Neutral Citation Number: [2023] EWHC 1925 (Ch)

Appeal Ref: CH-2022-000225
Case No: BL-2021-001295

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEAL (ChD)
ON APPEAL FROM DEPUTY MASTER McQUAIL

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 26 July 2023

Before :

MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE

- -

Between :

MARTIN'S COMMERCIAL LIMITED

Appellant

- and –

CINEWORLD CINEMAS HOLDINGS LIMITED

Respondent

- -
- -

Mr Daniel Dovar (instructed by **Wallace LLP**) for the **Claimant**
Mr Michael Pryor (instructed by **Maples Teesdale LLP**) for the **Defendant**

Hearing date: 20 July 2023
Circulation of draft judgment: 20 July 2023

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.
This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30 am on 26 July 2023

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MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE

Mr David Halpern KC :

1. The issues on this appeal are whether the Commercial Rent (Coronavirus) Act 2022 (the "**Act**") applies to proceedings commenced before 10 November 2021, and, if so, whether the current proceedings should be stayed for arbitration under the court's inherent jurisdiction, notwithstanding that this cannot be done under s.23 and Sched 2. As far as both parties are aware, this is the first case under the Act.

The facts

2. As the issue is one of pure law, the relevant facts can be summarised very briefly. The Claimant is the freehold owner of 142 Fulham Road, London SW10 9QR, which is let to Cineworld Cinemas Limited ("**Tenant**") for use as a cinema. Under the lease rent is payable quarterly in advance. The Defendant is the guarantor of the Tenant's obligations under the lease.

3. As a consequence of the COVID-19 pandemic ("**Pandemic**") and the legislation and regulations made in response to it, the cinema was unable to operate at all for three periods of time between 21 March 2020 and 16 May 2021, and was able to operate only on a restricted basis during the rest of that time.

4. On 13 August 2021 the Claimant issued proceedings against the Defendant for arrears of rent exceeding £1.09m and interest, for which the Defendant was said to be liable as guarantor.

5. The Defence denied liability on two grounds: (i) failure of consideration and (ii) an implied term that rent would be suspended if the permitted use were to become illegal.

6. On 28 October 2021 the Claimant applied for summary judgment. The application was stayed by consent, pending the hearing of the appeal in *Bank of New York Mellon (International) Limited v Cine-UK Ltd* [2022] EWCA Civ 1021, where the same two defences were relied on. On 27 July 2022 the Court of Appeal held that both defences failed. The Defendant accepts that, as a result of that decision, it would have had no defence to the claim, but for its defence under the Act, which was passed on 24 March 2022.

7. On 22 September 2022 the Tenant made a reference to arbitration pursuant to s.9 of the Act, seeking relief from payment.

8. Following the lifting of the agreed stay, the Claimant's application for summary judgment came before Deputy Master McQuail (as she then was), together with a cross-application by the Defendant for a stay pending the outcome of the referral to arbitration. The arbitrator has stayed the arbitration pending the outcome of these applications.

9. At the hearing before the Master the Claimant contended (i) that the Act did not apply, because the current proceedings had been issued before 10 November 2021 and (ii) that the arbitrator had no jurisdiction, because the court was already seised of the matter.

The Master's judgment

10. The Master concluded that the Act altered the substantive rights and duties of the parties with retrospective effect and that there was no carve-out in sections 9 or 14 for

proceedings commenced before 10 November 2021. S.23 and Sched 2 created an express regime providing for a stay in the case of proceedings commenced after 10 November 2021, but that did not preclude the court's inherent power to order a stay in the case of proceedings commenced earlier. It was necessary to order a stay in order to allow time for the arbitrator to determine whether or not to grant relief.

11. Permission to appeal was granted by Jonathan Richards J, but the Order does not set out his reasons.

The Act

12. Before considering the parties' submissions I need to look at the Act. The Commercial Rent (Coronavirus) Bill was published on 10 November 2021 and the Act was passed in the same form on 24 March 2022. It replaced earlier legislation and regulations which, broadly speaking, prohibited remedies such forfeiture and distraint in relation to business tenancies and imposed a moratorium on enforcing rent debts, albeit that it did not prohibit the landlord from bringing proceedings for rent debts and obtaining judgment.

