

**IN THE COUNTY COURT AT CENTRAL LONDON sitting at 10 Alfred Place, WC1E 7LR**

**CLAIM NO: F01CL755**

**Between:**

**ANDREW SAVILLE-EDELLS  
JENNIFER SAVILLE-EDELLS**

**Claimants**

**- and-**

**RAJANDRA KUMAR JAN**

**Defendant**

---

## **JUDGMENT**

---

### **Background**

1. This claim concerns a shop at 174 Kensington Church Street, W8 4DP. The shop is on ground and basement levels and forms part of a building consisting of a parade of 4 shops at ground and basement, with a further four storeys of residential flats above. The shop sits on the corner of the building and so has frontages on both Kensington Church Street and Kensington Mall. The subject shop trades as 'Pet Pavilion'. At street level the shop is used as a retail area selling pet foods and accessories. The basement is used for pet grooming.
2. The Claimants have held leases of the shop since 2003. The latest lease is dated 31.10.2011 with a term expiring on 23.07.2018 on a rent of £22,500 per annum.
3. When the original lease was granted in 2003, there is evidence that the parties agreed that the Claimants would carry out some works to the property. The only evidence of this is a letter dated 20.06.2003 from the Claimants to the Defendant's agent.
4. By notice dated 04.11.2018, the Defendant gave notice to end the lease on 11.04.2019. The notice stated that the Defendant did not oppose the granting of a new lease and in the schedule to the notice, he proposed a new lease of 15 years at a rent of £45,000 per annum subject to upward review to market rent at the 3<sup>rd</sup>, 6<sup>th</sup>, 9<sup>th</sup> and 12<sup>th</sup> years of the term and otherwise on the same terms as the existing lease.
5. These proceedings were issued in the County Court at Central London on 24.05.2019 (time having been extended by agreement between the parties). The Claim Form stated that the Claimants claimed the grant of a new tenancy of the subject shop. In the particulars of the Claim Form, as required by the Civil Procedure Rules, the Claimants set out their proposals for a new tenancy, those being: a term of 15 years

at a rent of £32,500 per annum with rent reviews at 5 and 10 years and otherwise on the same terms of the existing lease.

6. The Defendant filed an Acknowledgement of Service dated 27.06.2019 and in a supplement to that Acknowledgement, counter-proposed a new tenancy of 10 years at £50,000 per annum with a rent review at 5 years and a provision that the minimum service charge be £1,500 per annum with the precise amount to be determined annually by the landlord.
7. In June 2019, the claim was transferred to the London offices of the First-tier Tribunal (Property Chamber) for administration. Directions were given on 9 October 2019 with the intention that the matter would come to trial in January or February 2020. In fact, the trial was set for 10 & 11 March 2020. By order dated 19 February 2020, Regional Tribunal Judge Powell (sitting as a Judge of the County Court) made an order vacating the trial and giving directions for dates to avoid to be provided for the six weeks from 11 May 2020.
8. In late March 2020, the government ordered a lockdown in response to the Coronavirus pandemic and the tribunal suspended all hearings whilst it arranged for its operations to go exclusively on-line.
9. Whilst waiting for a date for trial, the parties continued to negotiate. Each party filed an expert's report in October 2021. The figures for the rent on a new tenancy contended for in those reports were; Claimant £25,125; Defendant £45,000. Given the delay between the ending of the lease in July 2018 and the determination of the terms of a new lease in 2021 and further, given that the onset of the Coronavirus pandemic occurred between those dates, the question arose as to whether a separate Interim Rent would need to be assessed.
10. By the time the matter came to trial, so far as the terms of a new lease were concerned, the parties were agreed that the terms should be same as the old lease save that;
  - (a) The term would be 15 years
  - (b) Upwards only rent reviews at 5 and 10 years
  - (c) No break options
  - (d) Service Charge capped at £1840 for years 1-5, thereafter at £1840 subject to inflation
  - (e) There was disagreement as to a term in the new lease for landlord's access
11. The claim finally came to trial on 18 & 19 October 2021. I sat with an Assessor, Mrs Flint FRICS. On the first morning of the hearing, myself and Mrs Flint inspected the exterior and interior of the subject property and inspected the exteriors of the comparable shops relied upon by the respective experts. The only oral evidence at trial came from the respective experts. The parties were represented as follows:
  - Claimants: Joseph Ollech (Counsel) instructed by TWM Solicitors
  - Defendant: Aryeh Kramer (Solicitor Advocate) instructed by GSC Solicitors

