Neutral Citation Number: [2022] EWCA Civ 1021

Case Nos: CA-2021-000744 AND CA-2021-003262

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MASTER DAGNALL
AND ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)
MR ROBIN VOS (SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)
QB-2020-002783 AND PT-2020-000828

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2022

Before:

SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT
LORD JUSTICE SNOWDEN
and
SIR NICHOLAS PATTEN

- -

Between :

BANK OF NEW YORK MELLON (INTERNATIONAL) LIMITED	**Claimant/ Respondent**
- and -	
CINE-UK LIMITED	**Defendant/ Appellant**

And Between:

LONDON TROCADERO (2015) LLP	**Claimant/ Respondent**

-and-

(1) PICTUREHOUSE CINEMAS LIMITED
(2) GALLERY CINEMAS LIMITED
(3) CINEWORLD CINEMAS LIMITED

Defendants/ Appellants

- -
- -

Jonathan Seitler QC and Philomena Harrison (instructed by **Maples Teesdale LLP**) for the **Appellants** in CA-2021-000744
Jonathan Seitler QC and Benjamin Faulkner (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Appellants** in CA-2021-003262
Guy Fetherstonhaugh QC and Elizabeth Fitzgerald (instructed by **Mishcon de Reya LLP**) for the **Respondents** in CA-2021-000744
Nicholas Trompeter QC and Chris de Beneducci (instructed by **Druces LLP**) for the **Respondents** in CA-2021-003262

Hearing dates : 21 and 22 June 2022

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Approved Judgment

Sir Julian Flaux C:

Introduction

1. These appeals, which we heard together, raise the issue of whether the defendants, who were the tenants of the claimant landlords and who operated cinemas at the premises, are liable to pay rent for periods of time during the Covid 19 pandemic when, due to the Coronavirus Regulations, they could not lawfully operate their cinema businesses from the premises. In each case, the landlords issued proceedings for the rent and sought summary judgment. The judge at first instance in each case ordered summary judgment in favour of the landlords on the basis that the tenants had no defence to the claim for rent. The tenants now appeal against those orders.

2. In the first case, the landlord is Bank of New York Mellon (International) Limited and the tenant is Cine-UK Limited which operated a cinema complex at the premises which were in a shopping centre at Hengrove, Bristol. I will refer to that appeal as the Hengrove appeal and the parties as the Hengrove landlord and the Hengrove tenant respectively. In that case, Master Dagnall in the Queen's Bench Division, ordered summary judgment in favour of the Hengrove landlord in a judgment dated 22 April 2021. Permission to appeal to this Court was granted by Stewart J on 22 September 2021.

3. In the second case, the landlord is London Trocadero (2015) LLP, to which I will refer as the Trocadero landlord. The first defendant is the tenant of the premises at Trocadero, Piccadilly, London from which it operates a cinema complex. The second defendant is the original tenant under one of the leases and the third defendant is the guarantor of sums due under both leases. The defendants are companies in the same group (as indeed is the Hengrove tenant) and I will refer to them as the Trocadero tenants save where it is necessary to distinguish between them. In that case, to which I will refer as the Trocadero appeal, Robin Vos, sitting as a Deputy High Court Judge of the Chancery Division, ordered summary judgment in favour of the Trocadero landlord in a judgment dated 28 September 2021. On 3 November 2021, the judge granted permission to appeal to this Court.

4. In both appeals, the tenants resist the payment of rent for periods when operation of the cinemas was unlawful on two grounds: (1) that the Government restrictions imposed as a consequence of the pandemic caused a failure of basis, relieving them of the obligation to pay rent for those periods and (2) that it was an implied term of the lease that the tenant should be relieved of its obligation to pay rent where the tenant could not lawfully use the premises as a cinema. There are differences of detail but the substance of the argument is the same in each case. In the Hengrove appeal there is an additional argument on behalf of the tenant that it is relieved from the obligation to pay rent by the rent cesser clause.

Factual and legal background

The Hengrove lease

5. The Hengrove lease is for 35 years from 1 May 1999, so that it had run for nearly 21 years when the restrictions under the Coronavirus Regulations were imposed and still had 12 ½ years to run when the restrictions came to an end.

6. Clause 1.8 of the lease defines the "Permitted Use" as:

> *"Use of the Property as and for a multiplex cinema for the exhibition therein of motion pictures television dramatic opera concert lectures or theatrical performances or entertainment…".*

7. Clause 4 is the Demise Clause and provides:

> *"The Landlord demises the Property to the Tenant TOGETHER WITH the rights specified in Part 1 of the First Schedule but EXCEPTING AND RESERVING the rights specified in Part II of the First Schedule SUBJECT TO all rights easements quasi easements privileges covenants restrictions and stipulations of whatsoever nature affecting the Property including the matters contained in or referred to in the deeds and documents listed in Part III of the First Schedule TO HOLD the Property unto the Tenant for the Term YIELDING AND PAYING unto the Landlord during the Term:*
>
> *4.1 yearly and proportionately for any fraction of a year the Basic Rent and from and including each Review Date such yearly rent as shall become payable under and in accordance with the Second Schedule such Basic Rent to be paid by equal quarterly payments in advance on the four usual quarter days in every year…*
>
> *4.2 UPON DEMAND by way of further rent:*
>
> *4.2.1 the Insurance Rent* [defined in Clause 2.9 as the sum which is equal to the aggregate of the gross insurance premiums chargeable to the Landlord, the costs of valuations and inspections for insurance purposes and any excess which is normal from time to time in the market.]

8. Clause 5 sets out the Tenant's Covenants. Clause 5.1 is headed "Rents" and provides:

> *"[THE TENANT COVENANTS WITH THE LANDLORD as follows:] To pay the Reserved Rents* [i.e. the sums due under Clause 4] *at the times and in the manner aforesaid without any deduction (except for any tax required by statute to be deducted) and not to exercise or seek to exercise any right or claim to withhold payment or any right or claim to legal or equitable set-off."*

9. Clause 5.17.1.4 is a covenant not to use the whole or part of the Property:

> *"otherwise than for the Permitted Use or the Permitted Sublet Use described in paragraph (a) of that definition during the first five years of the Term in accordance with the requirements and conditions of any planning permission authorising such use from time to time save that following the expiration of the first five years of the Term the Tenant subject to the other constraints as to the use of the Property in this clause 5.17 and as contained in the Superior Lease shall be entitled to change the use of the Property to any leisure use not being the then current primary permitted use or the Permitted Sublet Use of any other premises on the Estate or to any other use with the prior written consent of the Landlord not to be unreasonably withheld or delayed."*

10. Clause 7 is headed "Insurance" and under it the landlord and the tenant covenant with each other. Clause 7.1 is headed "Landlord to insure" and provides:

> *"the Landlord shall insure and keep insured with a reputable insurer or underwriters with the interest of the Tenant noted thereon and subject to such exclusions excesses and limitations as may be imposed by the insurers and which are normal in the marketplace:*
>
> *7.1.1. the Property against loss or damage by the Insured Risks in the Reinstatement Cost*
>
> *7.1.2. the loss of Basic Rent and Service Charge from time to time payable or reasonably estimated to be payable under this Lease…"*

11. "Insured Risks" is defined in clause 2.10. I have underlined the words to which Mr Jonathan Seitler QC on behalf of the Hengrove tenant drew particular attention:

> *"Means the risk of fire lightning explosion aircraft (save for damage caused by hostile aircraft following the outbreak of war) and other aerial devices or articles dropped therefrom riot civil commotion <u>strikes and labour disturbances</u> <u>or malicious persons</u> storm or tempest flood bursting or overflowing of water tanks apparatus or pipes earthquake impact collapse resulting from subsidence ground heave or landslip and accidental damage to Conduits weather under or above ground fixed or plate glass and three years' loss of Basic Rent payable to the Landlord in the event that the whole or part of the property becomes unusable due to the occurrence of the matters listed in this definition other than the loss of Basic Rent <u>and such other insurable risks as may be reasonably required from time to time</u> during the term by the Superior Landlord under the Superior Lease and notified to the Tenant but may from time to time exclude at the discretion of the Tenant any risk in respect of which cover is not available in the normal market in the United Kingdom on reasonable commercial terms in relation to the risks to be insured and subject to such exclusions terms and conditions as the insurers*

> *may reasonably require and are usual in the marketplace from time to time."*

12. Clause 7.4 is headed "Cesser of Rent" and provides:

> *"In case the Property or any part thereof or access thereto or any other part of the Estate shall at any time during the Term be destroyed or damaged by any of the Insured Risks so as to render the Property unfit for occupation or use and the insurance shall not have been vitiated or payment of the policy monies refused in whole or in part as a result of some act or default of the Tenant then the Basic Rent or a fair proportion thereof and Service Charge according to the nature and extent of the damage sustained shall from and after the date of such damage be suspended and cease to be payable until the Property shall have been made fit for occupation or use and in the event of dispute as to the amount or duration of the abatement of the Basic Rent such dispute shall be settled by a single arbitrator to be appointed in accordance with clause 11*
>
> *PROVIDED THAT If it is not possible for any reason for the Landlord to rebuild or reinstate the Property within a period of three years from the date of damage or destruction being caused by any of the Insured Risks the Landlord and the Tenant shall be at liberty to determine this demise by serving one calendar month's notice in writing to that effect upon the other and upon the expiry of such notice these presents shall determine but without prejudice to the right and remedies of either party against the other in respect of any antecedent claims or breaches AND IN THE EVENT of this demise being determined in such manner or if this Lease is determined by frustration as a result of such damage or destruction the whole of the insurance monies receivable under the policy of insurance shall belong to the Landlord absolutely and the Tenant shall have no claim or interest therein."*(my underlining).

The insurance policy

13. The Hengrove landlord effected All Risks insurance policies for annual periods from 31 March 2019 to 30 March 2020 and 31 March 2020 to 30 March 2021, under which the insurer was Allianz Insurance plc. Section 1 covered Property Damage and Section 2 covered Rent., where the Cover was defined as:

> *"If any BUILDINGS suffer DAMAGE by any causes not excluded under Section 1 Property Damage and the BUSINESS is in consequence thereof interrupted or interfered with the Insurer(s) will pay the Insured the amount of loss arising as a result in accordance with the following provisions provided that the Insurer(s) liability in any one Period of Insurance shall not exceed in respect of each item 200% of the Sum Insured."*

14. Under the heading "Rent – The Basis of Settlement of Claims" this Section then provided:

> *"The Insurer(s) will pay in respect of BUILDINGS which have suffered DAMAGE… a. the loss of Rent being the actual amount of the reduction in the RENT receivable by the Insured during the INDEMNITY PERIOD solely in consequence of the DAMAGE. [and costs of reletting and mitigation expenditure]"*

15. The Definitions included:

> *"BUILDINGS*
>
> *The BUILDINGS at the PREMISES and include various items e.g. fixtures and fittings. The PREMISES is a reference to the properties listed in the Schedule and which are used by the Insured for the purposes of the BUSINESS.*
>
> *BUSINESS*
>
> *The BUSINESS of the INSURED shown in the Schedule and including*
>
> *v. the provision of services to the TENANTS.*
>
> *DAMAGE*
>
> *Loss destruction or damage … i. the actual annual RENT at the commencement of the PERIOD OF INSURANCE … in each case the amount to be proportionately increased where the INDEMNITY PERIOD exceeds one year.*
>
> *RENT*
>
> *The money paid or payable to or by the Insured for tenancies and other charges and for services rendered in the course of the BUSINESS at the PREMISES"*

16. In the Schedule, the Insured is the Landlord and various associated companies. The "Insured's Business" is said to be:

> *"Property owners, Developers and Occupiers/Managers of Commercial and/or Residential property portfolios".*