13. S.1(1) states: "*This Act enables the matter of relief from payment of protected rent debts due from the tenant to the landlord under a business tenancy to be resolved by arbitration*".

14. In short, a debt is a protected rent debt ("**PRD**") if it is attributable to a period of time during which the tenant's business was adversely affected by coronavirus, ending no later than 18 July 2021. The Act provides for arbitration to decide whether there should be relief from payment, in the form of writing off the whole or part of the PRD, giving time to pay and/or reducing any interest payable. If a party (it will almost invariably be the tenant) makes a reference to arbitration, he has the right to ask the arbitrator to consider the grant of relief.

15. Part 2 of the Act is headed "Arbitration" and comprises ss.7-22. S.9(2) states: "*A reference to arbitration may be made by either the tenant or the landlord within the period of six months beginning with the day on which this Act is passed*."

16. Ss.13 and 14 empower the arbitrator to make a binding award. S.14(9) and (10) provide that any relief from payment of a PRD is deemed to be an alteration to the tenancy for the benefit of the tenant and any guarantor.

17. Part 3 of the Act is headed "Moratorium on certain remedies and insolvency arrangements" and includes s.23 which provides, so far as relevant, as follows:

> "*(1) Schedule 2 contains—*
>
> *(a) provision preventing a landlord who is owed a protected rent debt from using the following remedies in relation to (or on the basis of) the debt during the moratorium period—*
>
> *(i) making a debt claim in civil proceedings;*
>
> *(ii) using the commercial rent arrears recovery power;*
>
> *(iii) enforcing a right of re-entry or forfeiture;*
>
> *(iv) using a tenant's deposit;*

(b) retrospective provision in relation to certain debt claims made by such a landlord before the start of the moratorium period for the protected rent debt;

(c) provision relating to the right of such a landlord during the moratorium period to appropriate any rent paid by the tenant;

(d) retrospective provision in relation to the right of such a landlord to appropriate any rent paid by the tenant before the start of the moratorium period for the protected rent debt;

(e) provision connected with certain things mentioned in paragraphs (a) to (d).

(2) In this section "the moratorium period", in relation to a protected rent debt, is the period—

(a) beginning with the day on which this Act is passed, and

(b) ending—

(i) where the matter of relief from payment of the protected rent debt is not referred to arbitration within the period of six months beginning with that day, with the last day of that period, or

(ii) where that matter is referred to arbitration, with the day on which the arbitration concludes."

18. Sched. 2 provides, so far as relevant, as follows:

"*1(1) This Schedule applies in relation to a protected rent debt under a business tenancy.*

(2) In this Schedule—

(a) references to "the protected debt" or "the debt" are to the whole or any part of that protected rent debt;

(b) "the business tenancy" is the business tenancy under which the protected debt arose;

(c) "the landlord" and "the tenant" refer respectively to the landlord and the tenant under that tenancy;

(d) "the moratorium period", in relation to the protected debt, has the meaning given by section 23(2);

(e) a reference to doing something "in relation to" the protected debt includes, where appropriate, its being done on the basis of the debt.

2(1) The landlord may not, during the moratorium period for the debt, make a debt claim to enforce the protected debt.

(2) In this paragraph "debt claim" means a claim to enforce a debt in civil proceedings (including by a counterclaim or any other way of claiming payment of a debt in such proceedings).

3(1) This paragraph applies to proceedings on a debt claim which—

(a) is made on or after 10 November 2021 but before the day on which this Act is passed,

(b) is made by the landlord against the tenant, and

(c) relates to, or to debts which include, the protected rent debt.

(2) Either of the parties to the business tenancy may apply to the court for the proceedings on the debt claim to be stayed in order to enable the matter of payment of the protected rent debt to be resolved (whether by arbitration or otherwise).

