

# WH Smith Retail Holdings Ltd v Commerz Real Investmentgesellschaft mbh [Winchester County Court, 25 March 2021]

The first reported case to consider a pandemic rent suspension clause on a non-contested lease renewal. Find out more.

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## Facts

The tenant (WHS) had served on its landlord (L) a notice under section 26 of the Landlord and Tenant Act 1954 seeking a new lease of its unit in the Westfield Shopping Centre at Shepherd's Bush. By the time the matter came to court (November 2020) the country was in the middle of its second lockdown. However, although non-essential shops were closed, WHS's store remained open as it contained a post office (making it an essential retailer). However, sales were down by over 90%.

The parties agreed on most of the terms for a new lease, but a few issues remained outstanding (including the rent). In particular, the parties agreed that the new lease should contain a pandemic rent suspension clause which, if triggered, would mean that WHS would have to pay 50% of the rent and the whole of the service charge and would have to account for any sums received from the government by way of subsidy or support in respect of rent. However, the parties could not agree on the trigger for that rent suspension.

## Issues

1. Should the pandemic rent suspension be triggered only when WHS was forced to stop trading from the unit or when non-essential retailers were forced to close?
2. Should there be an uplift in the rent to reflect the benefit to WHS of having a pandemic rent suspension clause?

## Decision

1. The trigger should be the forced closure of non-essential retailers. Otherwise, the rent suspension clause would be very unlikely to have any effect. As it contained a post office, WHS's store had not been forced to close in the lockdowns to date and there was no reason to suppose that would change if there were to be further lockdowns. Matters might be different on the high street, but the reality in this shopping centre was that if non-essential retailers surrounding WHS were closed, there was no advantage to WHS in remaining open.
2. There should be no uplift because of the rent suspension clause. It was not the case (as L had argued) that WHS was, in effect, benefiting twice over from the pandemic. Any discount in rent as a result of the pandemic reflects a consensus about the general fall in the rental market. It is not providing the same thing as a pandemic rent suspension clause, which is an attempt to share the burden of the loss caused by the impact of compulsory closure of non-essential retailers. Pandemic rent suspension clauses have become something that all tenants want and the market has now priced them in.

## Points to note/consider

1. Whilst this is only a County Court decision, the case is of great interest as it shows the long-lasting effects the pandemic is likely to have on non-contested lease renewals. Everyone involved in landlord and tenant negotiations will particularly be interested in the judge's view that pandemic rent suspension clauses have, in effect, now become 'market norm' and that rent should not be increased as a result of them. In fact, the reverse is likely to be true – rent will be depressed if a lease does not contain such a clause.
2. In addition to the pandemic rent suspension clause (and its impact on rent), there were also other issues that the parties could not agree on. In particular, L wanted to modernise the service charge provisions to include, amongst other things, the costs of energy audits and steps taken to improve energy efficiency and of obtaining energy performance certificates when letting or renewing the lease of any unit in the centre. This wording reflected the latest form of lease precedent used in the centre and was required on leases granted to new tenants.

The judge refused to allow this change. The new clauses were opaque and likely to cause litigation. It was not enough for L to argue that the vagueness of the wording and the uncertainty of what is intended could be compensated by relying on the fact that everything will be conducted in accordance with the principles of good estate management. The judge was not convinced that L had discharged the burden on it to show that the proposed change was fair and reasonable in all the circumstances.

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