



REAL ESTATE

Reopening a Commercial Premises

by **Patrick Ryan**

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Many business owners planning to re-open during the phased lifting of the lock-down are suffering substantial financial pressures.

To put this in context - a recent article in the Currency reported that "79% of SME's are in sectors highly or moderately affected by Covid-19 employing 768,000 people with insufficient financial reserves to operate at a loss for very long".

Most business owners will occupy their premises on foot of a commercial lease. The Lease constitutes the contract between the landlord and the tenant so a proper understanding of its terms and obligations should be at the heart of any plan for the reopening of a business.

Potential Breach of Covenant Disputes arising from the Lease

Clarity around what are the rights and obligations under a lease is vitally important.

Currently, in Ireland there is no legislation providing a framework to govern the operation of leases in times of crisis.

Many leases have guarantee provisions that could entitle a landlord to seek redress from the guarantor under the specific terms of the guarantee, where the tenant defaults and fails to remedy his default. Some of the main covenants that may be relevant include:

Payment of Rent

As a general rule tenants do not have the right to withhold rent even during a pandemic. In practically all cases the lease will only entitle the tenant to claim a temporary rent reduction or other rent accommodation where the premises has been physically damaged or destroyed.

A unilateral decision to withhold rent will inevitably alienate the landlord and ultimately could lead to litigation. It would almost certainly be regarded as a breach of covenant entitling the Landlord to legal redress.

Payment of Service Charges

With the closure of non-essential retail businesses and facilities, certain services, such as cleaning and maintenance, could no longer be provided by landlords in respect of those premises forced to close. In such circumstances, there was a justifiable basis for a tenant to request that the service charge, (or portion thereof) be suspended. That justification would fall away when the landlord resumes providing the services following reopening.

Keep Open

Most commercial leases contain an obligation on the tenant to keep the premises open for trade during certain stated times and not to leave the premises unoccupied for a prolonged period.

A tenant not otherwise required to close as per Government guidelines – may have made a unilateral

decision to close their premises. Landlord's in such cases may have taken the pragmatic decision not to invoke the keep open provisions in the Lease. Over time this pragmatic approach is likely to change if the closure continues significantly beyond the permitted reopening timeline. That could give rise to an action for breach of the keep open covenant by the Landlord.

Quiet Enjoyment

On the other hand a landlord is obliged to afford quiet enjoyment to its tenant. A landlord that closed a multi-tenanted premises – thus effectively shutting the tenant down – could be found to have breached the covenant for quiet enjoyment. Any justification claimed by the landlord would fall away if the closure continues significantly beyond the permitted reopening timeline.

Force majeure and Frustration

Force majeure is generally understood to mean an unforeseen and exceptional event which results in one or both parties being unable to perform their contractual obligations as intended. Most commercial property leases do not contain force majeure provisions. The Irish courts are unlikely to incorporate a force majeure provision into a lease as an implied term even in the present circumstances.

In the absence of a force majeure provision, the argument might be made that the Lease has been frustrated. The tenant would have to satisfy the court that a supervening event - not contemplated when the lease was granted - has made it commercially impossible for the parties to perform their obligations under the lease, sufficient to justify early termination of the lease.

The tenant would face an uphill battle. The threshold for proving frustration to the satisfaction of the court is set very high. It is far from certain that the current circumstances would be sufficient to convince the court that the threshold has been met.

Remedies

Most commercial leases in Ireland are unlikely to have a clause which can operate to allow a landlord or a tenant to breach their obligations without consequences because of the current crisis. Tenants in breach of covenants such as payment of rent could have a judgement registered against them and in certain cases may find that they are forced to vacate on foot of an order for possession. Guarantors could find themselves pursued for redress by a landlord

Communication between the tenant and the landlord is vitally important. In many cases some level of compromise may be achievable and in most cases desirable. All sides are going to have additional and significant costs into the future. An agreed compromise will offer the best outcome in most circumstances.

Covid-19 Health & Safety aspects

In preparing for the return to work landlords and tenants of commercial property need to have regard to existing health & safety laws and the Return to Work Safety Protocol which Einde has dealt with in some detail earlier.

Obligations under Safety, Health and Welfare at Work Act 2005

The Safety, Health and Welfare at Work Act 2005 (as amended) imposes on both landlords and tenants. Compliance will have cost implications and the first port of call in seeking to determine cost allocation will be the Lease.

The Return to Work Safety Protocol

Compliance with the Protocol in many cases may require works to be carried out that could supplement steps already taken by those designated as essential businesses. In the case of those businesses preparing to reopen, the steps in question could require physical alteration or reconfiguration of the premises or the existing layout which may require the prior agreement of the landlord and/or the management company. Needless to say strong and constant communication and a collaborative approach is most desirable.

Cost allocation

In multi-tenanted scenarios, the requirements of meeting the increased frequency and intensity of appropriate cleaning schedules will have significant and long-lasting cost implications.

Leases should be reviewed to ascertain whether there is any obligation on the part of a landlord or management company to provide additional cleaning or maintenance services.

Where there are additional cleaning obligations, the ability of landlords to recover the costs from tenants will depend on the wording of the service charge clause in the Lease.

In many cases there not be clarity in this regard which points to the need for all parties to look at how the costs and cost-recovery measures are to be managed and paid for into the future.

Common law obligations

Most commercial leases contain clauses obliging tenants to abide by all statutory law There is the wider obligation at common law not to intentionally or negligently cause injury or harm to others. Where the risk of such harm or injury is foreseeable, the requirements to meet and discharge the duty of care could be greater.

I believe that it is beyond argument that landlords and tenants, as the owners and occupiers of commercial property owe a duty of care to take all reasonable and necessary steps to prevent the transmission of the Covid-19 virus on their premises.

Conclusions

- Have the terms of the Lease carefully reviewed to see what covenants have particular relevance to the plans for reopening and the associated costs.
- Default under the Lease may not be cost-free – be mindful of any guarantee obligations.
- Remember those other legal obligations that arise outside the scope of the Lease
- Active and coherent communication towards finding common ground will mitigate against wasteful and costly legal disputes.
- Document appropriately what is agreed for future reference.

For more information contact Pat Ryan at pryan@lkshields.ie

The cross-disciplinary business crisis advisory team at LK Shields are available to provide practical advice and legal insights to employers, business owners, directors, insurance providers, compliance officers, HR professionals and decision-makers faced with a crisis.

If you would like to discuss this further, please contact crisis-advisory@lkshields.ie or any member of our business crisis advisory team. To subscribe to our crisis advisory news and insight please [click here](#).

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