(Still) open all hours? Tenants' covenants to keep business premises open and to pay rent during the Covid-19 Pandemic

Jonathan Karas QC
James Tipler

Headline points

- *Business leases containing keep open covenants are unlikely to be frustrated altogether by reason of a closure forced by regulations.*
- *However, tenants whose leases positively require them to keep their premises open for trading may have a defence to liability for breach during the Covid-19 crisis where regulations prohibit such business use for the time being.*
- *Courts are unlikely to order specific performance or grant mandatory injunctions to force businesses to remain open during the crisis (where legally still permissible).*
- *Forfeiture for breach of such covenants, whilst unaffected by the moratorium on forfeiture for non-payment of rent under the Coronavirus Act 2020, will still be very difficult lawfully to effect in practice – and relief would likely be given in any event.*
- *Damages are in principle available to the landlord if it can prove injury to its reversion arising from a breach of a keep open covenant to which no defence of statutory authorisation is available.*
- *It is unlikely the tenant will be able successfully to argue that it should not have to pay rent during the pandemic, even where it is required by law to keep its business closed to the public for the time being.*

With effect from 1pm on 26 March 2020, businesses across England and Wales are now subject to the dramatic restrictions contained in The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and The Health Protection (Coronavirus, Restrictions) (Wales) Regulations 2020 ("the 2020 Regulations").

In some cases, business premises must now be closed to the public outright. Even where premises can remain open for business notwithstanding the Regulations, the tenant may struggle to keep trading while key staff, and indeed its customers, are having to self-isolate, or may wish not to expose their staff and customers to the health risks associated with staying open in the present circumstances.

Where does all this leave business tenants whose leases oblige them to remain open for business and trading?

There are four issues to consider:

(1) Is a failure to keep open as a result of the restrictions a breach of the particular covenant on its true construction?

(2) If it is on the face of things a breach, are there defences to liability for such a breach?

(3) Is the tenant still liable to pay rent where required to close its business?

(4) If the tenant is liable for a breach, what remedies might be available to the landlord?

How is the clause to be interpreted? Does it require the shop to be kept open at all? Does it require the shop to be kept open in these circumstances?

The first question is whether there is a positive obligation on the tenant to keep open at all.

A clearly-drawn covenant to keep premises open during certain specified hours will likely be construed as imposing a positive obligation on the tenant to trade, which will be broken if the premises are kept closed. On the other hand, a mere covenant, for example, not to use the premises otherwise than as a business will not generally oblige the tenant to keep trading.

The question is one of substance, not form. A covenant framed in positive language – "*to use the premises only for purposes falling with Class A1 of the Town and Country Planning (Use Classes) Order 1987*" – will not usually amount to a positive covenant to maintain such a use at all times. Similarly, a covenant "*not to use the premises for residential purposes but to use the same only for the purposes of a business as a stationer and for the supply of office equipment"* may only in substance prohibit certain uses without positively requiring the particular use mentioned.

Even if there is a positive covenant to trade there may be other qualifications in the lease against which the covenant must be construed. It may be open to argument that in some cases a qualification must be implied, if not expressed. For instance, most commercial leases will contain obligations by the tenant to comply with statute. It may be that the obligation to keep open will be read as subject to compliance with statute where the statute prohibits opening through no fault of the tenant. Such a construction might well be necessary to avoid commercial absurdity. It would be incoherent for one covenant to require the tenant to keep the shop open, while another requires the tenant to close the shop: see *Marks & Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72.

Defences to liability?

If, however, the tenant is on the strict construction of the lease the tenant is obliged to keep the premises open and the covenant cannot be read as qualified, this is not the end of the matter. There may well be defences open to the tenant.

First, a tenant might argue that the lease is frustrated. We consider that such a defence is most unlikely to succeed.

A contract is frustrated (and therefore discharged absolutely) where as a result of some supervening event, not attributable to either party and for which the contract makes no sufficient provision, the nature of the parties' outstanding rights and obligations are changes so significantly from what the parties could reasonably have contemplated the time of executing the contract that it would be unjust to hold the parties to its terms.

A lease can in principle be frustrated, but the occasions where the doctrine will apply will be rare: *National Carriers Ltd v Panalpina (Northern Ltd)* [1981] AC 675. Reported examples of leases being frustrated are accordingly hard to come by; absent something like total destruction of the premises, in the unusual event that neither party has covenanted to insure and reinstate in the event of natural disaster, a finding of frustration will be rare. It was held recently that Brexit did not result in the frustration of a lease held by the European Medicines Agency for premises used in London as its headquarters, as, among other things, the tenant agency retained powers to use and to alienate the premises such that it could

not be said the tenant was deprived of all modes of enjoyment of the demised premises: *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch). Where the lease permits and requires only one single use of the premises, which subsequently becomes illegal, it may be argued that the lease may be frustrated – but it is unlikely that this will result in the frustration of the lease since the restrictions of the kind now in force to deal with the instant pandemic are by their nature transient.

