



# Commercial Tenancies Post COVID-19

Henry Bright, Solicitor

21<sup>st</sup> July 2021

@geldards

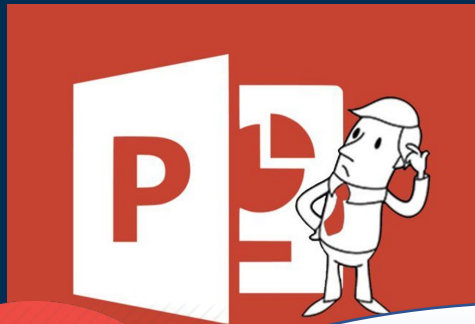
**YOU'RE  
ON MUTE!**



**Please stay on  
mute during the  
presentation**



**Feel free to put  
on your camera.  
We've missed  
you**



**We will send you a  
copy of the slides and  
recording shortly  
after the webinar**



**Please use the  
chat function to  
ask a question**



CHAT

# Post COVID-19 - What is the “new normal” for landlords and tenants?

- Rent arrears built up during lockdown closures – options for recovery for landlords and protections for tenants
- Lease renewals – how the pandemic has shifted the balance of power between landlords and tenants in negotiating renewal leases

# Rent arrears – available protections

- Moratorium of forfeiture of commercial tenancies
- Restriction on the use of Commercial Rent Arrears Recovery (CRAR)
- Restriction on presenting winding-up petitions

# Rent arrears

- Landlords can still sue for rent arrears!
- *Commerz Real Investmentgesellschaft mbH v TFS Stores Ltd* [2021] EWHC 863 (Ch)
  - Landlord obtained summary judgment against a Tenant for failure to pay rent arrears built up during the pandemic
  - Tenants are protected from eviction, but are still liable for any rent they do not pay

# Rent arrears – what is changing?

- In Wales – nothing has yet been announced
- In England – UK Government has announced a plan to “ringfence” rent arrears built up during the pandemic
  - Landlords and tenants are encouraged to come to agreement
  - Binding arbitration process will be put in place if there is a failure to agree

# Lease renewals

- Business tenants have a statutory right to remain in the premises on expiry of a business tenancy and a right to a new tenancy
- The terms of the renewal lease are governed by the Landlord and Tenant Act 1954 – to be agreed between the parties or determined by the Court in absence of agreement

