BRIEFCASE
QUARTERLY REAL ESTATE UPDATE:
CASES AND NEWS

December 2021

Season's Greetings
and best wishes
for 2022

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KEY CASES

HIGH COURT RULES ON TENANT LIABILITY FOR COVID RENT ARREARS

The landlord obtained summary judgment against its cinema tenant for rent arrears that accrued during the pandemic, when cinemas were forced to close or were subject to restrictions.

READ MORE...

THE IMPORTANCE OF EVIDENCING INTENTION IN AN OPPOSED LEASE RENEWAL

A landlord's intention was tested and found to be insufficiently firm and settled in a contentious business lease renewal.

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TIME OF THE ESSENCE AND INTERIM SERVICE CHARGES

A residential lease fixed the interim service charge unless the landlord notified the tenant of an increase. Was the landlord's notice too late and ineffective?

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FURTHER GUIDANCE ON TELECOMS OPERATOR ACCESS RIGHTS

Telecoms operators can access properties to assess the suitability of a site for their equipment, but are they entitled to undertake destructive investigative works?

READ MORE...

LANDLORD NOT LIABLE FOR DISREPAIR TO COMMON PARTS WHICH CAUSED FLOODING TO ITS TENANT'S DEMISE

The High Court held that there was no implied covenant to repair retained premises or a similar duty imposed in tort on a landlord when disrepair to common parts caused damage to a tenant's demised premises and loss of business.

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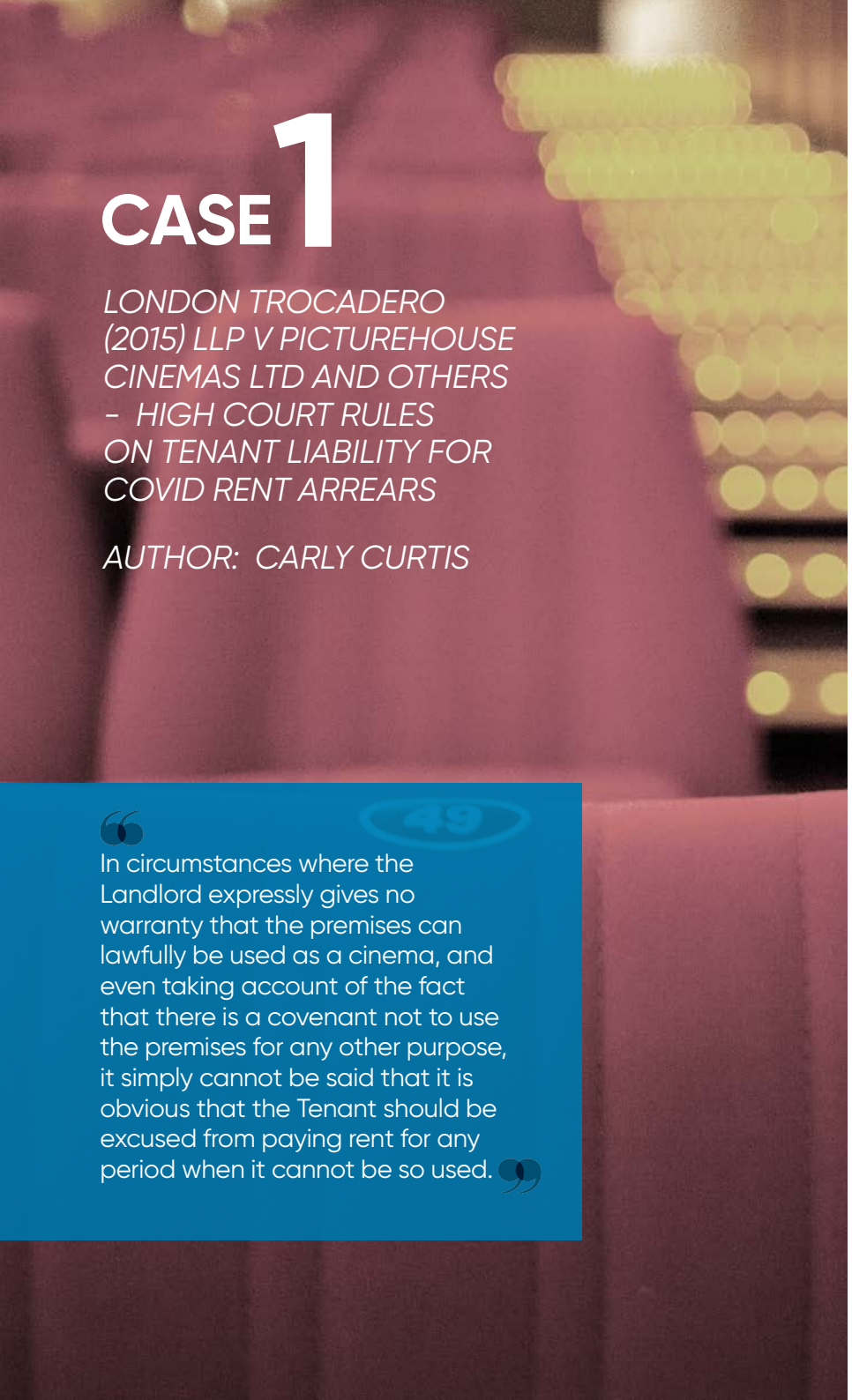


