



## COVID-19 AND COMMERCIAL LEASES: COURTS SIDE WITH LANDLORDS ON NON-REPAYMENT OF RENT

As the UK Government unveils further details of its roadmap for lifting lockdown across the country, commercial real estate investors will be breathing a sigh of relief at two recent High Court decisions relating to non-payment of rent by tenants during the COVID-19 pandemic.

### RECENT CASES

Commercial landlords have had their hands tied for over a year now and have been prevented by legislation from forfeiting leases for non-payment of rent as well as being unable to exercise commercial rent arrears recovery (CRAR) or presenting winding-up petitions against their tenants. But in two recent cases – *Commerz Real Investmentgesellschaft v TFS Stores* and *Bank of New York Mellon (International) Ltd v Cine-UK Ltd and others* – the Courts have confirmed that tenants must legally still pay their rent during the pandemic and, although the Government has restricted some remedies, there is no restriction on a landlord bringing a money claim for unpaid rents and seeking summary judgment against the tenant.

The facts of both cases were similar and reminiscent of the stand-off between many commercial landlords and tenants at present. In the *Commerz* case the tenant was the operator of The Fragrance Shop at Westfield Shopping Centre, London and in *Bank of New York* the four tenants operated a Sports Direct retail store, a cinema, a Mecca bingo hall and a nightclub. The tenants had all been forced to close their premises as a result of the COVID-19 lockdowns and had each refused to pay varying amounts of rent or service charge as a result. In both cases the High Court ruled in favour of the landlord, dismissing the tenants' arguments and ordering the tenants to pay the rent arrears to their landlord. The judge in each instance concluded that there was no legal justification for the tenants withholding rent because of the pandemic and the resulting loss of business at the premises.

### SOME KEY POINTS OF INTEREST INCLUDE:

- The cases demonstrate that there is no legal restriction on a landlord bringing a claim for arrears of rent and seeking judgment on that basis. This was not a means of circumventing or exploiting a "loophole" in the Government measures put in place to restrict forfeiture, etc and is entirely legal.

### Key issues

- In two recent cases the English Courts have confirmed that tenants must legally still pay their rent during the pandemic
- There is no legal restriction on a landlord bringing a claim for arrears of rent and seeking judgment against a tenant
- A typical rent cesser in a lease will only be triggered if there is physical damage to the premises and there is no justification for construing the rent suspension provisions so that they apply in the event of the premises being closed or "unfit for use or occupation" due to a legal requirement such as the COVID-19 lockdowns
- These decisions send a strong message to tenants who have withheld rent from their landlords during the pandemic, and inject certainty back into landlord and tenant relations

- The Court confirmed that the Code of Practice for Commercial Property Relationships, which was introduced by the Government to encourage landlords and tenants to reach a negotiated settlement on pandemic-related rent arrears, does not vary or suspend the contractual provisions in commercial leases. The Code is entirely voluntary and cannot be used by tenants as a reason for withholding rent.
- There was no basis for implying that the landlord would insure for, and claim on insurance for, loss of rent and service charges due to forced closures or denial of access to commercial premises due to notifiable disease or Government action. It was open to the tenant to take out business interruption insurance for such losses and if it had chosen not to then so be it – it was not the responsibility of the landlord to insure the tenant's business.
- In the usual way, the rent cesser wording in the leases was only triggered if there was physical damage to the premises (which was not the case). The Court found that there was no justification for construing the rent suspension provisions so that they applied in the event of the premises being closed or "unfit for use or occupation" due to a legal requirement such as the COVID-19 lockdowns.
- The Court upheld the landlords' argument that there was no legal basis for implying a rent suspension or similar in the lease as a result of the pandemic. It was not illegal or impossible for the tenants to pay rent. Furthermore, the leases had been negotiated between competent commercial parties and included detailed provisions relating to the cesser of rent in certain circumstances: had a cesser of rent in the event of the premises being unusable or unoccupiable as a result of something other than physical damage or destruction been intended then it would have been included.
- The enforced closure, which was for no more than 18 months in total, was found to be insufficient to frustrate the leases (which would have brought the leases to an end). The Court also dismissed the tenants' argument that the leases had been "temporarily frustrated" on the basis that there is no such thing under English law: if a contract is frustrated it is discharged in its entirety and cannot simply be suspended for a period of time due to a supervening event.

These decisions send a strong message to the "can pay but won't pay" tenants who have withheld rent from their landlords during the pandemic and, by injecting some much needed certainty back into landlord and tenant relations, should help the commercial real estate industry back onto its feet after the unexpected, short-term blow delivered by COVID-19. It will also give the Government some food for thought as it considers the results of its consultation, which closed on 4 May 2021, on how best to exit the forfeiture moratorium in the UK in the coming weeks and months.

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