

POUNDLAND LIMITED V TOPLAIN LIMITED 5 JULY 2021

# Post-Pandemic Business Tenancy Renewal Terms

This is yet another recent County Court Judgment as to renewal of a business tenancy. It seems tenants are now keen to take renewals to Trial to not only seek lower rents but better terms generally.

This case relates to Poundland's premises at 18-22 King St, Twickenham where the parties agreed a new rent of £130,000 per annum for a new 5 year lease without a break clause shortly before the Trial. But they did not agree all the other terms of the lease as Poundland wanted to change some of the historic terms in light of the pandemic and generally.

The case was heard by a District Judge whose findings will not be binding but they are interesting as set out below.



## OVERRIDING PRINCIPLE

It is not the purpose of the Landlord and Tenant Act 1954 to ordinarily permit amendments to leases on renewal which would result in a change to the respective risks, obligations and benefits carried and enjoyed, nor to insulate the tenant against the commercial and trading risks they may face, in a way that would either prejudice the landlord or interfere with their long term interests.

New Term Sought by Tenant	Reason Given	Term granted or refused	Reason for Decision
COVID-clause, which would have reduced the rent and service charge by 50% during a "use prevention measure", a phrase defined to include lockdowns due to COVID-19.	To modernise the lease by reacting to a lockdown as experienced during the COVID-19 pandemic. If the tenant was unable to trade, then that would present a risk not only to the tenant but also the landlord if the tenant is unable to pay the rent. The tenant relied on the recent decision in <i>WH Smith Retail Holdings Ltd v Commerz Real Investmentgesellschaft MBH</i> (25 March 2021).	Refused	Following the guidance in <i>O'May v City of London Real Property Co Ltd</i> , it would not be fair and reasonable "to impose on the landlord a sharing of the risk in circumstances over which the [landlord] would have no control whilst the [tenant] may have some by reference to reliefs or schemes that might be available to them by the government".

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			<p>In relation to the service charge, the judge reached the same conclusion, particularly bearing in mind that any service charge due will be in relation to costs and expenses for which the landlord may well still be liable.</p> <p>In relation to <i>WH Smith</i>, the parties there had already agreed such a provision and the court was simply determining the mechanics in which it would operate rather than expressing any view as to the substantive clause itself.</p>
<p>During lockdown the tenant will be relieved from complying with the insurer's requirements.</p>	<p>An inability to access the property during any lockdown was given as a reason as to why this should be granted.</p>	<p>Refused</p>	<p>It was not a good reason to relieve all the burdens imposed by insurers during a lockdown period where the conditions of any future lockdown period (should it arise) are completely unknown and the risks and obligations being relieved potentially irrelevant to the fact of a lockdown itself and which may well put the entirety of the insurance cover at risk.</p> <p>The Judge went on to say though that it may be appropriate to exclude compliance where that would breach any government legislation in relation to a future lockdown period, or otherwise be impossible. He concluded that, in any event, it might be thought that general principles may well provide the tenant appropriate protection if such circumstances were to exist.</p>



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The tenant sought to remove an existing clause that required the landlord's consent to be obtained before making any proposal to alter the rateable value of the property, such approval not to be unreasonably withheld or delayed.	As occupier the tenant benefits from any available relief and so their entitlement to any such benefit should not be controlled by the landlord whose position would not in any event be prejudiced as a decision would be made by the independent valuation office agency.	Refused	The provisions of the existing clause (as originally agreed between the parties) protects the balance of the parties' respective interests and the provision that consent cannot be unreasonably withheld did not amount to undefined control.
The existing condition relating to an assignor entering into an authorised guarantee agreement should only take effect "if reasonably required".	Gives express effect to section 19 (1a) of the Landlord and Tenant Act 1927 and section 16 (3) (b) of the Landlord and Tenant (Covenants) Act 1995. The tenant relied on the case of <i>Wallis Fashion Group Limited v CGU Life Assurance Ltd.</i>	Refused	Section 19 of the 1927 Act itself imposes the reasonableness requirement as the lease contains a tenant's covenant not to assign without the landlord's consent. <i>Wallis</i> was dealing with a position where the original lease predated the legislative change, which was not the case in this instance.
Suspensions of a right to forfeit during a lockdown period.		Refused	This would significantly alter the existing commercial balance between the parties. Imposing this proviso transferred or shared that tenant's risk during a lockdown period in circumstances where any government or central assistance that might be available would be available to the tenant and not the landlord. Clearly, there is a moratorium anyway at present re either forfeiture or levying distress for rent.

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Insertion of a MEES Clause, confirming that the landlord, if so required by the regulations, would meet the costs of any works to bring the property up to the relevant efficiency standard.	To ensure the landlord is contractually liable for such costs.	Granted	Nothing in the MEES Regulations interferes with any rights or obligations imposed as a consequence of entering into a lease nor would a breach of the Regulations itself affect enforcement of any such rights or obligations. So, if a situation arose where the tenant was in breach of a term of the lease the landlord could (all other things being equal) seek to enforce against that breach even though there may be a failure to comply with the MEES Regulations. Adding clarity against that background to the responsibility for compliance was appropriate and reasonable.
Payment in arrears (agreed to be monthly between the parties).	Reflects the tenant's standard position across the portfolio.	Refused	Does not fall within a proper exercise of discretion as suggested by <i>O'May</i> . The tenant's cash flow is a matter entirely for the tenant and the tenant's portfolio position was not a relevant circumstance. To recast the lease in a way which varied that responsibility, to share a commercial risk that ought properly to rest with the tenant, would be to redraw the parties' respective burdens in a way that would not be fair and reasonable.
Service charge cap of 10% of the annual rent in any year.	The certainty this will bring would allow the tenant to better manage their cashflow not least by avoiding major works being undertaken shortly before term end with the tenant then being liable for payment of a large service charge bill.	Refused	The current lease only allows a fair and reasonable of the "Annual Expenditure" which itself is defined by reference to "reasonable" and "reasonableness". This was sufficient. To introduce an artificial cap could affect the position the parties negotiated when agreeing the current terms.

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**JONATHAN ROSS**

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**Partner**

Property Litigation

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T: +44 (0)20 7863 8388

M: +44 (0)7881 826 158

E: [jonathan.ross@forsters.co.uk](mailto:jonathan.ross@forsters.co.uk)

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**ANNA MULLINS**

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**Senior Associate**

Property Litigation

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T: +44 (0)20 7863 8320

M: +44 (0)7917 574 097

E: [anna.mullins@forsters.co.uk](mailto:anna.mullins@forsters.co.uk)

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