

Issues to consider before hibernating your business due to coronavirus

COVID-19 Guide
April 2020



WE'LL
BE
RIGHT
BACK



CONTENTS

- 3 Issues to consider before hibernating your business due to coronavirus
- 4 Seeking to reduce or pause your commercial rent payments
- 5 Looking after your employees
- 6 Intellectual property & IT – considerations as you survive, then thrive
- 8 Corporate and commercial considerations
- 12 Maintaining cash flow

For advice and support on any of the issues raised in this guide please email enquiries@stephens-scown.co.uk

Some business owners may be thinking about pressing pause on their business in the short-term and starting up again when the coronavirus crisis is over. However, there are several key issues to consider before hibernating your business.

Experts from Stephens Scown's dispute resolution, corporate, employment, real estate and intellectual property teams outline the key legal points to be aware of.

The advice given in this article is correct as of 1 April 2020. The situation with COVID-19 is developing rapidly, so please do check our [COVID-19 Insights Hub page](#) for the latest updates.

For some businesses, trading conditions are so challenging at the moment due to the coronavirus crisis that temporarily shutting down or hibernating your business is the favoured course of action.

Even if hibernation is your short-term aim, you need to make decisions with an eye on the future and the time when your business will move from a position of survival to starting to thrive again.



**COVID-19
Insights
Hub page**



SEEKING TO REDUCE OR PAUSE YOUR COMMERCIAL RENT PAYMENTS

Rental payments are likely to be a significant overhead for many businesses.

The Government has put in place a prohibition on landlords' forfeiting commercial leases for three months, and is encouraging landlords to find ways to work with their tenants during the current crisis.

Our real estate team has this advice for landlords and tenants:

- *Although your lease may include a tenant's rent cesser clause, which would allow you to stop paying rent for a set period, these clauses invariably only apply in the case of damage by an insured risk only. It is very unlikely that closures due to the coronavirus restrictions will be an insured risk.*
- *In the case of service charges, it is possible that a tenant may be able to argue that the landlord's inability to provide services should reduce any service charge liability where payment on account is required.*
- *As the Government is encouraging landlords to work with tenants it may be possible to negotiate a rent concession or holiday with your landlord. This could be a deferral in rental payments, changes from quarterly rent to monthly or even an outright waiver of rent for a period. In the case of a deferment, the landlord will not lose out because the rent will still be paid (and typically any accrued interest).*
- *It is also advisable for tenants to check their business interruption insurance. Although the vast majority of policies won't include stoppage due to COVID-19, some may include stoppage due to a notifiable disease, so don't automatically assume you are not covered.*
- *If you are not occupying your premises for the time being do make sure that you have notified your buildings insurers and considered the terms of your lease. Modern commercial leases often require a tenant to notify their landlord if they are not operating from the premises for more than a minimal period, and it may be that you need to discuss the position with your landlord.*
- *Make sure that you have arrangements for dealing with any post delivered, particularly if you use the premises as your registered office.*

As the Government is encouraging landlords to work with tenants it may be possible to negotiate a rent concession or holiday with your landlord



LOOKING AFTER YOUR EMPLOYEES



Hibernation doesn't mean you need to lose your workforce. Starting to thrive again after a period of stasis will need your best people. Our employment team has this advice when making decisions about your workforce in the short-term:

- *You may wish to retain a core group of staff and you should consider how to safely introduce home working and establish ways of working remotely to facilitate this.*
- *If you decide to hibernate your business, it is likely you may need to furlough some of your staff. Under the Government's Coronavirus Job Retention Scheme, all UK employers with a PAYE scheme that was in place as at 28 February 2020 will be able to access support to continue paying 80% of their employee's salary for those that would otherwise have been laid off during this crisis. You can find out more about the scheme in [this article](#).*
- *You cannot use the Coronavirus Job Retention Scheme to claim for anyone who is working but on reduced hours or for reduced pay. Be careful to consider what is best for your business and your employees, as you may have thought that a reduction in hours or pay for everyone works best and is fairer – but would preclude you from using the scheme. If you agree such reductions with an employee you cannot furlough them as well, as they would be continuing to do work for you. Employees that are furloughed cannot do any work for you during their furlough. We understand that this will be interpreted very strictly by HMRC.*

Stephens Scown is offering a fixed price [COVID Crisis Toolkit for Employers](#), with written advice on amending contracts, furlough, redundancy, lay-offs and short time working.



