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COVID-19 RESTRICTIONS AND THE IMPACT ON COMMERCIAL LEASES - A PLIGHT OF FRUSTRATION

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The recent appeal by the Prime Minister for Landlords to "have a heart," is a plea that is being relied upon not only by tenants of residential premises, but by tenants of commercial premises alike. Social restrictions implemented by the Government have limited and/ or prohibited various commercial activities for an uncertain time. Many commercial tenants have been unable to generate revenue to cover operational costs, including rent, as consumers have complied with the stay-at-home directive. It may seem that a landlord's affirmative response to the Prime Minister's exhortation is a tenant's only hope, as there is a dearth of legal remedies to escape liability for breach of non-payment of rent in these circumstances.

Can a tenant suspend the payment of rent or terminate a lease because of Covid-19 restrictions?

The terms of the lease should be reviewed carefully to determine whether there are any express provisions for suspension of rent or termination of the lease. In addition to clauses permitting the tenant to terminate the lease for any reason, there are two other provisions which may be considered (1) rent abatement and (2) force majeure.

1) Rent abatement

An abatement of rent clause allows a tenant to suspend or reduce the payment of rent where there is a substantial interference with the business operations of the tenant, due to the tenant's inability to use the leased property. However, such interference is often limited to instances where the leased property is damaged or destroyed and becomes untenantable. The period of abatement is determined by the time required by the landlord to effect repairs or restore the property.

In view of the above, a tenant is not likely to encounter an abatement clause in a lease that is broadly drafted to cover disruptions caused by Covid-19 restrictions.

2) Force Majeure

The relief of force majeure may be used by a party wishing to avoid obligations under a contract, where there is a specified, unforeseen, extraordinary event, which is beyond the control of the parties and prevents one, or all of the parties from performing their obligations under the contract. Events of force majeure may include acts of God, strike, riot, war, terrorism, civil or military disturbances. Force majeure clauses typically suspend the liability of the parties only for the duration of the event.

In certain legal systems, the Court has the power to provide a party relief by declaring that an event falls within the ambit of force majeure. However, in our jurisdiction, force majeure is a creature of contract and must be expressly outlined in the lease. It should be noted that these clauses are narrowly construed to the precise wording of the lease. Therefore, a tenant must thoroughly examine the lease to determine whether the force majeure clause covers the circumstances caused by Covid-19.

It is not common for a force majeure clause to be included in a lease, and even less likely that such a clause would include a pandemic.

Is there any other legal remedy?

Frustration

The common law doctrine of frustration operates to automatically terminate a contract, where a supervening event occurs, and its effect changes the substance of the contract. Lord Radcliffe in Davis Contractors Ltd v Fareham UDC [1956]1 AC 696 at 729, outlined that frustration may be established where "without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do". It is not a rule of law that is lightly invoked. Therefore, mere hardship, inconvenience, or material loss, without evidence of a significant change in the operation of the contract may not suffice for a party to succeed with a claim of frustration.

Can a lease be frustrated?

It was the traditional view that a lease could not be frustrated because in any event, the tenant will have that which he bargained for, namely the leasehold interest in the property. However, the traditional view has shifted slightly from 'never to hardly ever.'

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