Secondly, even though the lease itself may not be frustrated, however, it is possible that an individual covenant such as a keep open covenant could itself be "frustrated" in a more limited sense – i.e. legally suspended until it becomes capable of performance.

In *Cricklewood Property & Investment Trust Limited v. Leighton's Investment Trust Limited* [1945] A.C. 221 at 234 and 244 this possibility was approved by the House of Lords. In *John Lewis Properties Plc v Viscount Chelsea* (1994) 67 P&CR 120, Mummery J applied these dicta to hold that a tenant had a lawful excuse not to comply with a covenant in its very long lease to carry out certain building works where those works had subsequent to the entry into the lease become effectively impossible owing to the relevant building become listed and the planning regime at the time precluding development. The tenant could not as a result lawfully comply with its obligation. If this first instance decision is good law, then it will provide a tenant with a defence if it is not able to open due to the restrictions imposed on it by the 2020 Regulations.

Thirdly, it is likely that the 2020 Regulations (where they apply) themselves provide a defence for non-compliance with the covenant. It has long be established that where a person covenants not to do an act or thing which it was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute discharges the covenant; conversely, it follows if a man covenants to do a thing which is lawful, and an Act of Parliament comes in and makes it unlawful for him to do it, the covenant is discharged (*Doe d. Anglesea (Lord) v Rugeley (Churchwardens)* (1844) 6 Q.B. 107; *Brown v London (Mayor)* 13 C.B. (N.S.) 828; affirming (1861) 9 C.B. (N.S.) 726.)

Briefly, under the Regulations, from 1pm 26 March 2020 until further notice (subject to a long-stop of six months):

- Persons responsible for carrying on a business listed in Part 1 of Schedule 2 must for the time being close any premises or part of the premises in which food or drinks are sold for consumption on those premises, and to cease selling food or drink for consumption on its premises. The Part 1 businesses include restaurants, cafes, bars and pubs.

- Persons responsible for carrying on a business listed in Part 2 of Schedule 2 must cease to carry on that business or provide that service for the time being. Part 2 businesses include cinemas, theatres, nightclubs, gyms, museums and galleries.

- Persons responsible for carrying on a business not listed in Part 3 of Schedule 2 (Part 4 in the case of Wales) of offering goods for sale or hire in a shop, must cease to carry on that business or provide that service save by way of receiving and fulfilling orders placed remotely. Businesses listed in Part 3 (or Part 4 in the case of Wales) are therefore excepted; these include food retailers, pharmacies, newsagents, certain health services, off licenses and homeware stores.

- These restrictions must be reviewed at least once every 21 days and must be terminated as soon as the Secretary of State considers/the Welsh Ministers consider they are no longer necessary.

Where the tenant is for the time being prohibited from providing its goods and/or services to customers visiting the premises as a result of these regulations, it appears to us that it would be unlawful for a tenant to comply with many forms of "keep open" covenant and thus compliance with the covenant is excused by operation of the statute. Whether this will be so will depend on the form of covenant and the nature of the business in question. It should be noted that even businesses which are not excepted businesses may continue to operate under the 2020 Regulations where they provide a service by way of receiving and fulfilling orders received remotely.

Does the tenant obliged to close its business premises under the 2020 Regulations still have to pay rent?

It should be noted, however, that whilst the tenant may therefore have a defence to an action to enforce the keep open covenant, the authorities seem to confirm that rent can still lawfully, and therefore must usually still be, paid by the tenant, even in these circumstances: see the decisions in *Cricklewood Property* and *Panalpina* (above).

Nothing in the 2020 Regulations provides statutory authority for a failure on the part of the tenant to pay the rent. Whilst the premises must be closed to customers, tenants are not required to give up possession; all the tenants' plant, fixtures and fittings can lawfully remain in place, and staff can still attend the premises to work (where it is not reasonably possible to do so from home: Regulation 6). Indeed, as set out below, the ability of the landlord to recover possession has for the time being been more tightly circumscribed (at least as regards a failure to pay rent).

Absent frustration of the lease, the essential bargain of granting exclusive possession of land in return for consideration by way of rent remains intact, therefore; albeit in a much less attractive form from the tenant's perspective for the time being.

As Lord Wright observed in *Cricklewood Property*, finding that no circumstances were shown in that case to excuse the tenant from paying its rent, at 236:

> *The appellants were not ejected in any shape or form from the demised premises. Neither the lessor nor anyone claiming under him interfered with the enjoyment of the land. All that happened was that for an uncertain term of the period, obviously likely to be short compared with the ninety-nine years of the lease, they could not proceed with their building scheme. The period of interruption is not stated, but it seems to be accepted that it is limited to the duration of the present emergency. The covenants to pay rent are absolute in terms and are expressly made independent of the progress of the building operations. It seems to me impossible to hold that these covenants are discharged by the facts alleged by the appellants in their affidavit.*

As Lord Porter added, more pithily at 241: "*the rent is payable for the site and issues out of the land… the land in some form is there and the payment of rent is not prohibited*."