(3) Where such an application is made in respect of proceedings on a debt claim the court must stay the proceedings (unless it is satisfied that they are not proceedings to which this paragraph applies).

4(1) The landlord may not, during the moratorium period for the protected debt, use CRAR [the commercial rent arrears recovery power] in relation to the debt. …

5(1) The landlord may not, during the moratorium period for the protected debt, enforce, by action or otherwise, a right of re-entry or forfeiture for non-payment of the debt. … "

19. Paragraphs (6) to (8) of Sched. 2 contain provisions preventing the landlord, during the moratorium period, from appropriating any rent deposit to a PRD in preference to an unprotected debt, or from using a rent deposit to recover payment of a PRD.

The Appellant's submissions

20. Ground 1 of the Appellant's appeal is that the Act does not permit any reference to arbitration where proceedings were commenced before 10 November 2021. Mr Daniel Dovar, for the Appellant, submits that this is clear from s.23 and Sched 2, and he relies in particular on the use of the word "*retrospective*", which is used in relation to "*certain debt claims"* in s. 23(1)(b), but not used more widely in relation to s.23(1)(a). He accepts that the arrears of rent in the present case constitute a PRD and that there would have been a right to require a moratorium for the purpose of arbitration, had the proceedings been commenced after 10 November 2021.

21. Alternatively he submits that there is a tension between s.9 and s.23, resulting in an absurdity or an ambiguity, thereby entitling him to refer the court to *Hansard*. The passages to which he refers in *Hansard* are part of the consideration of the Bill by the Business, Energy and Industrial Strategy Committee on 12 January 2022. Amendment 17 was a proposal to delete paragraph (a) from Sched. 2 para 3. The effect would have been to extend the moratorium to proceedings commenced before 10 November 2021. The response of Mr Paul Scully MP, the Parliamentary Undersecretary of State for Business, Energy and Industrial Strategy was as follows:

> "*On amendment 17, the Bill as drafted allows for a stay of debt claims that include ringfenced debt and are issued between 10 November 2021 and the Bill coming into force. The Bill enables ringfenced debt under those claims and under judgments made in respect of such claims to be subject to arbitration. I understand the concern about the date, but it is not an arbitrary date, because 10 November 2021 follows the Bill's introduction and the Government's announcement of the policy. The Bill seeks to introduce proportionate measures that address the interests of both landlords and tenants, whereas the amendment would allow for arbitration of protected debt which was subject to earlier proceedings or judgments when the parties could not have known that this was*

proposed at the time when the proceedings were issued, so reopening those situations." (Vol 706 Cols 610-612 and 617).

22. The Appellant's *Hansard* statement refers to an ambiguity in Sched. 2, but in my judgment the real point is whether there is an absurdity or ambiguity in s.9 arising from the alleged tension with s.23 and Sched. 2. However, I do not consider that I should ignore the *Hansard* statement on the technical ground that it does not refer expressly to s.9. Mr Pryor fairly conceded that there was no obstacle to my considering *Hansard* if I found an absurdity or ambiguity in the Act.

23. Mr Dovar relies on *Hutchinson v Jauncey* [1950] 1 KB 574 at 578-9. In that case a landlord served a valid notice to quit on a residential tenant and then issued proceedings for possession. Thereafter the Landlord and Tenant (Rent Control) Act 1949 came into force, extending the protection of the Rent Restriction Acts to the tenancy in question. Evershed MR accepted the general proposition that a person is not to be deprived of a vested right (in that case, the landlord's right to issue proceedings for possession) unless this is the intention of the Act. Such intention need not be express but may arise by necessary implication. However, the court held in that case that such an intention should be spelled out of s.10 of the 1949 Act.

24. Ground 2 of the appeal is only necessary if Ground 1 fails. In that event, Mr Dovar submits that s.23 and Sched. 2 provide an exhaustive procedural remedy in the form of a moratorium and that it would make no sense for the court to exercise its inherent jurisdiction to stay proceedings, if the only ground for a stay is the pending arbitration.

