

Legal Issues Surrounding Landlord-Tenant Relationships Amidst Covid-19



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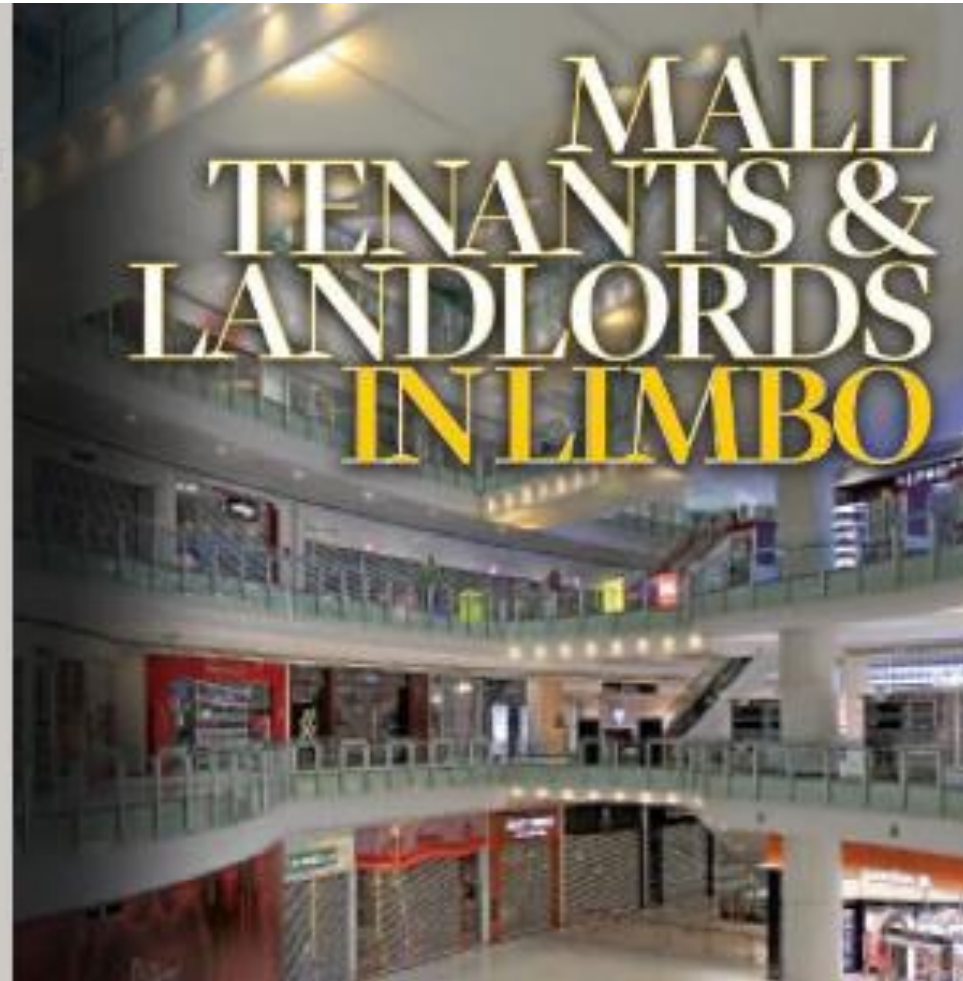
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MALL TENANTS & LANDLORDS IN LIMBO



Topics Covered

1. What is "**force majeure**", and can a tenant rely on "force majeure" to suspend rental payment or terminate the tenancy?
2. What should a landlord do when the tenant requests for **rental deduction**?
3. What can the landlord do to **recover overdue rent** without terminating the tenancy?
4. If the tenancy has to be terminated, how can the landlord **ensure the tenant vacates the premises expeditiously**?

Topics Covered

5. How can the landlord be **compensated** for the delay in refusing to vacate the premises?
6. What are the **essential terms** which must be inserted in a tenancy agreement?
7. How have **other countries** dealt with landlord-tenant matters amidst Covid-19? – An overview of the Singapore & UK approach

1. Force Majeure



1. Force Majeure

- Covid-19/MCO is not an automatic ground to defer paying or reduce rent
- Depends on whether there is a “**force majeure**” clause in the tenancy agreement.
- “**Force majeure**” = unforeseeable circumstance which renders party’s obligations impossible to be performed (Example: natural disasters, fires, acts of God, war, strikes, etc.)
- The “**force majeure**” clause will gives guidelines to parties on what to do in the event of a “**force majeure**” event (Example: suspension of rental for such duration, termination of tenancy, etc.)

Does the tenancy agreement have a “force majeure” clause?

Yes

You need to check the wording of the “force majeure” clause on whether it covers pandemics OR Government action in addressing pandemics (eg: “pandemic”, “disease”, “government action”, etc.)

