Neutral Citation Number: [2021] EWHC 863 (Ch)

Case No: PT-2020-000962

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 16/04/2021

Before:

CHIEF MASTER MARSH

- -

Between:

COMMERZ REAL INVESTMENTGESELLSCHAFT mbh	**Claimant**
- and -	
TFS STORES LIMITED	**Defendant**

- -
- -

Gary Cowen QC (instructed by **DAC Beachcroft LLP**) for the **Claimant**
Oliver Caplan (instructed by **Legal Director TFS Stores**) for the **Defendant**

Hearing date: 18 March 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHIEF MASTER MARSH

Chief Master Marsh :

1. This judgment relates to two applications heard on 18 March 2021. The first is the claimant's application for summary judgment under CPR rule 24.2 issued on 3 February 2021. The second is the Defendant's application issued on 15 March 2021 for an order adjourning the hearing of the claimant's application. Having heard the application to adjourn, I indicated that it would be dismissed and said I would give reasons when giving judgment on the claimant's application.

2. Mr Cowen QC appeared for the claimant and Mr Caplan appeared for the defendant. I am grateful to them for their submissions.

Context

3. The claimant is the leasehold owner of the Westfield Shopping Centre ("the Facility") at Shepherd's Bush in London which it holds under title numbers BGL69874 and BGL123620. The claimant demised to the defendant Unit 1164 on level 40 and Storage Area SO210 on level 20 ("the Premises") at the Facility by a lease dated 10 July 2019 for a term of 5 years from 1 February 2019 at an initial yearly rent of £200,000 per annum excluding VAT. On the same date, the parties entered into a side letter which provided that the definition of "Principal Rent" in the lease was to be replaced with "the aggregate of the Base Rent and Turnover Rent". The Base Rent is defined as £180,000 and the Turnover Rent is to be calculated in accordance with Schedule 4 to the side letter. The side letter also provided for rent and service charge to be paid by equal monthly payments in advance on the first of each month.

4. The defendant, which operates as 'The Fragrance Shop', was as a consequence of the extraordinary measures that are contained in the Health Protection (Coronavirus, Restrictions) Regulations 2020 SI 2020/350, and later the Health Protection (Coronavirus Restrictions) (All Tiers) (England) Regulations SI 2020/1374, obliged to close its business at the Premises on 26 March 2020. The business remained closed to the public until 15 June 2020. It was then closed again between 5 November 2020 and 2 December 2020 and from 19 December 2020 until 12 April 2021.

5. The claim is for rents payable under the lease.[1] The defendant has not paid any rent for the Premises in accordance with the side letter since April 2020 and the monthly service charge for April, May and June 2020 is also outstanding. The claim was issued on 3 December 2020 and the claimant seeks judgment for rent amounting to £166,884.82 (inclusive of VAT) and interest at the contractual rate. On its face, the claim is unremarkable. Indeed, given the sum that is involved, it might appear surprising that the claim is being dealt with in the High Court. However, up to the end of January 2020, claims for commercial rent issued in the High Court in London were not normally transferred to the County Court at the initial triage point against the possibility of tenants seeking to maintain a defence based upon grounds arising from the exceptional circumstances created by the Coronavirus pandemic. A defence has been served in this case and the issues it raises are directly related to the pandemic.

6. It is not part of this judgment to examine the precise effect of the pandemic upon either the claimant's or the defendant's business. That they have both been affected is not in

[1] All the material terms of the lease are set out in an Appendix.

doubt. Equally, it is not part of judgment to consider this, other than at a high level in relation to the adjournment application, the defendant's ability to pay rent, either now or in the past. The defendant has provided only limited evidence on that subject. The issue for the court is whether the claimant should be granted summary judgment on its claim for rents or whether the claim should proceed to trial.

Defence

7. The defence sets out three grounds for defending the claim, in addition to putting the claimant to strict proof that the sums claimed have fallen due.

   (1) The claim is said to have been issued prematurely contrary to the Code of Practice for Commercial Property Relationships During the COVID-19 Pandemic.

   (2) The claim is said to be a means of circumventing measures put in place to prevent forfeiture, winding up and recovery using CRAR. Issuing and pursuing the claim is said to be the claimant exploiting a 'loophole' in the restrictions placed upon the recovery of rent put in place by the government.

   (3) The defendant alleges that claimant is in breach of its obligation under clause 5.2 of the lease under which it covenanted to observe and perform its obligations under schedule 3, which included an obligation to insure. The defendant points to that obligation and says it is reasonable to expect that the claimant would insure against loss of rent due to forced closures and/or denial of access due to notifiable disease[2] and/or government action.

8. The third ground of defence was premised upon the defendant's belief that the claimant had not obtained cover against loss of rent caused by the risks relied upon by the defendant. The position appeared to be clear because in paragraph 16b of the reply the claimant asserted that it had not obtained insurance against those risks. Very shortly before the hearing, pursuant to a request made by the defendant, the claimant produced its policy and as a consequence the defendant has sought to recast its case in relation to the claimant's insurance covenants. It is right to note, however, that the defendant did not ask for the policy to be disclosed until 16 March 2021 although it had been open to the defendant to seek disclosure of the policy pursuant to paragraph 21 of PD51U from 2 February 2021 when the reply was served. The policy was produced promptly upon the request being made.

9. One further new ground of defence was put forward at the hearing, namely that the terms of the rent abatement clause specify that a dispute about the amount or period of the abatement of rent must be referred to an independent expert. In addition, the defence that is based upon the claimant's obligations to insure was re-cast at the hearing.

CPR rule 24.2

10. The principles that apply to the disposal of an application under CPR rule 24.2 are settled. The burden is on the claimant to show both that the defendant has no real prospect of defending the claim at a trial and that there are no compelling reasons why the claim

[2] It is common ground that COVID-19 is a notifiable disease.

should go to trial. Mr Caplan, submits that the second limb of CPR rule 24.2 is engaged in this case.

