Focus on
COVID-19
Coronavirus

A&L Goodbody

COVID-19:
Commercial Property Q&A

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.

Our commercial property provides a Q&A on some of the issues raised by COVID-19 for businesses in Northern Ireland.

You will find a full range of timely materials for businesses in our dedicated **COVID-19 HUB** on our website.

01

COVID-19 is a pandemic outside of a party's control – can tenants rely on this to claim that their rent should be suspended or to terminate their lease early?

Probably not but it may be worth checking. There is no common law rule that provides for either of these outcomes and it is not standard for leases to contain such provisions. Most leases only allow rent suspension or early termination in the event of damage or destruction to the property – not because a property has to be closed (either voluntarily or legally).

On occasion, we have seen leases where the rent can be suspended or the lease terminated early where the property is rendered "inaccessible" by an uninsured risk. If "uninsured risks" is drafted widely and a tenant is prevented from accessing their property there is potential to claim rent suspension or early termination but it is unusual to see such wide drafting and on the whole we don't think many tenants will be able to benefit from this.

02

Is COVID-19 a force majeure event?

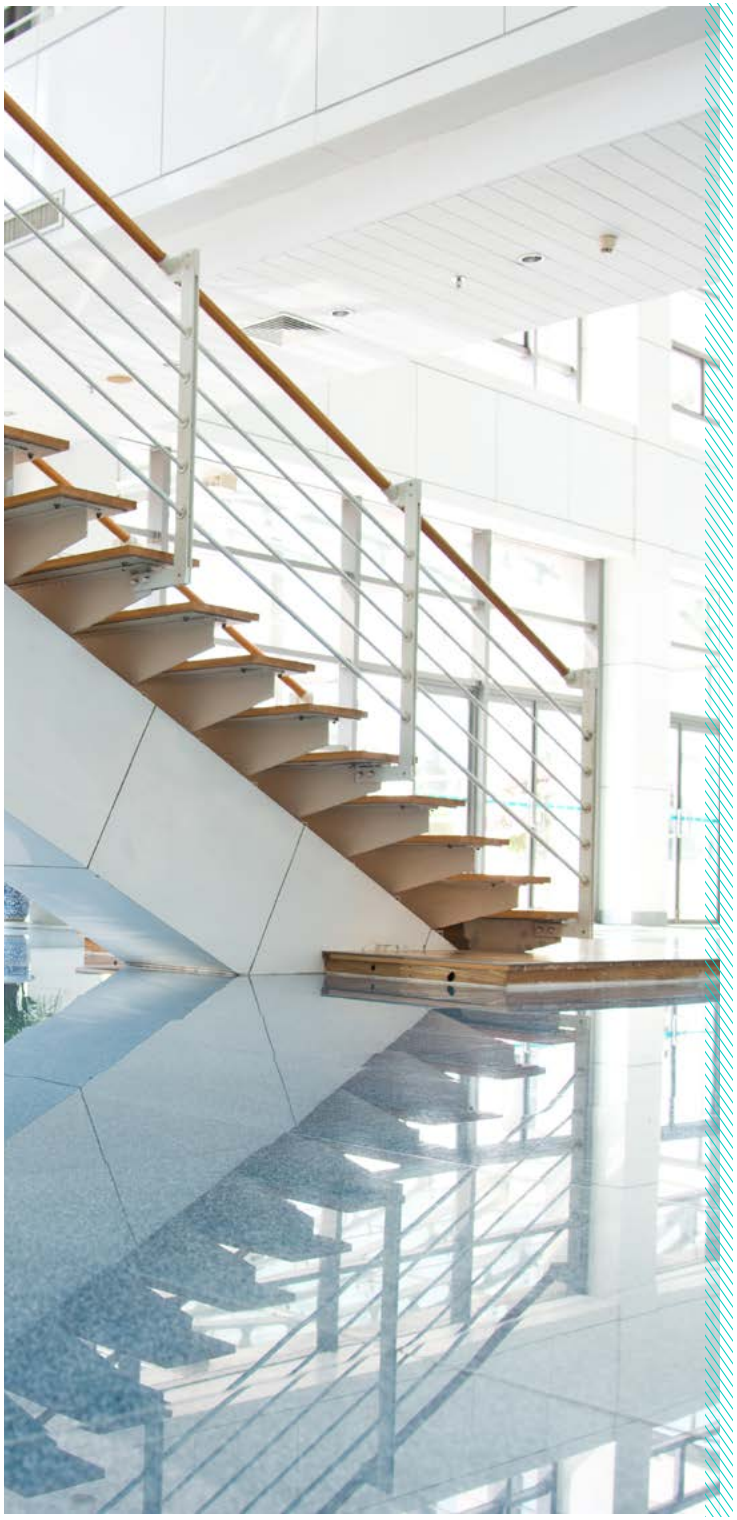
Some have queried whether COVID-19 is a force majeure event and if tenants can escape lease liability on this ground. The answer is likely to be no.

Force majeure clauses are clauses that alter parties' obligations under a contract or allow them to terminate when an extraordinary event or circumstance beyond their control prevents them from fulfilling those obligations.

