

**Rob Bailey**

**Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX**

[Rober.Bailey@Burges-Salmon.com](mailto:Rober.Bailey@Burges-Salmon.com)

---

### **Are lease renewals going viral?**

The Covid-19 pandemic has changed the way that risk is allocated between commercial tenants and their landlords.

Post-Covid negotiated leases within sectors most affected by the pandemic increasingly provide for risk-sharing and flexibility, where traditionally they focused on maintaining predictable landlord income streams. This has included the use of pandemic clauses, turnover rents and upwards/downwards rent reviews (let's call these "viral" provisions).

However, when it comes to renewals under the Landlord and Tenant Act 1954 ("the Act"), the courts' approach doesn't necessarily reflect market practice.

This is due to the Act's renewal provisions, which, unlike negotiated leases, focus on hypothetical parties and require justification to impose terms which substantially differ from the previous lease's.

Whilst each viral provision has its place in modern leases, this blog considers the relative merits of each and whether more should be done to impose them during lease renewal.

**Pandemic Clauses** reduce or suspend the rent payable in defined circumstances relating to pandemic or an associated lockdown.

Judicial views on the necessity and fairness of pandemic clauses are inconsistent (seen as industry standard in *WH Smith v Commerz* (2021) but unfair in *Poundland v Toplain* (2021)).

Pandemic clauses are generally one-sided. The landlord does not derive additional benefit when the clause is not engaged, but the landlord bears additional risk.

They can also have unintended results. A trigger event may not detrimentally affect a tenant's business, whilst nonetheless reducing/suspending rent.

**Turnover Rents** allow parties to share risk by reflecting the tenant's turnover in the rent, but reduce certainty for landlords and require careful thought and drafting.

In *W (no.3) v JD Sports* (2021), the Court seemingly accepted its ability to impose a turnover rent (a long-debated point), but declined to do so. The Act required a hypothetical tenant and for goodwill to be disregarded. Turnover rents penalise accumulated goodwill and require consideration of the actual tenant's business.

This demonstrates the limitations of an approach focused on protecting goodwill built at premises without financial penalty. For some tenants, this focus is outdated, especially large chains whose goodwill is often based on brands built more through advertising and online presence rather than premises.

**Upwards/Downwards Rent Reviews** allow rents over a long-period to be set according to the state of the market on a specific review date. But this gives little flexibility to deal with unpredictable and temporary market conditions.

This flaw can be mitigated with more regular reviews, but this is costly and burdensome.

There can also be limited comparables to ascertain market rent when a review date lands within a period of depressed economic activity.

### **Time to turnover a new leaf?**

Pandemic clauses and rent reviews are blunt instruments, allocating risks arbitrarily and inflexibly.

By contrast, turnover rents can be a nimbler tool, providing for shared risk and increased flexibility.

Future changes to the Act should allow greater scope to impose turnover rents in renewals for relevant sectors and tenants, whilst protecting smaller tenants from being penalised for building premises-specific goodwill.