COVID-19 - SHOULD RESTAURANTS, BARS & PUBS CLOSE OR REGEAR AS TAKEAWAYS AND WHAT ARE THE IMPLICATIONS FOR LANDLORDS AND TENANTS?

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We have had a number of landlord and tenant clients reaching out to us requesting guidance on the consequences of the current Covid-19 outbreak and the announcement that cafés, bars, restaurants and pubs need to close, hot on the heels of a temporary planning relaxation allowing pubs and restaurants to provide a hot food takeaway service. We set out below some of the most common questions that we are being asked. We would be happy to discuss the issues raised in this note, or any other concerns, with you in more detail.

Q. WHAT DO WE KNOW ABOUT THE DETAIL OF THE SHUTDOWN?

→ The Prime Minister announced the closure of cafes, pubs, and restaurants on 20th March 2020 saying:

"We are collectively telling, telling cafes, pubs, bars, restaurants to close tonight as soon as they reasonably can, and not to open tomorrow. Though to be clear, they can continue to provide take-out services."

→ This was followed by the publication of Government guidance on 23 March 2020 which clarified which businesses and venues must close and which are permitted to stay open.

Q. WHAT DO WE KNOW ABOUT THE DETAIL OF THE TAKEAWAY PLANNING RELAXATION?

→ The Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2020 came into force at 10am on 24 March 2020 and permits a change of use of pubs (Class A4 – drinking establishments) and restaurants (Class A3 – restaurants and cafes) for the provision of takeaway food at any time from 10am on 24 March 2020 until 23 March 2021.

→ Planning permission would usually be needed for such a change of use, but this relaxation to the planning rules (which applies in England only) allows businesses to make this change without a planning application. However, businesses wishing to do so are required to tell the local planning authority if the building is being used or will be used for takeaway food during this period.

→ Businesses who rely on this newly created permitted development right will be operating within a new Class DA as "*Restaurants and cafes, drinking establishments and drinking establishments with expanded food provision to temporarily provide takeaway food*".

→ The *"provision of takeaway food"* is clearly defined to allow the provision of hot or cold food that has been prepared for consumers for collection or delivery to be consumed, reheated or cooked by consumers off the premises.

→ On expiry of this temporary right (on 23 March 2021) the use of the building reverts to its pervious lawful use.

Q. WHAT SHOULD TENANTS CHECK FOR IN THEIR LEASES IF THEY WANT TO SWITCH TO A TAKEAWAY OPERATION?

→ Any tenant wishing to rely on this measure should review their lease, particularly in terms of use restrictions, and should talk to their landlord before embarking on a change to their operation including any alterations at the premises.

→ Where a landlord is minded to allow a change of use (and they will often have full discretion on this decision) and/or associated alterations, a written consent should be drafted, not least to protect their ability to place-make in the future. Of course a tenant that invests time and energy in building up this side of their business (including the necessary technology) may be reluctant to go back to a more traditional model when normal service resumes and that could have implications for estate design and management. Remember that any consents that are agreed could be e-signed for speed and efficiency.

Q. WHAT MIGHT THE IMPLICATIONS BE FOR RENTS UNDER THE LEASE?

→ Where there is a turnover rent in place the drafting may not cover a takeaway operation and so may need to be tweaked – perhaps to a turnover rent linked to the number of orders filled by an establishment. Where an open market rent is in place the parties will have their own positions on whether a rent concession (possibly a move to monthly rents or a short rent holiday to cover the costs of moving to the new operation) is appropriate in the circumstances.

Q. WHAT ARE THE IMPLICATIONS OF A TENANT BEING REQUIRED TO CLOSE ITS PREMISES BECAUSE OF THE SPREAD OF COVID-19, PARTICULARLY WHERE THERE IS A "KEEP OPEN" CLAUSE IN ITS LEASE? WOULD THIS CONSTITUTE A BREACH OF THE LEASE, EXPOSING IT TO POTENTIAL FORFEITURE?

→ It is very difficult/impossible to specifically enforce keep open covenants.

→ A tenant who shuts its premises or alters trading hours in response to the Covid 19 outbreak will be in breach of its "keep open" obligation, unless the lease provides that the tenant is not liable if the closure is not the tenant's fault.

→ If the tenant is in breach of its "keep open" obligation, the landlord will not, under current circumstances, get specific performance or an injunction to enforce the obligation.

→ A breach of the tenant's "keep open" obligation would entitle the landlord to forfeit the lease, however in the current climate, landlords would need to carefully consider whether they wanted to forfeit the lease, and if they did, the tenant would likely obtain relief from forfeiture with a reasonable plan to re-open.

→ A landlord would also be entitled to claim damages caused by the tenant's breach of its "keep open" obligation, however under the circumstances, tenants will contend that these damages are insubstantial, whatever approach to assessment is applied.

→ There will inevitably be tenants whose businesses become unviable as a result of the outbreak. Where a business has closed for good reason, a landlord might consider issuing a waiver letter to acknowledge the extraordinary circumstances and regularise the position during the Covid-19 outbreak.

Q. DOES THE LANDLORD AND/OR TENANT HAVE ANY INSURANCE THAT MIGHT RESPOND TO THE COVID-19 OUTBREAK? DO YOU NEED TO THINK ABOUT NOTIFYING YOUR INSURERS AS EARLY AS POSSIBLE, AND KEEPING THEM NOTIFIED OF ALL DEVELOPMENTS?

→ Landlords who have Loss of Rent policies should check if they would engage if tenants are not paying rent.

→ Tenants may have business interruption insurance if they are unable to occupy the premises but again, the policy may not cover viruses and disease in this scenario, and some insurers have indicated they may resist any claims on the basis there is no physical damage to the property.

Q. DOES THE LEASE HAVE A FORCE MAJEURE CLAUSE THAT COULD BE APPLICABLE IN THE CIRCUMSTANCES?

Most leases do not contain force majeure provisions, so neither the landlord nor the tenant will be able to argue that their obligations under the lease are suspended because of the coronavirus. The courts are unlikely to imply a force majeure provision into a lease.

Q. COULD IT BE ARGUED THAT THE LEASE HAS BEEN FRUSTRATED?

→ Frustration is the doctrine by which a party can be released from its obligations under a contract in whole or in part on the basis it has become impossible to perform them.

→ The threshold is very high to argue frustration of a lease, and it is unlikely that a court will be willing to find that a lease has been frustrated, even if premises are temporarily closed as a consequence of a Covid-19 outbreak. However, if a tenant has a short-term tenancy, and if as a result of a closure order the tenant could not access the premises for a substantial part of the term of its tenancy, it could, arguably, successfully claim frustration of the tenancy. In cases involving longer terms, a tenant is unlikely to succeed – unless there is an extended period of enforced closure.

→ Much like the situation on the ground, the current legal thought process is fluid and constantly evolving, so it is worth keeping an open mind on the doctrine of frustration, depending on how this situation plays out.

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This note is generic and high-level, and not based on a review of any of specific lease or factual circumstances. Any legal matter or dispute arising in connection with the Covid-19 pandemic will need to be considered on its individual merits and advice given after a full review of the relevant documents, information/facts and legislation.