

Coronavirus guidance – what are the issues for businesses and brands with premises in England?

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CATEGORY:
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The current crisis is uncharted territory for all owners of business premises, and in particular for landlords and tenants. All business premises owners can seek to minimise their business rates burden and take advantage of other Government schemes and concessions.

With many tenants having opted not to pay the current quarter's rent and seeking rent 'holidays', landlords are facing loss of income and, potentially, a wave of tenant insolvencies. For tenants, there may be no 'magic bullet' in the current circumstances, but there are ways for all business property owners to mitigate costs and boost cash-flow.

The issues to consider and steps you can take are set out below.

Can tenants argue that their lease obligations are terminated or suspended?

Very unlikely to succeed.

The legal issues are not entirely straightforward, but it is very unlikely that any legal arguments such as 'force majeure' events or 'frustration of the contract' would work to release a tenant from its obligations under its lease. There would need to be a major 'test case' to establish the precedent. It is almost unheard of for a modern English lease to contain a 'force majeure' provision and the concept of a contract being 'frustrated' by an unusual event has only been applied to leases in very specific circumstances. The general view is therefore that tenants are legally obliged to continue paying rent and service charges in circumstances like the present ones.

- **Force majeure** – This will only be relevant if the lease contains 'force majeure' provision. That is only likely to be the case in a lease which is quite old. Whether the provision can be relied upon will then depend on the definition of 'force majeure' in that provision.
- **Frustration** – English courts rarely decide that the concept of 'frustration' applies in the context of a lease. Frustration more commonly applies to agreements for leases and to licences to occupy. In the rare cases where a lease is frustrated, the lease will come to an end automatically. In other words there is no possibility of arguing that it is only 'frustrated' for a limited period.

What about tenants not paying rent?

The Government has announced that it will be unlawful until at least 30 June 2020 for landlords to take action to terminate ('forfeit') commercial premises leases for non-payment of rent. In effect, this means that tenants may defer paying the 25 March quarter's rent until at least 30 June. It is, however, a postponement of the due date for payment rather than a cancellation of the obligation to pay. Some landlords may charge interest on deferred payments.

Apart from that temporary moratorium, and any concession that may be agreed between landlord and tenant, all rent remains payable on the due date set out in the lease. Unilateral non-payment may seem a superficially appealing option for a tenant, but it is likely only to delay the inevitable: payment. There are no other restraints on landlords pursuing tenants for unpaid rent and legal action by a landlord will result in tenants being liable for landlords' legal costs in addition to the debt. That said in most cases, non-payment of the rent is unlikely to have any 'downside' for a tenant in the short-term.

Non-payment may have a range of outcomes, positive or negative, in the context of landlord/tenant negotiations, so it is not a step to be taken

lightly. Concerted action by tenants in multi-let buildings or developments may have a greater impact.

Offering or negotiating a deal

Some institutional landlords have announced that they will be granting three month rent 'holidays' (ie release from rent) to some of their food and beverage and retail tenants. All tenants in those sectors are approaching their landlords for concessions, generally asking for a rent holiday.

Many landlords are willing to offer deals, because they recognise the gravity of the situation for their tenants and they see it as being in their wider interests to grant concessions or take the opportunity to 're-gear' the lease securing a rent at current levels for longer at a time when recession looms. Those concessions will generally be rent 'holidays' either in the form of rent-free periods, reduced rent periods, deferred payment schemes (spreading the current rent over a number of future rent quarters) and/or monthly rather than quarterly payment. Re-gears will see lease terms being extended and/or early termination options ('break rights') removed and new rents/rent payment patterns agreed. A re-gear may be an appealing option for both parties: for tenants because they get an immediate rent-free period; for landlords because they secure income over a longer period and 'hedge' against a fall in rents.

Some tenants will have some 'leverage' in the form of having a break right in the relatively near future or simply the risk that the landlord could end up with an insolvent tenant if it is unwilling to 'share the financial pain' now. Some landlords may ask tenants for evidence of economic hardship before agreeing any concessions.