## **Evidence – Rent going forward**

### *General comments*

12. Both experts produced full reports and both were extensively cross-examined in the hearing. An account of all the evidence in this judgement would not be feasible. The following summaries therefore include only that evidence which bears upon my final decision. The parties can assume that if I have not mentioned an issue on which evidence was given, that issue has not had any impact on my final decision.

### *Tenant's improvements*

13. As stated above, the only evidence in relation to this matter was by way of a letter dated 20.06.2003. The relevant parts of that letter are as follows:-

As per your client's request I detail herewith our proposed renovations to the above unit. Our property specialist, Graham Marks, has advised us to request that these alterations be documented in the form of a Landlord's Licence to be completed along side the lease. You will note that I have copied this letter to all parties in order to expedite this.

- 1 Strip out all existing fittings. Damp proof render as necessary
- 2 Move position of staircase to basement so that it discharges within 3 metres of the front door to conform with current regulations
- 3 Install 3 air conditioning units.....
- 4 Rewire and provide new supply and fuse board....
- 5 Install new plumbing/pipe work and provide new staff WC and kitchen area  
.....
- 8 Install new lighting system throughout....

### *Inspection*

14. On inspection, we noted that the subject property was the only one amongst all the properties referred to and inspected that had a centrally situated staircase. All the other properties had either staircases along the flank wall or, at the rear. I formed the view that as a result of this, the layout of the subject property appeared to be inferior to the other properties. The positioning of the staircase meant that the shop floor areas around it were cramped, particularly in the rear right-hand side of the property at street level.

### *Expert evidence*

15. A fundamental difference of opinion between the parties' valuation experts was the issue of the Coronavirus pandemic and its effect on the market for shop lettings. The Claimants' expert, Mr Marks FRICS, in justification of his view that 'pre-pandemic' comparable transactions were no longer relevant, stated at paragraph 8.1 of his report:-

At the beginning of 2020 before the pandemic was announced, retail letting markets were altogether different to those today and in most cases values were higher. I would be

surprised if this statement were to be challenged as a broad statement since there has been so much publicity concerning the difficulties of the retail market with thousands of shops having closed permanently in the United Kingdom and those closures are still occurring. In Central London even in prime locations there are a large number of vacant shops currently, with low demand, and many of us in the profession wonder not only when most of the shops will be relet, but at what rents. I counted between 17 and 20 unoccupied units in Kensington Church Street on 29/09/21 – out of which there were 3 I was not certain whether they are permanent closures or whether they are temporarily vacant. Plus this covers a concessionary period which began on 1<sup>st</sup> April 2020 of nil business rates being payable by retail occupiers, and even today most retailers are paying no more than a third of full business rates, but this period of business rates concessions ends on 31<sup>st</sup> March next year, from which time full business rates will again be payable on retail property.

16. In his report, the Defendant's expert, Mr Bacon MRICS APAEWE, set out a table of analysed rents for the local area which spanned the start of the pandemic in the UK and then set out a commentary on those rents. He concluded, at paragraph 1.63 of his report as follows:-

For 6 October 2021, I consider that there is strong evidence to suggest that the market rent has recovered to substantially where it was in 2019 and, moreover, I am also mindful of the fact that this is to be the rent for the next 5 years.

