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COVID-19 MOVEMENT CONTROL ORDER ("MCO") - TO PAY OR NOT TO PAY THE RENT?

(FREQUENTLY ASKED QUESTIONS)

COVID-19 MOVEMENT CONTROL ORDER ("MCO") - TO PAY OR NOT TO PAY RENT?

Q1. Is there any initiative by the Government on rental payable during COVID-19 pandemic?

a) Yes. On 6.4.2020, the Government has announced additional Prihatin SME Economic Stimulus Package ("PRIHATIN PLUS") where the Government has undertaken a number of initiatives to facilitate SMEs.

b) The Government had introduced that the rentals of the SMEs in the retails sector which are operating on premises owned by Government-Linked Companies (GLCs) to be waived or discounted.[1] The Government also encourage the owners of private premises to provide similar assistance to their tenants to reduce their rental rates.

c) The Government also is given a tax deduction which equivalent to the amount of rental reduction for the months of April until June 2020 to the owners of the buildings or business spaces that provide rental reduction or waiver to their tenants that consist of SMEs.[2] This further tax deduction is subject to the condition that the rental reduction is at least 30% of the original rental rate for that particular period.

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[1] https://www.pmo.gov.my/2020/04/langkah-tambahan-bagi-pakej-rangsangan-ekonomi-prihatin-rakyat-prihatin/

[2] Ibid.

Q2. Is the Government's circular enforceable/ compulsory?

a) No. The Government only encourage the rental to be waived or discounted to the SME tenants in the retail sector that are operating on premises owned by the GLCs. Some of the GLCs have agreed to either waive or provide discounts of the rental on their premises to the SME tenants i.e. MARA, PETRONAS, PNB, PLUS and UDA.[3]

b) The Government also urge the owners of the private premises to reduce their rental rates to the tenants who are of SMEs. Such initiative is **not** compulsory.

Q3. Any legal difficulty on the rental during COVID-19 Movement Control Order ("MCO")?

a) It depends on the terms of the Tenancy Agreement **("TA")** itself. In a situation where the tenancy is a short term tenancy i.e. payment of rent is based on daily, weekly or monthly, hence the tenant will not bound to renew its tenancy upon such expiry. Hence, there will be no rental beyond that period.

b) The difficulty on the rental would be on the tenancy which is based on a fixed terms tenancy. For example, a three years term of Tenancy, whereby the same is yet to expire. As the tenant is committed to the fixed term tenancy, the rent is payable monthly in advance without any deduction regardless of the operation of the premise pursuant to the TA. During this MCO, there is a situation whereby the tenant is being given exclusive possession and quiet enjoyment of the premise before the MCO was enforced.

c) However, during the MCO, some of the tenants cannot even get access to the premise and could not even have the possession due to the enforcement of MCO. This situation tantamount to no exclusive possession of the premise. As the tenant is no longer enjoy the premise and could not have the possession, the question arises would be whether the rent of the premise is still payable/chargeable during MCO.

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[3] https://www.pmo.gov.my/2020/04/langkah-tambahan-bagi-pakej-rangsangan-ekonomi-prihatin-rakyat-prihatin/

Q4. What position can a Landlord take to charge Rental during the MCO?

a) The landlord can rely on the strict express terms of the contract entered into between the parties. Express terms of the contract are terms made in words, whether orally or in writing, that has been agreed upon by both parties at the time of the contract is made.[4]

b) If the contract is in writing, any statement appearing in that written agreement is regarded as a term, and any prior oral statement that is not repeated in the written agreement will be regarded as a representation.[5] Any terms provided in the contract are legally binding and any parties who are in default can be sued for breach of contract.

c) As per the TA, when the absolute possession has been given to the tenant, hence it renders that the landlord has fulfilled its consideration/bargain. Thus, the tenant is obliged to fulfil their obligation to pay the rent as the parties have agreed.[6]

Q5. Can tenant take a stand that rental is not payable during COVID-19 MCO?

