

# PMA Conference 2021



# Womble Bond Dickinson Retail Property Lawyers for you

---



# Introduction

---

We are pleased to provide some details of our retail client base and expertise. Our firm's reputation in the retail sector is built on a solid foundation of expert knowledge and experience, with a dedicated group of lawyers and support staff providing relevant, knowledgeable advice and positive outcomes for our clients.

We are able to offer you excellence in real estate work, with a core, partner-led team supported by colleagues specialising in Construction, Planning, Tax and Property Litigation.

This allows us to provide a comprehensive joined-up service under one roof to save time and expense in liaising with multiple external advisors.

Whether you are taking new stores, developing a warehouse facility or managing your operational estate, our team comes armed with the necessary skills and experience to complement your internal teams and to play a crucial part in the achievement of your objectives.

We understand that cost certainty is vital to retailers. Our pricing is competitive and transparent, with no surprises. With offices in Scotland we are also able to offer a cross-border service through a dual-qualified team.

We would be delighted to come and discuss your detailed requirements with you with a view to providing a proposal for property legal work.



**Alistair Walton**

Partner, Retail Property

T: +44 (0) 2380 208 482

E: alistair.walton@wbd-uk.com



**Mark Barley**

Partner, Property Disputes

T: +44 (0) 2380 208 153

E: mark.barley@wbd-uk.com



**Nikki Powell**

Partner, Retail Property

T: +44 (0) 2380 208 423

E: nikki.powell@wbd-uk.com

# Market leading credentials

---

## A dedicated retail focus

We act for more UK retailers than any other UK firm; our clients represent over 9,000 stores, £42 billion in turnover and 100 million square feet of retail space. Through our extensive retail experience we understand the complexity of property deals, from the planning stage right through to either store opening or commencement of logistics operations.

Fully committed to the retail sector — we are active within industry groups such as the British Retail Consortium, Revo and the PMA (Property Managers Association) and we are Senate members of the IMRG (the trade body for e-commerce) —our lawyers understand the issues affecting retailers and use our knowledge to inform our advice and keep clients updated on upcoming issues.

While many firms claim to specialise in the sector; the 2020 Chambers and Partners Guide to the UK Legal Profession ranks us among the best in the UK for retail work recognised for our significant depth of expertise in advising an array of household names on a huge range of retail matters.

The retail sector group at Womble Bond Dickinson exists to bring together expertise across [he firm, ensuring that all our advice is grounded in the commercial reality of the retail environment.

## Examples of our retail experience

- **New Look** in connection with its operational portfolio and its disposals and acquisitions programmes
- **Footlocker** as sole advisor on all property matters in England, Wales and Scotland
- **Decathlon** as advisor on acquisitions and property management
- **Dreams** in managing its property portfolio
- **Specsavers** with regards to its estates portfolio
- **Ann Summers** with all of its property requirements
- **Three Mobile** on its acquisitions and estates management programmes
- **Superdrug, Savers** and **The Perfume Store** as sole advisor on all property matters in England and Wales
- **Kingfisher** with its property requirements for **B&Q** regarding its acquisitions and portfolio management
- **Majestic Wine** on all of its property requirements
- **Carpetright** in connection with the management of its property portfolio

# Retail property services

---

## Acquisitions and disposals

- Competitive fixed pricing structure
- Involvement at Heads of Terms stage
- Agreeing standard set of amendments or ideal/acceptable negotiating positions
- Proactive use of lease meetings and driving transactions forwards
- Clear regular reporting
- First class development and Landlord & Tenant expertise
- Short form template assignments and sub-leases incorporating operational requirements
- Pre-disposal checklists to speed up obtaining consents for disposals
- Pre-contract enquiry checklists

## Management

- Template lease renewal precedents
- Client specific management documentation containing usual operational requirements (eg licences to alter)
- Streamlined debt recovery department
- Easy access to title deeds and rapid response to management queries
- Clear regular reporting
- Extranet facility and deeds storage
- A dedicated client-focused core team with dedicated client co-ordinator and strong, relevant experience
- Experienced team within reach and responsive at all times
- Tax, Environmental, Construction, Planning and Property Litigation experts integral to team
- Real retail experience

