

Commerz Real Investmentgesellschaft mbh v TFS Stores Ltd [2021] EWHC 863 (Ch)

The first reported case where a landlord obtained summary judgement to recover arrears of rent and service charge which had accrued since the start of the pandemic.

06 July 2021

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Facts

The tenant (TFS) held a lease in the Westfield Shopping Centre at Shepherd's Bush for 5 years from 1 February 2019. Under the terms of a side letter, it was liable to pay a base rent of £180,000 per annum and a turnover rent.

As a result of government restrictions, TFS was forced to close its shop from 26 March 2020 to 15 June 2020, from 5 November 2020 to 2 December 2020 and from 19 December 2020 to 12 April 2021. It had not paid any rent since April 2020 and three months' worth of service charge were also outstanding.

Under the lease, the landlord (L) was obliged to insure the shopping centre against the "Insured Risks". Although these did not expressly include notifiable diseases, they did include "such other risks as the Landlord may consider it prudent to insure". L had in fact insured for loss of rent against the outbreak of a notifiable disease, but the cover only extended to interruption or interference in L's business. The lease also included a rent suspension clause which applied "if the Premises are damaged by an Insured Risk or if the Facility [i.e. the centre] is so damaged as to affect materially and adversely the Premises...".

L brought a claim for summary judgement to recover arrears of rent and service charge of over £165,000 (inclusive of VAT) and interest.

Issues

1. Were the proceedings premature and contrary to the government's Code of Practice for commercial property relationships during the Covid-19 pandemic?
2. Did L's claim seek to circumvent the government restrictions currently in place preventing forfeiture of leases for arrears of rent, winding-up companies and exercising the process known as Commercial Rent Arrears Recovery (or CRAR)?
3. Was it an implied term of the lease that L was obliged to claim on its insurance for loss of rent before commencing proceedings to recover rent?

Decision

1. The Code is voluntary and it expressly states that it does change the underlying legal relationship between landlords and tenants. It encourages landlords and tenants to take a balanced view and is not a charter for tenants to refuse to pay rent. In any event, the evidence suggested that, if anything, it was TFS who had refused to engage in discussion about the rent arrears.

2. There is no legal restriction placed upon a landlord bringing a claim for rents and seeking judgment upon that claim. The steps a landlord may be able to take if judgment is entered are restricted, but the entitlement to bring a claim before the court for a determination about liability is unaffected.
3. L's insurance protected losses incurred by L to its business. It was not part of L's obligation to insure against losses to TFS's business (TFS could, of course, take out its own business interruption insurance to protect itself against such risks). The lease required the rent to be paid during the term and the only exception was the rent suspension clause which applied where there was physical damage to L's property (not where the property was closed due to a legal requirement). Any claim by L under its policy would therefore be rejected by its insurer on the grounds that L had not suffered a loss to its business. L was not therefore obliged to claim on its insurance for loss of rent.

Under the lease, TFS covenanted to keep the property open unless it was prevented from doing so by damage caused by an Insured Risk or to do so would be unlawful. However, that did not mean that a term could be implied that where the property was closed due to a legal requirement, no rent was payable (so that L could and should claim the loss of rent under its insurance policy). Such an implied term would contradict the express terms of the lease (which expressly provided that rent would only be suspended where there was physical damage to the property) and would not be so obvious that it went without saying.

Points to note/consider

1. Whilst this decision may not come as any great surprise, it will no doubt have sent a chill down the spines of many retailers. Chief Master Marsh was clear that the issues raised by TFS should be dealt with by applying the well-established principles that governed the construction of contracts and the implication of terms. The context in which the claim was made (i.e. a global pandemic) did not entitle TFS to argue that those principles were now part of an area of developing law.
2. This was the first Covid rent arrears summary judgement case to be decided. However, it seems that there are other similar cases working their way through the courts and, the following week, the second such case was decided (see below).

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