SHIFTING SANDS: POWER AND RESISTANCE IN LANDLORD-TENANT RELATIONSHIPS UNDER THE LANDLORD AND TENANT ACT 1954

by

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Abstract

This thesis explores the impact of shifts in market power on commercial landlord-tenant relationships under the Landlord and Tenant Act 1954. For over seventy years, the 1954 Act has regulated business tenancies in England and Wales, based on the assumption that, left unchecked, landlords will exploit their tenants' vulnerability at the end of a lease term. Enacted in a post-war context, the legislation was designed to protect tenants in a retail market that is now vastly different from today's landscape. While small business tenants continue to occupy high streets, the rise of large multinational corporations and private equity-backed occupiers has significantly transformed the commercial leasing environment. Drawing on Blandy, Bright and Nield's 'Dynamics of Enduring Property Relationships', this thesis argues that it is only by incorporating an analysis of shifting power dynamics into this framework can one can fully understand the broader implications for landlord-tenant relationships. Through 55 semi-structured interviews with property professionals, this thesis empirically examined whether the original assumptions about landlord power remained relevant in the current retail market. The data revealed that, rather than the legislation itself, power dynamics are the primary determinant of whether landlord-tenant relationships endure, and leases are renewed. Furthermore, the findings suggest a growing disparity between the commercial terms available to large corporate tenants and those offered to small business tenants, whose economic contributions are often tied to local communities. While the 1954 Act was originally intended to protect small vulnerable tenants, the research indicates that it has, in practice, inadvertently empowered corporate tenants at the expense of small tenants, exacerbating inequalities in lease negotiations.

Dedication

For my parents.
Whose interest in my ventures is never less than my own.

For my favourite child.
You know which one you are.

For Ben.
Who helped me to see the journey, not the destination, matters.

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Abbreviations and Definitions

2003 Order - The Regulatory Reform (Business Tenancies) England and Wales) Order 2003

CVA – A company voluntary arrangement

Debenhams CVA - Discovery (Northampton) Limited, and others v Debenhams Retail Limited (Debenhams) [2019] EWHC 2441 (Ch)

EPR - Enduring Property Relationships

Franses - *S Franses Limited v The Cavendish Hotel (London) Ltd* [2018] 3 W.L.R. 1952

Franses 2021 - *S Franses Limited v The Cavendish Hotel (London) Ltd* (county court 18 June 2021 unreported)

FTT – First-tier Tribunal (Property Chamber)

GFC - Global Financial Crisis

g**round (f)** - Section 30(1)(f) Landlord and Tenant Act 1954

Institutional Landlords - Large companies that hold good quality property portfolios often on behalf of pension funds

Interview Data - 55 semi-structured interviews with property professionals collected as part of this thesis

Lease Code – An industry code of practice produced by the RICS

Lease Renewal Market – Lease renewal transactions negotiated under the framework of the 1954 Act

MCL – The Model Commercial Lease

MEES Regulations - The Minimum Energy Efficiency Standards which originated from The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015

MSL - Medium-Size Landlords

MST - Medium-Size Tenant

Multiple - National or multinational companies with chains of physical shops or outlets.

New Look CVA - *Lazari Properties 2 Ltd (and 20 others) v New Look Retailers Ltd, and others* [2021] EWHC 1209 (Ch)

O'May - *O'May v City of London Real Property Co Ltd [1983] 2 AC 726 (HL)*

Pawlowski – James Survey - Mark Pawlowski and James Brown, 'Part II of the Landlord and Tenant Act 1954: Repeal or Further Reform?' (2015) 19(4) *L&T. Rev*

PACT - Professional Arbitration on Court Terms

PLA - Property Litigation Association

PLA Survey PLA, *Law Reform Survey* (2018)

Reading Academics – Neil Crosby, Sandi Murdock and Catherine Hughes at the University of Reading who monitored uptake of the Lease Code in the retail market between 1998 - 2009

SBL - Small Business Landlord

SBT - Small Business Tenant

The 1927 Act - The Landlord and Tenant Act 1927

The 1954 Act - The Landlord and Tenant Act 1954

UORR - Upwards Only Rent Reviews

WH Smith Case - *WH Smith Retail Holdings Ltd v Commerz Real Investmentgesellshaft mbh* (25 March 2021 unreported)

CHAPTER 1 INTRODUCTION

Commercial leases were largely unregulated until the turn of the twentieth century. After much political debate the state intervened to protect the right of the sitting tenant to remain in occupation at the end of their lease under the Landlord and Tenant Act 1954 (the **1954 Act**). Seventy years have passed since the legislation appeared on the statute books. There have been unimaginable changes since the 1950s – the advent of the internet being one. The legislation was enacted at a time when corporate tenants existed, but had yet to mature into today's strategic, well-resourced multi-million (or billion) pound corporates, or private equity funded occupiers. On the other hand, the familiar characters – the independent traders; the butcher, the baker, the candlestick maker – continue to trade from high streets and shopping parades.

Time has also brought changes to the retail market itself. Post-war Britain was a period of economic rebuilding and restoration of consumer confidence. In the 1950s local high streets were the vibrant commercial and social hubs of towns and cities in England and Wales. This is a time before shopping centres, modelled on medieval marketplaces, were voted the most vibrant districts in the country.[1] The retail sector has experienced significant decline over the past two decades. Physical brick-and-mortar stores have given way to the uptake in online shopping platforms. This was accelerated by the pandemic in 2020, which fast-tracked the decline of ailing businesses.

[1] BBC News, 'Britain's best and worst shopping districts ranked' *BBC News* (London, 27 June 2017) <BBCNews> accessed 30 October 2018.

As the tide of the retail market changes, and as the division between small business tenants and large multi-national corporate tenants grows ever wider, this thesis questions whether the one size fits all protection provided under the 1954 Act continues to serve the full spectrum of business tenant. This thesis explores whether the Landlord and Tenant Act 1954 meets its policy objectives in regulating commercial leases in today's retail market.

In this introductory chapter, I provide an overview of the market context in which this thesis is situated, and an overview of the original policy rationale, namely the protection of goodwill and entitlement for the sitting tenant to call for a new lease at the end of the contractual term. I also discuss my methodological approach and introduce key themes that emerge from this thesis: namely, protecting the small tenant, power and resistance in the retail market, and the implications of an excess of multi-national tenant power.

1.1 Policy Objectives

To examine the genesis of the 1954 Act, we look back 150 years to the turn of the twentieth century. At this point in time the existing land regime favoured the 'collective interests' of landlords over the more 'private, personal, piecemeal interests of the individual tenants'.[2] Quality commercial premises were in short supply. Scarcity of retail property following bombing during the Blitz further elevated the landlords' position. Some abused this position by forcing exorbitant rent increases on tenants if they wished to remain in occupation. This exposed small vulnerable business tenants, shop keepers particularly, to the deleterious effects of market forces. The 'spectre of the profiteering landlord loomed large over those

[2] Lord Ernle, Hansard HL Deb vol 69 col 418 (1 December 1927).

tenants whose lease was about to expire'.[3] The character of the landlord-villain is captured by Englander who notes:

> *'[T]he landlord was an ogre, the hardest of hard-faced men, one who preyed upon and tormented the lives of millions.'*[4]

The tenants' position is illustrated at the time by the case of the 'wretched dressmaker' who after a five-year lease term had had her rent, in a West-end street, raised from £200 to £600, 'simply because the goodwill she had created attached to the premises in which she was carrying on her trade'.[5] The character of the landlord is stained by 1000 years of history – of wealth derived from land theft, repression, and slavery.[6] This exploitation became known as 'landlordism', a pejorative term which persists today.[7] Landlordism is akin to 'land slavery' and was, arguably still is, one of the 'principle means of making the high nobility enormously rich'.[8] Although by 1870 wealthy merchants, bankers, industrialists, were displacing the upper-class elite in landownership, and in the cabinet,[9] this would not change, only replace, the exploitative nature of capitalist land ownership.[10] State intervention in commercial lease relationship is based on a presumption that landlords, as a species, will take commercial advantage of their tenant if they are able, and that every sitting tenant is vulnerable at the

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[3] Michael Haley, 'The statutory regulation of business tenancies: private property, public interest and political compromise' (1999) 19(2) *Legal Studies* 207, 212.
[4] David Englander, *Landlord and Tenant in Urban Britain 1838-1918* (Oxford University Press 1983) 5.
[5] Viscount Burnham, Hansard HL Deb vol 69 col 448 (1 December 1927).
[6] Simon Roberts and Madhu Satsangi, '"The Bad Landlord": Origins and Significance in Contemporary Housing Policy and Practice' (2021) 38(4) *Housing, Theory and Society* 496, 503.
[7] Tola Amodu, 'Regulating the Private Rented Sector: Millennial Themes' (2018) 10(2) *Journal of Property, Planning and Environmental Law* 154, 159.
[8] Humphry Sandwith, *The Land and Landlordism* (Kerby and Endean 1873) iii <TheLand&Landlordism> accessed 10 November 2019.
[9] Donald Kingsley, *Representative Bureaucracy* (Antioch Press 1944) 76.
[10] Karl Marx and Friedrich Engels, 'Manifesto of the Communist Party' 1 <marxists.org > accessed 12 February 2021.

end of their contractual lease term. The overall policy intention of the 1954 Act is to protect the tenant's position by giving them the statutory ability to renew their lease. The statutory framework achieves this by giving the tenant the right to request a new tenancy, on a fair market rent, limiting the grounds on which a landlord can evict a 'good tenant', and compensating the tenant if the landlord is successful in re-gaining possession on a statutory ground.[11] The 1954 Act is the state's deployment of measures intended to ensure commercial lease relationships endure beyond their contractual term, supporting economic continuity for small businesses.

1.2 The Protection of Goodwill

Goodwill is of particular importance to the shop, or retail tenant as was recognised as affecting retail tenants more specifically because:

> *'A tenant with a flourishing business, or with a business which is only beginning to get on its feet, necessarily feels qualms about the results of moving. This is particularly true of retail and other traders, whose customers get used to shopping with them in a certain place, but may well not all remain loyal to the extent of seeking them out in another street or even some distance away in the same street.'*[12]

Initially, this was through the Landlord and Tenant Act 1927 (the **1927 Act**); section 1 of the 1927 Act. Tenants who were able to establish that they had generated goodwill that attached

[11] Section 30(1) of the 1954 Act sets out grounds on which a landlord could reclaim premises from the tenant. The distinction here that the landlord is only required to pay statutory compensation for recovering the premises from a tenant on non-fault grounds – such as a desire to redevelop the premises. No compensation would be payable to a tenant who had failed to comply with covenants and/or pay rents if removed on fault-based grounds.

[12] Lord Uthwatt, 'Leasehold Committee: Interim Report on Tenure and Rents of Business Premises' (Cmd 7706, 1948-49) 34.

to their premises would be entitled to monetary compensation, or a new lease term.[13] The aim was to tackle cases where:

> *'[A] crafty landlord, observing that a tenant had created a very good business and had acquired a goodwill adherent to the premises in that way, deliberately brought the lease to an end, or declined to renew it, in order to secure the benefit of that increased value to himself'.*[14]

However, goodwill under the 1927 Act was not, in truth, 'goodwill at all in the sense in which that term is understood either in law or in ordinary business parlance'.[15] Haley writes that 'goodwill is a form of property which can be assigned and/or protected against unlawful interference, it was a logical progression to allow a tenant to be recompensated for its loss'.[16] Goodwill and its components are discussed in *Whiteman Smith Motor Co v Chaplin*:

> *'A division of the elements of goodwill […] appears in Mr Merlin's book as the "cat, rat and dog" basis. The cat prefers the old home to the person who keeps it and stays in the old home though the person who has kept the house leaves. The cat represents that part of the customers who continue to go to the old shop, though the old shopkeeper has gone; the probability of their custom may be regarded as an additional value given to the premises by the tenant's trading. The dog represents that part of the customers who follow the person rather than the place; these the tenant may take away with him if he does not go too far. There remains a class of customer who may neither follow the place nor the person, but drift away elsewhere. They are neither a benefit to the landlord nor the tenant and have been called the "rat" for no particular reason except to keep the epigram in the animal kingdom. […] It is obvious that the division of the customers into "cat, rat and dog" must vary enormously in different cases and different*

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[13] *Stuchbery v General Accident Fire and Life Assurance Corp Ltd* [1949] 2 KB 256 (CA) 256.
[14] Ibid 264.
[15] The Leasehold Committee, *Final Report of the Leasehold Committee* (Cmd 7982, 1950) 126.
[16] Haley (n 3) 216.

circumstances. The "dog" class will increase with the attractiveness and new accessibility of the tenant; the "cat" class with the advantages of the site; all sorts of variations may affect the "rat".'[17]

Bright notes that the tenant had to prove that the value of the premises had increased 'to include an amount for the cat element of goodwill – the goodwill that would attach itself to any new business set up on the old premises' and in addition to compensation may then be able to request a renewal of the lease.[18] The tenant would not be able to establish this if the premises were demolished. These rules were recognised as being complex to satisfy and moreover did not fully address the tenant's concerns: that they wanted a new lease, or security of tenure.

A new scheme was proposed three years later that formed the basis of the 1954 Act. Its premise was that the landlord 'should have the right to resume possession himself for the purposes of his own business or redevelopment', but if he does not require the premises then the 'sitting tenant has a greater right than any alternative tenant to the premises' on a 'fair contemporary market rent for the premises'.[19] Under this new regime it was no longer necessary for a tenant to demonstrate adherent goodwill, and unless the tenant is in breach of their covenants, the overarching purpose of the 1954 Act is to protect tenants' goodwill. Goodwill is the intangible value that arises because of the customer base built by the tenant trading from that leasehold location and is particularly significant in retail space because of the strong ties between consumer footfall and the tenant's business and brand. Security of

[17] [1934] 2 KB 35 (CA) 42. Scrutton LJ cited in The Leasehold Committee (n 15) 124.
[18] Susan Bright, *Landlord and Tenant Law in Context* (Hart 2007) 236.
[19] *Government Policy on Leasehold Property in England and Wales* (Cmd 8713, 1953) 43.

tenure was said to be a singular question that captured two inseparable strands: 'rent and tenure', because 'guarantee from eviction is of no value unless accompanied by protection against unreasonable increase in rent'.[20] The intention of parliament was to give business tenants the ability to call for the grant of a new lease, on expiry of the old lease, on fair commercial terms - thereby curbing landlord behaviour, and forcibly promoting 'good landlord[ism]'.[21] Interference with market conditions lay in curtailing an excess of landlord power recognising that 'landlords enjoy a stronger negotiating position [because] they tend to possess greater resources than tenants, and partly because supply of land and buildings is relatively limited [and] it is perceived to be in the public interest that tenants of whatever nature should enjoy security of tenure'.[22]

1.3 The Market Context

The commercial property market provides the physical spaces for different types of business from manufacture to hospitality and retail, and is an integral part of where people work and live; these properties are the building blocks of communities and of the physical environment.[23] In December 2021, the value of the commercial real estate market in the United Kingdom (UK) was estimated at over £1.6 trillion, an increase of almost £93 million since 2020.[24] The UK has the second largest commercial real estate market in Europe, after Germany, and it is key to the UK economy. Commercial property, including the retail high

[20] Leasehold Committee, *Interim Report on Tenure and Rents of Business Premises* (Cmd 7706, 1949) 5.
[21] The Leasehold Committee (n 15).
[22] David Neuberger, 'Our not so flexible friend' (2000) 38 *Estates Gazette* 139, 140.
[23] RICS, 'RICS economic analysis and look ahead' *RICS News* (London, 24 June 2020) <RICS> accessed 16 March 2024.
[24] Statista, 'Value of the commercial property market in the United Kingdom (UK) from 2018 to 2023' (*Statista Research Department* 21 October 2024) <Statista> accessed 1 November 2024.

street and shopping centres, plays a significant role generating jobs and investment, and this sizeable proportion of UK plc also encompasses the retail high street, which is a important component in the identity and makeup of communities in the UK.

This thesis particularly focusses on the retail sector, the high street, out of town retail sites, shopping parades, and shopping centres because the primary focus of the legislative intervention in commercial lettings the early twentieth century was to protect the goodwill of business tenants. The term 'high street' according to Google books search first appeared in 1543, at much the same time as the term 'market place'.[25] Many of the UK's first shops form along main roads in 'linear developments of coaching inns, shops and villas' and which were 'in an ideal position to develop as [a] network of high streets'.[26] By contrast the medieval market square was typically the place in which agricultural and other goods could be traded, but was also considered to be a 'town's emblem' a manifestation of its affluence and wealth.[27] High Streets are identified as having an 'intrinsic social value [with]in the historic built environment'.[28] High streets and market squares carry significance for 'the growth of public life' as areas of towns and cities where they 'are successful' they bring together 'people from different cultural groups' and are 'vessels to carry positive communal meanings'.[29] Over time, these centralised market systems were replicated in new shopping centres and out of town retail parks. The most vibrant 'retail centres' are Bluewater and Westfield.[30] Shopping centres

[25] Google, Ngam search result for 'high street 1500 to 2019' <Ngram> accessed 28 February 2019.
[26] Laura Vaughan, *Suburban Urbanities: Suburbs and the Life of the High Street* (UCL Press 2015) 4.
[27] Donatella Calabi, *The Market and The City* (Routledge 2016) 6.
[28] Sam Griffiths, 'The High Street as Morphological Event' in Laura Vaughan (ed) *Suburban Urbanities: Suburbs and the Life of the High Street* (UCL Press 2015) 32.
[29] Antonia Layard, 'Public space: property lines, interruptions' (2016) 2(1) *JL Prop. & Society* 1, 3.
[30] BBC News, 'Britain's best and worst shopping districts ranked' *BBC News* (London, 27 June 2017) <BBCNews> accessed 30 October 2018.

are refocused high streets, emulating themselves akin to the traditional high street by including social, community and cultural spaces.[31] There is marked division between 'privately-owned' individual properties and those 'very large, urban retail schemes [which] have proliferated, transforming multiple owned city centres into unitary sites owned as part of portfolios of multinational property companies'.[32]

Much has happened in the seventy years since the birth of the 1954 Act. The internet, for instance, has fundamentally changed the retail market because consumer behaviour is now driven by factors such as online shopping; the way that retailers engage with their customers, has had to evolve.[33] Today's retail market is as susceptible to social and economic factors as it was in the 1940s. The impact of the 2007 global financial crisis (**GFC**), and COVID-19 exposed town centres and high streets to economic shockwaves. The impact of the GFC was sharp and pierced the fragile buoyancy that had been masked in the preceding boom years by cheap credit and consumer confidence. MFI and Woolworths' announced their collapse into administration on the same day in 2008.[34] There were 'fifty-four major retailer failures in the peak year of 2008, and there were secondary peaks in administrations and liquidations in 2009 and 2012'.[35] The Royal Institution of Chartered Surveyors (the **RICS**) note business performance in the commercial property sector never recovered its transaction rate from

[31] Neil Wrigley and Erin Brookes, *Evolving high streets: resilience and reinvention-perspectives from social science* (University of Southampton 2014).
[32] Hammerson plc, *Annual Report 2017* <Hammerson> accessed 30 October 2018.
[33] Matthew Ward, *Retail Sector in the UK* Briefing (Commons Library Research Briefing 18 October 2024) 5.
[34] BBC News, 'Woolworths Set for Administration' *BBC News* (London, 26 November 2008) < BBCNews> accessed 30 October 2018.
[35] Neil Wrigley and Dionysia Lambiri, *British High Streets: From Crisis to Recovery?* <GreatBritishHighStreet> accessed 2 April 2023.

2007.[36] 2007 signalled the end of the 'space race' (the race by retailers to amass networks of physical stores) leaving these tenants instead grappling with a surplus of physical retail space and a move towards a virtual shopping experience. At the start of 2014, one in seven shops in the UK was standing empty. That figure was a mere one in nine in London, but closer to one in five in the northeast.[37] Marks & Spencer, for example, closed over 100 stores before 2022. Tabloid newspapers described closures in Boston, Cwmbran, Weston-Super-Mare and Hull as 'disgraceful' and 'awful' – the presence of an M&S is a proxy for the vitality of a high street.[38] Streets and shops become sites of 'negotiation and conflict, both commercial and social, but also of civic pride'. This meant that any 'abuse of this space was an abuse against the dignity of the town.'[39]

Bill Grimsey, who is the former CEO of Iceland, has carried out two reviews of the UK high street. The Grimsey report considered the resilience of the traditional high street and how it can compete with out-of-town shopping centres and move away from 'clone town Britain' model.[40] Despite argument that the high street has 'reached the end of its life expectancy […] out-of-town shopping centres […] are no less', [41] and in some senses much more, exposed to the competition of internet shopping.[42] Furthermore, a 2014 report produced by the

[36] Fabrizio Varriale, *UK commercial real estate impact report* (RICS, London March 2022) <https://www.rics.org/> accessed 2 January 2023.
[37] Hugo Rifkind, 'Don't Mourn the Old High Street. It was awful' *The Times* (London, October 11 2014) <The Times> accessed 14 October 2019.
[38] John Harris, 'Rebuild the faded towns of Britain to end our national malaise' *The Guardian* (London, 4 February 2019) <The Guardian> accessed 14 October 2019.
[39] Dave Postles, 'The market place and space in early modern England' (2004) 29(1) *Social History* 41.
[40] Bill Grimsey and others, *The Grimsey Review: An alternative future for the high street* 49 <TheVanishingHighStreet> accessed 28 October 2024.
[41] Griffiths (n 28) 33.
[42] Cathy Parker and others, 'High street research agenda: identifying high street research priorities' (2014) 7(2) *Journal of Place Management and Development* 5.

University of Southampton speaks of the resistance of the local, 'locationally obsolescent' high street which is performing well under the radar of 'commercial data providers'.[43] There is some evidence that these smaller towns 'experience recession differently from other locations due to their relative lack of exposure to risk from business cycles of larger tenants',[44] and adaptability of 'land use' contribute to a 'cycle of continual adaptation' of historical spaces.[45]

Lockdown restrictions on physical stores, resulted in a rapid surge in online shopping. Retailers faced enormous pressure to pivot to e-commerce platforms. There was a rapid digital transformation of the virtual shopping experience. At the same time, there was a change in consumer behaviour. Lockdown saw notable trends towards goods that supported working from home and health and wellbeing at home. The 'impact on consumer retail sectors varied with clothing and fuel' retailers particularly hard hit.[46] Retailers with physical stores faced immense pressure particularly those with chains of stores with rack rent leases.[47] Physical clothing retailers were hit particularly hard. On 23 March 2020 the government required 'the closure of non-essential retail stores as part of the first national lockdown' reopening in June 2020.[48] Even stores that were open faced pressures of protecting customers and employees by observing social distancing protocols and complying with other public

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[43] Neil Wrigley and Dionysia Lambiri, *High Street Performance and Evolution* (University of Southampton, 2014) 5.
[44] Ibid.
[45] Sam Griffiths and Laura Vaughan, 'High street changeability' (2017) 21(1) *Urban Morphology* 5.
[46] Muhammed Khaliq, *Impact of coronavirus (COVID-19) pandemic on retail sales in 2020* (ONS, 1 February 2021) <ONS-ImpactofCoronavirus> accessed 24 March 2023. These sectors saw a fall in sales of 21.5% and negative 22.2% respectively in 2020.
[47] Reuters, 'Hammerson gets less than half of Q1 rent as COVID-19 curbs tighten' *Reuters* (London, 19 January 2021) <Reuters> accessed 4 April 2022.
[48] Khaliq (n 46).

health restrictions. Consumers showed increased support for local businesses in part because on limitations on travel and because of a trend towards avoiding larger out of town locations. This made local physical retail stores more attractive to larger commercial retailers. Overall, COVID-19 accelerated change in the retail market towards e-commerce platforms, a slackening of retailers' need for physical premises, and a shift in consumer demand back towards the local high street.

1.4 Theoretical Approach: Power and Resistance in Property Relationships

1.4.1 Enduring Property Relationships

Broadly speaking, Blandy et al employ a property dynamics lens known as the Enduring Property Relationships (EPR) that 'acknowledges the diverse range of legal, regulatory, social, and commercial norms that shape property relationships', acknowledging that property relationships embody both an element of black-letter contractual 'presentiation', and relational characteristics.[49] The EPR approach is intended to offer a more multifaceted understanding than doctrinal analysis alone can offer. At the heart of the EPR lens is a recognition that it is impossible to separate a 'place,' from the 'law that governs and applies to it, and the parties who use it and hold property rights in it'.[50] The EPR lens views property relationships as being shaped by the following three interrelated perspectives: 'the diverse network of sources, property's temporal element, and discretionary spaces in decision-making'.[51] This framework permits these commercial leases to be explored through the

[49] Sarah Blandy, Susan Bright, and Sarah Nield, 'The Dynamics of Enduring Property Relationships in Land' (2018) 81(1) The *Modern Law Review* 85, 91.
[50] Ibid 89.
[51] Blandy, Bright, Nield (n 49) 95.

doctrine, the statute and legal precedent that sets parameters around agreement of renewal leases. In addition to the black-letter law, this also encompasses the norms of the commercial retail sector. Second, is a consideration of property's temporal elements, which particularly assists here when considering the adaptation and re-shaping of industry norms over time because of market changes. And, finally, discretionary spaces in decision-making are a perspective grounded in how disputes in relation to the terms of the new renewal lease are resolved between landlord and tenant including formal county court adjudication as well as informal negotiations in the shadow of the law, or the 1954 Act framework.[52]

Retail commercial leases have historically been 25-year leases, reducing since approximately 2008 because of changing market conditions to terms of 15 years, and the 10 years pre-pandemic. The renewal of these leases under the 1954 Act might lead the outside observer to think of these property relationships as promoting a longevity of presence, of occupation, a certainty rhythm akin to married life that is contractually less analogous to 'one-night stands' and more like 'marriages', or perhaps the lease renewal is more akin to the modern-day trend of renewal of vows.[53] Given the length and complexity of ongoing landlord-tenant relationship, one might assume that the norm associated with this species of property relationship were founded on a relational approach to contracting based on 'mutual trust and reciprocity'.[54] However, exploring these lease relationships from an EPR perspective supports Blandy et al's conclusion that rather than 'relational', these are highly presentiated

[52] Ibid 90.
[53] Robert Gordon, 'Macaulay, Macneil and the Discovery of Solidarity and Power in Contract Law' (1985) *Wis L Rev* 565, 569.
[54] Ian Macneil, 'Relational Contract Theory: Unanswered Questions' (2000) 94 *Nw. UL. Rev* 877, 897.

commercial relationships as they form 'discrete contracts'.[55] They are highly contentious and fraughtly negotiated transactions. After all, the point is that the 1954 Act is needed to force these relationships to endure at all. This thesis explores these relationships through the EPR theory. As this thesis will demonstrate, power is currently the most powerful predictor of whether the relationship between landlord and tenant will endure and lease renewed, not the legislation itself.

Further, from the 1960s, Institutional Landlords, such as banks and pension funds developed a monopolistic control over commercial lease terms in the retail market. Tenants might have been entitled to security of tenure, but on commercial terms that largely favoured landlords. Landlords imposed standardised commercial terms that were designed to facilitate capital growth based on leasehold rental income. Concern over Institutional Landlords' monopoly over commercial terms arose in the early 1990s following a period of acute financial recession. To combat the landlord monopoly over commercial terms a voluntary leasing code was introduced to facilitate fairer and more balanced lease terms and to pressurise professionals in the sector to self-regulate.[56] Over the years, self-regulation has been found to have had little, or no, reach in the retail market.[57] This thesis contends that power is not only a predictor of whether the relationship will endure, but collective tenant power has become a force for re-shaping commercial terms in the retail market. It further asserts that without

[55] Blandy, Bright, Nield (n 49) 91.
[56] The first Lease Code was introduced in 1992; the 2007 edition is in issue at the date that thesis interviews were conducted, although the RICS issued a new version in 2020: <https://www.rics.org/>.
[57] Neil Crosby and Cathy Hughes, *Monitoring the 2007 Code for Leasing Business Premises* (Department for Communities and Local Government, July 2009) 14. Survey data showed that 'tenants with less than employees were less likely to know about the 2007 code than larger tenants; only 14 per cent of smaller tenants were aware of the code'.

inclusion of power as the fourth pillar of EPR it is not possible to fully explore the implications of commercial landlord-tenant relationships in the retail market.

1.4.2 Power and Resistance

This thesis adopts Foucault's conception of power and resistance as the fourth pillar of Blandy et al's EPRs. Foucault articulates that power is present is all relationships:

> *'[In] verbal communication, or amorous, institutional or economic relationships, power is always present: I mean a relationship in which one person tries to control the conduct of the other'.*[58]

Power is a relationship between 'two individuals […] such that one can direct the behaviour of another or determine the behaviour of another'.[59] More broadly these relationships form patterns through repetition, or 'networks of relations, constantly in tension' that give insight into dynamics between institutional parties.[60] Whilst Blandy acknowledges that the norms created by such patterning are an important source of law, Blandy does not go so far as to consider how these patterns in law are created, and that without a consideration of power, a full picture of landlord-tenant relationships is not visible.

Mark Pawlowski and James Brown produced conjoined articles in 2015 that shared results of an online survey that set out to gauge the appetite of property practitioners towards reform of the 1954 Act (the **Pawlowski - James Survey**).[61] The Pawlowski - James Survey contained

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[58] Michel Foucault, 'The ethics of the concern for self as a practice of freedom' in Paul Rabinow (ed), *Ethics, Subjectivity and Truth* (The New Press 1997) 291-2.
[59] Michel Foucault, *Society Must Be Defended: Lectures at the College de France 1975–1976* (Penguin 2004), 29.
[60] Michel Foucault, *Discipline and punish: the birth of the prison* (Penguin 1991) 26.
[61] Mark Pawlowski, James Brown, 'Part II of the Landlord and Tenant Act 1954: Repeal or Further Reform?' (2015) 19(4) *L&T. Rev*, 164.

the ability for respondents to give free-text comments. Interviewees commented that the view that security of tenure was exploited by commercial tenants was 'unfounded', and that commercial tenants needed 'protection of the Act'.[62] Another respondent commented that tenant exploitation was 'the exception' and another commented that it 'only happened at the margins and well-advised landlords can deal with it'.[63] The Pawlowski - James Survey evidences, in the margins of the survey responses, a shift in power in the market. It is argued that without a consideration of power and resistance it is not possible to understand the implications of the actions of large corporate tenants in the retail markets. This thesis will put forward evidence that large corporate tenants act in concert together and leverage their collective strength to bring about change to sector norms pertaining to commercial leasing. Collective action of tenants has resulted in resistance to commercial terms and balance of risk that has been market norm and standardised practice for approximately sixty years. This thesis argues that tenants are leveraging their collective portfolios to resist decades of landlord monopoly over lease terms and market practices. Further, that without the insight of power and resistance to power it is not possible to fully understand the commercial implications of the legislation for small tenants, for tenant mix, and for redevelopment.

1.4.3 Typology of Landlords and Tenants in the Retail Market

In undertaking the exploration of commercial leasing practices, it became clear that in current commercial leasing practices classifications of 'bad landlord'[64] and 'vulnerable tenant' were outmoded and incorrect. Part of the issue is that the 1954 Act assumes the personalities

[62] Ibid 163.
[63] Ibid 164.
[64] Roberts and Satsangi (n 6) 503.

of landlord and tenant are one-dimensional. This thesis introduces a new spectrum of landlord and tenant personality that emerged from the Interview Data. Some old characters remain; for instance, it was clear that the character of the vulnerable dressmaker, though she does still exist, is now embodied as the modern-day hairdresser. However, this type of small tenant was typically represented as having less than three shops. These tenants are referred to in this thesis as the 'small business tenant' (abbreviated to the **SBT**). There was much discussion of large commercial tenants that were 'national, or multinational companies' that in some cases are private equity funded and have historically amassed portfolios of shops and outlets across the UK.[65] This type of tenant is referred to as a 'Multiple Tenant' or '**Multiple**' in the Interview Data on account of their multiple physical stores and their geographical footprint and network. The benchmark to be a medium-size tenant (an **MST**) was to have a minimum of four shops, which indicated a level of commercial and legal experience over and above a SBT. Landlords were also stratified. Unsurprisingly, the Interview Data referred to institutional landlords (**Institutional landlords**), which are large companies that hold good quality property portfolios often on behalf of pension funds. They were distinguished from 'medium-size' landlords sometimes described as development, or commercial landlords (defined as 'Medium-Size Landlords' or **MSL**). Finally, landlords at the bottom of the spectrum were said to be landlords who owned a one-off shop, often as a private family pension fund. These smaller landlords were categorised as the small business landlord (**SBL**). The categorisation is set out in the table 1.1.

[65] Colin Axon and others, 'Building communities: reducing energy use in tenanted commercial property' (2012) 40(4) *Building Research and Information* 461, 465.

Table 1.1 - Typology of Landlords and Tenants in the Retail Market

Small business tenant Three shops or less. (SBT)	Small business landlord Typically freehold owners of one to two premises. (SBL)
Medium-size tenant Tenants with more than three physical stores/locations. (MST)	Medium-size commercial/developer landlord Commercial landlords. (MSL)
Multiple tenant National or multi-national companies with a chain of physical stores. (Multiple)	Institutional Landlord Pension funds, institutional investors. (Institutional Landlord)

This categorisation is important because this thesis explores the dynamic between different types of landlords and tenants and considers the implications of power and resistance in relation to commercial terms and how this affects different category of owner or occupier. This thesis explores power between corporates, between big powerful players in the market, but also considers the implications for the SBT and the SBL, for tenant mix, and for redevelopment and investment in commercial buildings.

A further purpose in introducing this typology is to clearly demonstrate that the category of tenants under the 1954 Act has fractured. Whilst Multiples had begun to appear before the 1950s; Debenham's opened its first store in London in 1778 and by 1948 had over 100 retail stores.[66] Woolworths opened its first branch in 1909 and had over 400 stores in its network by the 1940s.[67] However, there is little consideration of the businesses of Multiple Tenants in parliamentary debate at the time and little consideration today of the different positions of the SBT and the Multiple. The point of introducing this typology is two-fold, to challenge the discourse around the 1954 Act's underpinning policy that it exists to protect the SBT, and to expose the complex power dynamics that play out under the 1954 Act regime and explore their impact on SBTs and SBLs.

1.5 Methodology and Research Questions

For seventy years the 1954 Act has been the legal apparatus that regulates business tenancies, the relationship between a commercial tenant and landlord, in England and Wales. A detailed overview of the legislation's main provisions is set out in chapter two. Simply put,

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[66] Derek Matthews, Malcolm Anderson and John Edwards, *The Priesthood of Industry. The Rise of the Professional Accountant in British Management* (Oxford University Press 1998) 174.
[67] Kathryn Morrison, *Woolworth's: 100 Years on the High Street* (Historic England 2015) iv.

the legislation entitles the tenant to a new lease on expiry of their existing contractual term unless renewal of the lease is blocked by the landlord because they wish to recover possession for re-development, or their own occupation. The terms of the tenant's renewal lease, should the parties fail to agree them, fall under the jurisdiction of the county court. However, in today's modern retail market there has emerged a distinction between the terms of commercial lettings that are negotiated 'on-market' and in lease renewal negotiations. This is because the mindset in 'on-market' negotiations is fundamentally different to lease renewal negotiations. In on-market negotiations, the tenant is negotiating to secure the premises and is, notionally or, in reality, competing against other tenants to secure a lease of the premises. There is an urgency to enter the lease, to take it off the open market and ultimately for the tenant to move in and trade. If negotiations break down in on-market negotiations, then the landlord can let to a different tenant. Negotiations for a new lease renewal are conducted under the jurisdiction of the county court, but there is no information about the impact that the 1954 Act regime, and the litigation process has on agreeing commercial lease terms.

One further important policy point to note is that in 1969 the government amended the 1954 Act to introduce an alternative contractual possibility: that the parties could contract outside the protection of the 1954 Act regime. When a tenant enters a brand-new lease there is a choice as to whether that lease is contracted within protection of the 1954 Act, or outside it. Whilst there is speculation that it would be 'no surprise' if the SBT were to emerge worse off from free market negotiations' there is no empirical evidence as to whether they do obtain security of tenure.[68]

[68] Susan Bright, 'Protecting the Small Business Tenant' (2006) 70 *Conveyancer and Property Lawyer* 137, 138.

The aim of this thesis is to obtain a more nuanced understanding of how the 1954 Act operates in practice and whether the 1954 Act discharges its original purpose of protecting the small vulnerable business tenant. In part, this meant in depth engagement with the underpinning doctrine, statutory provisions and case law underpinnings. Further, it involved detailed consideration of government consultation and debate in legislating to provide security of tenure to business tenants. This doctrinal approach considers and dissects the law 'as is', which means 'examining it for consistency and coherence, as well as critical appreciation of the law in terms of policy compatibility and future development'.[69] However, in order to understand how law is used in practice it is necessary to undertake empirical work, which 'enables us to weave together the law learned in books with the law understood and applied in practice'.[70] In order to understand how the 1954 Act is applied in practice I conducted 55 semi-structured interviews with property professionals (solicitors, barristers, judges, valuers and surveyors) to glean an insight as to how the 1954 Act impacts on and shapes lease negotiations and the commercial terms available on renewal. The data collected from these interviews (the **Interview Data**) inform this thesis' findings and conclusions. There is a body of work produced by Bright and Haley in relation to the doctrinal and policy analysis of the 1954 Act. Furthermore, Crosby together with other academics at the University of Reading, Murdoch and Hughes (together the **Reading Academics**) monitored uptake of the commercial lease code in England and Wales over a decade.[71] Gaps in the literature include

[69] Martin Dixon 'A doctrinal approach to Property Law Scholarship' in *Researching Property Law* (Bloomsbury Publishing 2015) 5.
[70] Lisa Whitehouse and Susan Bright, 'An Empirical Approach to Research in Property Law' in *Researching Property Law* (Bloomsbury Publishing 2015) 44.
[71] See Neil Crosby, Cathy Hughes, Sandi Murdoch, *Monitoring the 2002 Code of Practice for Commercial Leases* (ODPM London 2005).

understanding: i) whether and how SBTs obtain security of tenure; ii) the implications if a tenant does not achieve security of tenure whilst others do; iii) how the 1954 Act impacts on lease terms; and iv) how perceptions as to the purpose of the 1954 Act mirror its deployment in practice.