# Retail property services

---





# Womble Bond Dickinson at a glance

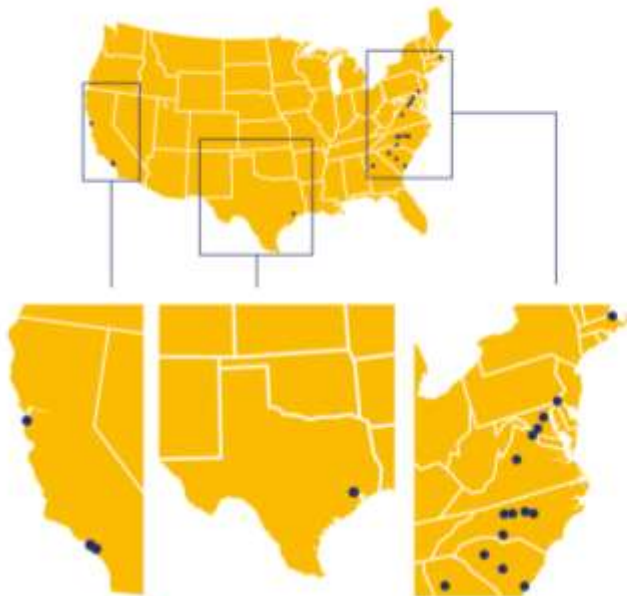
---



**26** Locations  
across the  
UK and US



More than  
**400** Partners  
**1,000** Lawyers



## US

Atlanta  
Baltimore  
Boston  
Charleston  
Charlotte  
Charlottesville  
Columbia  
Greensboro  
Greenville  
Houston  
Irvine  
Los Angeles  
Raleigh  
Research Triangle Park  
Silicon Valley  
Tysons  
Washington, D.C.  
Wilmington  
Winston-Salem



## UK

Bristol  
Edinburgh  
Leeds  
London  
Newcastle  
Plymouth  
Southampton  
  
We also have a  
presence in Teesside  
at the Wilton Centre

womblebonddickinson.com



# PMA Conference

11 November 2021






# Implied Rent Suspension on COVID-19 Grounds?

Nikki Powell



# Commerz Real Investmentgesellschaft mbH v TFS Stores Limited

The Fragrance Shop  
*Spray a little happiness*

- The Fragrance Shop (*TFS*) had ceased to pay rent and service charge for its Westfield store from April 2020 on the basis that the pandemic had extinguished its trade. The Landlord had procured pandemic rent cesser insurance but only covered damage to the property.
- TFS brought 3 arguments to the High Court:
  1. Landlord failed to engage with the Government Code of Practice for Commercial Property Relationships
  2. Landlord was exploiting a loophole to allow rent enforcement during the pandemic
  3. Landlord was obliged to claim on its building insurance and/or the insurance rent cesser provisions in the lease should apply.

# *Commerz Real Investmentgesellschaft mbH v TFS Stores Limited*

---

- Points 1 & 2 quickly dispensed with – code of practice is voluntary and there is no legal prohibition on taking proceedings in the courts.
- Point 3 (insurance rent cesser argument) rejected as below:
  1. Landlord insures against own losses not those of the Tenant
  2. There was no property damage to trigger rent cesser provisions in the Lease
  3. Any statutory basis not to comply with a ‘keep open’ did not go as far to imply a rent suspension



# *Bank of New York Mellon (International) Ltd v Cine-UK Ltd and others*



- Cine UK, Mecca Bingo, Sports Direct & Deltic were subject to a joint unpaid rent claim during the pandemic. Rent was unpaid since March 2020.
- The Landlord had put in place pandemic insurance (beyond the requirements of the leases) which covered business interruption.
- The Tenants brought the same arguments as the TFS case but also creatively:
  - a) That the lockdown had caused a frustration of the leases i.e that they had terminated without further rent liability as the lease could not be performed; and/or
  - b) That the lockdown was a supervening event which caused a temporary suspension of liability to pay rent



# *Bank of New York Mellon (International) Ltd v Cine-UK Ltd and others*

---

- The court found that:
  - (a) while the lockdown regulations were deemed unprecedented & a supervening event under the lease, the store closures were temporary and insufficient to terminate the lease
  - (b) While it may have been illegal to trade from the property, it was not illegal for the tenants to continue to pay their rents





# *London Trocadero (2015) LLP v Picture House Cinemas Ltd*

*Picture  
house*

- Landlord pursuing a £2.9m rent arrears claim during pandemic as cinema either closed or operating on a reduced capacity.
- Picture House brought several defences including:



1. The lease should be deemed to include an implied term that if the permitted use was to become illegal then the obligation to pay rent would be suspended - rent should only be paid for periods the property could be used for its intended purpose
2. A “total failure of consideration” i.e. that the tenant had bargained for use of the property as a cinema – lease was granted on this basis and when that basis failed the landlord would be “unjustly enriched” by being paid for something the tenant was not receiving.



