

The 'game continues' in the Lillywhites rent dispute

There is currently a case going through the High Court involving the Lillywhites building (I'm pretty sure I bought a tennis racket there many years ago!) in Piccadilly, London, writes *Stephen Illingworth, Consultant, [Greenwoods GRM](#)*.

The landlord, Criterion Buildings Ltd, says that Lilywhites, a subsidiary of Sports Direct which is in itself a subsidiary of Frasers Group PLC, has not paid the rent, which is £2.76 million per annum.

Frasers Group wrote a pro forma letter to the landlord on 6 July 2020 saying "we should not be making any rental payment in respect to the property that we occupy until we are fully able to freely trade as a business at this location and the level of trade reaches a level which the parties would've envisaged when they drew up the lease."

The landlord issued proceedings to claim the unpaid rents in October 2020.

Lillywhites issued a defence saying that because the premises were closed "pursuant to government and government instruction the premises could not be used fully for the permitted use under the lease, namely as a retail shop and department store."

The defence actually says that "whether by reason of a failure of consideration relating to the period from 23rd March 2020 or whether by reason of an implied term that the sums due under the lease would only be payable in respect of periods during which the premises could be used in full for its intended purpose, no sums are payable under the lease...". There is also a side issue about whether the landlord's insurance should cover this issue.

The landlord's formal reply to the defence says that the tenant "has enjoyed and continues to enjoy exclusive occupation and/or possession of the premises and/or the right to the same at all material times. In the circumstances, whether or not the premises could be used fully for the permitted use under the lease is immaterial to the obligation to pay rent."

The landlord issued a claim for summary judgement, an ability to call for a quick decision by the court because its case is cast-iron. That led to a little bit of a concession from the tenant as it paid the rent up to 23 March 2020 and from 24 June to 4 November 2020 and from the 2nd until the 19th of December 2020, because during those times the tenant was allowed to trade from the premises.

The case is not finished yet and it will be interesting to see how the case is finally determined.

Leases do not usually provide for unprecedented and unforeseen circumstances like a Covid pandemic and the public lockdowns and restrictions following from it.

It is true that there are rent suspension clauses but those operate if the property is destroyed or damaged by an insured risk, which are usually physical risks, such as fire etc.

Of course, tenants negotiating leases now sometime request for "pandemics" to be a reason for rent suspensions but understandably this is resisted by most landlords.

During lease negotiations, I've often had arguments about what is to happen if the property is destroyed by an uninsured risk, but landlords tend to resist agreeing rent suspensions for uninsured risks, simply because they cannot get insurance. Pandemics have not been covered in property insurance (as opposed to business interruption policies), and certainly won't be covered now.

Tenants could try to use the doctrine of frustration but that only applies where the relevant subject matter cannot be used both now and in the future. Here is the expectation that this pandemic will be over eventually.

I expect it will be “game set and match” to the landlord but keep an eye out for future developments in this case.