
THE ART OF THE POSSIBLE: CHANGING LEASE TERMS ON RENEWAL
TAMSIN COX AND OLIVER RADLEY-GARDNER
FALCON CHAMBERS

Introduction

1. Absent agreement, when can a landlord or a tenant under a commercial lease secure a variation of their existing lease terms on a renewal under the Landlord and Tenant Act 1954? We take a look at some familiar, and a couple of not-so-familiar, issues that might be encountered in practice:
 - a. Variation of terms other than property, duration and rent: *O'May & Smithfield*; variation of common lease terms, variation of term length by insertion of a break option;
 - b. Rent: Variation of basis of rent payable (turnover rents), and the insertion of rent review clauses.

Terms Generally (Apart from Term and Rent)

2. Section 35 of the 1954 Act provides that:
 - (1) *The terms of a tenancy granted by order of the court under this Part of this Act (other than terms as to the duration thereof and as to the rent payable thereunder), including, where different persons own interests which fulfil the conditions specified in section 44(1) of this Act in different parts of it, terms as to the apportionment of the rent, shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court; and in determining those terms the court shall have regard to the terms of the current tenancy and to all relevant circumstances.*
 - (2) *In subsection (1) of this section the reference to all relevant circumstances includes (without prejudice to the generality of that reference) a reference to the operation of the provisions of the Landlord and Tenant (Covenants) Act 1995.*
3. Absent agreement, the Court therefore has to have regard to two things in determining whether to vary terms: the terms of the existing tenancy, and all the circumstances. The leading authority on this section is *O'May v City of London Real Property Co Ltd* [1983] A.C. 726. The tenant firm of solicitors sought, on renewal, to keep the terms of the original lease which simply required them to pay a proportion of the heating and light of the common parts. The landlords wanted instead a “clear lease”, that is, one where the fluctuating cost of the general management and repair of the common parts

(including heating and lighting) was recoverable under the then-developing concept of a variable service charge. It was established that a clear lease would greatly increase the landlord's reversionary interest. It was also agreed that a reduction of 50p psf would adequately reflect the additional burden to the tenant.

4. Despite the good sense (from a landlord's point of view) of that suggestion, and the fact that, to our eyes, a commercial lease of part of a block of offices without service charge provisions looks positively antediluvian, the House of Lords declined to make the change to a clear lease. In so doing, a number of propositions were established which we ought to bear in mind today. First, Lord Hailsham explained (at page 740) that:

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 should take into account, amongst other things, the comparatively weak negotiating position of a sitting tenant requiring renewal, particularly in conditions of scarcity, and 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 as regards his security of tenure.

[...]

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

5. However, there is a danger in focusing too much on the advantage to one party seeking the variation in testing whether the change should be made. As the Court of Appeal in *O'May* pointed out, (*per* Buckley LJ):¹

The effect of the proposed modification of the terms of the existing tenancy in the present case is to make the tenants insurers of the landlord against risks connected with the structure of the building which under the terms of the existing lease have to be borne by the landlord. They are risks which are inherent in the ownership of the building. The reduction in the rental which is said to compensate the tenants for assuming these risks is far from being an indemnity against them. The tenants might find themselves at any time unexpectedly and unforeseeably saddled with very heavy capital expenditure for which the reduction in rent would by no means compensate them, except possibly in the very long run; but, as has already been pointed out, a particular tenant may fill that role only for a relatively short period and compensation which is only compensation on a very long-term basis would be no comfort to him. The proposed alterations in the terms of the lease, in my judgment, alter the mutual relations of the landlord and the tenants so drastically, and so adversely to the tenants, that the court could not in the exercise of its discretion properly impose them on the tenants under the Act in the absence of some more cogent reason than can be discovered in this case. For these reasons, and for those already given by Shaw L.J. and Brightman L.J., I agree that this appeal should be allowed.