17. The Schedule included as an Additional Condition or extension: "Murder, Suicide, Disease or Pests". That cover was in an Endorsements section in the 2019/2020 Policy and in the "loss of Rent" extensions in the 2020/2021 Policy and provided:

> *"The Insurer(s) shall indemnify the Insured in respect of loss of RENT or Alternative Residential Accommodation and RENT in accordance with Condition 1 to Sections 1 and 2 (notwithstanding any requirement for DAMAGE to*

> *BUILDINGS) resulting from interruption of or interference with the BUSINESS during the INDEMNITY PERIOD following*
>
> *a… any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the PREMISES or within a 25 mile radius of it…*
>
> *The Insurance by this Extension shall only apply for the period beginning with the occurrence of the loss and ending not later than three months thereafter during which the results of the BUSINESS shall be affected in consequence of the interruption or interference"*

18. The Schedule also provided a further Extension to Section 2: Rent for "Prevention of Access (Non Damage)" which extends Loss of Rent cover to: *"loss to insured caused by prevention or hindrance of access to the BUILDINGS or prevention or use of the BUILDINGS"* due to various events and which include closures by or due to action (or advice) of police or statutory bodies but which has an exception for *"action taken as a result of drought or diseases or other hazards to health"*. The 2020/2021 Policy also has an exception for: *"where such actions or advice are directly or indirectly caused by or arise from any infectious or contagious disease."*

Relevant Covid events and Regulations

19. At [62] of his judgment, Master Dagnall quoted the history of the Government's statutory and regulatory response to the pandemic up until July 2020, as set out in [7] to [35] of the judgment of Lord Hamblen JSC and Lord Leggatt JSC in *Financial Conduct Authority v Arch Insurance* [2021] UKSC 1; [2021] AC 649. It is not necessary to repeat that history here. All that it is necessary to note is that it was and is common ground that the Hengrove tenant had to close its premises to the public from 22 or 23 March until July 2020 by virtue of the 21 March Regulations and then the 26 March Regulations.

20. On 4 July 2020, the 26 March Regulations were revoked and replaced with the more limited restrictions in the Health Protection (Coronavirus Restrictions) (No 2) (England) Regulations 2020. These permitted limited opening, but, as the Master found at [66], the Hengrove tenant considered that whilst some limited opening might be technically possible, it was not commercially feasible. The cinema was not reopened.

21. The tiering system was introduced from 14 October 2020 then, from 4 November 2020, the Health Protection (Coronavirus Restrictions) (No 4) (England) Regulations 2020 imposed different levels of restriction depending upon into which tier a particular area of the country fell from time to time. Areas might move in and out of tiers, so that on 18 November 2020, the Hengrove cinema changed from being unable to open to being able, in theory, to open on a distinctly limited basis. However, on 2 December 2020, the Health Protection (Coronavirus Restrictions) (All Tiers) (England) Regulations 2020 were passed, which had the effect of closing down to public access the cinema premises. The premises had not in fact been opened at any time since 14 October 2020.

22. At the date of the Master's judgment, 22 April 2021, the restrictions remained in place and the cinema premises were not permitted to open to the public. That remained the position until 16 May 2021. From 17 May 2021 until 18 July 2021, cinemas were allowed to open but still subject to certain restrictions. Since 19 July 2021, there have been no restrictions on the operation of cinemas.

The Hengrove proceedings

23. The Hengrove landlord originally pursued a simple debt claim for the arrears of rent unpaid for the 25 March and 24 June 2020 quarters. The arrears due on 29 September 2020 were subsequently added by amendment. The application for summary judgment was issued on 4 September 2020 and heard over four days in November and December 2020. By his judgment dated 22 April 2021 the Master entered summary judgment and rejected all the Hengrove tenant's defences. On 1 July 2021, the Hengrove tenant paid all the outstanding rent in full. Before considering the judgment of Master Dagnall in more detail, I will set out some of the factual and legal background to the Trocadero appeal.

The Trocadero leases

24. The second appellant in the Trocadero appeal was the original tenant under a lease dated 20 June 1994. The first appellant was and is the tenant under the lease dated 18 September 2014. That was entered as a result of an agreed reorganisation under which there was a variation of the 1994 lease and a surrender of part of the premises which were the subject of the 1994 lease. The second appellant as original tenant has no obligations under the 2014 lease but is liable under the covenants in the 1994 lease, whereas the second appellant as tenant is liable under the covenants in both leases. The third appellant as guarantor is liable in respect of the defaults of the original tenant under the 1994 lease and of the tenant under the 2014 lease.

25. The 1994 lease is a reversionary lease for a term of 35 years commencing on 30 September 2006. Thus, when the Covid restrictions were lifted it had 20 years still to run. The demise is in Clause 2 and provides:

> *"IN consideration of the Rent and of the covenants hereinafter contained the Landlord HEREBY DEMISES unto the Tenant ALL THAT the demised premises TOGETHER WITH the easements and rights specified in the First Schedule hereto BUT EXCEPTING AND RESERVING the easements and rights specified in the Second Schedule hereto TO HOLD the same … UNTO the Tenant for the Term YIELDING AND PAYING therefor during the Term FIRST yearly (and proportionately for a part of a year) the Rent which shall be payable by equal quarterly payments in advance on the Quarter Days the first of such payments or a proportionate part thereof to be due on the date specified in the Particulars and to be in respect of the period therein mentioned SECONDLY by way of additional rents the amounts payable pursuant to the provisions of sub-clauses 3.5 and 3.6 of the Lease AND THIRDLY by way of additional rent the amounts payable by way of Value Added Tax pursuant to the provisions of sub-clause 3.3 of this Lease."*

26. Under clause 3.1, the tenant covenants:

> *"to pay the Rents at the respective times and in the manner herein provided for without any deduction whatsoever"*

The quarter days under the lease were not the customary ones but 31 March, 30 June, 30 September and 31 December.

27. Clause 3.7.1 requires the tenant:

> *"to comply with all obligations imposed by … any Act or Acts of Parliament or legislation … in respect of the demised premises or the use thereof whether by the owner or the Landlord tenant or occupier and at all times to keep the Landlord indemnified against all costs claims demands and liability in respect thereof".*

Under clause 3.12.1, the tenant covenants not to use the premises other than for the "Permitted Use" which is defined as:-

> *"… a cinematograph theatre or theatres with the ancillary sale (but only to patrons of films who have been admitted through the ticket barriers) of merchandise relevant to such cinema use including hot and cold beverages for consumption of such patrons on the premises together with a bar, kitchens, café, and open terrace for the sale and consumption of alcohol on the premises and for conferencing purposes".*

28. Clause 3.16 contained a covenant by the tenant to comply at all times with the stipulations and restrictions set out in the Sixth Schedule. Paragraph 3(a) of that Schedule contained a Trading obligation:

> *"To keep the demised premises open for trading during the Minimum Trading Hours for each Centre Opening Day (so far as permitted by law) and to use its best endeavours to expand the trade carried on in the demised premises."*

29. Clause 4 contains the Covenants by the Landlord and clause 5 then contains Provisos. Clause 5.2 is headed "Cesser of the rent and certain other moneys" and provides:

> *"In the event of the demised premises or any part thereof or any of the Common Parts necessary for the use and enjoyment of the demised premises at any time during the Term being damaged or destroyed by any of the Insured Risks in respect of which insurance shall have been effected under the Terms of the Superior Lease so as to render the demised premises or any part thereof unfit for use then (unless the policy moneys become irrecoverable in whole or in part through any act or default of the Tenant…) the Rent and moneys payable pursuant to the Fourth Schedule hereto or a fair proportion thereof according to the extent to which the demised premises as the case may be*

> *are rendered unfit for use shall be suspended from the date upon which such damage or destruction shall occur until the demised premises or the relevant part or parts thereof shall again be fit for use or to the end of the Loss of Rent Period (whichever shall first occur) and any dispute concerning this sub-clause shall be determined by [arbitration].”*

30. Clause 5.5 is headed “No Warranty as to Permitted Use” and provides:

> *“Nothing herein contained or implied nor any statement or representation made by or on behalf of the Landlord or the Superior Landlord prior to the date hereof shall be taken to be a covenant warranty or representation that the demised premises can lawfully be used for the Permitted Use.”*

31. The 2014 lease commences on 18 September 2014 and terminates on 29 September 2041, on the same day as the 1994 lease. It is much shorter, incorporating all the terms, requirements, covenants and conditions of the 1994 lease. The grant in clause 2.1 states that; “the Landlord lets with full title guarantee the Property to the Tenant for the Contractual Term at the Annual Rent.” The annual rent is a peppercorn.

32. As before the judge, for all practical purposes, the parties did not draw any distinction between the two leases and it is the terms of the 1994 lease which are relevant.

33. In the context of clause 5.2 it is to be noted that the Trocadero landlord did take out insurance in accordance with clause 4.3 of the 1994 lease, but that did not include insurance against the consequences of a pandemic.

Relevant Covid events and regulations

34. The chronology of the restrictions imposed by the Government during the pandemic are the same as in the Hengrove appeal, as set out at [19] to [22] above.

35. The cinema complex at the Trocadero was forced to close pursuant to the 21 March regulations on 21 March 2020. Although cinemas were permitted to reopen on 3 July 2020, the Trocadero tenants did not reopen the cinema complex until 31 July 2020. However, due to the ongoing restrictions, the business was not sustainable and closed again on 9 October 2020. After the further lockdown between 5 November and 1 December 2020, there was a short period between 2 and 15 December 2020 when cinemas were not subject to closure but the Trocadero tenants did not reopen in that period.

36. Cinemas were then required to close in the third lockdown from 16 December 2020 to 16 May 2021. After 17 May 2021 cinemas were not subject to closure and the cinema complex has been open since that date.

The Trocadero proceedings

37. The Trocadero landlord commenced the proceedings on 22 October 2020 at a time when the arrears outstanding were some £1.5 million, the Trocadero tenants having failed to pay the June and September 2020 quarters. The Trocadero tenants had paid

the quarter due on 31 March 2020 but in the Defence sought to counterclaim the rent paid for that quarter as paid under a mistake of law.

38. By amendment to the Particulars of Claim, the Trocadero landlord added claims for the December 2020 and March 2021 quarters, in respect of which the Trocadero tenants had not paid the rent. By the time of the summary judgment hearing, the amount claimed was approximately £2.9 million. The Trocadero landlord also sought summary judgment in respect of the counterclaim for the March 2020 quarter.

39. In his judgment the judge noted that one of the problems with the Trocadero tenants' defence based upon failure of basis was that it was difficult to argue that the Trocadero landlord had been unjustly enriched in circumstances where the rent had not been paid. At [172] the judge advanced a tentative pragmatic answer that where failure of basis was pleaded as a defence to a contractual claim, it should be pleaded by way of counterclaim in unjust enrichment and set-off. However, because he had decided that failure of basis was not available in any event, the judge expressed no concluded view on this.

40. Prior to the hearing of the appeal, the Trocadero tenants sought to adopt the judge's pragmatic answer and put forward a draft amended pleading which sought a declaration as to their entitlement to recover from the Trocadero landlord, in reliance on failure of basis, sums which they had not yet paid as rent. In the skeleton argument for the Trocadero landlord, Mr Nicholas Trompeter QC objected to this amendment as being an attempt to set off a hypothetical counterclaim and argued that the appeal was academic. This elicited a detailed refutation from the Trocadero tenants in a supplementary skeleton argument.

41. At the outset of the appeal hearing, the Court indicated that we wanted to hear argument on the defences of implied term, failure of basis and (in the case of the Hengrove appeal, the rent cesser clause) rather than dealing with this issue of a hypothetical counterclaim. It was left at the end of the hearing that if we needed further assistance from counsel on this issue we would inform them. In view of the conclusion we have reached on the appeals that all the defences fail, it is not necessary to deal with the issue of amendment.

