



**April 2020**

## **COMMERCIAL LEASES DURING COVID-19 LOCKDOWN**

In the wake of the unprecedented Covid-19 pandemic, public health measures were announced by the Government on 24 March 2020, following a meeting of the National Public Health Emergency Team. The measures were designed to combat the spread of Covid-19 having regard to the grave risk to human life. The Government policies included the lockdown of non-essential businesses to include retail outlets, restaurants and cafes, unless they can offer a take-away option. Given that tenants may not operate their businesses (non-essential business) from their premises, this has led to cash-flow issues for tenants where a considerable amount of them are now struggling to pay or have suspended the payment of rents.

### **Considerations**

The following matters should be noted by both landlords and tenants when considering their position during the current lockdown:-

#### *1. Force majeure*

Clauses of this nature which allow the contracting parties to end a contract are not usually contained in leases. They typically form part of development agreements or construction contracts.

#### *2. Frustration*

It could be argued that the law of frustration applies to leases. This is a common law doctrine that acts as a device to set aside contracts where an unforeseen event either renders contractual obligations impossible or radically changes the parties' principal purpose for entering into the contract. However, frustrating circumstances are narrowly construed and were not held to be present in a recent UK case of Canary Wharf (BP4) T1 Limited and Others v. European Medicines Agency [2019] EWHC 335 (Ch). This case involved the tenant namely, European Medicines Agency, who held a 25 year lease granted in 2014 of an office

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building, who claimed that it had written to its landlord advising that it was treating Brexit as a frustration of the law. The High Court ruled that the lease could not be frustrated due to the withdrawal of the United Kingdom from the European Union.

However, the current crisis is a far more extreme situation and could permit the tenant to claim the law of frustration. To date, there has been no judicial decision on frustration covering this current situation and it would be a matter for the determination of the courts at a future date. Although the current crisis appears to be a stronger case than the Canary Wharf case, in the absence of a specific clause in the lease, one cannot guarantee that frustration will be held to have occurred but it is a risk of which landlords must be aware. If frustration is found to have arisen, the lease would be at an end which will require the tenant to vacate the premises in order to avail of the benefit of frustration. Accordingly, if a tenant intends to continue trading after the crisis, this is not an option to be taken lightly.

### *3. To Keep Open Clause*

A lease granted for trading operations typically contains a clause obliging the tenant to remain open for business. However, leases of this nature also usually contain a clause obliging the tenant to comply with statute which in this crisis would require a tenant to comply with the lockdown policy implemented by the Government. Given that one cannot contract out of law, it would prove difficult for a landlord to rely on or enforce a "...*Keep Open*..." obligation provided in the lease at this time.

### **Legislative changes**

The Oireachtas enacted the Emergency Measures in the Public Interest (Covid-19) Act, 2020, (**2020 Act**) on 27 March 2020. This offers protection to residential tenants by providing changes to the Residential Tenancies Act 2004, for the duration of the Emergency Period (initially for three months commencing on 27 March 2020 but can be extended). Part 2 of the 2020 Act provides a moratorium on rent increases, evictions and notices of terminations.

Regarding commercial leases, the 2020 Act contains a provision that "all proposed evictions in all tenancies in the State" are prohibited for the duration of the Emergency Period. This arguably extends the ban on evictions during the Emergency Period to commercial leases even though it does not appear that this was necessarily intended by the Oireachtas.

It is worth noting that Sections 82 & 83 of the Coronavirus Act 2020 (passed in the United Kingdom on 25 March 2020) which apply to relevant business tenancies in England, Wales and Northern Ireland, prevent commercial tenants from being evicted due to the non-payment of rent during the relevant period i.e. from 6 March to 30 June 2020 or such later date as may be specified. It is anticipated that Scotland will enact similar legislation.

### **Banks**

The CEOs of Ireland's five (5) retail banks, AIB, Bank of Ireland, KBC, Permanent TSB and Ulster Bank (**Banks**) met up and drew a series of measures on 18 March 2020 to provide support measures (**Support Measures**) to mitigate, to the extent practicable, the adverse economic consequences resulting or likely to result from the crisis to include:-

- 1 Implementing a payment break up to three (3) months for business and personal customers impacted by Covid-19. This measure may provide landlords with an opportunity to avail of a payment break if they are receiving less rent than usual or receiving no rent from certain tenants.
- 2 Any applications for payment breaks are not to impact a customer's credit record.
- 3 The Banks also accept that a simplified application process is required for businesses and personal customers to avail of these implementations.

The Support Measures are welcome and may allow landlords and tenants some breathing space to evaluate the situation and to work out an effective solution, in anticipation that tenants will be in a position to operate their businesses and commence paying rent once the crisis has passed.

### **Conclusion**

The current crisis requires the banks, landlords and tenants to collaborate together in a cohesive and effective way. They will do this by adopting and agreeing commercially sound structures that will work for all parties to enable commercial tenants to resume their businesses once the crisis has passed. Hopefully, this will further enable retailers, hotel operators, restaurateurs etc. to return to the operating and employment levels that were held before the crisis and that landlords' bank debt can be repaid, thus ensuring that the economy will function and run effectively after the crisis and that the effect of the crisis is mitigated.

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