

REAL ESTATE

COVID-19: Practical Considerations: Commercial Leases in Northern Ireland

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The coronavirus situation is continually and rapidly evolving and we encourage you to keep up to date with guidance from the government and Public Health Agency. These FAQs provide guidance on keep-open provisions and rent suspension.

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This document is a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

The government has announced that non-essential retail stores (including clothing and electronics stores, beauty salons, etc.) must close as part of the response to the COVID-19 situation for an initial period of three weeks from 23 March 2020.

Prior to the announcement, many other businesses had already voluntarily chosen to close their doors due to decreasing footfall and employee safety issues.

The fallout for landlords, tenants and other stakeholders will be significant and the provisions of commercial leases will be increasingly scrutinised as these parties consider their options.

WHAT IS A KEEP-OPEN CLAUSE?

A keep-open clause is a tenant's covenant in a commercial lease which obliges the tenant to keep the premises open for trading. They are most commonly found in leases in the retail and leisure sectors. A landlord may include a keep-open clause for a number of reasons, for example:

- if the unit is in a shopping centre its closure could have an adverse effect on the centre as a whole (particularly if an anchor unit) in terms of footfall, rental levels, marketability etc.; or
- if the unit is in an Outlet the lease may contain a turnover rent. Whether the tenant is trading will impact how much rent the landlord receives.

WHERE DOES THIS LEAVE THE LANDLORD AND THE TENANT?

Where the breach of the keep-open provision is a direct result of the government's response measures, a tenant can validly argue that the closure is part of their statutory compliance obligations and it would be difficult for a landlord to argue against this.

Where a tenant has voluntarily suspended trading the issue becomes slightly less clear cut.

A tenant's non-compliance with a keep-open clause would usually be a breach of the lease, entitling the landlord to claim damages which could ultimately lead to forfeiture/termination once the required processes have been followed.

WHAT ABOUT INJUNCTIVE RELIEF?

In Northern Ireland, it is unlikely that a landlord would be entitled to an injunction to force the tenant to keep-open and trade, particularly where the reason for the closure is the coronavirus and government intervention.

WHAT ABOUT TURNOVER RENTS IF THE PREMISES CLOSE?

If the landlord is including a turnover rent the landlord should ensure that there is a notional rent payable if the premises remain closed for more than a specified number of days.

While this will not keep the premises open and will not avoid issues of reduced footfall and issues with the desirability of neighbouring units to other tenants, it will protect the landlord's income.

CAN A TENANT SIMPLY STOP PAYING RENT?

It is unlikely that any institutional lease will provide for rent suspension in the event of an event such as coronavirus. Further, a tenant cannot unilaterally suspend rent payments. Therefore, if a tenant ceases paying rent this will cause a breach of the lease.

The government announced on 23 March 2020 that commercial tenants who cannot pay their rent because of coronavirus will be protected from

eviction/forfeiture if they miss a rental payment in the next 3 months.

In addition, the relevant legislation confirms that any withholding of rent during the relevant period will not be a valid grounds for a landlord to oppose the grant of a new tenancy under the Business Tenancies (NI) Order 1996.

However, a tenant should also be mindful of their obligations to third parties including any mortgagee/chargee. If the tenant's leasehold interests are secured there could be a breach of the terms of the security document which will normally provide an obligation for the tenant to pay all rents punctually.

Landlord's will also consider reducing the provision of services in shopping centres

and retail parks focusing on essential services such as security and maintenance. Tenants may therefore be less inclined to stop paying service charge (on the basis that it should be significantly reduced).

Most tenants will also want to continue paying the landlord the insurance contribution where the landlord is responsible for the insurance of the property in order to have the assurance that the property remains validly insured.

We anticipate that the various interested parties will have to show a degree of flexibility at least in the short term.