Case No: G00CL673

**IN THE COUNTY COURT AT CENTRAL LONDON**

Central London County Court
Royal Courts of Justice
Thomas More Building
Royal Courts of Justice
Strand
London
WC2A 2LL

BEFORE:

**HIS HONOUR JUDGE DIGHT CBE**

BETWEEN:

**HPUT TRUSTEE NO 1 LIMITED** **(1) CLAIMANT**
**HPUT TRUSTEE NO 2 LIMITED** **(2) CLAIMANT**

**- and -**

**BOOTS UK LIMITED** **DEFENDANT**

**Legal Representation**
Mr Nicholas Simeon Trompeter QC (Counsel) on behalf of the Claimants
Mr Martin Anthony Hutchings QC (Counsel) on behalf of the Defendant
Mr Benjamin Charles Gatehouse Faulkner (Counsel) on behalf of the Defendant

**Other Parties Present and their status**
None known

**Judgment**

Judgment date: 24 May 2021
(start and end times cannot be noted due to audio format)

Reporting Restrictions Applied: No

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Number of folios in transcript 245
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**His Honour Judge Dight:**

1. This is the trial of the first of a batch of 123 claims between the same parties under Part II of the Landlord and Tenant Act 1954, which I will refer to as "the 1954 Act", concerning what are referred to as unopposed business tenancy renewals of a series of leases granted on 22 March 2005. The Claimants are the landlords, although I will refer to them in the singular below, and the Defendant is the tenant in each case.

2. The references to the claims being unopposed is a slight misnomer in that while it is agreed that the existing leases should be renewed there is a very lively dispute in each of the claims as to the rent and some of the other terms of the proposed new leases. In addition, the tenant has made applications for the determination of an interim rent in each case under section 24A of the 1954 Act but the parties have agreed that the interim rent payable from 22 July 2020, which is the date of expiry of the old terms, should be the same as the rent determined to be payable at the commencement of the terms of the new leases.

3. Although I was due to try four claims in the first batch three of them settled leaving the claim in respect of numbers 9, 11 and 13 The Promenade and 10 Princess Street, Bridlington, which I will refer to as "Bridlington". Even in respect of Bridlington the issues narrowed in the lead up to and in the course of trial.

4. The Landlord was represented at trial by Mr Trompeter QC, the Tenant was represented by Mr Hutchings QC and Mr Faulkner, to each of whom I am extremely grateful for their industry, efficiency and good humour before and during the trial.

5. The parties have agreed the form of draft leases subject to the following issues:

    a. first, duration of the new tenancies. The Landlord contends for ten years, the Tenant contends for five years, although the Tenant's position until shortly before trial was that there should be a three year lease with annual breaks;
    b. secondly, as to whether there should be a tenant's break clause in the new tenancies. The Landlord says no break clause and the Tenant asks for a break clause at three years;
    c. thirdly, as to whether there should be rent increases during the term. The Landlord argues for a fixed annual increase of 1.5% as per the current tenancies. There is a dispute about the basis upon which the court could include such a term in a new lease under the 1954 Act. The Tenant says that a fixed increase is not the same as a rent review and therefore would fall to be considered under section 34(1) of the 1954 Act, rather than section 34(3) of the 1954 Act. The Tenant says also that there need be no rent review provision in a five year lease but, if the lease to be granted is for longer than five years, there should be an either way review clause at year five;
    d. fourth, the rent and the interim rent are in issue, although the parties are agreed, as I have already said, that the interim rent should be the same as the rent payable under the new tenancy. The valuation date for the rent payable under the new lease is some time after this hearing, in September or later of this year, but for the purposes of the exercise I am undertaking it is effectively now or in the near future.

6. The principles relating to the determination of the rent due under the new lease are largely agreed, although there are some differences between the parties, but there is a

significant difference between the interpretation of the comparables relied on by each side and what therefore should be the rent payable under the new lease.

7. So far as the evidence is concerned, I heard some generic evidence together with a limited amount of specific evidence on behalf of both the Landlord and the Tenant. Given the way in which this case, or rather the litigation has developed, it was agreed that the Landlord and Tenant could have the opportunity of putting in what had been referred to as "master statements" with a right to put in case specific statements in respect of individual properties.

8. In line with those directions, Mr Duncan Reader of Quadrant Estates, a surveyor who manages the Landlord's portfolio, filed two master statements on behalf of the Landlord dated 15 February 2021 and 7 April 2021. Miss Kirsty Foster, a Boots in-house estates surveyor and manager, filed what was an amended master statement made on 15 February 2021 and amended on 23 March 2021, on behalf of the Tenant.

9. At trial, and after she had given evidence, I refused permission for Miss Foster to put in a further witness statement relating to the turnover of Bridlington in the years from 2015. I would have welcomed such evidence if it had been given at the appropriate time and in greater detail, in accordance with the case management directions which I had given in December 2020 but, by the time it was sought to be relied on it was too late, it was unsupported by documents evidencing the statements that Miss Foster was hoping to make and would have raised more questions than it purported to answer. There was therefore a lack of specific evidence from the Tenant as to the performance of Bridlington, which was a matter of some interest in the circumstances of the issues which I had to determine.

10. I heard from two experts, both valuers. On behalf of the Landlord I heard from Mr Jonathan Stott MRICS, who filed two reports, on behalf of the Tenant I heard from Mr Andrew Clark MRICS, who also filed two reports. They each put their name to a joint statement dated 22 March 2021. I am grateful to them for their reports and their oral evidence. Each of them has extensive, although slightly different but equally impressive, experience in the field relevant to the issues before me, but each of them was, to a degree, hampered by the evidence available to assist them in formulating their opinions on key matters. Both experts were subjected to lengthy cross-examination. Perhaps subject would be a kinder word to use.

11. In closing submissions there was a careful critique of the written and oral evidence of each of the experts and each party asked me, in essence, to reject the evidence of the other party's expert for not dissimilar reasons. I have looked carefully at the admissible evidence supporting the views of the experts and considered the logic of their opinions. After having read their reports and the joint statement, and having listened to their oral evidence and the submissions in respect of it, I come to the conclusion that I will not accept or reject wholesale the evidence of either of them.

12. In matters of professional opinion it goes without saying that there is a range of reasonable views. In respect of most of the evidence given by the experts their views fell within that range and I have, as will appear below, accepted those of their views which, in my judgment, are better supported by evidence which I can evaluate and which, as a matter of logic, in my judgment, are a better fit with other material and evidence before me.

13. The background of the litigation is as follows. The freeholds of 311 premises from which the tenant carried on the business of pharmacists and opticians had been owned by various companies in the Boots Group for many years. In 2005 there was a sale and leaseback arrangement to a number of Boots companies. On 22 March 2005, leases were granted in similar terms save as to rent, subject to what were called standard lease conditions, also dated 22 March 2005, for terms of 15 years and four months from the date of grant, expiring on 21 July 2020. The permitted use under the standard lease is Class A1 of the Town and Country Planning (Use Classes) Order 1987 as a retail shop, together with other specific uses reflecting the nature of the businesses carried on by Boots.

14. The Claimants became the landlord by purchasing the freehold interests in July 2005. What has been referred to as a master agreement was entered into on 29 July 2005, together with deeds of variation of the same date which varied the terms of the standard lease and the standard lease conditions. Fortunately the copies of the standard form lease and the standard lease conditions which I have been provided with have incorporated the amendments made by the variations which were brought about in July 2005.

15. So far as the current lease is concerned, the term, as I have already said, was for 15 years and four months from the date of grant, expiring 21 July 2020. As a result of the master agreement the Landlord could not dispose of the reversion without the Tenant's consent while the Tenant was a tenant, unless the disposal of all the units was to a single buyer and it is subject to various other investment based provisions, as I read it.

16. The lease contained an annual break clause which, by virtue of clause 9, was to be omitted from any business lease renewal under the 1954 Act, a provision which was reflected in clause 5.7 of the standard lease conditions. The lease contained an option on the part of the Tenant to renew at clause 7, schedule 3 of the standard lease conditions. I am told that the Tenant has exercised its right to renew leases in 139 other cases, which are not part of the business lease renewal litigation before me.

17. In the present case the initial rent was £73,000 per annum, now standing, as I understand it, at something in excess of £90,000 as a result of the fixed yearly increase of 1.5% per annum (compounded), which is provided for in schedule one of the lease.

18. On 16 January 2020 the Tenant served a section 26 notice, expiring with the term of the lease, seeking a new three year lease with annual breaks, at £25,000 per annum. The claim was issued on 19 March and, on 25 June, the Landlord filed an acknowledgement of service agreeing to the grant of a new lease but asking that it be for a term of ten years with no break, at an annual rent of £89,000. On 21 or 22 July of last year the contractual term expired and the lease continued under section 64(1) of the 1954 Act, which is the date from which the interim rent is payable.

19. During the course of the trial I heard, unsurprisingly, a considerable quantity of evidence about the state of the current retail rental market, particularly in light of the coronavirus pandemic, which the whole world has been suffering from since the first few months of 2020. Since that time much has changed. There was evidence on both sides, and it is fair to say that, in general, the Landlord's views on the prospect of a quick return to normality, whatever that may be, are much rosier than the Tenant's.

