Neutral Citation Number: [2021] EWHC 1013 (QB)

Case No: QB-2020-002783
And Case No. QB-2020-002786
And Case No. QB-2020-002792

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/04/2021

Before :

MASTER DAGNALL

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Between :

QB-2020-002783 ("the First Claim")

BANK OF NEW YORK MELLON (INTERNATIONAL) LIMITED — **Claimant**

- and -

CINE-UK LIMITED — **Defendant**

And QB-2020-002786 ("the Second Claim")

Between:

AEW UK REIT PLC — **Claimant**

- **And -**

MECCA BINGO LIMITED — **Defendant**

And QB-2020-002792 ("the Third Claim")

Between:

AEW UK REIT PLC **Claimant**

- **And -**

SPORTSDIRECT.com RETAIL LIMITED
Defendant

Mr Guy Fetherstonhaugh QC and Ms Elizabeth Fitzgerald (instructed by Mishcon de Reya LLP) appeared for **the Claimants in the First Claim, the Second Claim and the Third Claim**
Ms Philomena Harrison (instructed by **Maples Teesdale LLP**) for the **Defendant in the First Claim**
Mr Tim Calland (instructed by **Estate Legal Limited**) for the **Defendant in the Second Claim**
Ms Katharine Holland QC, Ms Kimberley Ziya, and Mr Admas Habteslasie (instructed by **Shoosmiths LLP**) for the **Defendant in the Third Claim**

Hearing dates: 24 and 25 November and 17 and 18 December 2020

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JUDGMENT

MASTER DAGNALL :

Introduction

1. The COVID-19 pandemic ("the Pandemic") and its consequences have had a massive effect on public, private and business life in this country and elsewhere in the world. This Hearing has concerned questions as to upon whom (landlords, tenants and/or insurers) certain of the resultant financial detriments should fall, and, in particular, whether tenants of commercial premises have remained responsible to pay their rents notwithstanding that they have been subject to the enforced closure of, or inability to trade from, their premises.

2. There are before me applications for summary judgment made by the Claimant landlords ("the Landlords") against the Defendant tenants ("the Tenants") in these three Claims for rents ("the Rent(s)") which have (in principle) fallen due under three leases ("the Lease(s)") of commercial premises ("the Premises") during the currency of the Pandemic and consequent statutory regulations ("the COVID Regulations") restricting the use of and access by the public to the Premises and, at least according to the Tenants, compelling or necessitating their closure for (at least) substantial

periods of time (and so that they were all closed as at the dates of the hearing, and see below).

3. The Landlords contend that the Rents (including value added tax ("VAT") and interest ("Interest")) simply continue to fall due and payable notwithstanding the existence of the Regulations and their effects. The Tenants assert that, for various differing reasons, the consequence of what has happened is that they do not have to pay all or part of the Rents.

4. The Landlords are Bank of New York Mellon (International) Limited ("BNY") and AEW UK REIT Plc ("AEW"). They are associated entities being, for these purposes, entities which hold the assets of commercial property funds, essentially (although I am not concerned with the precise legal structure) on behalf of investors to whom they will owe responsibilities to seek to collect income such as the Rents. In each case they are landlords by assignment. They act by the same solicitors and counsel being Guy Fetherstonhaugh QC and with him (and who appeared on her own at previous hearings) Ms Elizabeth Fitzgerald.

5. The Tenants are three well-known substantial commercial entities, being:
    a. Cine-UK Limited ("Cine-UK") which is the tenant of a Lease ("the Cine-UK Lease") dated 24 January 2002 made between (1) Sun Life Assurance Society Plc (2) Cine-UK Limited and (3) Hengrove Park Bristol (Phase 1) Management Company Limited of the land and multiplex cinema forming part of the leisure development at Hengrove Park, Hengrove, Bristol and which are (or were) a cinema ("the Bristol Cinema"). The Landlord (and also the Superior Landlord) is BNY and the Claim is QB-2020-002783. Cine-UK appears by Ms Philomena Harrison

    b. Mecca Bingo Limited ("Mecca") and which is the tenant of a Lease ("the Mecca Lease") of Premises at Ground Floor and Part First Floor, Unit 6 and adjacent smoking area, East Thames Plaza, Dagenham dated 18 September 2017 and made between (1) Meadow Dagenham Retail Limited and (2) Mecca Bingo Limited. and which Premises are (or were) used for the playing of bingo ("the Dagenham Bingo Hall"). The Landlord is AEW and the Claim is QB-2020-002786. Mecca appears by Mr Tim Calland

    c. SportsDirect.com Retail Limited ("Sports Direct") and which is the tenant by assignment of a Lease ("the Sports Direct Lease") of Premises known as part of the Ground Floor, the First Floor and part of the Second Floor of the Woolworth Building, Bank Hey Street, Blackpool, Lancashire dated 20 March 2008 and made between (1) Development Securities (Blackpool Developments) Limited and (2) Sports World International Limited, and which Premises are (or were) used as a retail shop ("the Blackpool Shop"). The Landlord is AEW and the Claim is QB-2020-002792. I believe that AEW is also the Superior Landlord but it is common-ground in any event that the relevant Insurance is that to which I refer below as taken out by

AEW. SportsDirect appears by Ms Katharine Holland QC and with her on the first two days Ms Kimberley Ziya and on the final two days Mr Admas Habteslasie.

6. The Leases each contain provisions for the Rents (themselves subject to review or increase) to be paid by quarterly instalments of annual figures (with VAT) in advance on the usual quarter days; and with Interest to accrue following default. The Claims were originally for all or part of the March 2020 quarter's rent, and in some cases for the June 2020 quarter's rent, although I have given permissions which will enable Rents for other quarters to be claimed.

7. The Tenants assert that they have a real prospect of defending the Claims and/or there is a compelling reason(s) why the Claims should be disposed of at a trial for a number of reasons, but where different Tenants (at least in their pleaded Defences) rely on different reasons although counsel in their submissions sought (albeit only as "fall-back" secondary cases) to adopt each other's submissions. These reasons divided up into:
    a. The Rent Cesser clauses in the Leases should be construed to provide that in the circumstances of the Regulations and of the Landlords having (allegedly) insured against the event of the Pandemic and/or the Regulations ("the Insurance"), the Rents ceased to be payable, at least whilst the Premises were or had to be closed
    b. If the Rent Cesser clauses were not to be construed so expressly, then there should be implied into the Leases terms to such effect
    c. If the Rent Cesser effect was not to be achieved by construction or implication then the Leases should, by (i) construction or (ii) implication, be read to provide that the Landlords were to be left to recovery by their Insurance and where:
        i. the Insurance covered the Rents and so that the Landlords could have them paid by the Insurer and in consequence of which the Landlords can only look to the Insurer for payment and not the Tenants or
        ii. if the Insurance did not so cover the Rents at all or in part then that was the fault of the Landlords and who could not recover from the Tenants what they should have been able to recover from the Insurance
    d. If the Rent Cesser effect was not to be achieved by construction or implication then a similar effect flowed from (i) a suspensory frustration (that is to say a short-term frustration following which the Leases would continue as before) and/or (ii) an application of principles of supervening event in terms of illegality and/or (iii) the application of a doctrine of temporary failure of consideration
    e. An application of relevant UK Government Guidance requiring landlords and tenants to consult as to rent suspension and similar measures, and the need for a full consideration of all the issues in the light of the (allegedly) unprecedented circumstances of the Pandemic and of the Regulations.

8. The situation in relation to Mecca Bingo is slightly different in relation to the March 2020 quarter's rent which Mecca Bingo paid but which payment it contends was made under a mistake entitling it to recover under the law of restitution and unjust enrichment. The Landlord, AEW, does not contest that that claim would have a reasonable prospect of success if, but only if, the argument that the March 2020 quarter's Rent had not fallen due itself had a reasonable prospect of success.

9. There is also a further specific and distinct point relating to an element of the Rent claimed against Sports Direct where AEW had originally brought proceedings in the County Court Business Centre under Claim No. G8QZ85H4 ("the County Court Claim") for a sum of "Rent" for the March 2020 quarter and for which it obtained default judgment ("the County Court Judgment") and which sum ("the County Court Judgment Sum") was then paid. AEW contends that it had miscalculated the amount claimed and has included a claim for what it says is the balance ("the Balance") in Claim QB-2020-002792 which it contends (now) is previously unclaimed VAT. Sports Direct contends that this claim for the Balance cannot be made at all, and in any event not by separate High Court proceedings where the County Court Judgment still stands, as a result of the doctrines of merger (and cause of action and issue estoppel) or abuse of process.

The Procedural History and this Hearing

10. This hearing came about initially as follows. BNY had also issued proceedings ("the Deltic Proceedings") and sought summary judgment ("the Deltic Summary Judgment Application") against Deltic Group Limited ("Deltic") under Claim No. QB-2020-002071 in relation to two leases of Night-Clubs (in Kingston-upon-Thames and Uxbridge). Deltic issued an application for a stay of those proceedings ("the Deltic Stay Application"). On 16 September 2020 I dismissed the Deltic Stay Application, but I adjourned the summary judgment for timing reasons and where Deltic wished to adduce additional arguments on law.

11. The Deltic Summary Judgment Application came back before me on 14 October 2020, and on which occasion Deltic applied to adduce further arguments on law being at least some of those now raised by the Tenants. In the meantime, I had learnt that there were other claims in the High Court, Queen's Bench Division from BNY and AEW and for which I was or was to become the assigned Master. At that hearing BNY and AEW confirmed that they either had issued or were in the process of issuing applications for summary judgment in relation to each of the Claims. On an inspection of the court's electronic CE-File it was clear that the main underlying issues, being whether commercial rents were still payable during the Pandemic in the circumstances of the Regulations and the Insurance, arose in each of the Claims although each of the Tenants, and Deltic, were raising particular legal arguments as to why their desired consequences (Rents not being payable in whole or in part) flowed from (relatively) common facts.

12. In the absence of strong opposition from BNY and AEW, I came to the provisional conclusion that it was much more consistent with the overriding

objective in Civil Procedure Rule ("CPR") 1.1 for the various Applications (including the Deltic Summary Judgment Application) to be listed together to be dealt with at a single Hearing rather than to have a number of separate hearings with the risk of inconsistent outcomes and substantial needless expenditure of time, cost and court resource. I made provisional directions to that effect on 14 October 2020 giving parties not there represented before me opportunities to object (but none did object), and also other litigants (there being a number of similar proceedings in various county court hearing centres, including where landlord claimants are, again BNY and AEW) opportunities to apply to join in (but none did so). I also provided that I would consult with the Senior Master, as I then did, and she confirmed that I could deal with the various applications together at the one Hearing and adopt my provisional course, and which I have now done.

13. I do add that I had and have considered over the course of time as to whether I should refer the various applications to the Judge to decide (under paragraph 1 of the Practice Direction ("PD") A to CPR23), in view both of the issues involved and the circumstance that (in the absence of any other High Court judgment directed to the underlying issues) my judgment may be seen as having a wide application including in terms of its potential effect upon matters in the County Court. However, I have decided not to refer to the Judge, and in particular as:
    a. No party has asked me to do so;
    b. These are applications for summary judgment for claims in debt. It is usual for Masters to determine such applications;
    c. There were dates open in my diary which enabled me to hear the matter fully within a reasonably short time period from the initiation of the various applications, enabling the matter to be dealt with, in my view, expeditiously and fairly in accordance with CPR1.1(2)(d);
    d. The matter has been fully argued using four hearing days of court time and to refer now would involve a very substantial waste of party and court resource.

14. The applications were first listed and heard on 24 and 25 November 2020. At this point the Deltic Summary Judgment Application was still before me, and it, uniquely (the other Tenants did not seek to allege this in relation to their Leases), asserted that the Deltic Leases had been altogether frustrated so that they had ceased to exist ("the Full Frustration Argument"). However, Deltic itself had notified the Court that it had dis-instructed its solicitors and was choosing not to appear either by itself or by legal representatives although not (then) consenting to judgment against it.

15. There was insufficient time to hear all of the submissions on 24 and 25 November 2020 and I therefore adjourned the Hearing to 17 and 18 December 2020 (the dates having been held in reserve) and which proved sufficient to conclude oral submissions. In the meantime, BNY and Deltic had reached a settlement and which was embodied in a consent order which I made on 17 December 2020. As a result, the Deltic Summary Judgment Application was resolved and is not a subject of this Judgment although I do

refer to the Deltic Proceedings at times below, and including as to the Full Frustration Argument.

16. Further, the Hearing took place after the Commercial Divisional Court's judgment in the FCA v Arch litigation ("Arch") relating to the construction of standard-form terms in business interruption insurance ("BII") policies. I was, following the Hearing, provided with a copy of the eventual Supreme Court judgment ("the Arch Judgment") [2021] SC 1 and invited further submissions (as desired) in relation to it and what I considered were certain possibly relevant elements of the Insurance in this case. The last of those was provided on 9 February 2021.

17. The Hearing has involved substantial Bundles, full Skeleton Arguments (with some supplementary written submissions) from all parties, and full oral submissions from each of the parties. If I do not refer to any particular submissions or material in this Judgment, I have, nonetheless, borne and weighed each such matter in mind.

18. Following my circulation of this judgment in draft, but prior to its handing-down, there was delivered by Chief Master Marsh his judgment in Commerz Real v TFS Stores [2021] EWHC 863 (16 April 2021). That judgment considers various of the points and arguments which are the subject-matter of this judgment, although I think that I have received a greater citation of authority and much more extensive argument (and I have also had to deal with the particular wordings of the documents before me). In any event, to the extent that that judgment (which, in terms of precedent, is persuasive rather than binding upon me) overlaps with mine, I regard it as being fully consistent with my analysis and conclusions. Therefore, while, when I saw that judgment in a case-law update, I drew the attention of the parties to it, I have not required any further submissions upon but rather merely noted it at relevant points below.

The Applications

19. The Applications are made by Notices of Application dated: in the case of the First Claim (Cine-UK) 4 September 2020, the Second Claim (Mecca) 15 October 2020 and the Third Claim (SportsDirect) 4 November 2020 (after amendment).

20. The Applications are all made under CPR24.2 which provides that:
"The court may give summary judgment against a defendant...on the whole of a claim or on a particular issue if –(a) it considers that –(ii) that defendant has no real prospect of successfully defending the claim or issue... and (b) there is no other compelling reason why the case or issue should be disposed of at a trial"

21. It is common ground that the Court's general approach to this is as set out in Mellor v Partridge [2013] EWCA 477 at paragraph 3:
"3. John and Frank applied for summary judgment on all the claims made against them. That application came before Beatson J (as he was then) who summarily dismissed some of the claims, but refused to dismiss others on

the summary basis. Both sides now appeal. Our task is not to decide whether the claimants are right. Our task is to decide which parts of the case (if any) are fit to go to trial. If I may repeat something I have said before (Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch), approved by this court in AC Ward & Son v Catlin (Five) Ltd [2009] EWCA Civ 1098):

"The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All ER 91;

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman

iv) This does not mean that the court must take at face value and without analysis everything that a 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 at [10]

v) 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 NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;

vi) 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 at the time of the application, where reasonable grounds exist for believing that a fuller 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 [2007] FSR 63;

vii) 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."

22. It is also common-ground that, in general, these Applications do not raise questions of fact, and that I should proceed on the basis of what is factual common-ground or general public knowledge (and of which I can take judicial notice). The issues between the parties lie more in the true meanings (by way of construction and of implication) of the Leases and the Landlords' Insurance Policy (and the County Court Claim Form), and the application of various principles of law. However, there are possible questions of fact regarding the impact and perceived future length of the COVID pandemic and statutory regulations which I will need to and do consider below.

23. There was, however, some difference between the parties as to whether it was appropriate to decide on a summary judgment basis matters which related to the construction and effects of standard-form documents, being both the Leases (which are in standard commercial lease forms) and the Landlord's Insurance Policy.

24. Mr Fetherstonhaugh submitted for the Landlords that a suggestion in some of the case-law as to a judicial reluctance to do this was rather unfounded but, in any event, limited to specific circumstances.

25. He properly drew my attention to the decision in Ward v Catlin [2009] EWCA Civ 1098 where an application for reverse summary judgment was made based on a defence which relied upon standard-form clauses in relevant commercial insurance policies.

26. At paragraph 16 reference was made to the consequences of the applying defendants' construction being said to be draconian and the claimants there submitting that the factual matrix of the policies was important. The judge below had determined some points (e.g. of the nature of policy provisions being warranties) but had refused to construe them without what that judge had thought was a trial necessary to determine the relevant factual matrix. At paragraphs 25 onwards the Court of Appeal upheld that as being a legitimate exercise of discretion. They referred to the burden being on those defendants to in insurance law justify what would be a draconian construction and outcome. At paragraphs 30 and 31, they held that the wording of the relevant clauses lacked clarity.

27. At paragraphs 34 to 36, it was said:
"34. The Claimant has a real prospect of successfully contending that its interpretation gives the Policy a more reasonable commercial meaning and one more likely to be that intended by the parties, by limiting the "protections provided for the safety of the insured property" to those in the Original Proposal, and any burglar alarm system within the BAMW to a burglar alarm stated in the Schedule and which was approved by the Defendants, and by limiting the Warranties, as the Judge was inclined to do, to defects within the knowledge or reasonably capable of being within the

knowledge of the Claimant and its agents. So far as concerns the former contentions, the Claimant may derive some support from the "General Condition" that "the Proposal and/or the particulars in writing by which the Insured has applied to the Insurers for an Insurance in the terms stated in this Policy and which the Insured has agreed shall be the basis of this Contract shall be held to be incorporated herein."

35. I agree with the Defendants that neither the Claimant nor the Judge has articulated clearly any evidence relevant to interpretation which is likely to exist and, although not available on the hearing of the Application, can be expected to be available at trial. Had this been the only ground for dismissing the Application, it would not, in my judgment, have been sufficient: ICI Chemicals & Polymers v TTE Training: [2007] EWCA Civ 725 at paragraph [14] (Moore-Bick LJ). Mr Stuart-Smith accepted, however, as I have said that it is apparent from paragraph [46] of the Judgment that the Judge's decision included the arguability of the Claimant's submissions on interpretation. Furthermore, I bear in mind that the Warranties are standard terms of the Defendants' Multiline Commercial Combined Policy, which may affect many other policyholders, and that provisions in the Warranties such as "be in full and effective operation at all times" and "put into full and effective operation at all times" are said to have even wider currency in the insurance market. In those particular circumstances, combined with the arguability of the Claimant's points on interpretation, I can understand why the Judge considered it would also be appropriate to give the Claimant the opportunity to seek and adduce any relevant and admissible factual material available by the date of the trial.

36. For all those reasons I would dismiss this appeal. I would make no order on the Respondent's Notice."

28. Mr Fetherstonhaugh submits that while the asserted need for evidence regarding the factual matrix was not of itself sufficient for that reverse summary judgment application to be refused, it was the fact of the existence of both the standard-form nature of the clauses and the arguability of the interpretation issues which justified the refusal on the basis that there should be an opportunity to obtain such factual material . In this case, he submits that the interpretation (and other) issues are not arguable, and rather that the answers are clear, and also that there is no factual material which could usefully be obtained.

29. Mr Fetherstonhaugh then took me to the recent decision relating to the construction of a business interruption insurance policy in COVID circumstances in TKC v Allianz 2020 EWHC 2710 where at paragraphs 95-100 (after holding that there was no real prospect of a factual dispute) the deputy judge held:
"95. There is, nevertheless, a second limb to Mr Marland's argument that this case is unsuitable for summary determination, which is that it potentially has wider significance. In Mr Marland's submission, the fact that this is a standard form policy wording in widespread use provides a compelling reason why the issue of whether it provides cover in the

circumstances of the present COVID-19 pandemic is unsuitable for determination without a full consideration of the underlying facts and full exploration of the issues at trial.

96. In support of this submission, Mr Marland relied upon the observations of Etherton LJ in AC Ward & Son v Catlin (Five) Ltd. That case, like the present, involved an application by an insurer for summary judgment against a claiming policyholder. At first instance, HHJ David Mackie QC had dismissed the defendant insurer's application. The Court of Appeal dismissed the insurers' appeal from that decision, holding that the claimant policyholder "has a real prospect of successfully contending that its interpretation gives the Policy a more reasonable commercial meaning and one more likely to be that intended by the parties" [and paragraph 35 is then cited]

97. As Lewison J recorded in his EasyAir principle (vi), the court will always be conscious of the practical limitations of the summary judgment procedure. As Mummery LJ observed in Doncaster Pharmaceuticals Group Ltd v The Bolton Pharmaceutical Co 100 Ltd (a case cited by Lewison J):

.. there can be more difficulties in applying the "no real prospect of success" test on an application for summary judgment... than in trying the case in its entirety .. The decision-maker at trial will usually have a better grasp of the case as a whole, because of the added benefits of hearing the evidence tested, of receiving more developed submissions and of having more time in which to digest and reflect on the materials.
The outcome of a summary judgment application is more unpredictable than a trial. The result of the application can be influenced more than that of the trial by the degree of professional skill with which it is presented to the court and by the instinctive reaction of the tribunal to the pressured circumstances in which such applications are often made...

98. However, this is not a case of the type which Mummery LJ was there considering. The Skeleton Arguments lodged on both sides for this application were lengthy, well-reasoned, and contained a full citation of authority. The hearing by video-link before me was largely free of technical problems and lasted a full day. I am therefore satisfied that both parties have had an adequate opportunity to address the relevant issues in argument.

99. Moreover, given the economic effects of the COVID-19 pandemic, it seems to me that there is a public interest in having the issue of whether the Business Interruption section of Allianz's standard "Commercial Select" policy provides cover determined (if it can fairly and justly be done) sooner rather than later. That circumstance distinguishes the present case from the situation considered by the Court of Appeal in the AC Ward & Son case, where the issues being considered, while of some general significance, were not of immediate and pressing importance to other policyholders, and where the court's decision was handed down less than two months before the date fixed (subject to the outcome of the appeal) for the trial of the action.

100. In my judgment, it would therefore be in accordance with the overriding objective for me now to deal with and to decide, so far as I am able, the issues of interpretation raised by Allianz's application."

30. Mr Fetherstonhaugh submitted that I should take the same course here. He submits that the matters have been very fully argued out, there are no material factual issues, and that it is of great importance for commercial landlords (and their investors) and tenants to know generally whether commercial rents are actually payable.

31. The Tenants made limited submissions with regard to this, not adducing any other authorities, but accepting (as indeed does Mr Fetherstonhaugh) that similar issues to those raised in these Applications may be arising with regard to very very many sets of commercial premises and leases, and pressing upon me contentions that in the light of the Court of Appeal's approach I should not be deciding matters at this point but leaving them over to a full trial at some later date.

32. It does seem to me that the case-law makes it clear that I have a discretion as to whether or not to proceed to summary judgment although it is not entirely clear how it arises within the three possible elements of (1) whether there is a real prospect of a defence succeeding (2) whether there is, in any event, a compelling reason for a trial or (3) it is more general (arising from the use of the word "may") in CPR24.2.

33. However, it does seem to me, in any event, that the discretion (and each of the above elements) has to be considered in all the circumstances of the case, and which could include other matters of the public interest and in particular the Government Guidance to which Ms Harrison has taken me (see below). Nevertheless, arguments in favour of requiring a trial, and thus of refusing summary judgment, have to be measured and balanced against the policy of granting summary judgment as a means of achieving the CPR1.1 overriding objective and including by saving time and expense, avoiding waste of parties' and court resources, and ensuring that if a defence is clearly going to fail then it should be disposed of at an early point and the claimant be given the judgment to which it is entitled without further delay. I bear in mind also that the question of the grant of summary judgment is separate from any question as to what should happen regarding enforcement of such a judgment.

34. I have applied these various principles and authorities in and in making my determinations below.

The Leases

35. The Leases are all in a standard commercial form and very much resemble each other. There is attached at the end of this Judgment a Schedule setting out certain of their material provisions and clauses.

36. Each Lease contains a demise for a defined term of years. As to this:
    (1) The Cine-UK Lease is for 35 years from 1 May 1999 meaning that until the COVID pandemic resulted in substantial regulations towards the end of March 2020, it had run for some 20 years, and after, say, 18 months (as to which see below) of pandemic restrictions it would have another 12.5 years to run. It does, however, have a break clause enabling determination after 25 years (when after 19 months of pandemic restrictions only 2.5 years would be left to run);
    (2) The Mecca Lease is for 15 years from 18 September 2017 meaning that until the COVID pandemic resulted in substantial regulations towards the end of March 2020, it had run for some 2.5 years, and after, say, 18 months (as to which see below) of pandemic restrictions it would have another 11 years to run;
    (3) The SportsDirect Lease is for 15 years from 5 October 2007 meaning that until the COVID pandemic resulted in substantial regulations towards the end of March 2020, it had run for some 13.5 years, and after, say, 18 months (as to which see below) of pandemic restrictions it would have another 1 year to run.

37. The Leases all have (subject to the relevant Premises being occupied for the purposes of a relevant business by a relevant person) the protection to their tenants afforded by Part II of the Landlord and Tenant Act 1954 ("the 1954 Act") none being "contracted-out". That protection extends, in the usual course, to a right to continued renewals (at then market rents) with statutory compensation if a renewal does not take place due to assertion by the Landlord of a non-fault ground (e.g. redevelopment). However, 1954 Act rights require the existence of a Lease and it is common-ground that they would not exist if a Lease was frustrated or otherwise avoided.