11. The principles that the court must apply are conveniently set out in the judgment of Lewison J (as he then was) in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch). The judgment concerns an application for summary judgment made by the defendant, but the principles that are summarised there apply with equal force to an application made by a claimant. The summary was approved by the Court of Appeal in *AC Ward & Sons Limited v Catlin (Five) Limited* [2009] EWCA Civ 1098. Notably, in *AC Ward & Sons Ltd v Catlin (Five) Limited* the Court of Appeal upheld a decision not to rule on a point of construction of the terms of a contract where the terms were said to be standard terms which were widely used in the insurance market.

12. There are some additional points of emphasis, however, that Mr Cowen QC and Mr Caplan invite the court to consider:

    (1) It is open to the court to deal with a point of law or construction on the hearing of an application for summary judgment. In *Easyair* and in *Mellor v Partridge* [2013] EWCA Civ 477 at [3(vii)] Lewison J said it was open to the court to determine "a short point of law or construction". This description usually prompts the applicant to submit the point is short, and is therefore capable of being dealt with on an application for summary judgment, and the respondent to submit it is anything but short. Quite where the boundary lies between a point with which it is acceptable for the court to deal on a summary basis, and one that is unsuitable, is not easy to draw. As it appears to me, the notion of shortness does not relate to the length of the document to be construed or the length of the material passage in that document; but it may relate to the length of the hearing that will be required and the complexity of the matrix of fact the court will have to consider. In my experience the court regularly deals with points of law and of construction of real difficulty on the hearing of an application for summary judgment. I would only add that there may be some overlap between the idea of a point of construction not being 'short' and the second limb of CPR rule 24.2. There may be some points that the court is capable of grappling with (or grasping the nettle as it is sometimes put) that, nevertheless due to the context in which they arise or other factors are best left to be dealt with at a trial.

    (2) It is trite that the court must not on hearing an application for summary judgment conduct a mini-trial. In this case there is no risk of that happening because there are no material disputes of fact.

    (3) The court should be reluctant to grant summary judgment where the law is uncertain or the application involves the court making a determination in a developing area of law. The rationale is that the development of the law should in some cases be based upon findings of actual and not hypothetical facts. The judgment of Peter Gibson LJ in *Hughes v Colin Richards* [2004] EWCA Civ 266 at [30] is usually cited in support of this principle. *Hughes* concerned whether the adviser who set up a trust for the settlors might have assumed a duty of care towards the beneficiaries of the trust. I would observe that although there was an application for summary judgment before the court in *Hughes*, it was secondary to an application to strike out the claim under

CPR rule 3.4(2)(a), and the defence denied the core facts relied upon by the claimants.

13. In addition, the defendant relies upon the behaviour and conduct of the claimant. Mr Caplan submits that conduct can be relevant to the second limb of CPR rule 24.2 and the need for the overall merits to be considered at a trial. If the first two grounds of defence (prematurity and the exploitation of a loophole, as the defendant puts it) do not have a real prospect of success as defences to the claim, Mr Caplan submits they may nevertheless provide reasons why the court should not enter summary judgment. The relevance of conduct and the application of the second limb of CPR rule 24.2 is discussed in the notes in Civil Procedure at 24.2.4 and a number of examples of the type of circumstances that may engage the second limb are cited.

14. The notes refer to two pre-CPR cases. Some caution is needed, however, because the terms of RSC Order 14 were not the same as CPR rule 24.2. Under the RSC the emphasis was different. The court was required to consider whether there was "an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial". In *Miles v Bull* (No 1) [1969] 1 QB 256 Megarry J observed that the second part of the rule was very wide. He went on to say with reference to the facts in that case:

> *" They also seem to me to have special significance where, as here, most or all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which will aid her. If the defendant cannot point to a specific issue which ought to be tried but nevertheless satisfies the court that there are circumstances that ought to be investigated, then I think that those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff. In the present case the plaintiff's evidence initially consisted of a single affidavit in which brevity could scarcely be carried further. He has now amplified this by further evidence, but this is certainly not exhaustive or conclusive. The words "there ought for some other reason to be a trial" seem to me to give the court adequate powers to confine Order 14 to being a good servant and prevent it from being a bad master."*

15. There is a material difference between there being "no other compelling reason why the case … should be disposed of at a trial" and "there ought for some other reason be a trial." Notably in the CPR the word "compelling" has been added. It seems to me that the scope of the court's discretion under the CPR is rather narrower than the very wide discretion under the RSC.

16. Order 14 of the RSC was also considered by Cairns LJ in the Court of Appeal in *Bank fur Gemeinwirtschaft Atkiengesellschaft v City of London Garages* [1971] 1 WLR 149 at 158 where he observed:

> *"It is not difficult to think of other circumstances where it might be reasonable to give leave to defend although no defence was shown: for example, if the defendant was unable to get in touch with some material witness who might be able to provide him with material for a defence; or if the claim were of a highly complicated or technical nature which could only properly be understood if oral*

> *evidence were given; or if the plaintiff's case tended to show that he had acted harshly and unconscionably and it was thought desirable that if he was to get judgment at all it should be in the full light of publicity."* [emphasis added]

17. I have doubts about whether the authorities dealing with RSC Order 14 are a reliable guide to the proper approach to the application of the second limb of CPR rule 24.2, bearing in mind the significant difference between the two rules and the requirements of the Overriding Objective. It seems to me that adding the word "compelling" was clearly intended to limit the very wide discretion under the RSC. The basis upon which Megarry J decided *Miles v Bull* chimes, for example, with the principle to be derived from the decision of the Court of Appeal in *Royal Brompton v Hammond (No5)* [2001] EWCA Civ 550 in relation to the first limb of CPR rule 24.2 that the court should consider the evidence which can reasonably be expected to be available at trial and the lack of it. On the other hand, the need for a trial in order that judgment is obtained in the full light of publicity is unlikely to be a compelling reason to refuse summary judgment when the rule is construed by reference to the Overriding Objective and bearing in mind that the hearing of an application under CPR rule 24.2 will invariably take place in open court.

