

Landlord and tenant law: options available for office tenants in lockdown

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The impact of the COVID-19 pandemic on the Irish office environment has been profound.

As reported in the Irish Times, social media giant Twitter informed staff this month they can continue to log in from home indefinitely, while Google and Facebook have told employees to work remotely until the end of this year amid broader COVID-19 shutdowns. All three have large operations in Ireland.

Almost overnight, businesses were forced to migrate to a remote working environment with employees setting up makeshift offices in attics, spare rooms, sheds and kitchens across the country.

For the fortunate ones, remote working systems may have already been in place but for a much smaller number of simultaneous users. IT systems have now been fully tested!

For others, technology was quickly rolled out to ensure staff could continue working and businesses could continue to operate.

What is universal, is that during this accidental experiment into remote working, office buildings across the country are empty.

Most commentary on the effect of COVID-19 has focused on its impact on retail due to store closures. However, most offices have also closed.

Transition to a remote environment may have been seamless, but one would also expect an inevitable reduction in productivity across all office sectors for obvious reasons such as IT problems, childcare, lack of onsite management etc.

Whilst retail tenants might seek to negotiate rent reductions commensurate with turnover, what options are available in the office space?

Short Term

Tenants are contractually bound to the rent specified in the Lease for the agreed term.

Landlords will hold a position of strength at the outset of any rental negotiation with a tenant. Many landlords will request management accounts from the tenant and will seek concessions in exchange for a new rent arrangement such as removing an upcoming break option in the lease or extending the term.

Whilst a landlord is entitled to refuse any reduction sought, in our experience from recent weeks, most will agree to some level of temporary reduction pending the government's alleviation of the emergency measures introduced to prevent the spread of COVID-19.

Medium Term

This is where matters will become more complex.

It is unknown what medium to long term social distancing restrictions will be imposed by the Government. However, if businesses follow the announcements of Google, Facebook etc., offices will remain closed or will be only partially occupied for the next six to nine months.

Notwithstanding, limited occupancy, full rent and service charge will fall due.

Tenants may seek to negotiate further rent reductions or deferrals, however the compassion shown by some landlords is unlikely to continue forever.

If a new rent arrangement is refused, tenants often consider withholding rent. This occurred frequently in the last recession. Tenants withheld some or all rent on grounds that the full amount was disputed due to an alleged breach of covenant by the Landlord. By alleging that the rent was disputed, debt recovery proceedings issued by the landlord were delayed, sometimes by years. This was typically done by the tenant seeking a full plenary hearing of the dispute or by asserting that the appropriate jurisdiction for the dispute, pursuant to the lease, was arbitration thereby staying the court proceedings.

More often than not, the tenant's case was legally challenged but by not paying rent or by paying reduced rent for the duration of the proceedings, the tenant had the additional liquidity it required desperately at the time. A compromise was generally reached in respect of the landlord debt recovery proceedings which often involved the tenant paying a lump sum off the total arrears for the surrender of the Lease.

Long Term

The ease with which many offices have adapted to remote set-ups will raise a question for many business owners - "do we need the office space we have?"

Whilst it is unlikely that businesses will look to migrate to a fully remote environment permanently, some businesses may be weighing up the commercial benefits of downsizing their office space.

Tenants should consider all options available to them if seeking to exit or renegotiate a Lease which is no longer fit for purpose: -

Preparation. Review the Lease for upcoming Break Options, Landlord Covenants etc.

Negotiation. Explore discussions with the landlord. However, be aware that all open communications could be referenced later by the landlord in any litigation which could arise - this includes letters, emails, text messages. All negotiations should be marked as being “ ”.

Litigation. If no agreement can be reached a dispute may crystallise between the parties. Litigation can sometimes provide leverage in the context of future negotiations - the inevitable long-term nature of litigation can in itself trigger a party to take a more commercial view at an early stage.

It can be worthwhile seeking legal advice to consider the terms of your lease and the options and strategies which may be available to you. If you have any queries and would like to discuss this topic further, please get in touch with Maria by emailing maria.edgeworth@ogier.com

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