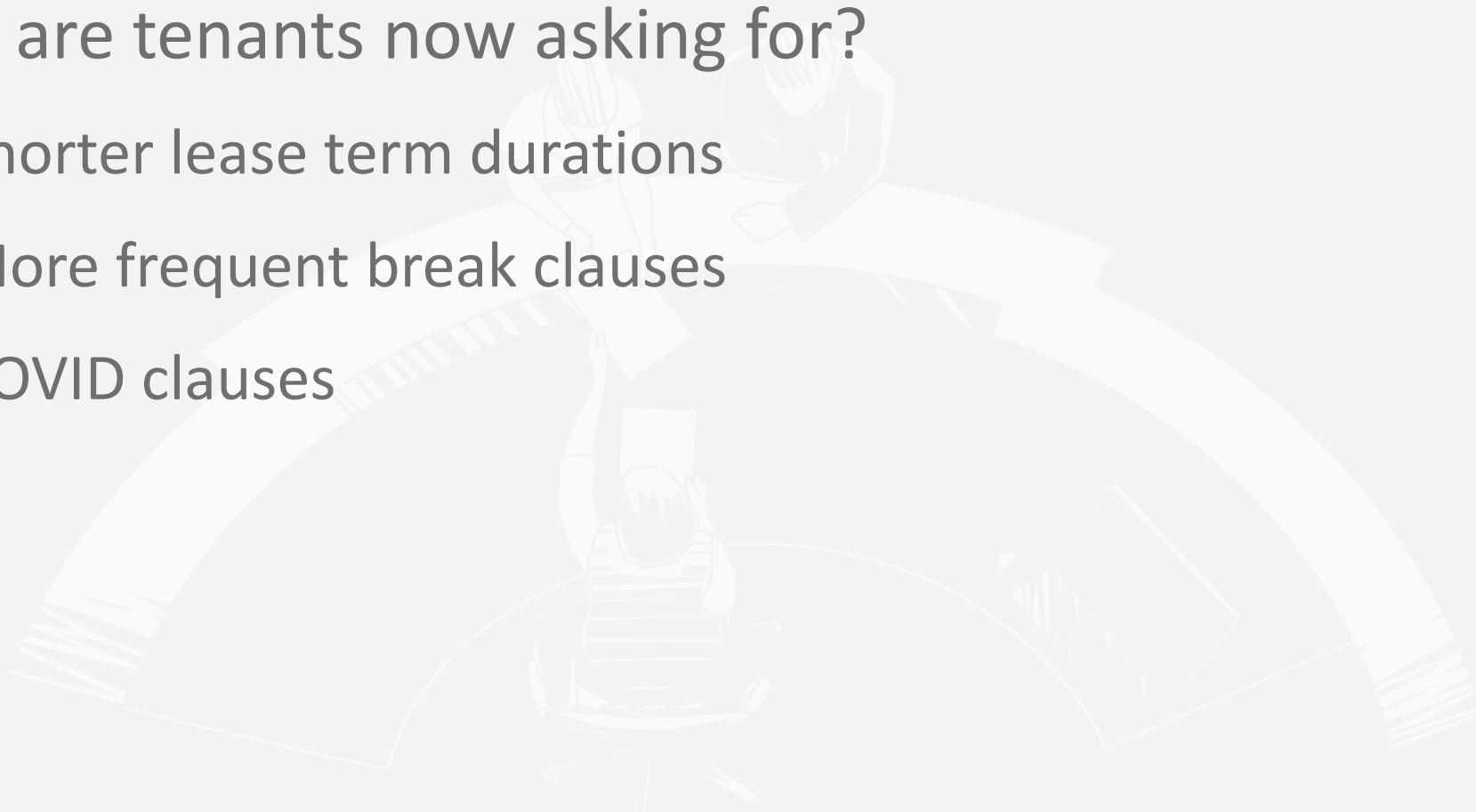
# Lease renewals

- What are tenants now asking for?
- Will they tenants get what they want?
- Trends in the commercial market generally
- Market forces vs legal forces
- The factual context is always key



# Lease renewals

- What are tenants now asking for?
  - Shorter lease term durations
  - More frequent break clauses
  - COVID clauses



# Lease renewals – term of the new lease

- Dealt with under section 33
- Court has discretion to award a term that is “reasonable in all the circumstances”
- Starting point is the existing lease term
- But the Court has a wide discretion

