

MCKERCHER LLP BARRISTERS & SOLICITORS

MARCH 30, 2020

That COVID-19 will have an impact on commercial agreements of every type is at this point self-evident. In past weeks, governments have passed increasingly restrictive measures to limit the spread of the virus. In Saskatchewan, the most recent public health order indefinitely closed businesses ranging from swimming pools and ice rinks to tattoo parlours, bars and cafes. At this point, it is unknown when things will return to “business as usual.”

In light of the widespread and indefinite closure of many kinds of businesses, commercial landlords may have concerns, broadly, in relation to (1) their potential liability toward their tenants for complying with public health orders requiring them to restrict access to the leased property, and (2) their tenants’ obligation to pay rent when they are unable to use the leased property as a result of a public health order. This article gives a brief overview of some common commercial lease terms (both express and implied) and common law doctrines pertinent to those concerns.

Quiet Enjoyment and Constructive Eviction

Most commercial lease agreements will contain a provision whereby the landlord covenants to give the lessee “quiet enjoyment” of the leased property; if not, the term is implied by law. “Quiet enjoyment” means possession free from substantial interference of the landlord. If the interference is severe enough and of a long enough duration, a tenant might also claim that it has suffered a constructive eviction. Landlords may have concerns that complying with a public health order requiring them to restrict their tenants’ access to leased property will make them susceptible to a claim that the covenant has been breached. Courts have held, however, that government orders that have the effect of temporarily displacing tenants are not acts of the landlord and, accordingly, form no basis for a claim that the covenant has been breached. It seems unlikely that a tenant could claim a breach of the covenant on the basis that a public health order required it to suspend its operations, which may relieve landlords from potential claims for damages or rent abatement.

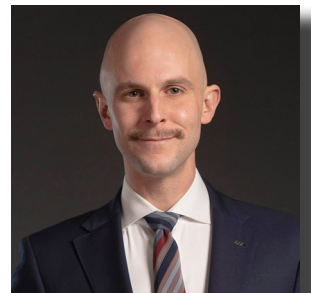
Other Common Commercial Lease Terms

There are several common commercial lease terms that landlords may be able to rely upon for additional protection against claims from tenants arising from a landlord’s response to, or the interference with possession caused by public health orders. It must, of course, be kept in mind that each contract is different, and the extent to which any lease provision will apply depends on its specific wording.

Rules and Regulations Clauses. Clauses of this sort will typically give the landlord the ability to enact and enforce reasonable rules and regulations relating to access, use, and occupancy of the demised premises. This may give a landlord the right to restrict access to the leased property in response to a public health emergency like the COVID-19 pandemic, provided the restrictions are reasonable, without breaching the lease agreement.



CHRISTOPHER J. MASICH
PARTNER, SASKATOON
DIRECT: (306) 664-1356
c.masich@mckercher.ca



ROBERT P. EMES
STUDENT AT LAW, SASKATOON
DIRECT: (306) 664-1336
r.emes@mckercher.ca

CONTINUED ON PAGE 2

SASKATOON
374 Third Avenue South
Saskatoon, SK S7K 1M5
(306) 653-2000 F (306) 653-2669

REGINA
800 - 1801 Hamilton Street
Regina, SK S4P 4B4
(306) 565-6500 F (306) 565-6565

mckercher.ca



Force Majeure Clauses. A force majeure clause postpones the contractual obligations of one or both of the parties on the happening of some triggering event while the event endures. In commercial leases, it is not uncommon for clause to operate to the sole benefit of the landlord, but it may temporarily excuse both parties of their obligations. To apply, the force majeure clause would likely need to reference some event like an epidemic, or potentially government regulation. It could provide an additional defence to a claim for the breach of the covenant of quiet enjoyment since the failure, or inability to perform the covenant would be a consequence of the force majeure event. However, if the clause postpones the obligations of both the landlord and the lessee, then the lessee's obligation to pay rent may be postponed for the duration of the force majeure event as well.

Exculpatory Clauses. A lease may provide that a landlord is not liable for injury to business or loss of income for either negligence or for breaching the lease agreement. A clause of this sort might assist a landlord defending against a claim for consequential damages on the basis that it breached the lease agreement by restricting access to the premises in response to COVID-19.

Compliance with Laws Clauses. The lease may obligate the lessee to comply with all laws, regulations or orders enacted by competent authorities, failing which it will be found to be in breach of the lease. A landlord may be able to rely on a clause like this to limit its liability or establish a counterclaim if it is in a position where it is required to enforce a building restriction owing to, for example, a tenant that is not complying with an order to close.

The Doctrine of Frustration. The common law doctrine of frustration relieves parties from further performance of their contractual obligations when performance becomes impossible or radically different due to some unforeseen event beyond parties' control. A tenant unable to meet its rental obligations due to business closure may attempt to rely on the doctrine to argue that the obligation has become impossible to perform as it has been "frustrated" by the COVID-related closure. But tenants may be reluctant to make this argument as if the remedy of frustration is found, the lease agreement would terminate, which they may wish to continue. In addition, commercial leases of real property are rarely found to have been frustrated in Canada.

Summary

In sum, landlords and tenants should examine their leases carefully to ensure they understand the full extent of their obligations. We can help. If you have questions regarding your commercial lease, contact us for an opinion.

About the Authors:

Christopher is a Partner practicing in the Firm's Saskatoon office where he maintains a commercial transactions and project development practice focusing on Saskatchewan key economic sectors – energy, natural resources and agricultural.

Robert is a student at law in the Saskatoon office.

About McKercher LLP:

McKercher LLP is one of Saskatchewan's largest, most established law firms, with offices in Saskatoon and Regina. Our deep roots and client-first philosophy have helped our firm to rank in the top 5 in Saskatchewan by Canadian Lawyer magazine (2019/20). Integrity, experience, and capacity provide innovative solutions for our clients' diverse legal issues and complex business transactions.



SASKATOON

374 Third Avenue South
Saskatoon, SK S7K 1M5
(306) 653-2000 F (306) 653-2669

REGINA

800 - 1801 Hamilton Street
Regina, SK S4P 4B4
(306) 565-6500 F (306) 565-6565

mckercher.ca
02