Coronavirus and Rent Arrears

Forfeiture

As a consequence of s.82 of the **Coronavirus Act 2020**, forfeiture of non-payment of rent in commercial leases has now been suspended until 25 march 2022. In addition, under the the **Corporate Insolvency and Governance Act 2020**, landlords cannot serve a statutory demand or serve a winding up petition on account of rent arrears before 30 September 2021, if the reason for those arrears was the pandemic, although the section does allow a demand for rent to be made without waiving the right to forfeiture for non-payment of rent.

Forfeiture other than for non-payment of rent is also still available, but landlords should beware. Having rid themselves of their current tenant, the landlord may have difficulty in finding a new tenant, especially at the same rent, in the current climate. In addition, there are major issues in relation to business rates liability. If premises remain empty for more than three months (or six months for industrial units and warehousing) then, with exceptions, the landlord will once more be liable to pay full business rates on the property. On this basis, a landlord may think it expedient to, at least temporarily, forego rent rather, than effect forfeiture.

Commercial rent arrears recovery

This might be available in relation to occupied premises only. But until 25 March 2022 it is now available only where there are 544 days of rent arrears.

Suing for rent arrears

In ***TFS Stores v Commerz Real Investmentgesellschaft*** **[2021] EWHC 863**, the tenant had been closed during the various lockdowns and, since April 2020, it had not paid any rent. The landlord sued for non-payment of rent. In a summary judgment the High Court found for the landlord. Although Commercial Rent Arrears Recovery is suspended it was clear that this did not stop the landlord from suing for the arrears.

It is interesting to note that the tenant also argued that the landlord had not adhered to the "Government Code of Practice for Commercial Property Relationships During the Covid 19 Pandemic", but the Court held that, being a code of practice, this was merely voluntary.

Suspension of Rent

Bank of New York Mellon Limited v Cine-UK Limited **[2021] EWHC 1013.** The main question for the Court in this case was whether rent suspension provisions covered the pandemic. The Court decided that they did not; they merely covered physical damage or destruction. In addition, the Court decided that the contract had not been frustrated as the leases were for between twelve and thirteen years and the maximum closure was likely to be 18 months.

A major talking point of the moment is whether, on renewal, the new lease may include a rent suspension provision in the event of lockdown due to pandemic. In ***WH Smith v Commerz Real Investmentgesellschaft*** **(2021) April 19, County Court**, the tenants had a lease of premises in a large shopping centre. They were able to remain open during the various lockdowns as the premises included a post office. On a lease renewal the landlord accepted that the new lease would include a rent suspension provision in the event of pandemic but only if the tenant's premises had to close. The tenant argued that their profits were much reduced due to lack of footfall in the shopping centre and therefore they wanted a rent suspension provision if any of the premises in the shopping centre had to close due to pandemic. The county court judge decided for the tenant. This case may be instructive although a county court decision does not set a precedent.

Business Interruption Insurance

The tenants in ***Bank of New York Mellon v Cine-UK*** also argued that the landlord was not out of pocket because they could claim off their business interruption insurance. The Court held that this was irrelevant as it was open to the tenants to have taken out their own business interruption insurance, which they had not.

This does not mean that business interruption insurance cannot assist, however. In ***FCA v Arch and others*** **[2021] UKSC 1** the Supreme Court confirmed that certain business interruption insurance policies ***would*** cover closure through lockdown. The FCA has now issued detailed guidance on various business interruption insurance policies and their effect.

Company Voluntary Arrangements and Restructuring Plans

Company Voluntary Arrangements were introduced by the **Insolvency Act of 1986** as a process whereby a company's liabilities may be restructured if 75% in value of the creditors are in favour. If approved, all the company's creditors are bound by the scheme, whether or not they voted in favour. There is, however, a 28-day window to object on the grounds of unfair prejudice or material irregularities.

In ***Lazari Properties Limited and others v New Look*** **[2021] EWHC 1209** the tenant had entered into a CVA in September 2020, under which the current market rent was to be replaced by a turnover rent, and there was to be a 3-year concession period in relation to rent and a release of keep open clauses within the lease.

Various landlords challenged the terms of the CVA , objecting to the fact that different classes of creditor were treated differently and that there was no give and take. These landlords also claimed that the provisions of the Act did not carry the ability to change proprietary rights. In addition, they claimed that the ability of certain creditors, who would not be affected by the terms of the CVA, to impose their will on other creditors who would be affected, was unfairly prejudicial.

It was held that on the correct interpretation of the legislation such a scheme was possible and was not unfairly prejudicial. The court commented that this was not an all-encompassing test, but that everything depends on the fairness of the case. The case is now to be heard by the Court of Appeal.

The case of ***Carraway Guildford (and a Nominee) Limited and others v Regis and others*** **[2021] EWHC 1294** followed on three days after the New Look case in May 2021. Regis entered into a CVA in October 2018, which certain landlords challenged on the grounds of material irregularity and unfair prejudice. Regis subsequently went into administration and this terminated the CVA but the landlords nevertheless pursued the claim arguing that the nominees had breached their duties and should pay their fees back.

The CVA was revoked on the basis that the treatment of an inter-company loan and its preferential treatment as critical creditor was not justified. However, as the CVA had already terminated, this had little practical effect.