The following research questions are central to this thesis:

1) Would the underlying drivers of the 1954 Act, based on Landlord market power, still recognisable in today's retail market conditions and, if not, what is the current dynamic?
2) To what extent are tenants subject to established landlord market power, and what, if any, strategies do tenants employ to resist the exercise of landlord power in the current retail market?
3) How do the evolving power dynamics between landlords and tenants in the retail market post 1954 impact on security of tenure and their broader leasehold relationship?; and
4) How do the 1954 Act's mechanisms influence the negotiation of commercial lease terms within today's retail market?

1.6 Themes

The broad theme that emerged from the Interview Data was that of power and resistance. That discussion is situated in discussions around the protections afforded to the SBT, the recognition of a spectrum of personalities for landlord and tenant, and implications of a changed landlord-tenant dynamics operating under the 1954 Act legislative framework. An overview of these mains themes is set out below.

1.6.1 Protecting Small Business Tenants (SBTs)

The overall policy intention of the 1954 Act is to protect the tenant's position, which is 'vulnerable' vis-à-vis their landlord at the end of the lease term.[72] The statutory framework achieves this by giving the tenant the right to request a new tenancy, on a market rent, limiting the grounds on which a landlord can evict a 'good tenant', and compensating the tenant if the landlord is successful in re-gaining possession on a statutory ground.[73] However, the Interview Data revealed that SBTs are unlikely to achieve security of tenure in the retail market because their leases are more likely to be contracted outside the 1954 Act and that the legislative mechanisms in place do not protect the SBT. This is explored in chapter seven.

1.6.2 Power and Resistance Across the Spectrum of Landlord-Tenant Relationships

The Interview Data pointed to complex dynamics between landlords and tenants. Property professionals spoke of different practices of resisting landlord market power. For instance, on one hand, the 1954 Act does not support SBTs by affording them security of tenure to protect their goodwill. However, at the other end of the spectrum, Multiples are acting in concert to assimilate knowledge gleaned from lease renewal transactions across geographical locations and property types in the UK to refine tactics to obtain more favourable terms. There is also evidence that Multiples derive benefit from the 1954 Act litigation process as it permits Multiples to apply pressure for changes to the balance of risk in institutional leases, and to

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[72] The leading case that concerns the terms of the new lease under section 35 of the 1954 Act is *O'May and Others v The City of London Real Property Co. Ltd* [1983] 2 AC [726], [729]. The 'vulnerability of the sitting tenant' vis-à-vis the more powerful position of the landlord on renewal is woven into this decision.

[73] Notions of 'good' and 'bad' behaviour and actors featured in the genesis of the 1954 Act and were enshrined in section 30(1), which set out grounds on which a landlord could reclaim premises from the tenant. The landlord is only required to pay statutory compensation for recovering the premises from a tenant on non-fault grounds – redevelopment for example – however, no compensation would be payable to a tenant who had failed to comply with covenants and/or pay rents if removed on fault-based grounds.

challenge and erode legal precedent in the county court. The Interview Data support the conclusion that the 1954 Act facilitates Multiples challenging and making inroads against institutional lease terms. These themes are explored in chapters five and six.

1.6.3 The Implications of Excess Multiple Power

There is little insight as to the impact that the 1954 Act has on commercial lease terms in the current market. Haley acknowledges that the 1954 Act 'represents an unusual and complex measure of political and economic engineering'.[74]. However, Bright notes that there is 'surprisingly little discussion as to how the letting regime does, and can, promote (or hinder) commerce'.[75] This thesis explores the impact that the 1954 Act has on the terms of commercial leases and on lease transactions from a doctrinal and empirical stance. There is evidence that some of the practices of resistance by Multiples are potentially commercially oppressive to both SBTs and SBLs. The broader picture that emerges is that Multiples' position in the retail market is elevated not simply because they have security of tenure, but because negotiating under the 1954 Act regime enables them to negotiate more favourable terms in the 'Lease Renewal Market' then are available in on-market negotiations. This is problematic for SBLs and SBTs because they cannot compete against Multiples who are able to negotiate more favourable terms under the 1954 Act's legislative protection. Once more favourable terms are negotiated, Multiples can also utilise strategies to oppose landlords' opposition to a new tenancy, which potentially contribute to 'clone towns', lack of tenant mix, and an unhealthy

[74] Michael Haley, 'Business tenancies and interventionism: the regulation of policy' (1993) 13(2) *Legal Studies* 225, 225.
[75] Bright (n 68) 138.

imbalance between those commercial terms obtained by larger Multiples and those available to SBTs. This discussion is set out in chapter seven.

1.7 Conclusion

Chapter one provided an overview of the policy and legal underpinnings, as well as the theoretical and methodological foundations relevant to this thesis. In chapter two, a more comprehensive examination of the policy provisions leading to the enaction of the 1954 Act, alongside the doctrinal frameworks supporting this thesis, is presented. The aim of chapter two is to clarify the original and evolving intentions of the policy, facilitating comparison with the legislation's current performance against these aims. Additionally, a detailed review of the 1954 Act and relevant case law interpreting those provisions is included to assist the reader with navigating the complex and technical landscape established by the legislation. Finally, the 1954 Act intersects with other legislation relating to COVID-19, the insolvency of corporate tenants, and implications of commercial lease terms for sustainability and carbon reduction goals. Where these regimes are relevant because they intersect with security of tenure under the 1954 Act, the relevant legal provisions are also set out to provide a fuller picture of the legal landscape of retail leases and to provide a foundation for discussion in later chapters.

CHAPTER 2 POLICY DRIVERS AND DOCTRINAL FOUNDATIONS

As I discuss in my methodology, this thesis provides a doctrinal analysis of relevant legislation and case law, which sits alongside empirical insights into these lease renewal transactions. This chapter two offers a comprehensive overview of both legislative and common law provisions pertaining to lease renewals. The intention is to set down the main provisions of the 1954 Act that underpin negotiations, and property valuations, in order to better understand the evolving dynamics of the retail market. Additionally, this chapter two includes an examination of the historical development of security of tenure for business tenants. This analysis is essential, as it allows for a critical assessment of the original intent behind the 1954 Act in comparison to its contemporary application within today's retail sector.

2.1 Charting Policy Change

2.1.1 The Rent Restrictions Act 1915

Security of tenure and rent control for business premises has just celebrated its centenary. Haley charts the 'social and political change' from the late nineteenth century that spelled the genesis of the 1954 Act and ultimately 'the significant retreat from market forces and the gradual recognition that security of tenure […] was the necessary response'.[76] Asquith's government were initially prompted by housing shortage during WW1, to implement rent

[76] Haley (n 3) 207.

control for private (unfurnished) housing. Initially conceived as a temporary measure to expire six months after cessation of the war,[77] the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915 (the 'Rent Restrictions Act 1915'), gave some protection to tenants of residential and mixed-use single unit premises (falling within a prescribed rateable value) from the landlords' common law right of re-entry, and was the embryo of security of tenure for business premises. Christopher Addison, Minister of Health, set up and instructed the Salisbury Committee, in 1920, to review the deterioration of housing supply during the war.[78] Although tasked with steadying rental levels and preventing residential tenants from being compelled to give notice, the Salisbury Committee also heard voluminous evidence from aggrieved business tenants, particularly in London, Birmingham, Manchester and Liverpool.[79] Tenants complained of 'exorbitant' rent increases for business premises.[80] Newspaper reports from that period report tenants calling:

> *'[U]pon Mr Lloyd George and show[ing] him notices to give up possession of their premises on June 25 - the day after their lease period ended. [Further] a Liverpool businessman told him he had received notice to pay £250 in place of one of £55 per annum or leave the premises on 25 June'.*[81]

Retail and commercial property shortages had driven up acquisition prices in the immediate post-war period (including retail and commercial property) and many landlords, having purchased property at a high value, were accused of increasing rents and rent

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[77] Wendy Wilson, *A Short History of Rent Control: A Briefing Paper* (CBP 6747 30 March 2017) 4.
[78] James Cecil, *Report of the Committee on the Increase of Rent and Mortgage Interest (War Restrictions) Acts* (Cmd 658, 1920).
[79] Including the Town Tenants' League and the Birmingham Federation of Tenants' Association.
[80] Cecil (n 78) 8.
[81] The Manchester Guardian, 'The Business Tenant: Fear of Further Evictions and Higher Rents' *The Manchester Guardian 1901-1959* (*ProQuest Historical Newspapers* 8 March 1921) 11.

assessments by 200, 300, 400 per cent, to cover their outlay, thereby levying a burden on business.[82] Evidence was put forward by witnesses representing the Town Tenants' League that the war had only accentuated existing grievances, and which the Rent Restriction Act 1915 was not designed to mitigate in the long term.[83] There was a sense that landlords wielded unfettered power to raise rents and this, in turn, compelled tenants to give notice. The Salisbury Committee concluded that steps should be taken to prevent profiteering in business premises in the UK's major towns and called on the government to introduce legislation to curb the behaviour of these landlords who were dispossessing business tenants and depriving them of the goodwill attaching to their business premises.

The Salisbury Committee concluded that security of tenure for business premises was necessary, but recommended a separate enquiry into the need for legislative intervention, because the provisions of the Rent Restriction Act 1915 were unadaptable to this class of (business) property.[84] To alleviate short term pressure, the Salisbury Committee included in its Bill at Committee stage a special provision controlling business tenancies for a year, as an emergency measure to cover the period of any further deliberations. Temporary provisions were included as s13 of the Rent Restrictions Act 1920.[85] The Salisbury Committee considered the Rent Restriction Acts unsuited to this class of property and referred the issues surrounding

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[82] The Manchester Guardian (n 81).
[83] Cecil (n 78) 9.
[84] Ibid 8.
[85] Control was restricted to those business premises of a rateable value on a par with those residential premises controlled by the Rent Restrictions Act (£105 London and £78 elsewhere). The machinery of control operated as follows:
An increase of 35% (15% for residential) of existing rent was permitted in addition to those allowed for expenditure on repairs or for increased rates. The landlord could obtain possession through the Courts for a bona fide scheme of redevelopment in the public interest, or, subject to providing alternative accommodation, of premises required for his own business or for the public service.

commercial security of tenure back to the government. On 1 March 1921, however, Lloyd George announced that the government did not intend to extend protection given to business tenants.[86] Instead, a Select Committee on Business Premises (the 'Select Committee') was formed and invited to enquire into the 'position of leaseholders and tenants of business premises; and to advise whether any, and if so what, alternations in the law are required to remove obstacles to the development of their businesses arising out of conditions affecting tenure, undue restrictions on improvements, and unreasonable increases in rents'.[87]

The Select Committee was satisfied that there was evidence that business tenants had been compelled to submit to unconscionable rent increases to retain possession and (in some cases) had been dispossessed of their premises without the option to retain them on fair terms. The landlords in these cases have 'taken full advantage of the present abnormal demand for business premises; and their action has sometimes caused peculiar hardship, owing to the consequent loss of goodwill'.[88] Given the current shortage of alternative accommodation, it was conceivable that cessation of business might arise. Although, it was noted that, 'the majority of landlords do not appear to have acted harshly towards tenants', nor had they tried to 'extract an excessive return on the capital invested by them in such property'.[89]

Business tenants themselves were divided between suggestions of temporary measures to cover shortage of premises, and more permanent alteration of the law. The Select Committee recommended implementing the minimum state intervention to avoid discouraging new

[86] The Manchester Guardian (n 81).
[87] Property Select Committee *Report on Business Premises* (HC, 14 December 1920) 591.
[88] Ibid.
[89] Ibid.

building and suggested a temporary measure to last for two and a half years from the date of their report. It was envisaged that, during this period, tenants could apply to a tribunal for prolongation of their tenancy lasting no longer than the period dictated under the Rent Restriction Acts. New buildings were to be exempt from these provisions. Yet despite recommending immediate legislation to ensure continuity of control when section 13 of the Rent Restriction Act lapsed in June 1921, no new legislation was introduced.

2.1.2 The Landlord and Tenant Act 1927

Formal statutory intervention in private business lettings was raised again in 1927. Common tenant complaints related to payment of dilapidations at the end of their lease and that 'town tenants' in particular were affected by landlords taking advantage of 'bad law'.[90] The case of the 'wretched maker' was put forward 'who during five years had had her rent raised from £200 to £600 in one of the West-end streets, simply because of the goodwill that she had created and that attached to the premises in which she was carrying on her trade'.[91] Dissenting voices opposed to intervention are concerned that the time for intervention has passed because: i) there had been tremendous scarcity of building, but the market was now recovered; ii) statutory interference in contractual lease provisions brought uncertainty; and iii) investment in commercial freehold property would become unattractive.[92]

Debate in 1927 challenged the current land regime favours the 'collective interests' of landlords over the more 'private, personal, piecemeal interests of the individual tenants'.[93] It

[90] Viscount Burnham, Hansard HL Deb vol 69 col 448 (1 December 1927).
[91] Ibid.
[92] Ibid.
[93] Ibid.

is openly acknowledged that the Landlord and Tenant Act 1927 (the **1927 Act**) is introduced to address this 'inevitable clash of interests', protect 'the weaker man, and that weaker man is the individual tenant' by giving the tenant 'the right to some form of compensation [without] impairing the sanctity of property'.[94] The 1927 Act was passed and operated to give a tenant, who had made improvements to business premises during their tenancy, a right to compensation at the end of the tenancy, even if the landlord did not consent to those improvements. The intention of the 1927 Act was to protect the tenant's position by offering both compensation for loss of goodwill and for improvements. Security of tenure is not offered under the 1927 Act, instead a tenant is offered compensation for loss of goodwill and improvements in a bid to incentivse landlords to renew leases by removing the cost-free gain from the tenant's investment in the premises.[95] Haley notes that these provisions were however 'ill thought out, largely unworkable and easily sidestepped by a well-advised landlord'.[96] This meant that 'business tenants enjoy[ed] virtually no protection outside the terms of their tenancies in respect of either tenure or of rent'.[97] The tenant was to be compensated at the end of the term for loss of goodwill. The 1927 Act identified 'adherent goodwill' as the goodwill that attached to the premises themselves and yielded some benefit to the incoming tenant.[98] The calculation focussed on not the loss to the tenant, but the gain of the landlord (or the value to the incoming tenant). This meant that 'the tenant could not

[94] Lord Ernle, Hansard HL Deb vol 69 col 418 (1 December 1927).
[95] Haley (n 3) 215.
[96] Haley (n 3) 217.
[97] Leasehold Committee (n 20) 12-24.
[98] The Leasehold Committee (n 15) 126.

succeed if the premises were to be demolished or if the landlord intended to re-let for a different and, perhaps, more valuable purpose'.[99]

The 1927 Act afforded limited protection to the tenant of business premises on termination by affording to the tenant the opportunity to claim compensation for the loss of goodwill by removal from the premises if he can prove that because of carrying on his/her business for a five year minimum period the tenant has increased the letting value of the premises. When compensation would not cover the actual loss he would suffer through moving business elsewhere, then the tenant can claim a renewal of the tenancy. A single renewal not exceeding 14 years could be granted, and the rent for the renewal was fixed by the Tribunal under the 1927 Act based on what a willing lessee would pay to a willing lessor, but excluding any increased letting value attributable to the tenant's goodwill. This protection is not afforded to tenants who have less than five years' standing, or those who occupy for professional purposes. The 1927 Act is first and foremost a compensation mechanism, rather than protection against eviction. As such, the Landlord and Tenant Act 1927 was 'an overly cautious response to the problems faced by business tenants and failed to achieve its policy objectives'.[100]

2.1.3 The Implications of the Second World War

By the 1950s, the British government was again dealing with a shortage of property. Bombing strategy during the Second World War focused on precision attacks on particular targets (usually factories) and 'area bombing' of districts of major cities was used to cripple

[99] Haley (n 3) 216.
[100] Michael Haley, 'Compensation for tenants' improvements: a valediction?' (1991) 11(2) *Legal Studies* 119, 123.

the workforce, destroy industry and transport links.[101] The effect of simultaneous bombing in the UK's major cities was that business localities, factories and transport infrastructure were destroyed.[102] Bombing displaced both residential and commercial occupiers.[103] The Blitz and hardship experienced during the war went some way further 'towards breaking down the class barriers which until then were characteristic of British society',[104] which coupled with a critical shortage of commercial property became a driver for greater state intervention. Post-war Britain was reflecting on the impact of the 1927 Act, which was considered to be 'well-intended but has not proved very effective in practice' when set in its post-war context.[105] Much of the debate centred around notions of goodwill in determining new rent levels, because they 'imported an illusory and often fictitious figure into the purchase price of going concerns' as it required consideration of the hypothetical grant of a new lease to a sitting tenant 'at a fair contemporary market rent'.[106]

Post-war business rents were 'very high indeed'[107] because 'bomb damage and abnormal dilapidation have removed, damaged or blighted many of [the premises] that were formerly habitable'.[108] During the Blitz over one million buildings were destroyed or otherwise damaged.[109] John Lewis' London department store was one of several department stores

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[101] James Joll, *Europe Since 1870* (Penguin 1990) 413.
[102] Brian Bond, *War and Society in Europe, 1870-1970* (Sutton Publishing Limited 1998) 150.
[103] Patricia Garside, 'The Significance of Post-War London Reconstruction Plans for East End Industry' (1997) 12(1) *Planning Perspectives* 25.
[104] Joll (n 101).
[105] Lord Meston, Hansard HL vol 180 col 526 (18 February 1953).
[106] Ibid.
[107] Wilfred Burns, *New Towns for Old: The Techniques of Urban Renewal* (Leonard Hill 1963) 77.
[108] Ibid.
[109] Ronan Thomas, 'Oxford Street's Store Wars' *BBC News* (London, 6 September 2010) <BBCNews> accessed 8 July 2019.

destroyed on Oxford Street in September 1940, and it was only rebuilt in 1958-60.[110] Property is in such short supply that *The Economist* reports that three vehicle manufacturers by 1950 were making mobile shops, and that approximately 4,000 had been commissioned in different parts of the country, as alternative to physical retail space, to take advantage of the shortfall in commercial premises which had resulted in 'far fewer premises being opened'.[111]

The critical shortage of commercial premises was compounded by a great revival and expansion of business activity in the years after 1945. Existing 'businesses found themselves in competition with new businesses seeking premises in which to trade'.[112] The increase in post-war demand created pressure on supply of available accommodation at a time when there has been virtually no new building done for nearly 10 years. Finally, the inadequacy of premises supply in late 1940s was accentuated by the scale of bombing in the business areas especially of the UK's big cities, but also to a lesser degree in smaller towns. These three factors combined to assure a 'sellers' market' in business premises, in which the 'landlords were able to abuse their superior bargaining power' taking advantage of tenants whose livelihood depended on retaining their business premises.[113]

A committee was appointed on 1 December 1948 (led by Lord Uthwatt) to consider: i) whether an occupying tenant of premises occupied for business or professional purposes should be given security of tenure; ii) whether rents charged for business premises should be controlled, and by what means; and iii) whether further provision should be made for 'giving

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[110] Ibid.
[111] Economist, 'Shops on Wheels' *Economist* (Economist Historical Archive, 9 October 1954) <http://Tinyurl.Galegroup.Com/Tinyurl/B3vnv0> accessed 7 July 2019.
[112] Haley (n 3).
[113] Haley (n 3).

to tenants a right to compensation for improvements on the termination of their tenancies'.[114] In March 1949, the Uthwatt Committee presented an Interim Report recommending temporary legislation on the tenure and rents of business premises.[115]

The Interim Report determined that general practice should be that 'good landlords [should] grant renewals on reasonable terms to well-behaved tenants' and therefore as this was already the general practice of landlords their interests could not be 'seriously damaged by a short-term measure enforcing this rule on the unconscionable'.[116]. The Interim Report concluded that security of tenure should be viewed as an 'emergency measure' during this 'exceptional period of shortage' this issue should be approached so that 'a sitting tenant of business premises […] should be treated as having a right to renewal of his tenancy'.[117] The Interim Report identified two different approaches to the problem of tenant security. The first, to give the tenant prima facie a right of renewal, subject to safeguarding the legitimate interests of the landlord as to compliance with covenants. The alternative proposition was to not give a general right of renewal, but to permit a tenant to claim renewal only if special circumstances are shown.

It was envisaged that the landlord would reasonably be allowed to regain possession 'by giving a positive reason, e.g., getting rid of a bad payer, pulling down a block of premises, extending his own business, etc'.[118] The Uthwatt Committee preferred to move away from the method that would require a tenant to justify the grant around a framed around goodwill

[114] Leasehold Committee (n 20) 5.
[115] Leasehold Committee (n 20) 12.
[116] Ibid 7.
[117] Ibid.
[118] Hansard HC Deb vol 483 col 1407 (5 February 1951).

'which does not represent the sum total of the tenant's interest in [the] business and therefore goodwill should not be the criterion'.[119] Criteria in the form of 'special hardship' to the tenant, or 'treatment expected from a good landlord' were also mooted, but again proved difficult to produce a working definition.[120]

Two members of the Uthwatt Committee, Sir Edwin Herbert and Edward Gillett rejected the recommendation, citing in their minority report several reasons which included: i) lack of evidence as to whether there was a tenants' market between 1921 and 1939; ii) that scarcity 'brought about by bombing' had led to the reversal of the tenants' market but that market equilibrium was starting to re-appear; iii) that rents post 1945 had risen steeply, but no evidence had been presented about business profits comparative to business rents; iv) that few examples of landlords taking advantage of tenants had been given in witness; v) there would be difficulty in giving legislation granting security of tenure a 'systematic overhaul' once in place; and vi) it is impossible to abolish 'scarcity value' by legislation.[121] No action was taken on the basis of the Interim Report.

Lord Uthwatt was succeeded on his death in April 1949 by Lord Jenkins. In June 1950, Lord Jenkins presented the Final Report of the committee (the 'Final Report').[122] The Final Report also advocated for security of tenure (as opposed to compensation as a primary right) but was more measured fearing that automatic rights of renewal 'might prove worse than the disease it was designed to cure'.[123] The Final Report identified the failures of the 1927 Act, particularly

[119] Ibid.
[120] Ibid.
[121] Ibid 36-37.
[122] The Leasehold Committee (n 15).
[123] The Leasehold Committee (n 15) 115.

'adherent goodwill', which did not sufficiently protect the tenant's interests.[124] Instead, the Final Report offered up two alternative avenues: i) a compensation claim – under which approach the compensation package afforded to a tenant would be enhanced to deter landlords from preventing renewal;[125] or ii) a renewal approach – that relaxed the 1927 framework so that 'proof of a right to compensation for adherent goodwill is no longer a prerequisite to any claim to renewal'.[126] The renewal approach was preferred as less complex and costly for the landlord, though would remain subject to the 'just exceptions' under the 1927 Act that would deny the tenant renewal in certain circumstances.[127]

The Final Report considered how to balance the interests of landlords 'the majority' of whom 'behave fairly and responsibly towards their tenants in the matter of renewal', and how the interests of business tenants can be 'strengthened', and how 'the interests of the public at large' should be protected.[128] It was acknowledged that the tenant should not be afforded:

> *'[S]uch a degree of security as will protect the bad tenant or perpetuate the inefficient business; or will prevent the due expansion of existing businesses or the setting up of new ones; or will in other ways promote stagnation and interfere with redevelopment or other desirable change.'*[129]

[124] Ibid 118-119.
[125] Ibid 145.
[126] Ibid 148.
[127] Ibid 160.
[128] Ibid 142.
[129] Ibid 143.

2.1.4 The Landlord and Tenant Act 1954

It was three years before the Landlord and Tenant Bill was put before Parliament.[130] In the interim, a temporary measure had been introduced to protect shop tenants by allowing them to apply to court for a new one-year tenancy.[131] Haley noted that the fact this temporary 'experiment appeared to work well' likely assisted the warm 'welcome [afforded to the White paper proposals] in both Houses'.[132] The premise of the Bill was to permit the tenant to remain in occupation whilst they applied to the county court for a new lease.[133] The Bill proposed a standardised, arbitrary formula to calculate the amount of compensation payable to an unsuccessful tenant.[134] *The Economist* reported at the time that the 'White Paper contains proposals which should not be contentious in principle to strengthen the position of a business leaseholder in securing an extension of his lease'.[135] There is however evidence of old tensions, that security of tenure for business tenants 'nevertheless mangles again the shreds of any belief that the owner of property is entitled to do what he likes with his own'.[136]

Part II of the Landlord and Tenant Act 1954 (the '**1954 Act**') was introduced primarily to improve the protection afforded to tenants under the Landlord and Tenant Act 1927, which compensated tenants who were unsuccessful in their bid to renew their tenancy. The 1954 Act improved on the tenants' position by giving 'the tenant that degree of legal right which he

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[130] 'Government Policy on Leasehold Property in England and Wales' (Cmd 8713, 1953).
[131] Leasehold Property (Temporary Provisions) Act 1951.
[132] Haley (n 3) 223.
[133] 'Government Policy on Leasehold Property in England and Wales' (Cmd 8713 1953) 43.
[134] Ibid 50.
[135] Economist, 'Leasehold Reform' *Economist* (The Economist Historical Archive, 24 January 1953) <http://Tinyurl.Galegroup.Com/Tinyurl/B3uDv1> accessed 7 July 2019.
[136] Economist, 'Landlords and Tenants Again' *Economist* (The Economist Historical Archive, 19 December 1953) <http://Tinyurl.Galegroup.Com/Tinyurl/B3v9t9> accessed 7 July 2019.

might otherwise have expected from a good landlord'.[137] For 70 years, the 1954 Act has been the apparatus that governs lease renewals in England and Wales. The premise being that if a landlord wishes to re-let their premises at the end of a lease term then 'provided [the tenant] has been a [good tenant] and provided he pays a fair rent under present-day conditions' then it is reasonable that the tenant should be allowed to remain.[138] The 1954 Act was specifically intended to 'provide security of tenure [for the tenant]; to deal with their problems of dilapidations and rent, and the conditions under which they continue in occupation' and to provide 'security of tenure on terms which will be acceptable for tenants'.[139] In short, the 1954 Act addresses three tenant concerns: i) security of tenure; ii) the cost of dilapidations that the tenant might face; and iii) the level of rent and lease terms if the tenant stays on in the lease premises.[140] It was acknowledged that the implication of this legislative interference would 'adjust the balance' between these parties, which is necessary because achieving 'balance between the landlord and tenant is an important part of our social structure'.[141]

2.2. Reform of the Landlord and Tenant 1954

2.2.1 Law Commission Review: 1969

The first review of the Part II of the 1954 Act takes place 13 years later. The Law Commission notes that Part II of the 1954 Act is an important piece of legislation as it 'affects a considerable section of the community'.[142] Applications for new tenancies filed in the county courts

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[137] Lord Rochdale, Hansard HL vol 188 cols 107-52 (29 June 1954).
[138] Ibid.
[139] Ibid.
[140] Ibid.
[141] Ibid.
[142] Law Commission, 'Report on the Landlord and Tenant Act 1954 Part II' (Law Com. No. 17, 1969) 1.

increased steadily between 1964 and 1967: 1964 (2,563) 1965 (2,955) 1966 (3,962) and 1967 (4,258).[143]

The Law Commission's 1967 Working Paper on Landlord and Tenant Act 1954 (the **1967 Working Paper**) considered the state of the law to be unsatisfactory on a number of points, the main issues related to rents during holding over (the inception on interim rents see below) and the second to contracting outside the 1954 Act as there was appetite for this in the market.[144] The 1954 Act was amended so that tenancies under six months were automatically excluded from security of tenure, and it was accepted that 'there may be cases where a tenant is willing, for good reasons, to accept a tenancy for more than six months without rights under the Act'.[145] There was no intention for contracting out to become 'standard' or 'unexceptional'.[146] The procedure for contracting a lease outside the 1954 Act required a joint application of the parties to court under section 38(4) 1954 Act. The court routinely 'rubber-stamp' these applications.

2.2.2 Law Commission Review: 1988

In June 1984 the Department of Environment announced a review of the 1954 Act, and a consultation with interested bodies began. The Law Commission referred in their 1988 review to the fundamental purpose of the legislation as 'confer[ring] on business tenants security of tenure without otherwise protecting them from market forces'.[147] This is striking given that the rationale for the grant of the 1954 Act was to adjust the balance between contacting

[143] Ibid 50.
[144] Law Commission, 'Working Paper' (Law Com. No. 7,1967).
[145] Law Commission (n 142) 32-33.
[146] Bright (n 18) 240.
[147] Law Commission, 'Part II [Two] of the Landlord and Tenant Act 1954' (Law Com No. 111, 1988) 5.

parties, given shortages of property and to address rent levels and lease terms if the tenant wished to have a further tenancy. Responses to that consultation led the Department to specifically focus on the effect on small, as well as other, business tenants. No indication is given as to why smaller business tenants are the focus of this consultation, but conclusion drawn was that the 1954 Act 'still works satisfactorily, and that the balance of rights between both parties to business lettings particularly where small businessmen are involved either as tenants or landlords, is being maintained'.[148] Later in its report the Law Commission referred to the balance between the interests of landlord and tenants as being 'broadly right'.[149]

However, the Law Commission concluded that there were some 'technical defects causing concern to the users of the 1954 Act which, while they did not go to the heart of the legislation, could be reformed' to aid the satisfactory working of the Act in accordance with its original purpose.[150] In relation to these 'technical defects' the Law Commission commented:

> *'It must be recognised that almost every amendment to the Act, however slight, necessarily makes some adjustment to that balance. We would not rule out a reform merely because, taken in isolation, it alters the balance. That would quite unnecessarily eliminate the chance to improve the working of the [1954] Act. What we accept is important is that the underlying purpose of the legislation should remain the same, and that it should be achieved with the same degree of even-handedness.'*[151]

There is almost a sense here that this piece of legislation (and its ongoing reform) has not just taken on a life of its own, but has subsequently re-invented itself. No one, but those

[148] Ibid.
[149] Ibid.
[150] Ibid.
[151] Ibid.

applying and utilising it are quite sure of its adaptability, or of its next mutation in response to these latest 'technical' tweaks.

2.2.3 Law Commission Review: 1992

The 1954 Act is reviewed again, four years later, in 1992 amid UK recession. The Law Commission this time explained the background to this 'periodic' review and its aim accepts that the 1954 Act is 'an established part of the commercial property market' and as the 'practices of that market develop and change over the years, so it is appropriate for the statutory provisions' to be reviewed 'to ensure they are still fulfilling their intended purpose'.[152] The 1954 Act has transfigured from its social reform origins to the nervous system of the commercial property industry coordinating and standardising responses detecting and responding to market changes.

The Law Commission felt compelled to 'record' that a 'small minority argued that the legislation was no longer needed, as there was no shortage of commercial property a security of tenure regime imposed by statute was unnecessary'.[153] There is no introspection, given the obvious factual underpinnings to this statement, as to who is (or is not) vocal about abandoning of the 1954 Act, nor is there any examination of reasoning either for or against retention of this piece of legislation. The Law Commission was not concerned with 'fundamental justifications' for the 1954 Act, merely with improving its workings, to increase its usefulness and eliminate unnecessary formalities. Instead, the legislative procedure is said to be 'familiar to professional advisers and to major property owners [and] should not

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[152] Law Commission, *Business Tenancies: A periodic Review of the Landlord and Tenant Act 1954* (Law Com No.208, 1992) 5.
[153] Ibid 48.

therefore be changed unless there are clear countervailing advantages'.[154] There is neither consideration of the imbalance to small property owners, nor that the argument in favour of an alternative must have 'clear countervailing advantages' to major property owners, or major property occupiers. The language used to describe this framework is as a 'practical piece of legislation' which maintains an 'overall balance between landlord and tenant [that] is generally regarded as fair'.[155] Although it is acknowledged that 'almost any single alteration will change that balance' the Law Commission intended its recommendations to the 'broadly neutral'.[156] The sense is that that provided parties are in principle able to 'refer disputes to court' recourse to the courts should be kept to a minimum to limit expense and delay and reduce burden on the court system. There is no consideration of small property owners/occupiers who may not have recourse to costly courts in the event of a dispute.

It was broadly accepted in 1992 that the 1954 Act had stood the test of time. But whilst there was 'no mood for radical change' it was acknowledged that the 'intended balance between the tenant's occupational rights and the landlord's financial interests is difficult to maintain and that the provisions must be kept in step with the exigencies of contemporary commerce'.[157] The UK was emerging from recession and by 1992 'virtually all investment office properties situated in central London … were either vacant or let at rents above market value – i.e. overrented'.[158] This issue exposed commercial practices, particularly relating to rental valuation and the use of upwards only rent reviews ('**UORR**s') by landlords. UORRs are a

[154] Law Commission (n 152) 48.
[155] Ibid.
[156] Ibid.
[157] Haley (n 3) 228.
[158] Neil Crosby, Virginia Gibson and Sandi Murdoch, 'UK Commercial Property Lease Structures: Landlord and Tenant Mismatch' (2003) 40(8) *Urban Studies* 1487, 1488.

standard provision of an institutional lease ensuring rents either increase or maintain their previous level. The Department for the Environment first raised the issue of UORRS in 1993 following a paper by John Burton, which criticised the impact that Institutional Landlords had on leasing structures - because UORRs amounted to ratcheting up rents without any transparency.[159] The 'Government consulted on legislating in the specific areas of upward only rent reviews, confidentiality clauses and rent determination processes at rent review and lease renewal'.[160] However, rather than legislate to improve transparency, the government was instead persuaded to encourage the property industry to develop a scheme of self-regulation, the introduction of an industry code of practice known as the '**Lease Code**'.[161] The first Lease Code, introduced in 1995 (RICS, 1995), was developed by a committee of stakeholders in the leasing process. The 1954 Act has historically operated in a market controlled by landlords. The Lease Code was introduced to promote fair commercial leasing practices in a landlord-centric market. The government instructed the Reading Academics to monitor the uptake of the Lease Code within the commercial leasing sector between 1998 and 2009. The broad thrust of the Reading Academics' research was to demonstrate that the Lease Code has had no impact on the retail market.[162] However, 15 years later, self-regulation is still the means by which lease terms are held in check. The latest edition of the Lease Code was

[159] John Burton, *Retail Rents – Fair and Free Market*, (Adam Smith Institute 1992) 42.
[160] Department for the Environment, 'Consultation paper on commercial leases' (Department of the Environment 1993).
[161] Crosby, Gibson, Murdoch (n 158).
[162] Andrew Baum, Neil Crosby, and Sandi Murdoch, *Commercial Property Leases: A Critical Examination of the DoE Proposals*, (Centre for European Property Research, University of Reading 1993).

implemented in 2020.[163] The Lease Code relies on self-regulation; the retail sector monitors itself in implementing the terms of the Lease Code.

2.2.4 Law Commission Review: 2003

By 2003, the language used to evaluate reform of the 1954 Act had evolved. Reform must pass a 'desirability' test, which considers the extent to which the order removes or reduces burdens or confers benefits on landlord or tenants or the courts. The aim of reform was to 'make renewal or termination of business tenancies quicker, easier, fairer and cheaper'.[164] The Law Commission commissioned a Regulatory Impact Assessment to anticipate the impact of their proposals. This Assessment stated that, '[i]t is very difficult to estimate the total costs (and savings) for a typical business affected by the legislation', and as a result there was no attempt to calculate the overall financial impact of the proposed reform of the 1954 Act.[165] However, it was anticipated that the cumulative effect of these reforms would result in a reduction in court proceedings and associated legal costs.[166] In enacting the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003,[167] the Law Commission aimed to promote more harmonious relationships between landlord and tenant. In addition to streamlining the contracting-out process, the aim was to reduce:

[163] RICS, *Code for leasing business premises* (RICS 2020). The earlier 2007 lease code was the version referred to by interviewees at the time interviews took place.
[164] Select Committee on Regulatory Reform, *Second Report* (2002-3 182) 11 December 2002) 5.
[165] Ibid 46.
[166] Ibid 23.
[167] SI 2003/3096.

'[S]cope for manipulation by the parties [on one hand] and increase opportunity for resolution by negotiation on the other, [contributing] to more harmonious relationships between owners and occupiers of commercial property'.[168]

2.3 The Provisions of the Landlord and Tenant Act 1954

The following sections set out an overview of the main provisions of the 1954 Act. Included are those provisions that are referred to, or explored, in the Interview Data in chapters five to seven (inclusive).

2.3.1 Lease Renewals: Protected Tenancies

Section 23 1954 Act sets out details of the tenancies to which the 1954 Act applies. Section 23(1) states that the 1954 Act applies to any tenancy where premises are occupied by the tenant for the purposes of him carrying on a business. The definition of 'business' in section 23(2) includes a 'trade, profession or employment and includes any activity carried on by a body of personas, whether corporate or unincorporated'.[169] Examples of generosity of interpretation here are demonstrated by the Court of Appeal confirming that the running of a community centre by a local parish priest was a 'business'.[170] A property can be occupied for 'business' even if ancillary to the 'business' use, for example parking.[171] Section 23(1)(A) provides that the business must be carried on by 'a company in which the tenant has a controlling interest'; or if the tenant is the company then the person with the controlling interest in the company should be in occupation.

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[168] Select Committee on Regulatory Reform, *Second Report* (2002-3 141) 19 December 2002.
[169] Section 23(2) 1954 Act.
[170] *Parkes v Westminster Roman Catholic Diocese Trustee* (1978) 36 P&CR 22.
[171] There are however limits. See *Hillil Property & Investment Co Ltd v Naraine Pharmacy Ltd* (1980) 39 P. & C.R. 67 use as a 'temporary dumping-ground' fell outside the remit.

