IN THE NOTTINGHAM COUNTY COURT — No. E00DE178

60 Canal Street
Nottingham
NG1 7EJ

Friday, 22 October 2021

Before:

HER HONOUR JUDGE FINE

B E T W E E N :

W (No. 3) GP (NOMINEE A) LTD
& W (No.3) GP (NOMINEE B) LTD — Claimants

- and -

J D SPORTS FASHION PLC — Defendants

MR P. RAINEY QC and MR FAIN (instructed by Mishcon de Reya LLP) appeared on behalf of the Claimants

MR G. COWEN QC and MR RANSON (instructed by DLA Piper UK LLP) appeared on behalf of the Defendant.

J U D G M E N T

JUDGE FINE:

INTRODUCTION

1 The matter before the court is an unopposed lease renewal application by the claimants, the first claimant being W (No. 3) GP (Nominee A) Ltd and the second claimant being W (No. 3) GP (Nominee B) Ltd, as landlords in which the parties seek the court's determination of the rent payable under a new lease which the claimants will grant to the defendant. The parties have agreed the terms of a new draft lease subject to the issue of the rent.

2 There is also an application for the court to determine the interim rent payable by the defendant for the period from 24 June 2017, the defendant's lease having expired on 23 June 2017, until the start of the new lease, which is three months and twenty-one days after the judgment of the court.

THE ORAL APPLICATION TO ADJOURN THE TRIAL

3 On 2 February 2021, in the presence of counsel for both parties, this matter was listed with a provisional trial time estimate of four days in the trial window of 14 June to 9 July 2021. Neither party applied to amend that time estimate. A pre-trial review was directed for eight weeks before trial, which could be vacated if both parties confirmed that no further directions were required. The bundle does not contain any order made at a PTR, so it appears that both parties were of the view that no further directions were required. In any event, the trial time estimate remained at four days.

4 In his written skeleton argument, Mr Rainey QC for the claimants submitted that both counsel were of the view that four days was a tight time estimate and he set out a trial timetable so that the hearing would be completed within the four days, with judgment being reserved. Despite the proposed trial timetable, and despite the absence of any prior application to adjourn the trial, at the start of the four day trial listed in accordance with the time estimate and trial window set out in the order of 2 February 2021, Mr Rainey QC, with the consent of defendant's leading counsel, applied for the hearing to be adjourned and re-listed for a seven day hearing.

5 I refused that oral application and I gave full reasons, which included consideration of the overriding objective. I am not going to repeat those reasons. I confirmed that the court would adhere to the trial timetable set out in Mr Rainey QC's skeleton argument. Despite, at the start of the trial, there being no final joint statement of the experts, nor a complete CPR compliant electronic bundle, with the co-operation of counsel, the hearing was completed within the listed four days and judgment was reserved.

THE APPLICATION TO ADJOURN TODAY'S HEARING

6 On 20 October, two days ago, the defendant's leading counsel emailed the court as follows,

> "Dear Judge.
> You may recall that I am counsel in this matter for JD Sports, the claimant [sic - JD Sports is the defendant]. I understand that the handing down of judgment has been listed for 10.00 a.m. on Friday,

> 22 October, with a two-and-a-half-hour time estimate. My clerk has also informed me the matter has now been listed remotely. Unfortunately, I'm out of the jurisdiction on annual leave and will be in the process of travelling back to London on Friday at the time scheduled for the hearing.
>
> I am sure you have in mind that the matter was a hard fought, fully contested trial where there are likely to be significant arguments about costs, whatever the outcome. My clients feel that whilst they could send along alternative counsel, it would put them at a significant disadvantage to the defendant, [sic- should read claimants], whose trial counsel is, I am told, available for the proposed hearing. That is particularly the case where your judgment is being delivered in court so that any counsel coming to the case afresh will have to prepare his or her submissions 'on the hoof', and without having heard the evidence and argument in person or a transcript being available at such short notice. I am therefore asking whether it would be possible for the handing down of judgment to be subject to a slight further delay to enable both trial counsel to be present and to ensure that neither counsel is disadvantaged. Dates upon which both counsel are able to attend either remotely or in person could be delivered to the court before Friday to ensure the shortest possible further delay.
>
> Alternatively judgment could be handed down on Friday with consequential arguments to be heard on a subsequent date at which counsel could attend. Of course, it would be hoped that such an order might be able to be agreed, obviating the need for such a hearing. I hope that you will agree that it would be most unfair for one party to be significantly disadvantaged by the absence of trial Counsel…."

7 My observations are as follows. Today's hearing was listed about a month ago and I would have expected the notice of hearing to have been sent out at that time. There has been a delay in delivering judgment because this is the first week of my sitting at the County Court in Nottingham for some time. There is no explanation why no prompt application nor request for a re-listing of today was made when the notice of hearing was received. Nor does defendant's leading counsel explain when he arranged to be away and whether this was before the date for the delivery of judgment was entered in his diary. At the late stage of the sending of the email it would have been too late for the court to list another case in its place. Mr Cowen QC's expressed hope that consequential orders may be agreed appears inconsistent with his earlier statement that there are likely to be significant arguments as to costs.

8 In the interests of the overriding objective and natural justice, I made the following order:-

> "Upon reading an email from counsel for the defendant dated 20 October 2021, requesting that the hearing listed on 22 October 2021 be vacated or limited to the delivery of the judgment
> It is ordered that –
>
> 1 Judgment will be delivered at the hearing at 10.30 a.m. on 22 November 2021 by CVP with costs reserved.

2. The parties shall by 4.00 p.m., 22 November 2021 file a consent order as to costs, or request a hearing to determine the issue of costs.

3. The additional costs of a further hearing to determine the issue of costs will be determined by the court at that hearing.

4. This order was made without a hearing. A party affected by this order may apply to have it varied or set aside within two days of service of this order."

Two days was substituted for the usual seven days, because seven days would have been inappropriate as they would have ended five days after the hearing. I asked for the order to be drawn and emailed to everyone urgently. No application has been filed pursuant to the order. That is the background of the latest application.
I return to the substantive judgment.

THE UNIT

9 The subject property is a retail unit numbered SU259 and SU310 at the Derbion Centre in Derby. The unit is on the upper level of the mall, at the junction between the South Mall and the East Mall. The shopping centre has been previously variously called "Intu Derby", "Westfield Derby" and "the Derby Centre".

10 The centre opened in 1975 and was redeveloped in 2007. It contains over two hundred retail and restaurant units. The lower floor of the mall is mainly occupied by convenience and value based retailers, such as food retailers, whilst the upper mall has been designated for fashion retailers or sellers of aspirational merchandise, although not all retailers in the upper mall fall within this category.

11 The unit of 9,072 square feet in total is arranged on the ground floor and mezzanine, linked by a customer lift and escalators. It is an irregular shape, being wide at the front and narrowing to the rear. Around 71% of the total net internal floor area is on the mezzanine level.

THE PROCEDURAL HISTORY

12 By a lease dated 16 January 2008, and made between the claimants and defendant (under its previous name, "John David Group Plc"), the premises were demised to the defendant for a term of ten years, commencing on 24 June 2007. The rent was calculated as an initial base rent of £175,000 and a turnover rent equivalent to the amount by which the turnover of 8% of gross sales exceeds the base rent, calculated on a quarterly basis.

13 The term of the lease expired on 23 June 2017, and the defendant held over pursuant to Part 2 of the Landlord and Tenant Act 1954.

14 On 22 December 2016, the claimants served a section 25 notice terminating the tenancy on 23 June 2017. The section 25 notice proposed a new lease with a ten year term at a rent of £282,000.

15 The claimants commenced this claim on 23 February 2018, proposing a ten year term on the same terms as the section 25 notice. The claim included an application for interim rent pursuant to section 24A of the 1954 Act.

16 The defendant acknowledged service of the claim on 20 June 2018 and proposed a five-year term at a rent of £160,000, with a three month rent-free period and a turnover rent equivalent to 5% of the defendant's turnover.

17 By the date of trial, the parties' positions had reversed. The claimants are now seeking a turnover rent of 8%, which would produce an annual rental figure of £496,000 on the defendant's estimated turnover for 21/22. A turnover rent is a method of calculating the rent payable based on the tenant's turnover. The claimants also propose a capital contribution to be paid by the claimants of £200,000, of which £100,000 would be reimbursed by the defendant if the defendant operates the three-year break clause. The defendant seeks an annual fixed rent of £17,700.

18 If the court were to order a turnover rent, which the defendant opposes, the defendant seeks a turnover rent of 0.29% of turnover. If the court orders a fixed rent (which the claimant opposes) the claimant seeks a fixed rent of £170,000 per annum. The parties have agreed a five year term with a break clause at three years, exercisable by the tenant on six months' notice.

THE ISSUES

19 The following issues have been identified by counsel as arising for determination by the court:

(a) Does the court have jurisdiction to order a turnover rent?

(b) What rent/turnover rent should be payable under the new lease?

(c) Should there be an adjustment for a standard rent-free period?

(d) Should there be a capital contribution paid by the claimants to the defendant?

(e) The quantum of the break penalty, if the new lease is at a turnover rent, and

(f) With regard to the interim rent, whether the court applies exception A or B under section 24(3) in Part 2 of the Landlord and Tenant Act 1954, and the amount of the interim rent.

THE LAW

20 The Landlord and Tenant Act 1954 is intended to balance the interests of the landlord and the tenant - to provide security of tenure to the tenant whilst protecting the landlord's right to an open market rent and provide circumstances when the landlord can take back possession. The rent has to be determined by the court under the provisions of section 34 of the 1954 Act. Section 34 reads as follows:

> "Rent under new tenancy.
>
> (1) The rent payable under a tenancy granted by order of the court under this Part of this Act shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court to be that at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing lessor, there being disregarded—

(a) any effect on rent of the fact that the tenant has or his predecessors in title have been in occupation of the holding,

(b) any goodwill attached to the holding by reason of the carrying on thereat of the business of the tenant (whether by him or by a predecessor of his in that business),

(c) any effect on rent of an improvement to which this paragraph applies"

Sub-paragraph (d) applies to licensed premises and is therefore not applicable. Under sub-paragraph (3), where the rent is determined by the court, the court may, if it thinks fit, further determine the terms of the tenancy to include a provision for varying the rent.

