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COVID-19: FIVE ISSUES FOR COMMERCIAL LANDLORDS AND TENANTS TO CONSIDER

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A state of emergency has now been declared by the Province of British Columbia and the City of Vancouver due to the COVID-19 virus. While these are unprecedented times for everyone, these declarations may raise very complicated issues for commercial landlords and tenants. In this newsletter, we outline our top five issues for commercial landlords and tenants to consider when assessing their lease obligations in the face of a pandemic.

1. In any situation, our first piece of advice is always to READ THE LEASE!

Questions about when rent abates, if at all, are often answered in the lease. Any party wondering whether rent must be paid each month should first look to their lease terms.

2. Could the landlord's response to a pandemic constitute an interference with the tenant's right of quiet enjoyment?

Quiet enjoyment is the fundamental commitment made by a landlord in any lease. It protects a tenant's occupancy from "substantial interference" by a landlord. This point is key as the current pandemic, and the associated directions from government authorities, are not the *landlord* interfering with a tenant's occupancy. While it is possible a landlord may take steps that interfere with a tenant's quiet enjoyment, it is unlikely that directions given by government authorities will qualify as a breach of the landlord's covenant for quiet enjoyment. Many leases do, however, contain an express covenant for quiet enjoyment and it is possible that the provision may expand the scope of the landlord's obligation.

3. Is this a "force majeure"?

Force majeure clauses apply where performance has become impossible due to some event beyond the parties' control. A connection between the event and the party's inability to perform is usually key. Subject to the lease language, the fact an event specified in a force majeure clause has occurred is generally irrelevant unless that same event prevents performance of the contractual obligations. Leases typically define what events trigger the clause and, if it applies, the effect of those events. It is common for these clauses to cover actions by a civil authority and, less often, issues arising due to a pandemic or quarantine.

One must also consider whether the clause contemplates only a total inability to perform or if it stipulates what happens if the ability to perform is simply delayed by the extraordinary event that occurs.

4. Is the contract "frustrated"?

Force majeure, a term contained in a lease, and frustration, which does not require any lease term to apply, are often viewed as arising in similar circumstances. Where an outside event renders it impossible to perform a contract, that event may "frustrate" the contract and the legal effect is that frustration relieves the parties of any further obligations. Directions by a civil authority or a pandemic may be frustrating events, however, as with force majeure, one must ask whether the specific event is the reason the contract cannot be performed. Courts typically look for more than hardship or inconvenience before applying this doctrine.

5. Is there insurance or other relief available for the parties?

Landlords may have insurance coverage for rental loss and tenants may have coverage for business interruption. Review your insurance policy to understand the circumstances in which a claim can be made.

Further, the federal government has recently announced measures to support businesses during these uncertain times. Banks may agree to defer debt payment obligations. Avenues other than the lease may provide a form of relief if the current pandemic is creating financial hardship for either a landlord or a tenant.

If you have any questions relating to leasing matters please contact a member of our Commercial Leasing Real Estate Group or the author of this article, C. Nicole Mangan.