

Judgment has recently been handed down in the unreported case of *Poundland Ltd v Toplain Limited*, which concerned a lease renewal (pursuant to the Landlord and Tenant Act 1954) of premises in Twickenham demised to Poundland Ltd.

The parties had already agreed the rent, interim rent and term but were in dispute over the tenant's proposed variations to the current lease, in particular, in light of the COVID-19 pandemic.

The tenant sought variations including the rent and service charge to be reduced by half during any further lockdown, a request to pay rent in arrears and changes to the indemnity provision. The tenant also sought that in any further lockdown, forfeiture would be prohibited and the tenant's insurance obligations suspended. The tenant relied on the case of *WH Smith Retail Holdings Ltd v Commerz Real Investmentgesellschaft MBH* (unreported) arguing that "pandemic clauses" were now commonly agreed in the market.

The landlord disputed the variations and, in particular, argued that there was no market precedent for the rent reduction and that the variation would fundamentally change the parties' position.

District Judge Jenkins predominantly agreed with the landlord and held that:

- A variation to the rent would not be fair and reasonable. The court said, "it is not the purpose of the Act to protect or insulate the claimant other than to allow them to continue their business following the term end." The court referred to the tenant's ability to rely upon government relief schemes, whereas the landlord would have little control. Further, the court distinguished the *WH Smith* case, as in that case, the parties had already agreed to include a "pandemic clause" (the court only had to determine the mechanics of it).
- The forfeiture clause was rejected, as it would significantly alter the existing commercial balance by transferring the tenant's risk onto the landlord.
- It was not sensible to suspend the insurance obligations as suggested, as the conditions of any future lockdown would be unknown.

## Comments

Whilst this is a County Court judgment and, therefore, not binding, it does provide helpful insight into how the court will deal with these types of clauses and tenants' fears about rental obligations in any future lockdown. It may also have an impact on negotiations in that landlords may feel emboldened to refuse clauses of this type.

If a party is seeking to vary the terms in an existing lease, the burden of proof will be on that party to show that it is a fair and reasonable variation, having regard to the terms of the current lease and all circumstances. District Judge Jenkins did acknowledge that in his view, the relevant circumstances would include a consideration of the effects of the COVID-19 pandemic and lockdowns.

There is currently a moratorium in place preventing landlords from taking insolvency action (until 30 September 2021) and forfeiture action (until 25 March 2022) against tenants in the event that rent is not paid as a result of the COVID-19 pandemic. Landlords are instead often relying upon debt proceedings to enforce unpaid rent until the arbitration process for unpaid rent arrears is put in place. It is not surprising that the courts are not willing to impose "pandemic clauses" on lease renewals in light of these government-imposed restrictions.

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