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COVID-19 Interactive Lease Tool Kit for Real Estate in England, Wales & Scotland

Dentons UK

Launch

Introduction

Welcome to Dentons' COVID-19 Interactive Lease Tool Kit. Drawing on our extensive experience, this tool kit sets out guidance on some of the most frequently asked questions regarding the impact of COVID-19 on both existing and new leases in England, Wales and Scotland. It also provides you with contact information should you need any further help from the world's largest real estate team to navigate through these unprecedented times.

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What do you need help with?

An existing lease

Whether you are landlord or tenant, [click here](#) for more advice on the impact of COVID-19 on existing leases.

Negotiating a new lease

Whether you are a potential landlord or tenant, [click here](#) for advice on how to factor COVID-19 into the drafting of new leases.

Who to contact at Dentons for further help and advice

[Click here](#) for details of who to contact if you need further help and advice.

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Existing leases

Who bears the cost of a deep clean of the common parts?

Could COVID-19 bring the lease to an early end?
Read more about frustration, force majeure, forfeiture/irritancy and break clauses.

Could the landlord be in breach for closing the property?

What happens if the landlord voluntarily closes the property due to health and safety concerns?

What is the effect of COVID-19 on rental obligations?
Guidance on rent suspension (including where there is a government ban), turnover rents, rent reviews and variations to rental obligations.

What happens if there is a keep open clause?

This is a clause in a lease requiring the tenant to keep the premises open. These are mainly seen in retail leases.

Will the insurance provisions in the lease be engaged by COVID-19?

Will business interruption cover apply?

How to approach variations to an existing lease.

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What happens if there is a keep open clause?

England & Wales

- While the courts will generally not grant an order for specific performance to make the tenant keep trading, they might grant damages for breach, so a tenant will need to be mindful of this if it has to close the premises. However, there is a question mark over what the damages would be if the premises were required to be shut as part of a government-imposed ban. Also there is a question mark as to whether the courts would enforce such a covenant if closure is for public health reasons.

Scotland

- Under Scots law, the general rule is that a landlord can enforce a keep open clause by obtaining a court order for "specific implement". This is an order forcing compliance with the clause. It is the landlord's primary remedy for breach by the tenant of such a clause (damages being the alternative). However, the court has discretion whether to grant such an order, and a key consideration is whether granting the order would be inconvenient, unjust, or cause exceptional hardship. It is likely that the circumstances surrounding COVID-19 could result in the courts refusing specific implement on these grounds. This is particularly so if the premises have closed due to a restriction imposed by the government.

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Who bears the cost of a deep clean of the common parts?

**England,
Wales &
Scotland**

- This will depend upon the service charge provisions in the lease. You would need to review these carefully to see whether the provisions are wide enough to cover this type of expenditure.
- Ideally landlords will have made express provision in the service charge for the recovery of cleaning costs and/or health and safety measures as any sweeper clauses are likely to be narrowly construed.

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Will the insurance provisions in the lease be engaged by COVID-19?

England,
Wales &
Scotland

- Even if you could argue that COVID-19 was an insured risk (or an uninsured risk), normally the operative provisions in the lease are only triggered when the risk causes **physical** damage or destruction to the premises or the wider property – it is hard to see how COVID-19 could cause physical damage and so these provisions are unlikely to be relevant.

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Will business interruption cover apply?

**England,
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- Many businesses are examining their insurance coverage to see whether they might have any remedies in respect of business interruption. Unfortunately, many are finding that they do not. Even if they have business interruption cover under their property/casualty policies, it will likely only trigger where there is physical damage to property (through fire, flood etc.).
- For those who do have business interruption cover the best advice is to check you policy and speak to your broker. If you do have relevant cover, steps should be taken straight away to intimate circumstances giving rise to a claim, as soon as any forced closure or restriction of business takes place. If there is delay in intimating, that could jeopardise the cover. Likewise, if there is cover, insurers should be given an opportunity to review any contingency planning and comment. Cover would be based on an assessment of profits in the period prior to cessation/restriction of trading and a formula to calculate any resulting compensation.

