



Our premises are in a building that we have been forbidden to access due to the COVID-19 outbreak but our landlord is still charging rent. What are our rights and can we challenge this?

BRYAN
CAVE
LEIGHTON
PAISNER 

In light of the rapidly developing situation and government response, this memorandum is accurate as at 21 October 2020.

What are our rights?

You should read your lease carefully, as this will contain the specific details of what you and your landlord can do in these circumstances.

There is usually a requirement in leases for rent to be paid without any deductions. So, even if your building is closed, you are still required to pay rent and any other sums defined as rent in your lease (e.g. service charge).

You should check whether the drafting of the insurance provisions in your lease are wide enough to trigger a rent abatement in a pandemic or when access to the premises is prohibited, although this would be unusual. As your landlord is likely to have taken out the insurance you should ask for a copy of the policy.

Can we withhold rent?

The starting position is that rent continues to be payable, even though your building is closed.

As things stand, if you don't pay your rent, your landlord cannot exercise its usual right of forfeiture (i.e. take steps to recover possession of your premises) until 31 December 2020. However, after 31 December 2020 (or any date extended by the Government), your landlord can then seek to recover possession for any previously unpaid rent.

Ahead of this date, your landlord may issue a claim for debt against you and may be able to withdraw from a rent deposit that it may hold (depending on its terms). So, withholding rent is not without risk for you.

You should be aware that there is a business rates holiday for a wide range of businesses (including retail, leisure and hospitality business), meaning that you do not have to pay business rates for the 2020 to 2021 tax year.

If we cannot occupy the premises, does the lease come to an end?

Even though you cannot occupy the premises, it is likely that your lease will continue unless you take action to try and bring it to an end early.

Break option

If you decide that you no longer want the lease to continue, you could consider serving a notice to end your lease early (if you have a break right in your lease).

However, you should carefully check your lease, as there are often conditions attached to being able to exercise your break that you may struggle to satisfy as a result of the COVID-19 outbreak (e.g. not having any arrears).

Frustration

You could try to argue that your lease is “frustrated” because it is impossible for you to perform your obligations as tenant and for your landlord to meet their obligations as a result of COVID-19.

However, the threshold is very high to argue frustration of a lease, and it is unlikely that a court will be willing to find that a lease has been frustrated, even where your premises are temporarily closed as a consequence of the COVID-19 outbreak. You would have a better chance of successfully claiming frustration if there is an extended period of forced closure and you don’t have long left to run on your lease, but even then it is uncertain.

Force majeure

You could try to argue that COVID-19 is a “force majeure” event, meaning it is an event that is outside your and your landlord’s control that prevents the performance of your obligations in the lease. This would suspend your obligations (e.g. to pay rent) until the end of the COVID-19 outbreak.

Most leases do not contain force majeure provisions, so neither you nor your landlord will be able to argue that your obligations under the lease are suspended because of COVID-19. The courts will not imply a force majeure provision into a lease.

What to do

Do you want the lease to end?

If you are happy for the lease to come to an end, you may want to consider arguing that the lease has been “frustrated”. You could also check your lease for any break rights that you could use to end your lease early.

Speak to your landlord

At the moment, lots of landlords are receptive to tenants asking for help (e.g. by agreeing a temporary rent “holiday” or switching to a monthly rather than quarterly payment basis to ease cash flow) in these unprecedented times. Landlords generally don’t want empty premises which they have to secure and pay rates on. So, if you think you will struggle to pay your rent, it is sensible to have a conversation with your landlord as soon as possible to see if you can agree a way forward. Any rent concession or holiday should be clearly recorded between you and your landlord.