21 It is agreed that there are no relevant improvements and therefore, the disregard in (c) is not applicable.

22 The court therefore has to determine the rent at which, having regard to the terms of the tenancy, the holding might reasonably be expected to be let in the open market by a willing hypothetical landlord to a willing hypothetical tenant, disregarding the four factors in section 34(1). In this case the relevant factors include the fact of the tenant's occupation and any goodwill attached to the unit due to the tenant's occupation. The court must also take into account the state of the letting market generally, the actual premises and their location.

23 As highlighted by His Honour Judge Bailey in the unreported case of *HMC Music Ltd v Mount Eden Land* [2012] as reinforced by his Honour Judge Lochrane in the 2016 unreported case of *Odey Asset Management Group Ltd v Telford*, the court is faced with an extremely difficult task in attempting to divine the way in which hypothetical negotiations would have resolved on the basis of material available to the hypothetical parties.

24 I have been provided with the judgments from both cases. At paragraph 14 of his judgment, His Honour Judge Bailey stated:

> "It is well arguable that in reality, under section 34, the judge's task is to assess how negotiations between the willing landlord and the willing tenant would have gone in the light of the material likely to have been before both negotiating parties. This is a near impossible task. The judge knows that the careful reasoned approach he attempts to undertake is most unlikely to be that adopted in real life. He must nevertheless undertake the task and trust that his answer will as closely mirror that which would have been arrived at by the parties with complete freedom of approach as is possible to achieve. Valuation is an art, not a science, but the forensic exercise leads experts and the court to put a scientific jacket on the artistic exercise."

25 This task is made all the more difficult in circumstances where the parties' experts are so far apart. The court's role is to produce a result that mirrors reasonably closely the likely result of such a hypothetical exercise.

26 The court was also referred by counsel for the claimants to section 35 of the Act, which reads as follows:

> "Other terms of new tenancy.
>
> (1) The terms of a tenancy granted by order of the court under this Part of this Act (other than terms as to the duration thereof and as to the rent payable thereunder) shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court; and in determining those terms the court shall have regard to the terms of the current tenancy and to all relevant circumstances."

THE FACTUAL EVIDENCE

27 The court heard the evidence of Mr Michael Boundy, the senior asset manager for the shopping centre, now employed by Savills and previously by Intu. Savills took over the management of the centre on behalf of the claimants from Intu, when Intu went into administration in July of 2020.

28 Mr Boundy is responsible for all letting activity at the centre. Part of his role is to maximise the centre's income and capital growth. Mr Boundy stated that the claimants prefer to include turnover rents in their leases, as they enable the landlord to monitor the performance of their tenants. In order to decide the turnover percentage, the landlord first has regard to the turnover figures for the particular proposed tenant.

29 Although in his witness statement Mr Boundy explains that the claimants have the turnover figures, either from another Intu shopping centre or from market knowledge, he acknowledged in cross-examination that turnover figures are usually confidential, so the turnover figures of a particular retailer in a particular store would not be market knowledge. The claimants have not disclosed the actual rent figures paid by other tenants in the centre paying turnover rents because this information is confidential.

30 Mr Boundy explained that he has in mind an approximate figure for the rental income that he will agree for a particular unit, although each offer is assessed on its merits. In his oral evidence, Mr Boundy explained that the practice is that the prospective tenant will carry out a profit analysis and will submit a projected turnover figure to the claimants. Mr Boundy recognised that turnover figures vary between retailers. Not all retailers are equally successful and they also operate on different profit margins. Turnover figures do not take into account the profit margin on the turnover. A retailer can have a high turnover but low profit margin, or, conversely, a low turnover and high profit margin.

31 The starting point of every deal on a turnover rent is the turnover of that particular prospective tenant and Mr Boundy will not consider any offer by a tenant of a turnover rent unless the prospective tenant has provided their turnover figures, because a set percentage of an unknown turnover is meaningless.

32 Mr Boundy also stated that the percentage for a turnover rent would be influenced by factors such as tenant mix, the desire to induce a particular brand into the centre and other estate management criteria. Such factors are specific to each deal. Inducements were, for example, offered to Mango, Hugo Boss and Disney to bring them into the centre. When assessing a deal with a turnover rent, the parties need to consider the whole deal, including but not limited to, the rate for the turnover rent, the threshold when it becomes payable, any

capital contribution/s and liability for service charges and business rates. The size of the unit is also relevant, there being fewer prospective tenants for larger units.

33 Mr Boundy explained whilst the claimants' preference is for the rent to be calculated on a base rent plus turnover model, the claimants have agreed variations to this model to take into account market conditions. Mr Boundy confirmed that Superdry this year, in a 1954 Act renewal in the lower mall, agreed a rack rent following the tenants' existing terms. His evidence was that the claimants tried to negotiate a turnover rent, but felt that they could not insist on one as the tenants' expired lease did not provide for a turnover rent.

34 It is very common for the claimants in this centre to offer a side letter to tenants, which contains a concession when granting a new lease, for example, Zara, Moss Bros, Phase Eight and Hugo Boss. Mr Boundy could think of no reason why a tenant would sign up to a side letter other than the reason that it offers a concession to the actual lease. He agreed that the landlord would not sign up to the side letters unless they were necessary to get the deal agreed, so the real deal is the deal in the side letter.

35 The other witness of fact before the court was Rachel Ryan, the group estate manager of the defendant, who confirmed that the tenant paid, under the now expired lease, a base rate currently of £205,723 per annum, and a turnover rent of 8% which comes into effect when the yearly turnover rent exceeds the base rent for the same year. After the defendant had filed their acknowledgment of service with a counter offer, which had been proposed by Ms Ryan, the defendant became aware that other leases in the centre had recently been granted with rack rents, such as Footlocker and Beaverbrooks, with no turnover element. Further, the defendant understands that other retailers with a runover provision in their leases do not pay any turnover rent, or pay significantly less than the defendant.

36 The defendant has a high turnover, but low profit margins as the vast majority of their merchandise is branded from brands other than their own, and bought in and sold at a lower margin than if they manufactured the item itself. A turnover rent therefore penalises the defendant. The defendant therefore changed their position as they were of the view that they were paying significantly more than an open market rent.

37 When opening a new shop, the defendant projects their likely turnover and profit, and decides how much they are willing to pay on this basis. If the landlord is asking too much, the defendant will not bid for the unit.

38 I turn to the issues that I have identified.

39 **(a) Does the court have jurisdiction to order a turnover rent on a 1954 Act lease renewal?**

Both parties agree that this is an issue of law which has not apparently been fully argued before, nor fully considered, by the court. Claimants' counsel submitted that a turnover rent is a rent for the purposes of section 34 and that there is no bar to awarding such a rent. Defendant's counsel submitted that the court does not have jurisdiction to determine a turnover rent, nor to include a turnover element of rent in a new lease. The submissions fall under three headings, namely:

(i) the statutory construction of the 1954 Act;
(ii) the caselaw;
(iii) the textbooks.

(i) the statutory construction of the 1954 Act

40 Claimants' counsel submitted that there is no definition of “rent” in the 1954 Act which prevents a “turnover rent”. It was said that the words of section 34 are clear. The rent determined by the court must reflect what would be agreed on the open market, to be determined from valuation evidence. It would be wrong for the court to depart from the evidence and determine the rent on a basis other than a turnover basis. Such an interpretation would render the 1954 Act no longer fit for purpose.

41 The claimants also relied on the presumption of reality, as set out in the authorities of *Harbinger Capital Partners v Caldwell and Another* [2013] EWCA Civ 492 and *Mundy v Trustees of the Sloane Stanley Estate* [2018] EWCA Civ 35, in which Lewison LJ stated that, "Reality must be adhered to so far as possible. Although the sale is hypothetical, there is nothing hypothetical about the market in which it takes place."

42 In the claimants’ submission, any construction of section 34 as excluding jurisdiction to award a turnover rent would conflict, it was said, with the presumption of reality. The 1954 Act remains in force, appropriate and substantially unaltered, because its language is flexible and the courts have approached issues of construction of the Act on a purposive basis. For example, rent review clauses were incorporated by the courts, pre the amendment in 1969 in section 34(3) of the Act, and courts order the inclusion of break clauses in lease renewals, even though sections 33 and 35 make no provision for such break clauses. Courts, to reflect the reality, should therefore determine that a turnover rent falls within the jurisdiction in section 34, even though section 34 makes no reference to a mechanism for determining the rent rather than a single rent figure. Finally, if the market comparable evidence becomes all turnover rent, where will the court be left if section 34 does not permit the court to determine that the new rent should be a turnover rent?

43 Defendant’s counsel submitted that the word "the rent" demonstrates that section 34 assumes that there will be one objectively identifiable rent at which the premises would reasonably be expected to be let in the open market on the valuation date. Valuers compare the subject premises, its location, size and quality with completed transactions. The tenant in section 34 is an anonymous hypothetical tenant which might be the actual tenant, but might not be. The difference between the actual tenant's bid for the premises and that of a different hypothetical tenant is removed by the disregards set out in section 34(1)(a) and (b), which make it clear that the circumstances of the existing tenant must be disregarded.

44 A turnover rent, however, introduces a variable element which is dependent upon the identity of the proposed tenant, and the likely quantum of that tenant’s trade from that premises. Because of its variable nature, a turnover rent will not ensure that the tenant is paying a sum at which the property would be let in the open market on the valuation date. Section 34 requires the court to determine a figure representing the open market rent for the holding. A turnover rent is not what the words of section 34, nor section 24C in respect of an interim rent, require. It is a mechanism for determining the rent with a differing result dependent on the turnover of the hypothetical tenant.