Other arguments as to material irregularity failed as in New Look. There had been a blanket 75% discount of future rent to landlords. This was held not to be a material irregularity, but the court said it could not be justified. In New Look there had been a 25% discount which had been justified. Despite the finding of a breach of duty, in the absence of bad faith or fraud the court refused to order a payment of the fees of the nominees and the landlords' victory was pyrrhic.

The **Corporate Insolvency and Governance Act 2020** also introduced the concept of the "cross-class cram down": a restructuring plan whereby creditors can apply to restructure a business, for instance in relation to rent, by a 75% majority. In some respects, this is similar to a company voluntary arrangement, but it will be overseen by the court and applies to secured, and not merely unsecured, creditors.

In ***Re Virgin Active Holdings*** **[2021] EHWC 1246** the creditor landlords had to accept a reduction in rent in relation to various gyms where the tenants have been severely impacted by the pandemic. The background was as follows. Virgin Active operates a chain of health clubs which were forced to close for extended periods in 2020 and 2021. Three of the group's lease holding companies launched interconnected restructuring plans under the new legislation. Virgin active grouped its creditors into seven separate classes, each of which would have a different restructuring plan. The first class involved secured creditors. Their security would remain, but with amongst other things, an extension of the loan period by three years and a deferral of interest payments. The various landlords were classed as A to E. Class A landlords would receive 100% of future rent and accrued arrears. Classes B to E landlords would have all unpaid rent released in return for a payment of 120% of the estimated return on a hypothetical administration. Class B landlords would be entitled to full contractual rent up to three years following sanctioning of the plan. Classes C to E would receive no rent but there would be the benefit of break clauses.

Unsurprisingly, the secured creditors and class A landlords voted 75% in favour of the plan. Classes B to E plus the unsecured creditors voted against. The high court decided that the five dissenting classes could be required to accept the plan and cross-class cram down would be imposed upon them. This can be the case if none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative, being whatever the court considers would be most likely to occur if the plans were not sanctioned. The judge decided that the most likely alternative would have been administration and liquidation. Although the case depends very much on its facts, it is worrying for landlords, in particular, as secured creditors may be able to dictate to them.

On 16 June 2021 the Government announced that legislation will be introduced whereby night clubs and other members of the hospitality sector would have their rent ring-fenced whereby the landlord would have to shoulder some of the burden in relation to rent arrears. We do not yet know the detail.

BUSINESS RATES AVOIDANCE & EMPTY PROPERTIES

As mentioned above, empty commercial properties pay full business rates after 3 months and empty industrial units and warehouses pay full business rates after 6 months. If there has been occupation of at least 6 weeks during these periods, then the time period to attract business rates starts again.

In ***Hurstwood Properties (A) Ltd & Others v Rossendale Borough Council*** **[2021] UKSC 16** special purpose vehicle companies were set up with no assets. The companies were then granted leases of the otherwise empty premises, after which they would then be dissolved or go into liquidation. The dissolution or liquidation process would be drawn out for as long as possible and eventually, if dissolved, the lease would go to the Crown under *bona vacantia*. As premises of companies in liquidation do not pay business rates, the company avoided liability.

The Supreme Court decided unanimously that there was a case to answer. The purpose of business rates on empty properties was to ensure that premises were not deliberately empty and the special purpose vehicle companies never intended to occupy. The device was therefore a sham and the business rates liability remained. There was a suggestion that the directors in relation to the dissolution schemes may be-committing a criminal offence. There are now 55 further cases in this area due to be heard. How this impacts on other empty property avoidance schemes is yet to be seen.

SERVICE CHARGE LIABILITY

In ***Finchbourne v Rodrigues*** **[1976] All E.R 581** it was held that there would be an implied term that the work must be reasonably incurred. This, however, involves a residential property and, until as recently as 2020, has not applied to commercial leases.

In ***Sara and Hossein Asset Holdings v Blacks Outdoor Retail*** **[2020] EWCA 1521**, for two years the tenant had argued that various works were not covered by the service charge in the lease. The relevant clause stated that, "In the absence of manifest or mathematical error or fraud such certificate shall be conclusive". The court held that, as the landlord's certificate in relation to service charge was stated to be conclusive as to liability, the tenant could not question this.

In ***Criterion Buildings v McKinsey & Co [2021] EWHC 256*** the landlord successfully claimed £2.2 million plus interest of service charge arrears. The service charge was almost six years in arrears as the tenant was questioning how liability had been allocated between various tenants, the level of reserve funds and the fact that the lifts had been replaced without good reason. The lease stated that the tenant would pay a "due proportion" of the service charge as determined by the landlord. The court decided that, as long as the lease covered the works done, the landlord's determination would be conclusive save in exceptional circumstances.

A due proportion of the costs of services and expenses was defined as "a fair proportion to be determined from time to time by the landlord or the landlord's surveyors taking into account the use made of and benefit received from the services and expenses…". The Court held that a fair proportion was not determined objectively, and that the landlord could make a subjective decision as long as it was a rational one.

In the future, tenants may consider making clear that the landlord's decision had to be objectively reasonable. This might be extremely significant in the future when landlords wish to charge for making premises more efficient and replacing out of date heating and lighting systems. If the landlord is not able to repair or replace like for like due to an intervening statute, unless the service charge provision clearly deals with the matter, they would be able to add the cost to the tenant. It is suggested that tenants should wish to have these very common service charge clauses changed on a lease renewal. See above as to whether the court may permit this.

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