

COVID-19

Property Advice Factsheet

How to negotiate a rent holiday

This advice factsheet has been prepared in the light of the COVID-19 outbreak. It has been prepared to help tenants of affordable artist studios and provides a general guidance on matters to be taken into account if you want to negotiate a rent holiday:

- Most leases will expressly prohibit the withholding of rent in any circumstances. Speak to your landlord as soon as you can about a rent holiday. Some landlords are already looking at this with their tenants. When you speak to your landlord, make it clear what you want to achieve: are you seeking a deferral of the rent (meaning it will be payable in the future with interest); a waiver of the rent (meaning it will be written off); paying rent monthly rather than quarterly; paying in arrears rather than in advance; a rent free period; a rent reduction, the landlord drawing on the rent deposit instead of collecting rent; or permanently or temporarily converting rent to a turnover basis?
- Note that the landlord is under no obligation to act in good faith when considering a request for a rent holiday. However, landlords know that if they lose their tenant, they will have a rent void (a period with no tenant and no rent). If they have an empty property they may also get squatters. Most landlords would prefer to avoid this, especially in the current circumstances, when it will be particularly difficult to find a new tenant. The landlords will also take on liability for rates after three months, which is a further incentive for them not to have empty property.
- If the landlord's property is charged, note that the landlord will likely need the consent of its lender to any variation of the terms of your lease. This could delay the landlord's response to your request.
- Any agreement will need to be legally documented.
- If you paid a rent deposit when you took the lease, you could suggest that the landlord uses this to cover the rent before a default arises under the lease for non-payment of rent. If you do, then consider taking legal advice to make sure the requirement for the tenant to top-up the rent deposit is waived (or deferred) and legally documented.
- Your lease is likely to contain a rent suspension provision, if there is material damage to the property (for example from a flood or a gas explosion). In the case of Covid-19, the premises have not been damaged or destroyed, so the rent suspension provisions in most leases will not respond. The obligation on you to pay rent will continue.
- Check what your lease says about insurance. Normally, the landlord is required to take out insurance against material damage to the property. In the unlikely event that the landlord is also required to insure against non-material damage, ask the landlord to check the terms of the policy to see whether COVID-19 is covered. If it is, the rent suspension provision in the lease could respond. If you think this could apply, consider taking legal advice, as the terms of the clause will need to be reviewed closely.
- If you have your own insurance policy, check the terms of the policy to see if business interruption is covered. The trigger for a pay-out for business interruption is normally material damage to the property (for example from a flood or gas explosion). In the unlikely event that the policy has a non-material damage add-on for infectious diseases, the scope of the cover needs to be examined closely. It is likely to be limited to a list of diseases which were notifiable at the time the insurance

was taken out, and will therefore not extend to COVID-19. Speak to your insurer as soon as possible to see if you are covered.

- Whatever your lease says, keep talking to your landlord. Let them know what your situation is. For example, if you think you will be able to get a loan, or agree a payment plan, then discuss that with them.
- Check whether, as a last resort, you are able to give notice to terminate your lease, and how you can do that. Most break clauses require a minimum of 3 to 6 months' notice to be given to the landlord to exercise the break, so the benefit will not be felt immediately. If there is a break clause in your lease consider taking legal advice, as the terms of the clause will need to be reviewed closely to ensure that any conditions are complied with – for example, it is normal to require all rent to be paid in full to the break date for the break to be effective. A break right could also be used to negotiate a rent holiday and you could agree to give up your break right in return for the rent holiday.
- If you are unable to negotiate a rent holiday with the landlord, and you cannot pay rent, note that one of the main remedies the landlord has for non-payment of rent has been temporarily suspended. The Coronavirus Act came into effect on 25 March 2020, and applies to leases for a term longer than six months. The Act prevents the landlord from terminating ("forfeiting") the lease for non-payment of rent. Currently, this only applies to the non-payment of rent between 26 March 2020 and 30 June 2020, although the government is likely to extend the end date. Note that if rent is not paid during this period, the rent is only deferred, not written off, so once the period has expired, rent will become due with interest. This is not therefore an alternative to negotiating a rent waiver with the landlord, if you are unable to pay the rent in the foreseeable future.
- Note that the Act does not prevent the landlord from taking termination ("forfeiture") action for any other breach of the lease, nor serving a statutory demand or presenting a winding-up petition for non-payment of rent if the tenant is a company. If you are sued for rent this could affect your credit rating. In addition, a landlord may withdraw money in accordance with the terms of any rent deposit which they hold, and ask you to top up the rent deposit if the terms of the rent deposit.
- Finally, while it is unlikely, your lease may have what is called a force majeure clause, which will say what happens to the lease in this type of emergency situation. These types of clauses are unusual in the U.K., and have the effect of suspending a party's obligations under the contract during the emergency situation. If there is a clause like this in your lease, consider taking legal advice, as the terms of the clause will need to be reviewed closely. There is also a similar non-contractual remedy available called frustration, which allows a party to discharge a contract if performance becomes impossible, due to a change in circumstances. Since the impact of COVID-19 is hopefully only temporary, it is unlikely that it will frustrate the performance of a lease.

