Claim No F02BM162

IN THE BRENTFORD COUNTY COURT
IN THE MATTER OF PART II OF THE LANDLORD AND TENANT ACT 1954

B E T W E E N:

POUNDLAND LIMITED	**Claimant/ Tenant**
and	
TOPLAIN LIMITED	**Defendant/ Landlord**

Judgment of District Judge Jenkins
7 April 2021

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1. The claimant occupies 18 to 22 King St, Twickenham TW1 3SN for commercial purposes, holding over under a lease dated 12 February 2010 between these two parties, now expired. The claimant served a section 26 notice dated 3 July 2019 and although the parties agreed that the claimant should be granted a new lease, as they were unable to agree the terms these proceedings were commenced pursuant to section 24 of Part II of the Landlord and Tenant Act 1954. Immediately prior to trial the parties reached agreement on an annual rent of £130,000 for a five-year term with no break clause, and that the interim rent should be at that same figure. The parties also agreed that there should be no order for costs in respect of these proceedings.

2. The remaining differences between the parties are in respect of indemnity provisions, the timing of rent payments (which had been agreed as monthly), what were collectively described as "pandemic clauses" under a "use prevention measure", together with a number of other miscellaneous provisions.

3. The legal position is clear. Section 35 of the 1954 act provides that:

> *"(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) including, where different persons own interests which fulfil the conditions specified in section 44(1) of this Act in different parts of it, terms as to the apportionment of*

the rent, 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.*

(2) In subsection (1) of this section the reference to all relevant circumstances includes (without prejudice to the generality of that reference) a reference to the operation of the provisions of the Landlord and Tenant (Covenants) Act 1995."

4. The exercise of the discretion given to the court by the Act was clarified by the House of Lords in ***O'May v City of London Real Property Co Ltd (1983) 2 AC 726*** where Lord Hailsham (at page 740) said:

> *"From these sections I deduce three general propositions. (1) It is clear from section 34 that, in contrast to the enactments relating to residential property, Parliament did not intend, apart from certain limitations to protect the tenant from the operation of market forces in the determination of rent. (2) In contrast to the determination of rent, it is the court and not the market forces which, with one vital qualification, has an almost complete discretion as to the other terms of the tenancy (which, of course in turn must exercise a decisive influence on the market rent to be ascertained under section 34). And (3) in deciding the terms of the new tenancy, as to which its discretion is otherwise not expressly fettered, the court must start by " having regard to" the terms of the current tenancy, which ex hypothesi must either have been originally the subject of agreement between the parties, or themselves the result of a previous determination by the court in earlier proceedings for renewal."*

5. Lord Wilberforce (at page 747) added:

> *"The general purpose and policy of the Act of 1954 is clear. It was to provide security of tenure for those tenants who had established themselves in business in leasehold premises so that they could continue to carry on their business there. This objective was identified in the Leasehold Committee Final Report (1950) (Cmd. 7952), as the principal, indeed the only objective then recommended to be achieved by legislation.*
>
> *…….*
>
> *The crucial section, for present purposes, is section 35 which relates to the terms of the tenancy, other than terms as to duration and rent. This section contains a mandatory guideline or direction to "have regard to" the terms of the current tenancy and to all relevant circumstances. The words "have regard to" are elastic: they compel something between an obligation to reproduce existing terms and an unfettered right to substitute others. They impose an onus upon a party seeking to introduce new, or substituted, or modified terms, to justify the change, with reasons appearing sufficient to the court (see Gold v. Brighton Corporation [1956] 1 W.L.R. 1291 , 1294 - on "strong*

and cogent evidence" per Denning L.J., Cardshops Ltd. v. Davies [1971] 1 W.L.R. 591 , 596 per Widgery L.J.).

If such reasons are shown, then the court, applying the words "all relevant circumstances," may consider giving effect to them: there is certainly no intention shown to freeze, or in the metaphor used by learned counsel, to "petrify" the terms of the lease. In some cases, especially where the lease is an old one, many of its terms may be out of date, or unsuitable in relation to the new term to be granted. "

And at page 749:

"The character of the two parties' interests in the land - the landlord's an indefinite one by freehold, the tenants' a limited one over a comparatively short period, even though capable of renewal if the tenant so wishes, is such as to call for the assumption of long term risks by the former: his benefit too is long term and will not, according to the evidence, emerge till the 1990's. Transference of these rights to the leaseholders, accompanied, as is inevitable, by separation of control, creates a risk disproportionate to their interest."