45 The claimants' expert acknowledged in his second report at paragraph 1.3.3 that:

> "In this structure, the tenant pays a rent which is a function of its annual turnover multiplied by the turnover percentage. In this case, there is no market derived base rent. Instead, the tenant pays an on account payment which is not a function of open market rental value."

46 It was also submitted on behalf of the defendant that the turnover model depends upon the landlord considering the tenant's projected turnover figures, as confirmed by Mr Boundy. What is the turnover of the hypothetical tenant? Each potential tenant in this unit will generate a different turnover from the premises dependent upon the nature of their business, the strength of that business and a myriad of other factors. There is evidence in this case that the landlord will apply a different turnover rate, dependent on the tenant.

47 The defendant argued that a turnover rent is also inconsistent with the disregards in sections 34(1)(a) and (b). The level of turnover rent is fixed by reference to the actual tenant's turnover at the premises. Section 34(1) requires the court to disregard the effect on rent of the actual tenant's occupation of the premises or goodwill, built up by the business, carried on by the tenant or its predecessor. One expects turnover to increase over time with occupation and goodwill and there is therefore a conflict between the expressed disregards and the concept of a turnover rent. This argument also applies to the interim rent under section 24C(2).

48 Finally, defendant's counsel submitted that s24C(3) provides an alternative basis for the determination of the interim rent, when the interim rent "differs substantially" or is "substantially different" to the rent determined under section 34. Without knowing the sum to be paid under a turnover rent, it was submitted that it is impossible to make such a comparison against a previous fixed rent. In order for the court to make a comparison, the court needs to be able to compare two specific rental figures.

(ii) the caselaw

49 The claimants relied on historic examples of turnover rents in mining leases, with rents based on the amount of minerals extracted and in agricultural leases, with rents framed on the basis that the tenant sheers all the landlord's sheep. I was referred to *Debenhams Retail plc and another v Sun Alliance and London Assurance Co Limited* [2006] 1 P and CR page 8, which is an example of a turnover rent in a retail lease unit in the mid1960s. Turnover rents in carpark leases are common, as per *Carleton (Earl of Malmesbury) v Strutt & Parker (A Partnership)* [2007] P and LR 29.

50 Profit derived rents are also to be found in leases for pubs and other hospitality venues, for example, *Brooker & Anor v Unique Pub Properties Ltd* [2009] EGLR 59 (Ch). This was a Landlord and Tenant Act 1954 lease renewal. The experts in this case agreed that the hypothetical tenant, before making an offer for the premises, would:

(i) calculate the anticipated turnover from sales;

(ii) calculate the anticipated gross profit on turnover;

(iii) deduct the likely expenses to produce a balance divisible between landlord and tenant; and

(iv) bid a proportion of that divisible balance as rent.

In this case the beer sales were agreed. The parties differed on other matters of methodology. The rent was determined at £18,000, being a figure the court considered to be a sensible compromise in the circumstances. In leases of licensed premises the hypothetical incoming tenant would have access to the actual tied beer figures for the public house and for other public houses in the area owned by the landlord and would make assumptions in respect of other sales. The claimants submitted it would be odd if that methodology is permitted under the Act, but it is not permissible to arrive at a rent which is directly a percentage of turnover where that is the market evidence.

51 A differential rent, for example a rent which varies from year to year or according to circumstances, was awarded under section 34 by the Court of Appeal in *Fawke v Viscount Chelsea* [1980] QB 441 (COA). The Court of Appeal found that the property was in disrepair and a lesser rent was determined until repairs were effected. The variable nature of the rent was dependent upon the state of repair of the premises, and anyone bidding in the market for that property would pay the differential rate which was due to the characteristics of the property.

52 In *F R Evans (Leeds) Ltd v English Electric Co Ltd* [1978] 36 P and CR 185, Donaldson J described what is meant by a willing lessor and a willing lessee, and I read from halfway down page 92 of the judgment:

> "The first, and perhaps the most important, conflict between the parties is whether, in the application of the clause, the willing lessor is to be identified with the landlords and the willing lessee with the tenants. In a sense, the willing lessor must be the landlords because only they can dispose of the premises, but for the purposes of the clause the landlord is an abstraction - a hypothetical person with a right to dispose of the premises on an eighteen year lease. As such, he is not afflicted by personal ills, such as cash-flow crisis or importunate mortgagees. Nor is he in the happy position of someone to whom it is largely a matter of indifference whether he lets in October 1976 or waits for the market to improve. He is, in short, a willing lessor. He wants to let the premises at a rent which is appropriate to all the factors which affect the marketability of these premises as industrial premises - for example, geographical location, the extent of the local labour market, the level of local rates and the market rent of competitive premises...
> Similarly, in my judgment, the willing lessee is an abstraction - a hypothetical person actively seeking premises to fulfil needs which these premises could fulfil. He will take account of similar factors, but he too will be unaffected by liquidity problems, governmental or other pressures to boost or maintain employment in the area and so on. In a word, his profile may or may not fit that of the English Electric Company Ltd but he is not that company."

He continues at paragraph (c):

> "The fact that it is very likely that the English Electric Company Ltd would have been only the potential lessee is relevant, but its relevance is indirect. It does not matter whether the only potential lessee was this company or the XYZ Company Ltd. What matters is that in the state of the market there was not likely to be more than one willing lessee. The effect of this fact is not, however, decisive, because this single potential lessee is to be assumed to be a willing lessee - neither reluctant nor importunate, but willing. Just as the hypothetical lessor cannot rely over much on the fact that no properties similar to the Walton Works is available on the market, so the hypothetical lessee cannot rely too much upon the fact that he has no competitors - he is, and is known to be, a willing lessee. Furthermore, it is known that he will remain a willing lessee, so long as the willing lessor does not press his demand for rent beyond the point at which he is ceasing to

act as a willing lessor, and at which a willing lessee would cease to be such."

53 Turnover rents have been awarded in previous first instance cases. In *Naylor v Uttoxeter Urban DC* [1974] 231 E.G. 619, the issue in dispute between the parties in a 1954 Act lease renewal was whether the rent calculated as a percentage of gross commission of the tenant, a firm of auctioneers, should be 40% or 20%. Initially, there had been a dispute as to whether the rent should be calculated as a percentage of turnover rather than gross commission, but during the hearing the landlord accepted it should be calculated on gross commission. The rent determined was the rent proposed by the tenant, a fixed percentage of 20% with a base rent, i.e. a minimum rent. There was, however, no judicial consideration as to whether the court had jurisdiction to award such a rent.

54 I was also referred to *Stride & Son v Chichester Corporation* [1960] EGD 117, although I was not provided with any law report nor judgment for this case. The case is cited briefly in *Reynolds v Clarke,* where it is said that it is a case in which the parties agreed that the rent should be fixed by reference to the tenant's turnover.

55 In *National Car Parks Ltd v Hawksworth Securities Plc* May 2016, Cambridge County Court, unreported, the existing lease contained provision for a minimum rent followed by a percentage of turnover, which turnover rent applied only after the turnover exceeded a specified turnover figure. The issues the court had to decide included the level of rent and whether it should include a turnover rent. The experts were agreed that the conventional method of assessing rents for car parks was on a profits basis, although one of the experts also took the view that there should not be a turnover rent, as turnover rents were generally found in leases of new car parks.

56 The judge held that a turnover rent was appropriate because (a) it was in the existing lease and (b) the market evidence showed it was the market approach for car parks. The judge noted that he had not been addressed in detail on the question as to whether the court had power to fix such a rent, although, in the absence of argument, he took the view that he had such power.

57 I was also referred to the authority of *Inntrepreneur v Palmer* (16 April 1998) an unreported case heard in the Brighton County Court. In this case, jurisdiction to award a turnover rent again was accepted, although a turnover rent was rejected on the evidence. The only report that I have of this case is the reference in *Reynolds & Clark* and I read from paragraph 8-101(a) of *Reynolds & Clark*:

> "If the court has jurisdiction [to order a turnover rent] in what circumstances will the court award such a rental? In the *Inntrepreneur Pub Company Ltd v Palmer* decision, the learned judge considered that a turnover rent was inappropriate in that case as:
>
> 1. It was unfair to both parties as such a rent relied on the personality and performance of the actual tenant;
> 2. The turnover percentage was not liable to change and the risk of inaccuracy fell solely on the landlord;
> 3. Turnover leases were out of fashion since at least 1986/1987;
> 4. There was no evidence of turnover leases being granted in the market;

5. There was no evidence to guide the court as to what the appropriate percentage would be."

58 There are, it appears, no cases in which it has been decided that a turnover rent cannot be determined on a lease renewal under the 1954 Act.

59 I was also referred to the case of *Lynall v Inland Revenue Commissioners* [1972] AC 680, in which the House of Lords considered whether unpublished information is relevant in arriving at an open market valuation - in that case of shares in a private company. The House of Lords determined that confidential information ought not to be regarded as available to a hypothetical purchaser, as it was not open market knowledge. The parties to the hypothetical transaction can therefore take into account only information which is publicly available.

60 The case of *Gorne v Scales & Ors* [2006] EWCA Civ 311 (COA) is authority for the proposition that one can assume that the hypothetical lessee is reasonably well informed. Nonetheless it may not be possible to ascertain whether the turnover rent represents the open market value.

(iii) the textbooks

61 The textbooks are equivocal. *Woodfall on Landlord and Tenant* at paragraph 22.149.6 reads as follows in respect of turnover rents:

> "In appropriate circumstances, the court may fix the rent by reference to a percentage of the tenant's turnover or commission. To date this has only been done in the case of livestock markets, but it may be that the court would have such power in relation to retail units where there are no comparables (e.g. motorway shops, or where the current tenancy provides for rent to be assessed on that basis. It is not entirely clear how the problem of disregarding the tenant's goodwill can be overcome in these circumstances."

