CLAIM NUMBER G33YY383

IN THE COUNTY COURT AT LIVERPOOL
BUSINESS AND PROPERTY WORK
BEFORE DISTRICT JUDGE JOHNSON

(1) ATMORE CENTRES LIMITED
(2) ATMORE INVESTMENTS LIMITED

Claimants

and

TFS STORES LIMITED

Defendant

RESERVED JUDGMENT
HANDED DOWN ON 1 NOVEMBER 2021

I direct that copies of this version of the judgment as handed down may be treated as authentic.

1. This claim came before me on 18 May 2021 for the hearing of the Claimant's application dated 4 March 2021 for summary judgment pursuant to CPR 24.2 and/or for an order striking out of the defence pursuant to CPR 3.4(2)(a).

2. At the hearing, the Claimants were represented by Mr Cowen QC, Leading Counsel and the Defendant was represented by Mr Vickery, Counsel.

3. The claim is for outstanding rent, service charges and interest alleged to be due in respect of two premises. The First Claimant ("ACL") is the landlord, and the Defendant ("TFS") is the tenant of Kiosk 1, Spinning Gate Shopping Centre ("Spinning Gate"). The Second Claimant ("AIL") is the landlord and TFS is the tenant of Unit 16 Castle Walk, Newcastle Under Lyme ("Castle Walk").

The leases

4. On 30 August 2005, ACL granted a lease of Spinning Gate to TFS for a term of 10 years commencing on 30 August 2005 ("Lease A"). Lease A included the following provisions:
   a. Permitted Use was defined as *"use as a high class kiosk for the purpose of retail sale of perfumes fragrances, cosmetics and associated products"*.
   b. The Initial Rent was £15,000 per annum excluding VAT.
   c. Loss of Rent was defined at clause 1.12 as *"the loss of Rent for the time being payable for such period (being not less than three (3) years) as may be reasonably required by the Landlord from time to time having regard to the likely period required for reinstatement in the event of destruction (whether total or partial) in an amount which takes into account the Landlord's estimate of any potential increases in Rent."*
   d. Prescribed Rate was defined at clause 1.20 as *"interest (both before and after any judgment of four (4) per cent per annum over the base rate of Barclays Bank plc..."*

e. Insurance Rent was defined at clause 1.7 as *"a proportionate part (which shall be conclusively determined by the Landlord save in case of manifest error) of the premiums paid from time to time by the Landlord for insuring the Centre and the Plant and the Systems therein against the Insured Risks including (but without prejudice to the generality of the foregoing) all architects' surveyors' and legal fees for rebuilding and for insuring against Loss of Rent."*

f. Insured Risks were defined at clause 1.8 as *"risks in respect of loss or damage by fire and such other risks as the Landlord may consider necessary."*

g. At clause 4.1.1, TFS covenanted to *"pay the rents on the days and in the manner set out in this Lease and not to exercise or seek to exercise any right or claim to withhold the rents or claim to legal or equitable set-off."*

h. Pursuant to clause 3.1, the Initial Rent was payable yearly until the first Review Date and thereafter subject to review, by equal quarterly payments in advance on the usual quarter days.

i. Pursuant to clause 3.2, by way of further rent, the following were also recoverable:

   i. Clause 3.2.2: Insurance Rent (which was payable within 10 working days of demand under clause 4.10.1)

   ii. Clause 3.2.3: Service Charge (which was calculated and payable in accordance with the Fifth Schedule).

   iii. Clause 3.2.1: Interest (which, under clause 4.2, became payable at the Prescribed Rate on the rents from the date when they became due until payment).

j. At clause 4.14, TFS covenanted to ensure that illuminated signs were illuminated during Trading Hours and during the 30 minutes preceding and 45 minutes following those hours, and to keep parts of the Premises which are visible from the common parts attractively laid out and to keep display windows adequately dressed. Those covenants did not apply *"during such reasonable times as the Tenant is undertaking repairs or alterations to the Premises."*

k. At clause 4.20, TFS covenanted to pay on demand ACL's costs incurred in connection with procuring the remedying of breach of any covenants and in connection with the recovery of arrears of rent.

l. At clause 4.21, TFS covenants to observe and comply with any and every enactment so far as they relate to of affect the Premises.