The judgments below

42. In the Hengrove case, that was only one of three claims with which the Master was dealing. The other two are not the subject of appeal so that it is only necessary to focus on and summarise the Master's analysis and conclusions in relation to the defences put forward by the Hengrove tenant.

43. The Master dealt first with the Hengrove tenant's argument that the circumstances of this case fell within the rent cesser clause. Having set out the rival submissions in detail, the Master concluded at [129]-[130] that the Hengrove landlord's construction that "damage" and destruction" in the rent cesser clause was limited to physical damage and destruction was clearly correct. What influenced him most was that the Hengrove tenant's construction of the clause did not fit the words used whether taken alone or in the context of the lease as a whole.

44. The Master then turned to the Hengrove tenant's alternative argument that there should be implied into the lease a term that there should be an equivalent Rent Cesser in these

circumstances, and, in particular, where: (i) COVID and the COVID Regulations are unprecedented, and unforeseen, but have forced the closure of the Premises; (ii) the Landlord has chosen to insure so that the Insured Risks extend to such matters, and has done so at the expense of the Tenants, and in the context where the Leases (and the Insurance) provide for cover to include loss of Rent.

45. He noted that it was common ground that the principles of the law as to implication of terms were set out by Lord Neuberger PSC in *Marks and Spencer v BNP Paribas* [2016] AC 742 at [16] to [31] which the Master then quoted.

46. Having set out the rival submissions, at [142] the Master dealt with obviousness. He noted that the lease was a lengthy standard form professionally drafted document going into great detail about all sorts of circumstances, with express provisions as to rent cesser limited to physical deterioration with no warranty that the premises can be used for the Permitted Use, all in the context of the common law that rent is still payable notwithstanding that the premises become unusable unless there is agreement to the contrary. The Master concluded all those matters favoured the landlord and led him to conclude that in answer to the hypothetical officious bystander, the hypothetical landlord might well answer that the lease is intended to set out all the circumstances in which there would be a rent cesser even where an Insured Event occurred. He concluded at [145] that, where the Hengrove tenant could have insured its own business and turnover including against non-"bricks and mortar" risks such as Covid without breaching the prohibition in the lease, the landlord's interpretation of the lease represents an allocation of risk that is perfectly commercial and reasonable.

47. The Master also rejected at [147] the argument that the implied term was necessary to give the lease business efficacy. He considered that the lease worked without the implied term and simply provided for rent cesser in some circumstances but not others where the Hengrove tenant could perfectly well have insured itself. He also considered that the Hengrove tenant's arguments came close to seeking to contradict the actual terms of the lease.

48. The Hengrove tenant also contended that the effect of it being unable to operate from the premises in accordance with the Permitted Use resulted in a partial failure of consideration which relieved it from its liability to pay rent. The Master did not consider that the Hengrove tenant had any real prospect of establishing that defence. He did not consider that partial failure of consideration was a freestanding doctrine of contract law and no authority had been cited to suggest that it was. In any event he did not consider that being unable to trade in accordance with the Permitted Use was really a partial failure of consideration, but rather an unexpected occurrence which means the lease is not as beneficial as the Hengrove tenant expected. This is no fault of the Hengrove landlord and there is no suggestion it has breached any obligation. The Master considered that, more importantly, the lease does not provide that the rent is in any relevant way dependent on the Hengrove tenant being able to enjoy such use except in the limited circumstances of the rent cesser clause. He also considered that, in any event, the contractual allocation of risk is that the rent is payable in these circumstances for all the reasons he had already given.

49. In the Trocadero case, the judge dealt with the Trocadero tenants' defence of failure of basis extensively from [82] to [173] of the judgment. He recorded that, although they recognised that, as laid down by the House of Lords in *Fibrosa Spolka Akcjna v*

Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, for an unjust enrichment claim to succeed on failure of consideration (or as it is more aptly described in modern terminology failure of basis) the failure had to be total, they argued that the leases were severable on a time apportionment basis. Accordingly, it was argued that there was a total failure of basis in relation to those periods of time during which the premises could not be used as a cinema.

50. The judge rejected that argument. His primary reason for doing so, as set out in [123] was that, taking account of the terms of the leases, the use of the premises was not (in the words of Lord Toulson JSC in *Barnes v Eastenders Group* [2014] UKSC 26) "fundamental to the basis" on which the parties entered into the leases. At [126] the judge noted that, applying the principles derived from the judgment of Carr LJ in *Dargamo Holdings Limited v Avonwick Holding Limited* [2021] EWCA Civ 1149 (*"Avonwick"*), the question whether something was fundamental to the basis on which the parties entered into the leases must be answered taking into account the specific terms of the leases and the allocation of risk between the parties.

51. At [129] the judge accepted that it was clear from the terms of the leases that the parties expected that the premises would be used as a cinema and the Trocadero tenants were not permitted to use the premises for any other purpose, as well as having a positive obligation to keep the premises open during certain trading hours where it was lawful to do so. He said that no doubt the main benefit the tenants expected to derive from the leases was the ability to use the premises as a cinema. However, as he said at [130], there are other reasons why there may be periods of time for which the premises cannot be used as a cinema, some of which are expressly provided for in the leases, specifically damage or destruction by any Insured Risks. He noted that the parties have dealt with those risks by passing the burden to the landlord but on the basis it takes out insurance against those risks, for the costs of which the tenants paid.

52. The judge found at [131] that the leases also addressed the possibility that the premises could not be lawfully used as a cinema and clause 5.5 specifically provides that the landlord gives no warranty that the premises can lawfully be used for the Permitted Use. The risk that the premises cannot lawfully be used as a cinema has therefore been allocated by the terms of the leases to the Trocadero tenants.

53. The judge concluded at [132] that the suggested failure of basis would therefore both interfere with the agreed allocation of risk between the parties and be inconsistent with the terms of the leases.

54. The judge then went on to deal, *obiter*, with what the position would have been if he had concluded that there was a failure of basis because the continued ability to use the premises as a cinema was fundamental to the basis upon which the parties entered the leases. This included, at [144] to [159] that, had it been necessary to decide the point, he would have concluded that the Trocadero tenants had a realistic prospect of successfully arguing that the leases were severable. At [160] to [173], he then considered whether, if there had in principle been a failure of basis which would support a claim in unjust enrichment, this could provide a defence to a contractual claim for money otherwise due under the terms of the contract. At [169]-[170], he concluded that it would not be right as a matter of principle to extend the reach of failure of basis to provide a direct defence to a contractual claim. It was in that context that he advanced

the "pragmatic answer" of an amendment of the pleading, to which I have already alluded. As I have said, it is not necessary to consider that issue further.

55. The judge dealt with the issue of whether terms should be implied into the leases at [59] to [81] of the judgment. At [59] he said that there was a large measure of agreement as to the applicable legal principles. He noted that Mr Seitler QC relied upon Lord Neuberger's analysis in *Marks and Spencer* at [16] to [21], the passage to which Master Dagnall had referred in his judgment in the Hengrove case, as referred to above. The judge then said that Mr Trompeter QC relied upon the recent summary of the principles set out in the judgment of Carr LJ in *Yoo Design Services Limited v Iliv Realty Pte Limited* [2021] EWCA Civ 560 (*"Yoo Design"*) at [51] (decided after the Master's judgment):

> "In summary, the relevant principles can be drawn together as follows:-
>
> i) A term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the basis of the obviousness test;
>
> ii) The business efficacy and the obviousness tests are alternative tests. However, it will be a rare (or unusual) case where one, but not the other, is satisfied;
>
> iii) The business efficacy test will only be satisfied if, without the term, the contract would lack commercial or practical coherence. Its application involves a value judgment;
>
> iv) The obviousness test will only be met when the implied term is so obvious that it goes without saying. It needs to be obvious not only that a term is to be implied, but precisely what that term (which must be capable of clear expression) is. It is vital to formulate the question to be posed by the officious bystander with the utmost care;
>
> v) A term will not be implied if it is inconsistent with an express term of the contract;
>
> vi) The implication of a term is not critically dependent on proof of an actual intention of the parties. If one is approaching the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time;
>
> vii) The question is to be assessed at the time that the contract was made: it is wrong to approach the question with the benefit of hindsight in the light of the particular issue that has in fact arisen. Nor is it enough to show that, had the parties foreseen the

> eventuality which in fact occurred, they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred;
>
> viii) The equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the parties would have agreed it if it had been suggested to them. The test is one of necessity, not reasonableness. That is a stringent test."

56. The judge also noted that Mr Seitler QC relied upon a passage in the judgment of Chadwick LJ in *Bromarin v IMD Investments Limited* [1999] STC 301 to contend that, as the parties did not contemplate the Covid pandemic, it is necessary for the Court to consider objectively what the parties would have intended if the potential for such an event was put to them. However, the judge noted that *Bromarin* was a case dealing with construction, not implication of terms and cited what Carr LJ said in *Yoo Design* at [47] about implication of terms being a different and altogether more ambitious undertaking than the exercise of interpretation of a contract.

57. At [66] the judge set out the two implied terms for which the Trocadero tenants contend:

> "(a) That if the Permitted Use of the premises by [the Tenant] under the leases were to become illegal, then the obligation to pay rent and service charges otherwise due thereunder would be suspended and cease to be payable for that period;
>
> (b) That the sums due under the leases would only be payable in respect of periods during which the premises could be used for its intended purpose, as a cinema with attendance at a level commensurate with that which the parties would have anticipated at the time that the 1994 Lease and the 2014 Lease were entered into."

58. The judge considered first business efficacy and concluded, at [72] to [74], that the requirement that the tenant pay the rent even though the premises could not be used for the intended purpose, so that the risk was shouldered by the tenant rather than the landlord, did not lead to the conclusion that the leases lack commercial or practical coherence.

59. The judge concluded, for similar reasons, that it could not be said that the implied terms were so obvious that they go without saying. He concluded at [78] that where the landlord expressly gave no warranty that the premises could be lawfully used as a cinema and even though there was a covenant not to use the premises for any other purpose, it could not be said that it was obvious that the tenant should be excused from paying rent for any period when the premises could not be used as a cinema. The judge also considered at [79] that the fact that the parties had thought about suspension of rent and made express provision for it in certain circumstances in Clause 5.2 inevitably led to the conclusion that it is not obvious that a term providing for suspension of rent in other circumstances should be implied into the lease.

60. In relation to the second implied term the judge agreed with Mr Trompeter QC that it was too uncertain given that its application depended on anticipated audience levels. There was no evidence of those having been discussed between the parties and it would be impossible to determine whether the suspension of payments had been triggered in any given situation other than complete closure of the premises.

The Grounds of Appeal and the Respondent's Notice

61. In summary, the Grounds of Appeal in the Hengrove appeal are that:

(1) The Master erred in his interpretation of the rent cesser provision in the lease. The Hengrove tenant contends that this should not be limited to physical damage.

(2) The Master was wrong to reject the argument that a term should be implied into the lease to the effect that the rent due under the lease should be suspended for the period during which the premises could not be occupied.

(3) The Master was wrong to conclude there had been no partial failure of consideration which would operate as a defence to the claim for contractual rent otherwise due.

62. The Trocadero Grounds of Appeal are similar to the Hengrove Grounds 2 and 3. They are in summary:

(1) The judge erred in holding that there had not been a failure of basis of a severable obligation in the leases. In particular:

Ground 1.1: he should have found that the ability to use the premises lawfully as a cinema was fundamental to the basis of the leases.

Ground 1.2: he should have concluded that there was a "gap" to fill in the leases and that the claim in unjust enrichment was not inconsistent with the terms of the leases.

(2) The judge erred in holding that either or both of the implied terms contended for were not to be implied into the leases. In particular he should have held they were necessary to give business efficacy or so obvious as to go without saying, he was wrong to rely on Clauses 5.2 and 5.5 and he was wrong to conclude that the second implied term was too uncertain.

