Neutral Citation Number: [2021] EWHC 2591 (Ch)

Claim No: PT-2020-000828

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
PROPERTY, TRUSTS AND PROBATE LIST (Ch D)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Tuesday, 28 September, 2021

Before:

ROBIN VOS
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

- -

Between:

LONDON TROCADERO (2015) LLP

Claimant

- and -

(1) PICTUREHOUSE CINEMAS LIMITED
(2) GALLERY CINEMAS LIMITED **Defendants**
(3) CINEWORLD CINEMAS LIMITED

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NICHOLAS TROMPETER QC (instructed by **Druces LLP**) appeared for the **Claimant**
JONATHAN SEITLER QC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) appeared for the **Defendants**

Hearing dates: 23 and 26 July 2021
- -

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 by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 28 September 2021 at 10.30am.

DEPUTY JUDGE ROBIN VOS:

Introduction

1. Many businesses have been hit hard by the Covid pandemic, especially those operating in the hospitality and entertainment sectors where venues have had to remain closed or have been subject to restrictions. One particular problem for such businesses has been the payment of rent in respect of the premises from which they operate. Of course, this has also caused problems for landlords who may rely on the rent they receive to meet their own obligations.

2. The Claimant, London Trocadero (2015) LLP (the "Landlord"), is the landlord in respect of two leases of cinema premises at the Trocadero Centre in London of which the First Defendant, Picturehouse Cinemas Limited (the "Tenant"), is the tenant. The Second Defendant, Gallery Cinemas Limited (the "Original Tenant"), is the original tenant under one of the leases. The Third Defendant, Cineworld Cinemas Limited (the "Guarantor"), is the guarantor of sums due under both leases.

3. No rent has been paid under the leases since June 2020. The arrears (together with service charges) up to July this year are in the region of £2.9 million. The Landlord has brought this claim to recover the amounts outstanding.

4. The Defendants say that they are not liable for rent and service charges which have arisen in relation to periods when the premises could not be used as a cinema. They put their case either on the basis that a term to this effect should be implied into the leases or, alternatively, on the basis that there has been a failure of consideration (or, as it is now more often referred to, a "failure of basis"). They maintain that this is the case notwithstanding their acceptance that the leases have not come to an end as a result of frustration and that the Landlord is not in breach of the terms of the leases. Mr Seitler, appearing on behalf of the Defendants, acknowledges that the court is being asked to develop existing principles but maintains that, given the unique circumstances presented by the Covid pandemic, it is appropriate to do so.

Procedural matters

5. The Claim was commenced on 22 October 2020. At the time, the total amount outstanding was approximately £1.5 million.

6. The Defence included a counterclaim for the rent paid on 31 March 2020, said to be paid under a mistake of law (based on the same arguments as the Defendants put forward to defend the Landlord's claim for arrears) and also for damages relating to alleged overcharging by the Landlord in respect of amounts relating to insurance.

7. In January 2021, the Landlord applied to amend its Particulars of Claim to include further amounts which had by then become due and also applied for summary judgment.

8. On 13 July 2021, the Landlord updated its Particulars of Claim to include further amounts of rent and service charge which had become due, bringing the total up to the amount now currently claimed of approximately £2.9 million.

9. The Defendants have provided an Amended Defence and Counterclaim, which includes a further counterclaim in relation to payments in respect of electricity.

10. The original application for summary judgment included summary judgment in respect of the Defendants' counterclaim. The Landlord has also applied to amend its application for summary judgment to include the further counterclaim in respect of electricity. However, it now no longer seeks summary judgment in respect of the counterclaim relating to insurance payments and accepts that this should go to trial.

11. The result of this is that the summary judgment application relates to the claim for arrears by the Landlord, the First Defendant's counterclaim in respect of amounts paid under a mistake of law (which stands or falls with the outcome of the Landlord's claim for arrears) and the counterclaim in respect of electricity charges. However, the Defendants now accept the position in relation to electricity and so this element of the counterclaim is no longer pursued.

12. The Tenant claims to be able to set off its counterclaim in respect of amounts paid in relation to insurance against any arrears of rent or service charge found to be due. Although the Landlord disputes the right of set off, if it is found to exist, the Landlord accepts for the purposes of the summary judgment application that this should be based on the maximum amount claimed on the basis of the Defendants' case of £621,000.

13. On 12 July 2021, the Defendants made an application to adjourn the hearing of the summary judgment application. For reasons which I gave separately at the hearing, I refused that application.

14. I should also record that the Landlord applied for permission for an extension of time for the service of three witness statements in support of the summary judgment application which were provided to the Defendants but not properly served at least three clear days before the hearing as required by CPR 24.5(2). Again, for reasons which I gave at the time, I granted the extension of time.

Background facts

15. There is no dispute in relation to the facts which are relevant to the Landlord's claim and to that part of the counterclaim to which the summary judgment application relates.

16. The Landlord has, since August 2015, been the owner of the Trocadero Centre.

17. The Defendants are all members of the Cineworld group of companies. The Tenant is the current tenant of cinema premises at the Trocadero Centre under the terms of two leases dated 20 June 1994 (the "1994 Lease") and 18 September 2014 (the "2014 Lease").

18. The Original Tenant was the original tenant under the 1994 Lease. The Tenant became the tenant under the 1994 Lease in September 2014, at the same time as the 2014 Lease was put in place. The Guarantor has always been the guarantor under the 1994 Lease.

19. The 2014 Lease was entered into as a result of an agreed reorganisation under which there was a variation of the 1994 Lease and a surrender of part of the premises which were the subject of the 1994 Lease. The Tenant is the original tenant under the 2014 Lease and the Guarantor is the original guarantor under the 2014 Lease. The Original Tenant is not a party to and has no obligations under the 2014 Lease.

20. The result of this is that the Original Tenant is liable under the covenants in the 1994 Lease whilst the Tenant is liable under the covenants in relation to both leases. The

Guarantor is liable in respect of the defaults of the Original Tenant under the 1994 Lease and of the Tenant under the 2014 Lease.

The terms of the leases

21. I need only refer to a few provisions of the leases. The key relevant terms are set out below.

The 1994 Lease

22. The 1994 Lease is a reversionary lease for a term of 35 years commencing 30 September 2006. It therefore expires in September 2041.

23. The demise is contained in clause 2 of the 1994 Lease which provides as follows:-

> "IN consideration of the Rent and of the covenants hereinafter contained the Landlord HEREBY DEMISES unto the Tenant ALL THAT the demised premises TOGETHER WITH the easements and rights specified in the First Schedule hereto BUT EXCEPTING AND RESERVING the easements and rights specified in the Second Schedule hereto TO HOLD the same … UNTO the Tenant for the Term YIELDING AND PAYING therefor during the Term FIRST yearly (and proportionately for a part of a year) the Rent which shall be payable by equal quarterly payments in advance on the Quarter Days the first of such payments or a proportionate part thereof to be due on the date specified in the Particulars and to be in respect of the period therein mentioned SECONDLY by way of additional rents the amounts payable pursuant to the provisions of sub-clauses 3.5 and 3.6 of the Lease AND THIRDLY by way of additional rent the amounts payable by way of Value Added Tax pursuant to the provisions of sub-clause 3.3 of this Lease."

24. Under clause 3.1, the Tenant covenants:-

> "to pay the Rents at the respective times and in the manner herein provided for without any deduction whatsoever".

25. Clause 3.6 requires the Tenant to pay additional rent equal to the cost of insuring the premises against the "Insured Risks" and against any loss of rent or service charge resulting from this. It is accepted that the Insured Risks do not include the Covid pandemic.

26. Clause 3.7.1 requires the Tenant:-

> "to comply with all obligations imposed by … any Act or Acts of Parliament or legislation … in respect of the demised premises or the use thereof whether by the owner or the Landlord tenant or occupier and at all times to keep the Landlord indemnified against all costs claims demands and liability in respect thereof".

27. Under clause 3.12.1, the tenant covenants not to use the premises other than for the "Permitted Use" which is defined as:-

> "… a cinematograph theatre or theatres with the ancillary sale (but only to patrons of films who have been admitted through the ticket barriers) of merchandise relevant to such cinema use including hot and cold beverages for consumption of such patrons on the premises together with a bar, kitchens, café, and open terrace for the sale and consumption of alcohol on the premises and for conferencing purposes".

28. There is a provision in clause 5.2 of the Lease suspending the payment of rent or service charge where the premises are unfit for use as a result of being damaged or destroyed by any of the Insured Risks.

29. Clause 5.5 of the Lease provides as follows:-

> "No warranty as to Permitted Use
>
> 5.5 Nothing herein contained or implied nor any statement or representation made by or on behalf of the Landlord or the Superior Landlord prior to the date hereof shall be taken to be a covenant warranty or representation that the demised premises can lawfully be used for the Permitted Use."

30. Paragraph 3(a) of schedule 6 requires the Tenant to keep the premises open for trading during certain minimum trading hours so far as this is permitted by law.

The 2014 Lease

31. The term of the 2014 Lease starts on the date of the Lease (18 September 2014) and ends on 29 September 2041. It therefore terminates at the same time as the 1994 Lease.

32. The 2014 Lease is a much shorter document as, subject to certain consequential changes, it imports:-

> "all of the terms, requirements, covenants and conditions contained in [the 1994 Lease]".

33. The grant is contained in clause 2.1 which simply states that:-

> "the Landlord lets with full title guarantee the Property to the Tenant for the Contractual Term at the Annual Rent".

34. The annual rent is a peppercorn. The insurance rent and the service charge are to be calculated in the same way as under the 1994 Lease.