# Lease renewals – term of the new lease

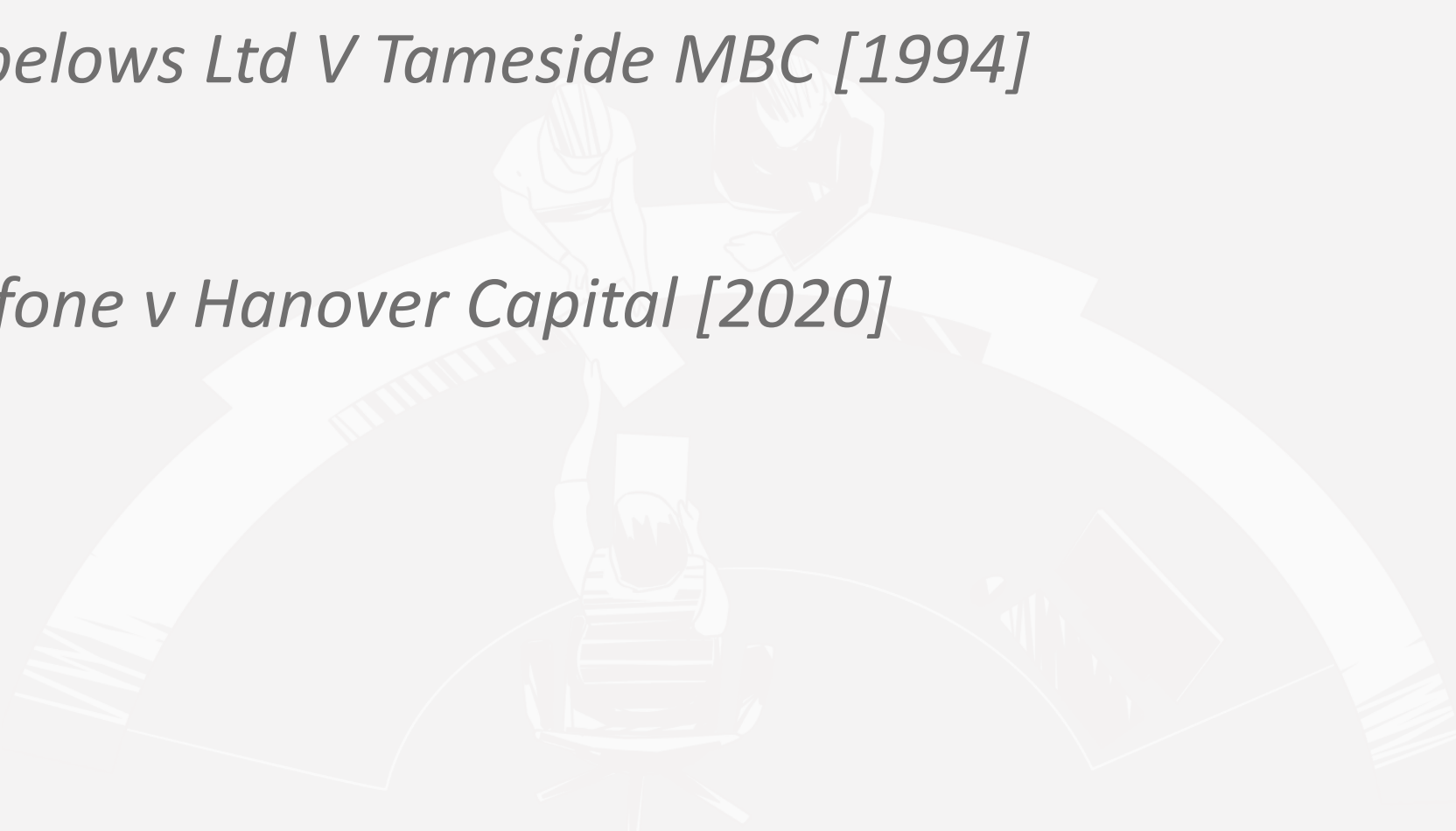
- The Court will look at:
  - Business needs of the tenant
  - Desirability of stability in the letting market
  - Impact on the capital value of the landlord's interest
  - Market practice generally
- The Court has a wide discretion

# Lease renewals – term of the new lease

- Do tenants have a good case for shorter terms?
  - CREDIA – data from June 2020 put average lease lengths at just 27.4 months
  - Lease terms have generally been decreasing anyway
  - More tenants have real concerns for their financial future