CASE 1

LONDON TROCADERO (2015) LLP V PICTUREHOUSE CINEMAS LTD AND OTHERS - HIGH COURT RULES ON TENANT LIABILITY FOR COVID RENT ARREARS

AUTHOR: CARLY CURTIS

> In circumstances where the Landlord expressly gives no warranty that the premises can lawfully be used as a cinema, and even taking account of the fact that there is a covenant not to use the premises for any other purpose, it simply cannot be said that it is obvious that the Tenant should be excused from paying rent for any period when it cannot be so used.

WHAT WAS IT ABOUT?

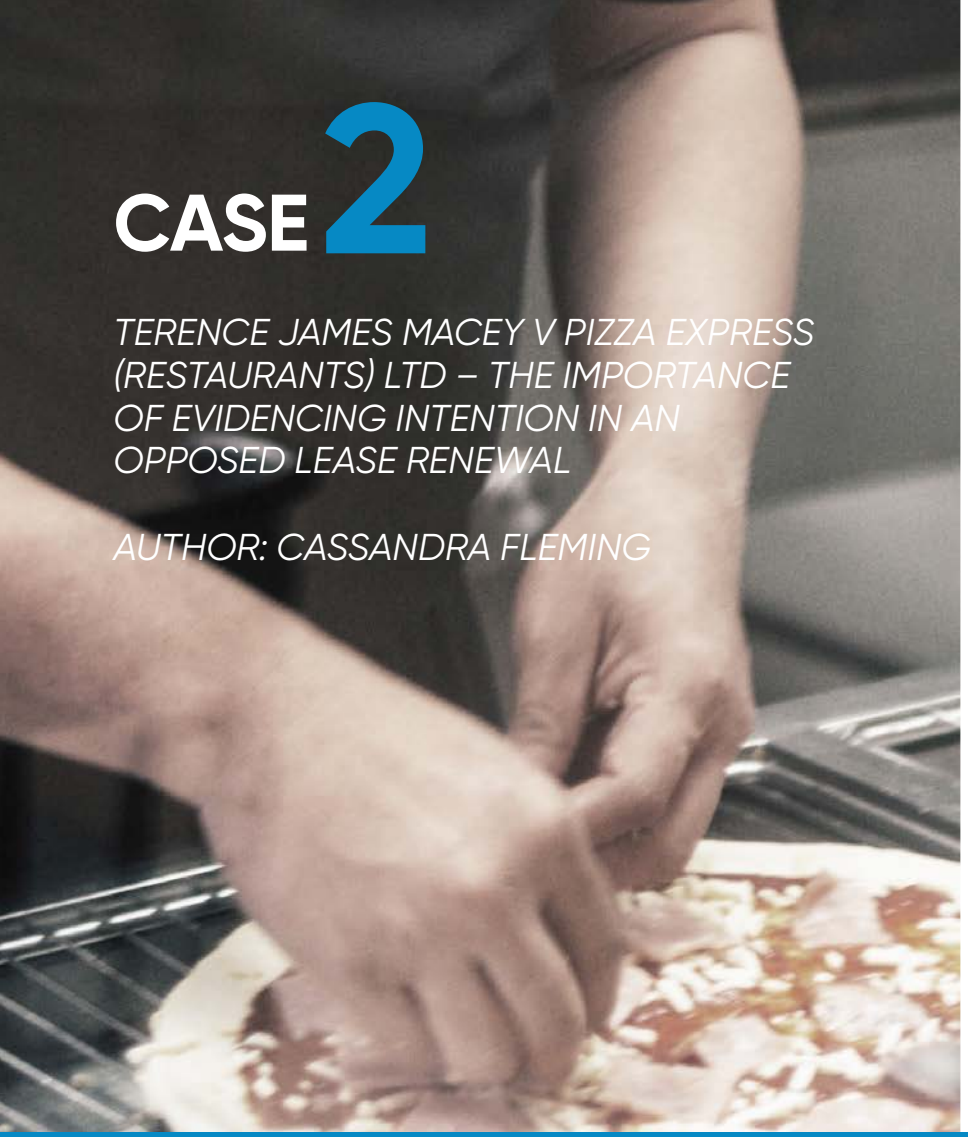
- The landlord sought summary judgment against its cinema tenant for rent and service charge arrears in the region of £2.9 million.
- The tenant claimed that it was not liable for rent and service charges that related to periods when the premises could not be used as a cinema due to pandemic lockdown laws. The leases did not provide that rent should be suspended under these particular circumstances, so the tenant argued that (1) the court should imply a term into the leases to the effect that payment of rent and service charge should be suspended during any period when the use of the premises as a cinema is illegal and/or during which the attendance would not be at a level commensurate with what the parties would have anticipated when entering into the leases; and/or (2) there had been a "failure of consideration" – the payments due under the leases were for the use of the premises as a cinema, therefore no payments were due under the leases for periods when the premises could not be used as a cinema.

