Impact of the Movement Control Order on Tenants

The Movement Control Order ("**MCO**"), which was first implemented on 18th March 2020 and extended until 14th April 2020, has created uncertainties and disruptions to most retail tenants as the MCO has affected their businesses due to closures of their operations except for "essential services", which are allowed to continue to operate during the outbreak of the coronavirus disease 2019 ("**COVID-19**") epidemic.

Since the MCO was put in force, it has greatly impacted business especially those concerned with rentals of warehouse, office space and shopping malls as most of them do not fall under the exception of "essential services".

Pursuant to **Regulation 5(1) of the Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020**, which states that:

> *"Any premises providing essential services may be opened provided that the number of personnel and patron at the premises shall be kept to the minimum."*

What will happen to tenants who fall under non-essential services and are directed to close their operations? What will happen when tenants eventually face financial difficulties and are not able to pay their monthly rental on time? We hope that the frequently asked questions ("**FAQs**") below can shed light on some of the foreseeable situations.

FAQ (1): Can tenants request for reduce or suspension of rental during the MCO?

Tenants will have to review their respective tenancy agreements on their rights to reduce or suspend rental due to unforeseen circumstances i.e. COVID-19. A standard tenancy agreement would include boilerplate clause for "*force majeure*", which may assist the tenant to request for a pro-rated reduction of rent or suspension throughout the MCO.

FAQ (2): What is a "*force majeure*" clause?

"*Force majeure*" clause is often drafted to set out events that is beyond the reasonable anticipation of the contracting parties including but not limited to acts of Gods, lockouts, riots, war, and others circumstances which are beyond either parties' control.[1] If your tenancy agreement consists of a "*force majeure*" clause, you will need to ensure that situations such as pandemic/epidemic, compliance with the Government or relevant authorities' orders/regulations are stated. It is then that it opens the doors for the tenant to bring up the issue of reduction or suspension of rental to the Landlord.

If the landlord refuses to reduce or suspend the rental notwithstanding clear provision in the tenancy agreement, the tenant may have to take the drastic step of terminating the tenancy prematurely. One may then argue that the landlord has breached its obligations of the agreement, resulting in the termination of the agreement by the tenant, which gives rise to claim for losses / damages by the tenant against the landlord.

[1] Malaysia Land Properties Sdn Bhd (formerly known as Vintage Fame Sdn Bhd) v Tan Peng Foo [2014] 1 MLJ 718

FAQ (3): Is COVID-19 considered as a "*force majeure*" event?

If a tenant is relying on the "*force majeure*" clause, the tenant bears the burden to prove that COVID-19 falls within one of the events referred to in the clause and that the tenant has been prevented, hindered or delayed from making payments.[2]

FAQ (4): What happens if the landlord refuses to reduce / suspend rental when a "*force majeure*" is established by the tenant?

The tenant may argue that the landlord has breached its obligations in the tenancy agreement, if the landlord refuses to reduce or suspend the rental notwithstanding the clear provisions in the tenancy agreement. The next possible step to be taken by the tenant is to terminate the tenancy before the tenancy expires. This may give rise to claim for losses / damages by the tenant against the landlord, subject to proof in court.

FAQ (5): What if the tenancy agreement does not have a *"force majeure"* clause?

If the tenancy agreement does not contain a "*force majeure*" clause, the tenancy agreement may be terminated based on the doctrine of frustration.

FAQ (6): What is the doctrine of frustration?

Frustration or legally known as doctrine of frustration is defined in **Section 57 of the Contracts Act 1950**:

> "*(1)An agreement to do an act impossible in itself is void.*
>
> *(2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*"

Simply put, the doctrine applies when the agreement is impossible or becomes unlawful to be carried out. As a result, such agreement then becomes void.

FAQ (7): How can a tenant prove doctrine of frustration?

Tenant must satisfy three (3) fundamental elements as follows:

(a) the event i.e. MCO must have been an event which was not provided for (in other words predicted by) in the tenancy agreement;
(b) the event that occurred must not have been caused by either party, i.e. the landlord or the tenant; and
(c) the event which is said to discharge the contractual obligations (e.g. payment of rental) must be such that renders it radically different from that which was undertaken by the tenancy agreement.

[2] Chitty on Contracts, 28th Edition Vol.1(p.273)

Tenants who wish to rely on the doctrine of frustration must bear in mind that the "event" must renders the contract ***impossible*** to be performed, and not merely difficult to be performed. The Federal Court in **Pacific Forest Industries Sdn Bhd v Lin Wen-Chih [2009] 6 CLJ 430** remarked that "*A contract does not become frustrated merely because it becomes difficult to perform. If a party has no money to pay his debt, it cannot be considered impossible to perform as it is not frustration.*" Thus, the burden is on the tenant to show such impossibility to perform its part of the agreement.

FAQ (8): What will happen to the tenancy agreement if the 3 elements are satisfied?

Upon fulfilling the three elements, the tenancy agreement will be rendered void. However, tenants may not wish to go so far as to invoke the doctrine of frustration to discharge the agreement. A better option for the tenants will be to negotiate with the landlord to reduce/suspend rental, defer payment of rental or even waive the late payment interest.

FAQ (9): What other avenues can be taken by a tenant to minimise the risk in breaching the tenancy agreement for non-payment of rental?

A tenant may consider the avenues provided below:

(i) Negotiate with the landlord and request for rental reduction or rental rebates. However, this is at the landlord's discretion whether to grant a reduction, if the tenancy agreement does not specifically spell out the tenant's rights. In fact, the Malaysian Shopping Malls Association encourages shopping mall owners to resort to a win-win situation with the tenants during this crucial period.[3]; or

(ii) Negotiate with the landlord to vary the existing terms in the tenancy agreement.

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[3] New Straits Times, 'Retailers seek govt intervention', published on 25 March 2020