20. It is, in my view, impossible to say with any degree of certainty, save in a limited number of respects, whether the changes which have come about as a result of the pandemic will be permanent. There has been much talk about a return to normality and much speculation as to when that will be and what it will look like.

21. The Tenant asks me to conclude, so far as the retail market is concerned, that before the pandemic the retail sector was already in decline and that there was a significant move to online shopping and that the economic uncertainties created by Brexit, as we are no longer allowed to call it, have added to the difficulties. It is submitted that the pandemic has accelerated the decline and, whatever evidence there may be either way, at the very least the conclusion that the Court could come to, and should come to, is that the pandemic has caused considerable uncertainty.

22. It is suggested that there are two significant consequences as a result of that uncertainty in the market.

23. First, that there is a now a demand for shorter leases and more frequent break clauses and, secondly, it is has led to a reduction in rents. Mr Clark in his report gives evidence, at section 10, about the condition of the retail sector and, in paragraph 10.2, he identifies a number of larger organisations, well-known high street retailers, who have either closed down or gone through some sort of insolvency process in the period from August 2018 until just before Christmas 2020, including House of Fraser, Arcadia, HMV, Thomas Cook, Oasis, New Look and Dorothy Perkins. There are others.

24. So far as the impact on Boots itself is concerned, there is some evidence as to the impact on them but perhaps not as much as I might have anticipated. According to the Walgreens Boots Annual Report for 2020 and articles in the press and on the internet, which have been included in the trial bundle, as a result of the change in the market Boots undertook a review of its need to retain all its existing stores in 2019 and, as a consequence, embarked on a closure programme to reduce the overall number.

25. The consolidating, if that is the right word, annual report for 2020, on internal page 48, describes the commencement on 20 December 2018 of a:

> **"Transformational costs management programme."**

Which refers to Boots in the following sentence:

> **"Divisional optimisation within each of the company's segments includes activities such as optimisation of stores, including plans to exit approximately 200 Boots stores in the United Kingdom."**

26. The press has interpreted that report as meaning that Boots intended to close 200 stores in the UK high street. I was taken to an online article from Sky News dated 28 June 2019 which said that Boots had confirmed plans to close 200 stores but at that point was not able to confirm which specific stores it would close because it had only just started the process, although that is some time after the date referred to in the annual report.

27. Mr James, Boots UK's managing director, described the plan as one to:

> **"Consolidate around 200 principally local pharmacy stores where we have a large number within close proximity."**

The article goes on to say:

> **"We believe that this is the right thing to do as it means that we can invest more in staffing those stores while not reducing our 90% coverage within a ten minute drive of a Boots."**

Then the article quotes the source as saying in April that the review would be:

> **"Focusing on low-performing stores and opportunities for consolidation."**

28. It would appear that, as at the date of this trial, Boots had closed 158 of the suggested 200 stores, including another store in the same street as the Bridlington premises which, from the photographs that I have seen, appears to be considerably smaller than the unit which this trial is concerned with.

29. The consequence of the change in the retail market and the challenges that the retail sector has faced has been dealt with briefly by Mr Reader and Miss Foster in their master statements, principally in relation to the suggested length of terms of new leases and, without trawling through it in detail, it is apparent to me that the essence of the evidence is that shorter leases have become much more the flavour of the market, reflecting the additional degree of flexibility that the Tenant asked for and needs in light of the uncertainties created by the economic circumstances in which the market finds itself.

30. I was, I have to say, troubled by some of the evidence given by Miss Foster in her witness statement where she purports to give specific evidence about some of the Boots stores but does not provide any documents directly supporting what she says. The situation was more acute in respect of her evidence concerning Bridlington. The experts both agree that there has been a change in the retail environment, although, as I said earlier, the Landlord is more optimistic. Mr Stott, when pressed, admitted to an evolution in the bricks and mortar retail sector but denied that there was a structural decline.

31. So far as documents are concerned I would have anticipated that a business of the size of Boots would have been conducting an ongoing review of profitability and an ongoing review of its strategy for development, looking at its continuing investment in its estate and infrastructure, and the potential changes that it could make in light of the challenges presented both by the economic circumstances in which they find themselves but also the different ways of operating caused by the pandemic.

32. I heard evidence that Boots has adapted to reflect the increase in online shopping. There is a greater use of the click and collect facility, for example. But I have seen no documents explaining how this review took place, what the current thought processes of the company are, nor what their current strategy is. The comment that I quoted earlier from the Sky News extract suggested that the company wanted to maintain a presence in 90% of areas within a ten minute drive of where people live, but I have seen no material which enables me to evaluate whether that is accurate or not.

33. What is apparent is that during the course of the pandemic the Tenant's business has not been forced to close as the restrictions put in place by the Government have increased and changed.

34. The first set of restrictions appeared in the Health Protection Coronavirus Restrictions England Regulations 2020, which came into force on 26 March of 2020. They were replaced in July 2020 by the No. 2 Regulations, which were much more restrictive. On 15 November 2020 the No. 4 Regulations came into force imposing a national lockdown for 28 days but they, like the earlier restrictions, did not require the Tenant's businesses to close.

35. On 2 December 2020 the Health Protection Coronavirus Restrictions All Tiers England Regulations 2020 created various tiers to which all local areas in the country were allocated and made subject to different levels of local restriction. Those did not stop the Tenant from trading. On 20 December 2020 the new tier four restrictions were created and, on 6 January 2021, every local area in the country was placed into tier four.

36. On 29 March 2021 the Health Protection Coronavirus Restrictions Steps England Regulations 2021 revoked the various tier regulations and set out the steps by which the government intended the country to emerge from the restrictions imposed as a result of the pandemic. Several of those stages have now passed and the government has relaxed restrictions in accordance with its plans so far. One only has to look at the news to see that whether they will continue to do so is still open to debate and the picture seems to swing one way or another day by day.

37. On 30 June 2021, in less than six weeks from now, the Steps Regulations are due to expire. That is before the valuation date under section 34(1) of the 1954 Act in respect of the new lease to be granted in respect of Bridlington. The restrictions should by then be revoked in their entirety and, if one takes the news at face value, there is no real suggestion at present that that final release will be delayed, although I accepted that there is a degree of uncertainty.

38. There is considerable speculation about what the impact on the market will be. As Mr Reader said in evidence, there is concern that the high street may never return (to what it was) but there is also great optimism depending on whose perspective one looks at the question from. There is no real clarity yet about what is going to happen with the different forms of government financial support although, on the face of it, it will all come to an end relatively soon, with the furlough scheme said to be ending in the course of the coming summer.

39. There is, as I have said, little evidence in documentary form of Boots' national strategy for facing the pandemic. One thing I can conclude is that there is nationally and locally, and in particular in the retail sector, considerable uncertainty about the future.

40. What then of Bridlington? There was limited evidence about Bridlington, although I was told a little about it. It is a seaside town. It has visits from day trippers going to the seaside. There are local shoppers who use the various retail outlets there. There is limited high value retail business.

41. In his report, Mr Stott says:

> **"Suffice to say, Bridlington is predominantly what is known in the retail property market as a convenience shopping destination. There are a number of different categories of retail offer in the market and convenience retail is one of these. Typical convenience retailers include banks, hairdressers, supermarkets, newsagents, pharmacies, coffee shops, mobile phone shops, travel agents, card shops, health food shops and so on.**
>
> **Convenience retailers sell goods and services which are convenient to shoppers' daily needs. These convenient uses are distinguished from other retail categories such as comparison retail, which predominantly comprise fashion and footwear offers, with consumers browsing multiple offers clustered together and comparing them on issues such as price, quality and design."**

He continues at paragraph 3.1.2:

> **"Like most retail locations in the UK, Bridlington has been affected by the global pandemic crisis. However, some retail destinations have been more profoundly affected by the pandemic than others. Large city centres have been hollowed out by a seismic drop in the numbers of office workers in comparison retail shoppers. Large swathes of non-essential retail have been closed in these locations for much of 2020 and these non-essential retailers typically fall into the comparison retail category which I describe briefly above.**
>
> **By contrast, essential retailer offers have largely remained open for trade during the course of the pandemic. There is a close correlation between essential retailers and the convenience retail sector which I describe above."**

At paragraph 3.1.3:

> **"Bridlington has little comparison retail but a lot of convenience retail and also a good line up of value retail."**

Pausing there, what he means by value retail are outlets where the prices are low. He continues:

> **"This can be seen by looking at the retailers and uses highlighted on the street traders plan enclosed at appendix JDS3."**

That is a reference to a plan to which I was taken during the course of the evidence and which has proved extremely valuable.