*Claimant's expert – summary of detail*

17. As to the subject property, the experts agreed the floor areas to be: Ground Floor 224 sq ft, and; Basement 227 sq ft. However, Mr Marks considered that the basement should be valued at A/20 which produces a total (rounded) ITZA figure of 235.
18. Mr Marks considered that, for this property, there was no real advantage in the corner return given that the side return was on Kensington Mall, a road without any significant footfall and that, in his opinion, the return added little, if anything, to the visibility of the shop. At most, he would add 2.5% for the return.
19. Shape and layout were however significant disabilities in Mr Marks' opinion. He considered a reduction of between 2.5% and 5% of the rental value was appropriate to account for these.
20. As to the relativity of the basement value, whilst Mr Marks conceded that the average value tends to be A/10, he considered that, the low ceiling height, poor light, poor stair access of the subject basement warranted A/20.
21. In respect of the Service Charge cap, Mr Marks noted that the proposed cap of £1,840 per annum amounted to over 7% of the annual rental value of the unit and that in his experience, it would be unusual for Service Charge costs in a case like this to be above this level. Therefore, in his view, the Service Charge cap would justify no more than a 2.5% uplift of the rent.
22. Two further valuation issues were mentioned in the reports, those being, an adjustment in respect of A/2 use and, an adjustment for a small unit. Neither issue was ultimately thought to be relevant to the valuation exercise by the experts.

23. Mr Marks, in his valuation, initially took account of five, post-pandemic, lettings. In his analysis, the values of these comparables ranged from £74 to £117 ITZA rate, with the average amounting to £96.32. Taking various factors into account in respect of the various properties, Mr Marks settled upon an ITZA figure of £104.32 which produced a (rounded) rent of £24,500.

*Defendant's expert – summary of detail*

24. In stark contrast to Mr Marks, Mr Bacon relied on the fact that the Valuation Office Agency had, for some years, valued the basement at A/10 and described it as 'Retail Area' whilst the basements at numbers 178 & 180 Kensington Church Street were described as 'Storage' and valued at A/20. Mr Bacon decided to value the basement of the subject property at A/5 to reflect its 'retail' (presumably potential) use. In cross-examination he conceded that the Valuation Officer would have reflected the tenant's improvements in his valuation.

25. Mr Bacon considered there was a clear advantage in the corner return given that the return was on a high traffic area and bus route and with traffic having to stop at a pedestrian crossing outside and he considered this justified a 10% uplift.

26. As to shape and layout, Mr Bacon stated in his report; "I don't consider that the shop has any shape issues or layout issues". He considered that the staircase has allowed the tenant to run two businesses from the premises, the shop and the grooming area.

27. In respect of the Service Charge cap, Mr Bacon considered that a tenant would allow 10% of rent to be a payment for Service Charge, so if the rent were £40,000, the tenant would expect to pay £4,000. One then deducts the actual cap agreed from this figure and the result should then be added to rent.

28. In his valuation, Mr Bacon takes account of pre-pandemic lettings. He sets out his analysis of 12 pre and post-pandemic transactions to arrive at a figure of £140 for ITZA. He then adds 10% to the resulting figure for the shop return and arrives at a total rent of £41,500. At trial, having considered the matter further, Mr Bacon made further adjustments to the comparables and arrived at a revised figure of £45,000.

**Conclusions as to new rent**

29. In so far as their basic approach is concerned, I found the evidence of Mr Marks to be more reliable for the following reasons;

(a) He is the more 'local' valuer. He has been dealing specifically with Kensington Church street, and indeed with the subject property, for many years.

(b) Whilst, to some extent, I thought that both experts, in their efforts to defend their valuations, had a tendency, at times, to be over defensive or over optimistic in their views, I had particular concerns regarding Mr Bacon in the following areas;

i. His insistence that there were no issues with the layout of the subject premises

- ii. His inclusion of a comparable premises (pre-pandemic at a high rent) in Notting Hill Gate that was, in my view (and in Mr Mark's view) clearly of no use as a comparable
  - iii. The way in which he valued the Service Charge cap which did not appear to make commercial sense
- (c) The issue of pre-pandemic comparables; I start from the position that, it would appear self-evident that following the disruption to the economy and shopping habits following the pandemic, there would be considerable uncertainty regarding commercial rents and accordingly, pre-pandemic rent agreements (if there were suitable post-pandemic comparables) should be treated either with extreme caution or simply ignored. Mr Bacon put up a reasonable argument for his case on rents. He relied upon his analysis of comparable rents to demonstrate that there was no on-going weakness in rents and he also made the point that the effect of the pandemic on rents was different depending on the location of the premises; for example, premises that previously benefited from a strong commuter presence may well have done very badly whereas a unit used for distribution of goods would have done very well. Further, people have tended to shop more locally rather than going to shopping destinations and this would favour the retailers in Kensington Church Street. I do not consider however that Mr Bacon's argument is sufficiently strong to dissuade me from the, intuitive, view that the pandemic has had a depressive effect on rents. Mr Bacon's reliance on the figures from his comparable analysis depend on his analysis, some of which I reject (see below). Whilst I accept that different areas may well be affected differently by the pandemic, I agree with Mr Marks that there must still be considerable uncertainty amongst retailers and prospective retailers as to what the future holds for them.
- (d) The fact that Mr Bacon placed some reliance on comparables that were, in all the circumstances, very out of date.