Section 23(1) provides that the 1954 Act will only protect a tenancy (which includes a subleases),[172] but means that licences fall outside the remit of the 1954 Act. The tenant must be in occupation of premises for business purposes, which 'varies according to the subject matter'.[173] The extent of presence required by tenant is a matter of fact and degree. Occupation links to the extent of the tenant's 'holding', which is discussed at section 2.3.2 below.

Section 43(3) 1954 Act specifically states that the 1954 Act does not apply to shorter leases granted for a term certain not exceeding six months, unless: the tenancy contains renewal or extension provisions beyond the initial six-month period; or the tenant has been in occupation for a period (including any predecessor's period of occupation) that exceeds twelve months. Tenancies at will are not protected by the 1954 Act.[174] However, where the contractual lease term has expired the tenant holds over under a tenancy at will, even where negotiations have continued 'at irregular intervals […] often in a desultory fashion […] for over a decade'.[175]

2.3.2 The Holding: The Area Physically Occupied Under the Lease

The 1954 Act uses the term 'the holding', which is defined in section 23(3) to mean the 'property comprised in the tenancy' and which is employed for the purpose of a business. An order for the grant of a new tenancy by the court is 'an order for the grant of a new tenancy of the holding; and in the absence of agreement between the landlord and the tenant as to the property which constitutes the holding the court shall in the order designate that property

[172] Section 69(1) 1954 Act.
[173] *Graysim Holdings Ltd respondent v P. & O. Property Holdings* Ltd [1996] A.C. 329 (HL) 334.
[174] *Wheeler v Mercer* [1957] A.C. 416, 417.
[175] *Valley View Health Centre v NHS Property Services Ltd* [2022] EWHC 1393 (Ch) para 186.

by reference to the circumstances existing at the date of the order'.[176] In a recent 2024 case, the landlord opposed the grant of a new lease to Sainsbury's on the basis that it intended to carry out redevelopment works to the basement.[177] Sainsbury's successfully argued that it was able to shrink its business operation into a smaller part of the overall holding to defeat the landlord's opposition to grant of a new tenancy on grounds that part of Sainsbury's holding was affected by the landlord's re-development plans.[178] Sainsbury's argued successfully that the definition of holding under section 23(3) applies only to 'those parts of the demise that the [tenant] is occupying, and not the whole demise'.[179] This serves as clarification that if the landlord's opposition to the new lease fails, the extent of the new lease that can be granted to the tenant can be different from that it occupied at the date of applying for renewal.

2.3.3 Section 34 of the 1954 Act: Determination of the New Rent

A significant theme of the data from this thesis concerns pressures exerted on valuation processes to cause inconsistency as a means of challenge orthodoxy. The legal framework for agreeing rental valuation is set out below together with the RICS approach to valuation.

Section 34 of the 1954 Act provides that the rent payable under a statutorily renewed lease is either at a level 'as may be agreed between the landlord and tenant' or if the parties are unable to agree then the court or Professional Arbitration on Court Terms (**PACT**) arbitration process will determine the level of rent 'having regard to the terms of the tenancy the holding might reasonably be expected to be let in the open market by a willing lessor'. There is 'an

[176] Section 32(1) 1954 Act.
[177] *Sainsbury's Supermarkets Limited v Medley Assets Limited* (county court 21 March 2024 unreported) 61.
[178] Ibid 248.
[179] Ibid 255.

absence of authoritative guidance as to how the rent is to be calculated for the purposes of section 34', though if 'comparable evidence exists, the matter is more straightforward and [typically] up-to-date rental figures for such properties will guide the court'.[180] A renewal includes the tacit assumption that the tenant is 'willing'. [181] Section 34 goes on to disregard the effect of certain factors on rental valuation. These factors include the tenant's prior and continuing occupation, tenants' improvements, and any value attached to the holding by virtue of the tenant's occupation.

In 1996, the RICS introduced professional guidance on open market valuation. The current version of the International Valuation Standards (the Red Book) defines 'fair market value' as 'the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion'.[182] In calculating market rent the valuer must consider 'the terms and conditions of the lease'.[183] Lease renewals are typically valued on a market-based approach, which means that an indication of value is obtained by 'comparing the asset with identical or comparable assets for which price information is available'.[184] Rental valuation is based on evidence of comparable properties and their rental values in the vicinity. Comparable evidence is the basis of commercial property valuation.[185] This means that rental valuation 'essentially proceeds by analogy' with a valuer searching 'for an analogue which is as close as possible to that

[180] Haley (n 74) 234.
[181] Ibid 232.
[182] RICS, Int*ernational Valuation Standards*, *RICS* (London 31 January 2022) 7.
[183] Ibid 25.
[184] Ibid 35.
[185] RICS, 'Comparable Evidence in Property Valuation' (1st ed RICS Professional Information).

[property] which he has to value'.[186] There are occasionally some unusual premises for which there is no comparable evidence.[187] Where there are 'significant differences' between comparable assets then 'adjustments' should be made.[188]

In determining a new rent under section 34 of the 1954 Act, a judge considers the lease renewal market, which is an artificial replica of on-market transactions. In chapters five to seven, I consider how parties are seeking to challenge orthodox valuation principles. For instance, the recent case of *WH Smith Retail Holdings Ltd v Commerz Real Investmentgesellshaft mbh* (the ***WH Smith case***), discusses rental valuation during the pandemic where the passing rent is £953,000 and rent was reduced to £550,000.[189] The case is an insight into tenants challenging overinflated rents and the problematic nature of comparable evidence, which effectively looks to evidence of what the market once was, rather than what it currently is. The *WH Smith* case gives an insight into section 34 valuation as the judge was asked to consider the 'appropriate rental for an empty unit' to be occupied by a 'hypothetical incoming tenant'.[190] WH Smith challenged the statutory hypothesis which assumes a willing tenant in the market on the basis that there is a lack of demand in the retail market generally and particularly at the Westfield Shopping centre arguing that this should indicate a nil rent.[191] Rather than focussing on looking backwards to comparable evidence of what market was, the Multiples attempt to shift the focus instead to evidence of lack of

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[186] As per Lewison J *Marklands v Virgin Retail* [2004] 2 EGLR 43, 9.
[187] See the often-cited case of *Humber Oil Terminals Trustee v Associated British Ports* [2012] EWHC 1336, 463 where a 'valid recent comparable transaction' was unavailable due to the uniqueness of the oil jetty.
[188] RICS (n 182) 35.
[189] (County court, 25 March 2021 unreported) 4.
[190] Ibid 45.
[191] Ibid 46. Also see *HPUT Trustees No1 Limited and HPUT Trustees No2 Limited v Boots UK Limited* (county court 24 May 2021 unreported) 118, where HHJ Dight is careful to state he considers the market in relation to medium-sized stores (despite evidence of void units) not to indicate 'a lack of demand'.

demand as the basis for a percentage rental cut by challenging the presumption that there is any 'willing tenant' in the market as conceptualised under section 34 of the 1954 Act.

The level of rent on renewal of a tenancy is often the final term to be agreed because the level of rent is influenced by and subject to the other lease clauses (duration, user, alienation), which may themselves have a bearing on the level of rent. Section 34(3) specifies that the new lease may include 'such provision for varying the rent as' the court thinks fit.[192] It is generally accepted that the court will include a rent review provision for leases with a term greater than five years.[193] It was invariably the case that rent review is upwards-only, not either way. It is accepted that details of the lease terms can affect its valuation if the negotiated user clause or repair clause are oppressive in comparison to market positions so that this can have the effect of depressing or increasing the rent.[194] This is why rent levels are traditionally agreed after the terms of the lease as they potentially impact on the level of rent. If there are no comparables available, then a court would look to local increases in rent.[195] This method of valuation does not encompass turnover rents as disregarding the tenant's current occupation is inconsistent with valuation based on the tenant's turnover at the premises.[196]

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[192] *Re 88 High Street, Kilburn* [1959] 1 WLR 279, 281 The court was persuaded to grant the tenant a longer lease together with an upwards only rent review 'to guard against inflation'. Section 34(3) of the 2003 Order later formalised this position.

[193] Tasmin Cox and Oliver Radley Gardner, 'The art of the possible: changing lease terms on renewal' (Falcon Chambers October 2017) 33.

[194] See *Cardshops Ltd. v Davies* (1971) 22 P. & C.R. 499, 500 where the inclusion of a surrender 'was so novel and burdensome a departure from the terms of the former tenancy' that the rent was adjusted to take account of this.

[195] In the case of *National Car Parks v Colebrook Estates Ltd* [1983] 1 WLUK 373 where the judge dismissed comparable evidence produced in relation to a basement car park because comparisons made between W1 and central London were in the judge's view 'ridiculous' - see Michael Blackledge, *Valuation Methods*, (Routledge 2009) 184.

[196] For a comprehensive overview of 'turnover rents', which link to the trading success of the tenant's business instead of comparable properties see Paul Clark's article 'Turnover Rents: part 1' (2014) 1 *Conveyancer and Property Lawyer* 4.

In open market negotiations it is standard for landlords to offer incentives to incoming tenants to enter the lease. A typical incentive is a rent-free period. Rent free periods are sometimes awarded to the tenant because the new incoming tenant needs to fit out, meaning carry out works to the premises, to make them suitable for business occupation. However, in some cases, rent free periods are a means of reducing the overall rental liability whilst the landlord retains the 'headline' figure of the rent on the lease. To illustrate, a rent of £100,000 per annum for a 10-year lease with a 12-month rent free period means that the tenant is paying £900,000 over the term, or £90,000 per annum. On renewal landlord and tenant typically argue from opposite positions. The landlord's position is that the tenant does not need a fitting out period because they are already in occupation and that the reality of the situation is that if a tenant is awarded a rent concession for fitting out, that would only be awarded to a brand-new incoming tenant to carry out works, then on renewal the tenant is effectively achieving a windfall. The tenant's argument is more abstract and relies on the interpretation of section 34(1) of the 1954 Act, which is based on the notion of a hypothetical letting.

The tenant argues that in a new letting the hypothetical tenant would receive an allowance for fitting out the premises. Furthermore, section 34(1)(a) of the 1954 Act specifically requires the court to disregard 'any effect on rent of the fact that the tenant has or his predecessors in title have been in occupation of the holding'. The tenant's argument is that the judge should ignore the tenant's ongoing occupation, including original fit out works, and treat the premises as though the tenant were not there, and determine the rent of the basis of the faceless, hypothetical tenant – which would include a rent-free period. There are several county court decisions on this point, none of which are binding. For instance, *Max Mara v*

Pearl Assurance, the first of such cases, favoured the landlord on HHJ White's reasoning that if the tenant has already fitted out, then it should not receive an 'unwarranted windfall'.[197] Subsequently, the majority of cases were found in the tenant's favour.[198] HHJ Bailey in *HMV Music v Mount Eden Land*, accepted the tenant's argument that questioned 'why the landlord should obtain a higher rent that they would get on the open market merely because the sitting tenant is renewing their lease'.[199] The complexity here is that the rent is set by reference to the fiction of section 34(1) and the 1954 Act operates within that fiction. Rather than importing the actual landlord and tenant into the hypothetical retail market, the characters are intended to be neutral, and those neutral characters placed within a hypothetical retail market. However, there is no binding authority, and, until a decision is challenged on appeal, there are simply a myriad of opposing decisions and reasonings that broadly, in number at least, favour the tenant's position.[200]

More recently, the county court again found in the landlord's favour in *HPUT Trustees No1 Limited and HPUT Trustees No2 Limited v Boots UK Limited* where the parties had a 'very lively debate' over the hypothetical rent free period in 311 leases.[201] HHJ Dight concluded that no rent free period should be allowed to the tenant because: i) under section 34(1) rent was payable from day one, ii) the drafting of section 34(1) does not suggest a rent free period, iii)

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[197] (County court 16 May 1996 unreported).
[198] For decisions in the tenant's favour see *HMV Music v Mount Eden Land* (county court, 17 January 2012 unreported), *Iceland Foods v Castlebrook Holdings* (county court, 3 September 2013 unreported) and more recently *WH Smith* (n 189).
[199] Catherine Taskis and Anthony Tanney, 'Fitting in or fitting out?' (*New Law Journal* 6 August 2021) < New Law Journal> accessed 22 March 2022.
[200] See Kirk Reynolds and Elizabeth Fitzgerald, 'Rent free fitting out periods and s34 of the Landlord and Tenant Act 1954' (Legal Briefing, July/August 2015) < https://www.inhouselawyer.co.uk/legal-briefing/.> accessed 22 September 2020.
[201] (County court 24 May 2021 unreported) 2.

there is no theoretical conflict between valuing a hypothetical model and taking reality into account, iv) the tenant does not, in reality, seek a rent free period, v) disregard of the sitting tenant does not mean ignoring the assumption that they will be going back into the premises to use them as before; and vi) inducement is part of a commercial negotiation for a new lease, which is illogical in this situation.[202]

2.3.4 Section 24A and 24C of the 1954 Act: Determination of the Interim Rent

The 1969 reforms considered that the operation of section 24 of the 1954 Act, which automatically continues a tenancy on the same terms (including rent) until it is terminated in accordance with the 1954 Act, might induce tenants to delay acceptance of a new tenancy where rents are to increase. The Law Commission stated that 'it has been suggested to us that the provisions of the Act are unsatisfactory' because the operation of the provisions of the 1954 Act have 'given rise to uncertainty or are likely to cause inconvenience or even injustice'.[203] Where rent levels would increase under the new tenancy there might be an incentive for tenants to delay entering into the new lease creating injustice for landlords.[204]

The report acknowledged that inducement to delay proceedings exists both 'when the landlord opposes an application for a new tenancy (when tenant knows landlord will ultimately succeed)'; and equally so when the landlord offers to grant a new tenancy.[205] In this latter case, a tenant who is not prepared (or is delaying) accepting a new tenancy at the new rent may nevertheless play for time by opposing the landlord's proposed terms, and then

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[202] Ibid 157-162.
[203] Law Commission (n 142) 1.
[204] Ibid. Tactically, it may worth a tenant's while to postpone a final order for a considerable period particularly where rent reserved in the original is below current market rent.
[205] Ibid 8.

apply to the court to revoke the order for a new tenancy when it is finally made.[206] The introduction of interim rent in 1969 was then to prevent a tenant 'in times of inflation' from unfairly prolonging payment of the old rent under section 24.[207]

In 1969, following the Law Commission's Review of the 1954 Act, the Law Commission proposed the introduction of measures to reduce the commercial opportunities afforded to tenants. A new section 24A was devised, which basically provides courts with the ability to determine the intermediary rent – that is the rent whilst the tenant is holding over under the existing tenancy following expiry of the contractual term.

For interim rent to be payable, a party must make an application to court for interim rent to be determined. An interim rent application is usually made as part of the lease renewal proceedings after the landlord, or tenant, have served a section 25 notice, or 26 request, respectively. Interim rent is payable for a period from 'the appropriate date', either:

i. The earliest date that that the existing lease could have been terminated where a landlord's section 25 notice has been issued; or
ii. The earliest commencement date of the new lease where a tenant's section 26 request has been served. [208]

The interim rent regime, contained in section 24C, applies only to unopposed renewals of the whole of the original premises demised. Section 24D applies in situations where the

[206] Ibid.
[207] Haley considers the position in *Re 88 High Road, Kilburn* where tenants are incentivised to appeal a first instance decision so that the 'continuation tenancy [and the old rental level] continues until the end of three months subsequent to the final disposal of the tenant's application' - see Michael Haley, 'Interim Rents: The Present Imperfect?' (1993) 22(1) *Anglo-American Law Review* 97, 100.
[208] Section 24B 1954 Act.

landlord opposes renewal.[209] The procedure in relation to an unopposed section 24C renewal is as follows:

i) The landlord has served a section 25 notice indicating that he will not oppose the grant of a new tenancy; and the tenant is in occupation of the whole of the property demised in the relevant tenancy; or

ii) The tenant has previously served a request under section 26 at a time when he is in occupation of the whole of the property demised in the relevant tenancy; and the landlord has not given notice that he will oppose the grant of a new tenancy under section 26(6).

In these cases, the level of interim rent is usually the same as is payable at the commencement of the new lease.[210] There are two exceptions where the parties may argue successfully to depart from this rule. The two exceptions are set out in 24C(3) and (4) as follows, which would replace the section 34 rent agreed for the new tenancy:

(a) The landlord or the tenant shows to the satisfaction of the court that the interim rent […] differs substantially from the relevant rent; or

(b) The landlord or the tenant shows to the satisfaction of the court that the terms of the new tenancy differ from the terms of the relevant tenancy to such an extent that the interim rent is substantially different from the rent

[209] The Civil Procedure Rules were amended to distinguish between opposed and unopposed claims. Opposed claims are now made under Part 7 claim form, whereas unopposed claims continue to be made under Part 8.
[210] Section 24C (2) 1954 Act.

which (in default of such agreement) the court would have determined under section 34 of this Act […].[211]

These provisions operate to give the courts flexibility to assess a different interim rent in situations where there has been a lengthy delay between service of the notice and grant of the new lease, or where the terms between new and old leases were markedly different so as to generate the newly assessed level of rent that which is payable between the end of old contractual lease term and commencement of the new lease term.

The default rule under section 24(D)(1) applies in relation to contested renewals only. This section states that the 'interim rent is that which is reasonable for the tenant to pay while the relevant rent continues' by virtue of section 24 of this Act. In determining the interim rent that it is reasonable for the tenant to pay, the court should have regard to the following (under section 24(D)(2)):

a) the rent payable under the previous tenancy; or

b) the level of rent paid under any sub-tenancy.

Otherwise, the rent shall be decided pursuant to sections 34(1) and (2) which 'shall apply to the determination [of the interim rent] under that section if a new tenancy from year to year of the whole of the property comprised in the relevant tenancy were granted to the tenant by order of court'.[212]

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[211] A 10% difference in rent was not held to be substantial in *Brooker v Unique Pub Properties* [2009] EWHC 2599 (Ch), whereas the county court more recently - in *MacWilliam v Clough* [2014] PLSCS 58, [91-3] - determined that a 40% decrease in market rent at the hearing date amounted to a substantial different. The latter case is reported in Lina Mattsson, 'Interim Rent and Covid-19 pandemic – tactical considerations' (Gatehouse Chambers, 19 May 2020) <https://gatehouselaw.co.uk/interim-rent/ > accessed 22 September 2020.

[212] Section 24D (2) See the case of *Humber Oil Terminals Trustee* (n 187) which concerned determination of interim rent for an oil jetty.

A section 34 rent requires the court to determine the rent that which, 'having regard to the terms of the tenancy [the old tenancy], the holding might reasonably be expected to be let in the open market by a willing lessor'.[213] David Holland QC argues that it is the interrelation of these three different perspectives: i) the rent reasonable to pay during continuation; ii) the rent payable under the terms of the relevant (new) tenancy; and iii) the rental valuation of a tenancy that continues 'year to year' under the general provisions of section 34(1) that pose 'conceptual' and occasional practical difficulties in application.[214] Part of the complexity lies in employing a section 34 valuation which is ascertained by reference to comparable evidence when retail leases do not run on a yearly basis. This means a valuer would be unlikely to find be comparable evidence available in the market.

Interim rent was recently considered by the county court in *S Franses Limited v The Cavendish Hotel (London) Ltd (**Franses 2021**)*.[215] The court considered the steps to determining the interim rent to be as follows:

i) Identify the open market rent for a year-to-year tenancy – starting on 2016 to the date of the new lease – the interim rent period.
ii) Consider whether 'adjustments' were required to 'cushion' against changing rent levels.
iii) Ensure the interim rent is reasonable for the tenant to pay bearing in mind the benefit obtained by the tenant under the tenancy.[216]

[213] Section 34(1).
[214] David Holland QC, 'Rent and Interim Rent Under Part II of the Landlord and Tenant Act 1954: An Overview and Update' (Landmark Chambers, 22 October 2012) < www.landmarkchambers.co.uk/> accessed 22 September 2020.
[215] (County court 18 June 2021 unreported).
[216] Ibid 94-102.

Applying these steps, the previous rent reserved was £220,000 and the new rent £140,650, whereas the rent for the year-to-year tenancy was set at £160,000.[217] The landlord's valuation expert had not valued the interim period on a year-to-year basis, rather on a 5 yearly basis which was incorrect. The judge was then left with the yearly figure put forward by the tenant of £140,000. The judge did not fully accept this, however, and concluded an interim rent of £160,000 pa was reasonable because the tenant's figure was 'too low for at least the first 3.5 years of the occupation both because of the difference between it and the passing rent at the end of the existing tenancy, but also because of the evidence about the market value of Jermyn Street properties over that time'.[218]

2.3.5 Section 35 of the 1954 Act: Terms of the Renewal Lease

When a lease renewal is negotiated, the terms agreed relate to the relative bargaining strength of the parties, and on the ability of their professional advisors, if any are instructed. When that lease ends, the terms of the lease renewal are negotiated and agreed between the landlord and the tenant, or, absent agreement, are determined by the court (other than rent and term) pursuant to Section 35 of the 1954 Act. Certainly, renewal presents the ability to align or revisit lease terms in relation to the specific business at those premises, or align terms and strategies across a portfolio and it is possible to see how this might 'appeal to both landlord and tenant alike'.[219] If agreement cannot be reached, then section 35 directs the court to 'have regard to the terms of the current tenancy and to all relevant circumstances'.[220] Haley

[217] Ibid 106 & 111.
[218] Ibid 112.
[219] Nathanial Duckworth, 'Section 35 of the Landlord and Tenant Act 1954: a chance to re-write a few wrongs?' 2008 12(5) *L&T Review* 156, 156.
[220] Section 35(1) 1954 Act.

notes that '[i]t is usually the landlord who seeks revision and the tenant who resists it'.[221] Haley goes on to note, however, that:

> *'The extra-statutory framework emerges that, before allowing a variation, a four-stage test must be satisfied. First, a reason must be shown for the variation; second, the other party must be adequately compensated by the effect the new term will have on rent; third, the tenant's business will not be impaired; and fourth, it is fair and reasonable to make the change. It is noticeable that this places the tenant on statutory renewal in a stronger position than a new tenant negotiating in the open market'.*[222]

There is potentially divergence between terms of 'on-market' lease terms and 'renewal market lease terms'. Haley remarks that it is unclear '[w]hether this advantage to the tenant, and the corresponding detriment to the landlord, was envisaged by Parliament'.[223] The intention of section 35 is not to protect from market forces and the courts will not impose commercial terms that simply improve one party's position under the lease to the detriment of the other.[224] Crosby and Murdoch noted in 2000 that lease renewals differ from open-market lettings because:

> *'[O]n a lease renewal, the rent bears a closer correlation to the terms of the renewed lease than appears to be the case on a new letting. This is positively indicated by a significant number of respondents. Furthermore, the nature of the renewal exercise (in which the statutory starting point for the new lease is the terms of the existing lease) leads surveyors, when negotiating both the terms and the new rent, to focus on the*

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[221] Haley (n 74) 238.
[222] Ibid 239.
[223] Ibid.
[224] See *Charles Clements (London) Ltd v Rank City Wall Ltd* [1978] 1 WLUK 67, 68 where the court refused modification of a restrictive user clause to include words proposed by the landlord that 'consent [to modifying the user was] not to be unreasonably withheld' as this would increase the rent.

changes to the existing lease; […] it may be reasonable to surmise that those changes are a material factor in the settling of the rent'.[225]

The scope of the court's discretion in determining the terms of the new lease is set out in the leading case of *O'May v City of London Real Property Co Ltd* (***O'May***).[226] In *O'May* the House of Lords held that it is for the party seeking to depart from the terms of the existing lease that must show that the change is 'fair and reasonable'.[227] *O'May* relates to tenancies of an office block and concerned the desire of the landlord to vary the structure of payments relating to the provision of services. Instead of recovering a fixed rolled up sum for repair, service charge, and maintenance obligations as per the old lease, the landlord wished to separate out these payments and recover them as service charge rents[228]. This structure meant that the landlord would not bear any shortfall that it could not recover from the tenant.

The level of rent was offset to take account of this shift in financial burden to the tenant.[229] The Court of Appeal did not sanction the departures from the original lease on the basis that the landlord wished to 'transfer a contingent liability and immeasurable liability' to the tenant, who only had a limited (five year) interest in the property.[230] The Court of Appeal decision was upheld by the House of Lords on appeal, who held that the burden of changing the terms of the current tenancy, against the will of the other party, rests on the party proposing the change to establish that the change is fair and reasonable and the landlord had failed to

[225] Neil Crosby, Sandi Murdoch, 'The influence of procedure on rent determination in the commercial property market of England and Wales' (2000) 18(4) *Journal of property investment & finance* 420, 434.
[226] [1983] 2 AC 726 (HL).
[227] Ibid 731.
[228] Ibid 727.
[229] Ibid.
[230] Ibid 221.

demonstrate this.[231] Part of the landlord's argument for the change was that the modern trend in the retail market was to move away from the all-inclusive model of collecting monies under a lease and the shift was towards clear leases.[232]

Lord Wilberforce accepted that modern lease trends were a relevant factor for consideration. He considered the landlord's long-term freehold interest vis-à-vis the tenant's short-term leasehold interest and determined that the assumption by the tenants of unknown service charge costs constituted a significant burden, and that it was more appropriate for the landlord to bear the longer terms cost risks associated with the property.[233]

In *O'May*, the House of Lords considered the key question, what it meant to 'have regard' to the terms of the existing lease and what 'fair and reasonable' meant. Lord Hailsham, reviewing sections 34 (determination of rent payable under a new tenancy) and 35 (the terms of the new tenancy) affirmed that Parliament did not intend to 'protect the tenant from the operation of market forces in the determination of rent', but that 'in contrast to the determination of rent, it is the court and not the market forces which has an almost complete discretion as to the other terms of the tenancy'.[234] Lord Hailsham states that the 'court must begin by considering the terms of the current tenancy' and that 'the burden of persuading the court to impose a change in the lease terms rests on the party proposing the change'.[235] The changes proposed must 'be fair and reasonable' in the context of the case and should consider:

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[231] Ibid 727.
[232] Ibid 731.
[233] Ibid.
[234] Ibid 740-741.
[235] Ibid 740.

> *'[T]he comparatively weak negotiating position of a sitting tenant requiring renewal, particularly in conditions of scarcity, and the general purpose of the Act which is to protect the business interests of the tenant so far as they are affected by the approaching termination of the current lease, in particular as regards his security of tenure'.*[236]

Section 35 is crucial as it relates to the remaining terms of the tenancy and whilst the courts must follow the direction to 'have regard to' the terms of the current tenancy and to all relevant circumstances these words are 'elastic' and 'compel something between an obligation to reproduce existing terms and an unfettered right to substitute others'.[237] Lord Wilberforce also indicates that 'there is no intention to freeze', or in the metaphor used by learned counsel, to 'petrify' the terms of the lease particularly as old lease terms may be unsuitable, or out of date, but in determining the new lease terms the courts must consider the objections of the tenant in accordance with fairness and justice.[238] Section 35 permits a court to settle terms of a new lease that are a change from the existing lease, if the court considers the change to be justified as fair between the parties. The landlord in *O'May* was unable to persuade the court that a change to the lease terms (to levy a separate service charge) was fair between the parties.

The more recent case of *Edwards & Walkden (Norfolk) Limited v The Mayor and Commonalty and Citizens of London*, concerned 51 claims for new tenancies by tenants who were traders at Smithfield Market.[239] The principal question was whether the tenants would

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[236] Ibid 740-741.
[237] Ibid 747.
[238] Ibid.
[239] [2013] 1 P.&C.R. 10

continue to pay 'an all-inclusive' rental figure that comprised one rolled-up figure that encompassed rent and service charge (the tenant's preference) or whether the structure of the payment terms of the lease would be altered to include separate rent and service charge payments (the landlord's preference).[240] In *Edwards* the landlord was successful in persuading the courts that a change from existing terms was fair and reasonable in the circumstances of the case. This decision appears to erode the decision in *O'May*, however the tenants in the case had conceded that the landlord should be able to recover its costs from the tenant(s) of maintaining the structure of the building. The most effective mechanism to do this is a variable service charge, rather than a fixed contribution as it (in principle) reflects actual expenditure ensuring landlord neither profits, nor loses from provision of services. Furthermore, the history of agreed lease provisions at the site showed that tenants had previously accepted variable service charge arrangements in their leases.[241]

Although *O'May* and *Edwards* focus particularly on payment structures in leases, these cases give an insight into the court's decision-making which will apply to any outstanding lease term that remains to be determined by the court. These cases 'impose an onus upon a party seeking to introduce new, or substituted, or modified terms, to justify the change, with reasons appearing sufficient to the court'.[242]

2.3.6 Section 35 of the 1954 Act: Statutory Updating

Section 35(2) specifically acknowledges that the consideration of 'all relevant circumstances' includes the operation of Landlord and Tenant (Covenants) Act 1995. Often it

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[240] Ibid 136.
[241] Ibid 161.
[242] *O'May* (n 226) 747.

is of relevance to a tenant whether the landlord can require them to give an authorised guarantee agreement (an 'AGA') under the 1995 Act. Neuberger J (as he was then) sets out the position in *Wallis Fashion Group Limited v CGU Life Assurance*[243] that a landlord can only ask for an AGA if 'lawfully imposed', and where an alienation covenant is silent, the landlord can only refuse consent (following section 19 of the 1927 Act) to assign where it is reasonable to do so.[244] Certainly, renewal presents the ability to align or revisit lease terms in relation to the specific business at those premises, or align terms and strategies across a portfolio and it is possible to see how this might 'appeal to both landlord and tenant alike'.[245]

Currently one controversial area concerns including obligations to comply with new sustainable property and environmental legislation. The Climate Change Act 2008 (2050) Target Amendment Order 2019 (which amended the targets set out in the Climate Change Act 2008) came into force on 26 June 2019.[246] There a focus on decarbonisation of the commercial property sector through legislative provision that impact on lease negotiations.[247] The Committee on Climate Change recommended the: i) strict enforcement of existing standards; ii) overhaul of approaches to low-carbon heating; and iii) major improvements to energy efficiency of buildings.[248] The CCC Report requires a 'clear trajectory' of energy efficiency

[243] [2000] *L. & T.R*. 520, 521.
[244] Ibid.
[245] Nathanial Duckworth, 'Section 35 of the Landlord and Tenant Act 1954: a chance to re-write a few wrongs?' 2008 12(5) *L&T Review* 156, 156.
[246] The aim is to reduce the UK's net carbon contribution by 100% from 1990 baseline levels by 2050.
[247] Tarnya Mason, 'Paving the Way to Net Zero - Expect a "Ramp-up" in Green Policies' (2019) 23(6) *L. & T. Review* 211.
[248] Committee on Climate Change, 'Summary Report: 2019 Progress Report to Parliament' (July 2019) https://www.theccc.org.uk/wp-content/uploads/2019/07/2019-Progress-Report-Summary.pdf> accessed 26 January 2020.

standards 'covering owner-occupied, social and private-rented homes and non-residential buildings'.[249]

In addition to EPC legislation, which has required a landlord to produce an Energy Performance Certificate since 6 April 2008 on the 'sale, or rental' of commercial premises,[250] the Government subsequently introduced The Minimum Energy Efficiency Standards which originated from The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 (the **MEES Regulations**).[251] The combined effect of these legislative frameworks is intended to ratchet up energy efficiency standards. MEES set an introductory target for commercial properties to achieve an 'E' rating. Under Part 3 of the MEES Regulations landlords have been unable to grant new leases of band F properties from 1 April 2018.[252]

From 1 April 2023, landlords are unable to continue to let 'sub-standard' properties, those with an EPC rating of F or G without valid exemption. Valid exemptions are registered on the Private Rented Sector Exemption Register and last for five years. There are three valid exemptions: i) consent, that the landlord is unable to undertake works without consent of the tenant, superior landlord, planning authority etc and that consent is not available; ii) the works would devalue the property by 5%, or more; or iii) recommended improvements have been made and the property remains sub-standard property.[253] Landlords and tenants may try to include provision in lease terms for properties which will only be affected by the MEES

[249] Ibid.
[250] Explanatory Note to Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment) Regulations 2008 (6 March 2008).
[251] MEES are derived from the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 (SI 2015/962).
[252] Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 (SI 2015/962).
[253] Chapter 4 Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 (SI 2015/962) [31-33].

legislation at a later date. By way of example, Carroll has written of the landlord's failed attempt in the *WH Smith case* to include recovery of the cost of energy efficiency works on renewal by including MEES provisions within its service charge regime.[254] Furthermore, Hewitson discusses the inclusion of so-called 'green clauses' on renewal his discussion of the judgement in *Clipper Logistics plc v Scottish Equitable plc,*[255] concluding that adding MEES obligations to the tenant's responsibilities on renewal will not be regarded as fair and reasonable.[256] So far, the legal regimes pertaining to achieving carbon neutral in commercial buildings and security of tenure under the 1954 Act are incongruous.

2.3.7 Landlord's Opposition to Renewal: Section 30 of the 1954 Act

When a tenant applies for a new tenancy under section 24 of the 1954 Act the court is required to grant a renewal unless the landlord opposes the grant of the new lease under one of seven grounds of opposition contained in section 30(1).[257] One of those grounds – section 30(1)(f) – ('**ground (f)**') is that is that the landlord is intending to demolish or reconstruct the premises. The purpose of the 1954 Act is to protect a tenant's occupation, but not at the cost of development potential. The mechanics of the landlord regaining premises is contained in ground (f). The landlord is required to show that it cannot reasonably undertake the works of construction 'without obtaining possession of the holding'.[258] The landlord will not be

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[254] Emily Carroll, 'Environmental White Elephants & Carbon Reduction Commitment: *WH Smith Retail Holdings Limited v Commerz Real Investmentgesellshaft mbh*' (University of Oxford 25 October 2021) <https://blogs.law.ox.ac.uk/r> accessed 24 February 2022.
[255] *Clipper Logistics plc v Scottish Equitable plc* (county court, 7 March 2022 unreported).
[256] Russell Hewitson, 'Should we be turning our commercial leases green?' 2024 (2) *Conveyance and Property Lawyer* 98, 103.
[257] The tenant may also be precluded from renewing their lease under s57 of the 1954 Act where possession is required for redevelopment by a public body. In such circumstances compensation is similarly available to the tenant.
[258] Section 30(1)(f) 1954 Act.

successful in obtaining possession if the scope of the works is not extensive and the tenant will agree to include terms into the new tenancy permitting the landlord access for purposes of carrying out those works; or in the alternative if the tenant is willing to accept a new lease of a smaller holding with the landlord accessing the remainder to facilitate the works.[259]

Re-development grounds have attracted suspicion as to the landlord's true intentions. In *Betty's Cafes Ltd v Phillips Furnishing Stores Ltd,* Lord Denning stated that it would be:

> *'[D]eplorable if a landlord could be allowed to get an advantage by misrepresenting his state of mind or any other fact [when] he, in fact, had not such intention at all'.*[260]

For this reason, the courts are vigilant to situations where landlords had 'fraudulently misrepresented their intention'.[261] There is a danger that where a landlord was initially successful, but then challenged by the tenant on the grounds of fraudulent misrepresentation,[262] that the tenant's lease may already have been surrendered leaving no recourse against the landlord. The courts look for a fixed and settled intention to redevelop the premises,[263] which is assessed at the date of the hearing.[264]

The basis of the landlord's proposed works to the demise and whether they met the ground in section 30(1)(f) were considered in *Pumperninks of Piccadilly Ltd v Land Securities plc*.[265] In this case the premises were what is known as an 'eggshell' meaning that the tenant was demised the interior skin of the shop whilst the landlord retained responsibility for the external structural and load-bearing aspects. The landlord's proposed works involved

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[259] Section 31A 1954 Act (inserted by the Law of Property Act 1969, section 7(1)).
[260] [1959] A.C. 20 (HL) 51.
[261] Ibid.
[262] Michael Haley 'Business tenancies: the extinction of renewal rights' (2004) Jan/Feb *Conveyancer and Property Lawyer* 2004 61, 65.
[263] *S Franses Limited v The Cavendish Hotel (London) Ltd* [2018] 3 W.L.R. 1952, 19.
[264] [1959] A.C. 20 (HL) 23.
[265] *Pumperninks of Piccadilly Ltd v Land Securities plc* [2002] Ch 332.

stripping out removing part of a structural wall, lowering the height of the floor in the demise. the tenant argued that these works were insubstantial and could be carried out without access being required under section 31(A).[266] Judgment was in the landlord's favour; the landlord's planned works could not be carried out under the existing lease and without possession, therefore section 30(1)(f) was satisfied.

Section 30(1)(f) more recently came under the spotlight in the case of *S Franses Limited v The Cavendish Hotel (London) Ltd (**Franses**)*.[267] The tenant, S Franses Ltd, held two leases that formed part of a building that otherwise comprised a hotel. The landlord, The Cavendish Hotel, wished to carry out redevelopment works to the hotel that did not affect the tenant's premises. The landlord, however, also wished to recover possession of the tenant's premises even though they were not required for the proposed redevelopment scheme. Advice from the landlord's solicitor confirmed that an initial scheme of work proposed would not satisfy the ground (f) requirement. The landlord then re-designed the works solely for the purpose of meeting ground (f) and removing the tenant. The landlord did not wish to carry out these works as part of its own redevelopment scheme, but was prepared to carry out £800,000 of irrelevant, extraneous works to meet the statutory hurdle to obtain vacant possession. The Supreme Court determined that the proposed scheme of work did not meet the spirit of ground (f), with Lord Sumption opining:

> *'This appeal does not, as it seems to me, turn on the landlord's motive or purpose, nor on the objective reasonableness of its proposals. It turns on the nature or quality of the intention that ground (f) requires. The entire value of the works proposed by this*

[266] [2002] Ch 332, 5-6.
[267] *Franses* (n 265) 19.

landlord consists in getting rid of the tenant and not in any benefit to be derived from the reconstruction itself. The commercial reality is that the landlord is proposing to spend a sum of money to obtain vacant possession'.[268]

In *Franses*, the Supreme Court found that the schedules of works submitted by the landlord and the intentions stated in giving evidence did not satisfy ground (f). For a landlord to satisfy ground (f) the landlord cannot 'devise spurious schemes of works in order to gain possession' because (reinforcing the original policy aims of the 1954 Act) it:

'[M]ust be remembered that if the landlord, having got possession, honestly changes his mind and does not do any work of re-construction, the tenant has no remedy. Hence the necessity for a firm and settled intention'.[269]

It was common ground that the landlord was proposing works that had no practical utility because it could not make use of the works without planning permission for change of use, which it did not intend to obtain.[270] In the longer term the landlord hoped to embark on an ambitious plan to extend 28 bedrooms onto the hotel. The landlord did not however rely on these works as grounds for opposing a new tenancy. The economic feasibility of this plan depended on the 'value of vacant possession exceeding the cost of the useless works'.[271] The outcome here was that the landlord failed in opposing a new lease as it had no genuine intention to redevelop the premises, and the commercial reality was that the landlord was merely expending money to defeat security of tenure.[272]

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[268] Ibid 17.
[269] Ibid 12.
[270] Ibid 6.
[271] Ibid 7.
[272] Ibid 17.