Grounds of defence

Code of Practice for commercial property relationships during the COVID 19 pandemic

18. The defendant says the proceedings are premature because the Code of Practice requires landlords and tenants to work together, it has been a reliable tenant and the pandemic has created exceptional circumstances. However, it is clear from the first paragraph of the Code that it does not affect the legal relationship between landlord and tenant:

> "*This Code of Practice is published in response to the impacts of COVID-19 on landlords and tenants in the commercial property sector and covers the whole of the United Kingdom. It is intended to reinforce and promote good practice amongst landlord and tenant relationships as they deal with income shocks caused by the pandemic. This is a voluntary code and does not change the underlying legal relationship or lease contracts between landlord and tenant and any guarantor*".

19. It is also clear that the Code encourages landlords and tenants to take a balanced view. The Code is not a charter for tenants declining to pay any rent. This can be seen from paragraph 3:

> *"The legal position is that tenants are liable for covenants and payment obligations under the lease, unless this is renegotiated by agreement with landlords. Tenants who are in a position to pay in full should do so. Tenants who are unable to pay in full should seek agreement with their landlord to pay what they can taking into account the principles of this code. This will allow landlords to support those tenants who are in greatest need and to maintain development activity which will contribute to economic recovery. It also means landlords should provide support to a tenant where reasonably possible, whilst having regard to their own financial commitments and fiduciary duties."*

20. Although the Code of Practice is pleaded as a ground of defence, Mr Caplan did not seek to maintain this element of the defence at the hearing. Instead, he relied upon the Code as

a basis for submitting that the claim should go to trial because of the claimant's conduct in failing to engage with it. However, the factual basis for this submission is absent. The documents which form Exhibit 1 to the reply and the chronology of correspondence that Mr Sorensen exhibits to his second statement show that there has been significant engagement by the claimant. There is simply no other conclusion that could be reached upon a review of these exchanges. The lack of engagement, if anything, is on the defendant's side.

21. Mr Caplan also submitted that the claimant's conduct in failing to make a claim under its insurance policy on the basis that COVID-19 is a notifiable disease is also a relevant matter that the court may take into account in deciding whether this claim should go to trial. It seems to me, however, that the proper approach is to determine this point not as a point of conduct but whether the defendant has a real prospect of defending the claim based upon the case it wishes to pursue in relation to insurance. I will come to that aspect of the case shortly.

Circumventing other Government measures

22. This limb of the defence is pleaded in paragraph 10 of the defence:

> *"The Defendant also avers that the Claimant's claim seeks to circumvent the measures put in place by the government. Those measures prevent forfeiture, winding up petitions and the CRAR procedure where rent arrears are related to Covid-19. The measures are clearly intended to protect commercial tenants where they have been forced to close and/or have been subjected to significantly reduced footfall during any trading periods, as a result of social distancing measures. Using what is essentially a loophole goes behind the intention of those measures."*

23. As part of the measures taken to protect the economy, the Government has placed restrictions upon some, but not all, remedies that are open to landlords. There is no legal restriction placed upon a landlord bringing a claim for rents and seeking judgment upon that claim. The defendant's position conflates on the one hand steps to enforce the right to receive rent under the contractual terms of the lease with, on the other hand, the right of the landlord to obtain a determination of the liability to pay rent and the court entering judgment for a sum. The steps the claimant may be able to take if judgment is entered are restricted; but the entitlement to bring a claim before the court for a determination about liability is unaffected. Indeed, it would be a surprising outcome if an indirect effect of steps taken to restrict the recovery of rent by self-help means and pursuing insolvency proceedings was to prevent landlords from pursuing proceedings and applying for summary judgment. Indeed, the logical consequence would be that a landlord would neither be able to apply for judgment in default, which is an administrative rather than a judicial step, or take a claim to trial. In any event, there is no basis for concluding that the claimant's right of access to the court, or that the court's powers under the CPR, are restricted.

Insurance

24. The substance of the defence revolves around the claimant's obligations to insure the Facility and the Premises and the rent cesser provisions in the lease. Although the

defendant's case has developed since its case was pleaded in the defence, the case as it was then put forward provides the logical starting point.

25. The material terms of the lease are in summary:

(1) Under clause 3.1 the defendant covenants to pay the Principal Rent without any deductions, counterclaims or set offs.

(2) Under clause 4.8 the defendant covenants to keep Unit 1164 open and to maintain active trade during the Facility's opening hours unless prevented from doing so because of damage by an Insured Risk (4.8.1.1), or to do so would be unlawful (4.8.1.4).

(3) Under clause 4.8.3 if the Premises are closed for trading in breach of clause 4.8.1, Base Rent is payable, even though the period of closure occurs during a rent free period (4.8.3.1) and liquidated damages are payable in addition to the Base Rent (4.8.3.2).

(4) Under clause 5.2 the claimant covenants to observe and perform its obligations in the schedules. The obligations as they relate to insurance must be considered in light of the definition of Insured Risks. The definition comprises a number of elements:

(a) The risks against which the Premises and the Facility are from time to time insured.

(b) This is followed by a lengthy list of risks prefaced by the words "… such risks … include …". It is plainly not intended to be a definitive list of insurance risks.

(c) The list of risks principally comprises the type of risk that will directly impact upon the Premises and the Facility in a physical way but also includes risks that may have indirect impact such as "riot and civil commotion, strikes, labour or political disturbance". The list does not make any direct reference to Notifiable Diseases or closure as a consequence of legal obligation.