WHAT DID THE COURT SAY?

- **Implied term:** The court would not imply a term into the lease. The requirement for the tenant to pay rent even though the premises could not be used for the intended purpose as a result of unforeseen, extraneous events did not deprive the leases of business efficacy or mean that they lacked commercial or practical coherence. The landlord gave no warranty that the premises could lawfully be used as a cinema, and the parties had allocated the risk that the premises could not be used as a cinema as a result of unforeseen events to the tenant. There was no good commercial reason why loss incurred as a consequence of the pandemic should borne by the landlord. Therefore the proposed implied term did not meet either the business efficacy or the obviousness test, and was inconsistent with the terms of the lease.
- **Failure of basis/consideration:** The continued and uninterrupted use of the premises as a cinema was not fundamental to the basis on which the tenant entered into the leases - it was simply an expectation which motivated them to enter into the leases. The leases did also address the possibility that the premises cannot lawfully be used as a cinema, and the landlord expressly gave no warranty that the premises can lawfully be used as a cinema (and the risk of this had been allocated in the leases to the tenant).
- The court therefore granted summary judgment to the landlord.

WHY IS IT IMPORTANT?

- This is yet another case where the court's interpretation of lease provisions in the context of rent arrears accrued during the COVID-19 pandemic has resulted in a favourable outcome for landlords. But the story is not over yet. The tenant's appeal of this case will be heard in February 2022, together with the appeal in the case of Bank of New York Mellon v Cine-UK.



CASE 2

TERENCE JAMES MACEY V PIZZA EXPRESS (RESTAURANTS) LTD – THE IMPORTANCE OF EVIDENCING INTENTION IN AN OPPOSED LEASE RENEWAL

AUTHOR: CASSANDRA FLEMING

> Mr Macey had (perfectly understandably and innocently) mischaracterised his state of mind. His "intention" was insufficiently firm and settled to constitute "subjective" intention for the purposes of section 30(1)(g).

WHAT WAS IT ABOUT?