6. In addition I was referred to ***WH Smith retail Holdings Ltd v Commerz Real Investmentgesellshaft MBH (unreported***) which dealt not with pandemic clauses but the appropriate trigger for such agreed clauses, although this is of persuasive and not binding authority, and ***Wallis Fashion Group Limited v CGU Life Assurance Ltd (2001) 81 P. & C. R. 393*** and in passing ***John Lewis Properties plc v Viscount Chelsea (1994) 67 P. & C.R. 120.***

7. It is not therefore the purpose of the legislation (and so the court in exercising its discretion) to approve (opposed) amendments to the lease which would result in a change to the respective risks, obligations and benefits carried and enjoyed, nor to insulate the tenant against the commercial and trading risks they may face in a way that would either prejudice the landlord or interfere with their long term interests. Subject to that general view I add that "all relevant circumstances" in my view, at least currently, includes consideration of the effects of the COVID-19 pandemic and in particular the lockdown that was imposed by Government and that it is appropriate to consider the potential effects of any repeat government imposed lockdown either for similar or indeed other reasons without of course seeking to anticipate if that might happen.

8. Consequent to the agreements reached, the parties agreed that this hearing should proceed on the basis of consideration of the written evidence filed and on submissions made. Both parties had filed both lay and expert evidence in accordance with directions given on 11 August 2020 (varied by agreement on 8 January 2021) and I had before me the written

evidence of Ben Wall and Danils Hanif together with the claimant's experts report from Chris Gilbertson and the report of Paul Jenkins on behalf of the defendant. Both parties had raised questions in respect of the expert evidence adduced. I remind myself that I can only come to a decision on the basis of the evidence that is before me, that I must look at that evidence on the balance of probabilities and that in a case such as this it is the party who seeks the variation of terms who will carry the burden of proof. And as expressly required, I have had regard to the current lease.

9. The issues left in dispute between the parties were helpfully set out in schedule form and whilst there are similarities in respect of some, I will work through them as set out in that schedule and by reference to clauses in the proposed new lease.

Clause 1.1

10. The claimant seeks to insert a new clause, an "indemnity proviso" which they would seek to impose in relation to a number of specific clauses in the lease (clauses 29. 4, 31. 7 and 34) which would require the landlord to comply with a number of steps as to notice and mitigation before being entitled to indemnity from the tenant. The clause also seeks to prevent double recovery. The clause breaks down into two parts dealing with each of those two specific and separate issues. The defendant sees this as a material departure from the existing lease imposing a burden on the landlord and improving the tenant's commercial position at the landlord's detriment. My position in relation to this proposed additional clause is, with respect, to repeat the views of Neuberger J (as he then was) in **Wallis Fashion Group** where he said at paragraph 14 that the proposal that he was then considering might "*on the face of it… add nothing*" but that it might "*very sensibly, removes any room for argument*…". Whilst I am not sure that the terms requiring information add much to the statutory and/or procedural position imposed on the landlord should a dispute arise, I do see that requiring that information to be provided at the earliest possible stage may provide the best opportunity to bring about an early resolution of any such dispute. Giving the parties that earliest opportunity for resolution is in my view an appropriate step to take and therefore in all the circumstances an appropriate provision to bring into this commercial arrangement. However, I am concerned with the provision seeking to prevent double recovery as drafted in that it provides that no indemnity is due if any claim "may be covered by insurance". Whilst this point was not specifically addressed there may be a number of commercial reasons why the claim although covered by insurance is not met or perhaps pursued and to bar an indemnity in such a blanket

way would not in my view be reasonable. It may well be reasonable to expressly prevent double recovery - although such a clause almost certainly would add nothing. I noted that this proposed proviso can be read as being in two parts and finding the draft clause is severable I accept it is appropriate to include the first part in relation to the early provision of information in the draft but not the second as to double recovery.

Clause 6.1 (Payment of rent in arrears)

11. The claimant's position that this amendment reflects the tenant's standard position across the portfolio is perhaps understandable but that does not in my judgement fall within a proper exercise of discretion as suggested by **O'May**. I do not accept that the assertion in the witness evidence from Mr Wall that "paying rent in advance is an unfair balance of power between the landlord and tenant". The tenant's cash flow is a matter entirely for the tenant and I do not accept the argument that the tenant's portfolio position is a relevant circumstance and to recast the lease in a way which varies that responsibility - to share a commercial risk that ought properly to rest with the claimant, would be to redraw the parties' respective burdens in a way that would not be fair and reasonable.