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Could the landlord be in breach for closing the property?

Access to or the use of premises, and related common parts, could become impossible or restricted should a landlord close the premises, or the larger property, due to COVID-19. This is most likely to arise in the case of shopping centres. A tenant would need to check its lease carefully for any landlord obligations which might be breached by such a scenario.

England & Wales

- Even if the lease is silent a non-derogation from grant clause will be implied into the lease. It is possible that should a landlord close or restrict access to a building, centre, estate or similar for reasons connected with COVID-19 that the tenant could argue that the landlord has breached these clauses. However, if there is a specific ban on the landlord opening the property then arguably the landlord has not taken any action and the covenant for quiet enjoyment/non-derogation from grant is not engaged at all.

Scotland

- The Scottish common law contractual remedy of rescission (i.e. termination on the grounds of material breach) does in theory apply to commercial leases. However, it is not often used for leases and the bar is set high. Other contractual remedies (such as specific implement or damages) might also be problematic (for example, if the action taken by the landlord was required by the government, or if the tenant would struggle to prove causation or loss).

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Could COVID-19 bring the lease to an early end?

Frustration

A doctrine for the early termination of agreements where there is some supervening event or illegality.

Force majeure

A clause modifying or terminating obligations on the occurrence of events outside a party's control.

Break clauses

A contractual right for a party to bring a lease to an early end in defined circumstances.

Forfeiture/irritancy

The contractual right of a landlord to bring a lease to an early end in the event of tenant default.

Surrender/ renunciation

The negotiated termination of a lease.

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Frustration

Could COVID-19 frustrate the lease?

England,
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Scotland

- Lots of parties are asking whether COVID-19/a global pandemic is enough to frustrate (i.e. bring to an early end) their lease.
- A tenant will have an uphill struggle if it tries to argue that the lease is frustrated because of COVID-19. The threshold test for proving frustration is set very high. In England, this was illustrated most recently in *Canary Wharf Limited v. European Medicines Agency* [2019] EWHC 335 (Ch). In Scotland, while there has been more willingness to apply the doctrine of frustration to leases, this has tended to be where there has been either total or partial physical destruction of the premises, something that COVID-19 is unlikely to cause.
- To argue frustration you have to show that there is some form of intervening illegality or failure of common purpose that renders performance of the lease impossible or so radically different from the parties' expectations that frustration is justified. Arguably, the outbreak of disease is not such an event – in recent years we have had to deal with SARS and swine fever. As such, public health issues should be within the contemplation of the parties at the time of grant, leaving it open to them to have negotiated provisions allocating the risk (although few will have done so).
- Where there are official bans in place preventing certain activities, this still may not be enough to cause frustration. The position is far from clear-cut as this is uncharted territory. Relevant considerations will include the actual lease terms and the length of the ban compared to the length of the lease (so there might be a stronger argument for frustration for a lease that was granted for three months during which the tenant was entirely prevented from operating from the premises).

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Force majeure

Is COVID-19 a force majeure event?

**England,
Wales &
Scotland**

- A force majeure clause is one that suspends and possibly ends the obligations on a party to perform obligations where that party is prevented from performing the same by events outside its control.
- It would be extremely rare to find a force majeure clause in a lease. Therefore, this is unlikely to be an option.
- Force majeure clauses are, however, commonly found in construction documentation.

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Forfeiture/irritancy

Will COVID-19 entitle a landlord to use the forfeiture/irritancy clause?

While forfeiture/irritancy (the right for a landlord to terminate early for breach) may be engaged if a tenant breaches its lease, a landlord will need to think carefully about using this remedy. If the lease is forfeited/irritated, would the landlord be able to re-let in this climate or will it find itself with empty premises and a potential business rates liability in three months' time? There is also the reputational angle to consider.