**Government's
Coronavirus Job
Retention Scheme**



**COVID Crisis
Toolkit for
Employers**



INTELLECTUAL PROPERTY & IT – CONSIDERATIONS AS YOU SURVIVE, THEN THRIVE

Our Intellectual Property and IT team has this useful advice for you to take before you hibernate your business:

- *Remember that you have a duty to mitigate your losses in your key contracts. The actions you take need to be proportionate and cannot open you up to liabilities which might otherwise be avoided. For many of your online service contracts, you will not be able to terminate these as you will be tied into fixed terms. Consider how you are going to pay the cost of these services, if you do not have any cash coming in.*
- *Managing your reputation during any downtime will be very important. To ensure that you have control over what others are saying about your brand, even when you are not necessarily trading, you should ensure that your trade mark registrations are up to date. Put a plan in place to ensure that social media is monitored and that you are able to deal with any negative fallout from disgruntled customers.*
- *Remember your ongoing obligations to consumers. The law affords particular protection to consumers, especially where a booking has been made online. You may not be able to cancel these contracts; if you do, you may find yourself open to further liabilities. Consider which commitments you have already agreed to and which can still be fulfilled.*
- *Don't forget your cyber security obligations. Your obligations to maintain security are maintained, even though you are not actively trading. This means keeping up to date with ICO registrations, paying any relevant security provision charges (for example, with your IT support).*
- *Don't miss any deadlines. It is possible that there will be deadlines for key payment of charges, such as trade mark renewals, ICO notifications, and also dealing with any ongoing opposition proceedings. You should make sure that these are not missed and that you have funds available to cover any official fees, even if there is no cash coming in to the business.*

Don't forget your cyber security obligations. Your obligations to maintain security are maintained, even though you are not actively trading.



When you move into better times and you start up your business again, our Intellectual Property & IT team has this advice:

- *When you switch to digital platforms be sure to sweat the small print and check that the terms of that platform are acceptable. Many of the platforms place unreasonable obligations on you in terms of your intellectual property. A platform that you sign up to now in order to deliver your services digitally, may take control of your IP and therefore scupper your business in the future.*
- *Now is a good time to be making applications to protect your IP; such as trade marks, designs, etc. We anticipate that filings will go down, together with businesses' appetite to make oppositions.*
- *There has been a significant spike in cyber crime instances since the coronavirus pandemic began. Now more than ever, it is important that your staff are aware of their obligations under GDPR and to protect the business from cyber attack. Ensure that staff are trained and that policies are in place to deal with any fallout.*
- *If you are looking to offer your own products online, then remember that the law around online delivery is very different to offline. Consumers are a lot more protected in the online environment than they are in the real world. Making sure that your terms are compliant with the Consumer Rights Act is really important. Failing to do so can have a significant impact on your cash flow as it can enable consumers to make requests for refunds further into the future.*
- *Consider your outsourcing agreements. Where your service provision is outsourced to a third party provider, remember that they are going to be severely impacted by the ongoing pandemic. If they are not also taking steps to thrive then your own service delivery will be damaged. Take a look at your contracts with subcontractors and assess whether or not you can bring those services back in-house if you need to.*

Some business owners may be thinking about pressing pause on their business in the short-term and starting up again when the coronavirus situation has changed.



CORPORATE AND COMMERCIAL CONSIDERATIONS

There are a range of issues which our corporate and commercial team advise you to consider before you hibernate your business.

