Recent developments in commercial landlord & tenant -

Liability for rent in the pandemic

By Gavin Hamilton
3PB Barristers

"The COVID-19 Pandemic and its consequences have had a massive effect on public, private and business life in this country and elsewhere in the world. This Hearing has concerned questions as to upon whom (landlords, tenants and/or insurers) certain of the resultant financial detriments should fall, and in particular, whether tenants of commercial premises have remained responsible to pay their rents notwithstanding that they have been subject to the enforced closure of, or inability to trade from, their premises."[1]

The pain has been well-publicised, but the resolutions remain mostly private. So, it is of interest to note two recent cases where L has applied for and obtained summary judgment on rent claims against T. All of the many arguments raised by Ts failed and the defences had, one might reasonably assume, been carefully filtered, to identify only those points thought to be arguable.

Commerz Real Investmentgesellschaft mbh-v-TFS Stores Ltd.

[2021] EWHC 863 (Ch)
Chief Master Marsh
Hearing date: 18 March 2021
Judgment: 16 April 2021

1. The claim was for rent of £166,884.82 for the Fragrance Shop in the Westfield Shopping Centre in West London. The shop was closed 26 March to 15 June 2020 and then from 5 November to 2 December 2020 and finally from 19 December 2020 to 12 April 2021.

[1] Paragraph 1 of judgment of Master Dagnall in *Bank New York Mellon (International) Ltd.-v-Cine-UK Ltd.*

T raised 3 defences:

1.1 The claim was issued prematurely, contrary to the Code of Practice for Commercial Property Relationships during the Coiv-19 Pandemic ("the Code").

1.2 The claim was circumventing restrictions on forfeiture, winding-up and Commercial Rent Arrears Recovery.

1.3 L was in breach of its obligations under clause 5.2 of the lease to insure under schedule 3. L should have insured against loss of rent for forced closures of the premises.

2. The first 2 defences were summarily dismissed:

2.1 The Code was voluntary and did not affect legal relationships. L had complied and *"the lack of engagement, if anything is on [T's] side."* (para. 21).
"The Code is not a charter for tenants declining to pay any rent" (para. 20).

2.2 None of the restrictions in the Coronavirus legislation prevented L from bringing a claim for rent and pursuing it to judgment (para. 23). Obtaining a judgment was different from enforcing it.

3. The claim relating to the insurance suffered from not being pleaded out fully: T had only asked L for the insurance policy 2 days before the hearing. No draft amended defence was produced at the hearing.

4. T's argument was that it was obliged to keep the premises open and that obligation was "removed", if there was damage from an insured risk under L's insurance, such as a notifiable disease. Quite how it did that was not articulated by T.

5. The master concluded that:

5.1 Although the policy taken out by L included loss of rent caused by notifiable disease, the policy was only triggered by physical damage to the premises (para. 34).

5.2 There was a clear distinction to be made between damage to L's property and damage to T's business at the property (paras. 32 & 34).

5.3 It was for T to insure itself against damage to its business caused by notifiable disease and it was not for L to do so (paras. 44-47).

5.4 If T was correct that L was obliged to take out insurance and it was for T's benefit, then how did L's failure to do that actually discharge T's rent liability? (para. 43)

5.5 The rent cesser provision in the lease was, on proper construction of the lease, only triggered by physical damage and it was not triggered by a legal requirement to close the premises (para. 51).

6. T floated the argument that there should be an implied term in the rent cesser clause, but the argument was not fully developed (cf. the second case). Any implied term would contradict the express terms and would not be "obvious" (para 52).

7. Finally, T's application for an adjournment to give it time to re-plead its defence in the light of the insurance policy was refused. T's delay in seeking the insurance policy and its failure to seek advice from counsel earlier both counted against it.

Bank of New York Mellon (International) Limited-v-Cine-UK Ltd.
AEW UK REIT plc-v-Mecca Bingo Ltd.
AEW UK REIT plc-v-Sportsdirect.com Retail Limited

[2021] EWHC 1013 (QB)
Master Dagnall
Hearing dates: 24-25 November & 17-18 December 2020
Judgment: 22 April 2021

8. These 3 claims related to rent due for a cinema in Bristol, a bingo hall in Dagenham and a sports shop in Blackpool.

9. Ts raised 8 defences to the rent claims:
   - 9.1 Failure by Ls to comply with the Code of Practice for Commercial Property Relationships during the Covid-19 Pandemic ("the Code").
   - 9.2 Construction of rent cesser clause, such that the obligation to rent was suspended.
   - 9.3 Discharge of Ts' liabilities for rent, either by payments from insurers or by way of off-set.
   - 9.4 Implication of term in rent cesser clause.
   - 9.5 Interpretation of insurance provisions.
   - 9.6 Frustration.
   - 9.7 Supervening illegality.
   - 9.8 Partial failure of consideration.