63. There is a Respondent's Notice in the Trocadero appeal which seeks to uphold the judge's decision for different or additional reasons:

(1) The basis for the obligation to pay rent was the demise granted to and/or the vesting of a term of years in the tenant and that basis did not fail.

(2) If (which is denied) the basis for the obligation to pay rent was the tenant's ability to use the premises as a cinema, that basis did not fail totally.

(3) If (which is denied) the basis for the obligation to pay rent was the tenant's ability to use the premises as a cinema, and if (which is denied) that basis did fail totally,

it is not possible or appropriate to sever the tenant's obligations to pay rent on a time-apportionment basis in respect of the periods for which the failure of basis was total.

The parties' submissions

64. The issue as to the true construction of the rent cesser provision only arose in the Hengrove appeal. Mr Seitler QC argued that, on the true construction of clause 7.4, it covered not just physical damage but financial damage as well. If it was illegal to use the premises for its sole permitted use as a cinema, the premises were rendered "unfit for occupation and use" within the meaning of the clause. The pandemic led to government restrictions which made the premises unfit for use.

65. The premises had not been "made fit for occupation or use", so that the obligation to pay rent was suspended, until the unlawfulness was lifted. Pressed by the Court as to how his construction was consistent with the proviso to clause 7.4 and in particular the opening words: "*if it is not possible for any reason for the Landlord to rebuild or reinstate the Property within a period of three years*", Mr Seitler QC simply submitted that in pandemic cases the proviso did not apply.

66. He submitted that the "Insured Risks" in clause 7.4 imported all the insured risks in clause 2.10, which included Loss of Rent under the Murder, Suicide, Disease or Pests extension in the policies which thus amounted to one of the *"other insurable risks as may be reasonably required from time to time"* within the meaning of clause 2.10. The words which I have underlined in [11] above: *"strikes and labour disturbances or malicious persons"* were specific examples of insured risks which could entail financial rather than physical damage. Mr Seitler QC asked rhetorically, if it had been intended to limit the rent cesser to physical risks only, why were strikes and labour disturbances included.

67. Mr Seitler QC submitted that the approach to the construction of clause 7.4 for which he contended was supported by a passage from the judgment of Chadwick LJ in *Bromarin* [1999] STC 301 at 310:

> "It is not, to my mind, an appropriate approach to construction to hold that, where the parties contemplated event "A", and they did not contemplate event "B", their agreement must be taken as applying only in event "A" and cannot apply in event "B". The task of the court is to decide, in the light of the agreement that the parties made, what they must have been taken to have intended in relation to the event, event "B", which they did not contemplate. That is, of course, an artificial exercise, because it requires there to be attributed to the parties an intention which they did not have (as a matter of fact) because they did not appreciate the problem which needed to be addressed. But it is an exercise which the courts have been willing to undertake for as long as commercial contracts have come before them for construction. It is an exercise which requires the court to look at the whole agreement which the parties made, the words which they used and the circumstances in which they used them; and to ask what should reasonable parties be taken to have intended by

> the use of those words in that agreement, made in those circumstances, in relation to this event which they did not in fact foresee."

68. He submitted that if the Hengrove landlord were right, then it has obtained pandemic cover which is useless to the person who has paid for it, which is a counter-intuitive conclusion. The lease had to be construed as a whole. Under clause 7.1 the Hengrove landlord undertook to take out insurance, including for loss of rent. Mr Fetherstonhaugh QC in his skeleton argument had said that the Hengrove tenant was conflating the tenant's loss with the landlord's loss but this was not so. What the landlord was insuring against was the landlord's loss of rent and the tenant had an interest in that loss because it prevented the tenant being liable for rent on premises which it may not be able to use. The landlord benefitted because the tenant's solvency was not imperilled. Mr Seitler QC submitted that it would be expected that the loss of rent insurance and the rent cesser clause would mirror each other.

69. In relation to the other provisions within clause 7 of the lease which the Hengrove landlord relied upon in support of its construction of clause 7.4, Mr Seitler QC submitted that the short answer to reliance on clause 7.1 was that although Reinstatement Cost in clause 7.1.1 was referring to the costs of rebuilding after physical damage, clause 7.1.2 imposed an obligation to insure in respect of loss of rent which would include insurance against a pandemic. Clause 7.3 on which the Hengrove landlord relies expressly excludes, by the words in brackets, an obligation to lay out insurance proceeds from loss of rent cover and the proviso to clause 7.4 simply reflects that the experience of these parties was of physical disasters and was inapplicable where the insured risk was a pandemic.

70. As an alternative to his case on the true construction of the rent cesser clause, Mr Seitler QC relied upon an implied term of the lease, as set out in paragraph 14F of the Amended Defence in the Hengrove case, that, where at the tenant's expense the landlord insured against loss of rent arising out of an insured risk involving non-physical damage to the premises, a suspension of rent would apply if the insured risk occurred, rendering the premises wholly or partly unfit or incapable of occupation, notwithstanding that no physical damage was caused. He submitted this implied term was necessary to give business efficacy to the lease because otherwise the tenant was paying for the insurance but not able to take the benefit of it when the insured event transpired. It was also a term which was so obvious that it went without saying. In response to the suggestion that the tenant should have to continue to pay the rent, the parties would have said: "Of course not. The tenant is paying for the insurance and must take the benefit of it". Mr Seitler QC submitted that the tenant should not have to pay the rent when the rent insurance was going to be triggered.

71. Mr Seitler QC focused his submissions on failure of basis on the Trocadero case. He relied primarily on three authorities. First was the decision of Stadlen J in *Giedo Van der Garde BV v Force India Formula One Team Limited* [2010] EWHC 2373 (QB) (*"Giedo"*). The claimant was an aspiring racing driver who entered an agreement with the defendant then known as Spyker under which Spyker would permit the claimant to drive a Formula One car for 6,000 km, in consideration for which the claimant paid $3 million. One of the claims was for restitution and the issue arose whether the failure of consideration was total or partial because Spyker had permitted Giedo to test and/or race the car for 2,004 km.

72. In his analysis which begins at [261] of the judgment, the judge noted that in *Fibrosa* Lord Porter recognised that the doctrine of total failure of consideration could be applied even if there had been some performance under the contract if there has been a total failure of a divisible part of the contract provided part of the consideration paid can be attributed to that part. Mr Seitler QC placed particular reliance on the example of a contract for ten sacks of wheat where only six are delivered given by Bovill CJ in *Whincup v Hughes* (1871) LR 6 CP 78 at 81 quoted by Stadlen J at [265]:

> "The general rule of law is that where a contract has been in part performed no part of the money paid under such contract can be recovered back." (page 81). However to this general rule he held that there are exceptions. "There may be some cases of partial performance which form exceptions to this rule, as for instance, if there were a contract to deliver ten sacks of wheat and six only were delivered, the price of the remaining four might be recovered back. But there the consideration is clearly severable… The contract having been in part performed it would seem that the general rule must apply unless the consideration be in its nature apportionable."

73. Mr Seitler QC returned to this example several times and submitted that in the same way the rent was severable so that if, on any given day the tenant could not lawfully use the premises as a cinema, there was a total failure of basis for that day, just as there was for the four sacks of wheat undelivered in the example.

74. He also relied upon the principle that receipt of benefits which are merely incidental to the performance of the contract is not inconsistent with total failure of consideration or basis enunciated by Kerr LJ in *Rover International Limited v Cannon Film Sales Limited* [1989] 1 WLR 912. At [273] Stadlen J quoted the examples given by Kerr LJ of the cases of *Rowland v Divall* [1923] 2 KB 500 and *Warman v Southern Counties Car Finance Corporation Limited* [1949] 2 KB 576. In the former case the plaintiff bought a car and used it for some months before discovering the seller had had no title. The Court of Appeal allowed a claim for the return of the price on the basis that the consideration that the plaintiff had bargained for was lawful possession of the car and a good title to it, neither of which he got though he had had the use of the car for some time. *Warman* was a hire purchase case to the same effect. Mr Seitler QC relied upon other examples of cases of incidental or collateral benefits cited by Stadlen J and the statement of principle at [285] of his judgment.

75. Mr Seitler QC also placed particular emphasis on the decision of the Court of Appeal in *Ferguson v Sohl* (1992) 62 BLR 95 analysed by Stadlen J at [311] to [323] of his judgment. That was a case of a building contract where a price of some £32,000 was agreed. Following disagreement the builder left the site when the works had only been partly completed. By that stage the defendant had paid £20,470. However, when the writ was issued the defendant had paid another £6,268.75. The County Court judge found that the value of the work done was £22,065.75 so there had been an overpayment of £4,673. The judge awarded the defendant that sum as money had and received in a restitutionary claim and that decision was upheld by the Court of Appeal. Hirst LJ found that in respect of the £4,673 there had been a total failure of consideration as that money had been paid for work which was never done at all. Nourse LJ agreed. At [323] of his

judgment, Stadlen J set out the features to be derived from that case upon which Mr Seitler QC relied.

76. The second of Mr Seitler QC's three cases was the decision of the Supreme Court in *Barnes v Eastenders Cash & Carry plc* [2014] UKSC 26; [2015] AC 1. There the Crown Court made restraint orders under the Proceeds of Crime Act 2002 against two defendants suspected of fraudulent evasion of duty and also management receivership orders under that Act. Those orders provided that the expenses and remuneration of the receiver would be paid out of the receivership property and in accordance with a letter of agreement sent by the Crown Prosecution Service ("CPS") to the receiver. That letter stated that the receiver would have a lien over the defendants' assets and that the CPS did not undertake to indemnify him if those assets were insufficient. All the orders were subsequently quashed by the Court of Appeal on the basis that there had been no reasonable cause to believe that there had been fraud.

77. The receiver then applied for an order that his expenses and remuneration be paid out of the receivership estate. What matters for present purposes is that whilst that claim failed, the Court of Appeal and Supreme Court holding that this would violate the rights of the defendant companies under A1P1 of the ECHR, the Supreme Court held that there was power under the 2002 Act to order the CPS to pay the receiver's expenses and remuneration because there had been a total failure of consideration in relation to the receiver's rights over the defendants' assets which was fundamental to the basis on which the receiver had agreed to act in accordance with the request of the CPS.

78. In his analysis of the law on unjust enrichment, Lord Toulson JSC approved at [107] what he described as a succinct summary of the meaning of failure of consideration given by Professor Birks:

> "Failure of the consideration for a payment . . . means that the state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist, has failed to sustain itself."

79. Mr Seitler QC also relied on the statement of Lord Toulson at [115] as to why there was a total failure of consideration in that case:

> "In the present case there was a total failure of consideration in relation to the receiver's rights over the companies' assets, which was fundamental to the basis on which the receiver was requested by the CPS and agreed to act. I use the expression "fundamental to the basis" because it should not be thought that mere failure of an expectation which motivated a party to enter into a contract may give rise to a restitutionary claim. Most contracts are entered into with intentions or expectations which may not be fulfilled, and the allocation of the risk of their non-fulfilment is a function of the contract. But in the present case the expectation that the receiver would have a legal right to recover his remuneration and expenses was not just a motivating factor. Nobody envisaged that the receiver should provide his services in managing the companies as a volunteer; those

> services were to be in return for his right to recover his remuneration and expenses from the assets of the companies, such as they might be. The agreement between the CPS and the receiver so provided, and that provision was incorporated into the order of the court."

80. Mr Seitler QC submitted that in relation to each day when the premises could not lawfully be used as a cinema, there had been a common assumption about the state of affairs which was fundamental to the basis for paying the rent and that fundamental basis had failed.