35. For practical purposes, the parties have not drawn any distinction between the terms of the 2014 Lease and the terms of the 1994 Lease to the extent that they are relevant to the claims in this case. I will therefore proceed on the basis that it is the terms of the 1994 Lease which are relevant.

The Covid restrictions

36. A series of different regulations imposed restrictions on the operation of cinemas between 21 March 2020 and 19 July 2021. It is not necessary to delve into the detail of the regulations; it is enough to summarise the broad effect.

37. From 21 March 2020 – 3 July 2020, cinemas had to close. They were allowed to re-open again on 4 July 2020 but subject to certain restrictions relating to social distancing.

38. The Tenant re-opened the Trocadero cinema business on 31 July 2020. However, the business was not sustainable due to the various ongoing restrictions and the premises closed again on 9 October 2020.

39. There was a further lockdown between 5 November 2020 and 1 December 2020 which prevented cinemas from opening. These restrictions were relaxed between 2 December 2020 – 15 December 2020 although the Tenant did not re-open the business during this period.

40. Cinemas were required to be closed again from 16 December 2020 – 16 May 2021. From 17 May 2021 – 18 July 2021, cinemas were allowed to open but still subject to certain restrictions. From 19 July 2021, there have been no restrictions on the operation of cinemas.

41. There is no direct evidence as to whether the Tenant has restarted its cinema business at the Trocadero since 17 May 2021 although it is implicit from what is said in the Defendants' amended defence and counterclaim that the premises have been open since that date.

42. The evidence given on behalf of the Tenant is that, between 23 March 2020 (when the cinema closed) to 16 May 2021, the premises were only open for 71 days and takings were only £247,000. This compares with takings of £8.92m for the period between 23 March 2018 – 16 May 2019.

Summary judgment application

43. In accordance with CPR Rule 24.2, the court may only grant summary judgment if it is satisfied that the Defendants have no real prospect of successfully defending a claim or issue and there is no other compelling reason why the case (or the particular issue) should be disposed of at a trial.

44. The principles to be applied are not controversial. Both parties referred to Lewison J's summary in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15] which was approved by the Court of Appeal in *AC Ward and Sons Limited v Catlin (Five) Limited* [2009] EWCA Civ 1098 at [24] as follows:-

> "(i) The court must consider whether the [Respondent] has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 2 All ER 91
>
> (ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> (iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*
>
> (iv) This does not mean that the court must take at face value and without analysis everything that a [Respondent] says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]
>
> (v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the

application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550

(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63

(vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

45. Although the Defendants suggest that there are compelling reasons why the issues which are the subject of the summary judgment application should go to trial (and which are essentially the same reasons which they put forward in support of their adjournment application), they do not suggest that, apart from this, the issues in question are not, in principle, suitable to be determined by way of summary judgment.

46. As I have already explained, there is no dispute in relation to the facts. On the other hand, the defence put forward by the Defendants raises a novel point of law.

47. There are two other recent cases where the court has had to consider similar claims to the one made in these proceedings. The first in time (at least in terms of the date when judgment was given) is *Commerzreal Investmentgesellschaft mbh v TFS Stores Limited* [2021] EWHC 863 (Ch), a decision of Chief Master Marsh. The Chief Master gave summary judgment in favour of the landlord. However, the failure of consideration argument was not put forward in that case. The Chief Master noted at [12(1)] that:-

> "in my experience the court regularly deals with points of law and construction of real difficulty on the hearing of an application for summary judgment".

48. However, he went on to observe at [12(3)] that Counsel in that case had raised the possibility that:-

> "the court should be reluctant to grant summary judgment where the law is uncertain or the application involves the court making a determination in a developing area of law. The rationale is that the development of the law should in some cases be based upon findings of actual and not hypothetical facts. The judgment of Peter Gibson LJ in *Hughes v Colin Richards* [2004] EWCA Civ 266 at [30] is usually cited in support of this principle".

49. In *Commerzreal*, Chief Master Marsh was satisfied that the defence did not rely upon any new principles of law, unlike this case. However, it can be seen that the possible objection referred to in *Hughes* is rooted in the desirability of developments in the law being based on actual rather than hypothetical facts. Peter Gibson LJ specifically noted at [22] that "the pleadings show significant disputes of fact between the parties". In this case, there is no dispute as to the facts.

50. The second decision is that of Master Dagnall in *Bank of New York Mellon (International) Limited v Cine-UK Limited* [2021] EWHC 1013 (QB). Again, the application was for summary judgment. In that case, a defence of failure of consideration was run as well as partial frustration. Despite this, the Master proceeded to give summary judgment.

51. In my view, this is an appropriate case for the summary judgment application to be determined. As I have said, there is no dispute as to the facts. The issues are points of law and construction which the parties have had a proper opportunity to address in

argument. Although some of the issues of law could result in a development of existing principles, this would be on the basis of actual facts rather than assumed facts. As Lewison J observed, if the Defendants' submissions are bad, the sooner this is determined the better.

52. In this particular case, there is another reason for this. Cine-UK (the defendant in the *Bank of New York* action) is another member of the Cineworld group. It has applied for permission to appeal against Master Dagnall's decision. Whatever the outcome of the application for summary judgment, it would in my view be more efficient for any appeals in this case and the *Cine-UK* case to be heard together. I note that any appeal from the decision of the Master is, in the first instance, to the High Court. However, I am told that an application has been made for the appeal to be heard direct by the Court of Appeal.

53. I will therefore go on to consider whether the Defendants have a realistic prospect of success and, if not, whether there is any other compelling reason for these issues to proceed to trial.

The issues

54. The Defendants put forward three defences to the claim for arrears.

55. The first is that terms should be implied into the leases to the effect that payment of rent and service charges should be suspended during any period for which the use of the premises as a cinema is illegal and/or during which the attendance would not be at a level commensurate with that which the parties would have anticipated at the time that the 1994 Lease and the 2014 Lease were entered into.

56. The second line of defence is that there has been a partial failure of consideration, on the basis that the payments due under the leases were for the use of the premises as a cinema, with the result that no payments are due under the leases in respect of periods for which the premises could not be used as a cinema.

57. The final defence is that the Tenant is entitled to set-off in equity its counterclaim in respect of insurance issues against any sums otherwise found to be due. It is said that any reduction in the rent or service charge which can be recovered as a result of the

set-off is not in fact due and so cannot be recovered from the Original Tenant or the Guarantor either, even though they have no counterclaim of their own against the Landlord.

58. I will take each of these defences in turn.

Implied terms

59. There was a large measure of agreement between the parties as to the principles which should be applied in determining whether any terms should be implied into a contract. Mr Seitler referred to Lord Neuberger's discussion in *Marks & Spencer Plc v BNP Paribas Securities Services* [2016] AC 742 at [16-21]. Mr Trompeter on the other hand relied on the more recent summary of Carr LJ in *Yoo Design Services Limited v Iliv Realty Pte Limited* [2021] EWCA Civ 560 at [51] as follows:-

> "In summary, the relevant principles can be drawn together as follows:-
>
> i) A term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the basis of the obviousness test;
>
> ii) The business efficacy and the obviousness tests are alternative tests. However, it will be a rare (or unusual) case where one, but not the other, is satisfied;
>
> iii) The business efficacy test will only be satisfied if, without the term, the contract would lack commercial or practical coherence. Its application involves a value judgment;
>
> iv) The obviousness test will only be met when the implied term is so obvious that it goes without saying. It needs to be obvious not only that a term is to be implied, but precisely what that term (which must be capable of clear expression) is. It is vital to formulate the question to be posed by the officious bystander with the utmost care;
>
> v) A term will not be implied if it is inconsistent with an express term of the contract;
>
> vi) The implication of a term is not critically dependent on proof of an actual intention of the parties. If one is approaching the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the

> actual parties, but with that of notional reasonable people in the position of the parties at the time;
>
> vii) The question is to be assessed at the time that the contract was made: it is wrong to approach the question with the benefit of hindsight in the light of the particular issue that has in fact arisen. Nor is it enough to show that, had the parties foreseen the eventuality which in fact occurred, they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred;
>
> viii) The equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the parties would have agreed it if it had been suggested to them. The test is one of necessity, not reasonableness. That is a stringent test."

60. Mr Seitler also referred to the decision of the Court of Appeal in *Bromarin v IMD Investments Limite*d [1999] STC 301. In that case, Chadwick LJ stated at [310g] that:-

> "It is not, to my mind, an appropriate approach to construction to hold that, where the parties contemplated event 'A', and they did not contemplate event 'B', their agreement must be taken as applying only in event 'A' and cannot apply in event 'B'. The task of the Court is to decide, in the light of the agreement that the parties made, what they must have been taken to have intended in relation to the event, event 'B', which they did not contemplate."

61. Based on this, Mr Seitler submits that, as the parties did not contemplate the Covid pandemic, it is necessary for the Court to consider objectively what the parties would have intended if the potential for such an event had been put to them.

62. However, *Bromarin* was a case dealing with construction of the contract in question and was not dealing with the possibility of terms being implied into the contract. As Carr LJ emphasised at [47] in *Yoo Design*:-

> "The implication of contractual terms involves a 'different and altogether more ambitious undertaking' than the exercise of contractual interpretation which identifies the true meaning of the language in which the parties have expressed themselves: the interpolation of terms to deal with matters for which, ex hypothesi, the parties have themselves made no provision. It is because the implication of terms is

> so potentially intrusive that the law imposes strict constraints on the exercise of the 'extraordinary' power so to intervene."

63. As has been seen above, Carr LJ went on to conclude in her summary of the principles at [51(vii)] that a term cannot be implied simply because the parties would have wanted to make provision for a particular set of circumstances had they foreseen the eventuality unless there was only one contractual solution or one of several possible solutions would undoubtedly have been preferred. The reason for this is no doubt based on the obviousness test.

