

COVID-19 Ireland Update: Considerations for Commercial Landlords and Tenants

Introduction

The provisions of a particular commercial lease always need to be considered in order to determine the obligations of landlords and tenants during a crisis such as COVID-19. In essence, the provisions of the lease in question and any relevant legislation will determine the legal position of the parties. From a commercial perspective however, it is clearly in the interests of both parties to seek to protect their respective investments and therefore to act in as fair and as reasonable a manner as is possible under the circumstances.

To date, the Irish Government has not sought to interfere in the commercial relationship between landlords and tenants. However The Emergency Measures in the Public Interest (Covid-19) 2020 (the "Emergency Act") was signed into law by the President on 27 March 2020 and provides for inter alia moratoriums on evictions and rent increases for residential tenants throughout the Covid-19 emergency in order to ensure people can stay in their homes during this period. There is a concern that when the Emergency Act was amended by the Dáil it unintentionally widened the scope of the ban on evictions to include evictions of commercial lettings. Section 5(7) (a) of the Emergency Act provides: "Notwithstanding any of the provisions in this section, all proposed evictions in all tenancies in the State, including those not covered by the Act of 2004, are prohibited during the operation of the Emergency Measures in the Public Interest (Covid-19) Act 2020".

All press releases relating to the Emergency Act and indeed the debates in the Dáil and the Seanad relating to the Emergency Act refer only to residential tenancies and not to commercial tenancies. However, given the wording of section 5(7)(a) the prudent view is that this section may apply to commercial tenancies, notwithstanding that this does not appear to have been the intention of the legislature. As a result, a landlord would be advised not to seek to forfeit any of its commercial leases for the duration of the Covid-19 outbreak in Ireland as any such forfeiture may be prohibited by this section of the Emergency Act. Furthermore, even if it is ultimately found that section 5(7)(a) of the Emergency Act does not apply to commercial leases, a landlord should always be advised to act reasonably when considering forfeiting a lease. In the current circumstances, it is likely that a court will be sympathetic to a tenant who is in difficulty due to Covid-19.

Another potential issue with section 5(7)(a) of the Emergency Act is that it refers to the period during which the section will remain in force as being the duration of the operation of the Emergency Act rather than the emergency period as defined in the Emergency Act. As a result, it appears that the Emergency Act would need to be revoked in order to lift the eviction prohibition set out in section 5(7)(a).

We understand that the Law Society of Ireland intends to make a submission to the Irish government to have section 5(7)(a) amended so that (i) it specifically refers to residential

tenancies only, and (ii) it refers to the emergency period as defined in the Emergency Act rather than the period of operation of the Emergency Act

Rent Payment Obligations

Generally speaking unless the lease contains a clause to the contrary, which would be unusual in an Irish commercial property lease (for example, a force majeure clause which specifically refers to government closure or a pandemic, which is discussed further below), a tenant will be obliged to continue to comply with its obligations under the lease, including covenants for the payment of rent, insurance rent, and service charge payments where applicable. It is important for tenants to be aware that the provisions of the lease remain in force and a tenant is therefore obliged to continue to abide by them. As a tenant is unlikely to have a contractual entitlement to adjust rent payments, it may decide to seek a commercial agreement with the landlord providing for temporary rent suspensions or concessions.

Tenants may also consider seeking temporary adjustments to the frequency of rental payments (e.g. to pay rent monthly instead of quarterly) in order to aid cash flow. A landlord is most unlikely to be in a position where it is obliged to accommodate any such requests. However a landlord may consider specific requests on a case-by-case basis, weighing up the commercial advantages and disadvantages while at all times trying to best protect its investment and the interests of its stakeholders and debt providers. Where a landlord is in a position to accommodate a special request, care should be taken to record that any such concession is of a temporary nature only and is granted strictly without prejudice to the landlord's entitlements under the lease.

Remedies for a Landlord Where a Tenant Ceases to Pay Rent

As outlined above, in the absence of any commercial arrangement to the contrary, a tenant is obliged to continue paying its rent under a lease and the non-payment of rent by a commercial tenant will constitute a breach of the provisions of its lease. The options that may be open to a landlord as a result of such a breach by a tenant include the following:

- (a) forfeiture of the lease (as noted above the enactment of the Emergency Act indicates that this option may not be currently available);
- (b) recourse to the amount of any rent deposit paid by the tenant;
- (c) recourse to any guarantor under the lease; and
- (d) an action for breach of covenant / recovery of rent arrears.

Termination of Leases

A tenant may seek to argue that a forced closure by the Irish Government of its business premises due to COVID-19 amounts to either a force majeure event or an event of frustration and accordingly the lease may be terminated on this basis.

As there is no doctrine of force majeure in operation in Ireland, force majeure will be of relevance only to the extent (if any) that the inclusion of such a clause has been specifically negotiated in the lease in question. As a general comment it should be noted that force majeure clauses are not common in Irish commercial property leases. If one does exist and the force majeure clause makes reference to 'disease', 'epidemic' or to 'government action', a tenant could seek to argue that an event of force majeure has arisen depending on the factual circumstances.

If the clause does not specifically mention disease, epidemic, government action or other similar language, a tenant will have a more difficult argument to make but may still seek to rely on any 'catch all' or generic language contained in the clause. Ultimately, the application of any force majeure provisions will depend on the particular wording of such provisions as well as the factual circumstances surrounding COVID-19. However as force majeure clauses are very unusual in Irish commercial property leases this analysis will only arise in exceptional cases.

Frustration of a contract arises where a supervening event occurs without the default of either party and for which the contract makes no provision. The event must so significantly change the nature of the outstanding contractual rights and obligations from what the parties could reasonably have contemplated, as to make holding them to its stipulations impossible or unjust.

Severe disruption or loss to a business caused by a particular event is unlikely to be sufficient to frustrate the contract in question, even where such loss or disruption continues for a period of time. While each claim of frustration would need to be assessed on its own merits and on the basis of the particular lease contract in question, the threshold to be met is very high and it is difficult to see a tenant successfully meeting that threshold even where circumstances would indicate it has a strong case.

Conclusion

In order to minimise any claims that might arise, it is advisable for commercial landlords and tenants to consider taking any reasonable steps to mitigate losses arising from COVID-19.

Commercial landlords and tenants should also comply with the latest requirements and

recommendations issued by the Irish Government. In addition, under common law, every individual owes a duty of care to other individuals / entities not to act in a way that causes harm. This legal duty of care should be considered by landlords and tenants, and any steps that may reasonably be taken to prevent the harm associated with the spread of COVID-19 relating to the occupation, ownership and management of the premises should be considered.

As the economic position arising from the restrictive measures introduced to curb the spread of COVID-19 continues to evolve, parties will need to review their own situation on an ongoing basis. A landlord or tenant looking to confirm its position under a particular lease will need to examine the terms of the relevant lease in question as each lease will be different and accordingly, the position from a legal perspective will need to be determined on a case by case basis.

Further Information

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