38. Each Lease contains clauses for the payment of the annual rent on a quarterly in advance basis on the usual quarter days being 25th March, 24th June, 29th September and 25th December in each year. The rent is payable together with VAT (and if not paid for certain periods of time then with interest at set rates). Each Lease also contains provision for rent review or a quantified rent increase, including for payment of any balancing figure for the period between a review date and when a review eventually takes place. The parties have been able to agree figures for what rents and amounts will have fallen due assuming that the defences raised fail, and which are set out in a Schedule attached. As I say above, a discrete point exists regarding what is said to be an outstanding element of the March quarter's rent (or rather the VAT upon it) in relation to the SportsDirect Lease (and I set out the relevant wording when I come to that below), and it is common-ground that if its defences do not fail at this point Mecca has an arguable claim to a repayment.

39. Each Lease also contains provisions for a "Prescribed Use" for the Tenant as follows:
    a. In the Cine-UK Lease:

i. "the Permitted Use" is defined by clause 1.8 as "Use of the Property as and for a multiplex cinema for the exhibition therein of motion pictures television dramatic opera concert lectures or theatrical performances or entertainment or for receiving or transmitting and broadcasting by any method or means any of the foregoing to viewers or listeners wherever located or for any other lawful theatrical or related purpose subject always to the constraints as to the use of the Property contained in the Superior Lease together with as ancillary to such use a games room and other uses ancillary to a multiplex cinema"; and

ii. Clause 5.17.1.4 is a covenant not to use the whole or part of the Property: "otherwise than for the Permitted Use or the Permitted Sublet Use described in paragraph (a) of that definition during the first five years of the Term in accordance with the requirements and conditions of any planning permission authorising such use from time to time save that following the expiration of the first five years of the Term the Tenant subject to the other constraints as to the use of the Property in this clause 5.17 and as contained in the Superior Lease shall be entitled to change the use of the Property to any leisure use not being the then current primary permitted use or the Permitted Sublet Use of any other premises on the Estate or to any other use with the prior written consent of the Landlord not to be unreasonably withheld or delayed"

b. In the Mecca Lease:

i. "the Permitted Use" is defined as "Use of the Smoking Area as a smoking shelter for patrons and staff only and for uses ancillary to the Tenant's use of the Property but not so as to involve any gaming equipment other than the playing of portable mechanised or video based bingo games. Use of the Ground Floor and part first floor, Unit 6:- as a bingo Hall with ancillary activities it being agreed that such activities may include (without limitation to the generality of the foregoing) the operation on any part or parts of the Property of concessions in accordance with clause 4.11.8(b) relating to the sale for consumption on or off the Property of food beverages (alcoholic and/or non-alcoholic) and other edible items and all merchandise related to bingo use and the provision of gaming or amusement machines; and/or as a casino with ancillary activities it being agreed that such activities may include (without limitation to the generality of the foregoing) the operation on any part or parts of the Property of concessions in accordance with clause 4.11.8(b) relating to the sale for consumption on or off the Property of food beverages (alcoholic and/or non-alcoholic) and other edible items and all merchandise related to bingo use and the provision of gaming or amusement machines; and/or For any other use within Class D2 of the Town and Country Planning

(Use Classes) Order 1987; and/or with the Landlord's written consent (which consent shall not be unreasonably withheld or delayed) for any other leisure and/or entertainment use [with a Proviso restricting cinema and certain other specific uses]

ii. Clause 4.18.1 is a covenant "Not to use the whole or any part of the Property: …(d) otherwise than for the Permitted Use in accordance with the requirements and conditions of any planning permission authorising such use from time to time …"

c. In the SportsDirect Lease:

i. "the Authorised Use" is defined at clause1.1 as "1(a) use as a shop for the retail sale of sports and leisure goods ... and related ancillary goods; and (b) use for an ancillary cafe or such other non-food retail use within Class A1 …as approved by the landlord (such approval not to be unreasonably withheld or delayed)" and

ii. Clause 3.7 is a covenant "Not to use the premises other than for the Authorised Use..."

40. Each Lease contains a qualified covenant against assignment or underletting.

41. Each Lease contains a definition of "Insured Risks". These differ slightly and are as follows:

a. In the Cine-UK Lease clause 2.10 provides that "Insured Risks"… "Means the risk of fire lightning explosion aircraft (save for damage caused by hostile aircraft following the outbreak of war) and other aerial devices or articles dropped therefrom riot civil commotion strikes and labour disturbances or malicious persons storm or tempest flood bursting or overflowing of water tanks apparatus or pipes earthquake impact collapse resulting from subsidence ground heave or landslip and accidental damage to Conduits weather under or above ground fixed or plate glass and three years' loss of Basic Rent payable to the Landlord in the event that the whole or part of the property becomes unusable due to the occurrence of the matters listed in this definition other than the loss of Basic Rent and such other insurable risks as may be reasonably required from time to time during the term by the Superior Landlord under the Superior Lease and notified to the Tenant but may from time to time exclude at the discretion of the Tenant any risk in respect of which cover is not available in the normal market in the United Kingdom on reasonable commercial terms in relation to the risks to be insured and subject to such exclusions terms and conditions as the insurers may reasonably require and are usual in the marketplace from time to time"

b. In the Mecca Lease, "Insured Risks" is defined as "The risk of terrorism, fire, lightning, explosion, aircraft (save for damage caused by hostile aircraft following the outbreak of war) and other aerial devices or articles dropped from them, riot, civil commotion, strikes and labour disturbances or malicious persons, storm or tempest,

flood bursting or overflowing of water tanks, apparatus or pipes, earthquake, impact, collapse resulting from subsidence, ground heave or landslip and accidental damage to Conduits weather under or above ground fixed or plate glass and such other risks and perils against which the Landlord, acting reasonably, may insure from time to time but may exclude at the reasonable discretion of the landlord any risk in respect of which cover is not available in the normal market in the United Kingdom on reasonable commercial terms and subject to such exclusions terms and conditions as the insurers may reasonably require"

c. In the SportsDirect Lease, "Insured Risks" is defined by clause 1.1 as "The risks of loss or damage (other than war damage) by fire, storm, tempest, flood, lightning, subsidence, landslip, heave and terrorism, explosion, aircraft (other than hostile aircraft and items dropped from such aircraft), riot or civil commotion, malicious damage, impact, bursting and overflowing of pipes and such other risks as are normally insured under a comprehensive policy relating to property of a similar nature to the Building and property owners' third party liabilities and machinery cover and such other risks as the Landlord or Superior Landlord shall from time to time desire to insure".

42. Each Lease contains a set of provisions regarding what is to happen regarding Insurance and what is to happen in the circumstances of particular Events occurring, being as follows.

43. In the Cine-UK Lease, within clause 7 there appear the following:

a. At clause 7.1 headed "Landlord to Insure" that "the Landlord shall insure and keep insured with a reputable insurer or underwriters with the interest of the Tenant noted thereon and subject to such exclusions excesses and limitations as may be imposed by the insurers and which are normal in the marketplace:
7.1.1. the Property against loss or damage by the Insured Risks in the Reinstatement Cost

7.1.2 the loss of Basic Rent and Service Charge from time to time payable or reasonably estimated to be payable under this Lease under any other leases of other parts of the Estate taking account in the case of the Basic Rent of any review of the Basic Rent which may become due under this Lease or such other leases (together with any applicable Value Added Tax) for a period of three years

7.1.3 property owner's liability and such other insurance as the Landlord may from time to turn reasonably deem necessary to effect

PROVIDED ALWAYS that the Landlord shall not be under any obligation to insure any fixtures and fittings installed by the Tenant which have become part of the Property or any alterations to the Property unless the Tenant shall have complied fully with the

provisions of clause 5.14 and the Landlord has agreed with the Tenant to effect the insurance thereof

b. At clause 7.2 headed "**Evidence of Insurance**"
"At the request of the Tenant (but not more than once in every year) the Landlord shall produce to the Tenant reasonable evidence from its insurers of the terms of the insurance policy together with evidence that the premium has been paid"

c. At clause 7.3 headed "**Destruction of the Property"**
"if the Property or any part thereof is destroyed or damaged by any of the Insured Risks then:

7.3.1 unless either the insurance shall have been vitiated or the payment of the insurance monies shall be refused in whole or in part by reason of any act or default of the Tenant and

7.3.2 subject to the Landlord being able to obtain the necessary planning permission and all other necessary licences approvals and consents (which the Landlord shall use all reasonable endeavours to obtain without being obliged to institute any appeal) the Landlord shall layout the proceeds of such insurance (other than in respect of loss arising under sub clauses 7. 1.2 and 7. 1.3) as soon as reasonably practicable in the rebuilding and reinstatement of the Property or any part thereof so destroyed or damaged substantially as the same were prior to any such destruction or damage with such variations as the Landlord may reasonably require or as may be requisite in accordance with the requirements of planning control and/or building and/or other regulations"

["Reinstatement Cost" is defined at 2.20 as "the costs (including the cost of shoring up demolition and site clearance architect's surveyor's and other professional fees) and Value Added Tax (if applicable) which would be likely to be incurred in reinstating the Property in accordance with the requirements of this Lease at the time when such reinstatement is likely to take place having regard to all relevant factors including any increases in building costs expected or anticipated to take place at any time up to the date upon which the Property shall be fully reinstated together with three years' loss of Basic Rent as referred to in the definition of Insured Risks herein"]

d. At Clause 7.4 headed "Cesser or Rent" that:
"In case the Property or any part thereof or access thereto or any other part of the Estate shall at any time during the Term be destroyed or damaged by any of the Insured Risks so as to render the Property unfit for occupation or use and the insurance shall not have been vitiated or payment of the policy monies refused in whole or in part as a result of some act or default of the Tenant then the Basic Rent or a fair proportion thereof and Service Charge according to the nature and extent of the damage sustained shall

from and after the date of such damage be suspended and cease to be payable until the Property shall have been made fit for occupation or use and in the event of dispute as to the amount or duration of the abatement of the Basic Rent such dispute shall be settled by a single arbitrator to be appointed in accordance with clause 11

PROVIDED THAT If it is not possible for any reason for the Landlord to rebuild or reinstate the Property within a period of three years from the date of damage or destruction being caused by any of the Insured Risks the Landlord and the Tenant shall be at liberty to determine this demise by serving one calendar month's notice in writing to that effect upon the other and upon the expiry of such notice these presents shall determine but without prejudice to the right and remedies of either party against the other in respect of any antecedent claims or breaches AND IN THE EVENT of this demise being determined in such manner or if this Lease is determined by frustration as a result of such damage or destruction the whole of the insurance monies receivable under the policy of insurance shall belong to the Landlord absolutely and the Tenant shall have no claim or interest therein."

e. Clause 7.5 headed "Tenant not to Vitiate Insurance" contains various obligations on the Tenant including in clause 7.5.2 "Not to insure the Property or any other part of the Estate against any of the Insured Risks" and by clause 7.5.3 "To notify the Landlord immediately in writing in the event of damage to the Property or (where known to the Tenant) or to any other part of the Estate by any of the Insured Risks".

44. In the Mecca Lease:
    a. Clause 7.5 provides that "the Landlord will effect the insurances referred to in clause 8.1 in a reasonable and cost effective manner subject to cover being available"
    b. Clause 8.1 provides that "The Landlord shall insure and keep insured with a reputable insurer or underwriters at a rate or rates not substantially in excess of those generally available in the market and subject to such exclusions excesses and limitations as may be imposed by the insurers:
    8.1.1 the Landlord's Estate against loss or damage by the Insured Risks in the Reinstatement Cost PROVIDED ALWAYS that the Landlord shall not be under any obligation to and shall not insure (a) any fixtures and fittings belonging to the Tenant or any alterations to the Property unless the Tenant shall have complied fully with the provisions of clause 4.15 and the Landlord has agreed with the Tenant to effect the insurance thereof (b) any fixtures and fittings belonging to the tenants of other Lettable Areas
    8.1.2 the loss of Basic Rent (including provision for rent review) and Service Charge including VAT from time to time payable or reasonably estimated to be payable to the Landlord under this Lease

and any other leases of other parts of the Landlord's Estate for a period of three years
8.1.3 property owner's liability and such other insurance as the Landlord may from time to time reasonably deem necessary to effect

c. Clause 8.3 provides that "if the Property or any part of it is destroyed or damaged by any of the Insured Risks then …the Landlord shall layout the proceeds of such insurance …as soon as reasonably practicable in the rebuilding and reinstatement of the Property …"

d. Clause 8.4 provides that "In case the Property or any part of it or access to it or any other part of the Landlord's Estate over which the Tenant has rights shall at any time during the Term be destroyed or damaged by any of the Insured Risks so as to render the Property or part of it unfit for or incapable of lawful occupation or use for the Permitted User and/or inaccessible and the insurance shall not have been vitiated or payment of the policy monies refused in whole or in part as a result of some act or default of the Tenant … then the Basic Rent and the Service Charge or a fair proportion of them according to the nature and extent of the damage or inaccessibility sustained shall from and after the date of such damage be suspended and cease to be payable until either:
8.4.1 the Property shall have been made fit for occupation or use or
8.4.2 the period, which will be not less than 3 years, for which the Landlord insures loss of rent and service charge will have expired whichever shall be the earlier …"

e. Clause 8.7 provides that "If the Property has not been reinstated so as to be fit for occupation and use and accessible" by a particular time then either party may serve a notice to determine the Lease.

45. In the SportsDirect Lease:

a. In clause 4.3 headed "Insurance" it is provided that:
"4.3.1 In relation to the insurance of the Building maintained by the Superior Landlord, the Landlord shall: (a) use all reasonable endeavours to procure that the interest of the Tenant is noted or endorsed on the policy;…
4.3.2 In case of destruction to or damage to the Building or any part or parts thereof by any of the Insured Risks the Landlord shall use all reasonable endeavours to enforce the covenant given by the Superior Landlord in clause 4.2.5 of the Headlease …
4.3.3. If the Property is wholly or substantially damaged by any of the Insured Risks the Landlord shall use reasonable endeavours to procure that the Superior Landlord obtains deeds of collateral warranty in favour of the Tenant from the building contractor …engaged to carry out the works of rebuilding or reinstatement …"

b. In clause 5.3 headed "Rent suspension" it is provided that:
"5.3.1 If the Building or the Premises are damaged or destroyed by an Insured Risk so that they are rendered unfit for occupation or use

> or inaccessible, then provided that insurance of the Building has not been vitiated or payment of the insurance money is not refused wholly or in part through an act or default of the Tenant the rent firstly reserved under clause 2.3.1 (or a fair proportion according to the nature and extent of the damage)will not be payable until the earliest of the date that:
> (a) the Premises are again fit for occupation and use and are accessible; or
> (b) until three years from the date the damage occurred, whichever is the earlier."
> And
> "5.3.2 If the Premises has not been rendered fit for such occupation and use and accessible within the period of two years six months from the date of damage or destruction then either the Landlord or the Tenant may at anytime thereafter but before the Premises has been rendered fit for such occupation and use and accessible by notice in writing to the other party determine this Lease …"

46. While the SportsDirect Lease refers to the Superior Landlord taking out the relevant Insurance, it is common-ground that AEW has acquired (I do not know whether or not with the consequence of a merger) the Superior Landlord's interest and is thus both Landlord and Superior Landlord, and no points have been taken in relation to the fact that the mesne lessor is not the Insured as such.

47. Each Lease contains a provision that the Tenant is to pay a proper proportion of the amount of the premiums incurred for the Insurance (in the case of the SportsDirect Lease by way of contribution to service charge payable to the Superior Landlord). There is no dispute but that the Tenants have paid the amounts demanded from them.

48. The Leases contain certain other specific provisions to which I refer below.

49. Certain of the above clauses contain references to Arbitration but it is common ground both that they are not relevant to what I have to decide and that Defences have been filed and steps taken in the proceedings by the Tenants without their having made any applications for stays under section 9 of the Arbitration Act 1996. I, therefore, say no more about them.

<u>The Insurance and the Insurance Policy</u>

50. The Insurance effected by the Landlords (whether by themselves or as Superior Landlords) is actually in the form of a single Insurance Policy, although it has differing wordings over the relevant two annual policy periods, the insurer being Allianz Insurance plc ("the Insurer").

51. The essential provisions for the annual periods are as follows.

52. The Period of Insurance runs from 31st March to 30th March annually.

53. The following definitions apply to the cover:

"BUILDINGS means the BUILDINGS at the PREMISES and include various items e.g. fixtures and fittings. The PREMISES is a reference to the properties listed in the Schedule and which are used by the Insured for the purposes of the BUSINESS.

BUSINESS means the BUSINESS of the INSURED shown in the Schedule and including … "the provision of services to the TENANTS".

DAMAGE means "Loss destruction or damage … i. the actual annual RENT at the commencement of the PERIOD OF INSURANCE … in each case the amount to be proportionately increased where the INDEMNITY PERIOD exceeds one year."

EVENT means "Any one occurrence or all occurrences of a series consequent on or attributable to one source or original cause"

RENT means "the money paid or payable to or by the Insured for tenancies and other charges and for services rendered in the course of the BUSINESS at the PREMISES"

INDEMNITY PERIOD means "The period beginning with the occurrence of the DAMAGE and ending not later than the maximum number of months thereafter stated in the CERTIFICATE OF INSURANCE during which the results of the BUSINESS shall be affected in consequence of the DAMAGE."

54. The Schedule contains the details of:
    a. the Insured; which is named as the Landlords only (although in relation to the Blackpool Shop there is a Certificate of Insurance on which SportsDirect is noted as the Tenant)
    b. the Insured's Business: which is stated as "Property owners, Developers and Occupiers/Managers of Commercial and/or Residential property portfolios".

55. There is a section 1 headed "Property Damage" and which states:
"If any BUILDINGS suffer DAMAGE by any causes not excluded the Insurer(s) will pay to the Insured the amount of loss in accordance with the provisions of the insurance

Provided that the Insurer(s) liability in any one Period of Insurance shall not exceed in respect of each item on BUILDINGS the Sum Insured and any other stated Limit of Liability"

56. There are a number of "causes excluded" but none refer to disease although they do seem to all be concerned with physical matters. It is provided that the amount to be calculated is on the "Reinstatement Basis" which has the definition "Reinstatement means the rebuilding replacement repair or restoration of BUILDINGS suffering DAMAGE" with a cap of what would have been payable had the BUILDINGS been wholly destroyed.

57. There is a section in respect of "Rent" which provides:
    a. "If any BUILDINGS suffer DAMAGE by any causes not excluded under Section 1 Property Damage and the BUSINESS is in consequence thereof interrupted or interfered with the Insurer(s) will pay the Insured the amount of loss arising as a result in accordance with the following provisions provided that the Insurer(s) liability in any one Period of Insurance shall not exceed in respect of each item 200% of the Sum Insured." And then
    b. Under the heading "Rent – The Basis of Settlement of Claims" that "The Insurer(s) will pay in respect of BUILDINGS which have suffered DAMAGE… a. the loss of Rent being the actual amount of the reduction in the RENT receivable by the Insured during the INDEMNITY PERIOD solely in consequence of the DAMAGE.. [and costs of reletting and mitigation expenditure]"

58. It is then provided that there are various extensions for causes not excluded (see above). There extensions include:
    a. where BUILDINGS are unoccupied but are not let or sold
    b. a provision that "DAMAGE is extended to include any outbreak of Legionellosis at the PREMISES causing restrictions on the use thereof on the order or advice of the competent local authority…"
    c. a provision headed "Prevention of Access" that "the insurance is extended to include loss of RENT resulting from DAMAGE to PROPERTY in the vicinity of the PREMISES insured by this Policy whether the BUILDINGS insured by this Policy are damaged or not excluding DAMAGE to PROPERTY of any supply undertaking which shall prevent or hinder the supply of services by an electricity gas water or telecommunications undertaking to the PREMISES."

59. However, for each policy period there is also an extension of cover for "Murder Suicide or Disease" (in the 2020-2021 policy it appears in the "Loss of Rent" extensions section and in the 2019-2020 Policy it forms part of an Endorsements section) which reads:
    a. "The Insurer(s) shall indemnify the Insured in respect of loss of RENT or Alternative Residential Accommodation and RENT in accordance with Condition 1 to Sections 1 and 2 (notwithstanding any requirement for DAMAGE to BUILDINGS) resulting from interruption of or interference with the BUSINESS during the INDEMNITY PERIOD following
    a… any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the PREMISES or within a 25 mile radius of it….
    The Insurance by this Extension shall only apply for the period beginning with the occurrence of the loss and ending not later than

three months thereafter during which the results of the BUSINESS shall be affected in consequence of the interruption or interference"

b. And in the case of the 2019-2020 Policy with the additional words "The liability of the Insurer(s) in respect of this Endorsement shall not exceed £100,000 any one loss"

60. There is a provision in each Schedule for cover headed "Prevention of Access (Non Damage)" which extends Loss of Rent cover to "loss to insured caused by prevention or hindrance of access to the BUILDINGS or prevention or use of the BUILDINGS" due to various events and which include closures by or due to action (or advice) of police or statutory bodies but which has an exception for "action taken as a result of drought or diseases or other hazards to health" (2019-2020 Policy) or "where such actions or advice are directly or indirectly caused by or arise from any infectious or contagious disease" (2020-2021 Policy).

61. In the 2019-2020 Policy there is a Nil Excess in relation to claims for Loss of Rent, but in the 2020-2021 Policy there is a £350 Excess.

Relevant COVID Events and Regulations

62. I take the relevant history of the Government's statutory and regulatory response to the COVID pandemic up to July 2020 from the Arch Judgment as follows:

"The emergence of COVID-19 and initial Government response

7.On 12 January 2020, the World Health Organization ("WHO") announced that a novel coronavirus had been identified in samples obtained from cases in China. This announcement was subsequently recorded by Public Health England. The virus was named severe acute respiratory syndrome coronavirus 2, or "SARS-Co V-2", and the associated disease was named "COVID-19".

8.On 30 January 2020, the WHO declared the outbreak of COVID-19 a "Public Health Emergency of International Concern".

9.On 31 January 2020, the Chief Medical Officer for England confirmed that two patients had tested positive for COVID-19 in England. The first case confirmed in Northern Ireland was on 27 February 2020, the first in Wales on 28 February 2020 and the first in Scotland on 1 March 2020.

10.On 10 February 2020, the Health Protection (Coronavirus) Regulations 2020 (SI 2020/129) were made by the Secretary of State for Health and Social Care, pursuant to powers under the Public Health (Control of Disease) Act 1984 ("the 1984 Act"). In broad terms, these Regulations provided for the detention and screening of persons reasonably suspected to have been infected or contaminated with the new strain of coronavirus. The Regulations were subsequently repealed on 25 March 2020 by the Coronavirus Act 2020 ("the 2020 Act").

11.On 2 March 2020, the first death of a person who had tested positive for COVID-19 was recorded in the UK, although the first death from COVID-19 was publicly announced by the Chief Medical Officer for England on 5 March 2020.

12.On 4 March 2020, the UK Government published guidance titled "Coronavirus (COVID-19): What is social distancing?". It referred to the

Government's action plan from the previous day, which discussed four phases of response: "contain", "delay", "research" and "mitigate". It also referred to the possibility of introducing social distancing measures and asked people to think about how they could minimise contact with others.

13.On 5 March 2020, COVID-19 was made a "notifiable disease", and SARS-Co V-2 made a "causative agent", in England by amendment to the Health Protection (Notification) Regulations 2010 (SI 2010/659) ("the 2010 Regulations"). Under the 2010 Regulations, a registered medical practitioner has a duty to notify the local authority where the practitioner has reasonable grounds for suspecting that a patient has a "notifiable disease", defined as a disease listed in Schedule 1, or an infection which presents or could present significant harm to human health. The local authority must report any such notification which it receives to, amongst others, PHE. Schedule 1 to the 2010 Regulations contained a list of 31 notifiable diseases before the addition of COVID-19. On 6 March 2020, similar amendments were made to the Health Protection (Notification) (Wales) Regulations 2010 (SI 2010/1546). COVID-19 had been made a notifiable disease in Scotland on 22 February 2020 and in Northern Ireland on 29 February 2020.

14.On 11 March 2020, the WHO declared COVID-19 to be a pandemic.

15.On 12 March 2020, the UK Government announced that it was moving from the "contain" phase to the "delay" phase of its action plan and raised the risk level from "moderate" to "high".

16.On 16 March 2020, the UK Government published guidance on social distancing. The guidance advised vulnerable people to avoid social mixing and to work from home where possible. The guidance included advice that large gatherings should not take place.

17.Also on 16 March 2020, the Prime Minister, the Rt Hon Boris Johnson MP, made a statement to the British public, the main text of which is set out in Appendix 1 to this judgment. In the statement he said that "now is the time for everyone to stop non-essential contact with others and to stop all unnecessary travel. We need people to start working from home where they possibly can. And you should avoid pubs, clubs, theatres and other such social venues." He added that "as we advise against unnecessary social contact of all kinds, it is right that we should extend this advice to mass gatherings as well."

18.On 18 March 2020, the Prime Minister made a further statement… The principal purpose of the statement was to announce the closure of schools from the end of Friday, 20 March 2020. In the statement he said: "I want to repeat that everyone -everyone -must follow the advice to protect themselves and their families, but also -more importantly-to protect the wider public."

19.On 20 March 2020, the Prime Minister made a further statement… In this statement he thanked everyone for following the "guidance" issued on 16 March 2020 but said that further steps were now necessary. He said that across the UK cafes, pubs, bars and restaurants were being told to close as soon as they reasonably could and not open the following day. He added that: "We're also telling nightclubs, theatres, cinemas, gyms and leisure centres to close on the same timescale."

The 21 March Regulations

20.On 21 March 2020, the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 (SI 2020/327) ("the 21 March Regulations") were made by the Secretary of State for Health and Social Care pursuant to powers under the 1984 Act. Equivalent regulations for Wales were introduced on the same day.