If the court is not convinced that the development intentions are immediate, they may be tempted to grant a shorter lease term, or a landlord's redevelopment break, at which point the landlord will still need to satisfy ground (f) to exercise the lease break.[273] The above example is straight forward example of resistance but becomes more complex where works are to be carried out to one property (Unit A) but will likely affect the ability of another tenant to occupy (Unit B). Landlords in this position face difficulty because they do not meet ground (f) in relation to Unit B and are open to actions for breach of covenant of quiet enjoyment. Whilst landlords might have been tempted previously to bring Unit B into the re-development scheme seeking advice on this is no longer possible either on grounds of 'intention' or as to whether works are sufficiently substantial.

An illustration of this can be seen in the case of *London Kendal Street No3 Ltd v Daejan Investments Ltd.*[274] Here the tenant challenged landlord's re-development plans to carry out damp-proofing works to the basement of a building, which would have terminated one of their leases under section 30(1)(f). Instead, the tenant mounted a challenge on the basis that the works amounted to a breach of covenant under its separate adjoining lease of the same premises. The court considered a number of factors that had arisen between the parties in discussing the works including: programme and timescales for works; mechanics of the building contract; financial compensation offered; and an undertaking to Court to carry out the works in order to find that the landlord had the requisite 'intention' under section 30(1)(f).[275]

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[273] *Adams v Green* [1978] 2 E.G.L.R. 46 and *NCP v Paternoster Developments Li*mited [1990] 1 E.G.L.R. 99.
[274] [2019] L.&T.R. 22.
[275] [2019] L.&T.R. 22, 52.

Returning to the judgment in *Sainsbury*'s discussed above, the judgment made clear that to oppose renewal of the lease the landlord had to prove that the proposed works involved 'to demolish or reconstruct the premises complied in the holding or a substantial part of those premises or to carry out substantial work of construction in the holding or part thereof' and that it 'cannot reasonably carry out the ground floor and basement works without obtaining possession of the holding'.[276] In order to determine the impact of the landlord's works the holding must be ascertained. At trial, the landlord had plans to widen a staircase between ground and upper floors, and to refurbish the upper floors as offices, all of which comprised part of the tenant's demise, which it planned to redevelop as office use.[277] Sainsbury's argued it was not occupying the upper floors; even though the upper floors were demised they were not part of their current holding. The staircase works would affect an area used by Sainsbury's as a stockroom and so the landlord's works would encroach on a small area of Sainsbury's demise, and their holding. However, Sainsbury's vacated the stock room a few days before the trial to avoid the landlord being able to satisfy that it was carrying out works to their holding under section 30(1)(f). The judge accepted that the tenant's 'holding' could, in principle, shrink to avoid being affected by the landlord's development plans.[278]

In *BMW UK Ltd v K Group Holdings Ltd* a similar evidential approach to establishing the landlord's intention to occupy for the purpose of running its own business was set down.[279] The landlord failed in securing a landlord break clause in the new lease. HHJ Monty KC stated

[276] Section 30(1)(f) 1954 Act.
[277] (County court 21 March 2024 unreported) 61.
[278] Ibid 249.
[279] (County court 28 July 2023 unreported).

that it was 'a question of whether such an intention is more than just a mere thought which has not matured into a genuine and workable decision'.[280]

2.3.8 Statutory Compensation Under the 1954 Act

Whereas Part I of the Landlord and Tenant Act 1927 'introduced compensation gauged to the rental gain obtained by the landlord as a consequence of the tenant's goodwill' to compensate the tenant, the 1954 Act awards an 'unimaginative' and 'arbitrary flat-rate award, geared to rateable values and a relevant multiplier' thus divorcing the tenant's award from its 'real-world losses'.[281] The 1954 Act provides that both rights to renew and statutory compensation are available at the end of a protected tenancy.[282] The tenant is entitled to statutory compensation where the landlord relies on, and can successfully prove one of the 'non-fault' grounds of opposition, which are found in sections 30(1),(f), and (g).[283]

Compensation is awarded at a flat-rate based on the rateable value of the premises, or if the premises have been occupied for 14 years then compensation is paid at twice the rateable value.[284] Haley confirms that this is a 'timid, landlord-centric stance' that does not go far enough to compensate the tenant for displacement, loss of interest or breach of contract.[285] If the landlord successfully opposes renewal on any other ground – tenant 'fault-based' ground – for instance non-payment of rent, then the tenant is not entitled to compensation.

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[280] Ibid 45.
[281] Michael Haley, 'Compensation for Business Tenants' (2020) 79(3) *The Cambridge Law Journal* 490, 491
[282] Section 43(3) prescribes that a business tenancy granted for a term not exceeding six months falls outside the protections of the 1954 Act.
[283] These grounds of opposition relate to the following grounds: e) uneconomic sub-letting, f) redevelopment, g) owner occupation. No compensation is available if the tenant is offered suitable alternative accommodation by the landlord.
[284] Section 37(2)(a) 1954 Act.
[285] Haley (n 281) 516.

2.3.9 Contracting Outside the 1954 Act

With few exceptions, any tenancy where the premises are occupied by the tenant for the purposes of a business carried on by the tenant are subject to the 1954 Act.[286] As originally enacted, security of tenure was mandatory. However, when the first review of the legislation took place thirteen years later, the Law Commission noted that there was appetite for leases to be contracted outside the protection of the 1954 Act.[287] Effect was given to this by the Law of Property Act 1969, which inserted a new provision, section 38(4) in to the 1954 Act, to allow the parties to agree that a new lease would be contracted outside the protection of security of tenure. The original procedure enacted in 1969 to contract a lease outside the 1954 Act's protection required a joint application to the county court 'seeking approval for the grant of a fixed term tenancy in respect of which the tenant's renewal rights will not apply'.[288] In 1992 the Law Commission undertook a further periodic review of the 1954 Act.[289] The Law Commission were keen to move away from the court process given that little or no scrutiny was given to an application to contract outside the 1954 Act and the same objective could be achieved 'without the unnecessary formality, delay or expense of a court application'.[290] A new process for contracting-out was recommended by the Law Commission that proposed that the tenant received a 'health warning' and the tenant would sign a 'declaratory statement' accepting the consequences of contracting a tenancy outside the 1954 Act's

[286] Landlord and Tenant Act 1954 Part II section 23(1). Tenancies excluded from the 1954 Act's protection include short tenancies of less than six months under section 43(1).
[287] Law Commission (n 142) 50.
[288] Select Committee (n 168) 6.
[289] Law Commission (n 152) 48.
[290] Dave Cowan, and others, 'Section 38 Landlord and Tenant Act 1954 - Failed Applications' (ODPM 2003) <http://www.odpm.gov.uk/> accessed 22 July 2022.

protection.[291] However, no action was taken until a subsequent review in 2003. The Regulatory Reform (Business Tenancies) England and Wales) Order 2003 (**the 2003 Order**) reformed the procedure for contracting a business tenancy outside the 1954 Act.[292] At the time, the Office of the Deputy Prime Minister avoided calls from the commercial property sector to abolish security of tenure, because government policy 'is that business tenants should normally have a statutory right to renew their tenancies', but there was no policy objection to a tenancy being excluded from security 'provided the tenant is aware of the implications of doing so'.[293]

The government was content that streamlined process provided balance between flexibility and 'reduced regulatory impact for businesses' whilst 'safeguarding potentially vulnerable tenants'.[294] In place of the existing court process, the 2003 Order provided for the tenant to either i) give a form of simple declaration, confirming receipt of a health warning 14 days' prior cautioning that the new lease would be contracted outside the 1954 Act; or ii) alternatively, give a statutory declaration before an independent solicitor that dispensed with the 14-day notice period.[295]

Although these two pathways exist, in practice the statutory declaration route is favoured for a variety of reasons. The reasons are i) uncertainty as to whether last-minute changes to lease terms may warrant a new 14-day notice being served resulting in delay, and ii) the benefits of ensuring the declaration is sworn before an independent solicitor who, whilst not

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[291] Select Committee (n 168) 6.
[292] The 2003 Order came into effect on 1 June 2004.
[293] ODPM, 'Review of Impact on Procedural Reforms' (2006) <review of Impact of Procedural Reforms> accessed 22 July 2022.
[294] Ibid 5.
[295] ODPM, 'ODMP Panel on Business Tenancies Legislation' (2006) <Review of Impact of Procedural Reforms> accessed 22 July 2022.

advising the tenant, will ensure the tenant is informed of the consequences of swearing the statutory declaration.

On one hand, the forms are utilised to protect SBTs and bring to their notice that they will not benefit from security of tenure. However, at the other end of the spectrum, the contracting out notices are a source of technicality that are tripwires that threaten landlords if not completed properly. The 2003 amendment appends standard-form declarations that must be completed. In *TFS Stores Ltd v Designer Retail Outlet (Mansfield) General Partner Ltd*,[296] a fragrance retailer challenged how the standard-form declarations had been completed by their landlord. This is discussed further in chapter seven (section 7.4). The tenant contested that the landlord's solicitor had incorrectly completed the standard form statutory declaration by stating the lease commencement date as commencing on 'a date to be agreed between the parties' or on 'the date on which the tenancy is granted'.[297] The tenant contended that this wording did not satisfy the requirements of the 2003 Order because the form of wording used meant that the date of the lease was not included, as appears to have been Parliament's intention. The appeal was dismissed by the Court of Appeal who determined that the form of words used was sufficient for the purposes of completing the statutory notice.

[296] [2021] EWCA Civ 688, 10.
[297] Ibid.

2.4 Other Legislative Provisions

2.4.1 The Coronavirus Act 2020

The Coronavirus Act 2020 received Royal Assent on 25 March 2020 introducing temporary measures that were designed to protect and support tenants during the pandemic. Section 82(1) prohibits any 'right of entry or forfeiture, under a relevant business tenancy, for non-payment of rent'.[298] The Coronavirus Act did this by preventing landlords from bring forfeiture provisions for non-payment of rent. This section also interrupted the operation of section 30(1)(b) that permits a landlord to obtain possession of business premises where the tenant is in default. The tenant will not be penalised for not paying rent during the pandemic without having to establish a causal link between the pandemic crisis and failure to pay.[299] This blanket ban was initially implemented until September 2020 and was then ultimately extended to 25 March 2022. Arrears of rent attributable to the pandemic are intended to be resolved under an arbitration scheme established under The Commercial Rent (Coronavirus) Act 2022.

The position in relation to frustration is set out in *National Carriers v Panalpina*.[300] In *Bank of New York Mellon (International) Ltd v Cine-UK Ltd* the court considers recovery of commercial rent during COVID19.[301] Multiples had withheld rents during the pandemic arguing that their leases were frustrated because of their inability to occupy their premises due to periods of lock-down ordered by the UK Government.[302] The Multiples' businesses were

[298] S82(1) Coronavirus Act 2020.
[299] James Tipler, 'Coronavirus Act 2020: safeguards against forfeiture for commercial tenants in England and Wales affected by national emergency' (Falcon Chambers News, 26 March 2020) <https://www.falcon-chambers.com/news/> accessed 29 September 2020.
[300] *National Carriers v Panalpina* 1981 AC 675, 675.
[301] [2021] EWHC 1013 (QB) 1.
[302] Ibid 3.

a cinema (Cine-UK), sports retailer (Sports Direct), and bingo hall (Mecca Bingo). These Multiples claimed their ability to occupy under their leases has been 'temporarily frustrated' when the pandemic forced tenants to close their storers.[303] If successful, a finding of frustration would bring the lease contract to an end. It was accepted that forced closure of the premises that were the subject of a lease could result in the lease's frustration, but closure for a short period – 18 months – in comparison to a term length of 15 years, as was the case here was said to be insufficient to result in frustration.

2.4.2 Pandemic Clauses

Aside from the point about frustration, it was established that the landlords had obtained pandemic insurance, which covered the landlords against loss of rent during the pandemic, and for which the tenants had effectively paid. Although the landlords had procured insurance against loss of rent during the pandemic (irrespective of damage to the premises) the landlord had not 'lost' rent because there was no rent suspension under the leases in the tenants' favour that operated independently, and in the absence, of damage to the premises. The case of *FCA v Arch Insurance*, is also relevant here; it is the test case brought by the Financial Conduct Authority in the Supreme Court in 2021 determining the scope of existing insurance policies insuring against loss caused by interruption of the insured's business due to human disease and pandemic lockdown.[304] The pre-existing availability of business interruption insurance due to the outbreak of infectious disease meant that tenants found it difficult to argue that the pandemic caused unforeseen situation and losses. It did, however, awaken the

[303] [2021] EWHC 1013 (QB) 7.
[304] [2021] SC1 Notifiable disease included an infectious or contagious human disease.

retail market, generally, to the collective push towards the standard inclusion of so-called 'pandemic clauses' in retail leases, which simply mean that a rent free period applies if a tenant cannot trade, not because of damage to the physical premises as per a typical rent cesser provision, but because of unforeseen interruption.

2.4.3 Company Voluntary Arrangements

One impact on the retail market has been the insolvency procedures of Multiple Tenants. Company voluntary arrangements (**CVA**s) are set out in Part 1 of the Insolvency Act 1986 now supplemented, under Part 26 of the Companies Act 2006, by the prospect of a scheme of arrangement. Whilst schemes of arrangement have long been a feature of UK company law, a trend towards retail tenants looking towards such arrangements has arisen over the past ten years. This increase in insolvency of Multiples, of course, coincides with instability in the retail market. Tenants having striven to acquire large portfolios have then found themselves over-shopped and with large property portfolios, rents and business rates faced with the expansion of online shopping. COVID-19 placed Multiples under risk of collapse, even if they were previously healthy, and the tendency towards CVAs increased during this period. The trend that has arisen over the past decade sees Multiples using CVAs to specifically target rental liabilities to enable tenants facing insolvency to carry on trading without changing their business model by using the insolvency process to substantially reduce their rental liability across their portfolio. These types of landlord-focussed CVA have been controversial in the retail market because these CVAs typically only target one type of creditor – landlords – leaving the tenant to carry on their business without re-purposing or changing their existing portfolio, at the landlords' expense. The regime under Part 1 of the Insolvency Act 2006 and Part 26 and Part 26A of the Companies Act 2006 is complex and lengthy. However, the impact

of these CVAs on the retail market is widely discussed in the Interview Data and therefore an overview is set out here to scaffold discussion in chapters five and seven that follows. The most useful insight is to offer a review of two of the most discussed CVAs in the Interview Data: the Debenhams and the New Look CVAs.[305]

2.4.3 i) Debenhams CVA

Opposition to the Debenhams CVA was the first to reach court. A CVA – a company voluntary arrangement – is proposed by company directors under s.1(1) of the Insolvency Act 1986. A nominee is appointed to independently to verify that the arrangement proposed is a better outcome for creditors than either administration or insolvency.[306] The proposal is required to be approved by a minimum of 75% of the company's creditors.[307] Once approved, the CVA is binding on creditors who received notice of the meeting.[308] Debenhams' CVA is typical of a landlord-focussed CVA described as a 'standard model retail CVA'.[309] The proposal was structured so that Debenhams' leasehold properties were organised into six categories:[310]

Category 1 containing the best performing leases down to Category 5, the least financially viable.[311] Rents were reduced as follows: Category 1 no reduction, Category 2 reduced to 75%, Category 3 reduced to 65%, Category 4 reduced to 50%, Category 5 leases would terminate in

[305] *Discovery (Northampton) Limited and others v Debenhams Retail Limited (Debenhams)* [2019] EWHC 2441 (Ch) (**Debenhams CVA**); *Lazari Properties 2 Ltd (and 20 others) v New Look Retailers Ltd* [2021] EWHC 1209 (Ch) (**New Look CVA**).
[306] See also Rule 1.3 of The Insolvency Rules 1986.
[307] Sections 3 and 4 Insolvency Act 1986 and rule 15.34 of The Insolvency Rules 2016.
[308] Section 5 Insolvency Act 1986.
[309] *Debenhams* (n 305) 8.
[310] Ibid 16.
[311] *Debenhams* (n 305) 17. Category 6 contained only one property which was unaffected as the headquarters.

January 2020. One major argument advanced by the landlords was the disparity between the contractual rent payable and new rents proposed under the new categories.

It was proposed in May 2019 and approved by more than 95% of creditors at a meeting in June. Landlords of several stores submitted challenges to the CVA in accordance with section 6 of the Insolvency Act 1986 on the basis that a) the 'voluntary arrangement unfairly prejudices the interests of a creditor […] of the company', or b) there has been 'some material irregularity' at the meeting or in relation to the qualifying decision procedure.[312] The landlords' principal argument was that the terms of the CVA were unfairly prejudicial because 'future rent' as opposed to existing debt could not be included in a CVA and because where company 'makes beneficial use of the premises let to it must pay the full contractual rent referable to that period of occupation, regardless of what the market rent might be'.[313] Under this ground, Norris J found no unfair prejudice despite the terms of the CVA treating different landlords differently.

Norris J in *Debenhams' CVA* determined two significant points. First, he found in landlords' favour by striking out provisions by the tenant seeking to use the CVA to prevent the landlords from forfeiting their leases as a CVA could not compromise proprietary rights. Second, Norris J declined the landlords' challenge to the unfair prejudice argument, and thereby established the principle that a CVA can reduce future rent liability under a lease whilst the tenant remains in possession and trading.[314] Furthermore, there was interesting discussion about whether the

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[312] Section 6(1) of the Insolvency Act 1986.
[313] *Debenhams* (n 305) 63.
[314] This is contrary to the obiter discussion of Neuberger LJ in *Thomas v Ken Thomas Ltd [2007]* L&TR 21, 34 who considered that 'if the tenant is to continue occupying the landlord's property for the purposes of trading under the CVA (and hopefully trading out of the CVA) the tenant should normally […] expect to pay the full rent to which the landlord is contractually entitled'.

level of rent reduction was 'fair'. Norris J determined that provided the rent cuts proposed were no less that 'current market rent' for the leasehold premises, noting that none of the landlords had argued that this was the case, and that 'in fairness to the tenant' it had not reached its 'categorisation' by reference to levels of 'overrenting' simply by analysis of its own profitability in those stores.[315] Furthermore, Norris J considered that if premises were overrented (for example by 100%) then it was 'unfair' for other suppliers not to 'receive market price for their goods in order that landlords should receive a 100% premium for the market price for his [premises] supply'.[316] Finally, the landlords were offered as part of the CVA a right to terminate their lease, which offered landlords the option to escape imposition of the lower rent. This is a complex judgment that tangles aspects of commercial 'fairness' with principles of rental valuation. It is problematic because leases that more closely follow market rent are available in the market, but at a greater upfront cost to the tenant, and a landlords' termination right leaves them in a position with no tenant, costs associated with re-letting, and left to bear dilapidations and fit out costs for a new tenant.[317] Furthermore, there is no consideration as to how a termination right sits with the 1954 Act, particularly as an agreement to surrender would require compliance with the legislation. Debenhams also used the CVA process to reduce business rates payable to the local authorities by up to 50% in respect of its underperforming properties.[318]

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[315] *Debenhams* (n 305) 67.
[316] Ibid 66.
[317] Stephen Jourdan, 'CVAs After the Debenhams Decision' (*Falcon Chambers News*, 31 October 2019) <https://www.falcon-chambers.com/images/uploads/articles/CVAs_after_the_Debenhams_decision.pdf> accessed 12 September 2022.
[318] William Eichler, 'Debenhams CVA to cost councils £8.5m in rates' (*LocalGov* 13 May 2019) <https://www.localgov.co.uk/Debenhams-CVA-to-cost-councils-8.5m-in-rates/47396> accessed 12 September 2022.

2.4.3 ii) The Corporate Insolvency and Governance Act (CIGA) 2020 and Virgin Atlantic CVA

In the interim, the CIGA 2020, which came into force on 26 June 2020, also brought in permanent changes introducing Part 26A into the Companies Act 2006. Under section 901A of the Companies Act 2006 a company proposing a restructuring plan had to satisfy the threshold that 'it had encountered or was likely to encounter financial difficulties affecting its ability to carry on business as a going concern' with the purpose of 'eliminating, reducing, preventing, or mitigating the effect to any of those financial difficulties'.[319] Part 26A, which is a court supervised restructuring process, includes the ability to 'cram-down' a dissenting class of creditors. The intention of the new Part 26A is set out in guidance notes to CIGA 2020 as follows:

> *'[Part 26A] will allow struggling companies, or their creditors or members, to propose a new restructuring plan between the company and creditors and members. The measures will introduce a 'cross-class cram down' feature that will allow dissenting classes of creditors or members to be bound to a restructuring plan. This means that classes of creditors or members who vote against a proposal, but who would be no worse off under the restructuring plan than they would be in the most likely outcome were the restructuring plan not to be agreed, cannot prevent it from proceeding'.*[320]

It is possible for the court to 'cram-down' a class of creditors even if a vote of at least 75% is not achieved, provided that at least one class of creditors had voted in favour and other creditors would be 'no worse off' than if the company entered insolvency.[321] This new Part 26 process was first used in the *Virgin Atlantic* restructuring in 2020 to compromise landlords'

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[319] Section 901A Companies Act 2006.
[320] Department for Business, Energy, and Industrial Strategy, 'Explanatory Notes: Corporate Insolvency and Governance Act 2020' <https://www.legislation.gov.uk/> accessed 19 April 2024.
[321] *Re Virgin Atlantic Airways* [2020] EWHC 2376 (Ch), 55.

claims.[322] Snowden LJ held that, because the landlords were arguably in a better position under the plan than in an alternative insolvency situation, the landlords' arguments of unfairness or unjust/inequitable treatment failed.

2.4.3 iii) New Look CVA

The *New Look CVA* restructuring included secured liabilities which require court sanction to re-structure and therefore New Look combined a CVA with a Part 26A restructuring scheme.[323] The New Look CVA proposal, dated 26 August 2020, received a majority vote (81.6%) on 15 September 2020.[324] The CVA was only one part of a package of measures designed to address New Look's secured and unsecured creditors. The New Look CVA scheme categorised different types of creditors: Category A Landlords of a critical distribution centre; Category B landlords replacing above-market rents with turnover rents based on the tenant's trading profit at that property; Category C Landlords saw a write-off of historic rents arrears and New Look vacating all its stores in that category. Other creditors, including employees, noteholders and general unsecured creditors were grouped separately but largely unaffected by the CVA. In a similar vein to Debenhams' proposal, landlords were offered a right to terminate rather than accept the changed contractual position. The CVA also wrote off historic arrears of rent and imposed a one year rent free period.

Landlords opposed the CVA on grounds that: i) each group of creditors contained fundamentally different terms; ii) the landlords' votes had not been accurately calculated; and iii) the CVA proposal was obtained with votes of creditors which votes were unimpaired by

[322] [2020] EWHC 2376 (Ch).
[323] *New Look* (n 305) 144.
[324] Ibid 11.

the CVA, thereby unfairly prejudicing the landlords' position.[325] Zacaroli LJ held the decision in *Debenhams* allowed the compromise of future rents. He dismissed the landlords' claims on the basis that differentiating between different creditors was within the jurisdiction of s1(1) of the Insolvency Act 1986 and he also went on to confirm that differential treatment between creditors did not satisfy the unfair prejudice test, even if it did call for an explanation. The explanation that he accepted was that even though the landlords' position was compromised they would be in no worse position than if the tenant had entered insolvency.[326] Again, the judge held that the landlord had been offered a right to terminate the leases that were compromised and that this represented 'give and take' between landlord and tenant.[327]

However, Zacaroli LJ stated that where landlords affected by a CVA were swamped (their votes diluted) by unaffected creditors then this could give rise to unfair prejudice:

> *'Put another way, where a sub-group of creditors is compromised by a CVA and their vote was swamped at the creditors' meeting by the votes of those who were unimpaired by the CVA, I do not think that it is necessarily enough to avoid a finding of unfair prejudice that the differential treatment of others was objectively justified (e.g. because they were critical creditors)'*.[328]

Like *Debenhams*, *New Look* also compromised its business rates under its CVA, including in relation to its Category A property (its distribution hub).[329]

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[325] *New Look* (n 305) 64.
[326] Ibid 235.
[327] Ibid 64.
[328] Ibid 190.
[329] Phil Corrigan, '£1.6m business rates' on New Look depot 'written off' as fashion giant fails to pay up' (*The Sentine*l, 17 March 2021) <https://www.stokesentinel.co.uk/>

These decisions are heard in the High Court which means that the judgments are accessible. Solvent tenants during the pandemic begin to appreciate that CVAs are potentially a means by which their competitors are trading at lower cost – lower rents and business rates. Insolvent tenants are not required to make reparations for loss suffered by landlords through non-payment of rent and therefore these compromised tenants are in a better position to be able to 'prioritise to any dividends or share buy-backs or other payment of any kind to the shareholders'.[330] The relevance of these CVAs is explained in chapter five, in particular, that solvent tenants use this information as evidence of rent in the county court lease renewals to re-base rents, and as the moral grounds to withhold rents during the moratorium and levy rent cuts from landlords.

2.5 Conclusion

This chapter two has set out the doctrinal underpinnings of this thesis. The legal landscape is relatively complex and therefore these underpinnings provide a platform that sets out the statutory and case law that provide a framework for analysis and discussion in later chapters. Chapter three sets out the theoretical underpinnings of this thesis. These underpinnings are important because working within a theoretical framework promotes deeper insights in exploring landlord-tenant relationships. The theoretical framework provides the basis for the design of the research project, inform the methodology (set out in chapter four), and then provide the foundation for interpreting and understanding the data gathered as part of this thesis in chapters five to seven.

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[330] Stephen Jourdan, 'CVAs After the Decision' (*Falcon Chambers News*, 31 October 2019) <https://www.falcon-chambers.com/images/uploads/articles/CVAs_after_the_Debenhams_decision.pdf> accessed 12 September 2022.

CHAPTER 3 THEORETICAL FRAMEWORK AND CONCEPTUAL FOUNDATIONS

In this thesis, I seek to add to the literature that theorises property relations by considering the implications of power relationships between commercial landlords and tenants for retail spaces, including the high street. I draw on Blandy et al's lens of enduring property relationships (EPR), which sets out a framework for exploring the various factors, legal and social, that shape property relationships, which we considered in the preceding chapter.[331] When analysing my data, I found that power between landlord and tenant was a major theme that ran through the data set as indeed it did through the policy history of the legislation considered in chapter two. Power is not a factor that is used to explore property relationships under the EPR approach – (see 3.2(iv) below). To make the enduring property relationships lens more useful for understanding the significance of market power for commercial landlord-tenant relationships I draw on Foucault's approach to power and resistance as a means of considering the intersection between market power in the retail sector and the structuring effect of the 1954 Act on property relationships. Leases are part proprietary and part contractual. The contract element lays down the rules that bind the parties to a legally binding agreement. But the relationship between the parties is more than the sum of the contract especially given the proprietary interests that follow the contract under the influence of legislation.

[331] Blandy, Bright, Nield (n 49) 85.

3.1 Contextualising Relational Contract Theory

Writing in 1963, Macaulay discovered that the business people that he studied in the USA 'preferred not to use contracts and avoided the law as much as possible'.[332] Relational contract theory (**RCT**) sees contracts more than the sum of words committed to paper, but seeks to examine the broader context, understandings and norms between the contracting parties.[333] Macneil terms these broader considerations 'relational contracts' and codes contracts within reoccurring 'behavioural patterns and norms' with the intention of establishing 'tools' exploring contracting behaviour. [334] To Macneil, contractual arrangements exist on a sliding scale between discrete, highly presentiated arrangements, to fully flexible and trusting 'relational' arrangements.[335] RCT provides a means of exploring relationships between landlord and tenant in the course of 'projecting exchange into the future'.[336] Presentiation is concerned with drawing 'the future into the present'.[337] Contractual presentiation is a recognition of a present contractual arrangements binding the future.[338] The context in which RCT is explored is that of property. Blandy et al, in a Modern Law Review paper entitled 'Enduring Property Relationships', contextualised RCT in the property law discipline.[339] RCT sees beyond the terms of a commercial lease and recognises the importance of the ongoing relationship between the parties. Thompson writes about prenups as examples of

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[332] Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55, 63.
[333] Peter Goodrich, 'Gender and Contracts' in Anne Bottomley (ed), *Feminist Perspectives on The Foundational Subjects of Law* (Routledge-Cavendish, 1996) 20.
[334] Macneil (n 54) 897.
[335] Ibid.
[336] Ian MacNeil, 'The Many Futures of Contracts' (1974) 47 S *Cal L Rev* 691, 803.
[337] Ian Macneil, 'Reinstatement (Second of Contract) of Contracts and Presentiation' 60(4) (1974) *Virginia Law Review* 589, 592.
[338] Ibid 590.
[339] Blandy, Bright, Nield (n 49) 85.

presentiation because a prenup 'binds a future situation that may or may not happen in future' – divorce.[340] However, even though the historic lease length in the retail sector was 25 years, meaning that two or three lease renewals could endure for a lifetime, Crosby et al writing in 2003, noted that there is little flexibility in contractual lease terms.[341] Blandy et al are also clear that they are highly presentiated contracts.[342] As stated in the introduction to this thesis, the purpose of the 1954 Act is to force these landlord-tenant relationships to renew, to endure. Nonetheless these landlord-tenant relationships are often fractious.

The context (or the power) of the relationship between the parties has historically governed by market conditions, or the relative power of landlord and tenant in the retail market. Lease drafting is inflexible and presentiated because it forms the basis of institutional property investment and 'overcautious' landlords, are nervous of the implications that flexibility would have on the value of commercial property.[343] Institutional lease terms are highly presentiated, the opposite of relational contracts, which involve fostering some degree of flexibility and good faith between landlord and tenant. Whilst commercial leases are presentiated, a question remains in relation to implications of power on security of tenure under the 1954 Act and the impact that this legislation has on these commercial relationships.

The purpose of the 1954 Act was historically to protect a tenant's goodwill generated by their occupation of the premises. Tenants did not want to lose the goodwill they had built up and wished to remain in their premises. The 1954 Act was enacted to impose, or force

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[340] Sharon Thompson, 'Feminist relational contract theory: a new model for family and property agreements' (2018) 45(4) *Journal of Law and Society* 617, 4.
[341] Crosby, Gibson, Murdoch (n 158) 1491.
[342] Blandy, Bright, Nield (n 49) 104.
[343] Crosby, Gibson, Murdoch (n 158) 1491.

longevity of occupation and of the landlord-tenant relationship on the parties. Power is dictated by market conditions and in a landlord monopoly tenants have benefitted from security of tenure on landlord-centric lease terms. Now the market has reversed, Multiples' goodwill is diluted by networks of physical stores, where they occupy high streets across the country. It is now landlords wanting tenants to remain and renew their leases. If anything, landlords are forced to adopt to a more relational approach to commercial leasing and the thesis data will argue are often required to make financial concessions to Multiples to ensure their relationship endures.

3.2 Enduring Property Relations (EPR)

Peter Goodrich writes that 'doctrinal writers and judges alike' tend to ignore 'relational dimensions of contracts'.[344] Broadly speaking, the EPR lens 'acknowledges the diverse range of legal, regulatory, social, and commercial norms that shape property relationships', acknowledging that property relationships embody both an element of black-letter contractual 'presentiation', and relational characteristics.[345] The EPR approach is intended to offer a more multifaceted understanding than doctrinal analysis alone can offer. The EPR lens views property relationships as being shaped by the following three interrelated perspectives: 'the diverse network of sources; property's temporal element; and discretionary spaces in decision-making'.[346] An overview of these perspectives is set out below.

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[344] Peter Goodrich, 'Gender and Contracts' in Anne Bottomley (ed), *Feminist Perspectives on The Foundational Subjects of Law* (Routledge-Cavendish, 1996) 20.
[345] Blandy, Bright, Nield (n 49) 91.
[346] Ibid 95.

3.2.1 The Diverse Network of Property Sources

Viewing property from this perspective is an understanding that property relationships are shaped by interconnected facets from black-letter law through to social customs and norms. At one end of the spectrum property relationships can be viewed from a purely contractual doctrinal perspective, for instance the written words of the contract that underpin the lease.

The contract itself though is not two dimensional as it is 'subject to canons of construction and interpretation' and is susceptible to equitable rebalancing of the 'inequality of bargaining power'.[347] Contractual and property law are also overlayed by a range of legal factors, to name a few: the law of trespass, the tort of nuisance, restrictive covenants, rights of reasonable access to another's land, and public environmental or planning regulation.[348] Commercial leases have their foundation in property and contract law. These terms are shaped by *inter alia* sustainable development and environmental principles, banking regulation, and the implementation of professional standards for solicitors and surveyors. At the opposite end of the spectrum, Blandy et al. acknowledge the impact that social norms potentially hold over the substance and performance of property relationships, for instance in residential leasehold property where tenants may have informal arrangements for collectively managing the estate.

3.2.1 Property's Temporal Element

The temporal element of property refers to the relationship over its lifespan, rather than a one-off snapshot of the contractual position. By way of example, the authors offer a lease as an example of an arrangement that subsists for a particular period. A lease must be finite,[349]

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[347] Blandy, Bright, Nield (n 49) 96-97.
[348] Ibid 97.
[349] Ibid 17.

and security of tenure provides the ability for a tenant to call for a new lease unless the landlord can meet the statutory grounds to refuse renewal under section 30 of the 1954 Act. The focus here is on how the relationship 'responds to change over time'.[350] This perspective is concerned with the re-shaping relationships over time such that they might endure.[351]

3.2.3 Discretionary Spaces in Decision Making

This perspective is grounded in considering property relations from the aspect of disputes, more particularly whether, and to what extent, 'the enduring nature of property relations is acknowledged in a range of decision-making scenarios, from informal dispute-resolution, regulatory intervention, to property tribunals and courts'.[352] Equity plays a role in offering relief from forfeiture,[353] or granting an injunction to enforce a property right where damages would not assist. Further, when there is a dispute over property rights – for instance a boundary dispute – it is possible to see that the parties have expectations grounded in self-generated norms and expectations in relation to their homes or businesses that the parties have themselves developed and have come to understand over time in place of pure contractual rights.[354]

The purpose of developing the EPR lens is to assist with appreciating and understanding property relationships across the full spectrum of legal and social relationships in a way that extends into the temporal and spatial dimension of property rights.[355]

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[350] Ibid 102.
[351] Ibid 86.
[352] Ibid 107.
[353] Ibid.
[354] Ibid 108.
[355] Ibid 85.

3.2.4 EPR and Power?

The EPR framework is a useful for identifying and considering the layers of legal and regulatory principle and the social norms that informally regulate property. One line of enquiry that is not explored in the EPR lens is the impact of power. This is perhaps because in relational transactions the significance of power is diminished to ensure the relationship endures. This is because in RCT the preservation of the relationship becomes more important than the exercise of power, to the point that legal rights may be waived.[356] The authors acknowledge the importance of power, but state it is specifically excluded due to a lack of room to discuss the implications of power in their article. Blomley writes that neglecting power tends to 'obscure and conceal power relations at work' and a tendency to see property as 'impersonal' spaces thereby 'displacing attention from the controller and the controlled' creating the illusion that relationships are 'impersonal and neutral'.[357] The issue with viewing property through a legal prism is that a traditional landlord/tenant dynamic is imprinted on the relationship. The dynamic is of the powerful landlord and weak tenant. The effect of institutionalising these characters is to 'conceal power relations at work in property'.[358] Power dynamics might appear fixed, or neutral, but closer examination reveals that they are significant because they can change the application and interpretation of the law, because it is impossible to separate out the physical 'place, the law that governs and applies to it, and

[356] Blandy, Bright, Nield (n 49) 85.
[357] Nicholas Blomley, 'Property Law and Space' in *Researching Property Law* (Bloomsbury Publishing, London 2015) 139.
[358] Ibid 135.

the parties who use it and hold property rights in it' so that the 'legal and spatial are conjoined and co-constituted'.[359]

3.3 Power

Retail leases play a significant role in ordering spaces, because retail spaces are 'constituted by and constitutive of social life, practice and experience'.[360] Commercial leases are property relationships that are deeply immersed in complex commercial contracts. They are overlain with common law and statutory authorities. There are also governance layers: including institutional demands of the finance and banking sector and of legal and surveying practice. Furthermore, these intricate relationships are shaped in their practical application by human actors and by 'human practice' by the dynamics between the individual landlords and tenants.[361] This thesis is, in part, an exploration of how the 1954 Act fails to address power in commercial landlord and tenant relationships in dynamic and even reversed market conditions.