Whilst the lease in question in each case must be carefully examined to see if a contrary intention is evident, it seems unlikely in typical cases therefore that the lease will contemplate a rent holiday simply because the tenant is unable to use the premises as extensively as it would like during the pandemic. If the lease were frustrated altogether but

the tenant remained in occupation, damages would be payable equivalent to an open-market rent. It is difficult to see that the tenant should be in a better position where its lease continues.

Thus, in *Mathy v Curling* [1922] 2 AC 180, even state requisitioning of land and military occupation is no answer to a claim on the covenant for rent: the tenant would be no more excused in these circumstances as he would if he were ousted from the premises by a trespasser (cf: eviction by the lessor himself). So, the tenant's remedy, if any, would lie against the government for compensation if the state interfered unlawfully. If statute authorised interference by the state and such interference was compatible with article 1 of the First Protocol to the European Convention on Human Rights, then the tenant will be without remedy at all.

Remedies for breach of enforceable "keep open" covenants

Even if a tenant is liable on the construction of a particular lease to keep premises open (e.g. because the 2020 Regulations do not require closure of its particular business), a landlord may still be without an effective remedy for the breach.

Specific performance/mandatory injunction

It is the settled practice of the court not to order specific performance of a covenant to carry on a business, or to keep a shop open for trading, save in exceptional circumstances: *Co-Operative Insurance Society v Argyll Stores (Holdings)* [1997] 2 W.L.R. 898. The difficulty in defining compliance and superintending any order, and its likely effect in prolonging litigation between the parties, are factors which point strongly against the making of such an order even in normal times; and it is virtually unthinkable any court would make an order to this effect in the present climate.

Damages

The landlord is however entitled to damages to compensate for any diminution in the value of the reversion resulting from the closure of the tenant's business that it can prove.

Thus in *Costain Property Developments Ltd v Finlay & Co Ltd* (1989) 57 P & CR 345, the tenant's closure of its shop within the landlord's shopping centre for two and a half years had a detrimental effect on attractiveness of the shopping centre in the eyes of shoppers, prospective assignees of shop leases and investors, which meant the price received by the landlord upon a sale of reversion was £147,000 lower than it would have been had the tenant kept its store open.

Similarly, in *Transworld Land Co v J Sainsbury plc* [1990] 2 EGLR 255 the tenant's closure of its supermarket in breach of a keep open covenant caused the other stores in the retail development to suffer substantial reductions in trade, with corresponding impact on rent review negotiations and determinations, and in some cases vacations of the other units, with consequential void periods and lost rent. All these heads of short-term loss were in principle capable of forming the subject matter of a clam in damages, although on the facts recovery was not made in respect of each matter or to the full extent claimed.

It was noted in *Costain* that the exercise of proving loss as a result of the breach was a complicated one, taking eight days at trial. Evidential difficulties may multiply where closures are made only on a short-term basis, and disentangling negative impacts truly due to the tenant's default from those attributable to the broader strains the pandemic presents will not be straightforward. Injury to the reversion may well remain only a potentiality

unless and until there is a rent review or sale of the reversion; and the passage of time will likely only add further complexity.

In the present case, it is highly unlikely that a landlord would be able to establish loss as a result of the tenant's failure to keep open in breach of the 2020 Regulations since the simultaneous restrictions on public movement as well as the Covid-19 crisis generally will in all likelihood be the causative factors in any diminution in value of the landlord's interest.

Forfeiture

Sweeping restrictions on the ability of landlords to forfeit leases of commercial premises (whether by action or physical re-entry) have been temporarily introduced in response to the Covid-19 crisis: see section 82 Coronavirus Act 2020. However, the moratorium covers only forfeiture for non-payment of rent or other sums due under business leases.

No new restriction is placed upon the ability of landlords to forfeit for breach of other covenants therefore, including keep open covenants.

However, it will still be necessary for the landlord to serve notice in accordance with s.146 Law of Property Act 1925, and to afford the tenant reasonable opportunity to remedy the breach. It seems doubtful a reasonable time will, in the present extraordinary circumstances, elapse during the continuance of the public health emergency. Actions seeking to enforce a right of re-entry by possession proceedings will also now be automatically stayed for the time being pursuant to the new Practice Direction 51Z.

Even if forfeiture is lawfully effected, relief would almost certainly be granted upon the tenant undertaking to put matters right as soon as practicable. And it would of course likely be commercially ill-advised for landlords to seek to forfeit business tenancies in any event, given the inevitable difficulty they will have re-letting the premises for the time being. Practitioners advising landlords should tread carefully accordingly.