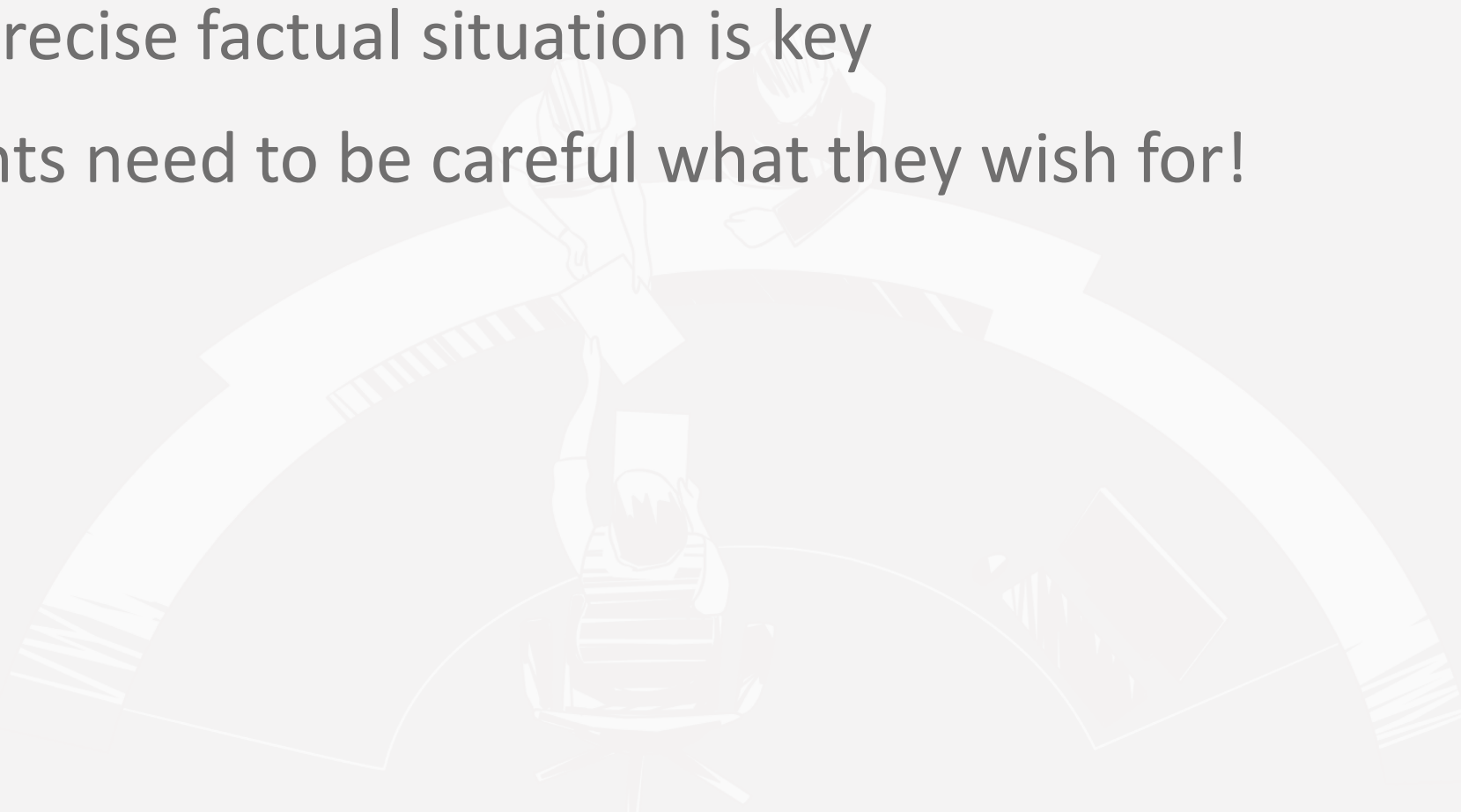
# Lease renewals – term of the new lease