6. Lord Hailsham accepted this point (at 743-744):

Admittedly the landlord's desire to vary the terms of the current lease in such a way as to maximise the value and marketability of his reversion is a perfectly valid and respectable reason from the landlord's point of view for seeking to secure the tenants' agreement to vary the terms of the tenancy. So, in my view, in Gold's case [1956] 1 W.L.R. 1291 the desire of the corporation to improve the tone of the street of which it was an important landlord was a perfectly valid reason in itself for seeking to secure the tenant's agreement to vary the terms of the Gold tenancy. So also in the Clements case, 246 E.G. 739 was the desire of the landlord to increase the rent, and so in the Aldwych Club case, 185 E.G. 219 was the tenants' desire to diminish the rent. But in my view it was precisely at that stage and not only at the fourth and last that the "intracranial dialogue" should have begun, and the interests of the other, and unwilling, party to the proposal should have been taken into consideration,

¹ [1981] Ch. 216, 228

and was ultimately so taken into consideration by the court in the cases cited. The improvement in the tone of the street was a perfectly valid aim of the landlords. But if done at the expense of the tenant's current business it was not a reasonable term to introduce into a lease against the tenant's wishes under an Act of Parliament the purpose of which was to protect the tenant's interest in carrying on his existing business. In the other two cases the desire to increase or diminish the rent was a perfectly legitimate negotiating objective for the landlord or the tenant respectively, but not, as the court held, by forcing on the opposing party an unwanted advantage which, in the circumstances, would have conferred no real benefit on him, and to which he did not agree.

7. He went on to observe that the agreement that 50p psf was adequate compensation was only agreed on the basis that, *if it had been necessary to make a rent concession, then that would be an acceptable concession. It did not answer the anterior question: should the variation be allowed in the first place. He concluded that:*

It is obvious that in the case of an office block in multiple occupation by different tenants the actual management of the exterior parts, common parts, lifts, boilers, and ancillary services will ordinarily rest in the hands of the landlords who will ordinarily covenant to provide them. Some of these items are very readily calculable or may readily be made the subject of insurance. Some may fluctuate enormously and the extent of fluctuation will, as the tenants' witness said, only ultimately be ascertainable at the end of a lease. Obviously it is to the advantage of the landlord to transfer the financial risk of fluctuation to the tenant, and there can be no possible reason why, if the tenant agrees (and the evidence was that many do), he should not do so. But the crucial question is, if the current lease does not so provide and the tenant does not agree, by what possible reasoning the court should impose the burden on the tenant against his will as a condition of his receiving a new tenancy under Part II of the Landlord and Tenant Act 1954. It may be granted that the transfer of the risk from the landlord to the tenant is a perfectly legitimate negotiating aim for the landlord to entertain. But the argument is two edged. It is equally a legitimate negotiating aim of the tenant to resist the change. Granted that a reduction in the rent of 50p from £10.50 per foot to £10.00 per foot is, in the limited sense described, an adequate estimate of the compensation which a landlord will offer if the risk is to be transferred. But the argument is again two edged. It may equally be argued that an additional 50p. is the adequate estimate of the rent rightly payable to the landlord if the risk is to be kept where it is under the current lease. But neither of the two statements assists to answer the question where, in the new lease, is the risk of fluctuation to lie. If I am correct that the inference from the authorities is that the language of section 35 requires that the party (whether landlord or tenant)

requiring a change must justify as reasonable a departure from the current lease in case of dispute about its terms, the answer must be that prima facie it must lie where the current lease provides, and that a mere agreement about figures based on either or both of two rival hypotheses does not shift the burden in any way.

8. We reach, therefore, the classic statement of the law in Lord Hailsham’s speech, that the burden is on the person seeking a change, and that the current lease is the guide for the terms on renewal. That is not to say that the terms of a lease are set in aspic. This is clear from Lord Hailsham’s judgment but also that of Lord Wilberforce (at 747), who said:

*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, cf. *Adams v. Green* (1978) 247 E.G. 49). Before doing so it will consider any objections by the tenant, and where there is an insoluble conflict, will decide according to fairness and justice.*

9. It is not an impossibly high bar, but anyone reading those comments will appreciate that the party seeking the change to terms faces a distinctly uphill struggle. Distilling the principles:
- (1) The burden is on the person seeking the change. The lease in respect of which renewal is sought reflects the deal done between the parties, and is a strong indication of how the parties had decided to allocate the risks and costs of the landlord and tenant relationship. Renewal proceedings should not radically rewrite those freely-negotiated “ground rules”. The Court is also entitled to take into account any prior state of affairs which are relevant between landlord and tenant, such as earlier leasehold arrangements that truly reflect those ground rules.
 - (2) That said, “having regard to” does not mean that there must be no change. Nor does it mean that there is a broad discretion. It means that each change must be looked at in context, bearing in mind the background to the lease in question and what the parties have agreed about the new lease.
 - (3) The fact that one party will benefit from a change is not a sufficient reason for a change to be made. A benefit to one party may be counter-balanced or outweighed

by a correlative burden which is imposed on the other party. A relaxed user clause may benefit a landlord, but will result in an increase in rent. The introduction of a tenant-funded service charge mechanism might give the landlord a set of clean leases that can be attractively packaged up and sold as an investment portfolio, but this is at the expense of the tenants having to bear the risk of deterioration in the building and unexpected capital expenditure items. Although it might be possible to off-set that risk by reducing the section 34 rent, such reduction, being a “guesstimate”, cannot be said fully to buy that risk out.

