WITH COMPLIMENTS

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Leases, Contracts and COVID-19: What is Force Majeure?

The COVID-19 crisis has changed everything. Our personal lives have been upended and our businesses hit hard.

And with many businesses operating out of leased premises, a great many

landlords and tenants are asking themselves what happens if the crisis leaves a tenant unable to pay the agreed rental.

What follows is of necessity a general guide only – professional advice specific to your case is essential here.

Tenants – your risk

As always "With Great Change comes Great Opportunity", but if you aren't able to very quickly find and exploit a viable new opportunity you may well struggle to pay your rental.

Don't just stop paying rental! Failing to pay rental on time means breaching your lease, and if you do that you face cancellation, legal action for recovery of outstanding rental, damages claims for breach (substantial if your lease has a long time to run and your landlord struggles to re-let) and calling up of your personal suretyships (exposing you to loss of all your personal assets, house etc).

Bottom line - take professional advice before you just stop paying!

Landlords – your balancing act

As a landlord you have a very delicate balancing act – on the one hand you won't want to lose even half-reasonable tenants at a time when finding new ones is going to be problematic. One wonders for example how many small businesses will now either fail entirely or be forced to cut costs. And how many others, having had an enforced period of "working from home", will now be reconsidering the whole concept of leasing separate office space at all.

On the other hand of course you need to cover your ongoing costs, which probably means enforcing payment of rent. That in turn means understanding your legal position - for example does your tenant now have an excuse to cancel the lease without penalty? If so, you lose a tenant without recompense. But if your tenant is still bound by the lease, you are free (if you wish – long-term support of your tenant may still be your best option) to demand full payment, then to reduce your losses by cancelling, evicting, executing against the tenant's assets and calling up personal suretyships.

What about "force majeure" or "impossibility of performance"?

"*Force majeure*" (a French legal term meaning "superior force") is an event, either due to "natural causes" (earthquakes, cyclones and so on) or to "human agency" (war, riots, legislation and the like) that makes it impossible to comply with the lease.

We really are sailing into uncharted waters here with worldwide debate over whether or not this pandemic is indeed a case of *force majeure*. There is bound to be a great deal of litigation before we can be certain whether or not the crisis (particularly the declaration of a national state of disaster and the lockdown period) will be accepted by our courts as a "*force majeure*" event. If it is, many tenants will argue that their failure to pay rental is not a breach of lease but rather a lease-destroying "supervening impossibility of performance".

So where do you stand? There are two main scenarios to consider -

1. **What does the lease say?** The onus of proving a *force majeure* is on the tenant trying to escape from the lease, and the first thing for both parties to check is what the lease says.

   Many leases have a clause that deals with a tenant's inability to occupy premises as a result of damage to or destruction of the premises which won't apply here, but some leases do have specific *force majeure* clauses. If yours has such a clause you are bound by whatever it says so check whether a pandemic or government order to cease business might fall under the clause, and if so what results and remedies are specified.

2. **What must the tenant prove if there is nothing in the lease?** If there is no *force majeure* clause in your lease, our common law applies. Your problem here is that there are a lot of grey areas involved and every case will be different, so

what follows is just a general and non-exhaustive guide.

A tenant would have to prove not only that the impossibility caused a loss of beneficial occupation (entitling the tenant perhaps to a rebate of rental for the lockdown period, or perhaps frustrating the lease altogether) but in all probability also that it is –

- "Unforeseeable with reasonable foresight". In this regard we may well hear arguments along the lines of "the emergence of the coronavirus and its impacts were neither unexpected nor improbable". Could such an argument prevail? Only time will tell.
- "Unavoidable with reasonable care".
- An absolute as opposed to a probable impossibility. "The mere likelihood that performance will prove impossible is not sufficient to destroy the contract."
- An absolute not a relative impossibility. "If I promise to do something which, in general, can be done, but which I cannot do, I am liable on the contract".
- Not the fault of either party. "A party who has caused the impossibility cannot take advantage of it and so will be liable on the contract."
- The "contrary common intention of the parties" could override the defence of impossibility. Consider any representations made by either party to the other that may be relevant.

Moreover our courts have held that "In each case it is necessary to 'look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied'."

That's all fertile ground for expensive and draining litigation, at a time when neither of you is likely to have an appetite for either.

Which brings us to…

A practical template for negotiation

Take this advice from Roman lawyer and statesman Cicero over two millennia ago: "Agree, for the law is costly".

So if you are a tenant, rather than just stopping rental payments and then having to fight it out through the legal system, ask your landlord to agree to a win-win compromise that will limit both short-term and long-term damage to your respective businesses.

