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RESTRICTIONS ON COMMERCIAL LANDLORDS CONTINUE DESPITE OTHER RESTRICTIONS BEING EASED

Following the outbreak of the Covid-19 pandemic, the Government introduced emergency legislation which restricted the usual enforcement options open to commercial landlords where their business tenants fell into rent arrears.

This included a ban on forfeiture on the grounds of non-payment of rent, a blanket ban on a landlord's right to oppose the renewal of a commercial tenancy based on the tenant's persistent arrears where it is a protected tenancy, restrictions on using Commercial Rent Arrears Recovery (CRAR), and a ban on winding up petitions where the debt has been caused by Covid-19.

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In mid-September 2021 it was announced that the restrictions that were introduced by the Corporate Insolvency and Governance Act 2020 as a response to the Covid-19 pandemic would not be extended. Instead, new restrictions have been introduced for winding-up petitions presented between 1st October 2021 and 31st March 2022.

Whilst this undoubtedly comes as a relief to businesses that are looking to recover outstanding debts, the restrictions that prevent landlords forfeiting a lease due to non-payment of rent have been extended yet again until 25th March 2022. It also remains the position that a winding-up petition may not be presented in respect of commercial rent that is unpaid because of the impact of Covid-19.

Whilst this has undoubtedly provided relief to many commercial tenants struggling to pay their rents whilst businesses have been closed, it also presents a further struggle for landlords reliant on the rental income.

The most viable option left for many landlords is to issue a money claim in order to recover rent arrears. The industry has seen a recent flurry of these cases since the recent extension was announced where landlords are issuing claims before the rules change in March 2022 (explained below).

DEALING WITH COVID-19 RELATED RENT ARREARS AFTER 25TH MARCH 2022

Following the extension of the restrictions on commercial landlords where there are rent arrears, lots of landlords and tenants will be wondering what will happen after 25th March 2022 when restrictions supposedly come to an end.

The Government announced in a press release earlier this year that they intend to introduce new legislation to effectively ring-fence rent arrears that were built up during the Covid-19 pandemic and separate them from any rent arrears that have accrued irrespective of the pandemic. There have also been discussions around introducing a binding arbitration process to assist in the resolution of disputes between business landlords and tenants after this time.

The Government has been clear to both landlord and tenants affected by rent arrears that where the rent that is not directly consequential to COVID-19 closures, lockdowns and restrictions, it should be paid. This ring-fencing will therefore not be a green light for tenants to avoid liability for all rent arrears accrued between March 2020 and July 2021 (when restrictions and business closures were lifted). Tenants will not be given a free pass during periods where their industry was effectively 'business as usual'.

Following on from this, it is expected that the proposed arbitration process will only apply where businesses have impacted by the forced closures during the pandemic, such as those in the hospitality industry. Aside from this, there isn't much information available at present about how the proposed arbitration system would work, how long the arbitration process will take, and perhaps most importantly for those already in financial difficulty – how much it will all cost.

A SIGN OF REASSURANCE FOR LANDLORDS WITH TENANTS IN RENT ARREARS?

In the recent case of *London Trocadero (2015) LLP v Picturehouse Cinemas Ltd* [2021] EWHC 2591 (Ch), the High Court was asked to determine a case where rent arrears of £2.9m had accrued during the Covid-19 pandemic at a time when there were forced business closures impacting the tenants' business.

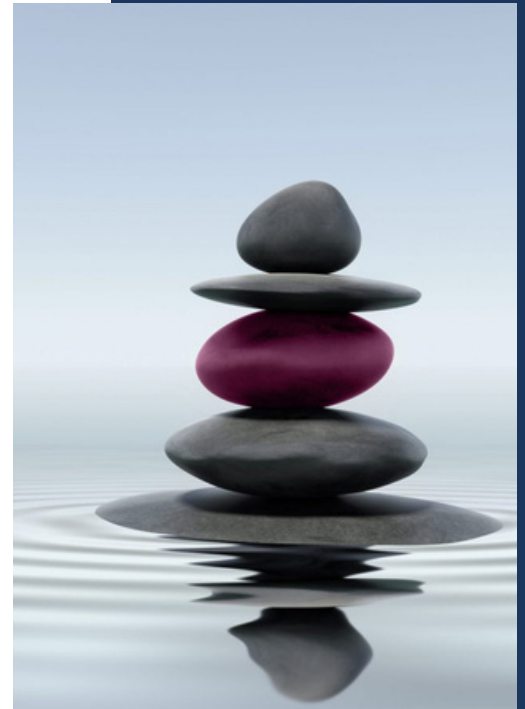
The business tenants in this case were cinemas which had been forced to close for much of the pandemic. The lease provided occupation to the tenants on the basis that the building could only be used for the purpose of a cinema – although the landlord provided no warranty to the tenant within the lease as to the 'lawfulness' of such use.

The cinemas sought to argue that rent did not fall due during periods where the premises could not be used as a cinema, and lawyers acting for the cinemas raised a number of novel arguments to support this, including an argument that the permitted use under the lease was effectively illegal.

The court ultimately rejected the tenants' arguments, and gave judgment for the rent arrears.

This is the latest of three reported cases in this area (the others being *Commerz Real Investmentgesellschaft mbH v TFS Stores Limited* [2021] EWHC 863 (Ch) and *Bank of New York Mellon (International) Ltd & Ors v Cine-UK Ltd & Ors* [2021] EWHC 1013 (QB)). Lawyers in all three cases raised interesting and novel arguments in an attempt to limit the tenants' liability in part or in full for rent payable from March 2020 onwards, but all ended with the court finding in favour of the landlords (assuming that there are no appeals!).

These cases may be reassuring to landlords with tenants in significant rent arrears, and remind landlords that whilst options are extremely restricted at present, it is still possible to bring a money claim in the County Court or High Court to get a CCJ for the arrears.



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If you would like to discuss or need any help or support on any of the issues above then please contact the Machins' Property Litigation Team on 01582 514000.