(d) The definition concludes with "… or such other risks as the Landlord may consider it prudent to insure." It is for the claimant to decide what, if any, additional risks are to be insured. There is no obligation to obtain cover beyond the risks that are set out in the definition.

(5) Under paragraph 3.3 of Schedule 3 the defendant is not permitted to insure against the Insured Risks unless the claimant is in breach of its obligation to insure and only after the claimant has been given an opportunity to rectify its breach.

(6) Paragraph 5 of schedule 3 provides for the suspension of rent. Under paragraph 5.1 it applies "… if the Premises are damaged by an Insured Risk or if the Facility is so damaged as to affect materially and adversely the Premises…".

Under paragraph 5.2 the Principal Rent is suspended "until the Premises have been reinstated and made fit for occupation, use and enjoyment …".

26. The defendant alleges that the claimant is in breach of clause 5.2 of the lease under which it covenanted to observe and perform the provisions of the schedules to the lease. The defence continues:

> *"12. Schedule 3 clause 2.1 of the Lease confirms that the Insurance Premiums are to include all monies and costs expended, or required to be expended by the Claimant in connection with cover against Insured Risks and loss of Principal Rent. Clause 1.1 of the Lease defines Insured Risks as including "the risks and other contingencies against which the Premises and Facility are from time to time insured" and "such other risks as the Claimant may consider it prudent to insure".*
>
> *13. The insurance protects both the Claimant and Defendant in particular circumstances, where there is a loss of Principal Rent. It is reasonable for the Defendant to expect that the Claimant would obtain satisfactory cover. It is the Defendant's position that satisfactory cover includes "such other risks prudent to insure" and that it is reasonable to expect that the Claimant would obtain cover for loss of rent and service charges related to forced closures and/or denial or loss of access due to notifiable disease and/or government action.*
>
> *14. The Claimant held itself out as an established Landlord and the Defendant therefore trusted the Claimant would procure the appropriate insurance in good faith."*
>
> *…*
>
> *"16. The Claimant is put to proof that it has obtained adequate insurance and that it has sought recovery from such insurance cover. In the event that the insurance does not cover loss of rent and service charges related to the forced closures of the stores, the Defendant avers that the Claimant has failed to meet its obligations under the Lease by failing to procure an appropriate extension to the insurance.*
>
> *17. It is the Defendant's position that the Claimant could and should have insured the Property for loss of rent and service charges to include cover where the Defendant is forced to close its stores or there is a loss or denial of access due to notifiable disease and/or government action. In failing to do so the Claimant has failed to adequately insure the Premises and is in breach of the Lease."*

27. The claimant's position was set out in paragraph 16 of the reply:

> *"(a) The Claimant was not required by the terms of the Lease (or otherwise) to insure against the risk of global pandemic nor loss of rental income attributable to such a global pandemic.*

> *(b) The Claimant did not insure against the risk of non-payment of rent as a result of the Premises being closed to the public as a result of a global pandemic. The Claimant is not entitled to claim on its insurance policy in respect of such a risk."*

28. The essence of the defendant's case, as it is pleaded, is that the claimant was under an obligation pursuant to the terms of the lease to insure against loss of rent due to a notifiable disease or government action, that the claimant is obliged to claim under the policy if such cover exists and if no relevant cover is obtained, the claimant is in breach of the lease. The defendant does not make a counterclaim for damages. It merely asserts that the claimant's alleged breach in relation to insurance is a defence to the claim. Furthermore, the defence does not address either the nature of the loss of rent the claimant could, or should, insure against or how it is said that the rent cesser provisions in the lease operate.

29. The claimant's primary submission is that unless the rent cesser provisions bite, it has not suffered any loss and, therefore, has not suffered a loss of rent that it could claim under its policy. The insurance cover relates to the claimant's loss to its business, not a notional loss because the defendant does not pay rent because the Facility is closed.

30. The defence and paragraph 16(a) of the reply give rise to a short point of construction. The claimant is, by virtue of clause 5 and paragraph 4 of the lease, obliged to insure against the Insured Risks and the other items referred to in paragraph 2.1 of schedule 3. The wording of paragraph 2.1, which is headed Insurance Premiums, is not entirely satisfactory. It requires that, amongst other things, insurance premiums "… are to include all monies and costs expended, or required to be expended, by the Landlord in connection with effecting and maintaining cover against Insured Risks" … and similarly effecting and maintaining cover against loss of rent. This seems to confuse the cost of cover, the premium, with the cover that is to be obtained. Nevertheless, it is clear from the lease that the claimant is only obliged to obtain and pay for cover against the Insured Risks and loss of rent. There is nothing in the definition of Insured Risks that refers to notifiable disease or government action and the final words are clear that it is for the claimant to decide which additional risks will be covered. This cannot be construed as creating an objective measure of reasonableness. The claimant is insuring its interests, albeit the defendant is required to contribute to the cost of the premium as part of its obligation to pay rent (clause 3.4).

31. Paragraph 16(b) of the reply makes two assertions. First, that the claimant did not obtain cover against the risk of the Facility being closed due to the pandemic. That is not, in fact, correct. Cover against the risk of loss caused by notifiable disease was obtained. The second assertion is that the claimant is not entitled to claim under its policy in respect of that risk.

32. The claimant produced a letter from Marsh, the claimant's brokers, before disclosing the policy, which summarises the scope of the cover held by the claimant:

> *"The insurance cover arranged on your behalf as the landlord for Westfield London provides coverage as specified under the terms of the lease for damage (as defined in the lease, and generally meaning physical damage) to the Premises and subsequent loss of rent to the landlord as a result of such damage to the Premises. There is no cover or any requirement for coverage under the terms of*

the lease provided by the policy for any business interruption suffered by a tenant, either generally or specifically in terms of non-payment of rent owing to a Pandemic or other Government ordered closure. This is customarily the responsibility of the tenant to arrange for insurance cover to protect against damage to their own property, subsequent business interruption and legal liability to third parties."

