

## Myriam Stacey KC

**Renewals: Where is the wriggle room for clients seeking to change the existing lease terms on renewal following the spate of recent cases?**

## Section 35 LTA 1954

“35(1) ... 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.***”

O'May [1983] 1 A.C. 726 (House of Lords)

- (1) Court starts by “having regard to” the current terms.
- (2) Burden of persuading the court to change the terms sits with party proposing the change.
- (3) They must show a “*good reason based in the absence of agreement on essential fairness*”.
- (4) Discretion to have regard to “all relevant circumstances” is otherwise not expressly fettered.

## “Spate of recent cases”

- 1) **WH Smith Retail Holdings Ltd v Commerz Real Investmentgesellschaft MBH** (25 March 2021) Winchester CC, HHJ Richard Parkes QC
- 2) **Poundland Ltd v Toplain Ltd** (7 April 2021) Brentford CC, DJ Jenkins
- 3) **HPUT Trustee No 1 Ltd and HPUT Trustee No 2 Ltd v Boots UK Ltd** (24 May 2021) CLCC, HHJ Dight CBE
- 4) **Clipper Logistics Plc v Scottish Equitable Plc** (March 2022) Sheffield CC, Recorder McNamara

## Where is the wriggle room?

- 1) New terms provide flexibility to reflect economic uncertainties and market conditions
- 2) New terms to reflect legislative changes
- 3) New terms to minimise the scope for uncertainties under existing clauses
- 4) New terms to reflect other relevant circumstances

## (1) Terms reflecting economic uncertainties

- Poundland Ltd v Toplain Ltd - T sought:
  - clause allowing for rent in arrears to assist T’s cash flow.
  - to “modernise” the lease with rent suspension clause in event of ‘use prevention measures’
- Court rejected both on application of of the *O’May* test:

*“... not the purpose of the legislation or exercise of the discretion to approve opposed amendments ... which result in a change to respective risks, obligations and benefits ... nor to insulate the tenant against commercial and trading risks in a way that would prejudice the LL or interfere with their long term interests”*

## (1) Terms reflecting economic uncertainties

- WH Smith Retail Holdings Ltd v Commerz Real
  - Insertion of rent suspension clause revisited
  - Inclusion of clause agreed in principle
  - No *O'May* burden on the tenant
  - Court decided trigger in favour of the tenant, having regard to the evidence
  - Reference was made to changed shopping habits, importance of footfall

## (1) Terms reflecting economic uncertainties

- HPUT v Boots, per Dight HHJ:
 

*“A consideration of all the relevant circumstances, in my judgment, require one, again, to have regard to the current uncertainty in the retail market and the need to protect the Tenant and the need to give sufficient security to the Landlord. Ultimately, as Lord Wilberforce said, the test is what accords with fairness and justice.”*
- Might include:
  - Insertion of tenant’s break clause (e.g. HPUT v Boots)
  - More generous alienation provisions (e.g. Clipper Logistics)
  - Changes to the user clause (see WH Smith – reference to the trend for major outlets such as supermarkets to use greater amounts of space for non-food items)

## (2) Terms reflecting economic uncertainties

- **Evidence is key:**
  - See Clipper (evidence sufficient for change to alienation of part *but not whole* and was not sufficient to support T’s position on duration of term)
  - See also HPUT v Boots, per Dight HHJ:

*“I have heard evidence that Boots has adapted to reflect the increase in online shopping. There is greater use of the click and collect facility for example. But I have seen no documents explaining how this review took place, what the current thought processes of the company are, nor what their current strategy is.”*

## (2) Changes to reflect new legislation

- Poundland -T sought clause requiring LL to carry out works due to:
  - ‘Green lease provisions’ **the Minimum Energy Efficiency Standard Regulations (MEES)** (from 1 April 2018)
    - set a baseline minimum energy efficiency standard (of E rating) for buildings
    - prohibition on letting and the consequent penalty for breach are imposed on the landlord
    - Legislation does not prescribe who should carry out or bear cost of the work

## (2) Change to reflect new legislation

- Court allowed new clause. Held that new clause was reasonable and appropriate to ensure compliance by LL:

*“As a general proposition it does seem to me to be appropriate if regulation requires that the property should meet those standards then the obligation to ensure that they are met should rest with the landlord”.*

- Also suggestion in passing that a T might be relieved from compliance with obligations which would contravene new legislation or where compliance was rendered impossible. Did not arise on the facts.