- *Rumbelows Ltd V Tameside MBC [1994]*
- *Vodafone v Hanover Capital [2020]*



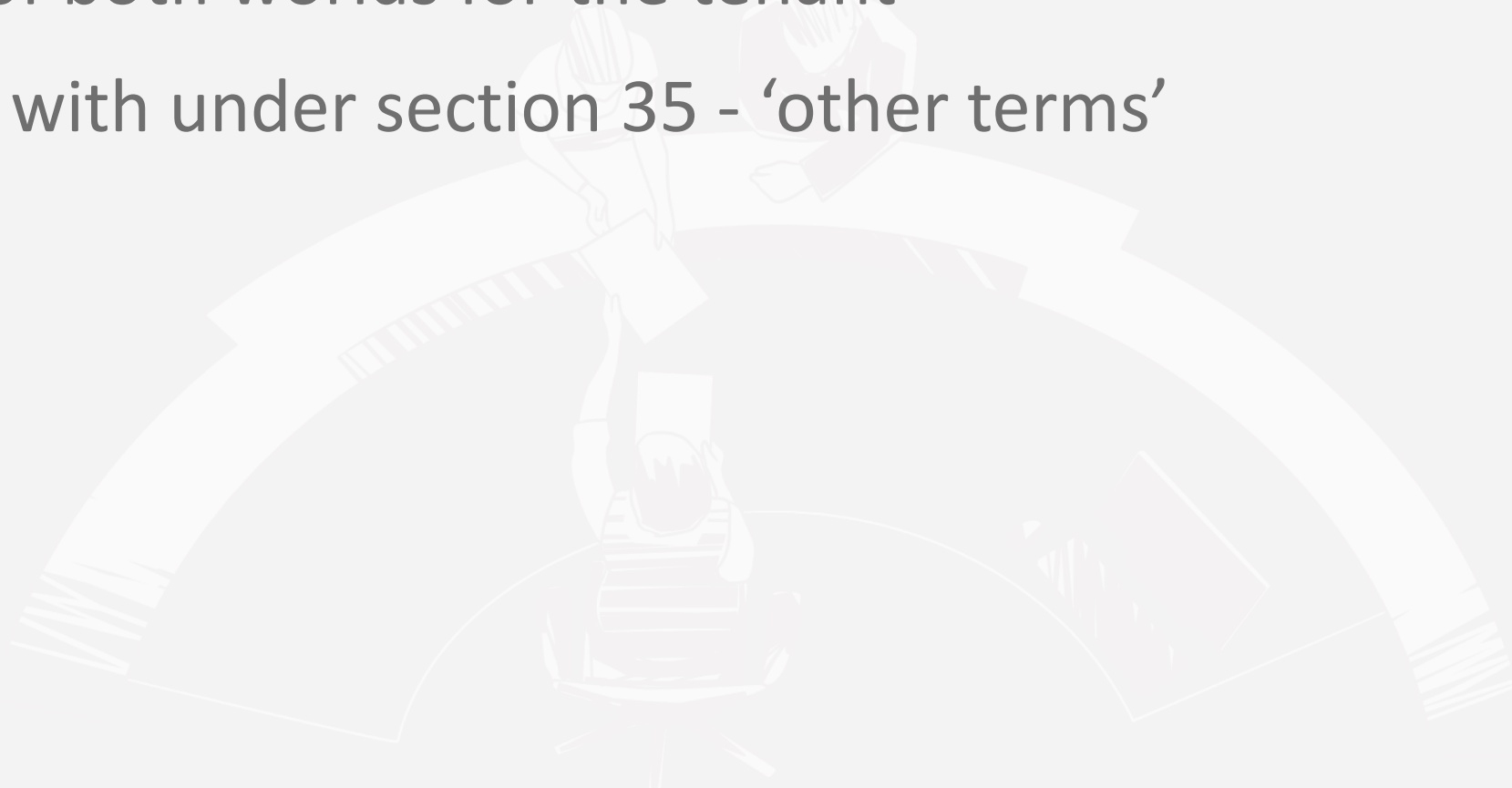
# Lease renewals – term of the new lease

- The precise factual situation is key
- Tenants need to be careful what they wish for!