Contracts

It is important to check the contractual terms with both customers and suppliers before you stop or reduce fulfilment of your contractual obligations. Under normal circumstances, failing to fulfil your contractual obligations could give rise to a claim for damages against you. Two ways you may be able to obtain relief from contractual obligations are via the principles of 'Force Majeure' or 'Frustration', which are discussed in these articles:

Frustration

Force majeure

Alternatively you may be able to trigger a termination clause, but make sure you do it in accordance with the contract terms; use the correct address and right method of giving notice.

If you are varying contractual terms both parties need to give consideration otherwise it may be invalid. Also ensure you include any guarantors as otherwise they may be released as a result of the variation.

Some contracts will contain specific provisions to deal with non performance. These should be checked carefully as the consequences of failing to perform could be costly where, for example, a counterparty may be entitled to claim pre calculated liquidated damages.

Also, check the terms of your agreement for any material adverse change or change in law clauses.

In the absence of a specific provision in the contract, talk with your customer/supplier. It's possible that they would struggle to supply you or pay for your service/goods – a delay or cancellation may suit them as well.



Frustration with contracts



Force majeure

Check your insurance policies

Many businesses will have business interruption policies to cover losses arising from certain types of business interruption but that does not mean they will necessarily cover pandemics. Because COVID-19 is not a previously known disease it is unlikely to be specifically covered by many insurance policies. Policy terms and conditions together with any relevant exclusions should be carefully reviewed.

Consider directors' duties

Decisions may have to be taken that involve putting creditors' interests first instead of the interests of the shareholders of the company. This can happen when the company is probably insolvent and the outcome of the decision is likely to mean that some or all creditors may not be paid in full.

Ensure you comply with health and safety regulations

Directors are under a duty to comply with health and safety regulations. Not only is this important in avoiding incurring personal liability but also because a company's workforce is vital for its continued performance and profit. The health, both physical and mental, of employees should be prioritised by directors and employers.

There is a [useful guidance note](#) issued by the Health and Safety Executive for boards to work through.

Check what state assistance is available to help with cash flow

The UK Government has made a package of support measures available which are outlined [here](#).

However, businesses should bear in mind that Government aid measures will only be lawful if the business is able to satisfy the eligibility criteria, particularly in relation to the Coronavirus Business Interruption Loan Scheme. This requires applicants to ensure that they meet the 'de minimis' criteria, by confirming that the business has not received de minimis state aid beyond €200,000 equivalent over the current and previous two fiscal years. We can provide assistance to businesses that need help to assess their state aid position as part of a Coronavirus Business Interruption Loan Scheme application or advice on the state aid implications of other public funding packages.



Health and safety guidance note



Cash flow support measures



CORPORATE AND COMMERCIAL CONSIDERATIONS

Consider how your board will function

Check your company's constitutional documents to ensure that the board is able to function and hold valid board meetings remotely. Articles of association for older companies may still require directors to meet face-to-face to convene a valid board meeting. If this is the case consider updating your articles to allow board meetings to take place remotely.

If some directors are unavailable for any reason, they may be able to appoint another director as their "alternate" to attend and vote at board meetings on their behalf (the company's articles should be checked to see if they allow for this). Whilst it is no longer a requirement under the Companies Acts for a private company to hold an AGM, your constitutional documents may require you to do so. If this is the case advice should be taken as to how to comply with your company's internal obligations.

Ensure your company can execute legal documents in the absence or unavailability of directors. Most companies have the power to grant a power of attorney to a third party to allow it to execute documents on its behalf.

Filing accounts

Companies House has advised that if COVID-19 has affected your company and you need more time to file your accounts, you must act before your [filing deadline](#). You can do this through making an application to extend the period allowed for filing. If you fail to do this, an automatic penalty will be placed on your company.

If a penalty is imposed, it is possible to appeal the decision. Appeals will be considered on the basis of the impacts of COVID-19 pursuant to policies regarding unforeseen ill-health.