33. Mr Caplan submitted that the letter is at odds with the policy. The material terms of the policy terms are:

"INSURED: [The definition includes the claimant]

LOCATION: Westfield London Shopping Centre, Ariel Way, London W12 7SQ

INTEREST: Material Damage & Loss of Rent (including Terrorism) as defined in the Policy

…

PERILS INSURED: All Risks other than as excluded within the policy

Loss of Rent – In the event of Damage to the Property Insured as a result of an Insured Event which causes interruption or interference to the Insured's Business, the Insurer agrees to pay the Insured the resulting Loss of Rent [emphasis added]

INSURED'S BUSINESS: All activities, functions or occupations of whatsoever nature or description carried on by the Insured …

…

It is hereby noted and agreed that the following amendment is made to the policy …

Loss of Rent – Specified Causes

…

viii Notifiable Diseases and Other Incidents:

a. discovered at an Insured Location

b. ….

c. which are reasonably likely to result from an organism discovered at an Insured Location and/or

d. occurring within the Vicinity of an Insured Location during the Period of Insurance."

34. The policy covers material damage and loss of rent from one of the perils insured, including a notifiable disease. Critically, however, the policy only covers loss

resulting from physical damage to property, including the Facility (and therefore the Premises) and damage to the claimant's business, not the defendant's business. This is the distinction made in the letter from Marsh.

35. In light of the terms of the policy, the defendant no longer relies upon its pleaded defence alleging that the claimant was in breach of its obligations to obtain insurance cover against the risk of a pandemic. It is clear, whether or not there is cover, no claim has been made under the policy by the claimant for loss of rent.

36. The defendant's revised case, having now seen the policy terms, has not been pleaded. Mr Caplan submitted that there had not been time before the hearing to produce a fully drafted amended defence. That may be correct. However, it is difficult to accept that the defendant was unable provide at least an indication in writing of the case it wishes to pursue both as to the proper construction of the lease and terms it says are to be implied within it. The defendant's precise landing point in terms of the case it wishes to pursue is far from clear.

37. The defendant's case as it is now advanced by Mr Caplan relies upon an issue of construction of the lease and implied terms. My understanding of the defendant's case is that on a proper construction of the lease, or as a consequence of implied terms:

> (1) That the claimant is obliged to maintain insurance for loss of rent resulting from a notifiable disease and/or government action and the claimant must claim under the loss of rent insurance policy it maintains before commencing proceedings to recover rent.
>
> (2) That the rent cesser provisions in the lease, properly construed, apply to the COVID-19 pandemic which amounts to a suspending event for the purposes of paragraph 5 of Schedule 3 of the lease.

38. Neither party directly relied upon any authority in relation to the construction of the lease. However, the proper approach to construction is not in doubt and can be seen from recent decisions in the Supreme Court including *Arnold v Britton* [2015] UKSC 36 [14]-[[23] and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 [8]-[15].

39. The approach to the implication of terms can be seen from Lord Neuberger's judgment in *Marks & Spencer plc v BNP Paribas Securities Trust Co (Jersey) Ltd* [2015] UKSC 72 where he cites with approval the following summary of the principles:

> *"18. In the Privy Council case of* ***BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings (1977) 52 ALJR 20*** *, 26, Lord Simon (speaking for the majority, which included Viscount Dilhorne and Lord Keith) said that:*
> *"[F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.""*

40. Conditions (2), (3) and (4) are particularly important in connection with this case. The observations made by Lord Neuberger at paragraph [19] of his judgment in relation to Lord Simon's formulation do not need to be referred to other than to remark that he records Sir Thomas Bingham's observations in *Philips Electronique Grand Public SA v British Sky Broadcasting* [1995] EMLR 472 that: *"it is difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue"*, because *"it may well be doubtful whether the omission was the result of the parties' oversight or of their deliberate decision", or indeed the parties might suspect that "they are unlikely to agree on what is to happen in a certain … eventuality" and "may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur"*.

The defendant's case

41. Mr Caplan points to a number of features in the lease:

(1) The claimant has an obligation to take out insurance for a wide range of risks.

(2) The defendant is required to contribute to the cost of the claimant's insurance.

(3) The defendant is not permitted to insure for the same risks as the claimant. If the claimant opts to insure against Notifiable Disease then it becomes an Insured Risk and the defendant may not take out cover for that risk.

(4) The defendant is obliged to trade at the premises under the keep open provisions and is liable for liquidated damages if it fails to do so.

(5) The obligation to keep open and trade from the Premises is removed either because of damage by an Insured Risk or because to keep open and trade would be contrary to the emergency coronavirus regulations.

(6) Damage by an Insured Risk should be construed more widely than merely being damage to the Premises.

(7) If the claimant chooses to insure against loss of rent caused by an Insured Risk that is related to COVID-19 or compulsory closure of the Premises, both the claimant and the defendant have an interest in the loss of rent claim.

42. Mr Caplan also relied upon a passage in *Hill and Redman: Landlord and Tenant* at 3529.1. Notably the passage occurs in a section of the work that concerns the parties' obligations in respect of the fabric and management of a building.

"The extent of the parties' respective obligations to each other and liability to each other for insured risks will be a matter of construction. So, it had been held that where a landlord had been fully indemnified in the manner envisaged by the provisions of the tenancy agreement, he could not recover damages from the tenant in addition, so as to provide himself with what would in effect be a double

indemnity ('the Rowlands principle')[3]*. It has subsequently been held that the following principles may be derived from the authorities*[4] *:*

(1) The court should construe the terms of the tenancy agreement in order to determine how the parties have agreed to allocate risk between themselves.

