

# Termination of Commercial Leases in the Time of Coronavirus

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## Overview

1. Generally, landlord (“L”) wants to keep the lease going, as re-letting will be difficult in the current market. Tenant (“T”) wants to get out of the lease, as he could not (until this week) lawfully trade and now has limited trade and reduced income. He cannot afford to pay the rent. Assignment or sub-letting will be difficult, if not impossible to arrange in this depressed market.
2. In order, here are the options for the parties to consider:
  - Termination of the lease
  - Agreed suspension of the obligation to pay rent
  - Agreed reduction of the amount of the rent
  - Agreed deferment of the obligation to pay rent
  - Statutory suspension of L’s enforcement remedies against T
3. Commercial pressure may lead to L agreeing to a rent holiday, or a reduced rent or deferment, because having T paying something may be better than not having T at all. Sums held by L as rent deposit may be used to ease the problem, with the agreement of both L & T.
4. This short paper considers the role of the law, as opposed to commercial practice, in facilitating premature termination or variation by T under these headings:
  - 4.1 Break clauses
  - 4.2 Surrender or variation
  - 4.3 Force majeure
  - 4.4 Frustration

## Break clauses

5. If there is such a clause in the lease, these issues will usually arise, depending on its terms:
  - 5.1 Who can serve the notice: T, L or both?
  - 5.2 When can a break notice be served?
  - 5.3 In what form must the break notice be served?
  - 5.4 Where must the break notice be served?
  - 5.5 When must the break notice be served so as to be a valid notice under the clause?
  - 5.6 What pre-conditions are there before T is entitled to serve a break notice: usually rent must be paid up to date, with no ongoing breaches of covenant.
  - 5.7 What further conditions, if any, must be satisfied by T as at the date of expiry of the notice?
  - 5.8 What happens about dilapidations and do those issues need to be resolved before expiry of the notice or can they be/will they have to be left over?
6. Many Ts will not now be able validly to exercise a break clause, because of difficulties with the rent.

## Surrender

7. This is the agreed termination of the lease on a date that is earlier than the date on which it is due to end, in circumstances where there is no prior entitlement for either L or T to terminate the lease. But why would L be willing to agree to this at the moment, when he won't easily find another T?
8. L may ask for financial compensation from T as the price for giving his consent or may require a rent deposit to be forfeited. Terms will need to be agreed as to the condition in which the premises are to be returned to L.
9. T leaving the premises is not enough to establish a surrender: it must be accepted as a termination of the lease by L, either expressly or by implication from his conduct: *Bellcourt Estates Ltd.-v-Adesina* [2005] EWCA Civ 208. L had not sent rent demands after T left, but that did not justify the inference that L accepted there was a surrender.

Even L changing the locks may not be enough to establish acceptance: *Preston BC-v-Fairclough* (1982) 8 HLR 70.

10. Ideally a deed of surrender has to be prepared to extinguish the legal estate and to avoid uncertainty. Are there unsatisfied obligations by either party and how are those to be dealt with? See for a recent example of where it went wrong: *Dreams Ltd.-v-Pavilion Property Trustees Ltd.* [2020] EWHC 1169 (Ch). Without meaning to L had released T from dilapidations liability in the settlement agreement.

## Variation

11. If L agrees with T to accept a lower rent or to defer payment, how is this best achieved?
12. There could be a deed of variation to reduce the rent for a specified period or a side-letter.
13. Many parties will prefer the latter, as it saves the costs of having a deed prepared. This may give rise to arguments about consideration for L's agreement to accept a lesser sum and whether it is binding on L, but L is likely to be estopped from claiming the full rent.

## Force Majeure

14. A specific clause is needed for this ground for termination to be raised. It may be found in an agreement for a lease, but it would be very surprising to find such a clause in the lease itself. The possibility that T may no longer wish to occupy the premises (for whatever reason) is dealt with by the alienation clause, usually permitting assignment or sub-letting.
15. Each force majeure clause will differ, but force majeure is usually defined as an unusual event beyond the control of the parties, such as adverse weather, strikes, government restriction, etc.
16. In a lease, the closest to be found to such a clause is likely to be the clause that relieves T from liability to pay the rent, if the premises are destroyed by an insured peril.
17. The question has been asked if, going forward, in negotiating for a new lease, T could now insist on a clause suspending his obligation to pay rent during compulsory business closure by reason of a pandemic such as Coronavirus. L's right to receive the rent could be protected by insurance, but the argument could be turned on its head: T's

liability for the rent could be protected by insurance. In practice I doubt whether any insurer would offer such cover on reasonable terms to either L or T and, given insurers' current reluctance to pay up on business interruption policies, neither L nor T could be confident that such a policy would provide any reliable measure of protection.

## Frustration

18. It has long been established that it is possible for a lease to be frustrated: in *National Carriers Ltd.-v-Panalpina (Northern) Ltd.* [1981] AC 675 the House of Lords confirmed the application of the doctrine of frustration to leases, although it was noted that there was no reported case in which the argument had succeeded. That remains the position today, nearly 40 years on.
19. The facts were that T rented a warehouse for 10 years. 6 years into the term, the only road to the warehouse was closed by the local authority. T could not gain access and argued that the lease had been frustrated. Master & judge followed the Court of Appeal decision in *Leighton's Investment Trust Ltd.-v-Cricklewood Property & Investment Trust Ltd.* [1943] KB 493 that frustration could not apply to a lease (that case had gone to the House of Lords ([1945] AC 221), but they could not agree).
20. So, the appeal in *National Carriers* went straight to the House of Lords. It was decided that the doctrine of frustration could apply to leases. Lord Simon said:  
  
*"Frustration of a contract takes place where there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances: in such case, the law declares both parties to be discharged from further performance."*
21. But although T won on the law, it lost on the facts, as it failed to raise a triable issue that the lease had been frustrated: the reasons included the point that the time for which the road was closed was no more than 20% of the duration of the lease.
22. The decision is of interest to jurists for the range of legal theories underpinning the doctrine (implied term, total failure of consideration, fundamental change in circumstances), but in practice it is of little use to a T in 2020 who wants to get out of his lease.

23. Very recently in *Canary Wharf (BP4) T1 Ltd.-v-European Medical Agency* [2019] EWHC 335 (Ch) Marcus Smith J considered the application of the doctrine of frustration to a Brexit-related issue.
24. In 2011 EMA agreed terms with Canary Wharf (BP4) TI Ltd. to take space in a building under construction. An agreement for a lease was entered into in 2014. The notification by the UK Government of the UK withdrawing from the EU in 2017 led to the EU deciding to re-locate the EMA to Amsterdam.
25. L issued proceedings for a declaration that the lease was binding on EMA and that it had not been frustrated by EMA's re-location. The judge held that the lease had not been frustrated as (a) the frustration was self-induced by the EU and (b) EMA could assign or sub-let the premises.
26. A fall-off in trade caused by a new business opening around the corner would not be a frustrating event. But could circumstances that prevent any trade at all, such as the Health Protection (Coronavirus Business Closure) (England) Regulations 2019 be a frustrating event?
27. Many articles have been written about this recently and concluded the answer is No. Why is this?
  - 27.1 A lease is an interest in land and is more than just a contract.
  - 27.2 By taking the lease, T takes the risk, just as the buyer of a freehold would, that it may not be possible to use the premises as intended.
  - 27.3 As things have turned out, the closure period is likely to be relatively short (3 months) and, as in *National Carriers*, the relationship of that time to the length of the lease is material.

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