81. The third of Mr Seitler QC's three cases was the Court of Appeal decision in *Avonwick*. That case concerned the sale and purchase agreement ("SPA") for shares in a company called Castlerose. It was accepted that there had been a common understanding that the price paid would include the sale of two other companies but the SPA only mentioned the shares in Castlerose. The appeal concerned only one of the claims dismissed by the judge, namely the unjust enrichment claim where the buyer claimed the restitution of that proportion of the consideration paid which represented the price for the two other companies. That claim was resisted on the basis that it would subvert the contractual bargain on the basis of a non-binding, extra-contractual understanding between the parties.

82. At [58] Carr LJ noted that in contrast with civil law systems an English law claim in unjust enrichment requires an "unjust factor" such as mistake, duress, failure of consideration or compulsion. At [67] she recognised that, a claim in unjust enrichment can succeed even where there is a subsisting contract but only if it respects the contractual regime and the allocation of risk between the parties. She described this at [70] as "the Obligation Rule": "I describe this principle, namely that an unjust factor will not override a valid and subsisting legal obligation of the claimant to confer the benefit on the defendant, as the "Obligation Rule."" She went on to say at [72] that the Obligation Rule is not absolute and there will be exceptions, albeit limited. At [75]-[76] she recognised that one such exception would be where there was a "gap" in the contract so that the law of unjust enrichment can be complementary to the law of contract by "gap-filling".

83. Mr Seitler QC relied upon Carr LJ's analysis of the decision of the High Court of Australia in *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; [2001] 208 CLR 516 (*"Roxborough"*). In that case retailers bought tobacco products from licensed wholesalers under contracts where the invoiced "cost" comprised the wholesale price and a discrete amount representing a licence fee imposed by state law. Payments were made to the wholesaler in anticipation of licence fees to be incurred at a later date. The retailer passed on the cost of the licence fee in the prices it charged its customers. The relevant legislation under which the licence fee was levied was subsequently held to be invalid. The amounts paid to the wholesaler in anticipation of future licence fees were thus not passed on but were retained by the wholesaler.

84. Although the retailer had passed on the cost of the licence fees to its customers, it claimed repayment of the sums representing the licence fee payments that had not been remitted to the revenue authorities. The majority of the High Court held that there had been a failure of a distinct and severable part of the consideration for the purchase of the goods and that was a total failure. They accepted that failure of basis included

payment for a purpose that has failed for example where a condition has not been fulfilled or a contemplated state of affairs has disappeared. The basis there was the common intention of the parties that the cost of the goods would include the licence fees and that those licence fees when so incurred would be passed on to the revenue authorities by the wholesalers.

85. Carr LJ went on to discuss severability and apportionment at [102] to [105] citing what Lord Toulson said in *Barnes* (referring to cases like *Roxborough* and *Ferguson v Sohl*) at [114]:

> "Modern authorities show that the courts are prepared, where it reflects commercial reality, to treat consideration as severable."

86. As Mr Seitler QC noted, the unjust enrichment claim failed in *Avonwick*. At [112] Carr LJ said that the parties had deliberately omitted any of the additional assets from the consideration in the Castlerose SPA. In those circumstances there was no gap in the contract for unjust enrichment to intervene and the alleged basis said to have failed was nowhere to be found in the SPA and was inconsistent with the express contractual terms ([117] and [123] of Carr LJ's judgment). Mr Seitler QC submitted however that this case was different and was like *Roxborough* and *Barnes*. The claim in unjust enrichment was not inconsistent with the terms of the leases. The judge had erred by regarding the question of risk allocation as relevant to the question what was the fundamental basis of the lease. It would have been much more appropriate to ask first what was the fundamental basis of the lease and then to go on to see if that was excluded by the terms of the lease or there was no "gap". This had been the approach of the Court of Appeal in *Avonwick*.

87. He submitted that it was clear from the "Permitted Use" of the premises in the lease which was as a cinema and clause 3.12.1 which did not allow the premises to be used other than for the Permitted Use, that being able to use the premises as a cinema was fundamental to the state of affairs which the lease assumed. This was not just a bald assertion as the landlords claimed but was true and correct and a matter of common sense.

88. In answer to a point put to him in argument by Sir Nicholas Patten, Mr Seitler QC submitted that ascertaining the fundamental basis of the lease was not just a matter of the construction of the terms of the lease. The terms of the lease inform one what the fundamental state of affairs is. It was not construction, but using the lease to infer the fundamental state of affairs.

89. In answer to the Trocadero landlord's case that the lease itself in clause 2 identifies what is the fundamental basis, Mr Seitler QC submitted that the fact that that provision stated what the rent was in consideration of did not exclude a common assumption as to a fundamental state of affairs, namely that the premises could be lawfully used as a cinema.

90. During the course of argument, Sir Nicholas Patten put to him that in the cases he relied on such as *Barnes* and *Avonwick* there was a wider arrangement or context than the contract, whereas here there was no wider context, just the lease. He was asked whether there was not a danger in those circumstances of deriving from the terms of the contract some assumption which has the effect of altering the terms of the contract. Mr Seitler

QC sought to answer that in two ways. First, that the hire purchase cases like *Warman* which he relied on did not have a wider context but the fundamental basis was that there was a right to purchase the vehicle. Second, there was also no wider context in *Barnes*. The receivership orders were made under the 2002 Act with no wider context. He submitted that there was a real danger that the Court would approach his submissions as if they were about frustration. They were not. This was a different jurisprudence. It was like the ten bags of wheat. If you didn't get one of the bags paid for you could certainly claim restitution.

91. Mr Trompeter QC was arguing that the only common assumption was that there was the grant of a demise, a property interest, but Mr Seitler QC countered that that was one common assumption but it was not the only common assumption about a fundamental state of affairs. There could be more than one fundamental basis: see *Goff & Jones* [14.14]-[14.15]. He accepted that he had to show there was a gap in the lease and that the claim in unjust enrichment was not inconsistent with the lease. The judge had held that the claim was inconsistent with the lease and the allocation of risk so there was no gap. The judge had relied on clauses 5.2 and 5.5. He had held that clause 5.2 set out an agreed allocation of risk but that was not really so because, unlike in the Hengrove case, in Trocadero the pandemic was not an "Insured Risk". Clause 5.2 was not about allocation of risk where there was no insurance and the premises could not be lawfully used.

92. Just because the clause mentioned some situations where risks were not allocated to the tenant, it did not follow that these were the only circumstances in which risks were not allocated to the tenant. Mr Seitler QC relied upon what Lord Wilberforce said in *National Carriers v Panalpina Ltd* [1981] AC 675 at 695B-D:

> "The second argument of principle is that on a lease the risk passes to the lessee, as on a sale it passes to the purchaser (see *per* Lord Goddard in the *Cricklewood* case). But the two situations are not parallel. Whether the risk - or any risk - passes to the lessee depends on the terms of the lease: it is not uncommon, indeed, for some risks - of fire or destruction - to be specifically allocated. So in the case of unspecified risks, which may be thought to have been mutually contemplated, or capable of being contemplated by reasonable men, why should not the court decide on whom the risks are to lie? and if it can do this and find that a particular risk falls upon the lessor, the consequence may follow that upon the risk eventuating the lessee is released from his obligation."

93. As for clause 5.5, Mr Seitler QC submitted that it was not making a representation at the date of the 1994 lease as to future use. This clause was all about planning as was made clear in the equivalent clause in the Hengrove lease. It was a "belt and braces" provision in any event confirming what the position was anyway.

94. Mr Seitler QC advanced the same arguments on failure of basis in relation to the Hengrove lease, although he accepted that it was not as strong a case as Trocadero because of the user provision at clause 5.17.1.4 where the tenant was entitled to change the use with the landlord's consent, not to be unreasonably withheld.

95. In relation to the Respondent's Notice which sought to contend that by virtue of the other benefits of the lease such as the entitlement to keep cinematic equipment on the premises, the basis did not fail, Mr Seitler QC submitted that this was a classic collateral benefit, not an essential part of what the Trocadero tenants had bargained for. Likewise the entitlement to possession of the premises was useless without an entitlement to use them as a cinema.

96. In relation to ground 3 of the Respondent's Notice and the Trocadero landlord's argument that the judge had been wrong to conclude, *obiter*, that the rent was apportionable, Mr Seitler QC submitted that the judge had been right for the reasons he gave.

97. Mr Fetherstonhaugh QC responded on behalf of the respondent landlords primarily on the issues of the effect of the rent cesser clause in the Hengrove lease and of implied terms and Mr Trompeter QC addressed primarily the issue of failure of basis. Mr Fetherstonhaugh QC began with some submissions about the construction of clause 7 of the Hengrove lease. He noted that it says nothing about insuring the business of the Hengrove tenant. Clause 7.1 only dealt with insuring the business of the landlord which was normal since a landlord would have no idea of the turnover of its tenant's business. The loss or damage to the Property in clause 7.1.1 is clearly a reference to physical loss or damage, which was reinforced by the reference to the Reinstatement Cost. Clause 7.3 is unequivocally to do with physical destruction and damage and the way in which "damage" and "damaged" are used can only mean physical damage to the premises.

98. The cesser of rent provision in clause 7.4 used exactly the same phrase: *"destroyed or damaged"* as in clause 7.3 which clearly had the same meaning of physical loss. Then the cesser only operated when the destruction or damage by Insured Risks was such: *"as to render the Property unfit for occupation or use"*. Only physical destruction or damage could render the premises unfit for occupation or use. The Proviso then used the same words *"damage or destruction"* and talked about inability to rebuild or reinstate the Property, which could obviously only be if the damage or destruction was physical. This clause was simply not dealing with non-physical damage.

99. In pinpointing why the Hengrove tenant's case on construction was wrong, Mr Fetherstonhaugh QC said one point rose to the top, that whilst the pandemic was an Insured Risk, it was not in the sense that the Hengrove tenant wants. The cover under the Murder, Suicide, Disease or Pests extension insured against Loss of Rent resulting from interruption of or interference with the "Business" which is defined as the business of the landlord. Therefore in insuring against the pandemic, the landlord had insured against damage to its business at its property but that had nothing to do with what loss the tenant might suffer. The Hengrove tenant had in fact effected business interruption insurance for loss of turnover, but that contained an exclusion of pandemics.

100. Furthermore, the insurance was against Loss of Rent which imports some element of causation of the loss, not just the tenant choosing not to pay rent. The Master had correctly identified this at [168] of his judgment, concluding that this was insurance against loss of rent caused by the operation of the rent cesser clause.

101. In relation to the implication of terms, Mr Fetherstonhaugh QC submitted that the correct approach was that of Carr LJ in *Yoo Design*. The Hengrove tenant did not criticise the Master's approach to the law. It said he was wrong but did not say why.

Mr Fetherstonhaugh QC emphasised two aspects of the test: (i) the stringency of the exercise and (ii) the chances of implication were more remote the more detailed the contract in question, as in this case where the lease was a standard form which had stood the test of time.

102. He noted that although Mr Seitler QC had focused on the implied term in [14F] of the Amended Defence, other terms were sought to be implied at [14G] and [18]. There were thus various formulations but they were very different from the terms sought to be implied in the Trocadero case, particularly the second implied term as set out at [57] above, which is a surprising term in this sort of case. Although that term is not advanced in the Hengrove case, he submitted that it demonstrates just how wrong it is to imply any term at all. That second implied term was described by Mr Trompeter QC for the Trocadero landlord as completely unworkable.

