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2. Pragmatism in the pandemic: the protection of commercial tenants in Singapore

Edward S W Ti²²

The COVID-19 epidemic has not spared any country, not least a densely populated country like Singapore. The government has been working tirelessly developing new policies and laws to mitigate the human and economic devastation brought on by the virus. The *COVID-19 (Temporary Measures) Act 2020* (COTMA) is intended to tackle some of the negative effects brought about by COVID-19. With an initial application period of 6 months which can be amended at the Minister's discretion, the COTMA covers a wide range of issues. Summarily, the COTMA provides for public health controls necessary to manage the health crisis, increases bankruptcy and insolvency thresholds to the advantage of debtors, allows company meetings and court hearings to be held virtually, relieves individuals from their obligations under certain types of contracts, provides rental relief to non-residential small-medium enterprises (SMEs), and requires property tax rebates granted to landlords to be passed on to non-residential tenants. Specific to protecting the interests of commercial tenants are two main thrusts – (a) temporary suspension of the landlord's legal rights against tenants who do not pay rent and (b) direct rental relief provided by landlords.

Suspension of tenancy obligations

For tenancy agreements entered into before 25 March 2020, the COTMA suspends some key tenancy obligations for tenants whose businesses have been 'materially impacted' by COVID-19. While the statute does not define the material phrase, Parliamentary records in the Hansard attempts to guide operational administration by stating that this inability to perform '*need not be the dominant cause but it cannot be a remote, insignificant cause either.*' This implies there could be more than one reason for the inability to fulfil the obligation but that COVID-19 is a material reason.

The legislation allows SME tenants who are materially affected by the COVID-19 pandemic to defer their rental payments during the 6-month period that COTMA is applied, with a maximum interest rate of 3% on delayed payments. Tenants are still required to pay the total rental sums, including the interest accrued, at the end of the application period. Failing which, their landlords will then be allowed to enforce the contracts against their tenants.

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Procedurally, the tenant seeking relief needs to first serve a notification for relief to their landlords. The notification must contain the details of the obligation, the date the obligation was expected to be performed, and a brief explanation how COVID-19 had materially caused the inability to perform. Landlords may contest this via a panel of assessors if (s)he deems that the contract in question does not fall within the definition of a 'scheduled contract', or that the party seeking relief has not been materially impacted by COVID-19. While the former may be easy to determine, whether the inability to perform was to 'a material extent caused by a COVID-19 event' could be more nebulous. Materiality is a question of degree and fact. Distinguishing a party who was merely *incidentally* but not actually materially suffering losses during the COVID-19 period, from one whose difficulties were materially caused by the pandemic is a grey area. To add to the challenge, the decision is left to a single assessor, and instead of in-person hearings, the regulations allow for the dispensation of a hearing, allowing the assessor to make a determination solely by reference to the forms and documents submitted. The primacy of expedience in these unusual circumstances explains why the COTMA does not provide for appeals against an assessor's determination.

If a valid notification has been served, the ordinary contractual enforcement rights are suspended until the notification of relief is withdrawn or until the end of the prescribed period. In addition, landlords are disallowed from terminating a non-residential lease or license for the unpaid rent, and from the right of re-entry or forfeiture of a lease or license of non-residential property.

In addition to allowing commercial tenants who have been materially affected by COVID-19 to defer their rental payments at a low interest rate, tenants unable to 'vacate premises, restore the property to its original state and yield vacant possession to the landlord' after the termination or expiry of the lease may also apply for relief against having to pay to the landlord 'double rent or double value', as specified under section 28(4) of the *Civil Law Act* (Cap 43). The COTMA does not define what 'inability to vacate the property' means, though it does state that this inability must be caused by COVID-19. Interestingly, there is no requirement that the tenant's business must have suffered because of the pandemic. It suffices that the pandemic has materially impeded the tenant's ability to move out of the premises. A broad reading of this could therefore include situations where the tenant is forced to hold over because the tenant cannot hire the needed manpower to remove his or her stocks or machinery in the leased premises, as well as other situations where a tenant is unable to find a new location to move to. In response to the tenant's application for relief, landlords with reasonable justification may also apply for relief. For instance, a landlord may have contracted with a new tenant to lease the premises and is unable to accommodate the existing tenant. The holding-over by the tenant-at-sufferance, as it were, may result in the landlord breaching his or her commitment to the new tenant. Assessors presiding over such cases thus have a critical role to minimise a domino effect in the property chain.

Transfer of property tax rebates

Singapore's property tax regime features a recurring wealth tax imposed on property owners ordinarily chargeable at a rate of 10% of the property's annual value, or approximately 0.2% - 0.3% of the asset value. On top of the suspension of key tenancy obligations, all non-residential property owners in Singapore became entitled, pursuant to the *Property Tax (Non-Residential Properties) (Remission) Order 2020*, to either a 30% reduction (for office and industrial property) or a complete waiver (for all other properties) for property tax that would otherwise be payable in 2020. Owners who are not leasing their properties are allowed to retain these benefits. When the Remission Order first came into effect on 10 March 2020, there was no legal requirement for landlords to pass these savings on to their tenants, with Parliament initially intending to leave it to the good graces of landlords to do right by their tenants who are facing cash-flow problems. Without legal compulsion however, few landlords voluntarily passed these rebates to their tenants, resulting in the enactment of Part 6 of the COTMA, which came into effect on 7 April 2020. Though deemed necessary, one parliamentarian described the fact that laws had to be enacted to compel landlords to pass on property tax rebates to their tenants as 'regrettable'. Apart from mandating that non-residential landlords must pass their tax savings from the property tax remission to their tenants, COTMA and its attendant regulations also provide the manner and timing of these payment rebates, and also require that the landlord is to provide tenants information detailing the breakdown of the rebates.

