

## ENGLAND AND WALES

# Good and bad news for retail landlords and tenants

Hammerson, one of the UK's largest shopping centre owners, has stated it expects to cut rents for retail tenants by 30% as they are too high, there have been two Court Judgments which reflects the current state of the retail market.

They both relate to Units within the Westfield Centre at Shepherds Bush, the largest retail and leisure destination in Europe.

The first case is a business tenancy renewal case called **WH Smith Retail Holdings Ltd-v-Commerz Real Investmentgesellschaft mBH (25 March 2021)**. The Judgment highlights the dramatic fall in retail rents in shopping centres, as well as the necessity to now include a rent concession pandemic clause in new leases so that landlords and tenants share the pain of any future lockdowns.



The second case is a rent recovery and loss of rent insurance case called **Commerz Real Investmentgesellschaft mBH-v-TFS Stores Ltd (16 April 2021)**.

The Court held that the Landlord did not have to give credit for the insurance cover it enjoyed re loss of rent's and that the Government Code of Practice did not inhibit the Landlord's ability to recover the rent's outstanding by way of proceedings.

## WH SMITH RETAIL HOLDINGS LTD V COMMERZ REAL INVESTMENT-GESELLSCHAFT MBH (25 MARCH 2021)

- This case relates to WH Smith's Unit comprising of 16,000 sq ft at the Westfield Centre, Shepherds Bush. It includes a Post Office which has continued trading throughout the pandemic but sales were down by 90%.

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- The original Lease was granted in 2008 for 10 years but it ended on 30 September 2018 and it took over 2 years for the renewal to be finally determined after a 4 day trial last November. This delay has proven to be very costly to the Landlord given the advent of the pandemic and its prejudicial effect on rental values.
  - The parties agreed on a renewal lease of just 5 years and the Judge noted how the retail market was frozen and at present, no retail tenant wants to enter into a long term commitment. He acknowledged that the market was fragile even before the pandemic and shops now are clearly facing a battle against online sales. However, he saw some hope for a recovery once the pandemic has passed.
  - The Landlord's expert surveyor was Joel Bancroft of Smith Young and Catriona Campbell of Gerald Eve acted for the tenant. They were a very long way apart with the Landlord arguing for a headline rate of £255 psf and the Tenant arguing for £142.11 psf.
  - The experts agreed that the pandemic had reduced rents by 20% and the Judge also held that a 24% discount should be applied for location and a 10% discount for size. So a 54% discount overall. Rental values in the main part of the Centre had been affected by other tenants not renewing when their leases ended in 2018 and by CVAs, and a shift of some tenants to the extension to be nearer the John Lewis flagship store.
  - The passing rent of the Unit was £953,000 per annum based on the 2013 rent review.
  - The parties agreed that a pandemic rent reduction clause should be included in the renewal lease otherwise, the Landlord faced a further 10% rent reduction to reflect the onerous liability of paying full rent during a lockdown. The parties also agreed that it should be based on the tenant paying 50% of the rent and the whole of the service charge. They disagreed as to what should trigger the suspension but then the Landlord wanted it to only apply on a complete shutdown of trading. Moreover, the Tenant succeeded in arguing for a trigger based on the shutdown of just non-essential retail.
- The tenant has to give credit for any Government grants received to help tenants pay rents during such a shutdown.
- After a thorough analysis of all the relevant comparable evidence available in the Centre, the new rent was fixed at £404,666 per annum- a reduction of some £550,000 per annum. This was based on a headline rate of £255 Zone A with the Judge placing particular reliance on an April 2020 letting to Halifax Building Society at this rate.
  - Due to the market rental changes, the interim rent payable from 1 October 2018 was not determined to be the new rent but it was fixed at £758,785 per annum showing how much the market has slipped since just 2 years ago.
  - The Landlord sought to introduce some changes to the service charge in order to allow for EPC and other energy related costs but the Court held that what was proposed was too vague and the Landlord could not justify a change to the terms of the original lease to now impose such costs on the tenants.



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### COMMERZ REAL INVESTMENT- GESELLSCHAFT MBH V TFS STORES LTD (16 APRIL 2021)

- This case relates to the failure by the tenant, The Fragrance Shop, to pay any rent of service charges since April 2020. The arrears amounted to £166,884.82.
- The tenant argued that the pursuing of Court Proceedings against the Landlord was an unlawful circumvention of the Government's restrictions on enforcing payment against struggling tenants, and that either the Landlord had to give credit for the loss of rent insurance cover it had placed which covered notifiable diseases or it was to be implied that liability to pay sums due was to be suspended if the premises could not be occupied.
- The Court gave the tenant's arguments short shrift. In essence, the Court held that:
  - The Government Code of Practice is voluntary and only prevents forfeiture and CRAR, not Court Proceedings.
  - The Landlord had complied with the Code anyway.
  - The Lease did not require the landlord to insure for loss of rent cover for notifiable diseases and this was included only to protect the Landlord's business and not the tenant's. Moreover, the insurance only applied if the tenant was unable to pay, not unwilling.
  - The Lease, as is standard, only suspended rental liability if there was physical damage preventing occupation.
  - There should be judgment in favour of the Landlord for the arrears.



### JONATHAN ROSS

Partner

Property Litigation

T: +44 (0)20 7863 8388

M: +44 (0)7881 826 158

E: [jonathan.ross@forsters.co.uk](mailto:jonathan.ross@forsters.co.uk)