

COVID-19 AND ITS IMPACT ON TENANCIES AND LEASES

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INTRODUCTION

Following the outbreak of the COVID-19 pandemic that has stalled operation of commercial activities in most parts of the world affected, numerous legal questions arise some of which relates to Tenancies and Leases. Now more than ever, tenants and lessees contemplate their fate in the event of a default in the payment of rent resulting from the economic consequences of the pandemic which they have to grapple with. Also landlord/lessors who have based all or part of their earnings on recurring rental income contemplate the available measures to mitigate their anticipated large-scale loss of rental income resulting from the continued effect of the pandemic.

In the wake of the uncertainties as to the end of the pandemic and full resumption of daily activities as it were, the government in some countries have put in place some legislative measures to alleviate the fears lurking around the landlord-tenant relationship.

GOVERNMENT'S INTERVENTION

In recognition of the prevailing need to protect the respective interests of both parties in Tenancies and Leases, the United Kingdom government, on 23rd March 2020, announced that commercial tenants who cannot pay rent because of Covid-19 will be protected from eviction. Furthermore, to protect businesses struggling with cash flow due to covid-19, the government has taken steps via the Emergency Coronavirus Bill to ensure that no business is forced out of its premises until 30th June 2020, even if they miss payment of rent.

In Germany, a draft law to be called COVID-19 Pandemic Act to relieve tenants during the pandemic is in the works. The proposed Act limits the rights of landlord's to termination due to late payment by the tenant from 1st April 2020 to 30th June 2020, provided the tenant demonstrates that the delay is due to the effects of the Covid-19 pandemic. The Act also authorizes the Government to extend the protection from 1st July 2020 to 30th September 2020 if social life, economic activity and



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employment continue to be significantly impaired by the COVID-19 pandemic.

In New York, Senator Mike Gianaris authored and introduced a Bill for the suspension of rent payments and certain mortgage payments to the New York State Senate. It stipulates that any residential tenant or small business commercial tenant in the state that has lost income or has been forced to close their place of business as a result of government ordered restrictions in response to the outbreak of coronavirus disease 2019 [COVID-19], shall have all rent payments suspended for 90 days following the effective date of the Bill.

In Australia, the prime minister, Scott Morrison, in his national address on Sunday 29th March 2020 stated that the National Cabinet agreed to a moratorium on evictions over the next 6 months for commercial and residential premises in financial distress.

The above measures, though restricting the eviction of tenants for failure to pay rent, are silent on the application of a notice to quit during this period.

The absence of a provision as to the application or otherwise of a notice to quit seems to suggest that the service of a notice to quit on a tenant for the appropriate duration will apply. However, upon the expiration of the duration of the notice, eviction cannot be implemented by virtue of the above legislations. Thus, eviction and recovery of premises will arise at the expiration of the stipulated period of the moratorium, rent suspension or protection from eviction.

In Nigeria, where the virus is still at its barest minimum though rapidly spreading; the Federal Government and Governments of affected States have since 30th March, 2020, ensured a 2-weeks total lockdown cutting across all corporate and commercial enterprises and educational institutions with the exception of essential service providers as food, water, pharmaceuticals, etc, to ensure the safety of Nigerians and slow down the spread of the virus. The daily increase in the numbers of cases reported by the Nigeria Centre for Disease Control [NCDC] created an imminent need for the extension of the lockdown which was announced by the President on Monday, 13th April 2020. This is





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not without dire consequences to citizens who already have to struggle with meeting several obligations with a very drastically reduced and continuing diminishing income resulting from the harsh economic reality the global economy is being fraught with amid the pandemic. However, it appears that the government has not contemplated the need to make any regulation to ease the fears that are likely to arise in landlord-tenant relations if the virus' spread is not speedily curtailed and the lockdown suspended. At this juncture, the question arising is, what becomes of the relationship and the obligations of the landlord and tenant amid Covid-19?

TENANCY AND LEASE ANALYSIS

With respect to tenancies, amongst the various types of tenants [yearly, quarterly, monthly tenants] the pandemic will have a major impact on monthly tenancies. In consideration of the resultant effect of the lockdown measures - reduced income and in severe cases zero income - payment of rent for monthly tenants will become a challenge. Quarterly tenants are not completely left out as the reduced income/loss of income for the month of April which

is one-third of their earning for a quarter from which their bills, rent inclusive, ought to be paid raises a concern.

On the other hand yearly tenants may be remotely affected however, the reduction/lack of income for one month is not a justifiable ground for failure to pay annual rent. This also applies to Lease transactions where rent is paid yearly. For lessees who pay a lump sum, the issue of default in payment will not arise. The covenant to pay rent contained in tenancy/lease agreements will become a crucial tool in enforcing the tenant/lessee's obligation to pay rent notwithstanding the lock down measure as the tenant/lessee is still in lawful occupation of the property.

Another likely issue that will arise is the payment of service charge or management fees. For tenants or lessees, not classified as essential service providers thus affected by the lockdown mandate, who usually pay a monthly service charge, management fee or other types of fees covering security, electricity, water etc, the issue of the obligation to pay such charge or fees will arise. A practical example of such are tenants/lessees in shopping malls.



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here is no logical justification for such payment in consideration of the non-utilisation of the above services/ facilities. Thus landlords/lessors may likely lose such income on the basis of non-utilisation of such services or facilities due to the lock down measure except where the parties come to a negotiation or agreement as to the payment of such charge or fees.



SITUATIONS TO EXPECT

Given the economic hardship and loss of income the health crisis has brought, tenants - particularly monthly tenants - are bound to default in their obligations to pay rent. In countries like Nigeria that have not put any measure in place, tenants and Lessees in extreme hardship will seek other alternatives.