42. Mr Stott says:

> **"Value retail is a third retail category and includes low price point goods. Examples include pound shops, discount food stores such as Aldi, Lidl and Iceland, discount fashion such as Shoe Zone, Peacock's, M&Co and charity shops including Oxfam, YMCA and British Heart**

**Foundation. Again, some of these value uses fall into the category of essential retail.**

**I will comment further on the effects of the pandemic on the retail market and my valuation later in this report, but both the value sub-sector and convenience retail destinations have weathered the pandemic more successfully than, say, comparison shop destinations simply because those destinations are fulfilling the daily shopping needs of their immediate populations."**

43. So far as the premises themselves are concerned there is a useful photograph of them in the bundle. The location and description of them I take from paragraph 3.2.1 of Mr Stott's report, subject to this, that Mr Clark does not agree about the prominence of the location afforded to them by Mr Stott. Mr Stott says:

> **"The subject premises comprise a large, essentially rectangular, purpose-built shop unit arranged over ground, first and second floors. Retail trading space is located at the ground floor with a small storage area at ground floor also, and storage and ancillary space located on the two upper floors.**
>
> **The subject premises are among the most prominent on the Promenade, which is a long shopping street in the centre of the town, with a very wide frontage which is a strong attractant to customers. The significant size of the shop does however mean that a downward rental adjustment in my valuation is warranted. This adjustment is referred to in the retail property market as a quantum discount."**

He deals with the issues of a quantum discount in due course. So far as location of the premises is concerned, he described it as a good location.

44. The plan which I was provided with shows that there is a number of shopping streets in Bridlington which have units of different sizes. There is no dispute between the experts that the core of the better retail units is to be found in and around the Promenades, which is in the centre of the town. The Promenades themselves, which comprise a shopping mall, has a number of units of significant size, the majority of which appear, as far as one can tell from the plan, as if they are about the same or not significantly larger or significantly smaller than the subject premises. There is also a number of smaller units within the Promenades.

45. Confusingly, the subject premises is on a street called Promenade on which there is a number of other smaller units, some of which are vacant and some of which are relied on as comparables. At the bottom of the Promenades and Promenade runs a street called Chapel Street, which leads, to the east, towards the seaside and, to the west, towards the railway station. On the other side of Chapel Street is an area called King Street which has more shops. On the east side of Promenade, a continuation of Chapel Street is a street called Cliff Street which at one stage had a large Marks & Spencer's unit which closed down some time ago. To the south west of the town, there is a new development in an area called Hilderthorpe, off Hilderthorpe Road.

46. Mr Stott described the location of the subject unit as a good location. His principal comparable is one which is two doors away on the corner of Chapel Street and

Promenade, a letting to a business called Hi-Tech, with two frontages facing in different directions, with two zebra crossings around it leading from other streets.

47. There was some dispute about the precise circulation route that a pedestrian would adopt if they were going through the town with a view to shopping or to visiting the seaside. Mr Stott, having commented that Promenade and the shopping centre in the Promenades was the central retail core, said that there were, really, two elements to the town, the tourist element and the local shopper retail elements, that day trippers would head to the beach and that would take them on a route probably down Chapel Street and Cliff Street, off to the seaside.

48. He explained that the reason why, in his view, the Marks & Spencer unit had not performed as well as it could have done, and why it closed, was because it was not in the retail core of the town and was a huge site. It was not where the main footfall of shoppers would be, around the Promenades and Promenade. The Marks & Spencer site would be better redeveloped, and his understanding was that it has been sold, probably for that purpose.

49. There was a dispute between Mr Stott and Mr Clark, who gave expert evidence for the Tenant, as to whether people who went to the main shopping mall in the Promenades would then go out onto the street around where the subject premises was and what the precise route around the shopping units followed by pedestrian shoppers would be. Mr Clark, nevertheless, accepted that one of the potential pedestrian flows was through the Promenades and into the Promenade, and past the subject premises.

50. So far as the location of the subject premises is concerned Mr Stott said that good was too strong a word. He suggested that there were stronger places, pitches in other parts of the town, namely on Chapel Street, round the corner, and King Street that I have already referred to, and that Boots was off prime. He suggested that one of the comparables on Chapel Street, round from the main entrance to the Promenades, was a better location.

51. There was also evidence about the specific retail market in Bridlington and where it has reached in the town's historic retail cycle, if it can be described as that. Mr Clark, in paragraph 10.25 of his report said this:

> **"The decline of the town could be seen back in April 2018 when the Marks & Spencer department store closed its doors at 7 to 8 Prince Street. The department store was, no doubt, a major footfall driver for the town centre. Marks & Spencer currently has no presence in the town and the large unit has remained vacant since and is due to be converted into a pub restaurant and adult gaming centre, as detailed by the news article."**

Which he provided, and he said:

> **This conversion is indicative of the current state of the retail market in Bridlington."**

52. He went on to say at 10.26:

> **"More recently work began in December 2020 on the new out of town retail development at the former coach and car park in Hilderthorpe Road, Bridlington, under a development scheme with the East Riding and Yorkshire Council, which will deliver 44,000 square feet of new commercial floor space. The scheme is due for completion in summer 2021 with Lidl and B&M retail among the tenants which have already secured space. This will further detract from retailing in the town centre."**

53. What is interesting about the evidence about the decline in the market in Bridlington, as the Tenant would have it, is that nevertheless a number of national retailers are, despite insolvency regimes, still operating in the mall, namely Peacocks and New Look. Sports Direct seems still to have a significant unit there. True it is that there are many vacancies of units in the town: there are two very large vacant units, one being the Marks & Spencer unit that I have already referred to, the other being 22 to 24 Promenade, on the other side of the road and further up the street from the subject premises.

54. There is, so far as I am aware, no other unit of the size of the subject premises which is currently vacant, although there is a number of retail units of significantly smaller size, less than, on the face of it, half the size of the subject premises which are vacant in the town. In section 12 of his report Mr Clark identifies a number of empty units. In paragraph 12.10 he refers to number 22 Promenade, which is the very substantial unit that I have mentioned, at 55 to 59 King Street he refers to a unit occupied by the YMCA, which is just under 3,000 square feet, which is let on a flexible basis with a nominal rent.

55. He refers in paragraph 12.12 to number 10 Promenade, which comprises 3,600 feet and is available to let, and then he goes on to say, in paragraphs 12.13 and following:

> **"Even compared to these properties the subject premises is much larger, further limiting the type of potential occupier to the likes of B&M, who are opening out of town, and Marks & Spencer, who left the town in 2018."**

12.14:

> **"Without any large store letting evidence which in itself supports my view that there is no demand for large shops in Bridlington, it is difficult to quantify how this lack of demand translates to the valuation of the subject premises, although I do believe that it needs to be considered."**

56. The specific sizes and locations of the empty units, it seems to me, have to be considered when evaluating whether there is a market for units of the size of the subject premises, which is very significantly larger, as Mr Clark says, than all the units he has mentioned other than 22 Promenade.

57. Miss Foster's evidence was that Bridlington was on a downward trajectory. She said that the store suffered as a result of the closure of Marks & Spencer. She was cross-examined about her evidence and there is nothing which was put forward which I could evaluate to support it. It seems to me that that evidence was largely speculation.

58. What is apparent is that, notwithstanding the Covid related restrictions that have been imposed from time to time since March 2020, the Tenant has continued to trade from the subject premises. It has continued to trade elsewhere around the country and has entered into a significant number of new leases of high street stores, both as a result of the exercise of its option to renew and as a result of business lease renewal litigation. In Bridlington it closed down a smaller unit in Promenade in February 2020 but it has taken the deliberate decision not to operate the existing break clause in the current lease of the subject premises and has decided that it wants to take a new lease of the current premises. That would seem to be an indication of confidence in the future success of its business at the subject premises.

59. As to the decision to close the smaller store and keep the larger one (ie the subject premises), Miss Foster acknowledged that that is what had happened, but she could not explain the precise basis for the decision because she said that she was not involved in the decision. However, she said it suggested that Boots' preference was to remain in the big one in the hope or expectation that the business from the smaller unit would be absorbed in the larger, although that could not be guaranteed. She said that so far as she was aware Boots had never looked into the feasibility of closure of the subject premises in Bridlington.

60. Drawing the various threads together of the evidence about Bridlington itself, it seems to me, as I think Mr Hutching described it, that the retail lettings Bridlington is bouncing along the bottom commercially or economically. There is evidence of recent transactions in Bridlington of new lettings of retail premises on different bases, when mean that the market is moving. There are big names in the the Promenades that are still trading and there is evidence of new development in Hilderthorpe Road, and so the evidence suggests that the market in Bridlington has a certain vibrancy. I will come back to the specific comparables when I come to look at the rent payable under a new lease.

61. I want then to look at the specific issues between the parties. It is common ground that the policy of the 1954 Act is to protect the tenant. Reliance was placed on *O'May & Ors v City of London Real Property Company Limited* [1983] 2 AC 726, a decision of the House of Lords where Lord Hailsham gave what can probably be described as the leading judgment. He looked carefully at the statutory regime and although I will come to the specific provisions in due course it is worth setting out at this point what he said at page 740D onwards.

