

## TENANCY

## LANDLORD'S RIGHTS AND REMEDIES UNDER TEMPORARY MEASURES FOR REDUCING THE IMPACT OF CORONAVIRUS DISEASE 2019 (COVID-19) ACT 2020 – A RIGHT DENIED?

**INTRODUCTION** In view of the ongoing COVID-19 pandemic, the Government of Malaysia has taken various steps to curb its impacts and/or effect particularly on the country's economy. It was noted that retailers have been experiencing a decline in sales which resulted and/or contributed to the default in the payment of debts. It was further reported that due to the implementation of the Movement Control Order (“MCO”), Retail Group Malaysia (RGM) estimates that a total of 209,000 stores that account for 61% of the total retail outlets in the country and 63.3% of the total retail sales were closed for the six weeks<sup>1</sup>. Only 126,000 retailers, comprising supermarkets, hypermarkets, mini-markets, convenience stores and pharmacies, have been allowed to stay open.<sup>2</sup> All the above have led to the passing of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 (“COVID Act”) on 22 September 2020 to mitigate the financial and social impact of COVID-19.

Since the publication of the COVID Act on 22 September 2020, there has been a rise in the number of disputes between landlords and tenants. Most disputes involve a similar issue i.e. non-payment of rental by tenants occupying non-residential immovable properties. During the implementation of MCO previously, several restrictions were imposed such as shopping centers were not allowed to operate etc. As a result of the restrictions imposed, a great number of existing tenants were affected in which they were not able to carry on business at their respective tenanted premises.

<sup>1</sup> Vasantha Ganesan (2020) 'How a Malaysian Covid-19 Act could help mall tenants and landlords who are in limbo', *Edge Weekly*, available at: <https://www.theedgemarkets.com/article/cover-story-mall-tenants-and-landlords-limbo> (Accessed: 6 December 2020).

With the current implementation of the Conditional Movement Control Order (“CMCO”) in the designated states, the retail sales at shopping centers have continued to decline due to, amongst others, patron(s)' fear of being exposed to COVID-19 as well as the standard operating procedures under the CMCO on social distancing which limits the number of customers in tenanted premises depending on the size of the same.

### THE EFFECT OF THE COVID ACT ON TENANCY DISPUTE INVOLVING NON-RESIDENTIAL IMMOVABLE PROPERTIES

In so far as tenancy disputes involving non-residential immovable properties are concerned, Part II of the COVID Act would be applicable where section 7 read with its Schedule therein provides that the inability of any party or parties to perform any contractual obligations arising from any of the categories of contracts specified in the Schedule due to the measures prescribed and/or taken under the Prevention and Control of Infectious Diseases Act 1988, such inability shall not give rise to the other party or parties exercising his or their rights under the contract.

In other words, if a landlord and tenant has entered into a tenancy agreement or a lease, and a tenant fails to perform its obligation under the contract such as to make due and prompt payment of rental for the period between 18 March 2020 to 31 December 2020, the landlord is prohibited under the COVID Act to exercise its rights provided in the contract, which would usually include but is not limited to:-

- (a) Termination of the tenancy agreement;
- (b) Forfeiture of deposit paid;
- (c) To regain possession of the tenanted premises from tenant; and
- (d) Commencement of a legal proceeding to recover all arrears and/or an order for vacant possession of the tenanted premises in the landlord's favour.

<sup>2</sup> Ibid.

Having said the above, there is a saving provision provided in **section 10 of the COVID Act** which states that any termination of contract, commencement of legal proceeding(s) and forfeiture of deposit etc. which occurred after 18 March 2020 to the date of publication, shall be deemed to have validly commenced and thus will not be caught under the provisions of the COVID-19 Act.

In the event any termination of contract, commencement of legal proceeding(s) and forfeiture of deposit etc. could not be carried out in time i.e. prior to the publication of the COVID Act, landlords would now be caught in a bind as such rights could no longer be invoked until the lapse of the operation period of Part II of COVID Act i.e. by 31<sup>st</sup> December 2020. There is also a real likelihood that the said period may be extended and consequently, affected landlords may find themselves unable to proceed with their contractual rights for an even longer duration.

Further, sections 29 and 30 of the COVID Act also provides that a warrant of distress issued under the Distress Act 1951 shall not include the distraint for arrears of rent for the period from **18 March 2020 to 31 August 2020**. In other words, it means that the warrant of distress should exclude the arrears for rental payable for the period from 18 March 2020 to 31 August 2020. Recovery of arrears of rent through distress proceedings during this period would be precluded completely.

## **AVAILABLE RECOURSE TO AFFECTED LANDLORDS**

Affected landlords may consider the options set out below.

### **(1) Tax Deductible Rental Relief**

Pursuant to the Economic Stimulus Package 3.0 (Rental Reduction for Business Premise), tax reductions are offered to landlords which offer reduction or reliefs of rental payments given between April 2020 to June 2020 of at least 30% to qualified small and medium sized enterprises (“SME”).<sup>3</sup> In this regard, landlords may consider offering rental reduction or rebates to tenants as a means and

<sup>3</sup> Please refer to the Economic Stimulus Package 3.0 (Rental Reduction for Business Premise) amended 15 June 2020.

<sup>4</sup> Section 9, Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020.

attempt to help affected tenants and at the same time ensuring income (despite being reduced income) for the landlords. However, there are no further updates on the said Economic Stimulus Package 3.0 post-June 2020.

