

Turnover rent on 1954 Act renewal

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*Can a court order a turnover rent on a 1954 Act renewal? This was the key question in **W (No.3) GP (Nominee A) Ltd and W (no.3) GP (Nominee B) Limited v J D Sports Fashion Plc (October 2021)**. This county court decision makes for essential reading for both lawyers and valuers.*

Having reached agreement on the terms of the lease, the new rent remained hotly contested. The judge was critical of the experienced valuation experts, commenting that both were clearly partisan in their approach and highlighting flaws in the way they had prepared their reports.

The tenant had been holding over at the premises in the Derbion Shopping Centre, Derby, since June 2017, paying a base rent with 8% turnover top up which, at the time, equated to over £500,000 per annum. By the trial date in October 2021, the parties had effectively reversed their positions on what they were seeking. The landlord wanted a turnover rent of 8% (in return for a capital contribution of £200,000), which would produce an annual rent of £496,000 based on the tenant's estimated turnover. The tenant was seeking an annual fixed rent of only £17,700. The parties relied on comparable evidence running to hundreds of pages, citing 40 comparables, although the judge chose to focus on only 14 in her judgment.

In approaching the turnover rent question, the judge said that:

- The court must ensure that the purpose of the 1954 Act, to protect both landlords and tenants and reach an open market valuation, is met.
- The facts of each individual case must be considered.
- A turnover rent does not sit easily with section 34 of the 1954 Act, which requires an open market valuation between a hypothetical landlord and tenant, discounting certain disregards. These include the fact of the tenant's occupation and goodwill. A turnover rent is tenant-specific, which is contrary to these disregards. The same turnover percentage may produce widely varying rents depending on the hypothetical tenant and may not reflect an open market valuation.
- The court might award a turnover rent, particularly if the likely turnover is discernible and the disregards are not important (e.g. on renewal of a car park lease).
- In the current retail market, a turnover rent may be inappropriate if it results in a figure significantly above an open market rent.

As the evidence showed that rents have significantly reduced since 2017, the judge questioned on what basis the landlord could justify increasing the tenant's rental liability instead of significantly reducing it in line with market trends. The landlord's original proposal in 2017 was a fixed rent of £282,000 and its change to a turnover rent resulted in a higher rent of £496,000. She concluded that a turnover rent would not result in an open market rent and therefore determined that a fixed rent should be payable.

The parties were considerably far apart on an appropriate fixed rent, with the landlord contending for £170,000 against the tenant's £17,700. The judge recognised the difficulty of applying the comparables when there was such a wide divergence both in rents paid and the range of terms and incentives agreed. She took a mid-way point between the experts' Zone A valuations and, after applying various discounts, awarded a rent of £104,300. Specifically, she allowed a 20% reduction for the decline in the market since 2018 but was cautious about placing significant evidential weight on the periods of lockdown referring to this as an 'extraordinary period in retailing'. She also held that rent-free periods in comparables should be devalued in their entirety.

A final point to note is that the court awarded an interim rent from June 2017 of £160,300 based on section 24C(3)(a) of the 1954 Act (which takes into account the substantial difference in the market over the relevant period). She rejected the landlord's argument that the interim rent should reflect a substantial difference in the lease terms, which would mean section 24C(3)(b) also applied because she said that a turnover rent was not a lease term under section 35; it fell within the determination of rent under section 34.

This issues in this case are highly topical. As a county court decision, it is not binding but lawyers and valuers should still take note of the approach taken. Whether it will be appealed remains to be seen.