21.The 21 March Regulations provided for the closure of businesses set out in the Schedule to the Regulations. Under regulation 2(1) the businesses listed in Part 1 of the Schedule, which comprised restaurants, cafes, bars and public houses, were required to close or cease carrying on the business of selling food and drink other than for consumption off the premises. Regulation 2(4) required the businesses listed in Part 2 of the Schedule to close. These included cinemas, theatres, nightclubs, bingo halls, concert halls, museums, galleries, betting shops, spas, gyms and other indoor leisure centres…

22.Regulation 3 of the 21 March Regulations made contravention of regulation 2 without reasonable excuse a criminal offence, punishable on summary conviction by a fine. Regulation 4(1) provided that a person designated by the Secretary of State may take action as necessary to enforce a closure or restriction imposed by regulation 2.

Developments from 22 to 25 March

23.On 22 March 2020, the Prime Minister announced the next stage of the UK Government's plan, which included "shielding" measures for vulnerable people and advising members of the public to stay two metres apart even when outdoors.

24.On 23 March 2020, the Prime Minister made a further announcement…. He said that it was vital to slow the spread of the disease and "that's why we have been asking people to stay at home during this pandemic". The time had, however, come for "us all to do more". From that evening he was therefore giving "the British people a very simple instruction -you must stay at home". He said that people would only be "allowed to leave their home" for very limited purposes such as shopping for basic necessities and "travelling to and from work, but only where this is absolutely necessary and cannot be done from home". He added that "if you don't follow the rules the police will have the powers to enforce them, including through fines and dispersing gatherings." In order to "ensure compliance with the Government's instruction to stay at home" he stated that "we will immediately -close all shops selling non-essential goods ... stop all gatherings of more than two people in public ... and we'll stop all social events, including weddings, baptisms and other ceremonies, but excluding funerals."

25.Also on 23 March 2020, the UK Government issued guidance to businesses about closures. This included advice that it would be an offence to operate in contravention of the 21 March Regulations and that businesses in breach of the 21 March Regulations would be subject to prohibition notices and potentially unlimited fines.

26.On the same day PHE issued a document called "Keeping away from other people: new rules to follow from 23 March 2020." It stated that there were three "important new rules everyone must follow to stop coronavirus spreading". These were (i) "you must stay at home" and should only leave home "if you really need to" for one of the reasons stated; (ii) most shops

should stay closed; and (iii) people must not meet in groups of more than two in public places.27.On 24 March 2020, the UK Government issued guidance to providers of holiday accommodation to the effect that they should have taken steps to close for commercial use and should remain open only for limited prescribed purposes, for example to support key workers or homeless people.

28.On 25 March 2020, the 2020 Act was enacted. The 2020 Act applies across the UK, although different provisions have come into force in different nations at different times. In broad terms the 2020 Act established emergency arrangements in relation to health workers, food supply, inquests and other matters.

The 26 March Regulations

29.On 26 March 2020, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350) ("the 26 March Regulations") were made by the Secretary of State for Health and Social Care exercising powers under the 1984 Act. Similar regulations were introduced in Wales, Scotland and Northern Ireland.

30.The 26 March Regulations revoked most of the 21 March Regulations and replaced them with new rules which imposed more extensive restrictions. Regulation 4(1) was in similar terms to regulation 2(1) of the 21 March Regulations and required the businesses listed in Part 1 of Schedule 2 -which again comprised restaurants, cafes, bars and public houses -to close or cease selling any food or drink other than for consumption off its premises.

31.Regulation 4(4) required businesses listed in Part 2 of Schedule 2 to close. These included all the businesses that had already been required to close by regulation 2(4) of the 21 March Regulations (see para 21 above) and a number of others, including nail, beauty and hair salons and barbers, tattoo and piercing parlours, playgrounds, outdoor markets and car showrooms. Further restrictions and closures were imposed by regulation 5 for retail shops, holiday accommodation and places of worship -with the exception of the businesses listed in Part 3 of Schedule 2.32…

33.Regulation 6 introduced a prohibition against people leaving the place where they were living "without reasonable excuse".(A non-exhaustive list of reasonable excuses was set out in regulation 6(2).) Regulation 7 prohibited gatherings in public places of more than two people other than in limited circumstances. Regulation 9 made any contravention of the 26 March Regulations without reasonable excuse a criminal offence punishable on summary conviction by a fine. There were several reports of enforcement action being taken under these provisions in the months after 26 March 2020.

34.Regulation 3 of the 26 March Regulations required the Secretary of State to review the need for the restrictions at least once every 21 days, with the first review being carried out by 16 April 2020. The 26 March Regulations, and the equivalent regulations in Wales, Scotland and Northern Ireland, were amended on several occasions. For example, on 13 May 2020 garden centres and outdoor sports courts were added to the list of businesses in Part 3 of Schedule 2 which were allowed to stay open, as were outdoor markets and certain showrooms on 1 June 2020.

35.On 4 July 2020, the 26 March Regulations were revoked and replaced with more limited restrictions in the Health Protection (Coronavirus, Restrictions) (No 2) (England) Regulations 2020 (SI 2020/684) in England. Since then, there have been further legislative changes; but they have occurred since the trial and were therefore not considered by the court below…."

63. It is common ground (or at least clearly reasonably arguable) that the Tenants all had to close their Premises to the public (and to an extent at least, their staff) and businesses from 22 or 23 March 2020 to July 2020.

64. The more limited July Regulations permitted the opening of the various Premises. However, the operation of the Premises remained subject to the need to comply with the Management of Health and Safety at Work Regulations 1999 and other statutory and common-law safety requirements which when taken with the continually evolving government regulation and guidance involved very considerable constraints on public access (including in terms of numbers and social distancing).

65. The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020 [2020 No. 791] imposed a requirement for the wearing of face coverings indoors with various limited exceptions.

66. The evidence, which is not challenged by the Claimants on this hearing, is that this led to SportsDirect opening the Blackpool Shop, on a reduced basis, but to Cine-UK and Mecca considering that while some limited opening might be technically possible, it was not commercially feasible, especially when a cost-benefit analysis was carried out which involved taking into account that the government had introduced a "furlough" scheme enabling certain staff costs to be paid (to an extent) provided that they did not actually work.

67. As the pandemic continued various local regulations were introduced which had the effect of requiring SportsDirect to again close the Blackpool Shop.

68. Then, with effect from 14 October 2020, the Government introduced a tiering system by the Health Protection (Coronavirus, Local COVID-19 Alert Level) Regulations [2020/1103-5], replaced from 4 November 2020 by the Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020 [2020/1200] which imposed different levels of restriction depending upon in which "Tier" a particular area of the country fell from time to time. Areas might move in or out of Tiers, and with the result that on 18 November 2020 (a day of the hearing) the Bristol Cinema changed from being unable to open to being, in theory, able to open on a distinctly limited basis.

69. However, on 2 December 2020 there were enacted the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020

[2020/1374] which had the effect of closing down to public access (with limited ability for staff access) all of the Premises.

70. It is clear, and effectively common ground, for the purposes of this Hearing, that:
    a. From before the March quarter day (25 March 2020) all of the Premises were required to close to the public (with limited staff access);
    b. From 4 July 2020 it was possible to open the Blackpool Shop to the public for a limited period (until local restrictions caused it to have to close) and which was done;
    c. From 4 July 2020 it was possible to open the Bristol Cinema and the Dagenham Bingo Hall to the public but only on a very limited basis and which Cine-UK and Mecca did not regard as being commercially economic and which they therefore did not do;
    d. From 14 October 2020 it was for some (but only some) limited periods possible in theory to open each of the Premises (although there is nothing to suggest that they were in fact opened) but not from 4 December 2020.

71. It further seems to me that it is reasonably arguable that the effect of those government regulations and guidance (together with health and safety legislation in the context of the pandemic) was to render it commercially unfeasible to open the various Premises even if theoretically possible, except that the Blackpool Shop could open for limited periods of time.

72. As at the date of this Judgment, the pandemic and the most restrictive regulations are continuing. However, there have been substantial scientific developments, in particular now resulting in the "roll-out" of vaccines, and here the intention is to vaccinate the entire (adult at least) population by summer (and if not then by autumn) 2021. The Prime Minister on 22 February 2021 announced a "Road-Map" of a phased lifting of lockdown which would, if kept to, result in the lifting of all restrictions by mid-June 2021. In fact from 12 April 2021 it has become possible for the Blackpool Shop (but not the Bristol Cinema or the Dagenham Bingo Hall) to open and trade.

73. I refer to the various restrictive and lock-down regulations from time to time as "the COVID Regulations").

74. However, the announcements are clear that the Road-Map and the lifting of restrictions are dependent upon events occurring within and complying with the present scientific forecasts and are liable to change in the event of unforeseen developments. Moreover, it is not at all clear as to precisely what social distancing etc. requirements might remain in place at least for businesses such as those of Cine-UK and Mecca where substantial numbers of people attend within (relatively) confined spaces. I bear in mind also that the developing nature of the pandemic, including the emergence of new

variants of COVID-19, has led to something of a "creep" in terms of postponements of lifting of restrictions and the imposition of new lock-downs in the past even though the government is displaying a degree of (cautious) optimism. I refer to what I consider are and would have been the views of a reasonable commercial person with regard to the likely length of COVID-19 and the restrictions imposed by the COVID Regulations below.

Summary of the Parties' Positions and Cases

75. There is little factual dispute between the parties and, in any event, at Summary Hearing, and on the basis of the witness evidence and what is common knowledge (and of which judicial notice can, in my view, be taken) I should accept, for the purposes of this Hearing, what the Tenants say as a matter of fact (as opposed to what they assert as a matter of legal consequence, which is a different matter) and as I have set out above.

76. It is in these circumstances that the Tenants say that they, and the Leases, have been overtaken by wholly unforeseeable (including by the original parties to the Leases) events which have rendered the commercial purpose of the Leases temporarily (at least) impossible and unfulfillable and which they assert should result in the burden of rent being lifted from them on one or more legal grounds. They further assert that they have paid for the Insurance, that it should cover the Rents, and in consequence the Rent should be met by the Insurer or at least by the Landlords (whose recourse, if any, should be to the Insurance and the Insurer, with its being the Landlords own fault if that recourse is either not taken up or not available to them).

77. The Landlords' case is that this is a matter of allocation of risk in relation to events which were (at least to a degree) foreseeable and where it was for the Tenants (or their predecessors) to negotiate provisions which would have resulted in rent cessation in these events. The Landlords say that the Insurance may provide some cover (in particular to the Landlords) in the events of the pandemic but such does not extend to covering loss of Rent where there are no relevant rent cessation provisions in the Leases and the relevant Tenants can pay.

Arch and the Insurance

78. The question of whether the Pandemic and the various Regulations and other government and local authority conduct amounted to the occurrence of relevant events for the purposes of various types of BII policies came before the courts in composite litigation FCA v Arch Insurance (UK) Limited and Others. Following the oral hearing of these Applications, the Supreme Court delivered its judgement citation [2021] UKSC 1. I directed that the parties should be able to adduce further written submissions in relation to the resultant judgment, and the Landlords did so.

79. In the Arch case, the Supreme Court considered amongst other standard-form policy wordings, a version termed as "QBE 1" which is virtually identical to the relevant words in the Insurance - at paragraph 83(a) as follows:

"loss resulting from] interruption of or interference with the business arising from:(a) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the premises or within a twenty-five (25) mile radius of it;.."

80. At paragraphs 85 and 86 it was held in relation to the general coverage of QBE 1:
"85.The wording of QBE 1 is something of an outlier in that, unlike the clauses we have considered so far, the clause has as its subject a disease, rather than an occurrence of illness sustained by a person resulting from a disease. Nevertheless, we think the wording makes it sufficiently clear that the insured peril is not any notifiable disease occurring anywhere in the world but only in so far as it is manifested by any person whilst in the premises or within a 25 mile radius of the premises. The words "manifested by any person" etc are indeed, as the court below described them "adjectival". But that does not detract from the fact that they are an integral part of the description of the risk. They are adjectival but not conditional. We do not agree that the clause is naturally or reasonably read as if it said: "any human infectious or human contagious disease ... on condition that and from the time when the disease is manifested by any person whilst in the premises or within a 25 mile radius of it.

86.To read the clause as if it contained such words in our view involves unjustifiable manipulation of the language. It also involves treating the insured peril as subject to no geographical limit at all provided only that at least one person manifests the disease within the specified area. That seems to us an improbable form of cover for insurers to provide, as well as one which would be out of line with all the other limbs of the clause. Each of the other sub-clauses covers something happening at, or a consequence of something happening at, the insured premises: for example, injury or illness sustained by any person arising from food or drink provided in the premises; or the presence of vermin or pests in the premises. Sub-clause (a) is naturally understood as operating in a similar way. The only difference from the other sub-clauses is that the risk covered is not confined solely to something happening at the insured premises but extends to something happening within a specified distance away from the insured premises. Thus, it is not only disease manifested by any person whilst in the premises that is covered, but also disease manifested by any person whilst within a 25-mile radius of the premises."

81. It is common ground that there have been cases of COVID-19 within 25 miles of each of the Premises.

82. It was held in relation to causation of insured loss that:
"212.We conclude that, on the proper interpretation of the disease clauses, in order to show that loss from interruption of the insured business was proximately caused by one or more occurrences of illness resulting from COVID-19, it is sufficient to prove that the interruption was a result of

Government action taken in response to cases of disease which included at least one case of COVID-19 within the geographical area covered by the clause. The basis for this conclusion is the analysis of the court below, which in our opinion is correct, that each of the individual cases of illness resulting from COVID-19 which had occurred by the date of any Government action was a separate and equally effective cause of that action (and of the response of the public to it). Our conclusion does not depend on the particular terminology used in the clause to describe the required causal connection between the loss and the insured peril and applies equally whether the term used is "following" or some other formula such as "arising from" or "as a result of". It is a conclusion about the legal effect of the insurance contracts as they apply to the facts of this case."

83. It is thus common ground, at least for the purposes of considerations of summary judgment, that the effect of the Arch decision is that the Insurance does afford cover against relevant loss to at least some extent. However, the Landlords contend that this is irrelevant as the Tenants cannot show that any "loss from interruption of the insured business" has occurred at all, and so that there is no relevant loss which has been caused by the Government action in response to the Pandemic. I deal with this later below.

84. I do also note the existence of the "Prevention of Access (Non Damage)" extensions. I do not think that any party is seeking to rely upon these in any particular way, although Cine-UK has suggested that an independent head of claim by the Landlord against the Insurer might exist under it, but that this should not affect the construction of the "Murder, Suicide or Disease" provisions. I do not accept that any claim could be made under the "Prevention of Access (Non Damage)" extensions as they contain specific exclusions for closures due to "action taken as a result of drought or diseases or other hazards to health" (2019-2020 Policy) or "where such actions or advice are directly or indirectly caused by or arise from any infectious or contagious disease" (2020-2021 Policy), and which would seem to cover COVID measures. However, it does seem to me that the clause may have some very limited weight as to construction of the Policy which I deal with below.

Parliament, the Government and Commercial Premises and Rents

85. The various Leases all create business tenancies which are protected by the 1954 Act and to which I have referred above.

86. Parliament has enacted the Coronavirus Act 2020 which by section 82 (and subsequent regulations) provided, in effect, that business tenancies cannot be brought to an end by forfeiture, including for non-payment of rent, for the period from its inception until summer 2021, and the Corporate Insolvency and Governance Act 2020 and regulations under it which have effectively prevented the use of statutory demands and winding-up petitions based on non-payment of rent until summer 2021.

87. However, the Government has issued various Guidance in relation to the Pandemic and its consequences and which included a Code of Practice

published on 19 June 2020 ("the June Code") with regard to commercial premises and leases, and which is in the Bundles before me. The June Code referred in detail to the effects of the Pandemic and the then lock-down regulations and strongly encouraged landlords and tenants to communicate and negotiate ameliorative measures for tenants including rent-free periods and moratoria.

88. I drew attention to the fact that on 9 December 2020 the Ministry of Housing, Communities and Local Government published a statement referring to the above matters. It stated amongst other matters (and to which I refer below) that there would be additional guidance published in early 2021 to sit alongside the June Code and "to encourage all parties to work together to protect viable businesses and ensure a swift economic recovery." It stated that processes for Commercial Rent Arrears Recovery (i.e. the old distress) in relation to rent would be suspended to 31 March 2021 (now to summer 2021) and that all "This allows businesses sufficient breathing space to pay rent owed."

89. Ms Harrison for Cine-UK strongly pressed upon me submissions to the effect that it was highly inconsistent with the June Code for the Landlords in these cases to be insisting upon payment of full rents, and to be pressing for summary judgment (with presumably consequent enforcement) at this point in time. She took me to correspondence in May and June 2020 where Cine-UK had raised the existence and contents of the Code but the Landlords had simply stated that they were entitled to the outstanding rents, and contended that this was not good practice and was not a case of Landlords acting fairly and responsibly as provided for by the June Code but was rather wholly inconsistent with it. She submitted that the turnover from which it would have been expected that Tenants would pay their rents has been destroyed by the Pandemic and the Government Regulations. Accordingly, she submitted that there was a strong public policy in these unprecedented circumstances in favour of there being negotiations between the Landlords and Cine-UK and the other Tenants; that the Landlords had simply refused to engage in any such; and that this was of important weight in supporting the Tenants' contention that the Landlords had not shown that there was "no other compelling reason for a trial" as required for them to obtain summary judgment (CPR24.2(b)).

90. I had, as I informed the parties, previously rejected an application made by Deltic to stay the Claim against Deltic under CPR3.1(2)(f) on somewhat similar grounds. However, I have fully reconsidered the position in the light of the arguments now advanced.

91. While I do bear in mind the June Code and the Ministerial Statement generally in relation to my overall conclusions as to the appropriateness of whether or not to grant summary judgment, it seems to me that I should reject Ms Harrison's specific arguments for three sets of reasons.

92. First, the June Code encourages negotiation, and it is about the absence of negotiation that Ms Harrison complains. I do not see how that renders there

as being an "other compelling reason for a trial". If a negotiation was successful then there would be no trial. I cannot see any connection between the complaint and that submission as to its relevance. However, that does not prevent the matter being relevant to questions of whether the court should either grant a stay at this point or refuse summary judgment under its general discretion in the opening "may" of CPR24.2. Nevertheless, I refuse to do either of those for the following reasons (and which are also each a substantial reason for rejecting Ms Harrison's "other compelling reason for a trial" submission).

93. Second, the June Code is expressly stated to be "voluntary". In Paragraph 1 it stated "This is a voluntary code and does not change the underlying legal relationship or lease contracts between landlord and tenant and any guarantor."; and Paragraph 7 reiterates "Each relationship will need to respond to these circumstances differently. Therefore, this code is voluntary and presents options…". Moreover, the June Code recites that various industry bodies on both the landlord and tenant sides have signed up to the June Code but the Landlords are not members of any relevant body. The Ministerial Statement does not suggest that the Code is in any way binding. I also note that Parliament (and the Government through it) has enacted specific limitations upon various legal rights and remedies which are otherwise generally available to Landlords but no such limitation in relation to simply suing for rent (and even if that might lead to enforcement by Writ of Control).

94. I also bear in mind that in general a party with a legal right is entitled to bring legal proceedings to enforce it and that it is at first sight an interference with its possessions (and thus an inroad into Article 1 of the First Protocol to the European Convention of Human Rights) and an invasion of its Article 6 rights to a hearing within a reasonable time for it to be prevented from having its claim determined. While the Court has power to stay claims for negotiation and to require even unwilling parties to attend alternative dispute resolution hearings (see CPR3.1(2)(f) and (m) and Lomax v Lomax 2019 1 WLR 6527), it would be very unusual to do so where a party was seeking summary judgment on the basis that their claim was clear and all the more so if the court had actually concluded that that was the case (and to which this Judgment is also directed) – and I note that in a different COVID context I have reached a similar conclusion. See Trinity House v Prescott [2021] EWHC 283 at paragraph 20.

95. I therefore do not see that the existence of a voluntary Code encouraging negotiation should in any way obstruct a claimant who contends that they have a clear case seeking summary judgment and, assuming that such a clear case is made out, from obtaining it at this point.

96. Third, both the June Code and the Ministerial Statement are clear that they do not restrict landlords from requiring tenants who can pay their rents to do so. In the Foreword to the June Code is the phrase "Government has always been clear that tenants who are able to pay their rent in full should continue to do so…" and Paragraph 3 starts "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…" The Ministerial Statement contains the sentence "The government is clear that where businesses can pay any or all of their rent, they should do so."

97. I asked Ms Harrison, and also Ms Holland and Mr Calland, whether they were contending, or adducing any evidence to suggest, that any of the Tenants could not pay the outstanding rents. They each declined to make any such contention or to point to any such evidence. It is not, in my view, for the Landlords to have to demonstrate the Tenants' financial positions when the Tenants (and not the Landlords) have all the material knowledge. It does not seem to me that it is open to any of the Tenants in those circumstances to contend that the June Code or the Ministerial Statement places any obligation, even of a voluntary nature, upon the Landlords to negotiate.

98. Ms Harrison submits that this should be considered in the context of rents being paid out of turnover, and that there is none. However, that is not what the June Code and the Ministerial Statement say. If that construction was correct then the wording would be very different and refer to trading and/or turnover.

99. While in the Commerz Real case a somewhat similar submission from the tenant in that case was rejected on the basis that there had been significant engagement from the relevant landlord under the provisions of the Code, and the evidence is here that the Landlords have simply insisted upon full payment of the various Rents; for the reasons given above, I regard the Code both as being outside the litigation process and not applicable to these Tenants who are not said to be unable to pay.

100. I therefore do not think that this gives rise to any "other compelling reason" for there to have to be a trial within the meaning of CPR24.2(b).

Construction of the Leases

101. It is common ground between the parties that, the Landlords having decided to obtain the Insurance which extends in principle to loss arising from the circumstances of the Pandemic and the Government Regulations and consequent effects on the various Premises, such Insurance is against an "Insured Risk" for the purposes of that expression as used in each of the Leases. It seems to me that that is correct, each Landlord (or Superior Landlord) has "reasonably required" such Insurance.

102. The Tenants therefore contend that the Leases should be construed or the common law applied in those events so that:
    a. The Rent Cesser clauses result in the Rents being suspended, or

b. The Landlords are either unable to sue the Tenants for or have to give credit to the Tenants (including in effect by off-setting against the Rents) for:
   i. all sums recoverable from the Insurer and which extend to the amount of the rents; and
   ii. any sums which are not recoverable from the Insurer owing to failure to insure or underinsurance against the rents in the circumstances which have happened.

103. The Landlords' response is to say:
   a. The Rent Cesser clause does not cover the event of loss due to non-physical effects on the Premises i.e. their being closed or having access restricted to them otherwise than by reason of physical damage or destruction;
   b. The Insurance does not cover (and did not have to cover) "loss of rent" unless rent has ceased to be payable by the Tenants under the Rent Cesser clauses; and that the Rent Cesser clause and its meaning has to be determined first.

104. It seems to me that the Landlords' general approach to the analysis is correct in that the first question is as to the construction of the Rent Cesser clause, and without reference to the terms of the Insurance (except insofar as it feeds into the definition of Insured Risks). This approach did not seem to be contested by the Tenants, and I think it is right as:
(1) The Leases pre-date the Insurance (at least in its form before me) by numbers of years;
(2) While the Leases are to be construed in the light of their respective factual matrices; for a matter to be part of the relevant factual matrix it must have existed (or at least been contemplated to be going to exist in a particular form) as at the time of the grant of the relevant Lease. Otherwise the parties could not have been making their agreement (to the Lease) in the light and circumstances of the relevant matter. I have no evidence of what insurance policies might have provided for, or been known or contemplated to have provided for, at the times of the granting of the various Leases; and, of course, the fact that the various definitions of "Insured Risks" do not expressly provide for infectious diseases and their effects would at first sight suggest that they were not within the parties' then contemplation.

105. The general principles with regard to construction of the Leases (and any other contract) were not in dispute. I was taken to Arnold v Britton [2015] AC 1619 at paragraphs 14 to 23:

"Interpretation of contractual provisions
14. Over the past 45 years, the House of Lords and Supreme Court have discussed the correct approach to be adopted to the interpretation, or construction, of contracts in a number of cases starting with *Prenn v Simmonds [1971] 1 WLR 1381* and culminating in *Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900* .

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] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, 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. In this connection, see *Prenn [1971] 1 WLR 1381* , 1384-1386; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989* , 995-997, per Lord Wilberforce; *Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251* , para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in *Rainy Sky [2011] 1 WLR 2900* , paras 21-30, per Lord Clarke of Stone-cum-Ebony JSC.

16. For present purposes, I think it is important to emphasise seven factors.

17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. 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. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in *Wickman Machine Tools Sales Ltd v L Schuler AG [1974] AC 235* , 251 and Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios) [1985] AC 191* , 201, quoted by Lord Carnwath JSC at para 110, have to be read and applied bearing that important point in mind.

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one 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. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

22. Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is *Aberdeen City Council v Stewart Milne Group Ltd 2012 SC (UKSC) 240* , where the court concluded that “any … approach” other than that which was adopted “would defeat the parties' clear objectives”, but the conclusion was based on what the parties “had in mind when they entered into” the contract: see paras 21 and 22.

23. Seventhly, reference was made in argument to service charge clauses being construed “restrictively”. I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in McHale v Earl Cadogan [2010] HLR 412 , para 17. What he was saying,

quite correctly, was that the court should not "bring within the general words of a service charge clause anything which does not clearly belong there". However, that does not help resolve the sort of issue of interpretation raised in this case."