m. At clause 5.3.1, ACL covenanted *"At all times during the Term... to insure the Premises in their full reinstatement value (but not the contents) against loss or damages by the Insured Risks with a reputable insurer or at Lloyds..."*

n. Clause 5.3.2 provided *"In case of damage to or destruction of the Premises by any of the Insured Risks to employ all insurance moneys received by the Landlord other than in respect of Loss of Rent and service charges in reinstating and making good the Premises..."*

o. Clause 6.2 provided *"If during the Term the Premises or any part thereof shall be destroyed or damaged by any of the Insured Risks so as to be unfit for occupation and use by the Tenant hereunder then ... the rent hereby reserved or a fair and just proportion thereof according to the nature and extent of the damage sustained shall as from the date of such destruction or damages until the Premises shall have been rebuilt or reinstated and made fit for occupation and use or for three years from the said date (whichever is the earlier) be suspended and cease to be payable..."*

5. ACL and TFS entered a renewal lease of Spinning Gate on 21 February 2018 for a term of 10 years from 21 February 2018 at an annual rent of £14,000 excluding VAT ("Lease B"). Clause 3.2 provided that the lease was made upon the same terms and subject to the same covenants as Lease A.

6. On 19 December 2001, St Modwen Ventures Limited granted a lease of Castle Walk to The Fragrance Shop Limited (the former name of TFS) for a term of 10 years commencing on 29 September 2001 ("Lease C"). Lease C included the following provisions:

   a. At clause 1.6, the Initial Rent was £13,000 per annum excluding VAT.

   b. At clause 1.7, Permitted Use was defined as *"a retail shop within Class A1(a)... for the sale of perfumes, aftershave, cosmetics and associated products... "*.

   c. Insured Risks were defined at clause 2.1(h) as *"fire, impact, storm, flood, tempest, lightning, explosion, (in peace time) air-craft and articles dropped from them, missiles and projectiles bursting and overflowing of water pipes tanks and other apparatus, impact by road vehicles and terrorism and such other risks as the Landlord may (acting properly) from time to time require to have insured... "*

   d. Insurance Rent was defined at clause 2.1(i) as *"(i) the aggregate of all sums which the Landlord may from time to time pay or incur in accordance with its covenants contained in this Lease (A) in effecting or procuring the insurance of the Demised Premises against the Insured Risks... and in insuring not more than four years annual rent service charge and insurance rent, against the Insured Risks... "*

   e. Prescribed Rate was defined at clause 2.1(t) as *"the rate of interest published as a base rate by Lloyds TSB Bank plc... "*

   f. Pursuant to clause 3.1, the Initial Rent was payable yearly for the first five years and the yearly rent determined under Schedule 4, by equal quarterly payments in advance on the usual quarter days.

   g. Pursuant to Clauses 3.2, 3.3 and 3.4, Insurance Rent, the Service Charge Proportion and all other sums payable under the lease were payable on written demand.

   h. At clause 4.1(a), TFS covenanted to *"pay the rents and other payments on the days and in the manner set out in this Lease and not to exercise or seek to exercise any right or claim to withhold the rents or claim to legal or equitable set-off."*

   i. At clause 4.4 (a)(iii), TFS covenanted to pay on demand on an indemnity basis the landlord's costs in relation to the recovery of arrears of rent or other sums due from TFS.

   j. Pursuant to clause 4.6, interest became payable at 4% per annum above the Prescribed Rate (being the base rate of Lloyds TSB Bank plc) on the rents and other sums from the date when they became due until payment.

   k. At clause 4.7(a), TFS covenanted to observe and perform the Shop Covenants (set out in Schedule 5). Those included (at clause 19.1) a covenant to use the Premises for the Permitted Use only.

   l. At clause 4.11, TFS covenanted at (b) not to do in or near the Demised Premises any act or thing by reason of which the landlord may under any Legal Obligation incur have imposed upon it or become liable to pay any penalty damages compensation costs charges or expenses and at (c) to comply in all respects with the provisions of any Legal Obligation relating to the Demises Premises or to the carrying on of TFS's trade or business. Legal Obligation was defined in clause 2.1(j) as any obligation from time to time created or imposed by any Enactment or Authority which relates to the Demised Premises or their use.

   m. At clause 6, the parties covenanted to observe their obligations in Schedule 6. Under Schedule 6 clause 25.1(a) the landlord covenanted *"at all times during the Term to*

insure or procure the insurance of the Demised Premises ... the Main Structure and the Service Area in an insurance office of good repute upon the usual terms and conditions of such insurance office and through such agency as the Landlord may decide in respect of:

(i) insurance against damage or destruction by the Insured Risks in a sum equal to the full reinstatement value...

(iv) loss or rent for a period of four years ... and Service Area Charge and Insurance Rent."

n. Under Schedule 6 clause 27, *If the Demised Premises the Main Structure or the Service Area or any part of them are damaged or destroyed by any of the Insured Risks so that the Demised Premises or any part of them are unfit for occupation or use of access to them is impossible then ... the rent or a fair proportion of it according to the nature and extent of the damage sustained shall from the date of destruction or damage be suspended until the date on which the Demised Premises are again fit for occupation and use and access is available."*

o. Under Schedule 6 clause 29.3 TFS covenanted not to insure the Demised Premises against any of the Insured Risks (except to the extent that the landlord has failed to do so).

