

The impact of lockdown on leases

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Frustration by supervening illegality

- *James B Fraser & Co Ltd v Denny, Mott & Dickson Ltd* 1944 SC (HL) 35
- *London and Northern Estates Company v Schlesinger* [1916] 1 KB 20
- *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] L & T R 14, paras 190-200
 - para 195: “for supervening illegality to frustrate, it must remove all or substantially all of the benefit that one party receives from the contract.”

Caffè Nero cases

- *Caffè Nero v Castle Crown Properties*, Lord Fairley, unreported (Lexology, 9 February 2021)
 - *Hart's Trs v Arrol* (1903) 6 F 36
- *Newbury LLC v Caffè Nero Americas Inc*, 8 February 2021, Justice Salinger, Massachusetts Superior Court

New York cases

- Landlords prevailed:

- *BKNY1 Inc v 132 Capulet Holdings LLC*, 25 September 2020,
- *35 East 75th Street v Christian Louboutin LLC*, 9 December 2020
- *Victoria's Secret LLC v Herald Square Owner LLC*, 7 January 2021

- Tenants prevailed:

- *The Gap v 170 Broadway Retail Owner LLC*, 30 October 2020
- *International Plaza Association LP v Amorepacific US Inc*, 19 December 2020

Rent suspension clauses

- Example:

“If the Premises are destroyed or damaged by any Insured Risk so that the Premises are unfit for occupation or use, the Rent, or a fair proportion of it, will not be payable from and including the date of damage or destruction until the Premises are again fit for occupation and use.”

- Economic or only physical damage?
- *Dr Smood New York LLC v Orchard Houston*, 2 November 2020, Justice Love, New York County Supreme Court

Equitable abatement

“it is quite settled in law that an abatement is to be allowed if a tenant loses the **beneficial enjoyment** of any part of the subject let to him either through the fault of the landlord or through some **unforeseen calamity** which the tenant was not able to prevent.”

Muir v McIntyres (1887) 14 R 470, 472 *per* Lord President (Inglis)

Equitable abatement

- *Fern Trustee 1 Ltd v Scott Wilson Railways Ltd* 2021 SLT (Sh Ct) 7
 - “Beneficial enjoyment”
 - A question of circumstances
 - “Unforeseen calamity”
 - Unforeseen external reason
 - Not an insured event
 - The right to an abatement can be waived
 - Level of abatement – likely to be a matter for proof

Equitable abatement - assessment

- Renfrew DC v Gray 1987 SLT (Sh Ct) 70
 - Lettable value
 - Positive benefits
- *In re Hitz Restuant Group*, 3 June 2020, Judge Cassling, United States Bankruptcy Court, Northern District of Illinois, Eastern Division
 - Reduced ability to generate income