



Altus Group

LEASE CONSULTANCY
BRIEFING NOTE FOR INVESTORS



MAY 2020

Although for the UK events have escalated in the last couple of months, it was in January when it commenced in China and the end of January / start of February when it became clear that the UK was likely to be seriously affected. The reason for setting out the timeline below is that if you have rent reviews with dates of between mid-January onwards, we consider it is a reasonable assumption that the hypothetical tenant would factor in the potential impact of the virus into their rental bid.

We have then listed some likely questions that might be raised by landlord clients. Lastly, we have given some thought to the practical considerations for Lease Consultancy surveyors.

Timeline

- 7 Jan - Virus identified in China
- 11 Jan - China announced its first death
- 20 Jan - Other countries including the US confirmed cases
- 29 Jan - UK's first 2 patients test positive
- 30 Jan - WHO declared coronavirus as a global emergency

Questions for investors

The current situation with coronavirus raises a number of questions for investors of commercial premises.

In each case, it depends on the terms of the individual lease and below are some Q & A's.



FAQS **for investors**

Is my tenant entitled to a rental concession?

It is your decision whether you agree to a reduced rent, a rent free period or paying monthly instead of quarterly. The rent is not suspended due to coronavirus and in these unprecedented times it is for you to decide how to respond.

If you agree to offer a rent concession then the agreement should be by way of a side letter explaining the changes and for how long these will last. Your tenant may request a deed of variation which is a lease variation and therefore a side letter is preferable.

Do I have to keep the premises open?

You are required to keep your building open for tenants unless the government imposes statutory regulations requiring the property to close. Otherwise, you might be in breach of quiet enjoyment or non-derogation from grant.

If infection of Covid-19 has occurred within the building it is likely that you will be acting reasonably should you restrict access to the common parts. Most commercial leases permit investors to restrict access to common parts in an emergency.

In these circumstances, the building may have to close as tenants would not be able to access the premises. Investors are generally allowed to suspend provision of services if the building has to shut in an emergency and the service charge would be reduced accordingly.

Can lease obligations be suspended due to force majeure?

Most leases do not include provisions permitting suspension or termination due to 'force majeure' i.e. an event beyond the control of the parties such as a natural disaster. Leases will usually continue and the parties are obliged to perform their lease obligations.

Does a keep open covenant still apply?

If a tenant closes its premises then it will be in breach of a keep open covenant. However, these are difficult to enforce and any claim for damages will be difficult to quantify unless the tenant is paying a turnover rent, where a landlord can determine the turnover loss for the period of time when the premises are closed. This usually applies to retail or leisure premises.

For forfeiture or an injunction preventing closure, there is case law which says that these are not appropriate remedies for breach of a keep open covenant. Investors may not be able to enforce such a covenant if the tenant closes its business but continues to pay rent.

If government regulations force closure of premises, the covenant for tenants to comply with statutory regulations is likely to take precedence over a keep open covenant.

Who pays for any additional cleaning costs?

It is likely that additional cleaning costs will be paid by the tenant via the service charge. A sweeper clause appears in most commercial leases which gives the landlord an ability to recover all reasonable costs.



Practical considerations for Lease Consultancy

- **Rent reviews** - Many investors are likely to receive requests at rent review to agree stepped rentals to assist tenants in the short term. However, beware because most leases provide that the parties shall agree a “Rent” and not rents. There have been cases where the obligations of guarantors have fallen away as a result of this : *Beegas Nominees Limited v BHP Petroleum Limited* [1998] and *Friends Provident Life office v British Railways Board* [1996].
- **Lease Renewals** – Consider the timing for issuing a S25 notice and whether the existing and potentially higher rent is more important than early discussions with the tenant in respect of their future occupational requirements.
- **Lease Regears** - If a tenant has say 2 years until lease expiry, perhaps considering offering some financial incentive in return for the tenant committing to a further lease term.
- **Break Options** – By negotiating the removal of a break option and in return agreeing a financial incentive to assist with the occupier’s cash flow.
- **Rent Deposits** – These are usually held until lease expiry. However, to assist a tenant as an alternative to agreeing a financial concession, consideration could be given to releasing this early. It would be necessary to check what if any covenants might be associated with a rent deposit. For instance it might amount to breaking a legal covenant with a bank loan.