England & Wales

- In England and Wales, the Coronavirus Act 2020 sets out provisions restricting a landlord's right to forfeit for non-payment of rent during the "relevant period". The relevant period has now been extended to 25 March 2022. Note that this moratorium only applies to non-payment of rent, though rent is widely defined and would include service charge and insurance rent.

Scotland

- There is no moratorium on irritancy in Scotland. Instead, the notice period required for irritancy has been temporarily extended. A landlord usually has to give at least 14 days' notice to the tenant in order to irritate on the grounds of non-payment of rent (or other sums). The Coronavirus (Scotland) Act 2020 extended this to 14 weeks. This protection is scheduled to apply until at least 31 March 2022. For non-monetary breaches (e.g. failing to maintain) the time period required is less certain, but must be "fair and reasonable" in the circumstances. The impact of COVID-19 will factor into a court's assessment of what is "fair and reasonable".

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Break clauses

Will any break clauses be engaged?

**England,
Wales &
Scotland**

- We do not expect there to be any break clauses in existing leases that are specifically worded to deal with the current situation (or at least not any that pre-date March 2020). However, there may be break clauses that are operable now but for other reasons, and the parties need to take these into account when planning their strategy for dealing with COVID-19.
- One thing to watch for is that if tenants do not pay their full rent as a result of COVID-19, could they be prejudicing their rights pursuant to a break clause that requires all rents to have been paid in full in order to be operable?

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Surrender/renunciation

**England,
Wales &
Scotland**

- It is open to the parties to a lease to negotiate a surrender/renunciation to bring it to an early end. Any surrender/renunciation would need to be properly documented.
- For advice generally on lease variations (as opposed to surrenders/renunciation), [click here](#).

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What is the effect of COVID-19 on rental obligations?

Rent suspension clauses

Most leases contain provisions for the suspension of rent in certain circumstances.

Rent reviews

A lot of leases contain provisions for the review of the annual rent at periodic intervals.

Turnover rents

Rents based either wholly or partly on the turnover generated from the premises.

Rent suspension generally

Looking more generally at whether you can have a rent suspension if there is no express clause in the lease.

Variations

Looking at some of the issues you should consider if you are negotiating a variation.

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Rent suspension clauses

England,
Wales &
Scotland

- Tenants will be asking whether or not they are entitled to a rent suspension pursuant to the terms of their lease. Most rent suspension clauses in leases are drafted on the basis that the trigger is some form of **physical** damage or destruction to the premises or the wider property. COVID-19 is unlikely to cause such damage or destruction. Therefore, in almost all cases, the rent suspension clause will not be engaged.
- Since March 2020, COVID-19 rent suspension clauses (where a rent suspension is triggered by some aspect of the response to the pandemic) have started to emerge. However, at the present time there is no settled market position on such clauses

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Rent reviews

England, Wales & Scotland

- The key factor will be the date as at which the revised rent is to be calculated (i.e. the rent review date). Delaying the negotiation of an open market rent review until the market recovers is unlikely to help landlords, as most rent review clauses will assess the revised rent as at the rent review date.
- Some older leases may contain provisions for a new rent review date where, at the date of the actual rent review, there is some form of restriction on the landlord achieving full value. These were aimed more at statutory controls on rent, so are unlikely to be relevant but should still be considered.
- Index-linked rent review provisions will not be directly affected by fluctuations in the market (but will be influenced by changes in inflation impacting on the chosen index).
- For information on turnover rents, [click here](#).

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Turnover rents

England,
Wales &
Scotland

- If a tenant is paying a turnover rent (whether that is the only rent or not) and its trade declines, then logically it should be paying less rent. However, there are some potential issues here:
 - Normally such rental provisions are accompanied by some form of keep open or keep trading clauses. For more information on keep open clauses [click here](#).
 - Sometimes, if a tenant stops trading or there is an interruption to its trade, the turnover rent clause may contain some form of penalty or default provisions. For example, it is not unusual in these circumstances for the clause to require the turnover to be assumed to be the same as in the preceding year – this could be onerous for a tenant.

