Hogan Lovells

# COVID-19

## Risks and responsibilities for landlords

The outbreak of the novel coronavirus COVID-19 is an ongoing epidemic that poses significant issues for businesses in affected countries. The purpose of this note is to summarise the duties of property owners in England and Wales in relation to coronavirus and assess the legal implications of properties being closed or services withdrawn as a result of the current outbreak.

### Statutory duties to deal with COVID-19

The main statutory obligations on landlords with respect to health and safety are those set out in the **Health and Safety at Work etc. Act 1974** (HSWA).

The HSWA imposes duties on any "person who has, to any extent, control of premises… to take such measures as it is reasonable for a person in his position to take to ensure, so far as is reasonably practicable, that the premises… are safe". Breach of these duties is a criminal offence, and they can be enforced by the Health and Safety Executive (HSE) issuing formal enforcement or prohibition notices.

These duties are not prescriptive and so it is largely up to each landlord to determine what should be done in order meet its legal obligations. As such, there are no explicit duties or requirements on a landlord in relation to the control of COVID-19 in its premises.

Public Health England (PHE) and the Department for Business, Energy and Industrial Strategy have, however, published **guidance for employees, employers and businesses**[1], which is relevant to landlords. Following this guidance and the advice of the local PHE Health Protection Team (HPT) would be consistent with compliance by the landlord with its HSWA obligations.

At present, closure of premises is not recommended, even where there is a confirmed case of COVID-19, unless directed by Public Health England (PHE) or the local PHE Health Protection Team (HPT). Where there are suspected or confirmed cases of COVID-19, all surfaces that the person has come into contact with must be cleaned. Public areas where a symptomatic individual has passed through and spent minimal time in (such as corridors) but which are not visibly contaminated do not need to be specially cleaned and disinfected.

Landlords should continue to monitor the guidance published by PHE and, if in any doubt, contact the HPT for advice in relation to any specific premises.

Where the property has been leased to a single tenant in its entirety and the landlord does not retain any common parts, the landlord's duties are reduced as the tenant is the primary duty-holder under HSWA. The landlord may retain residual duties, so it would be sensible to ensure that the tenant is complying with the relevant health and safety guidelines.

1 https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/guidance-for-employers-and-businesses-on-coronavirus-covid-19

## Closing a building

Most leases will include a covenant for the landlord to give the tenant **quiet enjoyment** of the premises. A similar obligation **not to derogate from grant** is implied into all leases.

If a landlord retains control of a multi-let building like a shopping centre or the common parts of an office building which it decides to close as a result of a COVID-19 outbreak, it may be in breach of the covenant to give quiet enjoyment and/or not to derogate from grant. If, however, closure is required for compliance with a statutory obligation then it will usually have a defence to any such claim.

This might be relatively easy to apply to where the statutory obligation is clear-cut, for example if the government orders the closure of all shopping centres or offices. The position is less clear where a landlord chooses to close a building of its own volition, including in an effort to comply with its general duties under HSWA. In that case, the likely question will be whether the landlord acted reasonably in closing the building in order to comply with its statutory duties.

Even if the circumstances warrant the landlord closing the building, it is likely only to be reasonable to do so for the shortest period possible to carry out the recommended action.

It is unlikely that a landlord would ever be required pursuant to a statutory obligation to close access to **residential property**, effectively shutting people out of their homes.

If the landlord owns mixed use property where the residential parts can only be accessed through common areas which the landlord is required to close, it should contact the HPT for advice on managing the situation. The key is to find a balance between the residential tenant's right to remain in their home and the landlord's duty to comply with its health and safety obligations and the guidance from HPT will be an important measure in finding the balance.

## Provision of services

Depending on the terms of the lease, a landlord will probably not be liable to provide **services** – such as security, maintenance and cleaning – where it is impossible to do so because the necessary staff, contractors or materials have become unavailable. The landlord may first have to try and source alternative personnel and equipment even if it is more difficult or expensive for the landlord to do so.