On the face of it this would seem ideal however there are two issues:

- firstly, force majeure clauses are rarely found in leases; it is not standard practice to include them and there is no common law rule in the absence of this that that they apply and
- secondly, whether COVID-19 would amount to a force majeure event depends upon on how it is defined. Some force majeure clauses are defined broadly and will refer to events "beyond the parties' reasonable control". In this case it may be possible to argue that COVID-19 is a force majeure event. It is more likely though that the clause will contain an exhaustive list of events, and unless pandemic is specified it will not be possible to argue that COVID-19 is a force majeure event

It is worth noting also, that despite previous events such as SARS or Ebola there is no reported case law in the UK on the operation of force majeure clauses in the context of epidemics or pandemics.



03

Will a tenant be in breach of their "keep open" obligation by following government advice (soon to be legislation) and closing for non-essential business?

In theory yes, however most leases also contain an obligation on tenants to comply with legislation in force from time to time. The two clauses conflict with each other however most believe that the compliance with legislation clause would take precedence if challenged – especially in a time of national emergency. So once the emergency legislation is in force the likelihood of a successful claim (for "non-essential businesses" anyway) is lessened.

The answer is slightly different where an "essential" business (such as say a food store) closes of its own volition (for example to protect its staff, or where due to staff shortages it is no longer feasible to open). An example of this might be a small butchers shop in a large shopping centre. In this situation the tenant cannot claim that they have closed because of the emergency legislation so they will be in breach of the "keep open" provisions in their lease. That said it should be noted that "keep open" provisions have historically been difficult to enforce. Landlords generally instead try to claim for damages which requires proving their loss. In our example of the butchers shop above it would be difficult for the landlord to substantiate their losses – how would they value a drop in footfall and attribute it to one unit over the other in the situation where the rest of the centre is closed?

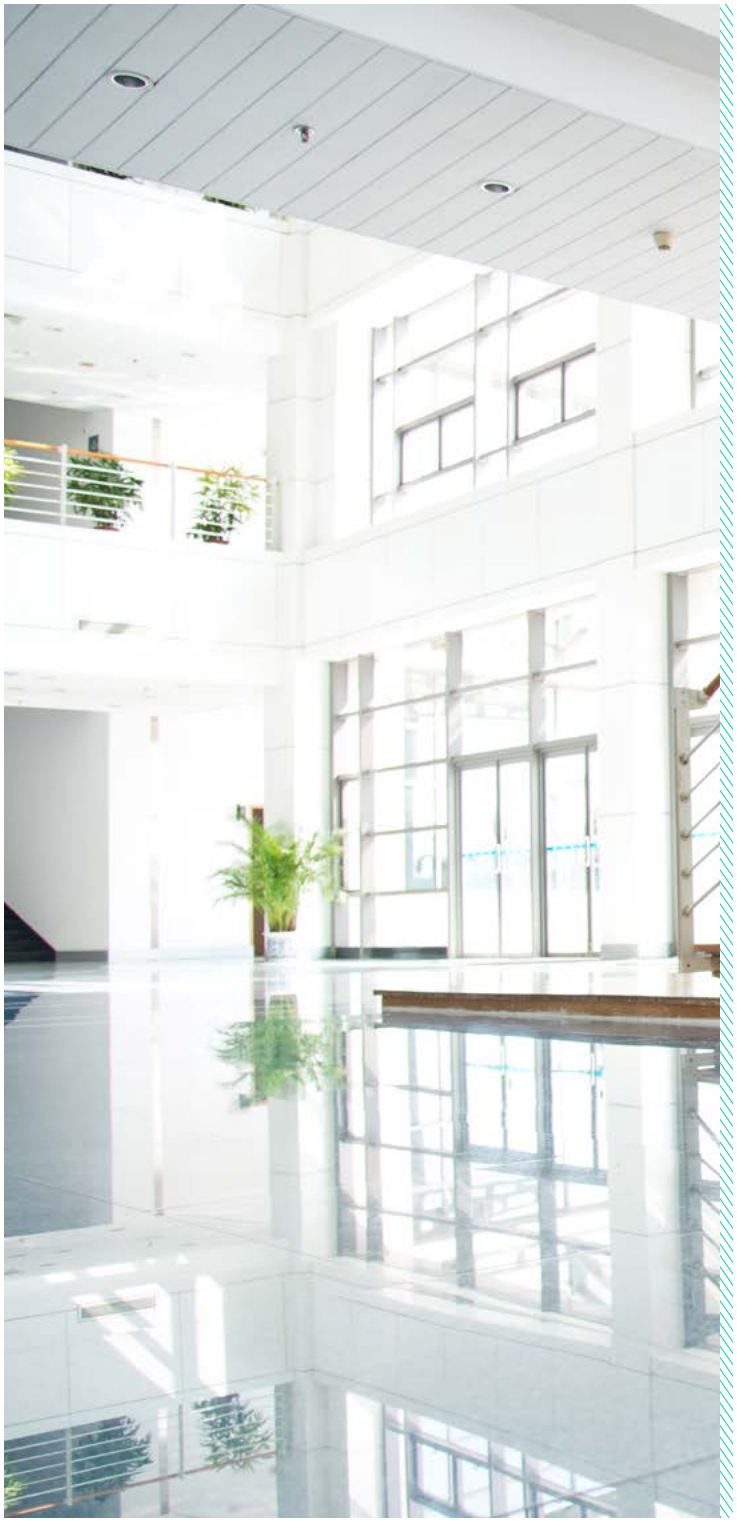
04

Can a tenant claim for derogation of grant or breach of quiet enjoyment if the landlord closes the property, the building or the common parts, and can the landlord claim frustration as a defence?