7. AIL (which was then named Atmore Developments Limited) and TFS entered a renewal lease of Castle Walk on 6 June 2018 for a term of 10 years from 21 February 2018 at an annual rent of £16,000 excluding VAT ("Lease D"). Clause 3.2 provided that the lease was made upon the same terms and subject to the same covenants as Lease C.

The dispute

8. The claim is for £13,509.36 in relation to Spinning Gate and £13,127.58 in relation to Castle Walk, plus interest. In the Defence, TFS puts the Claimants to proof as to the breakdown and calculation of the sum claimed (paragraph 7). However, it is not disputed that TFS have failed to pay sums which have fallen due under the Leases.

9. In his witness statement on behalf of the Claimants, Mr Shepherd asserts that *"on or about 24th March 2021 TFS stopped paying its rent and service charges under the Leases. No rent has been paid by TFS since then although some service charge has sporadically been paid."* According to Mr Cowen QC's skeleton, two further payments have been made since the claim was issued in respect of service charges: £428.50 in respect of Spinning Gate and £2.68 in respect of Castle Walk.

10. In his witness statement on behalf of the Defendant, Mr Leonard explains the impact of Covid 19 upon the Defendant. He states that the premises were closed from 26 March 2020 to 15 June 2020, from 5 November 2020 to 2 December 2020 and from 19 December 2020 to 12 April 2021. He says that the Defendant operates from physical store locations only, the Defendant was unable to make any sales during these periods, the Defendant has projected net losses in the financial year ending March 2021 of more than £6.5 million and it is not sustainable for the Defendant to pay full rent.

11. The fact that the Defendant was obliged to close its stores in not in dispute; the Defendant was under a legal obligation to do so from 26 March 2020 under the Health Protection (Coronavirus, Restrictions) Regulations 2020. The position of TFS as set out in the Defence is that TFS is not liable to pay the sums under the Leases because:

    a. The claim has been issued prematurely because this is against the Code of Practice for Commercial Property Relationships During the Covid 19 Pandemic ("the Code of Practice") which requires landlords and tenants to work together to find a resolution in disputes relating to Covid 19 (paragraph 13).

b. The claim seeks to circumvent measures put in place by the government preventing forfeiture, winding up petitions and the Commercial Rent Arrears Recovery procedure where rent arrears are related to Covid 19 (paragraph 14).

c. The Claimants have failed to meet their obligations under the Leases in that it was reasonable for the Defendant to expect that the Claimants would obtain satisfactory cover to include such other risks as may be necessary and/or required and that this would include cover for loss of rent and service charge related to forced closures and/or denial of loss of access due to notifiable disease and/or government action (paragraphs 15 to 20 and 23).

Proposed Amendment to the Defence

12. Mr Vickery in his skeleton put forward the following basis for an amended defence:

    a. On a proper construction of the lease:

        i. The rent suspension provisions include non-physical damage;

        ii. Further or alternatively, the rent suspension provisions include restrictions on TFS's use of the premises;

        iii. Further or alternatively, the rent suspension provisions apply upon occurrence of the risks and other contingencies against which the premises from time to time were or should have been insured under the Leases.

    b. In the alternative, the above were implied terms because they are obvious or necessary to give business efficacy to the Leases.

13. There is no application before the court for permission to amend the defence, nor has a draft amended defence been provided. However, when deciding this application, it is appropriate for me to take the proposed amendments into consideration.

Summary judgment

14. For the application to succeed, the Claimants must show that TFS has no real prospect of successfully defending the claim and there is no other compelling reason why the case should be disposed of at trial (CPR 24.2) or that the Defence discloses no reasonable grounds for defending the claim (CPR 3.4(2)(a)). In the context of the present case, nothing turns upon the different wording of these two provisions.