62 *Reynolds & Clark* in Renewal of Business Tenancies at 8-99 to 8-101 sets out both sides of the argument. I read extracts:

> "Turnover rent.
>
> A question of principle arises as to whether the court has power under section 34 to determine that the rent is to be payable by reference to a formula, such as one which relates it to the tenant's turnover rather than simply carrying out a valuation by reference to open market rack rents payable for comparable properties. Turnover rent provisions are commonly found in leases of licensed premises and are becoming more common (as a component part of an aggregate rental) in the leases of retail premises and shopping centres….
>
> There are essentially two questions: (1) does the court have jurisdiction to award a rent under section 34 by reference to a valuation based on turnover and (2) does the court have jurisdiction to incorporate a rent review clause in the new lease that reflects in whole or in part a review of the rent by reference to turnover. The former

issue, [which is the issue before this court], is perhaps more difficult than the latter.

The argument that the court has jurisdiction to assess a "turnover rent" (or some other rent linked to a formula) in an appropriate case is based upon the words "might reasonably have been expected to be let in the open market". It may be argued that one is being directed by these words to ask how the rent for the demised premises would be assessed in the open market if the premises were being let on the relevant valuation date. If the court finds, on the evidence presented at the hearing, that rents on the open market for premises like the demised premises would be assessed by reference to a turnover rent, such a rent would be the "market rent" for such premises, not a rent of a fixed amount assessed by reference to rack rent transactions. This argument may be supported by reference to *Naylor v Uttoxeter Urban DC…. Stride & Son v Chichester Corporation* is often cited as an example of the court awarding a rent by reference to the tenant's turnover . However, in that case, the parties' surveyors had agreed that that was how the rent was to be assessed…. In *Inntrepreneur Pub Company Ltd v Palmer* it was held that the court did have jurisdiction to fix an interim rent by reference to a percentage of turnover in an appropriate case. This was not a cattle market case but was of shop premises.

There are, however, powerful countervailing arguments to the effect that the court has no jurisdiction, either to fix an initial rent by reference to the tenant's turnover, (as was done by agreement in the *Stride* case) or as a variable turnover figure. It can be argued that such an approach conflicts with the express disregards of the effect upon rent of the tenant's occupation of the holding and of the goodwill of the tenant's business….Any fixing of an initial rent by reference to what the tenant has, in the period leading up to the grant of the new tenancy, been able to earn by way of turnover or commission, would seem to include an element attributable both to the tenant's occupation and to his goodwill. It is not easy to see how the rent could be adjusted so as to give effect to those disregards. Similarly, where the court orders that the rent will vary from time to time during the new tenancy by reference to the tenant's actual turnover, it is even more difficult to say that that rent will, at all material times, give full effect to the disregards.
If the court has jurisdiction, in what circumstances will the court award such a rental?" ….

And the authors go on to consider the case of *Inntrepreneur Pub Company Ltd v Palmer* to which I have already referred.

"Thus if the court were to have jurisdiction, the decision as to whether in fact, with regard to any actual renewal, a turnover provision should be incorporated will be determined, principally, by reference to what was happening in the market. This is consistent with the wording of section 34, namely, that the rent is that for which the holding might reasonably be expected to be let in the open market."

There follows a reference to *National Car Parks Ltd v Hawksworth Securities PLC* which I have already addressed.

(iv) My findings:

63 Whilst turnover rents may be an established mechanism for the calculation of the rent, particularly in certain specific market sectors, ordering a turnover rent on a 1954 Act lease renewal sits uneasily with the disregards in section 34(1)(a) and (b) of the 1954 Act. The purpose of the 1954 Act is not to penalise the successful established tenant, which has built up its business and goodwill over its period of occupation. By factoring in the tenant's turnover into the calculation of rent one is taking into account the business and goodwill the tenant has built up during the previous lease.

64 Lord Justice Stephenson in *Fawke v Viscount Chelsea* stated at the start of his judgment,

> "I have had many doubts in the course of the case, but of one thing I feel reasonably certain, namely that Parliament in enacting section 34 in 1954 and in amending section 34 and in enacting section 24A in 1969, never considered the problem raised by this appeal. The impact of disrepair in the property comprised in a tenancy on the court's power to determine the rent under either section."

Whilst *Fawke*'s differs from a turnover rent situation, because in *Fawke's* different tenants will pay the same differential rent, the same judicial observation applies to this case, namely that Parliament did not envisage the issue of whether a court should be able to order a turnover rent on a 1954 Act lease renewal.

65 I do not accept the submission that a turnover rent is not a rent, but is instead another term to which section 35 applies. A lease has a rental clause. Such a clause either sets out a rack rent or a mechanism for calculating the rent. A turnover rent falls within section 34 and is not another term under section 35.

66 A turnover rent, as a mechanism for the calculation of the rent, is tenant specific, depending on the turnover of the particular tenant. It therefore sits uneasily with the concept of the willing hypothetical tenant and the willing hypothetical landlord. It is impossible for the court to determine the appropriate percentage for a turnover rent without knowing the turnover of the willing hypothetical tenant, in particular where the business of the hypothetical tenant may vary.

67 The parties' real focus is on the rental figure that the turnover rent calculation will produce. This accords with Mr Boundy's evidence that the landlord has in mind a rental figure that it wants in respect of the property. The tenant is interested in profit, rather than turnover, and will only agree a set percentage of turnover if the resulting rental figure produces an acceptable profit. When agreeing a turnover rent the parties will therefore have calculated the expected rental figure, based on the forecast or actual accounts of the particular tenant, and found the resulting rental figure to be acceptable. It is not possible to conduct this exercise with a hypothetical willing tenant and a hypothetical willing landlord when the hypothetical willing tenant may operate in a range of businesses with differing turnovers and profit margins.

68 The same turnover rent percentage may produce widely varying rents in respect of different hypothetical tenants and may not reflect an open market rent valuation. If the hypothetical tenant is a high-end retailer with high profit margins, turnover may be less, but profit

margins greater, as compared to a retailer with a high turnover and low profit margins. A turnover rent may therefore not accord with the policy of the Act in section 34(1) as it may not result in a calculation of rent equivalent to the open market rent.

69 No hypothetical willing tenant is likely to agree to pay a turnover rent when that calculation produces a rental figure significantly above the open market value, or significantly above comparable rental payments of other tenants, or results in a figure in excess of what that tenant can afford in order to make a profit.

70 If the defendant's position were, however, to be accepted this would mean that a 1954 Act protected car park lease must be renewed at a rack rent, even if the comparables are all of a turnover rent and it is established that the rents for such leases are calculated on a turnover basis. The turnover of a car park lease is likely to depend primarily on the car park's location, layout and size, rather than the nature of the business and goodwill of the tenant leasing the car park.

71 The principle of a turnover rent on renewal was either agreed or was not argued in the 1954 Act lease renewal cases to which I was referred, and in which a turnover rent was ordered. The reasoning of his Honour Judge Weiner in *Inntrepreneur Pub Co Ltd v Palmer* as to why a turnover rent was inappropriate in that case demonstrates how each case is fact sensitive.

72 In the current lettings market for retail units in shopping centres, which is very favourable to tenants, a turnover rent may be inappropriate because it is unfair to a tenant to order a turnover rent which would produce a rental figure significantly above an open market rent valuation and comparable rents in the centre. Such a result does not accord with the purpose of the Act.

73 Turnover leases may be preferred by some tenants, but not all tenants. In the current market of retail units in shopping centres, the tenant is in the stronger bargaining position, so if the hypothetical willing tenant does not want a turnover rent, the hypothetical willing landlord will agree a fixed rent.

74 I find that where the parties do not agree that the lease renewal rent shall be a turnover rent, the court must evaluate the identified concerns to ensure that the purpose of the Act, to protect both landlords and tenants and to arrive at an open market rental valuation, is met. In some cases, such as where the nature of the business is clear, the likely turnover is discernible and the statutory disregards of little or no relevance, for example, a car park, a turnover rent may be appropriate. However, in other cases, the court needs to assess on the facts of the individual case whether a turnover rent accords with the purpose and provisions of the Act.

(b) What rent or turnover rent should be payable under the new lease?

75 The majority of the evidence was provided by valuation experts on both sides. Whilst both experts had undoubted expertise, it was clear to me that they were both partisan in their approach, and were focussed on the interests of their respective clients rather than their role under the Civil Procedure Rules to assist the court.

76 Civil Procedure Rule 35.3 provides that it is the duty of experts to help the court on matters within their expertise. This duty overrides any obligation to the party instructing the expert and by whom they are paid. The expert must comply with the requirements in the Practice Direction to Part 35, which includes that the expert should provide objective, unbiased opinions and summarise a range of opinions, giving reasons for their own opinion.

77 By the first day of the trial, the experts had not produced a final joint statement, nor agreed the measurements of the unit. These matters were largely resolved by the second day of the trial, although the final statement, running to 131 pages, was unpaginated and the experts failed to break down the mezzanine footage between mezzanine sales and mezzanine ancillary.

78 The claimants' expert, Jonathan Stott, a chartered surveyor, is employed by Savills and was instructed by the claimants to act as an expert at around the time Savills took over the management of the centre. He denied being conflicted as he is not personally involved in Savills' management of the centre, although I find that his employer is not disinterested in the outcome of this case. I place no weight, however, on this potential conflict of interest. Mr Stott has considerable experience in the retail property market, acting for both landlords as to 75% and tenants as to 25%, and he has substantial experience of shopping centres. His first report, which is entirely focussed on a turnover rent, does not comply with the guidance for experts. On occasion, he also failed to provide comprehensive, objective evidence, for example, with regards to the claimants' side letters to other tenants and in some comparables he omitted to include the totality of the deals.

79 The letter of instruction asked Mr Stott to prepare an expert's report on the questions of turnover rent, base rent and interim rent. He was not asked to advise on a fixed rent, and he did not advise on a rack or fixed rent until his second report. Mr Stott has prepared two reports dated 4 December 2020, and 9 June 2021 and he has also responded to questions raised by the defendant. He confirms that the ground floor is triangular in shape and states that this would prove slightly awkward if it were the only trading space available. In his opinion, the ground floor serves as a lure to potential customers to the first floor trading space. He also notes that the frontage is exceptionally wide and there is well-located vertical circulation.