103. Although the Hengrove tenant was now saying that the term to be implied was that rent should cease only for the periods when it was illegal to open the cinema complex, not when it was difficult to do so, the term contended for was seeking to reallocate how the risks had been allocated in the bargain. The landlord insured against something going wrong with the building, the bricks and mortar and the tenant paid the cost of insurance, but both parties benefit. It was obvious there would be other losses not covered by this insurance, such as losses related to the tenant's own business. The contention that there was a lacuna in the lease was entirely misplaced. The parties had turned their minds to what would happen if the premises changed physically. Non-physical damage was not unforeseen but was never part of the scheme. Mr Fetherstonhaugh QC submitted that it was nonsense to suggest that the risk of pandemic was unforeseeable. He cited examples of previous pandemics: the Great Plague in the 17th century, the 1918 Spanish flu (when premises were closed in Australia and in the United States) the 1957 flu and SARS when there was a lockout in Hong Kong requiring people to leave buildings. As the Master had said, the Covid pandemic was unprecedented but not unforeseeable.

104. The loss of rent in the way for which the Hengrove tenant contends was not covered by the policy and it was wrong to say it had paid for insurance since it had never paid for insurance which enabled it to stop paying rent. What it paid for was cover for damage to the building.

105. Even if the Hengrove tenant were right that there was a lacuna in the lease, it still needed to establish what term would have filled it. It is by no means clear that if the officious bystander had raised the point, the Hengrove landlord would have agreed that it should rejig the insurance so as to cover it being illegal for the tenant to trade. It is likely the landlord would have said it is for you, the tenant, to insure against that risk.

106. Mr Fetherstonhaugh QC gave the Court the headlines of the Hengrove landlord's approach to the issue of failure of basis. He submitted that the comparison with the contract for ten sacks of wheat was inapposite. The lease was completely different: not just a contract but the grant of an estate in land for a term. Mr Seitler QC was wrong to say the demise was of no value at all when it was illegal to open the cinema complex. The Hengrove tenant did not have a mere licence but a right of possession of the premises to the exclusion of everyone else including the Hengrove landlord. It could occupy the premises, store goods there, require the landlord to comply with its obligations under the lease and it could have used the time to refurbish the premises.

He noted also that under the Hengrove lease, the use as a cinema was qualified. The Hengrove tenant was given the space for a term of years and could have changed the use of the premises with the landlord's consent. Given that the premises were in a shopping centre, it would not suit the landlord to have no footfall in the premises and it would have readily consented to a change of use if the premises would otherwise be empty. Mr Fetherstonhaugh QC submitted there was no total failure of basis here.

107. On behalf of the Trocadero landlord, Mr Trompeter QC said that the case was governed by the terms of the leases which made it clear that rent was payable, notwithstanding any inability of the tenant to make lawful use of the premises. The arguments of the tenant about fundamental basis and implied term sought to subvert the allocation of risk. There was no evidence of the circumstances in which the lease was entered into or of any understanding extraneous to the lease. Mr Trompeter QC took the Court through the provisions of the 1994 lease on which he particularly relied to make good his case. The commencement date of the 1994 lease was 30 September 2006, 12 years after the grant. No one could have realistically predicted in 1994 what the market would be like in 2006 or thereafter so the Trocadero tenants must have accepted that the prevailing economic circumstances could change from time to time so as to impact on user.

108. Mr Trompeter QC also pointed out that under clause 2, what the Trocadero tenants got in consideration of the rent and the other covenants was the demise of the premises. The rent was the essence of the lease. It was payable yearly but the tenants could discharge their obligation by four equal quarterly instalments. By virtue of clause 3.1 the obligation to pay the rent throughout the term was an absolute one and, independently of that obligation, under clause 3.7.1 the tenants covenant to comply with obligations imposed by statute, which would include the Coronavirus regulations. He submitted that by these clauses, the parties had catered for the situation which actually arose in this case and had agreed that the tenants should pay the rent regardless.

109. Under clause 3.12 the Trocadero tenants covenanted not to use the premises other than for the Permitted Use as a cinema. Mr Trompeter QC said that Mr Seitler QC sought to imbue this clause with some special status so as to make the ability to use the premises as a cinema the fundamental basis of the lease, but he asked rhetorically why that should be so, why that provision should be more important than the absolute obligation to pay rent.

110. Mr Trompeter QC drew attention to clause 3.16, the obligation on the tenant to keep the premises open so far as permitted by law and submitted that this provision, like clause 3.7.1 recognises that there may be circumstances where the law does not permit the tenant to keep the premises open for trading and yet there is no abatement of the obligation to pay rent.

111. He relied on the provisos in clause 5, particularly the rent cesser clause in clause 5.2. as the judge had said that clause demonstrated that the parties had thought about suspension of rent and had made provision for it only in certain circumstances, which only concerned physical damage to or destruction of the premises. The judge had been right to say at [131] that this emphasised that the risk that the premises cannot be used as a cinema is one to be borne by the tenant.

112. Clause 5.5 was the provision that the landlord gave no covenant, warranty or representation that the premises can be lawfully used for the Permitted Use. If the Trocadero tenants were right about this appeal, the curious outcome would be reached that, although by virtue of clause 5.5 the Trocadero landlord would not be liable for any civil wrongdoing when the premises could not lawfully be used as a cinema, at the same time the Trocadero tenants were relieved of any obligation to pay rent by reason of the same matters. Although Mr Seitler QC sought to argue that the provision was really concerned with planning, there is nothing in the wording which leads to that conclusion (in contrast to the Hengrove lease) and in any event clause 3.8 of the 1994 lease contains a specific covenant about planning.

113. Mr Trompeter QC advanced eight propositions of law in relation to failure of basis:

(1) In *Avonwick* Carr LJ says at [54] that the purpose of a claim in unjust enrichment is "to correct normatively defective transfers of value". It follows that the key consideration is whether there is a defect in respect of payments of rent.

(2) At [80] Carr LJ held that the meaning of failure of basis extends beyond mere failure of counter-performance and can extend to failure of a bargain which is not contractual.

(3) At [79] Carr LJ held: "The core concept of "failure of basis" is that a benefit has been conferred on a joint understanding that the recipient's right to retain it is conditional."

(4) As held at [115] of *Barnes* (quoted at [82] above, understanding is distinct from motive. The Court is looking for the object of the basis, not the motive behind it, what the parties were intending, not why.

(5) The joint understanding of the parties has to be assessed objectively: see *Goff & Jones* [13-02] and [13-04]. To the extent that *Giedo* had said failure of basis should be looked at from the perspective of the payer, it should be approached with care.

(6) At [67] of *Avonwick*, Carr LJ said that invalidity of the contract was not a necessary prerequisite to a claim in unjust enrichment, but

(7) The claim must respect the contractual regime and the allocation of risk, what Carr LJ called the obligation rule. A claim in unjust enrichment can only operate as a gap filling exercise.

(8) There will not be a gap in the contract where it expressly provides the basis for the payment in question nor where the basis and the failure are within the parties' contemplation: see [125] of Carr LJ in *Avonwick.*

114. It was striking that, in his reply submissions, Mr Seitler QC essentially agreed with these propositions of law, although he disputed how they should be applied to the facts of the case.

115. Mr Trompeter QC submitted that the reasons which Carr LJ gave at [115] to [117] for the claim in unjust enrichment not succeeding in that case were equally applicable here. The language of the lease repeatedly contemplated that the premises might not be

capable of lawful use by the tenant but there was no provision for the non-payment of rent.

116. In relation to *Roxborough* upon which Mr Seitler QC relies, Mr Trompeter QC submitted that the judge had been correct to say that whilst that case:

> "demonstrates that the payment obligation will not, despite the Obligation Rule, of itself prevent a claim in unjust enrichment, [t]he position is however different if, as in this case, giving effect to a claim in unjust enrichment would be inconsistent with other provisions of the contract."

117. In that case the relevant payment obligation had related to a distinct additional sum, the licence fee, where the contract set out in express terms the basis for the payment, namely that there was an obligation to pay the licence fee. However, in other cases the payment obligation of itself may well prevent a claim in unjust enrichment. *Avonwick* was such a case as Carr LJ explained at [133]. Thus, in *Roxborough* the claim in unjust enrichment was consistent with the contract, whereas in *Avonwick* it was not.

118. Mr Trompeter QC submitted that it was clear from the terms of the leases that, under clause 2, it was the demise which was the joint understanding for the basis on which rent was payable. There was nothing in the terms of the leases which suggested that the basis on which rent was payable was that the Trocadero tenants could lawfully use the premises as a cinema. They would have to be able to point to some extraneous non-promissory understanding but that was neither pleaded nor evidenced and would run contrary to the contractual regime and the allocation of risk. It was unsurprising that this alleged basis did not exist because beyond what was in the lease there was no common object or motivation at all.

119. He relied upon the decision of Marcus Smith J in *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch); [2019] L.&T.R. 14. The issue in that case was whether a lease held by the European Medicines Agency of premises in London used as its headquarters was frustrated on the UK's withdrawal from the European Union. The judge held that it was not. Although it was a frustration case, Mr Trompeter QC submitted that it contained an analysis which was equally applicable here.

120. At [237] the judge identified the question which arose in these terms: "The question is whether there can be said to be a common purpose as between the EMA and CW, at the time of the Agreements, going beyond what was agreed upon in the Lease, which has been rendered radically different by supervening events." He went on at [245] to identify why there was no common purpose outside the terms of the lease which had been frustrated:

> "Outside the terms of the Lease, the parties' purposes were not common, but divergent. The EMA was focussed on bespoke premises, with the greatest flexibility as to term, and the lowest rent. CW was focussed on long-term cash flow, at the highest rate, and was prepared to allow the EMA its say in the building's configuration, provided that this was not adverse to CW's interests. There was no common view or expectation between

> the parties that the risk of the consequences of the EMA abandoning its headquarters should be differently visited according to the reason for the EMA's departure. I find that it was CW's purpose that *whatever* the reason for the EMA's intended departure, it should be protected: and, from the terms of the Lease, the EMA knew this."

121. Mr Trompeter QC submitted that the position was the same here. Once one left the four corners of the lease, the only interest of the Trocadero landlord was to get rent for as long as possible whereas the Trocadero tenants' interest was to run a successful business from the premises. Those interests were divergent and there was no extraneous understanding.

122. Mr Trompeter QC went on to make the point that Grounds 2 and 3 of his Respondents' Notice (as set out at [63] above) only arose if he lost on his primary argument that the judge had been correct to find that there was no failure of basis. On the assumption that the ability to make lawful use of the premises was the main bargain contracted for under the lease, the issue then was whether the tenant received any part of that bargain. The judge decided the answer was no but he was wrong to do so. The demise continued and the Trocadero tenants enjoyed exclusive possession of the premises even when they could not be lawfully used as a cinema. They continued to receive the services the Trocadero landlord had covenanted to provide.

123. The judge had said at [138] that simply having possession did not provide any part of the essential bargain but that could not be right. Notwithstanding that the Trocadero tenants were not able to use the premises as a cinema for 280 days, they retained the benefit of the remainder of the 35 year term. Furthermore, without that right to possession, they would have had no ability to use the premises at all so it was difficult to see how entitlement to possession was not part of the bargain they expected to receive. Mr Trompeter QC submitted that this was effectively admitted in a passage in Mr Seitler QC's supplementary skeleton which read:

> "The grant of the demise is a necessary element for the Appellants to be able to use the Premises lawfully, such that without the demise, the basis will fail. But that does not mean that the basis cannot otherwise fail."

124. In relation to Respondents' Notice ground 3, the issue of apportionment, Mr Trompeter QC submitted that the rent was yearly, albeit the liability to pay it could be discharged by payment of quarterly instalments. By its nature, unlike the sacks of wheat, it was not apportionable. There was no daily unit of measurement in the lease. Taken to its logical conclusion, the Trocadero tenants' argument would be that they did not have to pay rent at night when under local authority regulations they could not lawfully use the premises as a cinema.

