Corona virus – typical issues faced by landlords

The corona virus has resulted in many new issues for property owners. In addition to the many employment law related issues that affect the majority of businesses, many landlords have now implemented additional measures connected to cleaning, have received requests for rent exemption, have received notice of delays of building works and have received requests that keep-open obligations in leases be suspended.

In this newsletter, we will be providing an explanation on some of the legal concepts that are good to be aware of, which will be based on the standard lease used most in Norway, namely the standard lease for used "as is" premises. Use of other standards, for example the all-inclusive standard, or dealing with leases with special clauses which deviate from the standard, can affect the assessments that are made in this newsletter. The assessments that will have to be made are concrete, and every situation will need to be assessed on its own facts. Parties should be careful in adopting a strict interpretation of the wording in their contracts since it must be assumed that none of the parties thought about the situation that has now arisen at the time contractual relations were entered into.

We strongly recommend that landlords pay close attention to all official recommendations that are released and adjust to these in a way which is relevant to their individual business. In addition, we also recommend that any inquiries that are raised about possible consequences on the landlord/tenant relationship, which don't need to be responded to immediately, are answered with the following: "We understand the situation that has arisen, but we will need to assess the consequences of these more carefully and deal with these when we can. Notwithstanding this, we recommend that you look into what kind of insurance cover you have in the event of an interruption to your business." This is due to the fact that several of the analysis that must be made are complex, and what might be relevant advice given by the authorities today, may change on a daily basis.

Operation of the properties

Tenants normally have operational responsibility over their exclusive premises. Clause 8.9 of the standard lease provides as follows:

> *"The Lessee shall pay, directly and for its own account, cleaning of the Exclusive Area (including internal cleaning of windows) and caretaker services for its own use."*

The landlord will normally have operational responsibility over the common areas. Clause 14.2 of the standard lease provides as follows:

> *"The Lessor shall arrange for maintenance, operation and cleaning of the Common Area and external areas."*

A concrete assessment of which measures are appropriate and necessary must be carried out so that, especially cleaning, is carried in accordance with the applicable recommendations that exist from time to time. These recommendations (can) change on a daily basis, so it is therefore important that both the landlord and tenant continuously review how they will satisfy their operational responsibilities.

Keep-open obligations

It follows from section 5-1(4) of the Tenancy Act that a tenant has a general keep-open obligation, with modified exceptions:

> *"The tenant of shop or catering premises is obliged to keep the business open and in normal daily operation except when temporary closure is necessary."*

The exception is applicable "when temporary closure is necessary". Keep-open obligations, therefore, do not apply where the health authorities enforce closure. This is, for example, applicable to the following businesses from 12 March 18:00 to and including 26 March 2020, where the Directorate of Health has made a decision against/to close several business (with legal authority in the Infection Control Act):

- Gyms
- Companies that provide hairdressing services, skin care, massage and body care, tattooing, piercing, etc.
- Swimming pools, water parks, etc.

The following decision made on 12 March is applicable to shops:

> *"Detail and trade shops will remain open. There is no reason to stockpile food. Grocery shops will stay open."*

This, therefore, entails that keep-open obligations applicable to grocery shops remain unaltered and arguably strengthened because it is important that these establishments are kept open in the current circumstances.

The following decision made on 12 March is applicable to the hospitality industry:

> *"All establishments in the hospitality industry, except for eating places where food is distributed, i.e. canteens and eating places that can ensure visitors to keep at least 1 metre distance from each other. Buffets are not allowed. The hospitality industry includes restaurants, bars, pubs and nightclubs."*

There is now a prohibition on keeping-open businesses operating in the hospitality industry, which are unable to satisfy the requirement to keep visitors at least 1 metre apart from each other. As a result, these business' keep-open obligations are now suspended.