- Pizza Express occupied premises in Exeter. Its landlord, Mr Macey, wanted to use the premises himself (as a wine bar), and so opposed renewal of the lease.
- Section 30(1)(g) of the Landlord and Tenant Act 1954 allows a landlord to oppose renewal where it intends to occupy the premises for the purposes of a business to be carried on by itself.
- The issue was whether Mr Macey had the requisite intention to satisfy that ground. That test has subjective and objective elements. Subjectively the question is whether the landlord's intention is sufficiently "firm and settled", and objectively, is the plan capable of achievement.

WHAT DID THE COURT SAY?

- At first instance, the court concluded that the landlord had failed to show he had a firm and settled intention. That was upheld on appeal.
- The judge rejected Mr Macey's evidence as it lacked corroboration, and his assertions and documents raised "an index of suspicion". Further, the judge drew adverse inferences from his failure to call supporting witnesses.
- In determining whether "the proposal had moved out of the zone of contemplation into the valley of decision", there was no evidence that Mr Macey had incurred any "truly significant costs" from which one could infer, on objective grounds, the relevant intention to occupy the premises for his own business purposes.
- Without suggesting that Mr Macey was dishonest, the court felt that he had "mischaracterised his state of mind".

WHY IS IT IMPORTANT?

- Whilst the key date for proving intention is at the hearing, landlords should line up and disclose corroborating evidence in a timely manner, including calling any relevant witnesses.
- Landlords must be willing to have committed financially, and carried out some degree of preparatory acts, to demonstrate their firm and settled intention.
- Tenants should seek and test evidence, where the stated intention is doubted.
- You can read more on section 30(1)(g) of the Landlord and Tenant Act 1954 in BCLP's recent **expert insight**.

CASE 3

KENSQUARE LTD V BOAKYE - TIME OF THE ESSENCE AND INTERIM SERVICE CHARGES

WHAT WAS IT ABOUT?

- A residential tenant had to pay an interim service charge half yearly on 1 April and 1 October each year.
- The amount payable was fixed by the lease unless the landlord revised the amount payable by notice "to be served on the tenant not less than one month prior to the commencement of that financial year".
- The landlord served a notice retrospectively increasing the amount payable after the financial year had started; was that notice effective to increase the charge or was it too late?

WHAT DID THE COURT SAY?

- The starting point is that time is not "of the essence" unless the lease indicates to the contrary.
- Taken at face value the lease required that notice must be served at least a month before the beginning of the financial year. The issue was whether this reading of the lease indicated that time was of the essence, in which case the notice had been served too late.
- Both the language of the service charge clause and the scheme of how the service charges were administered pointed to the time limit of an increase being notified not less than one month before the financial year being applied strictly. Time for giving the notice was of the essence and the notice was too late to be effective.

WHY IS IT IMPORTANT?

- This decision from the Court of Appeal is a master class in how to test whether a time limit embedded in a lease is or is not to be strictly applied. It confirms how to analyse the language of the lease and the way that the obligations in the lease play out.
- The court recognised that the outcome of the analysis might vary according to the context; for example a commercial rent review or a claim for final service charges as opposed to interim service charges.
- This was a dispute between a tenant and a landlord owned by all the tenants in the building. The court however noted that the original landlord was not tenant-owned and that was a relevant feature.

> "The circumstances of the case indicate that requiring precise compliance would fulfil the intention of the parties."

AUTHOR: ROGER COHEN

CASE 4

CORNERSTONE TELECOMMUNICATIONS INFRASTRUCTURE LTD V (1) ST MARTINS PROPERTY INVESTMENTS LIMITED (2) THE MAYOR AND COMMONALTY AND CITIZENS OF THE CITY OF LONDON - FURTHER GUIDANCE ON TELECOMS OPERATOR ACCESS RIGHTS

AUTHOR: ANNA ICETON

> The owner of any valuable, high-quality building will understandably be reluctant to allow contractors over whom it has no authority or control to interfere with the structure of its building.

WHAT WAS IT ABOUT?

