

COVID-19 and Commercial Leases: Options for Landlords and Tenants

*James Woods and Mandeep S. Minhas **
Hamilton Duncan, Surrey, British Columbia

As businesses across British Columbia are being forced to limit or cease their operations due to efforts to prevent the spread of the COVID-19 virus, many business owners suddenly find themselves facing challenges they could not have foreseen. Landlords and tenants may wonder what options they might have under their leases and at law if current obligations cannot be met.

Force Majeure

Commercial leases typically contain a force majeure clause. A force majeure clause may apply when an unforeseeable event outside the control of either party makes the performance of the contract impossible. If a force majeure clause is triggered, it may relieve both parties from their duties for the duration of the event.

Depending on how a force majeure clause is worded, the closure of a business by government order as the result of a pandemic may or may not be contemplated as a force majeure event. However, a downturn in business will not be considered unforeseeable. Also, even if a force majeure clause is triggered, the tenant may still be obligated to pay rent, based on other provisions of the lease.

Frustration of the Lease

Frustration occurs when an outside event that is not the fault of either party makes it impossible to perform a contract. If a contract is frustrated, the parties are relieved of any further obligations.

The closure of a business by government order to slow the spread of the COVID-19 virus may be considered a frustrating event. Much may depend on the duration of the order and how long the business must remain closed as a result. As many businesses in the Lower Mainland were ordered closed in recent days, it is likely too soon to determine if a tenant whose business was closed by the order could argue frustration. Also, as with force majeure, it should be noted that courts will not consider a foreseeable event such as an economic downturn as frustration of a lease.

Rent Relief or Abatement Agreements

A tenant who anticipates being unable to pay rent could ask a landlord for a rent relief or abatement agreement. These agreements can take many forms, such as:

- A rent deferral to a later date, with payments by lump sum or increased rent over time;
- A rent forgiveness for a period of time;
- A conversion of overdue rent to a loan to be repaid over time.

These agreements may offer a win-win in that they allow a tenant the flexibility they need to get through a cash crunch and offer a landlord some assurance that they can continue to meet obligations to their lender.

Remedies available to a landlord for failure to pay rent

If a tenant defaults in their obligation to pay rent, a landlord may choose one of five remedies:

- Insist on the performance of the lease and sue the tenant for rent owed each time it comes due;
- Terminate the lease and repossess the premises and sue the tenant for rent owed or losses resulting from the tenant's breach to the date of termination;
- Take possession of the premises and re-let the property. There must be a provision in the agreement which allows the landlord to re-let the property; or
- Terminate the lease with notice to the defaulting tenant that damages will be claimed for losing the benefit of the lease over its unexpired term. A landlord may or may not be required to mitigate their damages.
- Seize goods left on the premises by a tenant with the intention of selling the goods sold in order to pay the amount owed.

A landlord is only entitled to seek one of these remedies. For example, they cannot terminate the lease, start an action for damages, and seek further payments of rent.

Many leases also provide for a personal guarantee or indemnity by a principal of the business, and landlords and tenants should be aware of any such rights and obligations.

Before terminating a lease, a landlord should consider whether a court might find it just and reasonable to exercise its equitable jurisdiction to grant relief from forfeiture, particularly in extraordinary circumstances such as these.

Contact Us

We are here to help you through this trying time, and encourage you to contact us for legal advice on landlord-tenant issues, whether covered here or not.



James Woods is an associate at Hamilton Duncan and one of the solicitors in our corporate commercial law practice group.



Mandeep Minhas is an associate at Hamilton Duncan and a member of our commercial litigation practice group.

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