

Coronavirus and Commercial Property in Gibraltar

This article explores some key issues relating to the impact of the outbreak of coronavirus (COVID-19) on the commercial property sector in Gibraltar.



The provisions of commercial lease agreements that have already been entered into will generally govern the obligations and responsibilities of landlords and tenants. However, common law doctrines and prudent business practices require parties to act reasonably in the face of the unprecedented issues presented by COVID-19.

- **Compliance with lease obligations** - Many leases will require rent payments to be made in advance on a quarterly or monthly basis and, unfortunately, they do not permit tenants to withhold rent. It is important to review the provisions of existing leases in light of adverse impacts on businesses as a result of COVID-19 which may lead to a breach of the lease provisions. Such a breach could entitle the commercial landlord to exercise its right to seek damages or forfeit the lease (albeit relief from forfeiture may be available from the Court).
- **Rent reduction** - For landlords and tenants alike, any agreement relating to a rent reduction or any flexibility in payment of rent should be carefully documented to avoid any unintended consequences in respect of the rest of the provisions in the lease agreement i.e. the inadvertent release of a guarantor.

Pursuant to the Civil Contingencies Emergency (Coronavirus) (Catering and Other Establishments) (Construction Shipbuilding and Repair) Regulations 2020, the following commercial premises in Gibraltar must at all times remain closed to any member of the public: (i) restaurants (ii) bars (iii) cafeterias (iv) night clubs (v) gyms (vi) retail shops (together 'Relevant Sectors') excluding inter alia (i) supermarkets, grocery stores, bakers, confectioners, butchers, fishmongers, health shops and pharmacies (ii) petrol stations, port and bunkering services (iii) wholesalers or other businesses providing supplies to the above and, HM Government of Gibraltar has also announced that gaming and financial services sectors will be excluded.

- Where HM Government of Gibraltar is the direct landlord for businesses in the Relevant Sectors, all commercial rents payable in respect of the second quarter of 2020 will be waived.

The following measures have also been announced with a view to encourage commercial landlords to provide flexibility during this challenging period to tenants in the Relevant Sectors:

- Commercial landlords will be required to pay tax at a rate of 50% on the gross rent without deductions where they do not waive at least 50% of the rent due in the second quarter of 2020 for tenants in the Relevant Sectors.
- However, these provisions will not apply where commercial landlords agree to waive the rent due in the second quarter of 2020 and extend the commercial lease by a further three months.
- Tenants in the Relevant Sectors who are not afforded flexibility by their commercial landlords will be allowed a deduction against their tax liability of three times the amount of rent paid.

Here are other key issues to consider:

- **Insurance** - Landlords may seek to claim under loss of rent insurance policies. It is important to check the language of the policy to determine whether losses related to COVID-19 can be claimed.
- **Rates and utilities** - HM Government of Gibraltar has announced that all business rates for the second quarter of 2020 will be waived for all businesses. Payments for water and electricity charges incurred by businesses in the Relevant Sectors for April 2020 will be deferred, and instead payable over the next 12 months.
- **Enhanced cleaning** - Tenants are usually responsible for cleaning the demised premises but it may be appropriate for landlords or managing agents to modify rules and regulations to require tenants to perform enhanced cleaning. Where a landlord is responsible for cleaning, the landlord's ability to pass on to the tenants any additional costs for enhanced cleaning will be governed by the service charge provisions in the leases. Typically, such provisions will include a "reasonableness" qualification for costs which are to be passed on to tenants. Some leases may even have a cap on the amount which may be passed on to the tenants.
- **Potential closures** - Certain retail leases may require tenants to keep the premises open and operating for business, and the specific language of such clauses and other lease terms will need to be reviewed from time to time in light of specific requirements of any conflicting guidance issued by the health, regulatory and governmental authorities in relation to any temporary lock-down as may be relevant. In circumstances where premises are closed by direction of HM Government of Gibraltar, landlords will not have recourse to the tenants in respect to any such covenant.
- **Construction** - If construction works are contemplated as part of a new commercial lease arrangement, consider the impact that may be caused by COVID-19 on timing. Travel bans and quarantines may result in scarcity of materials, reduction in work force and/or delays in approvals. For any construction projects that are underway, it is worthwhile reviewing the force majeure provisions and implications this may have in respect of the commercial lease obligations.
- **Business continuity** – Tenants of office premises could consider entering into distinct arrangements for short term occupation of separate office premises to isolate groups of employees from one another to ensure business continuity. Any such arrangement should be carefully drafted to ensure that it does not attract statutory security of tenure.

This article does not constitute legal advice nor is it intended to be comprehensive. Our ability to assist clients during these challenging times remains unaffected. Please feel free to contact us for legal advice relating to commercial property in Gibraltar.



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