- CTIL, a Code operator, identified the roof of the First Defendant's ("site provider's") building as a potential site for the installation of its telecoms apparatus, and wished to carry out a multi skilled visit ("MSV") at the site, to assess whether the site was suitable for the installation and operation of its electronic communications equipment. The 2017 Electronic Communications Code provides that Code operators are entitled to access sites for these purposes, however the operator and site provider must agree the terms of access under a "MSV agreement", and in the absence of agreement, if certain requirements are met, the operator can ask the Upper Tribunal to impose a MSV agreement on the site provider.
- Although the site provider had no objection in principle to the proposed MSV and/or CTIL accessing the property, for numerous reasons it considered that the roof of its building was unsuitable for the installation of telecommunications equipment (and went to a considerable effort to demonstrate this to CTIL), and it was concerned about the risk of damage to the property as a result of CTIL's proposed investigative works.
- Consequently, the site provider proposed a more limited visual survey that it considered would be sufficient to demonstrate that its building was not suitable for CTIL's purposes. CTIL disagreed and made a reference to the Upper Tribunal, seeking to impose its MSV agreement on the site provider. The parties also disagreed on the extent to which CTIL would reimburse the site provider's expenses incurred as a consequence of CTIL's MSV request.

WHAT DID THE COURT SAY?

- The site provider's concerns were valid and CTIL was not permitted to undertake the proposed destructive investigative works.
- Site providers are entitled to be reimbursed their reasonable expenses of dealing with operators' requests to carry out MSVs, and for facilitating access. There are no set rules as to the type of expenses that site providers might incur, and operators will not get away with minimal contributions only – the costs are the costs and a site provider should not be left out of pocket.

WHY IS IT IMPORTANT?

- Not every property is suitable for telecommunications equipment. Code operators must be prepared to have commercial discussions with site providers about the suitability of their properties as telecoms sites, take on board their issues and concerns and have those catered for in access agreements, and meet their reasonable expenses.

CASE 5

STONECREST MARBLE LIMITED V SHEPHERDS BUSH HOUSING ASSOCIATION LIMITED - LANDLORD NOT LIABLE FOR DISREPAIR TO COMMON PARTS WHICH CAUSED FLOODING TO ITS TENANT'S DEMISE

WHAT WAS IT ABOUT?

- The tenant Stonecrest operated premises in Wandsworth as a showroom selling tiles and tiling products. The landlord housing association retained the residential units above the showroom as social housing.
- A drainage gutter within the retained premises became blocked by the gradual build-up of leaves/ debris and caused water ingress to the showroom over a 2-year period. Stonecrest had done nothing to cause or contribute to this.
- Was the landlord housing association liable to Stonecrest for the damage and loss of business?

WHAT DID THE COURT SAY?

- The court looked carefully at the contractual scheme for repair and insurance of the demised premises and retained premises. There was an express clause in the lease that the landlord was not obliged to repair the retained premises where the need for repair arose from an uninsured risk and the insurance policy taken out by the landlord expressly excluded cover for damage caused by gradual deterioration or wear and tear.
- The court held that where there is an express comprehensive scheme for repair and insurance of both the demised and retained premises, there is no reason to impose on the landlord either (a) an implied covenant to repair the guttering or (b) any similar duty in tort.
- This is despite the fact that Stonecrest were both ignorant (Stonecrest were not entitled to see a copy of the landlord's insurance policy so had no way of identifying any gaps in the landlord's repairing obligations) and powerless (Stonecrest had no right to enter the retained premises to inspect or then fix the problem).

WHY IS IT IMPORTANT?

- The lessons are clear for all tenants: ensure the landlord cannot exclude liability for damage which is not an insured risk. If you do agree such a clause, make sure you read the exclusions within the insurance policy itself (and of course those will change from year to year when the policy is renewed). The court will not step in to plug gaps caused by defective drafting.