Clause 6.3:

12. The claimant proposes that the annual rent be reduced by 50% during any use prevention measure as defined. The claimant's view is that this would modernise the lease by reacting to a lockdown as experienced during the COVID-19 pandemic. If the tenant was unable to trade, then that would present a risk not only to the tenant but also the landlord if the tenant is unable to pay the rent. They assert that it is in both parties' interests for the tenant to be given rent relief if it enables it to continue to trade and so meet its ongoing obligations to the landlord. They say such a clause is in line with similar clauses agreed between many tenants and landlords in the past 12 months. They rely on ***WH Smith***. The defendant's position is that not only is there no market precedent for such a clause but that it fundamentally changes the relationship between the parties. They say that the impact of any lockdown would be controlled by legislation and that the appropriate course is for the tenant to take advantage of any benefit the government may put in place. In ***O'May*** the landlord sought to impose upon the tenant the obligation to pay a service charge; however the court decided that it would not be fair and reasonable to impose that new risk. Here it is the tenant seeking to impose a new risk upon the landlord, by sharing what clearly must otherwise be the tenant's risk to pay rent, during a period when circumstances might make it difficult for the claimant to trade. I

conclude that the imposition of such a clause to reduce the claimant's liability in those circumstances would not be fair and reasonable. It is not the purpose of the Act to protect or insulate the claimant other than to allow them to continue their business following the term end. The purpose is not to redesign previously negotiated risks even though a national lockdown may not have been in the parties' minds when they did so. Although right to give consideration to the issue, it is not in my view sufficient a reason to impose a sharing of the risk in circumstances over which the defendant would have no control whilst the claimant may have some by reference to reliefs or schemes that might be available to them by the government. In relation to ***WH Smith*** the court there was dealing with a situation where the parties had already agreed such a provision and was simply determining the mechanics in which it would operate rather than expressing any view as to the substantive clause itself. To impose this variation would in my judgement not be fair and reasonable and I do not do so.

13. In relation to the service charge where the claimant seeks a similar reduction in such circumstances, I reached the same conclusion particularly bearing in mind that any service charge due will be in relation to costs and expenses for which the defendant landlord may well still be liable, and of course if not, then no service charge demand will follow.

Clause 7.5 (c)

14. The claimant seeks a proviso that during any lockdown period the tenant will be relieved from complying with the insurer's requirements. They suggest, by way of example, an inability to access the property during any lockdown as good reason why this should be. The Defendant's position is that there is no justification for a failure of a tenant to comply with insurer's requirements which is a view with which I agree. It does not seem to me that it is good reason to relieve all the burdens imposed by insurers during a lockdown period where the conditions of any future lockdown period (should it arise) are completely unknown and the risks and obligations being relieved potentially irrelevant to the fact of a lockdown itself and which may well put the entirety of the insurance cover at risk. Whilst it may be appropriate to exclude compliance where that would breach any government legislation in relation to a future lockdown period, or otherwise be impossible, that is not suggested by either party here. In any event it might be thought that general principles may well provide the tenant appropriate protection if such circumstances were to exist. I do not therefore accept that there is any good reason for the proposed amendment.

7.6 (b)

15. The Claimant seeks the removal of an existing clause which says the landlord need not rebuild if the insurance rent is not been paid, asserting that it is reasonable to remove a potential windfall where perhaps the reason insurance rent was unpaid was because it was unreasonably or incorrectly demanded or due to an administrative error. I accept the defendant's view that if there had been "a failure" to pay in such circumstances then there would be a clear issue as to whether or not the insurance rent had or had not been paid and if in fact there was no such failure on the tenant's part, then the landlord would themselves be in breach if they failed to rebuild. Neither am I persuaded that the removal of this clause provides a certainty for the parties: if there was any dispute around valid payment of insurance rent then a dispute between the parties would still need to be resolved. This clause is in the current lease and I see no good reason for its removal.

8.3

16. The Claimant seeks to remove an existing clause which requires the landlord's consent to be obtained before making any proposal to alter the rateable value of the property such approval not to be unreasonably withheld or delayed. It is the claimant's position that as occupier they benefit from any available relief and so their entitlement to any such benefit should not be controlled by the landlord whose position would not in any event be prejudiced as a decision would be made by the independent valuation office agency. I accept that the defendant's position that the provisions of the existing clause (as originally agreed between them) protects the balance of the parties' respective interests and the provision that consent cannot be unreasonably withheld does not in my view amount to undefined control. I see no good reason why this existing clause should be removed.

18.3 (referred to as 17.3 of schedule)

17. The Claimant seeks to "modernise" the lease by inserting into clause 18.3 a provision that the existing condition relating to an assignor entering into an authorised guarantee agreement should only take effect "if reasonably required" saying that this would give express effect to section 19 (1a) of the Landlord and Tenant Act 1927 and section 16 (3) (b) of the Landlord and Tenant (Covenants) Act 1995. They rely on the judgment of Neuberger J (as he then was) in **Wallis Fashion Group**. The Defendant does not accept this, seeing it as a substantial departure from the current lease. They say section 19 of the 1927 Act itself imposes the reasonableness

requirement as the lease contains a tenant's covenant not to assign without the landlord's consent. **Wallis** was dealing with a position where the original lease predated the legislative change which is not the position here and it was on that basis that the amendment in **Wallis** was allowed, observing that in paragraph 14 of his judgment Neuberger J noted that the amendment added little to the statutory provision save for the clarity as to the form of the AGA those parties had agreed. I accept the defendant's submissions and do not find that good reason has been demonstrated for the lease to include such a provision in the circumstances.