Rental relief

The latest amendments to the COTMA additionally provide rental waivers for qualifying SME tenants. There are two components: (a) Government-funded rental waiver; and (b) Landlord-funded rental waiver. SME tenants necessarily qualify for the former, but need to prove that they have suffered a year-on-year decrease of revenue of at least 35% in order to qualify for the latter.

Under government-funded rental waivers, SMEs with retail property leases (i.e. shops) enjoy 2 months rent-free while SMEs with office property or industrial property leases enjoy a 1-month rent-free. SMEs that qualify for landlord funded rental waivers enjoy a further 2 months rent-free period for retail leases and 1-month rent-free period for office or industrial property leases.

It is first interesting to note that the rental relief is not necessarily tied to any requirement for the SME's business to be materially impacted by the pandemic. Whether presumptuous or for purposes of operational expediency, a 35% loss in revenue is sufficient to qualify an SME for rental relief. As a counterpoint, there is fortunately some relief for smaller landlords who may suffer

financial hardship should they be required to provide the full rental waiver. If they can show that their rental income constitutes a substantial portion of their income, these landlords will only be required to provide half of the landlord-funded rental waivers. The rental relief framework while well-intentioned, is not without its potential pitfalls. While SMEs renting their premises receive rent subsidies, owner-occupying SMEs that both own and operate at their place of business receive no further help apart from the aforementioned property tax rebates. A slight tweak in the corporate holding structure may also result in different outcomes as more sophisticated SMEs that rent their premises from a sister company ostensibly do enjoy the benefits of government-paid rental relief. It is also possible that through a tenant, the controllers of the bankruptcy-remote corporate shell could in fact, be more affluent than their landlord. Further, the lack of any requirement for an SME's business to be negatively impacted to qualify for government-funded rental relief means that businesses enjoying similar or even higher profits during the current period could receive a windfall. SMEs seeing a substantial decline in revenue due to reasons other than COVID-19 also receive a windfall, as they would not ordinarily be subsidised by their landlords. This could have the effect of synthetically supporting business that were going to fail for reasons outside COVID-19, thus delaying the inevitable. Finally, start-up businesses unlucky enough to have commenced operations amidst the pandemic have no operating history, and would thus be ineligible to receive landlord-funded rental waiver, being unable to present a year-on-year decrease in revenue.

A perfect system or just good enough?

The COTMA provisions targeted at protecting commercial tenants would have been deliberated at length as it is an incursion on a cornerstone of private law - the sanctity of contract. It also crosses the line on property rights. The Law Minister justified these unprecedented incursions by highlighting the overriding need *'to safeguard the fundamental integrity of the economic structure of the common good'*. The Singapore government's protections for commercial tenants were not so much to prevent *individual* hardship on the part of tenants as it was to prevent systemic economic fallout. The earlier discussion on the potential limitations of the rental relief framework highlights inequities across SMEs of various profiles. However, if the purpose of COTMA is first and foremost for the *'economic structure of the common good'*, perhaps the rental relief framework was not designed to be perfect, but just good enough. Quite abruptly, the COTMA has tied the landlords' hands, preventing them from enforcing their commonly held rights through means traditionally made available to them. It has been argued that these pro-tenant policies protect capital values which in turn serves the landlords' long-term interests. In justifying the policy, the Law Minister pointed out the correlation between growth of property prices and economic growth: *'If our SMEs do well, the economy is given a boost, property owners will continue to enjoy the stable value of their assets. If viable SMEs go under because of temporary cash flow difficulties, the economy as a whole suffers, the value of property will also suffer.'* However, the compulsory

and radical transfer of property and wealth from landlord to occupant via a rental relief is also potentially problematic. On one view, landlords have no choice but to share the downside business risk of their tenants, but are excluded from the upside gains. As there is no correlation between the deservingness of a landlord and the success or otherwise of its tenant, arbitrary outcomes may result. That being said, if the overarching objective is to design a system that is just good enough, despite not being entirely equitable, to prevent the Singapore economy from going into a downward spiral, there could be stricter limits on the incursions to landlords' rights. For example, there could be a requirement that the proviso of holding-over relief should be limited to tenants whose businesses have suffered as a result of the pandemic, not simply those who find it difficult to move out of the premises because of COVID-19.

Beyond pragmatism?

The intricate web of connections across the various housing markets with the social and economic wellbeing of cities is undeniable. It is common for the government to step in where required, to influence the property market, especially in such exceptional circumstances as the present global pandemic. This note outlines the protections afforded to commercial tenants in Singapore, as well as the potential pitfalls, inequities and arbitrariness that may be justified in favour of designing an imperfect system that sufficiently meets its objective. The overriding reason – to avoid economic ruin – is necessary and highly pragmatic.

Given the pressing nature of the intervention, there has been understandably little concern with how this is consistent with the sanctity of property rights. As the Singapore government continues to grapple with the effects of COVID-19, it would be prudent to identify further arguments justifying existing government interventions in favour of commercial tenants based on legal and economic principles. These would provide further legitimacy and acceptance among the populace, especially if the need for similarly, if not more, drastic incursions to property rights arise.