The tenant may invoke either Force Majeure clause or doctrine of frustration.

a) Force Majeure Clause

(i) If the TA provides a Force Majeure clause, hence the tenant can invoke such clause to suspend the payment of rent during COVID-19. However, it depends on the terms and effects of Force Majeure stipulated in the TA. Force Majeure clause provides that if there is an unexpected occurrence of events or circumstances beyond the parties' control such as natural disasters, war, epidemics, it frees both parties from liability or obligation of the contract.[7]

(ii) For TA, the purpose of Force Majeure clause is to contractually allocate the risks between the landlord and tenant with regard to the occurrence of future events in specific circumstances, all of which has been stipulated within the clause itself.[8]

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[4] Section 9 of the Contracts Act 1950

[5] Routledge v McKay (1954) 1 WLR 615

[6] Lau Nam Chan v Million Crest (M) Sdn Bhd [2009] 1 LNS 1340

[7] RHB Capital Bhd v Carta Bintang [2012] 10 MLJ 469

[8] RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and Another Appeal [2007] 4 SLR 413

b) Doctrine of Frustration

(i) If the TA does not have the Force Majeure clause, a tenant may invoke the doctrine of frustration which is provided under Section 57 of the Contracts Act 1950 [9] as follows:-

> *"(1) An agreement to do an act impossible in itself is void. Contract to do act afterwards becoming impossible or unlawful;*
>
> *(2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."*

(ii) In order to invoke the doctrine of frustration, the tenant must prove that such event has frustrated the TA. If successful, the TA can be set aside in its entirety as the contractual obligations are rendered impossible to be performed.

(iii) However, it is settled that a contract does not become frustrated merely because it becomes difficult to perform. If a party unable to pay his debt on the reason he has no money, it cannot be considered impossible to perform as it is not frustration. Neither can he plead frustration because the terms of the contract make it difficult to interpret. If it cannot be performed or becomes unlawful to perform, then the party who is to perform his part of the bargain can plead frustration. The doctrine of frustration is only a special case to discharge a contract by an impossibility of performance after the contract was entered into. A contract is frustrated when subsequent to its formation, a change of circumstances renders the contract legally or physically impossible to be performed.[10]

(iv) In view thereof, the tenant can either invoke Force Majeure clause (if the TA provides for the same) or invoke doctrine of frustration if the TA is proven impossible to be performed.

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[9] Section 57 of the Contracts Act 1950

[10] Public Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ 293

Q6. If the court found that rental is chargeable, what if Tenants fail to pay?

The landlord can take legal actions against the tenant i.e. by way of Writ of Distress or Writ of Summons.

a) Writ of Distress

(i) Writ of distress is a court order where the movable properties of the tenant within the rented premises will be seize and auction to recover the rental arrears owed by the tenant. Writ of distress is governed under the Distress Act 1951 whereby the action may only claim up to 12 months of the outstanding rentals.[11]

(ii) The procedure started with a letter of demand to the tenant for the arrears of rental. If the tenant still fail to pay, the landlord can proceed to issue the writ of distress. The writ of distress will direct the bailiff to enter into the premise and seize the movable properties of the tenant. After the properties being seized, the bailiff shall prepare an inventory list and an approximate valuation of the same. Thereafter, bailiff will serve on the tenant a notice of seizure and the inventory list with the time and place, which shall be after a minimum period of 6 days at least from the date of the notice. Upon the outstanding sum due under the writ of distress is fully recovered by the sale of the seized properties, any balance of the same will be returned to the tenant.

b) Writ of Summon

(i) The landlord also may pursue a legal action by way of writ of summons. Writ of summons is one of the modes used in civil proceeding against a person/company. In order for the landlord to claim the outstanding rents from the tenant, the landlord may file a civil action in court to demand for the outstanding arrears of rental. It is a common civil proceeding whereby the landlord will be named as the Plaintiff and the Tenant will be named as Defendant.

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[11] Section 5(1) of the Distress Act 1951

(ii) Civil action is started with the filing and service of the Writ and Statement of Claim on the Defendant. Upon being served, the Defendant is needed to enter appearance within 14 days from the Writ is being served on him. After appearance entered, the Defendant then has 14 days to file its Defence to the Statement of Claim.

(iii) Thereafter, the Plaintiff has 14 days to file a Reply to the Defence. The pleadings is closed upon the Plaintiff served the Reply to Defence. Upon the pleadings is close, the matter will be fixed for pre-trial case management where the Court will direct parties to prepare and file necessaries documents for Trial, and the Court will further fix dates for Trial.

(iv) Upon the Trial is done, the Court will direct both parties to file their submissions and submissions in reply (if any) for the matter. A decision will be delivered by the Court then.

