

SUMMARY OF THE GUIDANCE RELATING TO RENT AND OTHER PAYMENTS FOR LANDLORDS AND TENANTS OF JERSEY COMMERCIAL PROPERTY DURING COVID-19 CRISIS (THE GUIDANCE) 14.04.2020

Currently the Jersey courts are not sitting to deal with matters relating to commercial property (which includes applications for rent arrears, lease cancellations and consequential orders for possession and eviction). However, The Government of Jersey (**GoJ**) has now introduced the Guidance, which is dated 08 April 2020. The aim of the Guidance is to promote good conduct and reasonable behaviour by both landlords and tenants (and any guarantor) during the duration of COVID-19 (the **Pandemic**) and once open to hear such matters again, the courts will use the Guidance to assess the parties' reasonableness when considering court applications by either party.

Although it is described as voluntary, the court does have the ability to take into consideration the actions (or inaction!) of the landlord or tenant in any subsequent property proceedings, so it would not be advisable for either party to ignore the Guidance.

What type of premises does the Guidance apply to?

The Guidance applies to any lease, tenancy, licence or other agreement which provides for the occupation on commercial terms of commercial property. This includes (without limitation) premises that are being used for the purposes of: offices / retail / hospitality and leisure / warehousing / registered lodging houses (but **not** individual lodging units) and any property which is part commercial and part residential.

What won't the Guidance cover?

The Guidance does not apply to a breach of a commercial lease or to any arrears of rent and / or other payments due under a commercial lease which relate to the period immediately prior to the Guidance coming into force, of which the Tenant has been notified in accordance with the terms of the Lease.

The Guidance does not release a tenant from its continuing obligation to pay rent and other payments under its lease nor does it discharge a landlord or tenant from their obligations under the lease.

Under the Guidance:

1) If a tenant approaches a landlord for a concession, the landlord is required to seek to agree with a tenant, who has provided adequate evidence of financial hardship (see below): a partial or complete deferral of the relevant sums due; or a partial or complete waiver of the relevant sums due. This might include payments such as rent, service charges and other financial payments due under the lease. The same applies to other non-financial contractual commitments under the lease.

2) A landlord can also approach a tenant (providing supporting evidence) that it is unable to meet any of its contractual commitments under the lease. A deferral or other concession can be agreed in the same way.

3) A landlord or tenant which is unable to comply with any financial obligation or other contractual commitment under their lease, is required to give **at least one week's notice** to the other (together with supporting evidence) seeking to agree: a partial or complete deferral of the obligation or commitment; a partial or complete waiver of the obligation or commitment; or early termination of the lease, with the tenant handing back the premises to the landlord on terms agreed by the parties.

A deferral or concession under (1) or (2) above (a **Concession**) may be limited to the period affected by the Pandemic, or such longer period as the parties agree.

Where a landlord or tenant is suffering from financial hardship to the extent that it would not be reasonable for them to agree a Concession, they are required to write to the other providing evidence. The Guidance suggests this is the **only** permissible ground for refusing to agree a Concession. Where the landlord or tenant is not satisfied that the other has adequately evidenced their financial hardship, they are required to send (to the other) their reasons in writing. As these reasons / evidence can be taken into consideration by the court in any subsequent property proceedings and the court may make any penalty orders against any party as it sees fit, it is important when setting out reasons as to why you cannot agree a Concession, or why the evidence of your landlord or tenant has provided is inadequate, you do so properly and in a principled manner.

Once a Concession has been agreed by the parties, the Guidance requires the parties to document it in writing. This agreement can then be used in any subsequent property proceedings or in support of any application by the landlord or tenant for financial support from the Government of Jersey. We recommend that the Lease is properly varied to record any Concession in accordance with its terms (usually this requires both parties to sign a variation agreement).

However, the landlord and tenant must note that where agreement on a Concession has been agreed, neither party will be able to issue any subsequent property proceedings relating to the subject matter of the Concession other than to enforce its terms. It is also important that each party advises the other when their circumstances change and (for example, where the tenant is no longer suffering from financial hardship). This is an obligation under the Guidance.

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Guarantors

For the purposes of the Guidance, any guarantor is treated as a party to a commercial lease and is also required by the terms of the Guidance to demonstrate good conduct and reasonable behaviour.

Consequently, it is important to ensure that once a Concession has been agreed, any guarantor is also made a party to the agreement formally documenting the Concession, to avoid the guarantor raising an argument at a later date that they did not agree to the Concession so are not bound by it.

Questions arising from the Guidance

Whilst the GoJ's decision to adopt the Guidance is more flexible for landlords than the solution provided by the UK's Coronavirus Act 2020 (which provides a 3 month moratorium on a landlord's ability to take action against a commercial tenant only for the non-payment of rent), it is still open to interpretation. For example:

- How much evidence does a landlord or tenant have to supply to the other to satisfactorily prove that they cannot agree a Concession? This is extremely subjective and will depend on each set of circumstances.
- When does the Concession come to an end? The Guidance states that each party must advise the other when "their circumstances change" and "when it is no longer suffering from financial hardship" or they are once again able to discharge in whole or part all obligations due by them under the Lease. In such circumstances the Parties are obliged to re-assess the terms of the Concession. It is our view that this is not sufficiently clear.

It seems that the Guidance (like its counterpart, the UK's Coronavirus Act 2020) has the potential to pose a number of questions for the landlord and tenant in practise. As before, we will keep updating this Briefing Note as and when further information becomes available and we see how it works for our clients.

Contact

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 how the Guidance will affect your lease or any approach for a Concession you have received from or would like to make to your landlord or tenant please get in touch with a member of BCR Law's Commercial Property Team using the contact details.



Wendy Lambert
Partner
wendy.lambert@bcrlawjersey.com



Stephen Crane
Advocate
stephen.crane@bcrlawjersey.com



Emma Baker
English Solicitor
emma.baker@bcrlawjersey.com



Signe Sparne
English Solicitor
signe.sparne@bcrlawjersey.com