(2) A covenant by a landlord with his tenant to insure the demised premises in return for mutual obligations by the tenant is an important indicator that the parties intended that the tenant:
(a) need not take out insurance for the risk covered by the landlord, and
(b) would not be liable for any loss or damage suffered by the landlord falling within the scope of that which the landlord has agreed to cover.

(3) The strength of that indicator will depend upon the other terms of the tenancy, including whether they provide some alternative explanation for the covenant to insure.

(4) The strength of that indicator is greater where the tenant is contractually obliged to pay for, or to contribute towards, the cost incurred by the landlord of insuring the premises.

(5) Other relevant indicators include terms of the tenancy which relieve the tenant from repairing or other contractual obligation in the event of damage by an insured risk, or which require the landlord to lay out insurance monies on remedying damage caused by an insured risk, or which suspend the obligation to pay rent whilst damage from an insured risk prevents use of the demised premises. But the application of the principle in Rowlands does not depend upon the inclusion of all or any of these terms in the tenancy agreement.

(6) Where applicable, the principle in Rowlands will defeat a claim brought against the tenant in negligence even in the absence of a clause expressly exonerating the tenant from liability for negligence."

43. If the claimant takes on the burden of insuring against risks in which the defendant is interested it is possible to see that either by construction or implication of a term it may be arguable that the claimant must make a claim if the relevant circumstances arise. It is unclear, however, how the defendant puts its case beyond that general proposition. If there is a failure to make a claim, what are the consequences? If the breach were to have the effect of suspending the obligation to pay rent, how long would it operate and in what amount? No answers to these fundamental questions have been provided.

44. In any event, the lease does not permit the defendant to assert that the claimant had an obligation to include notifiable diseases and/or government direction as insured risks. The lease is clear that the obligation to insure is limited to the risks that are named in the definition. The claimant is not obliged to insure against any other risks unless it chooses to do so. Furthermore, the point does not assist the defendant, even if there is

[3] *Mark Rowlands v Berni Inns Ltd* [1986] 1 QB 211
[4] *Frasca-Judd v Golovina* [2016] 1 WLR 107 (QB) at para 48

an obligation in respect of such risks, because there is nothing in the lease that could ground the notion that the claimant is obliged to insure the defendant's business against loss. The fact that the defendant is obliged to contribute to the cost of insurance does not enable the lease to be construed in this way. The tenant's obligation to pay for the claimant's insurance is part of the rent the defendant pays for the premises.

45. There is a helpful passage in *Halsbury's Law*s Vol 60 para 565 concerning the effect of the claimant and the defendant having different insurable interests in the Premises:

> "*There are many cases in which two or more persons, such as landlord and tenant … each have an interest in the same property. These interests are separate and distinct; each is capable of supporting an insurance and each of the two persons interested may insure the property for his own protection. The insurance so effected insures for the sole benefit of the person effecting it and the other persons interested in the property have no right to participate*."

46. This passage makes the point that although the insured risks may be common between the claimant and the defendant, the scope of the cover each party is able to obtain will not be entirely common. Indeed, there is no obvious reason why, even if it were possible to do so, the claimant should wish to obtain cover against losses to the defendant's business. Such losses are for the defendant to insure.

47. The policy of insurance obtained by the claimant covers its losses, not loss incurred by the defendant. The point is made clearly in Lewison on Drafting Business Leases 8th ed. at para 7-16:

> "*If loss of rent is covered by the insurance policy, but the rent does not abate, then unless the tenant is the insured or one of the insured, the insurers will not pay because the landlord will have suffered no loss. If, however, the tenant takes out consequential loss insurance in respect of his business, then if the rent does not abate, the extent of his claim on his own policy will, to that extent, be diminished*".

Rent Cesser/Suspension

48. The defendant's obligation to pay rent continues unless the rent cesser provisions in the lease suspend that obligation. The starting point is the express terms of the lease.

49. Mr Caplan starts with the keep open covenant in clause 4.8. The defendant is obliged to keep open the Premises (other than the storage facility) and to maintain active trade unless it is prevented from doing so by an Insured Risk or do so would be unlawful. It is clear that during periods of lockdown the obligation to trade is suspended. The same position would apply if, for example, the Premises were damaged by fire. There is, however, nothing in clause 4.8 that has the effect of suspending the obligation under clause 3, as amended by the side letter, to pay rent.

50. The rent suspension provisions are found in paragraph 5 of schedule 3. Paragraph 5.1 refers to the provisions of paragraph 5.2 applying if the Premises "… are damaged by an Insured Risk or if the Facility is so damaged as to affect materially and adversely the Premises…". Paragraph 5.2 provides for rent "… or a fair proportion … according

to the nature and extent of the damage sustained…" to be suspended and cease. It goes on to limit the period of suspension "… until the Premises have been reinstated and made fit for occupation and enjoyment …". Paragraph 5.4 provides for the resolution of a dispute about the amount of abatement of the period of abatement to be referred to a surveyor acting as an expert.

51. I consider the terms under which rent cesser apply are clear. They only apply where there is physical damage to the Premises. Rent is suspended until the premises have been reinstated. There is no basis for construing these provisions so that they apply in the event of the Facility and/or the Premises being closed due to a legal requirement. The obligation to keep open and to trade is suspended but that is a quite different matter.

52. The defendant has not provided a draft implied term that would extend the scope of the rent cesser provisions and it is very difficult to see how such a term could be drafted with any precision. In addition, any such provision would contradict the terms of the lease and lastly, and fatally, such a term is not so obvious it did not need to be said. The lease apportions risk between the parties and the rent cesser provisions apply exceptionally in the limited circumstances they expressly contemplate, and no further.

Expert determination

53. At the hearing Mr Caplan sought to rely upon paragraph 5.4 of Schedule 3 of the lease which provides that a dispute about the abatement of the Principal Rent or the duration of the period of abatement under the rent cesser provisions must be submitted for determination by an independent expert. The premise of this submission is that such a dispute exists and, therefore, the claim must be stayed to permit the expert determination to proceed.

