

Lease variation for landlords during COVID-19 as at 31/2/2020



Wendy Lambert
Partner



Emma Baker
Advocate

Introduction

Current circumstances have seen a restriction on the number of sittings being offered by the Royal Court and, although the Royal Court is currently still passing contracts on a Friday afternoon at the revised time of 12:30pm - the next available date is this Friday, 3rd April - it is unclear whether this will continue following the Court's Easter Vacation.

Recent weeks have seen tenants who are unable to use their premises as a result of quarantining restrictions and/or staff sickness, or as a result of the recent Islandwide 'lockdown', approach their landlord to try and secure a rent suspension or rent holiday or to simply stop paying!

This has resulted in a number of creative solutions being offered by landlords, including:

- swapping to monthly rental payments, rather than quarterly;
- a suspension on rental payments for a short period, sometimes on the proviso that the 'missed' rental payments are spread out over a fixed period (and added to the normal rent) once all has returned to normal;
- temporary reductions in rent;
- rent suspension/holidays in exchange for the cancellation of a future right to break;
- a permanent or temporary conversion to rent being calculated on a 'turnover-only' basis (with a base minimum payable, regardless of the tenant's actual turnover); and
- a 3 or 6 month rent suspension with an extension of the lease by a further 3 or 6 months (so the landlord ultimately does collect the lost rent).

Once the terms of any solution have been agreed, it is important that they are properly documented to ensure the lease itself is not inadvertently varied or any tenant obligations waived.

Variation can be achieved with a side letter in the case of paper leases with a term of 9 years or less but if the lease is for a term of more than 9 years, this will require a variation contract to be passed before the Royal Court.

Although failing to document concessions such as a rent reduction may seem to be a tenant issue (as it is for the tenant's benefit), if a landlord wishes to be able to enforce the 'new' terms, they must be properly recorded. For example, if you agree a rental deferral, with payment at a later date, the tenant may gladly take the deferral, but then not comply with the delayed repayment terms.

It is our view (although there has been no specific guidance on this point) that following the Easter Vacation, if the Property Court is closed, it would be possible to make an application to the Samedi Court sitting on a Friday afternoon to 'pass' a variation contract, given the exceptional circumstances we find ourselves in. However, it is not possible at this stage to say for certain!

Our advice is: if you have already agreed a solution with your landlord tenant - document it!

This briefing is only intended to give a summary of the subject matter. It does not constitute legal advice. If you have any questions or concerns about how the Pandemic could affect your lease of commercial premises, or would like advice on any of the topics we have touched upon in this Briefing, please get in touch with a member of BCR Law's Commercial Property Team using the contact details below:

Wendy Lambert, Partner

+44 (0) 1534 760 882
wendy.lambert@bcrlawllp.com

Emma Baker, Advocate

+44 (0) 1534 760868
emma.baker@bcrlawllp.com