# Westfield Paves the Way for Rent Arrears Recovery

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*The highly anticipated High Court decision in Commerz Real Investmentgesellschaft mbh (CRI) v TFS Stores Limited (TFS) [2021] EWHC 863 (Ch), in which DAC Beachcroft acted for Unibail-Rodamco-Westfield on behalf of CRI, marks what is thought to be the first judgment to deal with rent liabilities and COVID-related defences raised by commercial tenants.*

A DAC Beachcroft team lead by Clare Hartley and Chloe Postlethwaite have successfully obtained a summary judgment on behalf of CRI, the Landlord of the Westfield London Shopping Centre, in respect of payment of commercial rent arrears accrued since the first national lockdown as a result of the COVID-19 Pandemic in March 2020. Chief Master Marsh handed down judgment in favour of CRI on 16 April 2021 and a link to the judgment can be found here.

Chief Master Marsh was satisfied that CRI had shown the rents were due and that TFS had no real prospect of defending the claim despite the various creative defences it advanced. He considered that there was no compelling reason that would otherwise prevent summary judgment from being granted, and was content to hand down judgment on that basis.

Chief Master Marsh noted that it was clear from Paragraphs 1 and 3 of the COVID-19 Code of Practice that the Code does not affect the underlying landlord/tenant legal relationship and that a balanced view must be taken. He confirmed there was no basis for concluding that CRI's (and other landlords') right of access to the Court, or the Court's powers, are restricted either:

> "*As part of the measures taken to protect the economy, the Government has placed restrictions upon some, but not all, remedies that are open to landlords. There is no legal restriction placed upon a landlord bringing a claim for rent and seeking judgment upon that claim.*"

Further, and again dismissing the argument of TFS, Chief Master Marsh confirmed that CRI was not obliged pursuant to the terms of the lease to insure for loss of rent due to pandemic. Even if it had done so, CRI was under no obligation to claim under its policy before pursuing TFS given TFS' covenants to pay the rents without deduction, counter-claim or set-off.

Chief Master Marsh added that, although the insured risks may be common between the parties, the scope of cover that each party can obtain will not be. He said the losses described by TFS were in any event for them to insure against, not their landlord:

> "*There is no obvious reason why, even if it were possible to do so, the claimant should wish to obtain cover against losses to the defendant's business. Such losses are for the defendant to insure.*"

The judgment importantly also clarified that where there is no physical damage to premises, the usual rent cesser provisions in commercial leases (which suspend payment of rent while premises that are subject to "damage" are reinstated) cannot be activated. Chief Master Marsh noted that the lease was very clear on that point and that it would be very difficult to imply a term in the lease to the contrary.

## Impact of the Decision

The pandemic has undoubtedly resulted in unprecedented challenges being faced by landlords and tenants. The pinch has perhaps been felt most acutely by those in the retail sector, who have had to endure three rounds of government imposed closures for non-essential retail since March 2020.

To help manage cash flow many commercial tenants have, since March 2020, withheld payment of rents, even in respect of periods where they were open and able to trade, using the COVID restrictions as their justification for refusing to pay. Landlords' usual routes for arrears recovery have meanwhile been stymied following Government intervention through statutory moratoriums on the usual enforcement options (including CRAR, forfeiture and statutory demands) meaning they had no meaningful leverage to enforce the terms of their leases.

This judgment will therefore come as welcome news to landlords, presenting a viable recovery tool for clawing back outstanding rent that may have accrued over the course of the last 12 months.

It is also particularly timely given the UK Government's recent Call for Evidence to support its decision-making on the best route out of withdrawing or replacing the current statutory measures when they are set to expire on 30 June 2021. So despite the unlocking of the non-essential retail sector on 12 April 2021, it is clear that there remains challenging times ahead.

## Authors


**Clare Hartley**

+44 (0)113 251 4913
chartley@dacbeachcroft.com

**Chloe Postlethwaite**

*Glasgow*
+44(0)141 223 7832
cpostlethwaite@dacbeachcroft.com


DAC BEACHCROFT