62. Having looked at the provisions he 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."

A certain amount of discussion took place in argument as to the meaning of "having regard to". He continued:

> **"Despite the fact the phrase has only just been used by the drafting of section 34 in an almost mandatory sense, I do not in any way suggest that the court is intending to or should in any way attempt to bind the parties to the terms of the current tenancy in any permanent form, but I do believe that the court must begin by considering the terms of the current tenancy, that the burden of persuading the court to impose a change in those terms against the will of either party must rest on the party proposing the change and that the change proposed must, in the circumstances of the case, be fair and reasonable and to take into account, amongst other things, the comparatively weak negotiating position of a sitting tenant requiring renewal, particularly in conditions of scarcity.**
>
> **The general purpose of the Act, which is to protect the business interests of the tenant so far as they are affected by the approaching termination of the current lease in particular with regard to his security of tenure. I derive this view from the structure, purpose and words of the Act itself."**

63. I look, then, at the first issue, the duration of the new tenancy. The test, in essence, is what is reasonable in all the circumstances. A balance is to be struck. The Landlord seeks a term of ten years with no break, the Tenant seeks a term of five years with a three year break. As I have already said, the Tenant's position until shortly before trial was that there should be a three year lease with annual breaks and the evidence which was relied on by the Tenant in support of that proposal was not revised prior to trial and, perhaps for reasons of privilege, no detailed explanation was given as to the change in its position.

64. The relevant provision of the 1954 Act is section 33, which provides as follows:

> "Where on an application under this Part of this Act the court makes an order for the grant of a new tenancy, the new tenancy shall be such tenancy as may be agreed between the landlord and the tenant, or, in default of such an agreement, shall be such a tenancy as may be determined by the court to be reasonable in all the circumstances, being, if it is a tenancy for a term of years certain, a tenancy for a term not exceeding fifteen years, and shall begin on the coming to an end of the current tenancy."

65. I was referred to a number of reported and some unreported decisions in respect of that section, and I reminded myself of the commentary on it to be found in paragraph 8-33 of *Reynolds & Clark: Renewal of Business Tenancies* (5th edn), where the learned editors say as follows:

> **"In considering the various authorities a number of general principles can be extracted, namely.**
>
> **(1) Each application for renewal of a tenancy turns on its own facts.**
>
> **(2) The court will seek to confer upon the tenant a term sufficient to protect the tenant in the carrying on of his business. The primary purpose of the legislation is to protect the tenant.**
>
> **(3) It is perfectly valid for a landlord to seek to maximise the value and marketability of its reversion but any patent diminution would be ignored.**
>
> **(4) What is likely to be granted in the market is of only limited value in assisting the court in determining, in the exercise of its discretion, what is reasonable.**
>
> **(5) Any rigid policy of either party as to the length of term to be taken for granted is irrelevant to the exercise of the court's discretion, and**
>
> **(6) The determination of the duration of the term is an exercise of discretion with the court seeking to strike a balance between the degree of protection to which the tenant is entitled in the exercise of his business interests and the need to ensure that the decision is neither unfair on or oppressive to the landlord."**

It seems to me that passage is an accurate and reliable precis of the principles to be derived from the various authorities.

66. I was, however, also taken to two specific decisions of judges sitting in the County Court. The first being a decision of HHJ Saggerson, sitting in this court, in *Dukeminster Limited v West End Investments (Cowell Group) Limited* (unreported) in which the judgment was given on 21 September 2018. In that case, faced with a tenant who wanted a five year term, the learned judge said that he had difficulty in ascertaining what the tenant's interests were and how best to protect them because of a lack of evidence on the point from the tenant.

67. I was also taken to the decision of Mr Martin Rodger QC, Deputy President of the Upper Tribunal (Lands Chamber), sitting as a judge of the County Court in a case called *Vodafone Ltd v Hanover Capital Ltd (renewal of a tenancy of a telecommunication mast site) (Rev 2)* [2020] EW Misc 18 (CC), where he said at [29] and [30]:

> "The duration of the new tenancy is required by section 33 of the 1954 Act to be such as may be determined by the Court to be reasonable in all the circumstances. When the Court exercises that discretion the question of reasonableness is at large and although the duration of the current tenancy

> may be a relevant consideration, there is no presumption in favour of repeating it, nor any onus of justification on a party seeking a longer or shorter term."

He refers to some of the passages from *Reynolds & Clark*.

68. In [30] he continued:

> "The overriding consideration which emerges from that discussion is that each case depends on its own facts. The length of the current tenancy, and the length of its continuation by the 1954 Act are relevant considerations, as is the nature of the tenant's business. The primary purpose of the legislation is to protect the tenant so the Court will seek to confer on the tenant a term sufficient to protect it in carrying on its business. The length of term likely to be granted in the open market is of only limited assistance in determining what is reasonable. The Court will seek to balance the degree of protection to which the tenant is entitled in the interests of its business and the need to ensure that the decision is neither unfair on nor oppressive to the landlord."

It is apparent that Mr Rodger based his decision on the specific facts of the case before him, emphasising as he did that each case is fact specific and that the discretion of the court is at large.

69. The facts of that particular case were very different to the facts of the current case. The evidence of Miss Foster in her witness statement at paragraph 46 was that the current position in the market, as far as Boots is concerned, is very different to that which operated when the leases were entered into in 2005 and that across Boots' own portfolio there was a trend towards shorter terms. She produced a table prepared by a Miss Richardson which set out some details of a number of transactions entered into by Boots over the last few years.

70. She says in paragraph 49:

> **"Importantly, the table represents data that mostly predates the Covid-19 pandemic. The business's current requirements for the unopposed renewal is a three year term with annual breaks."**

As I have already said, that is not the position which is currently pursued.

71. She says in paragraph 51:

> **"In order to successfully navigate the effects of the Covid-19 pandemic Boots must be able to manage its property portfolio actively and close or move unprofitable stores without delay. The Claimant's proposal restricting the Defendant to a ten year term with no break options binds the Defendant to a significant and long lasting financial undertaking at a point of increased uncertainty, when the retail market is rapidly deteriorating and when tenants are agreeing ever more flexible arrangements with their landlords, as can be evidenced by our own portfolio set out in the table above. If a longer term is**

**ordered by the court the risks to Boots would be so great that, in effect, its security of tenure will be undermined."**

72. To a degree, and not surprisingly given that this is a master statement, that evidence is argument, really, rather than evidence but what it demonstrates is the desire of the Tenant for a greater degree of flexibility, having regard to the uncertainties of the market, even if its precise requirements have changed since Miss Foster filed that witness statement.

73. On the other hand Mr Reader on behalf of the Landlord persisted in asking for a ten year term. In 19.1of his witness statement he relies on the fact that terms of 15 years and four months were granted initially.

74. In 19.2 he says:

**"By the time these matters come to trial the Defendants will have held over for nearly a year in respect of batch one and over a year in respect of batch two and the remaining properties. This indicates to me a desire to remain in the properties for the long term as if they had wanted to vacate they would have taken their opportunity to do so already, as they have on seven properties since service of the section 26 requests. Indeed, some properties the Defendant's been in occupation for a considerable period of time which indicates a long standing commitment to the property and the local area."**

75. He goes on, in paragraph 19.3, to refer to the fact that the Landlord's interests in the property is diminished by a shorter term. In 19.4 he talks about the increased costs in terms of management time and other expenses in dealing with renewals following shorter leases.

76. It seems to me that the approach which I must take is, having regard to section 33 and what was said by Lord Hailsham in the *O'May* case, to seek to balance the interests of the Landlord and the Tenant and come to a conclusion as to length of term which is "Reasonable in all the circumstances."

77. In doing so one has to take account, it seems to me, of the interests of the Tenant in the prevailing market. The market is currently in a state of uncertainty. The experts are not agreed as to what will happen in the future. There are varying degrees of optimism about what will happen. Equally, while Miss Foster's evidence says that Boots wants to maintain flexibility to make it, in my words, more nimble in the future and deal with uncertainties, there is, as I commented above, very limited evidence before me about their intentions and nothing that I can readily evaluate as to Boots' current or ongoing review of their retail and property portfolio strategies in these uncertain times, notwithstanding the fact that it is reasonable to assume that they have such a strategy and that it is under review.

78. On the other hand, when one looks at the interests of the Landlord, despite the assertions of Mr Reader in his witness statement as to the generic adverse effects of shorter leases on the Landlord's interests, there is no evidence from him which I can evaluate in relation to any specific adverse impact on his client were I to order a shorter term. I bear in mind the length of the current term, although the Court is not required

to have specific regard to that under section 33, it remains part of the circumstances in which the balance has to be struck.

79. In my judgment, the overriding criteria in the current market are the need for the Tenant to have flexibility, given the present economic and market uncertainty, and the need to remain nimble enough to make quick or sudden changes in its operating model nationally and in Bridlington in particular. I have come to the conclusion that what I should do is balance a reasonable period of security for the Tenant with a reasonable period of certainty for the Landlord and, in all the circumstances, the appropriate period for the new term should be five years. It seems to me that that provides each of the parties to the lease with both security, certainty and a degree of flexibility.

80. The experts before me appear to agree that shorter leases are the new norm and two of the lettings which were relied on as comparables, the Hi-Tech letting and the pet food shop letting, are for three years. What I am quite clear about from the evidence is that ten years is not the market norm.