Draw up a checklist including matters such as –

- Do you or your landlord have any sort of insurance cover for this sort of disaster?
- If you want to cancel the lease entirely, consider whether, if the protections of the Consumer Protection Act are available to you (see below*) it might pay you to give your 20 business days' notice and pay the "reasonable cancellation penalty" the landlord is entitled to demand. (*You need to take advice on this – leases between "juristic persons" such as companies and trusts in particular are excluded from this particular protection).
- Alternatively consider what you can offer the landlord to accept your cancellation without a fight.
- If you want to continue in the premises, make sure that your failure to pay on time is specifically recorded as not being a breach of the lease.
- Decide whether you will ask for a full rental holiday, or a rental reduction. For how long? The better a tenant you have been, the more incentivized your landlord is going to be to help you stay in place. Offering an extension of the lease – if it ties in with your long-term planning – could help a lot with that.

- If you run into a brick wall there, think of proposing that the arrears not be written off but rather just be deferred until your business is back up on its feet. Specify when payment of arrears will be made, what if any interest will be charged and so on.

- If the tenant is a corporate entity and you signed a personal suretyship for it, don't forget to specifically cover that aspect in your agreement.

- Remember to include in your agreement what happens to any deposit the landlord may be holding from you.

- If you agree on a new or amended lease, think of including a professionally-drawn *force majeure* clause (or check an existing clause for possible update).

Beyond leases – force majeure and contracts generally

Although this article specifically addresses landlords and tenants, the general principles of "*force majeure*" and "impossibility of performance" apply to all contracts and might in some cases entitle you to delay or avoid contractual obligations beyond lease agreements. Take professional advice specific to your circumstances!

In Times of Great Change, Make Sure Your Will is Updated!

"Death always comes without knocking" (Margaret Atwood)

Particularly in these times of pandemic, deadly infections and uncertainty, no one can ever say with any confidence that we will still be alive tomorrow, or next month, or next year.

Now more than ever having a valid and updated will in place is no luxury to be attended to "when I have the time" or "when I am older".

The risk is that without a proper will (your "Final Will and Testament") you die "intestate", in which event the law and not you decides which of your heirs gets what from your estate. You have forfeited your right to ensure that your loved ones are properly looked after when you are gone. You have lost your right to decide how your assets will be distributed on your death. And you have no say in who will wind up your estate as Executor. Executing a valid will is the only way to avoid all that.

Then – just as importantly - once you have your will done and dusted, avoid the very common mistake of forgetting to update it regularly.

Nine events to trigger an update review

Don't leave your loved ones struggling with an outdated will. Firstly diarise frequent review dates. Then keep in mind the many changes in circumstances that will require interim review –

1. **Times of great change in your health risk profile:** The current COVID-19 pandemic exposes us all to the threat of a sudden and radical change in our health status, and that (or indeed any new diagnosis or other actual change to your risk profile) calls for an immediate review of your will. Now more than ever it has to be fully up to date.

2. **Marriage:** Have I or any of my heirs married, re-married, changed marital regime (in or out of community of property, with our without accrual), entered

into or left a life partnership or the like? Does my will tie in with my marital regime and ante-nuptial contract if any?

3. **Divorce:** Have there been any divorces? This is vital because so many couples leave everything to their spouses. And if for example that applies to you and you divorce, you have only a three month window period within which to change your will. For three months your ex-spouse is effectively disinherited; but if you don't change your will within that window period your ex-spouse inherits everything.

4. **Birth or adoption:** Have there been any births or adoptions, do you have new children or grandchildren? This is particularly important if your will specifically names all heirs without a catch-all phrase that will include new children/grandchildren.

5. **Death:** Has anyone died and if so must any specific bequests or anything else change?

6. **Other changes in personal circumstances:** Have any of your heirs undergone a relevant change in circumstances, perhaps become more financially vulnerable for whatever reason (serious illness or motor vehicle accident causing disability, loss of bread-winner for example)?

7. **Changes in assets, liabilities, financial and business structures etc:** Have you sold any assets named in your will, or acquired assets that you would like to bequeath specially to a particular heir or that necessitate a re-allocation of bequests? Perhaps existing assets have changed dramatically in value? What about new liabilities, such as perhaps a new bond over a property which will reduce its value to a particular beneficiary?

   Have you formed or deregistered any trusts or asset-holding structures? Have you started or acquired or sold a business to be earmarked for a particular beneficiary? Do you have any new assets overseas that may call for a separate foreign will?

8. **Executor, Trustees, Guardians:** Is there any need to review your appointments of Executors, Trustees, Guardians?

9. **Changes in the law:** Have there been any changes in relevant laws, either through legislation or new court decisions? Tax laws in particular can change unexpectedly and affect the continued suitability of your estate planning.

How to update your will

If you plan major changes to your will, consider making an entirely new one but if the changes are minor a codicil may suffice. **In both cases you need to comply with important legal requirements so professional advice is critical here!**

Divorce in a Time of Lockdown - What Grounds Can You Rely On?

Note: If, as we hope, you personally have no need for an article on divorce, please think of passing this on to anyone you know who may find it relevant and useful.

The National Lockdown has thrown

together many couples not used to spending “24/7” time in each other’s company. Relationships will have strengthened for many couples, but others will be struggling. The fears, anxieties and money worries now looming over us all certainly won’t haven’t helped.