- (4) When assessing whether a change, beneficial to the landlord, might also benefit a tenant, the Court is entitled to ask whether the benefit to the tenant is real, or merely theoretical. A relaxation of a user covenant, increasing rent, might render the lease more expensive but also more assignable. However, a particular tenant may never seek to access such a benefit, so that the benefit is not a real one.
- (5) A change would not be ordered which would undermine the Act – for instance, a narrowing of the user clause that harms the tenant’s business is clearly impermissible. An alteration to an alienation clause under which a surrender on assignment is sought is plainly contrary to the Act.
- (6) A change sought by the landlord purely to drive up rent, or by a tenant purely to depress it, will not be allowed.
- (7) What market practice is, is not a sufficient reason for changing a lease term, but just one factor to be taken into account. Just because the lease would include a particular term in the open market if freely negotiated, for instance as to service charges or guarantees, does not mean it must contain that term on renewal. The Court will bear in mind that the tenant may suffer from a weak negotiating position.
- (8) An obsolete or deficient term might justify intervention by the Court. For instance, it might justify the introduction of a service charge regime on particular facts, or it might justify the introduction of a rent review provision where there was none before.

10. We now look at how the section 35 jurisdiction has been exercised in particular cases.

Service Charge Provisions

11. *O’May* was about service charges. Particularly in older leases, it can be common to find no service charge at all, or to find a fixed contribution. This is because service charge provisions are of more recent vintage than is sometimes appreciated. This means that, on renewal, the question arises whether there should be an adjustment to service charge provisions to bring them up to date. As we saw in *O’May*, the House of Lords did not consider that a move to a variable charge, under which a tenant picked up the tab for all of the works when before he had been limited to paying a fixed

contribution only, was within section 35 as this converted the tenant into an insurer for the landlord: in this regard, *Hyams v Titan Properties* (1972) 24 P&CR 359 (where the Court of Appeal imposed a variable service charge) might be in doubt.

12. In *Amarjee v Barrowfen Properties Ltd* [1993] 2 EGLR 133, it was accepted by the Court that a tenant, who had occupied on an oral tenancy initially without any express terms, should have imposed on him a term to contribute to the services provided for an entire parade of shops vested in the same landlord. Given the commonality of services, it made no sense for the tenant to contribute to his own unit, only. The Judge appears to hold that he would not have imposed the term had there been a written agreement, but it is difficult to see how that case is different.
13. Some have detected a relaxation to the perceived strictness of *O'May* in *Edwards & Walkden (Norfolk) Ltd v City of London* [2012] EWHC 2527 (Ch). The tenants had demised to them parts of Smithfield Meat Market. They had initially paid rent plus a service charge. They were then moved elsewhere on a temporary basis to accommodate refurbishment works and paid an inclusive rent, that is, without a separate service charge. The landlord on renewal sought to vary the lease terms so that service charge was again recoverable as a variable charge. Sales J agreed to that change. He said the following:

[83] The first important point of distinction from O'May is that it is common ground in this case that the basic principle applicable between the parties is that the City should be entitled to recover all its costs of maintaining and operating the Market on an ongoing basis from the tenants. So, for example, the tenants accept that the simple rent they propose should be based upon estimates to be made now about the future running costs of the Market. The City, in its proposals for a rent plus a variable service charge, is not seeking to change that basic principle, but says that its proposals will in fact better and more fairly reflect that principle. The choice between the different payment structures contended for by the two sides does not involve the same substantial shift in the basic parameters of the commercial arrangement between the parties as was in issue in O'May.

[84] Secondly, in my view the weight to be attached to the payment structure in the 2001 leases is considerably diminished because of the background to the agreement of the parties on those terms and the terms of the leases themselves. As set out above, the original position under the early 1980s leases was that the tenants should pay a rent and a variable service charge. The parties moved to a simple all-inclusive rent in 1987 in contemplation of the disruption associated with the refurbishment of the East and West Markets. The intention was that this should be a temporary solution until the refurbishment was completed. The refurbishment lasted longer than had been expected. [...]