80 Mr Stott acknowledged that it is usual in such reports to set out comparable evidence of rack or base rents analysed on a zone valuation methodology. In this case, however, his evidence is that the open market rent will be a turnover rent and not a rack rent, relying on the open market lettings from March 2018 to October 2020. Mr Stott confirmed that the evidence from CVAs (company voluntary arrangements) does not feature in the hierarchy of comparable evidence, as set out in the handbook of rent review by Kirk Reynolds QC and Guy Featherstone QC, which places open market lettings as the most reliable of the comparables, followed by arms-length agreements on lease renewal or rent review. He suggested that CVAs may not feature in the hierarchy of comparable evidence because the book predated the rise of CVAs as a phenomenon in the retail property market and because of the non-arms-length nature of the rents in CVAs.

81 It is the poor state of the retail market that has led to the phenomenon of CVAs, which give a company a way to restructure their estate to give their business a chance to recover. In his report, Mr Stott does not address in detail the retail market since 2018, save for referring to the move to turnover rents and the phenomenon of CVAs

82 I find that evidence arising from CVAs carries modest weight, because such comparables are not indicative of rents determined in the open market. Most CVAs include the opportunity for landlords to take the property back or, if the landlord chooses not to take the property back, for the tenant to pay less rent. Mr Stott observed that sometimes the tenant can pay more when they move from a rack rent to a turnover rent. In his view, the number of transactions in the centre show activity and demand.

83 The claimants have been asked to disclose the different amounts they received from those tenants with turnover rents, but they have not done so on the basis of confidentiality. When considering the comparables, the court therefore in most cases does not know whether the tenant is paying a top-up rent, where the rent is a base and turnover rent. Mr Stott in his answers to a question from the defendant confirms that nearly 40% of tenants, including the defendant, paid a top-up turnover rent over base rent in 2019, and acknowledged that the figures for 2020 would have been weaker. The majority of tenants have, therefore, not paid a turnover top-up rent.

84 Mr Stott referred to the landlord sharing in the tenant's success when the rent is calculated on the tenant's turnover, but success depends on profit and not turnover. In his first report, Mr Stott valued the rent on the open market for the new lease at 8% of turnover, with an on account payment of 80% of the previous year's turnover from year two. He also included in the deal a landlord's capital contribution of £200K on the basis of a five-year unbroken term, and of £100K if the lease contained an unconditional tenant break option at year three. In his second report, he kept to the above valuation, but he valued the rent on a non-turnover basis, at £179,500.

85 The defendant's expert was Catriona Campbell, also a member of RICS and an associate of the Chartered Institute of Arbitrators and a member of the Institute of Expert Witnesses. Ms Campbell has prepared two reports dated 3 December 2020 and 3 June 2021.
Ms Campbell's assessment of the unit is that the mezzanine floor is visible through the majority of the frontage and only a small section on the right side has a void with double height glazing. As a result, the frontage is not as impressive as many of the other large stores on the upper mall. With the exception of the subject property, the larger stores at the upper mall level have voids and double height glazing extending the full width of the frontage. In the subject unit, the full heigh glazing is limited to around 26% of the total width of the frontage. Ms Campbell is very critical of the unit.

86 Ms Campbell considers at length the state of the retail lettings market and the reduction in rents since pre-Covid which has taken a heavy toll on the retail market. In her first report, Ms Campbell values the open market rent at a fixed rent for the new lease at £57.5K based on the Typo comparable from October 2018 and making reductions to take into account the physical characteristics of the premises, the decline in the retail market since October 2018 and the absence of a cap on the high service charges. If forced to give a percentage turnover, Ms Campbell values the rent for a new lease on a turnover basis at 1% exclusive of service charges and business rates, with a two-year rent-free period.

87 In her second report, Ms Campbell reduced the fixed rent to £18,300 per annum, and reduced the turnover percentage to 0.3%. Alternatively, if the court were to order a turnover rent at 8%, Ms Campbell calculates a capital payment by the landlord on completion of £2,269,075 plus three months' turnover rent-free from completion, with a repayment of £955,400 if the tenant breaks their lease at year three.

88 The defendant's expert in her oral evidence demonstrated by her language her clear alliance to the defendant.

89 The experts have also prepared two joint statements, the first dated 12 April 2021 and the second being prepared for the second day of the trial. In the first joint statement, Mr Stott confirmed his valuation in his first report, and Ms Campbell supported a fixed rent of £57,500 or, in the event of a turnover rent, 1% of turnover with two years rent-free. In their second joint statement, Mr Stott kept his position set out in his second report, save that the wording in respect of the capital contribution changed slightly. He reduced the fixed rent to

£170,000. Ms Campbell also reduced the fixed rent. Her new fixed rent was £17,700 per annum and the turnover was 0.29% of turnover. Alternatively, if the turnover is set at 8%, at paragraph 10.1 she sets out her capital payment and the amount repayable by the tenant. I read as follows,

> "Three months rent-free for completion. Capital payment amounting to £2,271,925, over payment above market value from expiry of the initial rent-free period for 4.75 years. Payment for the final two years of the five-year term to be reimbursed if the tenant operates the break clause, year three of £956,600."

90 The expert evidence runs to hundreds of pages and the final joint statement cites about forty comparables. I limit my comments to some of the more relevant comparables. I shall address first those in the upper mall.

91 **River Island** is a similar-sized unit, 8,238 square feet, and was a new lease from 1 October 2020 for a 5 year term outside of the 1954 Act. In 2007, the rent had been £330,000 per annum. In 2019 there was a new lease, backdated to 2017, at a net rent of £140,038. In October 2020 there was a lease re-gear, namely a tenant's re-negotiation on the basis that otherwise the tenant would leave in June 2022 when the lease was due to expire. Instead, the tenant surrendered early in June 2021 and a new deal was agreed on the basis of 7% turnover with three months rent-free, service charge caps and mutual breaks from March 2022.

92 In Mr Stott's opinion, this comparable showed a preference by the tenant for a turnover rent and it showed the landlord was prepared to accept a lower rent while looking for a better unit for the tenant. In Ms Campbell's opinion, it showed that the re-gear resulted in a reduction of £64,000 per annum from the fixed rent of 2017. I find that this comparable demonstrates the collapse in the rental market in retail units in shopping centres and the strength of tenants' negotiation positions. The rent effectively reduced from £330,000 per annum in 2007 to £100,800 per annum, with a service charge cap, in October 2020.

93 **Mango** occupies a unit of 4,847 square feet plus an additional 470 square feet in 2 remote stores. The heads of terms were dated January 2020, but were reached in 2019. Whilst the lease was at a rack rent of £250,000 per annum, less 5% as a contracted out lease, the side letter is for an 8% turnover rent after the first three months which are rent free. The claimants are to pay Mango a capital contribution of £800,000, of which £200,000 is to be repaid if Mango operates the break clause at year five. There is an on account annual turnover payment of £150,000.

94 Mr Stott says this is an example of the tenant wanting a turnover deal. Ms Campbell calculates that, if the tenant operates the break clause at five years, the tenant will pay rent of approximately £22,500 per annum. The previous rent for this unit in 2007 was £356,400 per annum, plus a top up rent of 8% of turnover.

95 **Zara**'s store is twice the size of the defendant's unit and has a significant ground floor. The experts agree it is a better shape and configuration than the index unit. In 2008 the rent was £412,545 plus a top-up rent of 8% of turnover. In 2017, there was a lease re-negotiation following termination of the previous lease by the tenant. Mr Stott states that the rent was a rack rent of £356,260 and the discounted rent should be disregarded as it is personal to Zara. The side letter, which the claimants' expert initially failed to mention, provided that no turnover rent would be payable. Ms Campbell identifies the rent at £285,000.

96 In 2019, Zara gave up their 1954 Act protection and took a short lease at 6% turnover with two months rent-free. It is likely that the tenant would only have done that if the resulting rent was less than £285,000, especially as they had given up their rent-up protection. The defendant argues that one must net off two months' rent-free, whilst the claimants state that one does not net off the rent-free because it is calculated on turnover. I find that one should look at the actual wording of the lease, but it is likely that it is the turnover for the first two months that is disregarded, otherwise an agreement for two months' rent-free is meaningless. I therefore prefer the defendant's calculation on the basis that the two months are rent-free. On the balance of probabilities, Zara was paying in the region of £214,650 from 2019, as submitted by the defendant, for a better unit which is twice the size.

97 In May 2021, there was a lease re-gear with a further two months' rent-free, followed by rent of 6% turnover, and an on account payment of £128,790. Ms Campbell assesses the rent payable at £107,325, net of the rent free period. The claimants have not disclosed the rent being paid.

98 **The PVH Group, trading as Tommy Hilfiger**, formerly New Look Men, has a store of 3,515 square feet. In 2016, the rent was base of £140,000 plus 6% turnover of higher. There was a break clause at five years, with a £35,000 penalty. In 2018, the rent was reduced from £140,000 plus 6% turnover top-up to £56,000, following a CVA and the unit was vacated in May 2019. There was then a void of about two years.

99 In April 2021, it was re-let to the PVH Group with a break after a year, so it was potentially a short-term lease. The landlord is paying the tenant a capital payment of £130,000 with £20,000 to be repaid if the tenant operates the break clause. There is four weeks' turnover rent-free, 10% top-up turnover rent and if the tenant vacates after twelve months, they pay eleven months' turnover rent and will have received £110,000.

100 Mr Stott stated that the capital contributions reflect the work required on the unit, but it was agreed that the tenant's liability for repair is limited to the schedule of condition. I therefore do not accept Mr Stott's interpretation. This unit demonstrates the difficulty in finding tenants. The unit was void for two years from May 2019 to April 2021, with a new tenant taking a short lease with a significant capital contribution from the landlord.

101 **Young Ideas** was an open market letting in November 2020. It was a five years' contracted out lease with a mutual break at the expiry of year two. Young Ideas took over the Cath Kidston unit. Cath Kidston had a year's lease from August 2018, at the higher of £95,000 rent base or 10% turnover. In 2021, the Young Ideas' rent was capped at £50,000 irrespective of turnover, a reduction of almost half of the rent from 2018.