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How to engage in discussions with your landlord

This advice factsheet has been prepared in the light of the COVID-19 outbreak. It has been prepared to help tenants of affordable artist studios and provides a general guidance on matters to be taken into account if you want to engage in discussions with your landlord in relation to your lease:

- Don't be afraid talk to or communicate with your landlord or their representative (who may be a surveyor). Most landlords and surveyors are sensible and reasonable people who will be more interested in solving problems than creating conflict. Always be calm, reasonable and professional even in these difficult times.
- If you have not paid rent, explain why, and offer to discuss with your landlord how best to achieve an outcome which maximizes the sustainability of both businesses. Landlords are more likely to be open to negotiation if the tenant is genuinely in financial difficulty as it will not want to risk an insolvent tenant and vacant space that may be difficult to rent for the foreseeable future.
- Know what you want to achieve before you open discussions: paying rent monthly rather than quarterly, paying in arrears rather than in advance, a rent free period, a rent reduction, the landlord drawing on the rent deposit instead of collecting rent, a rental holiday, or permanently or temporarily converting rent to a turnover basis?
- The landlord may ask to see details of your finances. Unless required to in your lease (which would be unusual) you are not legally obliged to do so, but it might help your case if the accounts show the turnover is suffering.
- Consider getting legal or other professional advice and help from any tenant association or business association. If there is no tenant association, think about starting one.
- Talk to or communicate with other tenants who may be in a similar situation. Together you may have interests in common or collective bargaining power.
- When dealing with any landlord, remember that it is a legal relationship and a business relationship:
 - Do keep notes and records of meetings and copies of letters, notices, and emails.
 - But don't secretly videotape or tape record anybody and don't ever tape phone calls without permission!
- If you want to keep discussions "off the record" or unofficial then make sure you label such correspondence as "without prejudice save as to costs". This means that the communications cannot be used against either party in court until the court delivers judgment. The communication must be made in the context of genuine settlement negotiations, and the substance of the communication will ultimately determine whether the protection should apply. If in doubt, it is advisable to consult a lawyer about how these legal rules work in practice. You can have formal and informal discussions going on at the same time.

- If you receive any formal legal notices in the course of the discussions with your landlord make sure you get legal advice. Get legal advice BEFORE any deadlines run out, and not AFTER they run out.
- Your landlord may be under pressure, too, just like you. The landlord may be under pressure to take action due to their own headlease, or lender or even company policies. If the landlord and those other people all know what is going on, then they are more likely to be patient and agree a rent holiday or payment plan. As we have seen in this crisis, people really don't like uncertainty. Find out what these issues are and how you can try to deal with them to everyone's benefit.
- Landlords know that if they lose their tenant, they will have a rent void (that is, a period with no tenant and no rent). If they have an empty property they may also get squatters. Most landlords would prefer to avoid this, especially in the current circumstances, when it will be particularly difficult to find a new tenant. Landlords will also take on liability for rates after three months, which is a further incentive for them not to have empty property.
- Even if you are not caught by the government closure of non-essential businesses on 20 March 2020, but have to temporarily close your business due to the outbreak, perhaps because of health reasons, or to look after someone else who is sick, let the landlord know. Otherwise they may think you have abandoned the property. In that case they might change the locks or take other security measures. But if the landlord knows you intend to come back, then they can hopefully avoid taking any drastic steps. In addition, your lease may require you to notify the landlord if the premises are left empty, to avoid invalidating the landlord's insurance policy.
- Talk to your landlord about any health protection measures that you have put in place, or that they want you to put in place. They may want to carry out a deep clean or have a waste removal plan, for example. The landlord may need your help and cooperation, even if it is just to give them access. By working together and communicating with each other, you may be able to solve these problems.
- If things get really bad, consider getting a mediator or arbitrator involved to help solve the dispute. Mediators and arbitrators can work over the phone or by video conference, which may be necessary during the present crisis.