[86] *It is clear that this is an unusual case for the purposes of application of section 35. In light of this background, I do not consider that the same weight can be attached to the existing terms of the leases as would be appropriate in a more typical case. Since the 1980s there has been a continuing dispute between the parties about the structure of the payment terms to govern their relationship which both sides recognise has never been resolved and has only been “parked” by them in various ways as time has gone by. Further, the parties have indicated by the terms of the 2001 leases, in particular by clause 13, their agreement that each should have a fair opportunity to present argument about the appropriate payment structure for new tenancies going forward without being prejudiced in that debate by the drafting or form of the payment structure in the 2001 leases. That interpretation of events is reinforced by the insertion of clause 14 in some of the 2001 leases, which was intended to emphasise from the tenants' point of view that they should not be prejudiced in that debate by the fact that they had previously entered into the 1994 agreements. I therefore think that for the purposes of application of section 35 relatively little weight attaches to the simple rent provision in the 2001 leases, as compared with other factors relevant to the assessment of what terms should apply.*

[87] *It is common ground that the principle governing the new tenancies is that the City should be able to recover in full from the tenants the ongoing operational and maintenance costs of running the Market, and I agree with the submission of the City that that principle will most fairly and accurately be reflected by the City's proposals that the payment terms should include a variable service charge. The tenants' proposal for a simple rent, to be adjusted annually by a crude general inflation measure such as the Retail Prices Index, would create an unwarranted and avoidable risk that the underlying principle to be applied is departed from year on year (whether for the benefit of the City or for the benefit of the tenants would be a matter of arbitrary chance). In my view, this means that there is “a good reason based ... on essential fairness” (O'May at p. 741D per Lord Hailsham) for the payment terms to be structured as the City proposes, and such terms would best accord with “fairness and justice” between the parties (O'May at p. 747H per Lord Wilberforce).*

14. It is true that in *Smith*, a variable service charge was introduced into a lease. However, the point was that this was not the first time. The reason why the leases that were being renewed did not have such a provision was explicable on the facts - they were a temporary measure representing a departure from the general policy that was accepted by all sides, that the landlord should recover for his services in full. Rather than being a departure from *O'May*, it should be read as an application of the test.
15. In reality, absent unusual facts like in *Smith*, it will rarely be possible to persuade a Court to impose a service charge provision where none existed previously. In most cases, doing so will make the tenant the “insurer” for the landlord, carrying the costs of whatever goes wrong, and a decrease in the rent, whilst it might reflect what a

tenant in the market would require to assume such a risk, does not in fact compensate a tenant on renewal if a term is imposed and the roof comes off.

User

16. There are various reasons why a landlord or tenant might wish to widen a user restriction, or narrow it. A landlord may wish to widen the user restriction to enhance the rent. A tenant may wish to do the same to render the lease more assignable (and take a rent increase on the chin). A landlord may wish to narrow a user restriction as part of general estate management, or to please another tenant. A tenant may wish to narrow a user restriction in order to obtain a lower rent. However, baldly stated like that, none of those particular reasons for adjusting user clauses is a good one under *O'May*.
17. The cases on user need to be read carefully, but it also has to be borne in mind that the reasoning process for some cases may now be approached differently in light of the subsequent decision in *O'May*. Further, much turns on the nature of the user clause in the original lease. A highly specific absolute user clause in a lease might be very difficult to expand where the tenant does not wish it to be. On the other hand, a qualified user clause where a landlord can prove that consent would be available for a change of use, thereby expanding the class of tenants in the open market and therefore improving the section 35 rent, might not be cut down at the instance of a tenant seeking to restrict the hypothetical market for the purposes of a section 34 rent valuation.
18. The three principal cases, all pre- *O'May*, are as follows:
 - a. In *Gold v Brighton Corp* [1956] 1 W.L.R. 1291, a furrier had a lease with a wide “shops and offices” user clause in it. The furrier did not need the office use, but did need the shop use. This was because he was engaged in the sale of second hand clothing, to which the landlord objected on renewal, on the ground that he said it lowered the tone of his parade. The landlord sought a narrower clause restricted to a furrier and seller of ladies’ wear, but precluding second-hand sales. No evidence for the threatened ‘lowering of tone’ was tendered. Nonetheless, the trial judge agreed. This was reversed by the Court of Appeal, which ordered that the user covenant be restricted but to the business of a furrier and second hand clothes. It may not have helped that the landlord granted a lease to a new tenant of adjacent premises for the sale of second-hand goods shortly before the appeal hearing. The Court of Appeal emphasised that a tenant should not, by the 1954 Act renewals process, be deprived of the ability to carry out an important part of his business, unless there was a very good reason to do so. However, the Court of Appeal was persuaded to restrict the user clause to the uses for which the tenant in fact

used the premises, and cut down the wide user clause. This was because the function of the 1954 Act was to protect the tenant's business, not to ensure that the tenant had an assignable asset. Query, however, whether this would be justified after *O'May*. Denning L.J. said at p. 1293:

“The tenant says that it was wrong for the judge to restrict her from selling secondhand clothes, because that would deprive her of part of [her living]. ... Turning now to the Act of 1954, I think it plainly intends to protect the tenant in respect of his business. Section 23 says that the Act applies to premises which are occupied by the tenant ‘for the purposes of a business carried on by him.’ Inasmuch as the tenant is to be protected in respect of his business, the terms of the new tenancy should be such as to enable him to carry on his business as it is. They should not prevent him from carrying on an important part of it. At any rate, if he is to be prevented from using the premises in the future in the way in which he has used it in the past, it is for the landlord to justify the restriction: and there ought to be strong and cogent evidence for the purpose. I find no such evidence here.”

Denning LJ went rather further than this, though, in departing from the lease terms by restricting them to the tenant's business in hand (at 1294):

A question has arisen before us as to whether the tenant should not be allowed more liberty still. It was suggested that she should be left unrestricted to the same extent as in the former lease, with the result that she could carry on any kind of shop there. I do not think that would be right. The judge, when he gave his judgment, said that he thought it was reasonable to make some restriction. It is to be remembered that the object of this Act is to protect the tenant in respect of his or her business, and not to put a new saleable asset into her hands. The clause which I have proposed enables Mrs. Gold to carry on her existing business, and, indeed, in respect of children's wear, enables her to expand it. That is, I think, sufficient. After all, if in the years to come a change of user was reasonable, no doubt the corporation would give their consent.

Whether this was because he felt that to leave user unrestricted when on the facts that was surplus to the tenant's requirements (which privilege would still need to be paid for), or for some other reason, is unclear. The fact that it is (a) Lord Denning, (b) that Mrs Gold was a long-established lady furrier, and (c) that the Corporation had not covered itself in glory by letting to a second-hand shop notwithstanding its stance at trial leads one to conclude the former.

One gets a flavour of how the hearing went for the landlord from the judgment of Birkett LJ:²

² It is a comfort to us mortals to know that the hard day at the office was had by Leslie G Scarman, later Lord Scarman, so a savaging in the Court of Appeal happens to the best of us.

As I took rather a strong view about this matter, and, I am very much afraid, was too vocal about it, perhaps, by way of appeasement, I had better add a word or two for myself.

Parker L.J. concurring, said, at p. 1296:

“Undoubtedly under section 35 of the Act the county court judge is given a very wide discretion, but in the ordinary case, at any rate, it is difficult to think of any considerations which would justify changing the restrictions on user in such a way as to alter or limit the nature of the business which the tenant has lawfully carried out on those premises and which it is clearly the object of the Act to preserve.”

- b. In *Aldwych Club v Cophall Property* (1962) 185 E.G. 219, a club sought a renewal of a lease which restricted their user to that club, though subject to the landlord’s consent (not to be unreasonably withheld) to another use. The evidence was that the landlord had planning permission for office use, and would, if asked, grant consent to such a change of use. The effect of a change to office use was to double the rental value of the demised premises. This prompted the tenant to seek a restriction to use as a club on renewal. The Court rejected this. It was patently an attempt to restrict user at the instance of the tenant to lower the rental valuation that would result under section 34. It was unacceptable to restrict the user on renewal so as to exclude from that valuation a class of tenant most likely to want the lease, namely office tenants.
- c. In *Charles Clemens v Rank City Wall* [1978] 1 E.G.L.R. 47, the landlord wished to widen a user clause in order to increase the rent. User was restricted to that of a cutler. The landlord wished to turn that into a qualified covenant in relation to further or other users. Although on paper that gave the tenant the benefit of being able to do more on the premises, and to widen the class of possible assignees, he had no present intention of doing anything else and those benefits were contingent on a change in business or a desire to assign. Absent any intention to do either, and on the basis of an objection to that change, the alteration was rejected.