# Lease renewals – break rights

- Best of both worlds for the tenant
- Dealt with under section 35 - 'other terms'



# Lease renewals – break rights

- *O'May v City of London Real Property Co Ltd [1983]*
  - The burden is on the party proposing a change
  - Must show a good reason for the change based on essential fairness
  - Is monetary compensation a sufficient remedy?
  - Would the change materially affect the tenant's business security?
  - Is it fair and reasonable in all the circumstances?



# Lease renewals – break rights

- So, again, the factual situation is key
- Larger tenants with good covenant strength may struggle to overcome the *O'May* burden

# Lease renewals – COVID clauses

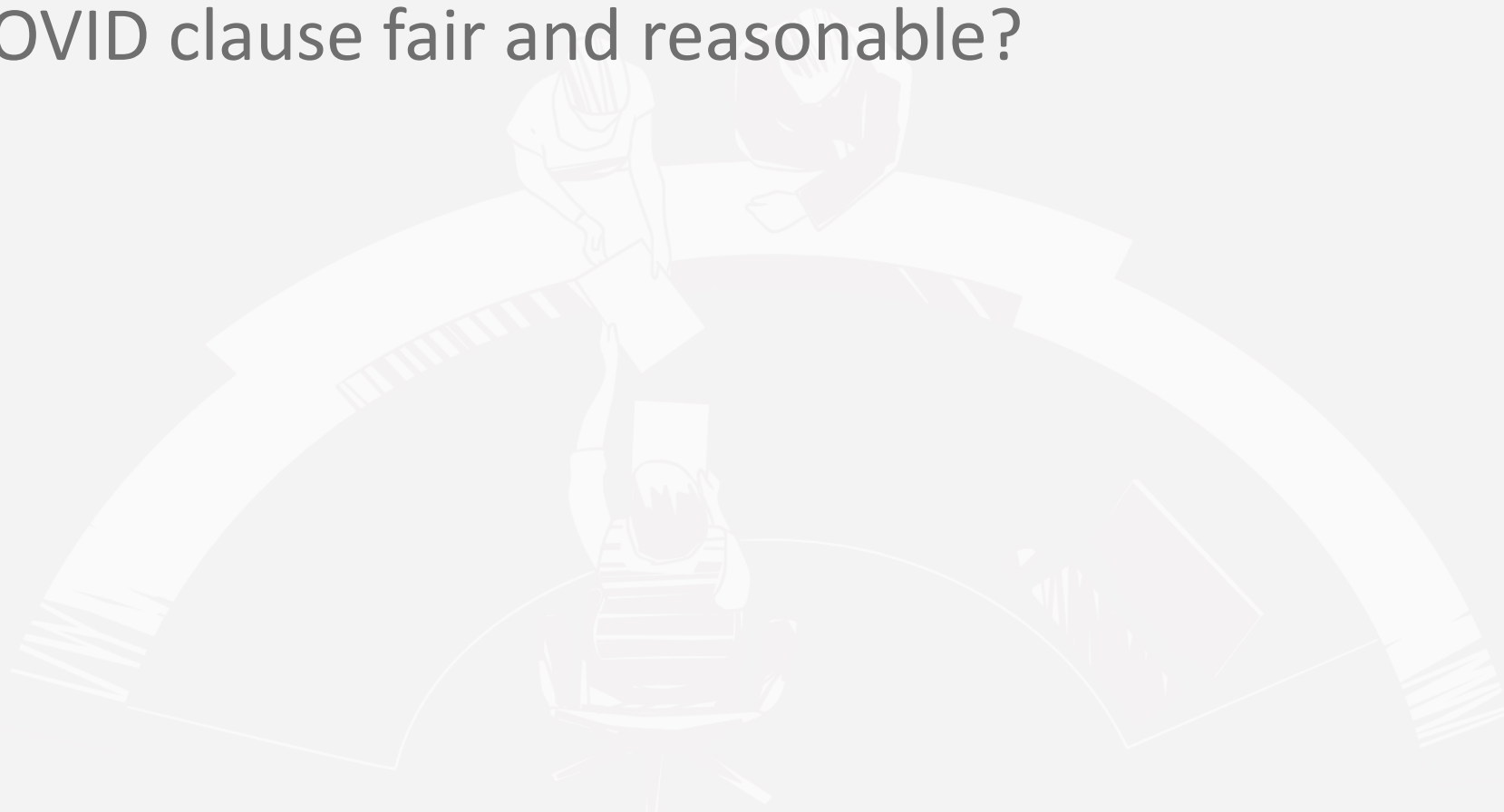
- Clauses that suspend/reduce rent
  - Usually only for 50% of the principal rent
  - Kick in if there is a legal obligation to close the whole of the premises
  - May require the tenant to seek out business interruption insurance

