

# The Legal Perspective – Covid and some cases

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# COVID update and 7 cases

- **Covid update**
- **The cases:**
  1. Bank of New York Mellon (International) Ltd v Cine-UK Ltd; London Trocadero (2015) LLP v Picturehouse Cinemas Ltd and others – pandemic rent defences
  2. Faiz and others v Burnley Borough Council (CA) [2021] EWCA Civ 55 - forfeiture - waiver
  3. Keshwala and another v Bhalsod and another (CA) [2021] EWCA Civ 492 - forfeiture – relief from forfeiture
  4. Vectis Property Company Ltd v Cambrai Court Management Company Ltd [2022] UKUT 42 (LC) - landlord building upwards
  5. Capitol Park Leeds plc v Global Radio Services Ltd [2021] EWCA Civ 995 - lease break option
  6. W (No.3) GP (Nominee A) Limited v JD Sports Fashion plc – turnover rents in lease renewals
  7. Valley View v NHS Property Services Limited – tenancies at will and 1954 Act rights

# COVID Regulations – recap and current position

3 Acts of Parliament – wide-ranging restrictions to protect commercial tenants against the impact of Covid:

- Coronavirus Act 2020 and Corporate Insolvency and Governance Act 2020:
  - no forfeiture, CRAR or statutory demands/winding up
- Commercial Rent (Coronavirus) Act 2022:
  - no forfeiture, rent claims, CRAR or statutory demands/winding up for rent arrears falling due between 21 March 2020 to 18 July 2021 (length of period subject to sector) – known as '*protected rent debts*'
  - arbitration process set up to deal with such arrears

Covid provisions now being lifted:

- CA 2020 and CI&GA 2020 restrictions - lifted on 25 and 31 March 2022 respectively
- CR(C)A 2022 provisions – restrictions/arbitration process ends on 23 September 2022, but has effectively ended now (as process needed to have been started by 26 August 2022)

All remedies then available again

# Bank of New York Mellon (International) Ltd v Cine-UK Ltd; London Trocadero (2015) LLP v Picturehouse Cinemas Ltd and others

## Pandemic rent defences

### Facts

- Combined appeal of the two cases
- Tenants had sought to resist landlords' claims for rent for periods when premises had to close due to Government Covid regulations

### Issue

- Whether tenants of a commercial premises are required to pay their rents notwithstanding such enforced closures - tenants argued:
  - Implied term: tenant relieved from rent whilst the premises could not lawfully be used as a cinema
  - Failure of consideration (a species of unjust enrichment) in relation to such periods: the assumption that the premises could be used as cinemas was fundamental to the obligation to pay rent, and that basis had failed
- In Trocadero case: implied term, no rent was due where attendance fell below levels anticipated at the time leases were entered into
- In Bank of New York case – true construction of the rent cesser provision in the lease relived the tenant from a requirement to pay

# Bank of New York Mellon (International) Ltd v Cine-UK Ltd; London Trocadero (2015) LLP v Picturehouse Cinemas Ltd and others

(continued)

## Held

Tenants failed on all counts:

- Rent cesser defence in the Bank of New York case: it applied only where there was physical damage or destruction to the property by an Insured Risk
- Implied terms defence: Leases worked 'perfectly well' without the implied terms. None of the implied terms satisfied the 'Business Efficacy' test nor the 'Obviousness' test.
- Failure of consideration/unjust enrichment: where the contract exists and is otherwise performed, there needs to be a 'gap', such that a claim in unjust enrichment does not contradict the terms of the contract. In this case:
  - No gap; and
  - Exclusive possession provided to tenants (in spite of the pandemic restrictions)

# Bank of New York Mellon (International) Ltd v Cine-UK Ltd; London Trocadero (2015) LLP v Picturehouse Cinemas Ltd and others

(continued)

## Takeaway

- Tenants bear the financial burden in such circumstances
- Focus of court's analysis:
  - contract terms and existing legislation
  - Covid effect/impact not usurp those principles
- No general legal principles that apply and most pre-pandemic leases do not provide for a Covid-type impact

# Faiz and others –v- Burnley Borough Council

## forfeiture - waiver

### Facts

- 30 October 2019: landlord served a section 146 notice on tenant of a café for breach of the alienation provision (unlawful subletting)
- 4 November 2019: landlord sent tenant a revised invoice for insurance for period to February 2020 (which had originally been sent on 26 September 2019)
- 22 November 2019: landlord purported to forfeit lease

### Issue

- By sending the revised invoice, whether landlord waived the right to forfeit – what was material:
  - that the revised invoice was sent after service of the breach/s146 notice?
  - that the invoice period ran until after all of the material events?
  - that it was a revised invoice, making the relevant date the date of the first invoice (which was before the material events)?