Alienation

19. Although there are fewer cases, it is clear that similar considerations apply on alienation clauses.

20. In *Cardshops Ltd. v Davies* [1971] 1 W.L.R. 591,³ a landlord proposed that a renewal tenancy should be subject to an absolute covenant against assignment. As originally

³ *Fitzpatrick Bros v Bradford Corp* (1960) 110 L.J. 208 is similarly on point, noting the value of alienation provisions to tenants.

granted, it was subject only to a qualified covenant. Perhaps optimistically, the landlord then ‘softened’ its position and was prepared to accept a clause that, on contemplation of assignment, a surrender should be offered by the tenant. The covenant plainly offended the 1954 Act:

“It imperilled the whole existence of such goodwill as these tenants had built up. They could not assign even to the most responsible person without first offering to surrender their tenancy to the landlords. I think that that was so novel and burdensome a departure from the terms of the former tenancy as not to be permissible under the Act. In my judgment the judge was wrong in imposing it, and I would be for excising all those parts of the new clause which went beyond requiring the tenants to seek the landlords’ permission and placing upon the landlords the obligation of assenting thereto unless, upon some reasonable grounds, such an assignment could be objected to.”

21. Query whether such a clause would be caught by section 38 of the 1954 Act (anti-avoidance) in any event, and bad for that additional reason.

22. Better covered is the question of whether the landlord can require that the departing tenant should enter into an authorised guarantee agreement (AGA) under the Landlord and Tenant (Covenants) Act 1995.⁴ As we can see from the amendment to section 35, it is provided by sub-section (2) that:

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.

23. The Court must therefore take into account that the 1995 Act exists, and that under it, a tenant will remain liable on the lease covenants only for the duration of time during which the term is vested in him.⁵ The way in which the 1995 Act mitigates this loss of protection for the landlord is by allowing him to require that the outgoing tenant enter

⁴ Bear in mind also section 41A(6), which covers a different but overlooked situation of partnerships:

(6) Where the court makes an order under section 29 of this Act for the grant of a new tenancy it may order the grant to be made to the business tenants or to them jointly with the persons carrying on the business in partnership with them, and may order the grant to be made subject to the satisfaction, within a time specified by the order, of such conditions as to guarantors, sureties or otherwise as appear to the court equitable, having regard to the omission of the other joint tenants from the persons who will be the tenant under the new tenancy.

⁵ Tenants had, in relation to “Old Leases” (i.e. those prior to 1st January 1996) sought to argue that a term releasing them on assignment should be included: see *Amerjee*, above. They did not succeed; it was not enough that this was market practice. An application of the “Sauce for the Goose” principle.

into an AGA. However, that is not an automatic right. Section 16(1) - (3) provide that:⁶

- (1) *Where on an assignment a tenant is to any extent released from a tenant covenant of a tenancy by virtue of this Act (“the relevant covenant”), nothing in this Act (and in particular section 25) shall preclude him from entering into an authorised guarantee agreement with respect to the performance of that covenant by the assignee.*
- (2) *For the purposes of this section an agreement is an authorised guarantee agreement if—*
 - (a) *under it the tenant guarantees the performance of the relevant covenant to any extent by the assignee; and*
 - (b) *it is entered into in the circumstances set out in subsection (3); and*
 - (c) *its provisions conform with subsections (4) and (5).*
- (3) *Those circumstances are as follows—*
 - (a) *by virtue of a covenant against assignment (whether absolute or qualified) the assignment cannot be effected without the consent of the landlord under the tenancy or some other person;*
 - (b) *any such consent is given subject to a condition (lawfully imposed) that the tenant is to enter into an agreement guaranteeing the performance of the covenant by the assignee; and*
 - (c) *the agreement is entered into by the tenant in pursuance of that condition.*

24. It follows that an AGA can only be required where there is a qualified or absolute covenant against alienation. Further, where the covenant is one which imposes a consent requirement (not to be unreasonably withheld), a condition that an AGA be given must also be reasonable. It is not the case that there is an automatic entitlement to an AGA in such a case. This follows from *Wallis Fashion Group Limited v CGU Life Assurance* [2000] 2 E.G.L.R. 49, where Neuberger J (as he then was) explained that

By virtue of section 16(3)(b) of the 1995 Act, a landlord's requirement for an AGA is valid and enforceable only if it is a requirement which is “lawfully imposed”. Where an assignment requires landlord's consent and the alienation covenant is silent on the specific issue of whether or not he can demand an AGA, then the landlord can only refuse consent if it is reasonable to do so—see section 19(1) of

⁶ The amended section 19 of the Landlord and Tenant Act 1927 is not relevant. The issue under consideration only arises where such a term is sought to be imposed for the first time

the 1927 Act. In those circumstances it seems to me that it follows he can only impose a condition on the grant of his consent if that condition is reasonable. If it is reasonable to demand an AGA as a condition of his consent, then that demand is lawfully imposed. If it is unreasonable to make such a demand, then it is not lawfully imposed.