125. He submitted that the distinction the judge drew between a case such as the present and the break clause cases was wrong. The reasoning in those cases: the decision of Peter Smith J in *PCE Investors Limited v Cancer Research UK* [2012] EWHC 884 (Ch); [2012] 2 P.&C.R. 5 at [49] followed by Morgan J in *Marks & Spencer plc v BNP Paribas* [2013] EWHC 1279 (Ch) at [42] to [45] to the effect that it was inappropriate to divide up a single consideration, was equally applicable to these leases. There was

no relevant distinction from the break clause cases. There for the broken part the tenant gets absolutely nothing whereas here the Trocadero tenants retained something throughout the illegal period.

Discussion

126. I will consider first the issue of the rent cesser clause in the Hengrove lease, which is an issue as to the construction of the terms of that lease. Despite the ingenuity of Mr Seitler QC's argument, I consider that the cesser clearly only operates where there is physical damage or destruction by an Insured Risk. Clause 7.4 says: *"In case the Property…shall…be destroyed or damaged by any of the Insured Risks"*, the clause then continues: *"so as to render the Property unfit for occupation or use"*. On their natural and ordinary meaning, those words are only apt to describe unfitness caused by such physical damage or destruction. That is made clear by the later words of the clause which state that the cesser continues until: *"the Property shall have been made fit for occupation and use"* and by the proviso which gives the tenant the liberty to terminate the lease if the landlord cannot: *"rebuild or reinstate the Property within a period of three years"*. Thus, the clause taken as a whole only contemplates unfitness for occupation or use caused by physical damage or destruction of the property which may require rebuilding or reinstatement.

127. Mr Seitler QC argued that the word *"damage"* was broad enough to include financial or non-physical damage such as was caused by the Government restrictions imposed during the pandemic. In my judgment, there are a number of problems with that argument. First, as Snowden LJ pointed out during the course of argument, it cannot be said that the Property, which is not a legal entity, has suffered financial or economic damage: rather it is the Hengrove tenant which has suffered that damage. However the wording of the clause makes it clear that the relevant damage or destruction has to be to *"the Property"*. Second, even if that hurdle could be overcome, whilst *"damage"* taken in isolation could refer to non-physical financial damage, in the context of the clause as a whole it clearly does not. The juxtaposition of *"damage"* with *"destruction"* points to this being physical damage and this is borne out by the fact that the damage or destruction must render the property *"unfit for occupation or use"*. The concepts of fitness or unfitness for occupation or use point to physical problems or constraints at the property. Contrary to Mr Seitler QC's argument, it is simply not apt to describe the premises as unfit for occupation or use where they are perfectly fit physically for occupation or use, but the Coronavirus restrictions have made it unlawful for the Hengrove tenant to use them. As I have said, that the clause is concerned with physical damage or destruction caused by Insured Risks is also borne out by the reference to the inability to rebuild or reinstate the property within three years in the proviso. Mr Seitler QC was driven to submit that the proviso was simply inapplicable where the damage was economic such as caused by the pandemic, but there is nothing in the wording of the proviso to suggest that it is only applicable if one type of damage occurs but not another.

128. Furthermore that the cesser of rent clause is concerned only with physical damage or destruction caused by Insured Risks is borne out by clause 7.3 which is headed: *"Destruction of the Property"* and begins: *"if the Property or any part thereof is destroyed or damaged by any of the Insured Risks and requires the insurance monies to be laid out in the rebuilding and reinstatement of the Property"*. That provision is clearly limited to where there is physical damage or destruction. Whilst it is of course

theoretically possible for a phrase used in several places in a contract to have a different meaning depending on the context, in this case clauses 7.3 and 7.4 follow one another and it is quite clear that *"destroyed or damaged"* in each clause means the same.

129. The passage in the judgment of Chadwick LJ in *Bromarin* relied on by Mr Seitler QC and quoted at [67] above is of no assistance to the Hengrove tenant, since the words used in clause 7.4 cannot have been intended objectively to encompass financial damage suffered by the Hengrove tenant because of the imposition of Government restrictions such as the Coronavirus regulations, whether those were foreseeable or not.

130. Mr Seitler QC sought to make much of the fact that, given the definition of "Insured Risks" in clause 2.10, the Hengrove landlord had taken out insurance for risks which were non-physical such as: *"strikes and labour disturbances"* and if its argument that the cesser of rent clause was limited to physical damage were correct, the tenant had paid for insurance from which it derived no benefit. However, as Mr Fetherstonhaugh QC pointed out, a strike or labour disturbance could very well lead to physical damage to the premises. In any event, even if there were a mismatch between the breadth of the insurance cover and the cesser of rent clause, that would not be sufficient to give to the words of the latter provision a different meaning to that which they clearly bear on the true construction of the lease. The insurance cover and the cesser of rent are not intended to be mirror images of each other. The tenant's interest is noted on the insurance but it is a separate question whether there should be a cesser of rent.

131. Mr Seitler QC advanced a similar argument in relation to the Murder, Suicide, Disease or Pests extension to the insurance taken out by the Hengrove landlord as an *"other insurable risk as may reasonably be required from time to time"* within the definition of Insured Risks. He submitted that if the restrictions caused by the pandemic did not lead to a cesser of rent under clause 7.4, the Hengrove tenant will have paid for an insurance from which it has received no benefit.

132. I agree with Mr Fetherstonhaugh QC that this argument essentially overlooks the substance of the insurance effected by the Hengrove landlord. The Murder, Suicide, Disease or Pests extension insured the Hengrove landlord against loss of rent: *"resulting from interruption of or interference with the BUSINESS"* following an outbreak of the disease. The business was defined as that of the landlord as a property owner. Thus, what the Hengrove landlord was insuring against was a financial loss to its business, not that of the Hengrove tenant. The Hengrove tenant could have taken out a business interruption insurance of its own which protected it against the risk of disease. It did have a business interruption policy, but it excluded pandemics.

133. Despite Mr Seitler QC's argument to the contrary, it is impossible to construe the policy taken out by the Hengrove landlord as protecting the Hengrove tenant from having to pay rent when it could not enjoy the premises. In my judgment, the Master was right to conclude that the insurance cover was for loss of rent to the Hengrove landlord where rent was not payable by the Hengrove tenant by reason of a provision in the lease such as the cesser of rent clause. The policy defines "Rent" as: *"the money paid or payable to or by the Insured for tenancies and other charges and for services rendered in the course of the BUSINESS at the PREMISES"*. Loss of rent cover insures the landlord against a situation where, for example, a tenant does not pay rent and is under no legal obligation to do so. It does not cover the landlord where the tenant chooses not to pay rent, even though it is under an obligation to do so, because the events which have

occurred do not fall within the cesser of rent clause. I have little doubt that, if the Hengrove landlord had sought to make a claim against the insurers for the rent which the Hengrove tenant did not pay during the pandemic, the insurers would have rejected the claim on the basis that the tenant was still liable to pay the rent so that the landlord had not suffered a loss of rent within the meaning of the policy at all.

134. In my judgment, it follows that the appeal by the Hengrove tenant in relation to the cesser of rent clause must fail.

135. Turning to the proposed implication of terms, as already noted, the implied term on which Mr Seitler QC focused in the Hengrove appeal was the one in [14F] of the Amended Defence that, where at the tenant's expense the landlord insured against loss of rent arising out of an insured risk involving non-physical damage to the premises, a suspension of rent would apply if the insured risk occurred rendering the premises wholly or partly unfit or incapable of occupation, notwithstanding that no physical damage was caused. As Mr Fetherstonhaugh QC pointed out the Hengrove tenant also contends for the implication of other terms, such as that rent should be suspended because Covid and the Coronavirus Regulations were unprecedented and unforeseen, but forced the closure of the premises. It can be seen immediately that these implied terms are an attempt to imply into the Hengrove lease a broader cesser of rent provision than the express clause at clause 7.4 permits.

136. The first implied term for which the Trocadero tenants contend as set out in [57] above is very similar, that if the Permitted Use were to become illegal the obligation to pay rent should be suspended for the period during which the Permitted Use was illegal. That too seeks to imply a cesser of rent provision which is far broader than the express cesser of rent clause 5.2 in the Trocadero lease. The second implied term seeks to limit the payment of rent to periods when the premises could be used as a cinema with levels of attendance commensurate with what the parties would have anticipated at the time that the leases were entered into.

137. Since the judgment of the Master in the Hengrove case, this Court in *Yoo Design* has restated and summarised the law on implication of terms (as quoted at [55] above). However, it is not suggested that the Master misstated the law. The judge in the Trocadero case cited and applied the summary of the law in *Yoo Design*.

138. In my judgment, none of the implied terms contended for in the two cases satisfies either the business efficacy test or the obviousness test. Taking the business efficacy test first, as Carr LJ set out at [51(iii)] of *Yoo Design*, this will only be satisfied where, without the implied term, the contract would lack commercial or practical coherence. That simply cannot be said of the leases in the Hengrove and Trocadero cases. They both work perfectly well without the implied terms. Both leases allocate the risk that the premises cannot be used for their intended purpose to the tenant, so that the tenant is obliged to continue to pay rent where the cesser of rent provisions are not applicable (which on this hypothesis they are not on the present facts) and there is nothing unworkable or incoherent about that allocation of risk.

139. The obviousness test is equally inapplicable. The term which it is sought to imply has to be precisely expressed and must be so obvious to go without saying. If the officious bystander had asked the question whether the parties intended that, if the premises could not be used lawfully because of restrictions such as the Coronavirus restrictions, the

obligation to pay rent would be suspended, far from a testy "of course" from both parties, it seems to me the landlord in each case would have said "of course not, the rent is payable throughout unless physical damage to or destruction of the premises has rendered them unfit for occupation or use". It follows that the aspect of the test identified by Carr LJ at [51(vii)] cannot be satisfied:

> "Nor is it enough to show that, had the parties foreseen the eventuality which in fact occurred, they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred."

140. As Carr LJ said in [51(viii)] the test for implication is a stringent one and in my judgment it is nowhere near satisfied in these cases. As Mr Fetherstonhaugh QC pointed out, where, as in these cases, the contracts in question were detailed documents prepared by lawyers, the scope for implication is limited. Furthermore, in my judgment none of the terms contended for can be implied into the leases because they are inconsistent with the express terms of the leases, in the sense that they seek to reallocate the allocation of risk set out in the bargain which the parties made.

141. As Mr Fetherstonhaugh QC said, the parties turned their minds to what would happen if the premises could not be used by the tenant. They provided for that eventuality by a cesser of rent in the case of physical damage or destruction rendering the premises unfit for occupation or use. They did not choose to make a similar provision for a situation where the tenant was unable to use the premises for any other reason. That was itself a deliberate allocation of risk and, as Mr Fetherstonhaugh QC said, the suggestion that there was a lacuna in the lease is misplaced.

142. The second implied term in the Trocadero case is also completely unworkable as Mr Trompeter QC said. The question of implication is to be addressed at the time the contract is made ([51(vii)] of *Yoo Design*). There is simply no evidence or any other material from which the Court could assess what level of attendance would have been anticipated for 2020 and 2021 when the leases were entered in 1994 and 2014. This would have required some sort of expert evidence, which was not available and even if it had been might well have been disputed and the subject of cross-examination, an impossible scenario for the implication of a term.

143. In relation to implication (and indeed his case on failure of basis) Mr Seitler QC sought to make much of the proposition that, whilst the pandemic itself might not have been unforeseeable or unprecedented, the restrictive Coronavirus legislation which was introduced was unprecedented. In those circumstances, he submitted that it was appropriate for the Court to consider applying the law in a fresh light. I do not agree. Even if the legislation were unprecedented and that may well be debateable, since some restrictions have been imposed historically during previous pandemics, including the Great Plague, that is no reason to disregard or disapply fundamental principles of the law of contract or to extend the law of unjust enrichment beyond its proper bounds.