106. I was also taken to paragraphs 69 to 71 in the judgment of Lord Hodge:

"69. In *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715 the mistaken omission of words in a clause was apparent because the bill of lading had been modelled on a standard clause. The person who had transposed the standard clause into the bill of lading had omitted a phrase in the standard clause in which the same word had appeared at the end of two consecutive phrases. The mistake was clear and it was apparent what correction was called for (paras 22 and 23 per Lord Bingham).

70. In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 a definition, which contained a grammatical ambiguity, made no commercial sense if interpreted in accordance with the ordinary rules of syntax. The background to the deal and the internal context of the contract showed that there was a linguistic mistake in the definition, which the court was able to remove by means of construction. In his speech Lord Hoffmann (at p 1114) referred with approval to the judgment of Carnwath LJ in *KPMG LLP v Network Rail Infrastructure Ltd* [2007] Bus LR 1336. In that case, which concerned a rent review clause in a lease, it was clear from the terms of the clause that its wording did not make sense. The court was assisted by an earlier agreement which set out the then intended clause containing a parenthesis, of which only part had remained in the final lease. It was not clear whether the parties had mistakenly deleted words from the parenthesis, which they had intended to include, or had failed to delete the parenthesis in its entirety. But that uncertainty as to the nature of the mistake, unusually, did not matter as the outcome was the same on either basis.

71. In *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56, 2012 SCLR 114 the internal context of the contract provided the answer. The sale contract provided for the payment to the vendor of a further sum on disposal of the land by the purchaser. Two of the methods of disposal required the parties to ascertain the market value of the property on disposal in calculating the additional payment and the other used the "gross sales proceeds" in calculating that payment. The purchaser sold the site at an under-value to an associated company, a circumstance which on the face of the contract the parties had not contemplated. The courts at each level interpreted the provision, which used the gross sales proceeds in the calculation, as requiring a market valuation where there was a sale which was not at arm's length. They inferred the intention of the parties at the time of the agreement from the contract as a whole and in particular from the fact that the other two methods of disposal required such a valuation. While this line of reasoning was criticised by Professor Martin Hogg ((2011) Edin LR 406) on the ground that it protected a party from its commercial fecklessness, it seems to me to be

> the correct approach in that case as the internal context of the contract pointed towards the commercially sensible interpretation."

107. I also bear in mind that as stated, for example, in the Rainy Sky decision at paragraph 21, where there is more than one possible construction, the Court is searching for the most appropriate of the various meanings. It does this by considering them all as one holistic exercise, and testing them together, rather than by simply considering each individually (with the risk of going through them as a series and rejecting each possibility in turn so as to leave the court with a last residual answer even though that answer would not the most appropriate).

108. I have also been taken to the Aberdeen case (Aberdeen City Council v Stewart Milne Group Ltd [2011] UKSC 56) itself where a contract had provision for a payment calculated by reference to either an "open market valuation" or a share of profit of "sale proceeds" and the question arose as to what would happen on a sale to an associated entity at an undervalue, and whether those proceeds were to be treated as the base amount for the calculation.

109. Lord Hope said at paragraphs 20 and 22:

> "20 The question then is whether there is anything in the definition of the expression "Open Market Valuation" which shows that this method cannot be used in the case of a sale. The definition directs attention to the open market value of the subjects "or the relevant part thereof as specified in the notice at the date of the notice served in accordance with clause 9.5". There is no requirement for a notice in accordance with clause 9.5 in the case of a sale. But the absence of a notice does not make the valuation exercise directed by this definition unworkable. In the case of a sale the information that a notice would provide is to be found in the contract, just as in the case of lease it seems not to have been thought necessary to identify the date as at which the subjects were to be valued in order to arrive at the Lease Value. It seems to me therefore that there would be no difficulty in implying a term to the effect that, in the event of a sale which was not at arms length in the open market, an open market valuation should be used to arrive at the base figure for the calculation of the profit share. I see this as the product of the way I would interpret this contract…
>
> 22… I would not, for my part, view the present case in that way. It seems to me that the position here is quite straightforward. The context shows that the intention of the parties must be taken to have been that the base figure for the calculation of the uplift was to be the open market value of the subjects at the date of the event that triggered the obligation. In other words, it can be assumed that this is what the parties would have said if they had been asked about it at the time when the missives were entered into. The fact that this makes good commercial sense is simply a makeweight. The words of the contract itself tell us that this must be taken to have been what they had in mind when they entered into it. The only question is whether effect can be given to this unspoken intention without undue violence to the words they

actually used in their agreement. For the reasons I have given, I would hold that the words which they used do not prevent its being given effect in the way I have indicated."

110. Lord Clarke (with whom the others agreed) said at paragraphs 28 to 33:

"28. In the course of argument some reference was made to the recent decision of the Supreme Court in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900. That appeal was concerned with the role of commercial good sense in the construction of a term in a contract which was open to alternative interpretations. It was held that in such a case the court should adopt the more, rather than the less, commercial construction. The court applied the principle that the ultimate aim in construing a contract is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant; the relevant reasonable person being one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

29. This appeal is concerned with a somewhat different problem from that which arose in *Rainy Sky*. Under the missives the respondent sellers were entitled to "the Profit Share" arising out of the on sale of the subjects by the appellant buyers. The expression "Profit Share" was defined as "the Gross Sale Proceeds", which were in turn defined as "the aggregate of the sale proceeds of the Subjects received by the Purchasers for the Subjects".

30. Lord Hope has drawn attention in para 9 to certain infelicities of drafting. However, the critical language in clause 9.4 is the promise on the part of the appellants to pay 40% of 80% of the gross sale proceeds "within 14 days after receipt of the gross sale proceeds". On the face of it the reference to the gross sale proceeds is a reference to the "actual sale proceeds" received by the appellants.

31. It is not easy to conclude, as a matter of language, that the parties meant, not the actual sale proceeds, but the amount the appellants would have received if the on sale had been an arm's length sale at the market value of the property. Nor is it easy to conclude that the parties must have intended the language to have that meaning. As Baroness Hale observed in the course of the argument, unlike *Rainy Sky*, this is not a case in where there are two alternative available constructions of the language used. It is rather a case in which, notwithstanding the language used, the parties must have intended that, in the event of an on sale, the appellants would pay the respondents the appropriate share of the proceeds of sale on the assumption that the on sale was at a market price.

32. In this regard I entirely agree with Lord Hope's conclusions at para 22 above. As he puts it, the context shows that the parties must be taken to have intended that the base figure for the calculation of the uplift was to be the open market value of the subjects at the date of the event that triggered the obligation. In other words, it can be assumed that this is what the parties

would have said if they had been asked about it at the time when the missives were entered into. The parties expressly agreed that in the case of a buy out or lease the profit would be arrived at by reference to market value. Rather like counsel for the respondent bank in *Rainy Sky*, Mr Craig Connal QC was not able to advance any commercially sensible argument as to why the parties would have agreed a different approach in the event of an on sale. I have no doubt that he would have done so if he had been able to think of one. As Lord Hope says at para 17, on the appellants' approach, it would be open to them to avoid the provisions relating to the open market value of a lease by selling the subjects to an associate company at an undervalue and arranging for the lease to be entered into by that company. The parties could not sensibly have intended such a result.

33. Lord Hope says at para 20 that there would be no difficulty in implying a term to the effect that, in the event of a sale which was not at arm's length in the open market, an open market valuation should be used to arrive at the base figure for the calculation of the profit share. I agree. If the officious bystander had been asked whether such a term should be implied, he or she would have said "of course". Put another way, such a term is necessary to make the contract work or to give it business efficacy. I would prefer to resolve this appeal by holding that such a term should be implied rather than by a process of interpretation. The result is of course the same."

111. While the panel all agreed in the result, Lord Hope resolved the matter by way of construction (and rejected implication as not being the appropriate route) while the majority resolved the matter by way of implication (as opposed to construction). This renders paragraph 22 of the decision in Arnold v Britton, a little difficult as it appears to regard Aberdeen as being a construction/interpretation case and approves of Lord Hope's approach and not simply his conclusion. I note that paragraph 71 of Arnold v Britton and the judgment of Lord Hodge also seems to express some difficulty with Aberdeen.

112. I think that the best rationalisation and explanation is on the basis that: Lord Hope was proceeding on the basis that the wording used in the contract allowed him to construe it to achieve what he thought was, in the particular circumstances, obviously intended; while the majority thought that the wording itself could not be so construed but was not such as to prevent a necessary implication occurring. Arnold is therefore affirming the appropriateness of Lord Hope's initial construction approach even if the majority in Aberdeen were to hold that it did not work on the particular facts of the wording of that contract and that the court had, instead, to look to implication.

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.

114. It may also be (as intimated by Lord Hodge at paragraphs 69-70 of Arnold) that the "obvious error" doctrine might assist not only where it was obvious that the "wrong words" had been used by way of a drafting error but also where it was obvious that "no words" had been used where they should have been again by way of a drafting error. However, that doctrine requires, in effect, a drafting error and not a mere failure to deal with an uncontemplated future scenario.

The Rent Cesser Clauses
Construction of the Rent Cesser Clauses

115. The individual Rent Cesser clauses are (repeated from above) as follows:
    a. Cine-UK Lease

    "7.4 In case the Property or any part thereof or access thereto or any other part of the Estate shall at any time during the Term be destroyed or damaged by any of the Insured Risks so as to render the Property unfit for occupation or use and the insurance shall not have been vitiated or payment of the policy monies refused in whole or in part as a result of some act or default of the Tenant then the Basic Rent or a fair proportion thereof and Service Charge according to the nature and extent of the damage sustained shall from and after the date of such damage be suspended and cease to be payable until the Property shall have been made fit for occupation or use and in the event of dispute as to the amount or duration of the abatement of the Basic Rent such dispute shall be settled by a single arbitrator to be appointed in accordance with clause 11

    PROVIDED THAT If it is not possible for any reason for the Landlord to rebuild or reinstate the Property within a period of three years from the date of damage or destruction being caused by any of the Insured Risks the Landlord and the Tenant shall be at liberty to determine this demise by serving one calendar month's notice in writing to that effect

upon the other and upon the expiry of such notice these presents shall determine but without prejudice to the right and remedies of either party against the other in respect of any antecedent claims or breaches AND IN THE EVENT of this demise being determined in such manner or if this Lease is determined by frustration as a result of such damage or destruction the whole of the insurance monies receivable under the policy of insurance shall belong to the Landlord absolutely and the Tenant shall have no claim or interest therein."

b. Mecca Lease
"8.4 In case the Property or any part of it or access to it or any other part of the Landlord's Estate over which the Tenant has rights shall at any time during the Term be destroyed or damaged by any of the Insured Risks so as to render the Property or part of it unfit for or incapable of lawful occupation or use for the Permitted User and/or inaccessible and the insurance shall not have been vitiated or payment of the policy monies refused in whole or in part as a result of some act or default of the Tenant … then the Basic Rent and the Service Charge or a fair proportion of them according to the nature and extent of the damage or inaccessibility sustained shall from and after the date of such damage be suspended and cease to be payable until either:
8.4.1 the Property shall have been made fit for occupation or use or
8.4.2 the period, which will be not less than 3 years, for which the Landlord insures loss of rent and service charge will have expired whichever shall be the earlier …"

c. SportsDirect Lease
"5.3.1 If the Building or the Premises are damaged or destroyed by an Insured Risk so that they are rendered unfit for occupation or use or inaccessible, then provided that insurance of the Building has not been vitiated or payment of the insurance money is not refused wholly or in part through an act or default of the Tenant the rent firstly reserved under clause 2.3.1 (or a fair proportion according to the nature and extent of the damage) will not be payable until the earliest of the date that:
(a) the Premises are again fit for occupation and use and are accessible; or
(b) until three years from the date the damage occurred, whichever is the earlier."

116. The Landlords' essential submission is that the various Rent Cesser clauses all only operate to suspend the Rent in circumstances where the Premises (or the surrounding Estate, or even merely the access to them) has been physically destroyed or damaged by an Insured Risk so as to prevent or render them unfit for occupation. They, therefore, focus on the need for physical damage and say that there is (as is common ground) simply no physical damage (or destruction). They say that this is the plain meaning of the contractual wordings, and their true interpretation and construction.

117. The Tenants say that the word "physical" is not used and that what has happened is, in effect, damage or destruction even if not of a physical nature. They contend that (elements in the following in [square brackets] being from me):

a. The clauses operate in the context of an Insured Risk which has prevented occupation, and where the Insurance provisions of each Lease provide that it is to extend to cover 3 years' Rent. The underlying intention is, therefore, in the event of an Insured Risk to throw the liability to pay the Rent onto the Insurer where as a result of the Insured Risk event the Tenant has been unable to enjoy the occupation of the Premises which is the basis of the relevant Lease;

b. The Insurance has been taken out for the benefit of the Tenant, who is funding its premium and whose interest is to be noted on the Policy. For an Insured Risk event to occur with consequent closure of the Premises but for the Tenant not to be protected against the resultant loss (i.e. having to pay Rent for Premises which cannot be enjoyed) could not have been intended. There should be a symmetry here which there is not on the Landlords' case;

c. Although the COVID regulations do and did not actually prevent access to the Premises altogether, they do prevent use for the purposes contemplated by the Leases as set out in their various Permitted Uses (or any alteration to uses which might be consented to under the various user covenants); thus they render the Premises unfit for use and the Tenants truly unable to "enjoy" occupation similar to what would have happened if there had been a fire but the Tenant could still "occupy" a burnt out shell of a building;

d. The words "damage and destruction" do not have to import of themselves "physical" deterioration. Even if destruction has to be physical, "damage", which is an alternative to "destruction", does not. For example, it is possible to say that premises have been damaged by a local road closure or road scheme which has restricted access to them;

e. Some of the Insured Risks, or at least one being insurance against "strikes or labour disturbances" do not suggest any real likelihood (or perhaps even possibility) of physical damage. A classic result of a strike is an inability to "enjoy" premises for various reasons including (i) a picket line dissuading people from attending (ii) a withdrawal of supplies necessary for a business to function (iii) a withdrawal of key staff (e.g. security or key health and safety personnel) necessitating a closure;

f. Adopting a matter raised by me; it would be very odd if an Insured Risk which caused physical damage to the electrical installations within the Premises (or even the Estate) resulting in an inability to occupy triggered the Rent Cesser but a strike (e.g. of power workers), itself an Insured Risk, which resulted in no electricity

being available (and the Premises having to be closed) did not trigger the Rent Cesser;

g. The Tenants' construction produces a perfectly "fair allocation of risk" where the Landlord, which is obtaining the relevant insurance, can negotiate an appropriate policy. The Landlords' construction leaves the Tenants having to insure for themselves against the same Insured Risks [albeit for different consequences] as the Landlord is already insuring and at the Tenants' own expense, and which is obviously not reasonable and could not have been contemplated. Moreover, the Leases contain clauses preventing the Tenants insuring the Property themselves (at least against Insured Risks) and it would be unreal to think that the parties had intended the Tenants to be incapable of being insured against their liability to pay Rent in non-physical damage circumstances where the Premises could not be enjoyed;

h. COVID and the COVID Regulations are "unprecedented" events which could not have been contemplated by the original parties to the Leases. This is an Aberdeen case and the wording can and should be construed to apply the Rent Cesser where the event falls within an Insured Risk and has had such effect on the ability to occupy and enjoy the Premises;

i. There is no authority to guide me [this was common ground, although it now turns out that the Commerz Real decision is, but only in a very shortly stated paragraph, against them] and so that this is effectively "new law";

j. This is all inappropriate for CPR Part 24 where very full consideration should be given to matters, the ramifications of which are potentially very extensive (not merely in a COVID scenario but in other cases of "non-physical damage") and in the context of standard form terms [as these clearly are]. These are matters of very considerable public importance with potentially vast economic effects and are deserving of full scrutiny at a full trial, there, in the light of all of the foregoing, being a compelling reason(s) for such a trial.

118. As against this, the Landlords submit that the Rent Cesser clauses simply only apply where there has been physical damage (or destruction). They submit that:

a. These are standard-form clauses which have existed for very many years (and perhaps centuries) and it has never been suggested that they should apply to instances of "non-physical damage";

b. The surrounding wordings of the relevant clauses in each Lease make clear that the "damage" (or "destruction") must be physical; and:

i. In the Cine-UK Lease:

1. Clause 7.3 is headed "**Destruction of the Property"** and is introduced by the words "if the Property or any part thereof is destroyed or damaged by any of the Insured Risks and requires the insurance monies to be laid out in "the rebuilding and reinstatement of the Property" – and which cannot apply to non-physical matters;
2. Clause 7.4 talks of a suspension "until the Property shall have been made fit for occupation or use" and which appears to relate to physical remedial works, not the lifting of a government Regulation on access;
3. The Proviso to Clause 7.4 provides for a determination of the Lease "If it is not possible for any reason for the Landlord to rebuild or reinstate the Property" which wording is one about physicality and not suitable for a non-physical problem.

ii. In the Mecca Lease:

1. Clause 8.3 provides that "if the Property or any part of it is destroyed or damaged by any of the Insured Risks then …the Landlord shall lay out the proceeds of such insurance …as soon as reasonably practicable in the rebuilding and reinstatement of the Property" – and which is contended shows that the "damaged" must be physical;
2. Clause 8.4 provides that where the Property is "damaged" then there is a suspension "until either… 8.4.1 the Property shall have been made fit for occupation or use…" - and the words "made fit" imply physical works;
3. Clause 8.7 provides for an option to determine the Lease "If the Property has not been reinstated" which again suggests that there must have been a physical deterioration.

iii. In the SportsDirect Lease, Clause 4.3.3. provides "If the Property is wholly or substantially damaged by any of the Insured Risks the Landlord shall use reasonable endeavours to procure that the Superior Landlord obtains deeds of collateral warranty in favour of the Tenant from the building contractor …engaged to carry out the works of rebuilding or reinstatement …" – which indicates that the damage must be physical.

c. There is a general principle that expressions used in carefully drafted contracts are used consistently and so as to have the same meaning (absent a reason for giving them different meanings), and as stated as being the "consistency principle" in Lewison: On the Interpretation of Contracts at paragraph 7.15 (and citing Lord Hodge in Barnados v Buckinghamshire [2016] UKSC 55 at paragraph 23).

119. I have considered this carefully, and especially as, although I view the Tenants' arguments as to construction of the Rent Cesser as being somewhat novel, that does not, of itself, render them incorrect.

120. With regard to the natural meanings of the words used:
    i. The usual meaning of the words "damage" or "damaged" is a physical one;
    ii. The Tenants did take me to Halsbury's Laws Volume 29 "Damages" where at paragraph 303 is said that "The concept of "damage" by contrast, is wider; it, simply, means any disadvantage suffered by a person as the result of the act or default of another which according to the circumstances may or not be compensatable." However, that quote is in the specific context of the law of "damages" and not of a lease dealing with a property interest;
    iii. The words "damage" or "damaged" are being used in the context of an alternative of "destruction" and which is clearly a reference to a "physical" event. While, strictly, the word "damage" or "damaged" could apply to anything less than full physical destruction, and thus to non-physical matters, the context is very much one of physicality;
    iv. It is a considerable stretch to extend "damage" or "damaged" to a non-physical disadvantage. While I have considered Tenants' point (d) above, it imports something of a modern colloquialism into what are carefully drawn standard-form formal documents
    v. Further, elsewhere in the surrounding clauses, as submitted by the Landlords, the words "damage" and "damaged" are used in ways which are clearly physical (being in terms of physical remedy and remedial and reinstatement works), and including by reference to the situation where physical remediation turns out to be impossible. This does seem to me to be a situation where the "consistency principle" applies both in terms of meaning of words and in terms of the subject-matter to which the relevant clauses are directed, all being "physical" and not "non-physical".

121. In terms of the factual matrix, which is to be considered as at the date of the various grants of the individual leases, I do see it as relevant that business interruption policies have been a standard feature of the insurance market for many years. Those policies are generally taken out by businesses to protect themselves against losses in turnover as it is turnover (rather than profit) which is lost as a result of a trade being suspended or limited due to a material event, including in particular events affecting their trading premises (such as a fire but potentially also disease in COVID and COVID Regulations terms) albeit that further provisions can be included within a BII policy to require any resultant savings in costs on the part of the insured to be brought into account.

122. Thus, there is and always was (as at the dates of the relevant grants) a well-known potential for tenants to protect themselves against the inability to use their premises by way of insurance. Moreover, that insurance would be an insurance of the relevant business (i.e. the trade) rather than of the Premises themselves, and thus would not fall foul of the Lease provisions against the tenant effecting insurance of the Premises. Strictly speaking the liability to pay rent would be irrelevant as the insurance is actually against the diminution in the insured tenant's trade (i.e. loss of turnover) which is not dependent upon whether or not the rent remained payable. Rather, it would be up to the insurer as to whether or not to include a "take account of savings in costs" clause so that if the rent ceased to be payable under the relevant Lease the tenant did not gain a double benefit.

123. With regard to the commercial purpose of the Rent Cesser clauses:
    a. It is correct as contended by the Tenants that:
        i. Their aim appears to be to protect the Tenants (although also indirectly the Landlords) against the consequence of an Insured Risk Event preventing the use of the Premises by the Tenant; and each Tenant's interests are to be noted on the Insurance. However, this is limited by the wording requiring the consequence of inability to use to be as a result of the relevant property being "damaged or destroyed" by the Insured Risk event rather than simply for the Premises to be unable to be used due to the occurrence of the relevant Insured Risk Event, and which is a considerable answer to the Tenants' point (a) above
        ii. They are to be seen in the context of a wider scheme under each Lease whereby the Landlord obtains the Insurance at the cost of the Tenant and so that the Tenant obtains insurance protection, and thus presumably against the consequences of the Insured Risk Events occurring. However, this is limited by the fact that the Insurance is primarily for the protection of the Landlord as the full owner of the "bricks and mortar", and thus in relation to "bricks and mortar" i.e. physical rather than "effects on trade" consequences, and which is a considerable answer to the Tenants' point (b) above, even though the Tenant's interest is a very real one.
        iii. Moreover, and in further answer to Tenants' point (b) above, the mere fact that the Landlords decide to insure against a risk which would only lead to non-physical disadvantage, and so render such risk an Insured Risk and such events Insured Risk Events does not mean that the Rent Cesser clause should be construed to apply to non-physical disadvantage. Other possibilities (and I consider various of them below in relation to the arguments addressed to me in relation to the Insurance and the Insurance provisions) are that:
            1. The Landlords are simply entitled to so insure on the basis that the Leases say that they can, and the insurance may protect their property in the form of

the "bricks and mortar" and freehold (or long leasehold) interest in the Premises; or

2. The Landlords are entitled to so insure and if the Insurance gives rise to a resultant benefit then they must bring it into account but not if it does not; or
3. If the Landlords so insure against the effects of COVID and COVID Regulations then they must insure against the rent generally for the periods of resultant closures. However, this argument is a matter of the construction of the Insurance provisions not of the Rent Cesser clauses; or
4. The Landlords are not entitled to so insure and the Tenants should not have to pay the relevant premium or part of the premium

iv. The Rent Cesser clauses are clearly designed to operate in the context of closures of the Premises due to Insured Risks. However, against that the closure has to be due to "damage(d) or destruction", and it is not sufficient for something to have occurred which has simply resulted in the consequence of there being a closure, and which is a considerable answer to Tenants' point (c) above

b. It is correct as contended by the Landlord that:

i. If they are to be seen in the context of the Insurance provisions:

1. The Insurance as required by each Lease (although the Landlord can choose to widen the categories of Insured Risk) is primarily a "bricks and mortar" insurance in terms of Insured Risk Events which would cause physical damage to the relevant Premises; and
2. The Insurance, although it has to include the 3 years of Basic Rent, is primarily directed towards the repair and rebuilding of damaged Premises rather than free-standing Rent. There is a potential difference here between the wordings of the various leases but none of the Tenants have really advanced any separate points based upon their individual wordings

ii. The Insurance provisions themselves tend to include a requirement to insure against "loss of Basic Rent" which requires the Basic Rent actually to be a "loss" and which gives support to the Landlord's approach that each Rent Cesser clause has to be construed first on its own terms to see whether or not it has been triggered

iii. And the Rent Cesser clauses and their surrounding provisions look on their own terms to be concerned with physical damage or destruction (and its possible remediation or absence of it) where the Tenant (as well as the Landlord) is to be protected, whilst other interferences with each Tenant's business can be insured (or self-insured) by the Tenant separately

iv. The above are some considerable answer to Tenants' point (g) above, and, with the Tenants being able to take out their own BII policies against loss of turnover, the mere fact that the parties could have chosen the allocation of risk contended for by the Tenants is counter-balanced by the Landlords' contended for allocation of risk also being perfectly commercially sensible.

124. However, I also need to consider the Tenants' various other arguments. Their point (e) above is that certain of the specified Insured Risks could only give rise to non-physical disadvantage and in particular "labour disturbances and strikes". It is correct that those specified events are not immediately suggestive of resultant physical damage. On the other hand, it is conceivable that a labour disturbance or strike could result in physical damage in some circumstances. For example, there is the possibility of violence on a picket line leading to actual damage to premises, and the words used are surrounded by others (riot, civil commotion and malicious persons) which suggest that context. Alternatively, a refusal to carry out maintenance or other protective operations could result in physical damage occurring.

125. I also bear in mind the point which I raised (Tenants' point (f) above) that it might seem odd, on the Landlords' contentions, that if an Insured Risk Event caused a shutting off of an electricity supply to the Premises without physically damaging or destroying them but rendering them unusable then the Rent Cesser clause would not operate but if the Insured Risk Event caused physical damage to the internal electricity cables with the same consequence then the Rent Cesser clause would operate. I think that has some force but, on the other hand, the occurrence of such physical damage to the infrastructure can be seen as being qualitatively different in the nature of the event.

