

## Does a Tenant really have to go on paying rent during lockdown?

### Perhaps we should ask the Officious Bystander...

If tenants are precluded by law from making use of the premises demised them, do they still have to go on paying their rent in full?

That's the question on everyone's lips. The landlord undoubtedly holds the high ground here. Unless the tenant is able to come up with a sound reason why the terms of the lease, including the covenant to pay rent, should *not* apply in the usual way, the tenant remains on the hook for the rent – coronavirus or not.

The notion that the adverse consequences of coronavirus legislation should fall entirely on the shoulders of the poor old tenant will not sit comfortably with everyone, especially tenants whose leases reserve a full market rent. So, in recent weeks, many have been thinking about ways in which tenants might conceivably seek to take the fight to the landlord.

Frustration is the obvious one. Some of my colleagues have recently provided interesting contributions on that subject ([here](#) and [here](#)). But frustration is almost certainly not the answer. For one thing, virtually no-one ever succeeds in persuading a Court that a lease has been frustrated, as the case law on the subject shows (see most recently *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch). Equally importantly, the tenant doesn't actually want its lease to be frustrated and therefore at an end: the tenant is hoping to go racing back to the premises, to resume its business, just as soon as it is allowed to do so.

There are admittedly some tantalising suggestions in *Cricklewood Property & Investment Trust Limited v. Leighton's Investment Trust Limited* [1945] A.C. 221 that an obligation in the lease might be *temporarily* lifted (partially or suspensively frustrated) which, at first, sounds a bit more promising as a potential solution to the problem at hand. But there are indications within the decision in *Cricklewood* itself that the principle cannot be extended to the covenant to pay the rent. There are also decisions, in the wartime context, which show that, when looking at the problem through the lens of frustration, judges just do not feel able to show

the rent-paying tenant any mercy (see, for example, *London and Northern Estates Company v Schlesinger* [1916] 1 KB 20 and *Matthey v Curling* [1922] 2 AC 180). So, on closer inspection, this looks unlikely to be the tenant's panacea; they must look for one elsewhere.

If the relevant lease happens to have a *force majeure* or cesser of rent clause that is broad enough to offer the tenant respite, then great; but most tenants won't be in that happy position.

So, unless anyone has a better idea, how about an implied term of the *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56 kind? Now, hear me out.

Lord Neuberger's sixth principle of construction, in *Arnold v Britton* [2015] AC 1619, was that "...in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is *Aberdeen City Council v Stewart Milne Group Ltd* 2012 SC (UKSC) 240, where the court concluded that "any . . . approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract...".

Readers may remember that *Aberdeen City Council* is the case where overage provisions triggered by an actual sale and quantified by reference to the proceeds of that sale were cunningly outflanked by means of a sale, at a significant undervalue, to an associated company of the paying party. On the clear and express terms of the contract, that ruse worked just fine. But the Supreme Court elegantly sidestepped the express terms on the basis that the sale at an undervalue was an event that the parties had not contemplated in their contract; their Lordships said that if the parties had been consulted by the officious bystander about the consequences of such a sale, they would obviously have agreed that, in those circumstances, overage should be calculated by reference to open market value, not the proceeds of the actual sale.

So, let's try that here. No-one, other than Bill Gates, expected the coronavirus. A tenant may well be able to establish that the coronavirus and the legislation to which it has led is

something that the landlord and the tenant simply did not contemplate in the express terms of the lease they executed in happier times. So, by parity of reasoning, we deploy the officious bystander and ask ourselves: what would reasonable parties in this position have agreed when prompted to supply an answer to our question?

This may very well be where the argument falls down. Whereas in *Aberdeen City Council* the answer was obvious, the same may well not be true here. In response to the officious bystander, the landlord would presumably say: “the tenant still pays the rent: it’s the party in possession who assumes the risk of unforeseen events of this nature”. The tenant would, in turn, say: “not a bit of it, I am not paying rent, in full, for premises that I cannot use through no fault of my own”. If there isn’t an obvious answer, then, in short, we don’t imply a term; and we must not fall into the trap of implying terms just because they seem fair and reasonable (*Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72).

So that’s the end of that – we should throw implied terms onto the scrapheap where frustration already languishes. Or should we? There are bound to be some judges who, instinctively, are slightly troubled by the notion that the awful consequences of the coronavirus should be visited exclusively on tenants. There may be some who have difficulty with the idea that we should casually watch commercial tenants disappearing down the plughole in droves while we cling doggedly to a line of authority, forged about a century ago and in a slightly different context (frustration), which suggests that a tenant’s covenant to pay rent ‘issues out of the land’ and is thus just plain sacrosanct.

Might a judge, who was looking for something to hang his or her hat on, remain interested in the idea of an implied term? Maybe, just maybe, a judge would be open to the argument that reasonable parties would have recognised that neither of them could be expected to shoulder all of the pain associated with a freak event like this. Decent folk might therefore agree to *split* the pain equally between them – so that the tenant pays, and the landlord receives, *half* the rent until the embargo is lifted. Alternatively, perhaps the parties would agree a discount on the rent proportionate to the decline in the tenant’s turnover over the relevant period.

Doubtless there are other ways in which the ‘pain sharing’ principle could be formulated; and that, in itself, may be problematic from the point of view implying a single term. But if one such formulation could be championed as the one that parties in this position would have alighted upon, a judge might just be tempted by it so as to arrive at an overall result that feels fairer and, in big picture terms, is just better for everyone than the alternative.

If the lease in question contains an express provision for rent abatement, albeit one not wide enough to embrace the current circumstances, inviting the Court to imply a more generous provision for rent abatement may be a touch ambitious. But, equally, if the starting point is that the parties simply did not contemplate the occurrence of this event in the express terms of the contract, a tenant might still be able to persuade the Court that an express provision for rent abatement in circumstances that the parties *did contemplate* should not tie the Court’s hands when implying provisions needed to regulate wholly unforeseen circumstances.

It would no doubt be a difficult argument to make – and each case will of course turn on its own particular facts – but, with the right case, it would be an interesting exercise to argue the point. We should also keep in mind that a landlord with a property portfolio of any size will *not* want to end up at trial on this issue. Even if the risk of losing is perceived to be small, the knock-on effect of an adverse result, incurred in public proceedings, will in many cases be unthinkable for a landlord of any substance. Even with a merely arguable case, a brave tenant may yet find there are deals out there to be had.

Food for thought at any rate.

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