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**Commercial Premises – Where Does the Burden of COVID-19 Losses Fall?**

Where the COVID-19 pandemic rendered the use of commercial premises illegal or unviable, should the resulting losses fall on the landlord or the tenant? The High Court pondered that burning issue in a decision of vital importance to property professionals and the hospitality industry.

The case concerned cinema premises that were required to shut during lockdowns. Even when permitted to open, continuing restrictions were said to have rendered the business unsustainable. Between the start of the first lockdown and 16 May 2021, the cinema was open for only 71 days and its takings were £247,000. During the same period in 2018-2019, takings were £8.92 million.

After the tenant ceased to pay rent in June 2020, the landlord launched proceedings to recover about £2.9 million in rent arrears and service charges. It sought summary judgment on its claim against the tenant, the original tenant under a previous lease and their parent company, which guaranteed sums due under both leases.

In resisting the claim, the defendants argued that they were not liable to pay rent and service charges relating to lockdown periods, during which the premises could not legally be open. They asserted that rent and service charges were only payable at times when the premises could be used as a cinema with attendance levels in line with those that were anticipated when the leases were entered into.

Ruling on the matter, the Court noted that the leases forbade use of the premises for any purpose other than that of a cinematograph theatre with associated services. However, the landlord expressly gave no covenant, warranty or representation that the premises could lawfully be used for that permitted purpose.

The Court found that the defendants had no real prospect of success in arguing that terms should be implied into the leases so as to relieve them from liability. Such terms were not so obviously necessary as to go without saying, nor were they required to give the leases business efficacy. The question of where the risk of the cinema being required to close should lie was a matter for negotiation. The fact that, as matters stood, the risk fell on the tenant did not lead to a conclusion that the leases lacked commercial or practical coherence.

The Court also rejected the defendants' arguments that the cinema's enforced closure amounted to a failure of consideration that undermined the whole basis of the leases. The leases continued to subsist and the tenant had remained in possession throughout. The ability to use the premises as a cinema was not fundamental to the basis on which the leases were entered into.

The defendants having no realistic prospect of successfully resisting the claim, the landlord was granted summary judgment. The sum payable on a summary basis was, however, reduced to take account of an arguable counterclaim in respect of certain insurance matters.

Contact us for expert advice on any matters concerning landlord and tenant law.

**Partner Note**

London Trocadero (2015) LLP v Picturehouse Cinemas Ltd and Others [2021] EWHC 2591 (Ch)

**Conversion of Listed Buildings and VAT Zero-Rating – Guideline Ruling**

Building works that involve the 'substantial reconstruction' of listed buildings have the great benefit of being zero-rated for VAT. As a case concerning the conversion of a grand former military nursing home showed, however, that advantage is only available in highly restricted circumstances.

The case concerned a vast, Grade II listed building that was for almost a century used to provide nursing facilities for war veterans. During a building project that lasted more than two years, it was converted into 86 luxury flats. The developer argued that the sale of the flats was zero-rated for VAT purposes and that it was thus entitled to recover all the input tax paid on the conversion works. That contention was, however, rejected by HM Revenue and Customs.

Ruling on the matter, the First-tier Tribunal (FTT) noted that the Value Added Tax Act 1994 zero-rates the supply of dwellings that are the result of a substantial reconstruction of a listed building. However, the Act also states that a building is not to be regarded as having been substantially reconstructed unless it incorporates no more than the external walls of the original, together with other external features of architectural or historic merit.

Dismissing the developer's appeal, the FTT noted that certain internal features of the building had been retained in compliance with planning requirements. They included a chapel, a splendid marble entrance hall and staircase, chimney stacks, trusses and most of the building's reinforced concrete floor slabs.

Despite the enormous scale of the conversion works, the retained internal features covered some 7 per cent of the building's floorspace and could not be viewed as de minimis or trifling. The floor slabs, trusses and chimney stacks, whilst performing a structural role, were not part of the external walls or other external features. Other grounds of challenge, based on European law principles of fiscal neutrality and proportionality, also fell on fallow ground.

The law surrounding listed buildings is complex. To ensure you do not fall foul of it, contact our expert team for advice.

**Partner Note**

Richmond Hill Developments (Jersey) Ltd v The Commissioners for Her Majesty's Revenue and Customs. Case Number: TC/2017/7169

**Jersey-Registered Property Developer Faces English Winding Up Petition**

Companies engaged in developing UK property are often registered abroad and that can pose legal difficulties for creditors. As a High Court ruling showed, however, in the event of insolvency proceedings, it is a company's centre of main interests (COMI) that matters, rather than its registered office address.