54. It is fair to say that this submission was not pursued with a great deal of enthusiasm and rightly so. The defendant has not applied for a stay of the claim and, in any event, the defendant has not disputed the jurisdiction of the court or followed the procedure in CPR rule 11. It is deemed to have submitted to the jurisdiction of the court pursuant to CPR rule 11(5). Furthermore, the defendant has served a defence. There is no proper basis for granting a stay.

Summary judgment

55. I am satisfied that the issues of construction the court has been asked to consider fall well within the ambit of typical issues for determination on an application for summary judgment. They are properly regarded as being 'short'.

56. Equally, I am satisfied that the claimant has discharged the burden of establishing that the rents it claims are due and the defendant has no real prospect of defending the claim to recover the outstanding rents. There are no compelling reasons why the claim should go to a full trial. The basis of the defence does not rely upon any new principles of law. The issues raised by the defendant are capable of being resolved by applying the well-established principles that govern the construction of contracts and the implication of terms. The context in which the claim is made does not entitle the defendant to contend that these principles are now part of an area of developing law.

Equally the defendant is not able to point to any conduct on the part of the claimant that might be regarded as oppressive or that the claim has been issued prematurely.

57. The claimant is entitled to judgment for the rent claimed and interest at the rate specified in the lease.

Adjournment

58. When considering an application to adjourn a hearing the court must apply the overriding objective and ensure that the claim is dealt with justly and at proportionate cost. Although the court must have regard to all the factors set out in CPR rule 1.1(2), ensuring that the case is dealt with expeditiously and fairly and allotting an appropriate share of the court's resources are factors of particular importance.

59. The application was made based upon a need to have time to re-plead the defence. It seems to me that in considering the application the court is bound to form a provisional view about the merits of the proposed amendments and whether granting an adjournment has a real likelihood of enabling the defendant to formulate a defence that should be tested upon a full hearing of the application for summary judgment. Furthermore, the timing of the application and if it is late any reasons for lateness are material considerations.

60. The application for an adjournment was made very late. The defendant was made aware of the application for summary judgment on 4 February 2021 but did not make the application to adjourn until 16 March 2021. During the intervening period the defendant's in-house legal department could have instructed counsel to advise. No such step appears to have been taken until the week commencing 8 March 2021. There were discussions between the parties during that period which were without prejudice. It is trite, however, that a party should not assume there will be a favourable outcome to negotiations and should take formal steps to protect its position at the same time as seeking to resolve a claim.

61. It was open to the defendant to seek a copy of the claimant's insurance policy from 2 February 2021 when the reply was served and open to the defendant to instruct counsel concerning the application for summary judgment from 4 February 2021. No reason for failing to act promptly has been given. In any event, if counsel had been instructed to settle an amended defence in the week commencing 8 March 2021 there would have been adequate time for a draft to have been produced. Even on the defendant's own timetable of events it was open to the defendant to provide the claimant and the court with an outline draft of the relevant terms of the lease construed as the defendant proposed and draft implied terms.

62. There is of course some prejudice to the defendant in refusing to adjourn the hearing. However, an adjournment would also have been prejudicial to the claimant given that no payment of rent has been made by the defendant for 12 months and an adjournment is likely to have led to a hearing being listed in May or June 2021. Furthermore, time had been set aside time in the court diary for the hearing that would not have been available to other court users. These factors, taken with the somewhat diffuse nature of the proposed new defence, led me to conclude that the court's discretion should be exercised against granting an adjournment.

Conclusion

63. Judgment will be entered for the claimant in the sum claimed together with interest at the contractual rate.

APPENDIX

MATERIAL TERMS OF THE LEASE

1. DEFINITIONS AND INTERPRETATION

In this Lease unless the context otherwise requires:

1.1 Definitions

……

Facility Opening Hours means:

1000 to 2200 on Monday – Saturdays

1200 to 1800 on Sundays

(in each case on public holidays); and

1000 to 2100 on public holidays (excluding Sundays)

(subject in each case to such statutory restrictions on opening hours as may apply) or such other hours as

specified by the Landlord from time to time;

……

Insured Risks means (subject to such exclusions, limitations and excesses as may be imposed by the Insurers and to the extent that insurance against such risks for properties similar to the Facility may ordinarily and reasonably be arranged in the United Kingdom market with an insurer of good repute at reasonable commercial rates and on reasonable commercial terms) the risks and other contingencies against which the Premises and the Facility are from time to time insured under this Lease. Such risks or other contingencies include fire, lightning, thunderbolt, storm, tempest, flood, bursting and overflowing of water tanks, apparatus or pipes, sprinkler leakage, earthquake, impact by road and rail vehicle, aircraft (but not hostile aircraft) or other non-hostile aerial device and devices dropped from them, riot and civil commotion, strikes, labour or political disturbance, explosion (including of boilers and other heavy apparatus), malicious damage (including where caused by acts of terrorism), accidental damage to underground pipes and cables, frost, subsidence, heave, landslip and such other risks as the Landlord may consider it prudent to insure.

……

Outside Hours Charge means the fair and proper cost to the Landlord of (at the Landlord's discretion):

(a) providing any of the Services outside the Facility Opening Hours; and / or

(b) permitting the exercise of the right at paragraph 1 of Part 2 of schedule 1 outside the Facility Opening Hours (or a fair proportion of such cost if provided to be enjoyed by another tenant or tenants);

…….

Uninsured Act of Terrorism means any malicious damage caused by an act of terrorism which is not an Insured Risk due to being:

(i) excluded, or partially excluded, from being so by reason of withdrawal of cover by the insurer and which is not otherwise available to be insured in the London Insurance Market at reasonable commercial rates and on reasonable commercial conditions; or

(ii) withdrawn from insurance cover by the Landlord on the grounds that cover cannot be placed in the London Insurance Market at reasonable commercial rates and on reasonable commercial conditions; or

(iii) excluded, or partially excluded, from insurance cover in relevant circumstances by reason of the operation of policy conditions.

