

First Judgment on Commercial Rent Arrear dispute involving Covid-19 issues



The first reported decision on tenant liability to pay rent during the Covid pandemic has been published.

In *Commerz Real Investmentgesellschaft v TFS Stores Limited* (2021) the owners of Westfield Shopping Centre in Shepherd's Bush sued The Fragrance Shop for non-payment of rent accruing during the period of lockdown.

The claim was defended by the tenant on a number of grounds directly connected to the pandemic:

- By suing for the arrears Westfield were seeking to circumvent the Code of Practice for commercial property relationships during the pandemic.
- The measures imposed by the Government restricting the right to forfeit, use CRAR or to commence insolvency processes were designed to protect tenants and while suing for rent arrears was not prevented by these measures, Westfield were in effect exploiting a loophole in the legislation.
- Under the covenants in the lease the rent suspension provisions were engaged.
- That the inclusion of a keep open clause in the lease meant that if the premises were incapable being kept open a clause should be implied to the effect that rent is suspended.

The landlord asked the court to award it summary judgment. Summary judgment is available in court proceedings where it can be shown that there is no reasonable prospect of success and there is no other reason why the case should be allowed to proceed to a trial.

Having satisfied itself that notwithstanding the novel circumstances leading to the dispute (i.e. the pandemic) there was no reason why this case should go to a full trial, the court assessed the grounds of defence. Dealing

with the tenant's arguments in turn:

- There was no evidence that the conduct of Westfield amounted to bypassing the provisions of the Code of Conduct. Correspondence demonstrated that Westfield had made significant attempts to avoid court proceedings.
- The absence of restrictions on suing for arrears of rent was intentional. The emergency legislation had put in place measures to restrict certain means of enforcing judgments but that did not restrict the ability to obtain judgment in the first place.
- As a matter of contractual construction the rent suspension provisions were only engaged in the event of physical damage and did not bite in the event of closure due to Government edict.
- As to the implied term suspending rent based on the keep open clause, the lease made clear provision for when rent would be suspended and had it been intended that rent would be suspended in circumstances other than physical damage to the premises, the lease would have said as much. The lease made commercial sense without implying such a provision and so there was no basis for the court to intervene.

The court also had to consider an argument in defence to the claim based on insurance. The tenant contended that the landlord had insured against certain protected losses, including loss of rent. It followed that it was for the landlord to claim under that policy for the rent in question.

The court rejected that argument also. It was clear that the loss of rent policy could only be claimed under if the landlord had first suffered a loss. As rent was not suspended under the lease the landlord had suffered no such loss.

The Westfield decision was handed down by a High Court Master so there is scope for the decision to be appealed or further similar cases to be considered at a higher level.

It is also important to note that the case was disposed of by the court on a summary judgment application, meaning there is scope for arguments against paying rent to be developed at a full trial in any future case.

However at least for now we do now have some judicial commentary on how Covid related defences to rent claims arguments might be considered by courts.

Read a [transcript of the decision](#).

How we can help

If you'd like advise on a rent dispute please contact [Nitej Davda](#) or our [property disputes](#) team.

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