30. In this case, there is a clearly a comparable that stands out from all the rest, that being 180 Kensington Church Street. It is by far the best comparable for the following reasons;

- (a) It is close to the subject property and forms part of the same building
- (b) It has a transaction dating from December 2020 which is post declaring of the pandemic and where the pandemic uncertainty is, in many respects, similar to the current picture
- (c) Its size is similar to the subject property

31. In his report, Mr Marks stated that there were compelling reasons why number 180 Kensington Church Street could not, by itself, provide an answer. Those reasons, and my reaction to them are as follows:-

- (a) *The tenant did not receive any advice from a Surveyor* – I'm not sure that, without hearing from the tenant directly, we can conclude that the tenant was unadvised. The tenant may not have been formally represented but may have taken advice. In any event, this is a real tenant in a real market who has rented a property, that in itself is good evidence.

- (b) *The tenant paid a full year's rent in advance which is unusual and may be due to a poor covenant – agreed, but I do not see how this would have any great effect on the rent.*
- (c) *The date of letting was relatively early in the pandemic and the retail market has worsened – this is the closest date to our valuation date. There is still, at the time of writing this judgement, considerable uncertainty as to what Winter 2021 will bring in the way of restrictions due to the pandemic. I'm not sure that the statement that the retail market has worsened is evidenced.*
32. Mr Marks comes to his ITZA figure by taking number 180 and four other comparables (160, 107, 139 and 37 Kensington Church Street) but then applies a weighting of 50% for 180 and 12.5% for each of the others. He weights in this way because, *"...it is apparent that the ITZA value of the letting of 180 stands well above the others including the most recent letting of 37 being a shop in the traditionally more valuable retail section of the street."*
33. In his report, Mr Bacon arrived at an ITZA of £145, *"primarily based upon the rents agreed at 180 and 178"*.
34. Both experts therefore agree that number 180 is a central comparable.
35. For the reasons given above, I am not persuaded that the pre-pandemic letting of number 178 is especially useful.
36. I consider that the most persuasive evidence I heard as to valuation was to take the approach of starting with the rent agreed for number 180 in December 2020. In Mr Bacon's report, he said of this rent; *"180 Kensington Church Street was agreed at an unadjusted rate £112.14 per sq ft in December 2020"* [para 1.50]. In cross-examination, he was asked why then in his table at page 7 of his report, his figure for this transaction was £130.00. It was put to him that, if one takes the rent of £30,000 agreed and divide that by the ITZA, you come to a higher figure. Mr Bacon stated that his figure of £112 takes account of the 3 month rent-free period and insurance liability.
37. In his valuation, Mr Bacon comes to a total ITZA figure of 269.4 sq ft.. He treats the basement area as A/5. I reject that evidence given that he had valued other basements at A/10 and I am not convinced of his assessment of A/5 for the subject property. Mr Marks treated the basement area as A/20 which is the same figure that he applied to areas for other properties that were simply storage areas. The obvious conclusion here is to take the basement of the subject property at A/10 as that is clearly in line with the way in which both experts have effectively dealt with other properties.
38. Taking the basement at A/10 gives an ITZA for the subject property as 246.7 sq ft.
39. So, adopting Mr Bacon's figure of £112.14, and the ITZA of 246.7 sq ft, one comes to a (rounded) rent figure of £27,665.

