

COVID-19 pandemic update on lease law in The Netherlands

December 2020

As an introductory comment, the Dutch district courts and courts of appeal have judged exclusively in interlocutory proceedings (kort gedingen) in disputes concerning the tenants' obligation to pay the contractual rent during the COVID-19 pandemic. At this moment, there are no court rulings on the merits of these cases (bodemprocedures). Therefore, the current case law only concerns temporary provisions, which can be confirmed as well as overruled in possible further appeal proceedings and/or in proceedings on the merits of the case.

In general (but always depending on all circumstances of the case), the courts rule that the COVID-19 pandemic and its consequences are a 'defect' (for which most lease agreements exclude claims from tenants' side) and/or 'unforeseen circumstances' which are not taken into consideration nor are discounted in the lease agreements concerned (nor will it be in most other lease agreements). By standards of reasonableness and fairness, it is unacceptable that the (financial) consequences of the pandemic are borne in full by the respective tenants or by the landlords. In short, the courts generally ruled that (taking) 'the pain has to be divided between parties'. Therefore, - given the nature and scope of the proceedings as a temporary provision - the tenant is allowed to suspend (opschorten) the payment of rent partially or is granted a (temporary) rent discount (huurkorting), both up to 50% of the contractual rent. In many of these court rulings it is ruled that the suspension or rent discount will have no effect if the tenant does not start a proceedings on the merits on the case within a certain period after the court judgment. Please be advised that tenants are not allowed to decide by themselves to suspend or discount their contractual rent payments.

The Dutch government measures and restrictions as a result of the COVID-19 pandemic have not been the same for all types of businesses. For specific types of leased properties, a summary of the court rulings is set out below. Hotels may stay open (with restrictions), but non-essential shops are closed as per December 15, 2020.

Hotels

No mandatory complete closure has been ordered, but hotels have welcomed (in a substantial manner) fewer guests, and the hotel restaurants were (except for hotel guests) and now are closed (except for ordering room service or take-away). At this moment, courts expect that in proceedings on the merits of the case it will be ruled that the COVID-19 pandemic is an unforeseen circumstance, and that the tenant and the landlord must 'share the pain' when substantial decreases in the hotel turnover figures are shown. As a temporary provision, the

courts deem it fair that the tenant can suspend his rent payments partially. Tenants in these cases are allowed to suspend their contractual rent payments up to 50% for the period that hotel facilities such as hotel restaurants, swimming pools and wellness were closed and/or for the periods that the hotels were opened fully again but suffered substantial turnover decreases due to welcoming very few guests. For the periods that the hotels with facilities were open again a rent suspension of 25% up to 40% is ruled to be reasonable.

Bars and restaurants

Bars and restaurants by governmental order had to fully close between 16 March 2020 and 31 May 2020, reopened between 1 June 2020 and 15 October 2020 (with restrictions) and as per 16 October 2020 until further order closed again (except for take-away). A suspension or discount of the rent payments is ruled reasonable and in general a suspension or discount of 50% of the contractual rent is ruled to be reasonable for the period that the bars and restaurants were and are completely closed, and or the periods of reopening a suspension or discount between 25% and 40% is ruled to be reasonable.

Retail

Other than general health measures to be taken into account (e.g. social distancing and altered routing inside shops), for shops there has been no mandatory closing order until 15 December 2020. Since exclusively non-essential shops or parts thereof are closed as per 15 December 2020, there are not many court rulings (yet) about the rent payment obligation in connection with these mandatory closures for leased retail objects. However, in the present case law the courts ruled that a temporary rent suspension or discount of 50% is reasonable given the significant turnover decreases as a result to the COVID-19 situation.

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