81. Next I turn to the related question of whether there should be a Tenant's break clause. The Landlord said there should be no break clause, the Tenant says that in a term of five years there should be break clause at three years. Miss Foster's original evidence at paragraph 45 of her witness statement was that the existing annual break clauses ought to remain.

82. The question of break clauses falls to be dealt with under section 35 of the 1954 Act, which provides as follows:

> "(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 [the] 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."

83. Again I was taken to the decision of HHJ Saggerson where he looked at the question of a break clause in that case between [42] and [45] and came to the conclusion that the insertion of a break clause in that case was neither reasonable nor appropriate. It seems to me that the Court is obliged to have regard to the terms of the current tenancy and to all the relevant circumstances, and it is, again, a case or fact specific decision. The facts of Judge Saggerson's case do not, with the greatest respect, assist me one way or another in reaching a conclusion the present case.

84. That a break clause falls within section 35 is supported by the decision of the House of Lords in *O'May* and is specifically referred to by Lord Wilberforce at page 747G to H in the following reference to section 35, where he says:

> **"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.**
>
> **If so, or for other good reasons shown, the court has power to order a modification by changing an existing term or introducing a new one, e.g. a break clause, see *Adams v Green* [1978] 247 EG 49, before doing so will consider any objections by the tenant and where there is an insoluble conflict will decide according to fairness and justice."**

85. The imposition of a break clause at the three year point in this proposed lease is not a matter of agreement. The burden is on the party seeking a change, and there is a dispute as to what that means in the current case, but it seems to me that since there were annual breaks in the original leases, and notwithstanding the terms of the master agreement and the standard lease conditions, it is for the Landlord to justify the change to a lease without breaks. The change which the Tenant seeks is that there is only one break in five years rather than a break in every year.

86. A consideration of all the relevant circumstances, in my judgment, require one, again, to have regard to the current uncertainty in the retail market and the need to protect the Tenant and the need to give sufficient security to the Landlord. Ultimately, as Lord Wilberforce said, the test is what accords with fairness and justice. In my judgment, to give the Tenant the degree of flexibility which it really needs it would be appropriate in all the circumstances by allowing them a break clause at three years in the way suggested. Therefore, if the circumstances change so that the market gets worse from the Tenant's perspective and the current operating model cannot survive, the Tenant has the right to withdraw from these premises.

87. If, on the other hand, the market is as the Landlord would have me understand it, particularly in Bridlington, given that the Covid restrictions are going to come to an end relatively soon, one should be optimistic about the future, which would generate an excess of demand over supply of retail premises in Bridlington. In those circumstances there would be no injustice to the Landlord in seeing a return of the subject premises to them after three years with a view to them re-letting it. I therefore conclude that the Tenant should have its three year break clause.

88. The third item is the annual or other rent increase. The Landlord asks for an annual rent increase of 1.5%, as per the terms of the current tenancies. The Tenant says that the current rent increase provision, properly construed, is not a review but a fixed increase and therefore falls to be considered under section 34(1), having regard to the evidence in the market and does not give rise to a discretion under section 34(3) or section 35 of the 1954 Act. The Tenant submitted that there should only be a rent review provision in a lease of five years or more.

89. The first question to consider, therefore, is whether the issue falls to be determined in accordance with section 34(1) or section 34(3). I repeat the relevant wording. Section 34(1) provides:

> "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."

Section 34(3) provides:

> "Where the rent is determined by the court the court may, if it thinks fit, further determine that the terms of the tenancy shall include such provision for varying the rent as may be specified in the determination."

Section 34(3) imports by the words "if it thinks fit" a discretion as to the exercise of which there is limited authority.

90. The Landlord submits that it is section 34(3) that gives rise to the right to this rent increase provision and that it would be an appropriate provision to replicate in the new lease. Mr Reader gave the reasons for it paragraph 21.1 of his evidence, where he says:

> **"The current leases contain the provision ... and this was agreed by Boots in its own property company when the original sale and leaseback transaction took place."**

Adding at 21.2:

> **"Had Boots taken up the contractual options for renewing the current lease, of which there are currently four outstanding in relation to properties at Cromer, Surbiton, Wallingford and Wick, then the terms of the new lease would contain an annual [1.5% increase] provision unless expressly waived by the claimant, there should be no difference between the contractual and statutory provisions."**

At 21.3:

> **"Boots is protected by virtue of the fact that under the Act the rent will be set at the market level at the start of the lease which will reflect its provision."**

21.4:

> **"An annual RPI rent provision instead is to ensure that the level of rent payable under the new lease stays in line with annual increases in inflation."**

91. As to which provision this falls within the Tenant relies on a decision of the Court of Appeal called *Fawke v Viscount Chelsea* [1981] QB 441 where the court considered the power under the '54 Act to determine the rent increasing by fixed amounts and looked at the provisions to which my attention has been drawn. Goff LJ, as he then was, said at page 453B to D, as follows:

> **"The next question of construction which was argued, although in the events which have happened it is probably now academic, is whether the court has any such power when determining a rent under section 34 from for a new tenancy. Here in my view the answer is free from**

> **doubt. I am satisfied section 34(3) authorises nothing more than the inclusion of a rent review clause, but what of subsection (1)? The judge thought that he could not make any such order because this would be not a variation of the determined rent for the new tenancy but the determination of two rents.**
>
> **With all respect, I do not agree. If supported by evidence that this would be the manner in which the holding might reasonably be expected to be let in the open market by a willing lessor I see no reason why the court should not determine a rent increasing by fixed amounts at specified times. By the same token, the court has, in my judgment, power to provide that the rent shall not commence or shall be at a less rate until repairs are effected."**

which was the issue in that case:

> **"or shall cease to be payable if you reduce the sum as from the time, albeit late in the commencement of a new lease, when it in fact started and until completed. This does not in any way conflict with section 34(3) or any of that subsection otiose because under a rent review clause the court would not itself be determining the rent but delegating that function."**

92. Brandon LJ at 456H and following considered whether the court had power under section 34(1) to settle on a differential rate of rent, concluding that it did.

93. Stevenson LJ, at 459 C, said:

> **"I agree with both Goff and Brandon LJJ that on its true construction section 34 as amended authorised by subsection (3) what has been called a variable rent, that is the provision for the parties varying the rent by a rent review clause and by (1) what Brandon LJ has termed a differential rate that is a provision by the court varying the rent payable at different periods during the term of the tenancy."**

94. The learned editors of *Reynolds & Clark* at paragraph 8-170 support the view that *Fawke v Chelsea* gives the court the power under section 34(1) to assess a differential rate, namely rent which is increased by fixed amounts.

95. It was argued by the Landlord that *Fawke v Chelsea* does not have the impact suggested by the Tenant, but I am afraid I disagree.

96. On the proper construction of section 34 it seems to me that (3) is intended to allow the Court to put in place a traditional or orthodox rent review provision which, as the Court of Appeal said, leaves the determination of the rent payable not to the Court but to an outside body, so the Court is not fixing the rent, it is simply putting in place a mechanism for review of the rent.

97. Where on the other hand the Court puts in place a regime or set of terms which automatically increases the rent by a stepped amount every year, in this case 1.5%, the the court itself is determining, and indeed fixing, the rent for the whole term rather

than leaving it to be reviewed or revised in the light of relevant circumstances at the review date.

98. That comparison drives me to the conclusion that a request for a fixed annual increase falls within section 34(1) rather than section 34(3). Having regard to the evidence that I have seen, there is no market for a stepped annual rent increase. In any event, even if one were to consider the request for such a provision under section 34(3), there is no market evidence of such a rent increase provision. Further, the experts seem to agree, that it would be a highly unusual provision to find in the market.

99. Having regard to the discretion available to the Court, I take account of the following.

100. First, as far as I can tell one of the reasons for the original stepped rent increase was because of the sale and leaseback arrangement by which the current lease came to be granted in the first place. I am not privy to the precise investment negotiations or arrangements which lay behind that decision but it seems to me likely that it was intended to provide a certain fixed value or return to the Landlord in the circumstances of that deal. However, the reasons for that original arrangement no longer exist. The lease now falls to be considered under the 1954 Act.

101. Secondly, it has been shown, if it was not already obvious, that a fixed rent increase is capable of working an injustice in that it might cause the rent to increase in a way that does not reflect the market, particularly bearing in mind that the effect of the way in which this particular provision operated was to compound the increase in the rent. I accept that in a rising market the impact would not necessarily be unjust but it is very different to an arrangement whereby someone stands back and values the lease in the potentially changed circumstances at the date of review.

102. Thirdly, as I understand Mr Stott's evidence, while there is a benefit to the Landlord of having a ratcheted rent increase, in terms of the calculation that has to be undertaken to work out the proper rent payable by the Tenant, the effect on the Tenant over the course over the whole term of the lease would be neutral.