25. The landlord's argument that section 35(2) entitled it to extract an AGA as of right therefore failed on a proper construction of the 1995 Act, which gave no such automatic requirement. Could the landlord nonetheless argue that such a requirement should be imposed in any event? The tenant was prepared to accept that the AGA should be imposed where reasonable, but not in all circumstances. The landlord did not wish for there to be a reasonableness qualification.

26. The landlord had some ingenious arguments:

First, there is the fact that, even as proposed by CGU, the alienation provisions in the tenancy will be more generous to the tenant and less beneficial to the landlord than under the lease, and the court should lean in favour of following the terms of the current lease (see section 35(1) and O'May). Secondly, a reasonableness requirement can, even with the best will in the world on both sides, lead to uncertainty and to costly and time consuming disputes. Thirdly, there is the fact that of the other 15 tenants who have agreed new tenancies in the Southgate Centre, 14 have consented to inclusion of a paragraph 17(c) in the form contended for by CGU.

27. As we all know, the word "ingenious" is judgespeak for "wrong".⁷ So it proved. As to the first point, this boiled down to a comparison of the position under the existing lease (entered into under the old law with original tenant liability due to privity of contract) and the position under a new lease (governed by the 1995 Act, under which the original tenant was released from liability unless bound by the AGA). Neuberger J considered that this was the wrong comparison. The 1995 Act had changed the default position of the original tenant - instead of being liable for everything, he was liable for nothing. Once that became the relevant comparator, the imposition of an AGA, even where not reasonable, was more onerous than the default position. As to the second point, this was not as contrary to the interests of the landlord as it appeared. The tenant would have the considerable burden of showing that no reasonable landlord would require the AGA (that is, a *Wednesbury* standard of unreasonableness). As to market forces - they were one factor. It was impossible to know whether the tenants would have been prepared to die in a ditch over the AGA,

⁷ See also "novel", and "brave"; all polite forms of the word "startling".

or whether they simply regarded this as one of a number of bargaining chips on the table which they were prepared to throw away, provided the other terms were right.

Redevelopment Breaks

28. The 1954 Act is there to protect business tenants, but it is not there to stop development. That is why we have ground (f). The protection of development potential is an equal concern to the protection of businesses. As we all know, if a landlord falls down on ground (f), he may have a fallback: a redevelopment break option.⁸ The advantage is that, if the development proposal is genuine but half-baked, or if the star witness crumbles in the box, then a development break or a shorter term may be secured as a half-way house.⁹
29. As was pointed out in *Adams v Green* [1978] 2 E.G.L.R. 46, if a landlord can show that there is a possibility of development, he will fall on ground (f) but will still be entitled to a redevelopment break. The tenant is protected because, on exercising that break, the landlord will again have to make out ground (f) to secure a termination order or to oppose an application for a new tenancy (as the case may be). The landlord does not have to show that the premises are ripe for development, or that it has funding, or any other matter under (f). It must show a mere possibility of development (and not even that it will do it itself); *NCP v Paternoster Developments Limited* [1990] 1 E.G.L.R. 99; *Adams* (above).
30. In imposing the break, the Court has to make a qualitative assessment: it has to balance the tenant's interest in an uninterrupted term against the landlord's interest in development. The latter involves a fact-sensitive balancing of the parties' various countervailing interests, the imminence of any development and the business impact on the tenant: *Davy's of London v City of London Corp* [2004] 3 E.G.L.R. 39). The imposition of a redevelopment break can have serious consequences for the section 34 rent if it means that the tenants in the hypothetical market are a restricted class: *Britel Fund Trustees Limited v B&Q Plc* (11 March 2016).¹⁰

⁸ The recent case of *S'Franses v Cavendish Hotel* [2017] EWHC 1670 (QB) rejected the tenant's submission, that it was relevant in termination proceedings to decide whether the ground (f) works might be rendered permissible under an alteration of lease terms on renewal, thereby rendering possession unnecessary. The argument put the cart before the horse: see at paragraphs [100] and following.

⁹ This was recognised in *McCombie v Grand Junction* [1962] 1 W.L.R. 581, and has been applied throughout County Courts since.