102 **Virgin Holidays** is a much smaller unit at 1,065 square feet. This was an open market letting in December 2019, for a five-year term at £55,000 per annum, twelve months rent-free with a tenant break at year two. The defendant gives a calculation of £44.50 per square foot and the claimant of £53.50 psf. I prefer the defendant's calculation because of the treatment of the one year rent-free period. The tenants, however, never moved in, the store has never opened, and it has not been fitted. It is anticipated that the tenant will exercise its break clause in December 2021 at year two, and that the landlord is not accepting a surrender.

103 **Hugo Boss**, a smaller unit at 1,997 square feet, was an open market letting in July 2019 of a contracted out lease to a fashion operator. It is of interest because the defendant's expert says that the landlord is effectively paying the tenant to be there. The lease, a ten-year term with a break clause at five years, is at a base rent of £95,000 plus turnover top-up of 10%,

but the real deal is in the side letter which reduces the base rent to nil and provides for a tiered percentage of turnover rent with a rent-free period.

104 The significant aspect is the landlord's capital contribution of £800,000 with £200,000 repayable by the tenant if the tenant exercises the break clause. If the tenant leaves after five years, the tenant will have received £120,000 per annum and, whilst the court and the defendant do not know the turnover for the tenant, the defendant's expert submits that the sum paid by the landlord to the tenant is likely to exceed the rent paid. The defendant's expert submits that the rent paid is likely to be £96,000 per annum, which contrasts with £120,000 per annum paid to the tenant if the tenant remains only for the five years. This supports the defendant's expert's submission that the tenant has been paid to be there.

105 **Typo** occupies a modest unit of 2,467 square feet. It is an open market letting, not to a fashion retailer, in October 2018, contracted out of the 1954 Act. The side letter reduces the £95,000 rent to £65,000 plus 10% of turnover if higher, with nine months' rent free. The defendant's expert submits that the 10% turnover is likely to be less than £950,000 and therefore, the real rent will be £65,000.

106 **Foot Asylum** was an open market letting in 2018 for a contracted out ten-year lease of a similar size unit. The lease rent is £255,000pa. There was a side letter setting a base rent of £220,000 with an 8% turnover top-up rent, if higher. The agreed evidence is that no rent based on turnover has been paid. There was also a capital contribution and a rent-free period.

107 **Footlocker**, a smaller unit, was an October 2017 agreement for a lease which commenced in March 2018, at a fixed rent of £175,000 with twelve months' rent free. It is an example of a fixed rent of a fashion retailer in the shopping centre.

108 I turn to a few units on the lower level of the mall.

109 **Disney Store**, 6,238 square feet, is a useful comparable of an open market letting in March 2020, even though it was on the lower level of the mall. It was not considered in Mr Stott's first report. It is a retailer of non-essential aspirational merchandise and is an example of the steps the claimants were willing to take to attract a new tenant into the centre. It is also an example of a new tenant not willing to accept a turnover rent. The unit had previously been occupied from 2010 by Poundland at a rent of £200,000 pa. Disney entered into a five-year contracted out lease with annual tenant options to break the lease. The claimants paid Disney £75,000 in March 2020 to move into the centre. The rent for year 1 was £1pa. Year two was to be a turnover rent at 8%, but Disney never paid any turnover rent. The store would have closed in March 2021, having paid £1 and received £75,000, but Disney agreed new terms, another year with a mutual break, at a rent again of £1. Service charges were capped at £2,000, significantly less than the budgeted service charges and there was an agreed condition that, if Disney was required to pay annual business rates in excess of £35,072, (which was 50% of the 2021/22 figures so was likely to happen), its liability for service charges would cease. Even though Disney was not paying rent nor service charges the tenant served notice to break and the lease ended on 1 September of this year.

110 **Albian Walk** is a value fashion retailer occupying a smaller unit. In February 2021, the tenant operated a five-year break clause. The tenancy had been at a fixed rent of £62.000 but the tenant wanted to move to a turnover rent and they did so. The tenant wanted flexibility and it was agreed that they could break their new lease at any time on three months' notice. This demonstrates that the tenant gets what the tenant wants at this time.

111 **Superdrug** occupies a larger unit than the index unit but is on the lower mall. The tenant renewed the lease in June 2020 for a five-year term with a tenant break at three years. The rent is a rack rent of £92,500 per annum with twenty-four months at half rent.

112 **Skechers** was an open market letting in May 2019 at a fixed rent and with a service charge cap and twelve months' rent-free.

113 The court was referred to very many comparables. Others include much smaller units, or lettings that are very different in their nature, such as, White Wall Gallery which occupies a small part of the previous Debenhams store at a low base rate rent and with a six month notice break clause to enable redevelopment of the large unit, or HMV, which was a temporary flexible deal following HMV's administration. Other comparables included lease re-gears, some following the tenant's administration, and post-CVA deals. These are of limited value as comparables as they were not open market lettings.

The court's findings:

114 I find that the shape and layout of the index unit is far from ideal, with a top heavy configuration. Retailers prefer rectangular units with a wide shop front, so that shoppers can see the merchandise on display and have easy access to the goods on sale.

115 As confirmed by the experts, the retail market pre-Covid had been changing due to the rise in online shopping and Covid has exacerbated the ongoing decline in the High Street and in shopping centres. The experts agreed that the retail market is now very different to that in 2017 and 2018.

116 This downturn is demonstrated by the significant list of vacant units in the centre, set out in section 7 of the expert's joint statement of June 2021 and by the void periods I have mentioned. The vacant units include units empty since 2018, as well as the large unit formerly occupied by Debenhams. Although the claimant's expert states that interest has been expressed in many of these units, there is no persuasive or detailed evidence that terms have been agreed for the re-letting of these units. Debenhams' former site is said to be in solicitor's hands, but there is no evidence as to why this is and whether any possible agreements are in respect of the whole store or any part of the store.

117 During the course of the trial another major High Street retailer announced the closure of all its shops. Each negotiation in the current times is tenant dependent. The sort of aspirational retailer targeted for this unit was particularly hit by Covid, as it was more affected by enforced closures and lockdown than, for example, the food sector.

118 There is little or no consistency in the comparables. Each negotiation is different and depends on the tenant, their circumstances, their preferences, their estimated or actual turnover, the strength of their brand and their bargaining position.

119 I accept Ms Campbell's evidence that a tenant willing to make a commitment to take a shop of over 9,000 square feet in the centre would be in an extremely strong negotiating position, especially for this particular unit. The current lettings market of retail units in shopping centres is very favourable to tenants. I find that Mr Stott's GAP analysis, served on the last working day before trial, is not persuasive. It is an indiscriminate list of retailers, none of whom have identified requirements for Derby or for a shop unit of 9,000 square feet, with only 2,600 square feet on the ground floor. Further, as set out in the experts' second joint statement, some of the retailers have stated that they have no interest in Derby, and others would have no interest in a unit of this size and configuration. Some of the listed retailers

are post-administration, and others are not in the market for new stores. The list serves no real evidential purpose.

120 A turnover rent is a mechanism to calculate the rent, and the parties need to know both elements of the calculation (the turnover and the percentage) to be willing to agree the turnover rent. The turnover of the willing hypothetical tenant is not known.

121 As Mr Stott and Mr Boundy, on behalf of the claimants, acknowledged a retailer will calculate their projected turnover and profit and bid accordingly, based on what they can afford. A fixed percentage of an unknown turnover figure is meaningless. What the parties are interested in is what sum is likely to be payable by way of rent. What can the hypothetical willing tenant afford? A turnover rent can vary considerably for this unit. This conclusion sits uneasily with Mr Stott's evidence that the hypothetical willing tenant would pay a turnover rent at 8%, because such a tenant would not pay a turnover rent which is significantly in excess of an open market rent and/or which they could not afford. As the court must take into account market conditions, I find that the hypothetical willing tenant would not agree a turnover rent unless it represents an open market rent.

122 Conversely, the hypothetical willing landlord will not agree a turnover rent of 8%, unless satisfied that the rental sum, calculated on the basis of the hypothetical willing tenant's projected or actual turnover figures, will be acceptable. The percentage is therefore meaningless without knowing the tenant's actual or projected turnover.

123 Some tenants prefer a turnover rent, whilst others prefer a fixed rent. In challenging trading times, such as during the pandemic, and even before this, with the effects of the expansion of on-line shopping, many tenants prefer a turnover rent because it offers protection from liability to pay a fixed rent when turnover is low or non-existent.

124 The comparables show that the deal is largely determined by the tenant's wishes. When the tenant wants a fixed rent, the landlord will agree a fixed rent. All retailers want to reduce their outgoings and if a fixed rent will be lower than a turnover rent, the tenant will choose the fixed rent.

125 When considering comparables, one has to look at the entire deal as confirmed by the experts, and, in particular the side letters which reflect the actual deal that the parties have agreed.

126 The court has not seen evidence as to the rents paid by tenants with turnover rents or with base and turnover rents. Mr Stott states, however, in his answers to questions that less than 40% of the tenants, including the defendant, paid a top-up turnover rent in 2019, and he acknowledged that by 2020 this would be less. The majority of tenants have therefore not paid a turnover top-up rent.

127 I was not referred to the wording of any specific lease clauses, but, on balance of probabilities, and subject to the actual wording of any relevant lease clauses, I find that it is appropriate to net down the turnover rent in respect of a turnover rent-free period. I agree with the defendant's expert and not the claimants' expert. This is because if there is a 2 month turnover rent free period one should disregard the turnover in respect of those 2 months.

128 Mr Stott's recommendation of a turnover rent of 8% takes no account of the actual amount of rent which will be paid, and the fact that if the hypothetical willing tenant is as successful as the defendant, the rent will have increased against a market trend of decreasing rents.

The rent proposed by the claimants would not therefore represent the open market rent. Rents have also reduced substantially over the last fifteen years or so.

129 Over the last few years the claimants have had to offer significant incentives, which effectively reduce the rent payable, to attract tenants. The recent lettings of Hugo Boss, Disney, Mango and Tommy Hilfiger are examples, reducing the rent or resulting in the landlord even paying the tenant to be in occupation.