15. The principles applicable to summary judgment applications were formulated by Mr Justice Lewison in *EasyAir Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) and stated in *Mellor v Partridge* [2013] EWCA Civ 477 as follows:

    a. The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91.

    b. A "realistic" claim is one that carries a degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472.

    c. In reaching its conclusion, the court must not conduct a "mini–trial": *Swain v Hillman.*

    d. This does not mean that the court must take at face value and without analysis everything that the claimant says in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel.*

    e. However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHW Trust v Hammond (No 5)* [2001] EWCA Civ 550.

f. Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus, the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact, where reasonable grounds exist for believing that a full investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2006] FSR 63.

g. On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

16. In accordance with (g) above, Mr Cowen QC invited me to determine the issues between the parties. He also referred me to two recent decisions of the High Court, which are binding upon me in accordance with *Howard de Walden Estates Limited v Aggio* [2007] EWCA 499. Those decisions were those of Chief Master Marsh in *Commerz Real Investmentgesellschaft MbH v TFS Stores Limited* [2021] EWHC 863 (ChD) and Master Dagnall in *Bank of New York Mellon (International) Limited and Cine-UK Limited* [2021] EWHC 1013 (QB). In both cases, the issues were similar to the issues in the current claim, and in one case, the Defendant was TFS itself.

17. Mr Vickery accepted in his oral submissions that the court can deal with a short point of construction but in his skeleton he had referred me to *Hughes v Colin Richards [2004] EWCA Civ 266* in which Peter Gibson LJ in his leading judgment the Court of Appeal at paragraph 22 quoted Lord Browne-Wilkinson in Barrett v Enfield London Borough Council [2001] 2 AC 550: *"[I]n an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out."* I note that, in that case, there was a factual dispute, and that Peter Gibson LJ felt, at paragraph 30, that it was *"highly desirable that the facts should be found so that any development of the law should be on the basis of actual and not hypothetical facts."* This is quite unlike the present case, where there is no real dispute of fact. This case will not turn upon factual evidence or upon the cross-examination of witnesses.

18. Mr Vickery also submitted that the court should not rule on a point of construction without hearing full argument where this will have an effect on third parties, referring in his skeleton argument to *AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098* and *Iliffe v Feltham Construction Ltd [2015] EWCA Civ 715*. However, I note that, in both *Commerz* and *Mellon*, the masters both felt that it was appropriate to give summary judgment in circumstances which are strikingly similar to those of the present case. I further note that the basis of the defence in *Commerz* was identical to the Defence as currently pleaded in the present case.

Real prospect of success

Claim circumvents government measures

19. There is no dispute that, in the light of the Covid 19 pandemic, the government introduced various measures to protect and support businesses from the effect of the pandemic. As far as commercial landlords and tenants are concerned, these included the prevention of forfeiture until 30 June 2021 (under section 82 Coronavirus Act 2020), the prevention of the use of the Commercial Rear Arrears Recovery procedure unless 457 days of rent is outstanding (under the Taking Control of Goods Regulations 2013 (as amended by the Taking Control of Goods (Amendments) (Coronavirus) Regulations 2021) and the prevention of the use of statutory demands and restrictions upon the use of winding up petitions (under Schedule 10 of the Corporate Governance and Insolvency Act 2020).

20. The defence put forward is that the claim seeks to circumvent those measures. Mr Vickery submitted that this claim is a 'loophole which ought not to be allowed without full argument at trial.' However, there is no restriction upon bringing a claim under Part 7 for rent. I agree with the observations of Chief Master Marsh in *Commerz:*

"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 the 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 the courts powers under the CPR, are restricted."

21. TFS has no real prospect of successfully defending the claim upon this basis.

Claim issued prematurely

22. Paragraph 1 of the Code of Practice states: *"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."*

23. Compliance with the Code is voluntary and does not affect the legal rights of landlords. Non-compliance cannot constitute a defence to a claim for breach of contract and there is no real prospect of TFS succeeding in defending the claim on this basis. I shall return to the Code of Practice when considering whether there are compelling reasons for a trial.

Claimants have failed to meet their obligations under the Leases

24. The Defence as currently drafted alleges that it was reasonable for the Defendant to expect that the Claimants would obtain satisfactory cover to include such other risks as may be necessary and/or required and that this would include cover for loss of rent and service charge related to forced closures and/or denial of loss of access due to notifiable disease and/or government action (paragraphs 15 to 20 and 23). Although it is not clearly spelt out, as Chief Master Marsh put it in *Commerz*,

"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."

25. ACL was obliged to insure Spinning Gate against loss or damage by the Insured Risks under clause 5.3.1 of Lease A.

26. AIL was similarly obliged to insure Castle Walk against Insured Risks under clause 25.1(a) of Lease C. Separately AIL was obliged to insure Castle Walk against loss of rent for a period of four years under clause 25(1)(d).

