Machins SOLICITORS

PROPERTY LITIGATION NEWS

SEPTEMBER 2022

SUCCESS FOR LANDLORDS IN COVID-19 RENT DISPUTES

In Bank of New York Mellon (International) Ltd and another v Cine-UK Ltd and London Trocadero (2015) LLP v Picturehouse Cinemas Ltd and others [2022] EWCA Civ 1021, which were heard as combined appeals, the Court of Appeal dismissed the tenants' appeals against the landlords' successful claim for summary judgment in relation to rent arrears relating to Covid-19. The commercial tenants in each case were defending their landlords' claim for rent for periods of lockdown when cinemas were not allowed to open.

The tenants raised innovative arguments, including an argument that there was an implied term in the lease that they should not be liable for periods when the premises could not be used. The landlords in each case were awarded summary judgment for the rent arrears, and the tenants each appealed resulting in a combined appeal before the Court of Appeal.

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On the issue of implied terms, the Court of Appeal held that the implied terms that the tenants sought to rely on do not satisfy the usual tests: that the implied terms are needed for business efficacy or that it is so obvious that it goes without saying. The Court found that the lease worked well and made sense without the proposed implied terms. Further, the Court found that the unprecedented nature of the pandemic was not a reason to disregard or disapply fundamental principles of contract law.
The result of these appeals will be a welcome relief for commercial landlords pursuing Covid-related rent arrears.

Machins' Property Litigation team can advise in more detail on these issues.

ARBITRATION AWARD RINGS HOLLOW FOR H SAMUEL

The Commercial Rent (Coronavirus) Act 2022 ('the Act') has provided a degree of protection for tenants in respect of rent that fell due during any period in which the tenant's premises were subject to enforced closure or other Covid-19 related sanctions. Rent that has fallen due during this period is termed "protected rent debt" under the Act. It was designed to provide comfort to the retail and leisure sector, whose businesses were hard-hit by closures and restricted trading throughout the pandemic.

The Act provides that either the landlord or the tenant is able to refer the matter of a protected rent debt to arbitration within the six month period from 25 March 2022. The landlord cannot pursue the debt by court action, insolvency, forfeiture or Commercial Rent Arrears Recovery until either (a) the six month period passes without a reference being made to the arbitration process, or (b) an award has been made in an arbitration.

Under the arbitration scheme, jewellery retailers Ernest Jones and H Samuel argued that their office headquarters served purely to support its retail business and were in effect ancillary to that business. The arbitrator did not accept this position, instead making findings that in the Act the use of office premises was inherently different to retail operations. The arbitrator found that the premises were therefore not subject to closure requirements and that there could not be any protected rent debt. This finding led to an award to the landlord of £450,000 in respect of unpaid rent – the first award made under the scheme.

In the majority of cases, arbitration has not been needed. Landlords and tenants have managed to agree a way forward between themselves, although the prevailing business climate and the trading difficulties have sometimes resulted in tenants going into voluntary liquidation. The signal from the arbitrator in this case suggests that the lines regarding which rented premises will and will not qualify for relief will be tightly drawn.

HEADS OF TERMS NOT INTENDED TO BE BINDING

In a recently decided case, Pretoria Energy Company (Chittering) Ltd v Blankney Estate Ltd [2022] EWHC 1467 (Ch), it was confirmed by the High Court that a signed document titled Heads of Terms did not create a legally binding lease agreement between parties.

The Claimant in this case is an energy supply company, and the Defendant is a farming business. The Claimant brought a claim contending that the parties entered into a binding agreement set out in a document labelled "Heads of Terms" under which the Defendant agreed to grant the Claimant a 25 year lease of a site to use for an anaerobic digestion plant, which was to produce biogas and electricity from organic matter.
There were several factors taken into account by the High Court in coming to the conclusion that the Heads of Terms did not constitute a binding lease agreement:

1. A binding lockout clause was included in the Heads of Terms, which meant that the defendant landlord was free to negotiate with third parties but only after a certain date. If the parties had entered into a lease before this date, this would have not been possible.
2. A previous draft of the Heads of Terms included a clause which stated the parties must adhere "to all the terms, pricing and conditions of these Heads of Terms until the Final Agreement is accepted and signed". However, in the final Heads of Terms, this clause had been removed and it was replaced with the lockout clause detailed above. The parties agreed to a period of exclusive negotiation but not binding Heads of Terms - again suggesting that the Heads of Terms were not intended to be binding.
3. The case involved leasing land to develop new technology, which meant that bespoke drafting of binding agreements between the parties was to be expected. Although the Heads of Terms included standard provisions regarding rent and the term of the lease, the provisions did not reflect the novel nature of the transaction.
4. The Heads of Terms stated the lease would be contracted out of security of tenure (under the Landlord and Tenant Act 1954 Act) so the parties would need to carry out a contracting out process (including the execution of a statutory declaration between the parties) before the tenant entered into the lease.

As such, upon consideration of the wording of the Heads of Terms, the way that the drafting process had evolved, and the nature of the transaction and course of dealings between the parties, the Court held that the parties did not intend to enter into a binding contract.

TOP PITFALLS OF SUMMER 2022

1. Commercial rent arrears and forfeiture

Following the lifting in March of the Covid-related moratorium on forfeiting commercial leases for unpaid rent, we have seen a substantial increase in cases of landlords seeking to use this powerful remedy against defaulting tenants. This perhaps reflects the ongong financial strain that is being felt by businesses, resulting in more tenants falling into arrears and perhaps less leniency on the part of commercial landlords. Tenants should give thought to engaging with their landlords at an early stage if there is a risk of rent not being paid and should bear in mind that if a landlord is looking to take a property back then failing to pay rent may present an ideal opportunity for them to do so.

2. Preconditions for exercising a break clause

In the context of break clauses in commercial leases, we have seen a number of recent instances of fairly widely drafted preconditions with which a tenant must comply in order to exercise their right to break their leases. Whereas some leases simply require the tenant, in addition to giving proper notice, to ensure that there are no rent arrears and to leave occupation by the break date, some lease terms require a whole host of actions including compliance with numerous stringent covenants. Such clauses can be an excellent bargaining chip for landlords, but potentially a nightmare for tenants. Giving careful thought to the structuring of these provisions when drafting the lease is critical and can avoid unwanted problems when it comes to the point that a party seeks to rely on them.

3. Remember the "registration gap" when a property is sold

Where a freeholder has sold their interest in a property it is important to remember that there will be a delay in the Land Registry record being updated to reflect the new owner's details, referred to as the "registration gap".This can be very important if the property is tenanted. Whilst the buyer immediately takes the beneficial interest in the property at the point of completion, the legal title is not passed to that new owner until the Land Registry record is updated. This can have important implications in relation to matters such as the address at which certain types of notices are to be served by tenants, including break notices. Whilst many buyers will notify existing tenants about their acquisition straight away, this does not always happen and careful due diligence is needed when verifying the identity of the landlord, in order to avoid potential problems in this area.

If you would like to discuss or need any help or support on any of the issues above then please contact the Machins' Property Litigation Team on 01582 514 000.

Machins offer a full range of commercial services and our Property Litigation team are able to advise on any disputed landlord and tenant or property issue.

Ben Walters
ben.walters@machins.co.uk

Holly Baker
holly.baker@machins.co.uk