# Faiz and others –v- Burnley Borough Council (continued)

## Held

- The revised invoice was not a fresh invoice, but an indication that the landlord was willing to accept payment for part of the period covered by the original invoice
- No acknowledgement of existence of lease
- Therefore, no waiver

## Take-aways

- Once a landlord has knowledge of a breach, it is at risk of waiving right to forfeit
- A wide range of acts by landlord can affirm continuation of lease



# Keshwala and another –v- Bhalsod and another

forfeiture – relief from forfeiture

## Facts

- 20 year lease with 10 years unexpired
- 13 September 2018: landlord forfeits lease for non-payment of £500 rent by peaceable re-entry
- 26 February 2019: tenant applies for relief from forfeiture

## Issue

- Whether an application nearly 6 months after forfeiture is made with “*reasonable promptitude*”
- Court look to balance of the interests of the landlord and tenant when exercising discretion

# Keshwala and another –v- Bhalsod and another (continued)

## Held

- County Court: no relief
- High Court: relief
- Court of Appeal: no relief

## Take-aways

- Landlord: a tenant always has a right to apply for relief, which may be made many weeks/months after forfeiture
- Tenant: make an application for relief promptly

# Vectis Property Company Ltd v Cambrai Court Management Company Ltd

## landlord - building upwards

### Facts

- Vectis owned the freehold of Cambai Court
- 9 long leasehold flats who had a share in the management company
- Management company responsible for exterior of the building, including the roof
- Landlord wanted to build two additional flat in the roof space – no express right in the lease to do so
- Management company sought to prevent the landlord from doing so

### Two issues

1. Whether the landlord needed an express right to build; and
2. Whether the building of the two flats would interfere with the management company's obligation to repair and maintain the roof

# Vectis Property Company Ltd v Cambrai Court Management Company Ltd

(continued)

## Held

- Express right needed?
  - None needed as the roof was not demised to the management company but, instead, retained by the landlord
- Interference with repairing obligations?
  - No, as the obligation related to whatever exists at any given time

## Take-aways

- In many cases, there is additional value potential in the roof-space of buildings – that is not denied to the landlord due to lack of an express right to develop
- But – check the precise wording of the leases – look out for express restrictions

# Capitol Park Leeds plc –v- Global Radio Services Ltd

## lease break option

### Facts

- As with all break options, strict compliance with the conditions required
- Tenant break option conditional on the tenant giving vacant possession of the “premises”
- “Premises” defined in the lease as including fixtures
- Tenant removed all chattels, but also stripped out some fixtures
- Landlord challenged break on the basis that the “premises” (as defined) had not been returned to them (as some fixtures removed)

### Issue

- Whether the removal of some fixtures frustrated the break

# Capitol Park Leeds plc –v- Global Radio Services Ltd (continued)

## Held

- HC – no vacant possession – the ‘premises’ had not been handed back
- CA overturned HC decision – vacant possession given
- Conventional definition of vacant possession applies:
  - Free of people
  - Free of chattels
  - Free of third party interests

## Take-aways

- Emphasises (again) the need for extreme care when operating break options in leases
- Vacant possession not an easy condition to satisfy

# W (No.3) GP (Nominee A) Limited v JD Sports Fashion plc

## turnover rents in lease renewals

### Facts

- JD Sports - tenant of a shopping centre in Derby
- Existing lease had a turnover rent (i.e. percentage of turnover of business)
- Unopposed 1954 Act lease renewal:
  - Tenant wanted – conventional rent
  - Landlord wanted – turnover rent (as per expired lease)

### Two issues

1. Whether the new lease should have a turnover rent – applying O’May v City of London Real Property Co Ltd [1981] Ch. 216
2. Basis of calculating interim rent

# W (No.3) GP (Nominee A) Limited v JD Sports Fashion plc (continued)

## Held:

- Rent:
  - Starting point – terms of expired tenancy
  - Turnover rent not suitable for renewal – it had the effect of over-valuing the premises
  - Conventional basis for valuing rent in new lease
- Interim rent:
  - As the rent in the new lease was a conventional rent, the interim rent should be valued on the same basis



# Valley View v NHS Property Services Limited

tenancies at will and 1954 Act rights

## Facts

- Concerned five test cases to determine whether GPs were liable to pay a full service charge to their landlord
- In two of the cases, the Court was required to decide whether the GPs occupied under the terms of a tenancy at will or a tenancy implied from conduct
- GPs had:
  - been in occupation for years without written agreement or record
  - undertaken little to no negotiation for a formal grant within the first four years
  - in subsequent years, the parties carried on negotiations but there were periods where negotiations ceased

## Relevant issue

- If a tenancy implied from conduct was found, this would be protected by 1954 Act

# Valley View v NHS Property Services Limited

(continued)

## Held

- The Court found negotiations had continued over the period 2007 to 2011
- Claimants were therefore tenants at will

## Takeaway

- No time limit for a tenancy at will
- Courts appear reluctant to impose 1954 protected tenancies upon parties
- So long as there is some negotiation between the parties, a pause in negotiations will not displace presumption that the arrangement is a tenancy at will
- Proceed with caution: potential for dispute where no written agreement between parties and creates uncertainty for landlords who wish to recover possession quickly

# Summary

- COVID regulations – coming to an end
- Pandemic rent defences - failing
- Forfeiture x2 – relevant again
- Building upwards – popular means of adding value
- Lease break options – recurring issue
- Lease renewal – turnover rents
- Tenancies at will and 1954 Act rights – a common situation

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