Most significant of the alternatives are:

1. termination of the agreement and
2. temporary adjustment of agreement.

TERMINATION OF AGREEMENT

Tenants/Lessees in distress may seek to terminate their tenancy/lease in order to evade their obligation to pay rent on either of two grounds, namely force majeure and doctrine of frustration.

Force Majeure:

Most Tenancy /Lease agreements make provisions for several clauses including force majeure. A force majeure provision in any Tenancy/Lease agreement, works to exclude liability for non-performance caused by specified events like fire, floods, strikes, riots, famine, explosions, earthquakes, armed conflict or events generally referred to as "acts of God".



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See *Globe Spinning Mills [Nig] Plc v. Reliance Textile Industries Ltd [2017] LPELR-41433 [CA]*. This clause cannot be implied in an agreement that expressly excludes it.

Because there is no generally accepted definition of force majeure, the words used in force majeure provisions are crucial. A party seeking to rely on this clause will only be relieved from the relationship and performing his obligations upon the occurrence of events specifically mentioned in the force majeure provision. It must be noted that inability to perform the contractual obligation must be directly traceable to the force majeure event. In other words, a default that would have occurred even if the force majeure event never happened will not benefit from a force majeure provision. See *C.G.G. [NIG] LIMITED v. Augustine & Ors [2010] LPELR-8592 [CA]*.

If the contract contains a procedure that must be followed in order to enjoy the relief provided by the force majeure provision, then such procedure must be scrupulously followed. Further, a force majeure clause may require a party to mitigate damages in these circumstances.

Typically, the party seeking to enforce such a clause must demonstrate that it made reasonable efforts to exhaust alternatives to nonperformance.

In the case of COVID-19, a party is more likely to successfully invoke a force majeure provision to terminate the landlord-tenant relationship and evade the obligation if such clause expressly covers the "outbreak of diseases", "epidemics" or "pandemics" and all required of the party seeking to enforce same, have been complied with.

Doctrine of Frustration:

In Lease /Tenancy agreements without the force majeure clause, the doctrine of Frustration may be relied on by tenants to relieve themselves of obligations. Frustration is a common law concept that occurs when the obligations under an agreement cannot be completed due to unforeseen circumstances or an uncontrollable event. The court in *Okereke & Anor v. Aba North LGA [unreported]* listed events which constitute frustration to include subsequent legal changes or statutory impossibility; outbreak of war;



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destruction of the subject matter of the contract or literal impossibility; government acquisition of the subject matter of the contract; and where the commercial purpose of the contract has failed.

Once frustration is established in any agreement, the legal consequence is that the agreement is automatically terminated and each party is released from any future obligations thereto as obligations which fell due before the frustration are still in operation; the contract does not become void ab initio. See *AllCO Insurance Plc v. ADDAX Petroleum Company Ltd* [2014] LPELR-23743 [CA], *Pulseline Services Ltd v. Equitorial Trust Bank* [2010] LPELR-4886[CA], *Malik v. Kadura Furniture & Carpets Co Ltd* [2016] LPELR-41308 [CA].

In *Standard (Nigeria) Engineering Company Ltd & ANOR. v. NBCI* [2006] LPELR-3111 [SC] the supreme court held that the doctrine of frustration simply means that if the performance of a contract depends on the continued existence of a state of affairs, then the destruction or disappearance of the state of affairs without the default of either of the parties will discharge them from the contract.

A supervening impossibility has destroyed a basic assumption on which the parties had contracted. See *Revenue Mobilization, Allocation & Fiscal Commission v. Units Environmental Sciences Ltd* [2010]. Thus the effect of frustration is a total discharge from a contract and not a partial relief from the payment of rent for the duration of an intervention.

The question of whether the intervening circumstance – Covid-19 – is one which the law would regard as so fundamental as to frustrate a lease/tenancy is dependent on the special circumstances and facts of a case. However, a case likely to influence any court's decision is the recent decision of the High Court of England and Wales in *Canary Wharf (BP4) T1 Limited & Others v. European Medicines Agency* [2019] EWHC 921 where it was found that Brexit was not sufficient to frustrate a lease. The tenant in that case argued that it lost privileges and immunities granted under the EU Treaty. The High Court found that the tenant did not lack the ability to comply with its obligations under the lease and that the tenant could also continue the lease (albeit under less-desirable circumstances).





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It is important to note that the doctrine of frustration, though similar in effect to the doctrine of force majeure, is more restrictive. The doctrine of frustration will not relieve a party from performing a contractual obligation simply because the event complained of has made the performance more difficult or expensive as economic hardship is not a ground for invoking the doctrine of Frustration. Thus, it may be difficult for tenants to successfully claim their leases or tenancies have been frustrated.

TEMPORARY ADJUSTMENT OF AGREEMENT

Under this alternative, tenants/lessees may resort to one of two options based on their financial capacity. Tenants/lessees with the



financial capacity to pay rent in instalments may resort to the review of the mode of payment under their tenancies/leases. This can come in the form of a switch from yearly to quarterly or even monthly rent payments.

It is important however to note that not all Landlords/Lessors may welcome the option. Therefore Landlords/Lessors who consider the above arrangement a deal breaker are likely to resort to forfeiture and unlawful evictions. For countries without measures on Tenancies and Leases amid the pandemic as Nigeria, most tenants may risk being unlawfully evicted without an option for immediate legal redress in view of the lock-down which has occasioned temporary closure of courts to all matters except for matters of urgency.

In conclusion, the true impact of Covid-19 on tenancies and leases cannot presently be properly ascertained due to the novel nature of the pandemic. However, it is undeniable that certain adjustments are necessary in view of the economic consequences, to ensure the safety, welfare and protection of citizens and uphold the fight to curtail the spread of the virus.





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