

A photograph of three business professionals (two men and one woman) sitting around a table in a modern office or meeting room at night. They are engaged in a discussion, with laptops open in front of them. The room has large windows overlooking a city at night, with blurred lights visible. The overall atmosphere is professional and collaborative.

geldards

# Property Law Update

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20th October 2022

Bitesize Session by Property Dispute Resolution Team

# What we will be covering today:

- 1954 Act Lease Renewals – rent-free periods and pandemic clauses.
- Withdrawal of Break Notices
- Update on remedies for landlords on tenant default
- The outcome of pandemic rent arrears cases
- Implementation of Renting Homes (Wales) Act 2016

# LTA 1954 – Lease Renewals

- Section 32 : Property to be comprised in new tenancy
- Section 33 : Duration of the new tenancy
- Section 34 : Rent under the new tenancy
- Section 35: Other terms of the new tenancy

# Section 34 Landlord and Tenant Act 1954

(1) 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),
- 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.

# Is the tenant entitled to a rent free period?

- HMV Music Ltd v Mount Eden Land Ltd (2012)
- WH Smith Retail Holdings Ltd v Commerz Real Investmentgesellschaft mbH (25 March 2021)

*'It seems to me that the fact that the premises are fitted out thanks to a rent free period is properly seen as an effect on rent of the fact that the tenant has been in occupation, and therefore is to be disregarded, so that an appropriate adjustment should be made to the comparables for the absence of a rent-free period. It is a curious fiction, certainly, and it may be an unintended effect, but it seems to me to be required by the clear words of s34.'*

- S Franes Ltd v The Cavendish Hotel (London) Ltd (unreported) (18 June 2021)

# Is the tenant entitled to a rent free period?

- Max Mara v Pearl Assurance PLC (Unreported 16 May 1996 Central London County Court)

*'In my judgement the [landlords] rightly stress that if a tenant who becomes entitled to a lease renewal under the 1954 Act is to have, however the calculation is done, a notional rent free allowance as if he was again being compensated for the rental cost of fitting out when no such burden is being incurred he will receive an unwarranted windfall at the expense of the landlord... In my judgement the court should be reluctant to interpret the section in a way which involves a departure from reality with the importation of a fiction into the determination of an open market rent unless the wording unambiguously requires this... Section 34(a) read simply prevents any accretion to rent attributable to the occupation by the tenant entitled to a lease renewal and on the other side any sitting tenant concession. It does not require the court to import a fiction with all the uncertainties and distortions that would inevitably follow.'*

# Is the tenant entitled to a rent free period?

- HPUT Trustee No 1 Limited & HPUT Trustee No 2 Limited v Boots UK Limited (Central London County Court, 24 May 2021)
  - a) The draftsman could have expressly included within section 34(1)(a) provision for a rent free period but had not done so.
  - b) The presumption of reality should be followed unless it conflicted with the required hypothesis; in this case, there was no such conflict.
  - c) The word 'reasonably' in s.34 reinforced the importance of reality – and in reality, the tenant would not carry out any fitting-out works.
  - d) The disregard in s.34(1)(a) was targeted at sitting tenant overbid, rather than at fitting-out works.

# Pandemic clauses in 1954 Act Lease renewals

Section 35, Landlord and Tenant Act 1954

- 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 relevant circumstances.***

# Pandemic clauses in 1954 Act Lease renewals



- WH Smith Retail Holdings Limited v Commerz Real Investmentgesellschaft mbh



- Poundland v Toplain

# Withdrawal of break notices

- Effect of exercising a right to break:
  - brings the lease to an end
  - once exercised, it cannot be withdrawn unilaterally.

(Judicial basis for rule [*Tayleur v Wildin* (1868) LR 3 Exch 303; *Freeman v Evans* [1922] 1 Ch 36; and *Lower v Sorrell* [1963] 1 QB 959)

- Provides certainty for the landlord
- Landlord could agree to withdrawal but there are implications

# Implications of withdrawal of break notice

- New Lease created which may require mortgagee's consent
- Undertenant – new underlease which may require consent of the Landlord and Superior Landlord – failure amounts to a breach and could lead to forfeiture
- New lease may not be contracted out of the LTA 1954
- May terminate Guarantor's liability
- If lease brought to an end was an “old lease” created before the Landlord and Tenant Covenants Act 1995, any new lease created by implication will be a “new” lease for the purposes of the LTCA 1995
- Any underlease would also end
- Potential SDLT implications if new lease is for an increased rent

# Advice

- **Tenants:** consider carefully whether a break is really what is wanted. If using a break to renegotiate terms, it may be possible to achieve same deal by threatening to exercise the break
- **Landlords:** if accepting a withdrawal of a break notice, this should be done in conjunction with the grant of a new lease

# Update on remedies for tenant default

1. Forfeiture
2. CRAR
3. Insolvency
4. Court Proceedings
5. Pursuing a Guarantor
6. Drawing down on a rent deposit

# Outcome of pandemic rent arrears cases : Bank of New York Mellon (International) Limited and London Trocadéro



# Bank of New York Mellon (International) Limited and London Trocadero

- Court of Appeal judgment in two cases: (i) Bank of New York Mellon (International) Limited v Cine-UK Limited and (ii) London Trocadero v Picturehouse Cinemas
- Tenants resisted the payment of rent for the time the operation of the cinemas was unlawful due to Covid restrictions on the basis:
  - 1) The restrictions caused a **failure of basis** relieving the obligation to pay rent
  - 2) **Implied term** that if use of the Premises was unlawful no rent due
  - 3) (Hengrove) The **rent cesser clause** meant no rent was due

# Rent Cesser Clause

- “In case the Property..shall..be destroyed or damaged by any of the Insured Risks...so as to render the Property unfit for occupation or use”.
- Landlord effected an All Risks policy which covered loss of basic rent in certain circumstances
- Court found natural and ordinary meaning of the words used applied to unfitness caused by physical damage

# Implied terms

- If the Permitted use of the property became illegal then the obligation to pay rent should be suspended for the relevant period
- The payment of rent should be limited to periods when the premises could be used as a cinema
- Court found did not satisfy the tests for implication – the leases worked perfectly well.
- Deliberate allocation of risk that the premises could not be used was with the tenant

# Failure of basis

- The leases had many years left to run
- An unjust factor will not override a valid subsisting legal obligation to confer a benefit
- Tenant's argument that consideration for rent was on assumption premises could be used lawfully as a cinema was dismissed
- Allocation of risk that the premises could not be lawfully used as a cinema lay with the tenants
- A clause providing for the tenant to comply with statute did not alter the Court of Appeal's conclusion, it was simply a further indication of where the risk lay

# Precedent

- Court of Appeal's judgment in these combined appeals will have set a precedent on which landlords may rely
- Case of wide interest because it further solidifies the test for implication of terms, and most interestingly, restricts the scope of advancing arguments of failure of basis.

# Renting Homes (Wales) Act 2016

- Key date: 1 December 2022
- Government Guidance available for landlords and tenants affected by the legislation.



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# Thank You

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