Q7. Can the Landlord expel or evict the Tenant if rental is not paid?

a) Cannot. The landlord must file a civil suit against the tenant and obtain a Court order to evict the tenant.

b) This was provided under Section 7(2) of the Specific Relief Act 1950[12] that *"Where a specific immovable property has been let under a tenancy, and that tenancy is determined or has come to an end, but the occupier continues to remain in occupation of the property or part thereof, the person entitled to the possession of the property shall not enforce his right to recover it against the occupier otherwise than by proceedings in the court."*

c) The landlord is not allowed to retake possession of the property except by way of Court order/proceedings. If the landlord proceeds to do such action without the Court order, that will tantamount to tort whereby the landlord will be held liable.[13]

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[12] Section 7(2) of the Specific Relief Act 1950

[13] Dr Harjit Singh v Suhaimi Bin Samat & Anor [1995] MLJU 109, Metro Charm Sdn Bhd v Lee Nyan Hon & Brothers Sdn Bhd & Anor [2007] MLJU 2272

Q8. What happen if the Tenant refuse to vacate the property upon the termination by the Landlord?

a) Upon a valid termination, the landlord has the right to retake the possession of the property. However, the landlord is prohibited from evicting the tenant and/or retake the possession of the property without a Court order as explained in question 9 above. Therefore, the landlord has to file a civil action against the tenant and get the Court order first before he can evict the tenant and retake the possession of the property.

b) Apart from filing the civil action as stated above, the tenant also may be liable for double rental by the landlord pursuant to Section 28(4)(a) of the Civil Law Act 1956[14] which reads as follows: -

> *(a) Every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not.*

Q9. Does MCO has affected the Tenant to use and enjoy the property pursuant to the Tenancy Agreement?

a) It depends on the purpose of the property rented for.

b) For example, the commercial retail tenancy may be affected due to MCO as some of the tenant are not allowed to operate their businesses during MCO. Pursuant to paragraph 5(1) of the Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020 published by the Federal Government Gazette[15] it provides that:-

> *"Any premises providing essential services may be opened provided that the number of personnel and patron at the premises shall be kept to the minimum."*

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[14] Section 28(4)(a) of the Civil Law Act 1956

[15] Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020.http://www.federalgazette.agc.gov.my/outputp/pua_20200318_PUA91_2020.pdf

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c) As a result, the commercial tenants who are of non-essential services are definitely affected because their tenancy is premised on them being able to run a business on that premises. As they are not allowed to operate, it resulted the commercial tenants cannot use and enjoy the property as agreed in the TA.

d) However, it is different with the residential tenants as they still can live in their house. The only issue would be their inability to generate money during MCO, but that was not a direct effect on the tenancy.

Q10. As MCO has ordered the Tenant who is in non-essential services to close its premise, does it mean that the Tenant do not have the exclusive possession of the premise?

Q10. AS MCO HAS ORDERED THE TENANT WHO IS IN NON-ESSENTIAL SERVICES TO CLOSE ITS PREMISE, DOES IT MEAN THAT THE TENANT DO NOT HAVE THE EXCLUSIVE POSSESSION OF THE PREMISE?

Yes. As explained in question 9 above, as the regulations prohibited the tenants of non-essential services to operate their businesses, hence the tenants are denied of the exclusive possession of the property during that period of time.

Q11. Is there any Law, in particular the Prevention and Control of Infectious Diseases Act 1988 which provide any deferment or suspension of rental?

Q11. IS THERE ANY LAW, IN PARTICULAR THE PREVENTION AND CONTROL OF INFECTIOUS DISEASES ACT 1988 WHICH PROVIDE ANY DEFERMENT OR SUSPENSION OF RENTAL?

There is no provision provides for such deferment or suspension of rental.

Q12. Landlord and tenant agreed to defer the payment of the rental and agreed to amend their Tenancy Agreement due to this COVID-19 MCO. Can I do the same with my landlord?

Yes. The best option at the moment is to communicate with the landlord personally for the rental reduction or waiver. The landlord has the discretion whether to grant the rental reduction or waiver.

Q13. Does the Force Majeure clause in any Tenancy Agreement cover current situation i.e. COVID-19 MCO situation?

a) As explained in question 5 above, Force Majeure clause means that any events that occurred beyond the reasonable parties' control will free the parties from its contractual obligations of the contract. Force Majeure is successfully invoked if such event falls within the description of what constitutes a "Force Majeure event" and the consequences of the occurrence of the same as stipulated in the TA.

b) In determining whether COVID-19 MCO qualifies as a Force Majeure event is depending on the construction of the force majure clause in the TA itself and also the facts of the case. Some Force Majeure clauses are drafted with certain broad definitions that covers all events or circumstances beyond the control of the party and some provides with a list of categories of events amounting to force majeure events.

