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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 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.

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Is Your Lease Under Threat of Forfeiture? Don't Delay Consulting a Solicitor

Tenants who fail to pay their rent on time place themselves in real danger of having their leases forfeited. As a Court of Appeal ruling showed, that risk exists no matter how small the arrears and no matter how short the delay in payment may be.

The case concerned mixed commercial and residential premises that were held on a 20-year lease. By mistake, the rent paid by the tenants for one quarter was £500 short of what it should have been. The landlords' response was to forfeit the lease by instructing bailiffs to take possession of the premises by peaceful re-entry.

The rent arrears were paid four days later, but the tenants delayed five and a half months before applying for relief from forfeiture. By that time, the landlords had re-let the premises. Whilst commenting that it appeared very harsh to forfeit a lease that had 10 years left to run over such a modest sum in arrears, a County Court judge refused to grant the tenants relief, principally on grounds of delay. That decision was, however, reversed by a more senior judge.

Upholding the landlords' challenge to that outcome, the Court of Appeal noted that the longer a tenant leaves it before seeking relief from forfeiture, the less likely it is that their application will succeed. The re-letting of the premises was relevant to the exercise of judicial discretion and the mere fact that the tenants had made their application within six months did not mean that they should be treated as having acted with reasonable promptitude. The County Court judge had made no error of law in refusing relief and her decision was restored.

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 which 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.

Three-Hundred-Year-Old Village Pub Listed as Asset of Community Value

Pubs, many of which date back centuries, are under increasing threat of closure due to the COVID-19 pandemic and the general downturn in the licensed trade. As one case showed, however, with the right legal advice there are effective steps that community groups can take to preserve them for future generations.

The case concerned a pub that was the only such establishment in a rural village. There had been a hostelry on the site since 1686. With a view to ensuring its preservation as a pub, the local parish council nominated it as an asset of community value (ACV). The nomination was accepted by the district council and the pub was listed as an ACV under the Localism Act 2011.

In challenging the listing before the First-tier Tribunal (FTT), the pub's owner argued that the registration was restrictive and might cause delays in any future sale of the property. She asserted that the pandemic had changed the nature of the pub's business and that it was unfair that it had been listed when another property in the village that served a similar community function had not been.

Rejecting her appeal, however, the FTT noted that it is well recognised that pubs make an important contribution to the wellbeing of communities. There was no suggestion that the owner had any intention of changing the use of the property from that of a pub and any such change would require planning permission.

The pub, which was famous for its Chinese food, was put to numerous community uses, hosting, amongst other things, local fundraising events, celebrations and Christmas lunches for elderly villagers. It was realistic to think that, despite the pandemic, it would continue to serve local people into the future. The nomination was valid and there were no grounds for overturning the listing.

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