

UPDATE TO GUIDANCE RELATING TO RENT AND OTHER PAYMENTS FOR LANDLORDS AND TENANTS OF JERSEY COMMERCIAL PROPERTY DURING COVID-19 CRISIS

1. Ministerial Update on Use of the Guidance

Overall, there has been positive feedback in relation to the use of the Guidance by Landlords and Tenants. Quarter 2 showed a significant increase in the use of the Guidance with a substantial number of Payment Concessions being offered and agreed between the Parties.

It remains essential for private parties to keep an open dialogue going while the COVID-19 situation continues to affect normal business and to reach sensible and pragmatic compromises as is provided for under Guidance.

Jersey Business has administered on behalf of Government free assistance and advice to local businesses wishing to use the Guidance and will continue to do so. It does however remain for the parties to agree the terms of any Payment Concession or Temporary Voluntary Arrangement.

The feedback Government has received is that:

- Larger commercial landlords and tenants have used professionals (lawyers and property agents) to negotiate having regard to the principles of the Guidance but adopting a wider and more bespoke range of concessions than are identified under the Guidance
- A number of smaller to mid-size commercial tenants continue to fail to take advice either from professionals or make use of the free service offered by Jersey Business and are likely to be prejudiced financially as a result
- Q2 showed a marked increase in the number of requests for assistance from local businesses to Jersey Business as this quarter followed the commencement of the COVID trading restrictions and was the period in which the non-financial local business sector experienced its most significant fall in income
- The required evidence of 'financial hardship' under the Guidance has been the primary source of disputes between the parties with some unreasonable requests for information and some parties using this requirement as a negotiating and/or delaying tactic
- The formal written arrangements (Temporary Voluntary Arrangements) documenting the agreed voluntary concession as provided for under the Guidance need to be more flexible to deal with the changing position and impact of COVID-19 and related Government trading restrictions
- The default position of most landlords is to offer full rent deferral under the Guidance rather than any other Payment Concession, regardless of the individual financial circumstances of the tenant and the impact of COVID trading restrictions on the tenant. The average deferral sum agreed with the assistance of Jersey Business for tenants is in the order of £10,000 per rental period

- There is a misapprehension that the Guidance does not extend to the guarantors of the tenant or landlord and this is potentially increasing the risk of individuals who act as guarantors, particularly in the case of small businesses, going bankrupt
- There is a misapprehension that the Guidance does not apply to Jersey property which is owned or occupied by landlords or tenants who are head-quartered or based off Island
- The impact of COVID-19 has escalated downward market trends relating to the public's use of town and its businesses: there is evidence of a substantial and consistent fall in the footfall in St Helier which appears to be unaffected by the lifting of COVID-19 restrictions, so that there is need for a broader rebalancing of the town rental market to cater for the longer-term behavioural changes embedded by COVID-19.

Government has evidence to indicate the economic impact of COVID-19 on local businesses will go on for longer and that recovery will take longer than may have been originally anticipated by parties to commercial leases when agreeing Payment or Obligation Concessions under the Guidance.

It is anticipated that local businesses will continue to experience cash-flow issues in Q3 and Q4 of this year. COVID-19 trading restrictions still apply albeit they are considerably less restrictive than at the beginning of the pandemic. This will continue to impact on income generation of local businesses, together with some of the longer-term behavioural changes accelerated by COVID-19. The Guidance therefore remains relevant.

Government's key concern is that landlords and tenants of commercial property should not consider rental deferral as being the preferred option. This option has greater risk for both parties in the longer-term. It impedes the landlord's cash flow and increases the debt of the tenant (and is likely to be one of several deferred business liabilities of a tenant and landlord). While the profitability of businesses continues to be impacted by the effects of COVID-19, a deferral potentially carries more insolvency risk.

Government encourages all businesses tenants to consider afresh whether their business is sustainable in the longer term, if their business model or activities need to change and how such changes might impact their ability to afford their current rent. Jersey Business can help with this assessment. Early surrender of the lease alongside negotiation of the terms of this early termination and surrender may be more beneficial to both landlord and tenant.

Government would also like the parties to consider adopting some of the other Payment Concessions, such as rent waiver or reduction, which are identified in the Guidance and those additional ones set out in this Update. This will help more businesses survive the effects of COVID-19 and, more critically, will allow the economy to recover more quickly.

It remains Government's aim and commitment to maintain a clear balance between the interests of both landlords and tenants and not to interfere unduly with the parties and their ability to negotiate between themselves.