Yes

- You need to check what are the remedies for a “force majeure” event (eg: suspension of rent, termination of tenancy, etc.) and deal with it accordingly

No

- You may nonetheless argue that it covers pandemics (not tested in Courts yet)
- Alternatively, you may rely on the doctrine of frustration (difficult)

No

- You may rely on the doctrine of frustration
- Frustration: a change in the circumstances rendering a contract legally or physically impossible to perform
- Elements:
 - 1) Change must not be provided for under the agreement;
 - 2) Change must not be self-induced; and
 - 3) Change must render the contract performance of radically different, such that it is unjust to enforce the original promise
- Can only apply in very narrow limits. A contract is not frustrated merely because it becomes difficult (or more expensive) to perform. Threshold: impossible

2. Rental Deduction?



2. Rental Deduction?

- If no “force majeure” clause or cannot invoke frustration, can tenant insist on rental deduction? General Law: Cannot
- But parties are always encouraged to negotiate. Factors to consider for landlords/tenants:
 - 1) Long-term relationship with tenant
 - 2) Difficulty in finding alternative tenant in this climate
 - 3) Arranging for deferment of rent payment to a later period, instead of deduction
 - 4) Arranging for an extension of the tenancy period

Non-Payment of Rent



Breach of Tenancy Agreement



Give Notice to Remedy Breach



Tenant Fails to Remedy Breach



**Recover Overdue Rent
Through a Court Action
(Tenancy Continues)**



**Recovery of Vacant
Possession of Premises
(Tenancy Terminated)**

3. Recovering Overdue Rent



3. Recovering Overdue Rent

- Landlord may seek remedy to recover overdue rent of up to 12 months under the **Distress Act 1951**.
- Landlord applies to the Court for a warrant of distress
- Once a warrant is obtained, the court will send a bailiff to seize the tenant's assets (subject to certain exceptions)
- Upon seizure, the bailiff issues a notice to the tenant, the amount due and that the property will be sold unless the arrears are settled within 5 days.
- If tenant fails to settle the amount due, the property seized will be sold by public auction and the proceeds will be channelled to the landlord.

4. Recovering Vacant Possession



4. Recovering Vacant Possession

- Can landlords exercise the remedy of self-help? (Entering by force, changing locks, move out tenants' belongings, etc.)
- Section 7(1) of the Specific Relief Act:

Recovery of specific immovable property

7. (1) Subject to subsection (2), a person entitled to the possession of specific immovable property may recover it in the manner prescribed by the law relating to civil procedure.

(2) Where a specific immovable property has been let under a tenancy, and that tenancy is determined or has come to an end, but the occupier continues to remain in occupation of the property or part thereof, the person entitled to the possession of the property shall not enforce his right to recover it against the occupier otherwise than by proceedings in the court.

4. Recovering Vacant Possession

Rasha Utara Enterprise & Makami Enterprise v. Majlis Perbandaran Sungai Petani (MPSP) [2017] 1 LNS 932, High Court

- Tenants are restaurant owners & bread shop owners
- The tenancy ended on 1.4.2013. Landlords requested tenants to vacate premises by 30.4.2013.
- Landlords again requested tenants to vacate premises on December 2013.
- On 26.1.2014, landlords entered premises and removed all tenants' belongings.
- High Court held: Landlords' action was unlawful and has to pay RM45,000 in damages

What Can Landlords Do Then To Recover Vacant Possession?

- Apply for a **Writ of Summons**. It is possible to apply for a summary judgment to expedite the matter. Once a judgment in favour of the landlord is obtained, he/she should serve it to the tenant.
- If the tenant is still adamant from moving out, the landlord must next obtain a **Writ of Possession**.
- Once a Writ of Possession is secured, a court bailiff will then remove the tenant from the premises and secure it for the landlord.

5. Compensation for Delay in Vacant Possession



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- Landlords can claim double rent under Section 28(4)(a) of the Civil Law Act 1956 for the duration which the tenant continues to occupy premises after tenancy has been terminated.
- Objective of the double-rent provision is to enable the landlord to recover damages for losses suffered.

5. Compensation for Delay in Vacant Possession

Rohasassets Sdn Bhd v. Weatherford (M) Sdn Bhd & Anor [2020] 1 MLJ 557, Federal Court

- Tenant rented 3 floors, whereby tenancies would end on March 2009, April 2009 and January 2011 respectively
- Negotiations on extension of tenancies started before the tenancy and continued after that. In the exchange of letters, landlord always reserved right to claim double-rent
- When negotiations failed, landlord on 1.10.2011 issued notice for tenant to vacate by 31.10.2011 (1 month).
- Tenant moved out on 31.10.2011.
- Landlord then filed suit to claim double-rent for 2009-2011 period

5. Compensation for Delay in Vacant Possession

Federal Court held:

- The landlord cannot claim double-rent for the 2009-2011 period because there was tacit approval for tenant to continue occupying
- Landlords' reservation of rights to charge double rent during the period of negotiations was neither here nor there. The landlord did not at any time ask the tenants to vacate the premises.
- To entitle the landlord to charge double rent, there **had to be a failure or refusal by the tenant to give up possession after being told to do so.**
- Federal Court however granted double-rent for the 1.10.2011 to 31.10.2011 period

Practical Tips To Obtain Vacant Possession Without Going to Court

- Offer to cover a part or the whole of the logistics costs
- Send Notices of Demand + claim for damages & double-recovery of rent from the ex-tenant
- Send a letter from your lawyer to pile on pressure on the ex-tenant



6. Essential Terms in a Tenancy Agreement

to recover the balance of any rental owing under the terms of this lease.