144. This brings me to Mr Seitler QC's case on failure of basis. Given that both of these appeals concern subsisting contracts which still have many years to run, the limitations on the application of the law of unjust enrichment identified by Carr LJ in *Avonwick*

are particularly pertinent. In identifying what she called the "Obligation Rule", Carr LJ said this at [67]-[68]:

> "67. However, as demonstrated by *Roxborough* (considered further below), invalidity of a relevant contract is not a necessary prerequisite to a successful claim in unjust enrichment. That is not to say that claims in unjust enrichment must not respect contractual regimes and the allocations of risk agreed between the parties. On the contrary, as explained by Professor Burrows in *The Restatement* (at 3(6)), an "often overlooked but crucial" element of the unjust factors scheme is:
>
> > "…that an unjust factor does not normally override a legal obligation of the claimant to confer the benefit on the defendant. The existence of the legal obligation means that the unjust factor is nullified so that the enrichment at the claimant's expense is not unjust..."
>
> 68. This orthodox position in England was articulated in *Kleinwort Benson* ...at 407-408). Lord Hope identified that a third question for consideration was *"Did the payee have a right to receive the sum which was paid to him?"* That question was relevant as follows:
>
> > "The third question arises because the payee cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him. The payer may have been mistaken as to the grounds on which the sum was due to the payee, but his mistake will not provide a ground for its recovery if the payee can show that he was entitled to it on some other ground.""

145. As already noted at [82] above, Carr LJ went on to say at [72] that the Obligation Rule was not absolute and that there could be exceptions, albeit limited. She noted at [74] that Professor Birks had said that it would be "a very rare" case in which failure of consideration could be made out despite the existence and performance of a valid contract.

146. She identified at [75]-[76] that an exception would be where unjust enrichment fills a "gap" in the contract, in these terms:

> "75. The Gaiduk Parties submitted that a claim in unjust enrichment functions as a "gap-filling" device which is in some way subsidiary to the law of contract, echoing remarks made by Australian judges in the past (see *Pavey* at 256; *Roxborough* at [75] and *Mann* at [22]). Provided that what is meant by this is properly understood, it can be seen to make sense: the claim in unjust enrichment is not allowed to contradict the terms in the contract. However, it should not be treated as meaning that the claim in unjust enrichment is in some way inferior or subsidiary to a claim in contract. Frederick Wilmot-Smith advances a sound criticism of the terminology in *Contract and Unjust Enrichment*

> *in the High Court of Australia* 136 LQR (April) 2020, 196-201 stating:
>
> > "Since a court can… always let gains and losses lie where they fall, there is never a true "gap": it follows that there is only ever a "gap" if (for independent reasons) one concludes that there should be a restitutionary claim."
> >
> > 76. Asplin LJ may have expressed the true meaning of the phrase "gap-filling" with the greatest clarity during the course of the hearing: it is not gap-filling "in the sense of seniority or a minority, or being junior". It is because there is no "space" for the law of unjust enrichment in particular claims. In this way, the law of unjust enrichment can be seen as complementary, though not subsidiary, to the law of contract."

147. In my judgment, despite the ingenious submissions advanced by Mr Seitler QC, this is where his entire case on failure of basis founders. There is no "gap" in these leases which requires to be filled by the law of unjust enrichment. The leases contain a carefully worked out contractual regime for the allocation of risk and the proposed "failure of basis" would subvert that regime and contradict the terms of the contracts in a way which, as *Avonwick* demonstrates, the law does not permit.

148. The decision of the High Court of Australia in *Roxborough* does not assist the Trocadero tenants or the Hengrove tenant. As Mr Trompeter QC pointed out, that was a case where the claim in unjust enrichment was consistent with the terms of the contract. In contrast, *Avonwick* was a case where the claim in unjust enrichment was inconsistent with the terms of the contract and so failed.

149. In the case of the leases in the present cases, it is clear that the consideration for the obligation to pay rent was the demise of the premises for, in each case, a 35 year term, giving the tenant exclusive possession. Mr Seitler QC accepted that that consideration or basis had not failed but submitted that there was more than one basis and that the common understanding or assumption that the premises could be used lawfully as a cinema was also a fundamental basis for the obligation to pay rent and that that basis had failed.

150. The difficulty with this argument was identified by Sir Nicholas Patten during the course of argument, which is that, whereas in cases like *Barnes* and *Roxborough* there was some wider arrangement which gave rise to an extraneous or extra-contractual understanding the operation of which did not subvert the contract, in the present case there was no wider context, but only the letting of the premises on the terms of the leases.

151. Mr Seitler QC did not seek to rely upon some extraneous or extra-contractual common understanding or assumption outside the lease, but, even if he had, that case would be hopeless, essentially for the reasons given by Marcus Smith J in the *Canary Wharf* case cited at [120] above. As that judge said, outside the terms of the lease, the parties' interests and purposes are not common but divergent. Rather, Mr Seitler QC argued that the common understanding or assumption is to be found within the lease, in the user covenant, but the problem with that argument, which leads into the contention that

the permitted use is somehow the fundamental basis of the lease, is that it would have the effect of altering and thus subverting the terms of the contract and altering the allocation of risk for which the express terms of the lease provide.

152. Focusing on the terms of the Trocadero 1994 lease, clause 5.2, the cesser of rent clause, is a complete code as to the circumstances in which the obligation to pay rent is suspended, which is limited to where there is physical damage to or destruction of the premises caused by an insured risk. The lease clearly contemplates that there may be circumstances where it is not lawful to use the premises for the Permitted Use (specifically clause 3.16 and the sixth schedule) but there is no suggestion in the terms of the lease that there should be a cesser of rent in those circumstances. If the parties had intended that there should be, they could and would have included it in clause 5.2. They did not and, in those circumstances, the covenant to pay rent in clause 3.1 continues to apply.

153. Furthermore, contrary to Mr Seitler QC's submissions, clause 5.5 is clearly not limited to planning and, even if it is declaratory of the position as a matter of law, it is a provision which makes it as clear as it possibly could that there is nothing in the lease or otherwise which amounts to any sort of obligation on the part of the Trocadero landlord that the premises can lawfully be used as a cinema. The inevitable obverse is that the risk that the premises cannot lawfully be used as a cinema rests upon the Trocadero tenants. That allocation of risk is completely inconsistent with Mr Seitler QC's argument that the fundamental basis of the lease was that the permitted use was lawful and that the Trocadero tenants are relieved from the obligation to pay rent when the premises could not lawfully be used as a cinema. Clause 5.5 is thus confirmation that, save in the circumstances set out in clause 5.2, there is no cesser of rent and that, accordingly, the judge's approach to these two clauses in [130] and [131] of the judgment was correct.

154. That allocation of risk is not altered by the fact that the only Permitted Use under the lease is as a cinema, since the Trocadero tenants also covenant in clause 3.7.1 that they will comply with any obligations imposed by statute in respect of the premises or the use thereof, a further indication that the risk that the premises cannot lawfully be used as a cinema because, in this instance, of Coronavirus regulations, rests upon the Trocadero tenants.

155. The passage in the speech of Lord Wilberforce in *Panalpina* set out at [92] above upon which Mr Seitler QC relied does not assist his case because it states that whether or not only specified risks have passed to one of the parties depends upon the terms of the lease. In the present case, for the reasons I have given, the terms of the lease make it clear that the risk that the premises cannot lawfully be used as a cinema rests upon the Trocadero tenants.

156. In my judgment, the position is no different under the Hengrove lease. Whilst it is the case that the equivalent to clause 5.5 of the Trocadero lease is limited to planning, clause 7.4 is a cesser of rent clause which, if anything, is even more clearly limited to physical damage or destruction than the cesser of rent clause in the Trocadero lease because of the proviso. There is nothing in the Hengrove lease to suggest that there will be a cesser of rent in other circumstances than clause 7.4 which, as with clause 5.2 of the Trocadero lease, is a complete code as to the circumstances in which the obligation

to pay rent will be suspended. The parties not having provided for a cesser of rent in other circumstances, rent continues to be payable under clause 5.1.

157. The covenant in clause 5.17.1.4 not to use the property except for the Permitted Use expressly contemplates that the Hengrove tenant may change the use of the premises with the consent of the Hengrove landlord, not to be unreasonably withheld. Although that clause does not spell out the circumstances in which a change of use might be sought, one possibility is where it is no longer lawful to use the premises as a cinema. However, nothing in that clause or any other provision of the lease suggests that rent would cease to be payable in those circumstances.

158. Since the basis of the obligation to pay rent under both the Hengrove lease and the Trocadero lease was the demise of the premises for a 35 year term and, on the true construction of both leases, the obligation to pay rent was only suspended where the cesser of rent clauses applied, namely where there was physical damage to or destruction of the premises by an insured risk rendering them unfit for occupation or use, there is simply no gap in the lease which requires filling by a claim in unjust enrichment. The contention that the fundamental basis for the obligation to pay rent is that the premises can be lawfully used as a cinema is inconsistent with the express terms of the leases and the allocation of risk between the parties. The analysis of Carr LJ in *Avonwick* at [115] to [117] is apposite and applies, by parity of reasoning, in the circumstances of the present case:

> "115. In my judgment, the fundamental reason why the claim in unjust enrichment cannot succeed is clause 2.4 of the Castlerose SPA, repeated here for ease of reference:
>
> > "2.4 The consideration for the sale of the Shares shall be US$950,000,000 (**the Consideration**)."
>
> 116. This was the express basis of payment agreed in a relevant contract the validity of which cannot be (and has not been) impugned. In such circumstances, there is no scope for the law of unjust enrichment to intervene by reference to a basis which is not only alternative and extraneous, but which also directly contradicts the express contractual terms. None of the authorities begin to go that far.
>
> 117. The basis for the unjust factor contended for by the Taruta Parties does not qualify or add to clause 2.4: it is simply wholly at odds with it. Indeed, whilst the factual background of fluid commercial negotiation between the parties could be said to be commonplace, the proposition contended for by the Taruta Parties is extreme: that they should be entitled at common law to recover monies on the basis of an understanding which runs directly contrary to an express agreement contained in a valid and subsisting contract (in circumstances where the facts do not afford any basis for a claim for rectification)."

159. As Carr LJ went on to say at [133], distinguishing *Barnes* and *Roxborough*:

> "However, where the basis of the consideration is expressly and unconditionally spelt out on the face of a valid and subsisting contract, as here, there is no proper scope for inquiring into an alternative basis that is plainly contrary to the express basis freely agreed between the parties. It is not an inquiry that was carried out in *Roxborough* or *Barnes* where the basis that failed was one not at odds with (and indeed in the case of *Roxborough* expressly reflected in) the relevant contractual provisions."

160. Applying that reasoning, in the present cases the fundamental basis contended for is contrary to the express terms of the leases and the allocation of risk between the parties, in circumstances where there is no gap in those leases and thus no scope for the operation of the law of unjust enrichment. Since the respective tenants' cases that there has been a failure of basis fails at this first hurdle, it follows that the appeals based upon failure of basis must be dismissed.

161. Given that conclusion, it is not necessary to decide the issues raised by Grounds 2 and 3 of the Respondents' Notices which the judge decided *obiter* in favour of the Trocadero tenants, namely that if the basis for the obligation to pay rent was the ability to lawfully use the premises as a cinema, that basis did not fail totally and that the obligation to pay rent could be apportioned so that there was a total failure of basis during those periods when the premises could not be lawfully used as a cinema. Given that those issues do not arise in circumstances where I have concluded that there was no failure of basis at all, it would seem advisable to say no more about them. The issue of apportionment of rent, in particular, is a potentially complex one which is better decided in a case where it is critical to the determination of the issues on appeal and not merely *obiter.*

Conclusion

162. For all the above reasons, both these appeals must be dismissed.

Lord Justice Snowden

163. I agree.

Sir Nicholas Patten

164. I also agree.