c) The law is clear that in order to invoke Force Majeure clause, the agreement must be construed by the words used in the agreement.[16]

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116] CIMB Bank Bhd v Anthony Lawrence Bourke & Anor [2019] 2 MLJ 1

d) It is settled that a party relying upon the Force Majeure clause must prove the facts of its case are within the Force Majeure clause. He must prove the occurrence of one of the events referred to in the clause and that he has been prevented, hindered or delayed, as that case may be from performing the contract by reason of the event. He must further prove that his non-performance was due to the circumstances that is beyond his control and that there were no reasonable steps that he could have taken to avoid or mitigate the event or its consequence.[17]

e) We are of the view that if the Force Majeure clauses were drafted to include a list of categories such as "outbreak", "epidemic of general virus outbreak" or "public disease" as Force Majeure events, hence the COVID-19 may be qualified as a Force Majeure event. However, if there is none of the above specific list of events stipulated in the TA, it is still arguably to cite COVID-19 under Force Majeure clause that covers "acts of God", "lockdown", "acts of Government" or "events making it impossible for parties to fulfill their contractual obligations".

f) It is our view that COVID-19 can also be qualified as a Force Majeure event within the definition of "acts by Government" due to the enforcement of the MCO by the Government. Therefore, we are of the view that COVID-19 MCO is covered by the Force Majeure clauses if the TA provides such Force Majeure events as explained earlier.

Q14. Some agreements contain different effect of Force Majeure clause. Does these different effects of Force Majeure clause give different meaning?

a) Yes. For example, if the Force Majeure clause allows for suspension of rental payment during the Force Majeure event, then the tenant can invoke Force Majeure clause to delay the payment of rent during the MCO due to COVID-19.

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[17] Intan Payong Sdn Bhd v Goh Saw Chan Sdn Bhd [2004] 1 LNS 537

b) Another example is where the Force Majeure clause provides that the rental is waived due to the Force Majeure events, hence the tenants do not have to pay for the rent.

c) The tenant cannot invoke the effect of suspension of rental if the Force Majeure clause did not provide for such effect. Some of Force Majeure clause also provides options for the tenant where the tenant may choose either to pay the rent or terminate the tenancy during the Force Majeure events. In this situation, if the tenant refuses to terminate, hence he must pay the rent.

Q15. If COVID-19 pandemic is qualified as a Force Majeure event, can the Tenant suspend the payment of rental?

a) As explained above, if COVID-19 is qualified as a Force Majeure event, the tenant can only suspend the payment of rental if the Force Majeure clause in its TA provided such Force Majeure effect.

b) The Court also has decided that "*it is trite that a party relying upon a force majeure clause must prove the facts bringing the case within the clause. He must therefore prove the occurrence of one of the events referred to in the clause and that he has been prevented, hindered or delayed, as that case may be from performing the contract by reason of the event. He must further prove that his non-performance was due to circumstances beyond his control and that there were no reasonable steps that he could have taken to avoid or mitigate the event or its consequence*".[18]

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[18] Intan Payong Sdn Bhd v Goh Saw Chan Sdn Bhd [2004] 1 LNS 537

Q16. If the Tenancy Agreement does not provide any Force Majeure clause, can Tenant still rely on such principle to resist rental payment during COVID-19 MCO?

a) Cannot. The defence of Force Majeure is only applicable when it is expressly set out in the contracts/agreements. If the TA does not provide any Force Majeure clause, hence the tenant cannot rely on such principle. This is because the law is clear that when a contract is entered in writing, the intention of the parties must be set out expressly within the contractual documents.[19]

b) As the TA does not provide such Force Majeure clause, hence the tenant has no opportunity to invoke the defence of Force Majeure which resulted he still has to pay the rent as usual pursuant to the TA regardless any event happens.

c) It is settled that when there is no provision of Force Majeure in the contract, the Court will refuse to imply the same into a contract.[20] There can be no general rule as to what constitutes a situation of Force Majeure.[21] It is all depending on what rights, obligations or situations that the parties have provided expressly in their TA.

Q17. What can the Tenant do to protect its rights as this COVID-19 MCO has caused the Tenant the inability to perform the contract?

a) As explained in question 5 above, the tenant can only invoke the Force Majeure clause if the tenant can prove that COVID-19 MCO is within the definition of the Force Majeure events provided in the TA.

b) If there is no Force Majeure clause, hence the tenant cannot rely on such principle. The tenant can also rely on the doctrine of frustration whereby the tenant has to prove that COVID-19 pandemic and MCO has frustrated the contract which resulted that it is impossible for the tenant to perform its obligations under the contract.