27. Insured Risks in Lease A are defined as: *"risks in respect of loss or damage by fire and such other risks as the Landlord may consider necessary"*. Insured Risks in Lease C are defined as *"fire, impact, storm, flood, tempest, lightning, explosion, (in peace time) air-craft and articles dropped from them, missiles and projectiles bursting and overflowing of water pipes tanks and other apparatus, impact by road vehicles and terrorism and such other risks as the Landlord may (acting properly) from time to time require to have insured..."*

28. I agree with Mr Cowen QC when he says that the Claimants' insurance policy is not an aid to construction of the Leases. However, it follows from the wording of the Leases that any risk against which the landlord has insured becomes an Insured Risk. Copies of the Claimants' insurance policy schedules with Aviva for both Spinning Gate and Castle Walk are exhibited to Mr Shepherd's witness statement together with the policy wording in full. Both schedules identify the following "Selected Covers":

"Property Damage - Buildings

Business Interruption (36 months)".

29. The policy provides, under the heading, "Asset Protection Property Damage":

"We will indemnify You in respect of Damage to the Property Insured occurring during the Period of Insurance at the Premises."

Damage is defined as *"Physical loss, destruction, or damage."*

The policy goes onto provide:

"If rent is insured under this Section We will indemnify You in respect of loss of rent resulting from the Building or any part of the Building

(1) generating the rent received

or

(2) for which rent is payable

being made unfit for the purpose of The Business as a result of damage insured by this Section."

The Business is defined as *"Activities directly connected with the business specified in The Schedule."* There is no mention of TFS or of the tenant in the schedules. The Business must mean the business of the Claimants who are named in the schedules. The loss of rent is insured where it results from physical loss, destruction or damage which renders the premises unfit for the Claimant's business (i.e. that of a commercial landlord).

30. The policy provides, under the heading, "Revenue Protection Business Interruption":

"In respect of each item in The Schedule, We will indemnify You in respect of any interruption or interference with The Business resulting from Damage to property used by you at The Premises for the purpose of The Business occurring during the Period of Insurance caused by any of the following Contingencies

The Schedule will state

(a) which of the following Contingencies apply

(b) any Clauses, Extensions and Additional Contingencies which apply".

Damage is again defined as *"Physical loss, destruction, or damage"*.

The policy goes onto provide:

"If following Damage we are indemnifying you in respect of loss of Gross Rentals and a pre-existing cessor clause in the lease enables a lessee to cease paying Rent which but for the Damage that lessee would normally pay, We will pay Rent as part of the loss."

"We will not indemnify You beyond the date when the terms of the cessor clause in the lease determined that the lessee should begin to pay such Rent again."

As Mr Cowen QC put it, this provision dovetails with the rent suspension clauses in the Leases. If there is physical loss, destruction or damage to the premises, rent will be suspended as provided in the Leases and the Claimants are insured for the rent which they would have received.

31. The Business Interruption section then lists Additional Contingencies:

"The Schedule will state which of the following Additional Contingencies described below apply."

There are provisions for Action by Police, Government or Other Competent Authority and for Specified Disease.

32. Both schedules identify the following Contingencies:

"Accidental loss or destruction of or damage to the Property Insured as detailed in the Policy wording including Additional Contingency A Subsidence.

Glass section is operative

Terrorism section is operative".

The contingencies for Action by Police, Government or Other Competent Authority and for Specified Disease are not listed. It seems to me to be plain that the Claimants did not insure against these contingencies. Even if the policy did include Specified Disease as a contingency, as Mr Vickery conceded, Covid 19 is not listed in the definition of Specified Disease.

33. As the Claimants did not insure against Action by Police, Government or Other Competent Authority or for Specified Disease, they are not Insured Risks. In both Leases, the landlord was given discretion as to which risks against which to insure. In Lease B, there is an explicit added requirement to act 'properly'. As Mr Cowen QC put it, those words are there to protect the tenant, who is obliged to pay insurance rent, and which would not want to overpay insurance rent to the landlord to insure against fanciful risks. I also agree with Mr Cowen QC's analysis that a landlord acting properly would not insure against disruption to the tenant's business. The Claimants here have protected themselves by insuring against physical damage to its buildings and loss of rent arising from such physical damage. In doing so, the Claimants have complied with the Leases.

34. In any event, even if the Claimants have breached any covenant(s) in the Leases, there would be a claim for damages and TFS has not brought a counterclaim. There is no right to set off any such damages against rent; clause 4.1.1 of Lease A and clause 4.1(a) of Lease C make this clear and those clauses are enforceable in accordance with *Electricity Supply Nominees Ltd v IAF Group Ltd [1993] 2 EGLR 95*. The Defence as pleaded does not set out why it is said that the alleged breach by the Claimants exonerates the TFS from its obligation to pay rent.