If the landlord was forced to close the building due to an inability to provide services then, again, that would in principle be a breach of quiet enjoyment and/or derogation from grant, unless it was as a result of circumstances beyond its control. The landlord would need to show that it was impossible to provide the services, and impossible to keep the building open without them.

A breach would entitle the tenant to a claim in damages if they can demonstrate a loss – perhaps for a reimbursement of rent, lost profit or the cost of implementing business continuity measures to enable them to continue operating from alternative premises. This may be difficult in the current circumstances where people have already been advised by government to work from home if they can. The same would apply if the tenant decided to vacate because it was impossible to continue in occupation without the necessary services.

## Tenant compliance

Most commercial leases include a tenant covenant to comply with statute. Accordingly, tenants should keep up to date with the latest official guidance on coronavirus and implement all required steps. In addition, many commercial landlords have a right in their leases to impose reasonable regulations on their tenants, with which the tenants would be obliged to comply.

Should a tenant close the premises, citing compliance with its general statutory duties under the HSWA, and it has a **keep open covenant** in its lease, it will technically be in breach. If the tenant also has an obligation to comply with statute then it is likely to say that this overrides the keep open clause.

If a tenant chooses to close premises of its own volition, a landlord may have a damages claim against the tenant if it suffers financial loss (e.g. loss of rental income where the lease includes a turnover rent). Such loss may be minimal or difficult to prove in circumstances where the tenant's trade would have substantially reduced in any event.

## Lease termination

A **force majeure** clause may entitle one or both parties to suspend performance of their obligations under a contract or provide a right to terminate in certain circumstances.

The wording of any force majeure clause should be reviewed closely to determine whether and, if so, how force majeure events are defined and if they might cover COVID-19, for example if epidemics and/or pandemics are included.

Where force majeure is not defined in the contract, it does not have a specific meaning in English law. It is generally understood to mean exceptional events which prevent or hinder the performance of an obligation where these events are beyond the parties' control and could not have been foreseen at the time the contract was entered into or prevented by the affected party.

Whilst it is possible, depending on the drafting, that a COVID-19 outbreak or resulting closure of the premises may trigger a force majeure clause, it is fairly unusual for modern commercial leases to include such provisions.

Alternatively, a lease may be discharged on the ground of **frustration**. This applies when something occurs after a contract is entered into which makes it physically or commercially impossible to fulfil the parties' obligations, or transforms the contract into something radically different from what was agreed. There have been no reported cases in England and Wales where a lease has been frustrated. It is, therefore, unlikely that a temporary closure of premises would provide grounds to frustrate a lease, especially where the period of closure is short compared to the remaining term.

## Cessation of rent

Generally, tenants will not be entitled to a reduction in rent or any rent free period as a result of a downturn in trade related to the COVID-19 outbreak. For the same reason, if the landlord holds a long leasehold interest then it should continue to pay rent, even if it does not receive the rent from its under-tenants.

Landlords should check insurance provisions in their leases as well as their policies to ascertain whether COVID-19 (included under a broader definition such as epidemic or pandemic) is an insured risk. If COVID-19 is covered then the tenant may in theory be entitled to a cessation of rent – but only if the rent suspension is wide enough to be triggered by the premises becoming inaccessible or unfit for occupation, irrespective of whether that is a result of damage or destruction.

*This note is provided as a general guide only. It should not be relied upon as a substitute for specific legal advice. If you would like any further information on any of the matters raised in this note, please contact:*


Mathew Ditchburn
Head of Real Estate Disputes
T +44 20 7296 2294
mathew.ditchburn@hoganlovells.com

Shanna Davison
Senior Associate
T +44 20 7296 5524
shanna.davison@hoganlovells.com

Rachel Lindberg
Associate
T +44 20 7296 2163
rachel.lindberg@hoganlovells.com


www.hoganlovells.com