103. In all the circumstances I have come to the conclusion that there should be no fixed stepped increase, nor, it seems to me, is there any need for a rent review provision in this five year term. Had I come to the conclusion that the appropriate term was ten years then I would have included an upwards only rent review provision at five years because it seems to me that that reflects relevant current commercial practice and would have enabled the parties to re-evaluate the position in accordance with the then prevailing market conditions at that point.

104. I turn then to the fourth set of issues which concern the new rent and the interim rent. The rent payable from commencement of the new lease will be three months and 21 days after judgment: that is therefore the valuation date. The other terms of the leave have to be determined before the Court can determine the rent which is to be paid under the new lease because the value of the premises on the open market depend on the rights and restrictions of the lease pursuant to which the premises are to be let ie the hypothesis to be valued.

105. In very broad terms, the Landlord contends for a Zone A rate of £26 per square foot, which could result in a total rent of £64,420, and the Tenant contends for a Zone A rate of £19.40, which could result in a rent of £37,800.

106. It is important therefore that I set out the whole of s.34(1) of the 1954 Act, including the matters to be disregarded when setting the new rent:

> "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)..."

The other disregards are irrelevant for present pusposes.

107. This is a question of valuation for the court, not a matter of discretion. The lease to be valued in accordance with section 34(1) is a hypothetical model but it has to be valued in the real market. The methodology adopted by the experts is largely agreed but there are differences. They accept that the valuation has to be carried out by reference to comparables. It is common ground that there is a hierarchy of comparables with open market lettings at the top and 1954 Act determinations at the bottom, but that the hierarchy is only a guide or a tool.

108. The experts agreed that the comparables have to be devalued using the zoning method to identify the Zone A rate, namely the most valuable zone in the first 20 feet of the front of the ground floor premises. They are also agreed that the value of the zones diminishes significantly as one goes further into the building and there is considerable agreement between the experts as to the reduction in value of the zones as one moves into the premises. For example, Zone B rates is half Zone A, or A over (or divided by) two, C is A over four. By the conclusion of the trial it was agreed that ground floor ancillary space was A over 16.

109. There are significant disagreements between the experts, first as to the discount for length of term. For a five year term with no break the Landlord says there should be a 5% discount. For a five year term with a three year break, the Landlord says there should be no discount, the Tenant says 3%. Secondly, there was disagreement about whether should be a quantum adjustment and, if so, how much. Thirdly, whether there should be a frontage to depth adjustment and, if so, how much. Fourth, whether there should be an assumption that a rent-free period has been allowed when undertaking an analysis of the comparables and, more specifically, in relation to the figure to be determined by the Court under section 34 on its proper construction. Fifth, the experts disagree as to the impact of any annual rent increase, which I need not now consider, given my conclusion on that issue above.

110. In their reports the experts make referenced to a substantial number of comparables. It is fair to say that the Landlord's key comparable is the premises occupied by Hi-Tech at 1 to 3 Promenade, at £26 per square foot, Zone A, as analysed by the Landlord,

although the Tenant says it works out at £19.40 per square foot. The Tenant's key comparable is the premises occupied by Age UK at 35 Promenade, in the same street as the subject premises, which the Tenant analyses at £19.40 per square foot, Zone A, and the Landlord analyses at £20.30 per square foot.

111. It is important that I should start by noting that valuation is an art not a science and that there are no specific rules which dictate precisely how this valuation is to be undertaken, but the degree of expertise, views and opinions of the valuers called to give evidence are highly material to the exercise of analysing the comparables.

112. Without doubt there are no comparables in Bridlington of exactly the same size as the subject premises. The evidence that I have seen appears to suggest that there is a turnover of lettings of small shops, that there is a static market in medium-sized shops and that there are no large shops of the size of the subject premises on the market at present.

113. The experts were not entirely agreed as to the analysis of the current vacancies in Bridlington and what conclusions should be drawn from them but Mr Stott was clear that while small shops were being taken on new letting, medium sized shops were not. Mr Clark referred to seven lettings of small units which he said showed evidence of demand in Bridlington to 2019, even if they did not look particularly consistent. However, both experts agreed there are no directly comparable transactions which could be relied on to reach a conclusion at to the value of the subject premises.

114. Mr Stott said was that there is evidence that bigger shops are let and trading, which is an indication that the retailers who occupy those units are happy where they are and trading successfully and have no intention of leaving Bridlington. He was referring principally to the larger units in the Promenades. He said that that the evidence demonstrated either that there was demand for big shop units or a lack of supply of big shops. He did not accept that it was right to assume that because medium shops were not currently letting that there was no demand for bigger shops. He said that the lack of supply of such units demonstrates that the occupiers want to be there and not leave, and that therefore there is a demand for bigger units in the town. He referred specifically to the fact that Peacocks and New Look, although in some form of insolvency arrangements, were still in occupation of bigger units and continuing to trade. He said that their presence demonstrated demand for such units because they could have left their premises had it suited them better.

115. Mr Clark referred to the fact that the subject premises were about 10,000 square feet, and are much larger than all the comparables, that there would be few tenants who would be interested in a building with the unequal split between retail space and ancillary space to be found in the subject premises, there being a lot of ancillary space, which would in turn make the premises rather expensive. While he accepted that there was a number of larger retail units dotted around in Bridlington which, with the exception of the former Marks & Spencer's building, were all let and occupied by tenants, his overall position was that there was a lack of supply of larger units as opposed to a significant demand for them. He told me that there are no letting transactions to demonstrate demand for such units. He argued that a large retail unit would not be lettable in the current market and in support of that argument he relied on the vacant Marks & Spencer unit as an example. He said that, in analysing the units relied on by Mr Stott as evidence of demand in the Promenades, it should be noted that they were all in a better location than the subject premises and he suggested that the

tenants of them would be far less likely to consider premises in the position of the subject premises. He said it would be wrong to assume that the larger units were in demand although he accepted that they would have been at the time they were let.

116. As I suggested during the course of evidence, it may be that there was a balance of supply and demand for the larger units in Bridlington, but it seems to me one has to look at the evidence rather than follow a gut feeling. I do not mean that in a disrespectful way to either expert. The reality is that there is no evidence of current letting transactions which demonstrate that there are tenants looking for large premises or large premises looking for tenants. That does not mean that the supply and demand is in imbalance.

117. The lack of evidence of current transactions makes it much more difficult to work out the appropriate rent for the subject premises but there are other tools which enable that to be undertaken. It seems to me unrealistic to assume that tenants, or would-be tenants, of much smaller units would be interested in the subject premises. In a sense, they form part of a different market. Equally, the fact that no-one can give evidence of a national retailer or a specific tenant that might be interested in the subject premises is not, in my judgment, a good basis for concluding that there is a lack of demand for it or for units of a similar size in Bridlington.

118. For all those reasons, therefore, I have come to the perhaps unpopular conclusion that the market in Bridlington for premises of the size of the subject premises is in balance. I do not regard the Marks & Spencer's much larger site further towards the beach and away from the shopping area as evidence of a lack of demand, nor do I consider the property at 22 to 24 Promenade, which is still vacant, as evidence of lack of demand, given its very unusual shape and what appears to be its lack of suitability for a major retail space.

119. In evaluating some of the other comparables it was also argued that the court should treat a comparable as less reliable where the tenant of the relevant unit was unsophisticated and/or had not been represented by a professional during the letting transaction. It seems to me that one has to bear in mind that negotiations might take a different form if they were undertaken by agents rather than by individual tenants but I disagree with the suggested assumption that where individual tenants take units of smaller shops that they will not particularly have regard to the state of the market but rather what they can afford in all the circumstances. While the depth of their pockets may be a factor, as with every new tenant, I have no doubt that even individual tenants, unrepresented by professional agents, would not want to pay more than it was felt the premises were worth.

120. There was a dispute between the experts as to whether I should conclude that the tenants of what were said to be a number of comparable lettings were in fact paying inflated rents due to the fact they were either charity shops or, for other reasons, not liable to pay rates thereby rendering the transactions unreliable as comparables. In essence, my view is that no business chooses to pay more than it has to for its premises, particularly charities, and it should not be assumed for the purposes of evaluating a comparable that a charity would pay more than the going rate for a particular unit.

121. I am asked also to reach a view as to whether the evidence of the market in Bridlington demonstrates that the appropriate rate for first floor ancillary property is £2.50 a square foot, or A over (divided by 20). I was shown two transactions which demonstrate that

a flat rate of £2.50 per square foot is being paid, on the face of it, for first floor ancillary accommodation. The main exxample is the letting to Age UK where the figure of £2.50 for first floor ancillary property is derived from the tenant's own post transaction analysis of the rent which it had agreed to pay. While that is not an agreed analysis it seems to me that it is good evidence of the thought processes of the tenant at the time, and afterwards, as to what it thought the premises were worth and what it thought it had agreed to pay for various parts of the premises. One does not know exactly how it reached that conclusion but the document in question was plainly intended as some formal record of the analysis of the rent from the tenant's perspective and no good reason has been advanced as to why the tenant would have misanalysed or misstated the amount of rent which it had agreed to pay.