35. On the basis of the Defence as currently drafted, TFS has no real prospect of successfully defending the claim.

<u>Proposed amendments to Defence</u>

36. If the current application is unsuccessful, TFS will apply for permission to amend the Defence. TFS's revised case is that the Leases should be construed so as to include within the suspension of rent provisions, the suspension of rent as a consequence of non-physical damage and/or restrictions on TFS's use of the premises and/or occurrence of the risks and other contingencies

against which the premises from time to time were or should have been insured under the Leases (I shall call these "the Suggested Provisions"); in the alternative, the Suggested Provisions should be implied terms.

37. In *Arnold v Britton [2015] UKSC 36* Lord Justice Neuberger considered the correct approach to the construction of contracts:

"[15] When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14, [2009] 4 All ER 677. And it does so by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context. That meaning has to be assessed in the light of:

(i) the natural and ordinary meaning of the clause,
(ii) any other relevant provisions of the lease,
(iii) the overall purpose of the clause and the lease,
(iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and
(v) commercial common sense, but
(vi) disregarding subjective evidence of any party's intentions."

He went on to consider seven factors at paragraphs 16 to 23 of his judgment, the last of which is not relevant to the present case.

38. The natural and ordinary meaning of the suspension of rent clauses in both Leases is that they operate only where there has been damage or destruction of the premises; in Lease A, at clause 6.2, the rent is suspended if *"the Premises or any part thereof shall be destroyed or damaged by any of the Insured Risks so as to be unfit for occupation and use by the Tenant"*, and in Lease C, at clause 27, rent will be suspended if the premises are *"damaged or destroyed by any of the Insured Risks so that the Demised Premises or any part of them are unfit for occupation or use or access to them is impossible"*.

39. Insured Risks do not necessarily only relate to physical damage and the landlord could opt to insure against risks which would not cause physical damage. The Claimants have insured against terrorism which is not necessarily a physical act. I can see that there could be an act of terrorism involving interference with IT or services infrastructures which might render the premises unusable. However, if terrorism does not cause destruction or damage to the premises, then the rent is not suspended. If follows that, on a literal reading, even if the Claimants had obtained insurance for loss of rent due to notifiable disease and/or government action, this would not trigger the suspension of rent provisions because the premises have not been destroyed or damaged by or as a result of the Covid 19 pandemic.

40. It is clear that TFS has been prevented from using the premises because of the Covid 19 pandemic. The Permitted Use for both premises is the retail sale of perfumes and similar products. Moreover, in Lease A there are positive obligations in clause 4.14. If TFS had breached Covid-19 legislation by continuing to trade, then this would also have been a breach of the Leases, given the requirements in clause 4.21 of Lease A and clause 4.11 of Lease C. Mr Vickery argued that, where TFS would have been in breach of the Leases if it had continued trading, it leads to an unreasonable result if the rent is not suspended, and he referred me to paragraph 29 of the judgment of Lord Justice Etherton in *AC Ward:*

"It is also a well-established proposition of contractual interpretation that the more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they should make their meaning clear: Wickman Machine Tools Sales Limited v Shuler AG [1974] AC 235, 251 (Lord Reid)."

41. At paragraph 42 of his judgment in Commerz, Chief Master Marsh considered a passage from Hill and Redman: Landlord and Tenant at 3529.1 which stated:

"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')."

The passage went on to list the principles taken from *Frasca-Judd v Golovina* [2016] EWHC 4907 (QB), where Mr Justice Holgate said at paragraph 48:

"In my judgment, the following principles may be derived from the authorities: -

(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."

42. TFS is obliged to pay insurance rent under clause 3.3.2 of Lease A and clause 3.2 of Lease C. In Lease C, TFS was prevented by clause 29.3 from insuring itself against Insured Risks. If the premises are damaged or destroyed, the rent is suspended in accordance with the Leases and the Claimants can claim against their insurance. There can be no argument that the intention of the parties was that the Claimants cannot claim unpaid rent against TFS in those circumstances. I can also see that, if the Claimants had opted to insure themselves against loss of rent arising from a notifiable disease or government action, then arguably, under the Rowlands principle, the court could find that the Claimants are obliged to claim their resulting loss of rent from their insurer and not from TFS. However, I have noted the findings of the court in both *Commerz* and *Mellon* that, unless there is a corresponding rent suspension clause, there is no loss of rent which can be claimed under the policy.

43. This case differs from both *Commerz* and *Mellon* because the Claimants have not in fact insured their losses arising from a notifiable disease or government action. Chief Master Marsh in *Commerz* observed as follows:

"In any event the lease does not permit the defendant to assert that the claimant had an obligation to include notifiable diseases and all 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."

This must also be true of the Leases in the present case.