# *London Trocadero (2015) LLP v Picture House Cinemas Ltd*

---

- The High Court examined both legal arguments in detail but was firm in rejecting both lines of defence:
1. There could be no such implied term – they were not necessary for the business efficacy of the lease. The grant of the lease still made legal sense even where the tenant could not use the property, it was simply that the tenant shouldered the risk of the lease (which remained in existence) being of little practical benefit over the pandemic period
  2. The Tenant still has what it essentially bargained for when it completed the lease. The landlord never warranted that the property could always be used as a cinema, and therefore no basis for the argument that the landlord was unjustly enriched by receiving rent while the tenant was not able to use the property.



# Application



- 
- While the threat of forfeiture, winding up orders and statutory demands has been reduced during the pandemic the courts powers remain.
  - Rent concessions must still be expressly agreed and carefully drafted. Standard lease clauses by themselves aren't enough protection in the courts.

# Pandemic Clauses

## Alistair Walton

11 November 2021



# *WH Smith Retail Holdings Ltd v Commerz Real Investmentgesellschaft mbH*

---





# Background

---

- Unopposed lease renewal of a retail unit within Westfield Shopping Centre.
- The lease terms had to a large extent been agreed by the parties before the trial, including the principle that some form of a pandemic clause would be included in the new lease.
- WH Smith had remained open and able to trade throughout the pandemic due to unit containing a Post Office but had suffered 90% drop in trade.
- The main terms of interest left for the Court to decide were:
  - The trigger for the pandemic clause;
  - Rent; and
  - Interim Rent.

# What arguments were raised in relation to the trigger for the pandemic clause?

---

- WH Smith argued that the trigger should be the closure of non-essential retailers. WH Smith had an agreement with the Post Office to remain open.
- The Landlord argued WH Smith had a competitive advantage by remaining open and that either:
  - the trigger should be 4 weeks after non-essential retailers were closed; or
  - the level of rent suspended under the pandemic clause should be reduced.

# What was the decision?

---

- Pandemic Clause – The Court agreed that the pandemic clause should be triggered where “non-essential” retailers were forced to close. The Court held there was no competitive advantage by remaining open due to the location of the store.
- New Rent – The new rent was discounted by 50% to take account of the effect COVID and the market conditions leaving a final rent of £404,666 per annum. Importantly, the Court concluded there should be no rent uplift in return for the inclusion of a pandemic clause.
- Interim Rent - The effective date for interim rent had been agreed as 1 October 2018 and it was accepted the retail market was in a much better state at that time. The Court concluded interim rent should be set at £758,785 per annum.

# What are the implications on the market of the decision in *WH Smith Retail Ltd v Commerz*?

---

- The case is the first example of how the Court will treat attempts by tenants to include some form of pandemic-protection clause in a lease renewal, and what, if any, effect on rent the inclusion of such a clause would have (none, in fact).
- Court seemed to widely accept that reductions for COVID and requests for pandemic clauses were now common place and are being factored into the market when assessing rent levels.
- However, this judgment only dealt with the trigger for pandemic clause and not if one should be included where one was not agreed

# Pandemic clauses

---

## *Poundland Ltd v Toplain Ltd - April 2021*

- Parties had agreed lease terms for a 5 year lease
- In dispute was whether there would be a covid/pandemic clause
- Section 35 1954 Act

"the terms of a tenancy by order of the Court...shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the Court and in determining those terms the Court shall have regard to the terms of the current tenancy and to all relevant circumstances"





# The courts view and the future

---

Relevance of WH Smith case?

The purpose of the 1954 Act was not to rewrite previously negotiated risks - even though a national lockdown may not have been in the parties minds

O'May Principles – Is the clause fair and reasonable?

Judge stated “right to give consideration to such issue..”

