

Coronavirus (COVID-19) considerations for Cayman Islands commercial landlords and tenants

Service area / [Property Law](#)

Location / [Cayman Islands](#)

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It's the topic that is impossible to avoid – the coronavirus (COVID-19) outbreak and its implications on every aspect of public life.

The Cayman Islands Government's total lockdown of the Islands and its earlier order shutting down bars and restaurants (save for takeaway or delivery), shops selling non essential goods, gyms, spas and the cinema will have a profound impact for many local businesses, particularly those in the hospitality and retail sectors.

Whilst the UK and other governments are currently reviewing emergency legislation to deal with the COVID-19 pandemic, we will see over the coming weeks what is proposed in relation to commercial leases. It is possible (but unlikely) that the Cayman Islands may follow the UK with emergency legislation designed to provide a statutory moratorium on a landlord's ability to terminate a commercial lease for non-payment of rent.

Whatever emergency measures may be introduced, the following note provides a brief summary of some key areas that will need to be considered in relation to commercial leases and associated agreements over the coming months.

Force majeure

Many commercial contracts have "force majeure" clauses. These clauses provide parameters for when a party may terminate the contract and/or be excused for failure or delay in complying with the terms of the contract due to a specified event. The contract will usually specify which events constitute force majeure events but depending on the drafting, a

pandemic may not necessarily be covered within the force majeure provisions.

It is unlikely that most commercial leases in the Cayman Islands will contain an express force majeure clause (and so the parties will not be able to rely on such an option in the event COVID-19 leads (directly or indirectly) to breaches of the lease) but even if force majeure provisions are included, they may not cover COVID-19 or, if they do, they will not provide relief for the tenant's inability to pay rent. However force majeure clauses are regularly included within agreements to lease (commonly known as "Pre-Lets") where parties are committed to take a lease once a building has been constructed or other works completed. Landlords and developers with ongoing development projects should review such force majeure provisions carefully, especially if the COVID-19 pandemic is likely to have an adverse effect on the completion of their development.

Rent suspension/abatement

Most commercial leases will contain provisions allowing for rent to be suspended in circumstances where the premises have been damaged or destroyed by an insured risk, and it has become increasingly common for this to be extended to also include any damage by uninsured risks.

It is almost certain that such clauses would not be triggered by an inability to use the premises due to the COVID-19 pandemic as it is highly unlikely that any physical damage or destruction of the premises will arise due to COVID-19. However, some rent suspension clauses may be drafted more broadly, to allow for rent to be suspended in circumstances other than where the premises are damaged or destroyed by an insured risk.

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Both landlords and tenants will need to carefully review and consider the rent abatement clauses within their commercial leases. In the current climate, it is also important for landlords to review their buildings insurance and rent loss policies to determine if disease or epidemics would be covered as an insured risk. Equally tenants should be reviewing their business interruption policies, although it will be too late to change them if they have been precluded from occupying their premises.

Unpaid rent

Commercial leases will usually contain express provisions setting out circumstances in which a landlord may take steps to formally cancel the lease and to seek an order for vacant possession. Usually this will include where the rent remains unpaid for anywhere between 7 – 30 days after falling due. In this case, the landlord will normally be entitled to terminate the lease and take steps to cancel the lease before the Grand Court and obtain an order for vacant possession of the premises. In those cases where the tenant or anyone claiming through or under the tenant is not in occupation and carrying on its business, the landlord may cancel the lease by re-entering the premises and changing the locks.

A tenant may only be evicted by order of the Court. Although there is no legislation on this point, it is possible that the Court's response in light of the difficulties presented by COVID-19 would be to adjourn all eviction proceedings to an unspecified future date.

If a landlord decides to apply for cancellation of the lease due to non-payment of rent, they must carefully consider the cost and other implications of issuing such proceedings. It is likely that the Court will be sensitive to the extraordinary economic circumstances in which many businesses may suddenly find themselves when requesting relief.

Notwithstanding that a tenant may have missed a rent payment, thereby allowing the landlord to issue proceedings to terminate the lease and evict, landlords will need to consider carefully the potential adverse publicity that may arise where long established local businesses are evicted from premises – and in addition should consider carefully the likelihood or otherwise of finding an alternative tenant to occupy and operate from the premises once matters return to normality.

Landlords may have other options where rent has not been paid by the tenant, such as drawing on a rent deposit or making a claim on a guarantor (if there is one). The terms of such deposit agreements and guarantees would need to be considered carefully.

The best advice for any tenants who are struggling to pay their rent is to speak to their landlord as soon as possible to discuss if any alternative payment or other arrangements can be agreed (see our 'practical steps' section below).

