

WHAT HAPPENS TO RENT UNDER THE LEASE?

Background to lease contracts in the era of COVID-19

Many thousands of business are having difficulties paying rent. Unless a “force majeure” clause exists in a lease contract, there are no grounds under commercial and retail tenancy laws for a tenancy to be ended or lessees be protected due to a viral outbreak. The general rule is that the lease and rent liabilities continue on and lessees do not escape liability. There are two general exceptions: -

1. A **force majeure** clause

“...excludes a party from liability for failure to perform that contract where that failure was due to forces, either natural or human, beyond the party’s control.”

Common examples might be earthquake, sabotage, natural disaster etc. Not all leases contain such a clause. Without such a clause in the lease, it won’t apply.

2. Doctrine of “**frustration**”

...where a contractual obligation has, without the default of either party, become incapable of being performed...when performance is impossible, rendered pointless, becomes illegal, or the outbreak of war.”

Frustration usually applies to the whole of the lease in general so the contract can never be performed. The doctrine of frustration is often modified by States such as *Frustrated Contracts Act 1978*, but trying to apply it a part of a lease for what is a temporary, albeit extended shutdown, might be very difficult.

Situation as at 27 March 2020

The Federal and State Governments are working to find a national response. In NSW for example, temporary measures are in place. For example, Part 11 of the *Retail Leases Act 1994 (NSW)* was amended to provide a mechanism for regulations relating to recovery, repossession and rights under a lease of retail premises. The regulation powers are to protect NSW commercial tenants for a period of 6 months unless revoked earlier, or a national framework is adopted.

No doubt the NSW Minister will be monitoring to see what happens and how retail lessees are treated in coming months.

Shopping centres owned by members of the Shopping Centre Council of Australia (the large ones such as Westfield, GPT, Stockland, etc) have been urged to cease all terminations due to breach

of lease for non-payment of rent, but that request is not uniform and does not account for rent defaults in thousands of non-member small centres and high streets.

SEND A LETTER TO YOUR LESSOR (DOWNLOAD AND “SAVE AS” TO YOUR WORD PROCESSOR)

- Obtain a copy of the lease. Click red area for letter > once downloaded, complete by overwriting the red text using your details and the lessor’s details as per the lease;
- Each lease requires a separate letter, to the lessor and the agent or centre manager;
- Date, post and email the original and/or copies of the letter if there are more than one lessors. You must keep a copy for your file. There is usually an address and a clause which deals with “notices” so it is delivered (or “served”) in accordance with the lease. If you hand deliver it, keep a note of when and to whom you handed the letter;
- If the lessor or agent calls you, make notes of the conversation, keep copies of all correspondence such as defaults notices, letters of termination, notices to remedy or lock - out.

Seek first to understand, then be understood

The COVID-19 outbreak really is unprecedented. Governments, landlords and tenants will be required to work together to sort out the commercial problems when the health threat has passed. Each business and lease are different and as the situation is changing by the week; it’s not possible to deal with all situations. Some businesses are benefitting from the viral outbreak, many are in great distress, some regions are suffering on top of bushfire problems.

Words of warning.

In previous severe downturns, many tenants were panicked into rent deferments, balloon payments, forced lease extensions, extra loans and top up security. These agreements often became impossible to meet as sales projections and profits took much longer to be realised after the downturn.

This guide is general business advice only. It should not be taken as specific legal advice. If there is a genuine retail lease dispute, seek advice or refer the matter to your State based mediation, Court or Tribunal. If you need help?

Stephen Spring
The Retail Lease Coach
retaillease.com.au
info@retaillease.com.au
+61 411 500 323