

# Covid-19, lease renewals and rent reviews

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# Welcome and introduction

- What to look for in a rent review - evidence and tactics
- The types of clauses landlords and tenants might wish to insert - rent, repair and stay open provisions
- Does the Landlord and Tenant Act 1954 allow you to insert Covid-19 clauses in a lease renewal?
- Turnover rent - issues and controversies

# Rent reviews

- The effect of COVID-19
- What to look out for
- Timing & other arguments

# Rent reviews

## The effect of COVID-19

- Possible future lockdowns and the risk of a further economic shock after 31 December 2020
- Should Landlords/Tenants trigger RR, or bide their time?
- Importance of evidence of transactions & concessions since March 2020

# Rent reviews

## What to look out for

- The purposes of a RR clause are:
  - to protect a Landlord against inflation
  - to ensure so far as possible that a Tenant pays a market rent: *British Gas v Universities Superannuation Scheme* [1986] 1 WLR 396
- What are the main features?
  - Date of RR
  - Procedure for triggering the RR
  - Method of determining the new rent
  - Dispute resolution provisions

# Rent reviews

## What to look out for

- The date for the purposes of valuation will usually be the review date in the lease: *Glofield Properties v Morley (No. 2)* (1990) 59 P&CR 14
- Depending on the RR clause, it may be arguable that the valuation should be the date of determination instead
- A valuation should not take into account transactions after the review date, but see *Segama v Penny Le Roy* (1984) 1 EGLR 109 and the series of four articles in L&TR 2009 Issue 13 titled “Valuation evidence: a principled approach”

# Rent reviews

## Timing

- Typically “time is not of the essence”
  - This means serving notice ‘late’ will not prevent the RR from going ahead
  - But see *First Growth Partnership v Royal & Sun Alliance Property Services* [2003] 1 All ER 533 (CA)
  - It is arguable that if a Landlord fails to trigger a RR, its right to do so expires or lapses upon the date of the next review
- If no time period is specified in the lease then a party cannot unilaterally make time of the essence: *Proxima GR Properties v Spencer* [2017] UKUT 450 (LC)

# Rent reviews

## Other arguments

- What about a clause which provides for a “reasonable rent” or “such amount as is fair that the Tenant should pay... having regard to all other relevant circumstances including the personal circumstances of the Tenant and the Landlord”
- Real difficulties with March/June 2020 RR dates vs before & after
- Tenants may argue that valuations should take account of the need for Landlords in the current market to offer inducements such as rent-free periods or discounts
- Such inducements/concessions may either be used as evidence, or argued to be relevant facts which should be taken into account at the RR



# Covid-19 clauses



# The issues

- During the initial lockdown period, a number of commercial premises were closed down
- Customers / turnover reduced
- Difficulty in complying with leasehold covenants e.g. repair, yielding up
- Prospect of further lockdowns (either national or local)

# Should a new lease contain 'Covid-19 clauses'?

- Can give the parties (and especially the tenant) greater certainty in case of future lockdowns
- Concern that the risk of lockdowns is pushed from the tenant to the landlord
- Will such a clause offer more than the law already does? *John Lewis Properties plc v Viscount Chelsea* [1993] 2 EGLR 77

# What kind of clauses might be added or modified?

- Rent reduction (either in whole or a reasonable proportion) during a lockdown
- (comparison with rent reduction where premises have been damaged / destroyed by an Uninsured Risk)

# What kind of clauses might be added or modified?

- Landlord prevented from taking steps to enforce repair or redecoration covenants during a lockdown, until a reasonable period after the end of the lockdown
- (What is the aim of such a provision?)
- (Can the landlord rely on a *Jervis v Harris* clause?)

# What kind of clauses might be added or modified?

- Tenant not required to yield up during a lockdown period, but is granted a licence for a reasonable period, ending after the lockdown period has ended
- (Could you get a new tenant to move in during this period, and start paying rent? Could it possibly benefit the landlord?)

# What kind of clauses might be added or modified?

- Stay open provisions to be made expressly subject to legality of compliance with them, or otherwise simply suspended
- (Would 'stay open' covenants be enforceable anyway? *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1)

# Points to consider when drafting

- What will trigger a 'lockdown' provision?
- Is the obligation only suspended (e.g. pay is still due, but is not yet payable) or is it discharged altogether?
- How will 'reasonable' be determined, and with reference to what? Expert determination? Arbitration? Court?



# Landlord and Tenant Act 1954



# Lease renewal under LTA 1954

- Parties can agree that the new lease will contain Covid-19 clauses
- Can the court order Covid-19 clauses to be included as part of the new lease?
- Some tenants in lease renewals are looking for these concessions

# Section 35: other terms of new tenancy

- (other than terms as to the duration and the rent payable)
- “*shall be such as may be agreed between the landlord and the tenant*” or
- “*may be determined by the court*”
- “*the court shall have regard to the terms of the current tenancy and to all relevant circumstances*”

# O'May v City of London Real Property Co Ltd [1983] 2 AC 726

- Existing lease provided for rent plus a service charge
- Landlord's proposal was that it would covenant to provide all the services to the building and then recover all of those expenses
- Create a 'clear lease'

# O'May v City of London Real Property Co Ltd [1983] 2 AC 726

- Judge at first instance agreed that this was a reasonable proposal
- Court of Appeal and House of Lords held against the landlord

# O'May v City of London Real Property Co Ltd [1983] 2 AC 726

- Court of Appeal: Shaw LJ:
- *“In my judgment the landlord's terms introduce a radical change in the balance of rights and responsibilities, of advantage and detriment, of security and risk. The tenants are justified in rejecting them in so far as they seek to achieve a clear lease.”*

# O'May v City of London Real Property Co Ltd [1983] 2 AC 726

- House of Lords:
- in deciding the terms of the new tenancy,, the court must start by “*having regard to*” the terms of the current tenancy
- burden of persuading the court to change the terms of the tenancy rests on the party proposing the change

# O'May v City of London Real Property Co Ltd [1983] 2 AC 726

- Lord Hailsham:
- *“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”*



# O'May v City of London Real Property Co Ltd [1983] 2 AC 726

- Lord Hailsham:
- There “*must be a good reason based in the absence of agreement on essential fairness for the court to impose a new term not in the current lease by either party on the other against his will.*”

# Considering the balance of the lease

- *Edwards & Walkden (Norfolk) Ltd v The Mayor and Commonalty and Citizens of the City of London* [2012] EWHC 2527 (Ch), [2013] 1 P. & C.R. 10, Sales J:
- “...the Court should not generally exercise its discretion under s.35 to change the basic parameters of the commercial arrangement between the landlord and the tenant”

# Scope for change and modernisation

- *Blythewood Plant Hire Ltd v Spiers Ltd (in receivership)* [1992] 2 EGLR 103
- Upwards-only rent review clause inserted
- Two-way clauses were “*virtually unknown*”
- Would affect the value of the landlord’s interest, but not the tenant’s

# Scope for change and modernisation

- Leases do change over time and require modernisation
- Covid-19 clauses might well reduce the overall rent payable
- Likely to be decided on a case-by-case basis, with numerous factors to consider e.g. location, user, length, etc.
- Danger of the tenant ‘walking away’

# Turnover rent

- What is a turnover rent?
- How can a turnover rent help:
  - Tenants?
  - Landlords?
- Advantages
- Disadvantages
- Possible solutions

# Thank you for attending

- Series of webinars presented by 39 Essex Chambers on property, construction and related areas - <https://www.39essex.com/category/seminars/>
- Latest updates on COVID-19 related issues at <https://www.39essex.com/covid-19/>

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# Thank you for listening!

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