Temporary Relief for Tenants in Singapore during the COVID-19 Pandemic – Part 1

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It is impossible to exaggerate the significance of landlord and tenant law in Singapore. The steady accretion of land to ultimate Government ownership since the passing of the Land Acquisition Act in 1966 has inevitably reduced the amount of land held in fee simple.

More to the point, almost all businesses in Singapore, whoever owns and operates them, rent their business premises. This is most obviously the case in respect of industrial premises rented from the Jurong Town Corporation, but it is equally true of businesses operating in retail areas such as Orchard Road, and offices in the Central Business District. For a variety of reasons, it just makes sense to rent.

The COVID-19 pandemic has had a devastating effect on the economy across all sectors, probably nowhere more dramatically than in the retail, entertainment and hospitality sectors. You did not need to be a business guru to understand this at the height of the Circuit Breaker. All you needed to do was go for a walk in or drive through one of Singapore's traditionally busy shopping or business areas. Footfall wasn't simply reduced; for obvious reasons it had effectively vanished completely.

As in many countries, the Singapore Government wasted no time in providing relief for those affected by the pandemic. The COVID-19 (Temporary Measures) Act 2020 (Act No. 14 of 2020) (the "original Act"), was passed by Parliament in a single day, 7 April, and came into force on various dates in April (apart from Part 4, dealing with the conduct of meetings, which was deemed to come into effect on 27 March.

The original Act tackled the myriad problems suddenly thrust upon Singapore's business community from a variety of angles.

The most significant provision is section 5, which along with the rest of Part 2 (ss 4-19) came into effect on 20 April Section 5 is aimed at preventing strict enforcement of contractual rights in relation to "scheduled contracts", where performance has been rendered impossible by the pandemic, if that obligation had arisen on or after 1 February 2020 (s 5 (1)(a)).

Under Part 3 of the original Act, which also came into force on 20 April, statutory benchmarks for insolvency procedures, in respect of both individual and corporate debtors, and with regard to both the value of indebtedness and timing of response, were amended in favour of the debtor. Being of general

application this is clearly of relevance to tenants of both commercial and residential properties who are facing financial difficulties.

There are specific provisions, set out in sections 6 and 7 respectively, dealing with issues arising in the construction industry and the events and tourism sectors.

In the context of landlord and tenant law, it is section 5 that is important because the Schedule to the Act includes among the list of "scheduled contracts", "a lease or licence of non-residential immovable property". (Note, however, that the original Act does NOT apply to a lease or licence of such property entered into or renewed (other than automatically or in exercise of a right to renew) on or after 25 March 2020 (s 4). Under section 5 if (for the purposes of this paper) a tenant of non-residential property is unable, because of the pandemic, to perform an obligation under the contract, and has served a notification for relief under section 9 on the landlord , and any surety, if relevant, then the landlord cannot take any of the actions described in subsection (3) of section 5 in relation to the tenant's inability to perform until (a) the expiry of the " prescribed period" (6 months from 20 April 2020 to 19 October 2020 which may be extended or shortened for a period determined by the Minister for Law or the Minister for Finance where relevant) , (b) the withdrawal of the notification, or (c) the determination by an assessor that the matter was not one to which section 5 applied.

A word about the notification / assessment process. Section 9 enables a tenant who intends to seek relief under section 5 to serve a notification to that effect, using the form prescribed by the Ministry of Law. The landlord can respond by applying to the Registrar of assessors for a determination by an assessor as to whether section 5 applies. If the assessor concludes that it does apply - i.e., that the tenant is unable to pay the rent and that this inability is caused by the pandemic - he may make "further determinations in order to achieve an outcome that is just and equitable in the circumstances of the case", after taking into account the ability and financial capacity of the tenant to pay the rent (s 13(2)(a). Such further determinations include requiring the tenant to "pay any sum of money to discharge any obligation under the contract", i.e., the rent or at least part of it (s 13 (3)(a) , or overturning the re-entry or forfeiture of non-residential property effected in breach of section 5(2) (s 13 (3)(b). After an amendment to the original Act, an assessor is also to require an amount of deposit taken under the contract to be offset against any amounts owing (s 13 (3)(e)(security deposits paid by tenants to landlords are frequently a bone of contention but that is another story). An assessor's decision is final and binding (s13 (9),(10).

It can be seen that original Act took a somewhat cautious and essentially defensive approach to the position faced by tenants. In Singapore, as in most if not all common law jurisdictions, landlords have a battery of remedies to deploy against a tenant who fails to pay, or delays in paying rent. The landlord can sue for the unpaid rent, or , subject to certain conditions , re-enter and forfeit the lease , i.e., put an end to it altogether, or , in some ways most effectively and most humiliatingly of all, levy distress , i.e., get a court order to seize and sell the tenant's personal effects. These are the traditional weapons in a landlord's not inconsiderable armoury. The courts have considered them inadequate, so a more recent innovation has enabled a landlord to terminate a lease by acceptance of a repudiatory breach; it is not clear whether failure to pay rent would constitute such a breach. (The advantage of proceeding in such a way is that the landlord can terminate the lease and still claim damages for loss of future rent, subject to a duty to mitigate.)

