



**Liability for Commercial Rent in the Pandemic**  
**Review of Recent Developments**

Gavin Hamilton  
20 May 2021

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**Where we are now**

- 14 months after start of Pandemic, but all change now
- Rent arrears figure for last quarter – less than 20% of commercial rent was paid on time
- Huge pressures on both L & T
- Countless agreements reached in private
- Relatively few disputes have reached the courts

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*Bank of New York Mellon (Int.) Ltd.-v-Cine-UK Ltd.*  
*AEW UK REIT plc-v-Mecca Bingo Ltd.*  
*AEW UK REIT plc-v-Sportsdirect.com Retail Ltd.*  
 [2021] EWHC 1013 (QB)

Master Dagnall  
 Hearing dates: November & December 2020  
 Judgment date: 22 April 2021

Cinema in Bristol, bingo hall in Dagenham and sports shop in Blackpool

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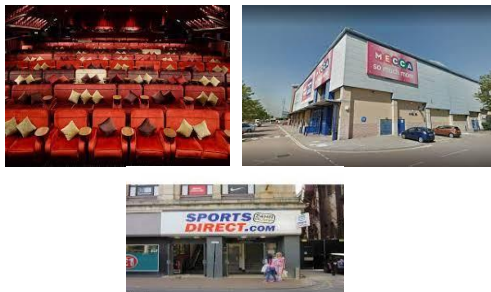
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**Topics Covered in Judgments**

1. The Code of Practice
2. Statutes & Regulations
3. Construction of rent cesser insurance clauses
4. Implication of term
5. Temporary frustration/supervening illegality

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**The Code of Practice for Commercial Property Relationships**

- Published on 19 June 2020
- Annex published on 6 April 2021
- Voluntary code encouraging negotiation
- It expressly does not change the legal relationship between L & T – not a bar to L seeking judgment
- In *BNY* all 3 Ts declined to say that they could not afford to pay the rent (para. 97)

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

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### Primary Legislation

- Coronavirus Act 2020
- Section 82 – no forfeiture until end of “*relevant period*”
- *Commerz* – this does not prevent L obtaining a judgment for rent (para. 23)
- Corporate Insolvency & Governance Act 2020 – section 10 & schedule 1- no statutory demands or winding-up petitions during relevant period



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### Secondary Legislation

- Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) Regulations 2021 (SI 2021/283)
- Currently “*relevant period*” ends on 23 June 2021



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### Insurance for loss of rent

- Standard commercial lease allows L to insure against loss of rent on certain risks chosen by L and requires T to pay cost of insurance
- T’s obligation to pay rent is suspended on occurrence of the insured risk
- Typical insurance policy provides for L to be paid rent by insurers if rent is not payable by T by reason of occurrence of the insured risk



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### Insurance for Loss of Rent

- In both *BNY* & *Commerz*, on construction of lease and policy, that meant physical destruction - not enforced closure
- So, it is not enough that T simply has not paid the rent in circumstances when T is not relieved of liability to pay
- This is insurance by L to protect L's business interests and is not insurance by L to protect T's business interest – *Commerz* paras. 46-47, *BNY* paras. 121-122



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### Insurance

- Lease usually provides that T cannot insure for those risks that L has chosen to insure under L's policy for the premises (for which T has to pay)
- But T can insure its own business (not L's premises) for risks that are not covered by L's policy – such as loss of T's own turnover or even T's liability for rent



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### Implied Term

- In *BNY* Ts argued for implication of a term in the leases that rent cesser should apply to Covid
- Master Dagnall thought the proposed term was fair and reasonable and equitable (para. 140)
- But he was not satisfied that it was either obvious or necessary for business efficacy (paras. 141-149) as Ts could either have negotiated for a wider term or insured themselves against the Covid risk

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### Implied Term

- Ts' argument in *BNY* went further: Ls could not claim for something from them that could have been claimed under the insurance policy – *Mark Rowlands-v-Berni Inns*
- This was rejected too: in *BNY* (paras. 160-172) because it could not have been claimed from insurers
- In *Commerz*, Chief Master Marsh came to the same conclusion, although there T's arguments were much less refined and developed than they were in *BNY*



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### Frustration of Lease

- Yes, in principle it can apply to leases – *National Carriers-v-Panalpina* [1981] AC 675 (HL)
- In practice, it is very unlikely to apply
- Evaluative process: relationship between affected period (short) and the term of lease (long)
- Full frustration/suspensive frustration – in *BNY* Ts argued for latter
- Claim was rejected: 18 months in a 15 year lease was too short (para. 209)



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### Frustration of Lease

- Time was too short to make a "radical difference" or to make it "unjust" for any of the leases to continue (para. 209)
- As these were protected tenancies under L & T Act 1954, any frustration would cause the loss of T's protected rights
- If lease ended during a lockdown, answer might be different
- No such thing as a temporary frustration (para. 211) - if there was, *National Carriers-v-Panalpina* would have been decided differently



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### Final Arguments Raised in *BNY*

- T argued for impossibility of performance of the obligation to pay the rent due to supervening illegality
- L’s riposte: not impossible or illegal to pay the rent, even if it was impossible to trade
- Rejected by Master (para. 218)
- As was the further argument that there had been a partial failure of consideration (para. 221)

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### Other Case of Interest

- *WH Smith Retail Holdings Limited-v-Commerz Real Investment gesellschaft mbh*
- L & T Act 1954 Determination of Tenancy Renewal Terms
- Decision of HH Judge Richard Parkes QC, sitting in County Court at Winchester [2021] Lexis Citation 44
- Hearing: November 2020, Judgment: 25 March 2021

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### WH Smith continued

- Westfield Shopping Centre again
- Agreement between L & T that there should be a pandemic rent suspension clause in the new lease
- Originally T said there should be 100% suspension of rent, but then agreed to L’s figure of 50%
- Dispute was as to what should be the trigger
- Decision: that non-essential shops are prevented from trading

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### WH Smith

- On the question of rent, parties' experts were agreed that rents had fallen by about 20%
- J determined that there should be a 20% discount for Covid
- There should be no adjustment to the rent (upwards or downwards) to reflect the pandemic rent suspension clause
- Net effect: new rent £404,666 pa down from old rent of £953,000 pa

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