122. However, that transaction does not seem to me to indicate that the open market value for first floor ancillary accommodation in Bridlington, wherever it may be and at whatever time it may be let, and notwithstanding the Zone A rate, is £2.50. It seems to me that that would be taking the evidence far too far and, in my judgment therefore, for the rest of the comparables the appropriate devaluation in respect of first floor ancillary rates should be at A over 20.

123. I am now going to consider some of the comparables, but not all of them, I will focus on those which seem to me to be of greatest assistance (ie closest in location, size, layout and time) in determining the new rent for the premises. I have to bear in mind that the subject premises extends to some 11,000 square feet in total.

124. The Landlord's main comparable was the letting to Hi-Tech at 1 to 3 Promenade. It is three doors away from the subject premises, on a corner with a double frontage facing onto Promenade and onto Chapel Street, adjacent to two zebra crossings, one across each of those two streets. The letting took place in May 2020 and was therefore at the beginning of the pandemic, albeit relatively early on when, perhaps, it was thought that the pandemic would not last very long. It was a letting on the open market and therefore at the top of the hierarchy of comparables. The letting was for a term of three years without a pandemic clause.

125. There is a dispute about the proper analysis of the rent paid for the letting and, in particular, in respect of the number of square feet to be treated as ground floor Zone A. The Landlord's analysis is that the proper analysis gives rise to a Zone A rate of £26, the Tenant's £19.40. The Tenant relies on the fact that in the transaction the new lessee had not been professionally represented and that there is no analysis from the parties as to the terms on which the rent was agreed. It was also submitted that these premises are in a superior location to that of the subject premises and therefore the better comparable was the letting to Age UK further down Promenade from the subject premises.

126. There was also a dispute as to the size of the Hi-Tech premises. The Landlord carried out its devaluation analysis in reliance on, among others, two pieces of evidence: first, the letting agents particulars for the property and, secondly, an email from the letting agents to the Landlord;s agents in February 2021, containing their own devaluation analysis of the rent agreed. The letting particulars appeared to show that the ITZA was circa 657 square foot, being total sales of 784 square foot with an office of 53 square feet. When asked in writing about the particulars the letting agent confirmed that the details were indeed correct.

127. The Tenant relies on the fact that the original letting particulars contain a heavy disclaimer as to descriptions and dimensions, and submitted that therefore the details are not to be relied upon. It argued there is a much more reliable source of information as to the size of the Hi-Tech to be found in a lease renewal analysis relating to a much earlier letting to the jewellers, H Samuel & Co, some time ago. That letting was for a term of 25 years from 25 January 1989, in other words to 2014, expiring some seven years prior to the letting to Hi-Tech. The H Samuel analysis showed that the ITZA square footage for the ground floor was 786 square feet, which would if adopted to analyse the letting to Hi-Tech would mean that the premises had been let to them at a Zone A rate of £19.40 a square foot, rather than £26 as contended for by the Landlord.

128. The real question therefore is which of those two sets of calculations or analyses should be relied on in assessing the current size of the Hi-Tech premises. It seems to me that I have to evaluate this by having regard to the quality of the evidence that has been put forward. The evidence I prefer is the most recent evidence, namely the details provided in the recent email from the letting agents in February 2021, they having let the property in May 2020. I prefer their analysis of the size of the unit for a number of reasons.

129. First, the H Samuel & Co analysis is some 32 years old. Secondly, while it appears to be a formal record of the way in which H Samuel & Co worked out the sum that it was paying for the space, and there were well respected agents on both sides, there has been no direct confirmation that the information contained on the analysis is still accurate.

130. Thirdly, the figures provided by the current letting agents are not only recent but also, after the initial information was provided, confirmed by them in their email to the Landlord's agent. The use of the word "circa" in respect of the total ITZA figure is not, in my judgment, to be read as indicating that it is a wholly unreliable figure but that there may be some fraction of a square foot which is not included. One asks rhetorically why would a selling or letting agent under-measure the area that they were selling as retail space when they want to maximise the value of their space? In my judgment, the recent evidence is preferable to the evidence, untested, of the H Samuel & Co letting and therefore the calculation should be done on the basis of the smaller ITZA square footage.

131. I do not know the cause of the difference in the measurements in the two sets of documents. . It may be that there has been some sort of structural alteration to the building, in particular on the ground floor, in the years between the lettings, but it would be speculation to go down that route. There is a significant difference between the two and, in my judgment, on balance, the better evidence is the second. A lot can have happened since the first analysis was prepared and there is no evidence as to what that may have been.

132. There is a further dispute in connection with the Hi-Tech letting as to whether the first floor ancillary space should be valued at £2.50, which is again is a figure to be found in the H Samuel & Co document, or at A over, or divided by, 20. As I have already said, I do not accept that there is evidence that the current open market value of first floor space throughout this part of Bridlington is £2.50 and the analysis ought to be carried out at A over 20. For all those reasons, therefore, it seems to me that the analysis at £26 a square foot is to be preferred to the analysis at £19.40 per square foot.

133. So far as location is concerned, it seems to me that the location of the Hi-Tech premises are arguably better than the subject premises, given that it has two frontages on a corner. On the other hand it is only two doors away from the subject premises separated by two relatively small units. I have reached the conclusion that the Hi-Tech letting is a good guide as to the appropriate Zone A rate for the subject premises.

134. As to Age UK, the Tenant's key comparable, which is at 35 Promenade there is a dispute about the nature of the location, the Tenant asserting that it is in a better location and the Landlord asserting that it is in a worse location than the subject premises. Neither expert really wanted to accept that there was a step change in the open market value or desirability of properties as one moved up the road.

135. It does seem to me unlikely that a charity would want to establish itself in a prime location. I note that as one goes up the road, albeit passing the secondary or rear entrance to the shopping mall in the Promenades, there are empty units. It seems to me more than arguable that the letting values of retail units would decline as one went up the road but not very significantly.

136. The Age UK transaction took place in November 2020 and is therefore relatively recent.

137. It was a deal which was reached after a break clause had been exercised which the Tenant says makes this transaction equivalent to an open market letting. However, it seems to me in terms of the hierarchy of comparables a reletting to an existing tenant after exercise of a break clause it is not as good as an open market letting to a new tenant.

138. The letting was for a term of five years and produces, on the Landlord's analysis, £20.30 a square foot and, on the Tenant's analysis, £19.40 a square foot. The main difference between them is whether adopting a first floor ancillary rate of £2.50 is appropriate. For the reasons I have already given above it seems to me in this instance there is good evidence of what the tenant was prepared to pay for the first floor ancillary space. Therefore adopting that as the appropriate rate for analysing the comparable, rather than A divided by 20, leads to acceptance of the Tenant's argument that the ITZA or Zone A rate for this letting is £19.40 a square foot.

139. When compared with the subject premises it seems to me that the location of the Age UK premises is likely to be less valuable than the subject premises given the fact that it was slightly further away from the main confluence of shoppers and the prime retail areas. I am not persuaded that the fact that there is a secondary entrance to the Promenades not far from the Age UK premises compensates for that and I note, as Mr Stott was keen to tell me, that there was an entrance to a goods yard serving the Promenade just two doors away from them. For those reasons, therefore, it seems to me that Age UK is a less good comparable than the Hi-Tech comparable.

140. The last comparable that I want to refer to is a letting two doors away from the subject premises, to East Coast Raw Pet Foods at 17 Promenade, which was considered by the experts in their supplemental reports. The letting took place in February 2021 so, on the face of it, very recent and therefore apparently relevant. It is an open market letting for a period of three years at an annual rent of £8,000. The analysis of the experts is,

on Mr Stott's case, that the Zone A figure is £26 a square foot and, on Mr Clark's case, somewhere between £18.25 and £21 a square foot.

141. The unit is relatively small. Looking at the photographs of the unit it is a very different beast to the subject premises. It looks nothing like the sort of premises that the subject premises are. The sort of tenant that would be attracted would be entirely different. There is no analysis of the rent which is agreed to be paid and there is considerable argument between the experts as to how the figures should be devalued, having regard to the size of the premises. One only has to stand back, in my judgment, looking at this comparable, to recognise that it is far too problematic and consequently less reliable than the other evidence in the street, even though it is recent. It simply is not, in my judgment, comparing like with like.

142. For all those reasons therefore the comparable which I find most persuasive, and nearest in most respects to the subject premises in relevant ways, is the Hi-Tech transaction and I accept, as I have already said, the Landlord's analysis of the Zone A rate in respect of it.

143. I have then to look at the dispute between the experts as to the way in which the comparables should be used. The first issue between them is as to the discount to be allowed for the length of the new term. On a five year with no break, the Landlord says there should be a 5% discount. The Tenant says that there should be no discount, as I understand the evidence. The conclusion I have reached is that this is to be a five year term with a break at three years, not a very long term if broken at that point. In the circumstances, in my judgment, there is no need to, and it would not be right to, incorporate a discount for length of term.