Lessee(s) shall be given seven (7) days notice of any default or breach.

16. **BIRTHDAY CAKE:** Lessor shall provide birthday cake for Lessee(s) on the weekend closest to their birthdays, which are June 7th and February 17th. Vanilla cake is not acceptable.

17. **USE AND ENJOYMENT:** Lessee(s) shall have the full use and

General Terms:

- Rental Payment, including the method of payment & the dateline to pay every month
- Period of the Tenancy
- Rental and Utility Deposits

Terms to Look Out for if You Are a Landlord:

1. The tenant has to maintain any fixtures or fittings in the premises in good condition
2. Whether the tenant is allowed to make alterations or additions to the premises, and if so, what are the limits and should there be prior consultation with the landlord?
3. The tenant is prohibited to use to use the premises for other purposes e.g.: a residential home used for commercial activity.

Terms to Look Out for if You Are a Landlord:

4. The tenant is prohibited to assign or sub-let the premises
5. The landlord's right of entry and inspection of the premises (with adequate notice beforehand)
6. At the end of the tenancy, for the tenant deliver vacant possession of the premises in a clean and tenantable condition

Communicate Effectively With Your Lawyer!

1) Beware the “contra proferentum rule” & the general rule to construe against landlords

- If a document contains an ambiguity, it is to be construed adversely to the party who prepared it
- In cases of doubt contracts of tenancy are to be construed against the landlords

2) Beware Section 91 & 92 of the Evidence Act 1950

- General rule: If terms are reduced to the form of a document, no external evidence shall be given to modify the terms of the document

Terms to Look Out for if you are a Tenant:

1. The landlord has to maintain structures such as roofing, walls, water piping & electrical wiring
2. The tenant's right to peaceful enjoyment of the premises without unnecessary interference and nuisance
3. The option for renewal at the end of the tenancy, and if so, whether the tenant has priority over others

Breach of a Tenancy Agreement

1. Tenant fails to pay rent on time/at all
2. Tenant fails to maintain any fixtures or fittings in the premises in good condition
3. Tenant makes unauthorised alterations or additions to the premises
4. Tenant uses the premises for other purposes
5. Tenant sub-lets the premises
6. Tenant fails to deliver vacant possession of the premises in a clean and tenantable condition

Terms to Regulate Disputes:

1. Either party to give notice to the other if any terms of the agreement are breached
2. The complaint must be remedied within a specified period
3. If complaint is not remedied, the aggrieved party has the right to terminate the agreement
4. In the case of the landlord, he may deduct or forfeit the Rental and Utility Deposits accordingly

Landlord-Tenant Issues: The Singapore Experience



Landlord-Tenant Issues: The Singapore Experience

Singapore COVID-19 (Temporary Measures) Act 2020

- Landlords cannot (1) terminate the tenancy due to non-payment of rent or other moneys; (2) exercise right of re-entry or forfeiture
- Requirements:
 - (a) non-residential tenancies;
 - (b) tenancies/leases entered into or renewed before 25 March 2020;
 - (c) moratorium in force for a period of 6 months from 20 April 2020;
 - (d) tenant must serve notice to landlord and show that inability to pay is caused materially by Covid-19 (landlord can challenge such notice before a Registrar)

Landlord-Tenant Issues: The Singapore Experience

- Landlords are required to pass on to tenants any property tax remissions/rebates granted. Can be paid to the tenant in lump sum or in instalments, and it may be offset against rent payable by the tenant to the landlord.

Landlord-Tenant Issues: The Scottish Experience



Landlord-Tenant Issues: The Scottish Experience

Coronavirus (Scotland) Act 2020

Extended notification period for vacant possession:

- (a) 28 days** – Ground 10 (tenant is no longer occupying the property)
- (b) 3 months** – Grounds; 1 (landlord selling); 4 (landlord moving in); 5 (immediate family member or landlord moving in); 13 (criminal behaviour of tenant); 14 (anti-social behaviour of tenant); 15 (tenant association with someone guilty of criminal or anti-social behaviour); 16 (landlord ceasing to be registered); 17 (HMO license revoked)

Landlord-Tenant Issues: The Scottish Experience

(c) 6 months – Grounds; 2 (lender intends to sell); 3 (refurbishment); 6 (change of use); 7 (required for religious purposes); 8 (tenant is no longer an employee of landlord); 9 (supported accommodation); 11 (breach of tenancy); 12 (rent arrears); 18 (overcrowding notice).

Thank you



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