130 CVAs or lease re-gears do not produce reliable evidence of an open market rent because these involve existing tenants seeking to re-negotiate their leases. Businesses engaged in a CVA are often struggling to pay the company's liabilities and the business is likely to go into the insolvency process unless the landlord gives concessions.

131 Further, on what percentage should the turnover rent be calculated? The claimants' expert stated that the turnover rent for general fashion retailers varies between 6-12% of turnover, although on his assessment in this case, he advised that the appropriate percentage is 8%. It is not appropriate for the court to average the percentage because the rent determined by the court should be the open market rent. Without knowing the hypothetical tenant's turnover, the court cannot be satisfied that the percentage will produce an open market rent acceptable to the hypothetical landlord. Turnover varies widely according to the retailer such as the turnover of Zara compared to that of the defendant.

132 It is unfortunate that the parties have been unable to agree the rent. The parties' polarised positions mitigate against a successful ongoing future commercial relationship which is in both their interests. It is in the claimants' interest to have a successful retailer in their centre and it is in the defendant's interest to operate from a unit which makes them money. The aspiration of the claimants, if successful, to obtain a rental figure for the new lease which is significantly in excess of the open market value of the unit, as recognised by their own expert, when comparing his assessed open market fixed rent of £179,500 to the turnover proposed figure of £496,000, could result in the loss of the tenant, which is not bound to enter a lease at the rent determined by the court.

133 The tenant has paid the following sums historically as a turnover rent. June 2016-2017, £527,056, June 2017-2018 £509,622. June 2018-2019 £504,261 and June 2019-2020 £400,595. It is not in dispute, and is clearly demonstrated by the comparables, that rents have significantly reduced over these years. On what basis can the claimants justify increasing and not significantly reducing the defendant's rental liability in line with market trends? I note that River Island's rent reduced from £330,000 in 2007 to £100,800 in 2021. Mango's rent reduced from £356,000 to, arguably, £22,500. I have also given other examples. The claimants' original position was to propose a fixed rent of £282,000, which is significantly less than the £496,000 that they are now effectively seeking.

134 A turnover rent in these circumstances is likely to produce a result that does not accord with the purpose of the Act, as it is unlikely to result in an open market rent. It is not market derived but is derived from the tenant's turnover. Mr Stott said that it is a way for the landlord to share in the tenant's success but this is not correct. The profit is the figure to be used to assess a company's success, not its turnover.

135 I agree with Ms Campbell that the claimants' position is inconsistent with the objective of the 1954 Act, namely that a tenant should be entitled to renew its lease at market value. If the court were to order the 8% turnover rent sought by the claimants, the court would be effectively ordering a rent of just short of £500,000, significantly in excess of the open

market value identified by the claimants' expert. It would also take into account the statutory disregards of goodwill and occupation highlighted previously.

136 For the above reasons, I therefore find that it is not appropriate for the court to determine the rent in this 1954 Act lease renewal as a turnover rent.

137 I turn therefore to the calculation of a fixed rent. The claimants' expert arrives at a final figure of £170,000 and the defendant's expert at £17,700. The rent the court orders must be the open market rent from the perspective of both parties, for the landlord and tenant both to be willing. I note that Ms Campbell's valuation in her first report, and in the first joint statement, was £57,500. Ms Campbell then reduced this further to, as she describes it, "reflect developments since December 2020." This included a further lockdown period from 6 January 2021 to 12 April 2021, the longest of the three lockdown periods. The other two lockdown periods having been 23 March to 14 June 2020 and 5 November to 2 December 2020.

138 Large stores have announced their closures since December 2020, namely Debenhams and Arcadia. Debenhams was an anchor tenant in the centre and Topshop also had a large store of over 20,000 square feet. I find that the period December 2020 to June 2021 was an extraordinary period in retailing, with non-essential retailers being legally required to close for almost half of this period. I am assessing the rent today as at the judgment date, the lease being treated as starting in early 2022.

139 The government has clearly stated that its intention is to avoid further lockdowns. I am therefore cautious about placing significant weight on the updating evidence between December 2020 and June 2021. I note that even in their second joint statement, the experts do not agree the split between the Mezzanine and the sales floors. Their agreed total square footage in a second joint statement is 9,072 square feet, significantly less than the claimants' expert's square footage of 9,944 square feet, and also less than the defendant's square footage of 9,214 square feet.

140 Doing the best I can on the evidence before the court, in the light of the wide divergence in rents paid and the range of terms and incentives agreed which are relevant to the issue of rent, such as capital contributions, caps on service charges and/or business rates and break clauses, I assess the rent as follows.

141 I turn first to the rate per square foot, the Zone A rate. Mr Stott arrives at a value of £72.72 per square foot, being the highest figure in his range in paragraph 4.3.2 of his report. Mr Stott bases his £72.72 per square foot on the Mango agreement of 2021. I do not agree with Mr Stott that the rent-free period in respect of Mango falls to be disregarded. I also note the dispute as to whether the significant capital contribution should be apportioned between five years, on the basis that the tenant exercises the break clause, or the full ten-year term. I note the evidence of Ms Campbell that agreement was reached in 2019 with heads of terms dated January 2020, so this is not reflective of the rent in May 2021. I therefore find that £72.72 per square foot needs to be reduced.

142 In her first report Ms Campbell values the price per square foot at £61.35, and sets out a range in paragraph 10.1.1 of her report from £85.20 to £61.35 in 2018. A discount will be applied later to reflect the reduction in market rents between 2018 and 2021. Ms Campbell values the price per square foot at the lowest of the rental comparables in her range, as it is the last open market letting agreed at a fixed rent. It also happens to be the lowest, and the range of dates is modest, running from May to October 2018. I therefore take a midway

value between the two experts' respective valuations for the price per square foot, and I take a price per square foot of £67.04.

143 This is the calculation of the rent:

Area	Sq ft	A /x	ITZA	Rate psf	Rent p/a
Zone A	1,444	1	1444		
Zone B	601	2	301		
Zone C	445	4	111		
Zone D	127	8	16		
Total grd sales	2,617		1,872	£67.04	£125,499
Less 15% frontage/depth					-£18,825
Less 5%					-£6275
Mezzanine Sales	4,639	13		£5.16	£23,937
Mezzanine ancillary	1,816	20		£3.35	£6084
Subtotal of total area	9,072				£100,399
Subtotal					£130,420
Less 20% market decline since October 2018					-£26084
Total					£104,336
Say					**£104,300**

144 The square footage for zones A, B, C and D have been reduced to reflect the sizes agreed by the experts by the second day of trial.

145 Having calculated the rent on the basis of the zones, the rental figure is £125,499 and I turn next to the deductions in respect of frontage / depth and shape. Both experts agree there should be reductions, but they do not agree the respective percentages. The claimants' expert proposes deductions of 7.5% in total, being 5% and 2.5% respectively. The defendant's expert submits the correct deductions are 25% in total, being 20% and 5% respectively. I assess the deductions in respect of frontage / depth and shape at 15% and 5% respectively for the following reasons.

146 The first deduction is due to the frontage / depth ratio. Shops which are not deep compared to their width tend to have a greater proportion contained in the most expensive A Zone, which is the floorspace closest to the window. It is standard market practice for valuers to apply a discount to the ground floor rental value of such a unit to reflect this disproportionately high ratio of the ITZA (which stands for the area 'in terms of zone A').

147 Mr Stott states that there is no fixed relationship between the size of the ratio and the size of the discount, but he generally applies a 5% discount in these circumstances. He refers to the Whitehall Gallery and the Perfume Shop. I have found that the Whitehall Gallery is not a reliable comparable because it is an unusual tenancy, the tenant occupying the frontage area of Debenhams on a short-term basis. The Perfume Shop is a very small unit of only 447 sq ft, in which the whole unit is contained in Zone A and both experts agree a reduction of 10% for frontage / depth ratio for this unit.

148 Ms Campbell refers to lecture notes prepared by Mr Osmond, an experienced arbitrator and expert and consultant at Cushman & Wakefield who considers that the approach adopted by Mr Stott is misleading and should be rejected as a valuation methodology. Ms Campbell also refers to a 2014 lease renewal in the Manchester Arndale Shopping Centre in which she was involved. The court considered the appropriate adjustment for frontage / depth, accepted Ms Campbell's considered analysis, and applied an adjustment of 20%. Having considered the two party's experts' evidence, I find that the relevant adjustment with regard to frontage / depth is 15%.

149 The next adjustment relates to shape. Mr Stott acknowledges that the subject premises, being essentially triangular, are an awkward shape, which warrants a downward adjustment, although in his view it is a slight adjustment. Relying on his judgment he applies a 2.5% discount. Ms Campbell considers that it is an understatement to say that the subject property is not a standard shop configuration. The unit comprises two distinct irregular sections at right angles and tapers to a narrow rear. In her expert opinion some retailers would reject the unit on configuration grounds. The defendant's expert has therefore made a discount of 5% for the shape applied to the ground floor sales area.

150 Having considered the comparable units and their configuration to the configuration of this unit, I prefer the defendant's percentage discount of 5% to that of the claimants' 2.5%.

151 The total deduction therefore is 20% which produces a net rental of £100,399 in respect of the ground floor.

152 I next address the mezzanine sales and ancillary areas. Although the experts have separated the mezzanine sales and ancillary areas in their calculations, they have not done so in their agreed amended measurements for the property. Doing the best that I can, and knowing that the total is now 6,455 sq ft for the mezzanine, I have apportioned this as to 4,639 sq ft in respect of the mezzanine sales and 1,816 sq ft in respect of the mezzanine ancillary. The total of 9,072 sq ft is not in dispute.

153 Turning to the A/x column, the experts agree that the deduction for the mezzanine ancillary area is to be divided by twenty. They do not agree the deduction for the mezzanine sales area. The claimants' expert says the deduction should be divided by ten, and the defendant's expert says it should be divided by sixteen.