126. With regard to Tenants' point (h), it is correct that the COVID Regulations are unprecedented in modern times. In the past the 1918 onwards outbreak of Spanish Flu caused more deaths, and, centuries before, the 17th century Great Plague led to both many more deaths and to mandatory closures, but no authorities have been cited to me regarding rent cessers and their operation (assuming they then existed) in those circumstances. Lord Hope's "construction" (as opposed to "implication") approach seems to have been a minority one, and it does seem to me that the majority held that it could not be applied unless it was consistent with the wording used, and I do not see it as being so for the reasons given above and below. However, his approach also requires it to be clear as to what the parties would have intended (as at the date of grant) to happen in the particular unforeseen circumstances (had they known of them). I deal with this further in relation to "implication" below, but in view of the facts that (a) the Rent Cesser clause is seemingly directed towards a "bricks and mortar" and physical damage scenario and (b) BII insurance policies were available to protect the Tenants' business turnover, I do not see it as clear that the parties would have agreed that the Rent Cesser clause should

operate in these COVID and COVID Regulation circumstances even if the Landlords decided to insure against such disease risks. That would require the Landlords to have to obtain a particular type of Policy with particular provisions which might not be available (as the Insurers would have to decide whether to provide Rent cover in the event of non-physical disadvantage, and at what price) and when a Tenants' Policy might have been much more easily available and appropriate.

127. Thus, in terms of the competing iterations of construction of the Rent Cesser clauses and, in particular:
    a. In relation to the Tenant's construction that they are triggered by non-physical disadvantage to the Premises (said to result in the Premises being "damaged"):
        i. That is not the natural meaning of the words either on their own or in context, and involves a breach of the consistency principle
        ii. They are consistent with a possible commercial purpose but do not represent the main thrust of the provisions
        iii. They are not required to protect the Tenant in a commercial sense, in that alternative protections by way of turnover BII policies were always potentially available
        iv. They are somewhat novel in that it has not been suggested previously that these standard-form clauses can be triggered by purely non-physical matters
    b. In relation to the Landlord's construction that they are only triggered by physical damage to or destruction of the relevant Premises:
        i. This is the ordinary meaning of the words used both on their own and in context and accords with the consistency principle
        ii. They are consistent with a possible commercial purpose. Although it can be argued that there are possible anomalies it is, at worst, unclear that they are really anomalies
        iii. They are consistent with the general thrust of these provisions which are to deal with the "bricks and mortar" and "property owner" aspects of the matter where the Landlord and Tenant interests combine and align.

128. I have asked myself as to whether I should be resolving this construction issue on a summary basis in the light of the above case-law and the potential effects on very many other properties and landlord and tenant relationships. However:
    a. This is a pure issue of construction
    b. There are no relevant factual disputes which have been either suggested or become apparent to me. There has been no suggestion of any factual matrix matter upon which any evidence would be deployed at trial
    c. The matter has been argued out fully with full citation of authority and preparation
    d. The case-law is in favour of determining such issues with all the savings of cost and resource which would follow.

129. I have considered the terms of each of the Leases individually, and in each case considered my views, and which are set out above and below, as to (i) the natural and ordinary meaning of the clause, (ii) the 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. I have concluded that the Landlords' constructions are clearly correct and should be adopted as against the Tenants' constructions. I note that in Commerz Real, and on the basis of a much shorter analysis (although where there was a "keep open" covenant which is not present in these Leases) Chief Master Marsh came to the same conclusion.

130. The most important point (although I have considered construction generally as set out above, and, in particular, those matters set out above which also otherwise favour the Landlords' constructions) is that the Tenants' constructions of the Rent Cesser clauses simply do not fit the words used either taken alone or in their context or as otherwise used in the Leases, whilst the Landlords' constructions do fit the words used in all those aspects. Notwithstanding the able arguments of the Tenants' counsel, when applying the iterative approach and considering which construction is that which meets the test of "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" it seems to me that it is the Landlords' construction with its requirement that the Insured Risk Event must have caused the relevant Premises to have been physically damaged or destroyed, and which is not the case here; and the Tenants do not have any real prospects of success on this issue. I would add that while I have considered the Rent Cesser clauses above on their own, I have borne in mind the rest of the Leases as the process of construction of a single document is an holistic one.

Implication and the Rent Cesser Clauses

131. However, the Tenants contend, in the alternative to their construction arguments, that it should be implied into each of the Leases that there should be an equivalent Rent Cesser in these circumstances, and, in particular, where (i) COVID and the COVID Regulations are unprecedented, and unforeseen, but have forced the closure of the Premises (ii) the Landlord has chosen to insure so that the Insured Risks extend to such matters, and has done so at the expense of the Tenants, and in the context where the Leases (and the Insurance) provide for cover to include loss of Rent.

132. It is common-ground that the basic principles of the law of implication are set out in Marks and Spencer v BNP Paribas [2016] AC 742 (itself a commercial lease case) at paragraphs 16-31 as follows:
"16. There have, of course, been many judicial observations as to the nature of the requirements which have to be satisfied before a term can be implied into a detailed commercial contract. They include three classic statements, which have been frequently quoted in law books and judgments. In *The*

Moorcock (1889) 14 PD 64, 68, Bowen LJ observed that in all the cases where a term had been implied, "it will be found that ... the law is raising an implication from the presumed intention of the parties with the object of giving the transaction such efficacy as both parties must have intended that at all events it should have". In *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, 605, Scrutton LJ said that "[a] term can only be implied if it is necessary in the business sense to give efficacy to the contract". He added that a term would only be implied if "it is such a term that it can confidently be said that if at the time the contract was being negotiated" the parties had been asked what would happen in a certain event, they would both have replied "'Of course, so and so will happen; we did not trouble to say that; it is too clear'". And in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227, MacKinnon LJ observed that, "[p]rima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying". Reflecting what Scrutton LJ had said 20 years earlier, MacKinnon LJ also famously added that a term would only be implied "if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'".

17. Support for the notion that a term will only be implied if it satisfies the test of business necessity is to be found in a number of observations made in the House of Lords. Notable examples included Lord Pearson (with whom Lord Guest and Lord Diplock agreed) in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, 609, and Lord Wilberforce, Lord Cross, Lord Salmon and Lord Edmund-Davies in *Liverpool City Council v Irwin* [1977] AC 239, 254, 258, 262 and 266 respectively. More recently, the test of "necessary to give business efficacy" to the contract in issue was mentioned by Lady Hale in *Geys* at para 55 and by Lord Carnwath in *Arnold v Britton* [2015] 2 WLR 1593, para 112.

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, [1977] UKPC 13, 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."

19. In *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 481, Sir Thomas Bingham MR set out Lord Simon's formulation, and described it as a summary which "distil[led] the essence of much learning on implied terms" but whose "simplicity could be almost misleading". Sir Thomas then explained that it was "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". Sir Thomas went on to say this at p 482:
"The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. [He then quoted the observations of Scrutton LJ in *Reigate*, and continued] [I]t is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred ..."

20. Sir Thomas's approach in *Philips* was consistent with his reasoning, as Bingham LJ in the earlier case *The APJ Priti* [1987] 2 Lloyd's Rep 37, 42, where he rejected the argument that a warranty, to the effect that the port declared was prospectively safe, could be implied into a voyage charter-party. His reasons for rejecting the implication were "because the omission of an express warranty may well have been deliberate, because such an implied term is not necessary for the business efficacy of the charter and because such an implied term would at best lie uneasily beside the express terms of the charter".

21. In my judgment, the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in *BP Refinery* as extended by Sir Thomas Bingham in *Philips* and exemplified in *The APJ Priti*. First, in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with 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: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and

obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would 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", to quote from Lewison, *The Interpretation of Contracts* 5th ed (2011), para 6.09. 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, as suggested by Lord Sumption in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.

22. Before leaving this issue of general principle, it is appropriate to refer a little further to *Belize Telecom*, where Lord Hoffmann suggested that the process of implying terms into a contract was part of the exercise of the construction, or interpretation, of the contract. In summary, he said at para 21 that "[t]here is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?". There are two points to be made about that observation.

23. First, the notion that a term will be implied if a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would understand it to be implied is quite acceptable, provided that (i) the reasonable reader is treated as reading the contract at the time it was made and (ii) he would consider the term to be so obvious as to go without saying or to be necessary for business efficacy. (The difference between what the reasonable reader would understand and what the parties, acting reasonably, would agree, appears to me to be a notional distinction without a practical difference.) The first proviso emphasises that the question whether a term is implied is to be judged at the date the contract is made. The second proviso is important because otherwise Lord Hoffmann's formulation may be interpreted as suggesting that reasonableness is a sufficient ground for implying a term. (For the same reason, it would be wrong to treat Lord Steyn's statement in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459 that a term will be implied if it is "essential to give effect to the reasonable expectations of the parties" as diluting the test of necessity. That is clear from what Lord Steyn said earlier on the same page, namely that "[t]he legal test for the implication of ... a term is ... strict necessity", which he described as a "stringent test".)

24. It is necessary to emphasise that there has been no dilution of the requirements which have to be satisfied before a term will be implied, because it is apparent that *Belize Telecom* has been interpreted by both academic lawyers and judges as having changed the law. Examples of academic articles include C Peters *The implication of terms in fact* [2009] CLJ 513, P Davies, *Recent developments in the Law of Implied Terms* [2010] LMCLQ 140, J McCaughran *Implied terms: the journey of the man on the Clapham Omnibus* [2011] CLJ 607, and JW Carter and W Courtney,

Belize Telecom: a reply to Professor McLauchlan [2015] LMCLQ 245). And in *Foo Jong Peng v Phua Kiah Mai* [2012] 4 SLR 1267, paras 34-36, the Singapore Court of Appeal refused to follow the reasoning in *Belize* at least in so far as "it suggest[ed] that the traditional 'business efficacy' and 'officious bystander' tests are not central to the implication of terms" (reasoning which was followed in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] SGCA 43). The Singapore Court of Appeal were in my view right to hold that the law governing the circumstances in which a term will be implied into a contract remains unchanged following *Belize Telecom.*

25. The second point to be made about what was said in *Belize Telecom* concerns the suggestion that the process of implying a term is part of the exercise of interpretation. Although some support may arguably be found for such a view in *Trollope* at p 609, the first clear expression of that view to which we were referred was in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191, 212, where Lord Hoffmann suggested that the issue of whether to imply a term into a contract was "one of construction of the agreement as a whole in its commercial setting". Lord Steyn quoted this passage with approval in *Equitable Life* at p 459, and, as just mentioned, Lord Hoffmann took this proposition further in *Belize Telecom*, paras 17-27. Thus, at para 18, he said that "the implication of the term is not an addition to the instrument. It only spells out what the instrument means"; and at para 23, he referred to "The danger ... in detaching the phrase 'necessary to give business efficacy' from the basic process of construction". Whether or not one agrees with that approach as a matter of principle must depend on what precisely one understands by the word "construction".

26. I accept that both (i) construing the words which the parties have used in their contract and (ii) implying terms into the contract, involve determining the scope and meaning of the contract. However, Lord Hoffmann's analysis in *Belize Telecom* could obscure the fact that construing the words used and implying additional words are different processes governed by different rules.

27. Of course, it is fair to say that the factors to be taken into account on an issue of construction, namely the words used in the contract, the surrounding circumstances known to both parties at the time of the contract, commercial common sense, and the reasonable reader or reasonable parties, are also taken into account on an issue of implication. However, that does not mean that the exercise of implication should be properly classified as part of the exercise of interpretation, let alone that it should be carried out at the same time as interpretation. When one is implying a term or a phrase, one is not construing words, as the words to be implied are *ex hypothesi* not there to be construed; and to speak of construing the contract as a whole, including the implied terms, is not helpful, not least because it begs the question as to what construction actually means in this context.

28. In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one

has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term. This appeal is just such a case. Further, given that it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would seem logically to follow that, until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied. Having said that, I accept Lord Carnwath's point in para 71 to the extent that in some cases it could conceivably be appropriate to reconsider the interpretation of the express terms of a contract once one has decided whether to imply a term, but, even if that is right, it does not alter the fact that the express terms of a contract must be interpreted before one can consider any question of implication.
29. In any event, the process of implication involves a rather different exercise from that of construction. As Sir Thomas Bingham trenchantly explained in *Philips* at p 481:
"The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, *ex hypothesi*, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power."

30. It is of some interest to see how implication was dealt with in the recent case in this court of *Aberdeen City Council v Stewart Milne Group Ltd* 2012 SLT 205. At para 20, Lord Hope described the implication of a term into the contract in that case as "the product of the way I would interpret this contract". And at para 33, Lord Clarke said that the point at issue should be resolved "by holding that such a term should be implied rather than by a process of interpretation". He added that "[t]he result is of course the same".

31. It is true that *Belize Telecom* was a unanimous decision of the Judicial Committee of the Privy Council and that the judgment was given by Lord Hoffmann, whose contributions in so many areas of law have been outstanding. However, it is apparent that Lord Hoffmann's observations in *Belize Telecom*, paras 17-27 are open to more than one interpretation on the two points identified in paras 23-24 and 25-30 above, and that some of those interpretations are wrong in law. In those circumstances, the right course for us to take is to say that those observations should henceforth be treated as a characteristically inspired discussion rather than authoritative guidance on the law of implied terms."

133. At paragraphs 50-51 Lord Neuberger stressed that it was not enough that without the implication there might be a "somewhat curious effect" and one which could "fairly be said to be capricious or anomalous", and he seemed to require a something more of the situation without the implied term such as "commercially or otherwise absurd" and especially where relevant

matters were (as in the case relating to payment dates) within the tenant's control.

134. While the various judgments described the Belize judgment in differing terms, their Lordships all saw it as illuminating, but not as watering down the traditional tests for implication. In paragraph 77 Lord Clarke said: "I agree with Lord Neuberger and Lord Carnwath that the critical point is that in *Belize* the Judicial Committee was not watering down the traditional test of necessity. I adhere to the view I expressed at para 15 of my judgment in the *Mediterranean Salvage & Towage* case (which is quoted by Lord Carnwath at para 62) that in *Belize*, although Lord Hoffmann emphasised that the process of implication was part of the process of construction of the contract, he was not resiling from the often stated proposition that it must be necessary to imply the term and that it is not sufficient that it would be reasonable to do so. Another way of putting the test of necessity is to ask whether it is necessary to do so in order to make the contract work: see the detailed discussion by Lord Wilberforce in *Liverpool City Council v Irwin* [1977] AC 239, 253-254."

135. Thus, although the proposed implied term must be clear, fair and reasonable and not contradict any express term, it must be either (or both) obvious (in the sense that if the officious bystander had asked the parties at the date of grant of the Lease whether it would apply then they would clearly (as reasonable persons in their particular situations) all have answered on the lines of "of course, that is so obvious that it goes without saying" rather than something less such as "yes, I think that I would be prepared to agree that") or necessary (this not being a test of absolute necessity but still a matter of "necessary" rather than merely "convenient") to give the contract business efficacy in the circumstances which have now occurred. However, these matters have to be considered in all the circumstances at the relevant time and including those of (i) whether the relevant contract is or is not an apparently carefully drafted formal commercial contract which purports to be a comprehensive agreement allocating risks between the parties and without gaps requiring to be filled by implication and (ii) the actual terms of the contract as they have already been construed and (iii) whether the circumstances which have arisen can be said to be wholly unforeseen (as in the Aberdeen case).

136. The Tenants submit with regard to an implied term that:
    a. The term is fair and reasonable especially as the Tenants have paid for the Insurance;
    b. The fact that the COVID situation is unprecedented overcomes points to be made as to the Leases being carefully drafted apparently comprehensive documents as this situation was effectively unforeseeable;
    c. The actual construction of the Rent Cesser Clause to confine it to cases of physical damage gives rise to an obvious hole or gap or lacuna which has to be filled, and all the more so (see the Landlords' arguments and my decisions below) if it was, and was only, the fact

of a cessation of Rent under the Lease which would trigger the Insurer's obligation to pay out equivalent sums under the Insurance although the terms of the Insurance should not affect the construction of the Lease:

i. to give business efficacy to the situation of where the Insured Risk, paid for by and to benefit the Tenants, has resulted in closure of the Premises, and so the Insurance should have to pay for the consequence by way of an equivalent sum to the Rent, and also

ii. by the "obvious" answer to the officious bystander's question being that it would go without saying that an Insured Risk Event resulting in closure should lead to a cessation of Rent;

d. The fact that each Lease provides that the Landlord does not warrant that the Premises can be used for the Permitted Use in planning law is not relevant to this situation of COVID and especially where COVID is an Insured Risk. The same applies to the common-law principle that even if a building is burnt down the relevant lease and the liability to pay rent continues unless there is an agreement to the contrary.

137. The Landlords submit that the tests for implication are simply not met in this situation. They say that:
    a. The Leases are carefully drawn, and the position as to Rent Cesser is fully set out and carefully circumscribed;
    b. The Tenants could always have insured their turnover under a BII policy, and the express Rent Cesser clause represents an agreed allocation of risk;
    c. COVID could not be wholly unexpected. Fears of pandemics had existed in the recent past, in particular there had been the fear of the Asian SARS epidemic spreading to this country.

138. I note that in the "closure" commercial lease case of National Carriers v Panalpina [1981] AC 675 (and see below) there was no mention in any of the judgments of any possibility of an implied term resulting in a rent cesser. However, I place little weight on that as:
    a. The point does not seem to have been argued;
    b. There was not the feature of the Insurance which exists in these cases.

139. I have again considered whether this matter is appropriate for summary judgment and determination, and where, again, the question of such an implication is in a standard-form context, and could potentially affect very many other properties and landlord and tenant relationships. However:
    a. This is a pure issue of interpretation;
    b. There are again no real relevant factual disputes which have been either suggested or become apparent to me. There has been no suggestion of any factual matrix matter upon which any evidence would be deployed at trial. The only matter in this context which might have been raised is the level of fear of something like SARS occurring but that is really a matter of public and historical record

and the possibility of pandemics is and was at the time of grant of the Leases one of common knowledge and speculation;

c. The matter has been argued out fully with full citation of authority and preparation; and
d. The case-law is in favour of determining such issues with all the savings of cost and resource which would follow.

140. I do consider that the implied term suggested by the Tenants would have been fair and reasonable and equitable. While it could prejudice Insurers who might find themselves with an insurance liability which they had not contemplated, it is for them to obtain and consider the relevant Lease(s) and their implied terms just as much as their express terms. One consequence, and indeed point, of the tests for implication is that the implications should be apparent to the reader, they being either obvious or necessary for business efficacy.

141. However, the burden is on the Tenants to show either (or both of) obviousness or necessity for business efficacy.

142. With regard to obviousness, this has to be seen in the context of the Leases being lengthy, standard-form, professionally drafted documents which appear to have been prepared with care and do not contain obvious drafting errors. Further:

a. They go into great detail regarding all sorts of circumstances. Thus they appear to be comprehensive and, but in conjunction with accepted doctrines of landlord and tenant law (as with the doctrines of apportionment which featured in the Marks & Spencer case), intended to cover the entire legal relationship between the parties. I bear in mind that implication still took place in the lease case of Liverpool v Irwin but that was for reasons of need for business efficacy and not obviousness
b. They include express provisions:
    i. as to Rent Cesser and which are limited to circumstances of physical deterioration (see above) even where closure has otherwise occurred as a result of an Insured Risk Event. Such a limitation suggests that closures due to non-physical deteriorations were not intended (or at least agreed) to result in rent cesser
    ii. as to the absence of a warranty that the Premises can be used for the Permitted Use. While that is only in a planning context, there is clearly no warranty that the Premises can always be so used
c. This needs to be seen in the common-law context of rent still being payable under a lease notwithstanding the relevant premises becoming unusable (e.g. due to fire) without an agreement to the contrary. If the Tenants wished to negotiate a blanket (as opposed to the limited) term to the effect that rent would not be payable if any Insured Risk Event resulted in a closure, rather than just one with involved physical deterioration (damage or destruction) then they could have done so.

143. It seems to me that the above matters all favour the Landlords. They lead me to conclude that in the circumstances of the officious bystander's hypothetical question, the hypothetical landlord (at least) might well answer that the Lease is intended to set out all the circumstances in which a Rent Cesser would exist even where an Insured Risk Event had occurred.

144. With regard to the Tenants' other points on obviousness based on their having paid the premium for the Insurance where this situation was an Insured Risk Event, it seems to me that they can be countered by similar points to those which I have set out on the construction arguments above, being in summary that:
    a. the Insurance provisions are directed towards "bricks and mortar" and freehold (or long leasehold) interest matters regarding to the Premises;
    b. the Landlords are entitled to insure as they choose (at least in relation to additional Insured Risks such as this one which is not specified as such) and if the Insurance gives rise to a resultant benefit then they must bring it into account but not if it does not;
    c. questions as to what happens if the Landlords do extend the Insured Risks are really questions for construction and implication of the Insurance provisions not of the Rent Cesser clauses;
    d. there is an alternative solution to the Tenants having paid the relevant premium of the Lease being interpreted to the effect that the Landlords are not entitled to so insure and the Tenants should not have to pay (and can recover) the relevant premium or part of the premium.

145. It also seems to me that where the Tenants could have chosen to insure their business and its turnover under their own BII policy, and which would not have been prohibited by the Leases' restrictions on not insuring the Premises themselves, that:
    a. There was a clear mechanism by which the Tenants could protect themselves by insurance against adverse non-"bricks and mortar" matters such as COVID; and
    b. The Landlords' interpretation of the Leases represents an allocation of risk which is perfectly commercial and reasonable. While there is a force in the Tenants saying that it would be inconvenient for them to obtain a sort of "top-up" insurance which would only operate in certain specific events, that does not make it unreasonable, and such a BII policy could operate in numerous non-"bricks and mortar" circumstances (e.g. failures or destruction of Tenants' computers etc.).

146. Taking all these matters together, I do not think that the "obviousness" test is met. It is not clear to me that the response from the parties, or at least the hypothetical landlord, to the officious bystander's question would be that the implied term sought by the Tenants would "go without saying".

147. However, the Tenants also contend that the implied term is required to give the Leases business efficacy. Again, I do not think that this is the case. The Leases "work" (to cite Lord Clarke in Marks & Spencer) without the implied term, and simply provide for a Rent Cesser in some identified circumstances but not in others, and where the Tenants could perfectly well (and perhaps more appropriately) have insured themselves. The Tenants' points as to their having paid the premium for an Insured Risk of which they cannot take advantage in this instance are met by the points set out above in the context of the "obviousness" argument. At most this is Lord Neuberger (in Marks & Spencer)'s situation of a "curious" and possibly "capricious or anomalous" effect rather than one which is "commercially or otherwise absurd". It does also seem to me that the Tenants' arguments come close to seeking to contradict the actual terms of the Leases where they introduce a specific limitation (physical deterioration) on the existence of a Rent Cesser in the context of a closure due to an Insured Risk Event.

148. The Tenants also contend that this is a situation for an Aberdeen implication in circumstances of a wholly unforeseen and unforeseeable event. I am not convinced that COVID and the COVID Regulations were truly unforeseeable in the light of such matters as SARS and consequent fears, although I accept that they can well be said to be "unprecedented". However, in any event, implication still requires the satisfaction of the obviousness and/or business efficacy tests and I do not find either as being satisfied. This is not, in my judgment, an Aberdeen case where it is clear what both parties would have intended if the potential for these events had been put to or considered by them. It is a classic case for a difference of view (or at least a negotiation) for the potential agreed allocation of risk.

149. I, therefore, do not find the tests for implication of the Tenants' proposed implied Rent Cesser term as having been met, and I do find that the Tenants do not have any real prospects of success of this issue. I note that in Commerz Real, and on the basis of a much shorter analysis (although where there was a "keep open" covenant which is not present in these Leases) Chief Master Marsh came to the same conclusion. I do, however, consider separately below, the Tenants' arguments for something with a somewhat similar effect being implied within the Insurance provisions.

The Insurance and the Insurance Provisions

Rights under or resulting from the Policy

150. The Tenants (adopting each other's arguments) essentially seek to rely upon the Insurance in two ways. First, they contend that the Insurance actually operates to cover the relevant Rent and that they can take advantage of this. Second, they contend that if the Insurance does not operate to cover the relevant Rent, then it should have done so and their ultimate liabilities should reflect only what should have been the situation.

151. In support of their contentions that they can rely on whatever entitlements exist in favour of the insured under the Insurance, whether or not the Landlords have made appropriate claims, they rely on a line of authorities and principally starting with Mark Rowlands v Berni Inns [1986] QB 211

(to which I drew counsels' attention prior to the start of the hearings) and the consideration of it and subsequent cases in Frasca-Judd v Golovina [2016] 4 WLR 107.

152. The Mark Rowlands decision concerned a situation where the tenant was paying an insurance rent of premiums to insure the demised premises against various insured risks including fire, and where the relevant premises were damaged by a fire caused by the tenant's negligence. The insurer paid the landlord and then brought a claim against the tenant in the name of the landlord relying on its rights of subrogation, which the tenant resisted on the basis that it should take the benefit of the insurance and which should bar subrogation even though it was not a co-insured.