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Property Advice Factsheet

Lease obligations, rent reviews and statutory renewals

This advice factsheet has been prepared in the light of the COVID-19 outbreak. It has been prepared to help tenants of affordable artist studios and provides a general guidance on matters to be taken into account in relation to the obligations in your lease, rent reviews and statutory renewals:

- **Rent holiday:** there are at present no measures in place by central government to suspend rent payments for commercial tenants. Unless and until that changes, consider asking for a “rent holiday” and see the factsheet “How to negotiate a rent holiday”. Note also that until 30 June 2020, the landlord's main remedy for non-payment of rent has been suspended, which is also discussed in the factsheet.
- **Public health and safety:** although commercial landlords and tenants are not at present under any statutory duty to notify the authorities of cases of COVID-19, they are under obligations to take steps to protect the health and safety of anyone entering the building (including employees and visitors), and to review risk assessments if there has been a significant change in circumstances, which could apply to COVID-19.
- **Landlord regulations:** leases usually allow landlords to impose regulations on tenants. This might include obligations dealing with hygiene, hand-washing, and self-isolation. If you are not already taking these steps, as far as you can, then you need to be doing so. See the Public Health England best practice guidance: <https://www.gov.uk/government/collections/coronavirus-covid-19-list-of-guidance>
- **Compliance with statute:** on 20 March 2020, the government ordered the closure of non-essential businesses, which includes restaurants, bars and galleries. Your lease is likely to require you to comply with statute, which will extend to complying with this government order. Your lease may also include a keep open clause (which requires you to keep the premises open), but it is unlikely a landlord will be able to enforce this clause in light of the government order to close businesses.
- **Buildings insurance:** let the landlord know if the premises will be empty - your lease may require you to notify the landlord to avoid invalidating the landlord's buildings insurance policy. If you have insurance, check that the terms of your policy are not invalidated by leaving the premises empty.
- **Assignment and sub-letting:** if you no longer want to occupy the space, it will be harder to assign or sub-let, as the demand is low, and you will not be able to conduct site visits. In addition, valuers are not carrying out physical site visits. Negotiating a rent holiday until you can market the premises might be the only alternative.
- **Obligation to repair:** your lease probably contains an obligation to keep the premises in good repair and condition and clean and tidy. Since cleaners are not “key workers”, and many building contractors are not working due to health and safety requirements, it may be difficult to comply with the terms of this clause.

It is however unlikely a landlord could enforce this clause in light of the "lockdown". In addition, the landlord may have a right to enter the premises and carry out works if you do not comply with your repair obligations, and recover the cost of the works from you. Again, it is unlikely the landlord will be able to exercise this right during "lockdown", due to health and safety reasons and the unavailability of contractors. However, it is advisable to discuss a potential breach of your repair obligations with the landlord if it is foreseeable that the breach will cause damage to the landlord's premises.

- **Service charges:** landlords are likely to want to recover costs of deep cleaning or waste removal or other emergency measures from tenants. Read your lease carefully to see if you are liable for those costs, and if you think this could apply, consider taking legal advice, as the terms of the clause will need to be reviewed closely. If the premises is empty, the service charge costs incurred by the landlord are likely to be lower, therefore, in the same way you would ask for a "rent holiday", consider asking the landlord for a service charge holiday (see the factsheet "How to negotiate a rent holiday").
- **Rent reviews and statutory renewals:** if you are in the middle of a rent review or a statutory lease renewal under the Landlord & Tenant Act 1954, then you may want to discuss a stay or suspension of that process with your landlord and their representatives. The Courts have recently passed emergency rules allowing parties to agree extensions to legal proceedings without the need for Court permission. This is a technical area, which will depend on the circumstances of the extension sought, and we recommend you seek legal advice in relation to it.

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Rent reviews

This advice factsheet has been prepared in the light of the COVID-19 outbreak. It has been prepared to help tenants of affordable artist studios and provides general guidance on matters to be taken into account if you have an upcoming rent review:

- A rent review is a mechanism in your lease where you and the landlord agree or fix a new rent. Usually this is based on the market rent at the time of the review, taking into consideration various assumptions and disregards which are set out in the lease. Rent reviews normally occur every five years. Rent reviews are never popular with tenants and many landlords are being asked to suspend rent reviews during the current outbreak.
- However, as most rent reviews are “upwards only” (meaning that if market rents at the time of the review have fallen, the rent will stay the same), and are likely to determine the rent for the next 5 years of the lease, it could be equally disadvantageous for landlords to undertake rent reviews now as rents are likely to fall in the short term. It remains to be seen how rent review clauses will be determined during the pandemic, and which party, if any, will benefit.
- Since there is uncertainty surrounding rent reviews for both landlord and tenant at the moment, there is a plausible argument for you to delay the review until the position is clearer. If you are uncertain how you should proceed, you should take advice from a surveyor with experience of rent reviews.
- It is important that you read your lease carefully to see how the rent review process works, as it can vary greatly from lease to lease. Two examples of rent review processes are set out below, but they are by no means exhaustive. If in doubt, consider engaging a lawyer well ahead of the rent review date to advise on the specific terms of your lease:

Example One:

- One party (usually the landlord) serves written notice on the tenant to start the rent review. That “rent review notice” will generally say what the new rent is that the landlord wants.
- You as the tenant will probably have to serve a “counter notice” within a set period of time (often twenty-eight days, depending on what your lease says) setting out the rent you want to pay.
- Once rent review notices are served, the lease will usually provide for a period of time in which you try to agree a new rent with the landlord. If it can't be agreed in that time, there will usually be a procedure for a valuer (often a surveyor, to decide what the new rent is, taking into account the terms of the rent review provisions and the assumptions and disregards in the lease. They will be guided by the evidence that you and the landlord give them on market rents.
- If you miss the deadline, then often the lease will say that you are “deemed” to have accepted the rent the landlord put in its notice.