County Court decision



# Legal Hot Topics

## Rent arbitration scheme, turnover rents and lease renewals

November 2021



# Government Arbitration Scheme

---

- June 2020: Government's voluntary code of practice encouraged landlords and tenants to work together
- 4 August 2021: policy statement
- *"The Government will legislate to ringfence rent debt accrued during the pandemic by businesses affected by enforced closures and set out a process of binding arbitration to be undertaken between landlords and tenants"*
- Upcoming legislation now published in advance to allow further negotiations before scheme comes into force
- New code now also published to replace June 2020 Code of Practice

# Commercial Rent (Coronavirus) Bill – Arbitration Scheme

---

- Arbitration Scheme to be available from when the Bill becomes law (probably 25 March 2022)
- Six months to refer relevant rent disputes to arbitration
- Arbitrator may give “relief from payment” ie:
  - Writing off all or part of the debt
  - Giving time to pay by instalments (max 24 months)
  - Waiving interest

# Commercial Rent (Coronavirus) Bill – Arbitration Scheme (continued)

---

- Arbitrator's decision will be based on:
  - Proposals that the parties may submit
  - Preserving or restoring viability of tenant
  - Preserving the landlord's solvency
  - Basic principle that debt should be paid in full subject to tenant's viability



# Eligibility for rent debts to be referred to arbitration

---

- Business tenancies to which 1954 Act applies
- “Protected rent” ie:
  - Tenancy “adversely affected by coronavirus”
  - Attributable to a “protected period”
- “Adversely affected by coronavirus” if business or premises have been subject to closure by covid regulations
- “Protected period” runs from 21 March 2020 to 18 July 2021/7 August 2021, or earlier if restrictions lifted earlier
- Would appear to apply to any rent falling due during the pandemic not just over specific lockdown periods

# Moratoriums

---

- Existing moratoriums on CRAR, forfeiture and winding up will continue to apply until 25 March 2022
- These moratoriums will be continued once the Bill becomes law for the period of the Arbitration Scheme ie six months (or as extended during an arbitration)
- Additional moratorium on making rent claims through the Courts (effective from when the Bill becomes law)

# Moratoriums (continued)

---

- Interim period between 10 November 2021 and the date Bill becomes law:
  - Any rent debt claim started in this period can be stayed to enable a reference to arbitration
  - If judgment has been obtained in this period then:
    - payment on that judgment may be referred to arbitration
    - judgment may not be enforced until end of arbitration moratorium
    - If relief from payment is given judgment must be altered accordingly

# Summary

---

- Tenants will wish to avoid making payment until after new Act comes into force
- No current stay on court proceedings however
- Act will have retrospective effect on judgments obtained from now on, or not paid
- Act will effectively potentially re-write the bargain between landlord and tenant based on viability of tenant's business

# Code of practice for commercial property relationships following Covid-19 pandemic - 9 November 2021

---

- This code replaces the previous 19 June 2020 code
- Applies to all commercial leases with rent arrears due to an inability to pay as a result of the pandemic
- A framework for negotiations in anticipation of the Commercial Rent (Coronavirus) Bill becoming law in March 2022

# Purpose of code

---

- To ensure Covid rent debt should not force an otherwise viable business to cease operating
- Achieving a proportionate balance between the interests of landlords and tenants
- Ensuring contractual commitments should be recognised as far as possible
- Assistance for landlords in resolving disputes as to rent prior to introduction of the Bill
- Government still expects tenants who are able to pay their rent debt in full to do so
- Not seeking to unwind existing rent debt deals which should continue to be honoured and will not be overridden

# Encouragement of negotiation

---

- All landlords and tenants are encouraged to attempt negotiation (even if rents fall outside those ringfenced by the Bill)
- Tenants in severe hardship because of Covid should approach landlords to negotiate the rent and seek support
- Landlords should consider reasonable cases put forward by tenants in distress and consider what can be done to enable the tenant to survive
- Tenants will need to show landlords sufficient evidence to substantiate their need for assistance with rent
- Types of evidence set out in annex B
- Possibility of mediation before arbitration





# Behaviours to be exhibited by landlord and tenant

---

- Transparency and collaboration: landlord and tenant as economic partners not opponents; negotiate transparently and in good faith
- A unified approach: mutual support for each other, and other stakeholders
- Acting reasonably and responsibly: need to identify mutual solutions in the face of Covid
- Swift resolution: avoiding costly or burdensome procedures to resolve disagreement
- Government effectively appealing to wider social responsibility which, in effect, cannot be legislated for

# Principles underpinning negotiations (and future arbitration)

---

- The aim is to preserve viable businesses
- However not at the expense of the landlord's solvency
- If affordable, tenant should meet obligations in full without delay
- Any relief should be no greater than necessary to allow tenant to afford the payment
- Viability – no set definition of viability as each business is different
- Setting aside ringfenced debt, has the tenant the means and ability to meet its obligations and to continue trading?