Turnover rent

Leases containing turnover rents will very likely be significantly impacted, either due to a reduction in turnover or, in cases where the tenant has had to cease operating, no turnover at all. As always, the impact will depend on the drafting of the turnover provisions within the lease.

For example, there may be a clause that, where the premises are closed for trading by the tenant on a trading day during the turnover period, the turnover for that day will be deemed to be equivalent to the average daily turnover for those days that the premises were actually open for trading during the turnover period. Often, however, this deemed turnover will not apply where the premises has been closed for reasons beyond the tenant's reasonable control (as would be the case if it was forced to close due to COVID-19), or by a force majeure event.

Without this deemed turnover, the inevitable result of reduced hours or closure will be lower turnover and, consequently, lower turnover rent, but many turnover provisions will likely have a base minimum payable, regardless of actual turnover.

Keep-open requirements

Certain commercial leases for retail premises may have keep-open clauses, whereby the tenant must keep the premises open for certain times of certain days. Should the tenant close the premises of its own volition, it will likely be in breach of such obligations. Even if closing due to government requirement, on the face of it the tenant would still be in breach of this clause, and most leases provide a right for the landlord to cancel the lease in the event of breach by the tenant of its obligations.

However, all leases will usually contain a requirement to comply with all laws and regulations. Where compliance with law would put the tenant in breach of another covenant in the lease such as a keep-open clause, compliance with law would of course generally be expected to take precedence.

Building access and security

Where the landlord has closed the building due to a government order, it will be difficult for a tenant to argue that the landlord is in breach of its obligations to allow the tenant quiet and peaceful enjoyment of the premises. In such circumstances, the tenant would be required to continue paying rent unless this is covered by the rent suspension provisions in the lease (see above), or otherwise agreed with the landlord.

Where a building is forced to close, it is essential that it is safely secured. Even where this responsibility falls on the tenant under the lease, the landlord should ensure that it has been properly done so that any insurance policy is not invalidated. It is also important to notify the insurer if the premises will be left unattended for any period of time.

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Services and cleaning

In a multi-let building or a building where the landlord provides the usual services, it is likely that the responsible landlord will arrange for heightened cleaning services in order to minimise chances of contagion. Common steps are to schedule more frequent cleaning of door handles, light switches, lift buttons and other high-usage fixtures and fittings, as well as providing hand sanitizer and cleansing wipes.

As to who will bear the cost of such additional services, this will be determined by the drafting of the CAM (Common Annual Maintenance) charge provisions. Many CAM charge provisions will allow for costs incurred in compliance with the requirements of government and other authorities. Additionally, it is common for inclusion of a “sweeper clause”, often expressed to cover any additional services carried out by the landlord in the interests of good estate management, and it would be hard to argue that additional cleaning during a pandemic would not fall within this definition.

Break notices

Some commercial leases contain break clauses, which can be exercised by the landlord, the tenant or both (if a mutual break clause). It is likely that over the next 12 months some tenants may look to exercise any break option available in an effort to mitigate the effect of the COVID-19 pandemic. Tenants or landlords intending to exercise a break option must read the lease provisions carefully to make sure that any attempted breaks are not frustrated by incorrect or out of time service of the break notice, or by the tenant not giving vacant possession.

Practical steps

Landlords and tenants would be advised to start having open dialogues and to work together to find sensible and practical solution to ensure that tenants’ businesses can survive in the long-term whilst at the same time protecting landlords’ income-streams. It is essential that such commercial negotiations start as soon as possible. Some concessions which might be considered include:

1. deferring the rent (in whole or in part) for a temporary period, perhaps coupled with an extension of the term to assist with the payment of deferred rent amounts; and/or
2. repaying tenants any overpaid CAM charge at the end of the CAM charge year following reconciliation, rather than deduct this from future instalments.

Once terms are agreed, it is important that any side letter or forbearance agreement is precisely drafted to ensure that the lease itself is not inadvertently varied or obligations waived, and to ensure all relevant aspects are carefully considered. Landlords must also consider their own obligations to lenders, insurers and any superior landlords.

The Property Law Group at Carey Olsen can assist with the negotiation and drafting of rent concessions and the preparation of necessary and unambiguous documentation to properly record and implement any concessions or forbearance that may be agreed.

For further information in the first instance please contact us.



FIND US

Carey Olsen
PO Box 10008
Willow House
Cricket Square
Grand Cayman KY1-1001
Cayman Islands

T +1 345 749 2000

E cayman@careyolsen.com



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