

Insights

LEASING – LIABILITY FOR RENT DURING THE PANDEMIC

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SUMMARY

Roger Cohen of Bryan Cave Leighton Paisner asks: is the tenant of commercial premises in England liable to pay rent whilst the premises were closed for the pandemic? Or has the tenant a defence to such a claim, thereby transferring the risk to the landlord?

Scenario

It may seem like a long time since we were locked down, but my business is still recovering. We shut for months in 2020 and 2021. Partly this was because it was illegal to open and partly because it was simply not viable to do so. There are still unpaid rents and our landlord is chasing for payment. What do you suggest?

Answer

In 2020, when the lock down began, the best advice to landlords, tenants and their lenders was to seek negotiated, case-by-case solutions to the payment of rent by tenants who could not trade. The parties could agree to waive rent or to postpone payment with or without interest accruing. However, deals could not be reached in every case. Sometimes deals were done but the tenant had been over optimistic or the landlord had pushed too hard and the terms of the deal were breached.

In 2020, some tenants made legal arguments for not having to pay rent during closure because of the pandemic. Those arguments included:

1. The lease had been frustrated by the legal requirement to close;
2. The closure meant that the lease failed to give the tenant anything at all. Rent was not payable because the basis for the lease had failed;
3. It was an implied term of the lease that rent was not payable when the premises had to be closed; or

4. Where the tenant paid or contributed to the insurance premiums paid by the landlord and the landlord's insurance policy gave cover against loss of rent for insured risks including Covid or closure because of the pandemic, the landlord should look to its insurers for the rent, not the tenant.

Two years on and through the fog of court cases, the legal position is now much clearer.

Each lease and the circumstances of each letting need to be considered but in general terms:

Frustration: the pandemic closure might frustrate a lease (and so terminate it) if the lease would otherwise end whilst the premises remained closed because of the pandemic. Where a lease has a material time to run after re-opening, the lease is not frustrated.

Failure of basis: The argument is that the tenant received no benefit whatsoever during the closure so that the landlord was unjustly enriched. The argument failed because a professionally drafted lease will contain a contractual regime for the allocation of risk. The "failure of basis" argument would subvert that regime and contradict the terms of the lease in a way that, the law does not permit.

Implied term: Where, the lease is a detailed document prepared by lawyers, the scope for implication is limited. Terms cannot be implied into leases that are inconsistent with the express terms of the leases, by reallocating the risk set out in the bargain that the parties made.

Insurance: Some landlords had obtained cover for loss of rent resulting from physical damage to the property and also for loss of access without damage having occurred. If the landlord had purchased that cover, the tenant would wish to argue that the denial of access triggered the suspension of rent provisions in the lease. However, the landlord was insuring against a financial loss to its business, not that of its tenant. The rent suspension provisions in the insurance clause are unlikely to help the tenant. On the usual wording, the denial of access, without damage, is not an event that triggers a rent suspension.

What can the tenant do?

The only option is to seek relief through an arbitration under the Commercial Rent (Coronavirus) Act 2022.

The Act gives arbitrators powers to grant relief to tenants whose businesses can be viable again.

The one thing that tenants need to know is that there is a time limit for beginning an arbitration under the Act. The time limit means that either the property owner or the tenant must have given notice of intention to arbitrate by 25 August 2022 and ideally earlier.

Therefore, our recommendation in answer to the question is that, if a deal cannot be agreed, to obtain without delay advice on the merits and cost of an arbitration case for relief, under this Act.

This note reflects the rules in England.

Sources:

Commercial Rents (Coronavirus) Act 2022

Bank of New York Mellon(International)Limited v Cine-UK Limited [2022] EWCA Civ 1021

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