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Rent suspension generally

England,
Wales &
Scotland

- At present there are no statutory provisions entitling tenants to suspend rental payments where there is a government ban in place.
- Note, however, the restrictions on forfeiture and irritancy for non-payment of rent. For more information, [click here](#).
- In addition it is open to the parties to agree a rent suspension for a limited period of time by way of a variation to the lease. For more information, [click here](#).

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How to approach variations to an existing lease

England,
Wales &
Scotland

- In the current market, co-operation is the order of the day. This may mean that aspects of an existing lease end up being renegotiated and ultimately varied.
- When negotiating and documenting variations, there are a number of things to bear in mind.
 - Be clear as to the purpose of the variation.
 - Where possible, be prepared to concede something in return.
 - Make sure the variation is properly documented – while you may be on good terms with your counterparty today, things could change. There may be legal requirements for a valid variation.
 - Is the variation personal or time limited?
 - Are you waiving, suspending, varying or deferring the relevant obligation?
 - If you vary one agreement, do you need to vary any interrelated agreements?
 - (In England and Wales) Be careful with any variations to the term of the lease or the extent of the demise – such variations could result in a surrender and re-grant of the lease with undesirable consequences.
 - (In Scotland) Be careful with variations to the extent of the premises, as there is some uncertainty as to whether it is competent to materially change this by way of a variation. It might instead need to be done as a renunciation and grant of a new lease.
- Parties should also take into account the "UK Code of Practice for commercial property relationships during the COVID-19 pandemic" (to view, [click here](#)) which was issued in June 2020 and Dentons training video (to view, [click here](#)).

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What COVID-19 provisions should I be thinking about when negotiating new leases?

Other
Some other considerations to take into account.

Break clauses
Considering whether to include a contractual break right in the event of COVID-19 disruption.

Rent suspension
Considering whether to include a rent suspension provision where COVID-19 affects the use and enjoyment of the premises.

Service charge provisions
Looking at how any COVID-19 related costs incurred in relation to common parts should be treated.

Extended rent-free periods
Where the tenant is being granted a rent-free for fitting out purposes and COVID-19 disruption is a possibility.

Notice provisions
Considering what modifications might be needed to the usual notice provisions to deal with COVID-19 disruption.

Obligation to take out business interruption cover
Whether landlord should be considering imposing obligations on tenants.

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Rent suspension

England, Wales & Scotland

- Since March 2020, we have seen the emergence of COVID-19 rent suspension clauses. These clauses provide that the rent will be suspended in the event of disruption to business or closure of the premises as a result of COVID-19-related issues. At the present time, there is no settled market position on such clauses.
- If you are negotiating such a clause, you need to be very clear about:
 - What will trigger the rent suspension? For example, would it only be triggered by a voluntary closure of the wider property by the landlord or will it also extend to closure as a result of a government ban? Will it cover circumstances in which the tenant, due to no fault or choice of the landlord, is unable to operate from the premises?
 - Is the trigger limited to COVID-19 disruption or should it extend to wider public health concerns?
 - What will be suspended? Will it be the whole of the annual rent or a fair proportion?
 - For how long will the suspension last? Is it to be time limited and, if so, if that time period expires but the underlying trigger remains, should there be an option to terminate?
 - Is it to be limited to the extent that the tenant is able to recoup the rent from other sources (for example, business interruption cover or a government grant)?
 - To view Dentons COVID-19 rent suspension clauses training video click [here](#).