44. Applying the principles in *Arnold*, firstly, commercial common sense should not be invoked to undervalue the importance of the language of the provision which is to be construed, and, secondly, the less clear the centrally relevant words are, the more ready the court can properly be to depart from their natural meaning. In the present case, looking through the eyes of a reasonable reader, the language of the rent suspension clauses is clear and the ordinary and natural meaning is that there must be damage or destruction of the premises. Thirdly, commercial common sense is not to be invoked retrospectively and, fourthly, the purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. TFS has not been able to trade from its stores and has suffered significant losses. It is easy to say, with hindsight, that the parties should have agreed that, in the event of non-physical damage to the premises, and/or where TFS has been prevented from using the premises, the rent will be suspended, or that the Claimants should have insured against loss of rent due to notifiable disease and/or government action and where that occurs, the rent will be suspended. However, as Lord Justice Neuberger put it, *"The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language."* Fifthly, the court can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. It was open to either party to take out insurance against these contingencies, and given that there are provisions in the Leases for insurance rent and rent suspension, the parties clearly directed their minds at the time to the allocation of risk. Sixthly, where an event subsequently occurs which was plainly not intended or contemplated by the parties, if it is clear what the parties would have intended, the court will give effect to that intention. When entering into the Leases, neither the landlord nor the tenant knew or could have predicted that there would be a global pandemic and/or that TFS would be prevented from using the premises even though there was no physical damage to it.

45. In *Mellon*, Master Dagnall, having considered *Arnold* and several other authorities considered the approach which should be taken:

"113. However, all of the decisions are authority for the propositions that where the court concludes that an event has occurred which the parties either did not contemplate or could not have contemplated, then it is proper to search (from the admissible factors as to construction i.e. wording and factual matrix of the contract etc. but not negotiations or subsequent subjective declarations) for their objective contractual intention being as to what they intended, by the words used in the contract, to happen in that situation. If the intention is sufficiently clear then the relevant contents (i.e. the words) of the contract can be construed as expressing it. However, if the words used simply cannot justify that construction (e.g. there is nothing in the contract which could be said to deal with the relevant event at all), there is nothing which can be interpreted to achieve the "intended" result by the process of construction; and matters have to be left to the rules of implication (if at all). On the other hand, the situation where it can be said that (i) the actual objective intention of the parties as to what would happen is clear from the content of the contract etc. but (ii) no words within the contract can be construed on any basis to be expressing it ("the Gap Scenario"), must be a very rare one. What happens more often is where there is an absence of any relevant wording but it is obvious what is needed for the contract to work or obvious what would have been intended in a relevant circumstance, in which case the law of implication applies. Moreover, even in the Gap Scenario, implication will usually (as was the majority decision in Aberdeen) be available."

46. I cannot find that the words used in the Leases justify a construction that the Claimants were obliged to insure against loss of rent due to notifiable disease and/or government action and that rent would be suspended if that occurred. Nor can I find that the words used can be construed

to mean that the rent would be suspended where there is non-physical damage to the premises or where the tenant is prevented from using the premises (other than where there is physical damage). There is nothing in the wording which can be interpreted to achieve the result for which TFS contends by the process of construction. The only possibility is that a term should be implied.

47. In *Marks and Spencer plc v BNP Paribas Securities Services [2016] AC 742* Lord Neuberger set out the conditions for a term to be implied, quoting from Lord Simon in the Privy Council case of *BP Refinery (Westernport) Pty v Shire of Hastings (1977) 180 CLR 293*

"for 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 employed 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."

At paragraph 21 of his judgment, Lord Neuberger added six comments:

"...one is not strictly concerned with the hypothetical answer of the actual parties, but that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness will usually, if ever, add anything...Fourthly, ... I would accept that business necessity and obviousness, his third and fourth requirements, can be alternatives in the sense that only one of them needs to be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care"... Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is ... that a term can only be implied if without the term, the contract would lack commercial or practical coherence."

48. Mr Vickery submitted that reasonable parties would have agreed the Suggested Provisions because TFS has received no income and has lost its ability to pay rent whereas the Claimants have the ability to insure, and it is unfair for TFS to continue to pay rent when it would be in breach of covenant to trade and it was not able to use the premises for the Permitted Use; the Suggested Provisions are necessary because the premises were demised for the purpose of the Permitted Use and TFS has not been able to use the premises and it is obvious that the rent should be suspended where it is a breach of covenant to continue to trade and it is no fault of TFS. Mr Vickery formulated the question for the officious bystander as "Would rent be suspended and insurance paid [by the landlord]?" and he contended that the Leases do not work without the Suggested Provisions. I disagree with the generality of that proposition.

