

# What impact could COVID-19 have on leases?

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## Introduction

The government recently announced an ambitious rental assistance programme to assist tenants who have been economically affected by COVID-19 and are unable to satisfy their contractual obligation to pay rent. According to the prime minister, tenants who qualify for the programme will receive the following benefits during April, May and June 2020:

- 40% of rent payments will be postponed.
- Tenants will have 12 months to pay back the 40% of postponed rent.
- Landlords will be barred from evicting tenants or disconnecting electricity or water supplies during such period.<sup>(1)</sup>

In order to qualify for the programme, tenants must:

- be a citizen or legal resident of The Bahamas;
- be renting a residential property and paying monthly rent of B\$2,000 or less;
- provide proof that their employment or income stream has been affected by the COVID-19 pandemic; and
- not have had rental arrears prior to April 2020.<sup>(2)</sup>

This programme has no impact on commercial leases or residential rentals where the monthly rent is more than B\$2,000. Thus, landlords in such circumstances can distrain for rent or have tenants evicted.<sup>(3)</sup>

## Emergency powers

Many pundits in the Bahamas have questioned the legality of rental assistance during a state of emergency. As there are no authorities on the abrogation of leasehold interests, the Bahamian Courts would consider English authorities in interpreting such rights.

Therefore, in interpreting rental assistance programmes, the Bahamian Courts would refer to English case law. English case law, demonstrates that rights arising under lease agreements can be interfered with during states of emergency via the enactment of legislation.<sup>(4)</sup>

In many constitutional democracies, such as The Bahamas, the state has powers to authorise measures which are reasonably justified during the subsistence of a state of emergency.<sup>(5)</sup> Given the broad scope of Article 29(2) of The Bahamian Constitution, these measures could include the implementation of a rental assistance programme.

## Public health and safety implications

The rental assistance programme foreshadowed by the government is clearly important to public health and safety and reasonably justified during the COVID-19 pandemic. If landlords can evict tenants with no or limited income, there would likely be a sharp increase in homelessness. As a result, the government would have to open shelters to accommodate such persons where social distancing would be impractical. If an outbreak were to occur at a shelter, the public health impact could be cataclysmic, leading to a surge in COVID-19 cases and creating broader challenges. In such a situation, The Bahamas may be forced to take the draconian step of compulsorily acquiring properties to house homeless persons.<sup>(6)</sup>

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Notwithstanding the emergency powers available to states, The Bahamas must not act capriciously. It is incumbent on The Bahamas to enact legislation giving effect to rental assistance. Any abrogation of rights under a lease should be done through the enactment of robust legislation and not policy. In the absence of legislation, any attempt by the government to implement and enforce such programme would be illegal. Presently, no legislation has been enacted in The Bahamas giving effect to the rental assistance programme.

### **Future considerations**

In the wake of COVID-19, jurisdictions globally will have to re-evaluate laws relating to landlords and tenants. Nations should consider enacting legislation in order to protect the interests of both landlords and tenants. Lastly, landlords should consider including terms within lease agreements specifically relating to states of emergency.

### **Comment**

During a state of emergency, governments can implement rental assistance measures which allow for statutory modification of rights under a lease. However, such actions must not be undertaken in a cavalier manner and well-considered legislation should be enacted in support of the same.

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### **Endnotes**

(1) House of Assembly Communication, "COVID-19 Response by The Most Hon Dr Hubert Minnis", 27 April 2020, pp37-44.

(2) *Ibid.*

(3) Pursuant to Paragraph 24 of Notice 4 Re Extension of the Emergency Powers (COVID-19) (No 2) Order dated 31 March 2020, all civil trials in the Magistrate Court are suspended until two working days after the state of emergency is lifted (for further details please see "[At a glance: COVID-19 court protocols](#)").

(4) The impact of states of emergency on lease agreements in the United Kingdom is well documented. During World Wars I and II, legislation was enacted which essentially modified obligations arising under lease agreements.

In 1916 the (Emergency Powers) (Amendment) Act 1916 was enacted, which allowed tenants to apply to the court for leave to have their tenancies terminated. The court had an absolute discretion to terminate a lease notwithstanding any provisions within the lease dealing with termination. Further, termination of the lease could take place on such notice or terms that the court deemed fit (Section 2; see *Revill v Bethel* [1918] 1 KB 638).

Similarly, according to the UK Courts (Emergency Powers) Act 1939, landlords were barred from taking possession of property or recovering rent during a state of emergency without leave of the court (Section 2(1)). In the English Court of Appeal decision of *Re Affairs of Kirby* ([1944] KB 2139), Lord Justice Scott said the following in interpreting the act:

*both legal proceedings and measures of self-help available to landlords for recovery of rent or of possession of land for non-payment of rent are forbidden without leave of the court, and the effect of that Act was to create in the tenant a quasi-right to possession and to immunity from rent or mesne profits which continued so long as the court did not give the landlord leave to proceed by either road - courts or self-help (p217).*

See also the Court of Appeal decision in *Humberston Estates Limited v Allen* ([1941] 2 KB 317).

In 1941 the United Kingdom enacted the Liabilities (War-Time Adjustment) Act 1941 which had the effect of suspending the execution of a landlord's judgment for possession. The act's purpose was intended to be a middle course for debtors who were indebted to creditors as a result of World War II without imposing the harsh stigma of having such persons adjudged bankrupt (p217).

(5) Article 29(2) of the Constitution.

(6) Article 27(1a) of the Constitution.