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[19] BIG Industrial Gas Sdn Bhd v Pan Wijaya Property Sdn bhd & anor appeal [2018] 3 MLJ 326

[20] Muhammad Radhieddeen bin Abdul Khalid v Saujana Triangle Sdn Bhd [2017] MLJU 950

[21] Magenta Resources (S) Pte Ltd v China Resources (S) Pte Ltd [1996] 3 SLR 62

Q18. Is the tenancy being frustrated during the COVID-19 MCO?

a) Pursuant to Section 57 of CA[22], the doctrine of frustration can only be invoked when the party can prove that[23]:-

(i) the event upon which the tenant relies on as having frustrated the tenancy agreement must have been one for which no provision has been made in the tenancy agreement;

(ii) the event relied upon by the tenant must be one for which it is not responsible; and

(iii) the event which is said to discharge the promise, i.e. the tenant's covenant to pay full rental to the landlord, must be such that renders it radically different from that which was undertaken by the tenancy agreement.

b) As explained above, a contract does not become frustrated merely because it becomes difficult to perform. A party can plead frustration if it cannot be performed or becomes unlawful to perform his part of the bargain. A contract is frustrated when subsequent to its formation, a change of circumstances renders the contract legally or physically impossible to be performed.[24]

c) Therefore, it is our view that it is possible for the tenant to rely on the doctrine of frustration if they can prove that COVID-19 MCO has frustrated the purpose of the contract.

d) However, it is not easy for the tenant to prove such difficulties that lead to the frustration of the tenancy. The threshold to prove the frustration is very high. The Court has ruled that although the outbreak of SARS could arguably be considered an unforeseeable event, such event did not go as far as to radically alter the fundamental rights and obligations arising from the tenancy agreement. [25] In view thereof, we are of the view that it would be insufficient to raise the doctrine of frustration on the reason of financial difficulties due to COVID-19 MCO.

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[22] Section 57 of the Contracts Act 1950

[23] Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd [2007] 4 MLJ 201

[24] Public Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ 293

[25] Li Ching Wing v Xuan Yi Xiong [2004] 1 HKLRD 754

Q19. Can Tenant of non-essential service business rely on the principle of frustration on their Tenancy or Lease to resist payment of rental during COVID-19 MCO?

a) It is our view that as tenants of the non-essential services are prohibited to operate during this COVID-19 MCO which caused them unable to run its business in the leased premises due to the MCO, the tenant may claim frustration.

b) As explained in question 9 above, the commercial tenants who are of non-essential services are definitely affected by this COVID-19 MCO because their purpose of the TA is based on the ability of them to run the business on the leased premises. Furthermore, the tenants are being denied of their rights to the quiet enjoyment and exclusive possession of the rented premise due to COVID-19 MCO.

c) The commercial tenant may argue that the tenancy is frustrated on the reason that its business is ordered to cease operation and this goes against the purpose of the TA which stipulates that the tenant shall keep its leased premises open for business daily.

d) However, we are of the view that such problems arising from COVID-19 would not automatically operate as a ground for frustration of the tenancy agreement, unless it is expressly provided in the TA.

e) Financial constraints facing by the tenant in paying the monthly rental does not tantamount to an impossible act to frustrate the TA. It is our considered view that the tenant may face difficulties in proving that the TA is frustrated because the grounds such as rented premise cannot be used and possessed would be insufficient for the tenant to ignore its contractual obligation to pay the rental.

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Q20. What if the Tenant successfully invoked the Force Majeure clause or the doctrine of frustration to resist the landlord claim for rental during the COVID-19 MCO?

a) As explained in question 14, 15, 18 and 19 above, if the tenant successfully invoked Force Majeure clause, the tenant can do as to what the Force Majeure clause provides. If the clause provides the tenant may suspend the rent, hence the tenant can suspend the payment of the rent until the Force Majeure event ends. If the clause provides the rental is waived during the Force Majeure event, hence the tenant does not need to pay the rental until the Force Majeure event ends. It depends on what Force Majeure clause has provided in the TA.

b) As for the doctrine of frustration, if the tenant successfully invoked the doctrine of frustration, it will not affect the rental payment of the premise during the MCO. The effect of frustration is that the TA will be rendered void.[26] This doctrine will not give effect to any waiver or discount on the rental during the COVID-19 MCO period.

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[26] Section 57(2) of the Contracts Act 1950

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