AUTHOR: RASHPAL SOOMAL

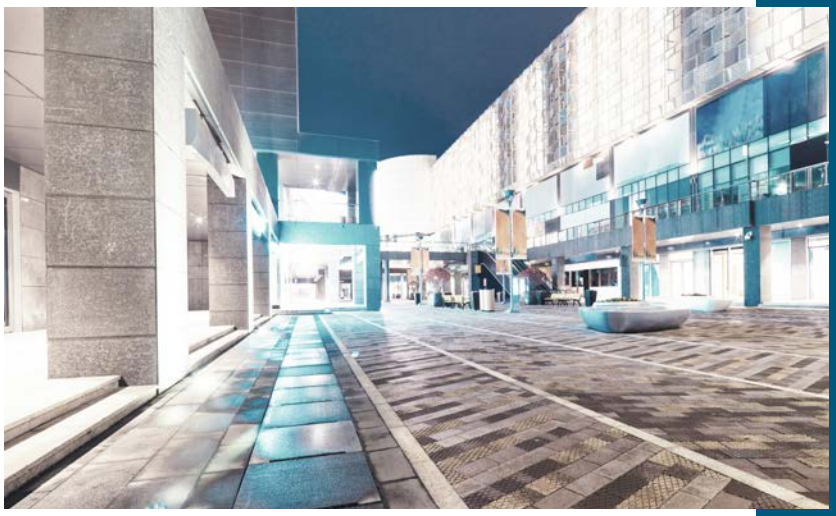
> The Lease is a detailed document, which runs to 48 pages and which was professionally drafted. The parties to the Lease were commercially sophisticated. Therefore, significant weight must be attached to the language that the parties have chosen to express their agreement.

RECENT LEGAL NEWS

NEW LEGISLATION AND CODE OF PRACTICE INTRODUCED TO ATTEMPT TO RESOLVE £BILLIONS OF COVID RENT ARREARS

THE HEADLINES

- The Commercial Rent (Coronavirus) Bill is expected to receive Royal Assent Q1, 2022.
- The Bill ring fences rent arrears that were accrued by business tenants whose businesses or premises were subject to compulsory coronavirus closure requirements or trading restrictions between 21 March 2020 and 18 July 2021 (in England).
- These "protected rent arrears" must either be negotiated/settled by the parties, or they could be referred to arbitration under the Bill, at the election of either party.
- If the dispute is referred to arbitration, a government-approved arbitration body will appoint the arbitrator. Following a "pre-action" exchange of formal proposals supported by evidence, the arbitrator will (1) dismiss the arbitration (where the rent debt is out of scope, or where the tenant's business is unviable (and wouldn't be viable, even if relief were awarded) or (2) award "relief from payment" of a protected rent debt, which may include writing off the whole or part of the debt, giving the tenant time to pay (no more than 24 months), and/or reducing any interest otherwise payable on the protected rent debt.
- In deciding what award to make, the arbitrator must apply the "principles" set out in the Bill, namely (1) the preservation or restoration of the viability of the tenant's business, so far as that is consistent with preserving the landlord's solvency; and (2) the requirement for the tenant to meet its obligations to pay protected rent in full and without delay so far as possible.
- There will be a moratorium on all landlords' remedies to pursue protected rent arrears during the first 6 months from the Act being passed, or until an arbitration concerning the protected rent arrears has been finalised.
- Arrears that fall outside the scope of the Bill can be pursued in the usual way, once the existing restrictions (on CRAR, forfeiture and insolvency) are lifted in March 2022.



- Where landlords and tenants have resolved the issue of protected rent arrears or an insolvency type solution is imposed (under a CVA, IVA or Companies Act 2006 compromise), those arrears will fall outside the scope of the Bill.
- The Government also published a new (voluntary) **Commercial Rents Code of Practice** providing further guidance on how parties should negotiate pandemic rent arrears. Businesses are encouraged to apply the principles underpinning the Code and Bill to help them resolve rent disputes, even if they fall outside of scope of the new legislation.
- The Bill is currently making its passage through Parliament. Numerous concerns, raised by a number of property industry bodies and associations, have been put before Parliament in an attempt to clarify and improve the drafting and application of this new legislation before it receives Royal Assent next Spring.
- You can read more detail on the Bill and Code in BCLP's recent **expert insight**.

> "The government's intention is that, where possible, rent debt accrued as a result of the COVID-19 pandemic should not force an otherwise viable business to cease operating. Contractual commitments should be recognised as far as possible while achieving a proportionate balance between the interests of landlords and tenants."

GETTING IN TOUCH

When you need a practical legal solution for your next business opportunity or challenge, please get in touch.

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