The Respondent's submissions

25. Mr Michael Pryor, for the Respondent, submits that s.9, read together with ss.13 and 14, clearly alter the substantive rights and duties of the landlord and tenant of a business tenancy in respect of PRDs. There are no words in those sections limiting the alteration to cases where proceedings are commenced after 10 November 2021.

26. S.23 and Sched. 2 confer on the tenant a procedural benefit in the form of a moratorium. This statutory procedure applies only where proceedings are commenced after 10 November 2021, but that has nothing to do with the alteration in substantive rights and duties. The Appellant's construction results in the procedural tail wagging the substantive dog.

27. Although s.23 and Sched. 2 cannot be used in this case, there is nothing in those sections to exclude the court's inherent jurisdiction to stay proceedings pending arbitration. A stay ought to be granted, in order to ensure that the tenant/guarantor is not deprived of the relief contemplated by the Act. However, unlike the statutory moratorium, this is not mandatory and could in theory be refused, e.g. for bad behaviour. (I should add that Mr Pryor did not seek to rely on s.9 of the Arbitration Act 1996, given that this was not a consensual arbitration.)

28. There is no absurdity or ambiguity in the Act and therefore no basis for invoking *Pepper v Hart*. Mr Pryor took me to *Chilcott v HMRC* [2010] EWCA Civ 1538 as a salutary warning against the misuse of that doctrine. In that case Sedley LJ said at [29]:

> "*Nor does [the argument] receive any assistance from the fact that no parliamentary debate was directed to the section in the course of its passage. To attempt to derive support from such parliamentary silence is in my view to misuse the limited permission given by Pepper v Hart to use aspects of parliamentary debates as an aid to construction. It is an unconstitutional invitation to the court*

not to rely on but to call in question proceedings in Parliament, contrary to Article IX of the Bill of Rights."

Discussion

29. There is no dispute as to the principles to be applied in construing the Act. A convenient, and authoritative, recent summary can be found in the judgment of Lord Briggs in *Aviva Investors Ground Rent GP Ltd v Williams* [2023] 2 WLR 484 at [9]:

> "*As with any question of statutory construction the answer depends upon reading the relevant words in their context, paying proper regard to their purpose, in this case to the mischief which the provision is designed to combat*."

30. I accept that a statute should not be construed as depriving a party of accrued rights with retrospective effect, unless that is the clear intention of the statute, whether by express words or necessary implication. However, in the present it is clear that the Act deprives a landlord of its right to accrued rent in some circumstances. The only question is how far this goes.

31. I referred the parties during argument to the words of Lord Carnwath in *Hosebay Ltd v Day* [2012] 1 WLR 2884 at [6], in relation to the Leasehold Reform Act 1967:

> "*Although the 1967 Act like the 1993 Act is in a sense expropriatory, in that it confers rights on lessees to acquire rights compulsorily from their lessors, this has been held not to give rise to any interpretative presumption in favour of the latter. As Millett LJ said of the 1993 Act:*
>
> > *"It would, in my opinion, be wrong to disregard the fact that, while the Act may to some extent be regarded as expropriatory of the landlord's interest, nevertheless it was passed for the benefit of tenants. It is the duty of the court to construe the 1993 Act fairly and with a view, if possible, to making it effective to confer on tenants those advantages which Parliament must have intended them to enjoy." (Cadogan v McGirk [1996] 4 All ER 643, 648.)*
>
> *By the same token, the court should avoid as far as possible an interpretation which has the effect of conferring rights going beyond those which Parliament intended*."

32. In my judgment I should construe the Act fairly. I should not lean in favour of extending it in order to benefit the tenant or guarantor, but nor should I interpret it restrictively so as to limit the alteration of substantive rights.

33. It would be too simplistic to say that ss.9, 13 and 14 are clear and cannot be affected by s.23 and Sched. 2; I have to look at the Act as a whole. However, it is relevant to note that the former are within Part Two, dealing with arbitration and conferring substantive rights, whilst the latter are in Part Three, dealing with the moratorium on remedies. One would not expect a modern statute to contain a paragraph buried in the middle of a Schedule dealing with procedural remedies to contain a major restriction on the substantive rights given by the Act. I therefore proceed on the basis that it is for the Appellant to show why the substantive rights conferred by ss.9, 13 and 14 should be read as being restricted by s.23 and Sched. 2.

