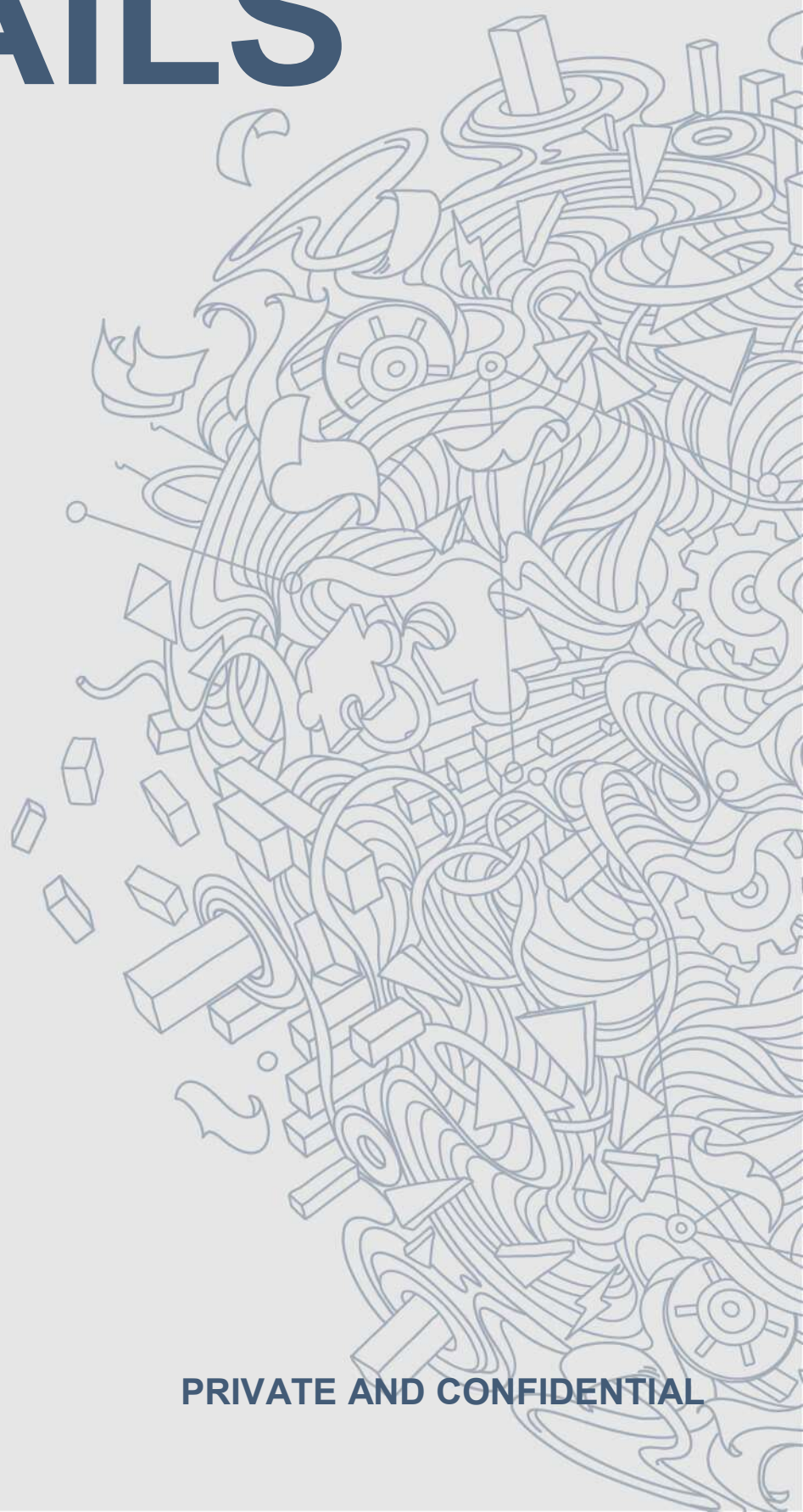
CASE DETAILS

April 2021: Bank of New York (Mellon) International Limited and Cine – UK Limited



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PRIVATE AND CONFIDENTIAL

CASE DETAILS

The court noted that the leases contained largely standard-form terms which had never been construed in the way suggested by the tenants. Reference was made to:

- **the Covid-19 pandemic and lockdown:** although unprecedented, it could hardly be said to be unforeseeable (noting the SARS epidemic two decades previously);
- **landlord insurance:** that it was not therefore surprising that landlords had prudently insured against such matters; and
- **tenant insurance:** that it had been open to tenants to take out business interruption (BI) insurance. These observations disposed of any arguments based upon construction and interpretation or the need for an implied term.

INSURANCE BASED ARGUMENT

It was noted a number of times that the landlords' concern was to insure its "bricks and mortar", leaving it to the tenants to insure what they considered to be important. Although the landlords' policy did include insurance against loss of rent in the current circumstances, whether or not there was any physical damage to the premises, there was no sense in which the rent had been "lost". This was because the rent cesser clauses themselves required physical damage or destruction to the premises if they were to operate, and there had been no such damage.

FRUSTRATION

The legal doctrine of frustration is set at a high bar. A contract will be frustrated if an unforeseen event occurs that renders it impossible to perform an obligation or the obligation is radically different to that originally envisaged when the contract was made. Covid-19 has meant that any period of non-occupation is only temporary. Tenants have introduced workarounds through increasing agile working and online offerings. There are no reported cases in England where a lease has been held to be frustrated. This is largely because land demised by a lease will nearly always be capable of enjoyment in some form, even if this becomes very difficult or impossible for a period of time (e.g. a 20 months' closure caused by a local authority was not sufficient to frustrate a 10 year lease).

The court noted that there was no legal authority for the temporary frustration of the contract argument. While accepting that the pandemic and the lockdown regulations brought in to deal with it were properly termed "unprecedented", and would, or at least could, qualify as a supervening event, the Master could not see the reasonably expected period of closures as ever having been any greater than 18 months. Each of the leases in question had at least a year left to run from that point, with 1954 Act protection.

PROBLEMS. POSSIBILITIES.
COMPLEXITY. CLARITY.
OBSTACLES. OPPORTUNITIES.
THE DIFFERENCE IS IMAGINATION.

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