Example Two:

- The lease provides that the landlord and tenant shall agree the new rent at any time before the review date.
- If the new rent has not been agreed by a certain number of months before the review date (often three), either the landlord or the tenant may refer the matter to a professional valuer to determine the new rent. Again, the valuer will take into account the terms of the rent review provisions and the assumptions and disregards in the lease.
- Do watch out during the current outbreak that you don't miss a notice served on you by the landlord. Check the terms of your lease to see where notices are meant to be sent, and try to get them redirected to you if you are not going to be there.
- Most leases usually say that if the notice is sent to the property, then that is good enough. It will be "deemed" served whether you actually receive or read it or not. So, if you can't be in the property because of the outbreak, let the landlord know where you are. Tell them that is where notices should be served for the time being. Although there is no precedent for this situation, the landlord would find it difficult to argue against sending the notice to a different address if you have been very clear from the outset that you are not at the property, and usually the clause will provide for notice of another address to be given.
- If and when the rent review starts, consider getting professional advice from a surveyor with experience of rent reviews to help put your case to the landlord and the valuer. The landlord will almost certainly get a surveyor to put their case forward. If you don't put your own case forward, then you are likely to suffer.
- If you have an upcoming break right, or are nearing the end of the term of your lease, you may have an option to terminate the lease or start a lease renewal process. These options are worth considering with a professional advisor, especially if market rents do fall, as the rent fixed by a Court or Tribunal, or negotiated in a new lease, could be less than the rent payable in your current lease.
- If you are in the middle of a rent review or statutory lease renewal, then you may want to discuss a stay or suspension of that process with your landlord. The Courts have recently passed emergency rules allowing parties to agree extensions to legal proceedings without the need for Court permission. This is a technical area, which will depend on the circumstances of the extension sought, and we recommend you seek legal advice in relation to it.

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Business Rates Holiday

This advice factsheet has been prepared in the light of the COVID-19 outbreak. It has been prepared to help tenants of affordable artist studios and provides general guidance on whether you are entitled to a business rates holiday:

What is a Business Rates holiday?

The Government announced that there will be a 12 month business rates holiday for retail, hospitality and leisure businesses for the 2020 - 2021 tax year. This means no business rates are payable during this period for qualifying properties.

Will the affordable artist studio sector benefit from the business rates holiday?

This will depend. The relief extends to property used for retail, hospitality and leisure businesses. It is unlikely that your studio is included in the hospitality sector. But if your use of the property can be shown to be for retail or leisure, the property may benefit from the relief. Please see below for further analysis of this.

How do I know if my property qualifies for the business rates holiday?

The Government has provided guidance for local authorities as to which properties it considers fall within the categories.

The Government guidance specifically states that art galleries are "properties used for assembly and leisure and will therefore benefit from the relief.

Likewise, if your property is used wholly or mainly for retail purposes, it will benefit from the business rates holiday. This means that if the main use of the property is for selling items to the public, it may be entitled to the business rates holiday.

If the property is a multi-let building, does the building need to be wholly or mainly used for retail or assembly and leisure to benefit from the business rates holiday?

No, this is not necessary.

Is there any guidance as to what constitutes a property "mainly" used for retail or assembly and leisure?

The test is whether the property is being used wholly or mainly for retail or assembly and leisure. This means that even if less than 50% of the floor space of the property is used for retail or assembly and leisure purposes, the relief may be available if the rest of the property remains unused.

Note however that the Government has specified that it does not consider properties that are not reasonably accessible to visiting members of the public to have the benefit of the relief.

Therefore your specific circumstances will need to be considered carefully. Ask yourself the following questions:

- Can it be said that the property is wholly or mainly used for assembly and leisure or retail purposes, and therefore benefits from the business rates holiday?

- Or, is the property wholly or mainly used as a studio for the creation of art/not reasonably accessible to visiting members of the public, in which case no holiday will be available?

If in doubt, consider taking legal advice.

If a property benefits from the business rates holiday, do occupiers need to take any action?

There is no need to take any action. Local authorities will automatically reduce the amount of business rates that occupiers are asked to pay and will send occupiers a new bill.

If, however, the local authority do not reduce the bill, and you think that the property is entitled to the reduction, it will be possible to appeal directly to the local authority in the first instance.

If you are dissatisfied with the local authority's decision, you can appeal to the Valuation Tribunal, and following that to the High Court.

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