A firm of architects was owed a judgment debt of £354,000 by a Jersey-registered property company. The debt arose from the firm's engagement by the company to assist in obtaining planning permission for a hotel development in England. With a view to recovering its money, the firm lodged a winding up petition against the company.

The debt was not disputed and the company's sole director also did not dispute that it was unable to pay its debts. The company argued, however, that its COMI was the same as its registered address in Jersey and the Court thus had no jurisdiction to hear the petition.

Rejecting that argument, however, the Court was satisfied that the company's COMI was at all times in England. All the places in which it pursued its economic activities, held assets, conducted negotiations and exercised management functions pointed towards that conclusion.

The company's sole economic purpose was to carry on business in the UK by developing the property, its principal asset. Its name itself indicated a likelihood that it was a special purpose vehicle. Its contracts were governed by English law and subject to English jurisdiction. Save for formal board meetings, which took place in Jersey, its head office administrative functions were conducted in England.

The company also failed to persuade the Court that its finances had been affected by the COVID-19 pandemic so that, by virtue of the Corporate Insolvency and Governance Act 2020, no winding up order could be made against it. Having accepted jurisdiction to consider the petition, the Court directed that it be listed for hearing in the general winding up list.

**Partner Note**

BUJ Architects LLP v Investin Quay House Ltd [2021] EWHC 2371 (Ch)

**Overflying Jets – RAF Fends Off Unlawful Noise Nuisance Claim**

Noise pollution may blight people's lives, but it by no means always amounts to an unlawful nuisance for which compensation is payable. The High Court resoundingly made that point in a case concerning a holiday park frequently overflown by noisy RAF jets.

A couple poured their life savings into purchasing land beside a reservoir in 2003 and developing it as a holiday park. They launched proceedings against the Ministry of Defence (MoD) claiming that activities at a nearby RAF airfield, used mainly for pilot training purposes, had substantially increased since 2007. They asserted that the deafening noise of jet engines constituted an actionable nuisance.

Ruling on the matter, the Court acknowledged that the noise of aircraft flying over or close to the holiday park was very loud and annoying, disrupting conversations and sometimes frightening small children. Although intermittent, there was no doubt that the noise interfered with the couple's enjoyment of their land and its holiday park use.

In dismissing the claim, however, the Court noted that the airfield had been in use by the RAF since 1951. There had been no increase in its use since the couple bought their land, nor had there been any significant change in flight patterns. Allegations that pilots sometimes deliberately overflew the holiday park in order to intimidate the couple were roundly rejected.

The noise of jets overflying the area had been part of everyday life for local people for 70 years and had come to form part of the locality's character. The noise had not materially increased since the couple bought the land and they had chosen to open a business that was sensitive to noise pollution.

Claims that the noise amounted to a violation of the couple's human rights to respect for their privacy and family lives and their peaceful enjoyment of their private property also fell on fallow ground. Emphasising the public interest in the training of jet pilots for the defence of the realm, the Court found that the MoD had taken all reasonable steps to reduce noise levels and meet the couple's requirements.

If your commercial property is being blighted by noise pollution or other forms of nuisance, we can advise you on how best to go about making a claim.

**Partner Note**

Jones and Another v Ministry of Defence [2021] EWHC 2276 (QB)

**Policy Statement Released on Pandemic Rent Debt**

The government has provided an update on its approach to dealing with commercial rent debt accrued during the pandemic. Its 'Supporting businesses with commercial rent debts: policy statement' reiterates the previously announced extension of protections under Section 82 of the Coronavirus Act 2020. The protections, which prevent landlords of commercial properties from being able to evict tenants for the non-payment of rent, will continue until 25 March 2022, unless legislation is passed ahead of this.

The policy statement also signals the government's intent to 'legislate to ringfence rent debt accrued during the pandemic by businesses affected by enforced closures and set out a process of binding arbitration to be undertaken between landlords and tenants'.

The principles due to be enshrined in the legislation will be published by the government prior to the new law being implemented.

For further information, see [https://www.gov.uk/government/publications/resolving-commercial-rent-arrears-accumulated-due-to-covid-19/supporting-businesses-with-commercial-rent-debts-policy-statement](https://www.gov.uk/government/publications/resolving-commercial-rent-arrears-accumulated-due-to-covid-19/supporting-businesses-with-commercial-rent-debts-policy-statement#code-of-practice)

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