¹⁰ [http://www.falcon-chambers.com/images/uploads/news/Judgment Britel Fund Trustees Limited v BQ PLC.pdf](http://www.falcon-chambers.com/images/uploads/news/Judgment_Britel_Fund_Trustees_Limited_v_BQ_PLc.pdf) for the transcript.

Rent

31. The usual 1954 Act renewal rent of a shop is arrived at by seeking out comparable transactions, adjusting them for location, quality and so on, and finding some yardstick for comparison (invariably ITZA, unless it is a massive unit). This can turn into unedifying battles about whether the staff toilet should in fact be classified as prime retail real estate. We are going to look at two more limited issues:
- a. When can a rent review clause be introduced, where there was none before; and
 - b. What happens if the premises you are valuing are such that the only sensible way of measuring the rental value is by reference to the variable turnover of the business on it?

Rent Review

32. Rent reviews are a standard staple in any lease of more than a short length. The Court recognised, in *Re 88 High Street Road, Kilburn* [1959] 1 W.L.R. 279 that a rent review clause could be inserted on renewal, at least at the landlord's behest, though it never really explained why, as it did not naturally fit into sections 34 or 35. The problem was resolved by the insertion of section 34(3), which now reads:

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.

33. It is established that, where the renewal term exceeds five years, the Court will, as a matter of practice insert a rent review clause. Although obviously the inflationary or deflationary cycle may dictate who wants a longer, and who wants a shorter, review, in practice the Court will receive market evidence to see what is done in the geographical area as a matter of practice, and this will influence the frequency of the rent review cycle.
34. It is also the practice of most Courts, if not invariably the case,¹¹ that the rent review will be upwards, not downwards, notwithstanding that in the open market institutional landlords insist on upwards-only as the norm. It is to be noted, however, that in all reported cases there was insertion of a rent review where none existed before. We have no guidance as to what would happen if a tenant sought to alter, for instance, an upwards-only rent review provision to one that could go either way.

¹¹ The exception is *Blythewood v Spiers* [1992] 2 E.G.L.R. 103, but the Court regarded an up and down rent review clause as a novelty. It is less so now, and indeed a two-way review is frequently recommended as spreading the joy, or pain, of fluctuating rental markets: see e.g. http://www.leasingbusinesspremises.co.uk/downloads/code_comm_lease090805.pdf

Turnover Rent

35. Odd forms of rent can be determined from time to time. Sometimes, as with pubs, it is not right to take a comparable, but preferable to base one's rent on the projected profit to be expected from a particular premises, and work from that (a "profit rent"). Other times, a rent might be determined which increases in increments, or by amounts when works of repair are completed by the landlord ("differential rents", as found to be within section 34 in *Fawke v Chelsea* [1980] Ch 44). Sometimes, however, premises cannot be valued by any of those methods, and the only sensible method is to calculate rent by reference to a formula, as a function of turnover ("turnover rent"¹²). That is something one finds with multi-storey car parks: turnover rent was agreed to be the right basis for a car park rent in *National Car Parks Limited v Hawksworth Securities Plc* (12 May 2016) and was considered the appropriate basis for setting the rent for the renewal lease by the trial judge.¹³
36. Such a rent under section 34 might be justified because that is what the market would demand for the business in question. In *Naylor v Uttoxeter Urban DC* (1974) 231 E.G. 619, for instance, it was determined that the market rent for a cattle market was 20% of commissions received. On the other hand, this sits ill with section 34 as a whole, which requires disregards of:
- (a) *any effect on rent of the fact that the tenant has or his predecessors in title have been in occupation of the holding,*
 - (b) *any goodwill attached to the holding by reason of the carrying on thereat of the business of the tenant (whether by him or by a predecessor of his in that business),*
 - (c) *any effect on rent of an improvement to which this paragraph applies,*
 - (d) *in the case of a holding comprising licensed premises, any addition to its value attributable to the licence, if it appears to the court that having regard to the terms of the current tenancy and any other relevant circumstances the benefit of the licence belongs to the tenant.*
37. It is a little hard to see how such disregards work where the rent is a function of turnover. The matter has not been authoritatively settled, but as we can see from *NCP*, the County Court can take the pragmatic view, at least when faced with consensus between the experts, over the legal niceties of section 34.

¹² See P. Clark, *Conveyancer*, 2014, 1, 4-10; and 2014, 2, 85-94, for discussion of that term.

¹³ [http://www.falcon-chambers.com/images/uploads/news/NCP v Hawksworth.pdf](http://www.falcon-chambers.com/images/uploads/news/NCP_v_Hawksworth.pdf) for transcript.