Options that could be agreed include:

- no rent/reduced rent for a period (possibly linked to an extension of the lease by the same period)
- applying any rent deposit to current rents (with no or deferred 'top up')
- deferred rent eg rent-free now and higher rent spread over future rent quarters or years
- payment monthly in advance – rather than quarterly
- lease re-gear (renegotiation of term, break rights, rent, review dates, etc)

Tenants should tread carefully when agreeing any form of 're-gear', taking professional advice where appropriate. There is likely to be downward pressure on rents in the short- to medium-term, and so signing up to a further term at the same rent may be inadvisable.

Landlords may want to consider offering a concession which includes a deferral of a rent review (as deferral may work more to their advantage, especially for reviews due to take place during the crisis period).

In most cases, any deal – albeit captured in no more than a side of A4 – will only be binding if it is contained in a deed. Advice should be taken on how to deal with that.

Business rates: relief for retailers

Shops, cafes, restaurants and other essentially retail premises will benefit from a 'holiday' from business rates for the year commencing 1 April 2020. That will mean a year without any rates to pay and no 'catch up' payment in subsequent years. Rates typically equate to around one third of rent so this is a significant saving on outgoings.

The premises that benefit are 'occupied' rating hereditaments (ie units) which are 'wholly or mainly used:

- as shops, restaurants, cafes, drinking establishments, cinemas and live music venues,
- for assembly and leisure; or
- as hotels, guest and boarding premises and self-catering accommodation.

A little more detail on which premises are included in the above list can be found [here](#).

It will be noted that

- other retail business-related premises such as offices and warehouses are not included, although offices which form part of the same rating 'hereditament' as the primary qualifying use (eg shop) would appear to be included.
- the retailer must be 'based in England'. It is not clear what 'based in' means. However, one would assume that premises owned or leased by an English company would qualify even where that is a wholly owned subsidiary of a non-English enterprise.

Business rates: empty premises relief

The following relief is available in the case of any premises that do not benefit from the rates 'holiday'.

Business rates are not charged for a period of three months where premises are 'empty'. In order to qualify, the premises must be vacant and comprise a space capable of being separately occupied ie physically divided from other premises. It is therefore possible to vacate part of, say, an office and partition off an area that is vacant and claim the relief.

If the premises are in a 'listed' building, the period of relief is unlimited.

Business rates – deferring payment

As a matter of practice if not law, local authorities seem willing to defer payment of rates, wholly or in part. It is worth contacting them to see what 'grace' period is available. In any event, the prospect of any kind of enforcement action for non-payment of rates seems remote at present.

Business rates: other reliefs

Business rates are not payable in circumstances where it becomes unlawful to use the premises. So if there is a formal Government prohibition on the use of premises, business rates will be suspended for all affected premises: not just shops. Such a formal prohibition seems unlikely.

For any premises – such as offices – where rates remain payable, it may be possible to argue for a temporary reduction based on 'disruption' of your business in the same way that such a reduction is often available where major works are carried out to an adjacent building.

Insurance cover

It is worth checking the terms of your business interruption insurance cover, although such policies generally only cover loss resulting from physical damage to premises and exclude the economic impact of pandemics.

Cash-flow help

All UK businesses can defer the payment of the next quarter's VAT until the end of June.

The Government is also willing to

- guarantee loans of up to £5million which will aid cash-flow, if that is or becomes an issue. To qualify, your business must be 'UK based' and its turnover must not exceed £41million. Details may be viewed "here":<https://www.british-business-bank.co.uk/ourpartners/coronavirus-business-interruption-loan-scheme-cbils/>.
- defer payment of tax which is already due, but only if the business is 'in financial distress'.

It may be easier for you to contact us to discuss your options, in which case do please get in touch and we will do all we can to help you through this crisis and in dealing with challenges that follow it.


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