## (2) Change to reflect new legislation

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- Purpose must be clear. Not impose unreasonable burden on T having regard to parties' respective interests
- Example = WH Smith – LL wanted changes:
  - reflecting Energy Efficiency (Private Rented Property) Regulations 2011 (restricted LL's ability to let unless energy efficiency targets reached (EPC rating)).
  - sought to add costs associated with obtaining EPC certificate to service charge expenditure.
- Court refused new clauses: purpose unclear; conflict with existing provisions; "had the look of capital expenditure"

## (2) Changes to reflect new legislation

- Clipper Logistics - another 'green legislation' case. LL sought:
  - T prohibition on alterations resulting in sub-standard EPC rating
  - T indemnity clause for cost of any resulting new EPC certificate
  - T positive obligation to maintain current EPC rating and remedial works to restore EPC if it failed to do so
- Court refused first two, allowed the third as striking the right balance.

### (3) Changes to minimise scope for uncertainties

- Consider possibility to amend wording to cater for avoid uncertainties under the guise of modernisation.
- E.g. Poundland: considered amendment to insurance clause:
  - T sought to remove clause that LL need not rebuild if there had been “a failure” by T to pay insurance rent, as failure for administrative reasons might not be T’s fault.
  - Court refused: but might have reworded clause (insertion of words such as “save where the failure is not due to any fault on the part of the tenant”).

## (4) Other relevant circumstances

- All relevant circumstance = wide ranging
- Can include changes to T's financial position to protect LL:
  - Court has discretion to insert term obliging T to secure satisfactory guarantor: *Cairnplace v CBL* [1984]
  - That extends to other forms of security (rent deposit)
  - Burden = on LL to justify the change

## Key take aways

- O'May is narrow, but:  
*“A consideration of all the relevant circumstances, in my judgment, require one, again, to have regard to the current uncertainty in the retail market and the need to protect the Tenant and the need to give sufficient security to the Landlord. Ultimately, as Lord Wilberforce said, the test is what accords with fairness and justice.”*
- Allocation of risk is key - identify unfavourable terms & prioritise.
- Agree as many terms as possible as the terms determined by the court may not be favourable - be prepared to give some ground in return if you are taking this approach.

## Key take aways

- Consider whether market conditions justify greater protection on either side.
- Consider legislative changes which may justify new terms to ensure LL compliance, but:
  - Be specific as to the practical objective of the change.
  - Ensure no conflict with existing provisions.
  - Consider terms of existing lease to ensure that party is not already adequately protected.
- Support all proposals with specific evidence focused on demised premises.

## Key take aways – tenants

- Changes to provide more flexibility in respect of the demised premises to reflect market conditions (e.g. alienation, user clause, break).
- Incorporation of new LL obligations to reflect legislative changes
- But check that the changes = a reasonable re-balancing (permissible in principle) not reallocation of risk / attempt to insulate T (not permissible)
- Adduce evidence (market, business evaluation, future plans, business strategy and any evidence of broader business operations where the term has been sought).

## Key take aways – landlords

- Legislative changes – consider whether shared risk can be justified:
  - Don't pitch too high – positive duty during term vs imposition of capital expenditure / long term risks
  - Be specific as to the practical objective of the change.
  - Ensure no conflict with existing provisions.
  - Consider terms of existing lease to ensure that not already adequately protected.
- Market conditions - consider need for additional security (improved guarantor, rent deposit?)

## Q&A

**We will now answer as many questions as possible.**

**Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.**

# Thank you for listening

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