

WinckworthSherwood

Poundland Ltd v Toplain Limited (2021)

In the recent decision of Poundland Ltd v Toplain Limited (2021), the court refused Poundland Ltd's request for the court to use its powers under the Landlord and Tenant Act 1954 (1954 Act) to incorporate a 'pandemic clause' into a renewal lease. Although a county court judgement, and therefore not a binding decision on future cases, this decision gives us an important insight into the court's thinking on Covid-19 concession clauses and provides useful guidance on what constitutes reasonable modernisation in the context of a lease renewal.

The Facts

Poundland Ltd's (the Tenant) lease renewal at its Twickenham store was unopposed; however, the parties disagreed over the inclusion of additional 'pandemic clauses' - drafting which would offer the Tenant financial protections against future business interruptions caused by a pandemic. The two main provisions requested by the Tenant were:

- a 50% reduction in annual rent and service charge in the event of a government enforced lockdown, and
- disallowing the Landlord from ending the lease during any lockdown period

The Tenant also argued for rents to be payable in arrears (as opposed to in advance).

Lease Renewal Principles

Where courts are faced with deciding the commercial terms of a lease, the guiding principle is that the party requesting the change from the current lease drafting must demonstrate that it is fair and reasonable in the circumstances to impose such a change (O'May v City of London Real Property Co Ltd (1983)). Essentially, any change needs to be reasonable modernisation.

The Arguments

The Tenant argued that the insertion of the pandemic clauses was a reasonable modernisation and relied on another recent Covid-19 related case, WH Smith Retail Holdings Ltd v Commerzinvestmentgesellschaft mbH (2021) (the WH Smith Case, where a pandemic clause was allowed. Poundland argued that if it could not trade, it would consequently be a risk to the Landlord as it would be unable to pay its rent.

The judge disagreed, accepting the Landlord's argument that there was no market precedent for pandemic clauses to be routinely incorporated into a lease renewal. The judge distinguished Poundland's case from the WH Smith Case on the basis that in the WH Smith Case the parties had *already* agreed in principle to include a pandemic clause and it was for the court to decide the circumstances in which such clauses should kick in.

The court held that the inclusion of pandemic clauses would fundamentally change the relationship between a landlord and tenant and accordingly, a tenant's short-term commercial risks should not be passed on to a landlord as longer term property investment risks. Taking the specific risks of a pandemic, a tenant may be able to claim government reliefs or grants, but a landlord has no control over any enforced closures and so should not be in a position where it is shouldering the tenant's risk.

Practical Implications

Despite Government enforced lockdowns seemingly over in the way we experienced in 2020 and spring 2021, the lingering economic implications of Covid-19 and the threat of future pandemics are still very much at the forefront of commercial lease negotiations.

This case highlights the importance of fully discussing and agreeing lease renewal terms at the Heads of Terms stage, in particular where one party requires a departure from the current lease position.

As the end of a lease term approaches, frank and open discussions between the parties about the inclusion of a pandemic clause or other changes which may offer some degree of protection such as the option to pay monthly rents or a service charge cap are certainly worth having.

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