Section 5(3) prohibits the commencement or continuation of an action in court or arbitral proceedings against a tenant for recovery of rent or anything else (sub-paragraphs (a) and (b), and the commencement of any type of insolvency proceedings (sub-paragraphs (e)-(i). Other actions specific to the landlord-tenant relationship that a landlord is prevented from taking under section 5(3) are the commencement of levying of distress or execution over the tenant's property, save with the leave of the court (sub-paragraph (j), the termination of a lease or licence for non-payment of rent (sub-paragraph (l)), and the exercise of a right of re-entry or forfeiture or similar right in relation to immovable property, presumably also on the grounds of non-payment of rent, although section 5(3)(m) does not actually say so.

There is some uncertainty raised by these sub-paragraphs. Starting with the point made about sub-paragraph (m), where a lease contains an express forfeiture clause, or is a lease registered under the Land Titles Act (Cap 157) the landlord can forfeit the lease for breach of covenant. For this purpose, tenant's covenants are divided into two categories: the covenant to pay rent, the exercise of the right of

forfeiture in relation to which is governed by section 18A of the Conveyancing and Law of Property Act (Cap 61) (the "CLPA") and all other covenants, the exercise of the right of forfeiture in relation to which is governed by section 18 of the CLPA. This is why the absence of a reference to non-payment of rent is important. It suggests that a landlord may be unable to exercise the right of forfeiture in relation to a breach of covenant other than the covenant to pay rent - for instance the covenant to keep the premises in good and tenantable repair - a "subject inability " (to use the Act's phrase) that might or might not be caused by the pandemic. The presumption must be, not unreasonably, that the main problem confronting tenants is going to be the payment of rent. If a tenant commits a flagrant breach of covenant, such as an unauthorised subletting, the landlord would be able to forfeit the lease.

Sub-paragraph (l) is slightly puzzling. In practice the only ways to terminate a commercial lease in Singapore before its agreed expiry date are forfeiture, which is expressly dealt with by subsection (m), and surrender. For obvious reasons a fixed - term lease cannot be terminated by notice. Surrender is a two-party process; it requires the landlord's consent. An ill-advised tenant may well think that the best solution to his problems is simply to abandon the premises. That is not so; unilateral abandonment does not constitute surrender. The obligation to pay rent continues. Abandonment might, however, constitute a fundamental breach, and the landlord could terminate by accepting that breach, as noted above. This does not seem to be prohibited by section 5(3).

It is not clear what benefit is provided by sub-paragraph (j): the levying of distress requires a court order anyway.

Section 13A, added as an amendment to the original Act, enables an assessor to make further determinations, e.g., to vary the original determination if there has been a material change of circumstances, grant a party an extension of time to pay a sum of money, or require the parties to attend before the assessor for a further review of the matter.

Mention should also be made of Part 6 of the original Act, which came into force on 22 April. This contains various provisions relating to property tax. Essentially any remission of property tax given to a property owner in response to the pandemic must be passed on to any lessee or licensee of the property (s 19(2)) either by way of a lump sum or instalment payment(s) or off-set against the rent (s 19(3)). The owner has to keep records of his compliance with this obligation for a period of 3 years after the expiry of the prescribed remission period (s 19(5)).

The approach in Part 2 of the original Act – as in comparable jurisdictions such as England and Wales and various Australian states - is cautious and defensive in that it is simply suspending the use of the landlord's remedies for the relevant period. Rent remains payable, even if it can't be paid. Some commentators have suggested that the "prescribed period" can be used to negotiate fresh terms. Really? What is the incentive for landlords to do that? The fact is that the best that could be said about the original Act was that it postponed the inevitable.

This point has been made already but is worth repeating: the legislation applies only to tenants and licensees of commercial property - it does not apply to residential property. The fact is, though, that the pandemic presents special problems for commercial tenants and licensees. Many businesses , especially in the retail, entertainment and hospitality sectors, effectively had to shut down during the first phase of the Circuit Breaker; even conventional businesses were virtually required to abandon their office premises , as employees were - and still are - urged to work from home. Meanwhile landlords sit back and collect rent or plan their strategy of recovery for when - if - the prescribed period expires. (Landlords whose properties are mortgaged are protected from enforcement by section 5.) That said, the new legislation certainly poses problems for landlords and it has been pointed out above that there is a degree of uncertainty as to precisely what a landlord's rights are during the prescribed period. Landlords should be wary of acting precipitately without obtaining legal advice.

In June, the Government introduced into Parliament the COVID-19 (Temporary Measures) Bill (the "Bill") to amend the original Act. The resulting legislation, expected to be in force by the end of July, contains a number of provisions relevant to the landlord-tenant relationship. The provisions described above remain in place, with some new provisions, in particular a proposed new section 7B, which deals with the situation of a tenant holding over after the expiry of a fixed term lease. This is a serious matter for a tenant because the law requires him to pay double rent. The proposed new provision states that the tenant will not be subject to this liability if his inability to vacate the property is caused by the pandemic.

The main thrust of the new provisions is to provide some rental relief to “eligible” tenants affected by the pandemic. These provisions are contained in the proposed new Part 2 A, with details presumably to be provided in forthcoming supplementary legislation.

The approach to rental relief is a nuanced one involving what is in effect a tri-partite partnership between Government, landlord and tenant. The purpose of Part 2 A is set out clearly in the proposed section 19A. It is “to mitigate the impact of COVID-19 events on eligible lessees and licensees of non-residential properties by providing them relief from the payment of rent and licence fees... in specified situations.”

The details of the rental relief framework will be provided in the second part of this article.

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