40. As to adjustments to this figure, I first turn to the issue of the return frontage. I accept Mr Marks' figure of 2.5% to represent the advantage of the return frontage. I accept that the return into Kensington Mall, that being off the shopping area, does not add a great deal. I agree with Mr Marks that the car drivers pausing at the zebra crossing by the premises are more likely to be focussed on the crossing than the return of the shop.
41. However, as I have stated above, I accept Mr Mark's evidence, as witnessed by myself on the inspection, that the layout of the subject premises is poor. I'm not convinced that having the stairway to the basement either way around particularly affects the layout. The fact is that the subject property is different to all the comparables in having this centrally positioned stairway, and it undoubtedly detracts from the layout of the shop and creates awkward pinched areas around the staircase. I accept Mr Marks' suggested adjustment of 2.5%. This then cancels out the adjustment for the return frontage and leaves the rent figure at £27,665.
42. As for the Service Charge cap. I reject Mr Bacon's assessment of the way in which this should be treated because it appears to give all or most of the benefit of the cap to the landlord. For that reason, I prefer Mr Marks' analysis of the adjustment for the cap and allow 2.5% which brings the rent figure to £28,350.00 (rounded).
43. The figure that I have arrived at is not the same as either expert and that conclusion needs justification. Mr Marks placed most reliance on the comparable at number 180 but also had his figure influenced by four other comparables. Of those;
- (a) 107 Kensington Church Street provides real problems given that it comes with a residential flat on the first floor which introduces an almost unknowable element into any attempt at valuation.
  - (b) 139 Kensington Church Street is a much larger property with a much wider frontage. Mr Marks' analysed figure is an ITZA of £84.55, this is applied to the subject property would produce a rent of £20,799 which is clearly way out of line.
  - (c) 37 Kensington Church Street is in a very different, and for retail premises, a much better part of the road a significant way from the subject premises.
  - (d) 160 Kensington Church Street on Mr Marks' analysed figure of £73.75, which would produce a rent of £18,142 for the subject premises, is clearly unrealistic.
44. Accordingly, I reject Mr Marks' inclusion of these properties in his valuation.
45. As to Mr Bacon's reliance on 178 Kensington Church Street, I do not consider it, as a very pre-pandemic transaction, to be a credible comparable for the reasons given above.
46. The assertion that the Claimants carried out improvements, those being principally the turning round of the staircase, some rewiring, damp proofing and works to the basement, was not admitted by the Defendant. On the basis of the letter produced by the Claimants detailing the work, and in the absence of any other evidence, I find that the improvement works were carried out. As I understand matters, regardless of any



question of convenience of layout, the works to the staircase would have been necessary to comply with fire regulations. Therefore, in coming to a conclusion regarding the rent, I have to ignore these improvements and assume that any incoming tenant would have to carry out similar works in order to get the property ready for commercial use. However, neither party presented any valuation evidence as to the effect on the rent of the works..

### **Conclusions as to Interim rent**

47. Having concluded that the new rent should be £28,350.00, the starting point for the interim rent is that this should be the same as the new rent [s.24C(2) Landlord and Tenant Act 1954]. However, that section is disapplied where the Court is satisfied that the interim rent differs substantially from the new rent. Once again we have to consider the effects of the pandemic.
48. I have already concluded above that the pandemic has affected rents for retail premises. That means that the interim rent, which spans April 2019 to early 2022 is likely to be substantially different from the new rent.
49. Mr Marks considered that the rent for a yearly tenancy in April 2019 would have been £30,550 after taking into account the most relevant comparables for that time; 137, 160 and 178 Kensington Church Street.
50. For the reasons given above regarding the new rent, I return to number 180. This had a lease agreed at £40,000 in November 2017 (around £36,000 adjusting for size only ((with basement at A/10). This falls to £30,000 in December 2020 (around £27,000 adjusting for size only ((with basement at A/10).
51. Mr Marks favoured a broad brush approach to interim rent and settled on a figure of £30,550 (although for different reasons) taking into account the highs and lows of pre and post pandemic.
52. Mr Bacon gave two valuations, one for 1 October 2019 being £45,000 and the other for 1 October 2020 being £38,500. This implicitly accepts a reduction in rent post pandemic. I consider that Mr Bacon's figures generally are out of line with other transactions spanning the periods, being significantly too high (a contributing factor to that being the inclusion of the premises at Notting Hill Gate).
53. I conclude that, given the uncertainties of the period in question, one can only take a broad brush approach and I therefore accept Mr Marks' figure of £30,550 (although I appreciate that I have not accepted his reasoning in reaching this figure). I accept that figure because, on the balance of the evidence that I heard, it appears to reflect the general, relevant, market trends so far as they can be understood.
54. It appears to me that there is a significant difference in the new rent and the interim rent and accordingly I set £30,550 as the interim rent.