64. Mr Trompeter also referred to Lewison – *The Interpretation of Contracts* (7th Edition – s 4 of chapter 6) where it is stated that:-

> "The default position is that nothing is to be implied into a contract. The more detailed and apparently complete the contract, the stronger this presumption is."

65. Based on the authorities referred to in Lewison, I accept this is an accurate statement of the law. In my view, it does not however add anything significant to the summary of the principles set out by Carr LJ in *Yoo Design*.

66. The two suggested implied terms are as follows:-

> "(a) That if the Permitted Use of the premises by [the Tenant] under the leases were to become illegal, then the obligation to pay rent and service charges otherwise due thereunder would be suspended and cease to be payable for that period;
>
> (b) That the sums due under the leases would only be payable in respect of periods during which the premises could be used for its intended purpose, as a cinema with attendance at a level commensurate with that which the parties would have anticipated at the time that the 1994 Lease and the 2014 Lease were entered into."

67. The starting point is whether such terms are so obvious that they go without saying or that they are necessary to give the leases business efficacy.

68. Mr Seitler's submission is that, in circumstances where the premises were intended to be used as a cinema and where the Tenant's income would derive from such use, it is both obvious and necessary for business efficacy that the rent should not be payable during periods where the premises cannot effectively be used as a cinema. It would,

he says, be uncommercial to expect the Tenant to pay the rent if the cinema cannot open.

69. Mr Trompeter's position is that the defence based on implied terms is bound to fail as the proposed terms do not meet either the business efficacy test or the obviousness test and, in any event, are inconsistent with the terms of the leases. In my view, Mr Trompeter is right.

70. Looking first at business efficacy, it must be remembered that it is not enough that a term might be fair or reasonable, nor that the parties would have agreed to it had it been suggested to them. As Carr LJ said in *Yoo Design* at [51(viii)]:-

> "The test is one of necessity, not reasonableness. That is a stringent test."

71. Lord Neuberger, in *Marks & Spencer*, suggested at [21] that a more helpful way of looking at the business efficacy test is to ask whether, "without the term, the contract would lack commercial or practical coherence".

72. In my view, the requirement for the Tenant to pay rent even though the premises could not be used for the intended purpose as a result of unforeseen, extraneous events does not deprive the leases of business efficacy or mean that they lack commercial or practical coherence. Clearly, without the implied terms, the risk is shouldered by the Tenant. However, there is no good commercial reason why the loss should necessarily be borne by the Landlord.

73. Mr Seitler suggested that the Landlord would be able to insure against any loss of rent as it is in any event required to do in respect of the Insured Risks. However, as Mr Trompeter observed, it would equally be open to the Tenant to take out business interruption insurance to guard against the risk of unforeseen events preventing the Tenant from carrying on business. Indeed, it is apparent from recent litigation related to the Covid pandemic that many businesses have such insurance.

74. It is therefore a matter for negotiation between the parties as to where the risk should lie. The fact that, as matters stand, the risk is left with the Tenant does not, in this case, lead to the conclusion that the leases lack commercial or practical coherence.

75. Turning to obviousness, for similar reasons to those which I have already explained, it cannot be said that the terms are so obvious that they go without saying.

76. In this context, Mr Trompeter drew attention to the fact that there is a longstanding principle that a landlord, when granting a lease, gives no warranty as to the use of the premises (see for example *Cricklewood Property and Investment Trust Limited v Leighton's Investment Trust Limited* [1945] AC 221 at [239]).

77. Mr Trompeter submits that, in considering whether the proposed terms are obvious, this should be tested against the background that, under common law, a landlord does not generally give a warranty as to the use of the property. That principle is in this case reflected by the express terms of the leases as clause 5.5 of the 1994 Lease confirms that there is "no covenant warranty or representation that the demised premises can lawfully be used for the Permitted Use".

78. Although Mr Seitler submits that the lack of any warranty as to the use of the premises is irrelevant in the context of implied terms, it seems to me that it is highly relevant to the question as to whether the proposed terms in this case are so obvious that they go without saying. In circumstances where the Landlord expressly gives no warranty that the premises can lawfully be used as a cinema, and even taking account of the fact that that there is a covenant not to use the premises for any other purpose, it simply cannot be said that it is obvious that the Tenant should be excused from paying rent for any period when it cannot be so used.

79. In this context clause 5.2 of the lease is also relevant. This is the provision which suspends the payment of rent or service charge if the premises cannot be used as a result of being damaged by an Insured Risk. Whilst Mr Seitler submits that this is not a comprehensive code and that it does not conflict with a term which provides for a suspension of the payment of sums due under the lease in other circumstances, the fact that the parties have thought about the suspension of rent and service charge and made express provision for it in certain circumstances in my view inevitably leads to the conclusion that it is not obvious that a further term should be implied providing for a suspension of rent or service charges in other circumstances. It certainly cannot be said that, had the parties foreseen the possibility of a pandemic, the proposed

implied terms represent the only contractual solution or the one which would, without doubt, have been preferred.

80. In relation to the second proposed implied term, I should mention that Mr Trompeter submits that the proposed term is too uncertain given that its application depends on anticipated attendance levels. I agree with this. In the context of leases which last for over 25 years and in circumstances where there is no evidence of any forecast attendance levels being discussed by the parties, it would clearly be impossible to determine whether the suspension of payments had been triggered in any given situation other than a complete closure of the premises.

81. For these reasons, I am satisfied that the defence based on implied terms has no realistic prospect of success.

Failure of basis

82. In defending this claim, the Defendants rely on failure of consideration (or, as it is sometimes known, failure of basis), a concept relevant to the formulation of a claim in unjust enrichment. The authors of Goff and Jones – *The Law of Unjust Enrichment* (9th Ed) explain at [12-01] the concept of failure of basis as follows:-

> "… a benefit has been conferred on the joint understanding that the recipient's right to retain it is conditional. If the condition is not fulfilled, the recipient must return the benefit. The condition might take one of a variety of forms. For instance, it might consist in the recipient doing or giving something in return for the benefit… Alternatively, the condition might be the existence of a state of affairs, or the occurrence of an event, for which the recipient has undertaken no responsibility."

83. It is well established that, in order for a claim in unjust enrichment based on failure of basis to succeed, the failure must be total. Mr Seitler referred to the decision of the House of Lords in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32. Lord Porter confirmed at [77] that, under English law:-

> "Money had and received to the Plaintiff's use can undoubtedly be recovered in cases where the consideration has wholly failed, but unless the contract is divisible into separate parts it is the whole money, not part of it, which can be recovered … a partial failure of consideration gives rise to no claim for recovery of part of what has been paid."

84. Although the Defendants' Amended Defence and Counterclaim refers to a partial failure of consideration and that this is indeed how Mr Seitler framed his submissions in his skeleton argument, as he developed his arguments at the hearing, it became clear that what he was suggesting was a total failure of consideration in relation to a severable or divisible part of a contract.

85. In essence, Mr Seitler submits that, what the Defendants bargained for was the use of the premises as a cinema and that this was the state of affairs on which the leases were premised. He argues that this state of affairs failed as a result of the inability to use the premises as a cinema due to the various Covid restrictions, resulting in a failure of basis.

86. Viewed in the context of the leases as a whole, this is a partial failure of basis. However, Mr Seitler submits that the leases are severable on a time apportionment basis so that there is a total failure of basis in relation to the severable or divisible parts of the leases representing the periods during which the premises could not be used as a cinema. The result of this, he says, is that no rent or service charge is due for such periods.

87. It was not entirely clear whether the Defendants suggest that the failure of basis covers only those periods when the premises could not be opened or whether it should also cover those periods during which, despite the fact that it would be lawful for the premises to be used as a cinema, it was uneconomic for the Tenant to do so.

88. The Defendants' Amended Defence and Counterclaim states that the failure of consideration relates "at the very least" to the three periods when it was unlawful for the premises to be open. Mr Seitler's skeleton argument suggests that the failure of basis only relates to the periods when opening the premises as a cinema would "contravene the criminal law". However, in oral argument, Mr Seitler suggested that the defence is put forward in relation to all periods when the premises were not in fact open (even if they were capable of being open). Given the conclusions I have reached, nothing turns on this.

89. Mr Trompeter does not accept that English law recognises a partial failure of basis. He agrees that there may be a total failure of basis in relation to a severable part of a contract. However, he submits that, on the facts of this case, there is no failure of

basis and that, even if there is, it is not a total failure. In any event, he says that this would not provide a defence to a claim in contract as opposed to possibly providing a gateway to a restitutionary claim based on unjust enrichment.

90. Although the Defendants do not make a claim (or counterclaim) for restitution based on unjust enrichment as a result of failure of consideration (their counterclaim in respect of the March 2020 rent payment is based on mistake of law), Mr Seitler's position is that, in principle, if they were able to make such a claim had the rent and service charges been paid, this should provide a defence to having to make the payments in the first place. It would, he says, make no sense for the Defendants to have to pay these sums and then to bring an action to recover them.

91. There are a number of questions which the Court must address in determining a claim in unjust enrichment (see *Dargamo Holdings Limited v Avonwick Holding Limited* [2021] EWCA Civ 1149 at [55-56]). However, given that the Defendants' submissions in relation to failure of basis are not in support of a claim (or counterclaim) in unjust enrichment, it is only necessary in this case to consider whether there has been a failure of consideration or failure of basis (which, it is well established, is one of the categories recognised as satisfying the "unjust" element of unjust enrichment (see, for example, Lord Toulson in *Barnes v Eastenders Group* [2014] UKSC 26 at [103])).