10. The judgement is very detailed (253 paras.) and the following is a brief synopsis.

The Code

11. Master Dagnall agreed with Chief Master Marsh that the Code did not prevent enforcement of legal rights (paras. 92-100), noting in particular that none of Ts would confirm in terms that they could not pay the rent (para. 97). Negotiation under the Code was therefore possible and Ts could not properly blame Ls for the lack of negotiation.

Construction of Lease

12. The natural meaning of the words used was that rent cesser clauses required the premises to be damaged or destroyed before the suspension was triggered (para. 127). It was for Ls to decide which risks they insured against.

13. The master noted that there was a potential inconsistency between, for example, an interruption to electricity with no attendant physical damage (rent cesser would not be triggered) and an interruption to electricity where there was physical damage to cables (rent cesser would be triggered). Whilst an interesting point, it did not go anywhere (para. 125).

Implication of Terms

14. As for implication of a term, the arguments were fully and comprehensively developed, unlike in *Commerz*. The term sought to be implied was that the rent cesser clause applied to notifiable disease. The master thought that T's arguments were both fair and reasonable and equitable (para. 140), but he did not think that the implication was either obvious or necessary for business efficacy. The risk was one against which Ts were always free to insure themselves at their cost (para. 145).

Insurance

15. Turning to the insurance, the arguments advanced were that the insurance did cover the rent in question and, if so, the principle in *Mark Rowlands-v-Berni Inns* [1986] QB 211 should apply and give Ts a defence to Ls' rent claims. That principle is that where insurance is taken out for the benefit of both L & T, payment by insurers to L operates to discharge T's liability for negligence in relation to an insured risk. To argue that it also covered a contractual liability, such as rent, was novel (para. 156).

16. On this point, Ls conceded that if the insurance did cover the loss, T's had an arguable case that Ls should recover the rent from insurers (para. 157). But the anterior question was whether the insurance did in fact cover the rent and the answer was that it did not:

"…there still has to be… a reduction in the Rent "receivable" and which has not occurred in the absence of a Rent Cesser. It seems to me that it is the Tenants, and not the Landlords, who are trying to create a circularity by creating an assumption that their liability to pay rent has been suspended in order to invoke the provisions of the Policy in order to use them to justify the assumption and which is going the wrong way round." (para. 168(b)(ii)).

17. There was a separate argument that Ls were in breach of the insurance obligation by insuring for disease, but not for that insurance to extend to covering rent payments in the event of closure by disease. This too was rejected (para. 180) and at para. 187:
"… the only circumstances in which the Landlord has to ensure that the Insurer, rather than the Tenant will (ultimately) pay the Rent is where the Rent Cesser applies whatever Insured Risk has occurred."

Frustration

18. The final main argument was on frustration. Master Dagnall reviewed the authorities in detail: *National Carriers Ltd.-v-Panalpina* [1981] AC 675 (HL), *The Sea Angel* [2007] EWCA Civ 547 and *Canary Wharf-v-European Medicines Agency* [2019] L&TR 14. (paras. 195-208)

19. Yes, a lease can be frustrated (para. 209a), but it remains the position that there is no reported case in which that has been determined.

20. The conclusion that a lease has been frustrated would require an evaluation of the relationship between the time period of the lease (years) and the time period of the closure (usually months). The relationship of the times in the 3 cases the master was dealing with was similar to that in *National Carriers* (para. 209d-e) and was insufficient.

21. Left open was the possibility that a lease that ended during lockdown might be said to have been frustrated (para. 209f).

22. Conceptually, a suspensive or temporary frustration would not work (para. 211).

Supervening Illegality / Partial Failure of Consideration

23. Finally, the master dealt briefly with the arguments on supervening illegality and partial failure of consideration. These were both rejected, on the basis that there was nothing

illegal in the obligation to pay the rent (para. 218) nor was there any contractual doctrine of partial failure of consideration that would supersede the construction of the obligations in the lease (para. 221).

Lease Renewal

24. Also note the recent decision of HH Judge Richard Parkes QC on a hearing to determine the terms of an agreed lease renewal.

WH Smith Retail Holdings Limited-v-Commerz Real Investmentgesellschaft mbh

[2021] Lexis Citation 44.

Hearing dates: 17-20 November 2020

Judgment: 25 March 2021

25. Main points to note:
    - 25.1 It was agreed that there be a pandemic rent suspension clause of 50% of the rent and J ruled that it be triggered by a legal requirement to close non-essential shops.
    - 25.2 On the rent going forward, it was agreed between the valuers that Covid-19 had depressed rents by 20%.
    - 25.3 The net effect of the decisions on comparables and the appropriate discounts was that the rent went down from £935,000 to just over £400,000 per annum.

20 May 2021

Gavin Hamilton

Barrister
3PB Barristers

020 7583 8055
Gavin.hamilton@3pb.co.uk

3pb.co.uk