



Altus Group

LEASE CONSULTANCY
BRIEFING NOTE FOR OCCUPIERS



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, acting for occupiers, 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 tenant 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 occupiers

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

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



FAQS for occupiers

Can I stop paying rent for a period of time?

The Emergency Coronavirus bill has been enacted. For commercial property the main consequence is that there will be no risk of forfeiture for non-payment of rent during the “relevant period” which currently is up until 30 June 2020 but might be extended.

The legislation includes service charge payments and insurance as part of the “rent”. Occupiers do need to be aware that the rent is still owed along with any interest. The bill is silent on interest but the contractual position under the lease will dictate what if any interest is payable.

Does the rent suspension clause enable me to cease paying rent?

In most leases the rent may be suspended if damage to the property is caused by an insured risk and sometimes by an uninsured risk. It is however unlikely that leases will provide that the rent is suspended in the even that premises cannot open due to the government requiring premises to close.

Your business interruption insurance will state whether you might be insured for rent you are obliged to pay whilst the premises are closed. Some insurers may decide that closure as a result of COVID-19 is a ‘force majeure’ event and therefore any loss will not be covered.

You can ask your landlord for a rent deferral, rent free period, reduced rent or to pay monthly. The landlord does not have to agree but it is likely that many will wish to work with you in very difficult trading conditions.

Do I have to continue to pay rent if my building is closed?

As a rule, you must continue paying rent even if your premises close. If closure is due to COVID-19 then it will not be unreasonable for your landlord to close the common parts which then obstructs access to your premises.

However, if your landlord closes for other reasons, he may be in breach of the covenant to allow quiet enjoyment.

If there are regulations forcing buildings to shut, you cannot stop paying rent. You should request a rent free, rent deferral, pay reduced rent or to pay monthly.

If your landlord agrees to a rent concession, this should be documented by way of a deed of variation or side letter. For a tenant, a deed of variation is better because it is a change to your lease obligations. A side letter may be acceptable but is only a short-term arrangement.

Is the keep open covenant enforceable?

If you have a lease covenant to keep open during usual trading hours, some landlords may agree a variation to this where the tenant does not have to keep open in particular circumstances. Such an example would be a requirement to close because of legislation.

It is unlikely that a landlord can force a tenant to open despite the lease including a keep open clause. Nevertheless, your landlord is able to seek damages due to breach of contract. In negotiating better trading terms, it would be wise to try and agree that a keep open provision will not apply during closure because of COVID-19.

Can I shut my premises?

The obligation to remain in physical occupation and to trade does not appear in the majority of leases. Without a keep-open clause, your obligation is only to pay rent and comply with other lease obligations.

If the government passes regulations forcing premises to close then statutory requirements are likely to prevail over the usual tenant's covenant to comply with.

Will I still have to pay for services undertaken by the landlord?

If there is a service charge lease provision, then you will still have to pay for the services and landlords will remain obliged to provide such services.

If there is a need to carry out additional services such as deep cleaning then the additional costs are likely to be recoverable under the service charge provisions as reasonable costs.



Practical considerations for Lease Consultancy

- **Potentially delay negotiations** - This will depend on the rent review date. If the review date is before the end of Jan 2020, I would suggest that this will not help because the hypothetical tenant was not aware of the Coronavirus impact. Also, you can only realistically delay so long because if new evidence is effective many months after the review date, then less weight will be attached to it.
- **Ask the landlord to agree a concessionary rent whilst the impact of the virus is significant** – This might include a rental deferral which gives some breathing space but with an agreement to pay it back at a later date.
- **Advise occupiers about the Emergency Coronavirus bill** – ie it gives the tenant the ability to not pay rent until 30 June 2020 without the fear of forfeiture.
- **Lease renewals** – If the market deteriorates, then because we have a moving valuation date it may well make sense to delay negotiations.
- **Break options** – In many cases it may be appropriate to negotiate greater flexibility or shorter term leases, particularly until it is clearer how life looks going forward. Whilst this may be resisted by some landlords I suspect the courts will be understanding.
- **Terms agreed** – For lease renewals, where terms are agreed and solicitors instructed, for occupier clients we should be questioning whether the terms agreed remain appropriate.
- **Statutory obligation** – Acting for occupiers at lease renewal try and negotiate a clause whereby if the government forces closure of buildings, that the tenant can break the lease in order to meet its statutory obligations.
- **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.