The question that then arises is - what is applicable to businesses that aren't grocery shops or which don't operate within the hospitality industry, that "are able" to implement the 1 metre rule? Do keep-open obligations still apply to these or can closure of these businesses still be considered "necessary"? Factors that can be included in the assessment are, amongst others, whether the tenant has access to employees or whether these employees have been quarantined (or similar), and whether the tenant (as an employer) should allow its employees to not come to work based on general recommendations that have been made to limit activity in Norway. The answers to these questions are not obvious, and landlords should be careful in overruling each tenant's assessment, even though closure can have negative consequences, for example on turnover rent. The keep-open rules are supplemented by the rules on force majeure. In the event it is not possible to maintain continuity of business operations, for example due to a lack of staff as a result of the authority's quarantine decision, then it will not just be the provisions in the Tenancy Act that will determine the result of the assessments.

Insurance

The starting point at clause 18.1 of the standard lease is that each party shall insure their own assets/interests. It is provided further at clause 18.3 that:

> *"The Lessee shall insure...operating loss/interruption."*

We have only, to a limited extent, assessed tenant's insurance policies, and most of them are limited to physical damage to the property. However, in the event a tenant has insurance coverage, then this can influence an assessment of reasonableness/a revision of contract, because there will be less need for a revision of contract. Furthermore, DLA Piper has experienced in the past, that several tenants have a fairly long quarantine period before their insurance coverage will be triggered, and we have seen examples of periods of 2-3 weeks. Insurance policies can have many exceptions, but some policies can become very useful in the event measures adopted in Norway become very extensive. We recommend that the parties investigate both the landlord's and tenant's insurance cover closely.

Rent exemption

It is unlikely that tenants will be able to make a legal demand against the landlord for a rent exemption or a reduction in rent pursuant to the lease or the Tenancy Act, as a result of the tenant having to keep closed.

The starting point is found at clause 20.1 of the standard lease:

> *"The Lessee may claim rent reduction pursuant to Section 2-11 of the Tenancy Act as the result of delays or defects. As far as defects are concerned, this is conditional upon the defect being material and the defect not being remedied by the Lessor pursuant to the provisions of Section 2-10 of the Tenancy Act. The Lessee shall give written notice of any damage and defects, etc., within a reasonable period of time after the Lessee ought to have discovered these."*

It follows from the rules in the Tenancy Act that the assessment of whether the leased object has a defect, "shall be judged on the basis of the conditions on the agreed date for occupation by the tenant", see section 2-7 of the Tenancy Act. This, however, doesn't prevent a defect from existing if the landlord fails to comply with its continuous obligations at a later date, including placing the leased object at the tenant's disposal.

There is no defect in the leased object despite a tenant not being able to operate its business as a result of the general rules and guidelines that are applicable to the whole of Norway. However, situations cannot be excluded, following a concrete assessment, where the leased object or parts of it, won't be considered as having been placed at the tenant's disposal, for example in the event the landlord has closed a canteen or any other common areas. In the event a defect does arise, then the question then becomes whether this defect is "material". The boundary between what constitutes a delay and a defect are also fluid in these types of scenarios, and the materiality threshold does not apply to delays.

In the event a leased object should have been handed over to the tenant on 13 March 2020, and isn't handed over before 26 March 2020, then this will be considered a delay, and it follows that the landlord will not be able to demand rent for that particular period.

Landlord's liability

Even though a landlord makes a decision to keep the common areas closed, it is unlikely that tenants

will be able to make a legal demand against the landlord for damages pursuant to the lease or the Tenancy Act.

Landlord's liability is based on the same interpretation of the rules that are applicable to rent reduction, but are even stricter. Clause 20.2 of the standard lease provides that:

> *"The Lessee may claim damages under Section 2-13 of the Tenancy Act in respect of any direct loss resulting from any delay or defect. As far as defects are concerned, this is conditional upon the defect being material and the defect not being remedied by the Lessor pursuant to the provisions of Section 2-10 of the Tenancy Act. Indirect loss is not covered. The damages during the Lease Term shall not exceed 12 months' rent, unless the Lessor has acted with intent or gross negligence. In the event of any extension of the Lease Term, a new, corresponding limitation shall apply with regard to any loss during the extension period."*

There is also a requirement that there is a delay or a material defect pursuant to this clause. This clause does not cover indirect losses. The following are regarded as an indirect loss pursuant to section 2-14 of the Tenancy Act:

- loss resulting from reduced or discontinued production or sales (interruption of operations)
- lost earnings resulting from the loss of a contract with a third party since the tenant without reasonable grounds refrains from renting other property or adopting other measures to avoid or reduce the loss
- loss resulting from material damage.