154 Mr Stott states in his report that first floor sales space is typically valued at a rate of either A/10 or A/12 and occasionally, but rarely, one sees other rates. The choice between A/10 and A/12 is driven principally by the quality of the customer's access to the first floor trading space. In this case, he assesses that access is good, and therefore the correct rate to apply is A/10.

155 Ms Campbell says that the subject property has a top-heavy configuration with 71% of the net internal area at mezzanine level. At paragraph 10.4.2 of her report dated 3 December 2020 Ms Campbell sets out a chart detailing those units with a mezzanine level and the mezzanine rate applied. Based on the approach of treating 30% of net internal area as ancillary, Ms Campbell adopts an A/16 adjustment on the mezzanine sales area reflecting its size relative to the ground floor.

156 Having considered the experts' opinions I adopt a divider of thirteen, which falls between the views of the two experts, to calculate the rate psf in respect of the mezzanine sales area.

157 Mr Stott's evidence is that there should be no more deductions. Ms Campbell's evidence is that a further 10% should be deducted because of the size of the unit and 40% because of the decline in the rental market since 2018. Ms Campbell also proposes a service charge cap of £5,000. I am not persuaded as to the 10% reduction on the basis of the size of the unit. This is not an extraordinarily sized unit, it is a large unit, but it is not a unit, for example, the size of Debenhams or Zara.

158 Ms Campbell refers to a 2014 tenant lease renewal of WH Smith in Worcester, where there was clear evidence before the independent expert that there was no immediately identified demand for the subject premises. I have not seen any such clear evidence. I therefore do not accept that a deduction for the unit's size is appropriate.

159 Should there be a reduction to reflect the downturn in the market since 2018? I note the increase in store closures and of retail units occupied on CVA terms, administration terms and lease re-gears. I note the table in Ms Campbell's report dated 3 December 2020 at 10.7.3 giving a range of Covid adjustments from 17% to 25% in the period June to December 2020. The court is concerned with the rental which will be determined now, and which will be effective in February 2022. I take judicial notice of the vaccine, of the government's announcements as to the fact that future lockdowns are unlikely, of the medical experts' forecasts as to the impact of the vaccine, of the advances and treatments of Covid and of the opening up to a return of semblance of normality as well as the current rising rates of Covid. I find that the situation is more favourable and less gloomy than in June to September 2020.

160 There has, however, undoubtedly been a decline in the rental market since 2018 and for that I allow a reduction of 20% which reduces the open market rent to £104,336. I make no deduction to reflect the service charges. Disney was an example of the claimants' trying to attract a big name tenant into the unit, with especially enticing terms. I find that a willing hypothetical tenant and a willing hypothetical landlord would be likely to agree the rent for the index unit in the current market at £104,300.

(c) Should there be an adjustment for a standard rent-free period?

161 From the previously cited authorities of his Honour Judge Bailey and His Honour Judge Lochrane, it is clear that the whole of any rent-free period should be taken into account when adjusting the headline rent. Paragraph 53 of the judgment of his Honour Judge Bailey reads as follows, "There remains the fifth question, should an adjustment be made to reflect the absence of a rent-free period for fitting out." He continues at paragraph 56,

> "If the comparables, as in this case, are of rents payable by tenants who have three month rent-free periods, the determination of a rent which is to be paid throughout the term by reference to those comparables must surely reflect the fact that there will be no rent-free period under the new lease. The court is not there importing fiction, it is having due regard to the nature of the comparables."

When considering the rent psf rent free periods have therefore been taken into account.

(d) Should there be a capital contribution paid by the claimants to the defendant?
(e) The quantum of the break penalty, if the new lease is at a turnover rent?

162 I find that these issues no longer arise in light of my calculation of the rent payable in respect of the lease renewal.

(f) With regard to the interim rent, whether the court applies exception A or B under section 24(3) in Part 2 of the Landlord and Tenant Act 1954, and the amount of the interim rent.

163 Section 24C of the 1954 Act applies to the determination of the interim rent. The relevant period for the interim rent is the agreed date of 24 June 2017, and the interim rent will apply until the commencement of the new lease, which is three months and twenty-one days after judgment, assuming that there is no appeal. The default position in section 24C(2) is that the interim rent is the same rent as the rent under the new tenancy, unless one or both of the two exceptions in section 24C(3)(a) or (b) apply.

164 Exception A applies where the rent for the interim period differs substantially from the rent for the new tenancy. For example, where there has been a change in the market rent from the date of the interim rent to the date of commencement of the new lease, in this case 24 June 2017 to the date of commencement of the new lease. Exception B applies where the terms of the new tenancy result in a substantially different rent compared with the old tenancy. This might apply, for example, where there is a change in user clause or a change in the tenant's service charge or repairing covenant.

165 Both parties agree that a non-turnover rent would have been much higher in 2017 than in 2021. I therefore find that exception A applies. There has been a substantial movement in the market rental value between 2017 and 2021, as demonstrated by the comparables I have cited previously and as agreed by the experts.

166 The claimants' submit that exception B also applies on the basis that if the new tenancy is at a fixed rent, the change from a turnover rent to a fixed rent is a difference in the terms of the tenancy and exception B applies. The defendant submits that if a turnover rent, which is the mechanism for the calculation of the rent, is a rent as claimed by the claimants for the purposes of section 34, then the fact that the rent may be calculated in different ways in the tenancies is not a difference in the terms of the tenancies.

167 I find that it is incongruous for the claimants to describe a turnover rent as a term other than rent when the court is determining the interim rent, whilst submitting that a turnover rent is a rent for the purposes of section 34. I find that a clause defining the rent as a turnover rent and setting out the mechanism for the calculation of the rent is a rent clause. If this were not so, every tenancy with a turnover rent would have no rent clause.

168 I therefore prefer the defendant's submission that exception B is not applicable. The difference in the terms of the new tenancy must be so different to the terms of the existing tenancy that the rent which would have been ordered in respect of the new tenancy would be substantially different. This does not apply in this case. I have not been referred to any terms in the new tenancy that are so different that they would produce a substantially different rent.

169 I find that the word "terms" in exception B does not include the rent, whether fixed or based on a mechanism of calculation, such as a turnover rent. The interim rent is therefore to be determined in accordance with section 24C(5) and is the rent which would have been determined as the rent for the new term if the valuation date had been the valuation date for the interim rent purposes, i.e. the 24 June 2017.

170 I will not address the parties' experts' valuations of the interim rent on a turnover basis, as my expressed reasons as to why a turnover rent is not appropriate apply. In Mr Stott's first report he only provided a valuation for an interim rent on the basis of a turnover rent. In his second report, he assesses the interim rent at £281,750 per annum.

171 Ms Campbell in her first report assesses the interim rent at £131,250. In their first joint statement, each expert keeps to their initial positions. In the second joint statement, Mr Stott reduces the fixed interim rate to £255,500 and Ms Campbell increases her interim fixed rent to £139,000. The difference between the parties on a fixed interim rent basis is therefore effectively, £255,500 and £139,000. The parties' figures in their second joint statement reflect the revised floor areas.

172 I set out below the court's interim rent calculation.

AREA	Sq ft	A/x	ITZA	Rate psf	Rent pa
Zone A	1444	1	1444		
Zone B	601	2	301		
Zone C	445	4	111		
Zone D	127	8	16		
Total grd sales	2617		1,872	£82.40	£154,253
Less 15% frontage/depth					-£23,138
Less 5% shape					-£7,713
Mezzanine sales	4639	13		£6.34	£29,411
Mezzanine ancillary	1816	20		£4.12	£7,482
Subtotal	9072				£160,295

Say £160,300.

173 The first issue to be determined is the Zone A price per square foot. Mr Stott assesses this at £114.10 per square foot and Ms Campbell at £73.60. New Look, on 29 September 2016, is a relevant comparable which produces a price per square foot of £80.60. Although Ernest Jones' lease was around the relevant time it was a lease re-gear, as was Body Shop, and lease re-gears are less reliable comparables for the reasons already given.

174 River Island is a similar sized unit and the rent was agreed from June 2017, although the lease was only completed in June 2019. The parties' experts do not agree the relevant date for River Island's lease. I prefer Ms Campbell's opinion that the relevant date is 2017 and I also note that the experts initially entered this evidence in their reports based on the June 2017 date. This lease was for a five-year term, also inside the 1954 Act and for a similar sized unit. The lease was at a fixed rent with nine months' rent-free, which nets down to £82.40 per square foot. That is the price per square foot that I shall use for the calculation of the interim rent.

175 The calculation of the price per square foot at £82.40 produces a rent of £154,253. Applying the same reductions as before, namely 20% in total, for the reasons I have given previously, this reduces to £123,402. in respect of the ground floor. Adding the mezzanine sales and ancillary floors results in a rental figure £160,295 which I round up to £160,300. I therefore determine the interim rent at £160,300 per annum.

176 I have checked both the rent and the interim rent against the comparables and I am satisfied that they are consistent with the comparables, subject to the observations already made about the need to look at the entirety of each actual deal and the range of deals concluded.

177 As I stated at the outset, I made an order on 20 October, two days ago, that I would deliver judgment and reserve costs today. The usual order is that I invite the claimants' counsel to draw the order. I have received this morning emails from both counsel who do not agree as to the extent of the matters before the court today for determination. I will hear counsel for the claimants and then counsel for the defendant with regard to those emails.

Note

When delivering judgment I informed counsel that, in the event of a transcript being requested, the requesting party should provide the transcribers with the formatted calculations.
On 4 November 2021 I received the transcript for my approval. On 5 November I emailed the court office pointing out that the calculations in the transcript were incomplete. I received no reply. On 8 November 2021 I emailed all four counsel and the parties' solicitors informing them of the issue. On 9 November claimants' counsel, who attended the delivery of the judgment, replied that the claimants' solicitors had failed to provide the transcribers with the interim rent calculation but that this mistake had that day been remedied. Although I was subsequently sent a revised transcript from the transcribers the calculation for the interim rent has not copied and pasted in the correct format into this transcript.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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**** This transcript is approved by the Judge ****