153. As set out in various paragraphs of Frasca-Judd, the Court of Appeal held in Mark Rowlands that:

a. The relevant insurance was effected for the benefit of both the landlord and the tenant (paragraph 25);
b. The real issue was whether the provisions in that lease that insurance monies should be used to remedy the fire damage meant that the landlord, and hence also the insurer by way of subrogation, was precluded from suing the tenant for negligence in relation to the fire (paragraph 27);
c. There was established a principle that the contractual bargain between landlord and tenant was, in effect, that if the landlord recovered from the insurer then in both contract and tort the landlord could not sue the tenant. Paragraphs 33-36 of Frasca-Judd read:

"33. The Court of Appeal in England decided to follow "this impressive series of North American authorities" (see page 232 E). It rejected the insurer's arguments that the purpose of the landlord's covenant to insure and to apply the insurance monies for reinstatement, was simply to relieve the tenant's liability under its repairing covenant, but not a liability for fire caused through its negligence (in the absence of an express exemption). The Court stated:

"An essential feature of insurance against fire is that it covers fires caused by accident as well as by negligence. This was what the plaintiff agreed to provide in consideration of, inter alia, the insurance rent paid by the defendant. *The intention of the parties, sensibly construed, must therefore have been that in the event of damage by fire, whether due to accident or negligence, the landlord's loss was to be recouped from the insurance monies and that in that event they were to have no further claim against the tenant for damages in negligence.* Another way of reaching the same conclusion ... is that *in situations such as the present the tenant is entitled to say that the landlord has been fully indemnified in the manner envisaged by the provisions of the lease and that he cannot therefore recover damages from the tenant in addition, so as to provide himself with what would in effect be a double indemnity*."

> In this judgment I refer to the words I have italicised in that passage as the Rowlands principle (see also the headnote at [1986] QB 212 B-C).
>
> 34. The Court of Appeal also relied upon considerations of "justice, reasonableness and public policy" as providing complementary support for its conclusion (p 233C), which was based essentially upon the proper construction and effect of the lease itself.
>
> 35. Mr Butler submitted that in applying the principle in Rowlands in this case, for the word "fire" one should read "flood". Mr Davis agreed with that proposition.
>
> 36. The defendant also submitted that the Rowlands principle applies to the tenant's contractual liability under the tenancy just as much as to negligence on her part. The claimant accepted this proposition. Although the landlord and tenant cases referred to by the parties concerned claims in negligence for damages, there is clear authority to support the defendant's contention that the Rowlands principle applies to contractual liabilities as well as to negligence (see for example Guard Marine and Energy v China National Chartering Company Limited (The Ocean Victory) [2015] 1 Lloyds Reports 381 at paragraphs 74 to 75). In other words, the legal issue in this case depends upon the proper construction and effect of the tenancy agreement."

154. In Frasca-Judd, Mr Justice Holgate (as he then was) then considered further decisions and concluded that:

"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.

I would add that Woodfall's Law of Landlord and Tenant also treats the covenants discussed in Rowlands as *factors* or *indicators* in deciding whether the court should infer that the parties' common intention was that the landlord would look to an insurance policy rather than the tenant for indemnification, rather than as prerequisites for drawing that conclusion (see paragraph 11-104)."

155. Frasca-Judd was itself a case where premises had suffered flood damage, which was allegedly the fault of the tenant, but which was covered by an insurance policy which the landlord had covenanted to take out but where there was no provision for insurance rent i.e. the tenant was not directly paying for it. Nevertheless, Holgate J held that on the construction of that lease, the intention was that the relevant risk should be allocated to the insurance, upon which the landlord was to rely, and not a negligent tenant (see paragraphs 62, 64, 76 and 77-82).

156. Those decisions are not directly applicable to these cases before me as they do not concern wrongs allegedly committed by the Tenants for which the Tenants are being sued. Rather they concern contractual obligations on the part of the Tenants to pay Rent which are said to be (or ought to be) met by the Insurance in the circumstances that the Landlords have chosen to render COVID closures Insured Risk Events and have caused the Tenant to reimburse the Landlords for the relevant insurance premiums by way of the Leases' provisions for insurance rent.

157. Nevertheless, at least for the purposes of summary judgment, Mr Fetherstonhaugh did not seek to persuade me other than to proceed on the basis that if the Insurance did cover the relevant Rent in the circumstances which have happened then the Tenants would have real prospects of succeeding on the issue that the Landlords should have to recover it from the Insurer under the Insurance and not from the Tenants.

158. I think that he was correct to take that stance. I only have to decide whether the Tenants have real prospects of success on the point and it seems to me in principle that it is well arguable (and probably right, although I do not have to decide this) that:

a. The Insurance is for the benefit of the Tenants in Mark Rowlands terms;
b. Where a payment by the Insurers is (or would be) under the Insurance, upon the occurrence of an Insured Risk Event and by way of compensation for one of its consequences being closure of the

> Premises, and especially if it was for payment of a sum equivalent and calculated by reference to the whole or part of the passing Rent, then the Tenants should ordinarily be able to take the benefit of such payment so as to satisfy or reduce their liability for the passing Rent (there would be potential for exceptions, for example if the Insurer was only liable if the Tenant was insolvent and unable to pay). In effect the Tenant would obtain the benefit of the Insurance, with the Insurer paying for what had been insured and the Landlords not being prejudiced (as they would still receive from the Insurer and/or the Tenants the total of the Rent).

159. That conclusion seems to me to be entirely consistent with the Frasca-Judd and Mark Rowlands approach which is one based on the relevant Insurance policy being for the benefit of both Landlords and Tenants (as would seem to follow from the relevant Insurance and insurance rent provisions etc.).

160. However, Mr Fetherstonhaugh's main point for the Landlords is that the Insurance does not cover the Rent (or any equivalent) in the circumstances which have happened. He submits that it is only if the Rent Cesser clause operates, expressly or by implication, and which I have held above is not the case, that the Insurer is liable to pay the Landlords the amount of all or some of the Rent (I deal with further points regarding what would be the amounts if the Landlords are wrong below).

161. The Tenants submit (see below) that, if this were correct, the Landlords would then be in actionable breach of the Insurance provisions in the Leases. However, on the assumption that the Landlords are not, this raises a question of the interpretation of the Insurance Policy itself which is again to be considered in terms of both construction and implication applying the same principles as above.

162. The Landlords rely upon the terms of the relevant Murder, Suicide Disease etc. extensions in the Insurance Policy where the key wording is "The Insurer(s) shall indemnify the Insured in respect of loss of RENT or Alternative Residential Accommodation and RENT in accordance with Condition 1 to Sections 1 and 2 (notwithstanding any requirement for DAMAGE to BUILDINGS) resulting from interruption of or interference with the BUSINESS during the INDEMNITY PERIOD following [COVID events]"

163. Here "the Insured" is the Landlords. Mr Fetherstonhaugh contends that there is no "loss of RENT" where the Rent Cesser clause does not operate and the Tenants remain (in principle) liable for the Rent (and while further questions might arise were the Tenants to be insolvent as a result of what has happened, there is no suggestion before me that that is the case in fact). He contends that the Insurance is not relevant and the Tenants still have to pay the Rent.

164. The Tenants dispute this and say:
    a. If the Insurance is against "loss of RENT" then it implies that the Rent is actually lost;
    b. There is an express provision that "DAMAGE to BUILDINGS" is not required;
    c. In any event:
        i. The Insurance Policy defines "DAMAGE" in wide terms to include "loss, destruction or damage" and which thus extends to non-physical disadvantage;
        ii. The Rent section provides that if any BUILDINGS suffer such DAMAGE and the BUSINESS, which includes the property manager business, is interrupted then the Insurer will pay the amount of the loss. The Tenants contend that there is interruption with such matters as provision of services and other elements of the BUSINESS;
        iii. The "Rent – The Basis of Settlement of Claims" states that "The Insurer(s) will pay in respect of BUILDINGS which have suffered DAMAGE… the loss of Rent being the actual amount of the reduction in the RENT receivable by the Insured during the INDEMNITY PERIOD solely in consequence of the DAMAGE.. [and costs of reletting and mitigation expenditure]", which again seeks to cover Rent in the context of the wide definition of DAMAGE, and which is relation to the rent "receivable" and not the rent actually "received";
        iv. There is the "Prevention of Access" extension which also covers "loss of Rent" resulting from DAMAGE and with what appears to be a specific provision that physical damage is not required;
    d. The Landlords' approach involves circularity in that it is that the Insurance only operates where the Tenant does not have to pay the Rent but the Tenants say that they should not have to pay the Rent because the Insurance operates.

165. Mr Fetherstonhaugh responds to say that:
    a. There is no loss of Rent, and in fact no insurable loss at all, because the Rent Cesser clause does not operate;
    b. There is no reduction in the Rent Receivable because the Rent Cesser clause does not operate;
    c. The BUSINESS has not been interrupted. That business is the Landlords' business whilst the actual interruption has been to the business of the Tenants;
    d. In Lewison on Drafting Business Leases at section 7-16 it is stated that a tenant does not escape liability for Rent during a period when premises have been destroyed by fire unless there is a rent cesser exclusion "because the landlord will have suffered no loss"; and that the Leases should be seen in the context of that known approach. It seems to me that, being (but only being) an academic authority, it is

of some persuasive weight, and I note Chief Master Marsh regarded this citation as being of importance in Commerz Real.

166. I have had concerns as to whether I should be dealing with the construction of the Insurance Policy without hearing from the Insurer, but since I am not making any decision which would seem to be capable of prejudicing the Insurer, I have put them to one side. I have again considered whether this matter is appropriate for summary judgment and determination, and where, again, the construction question is in a standard-form context, and could potentially affect very many other properties and landlord and tenant and insurer relationships. However:
    a. This is a pure issue of interpretation;
    b. There are again no real relevant factual disputes which have been either suggested or become apparent to me. There has been no suggestion of any factual matrix matter upon which any evidence would be deployed at trial;
    c. The matter has been argued out fully with full citation of authority and preparation;
    d. The case-law is in favour of determining such issues with all the savings of cost and resource which would follow.

167. I have concluded that the Landlords are correct and the Insurance Policy does not operate to compel the Insurer to pay the Landlord sums equivalent to all or part of the Rent in the circumstances before me (i.e. where the Rent Cesser does not operate). In coming to this conclusion I have considered (i) the natural and ordinary meaning of the clause, (ii) the other relevant provisions of the Insurance Policy, (iii) the overall purpose of the clause and the Insurance Policy, (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. I have concluded that the Landlords' constructions are clearly correct and should be adopted as against the Tenants' constructions and which do not have any real prospects of success.

168. The most important points are:
    a. At first sight the Landlords, who are the Insured, have suffered no loss at all absent the operation of a Rent Cesser provision, and thus there is nothing for them to be insured against;
    b. In terms of the words used, they accord with the Landlords' construction, in particular as:
        i. It is the "Murder, Suicide or Disease" extensions which are primarily in point. As to them:
            1. The Insurance Policy provides for the Insurer to "indemnify" "against loss of RENT". That would seem to require there actually to have been a loss of Rent on the part of the Landlords and which has not occurred in the absence of a Rent Cesser;
            2. This has to be in consequence of an interruption to the "BUSINESS" which is that of the Landlords, and not

the Tenants, and which has not occurred. It might be different if the Premises were vacant and could not be let due to COVID but that is not the situation before me;

ii. In relation to the other (main) provisions of the Insurance Policy and even assuming that DAMAGE can extend to non-physical disadvantage for these purposes, there still has to be
    1. either an interruption to the BUSINESS and which has not occurred (see above), or
    2. a reduction in the Rent "receivable" and which has not occurred in the absence of a Rent Cesser. It seems to me that it is the Tenants, and not the Landlords, who are trying to create a circularity by creating an assumption that their liability to pay rent has been suspended in order to invoke the provisions of the Policy in order to use them to then justify the assumption and which is going the wrong way round;

c. The commercial purpose is to provide Insurance but it has to be against "loss" of some form suffered by the Insured (i.e. the Landlords). The standard way of doing this is by way of insuring against the operation of a Rent Cesser (which is a loss to the Landlords) and which is what, on the Landlords' construction, is happening here. This makes sense as it should be clear to the Insurer (who should ordinarily be being provided with the Leases as part of a fair presentation to it) what is in the Leases. The solution for the Tenants is to negotiate a wider Rent Cesser, or, as they could perfectly well have done, arrange their own appropriate BII policies;

d. The Landlords' approach receives some support from the authority of Lewison, although I do not have sufficient evidence to regard it as part of the factual matrix;

e. The Mark Rowlands and Frasca-Judd line of authority, although of some relevance, is not directly in point. It is not concerned with what is covered by the relevant Insurance but with whether such cover as exists can be taken advantage of, and if so how, by the Tenant. It is not concerned with liability for Rent at all (which is a liquidated debt liability) but only the ultimate liability for the remediation costs (and which is an unliquidated damages liability).

169. Notwithstanding the able arguments of the Tenants' counsel, when applying the iterative approach and considering which construction is that which meets the test of "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" it seems to me that it is the Landlords' construction with its requirement that the Insured Risk Event must have resulted in the Rent not being payable (or receivable) and which in the absence of a Rent Cesser is not the case here. I would add that I have considered the Insurance Policy as a whole in coming to this conclusion.

170. I am not sure whether the Tenants were really seeking to argue that, in the absence of their succeeding on construction, there should be implied into the Insurance Policy a term to the effect that they wish that cover would exist for the amount of Rent in the absence of a Rent Cesser. However, in any event, I cannot see that such an argument would have any real prospect of success. There is no real case for saying that such a clause would either be "obvious" or "necessary for business efficacy". This is a carefully drawn Insurance Policy with specific and well-drafted clauses and which contains within it a set of specific allocations of risk. It is also, primarily, to protect "the Insured" being the Landlords. To imply such a term against the Insurer would go well beyond what is permitted under the restricted doctrines of implication as explained in Marks & Spencer above.

171. Again, I note that this is consistent with Commerz Real, and, on the basis of a much shorter analysis, Chief Master Marsh came to the same or similar conclusions.

172. In the light of the above conclusions, I do not think that it is necessary for me to seek to resolve a number of points raised as to extent and limits of cover under the Insurance Policy in the event that Rent was covered by it so as to exonerate the Tenants. Issues would exist as to the three month period for cover and the maximum limit of £100,000 and the two different years of the 2019-2020 and 2020-2021 Policies; and as to whether the various occurrences of COVID and statutory impositions and relaxations of "lock-downs" meant that there would be multiple claims to be treated separately for these purposes or on one (or more) continuous basis(es). While I had some considerable difficulties with Ms Holland's arguments on these various points, they are academic in the light of my other conclusions, and I might well have been concerned anyway to resolve them against the Tenants (or the Insurer who could be prejudiced by my opining on these matters without hearing from it) without (at least) a greater citation of authority on the approach to such "multiple incident" and limitation of liability questions.

Interpretation of the Insurance Provisions

173. The Tenants, however, have also raised arguments (adopting those raised by each other) that the Landlords have acted in breach of the Insurance provisions by insuring against COVID and the COVID Regulations (thus rendering them an Insured Risk) but without insuring against sums being or equivalent to the Rent in the circumstances of resultant closures of or inabilities to use the Premises for the Permitted Uses. They contend both that there is an actual breach of the Insurance Provisions and, if not, then a breach of an implied term to such effect; and they also say that it cannot be right for them to have been charged and paid for the premium without obtaining the benefit, in effect, of Rent cover. Again I apply the principles first of construction and then of implication as set out in the case-law above.

174. Each of the Cine-UK and Mecca Leases provides that the Landlord shall insure (i) the Premises (or the Landlords' Estate including the Premises) against the Insured Risks and (ii) against loss of three years Basic Rent (and Service Charge). The SportsDirect Lease merely requires the Landlord to

ensure that various specific matters exist or occur in relation to the Insurance maintained by the Superior Landlord, but no suggestion or evidence has been advanced that that Landlord (or Superior Landlord) has breached any such provision or any provision of the relevant Head Lease.

175. The Cine-UK definition of "Insured Risks" also includes "loss of Basic Rent" (although only in the context of the listed risks and which may well not include the extra risks (which includes the COVID risk) against which the Landlord may insure) but no point has been taken by Ms Harrison based on that.

176. The Tenants contend that the terms of the Leases mean that the Landlord having chosen to include COVID (and other disease) as an Insured Risk, and to have the Tenants pay for it, must obtain insurance which provides that in the event of resultant closures the Insurer will pay the Rent or its equivalent. They say that this must be the purpose of the provision, and that it simply flows from the choice of the Landlord to include this as an Insured Risk, that the Landlord must insure against the consequences of such occurring.

177. The Landlords dispute this. They say that the wording simply does not say what the Tenants wish that it does, and that the position is governed by the Rent Cesser which sets out whether or not rent is payable when an Insured Risk occurs and thus when the Insurance need cover the rent.

178. I have again considered whether this matter is appropriate for summary judgment and determination, and where, again, the construction question is in a standard-form context, and could potentially affect very many other properties and landlord and tenant (and insurer) relationships. However:
    a. This is a pure issue of interpretation;
    b. There are again no real relevant factual disputes which have been either suggested or become apparent to me. There has been no suggestion of any factual matrix matter upon which any evidence would be deployed at trial;
    c. The matter has been argued out fully with full citation of authority and preparation;
    d. The case-law is in favour of determining such issues with all the savings of cost and resource which would follow.

179. I have concluded that the Landlords are correct and the mere fact that the Landlord includes something as an Insured Risk does not operate to compel the Landlord to include terms within the Insurance that the Insurer will pay 3 years (or other) Rent if such a Risk results in closure of or prevention of use for the Permitted Use of the Premises. In coming to this conclusion I have considered (i) the natural and ordinary meaning of the clause, (ii) the other relevant provisions of the Leases, (iii) the overall purpose of the clause and the Leases, (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. I have concluded that the Landlords' constructions are clearly

correct and should be adopted as against the Tenants' constructions and which do not have any real prospects of success.

180. The most important points are:

a. At first sight the Landlords, who are the Insured, have suffered no loss at all absent the operation of a Rent Cesser provision, and thus there is nothing for them to be insured against. Although there is a degree of circularity here, as a breach by the Landlords might be said to trigger a loss on their part, I do not think that the Insurance provisions can be sensibly read to say that there should be insurance against the consequence of such a breach;

b. In terms of the words used, they accord with the Landlords' construction, in particular as:

i. The first element of the Cine-UK and Mecca Insurance Provisions is for the Premises (or the Landlords' Estate) to be insured against the Insured Risks in "the Reinstatement Cost" which is for physical repair etc. costs and three years' loss of Basic Rent;

ii. The second element of the Cine-UK and Mecca Insurance Provisions is simply to insure against "three years' loss of Basic Rent and Service Charge" without reference to the Insured Risks; while the Cine-UK definition of Insured Risks provides that this is in relation to listed Insured Risks (which do not include the COVID disease scenario), the Mecca Lease is silent as to this;

iii. The SportsDirect Lease simply refers to specific matters in relation to whatever is the relevant Superior Landlords' Insurance Policy, and where I do not have any evidence as to what are the Superior Landlords' obligations under that Head Lease;

iv. Accordingly, at most the wording is that the Insurance has to be against "loss of Basic Rent and Service Charge" but that is only relevant if such a "loss" occurs. Absent a Rent Cesser there is no such "loss" on the part of the Landlord (or Superior Landlord), and who is the insured, as the Tenant is still bound to pay;

v. Further, the words "loss of Basic Rent and Service Charge" do not really apply to the Tenants' situations. The Tenants do not "lose" such matters. It is only the Landlords who do so and they only do so because of the existence of the Rent Cesser;

c. In terms of commercial purpose (and factual matrix):

i. it is logical for the Landlord only to have to insure against the consequence of the Rent Cesser (or, possibly, a Tenant insolvency due to the occurrence of an Insured Risk);

ii. the Tenants are protected by the ability to insure their own businesses and their turnover under their own BII policies;

iii. while it can be seen as potentially reasonable for the Landlords to create an insurance contract which provides that if an Insured Risk event occurs which results in the Premises

being closed then the Rent should be paid by insurers, that is only one possible way of dealing with that scenario. For the Tenants to insure by way of their own BII policies is also a reasonable approach. This is a matter of negotiated allocation of risk, and the Rent Cesser clause is at first sight the parties' relevant agreement as to such risk allocation and which is limited to cases of physical deterioration (see above).

181. Applying the iterative approach and considering which construction is that which meets the test of "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", it seems to me that it is the Landlords' construction which is correct and that the Tenants' construction, that the Landlords should have to insure so as to obtain the equivalent to (3 years') Basic Rent (and Service Charge) in the event of closure of the Premises due to what the Landlords had chosen (but did not have) to make an Insured Risk, has no real prospect of success. I would add that I have considered each of the Leases as a whole in coming to this conclusion.

182. However, I think that the Tenants also contend that such a term should be implied and in particular where they have been required to and have paid the premium for the policy which includes COVID disease etc. as an Insured Risk. They contend that it is obvious, and also necessary for business efficacy, for the Landlords, if they choose to insure against such a Risk, to obtain cover for (3 years) Rent (and Service Charge) in the event that the Risk results in closure of the Premises.

183. I have again considered whether this matter is appropriate for summary judgment and determination, and where, again, the question of such an implication is in a standard-form context, and could potentially affect very many other properties and landlord and tenant relationships. However:
    a. This is a pure issue of interpretation;
    b. There are again no real relevant factual disputes which have been either suggested or become apparent to me. There has been no suggestion of any factual matrix matter upon which any evidence would be deployed at trial. The only matter in this context which might have been raised is the level of fear of something like SARS occurring but that is really a matter of public and historical record and the possibility of pandemics is and was at the time of grant of the Leases one of common knowledge and speculation;
    c. The matter has been argued out fully with full citation of authority and preparation;
    d. The case-law is in favour of determining such issues with all the savings of cost and resource which would follow.

184. I do again consider that the implied term suggested by the Tenants would have been fair and reasonable and equitable. While it could prejudice Insurers who might find themselves with an insurance liability which they

had not contemplated, it is for them to obtain and consider the relevant Lease(s) and their implied terms just as much as their express terms. One consequence, and indeed point, of the tests for implication is that the implications should be apparent to the reader, they being either obvious or necessary for business efficacy.

185. However, the burden is on the Tenants to show either (or both of) obviousness or necessary for business efficacy.

186. With regard to obviousness, this has to be seen again in the context of the Leases being lengthy, standard-form, professionally drafted documents which appear to have been prepared with care and do not contain obvious drafting errors. Further:

a. They go into great detail regarding Insurance. Thus they appear to be comprehensive and, in conjunction with accepted doctrines of landlord and tenant law (as with the doctrines of apportionment which featured in the Marks & Spencer case), intended to cover the entire legal relationship between the parties. I bear in mind that implication still took place in the lease case of Liverpool v Irwin but that was for reasons of need for business efficacy and not obviousness;

b. They include express provisions, as to Rent Cesser and which are limited to circumstances of physical deterioration (see above) even where closure has otherwise occurred as a result of an Insured Risk Event, and to obtaining cover for "loss of [Rent]". Such a limitation suggests that closures due to non-physical deteriorations were not intended (or at least agreed) to result in "loss of [Rent]" requiring cover;

c. This needs to be seen in the common-law context of rent still being payable under a lease notwithstanding the relevant premises becoming unusable (e.g. due to fire) without an agreement to the contrary. If the Tenants wished to negotiate a blanket (as opposed to the limited) term to the effect that Rent would be covered by Insurance in the circumstances of such occurring due to any Insured Risk, rather than just one with involved physical deterioration (damage or destruction), then they could have done so;

d. Even on the Landlords' construction, and as Mr Fetherstonhaugh submitted, there is still potential for a benefit for the Tenants from the Insurance of COVID disease etc. as an Insured Risk; as if another part of the relevant Building or Estate cannot be let so as to generate income for the Landlord due to COVID etc. then the Insurance will provide monies which can be used to finance general Building/Estate costs (and which if not so financed might have resulted in an increase in Service Charge or a lower standard of services etc.);

e. The Insurance Provisions are primarily for the benefit of the Landlord (as the Insured). The fact that the Tenant is paying for the Insurance is part of the price being paid by the Tenant for the grant of the leasehold interest, and it does not follow that because the Tenant is the indirect payee then the Insurance must be tailored to the benefit of the Tenant as this implied term seeks to do;

f. If the Insured Risk is itself an inappropriate one, then the Tenants can seek to dispute their liability to pay the (entire) premium;
g. The Tenants have their own ability to insure their businesses, including against loss of turnover, by way of obtaining their own BII policies.

187. It seems to me that the above matters all favour the Landlords. They lead me to conclude that in the circumstances of the officious bystander's hypothetical question, the hypothetical landlord (at least) might well answer that the only circumstances in which the Landlord has to ensure that the Insurer, rather than the Tenant, will (ultimately) pay the Rent is where the Rent Cesser applies whatever Insured Risk Event has occurred.

188. Taking all these matters together, I do not think that the "obviousness" test is met. It is not clear to me that the response from the parties, or at least the hypothetical landlord, to the officious bystander's question would be that the implied term sought by the Tenants would "go without saying".

189. However, the Tenants also contend that the implied term is required to give the Leases business efficacy. Again, I do not think that the Tenants have shown that there is any real prospect of establishing this to be the case. The Leases "work" (to cite Lord Clarke in Marks & Spencer) without the implied term, and simply provide for Insurance against "loss of [Rent]" where a Rent Cesser exists in some identified circumstances but not in others, and where the Tenants could perfectly well (and perhaps more appropriately) could have insured themselves. The Tenants' points as to their having paid the premium for an Insured Risk of which they cannot take advantage in this instance are met by the points set out above in the context of the "obviousness" argument. At most this is Lord Neuberger (in Marks & Spencer)'s situation of a "curious" and possibly "capricious or anomalous" effect rather than one which is "commercially or otherwise absurd".

190. Again, I note that this is consistent with Commerz Real, and on the basis of a much shorter analysis Chief Master Marsh came to the same conclusion.

191. I have considered whether the Tenants would have any real prospects of establishing some estoppel or equivalent defence on the basis that the Landlords having required the Tenants to pay the entire premium, the Landlords should not then be able to say that the Rent is not to be treated as paid by the Insurer in the event of closure due to what the Landlords have made an Insured Risk.