144. The second issue between the experts is the size of the adjustment (or reduction in total rent) to be made for quantum (ie the size of the premises, which prima facie would drive a higher total rent unless there were to be a discount). The Landlord says there should be a reduction of 5%: Mr Stott deals with this in paragraph 6.6.8 of his report relying on his experience of such matters. The Tenant says there should be a discount of 15%. Mr Clark relies in paragraph 13 of his report on national comparables and an apparent lack of demand in Bridlington. There is, in my judgment, no good evidence which might demonstrate a consistent approach to quantum discounts. I respect and accept the evidence of each of the experts' experience and I understand the logic of the need for a quantum discount.

145. In my judgment, the way in which the quantum discount should work is by reflecting the supply of and demand for the particular premises in the area. This is of particular importance, it seems to me, when using a comparable such as Hi-Tech letting to calculate the rent for the subject premises where the sizes are so very different. In all the circumstances therefore, it seems to me, that the appropriate quantum discount, bearing in mind the very large size of the subject premises relative to the Hi-Tech premises, is 10%.

146. Thirdly, the experts are in dispute as to whether there should be a frontage to depth adjustment because of the disproportionately high amount of Zone A space at the subject premises. The Landlord says there should be no adjustment of the rent payable in respect of the subject premises. The Tenant says that it should be reduced by 7.5% and refers to a discussion of the concept by a Mr Osmond of Cushman & Wakefield in an article published in a professional journal in 2009, in which he identifies an ideal

ratio for shop premises of 1:3 (frontage:depth) and discusses the way in which a frontage to depth adjustment should operate.

147. Mr Stott's argued that while Mr Osmond set out the traditional way of working out whether there should be a frontage to depth adjustment in paragraph 1.3 of his article, he went on in paragraph 1.6 to set out his own preferred, and perhaps novel, way of looking at the situation. Mr Osmond's own method is said to take account of whatever shape the premises happen to be and focuses on what is said to be the ideal ratio. Adopting the ideal ratio as the appropriate stand would, it is submitted, lead to a discount of 7.5% in the instant case.

148. It seems to me that Mr Osmond specifically recognises that his approach was not at the time reflective of the prevailing market approach in the profession and that Mr Stott's approach was the more traditional approach. There is no evidence that professional valuation practice has changed. I am not, however, sure that it matters which approach is strictly the correct one because there is no doubt that there is a concept of a frontage to depth adjustment which is intended to reflect the market's view of a letting where there is a disproportionately high amount of Zone A space.

149. Looking at this particular set of premises, at the very wide frontage compared to the depth, it seems to me that whether the correct approach is Mr Stott's or Mr Osmond's, the cost of this premium space would limit the demand for the premises unless there were a reduction to account for it. I note that the analysis of the Hi-Tech transaction had a 5% discount for frontage to depth. It seems to me that, in respect of the subject premises the disproportionate amount of expensive space would be even higher, not as a proportion but because of the overall size. My finding, therefore, is that the appropriate discount to use is that suggested by Mr Clark of 7.5%.

150. The fourth disputed issue between the parties is whether there should be an assumption of a rent-free fit-out period in undertaking the calculation of the new rent payable under the new lease. The reality is that there is no need for Boots to have a period to refit the premises given that it is not a new tenant and the 1954 Act determination leads to a rent which is payable from day one. The question arises whether an assumption should be made, as in the market for new lettings, that a three month rent-free period should be allowed, thereby reducing the rent payable from day one under the new lease.

151. The Landlord says there should be no discount for a rent-free period and it is not its practice to agree them for business lease renewals. The Tenant says that there should be an assumed a rent-free period spread over the term of the lease up to the first break date. The resolution of that question turns, in part, on construction of section 34 of the 1954 Act in respect of which I have been referred to a number of decisions of the County Court, none of which is binding on me, but all of which point in the same direction, namely that the Court should assume that the 1954 Act protected tenant is entitled to a rent-free period.

152. The Landlord submits that I should have regard to the principle of reality and referred me to the decision of Sales J, as he then was, in the *Humber Oil Terminals Trustee Ltd (HOTT) v Associated British Ports (ABP)* [2012] EWHC 1336 (Ch), which was a decision under section 24 of the 1954 Act relating to interim rent where and one of the questions that the court had to decide in determining the rent which was reasonable for

the tenant to pay was whether the court should assume, contrary to the facts in that case, that the premises were not fitted out.

153. I was also taken to the reasoning of Lewison LJ in the Court Appeal case of *Harbinger Capital Partners v Caldwell (As the Independent Valuer of Northern Rock Plc) & Anor (Rev 1)* [2013] EWCA Civ 492 where, in discussing valuation criteria, Lewison LJ talked about the reality principle and said in [23]:

> "The following points amplify the reality principle:
>
> i) The hypothesis is only a mechanism for enabling one to arrive at a value of particular property for a particular purpose. It does not entitle the valuer to depart from the real world further than the hypothesis compels."

He then gave some examples before adding:

> "The world of make-believe should be kept as near as possible to reality."

154. The Landlord asked me to recognise that it is the current tenant which is taking a new lease of the premises as they are, accepting that there should be no increase in the rent payable as a result (in accordance with s.34(1)(a) of the 1954 Act), but nevertheless recognising and taking into account that the existing tenant is in the market for the premises, which is quite different to whether a sitting tenant overbid should be taken into account. I was reminded that section 34 requires the rent to be what the premises:

> "Might reasonably expect to be let for in the open market."

It was argued that the word reasonably in the context drives the conclusion that a tenant who does not need the fit-out could not reasonably ask for a rent-free period for one.

155. On the other hand, the Tenant submits that section 34(1)(a) requires the effect of the tenant's occupation of the premises to be disregarded by virtue of the words:

> "Any effect on rent of the fact that the tenant has or his predecessors in title have been in occupation of the holding..."

is to be disregarded. The Court should therefore assume that there has not been any occupancy by the Tenant and that the Tenant is excluded as a potential bidder. It was submitted that the use of the word reasonably in section 34 is intended to point to the quantum of the new rent and cannot override the presumption that the Tenant is not in occupation.

156. It was also submitted by the Tenant that since section 34 requires the Court to value a hypothetical model, which includes an assumption of no prior occupation of the premises, it is not possible to assume a different set of facts, even if those other facts are the real situation. In the circumstances of a hypothetical letting the hypothetical tenant would need to fit out the premises and in the circumstances of the 1954 Act valuation if no rent-free period were allowed the actual tenant would be penalised as against the other bidders in the market because it had happened to be in occupation. I was reminded that all the County Court decisions point in the same direction. I was

also taken to the commentary of the learned editors of *Reynolds & Clark* in paragraphs 8-152 to 8-155 in support of those arguments.

157. I come to the conclusion that the Court should value on the basis that no rent-free period is allowed for the following reasons. First, the rent payable under section 34(1) is the rent which is payable from day one. The assumption is therefore, on the face of the words used in section 34(1), that the Tenant will, in my words, hit the ground running and pay the going rate for the premises.

158. Secondly, there is nothing in section 34(1) which specifically requires the hypothetical model to include an assumption of a rent-free period. It would have been possible for the draftsman to say that it should be assumed that there would be a rent-free period. The wording of the disregard in subparagraph (a) does not, on the face of the words, in my judgment, compel that.

159. Third, it seems to me there is no theoretical conflict in principle between valuing a hypothetical model and taking into account the principle of reality unless the requirements of the hypothesis specifically drive out consideration of the real situation. As Lewison LJ said in the *Harbinger* case, the principle of reality requires one to stick with reality as closely as possible but, of course, the parties in the case of a rent review in a lease, or Parliament in the case of a rent review equivalent under a statute can specify what facts are to be assumed and what facts are to be disregarded.

160. Fourth, the reality in this situation is that the Tenant, which is seeking a renewal of its business lease, is unlikely to want a rent-free period to enable it to fit the premises out. The word reasonable, in my judgment, also drives the reference to reality.

161. Fifth, it seems to me that the disregard in subparagraph (a) is, having regard to what Sales J said in *Humber Oil*, aimed at preventing a sitting tenant overbid. The fact that a sitting tenant is disregarded for working out the rent that is payable does not mean that you need disregard the reality of whether the successful bidder will need a fitting-out period. It seems to me that the use of the words "predecessor in title" in the disregard in subparagraph (a) indicates that what is to be disregarded is the status of the tenant as a sitting or protected tenant under the Act, rather than the assumed fact that they will be going back into the premises to use them as they did before, having notionally been out of occupation the premises for the purposes of the bidding.

162. Sixth, standing back, in the market the requirement for some sort of inducement to the tenant to take the lease depends on all the circumstances. It is a commercial negotiation. The reality here is that the Tenant does not need an inducement in this case and specifically does not need a rent-free period and, in my judgment, it would be illogical for one to be built into the calculation.

163. The final matter, which I think is no longer necessary for me to determine, but would otherwise be the further matter going to the calculation of rent, would be the impact on the rent of an annual rent increase as to which there was little difference between the experts, but it is irrelevant in the light of my other conclusions.

164. I have not done a calculation of the sum produced by my conclusions. Could you sit down with your experts, factor in the matters I have dealt with, and work out what the ultimate figure should be.

This Transcript has been approved by the Judge.

The Transcription Agency hereby certifies that the above is an accurate and complete recording of the proceedings or part thereof.

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