To Foucault, power is not a top-down force exerted by a sovereign authority.[362] Power is no 'longer regarded as a capacity to be possessed, for example by a ruling class […] [r]ather, power emerged as a set of relations, apparatuses, knowledges, techniques, architectures'.[363] This kind of power is not exerted through violence, but rather through the regulation of bodies and behaviour, for instance through control by Institutional Landlords of institutional lease terms. Foucault articulates that power is present in all relationships:

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[359] Blandy, Bright, Nield (n 49) 89.
[360] Blomley (n 357) 135.
[361] Ibid.
[362] Michel Foucault, *Power/Knowledge: Selected interviews & Other Writings 72-77* (Harvester Press 1980) 119.
[363] Pat O'Malley and Mariana Valverde, 'Foucault, Criminal Law, and the Governmentalization of the State' in *Foundational text in modern criminal law* (OUP 2014) 317.

'[In] verbal communication, or amorous, institutional or economic relationships, power is always present: I mean a relationship in which one person tries to control the conduct of the other'.[364]

Power is a relationship between 'two individuals […] such that one can direct the behaviour of another or determine the behaviour of another'.[365] More broadly these relationships form patterns through repetition, or 'networks of relations, constantly in tension' that give insight into dynamics between institutional parties.[366] To Foucault, power is 'a network of relations, constantly in tension, in activity rather than a privilege that one might possess'.[367]

Foucault introduces the concept of disciplinary power, which serves to explain how power is exerted in modern societies through mechanisms of control and discipline.[368] Disciplinary power aims to shape individual behaviour to achieve broader societal goals and attitudes by seeking conformity to norms and rules.[369] For instance, from the 1960s, Institutional Landlords, such as banks and pension funds imposed standardised commercial terms that were designed to facilitate capital growth based on leasehold rental income. Concern over Institutional Landlords' monopoly over commercial terms arose in the early 1990s following a period of acute financial recession. There was debate as to whether onerous commercial terms – such as UORRs (upwards only rent reviews) had contributed to economic instability.

The government of the day consulted with industry stakeholders but determined to set out fair commercial terms in a voluntary code of practice, rather than legislate. In effect, the

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[364] Foucault (n 58).
[365] Foucault. (n 59).
[366] Foucault (n 60) 26.
[367] Ibid.
[368] Ibid.
[369] Michel Foucault, 'Two lectures', in Michael Kelly (ed.), *Critique and power: recasting the Foucault/Habermas debate* (MIT Press 1994) 44.

industry is self-regulated by professional bodies, including the Royal Institute of Chartered Surveyors and the British Property Federation who support the code of practice.

Research to date has concluded that the commercial property market has remained 'monopolistic', which has left tenants dissatisfied and frustrated because 'neither the British Property Federation nor the RICS championed change, or fully legitimised' the Lease Code.[370] Without the full support and implementation of the Lease Code tenants have historically been unable to resist the power structures within the retail sector that shape commercial leases. The creation of 'knowledge' or 'truth' reinforces these societal norms, which are internalised by the regime's subjects and monitored and corrected by the regime to maintain power.[371]

Discipline is at its heart about 'correction, that is realigning the deviant's behaviours with the normal template [and this] regime was to become automatic or habituated: subjects were to become docile bodies'.'[372] In the context of this thesis, retail property is the 'body' that Institutional Landlords wish to control though enforcing institutional lease terms. The aim is to suppress tenant behaviour with the broader aim of producing a stable retail market that can be harnessed for economic growth.[373]

Foucault sees power as a productive, not a negative, force that operates through evolving relationships and practices:

> *'What makes power hold good, what makes it accepted, is simply the fact that it doesn't only weigh on us as a force that says no, but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse. It needs to be*

[370] Catherine Hughes, 'The role of industry bodies in changing market practices through self-regulation: commercial property leasing in the UK' (PhD thesis, University of Reading 2015) 170.
[371] Foucault (n 369) 44.
[372] O'Malley, Valverde (n 363) 319.
[373] Ibid.

considered as a productive network which runs through the whole social body, much more than as a negative instance whose function is repression'.[374]

Power manifests through discourse – networks or systems of communication – and through thought and knowledge that construct social reality and everyday understandings, reinforcing societal norms that shape meaning and understanding.[375] At the turn of the twentieth century, the existing land regime favoured the 'collective interests' of landlords over the more 'private, personal, piecemeal interests of the individual tenants'.[376] Discourse is a 'social language' that gives us insight into the culture of the retail sector at different times allowing an understanding into an individual's perceptions about the network of institutions, and the thinking and common understandings that pervade the retail sector.[377] Discourse communicates changing patterns of power in the retail market in which we situate the operation of the 1954 Act. Disciplinary power creates not only obedient subjects who internalise and identify with the norms and values of the society in which they live, but more broadly, obedient bodies – here a compliant body of commercial leasehold property. [378] The creation of 'knowledge' or 'truth' reinforces these societal norms, which are internalised by the regime's subjects and monitored and corrected by the regime to maintain power.[379]

The effectiveness of a power regime is in its link to knowledge, because knowledge has the authority to be 'truth' and normalise the acceptance of knowledge that underpins a regime:

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[374] Foucault (n 362) 119.
[375] Ibid 112.
[376] Lord Ernle, Hansard HL Deb vol 69 col 448 (1 December 1927).
[377] Lois Tyson, *Critical Theory Today: A User-Friendly Guide* (Garland Publishing1999) 281.
[378] O'Malley, Valverde (n 356) 319.
[379] Foucault (n 369) 44.

'Disciplines are the bearers of a discourse, but this cannot be the discourse of right. The discourse of discipline has nothing in common with that of law, rule, or sovereign will. The disciplines may well be the carriers of a discourse that speaks of a rule, but this rule is not the juridical rule deriving from sovereignty, but a natural rule, a norm. The code they come to define is not that of law but that of normalization'.[380]

Disciplinary power also produces and shapes subjectivity, creating obedient subjects who internalise and identify with the norms and values of their society. If the tenant is characterised as feminine and vulnerable, then the landlord is characterised as the exploitative villain. The societal starting assumption is that there is an excess of landlord power, which creates inequity and a stratified society, which in turn was identified as having the potential to cause societal harm. The result is government intervention to protect the 'wretched dressmaker' the weak, feminised party from the excess of power of the landlord.

However, as Haley writes, an 'absence of empirical data' leaves it 'impossible to know whether this portrayal was accurate and, if so, to what extent'.[381] Roberts and Satsangi note that in the private residential rental arena the 'bad landlord' is a 'social description', a 'discourse' that serves a 'political purpose'; it is generally understood that the landlord is characterised as a tyrant who unreasonably prioritises their 'personal financial self-interest[s] over social, and in some cases legal, obligations'.[382] The idea of the ogre-landlord permeates the commercial lettings market. Discourse is at once descriptive and constitutive, and these discourses are 'embodied by repetition' over time.[383] The government in the early 1950s saw

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[380] Ibid.
[381] Haley (n 281) 494.
[382] Roberts, Satsangi (n 6) 506.
[383] Judith Butler, *Gender Trouble (*Routledge, 2002) 147-148.

rising rents and intervened in the commercial property market because of a fear that landlords would exercise their capacity to exploit market conditions. The aim of the 1954 Act regime is to avoid volatile behaviours and outcomes by taming the ability of landlords to take advantage of the market.

Government may have intervened to protect tenants on renewal, but commercial leases are still negotiated in the retail market. Market power has historically shaped commercial lease practice by shaping lease terms, and quasi-legal practices around valuation principles. Power here produces discourse and knowledge in its regulation of the commercial lettings market. Linked to disciplinary power is 'knowledge'. A disciplinary power regime is effective because the power regime is underpinned by knowledge; knowledge has authority to create 'truth' and normalise the knowledge that underpins a regime because '[t]ruth is linked in a circular relation with systems of power'.[384] For instance, discourse about the landlord-ogre and the vulnerable tenant reinforces justification of the state's intervention in private contract because of the tropes of exploitation of the vulnerable commercial party. Power, knowledge and truth are in a reciprocal relationship because power produces the knowledge, which is understood as truth. To control knowledge, and what counts as truth, is power. In this way, methods of producing knowledge - scientific methods for instance - provide truth. Several interviewees were able to recall the point in time (in the early 1980s) when, although commercial lettings were not yet that 'sophisticated in terms of evidence', for the first time they 'became more of a science'.[385] Lease valuation became more of a 'science' through development of a valuation methodology (based on comparable valuation principles) which

[384] Foucault (n 362) 133.
[385] Int1S.

produced knowledge (valuation data) which has been utilised to control rent levels and has stabilised the market for the purposes of investment and economic growth. A framework of comparable valuation methodology was developed during the 1960s to support 'a growing band of major property companies' and 'financial institutions' that were investing in commercial property.[386] The more prevalent valuation method utilises evidence of comparable rental evidence in the retail market to determine a new rent and is the basis of rental valuation under section 34 of the 1954 Act.[387] This methodology involves examining earlier rents of comparable leasehold premises and adjusting those rents to take account of changes in market, or differences of premises size or location, for instance. This encompasses valuation methodologies, designed to produce measurable 'truths' about the value of investment properties.

Power relations, giving structure to the field of actions produces tactics, become strategies. To Foucault, power 'produces reality; it produces domains of objects and rituals of truth'. [388] Foucault's perspective is concerned with what we know about property, what it is worth, and how it is valued are all a product of power relations.[389] Foucault sees the power-knowledge nexus as internal, not as external – 'there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations'.[390]

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[386] Jack Rose, *The Dynamics of Urban Property Development* (E & FN Spon1985) 39.
[387] RICS, 'Comparable Evidence in Property Valuation' (26/2012) RICS Valuation- Professional Standards (1st ed RICS Professional Information, Birmingham).
[388] Foucault (n 60) 194.
[389] Foucault (n 362) 30.
[390] Foucault (n 60) 27.

Landlords' market power has not been a purely external force. Institutional Landlords have built their needs into the terms of investment leases and internal market practices. The basis of property valuation and the terms of institutional leases are reflective of landlord power in the market and their harnessing of commercial property relationships, and commercial property, for their own ends. The catalyst for change in commercial leasing was the construction of new retail spaces, shopping centres, in the late 1960s, when a series of Arndale Centres, the first American-style shopping malls, were built in the UK in the 1960s.[391]

Construction of different types of retail spaces, was coupled with an intention to harness its investment potential. This was successful; Baum and Crosby note that between 1964 and 1982 institutional investment in commercial property increased from 'less than £1 billion to £17.5billion'.[392] Investment in leasehold property was facilitated in two ways that link into the 1954 Act: i) by the regularisation of commercial terms through the institutional lease; and ii) by standardising property valuation through use of comparable valuation evidence. Rose et al. argue that in 'in the mundane business of governing everyday economic and social life, in the shaping of governable domains and governable persons' that we should understand the role of 'the grey sciences' of the 'minor professions: the accountants, and insurers' and how 'techniques' for the everyday are embedded in the structure of the 1954 Act.[393] I consider institutional lease terms and valuation methodologies below.

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[391] Wikipedia, 'The Arndale Centre' <https://en.wikipedia.org/wiki/Arndale_Centre> accessed 21 November 2022. Durham, known as the Viking Centre, was the first centre to open in 1961.
[392] Andrew Baum and Neil Crosby, *Property Investment Appraisal* (Routledge 1988) 1427.
[393] Nikolas Rose, Pat O'Malley, and Mariana Valverde, 'Governmentality' (2006) 2 *Annu. Rev. Law Soc. Sci*. 83, 101.

The new retail centres were being constructed and offered to tenants on standard 'institutional' terms including 25-year terms, including upwards only rent reviews every five years[394] and on a full repairing and insuring basis.[395] Institutional lease terms would form the basis of the landlord's lease offering and market power manifests in a different form. Upwards only rent reviews were introduced in the 1960s.[396] They were approved by the House of Lords as a review mechanism fair to both landlord and tenant in *United Scientific Holdings Ltd v Burnley Borough Council:*

> *'I do not agree with what has been said in some of the authorities, namely, that a rent revision clause is for the benefit of the landlord alone and not at all for the benefit of the tenant. It is plainly for the benefit of both of them. It is for the benefit of the tenant because without such a clause he would never get the long lease which he requires; and under modern conditions, it would be grossly unfair that he should. It is for the benefit of the landlord because it ensures that for the duration of the lease he will receive a fair rent instead of a rent far below the market value of the property which he demises'.*[397]

Following property crashes in the 1970s and 1990s two issues emerge: i) 'the first is an increase in the litigation by banks against valuers; and ii) the second is an institutional response from the valuation profession'.[398]

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[394] Crosby, Gibson, Murdoch (n 158) 1488.
[395] Neil Crosby and John Henneberry, 'Financialisation, the valuation of investment property and the urban built environment' (2015) 53(7) *Urban Studies*, 1428. The FRI lease places responsibility on tenants for repairs and insurance, restricts tenant rights of alienation, and protects rental income (and capital values) through upwards only rent review provisions through the development of the institutional lease.
[396] John Burton, *Retail Rents – Fair and Free Market* (Adam Smith Institute 1992) 42.
[397] *United Scientific Holdings Ltd v Burnley Borough Council* [1978] A.C. 904, as per Lord Salmon at 948.
[398] Neil Crosby, Anthony Lavers, Henry Foster 'Commercial property loan valuations in the UK: the changing landscape of practice and liability' (Reading University 1997) 11.

Upwards only rent reviews were criticised in principle in 1992 by Burton who contended that 'contract terms have not changed to meet changed economic conditions … namely a reduction in inflation'.[399] Following Burton's report, the Department of the Environment consulted on whether to issue legislation to intervene in market practices. However, Burton's view was subsequently criticised in the following year by both Booth and Crosby et al. Booth countered that 'the upward-only rent review clause exists, like any contractual relationship, because the benefit to the landlord has a lower cost to the tenant than an alternative relationship of similar value to the landlord' and that the landlord benefits from 'stability and certainty of future rent (lower risk)'.[400] From the tenant's perspective there is a gamble that rent levels could be higher than under an upwards only review and 'the tenant may be less concerned by future downside variability of rent than by the affordability of the initial level of rent' and also that as 'market conditions change, the relative costs and benefits of the option embedded in upward-only rent reviews will also change'.[401] Crosby et al considered the implications for market and investments, namely 'a possible fall in the value of existing investments if upward only reviews were banned'. Crosby et al estimated the fall across the Investment Property Databank ('IPD') would be 4.3% across all properties.[402] Crosby et al also countered that banning upwards only reviews would not necessarily lower rents because resultant upwards-downwards reviews are less onerous lease terms and would attract a

[399] Burton (n 396).
[400] Philip Booth, 'Response to Department of the Environment consultation paper on commercial property leases' (1993, unpublished) in Andrew Adams, Philip Booth, and Bryan MacGregor, 'Lease Terms, Option Pricing and the Financial Characteristics of Property' (2003) (03) *British Actuarial Journal* 619, 627.
[401] Ibid.
[402] Neil Crosby, Andrew Baum, Sandi Murdoch, 'Commercial property leases: a critical evaluation of Department of Environment proposals' in Andrew Adams, Philip Booth, and Bryan MacGregor, 'Lease Terms, Option Pricing and the Financial Characteristics of Property' (2003) (03) *British Actuarial Journal* 619, 627.

higher rent overall and furthermore because 'cash flow is less secure' landlord-investors may seek higher initial rents to compensate for this.[403] Industry concern about the implications of legislating against upwards only rent reviews has resulted in minimal interference. The Reading Academics note in 2005 that after the introduction of the Lease Code 'there was little evidence that alternatives to the upward only market review were being offered by landlords or sought by tenants'.[404] As Braithwaite notes self-regulation can sometimes be 'an attempt to deceive the public into believing in the responsibility of a[n] irresponsible industry'.[405]

For Foucault, power is a network, a structuring force that shapes behaviours in actions and acts carried of people. Power relations form a kind of 'game' or 'war' in which each participant or group of participants develops a strategy to gain advantage.[406] Once the state has imposed its legislative regime (the 1954 Act), it effectively replaces the retail market with emergence of a new market framed by the 'set of relations, apparatuses, knowledges, techniques [and] architectures' of the 1954 Act.[407] The 1954 Act market is not controlled by a regulator per se, but it operates under the court's supervision. The regime leaves space for individuals to game the system. Resistance is an inherent and interconnected facet of any disciplinary system, challenging and destabilising institutional control.[408] Resistance can take many forms,

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[403] Andrew Adams, Philip Booth, and Bryan MacGregor, 'Lease Terms, Option Pricing and the Financial Characteristics of Property' (2003) (03) *British Actuarial Journal* 619, 627.
[404] Crosby, Hughes, Murdoch (n 71) 9.
[405] John Braithwaite, 'Responsive Regulation in Australia' in Peter Grabosky and John Braithwaite (eds), *Regulation and Australia's future* (Canberra: Australia Institute of Criminology, 1993) 82.
[406] Foucault (n 362) 90-92.
[407] O'Malley, Valverde (n 363) 317.
[408] Mona Lilja and Stellan Vinthagen, 'Sovereign power, disciplinary power and biopower: resisting what power with what resistance?' (2014) 2:7(1) *Journal of political power* 107, 114.

including foot-dragging, sarcasm, slander, theft, although it is usually difficult to maintain open challenge because disciplinary systems correct non-conformists.[409]

3.4 Resistance

I now consider resistance to power. Power, as I have set out, is a significant component in relational settings. Where there is a regime or strategy intended to shape behaviour, then space opens for resistance to that regime. Foucault writes that 'where there is power there is resistance […] resistance is never in a position of exteriority in relation to power'.[410] Power and resistance are two sides of the same coin. However, instead of situating resistance in opposition to power, Foucault does not view power as a right to be seized, his view is that resistance is interior to, and in effect a part of, power. Harding draws analogy to a resistor in an electronic circuit that regulates the flow of power.[411] Harding offers a lexicon of resistance through interrogation of the different types employed by lesbians and gay men which she refers to as follows: stabilising, moderating, and fracturing resistance. Stabilising resistance is 'the constant antithesis to disciplinary power relations – the behaviours and ways of being that the enforcement of laws and norms seek to eradicate'.[412] For instance, those 'eating an unhealthy diet' show a 'disregard for the normative convention of individualised responsibility for health'.[413] In the realm of property relationships and leases this would perhaps encompass the current example of the increase in landlords issuing section 21 notices pursuant to the Housing Act 1988 in anticipation of the Renters' Reform Bill banning no-fault evictions as a

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[409] James Scott, *Domination and the arts of resistance: hidden transcripts* (Yale University Press1990) 204.
[410] Michel Foucault *The Will to Knowledge: The History of Sexuality vol 1* (Penguin 1998) 95.
[411] Rosie Harding, Regulating Sexuality: Legal consciousness in lesbian and gay lives (Routledge, London 2010) 44.
[412] Ibid 46.
[413] Ibid.

disregard for the norm of secure housing for families.[414] Moderating resistance is concerned with reducing the exercise of power so that it becomes 'less violent or intense or rigorous'.[415]

This can be about campaigning for change in the law and challenging decisions of public bodies. These actions would not necessarily have an immediate effect on the law but have potential to transform power relations over time. Finally, Harding relates fracturing resistance, as akin to breaking a bone – it has the power to heal completely, or to change existing relationships in 'unpredictable and unexpected ways'.[416] Fracturing resistance encompasses any 'rebellious acts' that would probably require '(fairly immediate) engagement with resistors' actions by government or other state actors'.[417] Boundaries between these types of resistance are not concrete particularly as conceptualising resistance 'in space and time' blurs boundaries.[418]

3.5 Conclusion

I deploy concepts of power and resistance, in exploring modern day commercial landlord tenant relationships under the 1954 Act, because the point of including power is to ground these relationships in the everyday, in the market context within which they play out. Without the inclusion of power and resistance it is not possible to understand the 1954 Act's failure to regulate not only the market but also the exercise of unrestrained power within the landlord-tenant relationship.

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[414] Shelter, 'Section 21 no-fault evictions by bailiffs up 143% in a year' (*Shelter*, London 9 February 2023) https://england.shelter.org.uk accessed 19 May 2023.
[415] Harding (n 411) 47.
[416] Ibid 48.
[417] Ibid.
[418] Ibid 49.

The methodology follows in chapter four. The methodology follows next because it sets out how I conducted the project and collected my data before the findings are presented in three empirical chapters, chapters five to seven inclusive.

CHAPTER 4 RESEARCH METHODOLOGY AND METHODS

In this chapter four, I outline the methodological approach to this project and the methods I employ in addressing the research questions set out in chapter one. The research questions focus on the evolution of landlord-tenant dynamics since 1954 and examine the impact of the 1954 Act on lease renewals in the contemporary retail market. This thesis deploys two methods: i) doctrinal analysis of the 1954 Act and evaluation of underpinning policy drivers behind the legislation; and ii) 55 semi-structured interviews to better grasp the real-world application of the 1954 Act in the retail market. This chapter sets out the steps taken to ensure the validity and reliability of the findings from the Interview Data on which chapters five to seven, inclusive are based.

4.1 Methodological Approach

A paradigm is a culmination of approaches to gaining and interpreting knowledge that include theoretical or disciplinary orientation.[419] Quantitative and qualitative approaches to inquiry are often said to have their origins in opposing 'paradigms', that historically have not been viewed as compatible approaches.[420] In designing this project, a review of underlying literature involved analysing the Pawlowski – James Survey data, and a subsequent survey undertaken by the Property Litigation Association (**the PLA**). Both surveys yielded insights into commercial leasing practices.[421] Questions posed in the Pawlowski – James Survey included

[419] Thomas Kuhn, *The structure of scientific revolutions* (University of Chicago Press 1962) 50.
[420] James Creswell, 'Controversies in Mixed Methods Research' in Norman Denzin and Yvonna Lincoln (ed), *The Sage Handbook of Qualitative Research* (Sage 2011) 275, 304.
[421] Pawlowski, Brown (n 61) 164 and the Property Litigation Association, *Law Reform Survey* (PLA 2018).

asking whether the property industry considered repeal, or technical reform of the 1954 Act were required.[422] The Pawlowski – James Survey was based on 64 responses from property professionals to a questionnaire that broadly asked about repeal of the legislation, whether the 1954 Act was suitably flexible, and about power dynamics between commercial landlords and tenants.[423] 85% percent of respondents in the Pawlowski – James Survey stated that there was 'no compelling reason for [the 1954 Act's] repeal, that flexibility in negotiation could be achieved within the [1954 Act] statutory apparatus'.[424] The Pawlowski - James Survey also contained the ability for respondents to give free-text comments. Survey respondents commented that the view that security of tenure was exploited by commercial tenants was 'unfounded', and that commercial tenants still needed 'protection of the Act'.[425] A different survey respondent commented that tenant exploitation was 'the exception' and another commented that it 'only happened at the margins and well-advised landlords can deal with it'.[426] These responses sparked curiosity because this limited snapshot offered divergent views. Some respondents argued that tenants still needed 1954 Act protection, others suggested the legislation was exploited to the detriment of landlords. Perhaps most intriguing was the implication that an imbalance of power between landlord and tenant might be more evident where there are larger disparities between sophistication of these parties.

Furthermore, that exploitation of the 1954 Act primarily affected uninformed or ill-advised landlords—those who, lacking sufficient knowledge or strategic insight, may fail to navigate

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[422] Pawlowski, Brown (n 61) 164.
[423] Ibid 163.
[424] Ibid.
[425] Ibid.
[426] Ibid 164.

the complexities of tenant negotiations effectively. This raises questions about the dynamic in different areas of the retail market and the impact of the 1954 Act on landlord-tenant relationships.

In a similar vein, the PLA asked its members for comments about reform of the 1954 Act.[427] 51% of respondents (69 from 136 people) considered the 1954 Act fit for purpose, (with 35 people 25% opposing this view). Interestingly, despite participants raising questions over the 1954 Act's fitness for purpose, 85% of survey respondents (117 people of 137 people) responded that the 1954 Act should not be abolished.[428] In additional free text comments, respondents stated that the 1954 Act did not 'need abolition' because i) 'small property tenants' and those in weaker bargaining positions need [its] protection, ii) it is a well-understood piece of legislation and it should be left to those who understand it; and iii) Parliament was not trusted by the property industry to deal with the legislation.[429] These responses suggest that property professionals are reluctant to invite external scrutiny, instead justify the operation of the 1954 Act in the retail market by highlighting the benefits to the SBT.

These survey data could be categorised as revealing 'surface information' in relation to the profession's perceptions of the 1954 Act.[430] Although these data originate from a paradigm that is drawn primarily from a quantitative approach,[431] and have adopted a 'lens that is associated with the quantitative research paradigm' the PLA and Pawlowski-James Survey

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[427] PLA (n 421) 6.
[428] Ibid. Interestingly, the figures in the PLA Survey and the Pawlowski- James Survey are consistent in showing that 85% of respondents oppose repeal of the 1954 Act.
[429] Ibid.
[430] Nigel Fielding and Jane Fielding, *Researching Social Life* (Sage 1986) 205.
[431] Stephen Gorard and Chris Taylor, *Combining Methods in Educational and Social Research* (Open University Press 2004) 148.

data were insightful.[432] The data were useful because: i) they offered a snapshot of the profession and their perceptions of issues as a sector, and a broad insight into power dynamics; ii) suggested in some contexts tenant power might outweigh that of the landlord; iii) indicated that SBTs relied on the 1954 Act; and iv) the data suggested variances across different retail areas which may impact on dynamics of negotiations. The survey data, on one hand, ask 'superficial questions' that could be said to have elicited 'limited responses' to 'structured questionnaires'.[433] On the other hand, some of the responses gave a fascinating snapshot that might only have been revealed because the format 'enhanced candour and disclosure through increased anonymity levels'.[434] Both surveys sought an insight into the operation and potential shortcomings of the legislation, but neither the survey question design, nor the free text comments box were sufficient to lift the lid on a deeper view of the legislation's operation. As Kvale and Brinkmann state, 'if you want to understand how [property professionals see the retail sector] why not talk to them?'[435]

The survey approaches to collecting insights into the 1954 Act were limited in their ability to 'understand and reveal the layers of social meaning and context that underpin [the retail sector] and [its] practices'.[436] As such, while the survey data provided a useful overview of the industry, the responses elicited from the survey data were unable to yield a deeper insight

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[432] Susan Tucker and others, 'Conducting Mixed Methods Research' in Patricia Leavy (edn), *The Oxford Handbook of Qualitative Research* (2nd edn, Oxford Handbook) 575.
[433] James Carey 'Linking Qualitative and Quantitative Methods: Integrating Cultural Factors into Public Health', (1993) 3(3) *Qualitative Health Research* 298, 304.
[434] Claire Hewson, 'Qualitative Approaches in Internet-Mediated Research: Opportunities, Issues, Possibilities' in Peter Cane and Herbert Kritzer (ed), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 431.
[435] Svend Brinkmann and Steinar Kvale, Int*erviews: Learning the Craft of Qualitative Research Interviewing* (3rd edn. Sage 2015) xvii.
[436] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (ed), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, Oxford 2010) 929.

into landlord-tenant power relationships. The aim of conducting semi-structured interviews was to explore how power dynamics in the retail market, and application of the 1954 Act, have evolved over time. The 1954 Act can be viewed as a 'system of constraint' that serves a complex social function through a 'relational ordering' of power.[437] By carrying out semi-structured interviews, the goal was to gain a more nuanced understanding of interaction between power and knowledge that shapes institutional practices and landlord-tenant relationships. [438]

In seeking insight into the dynamics between landlord and tenant, I understood that no flat 'absolute truth' would emerge from the Interview Data, because experiences of interviewees were 'contextual and multiple'.[439] The point was to take a different 'exploratory' approach that was 'open to' complex 'narratives', or 'stories told by' the interview participants.[440]

This is a technical area of law and previous work has tended to reveal that the sector as shut off, abandoned by the government to self-regulation.[441] I wanted to glean insight into the 'operation' of the 1954 Act that could not be learnt 'from books alone', or from reading judgments or statute.[442] Interviews as a method are broadly 'linked with exploratory research' and I wanted to explore the implications of the government's imposition of this extra-

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[437] Stuart Elden, *Mapping the present: Heidegger, Foucault and the Project of a Spatial History* (Bloosmbury 2001) 126.
[438] Harding (n 411) 11.
[439] Johnny Saldaña, *The fundamentals of qualitative research: Understanding qualitative research* (Oxford University Press 2011) 23.
[440] Brinkmann, Kvale (n 429) 150. Also see Rebecca Bernstein and others, 'There's no local here, love' *After Urban Regeneration* (Policy Press, 2015) 100-101 where an index card method encourages immediate and short responses to understand audiences' perceptions of the 'local'.
[441] Pawlowski, Brown (n 61) 163.
[442] Susan Bright and Lisa Whitehouse, 'The Opportunities and Challenges of Empirical Work: Housing Possession in Theory and Practice' (Oxford Legal Studies Research Paper No.50/2013, 9 May 2013) 1.

contractual fetter on commercial landlord and tenant dynamics.[443] I wanted to survey the same topic – the operation of the 1954 Act – but from an qualitative perspective, not to 'test a theory' or 'measure anything' but to 'understand the experience' of how the law is applied, its perceived purpose and utilisation, and the implications as perceived by those people utilising it for commercial lease negotiations.[444]

4.2 Methods

My empirical analysis consisted of semi-structured interviews (as explained below) to ascertain how doctrinal law shaped commercial lease terms and how the court process shapes and influences lease negotiations under the 1954 Act. I wanted to understand lease renewal transactions – how they are negotiated under the 1954 Act, the impact of the 1954 Act process on commercial lease terms and whether the 1954 Act still meets is original policy intentions. Achieving these aims required me to understand the historical policy intentions, have a thorough grasp of doctrinal underpinnings, and then conduct semi-structured interviews to gain insight into interviewees' perceptions of the 1954 Act, how the law is utilised and for what purpose.

4.3 Policy Drivers and Doctrinal Analysis

Dixon notes that doctrinal research is 'the close textual analysis of statute and/or the analysis of as much case law as can be discovered'.[445] Doctrinal analysis is the traditional method of legal research in property law, focussing on the analysis and interpretation of

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[443] Webley (n 436) 931.
[444] Sharan Merriam and Elizabeth Tisdell, *Qualitative Research: A Guide to Design and Implementation* (4th edn Wiley 2016) 13.
[445] Martin Dixon, 'A doctrinal approach to Property Law Scholarship' in *Researching Property Law* (Bloomsbury Publishing 2015) 4.

statutes, legal rules and principles and case law. As Dixon notes, doctrinal research is concerned with understanding and interpreting the law as it is written and applies in the context of a particular case or judgment.

I reviewed the statutory provisions of the 1954 Act and consulted practitioner and academic texts, such as *Megarry & Wade* and *Landlord and Tenant Law in Context*, to assist me with identifying relevant case law for each statutory provision.[446] These cases give an insight into the current interpretation of the statute. Additionally, I used online legal research databases, *Westlaw* for example, to search for case law relating to sections of the 1954 Act and to trace where cases had been relied on in subsequent cases. I also utilised the 'precedent map' feature in *Westlaw*, which provides a visual map of where case law has been cited, or decisions confirmed. This literature review, conducted in the early stages of the thesis, helped establish the landscape of the 1954 Act and its current interpretation.

This early literature review laid the foundation for the subsequent interviews, during which property professional discussed ongoing cases in the county and appellate courts. The background doctrinal work that I had conducted enabled me to engage with the interviewees' discussions of the case law at a detailed doctrinal level.

During the interviews the property professionals eagerly anticipated the judgments of cases from the county and appellate courts that would address key legal questions, including: i) whether a lack of demand negates the assumption of a 'willing tenant', ii) whether leases were frustrated due to the pandemic, iii) whether sustainability provisions should be included under section 35 of the 1954 Act on renewal, iv) whether the county court had jurisdiction

[446] Charles Harpum, Stuart Bridge, Martin Dixon, *Megarry & Wade* (Sweet & Maxwell2012) and Bright (n 18).

over turnover rents under section 34 of the 1954 Act, v) whether tenants are entitled to discounted rent for a hypothetical rent-free fitting-out period; and vi) whether the courts would consider CVA rent reductions as evidence of market rent.

Many of these cases were heard in the county courts and the decisions unpublished. As Hunter notes, the absence of written judgments makes researching the decision-making processes of the county court problematic.[447] The Law Society Gazette reported in 2023 on the lack of decisions published by the county court, and that 'nothing at all was published from the Central London county court' in the preceding year,[448] even though 'its judgments are listed in the Daily Cause List suggests they must be substantial enough to reserve and deliver in writing.'[449] The Gazette note that 'while technically there may not be any legal precedents to report, there is still a transparency gap there waiting to be filled'.[450] The Gazette noted that 'the least productive was the Property, Trusts and Probate list, with an average publication rate of around 46% being published'. Whilst there might be 'good reasons for non-publication of cases involving confidential matters affecting children and vulnerable parties, particularly since most of them would have been heard in private, the lack of publication in other courts raises questions about transparency and open justice.'[451] Difficulty obtaining copies of county court judgments is not particular to this project, Hewitson, writing on MEES in the Conveyancer in 2024, notes that he is 'is grateful to Oliver Radley-Gardner KC of Falcon

[447] Caroline Hunter, Judy Nixon and Sarah Blandy, 'Researching the Judiciary: Exploring the Invisible in Judicial Decision Making' *Journal of Law and Society* 76, 77.
[448] Michael Cross, 'A quarter of judgments still unpublished' (Law Gazette, London 24 January 2023) <https://www.lawgazette.co.uk/practice/a-quarter-of-judgments-still-unpublished/5114890.article> accessed 18 October 2023.
[449] Ibid.
[450] Ibid.
[451] Ibid.

Chambers for providing him with a copy of the [county court] decision'.[452] My interview participants were eager to assist, offering to send copies of county court judgments, which assisted in understanding 'how judges take matters into consideration' and apply the legal framework.[453] As a result, the doctrinal review continued alongside the interviews, creating a loop of doctrinal analysis alongside broader thematic exploration. The interviewees gave their own and market insights into these cases and 'into the operation of law that [could not] be learned from books alone'.[454]

The case law decisions provide insight into how the law influences commercial negotiations and they also reveal how landlord-tenant dynamics shape, or attempt to shape, the 1954 Act. Several of the interviewees responded to the legal questions raised in these cases, particularly where traditional 'existing legal doctrine and frameworks are forced to confront, respond, and perhaps even evolve to respond' to market pressures beyond 'existing rules and doctrines'.[455] In this way, tenant resistance could be seen as a disruption to established legal practices, and interviews offered a window into the retail sector whilst legal norms were reshaped.

Finally, interviewees also focussed on the 1954 Act litigation framework itself, rather than the judgment or outcome, as a key factor in challenging and changing commercial lease terms. An overview of the litigation process, together with PACT alternative dispute resolution process, is provided in chapter two.

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[452] Russell Hewitson, 'Should we be turning out commercial leases green?' [2024] (2) *Conveyancer and Property Lawyer* 104.
[453] Ibid 2.
[454] Bright, Whitehouse (n 442) 1.
[455] Elizabeth Fisher, Eloise Scotford and Emily Barritt, (2017) 80(2) 'The Legally Disruption Nature of Climate Change' *Modern Law Review* 173, 176.

The doctrinal aspects of this thesis are based on two principal components: first, an examination of the policy underpinnings and their subsequent development, and second, a review of the legislation and relevant case law. I utilised the *Proquest* platform within the University of Birmingham online library to locate copies of parliamentary commission reports and recommendations underpinning the enactment of the 1927 and 1954 Act and subsequent evaluation of this legislation. I obtained copies of Law Commission reports in a similar vein.

I noticed on occasion that the Hansard debate referred to newspaper commentary that illustrated unfair landlord practices. I searched historical newspaper records using the Economist Historical Archive,[456] using search terms 'business tenant', 'goodwill' and 'security of tenure' with a date range of 1920 to 1990. [457] My analysis of the drivers that led to enactment of the 1954 Act are set out in chapter two (see section 2.1).

4.5 Semi-structured Interviews

If methodology is the 'higher order system' that influences the 'selection of methods' then method is simply 'a technique for generating data'.[458] I took a two-pronged approach: beginning with a detailed review of the historical development of the 1954 Act and reviewing current statutory provisions and review of recent case law to establish the law through interpretation of these documents. This is a form of 'qualitative research using these documents as source material'.[459]

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[456] *Economist Historical Archive*, 1843 – 2020 https://www.gale.com/intl/c/the-economist-historical-archive.
[457] https://hansard.parliament.uk/search/.
[458] Mike Evans and others, 'Decolonizing Research Practice: Indigenous Methodologies, Aboriginal Methods, and Knowledge/Knowing' in Peter Cane and Herbert Kritzer (ed) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 181.
[459] Webley (n 436) 931.

Thereafter, I undertook semi-structured interviews, which is a method frequently used to examine some particular aspect of the law, or section of the legal profession.[460] An interview 'is a conversation that has a structure and a purpose'.[461] I decided in designing my research project to proceed with semi-structured interviews. Had I limited my insight to one panel firm, for instance, then perspectives outside the mindset of this firm and its lawyers would have been lost. There would also have been risk of 'overestimat[ing] a position' in the market in 'build[ing] up a picture of […] practice'.[462] The issue is that there is potentially a risk in interviews of people not being candid, putting forward an image of themselves that they would like to present:

> *'Good interviewing can also reveal the rationalisations and justifications that interviewees use to convince themselves that they are doing the right thing. Handled sensitively, it can be helpful in seeing how respondents might be deceiving themselves and susceptible to unethical behaviours'.*[463]

Conducting a semi-structured interviews with property solicitors across England and Wales helps to balance out one-off issues that one or two firms, or landlords/tenants may encounter. Conducting semi-structured interviews involves identifying key themes that might be relevant and asking interview participants with the aim of creating a 'coherent' and broadly

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[460] See Steven Vaughan & Emma Oakley, '"Gorilla exceptions" and the ethically apathetic corporate lawyer' (2016) 19(1) *Legal Ethics* 50-75 and Hilary Sommerlad (2016) '"A pit to put women in": professionalism, work intensification, sexualisation and work–life balance in the legal profession in England and Wales' (2016) 23(1) International *Journal of the Legal Profession* 61-82.
[461] Brinkmann, Kvale (n 435) 5
[462] Richard Moorhead and others, 'Designing Ethics Indicators for Legal Services Provision' (2012) (Legal Services Board, London 2022) 28-29 http://www.legalservicesboard.org.uk accessed 22 November 2022.
[463] Ibid.

comparable data set around these key issues, or points.[464] My literature review and review of the historical underpinnings of the 1954 Act case law helped me identify some of the key issues affecting the negotiation of commercial leases, and more particularly, renewal leases.