……

3. **RENT**

The Tenant covenants to pay by way of rent during the Term, without any deductions, counterclaims or set offs (except where required by Law):

3.1 the Principal Rent……

3.2 (in respect of each Service Charge Period beginning or ending during the Term) the amount calculated by multiplying the Service Charge by the Service Charge Proportion at the times and in the manner set out in schedule 2, payable from and including the Service Charge Rent Commencement Date.

……

3.4 within fourteen (14) days of demand the Insurance Proportion of the Landlord's insurance premiums specified in schedule 3 from and including the Insurance Rent Commencement Date.

3.5 VAT …

3.6 Interest …

……

4. **TENANT'S COVENANTS**

The Tenant covenants with the Landlord throughout the Term, as follows:

……

4.8 **Trading during Facility Opening Hours**

4.8.1 To keep the Premises (excluding the Storage Area) open for business during the Facility Opening Hours and to maintain during the Facility Opening Hours active trade throughout all those parts of the Premises where retail trade is usually carried out or which are intended for retail trade, unless:

4.8.1.1 the Tenant is prevented from doing so because of damage by Insured Risk; or

……

4.8.1.4 to do so would be unlawful;

…….

4.8.3 If the Premises (excluding the Storage Area) are closed for trading during the Facility Opening Hours in breach of clause 4.8.1 then:

4.8.3.1 (if applicable) the Base Rent shall become payable for each day on which the Premises are so closed notwithstanding that the Rent Commencement Date has not occurred; and

4.8.3.2 (in addition to continuing to pay the Base Rent pursuant to this Lease) to pay the Landlord by way of liquidated damages forthwith on written demand for each day on which the Premises are closed a sum equal to twenty five percent (25%) of the Base Rent divided by the total number of days when the Facility has been open to trade during the relevant Year (as that term is defined in paragraph 1 of Schedule 4).

4.9 Trading Outside Facility Opening Hours

4.9.1 Not to open the Premises (excluding the Storage Area) for business outside the Facility Opening Hours without obtaining the prior consent of the Landlord……

……

4.9.3 In so opening the Premises for business outside the Facility Opening Hours, to comply with any conditions which the Landlord shall reasonably consider to be appropriate and pay within ten

(10) Working Days of demand to the Landlord the Outside Hours Charge.

……

4.15 Statutory Requirements

……

4.15.2

4.15.2.1 To comply with them, and not to breach, any Law which at any time affects the Premises, their use and / or the enjoyment of people in them;

……

5. **LANDLORD'S COVENANTS**

The Landlord covenants with the Tenant as follows:

……

Performance of Landlord's Obligations in Schedules

5.2 To observe and perform its obligations in the schedules.

……

11. **NO WARRANTY**

The Landlord does not warrant that the use of the Premises for the Permitted use is authorised under any Law or that the Premises are fit or otherwise usable for any specific purpose.

……

13. **EXPERT DETERMINATION PROCEEDINGS**

13.1 The provisions of this clause 13 apply to determination of issues by an independent expert if it is invoked elsewhere in this Lease or the parties otherwise agree to invoke it.

……

SCHEDULE 3

Insurance

1.**Interpretation**

In this schedule:

1.1

1.2

1.3

1.4

2. Insurance premiums

2.1 Insurance premiums are to include all monies and costs expended, or required to be expended, by the Landlord in connection with:

2.1.1 effecting and maintaining cover against Insured Risks;

2.1.2 effecting and maintaining cover against loss of:

2.1.2.1 the Principal Rent……

……

which cover the Landlord covenants to effect for a period of not less than five (5) years;

……

3. Tenant's obligations in relation to insurance cover

……

3.3 The Tenant may not insure the Premises against any of the Insured Risks other than where the Landlord is in breach of its obligations under paragraph 4.1 and then only provided that the Tenant has so notified the Landlord in writing and has allowed the Landlord a reasonable period of time in which to rectify the breach.

……

4. Landlord's obligation to insure and reinstate damage by Insured Risks

4.1 The Landlord shall keep the Facility (including the Premises) insured with an insurer of good

repute against the Insured Risks and other items referred to at paragraph 2.1 for the full cost of reinstatement, subject to any excess or deductible and any exclusions, warranties or other terms imposed by the Insurers on the insurance cover.

…….

5. Suspension of rent

5.1 Paragraph 5.2 applies if the Premises are damaged by an Insured Risk or if the Facility is so damaged as to affect materially and adversely the Premises, except in the circumstances and to the extent that insurance cover is vitiated by an act or default of the Tenant.

5.2 The Principal Rent and the amount payable by the Tenant pursuant to paragraph 2 of Part 1 of schedule 2, or a fair proportion of them according to the nature and extent of the damage sustained, are to be suspended and cease to be payable until the Premises have been reinstated and made fit for occupation, use and enjoyment, or, if earlier, until the expiry of the period for which loss of rent insurance has been obtained.

……

5.4 A dispute as to the amount of abatement of the Principal Rent or the Additional Rents or the duration of the period of abatement shall be submitted to an independent chartered surveyor who shall act as an expert and the provisions of clause 13 shall apply.

……

8. Uninsured Acts of Terrorism

8.1 The following provisions of this paragraph 8 apply if the Facility or the Premises are damaged or destroyed by an Uninsured Act of Terrorism so as to render the Premises unit for occupation, use or enjoyment.

……

8.9 Paragraph 5.2 is to apply in relation to any destruction or damage referred to in paragraph 8.1…..

……

and paragraphs 5.3 and 5.4 are to apply accordingly.