# Lease renewals – COVID clauses

- Section 34?
  - s34(1) – Court can only have regard to the terms of the renewal tenancy
  - s34(3) – Allows the Court to include provision for varying the rent “if it thinks fit”
  - Decided based on what is fair and reasonable

# Lease renewals – COVID clauses

- Is a COVID clause fair and reasonable?



# Lease renewals – COVID clauses

- Section 35?
- Court must have regard to “all relevant circumstances”
- Constrained by the *O’May* principles – the party seeking to impose the clause shoulders the burden of proving that essential fairness demands the clause

## *WH Smith Retail Holdings Ltd v Commerz Real Investmentgesellschaft mbH (unreported), 25 March 2021*

- Parties had agreed a 50% rent reduction COVID clause
- Argument over the trigger – tenant wanted closure of non-essential retail, Landlord said only if the tenant itself was forced to close (it was an essential retailer)
- Tenant was successful and the Court found the clause should have no effect on rent
- Shopping centre location – 90% reduction in trade in the centre

*WH Smith Retail Holdings Ltd v Commerz Real  
Investmentgesellschaft mbH (unreported), 25 March 2021*

*"...a pandemic clause has become something that all tenants want, and that the market has now priced it in. I do not think that there is any basis on which I can properly find that any uplift should be made nor (had I taken a different view) on which I could with any confidence have quantified it."*

## *Poundland v Toplain Ltd (unreported) – 29 June 2021*

- Tenant wanted the Court to impose a COVID clause
- Decision was based solely on section 35
- Constrained by the *O'May* principles
- High street location



## *Poundland v Toplain Ltd (unreported) – 29 June 2021*

- Tenant wanted the Court to impose a COVID clause
- Decision was based solely on section 35
- Constrained by the *O'May* principles
- High street location
- Court said that it is not the purpose of the 1954 Act to rewrite the balance of risk between the parties

# Lease renewals – does the law matter?

- Majority of lease renewals are agreed between the parties without referral to the Court
- But well advised landlords and tenants will be able to use the legal principles to good effect in argument
- However, market forces tend to dominate
- Landlords are most afraid of rental voids

# In overview

- There has been a shift in market practice
- Tenants are increasingly calling the shots
- Requests for shorter terms, frequent breaks and COVID clauses are now the “new normal”
- But landlords still have a lot in their armoury
- Everything turns on the specific facts

# Any questions?



# Contact details



**Henry Bright**  
Solicitor

+44 (0) 29 2039 1841  
[henry.bright@geldards.com](mailto:henry.bright@geldards.com)

**“First-class practice, known for its ‘stunning advice’”**

Client quote, Legal 500 – the world’s largest legal referral guide



**Cardiff**

4 Capital Quarter,  
Tyndall Street  
Cardiff, CF10 4BZ  
Tel: +44 (0)29 2023 8239

**London**

80 Coleman Street  
London  
EC2R 5BJ  
Tel: +44 (0)20 7620 0888

**Derby**

Number One Pride Place  
Pride Park  
Derby DE24 8QR  
Tel: +44 (0)1332 331 631

**Nottingham**

The Arc  
Enterprise Way  
Nottingham NG2 1EN  
Tel: +44 (0)115 983 3650