You can apply to extend your account either [online](#) or [by post](#). All that you will need is your company number, information about why you need more time to file your accounts and any documents that you might have to support your applications. If you are applying by post, you will need to also supply an email address and post your application to the Companies House office where your company is registered.



Filing deadline



Application to extend your account online



Application to extend your account by post



Communicate with customers and suppliers – let them know your intentions if it is a temporary measure

Other key issues to consider

- *Take tax advice to check if any relief can be claimed for any additional expenditure incurred as a result of the pandemic.*
- *Liaise with your bank. Check that they understand what you are planning to do and seek their support, so that they are ready to help when you are ready to trade again. In particular, check the banking covenants in your facility agreements as the current circumstances may have placed you in breach of these. Identifying these issues and proactively discussing them with your lender is likely to be appreciated and may help you to agree a way through this period.*
- *The British Business Bank is to deliver the Commercial Business Interruption Loan Scheme via the high street banks under which the Government is to guarantee without charge 80% of any advance made to a smaller company (turnover less than £45m) up to £5m. Note however this is a loan, not a grant, so will require repayment typically over 6 years. Note again banks are likely to require personal guarantees from company directors for the remaining 20% if the lending is for over £250,000.*
- *Communicate with customers and suppliers – let them know your intentions if it is a temporary measure. Keep in contact via social media so that loyal customers know when to return to you.*
- *Prepare for the return to normal operations. Take the opportunity to revisit your business plan, look at things that could be improved upon and things that can go.*



MAINTAINING CASH FLOW

Our dispute resolution team suggests you consider these issues carefully to avoid costly disputes later on. Some of the issues have been discussed in more detail above.

Cash flow will be key, so you should either press to get to the top of the queue for payment or agree extended terms in the hope that your customer will have an improved cash flow.

Tips for pressing for payment:

1

Offer a discount for early or advance payment.

2

State interest will be accruing on late payments. Under late payment legislation you can claim interest at 8% above base, fixed administration fee and reasonable costs.

3

Issue a debt claim and obtain a judgment – if a judgment is for more than £600 you should be able to claim interest at 8% and obtain a charging order over land, shares or other securities which provides added security.

4

Finally, and as a last resort, issue a statutory demand and/or winding up petition. Be very careful doing this as you may be throwing good money after bad and see no benefit from it. Additionally there are going to be statutory changes made which will have a marked affect on its viability.

Try and improve your position for example by obtaining a director's guarantee or other security such as a charge

For advice and support on any of the issues raised in this guide please email enquiries@stephens-scown.co.uk

Tips for extending payment terms:

- *Try and improve your position for example by obtaining a director's guarantee or other security such as a charge.*
- *Agree a term for the debtor to pay interest and or an administration fee to cover your additional costs.*
- *Document it correctly.*

For tips on how to minimise cash flow issues please refer to our article [here](#).

Many contracts especially in the construction sector have specific steps that need to be taken or notices served to ensure any delays are notified and are allowable. Make sure these are adhered to. You can find more details on how COVID-19 is impacting construction projects [here](#).

The Business Secretary has announced changes to insolvency laws and directors' liability when a company is insolvent in an attempt to allow viable businesses to continue to exist following this hiatus. How far that will go is not known – see our article on [new measures to help businesses avoid insolvency](#). We are likely to see some new insolvency processes to give added protection to companies. Of course, in many instances this will only have the effect of passing the problem onto the creditor and should not be used as an opportunity to defer action where a company is unlikely to be able to avoid an insolvent liquidation.

An understanding of directors' duties and options available to a company which is on the edge of insolvency is vital to minimise personal liability and maximise the viability of the company.

Company insolvencies

Where companies are already in an insolvent situation or likely to be so in the near future, rather than hibernate the current company with the likelihood that at least some overhead costs will continue to accrue over that period, you should consider speaking to an insolvency practitioner who can discuss with you the various options for rescuing an insolvent company. In this way, you can minimise the ongoing losses to the company.



How to minimise cashflow issues



Impact on construction projects



New measures to avoid insolvency