If your marriage is one of those unfortunate ones that is foundering, counselling hasn’t helped or won’t help, and you have come to the decision that divorce is your only option, be aware that you need a formal court order before your divorce will be legally recognised.

Moreover our law does not recognise the concept of “legal/judicial separation” so if you decide to just physically separate without divorcing, you should take professional advice on drawing up a contract in the form of a “separation agreement”. Normally this would be for a trial period but you could also agree to a longer-term separation.

The 3 grounds for divorce

In most cases couples opt for formal divorce rather than long-term separation, and it is important to appreciate that a court will only grant a divorce order if it is satisfied that at least one of the three recognised grounds for divorce exists.

In practice most couples will fall under the first ground i.e. “irretrievable breakdown of marriage” but to give you the full picture, the grounds for divorce in full are (all quotes are straight from the Divorce Act) –

1. **Irretrievable breakdown of marriage**

   This is by far the most commonly relied on ground for divorce: “A court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.”

   The court may take into account “any facts or circumstances which may be indicative of the irretrievable breakdown of a marriage” and may also accept evidence that –

   a. The spouses have not lived together for “a continuous period of at least one year immediately prior to the date of the institution of the divorce action”;

   b. The spouse being sued for divorce has committed adultery and the other spouse “finds it irreconcilable with a continued marriage relationship”; or

   c. The spouse being sued for divorce “has in terms of a sentence of a court been declared an habitual criminal and is undergoing imprisonment as a result of such sentence”.

   However: “If it appears to the court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection, the court may postpone the proceedings in order that the parties may attempt a reconciliation.”

2. **Mental illness**

   The court must be satisfied of two things here –

   i. The spouse must have been admitted to or detained in an institution under our mental health legislation as a patient, State patient or

mentally ill convicted prisoner, and “has, for a continuous period of at least two years immediately prior to the institution of the divorce action, not been discharged unconditionally”, and
“

ii. After having heard the evidence of at least two psychiatrists, of whom one shall have been appointed by the court, that the defendant is mentally ill and that there is no reasonable prospect that he will be cured of his mental illness.”

3. **A state of continuous unconsciousness “by reason of a physical disorder”**

Again the court must be satisfied of two things here –

i. The unconsciousness must have lasted “for a continuous period of at least six months immediately prior to the institution of the divorce action”, and

ii. After having heard the evidence of at least two medical practitioners, of whom one shall be a neurologist or a neurosurgeon appointed by the court, that there is no reasonable prospect that the defendant will regain consciousness.

Having grounds for divorce is not the end of the story

You will need also to satisfy the court that “the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances”.

Consider also, and prepare for, questions around division of assets and maintenance.

Property Sellers – Prepare for SPLUMA

Many factors can delay your property transfer, and all of them are likely to cost you.

A last-minute rush to comply with statutory requirements is one such pitfall to avoid. Beware therefore of the possibility that you will soon need (in some parts of the country you may already need), to lodge before transfer a formal “SPLUMA” (Spatial Planning and Land Use Management Act) certificate of compliance. SPLUMA, without getting too technical, provides a framework for all provinces and municipalities to pass laws governing land use and development.

There is (at date of writing) some confusion over what is actually required, and although currently a formal certificate of compliance seems to be necessary in some municipal areas only, there is a suggestion that the requirement will apply everywhere by October 2020.

It pays to comply anyway!

The important thing however is that - regardless of statutory requirements - you won’t want any problems with your buyer down the line complaining about unlawful building

work or zoning contraventions. So it makes sense to ensure that you are fully compliant well before you start any sales process.

Take professional advice (in good time so you can take corrective action if you need to) and make sure that –

- Building plans for all structures have been approved,
- Your property's use complies with its zoning, and
- There are no encroachments over building lines and property boundaries.

Your Website of the Month: Lockdown Advice for Entrepreneurs

"The scale of the national COVID-19 lockdown is unprecedented in living memory. The repercussions – personal, professional, national and international – will reverberate for years to come. As entrepreneurs, we need to be making the right decisions for right now to ensure that our businesses and our people's livelihoods do not become another casualty of the virus."

At date of writing it is still unclear to what extent the Lockdown will be relaxed in each Province, but regardless of timelines the COVID-19 pandemic and the crisis it has landed us all in are not going anywhere in a hurry.

Businesses and perhaps SMEs in particular face both enormous challenges and many new opportunities. Some good solid advice on how they can navigate these stormy seas comes from Allon Raiz of Raizcorp in the form of a series of articles under the heading "Lockdown advice for entrepreneurs" **here**. To date eight articles are available –

- "Get to rational quickly"
- "Building an opportunity matrix"
- "Scenario planning as a vital tool"
- "Building an exploded resources list"
- "Creating a small list of big questions"
- "Embrace your X"
- "Cross-functional teams"
- "Moving from contingency planning to live decision making".

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