Trocadero scores a Hat Trick for Landlords on Commercial Rent Recovery during the Pandemic

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This week's High Court judgment in **London Trocadero LLP v Picturehouse Cinemas Limited and Others [2021] EWHC 2591 (Ch)** is the latest in the line of recent decisions on commercial rent liabilities during the Covid-19 pandemic and confirms that landlords can currently still rely on the court route notwithstanding the UK Government's plans for arbitration next year.

In what will be welcomed as another resounding success for landlords, the High Court has just published its third decision on commercial rent liabilities during the Covid-19 pandemic. A link to the judgment can be found here.

It follows on the back of two highly-reported judgments published in April, both of which were also found in the landlords' favour: *CRI v TFS Stores [2021] EWHC 863 (Ch)* (in which DAC Beachcroft acted for the successful landlord - see our article on this judgment here) and *BNY Mellon v Cine-UK Ltd and Others [2021] EWHC 1013 (QB)*.

The judgment importantly also signals that court proceedings remain a valid means for rent recovery during the pandemic, notwithstanding the UK Government's plans to legislate for a binding arbitration process for Covid-linked rent arrears next year. Despite being requested to do so, the Court was not prepared to adjourn the hearing pending further news on that legislation being announced.

This latest decision concerned a landlord's summary judgment application for lease arrears of £2.9 million at the cinema at Trocadero Centre, London. The defendants were Cineworld, Picturehouse Cinemas and Gallery Cinemas.

The defendants put forward three key arguments in their defence, which were considered by the Court as follows:

1. Implied Terms

The defendants argued that terms should be implied into the leases to the effect that payment of rents should be suspended during periods where the premises could not be used as a cinema, or where attendance would not be at a level consistent with what parties had anticipated.

The court's starting point was to consider whether such implied terms are: (a) so obvious that they go without saying; or (b) necessary to give the leases business efficacy (i.e that the leases would "lack commercial or practical coherence" without them). The court was not persuaded on either point.

It said that, where the landlord has given no warranty the premises can actually be used as a cinema, it is not obvious that the tenant should be excused from paying rent in circumstances where it is unable to do so. It also noted that the parties had made express provision for suspension of rent in other circumstances, so it was not obvious that a further term should be implied to suspend payment of rent in circumstances not already covered by the leases.

The court also made it clear that, even though the premises could not be used for their intended purpose due to the lockdown, that still did not deprive the leases of business efficacy. At the end of the day, it was a matter for negotiation between the parties as to where the risk would lie, and the fact the risk was left with the tenant did not necessarily mean that the leases lacked commercial or practical coherence.

2. Failure of Consideration

Rather than arguing partial failure of consideration *per se* (which was rejected in the *BNY Mellon* judgment), the jist of the defendants' argument was that there had been a total failure of consideration in respect of a severable part of the leases, relating to the apportioned time periods of the closures during the pandemic.

The court said there had been no such failure as the tenant had retained possession of the premises and received at least part of a benefit from the bargain. Notwithstanding the "Permitted Use" restrictions in the leases, the use of the premises as a cinema was not "fundamental to the basis" on which parties entered into the leases, either. Rather, it was an expectation that motivated them to enter into the leases.

The court also examined the overlap between unjust enrichment and contractual obligations. It concluded that a failure of consideration could in principle lead to a claim in respect of the former (e.g. as part of a counterclaim for a refund of rent, had the defendants paid it upfront); but it could not necessarily be extended to give tenants a defence to not

paying the rent in the first place (as in the present case).

3. Set-Off

The defendants had among other things counterclaimed for repayment of amounts paid in relation to insurance, totalling up to £621k. They argued that they were therefore entitled to set-off these amounts against any arrears found to be payable.

The leases in question did not expressly exclude the ability to set-off: they only provided that rent be paid "without any deduction whatsoever". The court was therefore persuaded that a right of set-off could exist in principle.

The court's view was that there was more to explore here that would justify going to trial, so this element of the claim should be carved out of summary judgment. As a result, summary judgment was awarded in favour of the landlord, subject to a reduction of £621k (to account for the counterclaim, to be determined at a later date).

The judgment will no doubt come as welcome news to landlords, especially in the context of the various recent UK Government measures and announcements that have left them without any meaningful routes to enforce the terms of their leases (see our articles on this here and here for more detail).

It reinforces the key point that tenants who can pay their rent should do so. The High Court has made it clear that it considers the usual suite of defences that tenants have used to resist payment – all of which have been tested in these three recent judgments – have no real prospect of success.

Cineworld has of course recently won permission to appeal the *BNY Mellon* decision in the Court of Appeal, based on the interpretation of the particular rent cessor clause in their lease and a partial failure of consideration argument. So this latest judgment is unlikely to be the final word on the subject, although we think it's unlikely that the Court of Appeal will depart from the approach already taken by the High Court in these judgments.

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