This gave me some insight about the working of the legislation and pinch points around which to focus questions. A copy of my interview question schedule is at **Annex A**. I wanted to gain insight into my interviewees' experiences of practising in this area of real estate, in commercial leasing, over their career.[465] I designed open questions that would allow interviewees to answer without leading them to a particular response, or conclusion. Although questions all originated from my overarching framework, I framed my questions loosely, 'conversationally' by 'employing a blend of closed and open-ended questions, often accompanied by follow-up *why* or *how* questions'.[466]

Interviews took place by Zoom during lockdown. Zoom was the platform adopted by the University of Birmingham during the COVID-19 pandemic. On one occasion there was an issue with internet connection, and we switched to an interview over the telephone. An obvious strength of interviewing over the internet is that 'I was not constrained by geography'.[467] The pandemic also meant that lawyers were working remotely, from home, and in this sense, it made them more accessible because they were accustomed to hopping on and off calls. I issued a Participant Information Sheet to each interviewee with my initial request for interview together with a request for Consent. A copy of the precedent Participation Sheet

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[464] William Adams, 'Conducting Semi-Structured Interviews' *Handbook of Practical Programme Evaluation* (Jossey Bass 2015) 493.
[465] Lynette Lofland, *A World of Strangers; Order and Action in Urban Public Space* (University of California 1971) 3.
[466] Adams (n 464) 492-3.
[467] Merriam, Tisdell (n 444) 13.

and precedent Consent form issued are annexed at **Annex B**. All interviewees completed the consent information before interview. All interviews were transcribed and anonymised to remove identifying information, before I saved them on the University of Birmingham, password protected, secure server.

4.5.1 Identifying the Research Population, Sampling Method, and Recruitment of Interviewees

I situated my research questions in a broader theoretical framework and identifying my interest in investigating the historical application of the 1954 Act and any geographical intersection in its application. This helped to settle the research population that I needed to access. I wanted to speak to solicitors across England and Wales about the application of the 1954 Act by their clients and by those property lawyers themselves. I wanted to speak to people at different stages of their practising career, not least to learn about the historic application of the legislation and whether its application had changed or remained constant.

I knew from practising as a solicitor in this area that many of the larger landlords and tenants employ panels of law firms to manage their legal work in relation to property portfolios. I wanted to speak to lawyers who worked as part of a panel, and those lawyers who worked independently for a range of size of clients who operated, or owned, premises in prime retail locations. I considered the property sector and determined that I was primarily interested in the retail sector, because i) the 1954 Act was primarily enacted to protect goodwill which relates to customer footfall, ii) of the pressure on the retail market (as opposed to warehousing for instance) due to the growth of online sales; and iii) the dynamic of small landlords/tenants contracting against a significantly more powerful party.

Ordinarily, the grant of a brand-new lease would involve instructing only a transactional property solicitor to negotiate the terms of the lease. Lease renewal work is unusual because the transactions combine transactional (non-court facing lease drafting) and litigious (court-facing) lawyering. Lease renewals under the 1954 Act are unusual because the renewal is governed by the 1954 Act and is effectively under the jurisdiction of the county court. The renewal is instigated by service of notices under the 1954 Act and if the terms of the lease renewal are not agreed with a court timetable, then the county court will determine the terms of the lease under the legislation. For this reason, lease renewals are conducted in tandem by contentious and non-contentious lawyers, although in a small practice one solicitor might oversee the whole transactions. Therefore, the potential interviewee population and those interviewed included both contentious and non-contentious property lawyers. Retail property is a large area of legal practice. This creates a broad potential population for interview that could include almost every firm in England and Wales. I thought about how to identify the population of lawyers that undertook this work. In reading the leading judgments in this area of practice, I took a note of the solicitors' firms that had historically acted on high profile 1954 Act matters and taken these cases to court. This information is set in Table 4.1

Table 4.1 A list of Lawyers Acting in Leading Case Law Relating to the 1954 Act

O'May [1983] 2 A.C. 726 18 Feb 1982	Nabarro Nathanson Ince & Co Falcon Chambers
Edwards & Walkden (Norfolk) Ltd v City of London EWHC 2527 (Ch) 12 Sept 2012	Field Fisher Waterhouse LLP 3 Hare Court Chambers Falcon Chambers
S Franses Ltd (Appellant) v The Cavendish Hotel [2018] UKSC 62 5 December 2018	Landmark Chambers Wilberforce Chambers Falcon Chambers Maples Teasdale David Cooper & Co
On Tower UK Ltd v JH & FW Green Ltd [2021] EWCA Civ 1858	Eversheds Sutherland Pinsent Masons Falcon Chambers
EE Ltd v Stephenson [2021] UKUT 167 (LC)	Eversheds Sutherland Winckworth Sherwood LLP Falcon Chambers Devereux Chambers Maitland Chambers

This information is helpful to some extent in that it reveals the names of larger law firms that I knew had at one time or other been on the panel for either landlord or tenant. The issue is that there are not many cases, and this data is old – for instance Nabarro Nathanson, a major property specialist, merged in 2017 with CMS.[468] Furthermore, modern procurement practices mean that law firms re-tender approximately every three years and whilst this gave a snapshot of the type of larger firms involved, and was interesting, it was not particularly helpful. It was useful, however, in demonstrating that when matters approached court law firms tended to instruct London chambers, particularly Falcon, Wilberforce, Landmark.

4.5.2 Recruiting Solicitor Interviewees

I created two population lists. The first population that I created was aimed at identifying law firms/solicitors who acted on panels that served larger Institutional Landlords and large retail tenants. I did this by researching rankings of the top 100 retailers in the UK, and from these lists compiling a broad list of the top [30] retailers in the UK. I then researched, and created a list, of the main property funds in the UK – which included Land Securities, Hammerson, Mars Pension Fund, Legal and General. I then subscribed 'law.com' and researched recent press reports to draw up a list of law firms that had been appointed to the property panels of those retailers and property funds in the UK over the past three years.[469] I found press releases in relation to each of these landlords and tenants announcing law firm panel appointments. There were overlaps between law firms that acted for these commercial parties, primarily because each landlord/tenant tended to have three law firms on their panel

[468] CMS Law, 'CMS, Nabarro and Olswang Complete Largest Ever Merger in UK Legal Sector' <https://cms.law/en/chl/news> accessed 22 November 2022.
[469] See https://www.law.com/?slreturn=20241102160444.

to meet their transactional and litigation needs. The press releases also tended to specify which office (e.g. the Manchester office) would be carrying out the work. Overall, there were 29 law firms in England and Wales on the list. I then used the Law Society 'Find a Solicitor Function' and created an Excel table that I populated with a list of potential interview participants that worked in those law firms in 'commercial property' or in 'property litigation'. It is possible using the Law Society 'Find a Solicitor' function – see web address below[470] – clicking on 'Pro Search' and then on 'Organisation' to find the name of the law firm.[471] This then yields the names of practitioners in those specialities in each of the firm's office locations. I set up the Excel table to include the following data headings:

[Solicitor Name/ Email Address/Title/Office Location/Firm Name/Date Invited to Interview/Date of Interview.]

I created a second population list that was aimed at ensuring that I was reaching solicitors in smaller and medium law firm practices that were not involved in panel work for Multiples or Institutional Landlords. This process again involved using the Law Society data base.[472] I prepared a general Excel database of commercial property and commercial property litigation lawyers. The database was created by selecting 'Person', selecting 'Area of Practice: Commercial Property and Property Litigation'. This search result returned results of 16,692 solicitors. I selected one solicitor from every third page (which accorded to selecting every

[470] Law Society 'Find A Solicitor' function <https://solicitors.lawsociety.org.uk/>.
[471] Emily Carroll and Steven Vaughan, 'Matter Mills and London-Lite offices: exploring forms of the onshoring of legal services in an age of globalisation' (2019) 22(1) *Legal Ethics*, 12 – see use of the Law Society's 'Find A Solicitor' function employed in this earlier empirical work.
[472] Law Society 'Find A Solicitor' function <https://solicitors.lawsociety.org.uk/>.

50th person, in total a population of 330 solicitors). I created an Excel spreadsheet that collated the following information in relation to these solicitors:

[Solicitor Name/ Email Address/Title/Office Location/Firm Name/Date Invited to Interview/Date of Interview.]

The Law Society website does not always include practitioners' email addresses and so I obtained these against their firm website profile. If the solicitor's email address was not available on their firm's website, or they appeared to practice primarily in residential property practice, or they practised in a large panel firm that was on my first population list, then I selected the next person on the list. I added each solicitor and their details to the Excel spreadsheet.

All in all, I contacted 68 lawyers from the second, general list to request an interview. I also emailed 47 lawyers from the first, more targeted, panel firm list.[473] These email approaches resulted in 26 interviews with solicitors practising in commercial property from Magic Circle to high street practice; the remainder were obtained through snowballing.

At the start of the interview process I had intended to generate interviews randomly from my population. I was, however, keen to speak to people who could speak about the application of the 1954 Act and impact of legislative changes over the course of their career.

Susan Bright kindly introduced me to two property barristers. The barristers acted as gatekeepers who are 'typically […] individuals or institutions who have the power to either

[473] Crosby, Hughes (n 57) 22. Crosby combines survey questionnaire with semi-structured interviews. Crosby 'visits eight law firms as follows: three are 'high street and five international firms', which are London or Cardiff based. Surveyors interviewed were based in London offices of major UK real estate practices, and the other thee interviewed were based in regional practice.

grant or withhold access to a research population'.[474] These barristers were able to identify and, in some cases, to introduce me to 'information rich candidates', solicitors who had considerable years of experience practising in relation to 1954 Act renewals and commercial leases. Therefore, I also employed some 'snowballing sampling' alongside the randomly generated list of interviewees. Snowballing it typically understood to involve asking interviewees 'who should [I] speak to next'. Those interviewees that I spoke to who had qualified in the 1970s were all identified by through the 'snowballing' process.[475] However, the approach was perhaps more akin to 'purposeful sampling' than snowballing.[476] The aim was not to fill a quota of interviewees, but to 'strategically [identify] information rich' candidates to interview.[477] Those solicitors identified had practised in the legal profession for between 30-45 years and were able to speak of the application of the 1954 Act legislation in the 1970s and 1980s. These solicitors were very reluctant to speak to me, even with an introduction from a gatekeeper, and, I believe, would have been inaccessible without the introduction.[478]

A table setting out the details of those interviewed and their method of recruitment is below.

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[474] Marlene De Laine, Fieldwork, Participation and Practice: Ethics and Dilemmas in Qualitative Research 2000, 129.
[475] Brenda Phillips, *Qualitative Disaster Research* (Oxford University Press 2014) 32.
[476] Michael Patton, *Qualitative Research and Evaluation Methods* (3rd edn Sage 2002) 265.
[477] Ibid.
[478] Hewson (n 434) 431.

Table 4.1 - A List of 35 Solicitor Interviewees

Identifier	Gender	Practice Area	Location	Law Firm/Panel	PQE	Seniority	RM
Int1L	M	Comm Prop	London	Large Panel	40+	Partner	SB
Int2L	F	Comm Prop	Manchester	Inhouse	25+	Legal Counsel	SB
Int3L	M	Comm Prop	Birmingham	Large Panel	30+	Partner	Random
Int4L	M	Comm Prop	Nottingham	Medium Panel	30+	Partner	Random
Int5L	F	Comm Prop	Birmingham	Large Panel	20+	Senior Lawyer	Random
Int6L	F	Prop Lit	Manchester	Large Panel	15+	Partner	Random
Int7L	F	Comm Prop	Bristol	Medium Panel	15+	Senior Lawyer	Random
Int8L	M	Comm Prop	Derby	Medium Panel	5+	Lawyer	Random
Int9L	M	Prop Lit	London	Medium	30+	Partner	Random
Int10L	M	Prop Lit	Bristol	Independent	20+	Partner	Random
Int11L	M	Prop Lit	Sheffield	Large Panel	40+	Partner	SB
Int12L	M	Comm Prop	London	Large Panel	40+	Partner	SB
Int13L	M	Prop Lit	Manchester	Large Panel	20+	Senior Lawyer	Random
Int14L	F	Comm Prop	Yorkshire	In house	20+	Senior Lawyer	SB
Int15L	M	Prop Lit	London	Large	30+	Partner	Random
Int16L	F	Comm Prop	Leeds	Medium Panel	2+	Lawyer	Random
Int17L	F	Prop Lit	Yorkshire	In house	20+	Senior lawyer	SB
Int18L	F	Comm Prop	Reading	High Street	20+	Senior lawyer	Random
Int19L	F	Prop Lit	Yorkshire	Medium	10+	Senior Lawyer	Random
Int20L	M	Comm Prop	London	Inhouse	20+	Senior Lawyer	SB
Int21L	F	Comm Prop	Bristol	Large Panel	30+	Senior lawyer	Random
Int22L	M	Prop Lit	Birmingham	Small	5+	Lawyer	Random
Int23L	F	Comm Prop	Bristol	Large Panel	4+	Lawyer	Random
Int24L	F	Prop Lit	London	Large Panel	10+	Lawyer	Random
Int25L	M	Prop Lit	Midlands	Medium	30+	Lawyer	Random
Int26L	F	Prop Lit	Birmingham	Large Panel	10+	Lawyer	Random
Int27L	F	Comm Prop	Derby	Medium Panel	10+	Partner	Random

Int28L	F	Prop Lit	London	Large Panel	20+	Senior lawyer	Random
Int29L	F	Comm Prop	London	Large Panel	15+	Senior lawyer	Random
Int30L	F	Comm Prop	Newcastle	Small	10+	Partner	Random
Int31L	F	Prop Lit	London	Large	40+	Partner	SB
Int32L	M	Prop Lit	Bristol	Medium	20+	Senior Lawyer	Random
Int33L	M	Prop Lit	Liverpool	Small	15+	Partner	Random
Int34L	F	Prop Lit	London	Large	15+	Partner	Random
Int35L	M	Comm Prop	London	In house	10+	Senior Lawyer	SB

4.5.3 Additional Interviews

I also interviewed five barristers and judges in relation to the operation of county court hearings and the mechanics of county court litigation. The barristers, still in their capacity as gatekeepers, also spread the word about my project within the retail sector. They identified those barristers that had been, or were currently, engaged in some of the cases in the county courts and senior 'property valuers', which term includes arbitrators, and letting and managing agents in the retail leases. I had already spoken to one property agent during my pilot and found their perspective very useful in gleaning insight into changing commercial terms and valuation principles. I had intended to speak to one or two agents to assist with situating the interviews in the market. Once the barrister gatekeeper shared details of my project and my interest in the operation of the 1954 Act then I found I was inundated with offers from property valuers, who had 'heard' that I was looking at the 1954 Act. In many of these cases I thought that the property valuers 'felt they had something to say' for the case of either landlord or tenant in the retail market.[479] I did attempt to contact property valuers independently of the 'snowball' referral system; I drew up a population list constructed from the RICS websites. However, whilst property agents were happy to be interviewed via gatekeeper introduction, none would commit to an interview through this method of approach. I interviewed fifteen property agents and found their perspectives fascinating, not least because of the things they wanted to tell me about the market, but because of i) their relationships with their clients and instructing solicitors, ii) their insights into negotiations of

[479] Carroll, Vaughan (n 471).

heads of terms because of their direct contact with SBTs, iii) perspectives on giving valuation evidence in the court courts; and iv) experiences of PACT and alternative dispute resolution.

Though unanticipated at the outset, these additional interviews provide a richness of perspective that assisted me with translating the implications of changing market conditions. The property valuers, I should also add, were all avid trackers of 1954 case law and long after interviews had completed, kindly continued sending to me copies county court judgments.

I felt keenly aware that sampling approaches towards my solicitor population were key to the 'integrity of information informed' by the interview sample.[480] Whilst interviewing, I ensured that I kept issuing the 'random' recruitment emails to try to ensure equilibrium between methods.[481] Over the course of interviewing I became more discerning. This was in part to try to ensure gender balance amongst interviewees and to try to target the perspectives of professionals acting on behalf of different types/sizes of landlords and tenants. The study therefore combined different approaches 'beginning with convenience recruiting to launch [the] study, moving into a purposive stance as the dynamics of the recruiting process unfold, and then targeting recruitment for particular instances'.[482] For example, I was keen to ensure gender balance between interviewees and also to access interviewees who could speak about the experiences of smaller landlords and tenants.[483]

What I did find interesting, and perhaps was not expecting, is that often my interviewees had practiced in a range of law firms over their careers (some trained in large firms in retail

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[480] Anton Kuzel, 'Sampling in qualitative inquiry' in Benjamin Crabtree and William Miller (eds), *Doing qualitative research* (2nd edn Sage 1999) 36.
[481] Clive Seale and others, *Qualitative Research Practice* (Sage 2004) 17.
[482] Sally Thorne, 'Applied interpretive Approaches' in Patricia Leavy (edn) *The Oxford Handbook of Qualitative Research* (Oxford Handbooks 2014) 108.
[483] Renée Spencer, Julia Pryce and Jill Walsh, 'Philosophical Approaches to Qualitative Research' in Patricia Leavy (edn) *The Oxford Handbook of Qualitative Research* (Oxford Handbooks 2014) 84.

work, then moved inhouse, and then to a smaller firm toward the latter stages of their career). A small number of interviewees were in an in-house role at the date of the interview. Furthermore, some of the interviewees were practising as professional support lawyers or had practised as professional support lawyers at one point in their career.

Whilst interviewing, I asked: which law firms did interviewees see acting on transactions and what was the legal landscape in relation to retail work? I was pleased that roughly speaking the landscape mirrored my approach in that the legal work pooled in large/ medium sized law firms in London or in regional offices. Work carried out outside the panel framework was usually because clients sought niche advice (often from London firms), or because smaller landlords or tenants instructed their solicitors on a 'one off' basis. It was these 'one off' instructions that were more difficult to locate. Purposeful sampling is selecting the population from which most can be learnt; the 'logic and power of purposeful sampling derives from the emphasis on in-depth understanding of information rich cases', which are 'those from which one can learn a great deal about the issues of central importance to the purpose of the inquiry'.[484] I was attempting to ascertain what was 'typical, normal, average'.[485] I undertook 'purposeful sampling' in three areas, panel lawyers across the country, seeking out key practitioners with a wealth of experience over a period of time, and in relation to small/medium size firms that acted for smaller landlords/tenants with one or two, or small portfolios of properties.[486]

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[484] Patton (n 476) 53.
[485] Ibid 268.
[486] Ibid 45.

The barrister gatekeeper that I spoke to suggested speaking to barristers and judges who specialised in commercial lease work under the 1954 Act. Whilst these interviews were not envisaged as part of my main project, I spoke to five barristers and judges in relation to their 1954 Act work. Although these interviews with the property agents and barristers were not originally intended to be a part of my data set, it built up a 'triangulation of perspectives' that were 'reflective of a broader context' and gave a rich insight into the retail sector.[487] Overall, I interviewed 35 solicitors from a spread of 26 different law firms from Magic Circle, London Firms, Regional, and High Street practices. Five of those lawyers were currently practising in-house with large retail tenants or Institutional Landlords, but all had trained/worked in this area of practice previously in law firms. One interviewee had previously worked in-house but worked in private practice at the time of interview. I interviewed solicitors until the point of saturation was reached'.[488]

An overview of all interviewees is set out in Table 4.2.

[487] Thorne (n 482).
[488] Yvonna Lincoln and Egon Guba, *Naturalistic Inquiry* (Sage 1985) 202.

Table 4.2 - A Breakdown of all Interviewees

Barristers and judges	7 (2 women, 5 men)	This is taken from 4 barristers chambers.
Solicitors total	35 (19 women, 16 men)	17 property litigation solicitors 18 transactional property solicitors Drawn from 26 different law firms across the country. Many lawyers had practised in different firms across their careers. Some interviewees referred me to people with 1954 Act specialism in their own firm.
Property Surveyors	13 (3 women, 10 men)	3 were in house surveyors, although most practised a broad mixed practice over their careers between inhouse and roles in large commercial estate agents' practice. Some had set up their own estate agents' practices.
Total	55 Interviewees (24 women, 31 men)	

4.5.4 Transcription

While the wealth of perspectives gathered through extensive interviews can enrich research, the sheer volume presents different challenges. The next phase involved transcription, annotation, sifting through transcripts, coding themes, and ensuring that nuanced insights are not lost in the process.

I undertook pilot interviews during May and June 2020. The data revealed the impact of COVID-19 on the retail market. I was interested in capturing the market turbulence of the COVID-19 crisis, but was concerned that the Interview Data might only be relevant to this particular period of time, a period of market instability.[489] It was therefore important to separate out my thesis project from the immediate COVID-19 crisis, which might impact on the 'dependability' of my broader project.[490] The interviewees' insights into the COVID-19 crisis were of stand-alone interest to the Law Commission. Therefore, I decided to expand the focus of my interviews to specifically consider the 'COVID-19' impact on market conditions in addition to the original interview questions that I had designed for my thesis interviews. I obtained funding from the UKRI to expand my interviews in length and collect data about the impact that COVID-19 was having on commercial terms. I used this funding for transcription of my Interview Data.

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[489] Herbert Kritzer, 'The Data Puzzle: The Nature of Interpretation in Quantitative Research' *American Journal of Political Science* (1996) 40(1) 1-32, 13.
[490] Webley (n 436) 932.

4.5.6 Pilot Study

Whilst conducting the pilot interviews I transcribed each interview myself and considered each one in depth, by annotating each in the margin of the document and identifying main issues and themes that arose from these interviews. The transcription itself was time consuming job, but it brought with it a deep familiarity with the material. Reading, reflecting on and annotating these interviews was time consuming because I was adjusting to the interviewee's environment, the language and terminology that they used to talk about the retail world. Furthermore, as these were the pilot interviews, I reflected on which questions had gone well, and what could be improved. I appraised the quality of respondents' answers to questions: those questions that had elicited insightful, or perhaps unexpected, answers.

There were also occasions in my pilot interviews where the interviewee did not see an immediate answer to the question I asked. For instance, this occurred when I asked about connection between the legislation and physical landscape. Initially I found this nerve wracking because in some cases interviewees made it clear they did not see the point of the question and had 'no answer'.[491] I was worried there was no connection. This was particularly the case with solicitors who were caught up in the transactions. However, there were then interviews where different interviewees gave quite surprising and insightful answers. I began to see this as part of understanding the disconnect between the flat, two-dimensional application of doctrine and a broader appreciation of the legislation's implications across portfolios of properties. This broader perspective was more easily obtained from interviews with property agents and in house lawyers who were more accustomed to thinking tactically

[491] Patton (n 476) 456.

about the overall effect of commercial negotiation across a portfolio, as opposed to transactional solicitors who tended to be buried in the technicality of the 1954 Act's interpretation. In scenarios when issues were obscure to me, or wider point was obscured I would ask 'why' questions.[492] Gaining an insight into the logic of different professionals was extremely useful and made my data richer.

4.5.7 Interviewing Elites

It became clear that some of the property professionals I interviewed regarded themselves as either 'landlord' or 'tenant' focussed. This meant that interviewees criticised the actions of either landlords or tenants in the market. This was largely because of the approach of some commercial tenants to CVAs and withholding rents during the moratorium period, which was considered not to be acting in good faith, or landlords suppressing rental evidence. Relations between landlords and tenants and their specialist advisors was at times tense and it was clear that these elite property advisors were invested in their clients. Vaughan writes that:

> *'I am not elitist. I do not think that, for example, the views of specialist solicitors have an inherent value that is greater than that of a non-specialist. However, I do believe that their specialism adds something to the nature of the views they hold their specialism adds something to the value'.*[493]

A prominent theme that emerges from the data is around power relationships between landlord and tenant. As one interviewee commented:

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[492] Patton (n 476) 456.
[493] Steven Vaughan, 'Elite and Elite-lite Interviewing: Managing Our Industrial Legacy' in Alex Franklin and Paul Blyton (eds), *Researching Sustainability* (2013) 105, 106.

'I suppose the relationship between retailers and landlords, it really has been a "who's got the power?" type of relationship'.[494]

In researching this dynamic, it was important to reach the population that have 'the status or employment or position in society (or some other distinguishing factor based on power or privilege) that would enable them to comment on the dynamics'.[495] This position sometimes presented if lawyers were themselves involved in litigation and there was a sense they were justifying their actions, or role.[496]

4.6 Data Analysis and Coding

The review and analysis of data started at the point of the first pilot interview. The pilot data immediately revealed aspects of the landlord-tenant relationship that I was not expecting in my general question schedule. This was in part due to Covid-19, but mainly because the market had shifted, so had the commercial terms (for instance, pandemic clauses), and tactics between the parties had altered. I transcribed the pilot interviews by hand, anonymised the data and began to read and review these transcripts and to code these interviews. I added free text comments alongside them as I considered the data. I realised that there was a huge amount of turbulence that was seeping out into the press, into new case law decisions all of which was impacting landlord-tenant relationships. I decided to treat the COVID-19 implications as a separate add-on to my thesis and amended my interview schedule to accommodate a separate section relating to COVID-19 to capture its transactional implications.

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[494] Int3S
[495] Vaughan (n 493).
[496] Johnny Andoh-Arthur, *Gatekeepers in Qualitative Research* (Sage 2019) 35.

With the main interviews, once these were conducted and recorded, I immediately submitted these to a transcription company authorised by the University of Birmingham. On receipt of completed transcripts I anonymised each interview and saved them to One Drive – the University's password protected storage cloud.

Before, starting to analyse the main Interview Data, I considered how best to go about the practical and theoretical task of analysing my data. I investigated the computer software package Nvivo, which is supplied by the University of Birmingham. I attended online tutorials and downloaded the software onto my laptop. I looked at its capabilities playing around/creating themes with a sample of pilot data over a few days. At the same time, I asked qualitative researchers (my colleagues in the Law School) how they used the Nvivo software. A colleague informed me that whilst they used it, it was often unstable – they spoke of 'horror shows' where Nvivo crashed when used on a laptop and data coding information was lost.[497] I began to use the software and shortly afterwards, following a computer malfunction, I lost my data from Nivo. I determined that I would prefer to undertake my data analysis manually.

I began by coding the solicitor interviews as I regarded these as the main focus of my thesis. Coding is the 'assignation of short words or phrases' that ascribe a 'summative, salient, essence-capturing, and/or evocative attribute for a portion of language-based or visual data'.[498] Coding is to identify the 'minimum of data', the smallest denominator.[499] Practically speaking, I coded the data in the same way that I coded the pilot data for the remaining 30 solicitor interviews. I looked initially at location, work type, panel/non-panel lawyer, and then

[497] Merriam, Tisdell (n 444) 200.
[498] Johnny Saldaña, *The Coding Manual for Qualitative Researchers* (Sage 2013) 3.
[499] Lincoln, Guba (488) 235.

as I read and considered each interview, codes became more substantive. After coding 5-6 interviews I began the dual process of continuing coding, whilst also pulling these codes together into broader over-arching themes in Word documents (**Theme Documents**).

Placing data side-by-side in Theme Documents opened up new breadth and depth of knowledge and themes, referred to as 'axial-coding'.[500] Interpreting Interview Data – what 'lawyers do, and who they are, thus plainly matters, but the complexities of understanding and evaluating them are enormous'.[501] I made notes in the Theme Documents, using the document itself as a 'bucket or basket' where I placed my 'segments of text'.[502] It is here that I set out my broader initial thoughts and identified broader themes. I left these Theme Documents from time to time to code the next batch of interviews then with the new, broader themes in mind, repeating the process of bringing coded findings into the overarching Theme Documents. Stepping back into the Theme Documents again and again was an 'inductive and comparative' process, which helped me to identify things that I had not previously seen and identify broader issues.[503] At points, these Theme Documents became voluminous, and I took time mapping out the themes that emerged and considered how those ideas linked to other themes. In some cases, this resulted in the creation of new themes that emerged from strands of existing themes. After a period of time the process became simplifying and focussing on a smaller number of codes.[504]

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[500] Kathy Charmaz, *Constructing Grounded Theory* (2nd ed Sage 2014) 148.
[501] Richard Moorhead, 'Lawyers and Other Legal Service Providers' in Peter Cane and Herbert Kritzer (ed) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 801.
[502] Catherine Marshall and Gretchen Rossman, *Designing Qualitative Research* (6th edn Sage 2016) 224.
[503] Charmaz (n 500) 14.
[504] Ibid 148.

Whilst the data was rich and coding and theming it was interesting, the volume of words at times felt 'cumbersome' and overwhelming.[505] On reflection, in a future project I might be more cautious about obtaining the perspectives of additional, unanticipated interviewees. However, this meant the data took longer to review, code and theme. It also meant that I had to consciously return to my theoretical framework and to the focus of my research questions. It did mean, however, that the insights into these questions were richer than initially anticipated.

4.7 Conclusion

The empirical basis of this thesis is rich and based on 55 semi-structured interviews with commercial property and property litigators, barristers (a judge of the First-tier Tribunal), and property agents with specific expertise in this sector of valuation, asset management, and PACT. The themes identified in the Theme Documents go on to form the basis of the data chapters that follow in this thesis. The data yield an insight into the retail sector, the power dynamics between landlords and tenants, and the complex role that property professionals play in the market.

One main thread emerged – that of power and resistance. This theoretical underpinning connected the dominant themes that emerged from the data. These themes relate to the protections afforded to the SBT, power and resistance across a spectrum of landlord-tenant relationships, and the implications of an excess of Multiple power. These themes are considered in chapters five to seven, inclusive.

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[505] Charmaz (n 500) 150.

CHAPTER 5 MULTIPLE RESISTANCE AND MARKET DISRUPTION

Chapters two and three set out the context of this chapter five by detailing the historic retail market structures (investment lease and valuation) that have developed under decades of landlord-centric market control. This chapter five builds on that market history by offering a perspective into the changing commercial dynamics in the retail market during COVID-19. The intention is to offer up a snapshot of changing power and resistance in the market and tactics to resist traditional power structures employed by Multiple Tenants. This chapter five approaches commercial property law and its operation in the retail market through Blandy et al's lens of enduring property relationships (EPRs). It advances the central argument of this thesis that a fourth limb – power – will allow a fuller understanding of EPRs by exploring the capacity of Multiples to use the weight of their property portfolios to influence and re-shape the relationship. In considering power, I look to Foucault's understanding of power and resistance, particularly in analysing interactions between commercial landlord and tenant within the 1954 Act framework. The purpose is to explore the current landlord-tenant dynamic in the retail market. These discussions will, in turn, frame chapter six, where a deeper mapping of this power dynamic onto the provisions of the 1954 Act is offered up.

5.1 Background

The tenant's statutory right to protection, the right to renew their tenancy, under section 24 1954 Act is set out in chapter two. The ability to renew is, however, subject to rents and commercial terms that are available in the retail market at the point of renewal. Until the early

2000s the commercial terms available in the retail market were largely dictated by Institutional Landlords in the form of the institutional lease. The Interview Data speak to changes in market practices between approximately 1968 to 2021. Several of the lawyers interviewed as part of this thesis had acted for Institutional Landlords since the 1970s and 1980s. They commented that until the mid-2000s 'we were all into 25-year leases with upward only rent reviews'.[506] In the 1960s lease renewal transactions were characterised as straightforward negotiations, with leases amounting to 'no more than fifteen sides of A4 paper'.[507] They were simple, straightforward transactions. These interviewees stated that these hallmarks of the institutional lease were all 'pretty sacred'.[508] One interviewee commented on market power that 'for most of my career, landlords could throw their weight around and get what they wanted'.[509] This was until the mid 1990s when leases started to become more varied, notably 'more diverse between 1993 and 1998'.[510] Institutional lease terms are an investment landlord construct, designed to ensure the lease 'isn't leaking money anywhere' meaning that the tenant picks up costs under the lease of repairing and insuring the premises so that no residual liability falls to the landlord. This minimises landlord exposure and by standardising and formalising risk in leasehold relationships, the stream of 'rental income from the asset' is preserved.[511] This is at the heart of investment in institutional leases. The formalisation of the position on risk between the parties across the retail sector cements

[506] Int1L
[507] Int12L
[508] Int21L
[509] Int1L
[510] Crosby, Gibson, Murdoch (n 158) 1488.
[511] Angus McIntosh, Stephen Sykes, *A guide to Institutional Property investment* (Springer 1985) 109.

the commercial position of the parties so that the institutional lease reflects landlord-tenant market power.

Other practices grew up around the 1954 Act legislation. For instance, valuation methodologies, which Foucault would describe as a 'technology of power', are structures used to manage and regulate this body of commercial property. The valuation industry has evolved to include the practices of valuers, accountants, solicitors – valuation methodologies, institutional lease terms, and the legal practices around certificating titles to leasehold properties in accordance with the City of London Solicitors Company. All of these are technologies of power, designed to govern commercial leasehold property. In the introduction to its 1992 review, the Law Commission explained that the 1954 Act was 'an established part of the commercial property market' and as the 'practices of that market develop and change over the years, so it is appropriate for the statutory provisions to be reviewed to ensure they are still fulfilling their intended purpose'.[512] The 1954 Act has evolved to form the nervous system of the real estate sector. A central tenet of this thesis is that the 1954 Act has drifted from its original policy intention (protecting the SBT). Arguably, its substituted purpose became stabilising the retail sector and protecting landlord investment. In this chapter five, it is evident that rather than bringing stability to the retail sector, the legislation fails to regulate not only the market, but the exercise of unrestrained power within the landlord-tenant relationship.

Historically, the 1954 Act has been about encouraging the tenant to be secure, to put down roots, and to encourage longevity of occupation. Market practices, including the financial and

[512] Law Commission (n 152) 4.

legal mechanisms that have developed around commercial leasing and valuation on renewal, have been predominantly concerned with safeguarding the interests of investment landlords and promoting a secure investment market. A by-product of the solidity of the commercial property market is that the business rates taxation system, again developed off the back of this buoyant market, clinging to the value generated by retail properties. A whole financial eco-system developed that worked on assumptions that there is a shortage of property in the market, that rents will rise, that tenants will remain in occupation at the end of the term. The landlord-investment sector, having built these practices, have reaped their benefits.

Opposition to reform of the 1954 Act's legislative framework is often grounded in fear of the impact that 'intervention' could have 'on property investment'.[513] The tectonic shift which this thesis addresses is that market conditions have now shifted; they are no longer strongly in the landlord's favour and Multiple Tenants are acting, sometimes in concert with other Multiples, to challenge and resist traditional landlord-centric strictures and are challenging, reversing, re-basing, and reconstructing the industry norms around the 1954 Act.

5.2 Market and Power Shift

5.2.1 Comparative Valuation Methodology

Interviewees concurred that from the inception of the 1954 Act until the mid-2000s that 'landlords really did hold all the cards' in the retail market in terms of commercial negotiation.[514] Broadly speaking, a historic shortage of retail property meant that landlords had the upper hand and dictated commercial conditions to tenants. The late 1980s and early

[513] Bright (n 68) 156.
[514] Int3S

1990s are characterised as the 'race for space' era as out of town retail spaces spring up, supermarkets expand, and corporate tenants compete for space as physical space is the only outlet for retail goods. From the mid-80s onwards rents 'went through the roof', with one interviewee noting that rents in Milton Keynes tripled over a five-year period.[515] Commercially, landlords were delighted. One surveyor interviewee gives an example of how rental valuation influences capital value:

> *'[A clothes retailer] was expanding aggressively and they paid ten percent above the market and, immediately, you've moved your ERV[516] in your shopping centre forward by ten percent, and probably increased the value of the shopping centre by at least five percent, which, if you've just paid 50 million for a shopping centre, you've probably made two to three million quid just with that one letting'.*[517]

Chapter two explains that valuation methodology under section 34 of the 1954 Act looks to comparative evidence in the retail market. New lettings on the open market are considered by the RICS to be the best form of comparable evidence. In the interview extract above, the valuer confirms that in a rising market, where there is competition for physical space, tenants bid against each other for space. This pushes up rent. This means that on renewal of existing leases, the new letting would be indicative of rental value increasing rents across the shopping centre. Determination of the new rent is based on an open market valuation for the premises, disregarding the effect on the rent of the tenant's occupation, goodwill, or any improvements that have affected its value. The issue here is that these premises are already occupied by the

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[515] Int6S
[516] British Land, 'Glossary' https://www.britishland.com/glossary accessed 21 February 2021. ERV is the estimated rental value that a property can reasonably be expected to attain in the open market.
[517] Int3S

sitting tenant and so will not actually be marketed on the open market. Instead, to determine the new rent on renewal under section 34 of the 1954 Act, valuers look to evidence in the open market – namely agreed rents from recent lettings of similar premises in a similar location to the renewal property. The accepted valuation convention here is that the rent is determined by looking to data from already agreed on-market lease renewals or rent reviews as comparable evidence. These comparative valuation practices, in a 'healthy' retail market, can be used to manipulate market and capital growth using what is anecdotally referred to as the 'LPQ' effect:

> *'[W]here a landlord has a parade of shops, a charity, takeaway, newsagents [he can] lift the rental tone by letting to a slightly fancier French sandwich shop [Le Pain Quotidien] or an American Apparel, which can transform this into a prime piece of retail space. This enables the landlord to say to that the parade is "on the up" and the new letting is "the best comparable evidence" because it is nearest to the valuation date'.*[518]

Manipulation of valuation methodologies gave investment landlords the ability to grow the investment value of shopping centres, and out of town retails sites. These are sites where the landlord is in control of the reversion of a parade or centre rather than one individual shop. Combined, the section 34 valuation framework and the institutional lease create the underpinnings of the '**Lease Renewal Market'**. The Lease Renewal Market is distinct from commercial lettings that take place 'on-market'. This is because the mindset in 'on-market' negotiations is fundamentally different from lease renewal negotiations. To explain, the tenant is negotiating to secure the premises and is, notionally, or in reality, competing against

[518] Int3S

other tenants to secure a lease of the premises. There is an urgency to enter the lease so that it is taken off the open market. If negotiations break down, then the landlord, in a healthy market, can let to a different tenant. Negotiations for a new lease renewal are entirely different because the tenant is already secure being statutorily entitled to a new lease; the landlord continues to receive rent, and the tenant continues to trade. The factors that influence negotiations on the Lease Renewal Market are explored below and in chapter six.