92. Breaking down the parties' submissions, there are three issues which need to be considered:

    (1) Whether there has in fact been a failure of basis.

    (2) If so, does the failure of basis relate to a severable part of the leases?

    (3) If both of these hurdles are overcome, is the failure of basis a defence to the Landlord's contractual claim for payment of sums due under the leases?

93. These issues raise the question of the relationship between unjust enrichment and contractual obligations, a subject dealt with recently by the Court of Appeal in *Dargamo*, a decision released on 28 July 2021, less than a week after the hearing. As a result of this, I asked the parties for written submissions in relation to the relevance

of that judgment to the issues which I have to decide. I am grateful to both Mr Seitler and Mr Trompeter for the submissions which they have made and which I have taken into account in this judgment.

Failure of basis and subsisting contracts

94. In analysing what constitutes a failure of basis, Mr Seitler refers to the decision of Lord Toulson in *Barnes*, where he explained at [104-106] the reason for using the term "failure of basis" rather than "failure of consideration" as follows:-

> "104. Confusion is sometimes caused by the fact that the term 'consideration', when used in the phrase "failure of consideration" as a reason for a restitutionary claim, does not mean the same thing as it does when considering whether there is sufficient consideration to support the formation of a valid contract. Viscount Simon LC explained this in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 48:
>
> > 'In English law, an enforceable contract may be formed by an exchange of a promise for a promise, or by the exchange of a promise for an act ... but when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise.'
>
> 105. To avoid this confusion, Goff and Jones suggest, at paras 12-10 to 12-15, that the expression 'failure of basis' is preferable to 'failure of consideration' because it accurately identifies the essence of the claim being pursued. Whichever terminology is used, the legal content is the same. The attraction of 'failure of basis' is that it is more apt, but 'failure of consideration' is more familiar.
>
> 106. Failure of basis, or failure of consideration as it has been generally called, does not necessarily require failure of a promised counter-performance; it may consist of the failure of a state of affairs on which the agreement was premised."

95. In *Barnes* itself, the claimant was appointed as the receiver of the assets of a group of companies following an application made by the Crown Prosecution Service. There was an agreement between the receiver and the CPS as to the terms on which the receiver would act. That agreement provided that the receiver's remuneration would come from the assets of the relevant companies. The orders appointing the receiver were quashed on appeal, with the effect that he could not take any remuneration from

the assets of the companies. The Supreme Court held that a state of affairs which was fundamental to the agreement (that the receiver would be able to draw his remuneration form the companies' assets) had failed to sustain itself and that, as a result, the receiver was entitled to restitution in the form of payment by the CPS for his services. Importantly, there was a continuing contract between the CPS and the receiver, there was no breach of that contract by the CPS and, in particular, no failure by the CPS to perform any of its obligations under the contract.

96. Lord Toulson emphasised the need for the failure of the relevant state of affairs to be fundamental to the basis of the agreement. He said at [115]:-

> "I use the expression 'fundamental to the basis' because it should not be thought that mere failure of an expectation which motivated a party to enter into a contract may give rise to a restitutionary claim. Most contracts are entered into with intentions or expectations which may not be fulfilled, and the allocation of the risk of their non-fulfilment is a function of the contract."

97. It will be apparent from Lord Toulson's remarks that claims in unjust enrichment as a result of failure of basis most often arise against the background of a contract. However, it needs to borne in mind that a remedy in restitution based on unjust enrichment is a separate principle which can apply whether or not there is an underlying contract. It is different from, and does not form part of, the law of contract. As the authors of *Chitty on Contracts* (33rd Edition) explain at [29-001]:-

> "The law of restitution is concerned with whether a claimant can claim a gain from the defendant, rather than whether a claimant can be compensated for loss suffered. Restitutionary remedies are therefore distinct from those which are traditionally available in contract or in tort, as was recognised by Lord Wright [in *Fibrosa* at [61]]:-
>
> > 'It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English Law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.'"

98. Carr LJ confirmed this in *Dargamo* at [132], noting that:-

> "The underlying rationale for a claim in unjust enrichment differs from that of a contractual claim, and different policy considerations will arise."

99. The authors of *Goff & Jones* observe at [3-01] that the relationship between liability in contract and liability in unjust enrichment is problematic, a view shared by Carr LJ at [65] in *Dargamo*.

100. It is suggested in *Goff & Jones* at [3-13] that the general rule is that:-

> "Where there is a contract between the parties relating to the benefit transferred, no claim in unjust enrichment will generally lie while the contact is subsisting."

101. The main justification offered for this at [3-16] is that:-

> "The law should give effect to the parties' own allocation of risk and valuations, as expressed in the contract, and should not permit the law of unjust enrichment to be used to overturn those allocations or valuations."

102. It is however recognised at [3-20 - 3-22] that there are exceptions to this rule. Carr LJ expands on this in *Dargamo,* concluding at [67] that:-

> "…invalidity of a relevant contract is not a necessary prerequisite to a successful claim in unjust enrichment."

103. In *Dargamo,* the defendant, Avonwick agreed to sell shares in Company A to Dargamo and to another company Azitio Holdings Limited, the consideration being $950m. It was accepted that the price of $950m was intended to include payment for shares in other companies indirectly owned by the individual behind Avonwick. The shares in those companies were never transferred, thus giving rise to the claim by Dargamo in unjust enrichment based on failure of consideration. Whilst accepting that a claim in unjust enrichment could in principle be brought even where there is a subsisting contract, the Court of Appeal concluded that the claim could not succeed as it would be inconsistent with the clear terms of the contract which provided only for a sale of the shares in Company A in return for the purchase price.

104. The circumstances in which a claim in unjust enrichment can succeed where there is a subsisting contract are however unclear. Carr LJ in *Dargamo* refers at [70] to a significant restriction being what she describes as the "Obligation Rule" quoting the

statement by Lord Sumption in *DD Growth Premium X2 Fund v. RMF Market Neutral Strategies (Master) Limited* [2017] UKPC 36 at [62] that:-

> "It is fundamental that a payment cannot amount to an enrichment if it was made for full consideration; and that it cannot be unjust to receive or retain it if it was made in satisfaction of a legal right… The proposition is supported by more than a century and a half of authority…"

105. However, Carr LJ points out in *Dargamo* at [72 and 128] that the Obligation Rule is not absolute, mentioning in this context the decision of the High Court of Australia in *Roxborough v Rothmans of Pall Mall Australia Limited* (2001) 208 CLR 516 (examined in more detail below) where a claim in unjust enrichment succeeded despite the existence of a valid contract and an obligation in that contract to make the payment which was the subject of the unjust enrichment claim.

106. Having reviewed various academic commentaries in relation to the rationale behind the exceptions to the general rule that a claim in unjust enrichment cannot succeed where there is a subsisting contract, Carr LJ concludes at [75-76] that a claim in unjust enrichment where there is a subsisting contract is a "gap-filling device" which is "complementary, though not subsidiary, to the law of contract".

107. Reading her judgment as a whole, it can be seen that what Carr LJ meant by "gap-filling" was that the claim in unjust enrichment should not:-

(1) be inconsistent with the terms of the contract (see [75], [97] and [116]); nor

(2) interfere with the contractual allocation of risk between the parties (see [72-73], [121], [124] and [126]).

108. Whilst it must now be accepted that a claim in unjust enrichment as a result of failure of basis can in principle be made where there is a subsisting contract, it is clear that this remains an exception to a general rule. The exception will only apply where there is a gap (in the sense explained by Carr LJ in *Dargamo*) which needs to be filled.

109. Against this background, I turn now to consider whether, in this case, there has been a failure of basis.

Has there been a failure of basis?

110. Mr Seitler acknowledges that the Landlord did not give any warranty that the premises could be used as a cinema but nonetheless argues that the ability to use the premises as a cinema was fundamental to the basis of the leases. In support of this, he notes that, under clause 2 of the 1994 Lease, the demise is in consideration not only of the rent but also of "the covenants hereinafter contained". He points out that one of those covenants is the covenant in clause 3.12.1 not to use the premises other than for the Permitted Use (i.e. as a cinema).

111. Mr Trompeter puts forward two reasons why, in this case, there is no failure of basis. The first reason is that the foundation of the lease is simply the grant of a term of years (i.e. a legal interest in the premises) to the tenant in return for the payment of rent and other sums due under the leases. Like Mr Seitler, he also relies on clause 2 of the 1994 Lease in this context and points out that clause 3.12.1 does not positively require the Tenant to use the premises as a cinema; instead, it simply prohibits the Tenant from using the premises for any other purpose. He also draws support from the speech of Lord Goddard in *Cricklewood* where, in relation to a discussion about frustration, he states at [245] that:-

> "Now whatever be the true ground on which the doctrine is based, it is certain that it applies only where the foundation of the contract is destroyed so that performance or further performance is no longer possible. In the case of a lease, the foundation of the agreement in my opinion is that the landlord parts with his interest in the demised property for a term of years, which thereupon becomes vested in the tenant, in return for rent. So long as the interest remains in the tenant, there is no frustration though particular use may be prevented."

112. In the absence of any warranty as to the ability to use the premises for a particular purpose, Mr Trompeter submits that, in the light of this, any understanding as to how the premises are intended to be used cannot be fundamental to the basis of the contract but, in the words of Lord Toulson at [115] in *Barnes*, is merely "… an expectation which motivated a party to enter into a contract".

113. Mr Trompeter's second objection is linked to the first. He points out that, as I have already mentioned, in order for there to be a failure of basis, the failure must be total, referring by way of confirmation of this principle to the decision of Stadlen J in *Giedo van der Garde BV v Force India Formula One Team Limited* [2010] EWHC 2373

(QB) who quoted with approval [at 261] the statement in Goff & Jones *The Law of Restitution* 7th Edition at [19-009] that:-

> "The case law holds that a restitutionary claim, based on failure of consideration, will, therefore, succeed only if the failure is total."