49. However, with regard to the Suggested Provisions, is it obvious what would have been intended in a relevant circumstance? Do the Leases lack commercial or practical coherence without the Suggested Provisions?

50. From the point of view of a reasonable person in the position of the parties at the time when they entered the Leases:

    a) Under the Leases as drafted, the Claimants were not obliged to insure against notifiable disease or government action but could choose to include those risks as Insured Risks if they wished.

b) It is possible that, if someone had pointed out the possibility or likelihood of a global pandemic and of a lockdown, then one of the parties would have taken steps to obtain appropriate insurance.

c) Either party could have obtained insurance against non-physical damage, events preventing the tenant from using the premises and/or notifiable disease and/or government action. If the landlord under Lease C chose to take out insurance, TFS was not also permitted to insure against those risks but could have insured itself against other risks. The Claimants could have insured against losses to the Claimants' business (i.e. loss of rent) or TFS could have insured against losses to its business. It cannot be said that it is obvious that the parties would have agreed or necessary that the parties should agree that it would be the Claimants, as opposed to TFS, who would take out that insurance. If the officious bystander were asked, in the circumstances, "Would that insurance be paid by the landlord?", I think that answer would be no. It is a matter for negotiation between commercial parties as to who will bear the risk.

d) Under the Leases as drafted, it was intended that, if by reason of an Insured Risk, the premises were damaged or destroyed, and TFS was not able to use or occupy them, then the Claimants would claim against their policy for reinstatement of the premises and for the Claimants' loss of rent and rent would be suspended.

e) It is possible that, if someone had pointed out the possibility or likelihood of a global pandemic and of a lockdown, then the parties might have catered for that in the Lease by providing for suspension of rent as per the Suggested Provisions. It may also appear unfair that TFS is expected to pay rent for a period during which it is prevented from trading. However, equally, it might appear unfair that the landlord is deprived of its rental income from its capital assets if TFS cannot pay.

f) It cannot be said that it is obvious that the rent would or necessary that the rent should be suspended in the event of non-physical damage, events preventing the tenant from using the premises or in the event of a notifiable disease and/or government action. If the officious bystander were asked, in the circumstances, "Would rent be suspended?" I think that answer would be no. It is linked with the question of insurance and is a matter for commercial negotiation as to which party will bear the risk.

g) It was intended that if losses were suffered by TFS which fell outside of damage or destruction due to the Insured Risks, then the rent would not be suspended and TFS could claim against any insurance TFS had taken out itself. If the court were to imply the Suggested Provisions into the lease, this would be contrary to the express terms which were agreed.

There is no basis upon which the court can imply the Suggested Provisions as terms in the Leases.

51. Going back to *AC Ward*, I cannot see anything unreasonable about the result here. The expectation of the parties when entering the Leases was that TFS should protect itself by taking out insurance to the extent that the Claimants had not obtained insurance. It is very unfortunate that TFS has been unable to trade during the periods of lockdown due to Covid 19 and the result may seem harsh to commercial tenants who have suffered losses during the pandemic. However, in failing to take out its own insurance, TFS failed to protect itself against the risk of non-physical damage, the risk of being prevented from using the premises and the risk of incurring losses due to notifiable disease and/or government action.

52. TFS has no real prospect of successfully defending the claim on the basis of the proposed amendments to the Defence.

<u>Compelling reasons</u>

53. Like Chief Master Marsh in *Commerz* and Master Dagnall in *Mellon*, I am satisfied that the issues of construction which I have been asked to consider are properly regarded as being

'short' and are appropriate for summary determination. I am also satisfied that there is no new or developing area of law here. As Master Marsh said at paragraph 56 of his judgment, *"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."*

54. The Reply sets out details of discussions which took place between the parties from March 2020 onwards including offers by the Claimant of a rent-free period, half-rent period, reduction of rent and deferment of rent. These were all upon terms that the break clauses in the Leases were to be removed or altered. TFS made counter-proposals but the parties were unable to reach a negotiated agreement. The claim was issued in October 2020 and further rent arrears have accrued since then. There is no basis for finding that the claim was issued prematurely or that this comprises a compelling reason not to enter summary judgment.

Adjournment

55. Mr Vickery invited me to adjourn the application upon the basis that an appeal is pending against the decision of Chief Master Marsh in *Commerz*. He did not pursue the point with any force, and I have no information as to when such appeal was lodged, whether permission has been given or when such appeal is likely to be heard. I consider that it would not be in accordance with the overriding objective to delay this decision pending any such appeal.

Conclusion

56. TFS has no real prospect of successfully defending the claim and there is no compelling reason why there should be a trial. I will enter summary judgment in favour of the Claimant.

District Judge Samantha Johnson