Liability is limited to 12 months' rent. The exception that applies whereby the limitation period can be extended due to gross negligence by the landlord, will not normally be applicable unless concrete breaches exist of, for example, the duty to provide proper cleaning.

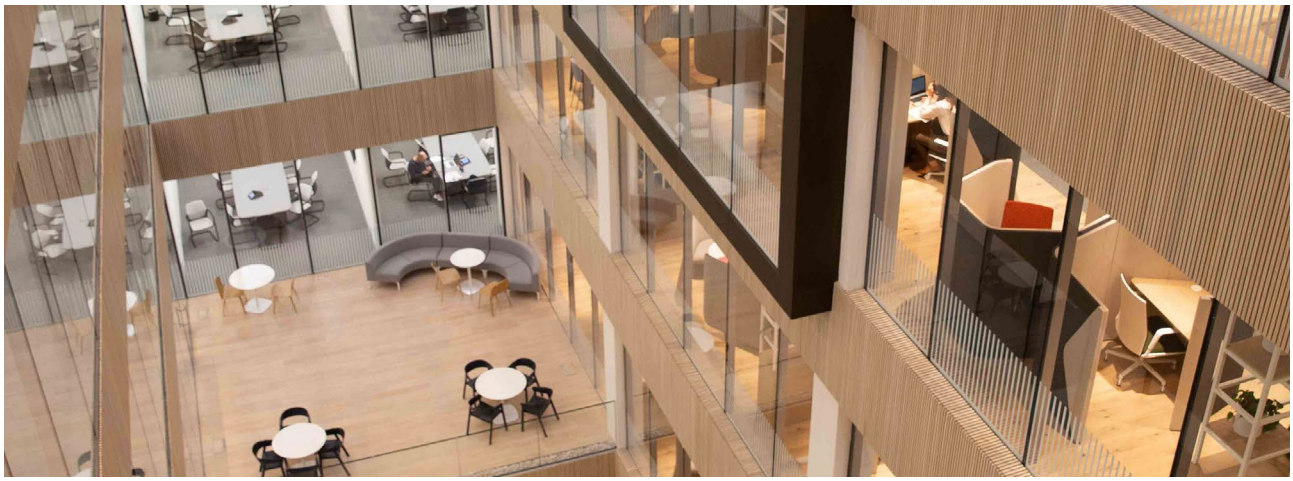
Delayed handover

A delay will exist in instances where there is an agreed handover date, which is postponed because of a delay in construction works that will be/are being carried out. This gives the tenant the right to a rent suspension for the duration of the delay, and also the right to a claim for damages for any direct losses suffered. Any direct loss suffered will normally be limited. However, it is arguable that the landlord can plead exception either based on the Tenancy Act section 2-13, and/or based on force majeure and thus escape liability – to do this, it is very important that the landlord provides notice of the event as soon as it becomes aware of it. Otherwise, it is arguable that the landlord may lose the opportunity to make a claim for limitation of liability, even though the doctrine of force majeure could have been applied.

Revision of contract

A revision of contract can result in the tenant being entitled to a rent exemption and its keep-open obligations being suspended temporarily. A revision of contract can ultimately lead to a termination of contracts.

In simple terms, a revision of contract means that the original contract entered into, is revised, so that it is given a different content than the content that was originally applicable. For example, that the obligation on the landlord to pay damages due to a delay falls away. A commonality to the legal doctrines on revision of contract, is that they might be applied even though no explicit provision for this has been incorporated in the relevant contract.