# Criteria for viability and affordability

---

- Preservation of the tenant's business and the jobs it supports without undermining solvency of the landlord
- Tenant's business must be viable to be eligible for rent concessions
- Tenant entitled to rent concessions if it can prove it cannot afford to pay but business otherwise viable
- If tenant cannot afford to pay in full, concessions must be affordable to both tenant and landlord
- Evidence includes existing and anticipated credit/debit balance, business performance since March 2022, assets, dividends to shareholders etc
- Where tenant part of bigger group then evidence of affordability may include that wider context



# Effect of Proposed Arbitration Scheme

---

- Imminence of scheme as a defence to rent claims ?
- London Trocadero v Picturehouse Cinemas (preliminary judgment)
- *“The legislation will help tenants and landlords work together to come to an agreement on how to handle “the money owed”. It is plain from this that the assumption is that the starting point will be that there is an amount of rent which is due from the tenant to the landlord”*
- Accordingly, the scheme will not affect the question as to whether rent is owed, so no defence to rent claims
- A possible factor, however, in delaying a claim, or in the enforcement of a rent judgment eg by way of stay?
- London Trocadero – permission to appeal and stay of judgment

# Turnover rents on lease renewals under 1954 Act

---

- Topic we spoke on at last year's PMA conference (see notes)
- Conclusion:
  - Turnover rent might be imposed upon a renewal but no clear authority
  - Seems to be particularly relevant in situations where turnover rent is the market norm e.g. a car park or a cattle market

# Issues with court's jurisdiction to impose turnover rent upon renewal

---

- Section 35: Open market rent subject to disregards
- Disregards
  - Any effect on rent from the fact the tenant has (or his predecessors in title have) been in occupation
  - Any goodwill attached to the holding by reason of the carrying on thereat of the tenant's business (or that of a predecessor)
- Court must exclude effect on rent of occupation and goodwill which are essential to a turnover calculation
- Arguably, however, this only applies to occupation and goodwill in the past not the future

# Desirability of turnover rents

---

- Pandemic has highlighted a potential connection between what rent should be payable under a lease and the tenant's turnover/ability to trade
- Tenants have argued that no trade should mean no rent liability i.e. a crude form of turnover rent
- Increasing prevalence of tenants on renewal seeking turnover rents to safeguard against future mandated cessation of trading
- But is the tide turning?



# W (No.3) GP (Nominee A) Limited v JD Sports Fashion Plc (Nottingham County Court 22 October 2021)

---

- No written judgment yet available as judgment was given orally (over five hours!)
- Landlord was seeking interim rent and tenant looking for fixed rent
- Presumably because tenant was trading so well and did not wish there to be a link between rent and turnover
- Turnover rent was provided for in old lease

# W (No.3) GP (Nominee A) Limited v JD Sports Fashion Plc (Nottingham County Court 22 October 2021)

---

- Court was not prepared to order an interim rent in renewal lease
- Presumably the rule in *O'May* (renewal terms same as old terms) was not applied
- Turnover rent would have regard to factors to be disregarded under the act (presumably the tenant's occupation and goodwill)
- Turnover rent only applicable in exceptional circumstances where it was common in the relevant industry
- Interim rent also would not be assessed by reference to turnover

# Conclusion

---

- Judgment needs to be studied in full when transcript available
- Only a County Court decision so not binding
- Interesting that landlords are now seeing the benefits of a turnover rent where tenant's post-pandemic trade is booming
- Expanding the turnover rent model
- The “phygital” experience
- Value of premises measured not simply in terms of monetary turnover but also footfall and dwell time
- Could those factors form the basis for modern turnover rent calculations?
- How would the 1954 Act fit in with that?

# Womble Bond Dickinson at a glance

---

## Our sectors



Representing  
more than

**250**

Publicly Traded  
Companies  
in the US and UK



**+170**  
Chambers  
rankings



UK Top  
**20** Law  
firm



US Top  
**80** Law  
firm



Ranked  
**102<sup>nd</sup>**  
global law firm  
by revenue

August 2021