

COVID-19: Guidance for landlords and tenants of commercial premises

Many businesses have closed their premises voluntarily in recent weeks, with more still told to do so as emergency legislation was rushed through, in the hope of limiting the spread of coronavirus. We look at the measures being introduced by government and by landlords and tenants alike. This is followed by a commercial property Q&A on some of the issues raised by COVID-19 for businesses in Northern Ireland.



Focus on
COVID-19
Coronavirus

What measures have been introduced by government to provide support to commercial tenants struggling to pay rent?

- Commercial tenants who are unable to pay their rent because of coronavirus will have protection from forfeiture (eviction) for an initial period of three months - until 30 June 2020 (the relevant period).
- The changes introduced apply to non-payment of “any sum a tenant is liable to pay under any relevant business tenancy”, so depending on the lease terms will apply to annual rent, service charge, insurance and interest.
- However, tenants will still have an obligation to pay their rent; this is not a rent suspension (more on that in the Q&A) and landlords will have the right to bring forfeiture proceedings or recover the rent after the relevant period expires.
- The legislation is not without some landlord protection. Normally a landlord could inadvertently waive the right to forfeit by say, accepting rent in part, however the legislation says that landlords cannot by conduct do anything to waive their right to forfeiture during the three months (they would have to do this expressly in writing if they so wished) so it very much leaves the door open for

landlords to forfeit after the expiry of the relevant period if the tenant is still in arrears.

- The initial measures only apply until 30 June 2020 but they can be extended beyond this date if the government decides.

How are landlords and tenants reacting to the closure of premises and issues paying rent?

Given that the immediate threat of forfeiture has been taken away, landlords and tenants have been urged by government to work together collaboratively to put in place arrangements that work for both parties.

So far, landlords seem keen to assist and are volunteering concessions – especially to otherwise model tenants who usually pay on time. Reputation goes a long way; landlords want to be seen to be acting responsibly in the current health and economic emergency and they do not want to be the one that forfeited all the leases.

They hope that the majority of tenants (especially those benefiting from government salary protections) will eventually bounce back. And in the meantime - reduced rents, deferred payments and other measures we discuss below help to mitigate their long term losses and ensure that tenants don't become insolvent and leave them with empty properties.

What measures are landlords and tenants likely to adopt?

Rent concessions

- We expect to see a huge increase in the number of concession arrangements put in place to help deal with short to medium term cash flow issues. These include introducing any or all of the following:-
 - » rent free periods
 - » temporary rent reductions
 - » deferring payments of rent until the next quarter day, until later in the term or until particular profits tests are met
 - » moving from quarterly to monthly rent payments
- These arrangements could apply to rent and service charge (but probably not insurance) and could apply for a fixed period of time, for the time in which COVID-19 substantially affects business or for the rest of the term of the lease.
- The parties will need to think carefully about the circumstances in which the concessions would fall away – for example, consecutive non-payment of rent by the tenant, persistent breach of other lease provisions or assignment to another tenant.
- It is important that any concession arrangements agreed between landlords and tenants are documented in writing to avoid any disputes and to make sure all terms are incorporated. Concession arrangements are normally documented by way of a 1-2 page side letter so they are quick to put in place and consequently offer immediate relief.

Lease Variations

Leases are likely to be carefully scrutinised to assess if further steps could be taken to mitigate impact upon businesses. For example, a tenant may want to delay an upwards only rent review date if the landlord was not willing to grant a rent concession, or the parties may agree additional assignment provisions in the event the tenant gets into further financial difficulty (but perhaps with added security for the landlord in the form of parent company or bank guarantees).

And then there are risk management issues - the “take home” lessons from COVID-19 if you will. Landlords and tenants may want to consider the following issues going forward (which should be read in conjunction with the Q&A):

- Should you insert force majeure provisions in to all your leases going forward to cover future pandemics and other national emergencies? Most leases don't contain these but they are commonly found in construction contracts and they allow parties to walk away from a contract for events beyond their control.
- How will additional health and safety legislation and government guidance affect your lease - and for that matter social expectations? Will there be additional requirements surrounding cleaning, social distancing and personal safety, and how will landlords recover these costs from their tenants?
- Are the insurance obligations in the lease sufficient or will you now require tenants to maintain business interruption cover (which is currently available but not commonly purchased)?
- Should “keep open” clauses be removed from leases or do there need to be more carve-outs for landlords and tenants alike?
- Will there be an increase in turnover linked rents going forward where the rent is calculated either entirely by reference to the tenant's turnover, or where there is a low base rent with a turnover top up if the tenant is performing well?

We expect both landlords and tenants to request variations to their current lease arrangements to deal with issues such as the above. We recommend that legal advice is taken to future proof your current lease arrangements as soon as possible but it would be advisable to wait to see what further policy advice is issued before taking any steps to do this.

Recourse to rent deposits

Landlords may wish to consider any rent deposits that are currently held and whether they can have recourse to these if the tenant has failed to pay rent. A tenant is unlikely to need these monies from a cash flow point of view (having already paid the monies over) and so it may be met with less resistance and have less impact on the tenant's business than some other landlord measures. Tenants should be aware that they are usually required to top up any sums deducted by the landlord from the rent deposit but it may be worth asking the landlord if they will waive or defer this obligation – at least short term.

Key contacts



Tracey Schofield
Partner
+44 28 90 727 495
tschofield@algoodbody.com



Victoria Howson
Associate
+44 28 90 727 467
vhowson@algoodbody.com



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