

# London Trocadero (2015) LLP v Picturehouse Cinemas Ltd and others [2021] EWHC 2591(Ch)

The third case this year where a tenant's defence to a landlord's summary judgement claim for pandemic rent arrears failed.

05 October 2021

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## Facts

The tenant (P) held two leases of a cinema premises in the Trocadero Centre in London. One lease was granted in 1994 and the other in 2014. The leases provided that the property could only be used as a cinema and that the landlord did not warrant that the property could be lawfully used as such.

During the pandemic, regulations required the cinema to close for certain periods. During those times, P could not trade at all. In the gaps between those restrictions, the trading conditions were so poor in Central London that the cinema largely remained closed. When it did open, its takings were a fraction of what they would have been in normal circumstances.

P had not paid any rent since June 2020. The landlord (LT) sought summary judgment for arrears of rent and service charge of £2.9 million.

## Issues

1. Should a term be implied into the leases suspending payment of rent and service charge during the periods when using the property as a cinema was illegal or the attendance would not be at a level commensurate with that anticipated when the leases were granted?
2. Had there been a failure of basis (also known as a failure of consideration) as the payments were for the use of the property as a cinema (meaning no payments were due for periods when the property could not be used as a cinema)?

## Decision

1. The proposed implied term was not necessary to give the leases business efficacy nor was it so obvious it went without saying (the tests for implying terms into contracts). It was also inconsistent with the express terms of the leases. The leases expressly provided for rent to be suspended in certain circumstances (e.g. insured damage) and this indicated that the risk of not being able to use the property in other circumstances lay with P (who could have taken out its own business interruption insurance).
2. There was no failure of basis. Taking into account the terms of the leases, the use of the property as a cinema was not "fundamental to the basis" on which the parties entered into the leases. The continued and uninterrupted lawful use of the property as a cinema was simply an expectation which motivated the parties to enter into the leases. In addition, the leases addressed the possibility that the property could not lawfully be used as a cinema (i.e. the no warranty as to permitted user clause) and allocated the risk to P.

## Points to note/consider

1. This is the third case this year where ingenious arguments employed on behalf of tenants to avoid paying rent during the pandemic

have failed (although the second of those cases, *Bank of New York Mellon (International) Ltd v Cine-UK Ltd*, does appear to be heading to the Court of Appeal). Whilst every case of course depends on its own facts and the terms of the lease in question, it does seem that tenants are going to have to wait for the promised legislation for mandatory arbitration for pandemic rent arrears (see later in this update) for any possible salvation.

Interestingly, the court in this case had previously dismissed P's application to adjourn the summary judgment hearing owing to the government's proposals.

2. In this case, P wanted to set off against the rent arrears its claim against LT for overcharged insurance premiums. The leases provided that rent was payable "without any deduction whatsoever" and the court decided that this was not sufficient to exclude P's right of set-off.

This aspect of the case shows the importance for landlords of ensuring that rent is payable "without any deduction, set-off or counterclaim". Most modern lease precedents will include drafting along those lines. The problem for LT here was that the original lease drafting dated back to 1994 (the 2014 lease largely incorporated the terms of the 1994 lease by reference).

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