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Notice provisions

England, Wales & Scotland

- The COVID-19 pandemic is forcing many businesses to reconsider how they operate, with many asking their employees to work remotely. One practical consequence of this is that legal notices being sent to business premises may not be picked up or forwarded to the relevant recipient within the relevant time periods for responding. As such, important deadlines may be missed.
- Besides trying to tackle this from a practical angle by trying to put in place measures to forward mail, it would also be prudent to consider this issue when drafting new leases. For example, parties should consider whether the notice provisions in any new lease should take account of the potential for disruption. Options include:
 - Considering whether service by email might be appropriate – if so, the email address needs to be one that is monitored and accessible by a number of people in case any key worker should fall ill.
 - Building in the option to nominate alternative addresses/recipients for service.
- Parties should also consider carefully any deeming provisions in a lease that apply in the event that a party does not respond within a given timescale.

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Break clauses

England, Wales & Scotland

- Most leases do **not** contain force majeure provisions; instead it is more common to see contractual break rights. Going forward, we anticipate that more parties will **consider** (but not necessarily agree to) including break rights that are triggered by COVID-19 disruption. Understandably, landlords will want to resist such clauses.
- If such a clause is going to be agreed, the parties must be very clear as to what should trigger the right to break. Example triggers could include:
 - If the government requires the premises to be closed to deal with the public health emergency.
 - If the tenant is prevented from trading from the premises for [x] days/weeks due to COVID-19-related disruption.
- If a COVID-19 break clause is included, other considerations include:
 - Who is to have the benefit of the break right – landlord, tenant or both?
 - What should happen to any payments made in advance of the break but which relate to a period after the break?
 - What other conditions should apply to the exercise of the break clause?

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Obligations to take out business interruption cover

**England,
Wales &
Scotland**

- The COVID-19 pandemic has encouraged a lot of clients to review their business interruption policies. Unfortunately, many have discovered that such policies do not cover the disruption caused by COVID-19 or indeed any other pandemic. This has, in turn, forced many tenants to seek rent holidays from their landlords.
- To protect themselves from a similar situation arising in the future, landlords may want to consider placing tenants under an obligation to obtain suitable business interruption cover in the future. Alternatively, or in addition, the landlord may insist that any COVID-19 monetary concessions do not extend to the extent that the tenant may recoup its losses via an insurance policy.
- Of course, the issue with this will be the availability of insurance cover going forward for COVID-19 and other health pandemics.

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Extended rent-free periods

**England,
Wales &
Scotland**

- Tenants entering into new leases are often granted rent-free periods for fitting out. If the tenant's contractors are unable to get on site and complete the fit out due to COVID-19-related disruption, that rent free period will be lost.
- Consequently, a number of tenants are requesting extensions to rent-free periods where they are unable to complete their fit-out due to COVID-19 disruption.
- If you are going to include such a clause in your lease, you need to consider:
 - What the trigger should be? Should it only apply where the contractors are banned from the premises due to government restrictions or should it also apply where there are legitimate health and safety concerns?
 - How long should the rent-free period be extended? Should it be commensurate with the COVID-19 disruption or is there a maximum extension (say three months)?
 - Should it be a complete rent-free or should the tenant be required to pay a reduced rent for the period of disruption (for example, 10% of the annual rent)?

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Service charge provisions

**England,
Wales &
Scotland**

- One potential consequence of COVID-19 has been the need in some cases to deep clean premises. Where those premises comprise the common parts of a larger property, those costs may be recoverable by the landlord via the service charge.
- Often, however, there is no express provision in the service charge and parties may find themselves relying on general clauses or even the sweeper clauses.
- Going forward, parties should consider making express provision in the service charge dealing with deep cleaning required for the health and safety of the property and its occupiers and visitors. This could also extend to other measures, such as increasing hand sanitisers or intensifying cleaning regimes.
- Alternatively, parties may want to try to exclude such costs from the service charge, though it is questionable how reasonable this would be as health and safety should be everyone's concern.

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Other

England, Wales & Scotland

- When negotiating new leases, it is worth bearing in mind some of the questions and issues surrounding COVID-19 and existing leases. To read more, [click here](#).

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Who to contact at Dentons

For English/Welsh lease queries

For Scottish lease queries

For any other queries

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English/Welsh Lease Queries



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