2. Government's Policy as Landlord

Government has updated its own policy as Landlord. Jersey Property Holdings has issued a new policy. This reflects Government's concerns about using rent deferral as the preferred Payment Concession under the Guidance. It also reflects its own behaviour over the last quarter where it has exercised its wider discretion and offered alternative rental concessions, such as rent waiver or partial waiver, to certain tenants who belonged to those business sectors worst effected by COVID-19. Here is a link to where the new policy can be found:

<https://www.gov.je/Health/Coronavirus/BusinessAndEmployment/Pages/GovernmentSupportForBusinesses.aspx>

Its revised policy works in tandem with Government new and continued support measures for those business and business sectors worst affected by COVID-19. Jersey Business will be administering all applications for Payment Concessions for Business Tenants of Jersey Property Holdings and will give assistance in identifying that Payment Concessions are appropriate to the individual business' circumstances.

Other quasi Government Landlords will be determining their own policy. The Guidance applies to them as landlord in the same manner it applies to private commercial landlords.

3. Court Update on hearing of Tenancy Disputes and Application of the Guidance

The Petty Debts Court and the Royal Court are hearing all cases including Tenancy Disputes. The Court will continue to apply the Guidance in respect of matters arising during the COVID-19 Period, which continues until the Court determines that it has come to an end.

The Parties are reminded that the Guidance is to promote good conduct and reasonable behaviour from both Landlords and Tenants during the COVID-19 Period and that this will be determined by the Courts in accordance with the Practice Direction issued by the Royal Court on 27 April 2020 and the Guidance.

4. Update on continued use of the Guidance - Reasonableness and additional Payment Concessions

Following feedback, Government believes it would be helpful to give some additional clarification as to how the Guidance is intended to operate.

Defined terms used in this Update shall have the same meaning as given to them under the original Guidance.

Reasonableness

(i) Payment Concessions and Obligation Concessions

In determining the reasonableness of the Parties in respect of any Payment Concessions or Obligation Concessions it is anticipated the Courts will have regard to the individual circumstances of the Parties, the prejudice each Party will suffer in consequence, and how

appropriate any offer of a particular concession is in those circumstances. This is in accordance with the Overriding Principles.

(ii) Evidence of Financial Hardship

The evidence required of either Party to manifest their initial claim of financial hardship should only be limited to such basic financial information as it is reasonable and appropriate for a Party to request having regard to their resources and their size as a business. Where a Party is able to demonstrate it is in receipt of Government support through one of the COVID-related support measures, it would be reasonable for financial hardship to be presumed by the Parties unless capable of being rebutted.

Government wishes to remind the Parties that it is their obligation to keep the other Party advised if their financial circumstances improve.

Where a Party is seeking a particular Payment Concession or Obligation Concession, such as full or partial waiver of rent, service charge or other payment obligation, it may be reasonable for a Party in accordance with the Overriding Principles to require additional financial information to assess, inter alia:

- (a) the sustainability of the business of the Party;
- (b) its future cash flow obligations; and
- (c) the strength of any Guarantor covenant.

It is in the interests of the Party seeking the Concession that notice is given as early as possible to the other Party.

Additional Payment Concessions

In order to provide Parties greater flexibility to agree a concession in respect of Sums Due during the COVID Period (to reflect the potential of an extended duration of COVID-19 trading restrictions or a second lockdown period), the following options could be considered in addition to those set out in the Guidance. Furthermore, Parties are free to combine one or more of the options set out in the Guidance and this Update, if it is appropriate, in any agreement they reach. Additional options include:

- (a) A period of complete waiver of Sums Due in consideration for an equivalent extension to the term of the Lease;
- (b) Sums Due to be calculated by reference to a fixed percentage of gross turnover; and
- (c) Early termination and surrender of the existing Lease and its replacement with a new Lease with improved terms for rent and other payments.

Variation to a Temporary Voluntary Arrangement

Government wishes to clarify that where Parties have entered into a Temporary Voluntary Arrangement and one Party wishes to vary its terms during the COVID-19 Period, this can be done by mutual agreement.

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Government recommends that the Party who wishes to vary a Temporary Voluntary Arrangement should give written notice to the other Party detailing the nature of the variation, the rationale and, where appropriate, with further evidence of financial hardship relevant to the nature to proposed variation.

The other Party is not obliged to agree a variation but should in accordance with the Overriding Principles consider the request and, if the Party refuses the variation, provide written reasons.