A revision of contract can occur on several legal grounds, especially due:

- to the Norwegian doctrine of breach of expectations
- to Section 36 Contract Act
- to force majeure

In some instances, a revision of contract can lead to an amendment of the contract, sometimes to a termination of the actual contractual obligations, and sometimes to a temporary suspension of the contractual obligations (in the event of a temporary suspension, the duty of fulfilment of these obligations resumes as soon as the circumstances have changed/normalised).

The core of the doctrine of breach of expectations is that the contract can be deemed invalid if conditions develop in an unforeseen manner so that key conditions/expectations for the contractual relationship have failed in such a way that fulfilment of the contract becomes unreasonably difficult or impossible to fulfil. Something extreme needs to occur in order for this doctrine to be satisfied, and it has, to some extent, lost its importance after section 36 Contract Act was passed, and the statutory basis for a revision of contract was established. Section 36 of the Contract Act states that a contract can be set aside (wholly or in part) or can be amended, in so far as it would be unreasonable or in conflict with good business practice to allow it to continue to apply. The same applies to unilateral binding dispositions. In applying this particular legislation, the decision will not only have to take into account the content of the agreement, the position of the parties and the conditions at the time the contract was entered into, but also any conditions and circumstances that occur at a later date.

The basic conditions for force majeure are:

- An event must exist which prevents fulfilment of a contractual party's obligations
- The event must be beyond the control of the contracting party
- The person affected by the incident could not have foresees the event when entering into the contract
- The person affected by the incident cannot reasonably have avoided or overcome the obstacle and its consequences

In addition to this, there is normally a requirement that a party gives notice that it will be invoking force majeure.

Since (in everyday language) force majeure is sometimes referred to as something synonymous with the extraordinary with no or only little focus on whether it hinders fulfilment, we have experienced that there is a lot of misunderstanding around the doctrine, and that there is a common misconception that the outbreak of the corona virus will provide general access to waive contractual fulfilment. This is, however, not the case. The event will have to prevent fulfilment of the contract in accordance with the doctrine of force majeure. The fact that a tenant's finances are negatively affected by the virus and the restrictions that come with it, will not in isolation constitute an event that prevents the fulfilment of the obligation to pay rent.

A commonality to all the conditions that are described above is that they need to be interpreted strictly, and that the result of the interpretation will depend on a concrete assessment. It is important to note that all these legal doctrines presuppose that circumstances arise that were not known at the time contractual relations were entered into. No party will be able to claim a subsequent revision of contracts for any contracts that are currently being entered into, and where the parties have full knowledge of the uncertainty that is currently prevailing. If new contracts are entered into today, where the parties would like their performance to be conditional on "normal circumstances without corona", then it is important that the parties explicitly regulate this in the new contracts.

GDPR

It might be tempting to start collating overviews of the challenges that are connected to the corona infection, including which tenants have had people that have been infected by the virus. Landlords need to be very cautious with this. It is clear that landlords, pursuant to the law, will not have legal access to collect and record information about tenants and their employees as a result of the corona pandemic. Tenants (as employers) will have a certain possibility to handle this type of information. This is information that a tenant cannot share with a landlord. The Norwegian Data Protection Authority has recently released a statement stating that "an employer shall not distribute information about an individual employee being infected or/and being quarantined to outsiders". For businesses with multiple employees, it should be possible for the landlord to obtain information if there has been a corona incident without revealing their identity. Landlords can quickly end up breaking the GDPR rules if they are too eager in following up on this information. Our advice is, therefore, that tracking infections on an individual level should be left to the authorities.

Commercial assessments

Some tenants are impacted especially hard by the measures that have been implemented in connection with the corona virus. Many of these will go bankrupt. Ultimately, everything will boil down to a commercial decision on what should be done to ensure that the tenants survive.

Contact persons

Gro Hauge
Senioradvokat
+47 95 96 60 25
gro.hauge@dlapiper.com

Line Ravlo-Losvik
Partner
+47 95 22 33 94
line.ravlo-losvik@dlapiper.com

Andreas Mello-Kildal
Partner
+47 47 01 94 94
Andreas.Mello-Kildal@dlapiper.com