192. However, I do not think that the Tenants have any real prospects of success on such an argument, and in particular as:
a. The juridical basis of such an argument is not clear to me;
b. It would flow from my construction of the various provisions of the Leases that the Landlords were not in any way representing that Rent would be simply covered and paid in these circumstances;

c. If the Tenants wish to complain about the terms of the Insurance and to dispute paying the (entire) premium as a result, then they could do so and that would seem to be the appropriate course and remedy.

Conclusion on the Interpretation of the Leases (and the Insurance Policy)

193. In the light of my conclusions above, I conclude that the Tenants have no real prospects of disputing their liabilities to pay the Rent under the terms of the Leases (or the Insurance Policy). However, they have a number of further arguments to which I now turn.

Frustration

194. In the Deltic litigation, Deltic raised an argument that the Deltic Lease had been frustrated altogether due to COVID and the COVID Regulations. I do not think that any of the Tenants have sought to advance that argument as such; but rather that SportsDirect (adopted by Cine-UK and Mecca) have argued that there has been a "temporary frustration" over the periods of lock-down and enforced closures of the Premises, resulting in Rent not being payable for such periods. The Landlords contend that (a) there has been no frustration at all and (b) there is no such thing as a "temporary frustration" in law.

195. Frustration is a doctrine which generally provides that where an wholly unexpected event, for which the parties had not made an agreement, occurred which sufficiently affects the contract so as to in some way negate (i.e. frustrate) its purpose, then the contract will be discharged and end.

196. I was taken to various paragraphs in Treitel on Frustration and Force Majeure (2nd Edn) where:

a. At paragraph 5-049 cases were discussed where " If the temporary impossibility lasts, or is likely to last, for so long that *no* part of the agreed performance can be rendered, the contract will be discharged." including where the advent of war had made it clear that chartered ship voyages would not be going to take place within the relevant contract period;

b. At paragraph 5-050 there was discussed the position where some performance was likely to remain possible during the remainder of the contract period:
"Where performance for some balance of the contract period remains (or is likely to remain) possible, and a claim is made in respect of that balance, the tests which have so far been discussed in relation to temporary impossibility obviously cannot apply… The test, in cases of the present kind, appears to turn rather on the ratio which the part remaining possible bears, or is likely to bear, to the whole of the specified performance; the lower that ratio, the more likely it is that the contract will be discharged. It will be convenient to refer to this test as "the proportionality test"";

c. In the specific context of frustration of purpose, paragraph 9-002 states:

> "The general rule is that the question whether the contract is discharged is to be determined by reference to the time of the occurrence of the allegedly frustrating event. The contract will be discharged if at that time a reasonable person would have taken the view that the event would lead to a sufficiently serious interference with performance to bring about discharge. It is not necessary to wait and see whether such interference actually takes place or would have taken place if attempts to perform had not been abandoned; indeed, the contract will be discharged even though subsequent events show that there would have been no such interference." References are then made to Embriacos v Sydney Reid [1914] 3 KB 45 where a war event appeared to have disrupted a charterparty permanently but where peace was unexpectedly declared so that the interruption was actually distinctly limited; but frustration had still occurred, Mr Justice Scrutton having said that "Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by the contract or not. They must be entitled to act on reasonable commercial probabilities at the time when they are called upon to make up their minds." In paragraph 9-003 there is then cited Bank Line v Arthur Capital [1919] AC 435 as authority for the same proposition.

197. I was also taken in detail to National Carriers v Panalpina [1981] AC 675. There a road closure had prevented commercial premises which had been let for 15 years (at an initial beneficial rent) being used after 10 years for some 18-20 months after which the lease would still have another 3 years to run. The tenant contended that the lease had been frustrated but this contention was rejected by way of summary judgment by a Master and the Master's summary conclusion was eventually upheld by the House of Lords.

198. Lord Hailsham referred to the effect of frustration at page 689B-D as follows:

> "Apart from the Law Reform (Frustrated Contracts) Act 1943 , the doctrine of frustration brings the whole contract to an end, and in the present case, apart from any adjustment under that Act and any statutory right to compensation under the closure order, the effect of frustration, had it been applicable, would have been to throw the whole burden of interruption for 20 months on the landlord, deprived as he would be of all his rent and imposed as he would have upon his shoulders the whole danger of destruction by fire and the burden of reletting after the interruption. As it is, with the same qualification as to possible compensation, the tenant has to pay the entire rent during the period of interruption without any part of the premises being usable at all, together with the burden (such as it may be) of the performance of the other tenant's covenants which include covenants to insure and repair. These are no light matters."

199. Lord Simon described the doctrine and the effect of frustration at page 700F-G as follows:
"1. Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance."
And then said at p707G:
"I would, however, presume to suggest that consideration should be given to whether the English doctrine of frustration could be made more flexible in relation to leases. The Act of 1943 seems unlikely to vouchsafe justice in all cases. As often as not there will be an all-or-nothing situation, the entire loss caused by the frustrating event falling exclusively on one party, whereas justice might require the burden to be shared. Nor is this situation confined to leases."

200. Their Lordships did conclude that the doctrine of frustration applied to leases but that it would a rare occasion when a lease would be frustrated, see:
    a. Lord Hailsham at p692B-E
    "In the result, I come down on the side of the "hardly ever" school of thought. No doubt the circumstances in which the doctrine can apply to leases are, to quote Viscount Simon L.C. in the *Cricklewood* case, at p. 231, "exceedingly rare." Lord Wright appears to have thought the same, whilst adhering to the view that there are cases in which frustration can apply, at p. 241. But, as he said in the same passage: "... the doctrine of frustration is modern and flexible and is not subject to being constricted by an arbitrary formula." To this school of thought I respectfully adhere. Like Lord Wright, I am struck by the fact that there appears to be no reported English case where a lease has ever been held to have been frustrated. I hope this fact will act as a suitable deterrent to the litigious, eager to make legal history by being first in this field. But I am comforted by the implications of the well known passage in the Compleat Angler (pt. i, ch. 5) on the subject of strawberries: "Doubtless God could have made a better berry, but doubtless God never did." I only append to this observation of nature the comment that it does not follow from these premises that He never will, and if it does not follow, an assumption that He never will becomes exceedingly rash."
    b. Lord Wilberforce at 697 A-B
    "The present may be an example. In my opinion, therefore, though such cases may be rare, the doctrine of frustration is capable of application to leases of land. It must be so applied with proper regard to the fact that a lease, that is, a grant of a legal estate, is involved. The court must consider whether any term is to be implied which would determine the lease in the event which has happened and/or ascertain the foundation of the agreement and decide whether this

still exists in the light of the terms of the lease, the surrounding circumstances and any special rules which apply to leases or to the particular lease in question."

c. Lord Simon at page 706C held that the doctrine of frustration was applicable in principle to leases and at 706C-G that a commercial lease of the type in that case (and in the cases before me) "is very much the sort that might be frustrated in the circumstances that have occurred"
d. Lord Russell was (see page 709) less inclined to agree that the doctrine could apply to leases but held that on the views of the majority the "hardly ever" approach would apply
e. Lord Roskill concluded that the doctrine was applicable to leases but again unlikely to be applicable, saying:
[p715B] "I respectfully agree with Viscount Simon L.C. and Lord Wright in the *Cricklewood* case that the cases in which the doctrine will be able to be successfully invoked are likely to be rare, most frequently though not necessarily exclusively where the alleged frustrating event is of a catastrophic character." And
[pp717H-718A] "But to hold that the doctrine is capable of applying to leases does not mean that it should be readily applied. Viscount Simon L.C. and Lord Wright both indicated in the *Cricklewood* case some of the limitations to which the invocation of the doctrine would be subject. I respectfully agree with what was there said but I do not think any useful purpose would presently be served by attempting to categorise those cases where the doctrine might be successfully invoked and those where it might not. Circumstances must always vary infinitely."

201. Nevertheless, notwithstanding that the road closures had rendered the relevant premises unusable for a substantial period of time, the House of Lords unanimously upheld the Master's decision that summary judgment should be given against the tenant on the basis that the facts could not possibly justify a conclusion that that lease had been frustrated.

202. Lord Hailsham simply adopted the opinions of the others as to this (p684D).

203. Lord Wilberforce after analysing the periods of time involved said at 697H-698B:

"My Lords, no doubt, even with this limited interruption the appellant's business will have been severely dislocated. It will have had to move goods from the warehouse before the closure and to acquire alternative accommodation. After reopening the reverse process must take place. But this does not approach the gravity of a frustrating event. Out of 10 years it will have lost under two years of use: there will be nearly three years left after the interruption has ceased. This is a case, similar to others, where the likely continuance of the term after the interruption makes it impossible for the lessee to contend that the lease has been brought to an end. The obligation to pay rent under the lease is unconditional, with a sole exception for the case of fire, as to which the lease provides for a suspension of the

obligation. No provision is made for suspension in any other case: the obligation remains. I am of opinion therefore that the lessee has no defence to the action for rent, that leave to defend should not be given and that the appeal must be dismissed."

Lord Roskill simply adopted this reasoning (p717A-B).

204. Lord Simon at 706E-G made clear that the length of the unexpired terms and restrictions on user were relevant factors:

"In a lease, as in a licence or a demise charter, the length of the unexpired term will be a potent factor. So too, as the American cases show, will be any stipulations about, particularly restrictions on, user. In the instant case the lease was for a short term, and had only about four and a half years to run at the time of the alleged frustrating event - the closure of Kingston Street. The demised premises were a purpose-built warehouse, and both parties contemplated its use as a warehouse throughout the term. This use, in Corbin's words (Corbin, Contracts , vol. 6, p. 391), "played a large part in fixing rental value," as the rent review clause shows. After the closure of Kingston Street it could no longer be used as a warehouse. No "other substantial uses, permitted by the lease and in the contemplation of the parties, remained possible to the lessee."

205. However, Lord Simon then held that the circumstances of that case clearly did not go far enough for there to have been frustration; saying at p707B-F:

"The appellants were undoubtedly put to considerable expense and inconvenience. But that is not enough. Whenever the performance of a contract is interrupted by a supervening event, the initial judgment is quantitative - what relation does the likely period of interruption bear to the outstanding period for performance? But this must ultimately be translated into qualitative terms: in the light of the quantitative computation and of all other relevant factors (from which I would not entirely exclude executed performance) would outstanding performance in accordance with the literal terms of the contract differ so significantly from what the parties reasonably contemplated at the time of execution that it would be unjust to insist on compliance with those literal terms? In the instant case, at the most favourable to the appellants' contention, they could, at the time when the road was closed, look forward to pristine enjoyment of the warehouse for about two thirds of the remaining currency of the lease. The interruption would be only one sixth of the total term. Judging by the drastic increase in rent under the rent review clause (more than doubled), it seems likely that the appellants' occupation towards the end of the first quinquennium must have been on terms very favourable to them. The parties can hardly have contemplated that the expressly-provided-for fire risk was the only possible source of interruption of the business of the warehouse - some possible interruption from some cause or other cannot have been beyond the reasonable contemplation of the parties. Weighing all the relevant factors, I do not think that the appellants have demonstrated a triable issue that the closure of the road so significantly changed the nature of the outstanding rights and obligations under the lease from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations."

206. Lord Russell simply agreed that the facts did not justify the application of the frustration doctrine even assuming that it did apply to leases (p709F-G).

207. I have also had cited to me Canary Wharf v European Medicines Agency [2019] L&TR 14 where the effect of Brexit on the particular tenant European Medicines Agency (an European Union entity) meant that it could no longer operate from the premises. However, this was not held to be sufficient to engender frustration, Marcus Smith J saying at paragraph 27 "Whether a contract is frustrated depends upon a consideration of the nature of the bargain of the parties when considered in the light of the supervening event said to frustrate that bargain. Only if the supervening event renders the performance of the bargain "radically different" when compared to the considerations in play at the conclusion of the contract will the contract be frustrated."

208. This followed, amongst other authorities, The Sea Angel [2007] EWCA Civ 547 where the "radically different" test has been considered and explained as follows:
"111. In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as "the contemplation of the parties", the application of the doctrine can often be a difficult one. In such circumstances, the test of "radically different" is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances.

112. What the "radically different" test, however, does not in itself tell us is that the doctrine is one of justice, as has been repeatedly affirmed on the highest authority. Ultimately the application of the test cannot safely be performed without the consequences of the decision, one way or the other, being measured against the demands of justice. Part of that calculation is the consideration that the frustration of a contract may well mean that the contractual allocation of risk is reversed. A time charter is a good example. Under such a charter, the risk of delay, subject to express provision for the cessation of hire under an off-hire clause, is absolutely on the charterer. If, however, a charter is frustrated by delay, then the risk of delay is wholly reversed: the delay now falls on the owner. If the provisions of a contract in their literal sense are to make way for the absolving effect of frustration,

then that must, in my judgment, be in the interests of justice and not against those interests. Since the purpose of the doctrine is to do justice, then its application cannot be divorced from considerations of justice. Those considerations are among the most important of the factors which a tribunal has to bear in mind.

113. Mr Hamblen submitted that whereas the demands of justice play an underlying role, they should not be overstated. He referred the court to Chitty at para 23–008 ("But this appeal to the demands of justice should not be taken to suggest that the court has a broad absolving power whenever a change of circumstances causes hardship to one of the contracting parties … Such a test is too wide, and gives too much discretion to the court"). I respectfully agree. Mr Hamblen also referred to Treitel at para 16–009 ("The "theory" does not, in other words, supersede the rules which determine the circumstances in which the doctrine of frustration operates"). I would again respectfully agree, as long as it is not sought to apply those rules as though they are expected to lead one automatically, and without an exercise of judgment, to a determined answer without consideration of the demands of justice."

209. Although I think that no-one is now (Deltic have compromised the Claims against it) seeking to contend that any of these Leases have been frustrated altogether, I am not wholly sure as to what was SportsDirect's final position as to this and in any event it seems to me to be useful to state shortly my reasons as to why it is clear that none of them have been frustrated altogether, as follows:

a. In principle, the doctrine of frustration applies to leases – see the majority in Panalpina;
b. An enforced closure of the premises arising from matters outside the control of the parties is such a supervening event as is capable in principle as giving rise to the frustration of commercial leases such as these and especially where, as here, the user clauses only permit in practice what have become impossible uses – see Panalpina itself;
c. However, it is only in a "rare" or "very rare" case that such a supervening event will have such a consequence (see Panalpina and the Sea Angel above). As to this:
    i. Has the situation become so "radically different" that the present situation is so outside what was the reasonable contemplation of the parties as to render it "unjust" for the contract to continue (see Panalpina per Lord Wilberforce, The Sea Angel and Canary Wharf);
    ii. There are relevant to this: the original term of each Lease, the likely period of the disruption and the likely remaining term of the Lease once the disruption has ended (Panalpina per Lord Wilberforce and Lord Roskill), and:
        1. This should be considered at each relevant point in time looking prospectively forward as to what reasonable commercial people would conclude was the likely length of the disruption (see Embriacos and the other cases cited by Treitel);

2. The court must consider this first quantitatively but then qualitatively as to whether there is such a "radical difference" (see Lord Wilberforce in Panalpina);
3. The court must also consider all this in terms of whether this new situation justifies a departure from the agreed allocations of risk, and where in the context of a lease the essential agreement is that the Tenant has agreed to pay the rent except in defined circumstances. This is where the parties have allocated the risks of disruption e.g. by reason of fire, generally to the Tenant (Lord Wilberforce in Panalpina); to which may be added that the parties have also given thought to closures due to Insured Risks but only allocated the risk (in relation to whether or not Rent should be paid) to the Landlord where there has been a closure due to physical damage arising from an Insured Risk (see above);

iii. In Panalpina it was held that summary judgment should be given against the tenant where there were 1.6 years of closure over the remaining 5 years of a 15 year lease leaving some 3 years in place. While Lord Simon regarded it as also relevant that the initial rent had been at a beneficial rate, Lord Wilberforce (and Lord Roskill) did not seem to regard this as important, but simply that there was not a sufficient qualitative difference to make it unjust not to continue with the originally agreed allocation of risk;

d. It seems to me the factual analysis and application in this case is no different to that in Panalpina, and which was also dealt with on a summary basis:

i. I am prepared to accept that COVID and the COVID Regulations would, or at least could, qualify as a supervening event. While, in the light of SARS etc., they could have been foreseen they are, in modern terms at least, properly termed "unprecedented";

ii. However, I cannot see the reasonably expected period of closures as ever having been any greater than 18 months. The original lock-downs in March 2020 were projected to be only a matter of months in order to deal with the immediate resourcing needs of public health bodies. There were after some 4-5 months then periods of something approaching reopening, which, while it was limited in the cases of entertainment venues (such as the Bristol Cinema and the Dagenham Bingo Hall), was real and thought to be the precursor for full liftings of the lock-downs. There was then the further lock-down commencing from late 2020 but this was very much in the context of a limited period of time being required to "flatten a further wave [of COVID hospitalisations etc.]" and to enable vaccines to be finally tested and their administration rolled-out. The position now

is that it has been announced that all restrictions are likely to be lifted by the end of June 2021. However, it also seems to me that it would always have been perceived, as has been announced to be the case (with reopening allowed in April 2021), that the closure periods would be significantly shorter for shops such as the Blackpool Shop than for the entertainment venues;

iii. That means, as stated above, that the likely perceived periods in relation to each Lease were:

1. for the Cine-UK Lease, original term 20 years (or 10 years if the break clause were to be exercised), and after 18 months of closures it would have another 12.5 years to run, or 2.5 years if the break-clause were to be exercised;
2. for the Mecca Lease, original term 15 years, and after 18 months of closures it would have another 11 years to run;
3. for the SportsDirect Lease original term 15 years, and after less than 18 months (being a shop) of closures it would have more than another 1 year to run.

iv. However, there is to also to be borne in mind that each of these Leases attracts the protection of the business tenancy provisions and protections of Part II of the Landlord and Tenant Act 1954. As long as they continue, they have rights of renewal or, if the Landlord was to rely on a mandatory ground to prevent renewal (such as redevelopment or occupation for own use) compensation. Those rights are valuable but if a Lease was frustrated then they would be lost. It seems to me that their effect on the practical terms of the Leases, and also the prejudice to the Tenants if there were full frustration, are such as to strengthen the degree of disruption which would be required in order to make it unjust for the Leases to continue. This point (assuming it was applicable) does not seem to have been advanced in Panalpina;

v. Here the practical effects of the closures are in reality not much different from those in Panalpina in terms of enforced closures although the Panalpina closure was more continuous making it a stronger case. In relation to Cine-UK and Mecca, the mathematical effects regarding the proportion of the contractual terms which were "lost" due to the closures and remaining after the closures are, in my view, less than in Panalpina (I do not think that the possible exercise of the break clause in Cine-UK is really relevant where it has not been invoked, is at the choice only of the Tenant and would still leave 2.5 years). The mathematical effect in SportsDirect is proportionately greater than in Panalpina, but a whole year is still a significant period to run, and the Blackpool Shop (a) has been able to open for some period since June 2020; (b) was always likely to be able to reopen at

an early stage, and (c) has in fact been able to reopen in April 2021, leaving 1.5 years of the SportsDirect Lease;

vi. Applying the qualitative approach, significant periods of time will remain in relation to each Lease after what will have been only a limited period of enforced closure. I do not see this as being sufficiently different from Panalpina where the matter was determined summarily against the Tenant. I do not see any real prospects of there being sufficient for any "radical difference" or to make it "unjust" for any the Leases to continue bearing in mind their terms and their actual allocations of risk.

e. As Panalpina itself was dealt with on a summary basis, I consider that I can deal with these cases likewise. The relevant facts are clear and I think that I can take judicial notice of how COVID and the Government's pronouncements, regulations and intentions have been announced, advertised and considered over its period and now. This is not a situation where evidence from any specialist source would be required as to what persons in the positions of the parties before me would think and consider (as, for example, in past cases as to the likelihood of foreign countries engaging in war or reaching peaceful settlements including of actual conflicts). It is simply a matter of what is and remains public knowledge and perceptions. No-one has sought to adduce any evidence of anything else;

f. I do make clear that I am not considering a case where the contractual Lease term (whether or not 1954 Act protected) ended during a or an expected lock-down. That could be argued to be a different situation but is not before me.

210. Therefore, and while no party was contending for such to be the case, I do not regard there as being any real prospect of it being shown that any of the Leases have been frustrated.

211. However, I do have to deal with SportsDirect's arguments that there has been a "temporary frustration". It seems to me that, arising from the matters above, there are two combined reasons why the Tenants have no real prospects of establishing such to have been or be the case, being:

a. First, that there is no such thing as a "temporary frustration", effectively suspending the contract for a period of time, in law. Both Treitel and the case-law, in particular my initial citations from Panalpina, make clear that frustration has the effect of discharging the contract and ending it. That is one reason why such a "radical difference" has to exist. Frustration does not suspend the contract, rather it terminates it and so that it does not subsequently revive. What the Tenants are seeking to do is to introduce one possible version of the flexibility that Lord Simon said would require statute. There is no case-law as to general "temporary frustration" (I consider the question of "supervening event" separately below);

b. Second, in order to have a "temporary frustration" there could not be a "full frustration". However, the doctrine of frustration is

> dependent on a "radical difference" having occurred which renders it unjust for the contract to continue. It is difficult to see how, where as here (see above), such a sufficient "radical difference" does not exist, there can be any frustration at all. If there could be such a temporary frustration then Panalpina would have been a classic case of it and would have been decided differently. The same applies in these cases.

212. I therefore reject the "temporary frustration" (and any full frustration) argument, and hold it (and they) have no real prospects of success.

Supervening Event/Illegality and Temporary Suspension of Obligation

213. The Tenants have, however, also sought to argue that there is a principle of contract and of law that a party can be released from an obligation where it is becomes impossible for it to be performed legally. The Landlords accept that there can be such a release or suspension but say that it is of no assistance to the Tenants here as it remains perfectly legal for them to continue to pay the Rent.

214. Two cases were cited to me on this. The first was Andrew Millar v Taylor [1916] 1 KB 402 which related to a contract for the export of confectionary where such export had been rendered illegal for a time due to provisions preventing "trading with the enemy" during stages of the First World War.

215. Swinden Eady LJ said at pp410-11:

> "Now the argument on behalf of the plaintiffs is this: the effect of the Proclamation was to render the export of the goods illegal, and the exporter or shipper would be liable to a penalty of 100l., and therefore the plaintiffs were released from further proceeding with the contract. The general rule of law is that where the performance of a contract has been rendered illegal and therefore impossible by Act of Parliament passed after the contract was made, or by an act of State, which of course would include the Proclamation, then the promisor is excused from performing his promise. In *Barker v. Hodgson* [33] Lord Ellenborough said: "If indeed the performance of this covenant had been rendered unlawful by the Government of this country, the contract would have been dissolved on both sides, and this defendant, inasmuch as he had been thus compelled to abandon his contract, would have been excused for the non-performance of it, and not liable to damages." But in the application of this rule care must be taken to consider whether an event which has happened has really rendered the performance of the contract impossible, or merely operated to suspend or delay its execution. If, for instance, the act of State consists

in placing an embargo upon ships leaving the kingdom for particular places abroad, the Courts have held, even when the delay has been very considerable, that the rights under charterparties have only been suspended. Thus in *Hadley v. Clarke* [34] it was held that although the period of suspense was in that case extreme - between two and three years - yet if the effect of an act of State is not to render the completion of the contract impossible but only to delay its execution temporarily and for a reasonable period, and does not frustrate the object of the engagement from a business point of view and as a mercantile adventure, the promisor is not excused, but must perform the contract; that is to say, he must perform it within a reasonable time after the difficulty has been removed."

And concluded at pp414-5:
"Now the plaintiffs relied upon cases such as *Esposito v. Bowden* [42] which show that where a contract involves trading with an enemy it is illegal. No doubt that is so: a contract involving trading with the enemy becomes at once ipso facto illegal; and the ground of that is put by Lush J. in *Geipel v. Smith* [43] as "a state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this." All trading with the enemy is prohibited, and that condition of things must be presumed to last for an indefinite time; it renders all contracts involving such trading illegal and impossible of further performance, and therefore they become void. In the present case if the interruption were such that the contract could not be carried out in a reasonable time, then it would invalidate the contract. If, on the other hand, the interruption is such that it does not prevent the agreement being carried out within a reasonable time, having regard to the terms of the contract itself, then a mere temporary interruption does not annul the contract. In this case the agreement was to manufacture and deliver goods within a reasonable time, no other time being specified, and the course of business between the parties shows that from six weeks to two months was the usual and reasonable time. If, therefore, an event happens which does not prevent the contract being carried out within that reasonable time and in accordance with the usual course of business between the parties, there is no reason why the contract should be thereby determined; and, having regard to the Proclamations that were issued on August 5, 10, and 20, I am of opinion that it was the duty of the plaintiffs to have waited a reasonable time for the purpose of seeing whether it were possible to fulfil their contract. If they had waited, the contract could have been carried out as usual without any difficulty; if they had waited until August 20 - a short interruption for ten or at the most fifteen days - the contract could have been carried out without difficulty. The suspension caused by the embargo on exportation was a temporary suspension for a short period and did not prevent the contract being carried out in the manner in which the parties had contemplated that it would be carried out. For these reasons I am of opinion that under the circumstances the plaintiffs were not entitled to repudiate the contract and refuse to perform it. It is a breach by them of that contract, and the defendants are entitled to recover against the plaintiffs, giving credit for the agreed sum which the defendants owed to the plaintiffs. In my opinion

the appeal ought to be allowed in respect of the counter-claim, the judgment reversed, and judgment entered for the defendants."

216. The other judgments are to similar effect although also in the express context of a contract and set of contractual obligations which had to be performed under the contract within a reasonable time of its inception, and where the analysis was again as to whether the statutory regulations had altogether prevented that occurring as at the point of the attempted repudiation and declaration that there would not be performance.

