

02 April 2020

3CS News Bulletin

Briefing Note – Coronavirus Business Relief, Contracts and Commercial Leases

Many businesses across the world have been affected by Coronavirus to some extent and it is likely that the disruption caused by the pandemic will continue to last for some time. As part of your business planning process you should review your key contracts to determine whether any are likely to be impacted and think about if you are likely to be eligible for business relief provided by the Government. You should also consider if there may be an impact on your commercial lease. This briefing note focuses on these key areas.

A. Coronavirus Business Relief

In addition to the Coronavirus Job Retention Scheme we covered in our previous newsletter, the Government has announced more details about the other business relief programmes it will be putting in place to support the economy and try to mitigate the hardships many companies will be suffering.

1. VAT and Income Tax Deferral

This will allow businesses to delay paying their Value Added Tax payments for three months, giving them flexibility with regards to cash flow. Instead of having to pay by 20 March 2020, the payment can instead be made by 30 June 2020.

For the self-employed, income tax payments due in July 2020 will instead be owed in January 2021.

All businesses and self-employed people are eligible for these changes, and no applications for the deferment are required - it will apply automatically. Obviously there will be no penalties or interest for late payment charged. And, if you are one of the lucky ones, if you have overpaid and are due a tax refund, these will be paid out as normal.



2. Business Rates Holiday

If you are a business involved in the retail, hospitality, and leisure industries, then a business rates holiday is being offered.

Any business that runs a shop, restaurant, café, drinking establishment, cinema, live music venue, hotel, boarding premises, or self-catering accommodation, or offers areas for assembly and leisure, are eligible. The holiday will be reflected in your April 2020 council tax bill. If you have a bill that includes the previous business rate, then it should be reissued automatically.

3. Sick Pay Support

The government will be making laws that allow small and medium-sized businesses to reclaim the statutory sick payments (SSP) made to employees who are absent due to coronavirus. This is separate to the Job Retention Scheme covered in our previous newsletter. Two weeks of SSP will be covered, and it will be open to businesses with less than 250 employees.

4. Cash Grants

Businesses that operate in the retail, leisure and hospitality industries will be eligible for cash grants.

Those with a property that has a rateable value of £15,000 and under can receive a grant of £10,000. If the property has a rateable value of between £15,000 and £51,000, the business will receive a grant of £25,000. If you are a small business that pays little or no business rates, but does occupy a property,

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then you will also be entitled to a grant of £10,000. Your local authority should be in touch if you are eligible for a grant.

5. Coronavirus Business Interruption Loan Scheme

This scheme will support small and medium-sized businesses with loans, overdrafts, and invoice and asset finance. The government will guarantee up to 80% of the total of loans up to £5,000,000 over six years. The loans themselves will come from the banks and accredited finance providers. If you are eligible, you can make the application directly to the bank.

B. Commercial Contracts

If you wish to terminate any of your existing contracts, the first step is to review the contract to determine whether there is an express right to terminate for convenience. If there is, you should consider whether it is desirable to rely on this (it may not be in all cases, for example, if the notice period is very long or if doing so may be detrimental to a commercial relationship). Many contracts, however, do not contain provisions that allow for termination and, in that case, you should consider if there is any applicable right to terminate. This may be, for example, if the other party to the contract is experiencing financial problems and a termination provision for insolvency applies (although there are to be changes to the insolvency rules during the Coronavirus disruption). In the absence of an express or applicable right to terminate, many businesses are considering whether they may be able to rely on a force majeure or if frustration could apply.

1. Force majeure

Force majeure does not have a particular meaning under English law and so whether it can be relied upon will depend on how it is drafted in a contract (if it is included at all). Broadly speaking, such provisions will often excuse a party from a failure to perform or a delay in the performance of its obligations under a contract if it is a result of an event outside its control. The key things to consider are:

- i. If the party seeking to rely on the clause has to do anything. For example, it may be obliged to use reasonable efforts to overcome the event in question.
- ii. If the clause requires that the party must be prevented from performing its obligations and if, in fact, this applies.
- iii. Whether the clause will cover Coronavirus. The list of events included in force majeure clauses will either be exclusive or non-exclusive. If the list is non-exclusive, it is possible that events not listed will qualify. However, if the list is exclusive, it will be necessary for the event to be included for it to qualify. In the event that the clause refers to 'disease, epidemic or pandemic', it is likely that Coronavirus will be covered. Other relevant wording that may assist (although the position is a little more complicated) include 'acts of God' or 'government action'. General wording in non-exclusive clause such as 'events, circumstances or causes beyond a party's reasonable control' may also cover Coronavirus depending on the drafting of the clause (and contract) as a whole.



2. Frustration

Frustration is a common law concept that applies in certain circumstances when a contract has become impossible to perform. When it applies, the remedy is the discharge of the parties from their contractual obligations and the termination of the contract. Simply put, a frustrating event is one which is unexpected, beyond the reasonable control of the parties and makes performance impossible or radically different to that which the parties contemplated when the contract was entered into. It can only be relied upon if the contract does not refer expressly to force majeure situations. In practice, it can be very difficult to rely on frustration and so it should be seen as a last resort.

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In certain circumstances, for example, if you do not wish to terminate the contract but your costs have increased and you need to increase the price, other clauses may assist you, such as a change in law, material adverse change or a price change clause.

The information set out above is intended to be a very brief guide - it is very important to check your contract very carefully and to obtain legal advice in respect of your specific circumstances. If you seek to terminate a contract when you do not have a basis for doing so, the other party may be entitled to terminate the contract on the basis of wrongful termination and seek damages from you.

C. Real estate commercial leases

Commercial leases in the London (and UK) market have rarely (if ever) been drafted to cater for the exceptional circumstances in which Coronavirus has produced for tenants.

Tenants may have immediate difficulties in paying rents, service charges and insurance. This may necessitate a review of your lease.

There are a number of operative clauses that we can advise upon in determining your position, as follows:-

- i. Under what circumstances and when can you terminate your lease?
- ii. Does your lease contain a specific force majeure clause, allowing you to break/terminate in the existing (Coronavirus or similar) circumstances;
- iii. When is the rent due to be reviewed and on what terms; and
- iv. How is the service charge calculated and how are the services provided (usually in the interests of good estate management and the landlord acting reasonably). Is there scope to request that the landlord desist in the provision of some/all services if the building is unoccupied. Is there standing that your service charge proportion be re-calculated (downwards).



Landlords are starting to reach out to tenants to offer temporary assistance such as deferred rental payment and rent reduction. Some tenants have also been successful in negotiating a short term rent free period.

We can perform a review of the operative provisions within your lease and can also assist with communications and negotiation with your landlord for a rent reduction/suspension, in the circumstances.

If you would like further advice in relation to this issue or any of our commercial services please contact the Commercial or Property teams at 3CS.



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