A landlord may close a property, a building of which the premises form part or the common parts - whether for a deep clean post a COVID-19 case, or simply because the rest of the building is now empty and it is not economical to continue to keep it open. If the tenant has not agreed to this the tenant could potentially argue that there is derogation of grant or breach of quiet enjoyment and they may be successful.

If it is not actually possible to keep the building open because of staffing shortages or other issues the landlord could consider arguing that the lease has been frustrated however it is unlikely that COVID-19 will frustrate a lease unless the courts determine otherwise. It is difficult to establish frustration (as an unsuccessful Brexit case last year has shown us) and there is currently no reported case of the law of frustration being successfully argued in relation to a lease.

Consider if an alternative defence for a landlord might be (if it is indeed the case) to prove that the tenant's business was "non-essential" under emergency legislation; the rationale being that the tenant would have to prove their loss as part of any successful claim – and technically they shouldn't have been open so wouldn't have suffered loss.



05

Are landlords obliged to continue to provide services to buildings (even if there is only one tenant left in the building)?

This will depend upon the wording in the lease. As above, most leases do not contain force majeure events but they do sometimes say that landlords will not be responsible for providing services due to events outside their control, or alternatively that the landlord only has a reasonable endeavors obligation to provide services. Other times leases will split services into those that are required (electrical, security, maintenance, and, now crucially – cleaning) and those that are discretionary (decoration, improvements) so it may be that there is an obligation on the landlord to provide basic services if nothing else.

Landlords concerned about this should (in addition to checking their leases) also check their insurance policies to see if they cover claims against non-provision of services for events outside of their control.

06

Additional costs for landlords – what could they be and who is responsible for them?

Businesses will be expected to help prevent the spread of the virus by taking appropriate containment steps. In China and elsewhere, there are multiple accounts of companies asking their customers to have their temperatures checked on entering buildings, to wear face masks once inside and even to walk through disinfection tunnels which spray people with anti-viral mist before entering the property. Whilst we can't speculate what measures will be introduced going forward one would expect an increase in health and safety legislation and also potentially added social expectations such as increased hand sanitisers in common parts and intensified cleaning. Landlords of co-working spaces such as student accommodation and care homes are likely to have more onerous duties again.

Landlords must comply with all legislation in relation to the parts of any building they control. The question arises then as to whether these additional costs can be recovered via service charges or whether the landlord must pay for these costs themselves. This requires a review of all leases to check for service charge caps and exclusions and wording landlords can seek to rely on such as costs incurred "as part of good estate management" or as "required by statute". Whilst we expect landlords can recover most of these costs from tenants there will be some they cannot, leaving the landlord to foot the bill for these additional costs themselves.

07

Will tenants face penalties or additional costs because of turnover rent provisions?

Leases with turnover rent elements often contain penalties if the tenant fails to keep the premises open. They also generally have provisions built in to allow the landlord to make an estimate of what the turnover would have been if the premises had been kept open (perhaps say by reference to turnover in a previous quarter). This will be a concern for many tenants and legal advice should be sought to check if the penalties are enforceable and if there are any carve outs the tenants can rely upon (eg permitted closures).

08

Are your current side letters at risk or do you risk losing them?

Most side letters already in place are contingent on continuing to pay rents and (as above) in some cases remaining open. If tenants fail to pay rent or keep a premises open (even though they may not face enforcement for the keep open clause) it could lead to the loss of these concessions and a sharp increase in rent (or lead to quarterly rather than monthly rental payments, which is obviously unworkable for a lot of tenants in the current economic environment). Side letters should be reviewed and waiver letters sought from landlords where possible.

09

How will service of notices under leases be affected – particularly if the post office or other mail is affected or closes?

Landlords and tenants will need to consider any notices that are required to be served under a lease – for example, notice to exercise a break clause or notice of practical completion of works. It is unlikely that any extensions of time will be granted in the event the party serving misses a key deadline (particularly for break clauses where time is of the essence) and we recommend building in additional time to pre-empt any potential postal service delays. Parties should also look at other service methods in the lease and under statute as it may be that service can be effected by hand (although this may go against government advice to limit unnecessary social contact) or sometimes by e-mail.

A&L Goodbody

Please do not hesitate to contact A&L Goodbody if you wish to discuss any of the matters raised in this publication.

You will find a full range of timely materials for businesses in our dedicated **COVID-19 HUB** on our website.

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