217. The second authority was John Lewis v Viscount Chelsea (1994) 67 P&CR 120 where the defendant to the counterclaim (i.e. the plaintiff) was a tenant under a building lease which contained an obligation to build premises in a particular form but where subsequent statutes had imposed a requirement for listed building consent to be obtained and which could not be done. At page 132 the Judge held:

"On the high authority of these dicta and as a matter of principle I hold that there may exist lawful excuses for non performance of a building covenant in a long lease and such excuses would provide a defence to an action for forfeiture for breach of covenant even though they would not provide the defence to a claim for rent."

And then at page 193:

"The result is that John Lewis is not in breach of its obligations in clause III. I should add this, however; my finding does not discharge John Lewis from its obligations. The leases continue for over 930 years. Circumstances will change. There may come a time when John Lewis no longer has a lawful excuse for non-performance of the obligation to demolish and rebuild."

218. I cannot see any real prospects of the Tenants succeeding in a contention that the COVID and COVID Regulations etc. are supervening events which temporarily suspend their obligations to pay Rent, and whether as a result of these authorities or otherwise, and in particular as:

a. Both cases proceed on the basis that an obligation the performance of which is made illegal is suspended for the period during which it is illegal and which may have the effect of frustrating (or in any event discharging) the contract if it is going to last long enough;
b. However, neither case suggests that, while the performance of the relevant obligation is excused, the performance of any other obligation (at least if the two obligations are not interdependent or conditional one upon the other) is excused. That can only depend

upon ordinary contractual principles (such as Rent Cesser agreements, frustration etc.) but the Tenants have (so far) failed in their attempts to invoke any of these;

c. Moreover, the John Lewis case makes clear that illegality amounting to an excuse of one obligation does not itself relieve liability to pay Rent.

I note that this also seems to have been view of Chief Master Marsh in the Commerz Real case (and which perhaps was a stronger case than these as there was actually a "keep open" covenant).

Partial Failure of Consideration

219. The Tenants do, however, finally assert that the effect of their being unable to operate from the Premises in accordance with the Permitted Uses results in a partial failure of consideration such as to relieve them from their liabilities to pay rent.

220. SportsDirect, in particular, relies upon clause 2.1 of the Blackpool Lease which provides that the Landlords let the Blackpool Premises "In consideration of the rents reserved and the Tenant's covenants" and contends that since this only permits (at least in practice as to which actual evidence was adduced) use for the Permitted Use, and which is temporarily impossible, there is such a partial failure of consideration.

221. As stated above, I regard the Tenants as having real prospects of success in contending that in practice they cannot trade from the Premises in ways permitted by the Leases. However, I do not see that they have any real prospects of that in itself relieving them from their liabilities to pay rent under the asserted doctrine, and in particular because:

a. I do not consider that "partial failure of consideration" is a freestanding doctrine of contract law. No case-law has been cited to me to say that it is. A partial failure of consideration can be a way of categorising a particular event which has meant that a party has not received an agreed benefit under a contract, but it is then a matter of contract law (e.g. that of construction of the contract including as to interdependent obligations, the law of breach of contract or the law of frustration) as to what is the consequence (if any) of that in terms of that party's rights and obligations. Here I have construed the contract (i.e. each Lease) so as not to provide for that consequence and likewise applied the law of frustration and supervening events/illegality to the same conclusion. The Tenants have failed in showing the applicability of any relevant principle of contract law;

b. I do not consider that the Tenants being unable to trade in accordance with the Permitted Uses is really a "partial failure of consideration", but rather simply an unexpected occurrence which means that the Leases are not (as) beneficial as the Tenants expected. It is no fault of the Landlords, and there is no suggestion that the Landlords have breached any obligation. Even more importantly,

the Leases do not provide that the Rent is in any relevant way dependent upon the Tenants being able to enjoy such use in practice except in the limited circumstances of the Rent Cesser Clauses (and which I have held do not apply here);

c. In any event, the contractual allocation of risk is that the Rent is payable in these circumstances for all the reasons set out above.

Conclusion regarding COVID matters

222. For all the reasons set out above, I conclude that the Tenants have not shown any real prospects of success in defending the claims brought against them for Rent due to COVID or the COVID Regulations etc.

223. I have also asked myself again whether the Landlords have shown that there is no other compelling reason for there to be a Trial of these matters. I have concluded that they have demonstrated that also. The Tenants contend that COVID is unprecedented and that it has had unprecedented effects which deserve a full investigation and trial, and especially in view of the very great number of commercial (and perhaps other) leases which have been affected. However, this is not a matter where any evidence is going to be adduced to better inform the Court. The Tenants have already been able to explain their individual situations fully in witness evidence. The matter has been fully argued out by highly experienced and competent counsel with full citation of authority and ample time for preparation. There is a strong public interest (as well as an interest of each of the parties) in a summary determination where that is (as here) capable of being achieved without any prejudice to justice. Moreover, the same approach was taken in TKC v Allianz (and, also, now, in Commerz Real).

The SportsDirect Rent Claims Point

224. There does, however, remain SportsDirect's contention that AEW having brought the County Court Claim for a sum of "Rent" for the March 2020 quarter, obtained the County Court Judgment (albeit by default) and then been paid the County Court Judgment Sum", should not now be able to claim the Balance which it had omitted in error in a separate High Court Claim (being QB-2020-002792).

225. The relevant clauses of the SportsDirect Lease (apart from the general reservation of rent) provide that:

"The Tenant will pay to the Landlord yearly during the Term (and proportionately for any part of a year) the following sums, each by way of rent.
2.3.1 Firstly, from and including 31 August 2007 to and including 15 February 2008 a peppercorn (if demanded) and from and including 16 February 2008 a yearly rent of THREE HUNDRED AND FIVE THOUSAND POUNDS (£305,000). This rent shall be paid clear of all deductions, counterclaims set off whatsoever (except as may be required by statute) by equal quarterly payments in advance on or before the usual

quarter days in every year. The first payment of this rent for the period from 31 August 2007 to 24 December 2007 (both dates being inclusive) shall be made on the date of this Lease. The rent shall increase on every fifth anniversary of 31 August 2007 by two per cent per annum compounded over the previous five year period. The increased rent in each case shall become payable from and including the fifth anniversary of 31 August 2007.
2.3.2 Secondly, from and including the Service Charge Commencement Date, a service charge calculated and payable in the manner specified in Schedule 4 (provided that the Landlord shall not be entitled to exercise the remedy of distress in the case of a bona fide dispute of balancing service charge payments made pursuant to paragraph 6 of Schedule 4 of this Lease).
2.3.3 Thirdly, the sums specified in clause 3.29 (interest).
2.3.4 Fourthly, any VAT chargeable on the yearly rents and Service Charge."

226. Thus, the rent (to which VAT and any interest was to be added) was originally £305,000 per annum but had been increased at intervals, most recently in 2017, on a compounded percentage basis.

227. The main facts are clear from the documents and seem to be uncontroversial:

(1) SportsDirect had paid the rent with vat under the Blackpool Lease up to and including the December 2019 quarter. However, SportsDirect did not pay any of the rent with vat for the March 2020 quarter

(2) The County Court Proceedings were issued by Claim Form out of the County Court Business Centre, using the online issue procedure, under Claim No. G8QZ85H4 by AEW against SportsDirect. The Particulars of Claim section was completed as follows:
"The Defendant is the tenant of premises known as part of the Woolworth Building, Bank Hey Street, Blackpool, Lancashire pursuant to a lease dated 28 March 2008 made between (1) Development Securities (Blackpool Developments) Limited and (2) Sports World International Limited. The Claimant is the Landlord. Pursuant to Clause 3.1.1 of the Lease, the Defendant agreed to pay the rent of £305,000 plus VAT per annum (equating to £76,250 plus VAT per quarter). The Defendant has failed to make payments of rent in the sum of £92,948.75. The claimant claims interest under section 69 of the County Courts Act 1984 at the rate of 8% a year from 25/03/2020 to 16/06/2020 on £92,948.75 and also interest at the same rate up to the date of judgment or earlier payment at a daily rate of £20.31."

(3) The Claim Form was served but no Acknowledgement of Service or Defence was filed or served. AEW then made a Request for Judgment in Default dated 23 July 2020 for the amount previously claimed with further interest and thus for £94,655.35 which together with costs totalled £99,014.84. Judgment in Default was entered under CPR12 on 24 July 2020

(4) However, the solicitors or others preparing the Claim Form had failed to properly understand or calculate the amount due. The rent had previously been subject to compounded percentage increases and was no longer the original rent of an annual £305,000 and thus quarterly £76,250 ("the Original Rent") plus vat, making a total of £91,500 per quarter but was now a quarterly figure of £92,948.75 ("the Increased Rent") plus vat, making a total of £111,538.50, per quarter

(5) Thus, what had happened is that AEW, instead of simply quoting and seeking the Increased Rent figure plus vat, had (i) quoted the Original Rent quarterly figure as being the passing rent to which vat was to be added and (ii) claimed that SportsDirect had "failed to make payment of rent in the sum of" what was actually the Increased Rent figure but without adding vat. The result was that AEW had claimed £18,589.75 (being "the Balance") less than that to which it was entitled

(6) I also note that AEW had claimed interest at the Judgments Act rate and which was greater than the contractual rate provided for in the Blackpool Lease.

228. I further note that:

a. At first sight it can look as if the claim in the County Court Proceedings was actually for what was stated to be a quarter's rent plus vat, as £76,500 plus vat is close to £92,948.75. However, the true figure for £76,500 plus vat would be £91,800 (and, if vat, at a rate of 20%, was simply being applied to a full quarter's rent of that amount or any other round figure (i.e. a figure with a zero in the pounds column), the resultant total inclusive of vat could not be one ending in a number of pence)

b. AEW seems itself to have misunderstood the matter (at least as far as its present case is concerned) even when the High Court claim was brought and subsequently; and as:

i. The original High Court Particulars of Claim sought the Balance figure by way of stating it was a claim for "Rent inclusive of VAT in respect of the March quarter rent in the amount of £18,589.75", that is to say on the basis that it was simply an apportioned element of the overall "rent inclusive of vat" figure, part of which had been paid and part of which had not

ii. The Particulars of Claim were then Amended to say instead "Rent inclusive of VAT in respect of the March quarter rent in the amount of £18,589.75 (£15,491.46 plus VAT of £3,098.29)"; thus making even more clear that this was simply a claim that not all of the entire inclusive figure had been paid but only an element of it part of which had been apportioned to rent and part to vat on that rent, leaving outstanding an element of the rent and the vat which was chargeable upon that element

iii. The Particulars of Claim were then Re-Amended to say "VAT in respect of the March quarter rent in the amount of £18,589.75" i.e. a claim for the VAT element alone, which is how AEW now (at least) puts its claim for the Balance.

229. Sports Direct contends that this claim for the Balance cannot be made at all, and in any event not by separate High Court proceedings where the County Court Judgment still stands, as a result of the doctrines of merger (and cause of action and issue estoppel) or abuse of process.

230. Ms Holland relies upon Moorjani v Durban Estates 2019 EWHC 1229, which concerned a residential long lease landlord and tenant dispute where the judge held that the claimant tenant had sued the defendant to judgment in the County Court for a claim for damages in respect of breaches of covenant to repair, and had then brought a claim in the High Court for further damages for breaches of the same covenants but in relation to different heads of loss. The Judge held that the High Court claim was barred by cause of action estoppel and the doctrine of merger although he would also have struck it out as an abuse of process.

231. In Moorjani, the Judge identified the basic relevant principles in a citation from the Supreme Court as follows:

" 3. In *Virgin Atlantic Airways Ltd v. Zodiac Seats Ltd [2014] A.C. 160* , Lord Sumption analysed the defence of res judicata. He said, at [17]:

"Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle.

The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is 'cause of action estoppel'. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings.

Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v. Boot [1928] 2 K.B. 336* .

Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as 'of higher nature' and therefore as superseding the underlying cause of action: see *King v. Hoare (1844) 13 M & W 494* , 504 (Parke B) …

Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case (1776) 20 State Tr 355* . 'Issue estoppel' was the expression devised to describe this principle by Higgins J in *Hoysted v. Federal Commissioner of Taxation (1921) 29 CLR 537* , 561 and adopted by Diplock LJ in *Thoday v. Thoday [1964] P 181* , 197-198.
Fifth, there is the principle first formulated by Wigram V-C in *Henderson v. Henderson (1843) 3 Hare 100* , 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.
Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

232. The Judge's section on the law of merger was as follows:
"13. In *King v. Hoare (1844) 13 M & W 494* , Parke B said at page 504:
"If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, 'transit in rem judicatam,' – the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher."

14. As Lord Sumption observed, the principle of merger produces the same effect as cause of action estoppel but is a discrete rule of law in its own right."

233. The Judge having reviewed the authorities stated his "Conclusions" as to the law as follows:

"17. Accordingly, the proper approach to this case is as follows:
17.1 The starting point is to consider whether the second claim is brought upon the same cause of action as the first.

17.2 The focus is upon comparing the causes of action relied upon in each case and not the particulars of breach or loss and damage. New particulars are not particulars of a new cause of action if they seek to plead further particulars of breach of the same promise or tort or further particulars of loss and damage.

17.3 Both cause of action estoppel and merger operate to prevent a second action based on the same cause of action. Such bar is absolute and applies even if the claimant was not aware of the grounds for seeking further relief, unless the judgment in the first case can be set aside.

17.4 Even if the cause of action is different, the second action may nevertheless be struck out as an abuse under the rule in *Henderson v. Henderson* where the claim in the second action should have been raised in the earlier proceedings if it was to be raised at all. In considering such an application:
a) The onus is upon the applicant to establish abuse.
b) The mere fact that the claimant could with reasonable diligence have taken the new point in the first action does not necessarily mean that the second action is abusive.
c) The court is required to undertake a broad, merits-based assessment taking account of the public and private interests involved and all of the facts of the case.
d) The court's focus must be on whether, in all the circumstances, the claimant is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.
e) The court will rarely find abuse unless the second action involves "unjust harassment" of the defendant."

234. Ms Holland contends that this case involves cause of action estoppel and merger because the same cause (or causes) of action that is to say failure to pay the March quarter rent and its vat and to comply with the covenants to pay such rent was (or were) being sued upon the County Court proceedings and is (or are) now being sued upon in these proceedings. She submits that (i) it is impermissible by reason of cause of action estoppel to sue upon the same cause(s) of action twice and (ii) there was a single cause (or sets of causes) of action for rent and vat which have merged in a single judgment. She submits that there was claim for the sums due for the March quarter where rent and vat cannot be seen or claimed separately and were actually claimed together and that is the end of it (unless, perhaps, the County Court Judgment were itself set aside or varied, which might be difficult generally and particularly following the County Court Payment).

235. Mr Fetherstonhaugh contends that this does not apply in a case of what he says:

a. was a simple and obvious mistake as to what was the overall amount

b. there was also a simple and obvious mistake in that the Claim Form stated the original rent and failed to state that the rent had been increased to what was now the Increased Rent

c. the actual claim in the County Court Proceedings was simply for the pure Increased Rent and not for the vat upon it which is now (see below) claimed as a separate distinct amount and which arises under a different sub-clause (2.3.4) of the Blackpool Lease than that (clause 2.3.1) which applies to the pure rent itself

d. and, thus, that the causes of action should be seen as distinct as
    i. it was only part of the rent (and its vat) which was being sued for in the County Court Proceedings and the right to the

remainder (being the Balance) should be viewed as a sufficiently separate cause of action to avoid the doctrines of merger or cause of action estoppel; and/or

ii. the VAT element should be seen as a separate cause of action from the rent; and it was the rent (only) which was being claimed in the County Court Proceedings, and not the VAT the cause of action for which was not determined and has remained unmerged.

236. I am only considering an application by AEW for summary judgment for this sum, and there is no application before me from SportsDirect for reverse summary judgment. I do consider that SportsDirect has real prospects of success on this issue, and indeed (at least) the better of the argument, for the following reasons.

237. The essential question in relation to both cause of action estoppel and merger is as to whether there is only one cause of action involved or whether the cause of action in the County Court Claim can be seen as distinct from that now sought to be sued to judgment upon in the High Court,

238. I have sought to construe the County Court Claim Form on the basis of the standard principles of construction of documents outlined above, with the essence being what it would mean to a reasonable reader with knowledge of the surrounding factual matrix and bearing in mind the apparent commercial purpose.

239. In relation to this:

a. The words used would seem of themselves to indicate a claim for:

i. What was said to be the then outstanding financial sum of or in the nature of Rent. There is no suggestion that only a part of whatever due was being claimed, and no suggestion that only a part of whatever was due in relation to a particular quarter was being claimed

ii. Both "rent" (in its simplest pure form) and VAT on that "rent", and which clause 2.3 of the Blackpool Lease in its opening words provided were both payable as "rent". The Claim Form stated that the relevant agreement on the part of the Defendant was to pay a specific annual figure of "Rent (plus VAT…)" and the quarterly rent was identified on the basis that it was a specific quarterly sum plus VAT. Although it is possible as seeing the allegation that "The Defendant has failed to make payments of rent…" as only referring to the pure rent element and not also to VAT, that would seem the less natural reading as:

1. There would be no need for the references to VAT and which would be otiose
2. The sum claimed was not simply the specified pure rent figure of one quarter £76,500. Although it is possible in theory that the Defendant was being said

to have failed to pay the specified rent element (but not vat) of the latest quarter and some of the specified rent element (but not vat) from a previous quarter, the more obvious apparent derivation of the sum (especially bearing in mind the apparent correlation between the rent plus vat amounts, even though on close examination it must be a mismatch – see above) was that this was a quarter's rent inclusive of vat (possibly with a little more)

b. The ordinary commercial purpose of the Claim Form would be to recover whatever was apparently due and unpaid, not merely to recover part of it. Further, the ordinary commercial purpose of the Claim Form would be to recover both the specified rent and the vat chargeable upon it as:
    i. That is effectively what the Claim Form says (with its references to vat which otherwise lack relevance or point)
    ii. Where, as here, vat is actually chargeable on rent (which is common-ground and known to the parties), as a matter of law rent cannot be paid (and thus cannot be claimed) without vat. If any payment is made in relation to rent then as a matter of law it is vat inclusive; the landlord must provide a vat invoice, the landlord must provide a vat return and account for vat to HMRC, and the commercial tenant is entitled to reclaim the vat from HMRC. Thus, as a matter of law, the claim had to be vat inclusive

c. As to the factual matrix; it is correct that it includes the Blackpool Lease itself (and which is referred to in the Claim Form) which on construction of the above clauses provides for the Increased Rent and which could be simply calculated from it (this is not a situation of a true rent review which might or might not have resulted in revisions from the Original Rent). On the other hand:
    i. the clauses of the Blackpool Lease provide that the vat on the pure rent is also recoverable as rent, and
    ii. it would require some considerable thought and effort (as demonstrated by the various points I have noted above as to mathematical calculation and AEW's own difficulties in understanding and formulating what had and should have happened) to appreciate that AEW had simply claimed a sum equivalent to one quarter of the Increased Rent without vat.

240. Applying the iterative approach between the various competing constructions in terms of which would be the reasonable reader's understanding of the Claim Form, I consider that the answer is that SportsDirect has (at least) real prospects of succeeding on a construction that AEW were claiming as the sums then outstanding under the Blackpool Lease, and in particular but not limited to the sums outstanding for the March 2020 quarter, as both rent and vat were the total of £92,948.75, and that, in any event, the sum of £92,948.75 was made up of pure rent and vat

chargeable upon it rather than just pure rent. In coming to such conclusion, I think that the first is the most likely construction, but if not then the second, in particular for the reasons set out above and because that it seems to me best fits with both the words used and the commercial and legal context with the factual matrix being (at worst for SportsDirect) neutral.

241. I turn then to the question of whether the County Court Claim was for the same cause of action as the present High Court Claim. I find that SportsDirect has (at least) real prospects of success in contending that it was, and indeed I think has the better of the argument, and in particular as:
    a. My preferred construction of the County Court Claim Form is that it contended that it was for:
        i. All sums then outstanding under the Blackpool Lease (as pure rent and vat on rent); but even if that was wrong then
        ii. For rent and vat i.e. not just for specified rent
    b. The cause of action for a quarter's rent (and the vat upon it) or the entirety of whatever is the outstanding element of it (assuming there has been part-payment) seems to me to be indivisible and a single cause of action in principle. While there is an argument that there is a claim for each individual pound:
        i. The "promise" is to pay the quarter's amount, and the entire sum, and the liability to pay it, has accrued due on the quarter day; and in any event
        ii. The obligation to pay the sum is "vat inclusive" i.e. it is not possible in vat law just to pay down the pure rent without paying the vat element (e.g. if the rent was £10,000 with vat on it of £2,000; a payment of £6,000 could not be made just in relation to the rent so as to leave outstanding rent of £4,000 and vat of £2,000; the payment would have to be applied £5,000 to rent and £1,000 to vat leaving outstanding rent of £5,000 and vat of £1,000 – even if the first result could be achieved such would require very express wording and which is not present here)
        iii. This is not a case where there was any suggestion (let alone any fact) of an agreement only to pay part of the overall sums or part of the March quarter's amount. That could have created a cause of action in itself (or varied what would otherwise have been the cause of action) but was not, and there was no suggestion that it was, the case here.

242. Therefore in my view, SportsDirect has (at least) real prospects of success in contending (and indeed the better of the argument) that:
    a. The County Court Claim's cause of action was for (or included) the cause of action for the entirety of the March's quarter's rent (both the Increased Rent itself and the vat on it), and thus merged into the County Court Judgment; and as a result
    b. AEW cannot bring or succeed on a claim for the VAT chargeable on the March quarter's Increased Rent in its High Court claim and as it seeks to do.

243. I would add that even if part of the above is wrong, I would still have held that SportsDirect has (at least) real prospects of success in contending (and indeed the better of the argument) that the County Court Claim Form and the County Court Judgment included a VAT element in relation to the March quarter (and that that simply follows from VAT law if nothing else). On that basis the High Court Claim as now advanced i.e. for pure VAT, would not be justified at least as to the majority of it.

244. I have carefully considered the fact that it can be demonstrated on careful analysis from the documents themselves both that AEW had made a mistake and what it was. However:
    a. The doctrine of merger (at least) is strict
    b. It takes care not only to identify that there was a mistake but also as to what it was (indeed AEW have had considerable difficulty in doing this and expressing it in an intelligible and correct way)
    c. At first sight, any solution would seem to be more likely (if it exists at all) to lie in seeking to vary (or set aside) the County Court Judgment but that would be a matter for the County Court within the County Court Claim itself.

245. I add that Ms Holland advanced an alternative argument based on the Henderson v Henderson principles and abuse of process. Mr Fetherstonhaugh resisted that on various grounds including that it was not "harassment by litigation" simply to claim an extra sum which had been omitted by mistake. There seemed to me to be some potential force in those arguments, but they do not arise at present where I have decided that real prospects of success exist on the cause of action estoppel/merger grounds, and so I do not need to and do not seek to resolve them.

246. As there is no application for reverse summary judgment, it is sufficient for me in consequence simply to refuse summary judgment to AEW with regard to the Balance, and further directions will be required. However, I may be prepared to consider (if a party was to seek this) determining the issue finally at this stage of the litigation (but that would involve my having to consider any contention which was advanced as to there being any potential relevant issue of fact).

Conclusion

247. The essential consequence of my various decisions above is that I will grant summary judgment to BNY and AEW in relation to their claims for rent, VAT and contractual interest except in relation to the claim for the Balance (and interest upon it) and in relation to which issue I will consider any further applications/submission along the lines mentioned above.

248. However, I feel that I should end this judgment in somewhat similar terms to the end of the judgment in TKC v Allianz. The situation of COVID

and the COVID Regulations has (at least in modern times and as a matter of degree) been unprecedented and in particular with regard to its effect upon the Entertainment (and Hospitality) Sector but also the Non-Essential Retail Sector who have been deprived of the turnover which is the life-blood of their businesses (and especially where there is no on-line equivalent). It is impossible not to feel sympathy for them.

249. As stated by Mr Salter QC as the section 9 Judge in the TKC v Allianz case (at paragraph 133) "Some may also argue that the common law should therefore change its approach… and should adapt its principles of contractual interpretation and implication to the present unprecedented circumstances, so that they assist in transferring the burden of the present emergency to those, such as insurance companies and other major financial Institutions. who may perhaps better be able to bear it."

250. On the other hand, the Landlords, BNY and AEW, will say that they are trustees (actual or in effect) for others (for example, pensioners) who have invested in their funds, and who may themselves be reliant upon their returns from such funds (and thus the underlying properties) for their own financial condition and well-being.

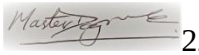
251. Mr Salter QC proceeded in his paragraph 134 to quote authors of a note as having "wisely observed":

"In times of uncertainty the law must provide a solid practical and predictable foundation for the resolution of disputes and the confidence necessary for an eventual recovery… Contractual rights are to be evaluated by applying settled principles to the contract in question. Legal certainty remains paramount and gives the surest basis for resolution."

252. That has been the basis of my analysis and this judgment. Anything else is a matter, in my view, for Parliament and not for the Courts.

Handing-Down and Consequential Matters

253. As stated in the draft judgment, I am handing down this judgment without attendance from the parties but with an adjournment of the hearing and of (with general extensions of time until further order) all questions of permission to appeal and time to appeal, form of orders and costs to a further date; with the parties to liaise and having until 4.30pm on 7 May 2021 to submit their proposed orders and any applications (including for permission to appeal and time to appeal) and a statement of whether they seek an oral hearing (and if so with dates to avoid until 9th July 2021).

 22.4.2021