34. When I look at the context of the preceding legislation, I see that the Act replaced previous legislation giving relief to business tenants in respect of rent during the time of the Pandemic. The Government's intention to pass the Act became known on 10

November 2021, but it was not actually passed for several months. During that interim period, tenants would doubtless have been seeking to stave off enforcement proceedings. There is nothing irrational in construing the Act so as to allow tenants to invoke the mandatory arbitration procedure, even in response to proceedings commenced before 10 November 2021. The previous legislation therefore does not assist the Appellant.

35. If it were correct that s.23 and Sched. 2 provided the only procedural route whereby the tenant could obtain a mandatory arbitration, then it would result in Part Two being pointless in the case of proceedings commenced before 10 November 2021, unless the landlord voluntarily agreed to go to arbitration. It is difficult to conceive of a case where a landlord would voluntarily agree to arbitration in that situation. In any event, if the Appellant is correct on Ground 1, there would be no basis for arbitration, because the Act would confer no substantive rights on a tenant whose landlord had commenced proceedings before 10 November 2021. If that were right, it would point in favour of s.23 and Sched. 2 cutting down the substantive rights. However, this argument assumes what it seeks to prove.

36. One of the fundamental principles of English law is *ubi jus, ibi remedium*; where there is a right, the law will provide a remedy to enforce that right. S.23 and Sched. 2 make it clear that the convenient remedy of a statutory moratorium is not available where proceedings were commenced before 10 November 2021, but that does not preclude the court from being able to exercise its inherent jurisdiction to stay the proceedings, pending determination of the arbitration. If the proceedings were not stayed, the tenant would be deprived of its substantive right to relief. As Mr Pryor says, this inherent jurisdiction is discretionary and might be refused, e.g. where the tenant has behaved badly; in that sense it is therefore different from (and less advantageous to the tenant than) a mandatory stay. I agree with Mr Dovar that it is undoubtedly odd that Parliament has gone to the trouble of creating a procedural code, but left a lacuna where proceedings were commenced before 10 November 2021. However there is nothing in the Act which prevents the court from filling that lacuna by using its inherent jurisdiction in order to ensure that the tenant is not left with no remedy to give effect to its right. In my judgment this undoubted oddity is less surprising than the contention that s.23 and Sched. 2, which deal with procedural remedies, require the court to read s.9 as subject to an implied limitation that it applies only where proceedings are commenced after 10 November 2021.

37. I must now consider whether it is permissible to look at *Hansard.* In *Pepper v Hart* [1993] AC 593 at 631D-F Lord Browne-Wilkinson said at 634C-E:

> "*My Lords, I have come to the conclusion that, as a matter of law, there are sound reasons for making a limited modification to the existing rule (subject to strict safeguards) unless there are constitutional or practical reasons which outweigh them. In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria*."

38. Mr Pryor agreed that I should look at the *Hansard* material *de bene esse* but he cautioned me against allowing that material itself to create the required ambiguity or absurdity, where none existed on the face of the Act. For the reasons I have already given, I have concluded that there is no absurdity or ambiguity, albeit that there is an oddity in the relationship between the different parts of the Act. The Minister's statement might be thought to assist Mr Dovar, but it is not conclusive, given that it was made in relation to Sched. 2 (i.e. the statutory moratorium) and it is not clear that the Minister was intending to limit the tenant's substantive rights in s.9. However, I have to put it out of my mind, because I have concluded that I am not allowed to rely on it.

Disposal

39. For these reasons I agree with the Master in relation to both Grounds 1 and 2. The appeal is dismissed.

40. Pursuant to CPR 52.3(2)(a) I formally adjourn the hearing of this appeal to the hearing which will deal with consequential matters, and I extend the time for any application for permission to appeal to 21 days from the date of that hearing