### **An issue regarding the Claimant's case**

55. It was only after the end of submissions at the hearing that the Defendant's representative raised the issue of the Claim Form. The Claim Form filed by the Claimants proposed a new rent of £32,500. It was said that, as the Claim Form had not been amended, any new rent arrived at by the Court could not be less than this figure.
56. After hearing further submissions on the matter, I dealt with the point at the hearing. I concluded that the Claimant was not limited to a figure of £32,500 or above.
57. s.24(1) of the 1954 Act, states that either the tenant or the landlord may; "apply to the court for an order for the grant of a new tenancy". That is exactly what the Claim Form seeks. It is only later in the Claim Form that details are put in for the proposals for a new tenancy. That is all the rent figure is, it is a proposal. The reason this information is contained in the Claim Form is that it is required by the Practice Direction to CPR56.
58. The relief that the Claim Form seeks is a new tenancy, the rent for that tenancy, in default of agreement, is solely a matter for the court.
59. The proceedings have been ongoing since May 2019 and the parties have been in negotiation. The Claimants' expert put forward a case for a rent lower than the proposal in the Claim Form. The fact that the new rent proposed by the Claimant may be less than as put in the Claim Form will have come as no surprise to the Defendant who will accordingly have suffered no prejudice.
60. I concluded therefore that the Claimant was not bound by the figure in the Claim Form.

### **The disputed lease term**

61. The burden of persuading the court to change the terms of a tenancy is on the party proposing that change.
62. The term proposed by the Defendant was a term containing detailed provisions as to an Energy Performance Certificate ('EPC'). The clause provided for;
  - (a) An obligation on the part of the tenant to co-operate with the landlord in the obtaining of an EPC
  - (b) An obligation on the part of the tenant to allow access to an Energy Assessor
  - (c) A prohibition on the tenant obtaining its own EPC (unless required)
  - (d) If the tenant had to obtain an EPC, an obligation to use an Energy Assessor approved by the landlord and pay the landlord's costs
  - (e) To deliver a copy of any EPC report to the landlord
  - (f) A prohibition on works carried out by the tenant that would result in the premises being designated as a sub-standard property.

63. The current term of the lease most relevant to the issue is in these terms:-

3.9 Entry by the landlord and others: To permit the Landlord to enter the Demised Premises with all necessary materials and appliances at any reasonable time or times during the term upon at least 48 hours prior written notice (except in the case of an emergency when no notice shall be required and then at any time) for any reasonable purpose and in particular but without prejudice to the generality of the foregoing and to any other express or implied right of entry contained in this lease:

- (a) to take inventories of the fixtures and fittings therein; or
- (b) to estimate the current value thereof for insurance purposes; or
- (c) to ensure that nothing has been done or omitted to be done which constitutes a breach of any of the Tenant's Covenants; or
- (d) to exercise the rights hereinbefore excepted and reserved

64. The Defendant's reason for requiring the new clause was said to be to protect his position regarding an Energy Performance Certificate. He was concerned that to avoid a penalty, he would require the power under the lease to enter for the purposes of obtaining a certificate. There is much uncertainty regarding the changing regulations regarding EPC certificates and there are severe penalties for failing to obtain such a certificate.

65. The Claimant argued that the current lease term was sufficient to give the landlord a right to insist on access for the purpose of obtaining a certificate.

66. In my view, the current lease term is sufficient to allow the landlord to obtain access to obtain a certificate and it is sufficiently wide for that right to be enforced. Accordingly, the Defendant has not discharged the burden of proving the necessity of the new clause and the lease will remain unaltered in that respect. It was not demonstrated that the various subclauses to the suggested new term were, in their variety and scope, necessary to protect the landlord's position. It seems to me that the wording of the existing clause which obliges the tenant to give access '*for any reasonable purpose*' clearly would cover the obtaining of an EPC.

**Deputy Regional Tribunal Judge Martyński, sitting as a Judge of the County Court at District Judge level**

**15 December 2021**