114. Lord Toulson notes at [114] in *Barnes* that:-

> "There is a lively academic debate whether it is an accurate statement of law today that failure of consideration cannot found a claim in restitution or unjust enrichment unless the failure is total, but that point has not been fully argued and it is unnecessary to decide it in this case. Modern authorities show that the courts are prepared, where it reflects commercial reality, to treat consideration as severable."

115. It is, however, clear that, subject to the point about severability (which I shall come on to), as the law stands, there must be a total failure of basis. Mr Seitler does not challenge this. In this case, Mr Trompeter submits that, as the Tenant has had possession of the premises under the terms of the leases throughout the entire period, it has received part of the benefit which it has bargained for and so there is no total failure of basis, even if the periods for which the premises could not open are treated as severable.

116. In this context, Mr Trompeter referred to Stadlen J's summary in *Giedo* at [285], having reviewed various authorities, of the test to be applied, as follows:-

> "This analysis reinforces the central importance in the test of identifying the essential purpose of the contract. Thus, a contract may confer the right to receive and impose an obligation to provide a number of benefits. The test as to whether receipt of any one or more of those benefits is inconsistent with total failure of consideration is not whether they are large or small in the context of the entirety of the benefits to be conferred but whether they are the whole or part of the main benefit expected or bargained for or merely incidental or collateral thereto. It is no doubt for that reason that the High Court in *David Securities* and *Baltic Shipping* and the Court of Appeal in *Rowland v Divall* and *Rover International* held that the answer to that question is to be approached from the perspective of the payer rather than the payee."

117. The key question therefore is whether the benefit received by the payer is part of the main benefit which that person had bargained for. Mr Trompeter relied on a number of cases in support of his proposition that the Tenant had received part of the benefit

which it had bargained for notwithstanding the fact that it could not use the premises for the intended purpose.

118. The first case is *Hunt v Silk* [1804] 5 East 449. In that case, A agreed in consideration of £10 to let their house to B which A was to repair and execute a lease of within 10 days but B was to have immediate possession. B took possession and paid the £10 but A failed to make the repairs or execute the lease within the agreed period. It was held that the contract could not be rescinded and that B could not recover the £10 in an action for money had and received since, as a result of his occupation of the property, the parties could not be put back in the same position as they were before the contract was entered into and the consideration had not wholly failed.

119. In *Sutton v Temple* [1848] 12 M&W 52, A took a lease of land from B for grazing stock. The land was contaminated and could not be used for grazing. A defended a claim for rent on the basis that he had not had any beneficial use or enjoyment of the land. Lord Abinger CB (with whom the other judges agreed) concluded at [62] that:-

> "The general rule must therefore be, that where a man undertakes to pay a specific rent for a piece of land, he is obliged to pay that rent, whether it answers the purpose for which he took it or not."

120. In *Matthey v Curling* [1922] 2 AC 180, Mr Matthey took a 21 year lease of a house and grounds from Mr Curling. The military took possession of the premises during the First World War. Shortly before the end of the lease, the house was destroyed by fire whilst the military were still in occupation. Mr Curling claimed payment of the rent for the final quarter and damages for breach of repairing obligations. He succeeded in these claims. In relation to the claim for rent, Lord Atkinson observed at [232] that:-

> "I cannot find any case in which the rent reserved by a lease was apportioned simply because the lessee was deprived of the use and enjoyment of a portion of the demised premises, his title to that portion not being either assailed, displaced or weakened. On the contrary, the trend of the authorities is, I think, strongly against any such result."

121. The final case relied on by Mr Trompeter is *Cricklewood*. In that case, the Respondents granted a building lease to the Appellants. The Appellants covenanted to build a certain number of shops on the premises. On a claim for unpaid rent, the Appellants argued that their obligation to pay the rent had been discharged by

frustration as a result of wartime building restrictions preventing the shops from being built. In concluding that the lease had not been frustrated and that the rent remained payable, Lord Porter noted at [242] that:-

> "The rent is payable for the site and issues out of the land."

122. What Mr Trompeter takes from these cases is that the rent is an incident of the proprietary reversion held by the Landlord and that it remains payable even if the Tenant cannot use the premises for the intended purpose. The result of this, he says, is that what the Tenant has truly bargained for is the grant of a term of years. Given that the leases continue to subsist and the Tenant has possession of the premises, Mr Trompeter submits that it has received all or part of the benefit which it has bargained for.

123. In my view, there has in this case been no failure of basis. The reason for this is that, taking into account the terms of the leases, the use of the premises as a cinema is not (in the words of Lord Toulson) "fundamental to the basis" on which the parties entered into the leases.

124. In reaching this conclusion, I am conscious that the statements made by Lord Goddard in *Cricklewood* must now be read in the light of the subsequent decision of the House of Lords in *National Carriers Limited v. Panalpina (Northern) Limited* [1981] AC 675 (this case was not referred to by either party but was closely examined by Master Dagnall in *Cine-UK*). The question in both *Cricklewood* and *Panalpina* was whether a lease had come to an end as a result of frustration. No definitive ruling was given in *Cricklewood* as to whether the doctrine of frustration could apply to a lease. Lord Goddard, together with Lord Russell both thought that it could not whilst Viscount Simon LC and Lord Wright were of the view that it could. Lord Porter did not come down on either side, preferring to leave the point open. However, in *Panalpina,* it was decided that a lease could in principle be frustrated although it was accepted that the circumstances in which this would occur were likely to be very rare.

125. In the light of this, Lord Goddard's suggestion in *Cricklewood* that, at least in the context of frustration, the foundation of the lease is the vesting of a term of years in the tenant in return for rent carries rather less weight. Indeed, in *Panalpina* Lord

Wilberforce noted at [693H] that the application of frustration to the lease in question could in principle be justified in that case on the basis of:-

> "…removal of the foundation of the contract – viz. use as a warehouse."

126. I do not therefore accept that the vesting of a term of years in the Tenant excludes the possibility that the use of the premises as a cinema was the foundation of the leases in this case (or, to put it another way, that it was fundamental to the basis on which the parties entered into the leases). However, bearing in mind the principles derived from *Dargamo*, that question must be answered taking into account the specific terms of the leases and the allocation of risk between the parties.

127. I have already mentioned Lord Toulson's observation at [115] in *Barnes* that:-

> "Most contracts are entered into with intentions or expectations which may not be fulfilled, and the allocation of the risk of their non-fulfilment is a function of the contract."

128. The question here is whether the continued and uninterrupted lawful use of the premises as a cinema was fundamental to the basis on which the Tenant (or the Original Tenant, in the case of the 1994 Lease) entered into the leases or whether it was simply an expectation which motivated them to enter into the leases. In my judgment, it was the latter.

129. As Mr Seitler suggests, it is clear from the terms of the leases that the parties expected that the premises would be used as a cinema. Indeed, the Tenant is not permitted to use the premises for any other purpose as well as having a positive obligation to keep the premises open during certain trading hours where it is lawful to do so. No doubt, the main benefit which the Tenant expected to derive from the leases was its ability to use the premises as a cinema. Clearly, a state of affairs which may have been anticipated by the Tenant has failed to sustain itself in that, for a period of time, it has been unlawful to use the premises as a cinema.

130. However, there are of course other reasons why there may be periods of time for which the premises cannot be used as a cinema. Some of those circumstances are expressly provided for in the leases, specifically damage or destruction by any of the Insured Risks. The parties have dealt with these risks by passing the burden to the

Landlord, but on the basis that the Landlord takes out insurance against the relevant risks, the cost of which is then paid for by the Tenant.

131. Although not dealt with in the same level of detail, the leases do also address the possibility that the premises cannot lawfully be used as a cinema. As I have already mentioned, clause 5.5 specifically provides that the Landlord gives no warranty that the premises can lawfully be used for the Permitted Use. The risk that the premises cannot be lawfully used in this way has therefore been allocated (as anticipated might be the case by Lord Toulson in *Barnes*) by the terms of the leases to the Tenant. This conclusion is not, to my mind, overridden by the fact that the Tenant has covenanted not to use the premises for any purpose other than as a cinema. Rather, clause 5.5 emphasises that the risk that the premises cannot be so used is one that is borne by the Tenant.

132. The suggested failure of basis in this case therefore would both interfere with the agreed allocation of risk between the parties as well as being inconsistent with the terms of the leases.

133. Mr Seitler suggests that a finding of failure of basis is not inconsistent with the terms of the leases given that the demise in Clause 2 of the 1994 Lease is specifically in consideration of both the rent and the covenant not to use the premises for anything other than as a cinema. That may be so but, as I have explained, it would be inconsistent with the other provisions of the leases which I have highlighted.

134. In this context, I should also make it clear that the inconsistency in question does not relate to the obligation to pay the rent but to the other provisions of the leases which I have mentioned (in particular at clauses 5.2 and 5.5). Where the failure of basis results from a state of affairs which has ceased to exist, the decision in *Roxborough* (which was cited with apparent approval by Lord Toulson in *Barnes* at [109-114] and which, although described at [121] as "controversial" by Carr LJ in *Dargamo,* was not expressly disapproved of by her) demonstrates that the payment obligation will not, despite the Obligation Rule, of itself prevent a claim in unjust enrichment. The position is however different if, as in this case, giving effect to a claim in unjust enrichment would be inconsistent with other provisions of the contract.

