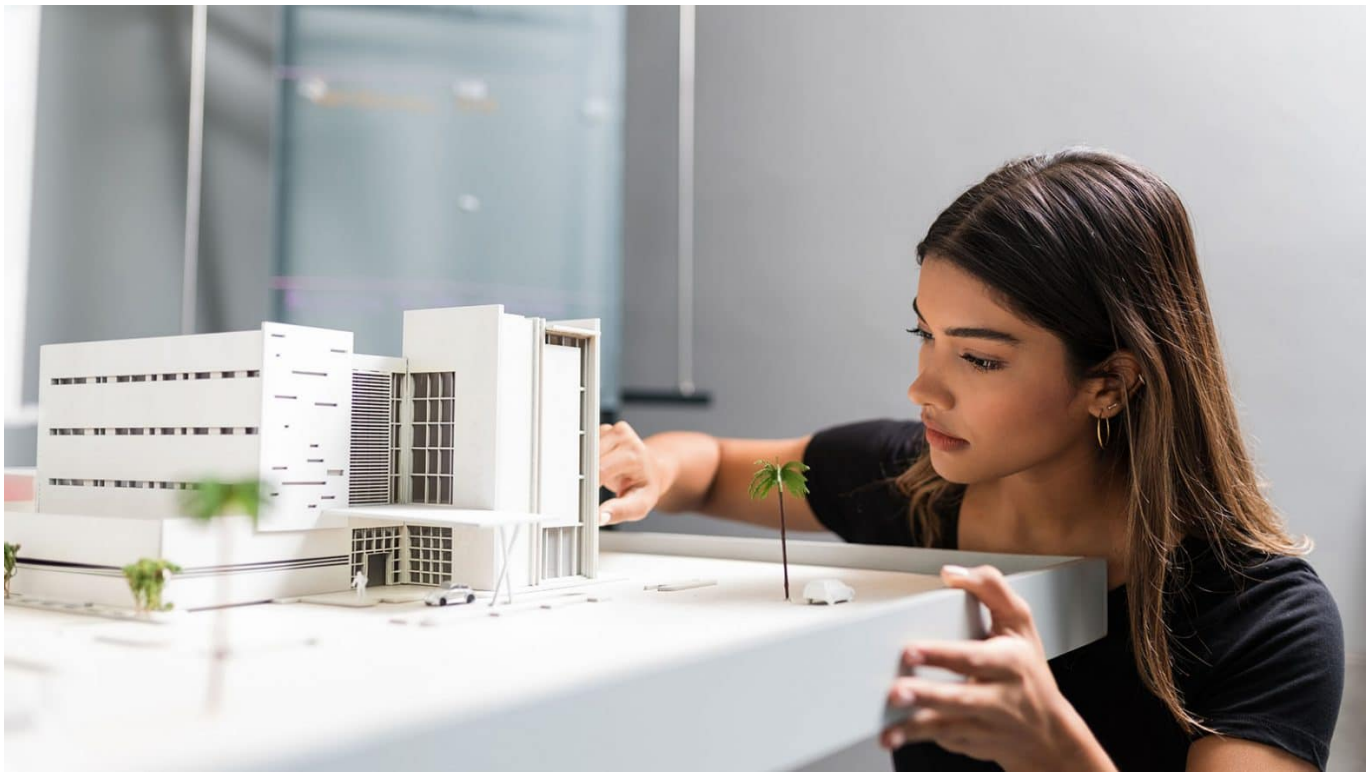
Court of Appeal's Covid rent arrears decision is welcome news for landlords



On 27 July 2022, the Court of Appeal dismissed the appeals of *Bank Of New York Mellon (International) Limited v Cine-UK Limited* and *London Trocadero (2015) LLP* v *Picturehouse Cinemas Limited and others*. The cinema tenants challenged payment of rent arrears that had accrued during the Covid 19 pandemic. Testing new legal arguments, the tenants argued that rent due under the leases should not be payable for periods when they were forced to close and could not lawfully operate their cinema businesses from their premises.

In both cases, the judges at first instance granted summary judgments in favour of the landlords. Nitej Davda reported on the High Court decisions in October 2021. We now provide an update following the Court of Appeal's decision which confirms that the Covid 19 restrictions did not waive the tenants' obligations to pay rent to their landlords.

The cinema tenants resisted payments of rent for periods when the operation of their businesses was unlawful as a result of the Covid 19 restrictions, raising the following defences, including a new argument that the premises were unfit for use under the terms of their leases. They contended that:

- the rent cesser clause in the lease should be construed broadly and not limited to physical damage to the premises;
- it was an implied term of the lease that rent should cease for the periods when it was unlawful to open and use their respective premises as a cinema; and
- the Covid 19 restrictions, imposed as a consequence of the pandemic, caused a failure of basis, meaning no payments were due when the premises could not be open and used as a cinema.

The Court of Appeal unanimously rejected the tenants' interpretation of the rent cesser clause reiterating the High Court's ruling: it only operates where premises are physically damaged or destroyed and does not include financial damage to a tenant's business.

Similarly, the Court disallowed the defence of an implied term. It affirmed the existing position that a term can only be implied into a contract where it is so obvious that it goes without saying or it is necessary to give the lease business efficacy. The Court decided that both commercial leases worked perfectly well without the implied terms and there was nothing unworkable or incoherent about allocation of risk in them.

The Court of Appeal also concluded that the tenants' attempt to argue that the pandemic caused a failure of basis did not merit relief from the tenant's obligation to pay rent. It was held that the suggested failure of basis would interfere with the already agreed allocation of risk between the parties and would go against the terms of the contract entered into.

The decision is welcome news to landlords still trying to recover commercial arrears accrued during the pandemic. For commercial tenants this outcome is a warning to consider the current options available to them or risk enforcement action by their landlord when the moratorium in relation to protected rent debt is due to be lifted after the 23 September 2022.

Download and read the Court of Appeal decision.

How we can help

For further help and advice on this topic or related topics, please get in touch with our real estate team or contact Anna Toynton or Vaida Majauskaite.

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