### **(2) Mediation under COVID Act**

Alternatively, affected landlords may refer the disputes to the mediation center specifically set up by the Government of Malaysia<sup>4</sup> to assist in resolving disputes which fall squarely under Part II of the COVID Act. Having said so, the monetary threshold for such referral is fixed at a sum of not more than MYR300,000.00.<sup>5</sup> In so far as to the likelihood of success for parties to achieve an amicable settlement by way of such mediation, it still remains an untested settlement mechanism.

### **(3) Claims Outside the scope of COVID Act**

In addition to the options stated above, affected landlords ought to also consider seeking legal advice to determine whether its claims do fall squarely under Part II of the COVID Act or otherwise. In the event of the latter, such affected landlord may then proceed to invoke all its rights under the contract including but not limited to commencing a legal proceeding in court for recovery of rental arrears and in most cases and more importantly, the vacant possession of the tenanted premises.

### **(4) Preparation for Disputes Post COVID Act**

Even if the claims by affected landlords fall squarely under Part II of the COVID Act, it does not necessarily mean that no steps could be taken at all on the part of the landlords. In anticipation of the dispute escalating into a court proceeding later i.e. after lapse of the operation period of Part II of COVID Act, relevant correspondences ought to be issued at this juncture to put on record of all the breaches that have been committed by tenants thus far to strengthen the anticipated claims later.

<sup>5</sup> Jabatan Perdana Menteri (2020) *Pusat Mediasi COVID-19*, Available at: <http://www.pmc19.gov.my/> (Accessed: 6 December 2020).

## COMPARISON WITH OTHER

**JURISDICTIONS** To curb the impact of the COVID-19 pandemic, other countries such as Singapore and the United Kingdom have passed its respective COVID-19 legislations. As a comparison, the respective COVID-19 legislations and its date of enforcement/commencement in some other jurisdictions are as follows:-

No.	Jurisdiction	Covid-19 Legislation	Date of Enforcement/ Commencement
1	Singapore	Covid-19 (Temporary Measures) Act 2020 (“ <b>Singapore Covid Act</b> ”)	20 April 2020
2	England and Wales	Coronavirus Act 2020 (“ <b>UK Coronavirus Act</b> ”)	25 March 2020

Malaysia’s COVID Act which came into force much later can arguably be said to have been introduced a little too late to effectively deal with and/or curb the impact of COVID-19. It is worthy to note the differences between these legislations vis-à-vis landlords and tenants i.e. the right to enforce the tenancies, leases or licenses.

### Singapore

Generally, Singapore has provided a more comprehensive and detailed regime dealing with tenancies. The Singapore Covid Act assists businesses and individuals and provides for deferment of their contractual obligations such as rent payment in order to provide temporary financial relief during the pandemic period. Unlike the COVID Act in Malaysia, there are requirements to be met such as serving a notification of relief on a landlord etc. prior to invoking the protection or relief under the Singapore Covid Act<sup>6</sup>.

Further, in Singapore, an affected landlord may apply for an assessor to be appointed to determine whether the tenant is indeed entitled to the relief sought.

Unlike Malaysia’s COVID Act, there are no instances where a landlord may appoint an assessor to determine as to whether a tenant should be entitled to relief.<sup>7</sup> All in all, it appears that the Covid Act in Singapore provides a more stringent, and on the face of the provisions, an arguably fairer mechanism in place prior to a tenant invoking the provisions of the same to the detriment of a landlord. This differs greatly as compared to the COVID Act in Malaysia.

### England and Wales

The UK Coronavirus Act introduces a moratorium on forfeiture for non-payment of rent by commercial tenants during the pandemic period. Similar to Malaysia and Singapore, there is no provision in the UK Coronavirus Act which provides for the rent to be waived, and liability for rental payments remain upon the expiry of the moratorium period.

It is pertinent to note that the moratorium does not automatically apply to all the tenants. The moratorium provisions apply only to a "relevant business tenancy", defined as one falling within Part 2 of the Landlord and Tenant Act 1954. As spelt out in section 82 of the UK Coronavirus Act, the landlord may not bring or enforce proceedings/an action for re-entry or forfeiture against business tenants due to the default on rent payments. The moratorium on "rent" extends not only to annual rent, but also includes any sum which a tenant is liable to pay under its business tenancy (including insurance, service charge and interest).

Despite the above, the UK Coronavirus Act makes no mention on other possible remedies which may be taken by the landlord for recovery of rent unlike Malaysia, which has imposed a total prohibition on the landlord to enforce its contractual rights during the prescribed period. It is worthy to note that the UK Coronavirus Act also provides relief for residential tenants in order to protect them from being evicted which differs significantly from the COVID Act in Malaysia that provides relief only for non-residential tenants (see section 81 of the UK Coronavirus Act).

<sup>6</sup> Section 9, Covid-19 (Temporary Measures) Act 2020

<sup>7</sup> Division 4, Covid-19 (Temporary Measures) Act 2020

**CONCLUSION** 31<sup>st</sup> December 2020 is fast approaching and to date, there has been no news on whether an order will be made to extend the operation period of Part II of the COVID Act. Whilst many affected landlords may be against any extensions, such extension is arguably important, perhaps even necessary in order to minimise and help cushion the impact of the ongoing COVID-19 pandemic on businesses in Malaysia.

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