135. As noted by Carr LJ in *Dargamo*, there has been a mixed reaction to the *Roxborough* decision. *Goff & Jones* for example criticises it at [3-26] as, in effect, amounting to a reallocation of risk between the parties. Clearly that is a matter which can be debated; but the criticism is not based on inconsistency with the payment obligation itself given that the payment obligation directly related to the state of affairs which had ceased to exist (the requirement for the seller to pay the relevant licence fee). Similarly, in this case, if it were accepted that the fundamental basis of the leases was the use of the premises as a cinema, the payment obligation would relate directly to that state of affairs and so a remedy which overrides that obligation could be justified if there were no conflict with other provisions of the leases and no interference with the allocation of risk between the parties.

136. Having said that, for the reasons I have given, the Tenant in my view has no real prospect of successfully arguing that the failure of the anticipated state of affairs is fundamental to the basis on which the parties entered into the leases.

137. Had I concluded that there was in this case a failure of basis in that the continued ability to use the premises as a cinema was fundamental to the basis on which the parties entered into the leases, it would in my judgment follow that there would (subject to point about severability which I shall come to) have been a total failure of basis despite the fact that the Tenant continued to have the possession of the premises.

138. The reason for this is that, as Stadlen J pointed out at [285] in *Giedo*, the question is whether any benefit is "part of the main benefit expected or bargained for" and that this question is to be approached from the perspective of the payer (in this case the Tenant). If the use of the premises as a cinema was indeed fundamental to the basis of the leases, it is clear that simply having possession of the premises but being unable to use them as a cinema would not provide the Tenant with any part of the essential bargain contracted for.

139. This conclusion is not, to my mind, affected by the authorities referred to by Mr Trompeter. Whilst they reflect the common law rule that rent continues to be payable notwithstanding the inability to use the premises for the intended purpose, with the exception of *Cricklewood*, they predate the development of the law in relation to unjust enrichment, as explained in *Fibrosa* and developed in subsequent cases such as

Barnes and *Giedo*, and so, understandably, do not address the question as to whether there was a total failure of consideration in the sense now understood in relation to unjust enrichment.

140. As far as *Cricklewood* itself is concerned, I have already mentioned that the case related to the question as to whether a lease could be frustrated and that no firm conclusion was reached in that case. Lord Porter in particular did not come down on one side or the other. In the light of the decision in *Panalpina*, his comments must be treated with some caution even in the context of the requirements for frustration of a lease to occur. These cases are therefore of limited assistance in determining whether the Tenant (in this case) has received part of the main benefit which it bargained for.

141. What those cases do however support is the proposition that there is a longstanding principle that an inability of a tenant to use premises for the purposes intended at the time the lease was granted will not provide a defence to a claim for the payment of rent. In my view, this indirectly supports a conclusion that the default position is that, in the case of a lease, an inability to use premises for the intended purpose is unlikely to constitute a failure of basis as it may be relevant to the presumed allocation of risk between the parties. However, there can be no general rule. Each case will depend on its own facts.

142. Mr Trompeter made the additional point that the Tenant continued to enjoy the services in respect of which the insurance rent and service charges are payable. He also suggested that the Tenant had received some benefit as a result of being able to store equipment at the premises whilst it was closed.

143. As far as the latter point is concerned, it is clear that the Tenant was not using the premises for storage of anything other than the equipment which was held at the premises in the normal course of its use as a cinema and so was not storage, and did not provide a benefit, in any real sense. Whilst the services have no doubt provided some benefit to the Tenant in keeping the premises secure and in good order, they cannot to my mind be separated from the ability to use the premises as a cinema. They are more in the nature of incidental or collateral benefits. In both cases therefore, these would not in my view prevent there from being a total failure of basis

had I reached a different conclusion on the question as to whether there had been a failure of basis in the first place.

Are the leases severable?

144. Given my conclusion that there was in this case no failure of basis, I do not strictly speaking need to go on and consider whether there is a total failure of basis in relation to a severable part of the leases. However, given that the point was argued before me, I will address this issue briefly.

145. Based on the authorities I have already mentioned (in particular *Fibrosa* and *Barnes*), it is clear that a failure of basis, which is not a total failure in the context of the agreement as a whole, can give rise to a claim in unjust enrichment if the failure in question can be attributed to a severable part of the agreement and so results in a total failure of basis in respect of that severable part.

146. Lord Toulson in *Barnes* refers in particular to the decision of the High Court of Australia in *Roxborough*. In that case, Rothmans sold tobacco products on a wholesale basis to Roxborough. Under New South Wales law, a licence fee (effectively tax) was payable in respect of the sale of such products. The agreement between Rothmans and Roxborough provided for two parts to the consideration, the first part being the actual cost of the goods and the second part being an amount equal to the licence fee. The effect of this was that, although the licence fee was payable by Rothmans, the economic cost was born by Roxborough.

147. It was subsequently determined that the provisions of New South Wales law levying the licence fee were invalid. Roxborough brought a claim against Rothmans to recover the amount of the payments it had made relating to the licence fee on the basis of failure of consideration. By a majority, the High Court of Australia allowed the claim on the basis that, given the terms of the agreement (which specifically provided for two separate amounts to be paid) the obligation to pay the amounts representing the licence fee could be severed from the obligation to pay the amounts representing the cost of the tobacco product. There was therefore a total failure of consideration in relation to the payments representing the licence fees.

148. This is however rather different to the present situation where there was a grant of a lease of premises to be used as a cinema in return for an annual rent to be paid in quarterly instalments. Mr Seitler placed heavy reliance on another Australian decision, that of the New South Wales Supreme Court in *Ocelota Limited v Water Administration Ministerial Corporation* [2000] NSWSC 370.

149. In that case, the plaintiffs granted a two year lease to the second defendant at an annual rent of $3m, payable in two equal instalments each year. The lease contained a provision allowing the landlord to terminate the lease if a named individual ceased to be employed by the tenant. The condition was satisfied and the landlord terminated the lease. As part of the proceedings, the tenant brought a counterclaim against the landlord seeking restitution of the rent it had paid in advance representing the period after the termination of the lease. Based on the terms of the lease, the judge decided at [79] that:-

> "The intention as disclosed by the lease is that … the consideration to be received by the lessee is severable by reference to the period of occupation; so that there was a total failure of consideration at least in relation to 83 days out of the 183 days in respect of which the $1.5m was paid. I do not think that such an interpretation of this lease is inconsistent with *Ellis v Rowbotham* and the other cases referred to, which did not address questions of severability of consideration under the particular leases being dealt with and consequent failure of consideration."

150. Mr Trompeter however refers to two subsequent English decisions which have declined to follow the reasoning in *Ocelota*. The first is *PCE Investors Limited v Cancer Research UK* [2012] EWHC 884 (Ch), a decision of Peter Smith J. The case related to the exercise by a tenant of a break clause in an underlease. One condition to the exercise of the break clause was that the tenant should have paid all rent due in full. However, the tenant only paid rent on a proportionate basis up to the date the break was to take effect. The judge held that, as a result of this, the condition for the exercise of the break had not been satisfied and that the underlease continued. In relation to *Ocelota*, he said the following at [49]:-

> "It is not appropriate to separate out parts of the obligation in the Underlease and say that there is a total failure of consideration merely because the lease had been terminated in future as regards the rent that was payable in advance for that period. The Underlease contains a bundle of rights and obligations on both sides and as part of that in my

> view the Tenant agreed to pay rent in advance as part of the overall consideration for obtaining the Underlease from the Landlord. Merely because the provisions obligate him to pay rent in advance even after the Termination Date does not mean that there is a failure of consideration as regards the payment merely because beneficial use of the premises is not taken. One looks at the overall package in the Underlease and the Tenant obtained consideration in the form of the entirety of the Underlease. In my view therefore the premise of Hodgson CJ's judgment is wrong and I would not accept it."

151. This approach was followed at first instance in *Marks and Spencer PLC v BNP Paribas Securities Services Trust Company (Jersey) Limited* [2013] EWHC 1279 (Ch). Again, the case was dealing with a tenant's break clause. In that case, the tenant had paid the rent for the full quarter and brought the claim to recover a proportionate part of the rent which had been paid in advance and which related to the period after the termination of the lease. Morgan J found in favour of the tenant on the basis of an implied term (which generated an appeal, ultimately to the Supreme Court). However, in relation to failure of consideration, the judge concluded that it was not possible to apportion the rent so that there was a total failure of consideration in relation to the period after the termination of the lease. In relation to *Ocelota*, Morgan J concluded at [46] that:-

> "I would not apply the reasoning in Ocelota to the present case. In any event, the circumstances in Ocelota were quite different from the present case. In Ocelota, the landlord unilaterally took back the premises from the tenant where there was no fault on the part of the lessee. In the present case, the lessor was perfectly willing to allow the lessee to enjoy the possession of the premises from 24 January 2012 until the end of the term but the lessee chose to give up that right. That may or may not be a valid ground of distinction but, in any event, I do not find the decision in Ocelota persuasive in the present context."

152. Mr Seitler submits that the distinction identified by Morgan J is indeed a valid one and that this case is closer to the situation in *Ocelota* than that in *PCE Investors* or *Marks & Spencer* in that the failure of basis has arisen through no fault or action on the part of the Tenant. This, he suggests, is very different to a situation where the tenant has voluntarily terminated the lease.

153. I do not accept that, in determining whether rent can be apportioned, there is a significant distinction between a situation where the tenant exercises a break or whether the break is triggered by the landlord.

154. The underlying reasoning in *PCE Investors* and in *Marks and Spencer* is that the rent is paid in respect of a bundle of rights and obligations contained in the lease. The rent payable in advance relates to all of those rights and obligations and so there is no failure of consideration just because there is no beneficial enjoyment of the premises after the date of termination (see *PCE Investors* at [49]). The lack of any distinction between a break exercised by a tenant or a landlord is confirmed by the comments of the Court of Appeal in *Jervis v Pillar Denton* [2014] EWCA Civ 180 at [7].