5.2.2 Tenant Resistance

Once the state has intervened to impose the 1954 Act, this statutory regime effectively replaces the 'open' market for secured leases, so that a new Lease Renewal Market emerges framed by the 'set of relations, apparatuses, knowledges, techniques [and] architectures' of the 1954 Act.[519] The 1954 Act regime is not controlled by a regulator per se, but it operates under the court's jurisdiction. The Lease Renewal Market is intended as a replica of 'on-market' conditions, a replica of the retail market. However, the 1954 Act regime leaves space for individuals to resist the system. Resistance is an inherent and interconnected facet of any disciplinary system, challenging and destabilising institutional control.[520] Resistance can take many forms, including foot-dragging, sarcasm, slander, theft, although it is usually difficult to maintain open challenge because disciplinary systems correct non-conformists.[521] The Interview Data show that tenants, emboldened by changing market conditions, are challenging and resisting the strictures of the traditional regime.

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[519] O'Malley, Valverde (n 363) 317.
[520] Lilja, Vinthagen (n 408) 114.
[521] James Scott, *Domination and the arts of resistance: hidden transcripts*. (Yale University Press1990) 204.

Interviewees spoke about changing market practices over the course of their practising career. Interviewees identified a point during the late 1970s to mid 1980s when tenants began employing property surveyors to manage their 800-plus stores nationwide as moment when tenants developed consciousness, a 'pulse'.[522] Tenants began to develop strategies to 'grow the [tenant's] estate' and the market uncertainty of the late 1980s was said to be the first time that interviewees recalled tenants having 'very gung-ho development surveyors who [developed tactics]to use the Act to their own advantage'.[523] Landlords soaked up Multiple Tenants' thirst to grow their property footholds across the country. Multiple Tenants were overall able to negotiate security of tenure in the market.[524] The 1954 Act is not intended to insulate the tenant from market conditions,[525] and tenants began to comprehend that the tactical management of portfolios through lawyers and property agents was a necessary evil to challenge the landlords' position to achieve more favourable lease terms on renewal. Tenants met with some success around this point in time in their requests for upwards and downwards rent reviews, although typically this occurred where there was no existing rent review provision in their lease, or in requests for shorter lease terms, or break rights.[526] This awakening in tenant consciousness to the potential benefits of the legislation marked a change in tactical approach: 'from when I was in, you know, short trousers in the '70s, I could see change in the '80s and '90s.'[527]

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[522] Int1L
[523] Int1S
[524] Int14L
[525] *O'May* (n 226) the 1954 Act is not intended to shield tenants from market conditions.
[526] See *Boots The Chemist Ltd v Pinkland* [1992] 2 EGLR 98, which concerned inclusion of an upwards/downwards rent review clause.
[527] Int4B

Several interviewees identified the point when tenants began to challenge the status quo as the point in time that the first shopping centre leases came up for renewal in the 1980s:

> *'[It was] strange to have a major retailer using the Act to its benefit and getting things like a break clause, reflecting […] a difficult market in the late 1980s - early 1990s. And so that was [the first] sort of change in the balance'.*[528]

In the next section I will look at Multiple tenant behaviours as a 'conflict of rival strategies' and aims,[529] as an increasing co-ordination of Multiple Tenants' resistance to landlord power.

5.2.3 Market Disruption and Legislative Failure

As explained above, there is separation between 'on-market' transactions, which encompass new lettings, and the renewal of those leases on the Lease Renewal Market. Historically, Multiples have typically had an eye on the terms that available to them in the open market to ensure that terms available on renewal 'reflect market practice'.[530] The Lease Renewal Market is, of course, a fabrication, an attempt to replicate 'on-market' terms within the structure of the 1954 Act. The Lease Renewal Market is, however, an imperfect facsimile of the open market. In a strong retail market, Multiple Tenants are motivated by competition for market share against other Multiple Tenants to negotiate new 'on-market' leases as quickly as possible. However, in a failing retail market, tenants keep a weather-eye open for softness and opportunity. Rather than competing against each other for space, we see

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[528] Int4B
[529] Nikolas Rose, 'Governing advanced liberal democracies' in Andrew Barry, Thomas Osborne, Nikolas Rose (eds) Foucault *and Political Reason*, (UCL Press 1996) 38.
[530] Int7L

Multiples beginning to act in concert, to resist long-held landlord power, leveraging their collective power in the market.

An inherent part, an interconnected facet, of any disciplinary system is resistance. Foucault writes that in a disciplinary regime:

> *'[There are] a plurality of resistances, each of them a special case: resistances that are possible, necessary, improbable; others that are spontaneous, savage, solitary, concerted, rampant, or violent; still others that are quick to compromise, interested, or sacrificial; by definition they can only exist in the strategic field of power relations. But this does not mean that they are only a reaction or a rebound, forming with respect to the basic domination an underside that is in the end always passive, doomed to perpetual defeat'.*[531]

Both landlords and tenants are hit by changing consumer behaviour in the retail sector. Landlords have fixed immobile assets, and are left in a position of justifying existing, but now noticeably overinflated rent levels, due to UORRs, to their disgruntled tenants who do have alternative business models to which they can turn. Since approximately 2008, the retail market has been in decline, in large part due the rise in online sales and less demand for physical space. Crosby et al noted in 2003 a growing dissatisfaction amongst tenants seeking more flexibility (shorter lease lengths, more break clauses, greater flexibility on assignment) where lease terms in the retail sector remained stubbornly out of kilter with the rest of the commercial sector.[532]

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[531] Foucault (n 410) 95.
[532] Crosby, Gibson, Murdoch (n 158) 1490.

Multiple Tenants have historically been unable to negotiate flexibility outside of institutional lease terms, for instance upwards and downwards rent reviews, without changes to the lease being reflected by an increase in the rent. This resulted in artificially high rents sustained in the Lease Renewal Market, when 'on-market' rents are falling. Exiting these obligations, or re-negotiating them, is tricky unless landlords are prepared to voluntarily release tenants, and so Multiple Tenants have turned to more creative solutions. Investment and Institutional Landlords are exposed to Multiple Tenants acting in relation to not one lease but utilising the weight of their portfolio to leverage change in the various ways which are considered in the sections below.

5.3 Collective Multiple Action

Multiples' actions have become more effective because they have begun to act in concert with other Multiples. Interviewees were asked what shaped lease renewal terms and commercial lease practice. Here is the response of one interviewee, which is included in full because of its significance:

> *'R: Well, I suppose at the very top of the chain, it will be court decisions. […] And I think then it's more likely you're probably going to see a lot of settlements so you won't necessarily get court decisions so there is more likelihood of it [the decision] coming out. There've been tenants grouping together. So, I think we have a, like a group of tenants, a lot of my clients are in. There are like 100 retailers who have all clubbed together and they're all sharing information [in an email group]. So, the moment they have got a landlord to back down on a term they told all the other retailers that the landlord backed down, "so, if you have this landlord don't give in".*
>
> *I: Is it across a shopping centre that they're sharing this information?*

R: It's just across the tenant groups so for example, in this [email] group, there are tenants like [Multiple 1], there is [Multiple 2] there's [Multiple 3], there's [Multiple 4] all clubbing together and sharing with this little group. And so, the moment, say, someone gets [a lease term] wording in, [Multiple 3] will get just in touch with the group and say "by the way, I've got this wording in so if you've got this landlord, don't back down on it, because they will give up and just let you have it". And the other thing is through agents, through the surveyors, because, obviously, there's an awful lot of debate at the moment about the impact on rent that [changing lease terms] are having. And I think there's a lot of discussion as well coming out of agents getting information from other agents. And they'll say "well, we got this [commercial term] wording in, and it had this impact [on rent]." And so, I think these slowly flood into the market, mainly through tenant interaction and the agents'.[533]

The interviewee stated that the Multiple email group was primarily established at the outset of the pandemic to 'lobby for change'. This meant lobbying the government to introduce the moratorium on forfeiture for non-payment of rent at the beginning of COVID-19 when the market was in distress. A moratorium was subsequently introduced in March 2020. Multiples began to realise the power of their collective portfolio weight, as the interviewee explained 'now they've built that network, it's going to take quite a lot to dismantle it'.[534] Multiples gain efficiencies from sharing information across portfolios. They are learning from each other's negotiations and assimilating those successes into their own negotiations as evidence of the ability to achieve those terms in the retail market.

To have evidence of changed commercial terms in the market is powerful because it provides the proof that these commercial terms are obtainable in the market and means

[533] Int26L
[534] Int26L

Multiples have more clout in negotiating to push for inclusion of these terms. Furthermore, evidence that these terms are widely achievable in the retail market means that it is more difficult for landlords to place a value on, or rentalise (obtain an increase in rent because of) the clause. This is explored more fully in chapter six. Once upon a time, Multiples competed against each other for physical stores, they are now collaborating and effectively running one gigantic portfolio across the country through a centralised neural network that continuously feeds up-to-date market information from property deals across the UK into negotiations.

The interviewer credits this group as being instrumental in challenging and in some cases reversing the position on commercial terms, and the distribution of risk between the landlord and tenant in the retail market. This is achieved by Multiples acting together to push for consistent terms and utilising each other's successes as evidence of these terms in the retail market. The interviewee refers to 'a 100' retailers in the group and refers to four specifically by name. Internet searches confirm the size of these retailer's renewal portfolios; the four named Multiple Tenants collectively held approximately 4,898 retail stores across England and Wales in 2021. This illustrates the weight of these Multiples' ability to resist a landlord-monopoly on commercial terms when the collective portfolio could equate to approximately 120,000 retail stores across England and Wales.

One example of Multiples utilising their email network to alter commercial term was put forward by a different interviewee. This interviewee spoke about pandemic clauses which emerged during COVID-19. A 'pandemic clause' is an extension of the force majeure clause that allocates risk if the premises are damaged, or in this new situation, if the tenant is unable to trade because of pandemic-related lock-down. In negotiation, Multiples sought to allocate all risk to landlords, whilst landlords argued that tenants should insure against business

closure. Solicitors interviewed for this project generally indicated that negotiation of these clauses was a hot topic in the sector. One interviewee gave an insight into the point that landlords began to accept pandemic clauses explaining that a Multiple got in touch with the group to say that pandemic wording had been accepted by their landlord.[535] This is an illustration of how a new commercial term, that alters the balance of risk in the lease, 'slowly floods into the market'.[536] The interviewee describes this as 'really powerful' mainly because landlords 'don't have anything similar and therefore stand under their own weight'.[537] Here the interviewer means that landlord ownership is fractured. This means that landlords across England and Wales are not connected in the same way that Multiples have united. Even the most determined landlords would struggle to maintain their position when Multiples have evidence of commercial points conceded by that landlord in negotiation with other tenants at other leasehold sites across the country.

The EPR approach is intended to offer a more multifaceted understanding than doctrinal analysis alone can offer. The EPR lens views property relationships as being shaped by the following three interrelated perspectives: 'the diverse network of sources, property's temporal element, and discretionary spaces in decision-making'.[538] This thesis' central argument is that without adding an understanding of power within the EPR approach the full picture of the relationship may not emerge. The impact that the weight of negotiation of a portfolio of properties has been rendered invisible to the outside observer of these commercial transactions. The example of the pandemic clause is an example of powerful

[535] Int6L
[536] Int26L
[537] Int6L
[538] Blandy, Bright, Nield (n 49) 95.

Multiples leveraging the power of their portfolio to create a precedent in the market – patterns of successfully agreed commercial terms and concessions that would have been previously unattainable but through repeatedly obtaining these terms, created change in the market.

The Multiples' information platform is utilised to shift the market terms and industry norms. Without power, it is not possible to observe how and who shapes these industry norms and practices. Power dynamics between large corporate players are significant because changes – though power and resistance – to industry norms have an impact on the economy, and an increase in the power of one corporate player can have significant effects on smaller landlords and tenants. Without adding the fourth pillar of power into the framework of EPR one cannot see the entirety of these relationships or consider the impact that these anti—competitive practices have on lease practice, on SBLs, on SBTs, and on tenant mix.

5.4 Rents

Above, examples are given of Multiples leveraging portfolio power to change commercial leases also being utilised to drive down rents. Multiples tactics are shaped by different sources of information in the retail market. One source of information is gleaned from Multiples that are distressed and facing financial difficulty. Before discussing how solvent Multiples have levied rent cuts the section below deals with the wider context in the market of distressed Multiples and their rent reductions, which have had impacted on solvent Multiples tactics.

5.4.1 CVAs and Insolvent Multiples

One prevalent issue that emerged in the Interview Data related to the development of company voluntary arrangements, or CVAs. A CVA is a form of insolvency process under

section 1 of the Insolvency Act 1986 that aims to provide a framework to rescue a distressed company that has a viable business. Interviews were conducted at a point in time when there had been a recent spate of CVAs – including Debenhams and New Look.[539] The connection between rent reductions sought by solvent tenants under the 1954 Act regime or otherwise, and these CVA processes is not immediately apparent.

At their core, these CVAs provide insight into how Multiples wield power within their retail portfolios. This thesis posits that power should be considered a fourth pillar in understanding enduring property relationships. Analysing power dynamics—initially landlord power in institutional leases—is crucial; without this perspective, current valuation methodologies would not exist as they do today. Furthermore, without Multiple resistance to existing norms, meaningful change in portfolios could not occur, such as reducing rent levels, challenging valuation practices, and shifting the long-standing balance of risk in commercial leases. This section explores the emergence of CVAs as a mechanism for recalibrating commercial rents under the 1954 Act through insolvency legislation.

Ostensibly, decline in the retail market has resulted in the insolvency of many Multiple Tenants: Woolworths, BHS, MFI, Toys 'R Us, Top Shop, Debenhams to name a few. Inevitably, as Multiples become distressed financial advisors and company directors consider options that might salvage the company, perhaps help the company to survive a tricky trading period (for example during COVID-19) or perhaps to buy time while it re-structures its business to reduce, or repurpose its excess physical space and convert to an online offering to keep up with online competitors. In fighting for survival, these companies have achieved financial and

[539] See section 2.4.3 above.

commercial changes that are not available in the retail market through statutory insolvency processes. Insolvent Multiples are perceived to have thereby gained an advantage over successfully trading Multiples.

Tenant rescue bids have emerged and developed over the past two decades. The typical type of rescue bid utilised by Multiple Tenants is the 'landlord-only' CVA. Details of the process and decision making are set out in chapter two. Multiple Tenants will have a range of creditors (secured and unsecured) but a CVA typically is a voluntary arrangement agreed upon between unsecured creditors. Landlords are typically one type of unsecured creditor of a retail tenant. Should a Multiple become insolvent then potentially all creditors will suffer losses. The landlord's position in the event their tenant goes into administration, or insolvency, is that they would have the right to forfeit or assign the lease to a solvent tenant. The landlord minimises their losses by handing the premises to a new tenant who can pay the rent. However, the typical position under a landlord-only CVA is that the tenant suggests to all its creditors that its plan to avoid administration is to cut costs by not paying rent to its landlords, and in some cases business rents to the local authority whilst carrying on trading as usual and paying debts as they fall due to their creditors. 'Landlord only' or 'rent cram down' CVAs have been implemented by retailers for several years to compromise the levels of rent that the retailer is obligated to pay over a particular period, typically between three and five years. These CVAs are viewed sceptically in the retail market because they are perceived as allowing tenants to maintain a 'particular critical mass [of shops] in order to [continue] to trade' at a reduced cost.[540] Part of the cynicism is that the Multiple does not have to be insolvent to put

[540] Int34L

forward such an arrangement, and therefore potentially a Multiple is able to keep trading more profitably, pass that profit on to its shareholders, whilst paying substantially reduced rent or rates, at the expense of landlords and the local authority. These landlord-only CVAs reduce rents by grouping properties into classes in terms of their profitability and then arbitrarily reducing rent in relation to each class of properties. Debenhams' CVA is a standard example of this approach. This classifies the retailer's properties into five categories as set out in Table 5.1 based on the 'financial performance and sustainability of the rent' for each of Debenhams' individual properties:[541]

[541] *Debenhams* (n 305) 817.

Table 5.1 - Debenhams CVA

	Rent compromise	**Rates compromise**
Category 1	100% of rent paid	No change
Category 2	75% of rent paid	No change
Category 3	65% of rent paid	No change
Category 4	50% of rent paid	50% business rates
Category 5	100% of rent paid until early termination within 4 months' of judgment.	50% business rates

Category 1 stores are lucrative stores that trade well in sought after areas and Debenhams are satisfied that these stores 'are performing relatively strongly from a financial perspective with rents considered to be at a market rent (or if above market rate, then at a sustainable premium)'.[542] Category 5 leases, at the other end of the spectrum, are not financially viable the rent cuts are not merely due to 'disparity between a market rent and the contractual rent under the lease'.[543] Landlords, of course, are unhappy about this proposal, but other unsecured creditors are inevitably keen to support a plan that facilitates the company to continue trading and paying their debts. The arrangement needs the support of at least 75% of creditors to vote in its favour. Landlords, the compromised creditors, find that their percentage of votes is swamped because they make up a minority of the overall number of creditors, who majority of whom are keen to vote for the arrangement.

The Debenhams CVA is the first time that landlords challenged the fairness of a CVA. Further detail is set out in chapter two, but, broadly, these arrangements are justified by the Multiple on the basis that if the landlords accept less, or zero, rent then the business remains viable and the long-term outcome is positive for everyone (except the landlord), because if the Multiple instead went into administration the landlord would lose out on rent completely. However, the Multiple here is arguing that it is justified cutting this creditor's contractually owed rent because it is over-inflated. Norris LJ, in making his decision as to the fairness of the CVA proposal, considered market levels of rent and that the landlord had not argued that these cuts went below the level of market rent.[544]

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[542] *Debenhams* (n 305) 16.
[543] Ibid 16.
[544] *Debenhams* (n 305) 66.

On the face of things, ailing Multiples with large property portfolios have proposed a rescue bid that would ensure that they could continue to trade by cutting their rent bills. However, the RICS write that:

> *'[Whilst such an arrangement] might seem like a reasonable step given the collapse of retail household names, the increased popularity of online shopping, business rates, […] and a squeeze on household spending [that has] been putting pressure on the retail sector […] the fact that times are tough for retailers cannot itself explain the growth of CVAs [amongst Multiples]'.*[545]

There is a sense in the retail market that Multiples have looked at the intersection between different legislative regimes to gain arbitrary rental cuts across property portfolios and a cynicism that CVAs employing a 'rent cram down' mechanism are allowing these Multiples to continue to trade more profitably than solvent tenants in the market.

This is perceived as a commercial affront on the traditional landlord-monopoly on UORRs because tenants are 'fulfilling [their own agenda] rather than being merely obedient'.[546] Landlords have mounted challenges to several of these CVAs, without success.[547] Much of the debate focusses on the hybridity of property and contract law.[548] The contractual element is 'a creative subsidiary which works within the discipline of the estate'.[549] Significantly, the tenant's covenant to pay rent through the words in the lease 'yielding and paying' as fusing the rent covenant to the leasehold estate.[550] The tenant's actions in unilaterally and arbitrarily

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[545] RICS, 'How CVAs affect landlords' (RICS, 8 January 2019) <https://ww3.rics.org/uk/en/journals/property-journal/how-cvas-affect-landlords.html > accessed 23 January 2023.
[546] Nikolas Rose, Governing the Soul: The Shaping of the Private Self (London: Routledge 1989) 221
[547] For instance, see the New Look and Debenhams CVAs.
[548] Blandy, Bright, Nield (n 49) 89.
[549] Warren Barr, 'Frustration of Leases – the Hazards of Contractualisation' (2001) 52 *N.Ir. Legal Q*. 82, 92.
[550] Stephen Tromans, *Commercial Leases* (Sweet & Maxwell, London 1987).

lowering rent unilaterally renegotiates the terms of the lease, yet the rent itself is regarded as 'an incorporeal right' attached to the 'estate' at the level set by the covenant for the duration of the term. The tenants have fundamentally and unilaterally used a statutory provision to undermine the underpinning foundation of the leasehold estate, potentially, reneging on a term that goes to the heart of the leasehold estate – rent and term impacts on dynamic between the parties.[551]

This is significant when, following Debenhams' insolvency case, the landlords successfully challenged the tenant's attempt to vary their right of forfeiture under the lease; forfeiture is a proprietary right and not part of the contractual package of terms negotiated. Using the CVA regime undermines the norm of UORRs and, worse, has handed solvent Multiples the means of challenging market rents under section 34 of the 1954 Act. The problem for landlords lies in the package of measures offered to them as part of a standard 'landlord-focussed' CVA. Landlords are typically offered the ability to terminate those leases where rents would be compromised, giving landlords the ability to escape the unpalatable revised lease terms offered under the CVA arrangement. Therefore, if a landlord thought that it could obtain higher or better terms with a different tenant then they would simply terminate the lease and let to a new tenant. This means that landlords are not required to accept the imposition of reduced rents under the CVAs. However, landlords have not, overall, exercised these termination rights. The interviewees suggest this is for two reasons. First that these stores are overrented and the Multiples have cleverly called the landlords' bluff and their failure to exercise their termination rights under the CVA has become evidence of market rent. This is

[551] Barr (n 549) 92

discussed in more detail in the section below. Second, that larger Institutional Landlords were unable to resist because they lack the commercial agility of smaller landlords and are more exposed to these CVAs because they have contracted more leases with these Multiples and are therefore more exposed in the sense of having to find more tenants. By cutting rents across a portfolio, rather than one store, the stark reality for an Institutional Landlord is that terminating numerous tenant leases on-mass would expose these Institutional Landlords to unacceptable levels of risk: not simply non-payment of rent, but also the costs of occupation – insurance, high business rates, and service charge.

The difference in approach to the CVAs between institutional and smaller independent landlords is illustrated in the extract below. The interviewee here distinguishes between the approach of the smaller landlord who exercised their break, and the Institutional Landlords who did not exercise their termination rights and instead were forced to accept the percentage rent cuts:

> *'It's very, very, refreshing working for a private individual rather than a big institutional [landlord] so when he has the [Multiple] in a nice, smart market town near [CITY] and as part of their CVA the rent was due to fall from 80 grand to 25 grand…and so he exercised the break in the CVA to kick them out because he thought "well I can find a nice local person [to enter into a lease] in that fully fitted building and I'd rather them paid me 25 grand and tried to make a living and a new business, you know some individual person who was offering something unique to the local community rather than, you know, bending over and just doing a deal with [Multiple]. I don't need the money that badly", was his view. Now a fund couldn't do that. Because they have ERVs[552] so, you know, if you have a big corporate retailer offering you, 25 grand and no*

[552] ERVs – estimated rental values.

interruption in rent or anything like that then reluctantly you're probably going to have to do it because there are so many layers of approval above you that mean you can't just do what your gut tells you, whereas with my private individual client you know we do have discussions around the retailers that he likes and the ones that behave decently and he has a very strong view about the people he really thinks are, you know, taking the piss and he's able to make those distinctions which I don't think a property company or a big landlord necessarily would be able to'.[553]

The CVAs exposed the vulnerability of the Institutional Landlord who were regarded as the 'gentle giants' of the retail world because they are bound up by regulation of the fund and were unable to act against these rent cuts. One interviewee pointed out issues lay with their size and scale: having 'three thousand occupiers on the books' makes it tricky to 'have individual conversations' each individual tenant seeking to revise their commercial terms at the same time.[554]

The issue for institutional and large property landlords is that by not exercising their CVA termination rights they are obliged to accept arbitrary rent cuts. This spectacle unfolds publicly, and Multiples, both solvent and financially insecure, watched with interest because landlords were glaringly exposed because payment of the rent reserved under the lease was not something investment landlords had the confidence to enforce. Again, by considering these arrangements from an EPR perspective, one can see a multiplicity of legal sources that challenge the property relationship between the parties and impact on the contractual underpinnings. However, without a consideration of power it is not possible to fully understanding the ramifications of the CVA decisions. In the Debenhams CVA there were

[553] Int13S
[554] Int4S

significant consequences for landlords across the county because of the size of the tenant's portfolio and the size of the space let. The Multiples' challenge to rent levels could be considered a form of moderating resistance.[555] This is because their actions expose and draw attention to high rental levels, and reveal landlord vulnerability due to lowered market confidence, and bolster tenant power in the market because the high level of costs associated with occupation - high business rates, insurance, service charge. As illustrated below, if CVAs are a form of moderating resistance, they scaffold solvent Multiples in engaging in practices that amount to 'fracturing resistance'.

Despite the legitimacy lent by a statutory insolvency rescue process the court of public opinion is that numerous Multiples who, whilst in a financially precarious position, are technically solvent have achieved significant arbitrary rent and business rate cuts at the expense of landlords (some are pension funds) and the public purse. Toby Moses writes in *The Guardian* that there is now:

> *'[A] generation of people now who know nothing else but shopping online. It's the norm. Physical shops feel almost unnecessary. Let's start thinking about how to help those facing redundancy, rather than how to help the House of Fraser shareholders'.*[556]

This insight supports the idea that perhaps the public interest has shifted and is not aligned with pulling out all the stops to save Multiple Tenants irrespective of the cost to the economy.

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[555] Harding (n 411) 47.
[556] Toby Moses, 'RIP Britain's high streets. Stop bewailing them and think afresh' *Guardian* (London 4 June 2018).

5.4.2 Comparable Evidence in a Falling Market and Section 34 1954 Act

Landlords are not the only injured party. Solvent tenants also feel aggrieved as a result of the CVAs because there is a sense that they feel they are 'punished for being prudent and being in a position to pay our rent' whereas the landlord is 'rewarding' poorly run businesses permitting them to pay 'only 20% of their rents with you because they've done a CVA'.[557] This has fostered animosity in the retail market and solvent tenants have sought ways of re-basing rents to CVA levels. To recap, landlords have very publicly been forced to concede huge rent cuts to ailing and distressed Multiple Tenants facing insolvency. For a solvent tenant to re-base their rents within the 1954 Act regime they must rely on section 34 of the 1954. Section 34 rental valuation imports comparable rental methodology into the lease renewal process. A rental valuer looks to a wide range of existing rental evidence in the market to draw comparison between evidence of rental valuation from the market that is applied to the asset being valued. The location of comparable evidence is important (prime, secondary and tertiary pitches) and other factors including 'size, accessibility, parking ratio, tenant mix, and building quality'.[558] Certain evidence takes precedence over others; interviewees typically stated that on-market valuation ranked about rent review or lease renewal outcome evidence.[559] The RICS advises its valuers to 'be aware of relevant court decisions and precedents'.[560] Crosby and Murdoch note in 2000 that 'what academic literature to date has not examined, in any systematic way, are the influences exerted by both the procedures for assessing and determining rents and the interaction between surveyors and solicitors (beyond general

[557] Int3S
[558] RICS, Comparable Evidence in Retail Valuation: 1st ed *RICS* (London 19 October 2019) 7.
[559] Ibid 12.
[560] Ibid.

exhortations that there should be greater liaison)'.[561] The interaction between legal adjudication process and valuation surveyors is an under-researched area. Comparable methodology and the expansion of relevant comparable inputs into the computation of retail rent, namely the evidence from CVA rent cuts, have had an impact on the retail rents of solvent tenants. Until recently, the CVA rent cram-downs they were not considered by valuation experts to feature in the hierarchy of acceptable comparable evidence because it is an arbitrary level of rent imposed unilaterally on the landlord and could not therefore be used as evidence of rental levels in the retail market. Historically, the prevailing view was that 'the objective standard imposed by section 34 [prevents] the court fixing of a rent below the market level on the basis of what the tenant can afford'.[562] However, in a 2021 county court judgment, the judge determined that CVA rent cram-downs did carry 'modest [evidentiary] weight' because landlords had refused the opportunity to exercise the CVA termination rights afforded to them, which spoke of their lack of confidence in the market, that they were not confident of re-letting the units at the same, or higher rent.[563]

CVAs are far removed from evidence of arm's length market rental evidence and are arguably obtained at the landlords' financial distress because of the sizes of portfolios in question. Resistance to disciplinary power is a refusal, whether open or covert, to participate in self-disciplinary practices.[564] In the context of agreeing a new renewal rent it means challenging the norms of valuation methodology. Leases are valued by comparison to rental evidence available in relation to similar properties in the market. Landlords, afraid of a race to

[561] Crosby, Murdoch (n 225) 434.
[562] Haley (n 74) 232.
[563] *W (No3) GP (Nominee A & B) Ltd and another v JD Sports Fashion Plc* (22 October 2021 unreported) 16.
[564] Lilja, Vinthagen (n 408) 125.

the bottom, shrouded rental evidence in side-letters, or other confidential non-disclosure agreements to prevent tenants from using these rents as a comparable, or leverage for a rent cut. This is landlord resistance to the challenge to rent levels (and implicit challenge to their overall market dominance) when the methodology works against them by evidencing falling rents. Here is a lawyer commenting on tenants trying to obtain evidence of comparable evidence in the COVID-19 market:

> *'We've not got any evidence it is all wrapped in confidentiality. So, any deals that are being done are all being done on a confidential basis. No one can get hold of them. No one knows what the market's agreeing or doing. So, it's a real issue for then an expert to say, "Well this is what I think that the rent looks like"'.*[565]

As one interviewee explained 'everything comes down to evidence'.[566] Absence of evidence because of NDAs has resulted in tenants challenging the interpretation of section 34 in court. The *WH Smith case* gives an insight into creative interpretation, and destabilisation, of section 34 valuation meanings.[567] Section 34 requires the judge to consider the 'appropriate rental for an empty unit' to be occupied by a 'hypothetical incoming tenant'.[568] WH Smith challenged the statutory hypothesis which assumes a willing tenant in the market on the basis that there is a lack of demand in the retail market generally and particularly at the Westfield Shopping centre arguing that this should indicate a nil rent.[569] Rather than focussing on looking backwards to comparable evidence of what market was, the Multiples attempt to shift the

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[565] Int9L
[566] Int11S
[567] *WH Smith* (n 189) 4. See case note on this judgment: Emily Carroll 'Valuing the Retail Jungle' (University of Oxford, 25 October 2021) https://blogs.law.ox.ac.uk/research-and-subject-groups/property-law/blog/2021/10/valuing-retail-jungle-wh-smith-retail-holdings accessed 24 February 2022.
[568] *WH Smith* (n 189) 45.
[569] Ibid 46.

focus instead to evidence of lack of demand as the basis for a percentage rental cuts by challenging the presumption that there is any 'willing tenant' in the market as conceptualised under section 34 of the 1954 Act.

This is the tenant challenging valuation norms and establishing a shift in valuation principles. The judge did not accept the tenant's interpretation, but, whilst this would have been an example is an act of moderating resistance to successfully put forward in court an alternative valuation basis, this is still significant. It is significant because it indicates that industry norms and valuation principles are in flux. Industry norms are shifting. By considering power dynamics between the parties, it is possible to capture industry 'norms' as they evolve. The 1954 Act is unable to capture the lower market demand unless there is comparable evidence and given that landlords have suppressed this, tenants are using the court process to petition for an alternative approach. The sense is that tenants are pressing and challenging the regime pushing for the 1954 Act's underpinnings to be re-constructed for the modern retail market. This outcome again encourages landlords to suppress any downturn in rents, because as soon as landlords have 'three voids in a shopping centre the retailers quickly realise you've got no negotiating position, and you're going backwards [on rents] and word gets around [tenants] quickly':[570]

> *'[H]ow do you get it, when it's not in your power; how do you get to the bottom of that information? That's a real struggle … because you're setting a rent based on comparables, as a comparable method of valuation, but you can't get to all the*

[570] Int3S

comparables. And what [hasn't been] said, which is the point I always love, is means we are arguing for zero rents in some places'.[571]

These two examples indicate that the section 34 valuation mechanism is insufficiently flexible to provide a fair valuation outcome in a declining market. This stretches the distinction between the 'court of law' and 'court of valuation', with Mummery J lamenting the 'difficult demarcation [between] the real world' and an 'abstract world peopled' with parties 'haggling hypothetically with stipulated assumptions'.[572] Revisiting the purpose of the 1954 Act, it is questionable whether interference with free-market conditions is justified given that the 1954 Act has only brought uncertainty and costliness to the process. The lack of certainty caused by suppression of comparable evidence means that section 34 fails as an appropriate mechanism to regulate lease renewal transitions in the retail market. There is insufficient evidence for a tenant to know if they are obtaining 'fair' commercial terms that reflect the market – the cornerstone of the 1954 Act. To test and challenge rental methodology requires hearing matters at trial which interviewees estimated at a cost of £100,000 per party. One interviewee commented there has recently been a 'bizarre explosion of people just not willing to back down on lease renewals' where parties with 'deep enough pockets prefer to run them to court'.[573] This is a form of justice that only larger tenants have the means to pursue.

5.4.3 Tenant Frustration and Withholding Rents

Frustrated at the cost and pace of change through the renewal framework, Multiple Tenants exploited pandemic conditions as an opportunity to re-base 1954 Act rents by

[571] Int17S
[572] Haley (n 74) 233.
[573] Int21L

obtaining their own arbitrary rent cuts, akin to a solvent CVA process. The government, put in place a moratorium, for which Multiples had collectively lobbied, to protect those tenants struggling to pay contractual rent liabilities from landlords exercising rights to forfeit. In implementing this temporary legislation, the government called upon landlords and tenants to act both reasonably and in good faith:

> *'Tenants should continue to pay rent and abide by all other terms of their tenancy agreement to the best of their ability. At the height of the pandemic the government made a strong package of financial support available to tenants, and where they can pay the rent as normal, they should do. Tenants who are unable to do so should speak to their landlord at the earliest opportunity'.*[574]

The moratorium presented an opportunity, whilst the landlord's recourse against the tenant was stayed, to re-base market rents across portfolios. Some tenants found that their renewal lease expired during the pandemic and so the valuation date fell at the lowest point in the market. Some 'unfortunate landlords' found their leases in a particular location had all expired in June 2020.[575] However, where a lease was not due to expire, tenants sought to bring landlords to the negotiating table to achieve similar rental cuts because:

> *'((Laughingly)) the market is arguably as low as it can possibly go, [and so] we're really pushing our renewal portfolios to get [landlords] to come and talk to us'.*[576]

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[574] Department for Levelling Up, Housing & Communities, '*Guidance for Landlords and Tenants*' <https://www.gov.uk/government/publications/covid-19-and-renting-guidance-for-landlords-tenants-and-local-authorities/coronavirus-covid-19-guidance-for-landlords-and-tenants> withdrawn on 28 February 2022.
[575] Int7S
[576] Int23S

This extract is an indicator of power between contracting parties, that landlords (particularly Institutional Landlords) have less manoeuvrability within the framework, seeking to avoid the pressure from the Multiple Tenants. Landlords were reluctant to come to the table to talk to tenants about rent cuts, and so Multiple Tenants, again collectively adopted the same strategy by simultaneously withholding rents and bringing landlords to their (financial) knees, the scene was set for a 'dog fight'.[577] Multiples used the opportunity presented by the pandemic moratorium as a shield to protect them whilst withholding rents across their portfolios of thousands of properties to leverage pressure on landlords to reduce their contractual rent. Depending on the position of a particular lease in the renewal cycle, the aim of these negotiations was to either agree a renewal rent quickly where lease had expired, or where a lease had not expired to re-gear a lease mid-term, or to agree a rent-free period to lower the overall rent over the lease term. It is argued that this is an example of 'fracturing resistance'.[578]

D'Adda's analysis of housing precarity in Barcelona highlights the concept of urban resistance, which encompasses 'resistance to the commodification of urban space'.[579] Depending on perspective of the reader, the actions of these Multiples might be considered activism challenging overinflated rents, or financial blackmail by collectively withholding rents, placing landlords under duress to unilaterally force changed contract terms upon them. Whichever perspective, the Interview Data capture the point in time when tenants have

[577] Vyman Solicitors, 'COVID-19 Lockdown – Landlord and Tenant Showdown' (9 April 2000) https://www.vyman.co.uk/covid-lockdown-landlord-and-tenant-showdown/ accessed 16 January 2021.
[578] Harding (n 404) 44.
[579] Gabriele D'Adda, *Urban Mobilizations and Municipal Policies to Un-make Housing precarity: The Barcelona Experiments* (Routledge 2021) 743.

broken long-held landlord financial control over the sector. Although this is not a physically manifested as a protest that involves tangible 'violence or riots', the effect is commercially violent.[580]

In house lawyers confirmed that Multiple Tenants were affronted that landlords had not rewarded them for being solvent and offering the same CVA rents as were offered to insolvent Multiples. The co-ordination of Multiples was not just about taking collective action to withhold rents, but also in the dialogue and messaging with landlords about why rents were being withheld. Multiples confirmed that both 'in [commercial] terms and aggression [they expected] their panel lawyers to be banging the [Multiple tenant's] message hard'.[581] The relationship here between Multiples and their lawyers in driving change is interesting. One panel lawyer paraphrased their client's (the Multiple tenant's) message as follows:

> *'[It's about] getting landlords to understand that [Multiple 1] are a really good tenant and they want to be rewarded. They don't want to hear that [the landlord's] given [the little cobbler] six weeks' rent free, or that they've given [Multiple 2] six weeks' rent free because they're closed. They need the landlords to understand, that they're a really good tenant to have and that for the sake of a month, six weeks' [rent free] whatever it is, that they'll get them back on the rent roll'.*[582]

Interviewees described landlord response as being dictated by their size:

> *'[S]ome [landlords] have bigger pockets and they don't want their tenant going under, whereas mid-size landlords frankly don't have the reserves for tenants not to pay their*

[580] Harding (n 411) 48.
[581] Int23L
[582] Int7L

rents – you know – lower cash flow, higher loan rates so they adopted a less commercial stance'.[583]

Similarly, SBLs were characterised as having lower cash flow/ high loan rates and did not have the reserves for tenants not to pay rents and were less likely to be able to hold out in negotiations. There was a huge amount of consternation at use of this tactic by solvent Multiples in the market, many of whom made significant profits during COVID-19. One interviewee relayed a conversation with their (Multiple) client expressing difficulty messaging rent cuts to landlords when the Multiple's 'trade hadn't been affected':[584]

'Oh, for God's sake, why can't you make [your financial position] sound worse? You're making our life difficult'.

