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COVID-19: Commercial Lease Considerations

by **Patrick Ryan**

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25th March 2020 | by Patrick Ryan

Patrick Ryan discusses the key legal issues arising for companies in the management of their commercial lease obligations as a result of the COVID-19 pandemic.

The COVID-19 pandemic has created unprecedented and rapidly evolving challenges across all sectors of society. These are likely to last for many months and pose many difficulties. The purpose of this article is to highlight some of the serious legal issues that arise for companies in the management of their commercial lease obligations.

Lease Considerations

You may be the landlord of a commercial property with a tenant that has closed its business, or is likely to cease operations temporarily, or you may be a tenant in such circumstances. The rights and obligations of the parties are governed by the terms and conditions of the lease in question.

Currently, there is no legislation in place that provides a framework for how the terms and conditions of a lease are to operate in times of crisis. Many will remember the difficulties that arose during the financial crisis and the decisions of the courts that followed concerning issues such as rent levels and rent reviews.

The parties to the lease must comply with its terms, including the obligation to abide by all applicable laws, which in the current emergency necessarily includes any government-mandated closures for public health reasons. There are examples of leases where specific clauses (such as compulsory minimum trading hours) would conflict with wider applicable laws such as those dealing with the preservation and protection of public health.

It remains to be seen what impact emergency legislation such as the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 will have now that it has been enacted and is in force. Of particular note within that legislation is the recognition of “the safeguards required to be put in place by owners or occupiers of a premises or a class of premises (including the temporary closure of such premises) in order to prevent, limit, minimise or slow the risk of persons attending such premises of being infected with Covid-19”.

Rent suspension, rent abatement claims and potential early termination issues are readily foreseeable in the short to medium term. Depending on the particular circumstances there may be insurance in place, which depending on the terms of the relevant policy, could be material to determining how the costs of an enforced shut down are to be allocated.

Frustration

In exceptional circumstances, the doctrine of “frustration” may apply to what are commonly termed as force majeure events sufficient to excuse the non-performance of a lease obligation because circumstances render it impossible to do so.

If the lease obligation simply becomes more expensive or difficult to perform, this is generally insufficient to

trigger frustration. In Ireland, it is very difficult for a party to succeed with a claim for frustration before the courts.

In the current environment forced temporary closures of leased commercial property may result in permanent closures of the underlying business. Ultimately the courts (on a case by case basis) will have to decide whether the forced or other mandated closures due to COVID19 constitute frustration of the underlying lease sufficient to release the parties from their respective obligations.

Please [click here](#) to read an article on frustration of contracts in the context of Covid-19.

Considerations

This COVID-19 pandemic has resulted in a sudden and profound shock for society and will inevitably give rise to significant and costly outcomes for many landlords and tenants of commercial property. Consideration should be given to the following suggestions.

1. Review the terms of any applicable lease.
2. Where possible document your decision and the process of arriving at that decision and the advice received from relevant professional advisors.
3. Pay particular attention to the content and timing of relevant government guidance and decisions that impact on you.
4. Review any relevant insurance policies – particularly those providing business interruption cover. Please [click here](#) to read our article on insurance considerations during the COVID-19 crisis.
5. Consider early communication with your counterparty. Verbal communication should be followed up in writing. In other words, seek to explore any possible potential for compromise or forbearance.
6. Depending on the particular circumstances it may make commercial sense to agree on a temporary rent abatement or suspension.
7. If the ultimate failure of the occupational tenant's business is likely, pursuing relief subsequently may be fruitless. It may be more commercially pragmatic to accept an early surrender in exchange for an agreed payment and thereby secure vacant possession and the ability to relet when the crisis passes.
8. Where agreement is reached – ensure it is reduced to writing.

For further advice please contact Patrick Ryan at pryan@lkshields.ie.

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About the Author



Patrick Ryan
Partner

Patrick practices in the areas of commercial property law (with a particular focus on industrial property), succession planning and trust law, and administration of estates law and practice.

T: +353 1 6385892 **E:** pryan@lkshields.ie