155. On this basis, *Ocelota* does not provide any assistance to the Defendants. However, had it been established in this case that a failure of basis had occurred, the position is, in my view, very different to the question as to whether rent can be apportioned in connection with the exercise of a break clause (whether by the Landlord or by the Tenant).

156. The reason for this is that the failure in question is the failure of a state of affairs which (contrary to my findings above) is fundamental to the basis on which the parties entered into the leases (the ability to use the premises as a cinema) to sustain itself. The failure does not relate to the performance by either party of any obligations under the leases or their ability to exercise rights or receive benefits under the terms of the leases. It is what Lord Toulson in *Barnes* referred to at [109] as "the failure of a non-promissory … state of affairs". The Tenant has not received any of what it bargained for. In such a case, there seems to me to be no reason in principle why the periods during which the premises could not be used as a cinema should not be treated as a severable part of the leases and the rent apportioned accordingly.

157. Mr Seitler notes that the lease itself provides in clause 2 that, although the rent is payable as a yearly amount, it is payable "proportionately for a part of the year". Mr Trompeter submits that this is only to take account of the possibility of the lease starting or ending on a day other than the quarterly payment dates.

158. However, it is apparent that there are other circumstances in which it may be necessary to apportion the rent. The provisions which I have already discussed in relation to the suspension of rent where the premises are damaged by an Insured Risk (clause 5.2) are one example of this, suspending the obligation to pay rent and service charges on the date upon which the damage occurs until the premises are once again

fit for use. It is clear that an apportionment of the rent and service charge would be needed to give effect to this. There is equally no reason why an apportionment could not be made to give effect to the consequences of a failure of basis which prevents the premises from being used as a cinema for a specific period of time.

159. Had it been necessary to do so, I would therefore have concluded that the Defendants have a realistic prospect of success in relation to this part of their defence.

Failure of basis as a defence to a contractual claim

160. One aspect of the inter-relationship of unjust enrichment and contract is the impact of the existence of a continuing contract on the assessment as to whether or not there is a failure of basis in the first place. I have addressed this in coming to my conclusion that, in this case, there was no failure of basis.

161. The second aspect is whether, if there is in principle a failure of basis which would support a claim in unjust enrichment, this can provide a defence to a contractual claim for money which would otherwise be due under the terms of the contract. Again, this is an issue which I do not need to address given my decision that there has been no failure of basis. I will however summarise my conclusions.

162. Surprisingly, Mr Seitler did not make any detailed submissions in relation to this point given that it is central to the defence put forward by the Defendants. He simply asserted that, if there is a failure of basis which would support a claim in unjust enrichment, it would make no commercial sense to require the payer to make the payment and then commence a claim for a return of the payment in unjust enrichment.

163. Mr Seitler provides no authority for his submission that failure of basis can provide a defence to a contractual claim as opposed to founding a claim in restitution on the basis in unjust enrichment. No doubt the reason for this is that there are no such authorities. This is perhaps the key area where he invites the court to develop the existing law.

164. For his part, Mr Trompeter says that failure of basis is a principle which is only relevant to restitution and not the law of contract. Again, he does not rely on any specific authority.

165. I have already mentioned the view of the authors of *Goff & Jones* (supported by Carr LJ in *Dargamo*) that the relationship between liability in contract and liability in unjust enrichment is problematic, that the underlying rationale for claims differs and that different policy considerations arise.

166. In a discussion of the fundamental principles applicable to contract law, the authors of *Chitty* identify at [1-032, 1-041] as key principles the freedom the parties have to agree the terms of a contract, the binding force of the contract and the fact that the general approach of the courts in providing remedies is to respect the terms of a contract either by compelling performance or by putting the parties in the position they would have been in had the contract been performed.

167. There are of course situations where the law considers it inappropriate to hold the parties to the strict terms of their contract. Frustration is a good example of this. However, these situations are very much exceptions to the general rule given the potential consequences for the parties (see for example *Chitty* at [23-003] in relation to the "narrow confines" within which the doctrine of frustration operates). As Lord Hailsham of St Marylebone observed at [689C-D] in *Panalpina*:-

> "… the effect of frustration, had it been applicable, would have been to throw the whole burden of interruption for 20 months on the Landlord, deprived as he would be of all his rent and imposed as he would have upon his shoulders the whole danger of destruction by fire and the burden of reletting after the interruptions. As it is … the tenant has to pay the entire rent during the period of interruption without any part of the premises being usable at all, together with the burden (such as it may be) of the performance of the other tenant's covenants which include covenants to insure and repair. These are no light matters."

168. Allowing failure of basis as a self-standing concept to provide a defence to a contractual claim would be tantamount to extending the doctrine of frustration so as to allow obligations under a contract to be suspended as a result of what might be termed temporary or partial frustration. There is of course no such principle as the law currently stands. It is clear that frustration brings a contract to an end and discharges the parties from all of their future obligations. Indeed, the possibility of temporary frustration was a significant issue in the *Cine-UK* case decided by Master Dagnall and was rejected by him. It is perhaps telling that the Defendants in this case do not put forward partial or temporary frustration as a defence.

169. Given the distinction between the law of unjust enrichment and the law of contract and bearing in mind the fundamental principles applicable to the law of contract and the approach the courts have taken in providing contractual remedies, it would not in my view be right as a matter of principle for the courts to extend the reach of failure of basis, a concept which might give rise to a claim in unjust enrichment, so that it provides a direct defence to a contractual claim in circumstances where the contract remains in existence.

170. In addition, allowing a defence or failure of basis in such a situation would, in my view, run the risk of giving rise to significant unfairness or injustice. In circumstances where neither party is at fault, the court would arbitrarily allocate the entire loss to one party or the other. However, it would be doing so against the background of a contract which continues to exist and where both parties have continuing rights and obligations under the contract. In the present case, for example, the Landlord would not have possession of the premises and would have an ongoing obligation to provide services in relation to the premises. In these circumstances, it seems to me that it would not be right, as a matter of contract law, for the court to intervene by removing one particular obligation of one of the parties.

171. I accept that there is some inelegance in allowing the possibility of a benefit to be recovered on the basis of unjust enrichment whilst not providing any defence to a contractual claim for the payment of the benefit in the first place. However, this does perhaps come down to a matter of practicalities and pleadings.

172. It may well be that the pragmatic answer to this is that, where failure of basis is put forward as a defence to a contractual claim, this should be pleaded by way of counterclaim in unjust enrichment and set-off, an approach apparently advocated by the court of appeal in *Universal Advance Technology Limited v Lloyds Bank Plc* [2016] EWCA Civ 933. However, in the circumstances, I express no concluded view on this.

173. This does however demonstrate one of the problems in respect of the inter-relationship between the law of contract on the one hand and unjust enrichment on the other. It provides a good reason why the courts should continue to keep a tight rein over the ability to bring a claim in unjust enrichment where there is a subsisting

contract, representing, as it does, a potential exception to the Obligation Rule referred to by Carr LJ in *Dargamo* in circumstances where the failure of basis in question results from the failure of a state of affairs to maintain itself.

Set-off

174. As I have already mentioned, the Tenant makes a counterclaim in respect of matters relating to insurance. The Landlord accepts for the purposes of the summary judgment application that the counterclaim has a value of £621,000 which is the maximum the Tenant says it is entitled to recover.

175. There are two issues which need to be determined:-

(1) Whether any right of set-off is excluded by the terms of the Lease; and

(2) If not, whether it is only the Tenant (as the person who is making the counterclaim) who can benefit from the set-off or whether the result of the set-off is that an equivalent amount of the rent and service charge is not in fact due so that, indirectly, the claim against the Original Tenant and the Guarantor is reduced as well.

176. In relation to the first point, Mr Trompeter relies on clause 3.1 of the Lease which requires the rent to be paid "without any deduction whatsoever".

177. Whilst acknowledging that the Court of Appeal in *Connaught Ltd v Indoor Leisure Ltd* [1994] 1 WLR 501 concluded at [510C] that, in the context of a lease, the expression "without any deduction" was insufficient to exclude an equitable right of set-off, Mr Trompeter refers to the observation of Waite LJ at [510A] that:-

> "The word 'deduction' has never achieved the status of a terms of art, but is an expression employed, both in everyday speech and in the language of the courts, at one moment in its strict sense to describe the ordinary process of subtraction with which it is grammatically associated, and at other moments in a broader sense to describe the result which follows when one claim is set against another and a balance is struck. It is thus a useful and a flexible word, but heavily dependent upon the context in which it is used for an accurate understanding of the sense in which it is being employed. If the context happens to be one that affords no guidance as to its intended meaning, it becomes an expression that necessarily suffers from ambiguity."

178. Mr Trompeter submits that it is clear from this that the word "deduction" can have a broader meaning and can therefore, in the right context, include a right of set-off. In this case, he suggests that the inclusion of the word "whatsoever" leads to this result.

179. In support of this, Mr Trompeter refers to the decision of HHJ Thornton QC in *Valeo Materiaux De Frictions v VTL Automotive Ltd* [2005] EWHC 1855 TCC. In that case, the sums in question were to be paid "in full without any deductions whatsoever". The Judge concluded at [57] that this expression:-

> "is in context, as wide as it could be and clearly cover set-off against an instalment of the consideration that has fallen due."

180. Mr Seitler on the other hand submits that the phase "any deduction whatsoever" is not, following *Connaught*, clear enough to exclude equitable right of set-off. In particular, he notes that the Court of Appeal's conclusion in *Connaught* was heavily influenced by the decision of the New Zealand Court of Appeal in *Grant v NZMC Ltd* [1989] 1 NZLR 8 where the clause in question required the rent to be paid "free and clear of exchange or any deduction whatsoever".