29. 4

18. The claimant seeks to insert the effects of the indemnity provisions into this clause which I will permit to the extent dealt with above.

31. 7

19. The claimant seeks to insert the effects of the indemnity provisions into this clause which I will permit to the extent dealt with above.

31.10

20. This is a new clause which the tenant seeks to introduce as a consequence of the Domestic Minimum Energy Efficiency Standard Regulations 2018 (MEES regulations) which will require the property to meet certain energy efficiency standards and therefore could result in works, perhaps significant, being necessary. The tenant, by this clause, seeks for the landlord to meet the costs of any such works. As a general proposition it does seem to me to be appropriate that if Regulation requires that the property should meet those standards then the obligation to ensure that they are met should rest with the landlord. The defendant does not seemingly dispute that saying that, "if" the regulations make that clear (save where any reduction in the standard required is as a direct consequence of a tenant's action), but assert that as clause 31 of the lease already covers statutory obligations this amendment is wholly unnecessary. It adds nothing. Clause 31 of the proposed lease which deals with "compliance with law" has an agreed provision at 31. 1 which reads "save where there is an obligation on the landlord...".

21. As I understand the Regulations nothing in them interferes with any rights or obligations imposed as a consequence of entering into a lease nor will a breach of the Regulations itself affect enforcement of any such rights or obligations. So, if a situation arose where the tenant was in breach of a term of the lease the landlord could (all other things being equal) seek to

enforce against that breach even though there may be a failure to comply with the MEES Regulations. Adding clarity in against that background to the responsibility for compliance would seem appropriate and reasonable. Accordingly, a provision which imposes a contractual obligation in respect of the MEES regulations is in all the circumstances a fair and reasonable new clause and whilst the drafting of the proposed clause might, as suggested, be improved - although none is proposed. I will permit the addition of this clause.

34

22. The claimant seeks to insert the effects of the indemnity provisions into this clause which I will permit to the extent dealt with above.

37

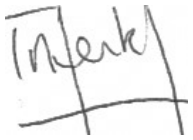
23. The claimant seeks to vary the existing forfeiture clause by including a proviso that the landlord cannot forfeit during a lockdown period, a variation which the defendant opposes. In my judgement this would significantly alter the existing commercial balance between the parties-crudely put the claimant's risk is around trading and the defendants around the ability of the claimants to pay the rent. Imposing this proviso transfers or perhaps shares that tenant's risk during a lockdown period in circumstances where any government or central assistance that might be available would be available to the tenant and not the landlord. Accordingly, the inclusion of this proviso would in all the circumstances be inappropriate and would not be fair and reasonable. I therefore accept the claimant's position.

Paragraph 6 Schedule 2

24. The Claimant seeks to impose a cap on the service charge, amending the proposed cap at trial from 2.5% of the annual rent to 10% of the by then agreed rent of £130,000. They say the certainty this will bring will allow them to better manage their cashflow not least by avoiding major works being undertaken shortly before term end with the Tenant then being liable for payment of a large service charge bill. The defendant opposes any such cap; the current lease only allows a fair and reasonable of the "Annual Expenditure" which itself is defined by reference to "reasonable" and "reasonableness". This protective definition will act as a limit on service charge including costs of significant works late in the term. Further it was said that the level of service in any one year is referable to earlier years when perhaps no service charge was raised. In any event, if the claimant is concerned it can seek to enforce the landlord's covenants. Whilst that last point would present an unhappy position should the need materialise, I am not satisfied that to introduce the proposed cap would be appropriate

particularly given the protection afforded by “fair and reasonable provisions” in the current lease. I accept the defendant’s position and I am of the view that to introduce an artificial cap in this way could affect the position the parties negotiated when agreeing the current terms and is therefore fair and reasonable.

25. On the basis therefore that the parties have been able to agree all other matters, and I am grateful to them for that, for the reasons set out above I reached the conclusions on the remaining disputed clauses as indicated. Clearly if I have failed to deal with something that I ought to have done or dealt with something in a way that is less than clear then I will be told. Subject to such observations or comments as to factual or typographical errors, I invite the parties to agree a draft form of order for approval to reflect these findings. A date will be fixed in due course for this judgement to be formally handed down and an order to be made in the terms of that draft. Finally, I would wish to apologise to the parties that it has taken much longer to produce these written reasons than certainly I indicated at the conclusion of the hearing or indeed that I would have wished.



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District Judge Jenkins

29th June 2021