181. Mr Seitler also draws attention to the decision of the Court of Appeal in *Edlington Properties Ltd v JH Fenner & Co* [2006] 1 WLR 1 583. That case also dealt with a lease. The rent was to be paid "without deduction or abatement". Neuberger LJ noted at [71] that the words "without deduction" had been held to exclude a right of set-off in purely commercial contracts (referring to *BOC Group PLC v Centeon LLC* [1999] 1 All ER (Comm) 970 at [979-980]) but nonetheless followed the reasoning in *Connaught*, confirming at [75] that:-

> "…the right of set-off against rent in a lease is not to be excluded except by words which cannot sensibly be interpreted as not extending to set-off. In my judgment the effect of the decision of the Court in the *Connaught Restaurants Ltd* case was almost this: that at least in the absence of any clear indication to the contrary in the lease, a covenant or any provision relating to the payment of rent will not exclude the tenant's normal right to claim equitable set-off, save where the word 'set-off' is specifically used."

182. As Mr Seitler pointed out, *Edlington* was decided after *Valeo* (although that case was not referred to by the Court of Appeal). *Valeo* was also a case dealing with a commercial contract rather than a lease.

183. In the light of the authority in *Connaught* and *Edlington*, there is no doubt in my mind that the words "without any deduction whatsoever" are not sufficiently clear to exclude equitable rights of set off. Whilst the word "whatsoever" did not appear in the relevant clause in *Connaught*, it was part of the relevant clause in *Grant*, on which that decision was based, and Waite LJ specifically confirmed at [510H] that the approach in *Grant* was correct.

184. In any event, if it is accepted (as it must be given the authorities) that the word "deduction" is insufficient to exclude rights of set off in the context of a lease, the addition of the word "whatsoever" does not in my view provide sufficient clarity to change the position. It certainly does not convert the words into ones which "cannot sensibly be interpreted as not extending to set off" (see *Edlington* at [75]).

185. This means that, certainly as far as the Tenant is concerned, any judgment against it must be reduced by the amount of the counterclaim. In relation to this, Mr Seitler suggested that the figure of £621,000 (which is based on the Defendants' expert's report) could increase once the Landlord has made full disclosure of documents which have been requested but which have not yet been provided.

186. This is put forward as a reason why summary judgment should not be given and why all of the issues in this case should proceed to trial rather than just the issues relating to the counterclaim in respect of insurance. I do not however accept this. There has been no suggestion by the Defendants prior to the hearing that the figure of £621,000 is anything other than the maximum amount which the Tenant might recover in respect of this part of its counterclaim. That position is reflected in Mr Seitler's skeleton argument which confirms that the counterclaim has a value of £621,000.

187. I also accept Mr Trompeter's submission that the figure of £621,000, referred to by the Defendants' expert is very much based on assumptions which are most favourable to the Defendants. As Mr Seitler says in his skeleton argument, the expert's conclusion is that the Tenant "may have been overcharged by as much as £621,000". There was no suggestion that the claim might exceed this amount once any further documentation has been reviewed.

188. The next question which arises as to whether the ability of the Tenant to set off its claim against the amount due is of any assistance to the Original Tenant and the Guarantor who, themselves, have no counterclaim against the Landlord.

189. In relation to this, Mr Seitler's case is that the effect of the set off is that an equivalent amount of the rent/service charge never becomes due. On this basis, he submits that there can be no claim in respect of this amount against the Original Tenant or against the Guarantor. This, he says, follows from the fact that the lease permits set off although he does not offer any authority for this result.

190. Mr Trompeter's response to this is that a right of set off is a personal right and is therefore only available to the person who has the claim. In support of this, he refers to the decision of Neuberger LJ in *Edlington* in which he states at [20] that:-

> "The very nature of an equitable set off is that it is personal in nature, in that it is a claim raised against the claimant which impeaches his right to sue and does not run against third parties".

191. The position in that case was however a little different. The reversion had been transferred to the claimant who was now making a claim for unpaid rent. The tenant had a claim for damages against a predecessor in title of the claimant. The conclusion was that the tenant could not set off their claim against the original landlord against a claim by the new landlord for rent falling due after the transfer. This therefore says nothing about the question as to whether, where set off is available, the effect is to prevent the rent from ever becoming due.

192. Mr Trompeter also refers to the decision of the Court of Appeal in *Muscat v Smith* [2003] 1 WLR 2853. Buxton LJ explained the background to equitable set off and at [39], in particular, that the question to be asked is:-

> "Whether the cross claim is sufficiently connected with the claim as to make it unfair that the Defendant should be obliged to pay the claim without deduction."

193. It seems to me that the answer to this question as far as the Original Tenant is concerned is straightforward. There is no doubt that the set off available as a result of the counterclaim is a personal right of the Tenant. It extinguishes the Landlord's claim against the Tenant to the extent of the counterclaim (see *Muscat* at [44]).

However, the Landlord's claim against the Original Tenant is a separate claim. It is in no way dependent upon the claim against the Tenant. There is no sufficient connection between the claim by the Landlord against the Original Tenant and the counterclaim by the Tenant. There cannot therefore be any reduction in the claim against the Original Tenant as a result of the Tenant's right of set off.

194. The position of the Guarantor is more complicated as the Guarantor guarantees the obligations of the Original Tenant under the 1994 Lease and of the Tenant under the 2014 Lease. There is therefore no doubt that the Guarantor is liable for the rent in respect of the 1994 Lease and for the service charges under the 1994 Lease (as the Original Tenant is liable for these sums) without any reduction in respect of the Tenant's right of set off.

195. However, on the basis that, as explained in *Muscat* [at 44], the effect of equitable set off is "to extinguish a claim and prevent its original establishment, rather than to provide a sum to be balanced off against the claim once established" it is not at all clear that the amount of any claim against the Guarantor cannot be reduced by the set off to the extent that the counterclaim is set off against any amount due under the 2014 Lease (in respect of which the Original Tenant has no liability) as opposed to the 1994 Lease. The Defendants in my view, do have a realistic prospect of success in relation to this point.

196. One of the problems here is that the amounts claimed by way of service charges and insurance rent have not been apportioned between the 2014 Lease and the 1994 Lease. This is the reason why the summary judgment claim against the Original Tenant only relates to the rent due under the 1994 Lease and does not include any insurance rent or service charges due under the 1994 Lease. The amounts claimed in respect of insurance rent and service charges exceed £621,000.

197. No suggestion has been made as to which part of the Landlord's claim is reduced by the equitable set off. In these circumstances, it seems to me that the only fair way of attributing the set off is to deduct it proportionately from each element of the claim. To the extent that this reduces the amount of the claim in respect of the rent under the 1994 Lease, this will not reduce the liability of the Guarantor. However, to the extent that it reduces the claim for insurance rent and service charges, this will reduce the

amount of the claim against the Guarantor by the same amount given the Landlord's inability (at least at present) to apportion the service charge between the amounts due under the 1994 Lease and the 2014 Lease.

198. I note that Clause 6.5 of the 1994 Lease provides that:-

> "Any sums which may not otherwise be recoverable by the Landlord from the Guarantor by way of guarantee by reason of any legal limitation, immunity, disability or incapacity or other circumstances relating to the Tenant (and whether or not known to the Landlord) shall nevertheless be recoverable from the Guarantor as principal debtor in respect thereof."

199. It is possible that the Tenant's right of set off is a "legal limitation" which reduces the amount recoverable by the Landlord from the Tenant and therefore reduces the amount that can be recovered by the Landlord from the Guarantor. If so, the effect of clause 6.5 would be that this amount can nonetheless be recovered from the Guarantor as principal debtor. However, Mr Trompeter has made no submissions based on this clause and so it cannot provide a basis for obtaining summary judgment in relation to the full amount claimed against the Guarantor.

Other Compelling Reasons to go to Trial

200. The only reasons put forward as compelling reasons why the claims which are the subject of the summary judgment application should go to trial are those which I have already rejected in refusing to adjourn the hearing of the summary judgment application (the appeal process in relation to the *Cine-UK* case and the proposed introduction by the UK Government of a binding arbitration process in respect of rent due in the circumstances arising in this case). For the reasons set out in my judgment in respect of the adjournment application, these are not compelling reasons why the relevant issues should go to trial.

201. The only other reason put forward by Mr Seitler is the possible uncertainty as to the amount of the counterclaim in respect of insurance matters. However, for the reasons I have given, I do not accept that there is any realistic prospect of the Tenant recovering more than £621,000 in respect of this aspect of its counterclaim. More generally, the fact that there may need to be a trial in respect of the insurance issues is not a compelling reason for the matters which are the subject of this summary

judgment application to proceed to trial. Clearly, any trial will be much shorter if the only issues to be dealt with are those which relate to insurance. There is no overlap in terms of factual issues which need to be determined between the insurance aspects and the issues which are the subject of the summary judgment application.

Conclusion

202. The Defendants have no realistic prospect of defending the claims in respect of which the Landlord seeks summary judgment and there is no other compelling reason for these issues to proceed to trial. The claims against the Tenant and the Guarantor must however, for the purposes of the summary judgment application, take account of the Tenant's counterclaim.

203. Summary judgment is therefore given in favour of the Landlord in respect of its claims against each of the Defendants subject to a reduction of £621,000 in respect of the claim against the Tenant and a proportionate part of that amount (to be calculated as described at [197] above) in respect of the claim against the Guarantor. I will leave it to the parties to agree the calculation of the precise amounts to be included in the order which will be made as a consequence of this judgment.