Taking this action put Multiples and landlords at loggerheads. Here we see resistance as the 'interaction of warring parties, as the de-centred network of bodily, face-to-face confrontations, and ultimately as the productive penetration and subjectivizing subjugation of a bodily opponent'.[585] The language used by interviewees betrays the damage to landlord-tenant actions caused by a failure of the 1954 Act to regulate the market by providing a workable mechanism for tenants to obtain fair commercial terms that bear resemblance to those available on market. The language that interviewees used to describe the situation between landlords and tenants was littered with references to war. Interviewees spoke of

[583] Int13L
[584] Int7L
[585] Jürgen Habermas, 'Some questions concerning the theory of power: Foucault again' in Michael Kelly (ed.), *Critique and power: recasting the Foucault/Habermas debate* (MIT Press 1994) 80.

being 'in the trenches',[586] others of 'fighting shoulder to shoulder' with other tenants.[587] These fraught negotiations also, publicly, engaged with broader societal discourses about the character of landlords and tenants outlined earlier. Landlords spoke of understanding 'rescue culture' and of trying to engage with tenants.[588] In the press, retailers described '85% of landlords [as] being reasonable, offering waivers, relief or lower rent, but 15% are just being stupid and nasty'.[589] Interesting that tenants here return to the old ogre-landlord trope, but re-inventing their position as the disadvantaged solvent, tenant. The 'unscrupulous lessor has long haunted the relationship of landlord and tenant'.[590] For instance, the trade union, the GMB, reported that 135,000 retail jobs were lost during the COVID-19 pandemic and called for landlords to 'review commercial leases and offer lower rents' to save 'vital business that drive our economy and help our communities thrive' as 'empty high streets and shopping centres that look like ghost towns are no good for anyone' as the 'great British high street is being allowed to wither and die'.[591] In effect, this draws on perceptions 'of the landlord as being the old-fashioned Victorian grasping landlord with a pencil moustache and the high hat',[592] that the landlord is sucking the life out of the tenant, an embodiment of the social/community high street. The British Property Federation sought to address this narrative

[586] Int10S
[587] Int16L
[588] Int3S
[589] Alex Lawson, 'Retailers and restaurants demand aid to fight 'nasty' landlords on rent as eviction moratorium end looms' (*The Standard*, 28 August 2020) https://www.standard.co.uk/business/retailers-restaurants-rent-eviction-moratorium-a4535426.html accessed 25 January 2021.
[590] Michael Haley, 'Section 30(1)(g) of the Landlord and Tenant Act 1954: The Unjust Relegation of Renewal Rights' (2012) 71(1) *Cambridge Law Journal* 118.
[591] Sahar Nazir, 'Nearly 135,000 retail jobs lost during pandemic' (*Retail Gazette* 17 February 2022) <https://www.retailgazette.co.uk/blog/2022/02/nearly-135000-retail-jobs-lost-during-pandemic/> accessed 5 May 2023.
[592] Int1S

by calling for 'the moratorium [to] end because it continue[d] to fuel the non-payment of rent among large, well-capitalised businesses', and seeking to disrupt the narrative of the 'evil landlord'[593] Landlords argued tenants had forgotten that they 'had put a huge amount of capital into build the shopping centre, they've got shareholders to look after, and in a lot of cases pensioners to look after'.[594]

Significantly, the government had to intervene after the moratorium to implement a rent arbitration system, ostensibly to remedy the position where tenants were struggling to pay, but more significantly to deal with arrears of solvent tenants who had withheld rent even whilst trading during the pandemic.[595] The collective action of these Multiples during the pandemic has re-based or cut rents across rental portfolios. The extent of these cuts is unknown as most are obscured in NDAs or side letters. However, Remit Consulting reported that shortfall of commercial rent paid by commercial tenants during the pandemic exceeds £7billion[596] The impact of volatility in the market was most keenly felt by large property companies and property funds with an impact on capital values, particularly on pension funds. In March 2021, Hammerson, the owner of the Bull Ring and Brent-Cross shopping centres saw a £2bn decline in its portfolio value after suffering its largest-ever drop in rental income.[597]

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[593] Alex Lawson, 'Retailers and restaurants demand aid to fight nasty landlords' *Evening Standard* (London 28 August 2020) https://www.standard.co.uk/business/retailers-restaurants-rent-eviction-moratorium-a4535426.html accessed 16 January 2021.
[594] Int1S
[595] *HPUT Trustees No1 Limited and HPUT Trustees No2 Limited v Boots UK Limited* (24 May 2021 unreported).
[596] Remit Consulting, 'The shortfall of rent aid by commercial tenants during pandemic will exceed £7 billion' (9 November 2021) <https://www.remitconsulting.com/blog/2021/11/9/the-shortfall-of-rent-paid-by-commercial-tenants-during-the-pandemic-will-exceed-7-billion-according-to-remit-consulting> accessed 5 May 2023.
[597] Camilla Canocchi, 'Bullring owner Hammerson writes down value of shopping centre as rental income halves' *ThisisMoney* (London 12 March 2021) https://www.thisismoney.co.uk/money/markets/article-9355007/Hammerson-writes-value-shopping-centres-2bn.html accessed 5 May 2023.

Arguably, when Multiple Tenants wield such significant power through their portfolios their 'power and influence' they become public actors. Comparatively, H&M and Adidas AG faced criticism in Germany for 'seeking rent concessions and accessing emergency measures designed to support smaller tenants less able to withstand the crisis'; Adidas publicly apologised.[598] There was no similar backlash in the UK possibly because discourse of the weak tenant, whose health is linked to that of the high street, pervades our perception of landlord and tenant arrangements. Wheeler notes that:

> *'There is an argument to be made that corporations are no longer private actors. They are public actors in terms of power and influence in areas such as environmental impact, location and relocation decisions, and corporate social responsibility'.*[599]

This is a situation where large global companies have collectively breached their contracts, taking advantage of a moratorium intended as a shield against enforcement action against them. Withholding rent is a bold commercial act, breaching the terms of the lease to levy commercial change. It is usually difficult to maintain such open resistance because the disciplinary system is corrective for non-conformists, but market conditions have emboldened tenants who are challenging norms and convention to make commercial gains.

Multiple tenant behaviours might be commercially unpalatable, but they need to be understood as a product of and resistance to the failings of the underlying legislative regime. Further, because the statutory regime offers tenants protection at the end of their lease term, Multiples are protected against retailiatory landlord action, for instance, where a landlord

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[598] Financial Times, 'Adidas under fire for holding back rent payments because of coronavirus' *Financial Times* (London, 29 March 2020) <https://www.ft.com/content/8bfe8e86-39b2-48c1-9a7c-5a527e60d120>.
[599] Sally Wheeler 'Contracts and Corporations' in Peter Cane and Herbert Kritzer (ed) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 130.

might refuse to grant a new lease where a Multiple that has withheld rent. The legislative protection might encourage bolder Multiple action to resist commercial terms in the retail market. These discourses around fault and blame miss the issue which is that the 1954 Act as a framework in a market of glut coupled with high business rates failed to effectively regulate the market. The suppression of section 34 comparable data, when on-market letting values and renewal rents had so significantly parted ways, resulted in increasingly extreme behaviour to evidence, and close, that gap.

5.5 Relinquishing Security

The advent of shopping centres in the 1960s meant a change in approach to creating retail spaces. A focus on rental income to service debt levied against the new built shopping centre meant that the focus was on drawing customers into the centre with large anchor tenants, and Multiple Tenants with a strong brand.[600] The thesis data suggests that shopping centre leases are more likely to be contracted outside the 1954 Act if a landlord is able to negotiate this with the tenant because then they have control over tenant mix.[601] Control over tenant mix is recognised as a key factor in 'maximising economic return' of the shopping centre.[602]

The monopoly that landlords have had over the market has enabled landlords to introduce highly presentiated lease terms in the fear of the impact that flexibility will have on lease valuation and capital return of the shopping centre. An overview of Multiples' techniques of resistance are set out in chapter six. Multiples have developed strategies for deriving benefit

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[600] Malcolm Kirkup and Mohammed Rafiq, 'Managing Tenant Mix in New Shopping Centres' (1994) 22(6) *Int* 29, 29.
[601] Genecon LLP and Partners, 'Understanding High Street Performance' (December 2011) https://assets.publishing.service.gov.uk/ accessed 20 January 2021.
[602] Mary Alice Hines, *Shopping Center Development and Investment* (2nd ed Wiley 1988) 171.

from the 1954 Act regime in relation to their portfolios that benefitting from security of tenure. Multiple Tenants are not confined to shopping centres, because landlords everywhere wanted the highest covenant strength they could attract and so Multiples occupy shopping parades and high streets across the country. The high street has become 'homogenised' because landlords, seeking the strongest covenant strength and the brand offered by Multiples, have filled these spaces with the same chains of stores.[603] There is little consideration, however, of the impact of Multiples' central management of their lease renewal portfolios on landlord-tenant relationships, and on the vitality of the high street.

A further drawback of section 34 is that it does not envisage turnover rents as a rental mechanism.[604] It is conventional wisdom that a tenant should seek security, rather than not, yet tenants have found that the market created by the 1954 Act is so far removed from market that they have relinquished security of tenure for on-market negotiations. When the market fell during COVID-19 many retailers saw that on-market conditions were far more flexible in terms of rent structures and levels than are available within the confines of the Lease Renewal Market. The norms that accompany the 1954 Act are out of step with the modern retail market and commercial practice because they are predicated on market conditions that no longer exist. Solvent, but ailing retailers – predominantly clothing retailers – saw turnover rents as providing the most viable business model. This rental model means that a landlord shares in its tenant's success and in its failures as its turnover varies. Many interviewees considered security of tenure for Multiple Tenants to be commercially 'irrelevant' because

[603] Ibid.
[604] See *W (No3) GP (Nominee A & B) Ltd and JD Sports Fashion Plc* (22 October 2021 unreported) [39]. It is not clear that the court has authority to order a turnover rent.

space is overall freely available to any tenant who wishes to take space.[605] The pandemic precipitated another change in Multiple behaviour by relinquishing security of tenure, to obtain more favourable turnover rental structures on the open market. Historically, the Reading Academics have noted that an increase in contracting-out coincided with a period of 'serious recession'.[606]

The explanation offered here is that where landlords do not have the 'upper hand in lease negotiations' and are forced 'to grant leases on less favourable terms' seek to avoid 'the perpetuation of these through the process of statutory renewal' – by contracting out.[607] The reasons for the continued high level of contracted out tenancies through different market states are not clear. There is 'anecdotal evidence that the pressure on landlords to provide more flexibility for tenants is producing a desire in landlords to have their own flexibility at lease end to choose whether to offer the tenant a renewal or to regain possession'.[608]

The background to the 1954 Act is predicated on the principle that landlords would take advantage of an unsecure tenant at the end of their term. This change to the order of the retail universe, tenant's relinquishing their rights, unnerved landlords:

> *'It was in early lockdown one, I think about…it was in June, a Multiple retailer deliberately lost their '54 Act rights. And I said "look, you do know you haven't made an application; I've checked this morning and you haven't". They said, "no, we haven't, so where would you like the keys delivered? Now, we can either stay there and save you rates, (which back in June were still being paid) or we can come to a deal on*

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[605] Int1B
[606] Crosby et al (n 71) 53. The authors note that the increase in contracting out has been dramatic and sustained. Although figures were not collected between 1990 and 1993, it seems that it was these years that saw the start of the period during which the number of contracted out tenancies began to rise sharply.
[607] Ibid.
[608] Patrick MAllister, 'Pricing Short Leases and Break Clauses' (PhD Thesis, University of Reading 2000) 6.

turnover, or we will close the shop this evening, we don't care". Well, the landlord was then petrified because it changed the entire dynamic. And it was quite a serious rent. And so, the landlord, from day one he'd be liable for repairs but after three months he'll be liable for rates, because there was no rates holiday for landlords. He would have no income. His insurance would go up because it was vacant. [Our solicitor] said, "I've never ever heard of this ever. I need time to think about this." And she came back [to me] and said, "I've thought about this, they're very clever"."[609]

Relinquishing security is a powerful act of resistance that changes the dynamic of the relationship ingrained in the Lease Renewal Market. Tenants have become bold and understanding their position in the market, have relinquished the smothering apparatus of the 1954 Act regime to obtain more favourable rental structures and commercial deals on-market.

5.6 Conclusion

In conclusion, power operates through the regulation of bodies and behaviour, creating subjects who internalise societal norms and values. Understanding enduring property relations requires recognition of power as one of the primary factors affecting their relationships. As illustrated longevity of relationships, whether a Multiple wants security of tenure, the level of rent and financial model they adopt are determined not by 1954 Act legislation, but by the distribution of power between landlord and tenant. The party in ascendancy typically has influence over market conditions so that the valuation mechanisms under section 34 and negotiation of new lease terms under section 35 1954 Act are largely irrelevant because the lease terms and rent are set by the party able to exert the strongest

[609] Int1S

influence over the negotiation process. Power dynamics play a crucial role in determining rent levels, and in the allocation of risk in these property relationships. The party with more power, currently the Multiple, is often better positioned to control the terms of the lease, and level of rent. A power imbalance can lead to unequal risk distribution with less powerful parties shouldering a disproportionate burden. Overall, the market currently produces a power asymmetry in the Multiples' favour.

The next chapter six considers whether and how power is balanced between landlord and tenant under the 1954 Act regime. However, resistance challenges institutional control with the potential to destabilise the system. Discourses on one hand serve a political purpose with the legacy of the 'ogre-landlord' justifying state interference, but they obscure underlying structural problems that aggravate relations between landlords and tenants and cause damage to society more broadly, socially and economically. The issue is that commercial property is regulated by the 1954 Act, which is attuned to developing understandings about the retail market in the 1950s and the correction of an excess of landlord power that is no longer borne out.[610] The 1954 Act, was designed to stabilise the commercial lettings market, but its failure to adapt to changing conditions, and tenants' frustration about the clunkiness of valuation mechanisms has led to instability in the retail market. Failure of the 1954 Act here has resulted in arbitrary reductions in rents and consequently property values, highlighting the need for reform to promote fairness and stability in the market.

There are still tenants that will insist on the 1954 Act to protect their physical and commercial position. Pragmatism over principle is both a driver and limitation of reform, and

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[610] Nikolas Rose, Pat O'Malley, and Mariana Valverde, 'Governmentality' (2006) 2 *Annu. Rev. Law Soc. Sci*. 83, 84.

Multiples will continue to seek security of tenure to 'negotiate a package that is specifically geared to protecting their anticipated business needs'.[611] The market has, however, fundamentally changed and tenants are seeking a greater variety of contractual and rental flexibility. Property glut has resulted in a bolder and more assured Multiple and the 1954 Act's inability to provide alternative rental or tenure models has provoked numerous tenants to relinquish security of tenure and seek their fortunes on the open market. We find ourselves in the interesting position where tenants do not need one of the arms of security of tenure: tenure. Landlords are left questioning why tenants want security of tenure:

> *'I don't think decisions businesses are making around their retail offer are linked to whether they have security of tenure. I think they certainly used to be when you had 15-year leases. Within ten years, we're down to five-year, or three-year leases. So, why would you then stick with the need for security of tenure ((laughs))? Why don't you just take a longer lease?'*[612]

It is no longer possible to conclude how and to what end the 'Act works'.[613] It is difficult to argue that it 'works' if it benefits neither small, nor large tenants and its mechanisms are so out of line with market practice that Multiples are required to spend hundreds of thousands of pounds in the court system to challenge and re-define the valuation methodologies underpinning the framework in order to seek rent 'justice'. The 1954 Act apparatus is, after all, said to be a negotiation framework designed to keep parties out of court. As a final point, arguably the overriding aim of the 1954 Act is to stabilise the commercial lettings market, which is where its longevity lies. If the purpose of the 1954 Act is, at its core, about maintaining

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[611] Bright (n 18) 242.
[612] Int5S
[613] David Neuberger, 'Our not so flexible friend' (2000) 38 *Estates Gazette* 139.

market stability and preserving the capital values, then the 1954 Act's failure to flex to changing market conditions has played a role in causing market instability. Perhaps it is now time to revisit the principle of the 1954 Act to ensure it provides a just foundation for the commercial lettings market.

CHAPTER 6 MULTIPLE TENANT AT RENEWAL: COMMERCIAL TERMS AND RESISTING DEVELOPMENT

Chapter five examined the power balance between landlord and Multiple in the retail market. It also considered how Multiples leverage power by acting collectively in the retail market with other retailers. This chapter six takes a focused, micro-level approach to explore how Multiples leverage their collective influence and utilise the 1954 Act framework to challenge and drive changes to commercial terms. It offers insights into how these entities disrupt established commercial norms, in the context of lease renewals, and shift the standard position in the retail market. Understanding the role and impact of their collective power is essential to fully grasp the significance of Multiple action in effecting these changes.

Chapter five gave examples of Multiples 'sharing information' on commercial terms that had been achieved during lease negotiations.[614] This builds on that by examining their efforts to disrupt and erode established precedents, as well as to reverse institutional lease terms that traditionally underpinned the retail market. The goal is to shift the sector's standard position toward one that is more Multiple friendly. This chapter six unfolds in two parts: i) the power of Multiples at renewal to negotiate more favourable lease terms; and ii) the ability of Multiples to block its landlord opposition to renewal of the lease.

6.1 Enduring Property Relationships

Much of the focus here is on the process of agreeing the terms of a new renewal lease under the 1954 Act, which is under the court's supervision. The 1954 Act creates a negotiation

[614] Int26L

space where the ultimate determiner of disputed lease terms is a county court judge. Blandy et al's framework focusses on the three dynamics that they consider shape property relationships. One of these dynamics is the process of dispute resolution, namely the county court adjudication system, which (absent agreement between the parties) is an external 'agent of settlement'.[615] Blandy et al draw on Rose's distinction between 'crystal rules', which are hard-edged rules and 'mud rules', which are 'fuzzy' and 'ambiguous' designed to facilitate agreement. Rose notes that:

> *'[O]ver time, the straightforward common law crystalline rules have been muddied repeatedly by exceptions and equitable second-guessing, to the point that the various claimants under real estate contacts, mortgages, or recorded deed don't know quite what their rights and obligations really are'.*[616]

The Interview Data offer insight into the PACT and county court processes, highlighting how the threat of rigid, crystalline rules is used to leverage more flexible, 'mud rules' to reshape the balance of risk in commercial lease terms and move away from traditional institutional frameworks.

Typical criticisms of the county court system are that it is incredibly expensive to engage with and the judges are not specialised, which can result in unpredictable outcomes. These are the same reasons, however, that motivate Multiples to view the county court system as fertile ground for disrupting and destabilising orthodox commercial lease terms. As the data will show, the threat of enforcement of a crystalline rule, by a non-expert judge threatens commercial common sense. Multiples have found the 1954 Act litigation process to be a

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[615] Blandy, Bright, Nield (n 49) 107.
[616] Carol Rose, 'Crystals and mud in Property Law' *Stanford Law Review* (1988) 40(3) 577, 578

platform for challenging traditional commercial leasing practices. By combining external legal decisions with efforts to push for the evolution of commercial leasing practice beyond its established norms, Multiples have created a space for resistance. The impact of these challenges is evident from the growing divergence between 'on-market' and 'renewal-market' lease terms.

Once again, the focus returns to the role of power in shaping commercial terms – an element that is missing from Blandy et al's relational model. To illustrate, if a single tenant advocates strongly for the inclusion of a more favourable term, its impact on the market is minimal. However, if twenty tenants across the country all insist on the same terms in 3,000 leases at the same time, the effect is much more significant. The consistency of this approach floods the market with new terms and creates a compelling evidence base, helping to establish these terms as the new norm in the retail market.

6.2 Context: Specialisation of the 1954 Act Litigation Process

Lease renewal negotiations typically occur within the county court system, and the litigation process itself plays a significant role in shaping the commercial terms of lease renewals. Alternative adjudication systems, such as PACT (Professional Arbitration on Court Terms) and a new Fast-Track lease renewal pilot, have been introduced to provide more efficient and cost-effective options, particularly for the better management of unopposed lease renewals issued in London.[617] Despite the availability of these simpler, cheaper options there is evidence that well-advised parties often prefer the county court process, using it

[617] An overview of these schemes is set out in chapter two.

strategically to challenge and, where possible, shift the prevailing market position on commercial terms.

The data reveal a dichotomy: on one hand, there is an increasingly specialised application of technical law, while on the other, county court judges are often described by interviewees as lacking expertise in commercial property matters. The aim here is to examine how the system created by the 1954 Act influences commercial lease terms in the retail market.

The county courts were re-shaped under the County Courts Act 1846. Originally intended to 'provide an accessible and inexpensive forum for pursuing small debts whilst the superior courts were intended to be accessible only to 'wealthy' parties and 'required legal representation'.[618] The idea was to make justice accessible, and local. But by the 1870s, there was expansion beyond original goals. Parties were routinely represented by 'credentialed attorneys' in the county court system and by this time the county courts jurisdiction widened to cover most civil matters.[619] Adjudication on the renewal of business tenancies protected under the 1954 Act falls under the county court's jurisdiction. Typically, a tenant serves a notice requesting a new lease and proceedings are issued in the county court to protect the tenant's right to a new lease. Absent agreement between the parties, the county court will ultimately determine any outstanding lease terms (including rent). Intended initially to be accessible and local there is an increasing level of sophistication evolving in the property sector that creates legal uncertainty that requires sophisticated legal determination.

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[618] Kate Leader, 'From Bear Gardens to the county court: Creating the Litigant in Person' (2020) 79(2) *The Cambridge Law Journal* 260, 269.
[619] Ibid 280.

The property professionals interviewed for this thesis qualified between 1970 and 2005; interviewees were asked how lease renewal transactions and the retail sector had evolved, if at all, over their careers. Interviewees spoke about the genesis of specialisation of different strands of the retail sector: legal and surveying. Property solicitors practising in the 1960s and 1970s spoke of the legal professional being sacred and as trainee solicitors being apprenticed to a senior solicitor as 'man and boy'.[620] This was characterised as the era of the 'property generalist' where junior lawyers would gain broad experience in acquisition, financing, Lands Tribunal work, and shop lettings (including renewals of these leases). Lease renewals were pedestrian affairs, consisting of no more than fifteen sides of A4 paper. Interviewees spoke nostalgically of having the existing lease 'copy-typed' by a secretary; negotiations were characterised as straightforward.

Surveying as a profession can be traced back to 1792, the Institution of Surveyors was first formally formed in 1868.[621] Surveyors, estates surveyors, initially employed by gentry for managing large, tenanted estates. Solicitors and surveyors had difficulty identifying the exact moment in history when tenants 'awoke', but interviewees noted that mindsets changed in and around the 1980s when the parties started to employ 'agents' to manage their growing portfolios of properties. The late 1980s and 1990s are characterised as the 'race for space' era with growth in retail sales as tenants expanded their trading bases. It is here that the gulf between 'lay' and 'law' grows in what Larson terms the 'professional project', which is:

[620] Int1L
[621] RICS, 'About RICS' < https://www.rics.org/about-rics > accessed 22 June 2023.

'The process by which producers of special services sought to constitute and control and market for their expertise [in] an attempt to translate one order of scarce resources – special knowledge and skills – into another – social and economic rewards'.[622]

In a similar vein, Muzio et al note that the professions '[leveraged] their superior technical, political and organizational resources to retain control over' markets and sources of income.[623] Growth of the sector is based on valuation, and comparison can be drawn between Foucault's concept of governmentality in the sense of developing valuation methodologies as a source of law, and as a regularising and standardising practice. Recessions during the 1970s and 1990s raised questions over valuation methodologies, which culminated in a review led by the RICS who noted that whilst 'for many decades the conventional methods of investment valuation were accepted as logical, practical and seemingly immutable [this was subsequently determined to be untrue]'.[624] Leasehold valuation underpinned the property investment and banking sector as investment landlords sought funding to build retail, industrial and office property. Throughout this time, interviewees stated that landlords 'were in the ascendancy'.

Despite peaks and troughs in the retail market landlords retained a monopolistic control over market. This is evident from standardised market terms, UORRs (upwards only rent reviews), which illustrate legal and valuation specialisms coming together to facilitate the investment growth. Banks increased their exposure to property investment companies between 1985 and 1990.[625] Exposure to falling property valuations in the 1970s and 1990s was

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[622] Magali Larson, *The Rise of Professionalism* (Berkley 1977) xvi.
[623] Daniel Muzio, David Brock, Roy Suddaby, 'Professionals and Institutional Change: Towards an Institutionalist Sociology of the Professions' (2013) 50(5) *Journal of Management Studies* 699, 702.
[624] Andrew Trott, Property Valuation Methods: Interim Report. London. (*Polytechnic of the South Bank/Royal Institution of Chartered Surveyors*, 1980).
[625] Crosby, Lavers, Foster (n 398) 185.

in part mitigated by upwards only rent reviews in leases, which kept rents artificially high as they could not re-base to market levels when the market rent was lower than the rent on the lease, exposing banks to increasing bad debt.[626] This raised questions about the specialist role of valuers, professional negligence, and the duties of care owed to banking sector.[627] In turn, this led to the development of the Red Book guidance on valuation processes by the RICS.[628] Lease renewal valuation became based on comparable evidence in the market even though the role of valuation in the property investment sector particularly amidst 'cyclical movements in property markets', mean that 'falls in nominal property market values are likely to occur with increasing regularity in the future'.[629]

In the retail sector, specialisation grew around (landlord-centric) valuation methodologies, which become the industry standard. Value is protected through adherence to institutional lease terms. Lord Silkin foresaw in 1954:

> *'[…] this Bill is exceedingly difficult and will, I have no doubt, for many years to come provide ample occupation for members of my [legal] profession'.*[630]

Knitting together legal and surveying threads 'builds and transforms the political, social and economic institution' that is the institutional commercial lease.[631] As Larson concludes, specialisation is an attempt to corner an aspect of the market and convert it into social or economic reward.[632] Competition to distinguish surveyors from lawyers as different species

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[626] Ibid.
[627] Ibid 195.
[628] RICS 1976.
[629] Crosby, Lavers, Foster (n 398) 186.
[630] Hansard HL Deb vol 188 col 120 (29 June 1954).
[631] Muzio, Brock, Suddaby (n 623) 704.
[632] Larson (n 622) xxiv.

and then to specialise within that species is a thematic undercurrent of the data. Within the lawyer branch, for instance, the profession sought to distinguish themselves as either transactional (solicitors taking control of the contractual, commercial and proprietary aspects of the transaction) or litigious (solicitors and barristers responsible for managing litigation and tactics).

There is also another species of lawyer here that emerges in the 1990s – the professional support lawyer (the **PSL**). PSLs do not typically have a fee-earning role, having stepped out of conventional legal practice. PSLs are employed by larger corporate law firms and act collectively at a national level representing the interests of their law firms and clients, lobbying for change, and playing a significant role in designing the law. Several interviewees confirmed having served as PSLs in their law firms at least one point in their practising careers. These interviewees spoke their involvement in shaping and standardising property law over the past 25 years. Their contributions included designing standard documents such as 'enquiries before contract', which incorporate property standard enquiries and Commercial Property Standard Enquiries, as well as developing the contracting-out procedure for lease renewals in 2003.[633] PSLs also discussed their role in designing the model commercial lease (the **MCL**), which is a standardised landlord lease precedent created in collaboration with other large law firms:

[633] Int3L

'The MCL is intended to avoid much of the unnecessary negotiation on most routine letting transactions by representing a fair starting (and, in many cases, end) point for both parties'.[634]

Hughes notes that although the BPF's note on the MCL website highlights where the MCL departs from Lease Code principles, it still represents the BPF's institutional position on lease terms.[635] For example, the MCL does not include the right to renew under the 1954 Act as a default position, and its rent review provision is based on UORR (upwards only rent review) method, with no allowance for alternative mechanism. One inhouse lawyer expressed frustration with their overzealous London-based panel lawyers who would not support the MCL. These solicitors believed their lease drafting was 'bespoke' and felt it reinforced their 'superiority' that they were 'clever enough to work inside the M25'.[636] In-house lawyers however trusted their lawyer's advice who rejected the use of the MCL because it did not '[adequately] protect [their] client's position'.[637] The key point here is that whilst the Law Society endorses the Lease Code, it stops short of recommending that its members adopt or promote it, since solicitors are obligated to prioritise their clients' interests.[638] This highlights that, in the retail market, landlord's lawyers have become accustomed to negotiating institutional lease terms that are often more onerous terms than set out in the Lease Code.

There was competition between lawyers and surveyors over their areas of expertise. Lawyers were critical of surveyors and valuers for producing valuation appraisals they deemed 'a load

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[634] Model Commercial Lease https://modelcommerciallease.co.uk/.
[635] Catherine Hughes, 'The role of industry bodies in changing market practices through self-regulation: commercial property leasing in the UK' (PhD thesis, University of Reading, 2015) 147.
[636] Int20L
[637] Int20L
[638] Crosby, Hughes (n 57) 26.

of guff' and questioned their independence when preparing expert valuation reports for lease renewal transactions.[639] On the other hand, surveyors criticised solicitors, engaging in 'lawyer-bashing'.[640] They criticised solicitors' lack of commercial awareness and market knowledge, particularly those within larger law firms. Crosby and Murdoch noted in 2000 that 'most solicitors have no hands-on knowledge and experience of the potential rental consequences of lease terms because they have little or no experience of rent review negotiations'.[641] The Interview Data suggest that surveyors have helped bridge the gap between legal and surveying work.[642] In these circumstances, surveyors spied an opportunity to step in and offer legal advice:

> *'[A]nd it's always me sort of metaphorically putting my balls on the line saying "no, let's turn down the request for an extension we want to get on with it, you know I think this transaction that's round the corner will happen" um, there's no advice from solicitors in that particular field. So, without being a qualified solicitor, I am stepping in and, you know because I charge an hourly rate basis for 54 Act lease renewals, um, I am basically substituting myself for the lawyers. And I think good surveyors are doing that more and more and more. So, I'm basically a chartered surveyor that's sort of substituting for the advice that I think lawyers should be giving to clients'.*[643]

One surveyor conceptualised themselves as 'hybridy': part lawyer, part surveyor.[644] Surveyors acknowledged their quasi-legal role not because they believed they were 'more of

[639] Int1B
[640] Int10S
[641] Crosby, Murdoch (n 225) 434.
[642] Crosby, Murdoch (n 225) 433.
[643] Int10S
[644] Int13S

an expert than the solicitors on technical legal issues, but because the same commercial points [came] up again and again within lease negotiations in the market'.[645]

6.3 Lease Renewal Adjudication: The Negotiation Net

As Haley notes, the 1954 Act 'statutory regime is notoriously technical and complex and, consequently, generates much litigation'.[646] Over the past decades legal and valuation professionals have created questions around valuation and lease terms that have required adjudication. 1954 Act lease renewals fall under the authority of the county court judge to determine if the terms of the new cannot be agreed between the parties. The specialisation of law creates legal disputes that require adjudication. To resort to 'end-game' court action is acknowledged as likely to be destructive to parties' long-term relationships and therefore the intention of the 1954 is to create a discretionary decision-making space.[647] One property professional described the renewal process as follows:

> *'You have issue of proceedings, service, directions hearing, and then the first set of directions are the exchange of this draft lease going back and forth. Then you have schedule of disputed terms to narrow the final issues, witness statements. And then after that, if there's still dispute, you have expert evidence and then then trial, effectively. No one ever wants to go quite as far as expert evidence because that's the expensive end'.*[648]

Feeley likens adjudication systems as akin to 'to modern supermarkets' who advertise the price of an outcome as though purchasing 'commodities'.[649] Those interviewees specialising

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[645] Int13S
[646] Haley (n 3) 227.
[647] Blandy, Bright, Nield (n 49) 107.
[648] Int12L
[649] Malcolm Feeley, 'Pleading Guilty in Lower Courts' (1979) 13(2) *Law & Society Review* 461, 462.

in the litigation end of the spectrum – barristers, litigators, and valuation experts – all spoke about the 'bargain' of litigation. In each field of litigation there are rules about costs, delay and outcome expectation that caution parties about entering the litigation process and what is certain and uncertain in terms of likely outcome. In the retail market, it was trite knowledge that a lease renewal trial in the county court costs £100,000 per party factoring in experts' costs and legal fees. Further, the delay between issuing proceedings and reaching trial (if matters progressed without a stay of proceedings) is in the region of 78 months.[650] Mnookin and Kornhauser conceptualise this as 'bargaining in the shadow of the law' where the litigation system imparts a negotiation structure, or a 'bargaining endowment' which frames the risks and legal rules in shaping parties' appetite for settlement outside court.[651] The success of the 1954 Act legal regime is widely acknowledged to be its function as a negotiation net: the cost of a hearing is £100,000 whether the parties are arguing about a rent of £15,000 or a rent of £1,000,000. When price and risk of litigation is known, it tends to limit parties' enthusiasm for engagement beyond a certain point in the court process, keeping parties under pressure to agree. Interviewees spoke of the court costs and taking matters to a county court trial as 'not being worth £100,000 if you lose because the shop's not worth that capital!'[652] This sentiment is reflected in the Interview Data with professionals stating that many had rarely, if ever, run lease renewals to trial at all over the course of their career.

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[650] HMCTS, *Management information* June 2023 https://www.gov.uk/government/statistical-data-sets/hmcts-management-information-june-2023 accessed 12 February 2024.
[651] Robert Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: the case of divorce' (1979) 88 *The Yale Law Journal* 950, 966.
[652] Int11S

This is not, however, the full picture. There is a difference between parties with one or two shops who engage with the litigation process as a one-off and parties with hundreds, even thousands, of properties in their portfolios. Galanter et al. write of the inevitability of 'repeat players' in the litigation system playing the litigation game differently because they have used the system before and have 'advance intelligence' how the system operates.[653] This knowledge feeds into litigation tactics and the structuring of the next lease renewal transaction. Repeat players enjoy 'economies of scale' so winning a technical point on one lease renewal, might yield benefits across the whole portfolio. Expert advice obtained might benefit properties across the portfolio which would reduce and justify the cost exposure.[654]

It makes sense that repeat players (the Institutional Landlords and Multiples with large portfolios of properties and their professional advisors) would prefer an adjudication system that reflects the specialism and sophistication of the property sector. Overwhelmingly, however, whilst neither strand of the property profession (lawyer nor surveyor) considered the county court a sufficiently sophisticated forum for determining technical points of law, no one wanted to use the specialised PACT or Fast-track First-tier Tribunal Process.

The county courts were criticised because the judges were said to be 'family law' practitioners and were not considered by interviewees to be sufficiently technical/specialised in this field. The 'lack of specialism' of county court judges was raised by almost every interviewee. The consensus was that:

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[653] Marc Galanter and others, *Why the Haves Come Out Ahead: The Classic Essay and New Observations* (Quid Pro 2014) 98.
[654] Ibid.

'[N]on-property judges are neither use nor ornament to be frank.'[655]

However, Multiples have found a use for non-specialist judges: muddying the water and eroding established principles when the market is in flux to force commercial change.

6.4 Challenging Orthodoxy: The Benefits of a Generalist Adjudication System

The litigation solicitors that I interviewed welcomed the opportunities that the reverse market conditions had created and spoke of engineering tactics for their tenant clients. For instance, specialist litigators that I spoke to described switching from predominantly landlord to a tenant client base for litigious work in the mid-2000s so that 'I predominantly do tenant stuff because their risk profile and appetite for litigation is much greater' particularly when the county court process itself can be used tactically 'to bolster their negotiating position with the landlord'.[656]

The lawyers considered the county court process as simultaneously positive and negative. Negative in the sense that county court judges often produced 'very muddled judgment'[s] that do not really deal with the legal point in question because the generalist judge has not really 'got to grips' with the complexity of the argument.[657] However, the process is simultaneously positive because the judgments also presented sufficient latitude to allow uncertainty to creep in so that lawyers could 'open up a horse trade'.[658] Generally, litigation solicitors spoke of having few or no matters go to trial over their entire career. There has been a recent explosion of county-court trials:

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[655] Int30L
[656] Int15L
[657] Int34L
[658] Int15L

> *'It's quite rare for renewals to actually make it to trial. I used to work at [panel firm] and I only knew of one renewal in the five years I was there go to trial. And I've been at [panel firm] now for four years and this year alone, we've had four go to trial. So, it's been this bizarre explosion of people just not willing to back down on renewals. It's incredibly strange. And so, I suppose at the very top it you may well end up with a landlord and tenant who are completely at odds and they've got deep enough pockets that they will run this to court'.*[659]

One reason for the explosion of litigation is because current market conditions, where tenants are in ascendancy, do not align with the landlord-centric principles that have structured and framed the legal order since its creation. To capture that dynamic, it is important to understand how power (and resistance) operate from within the 1954 Act legal regime.

From a Foucauldian perspective, valuation principles and institutional lease terms became part of the normative legal framework in the 1970-80s. For tenants wishing to retain the benefit of security of tenure, but also challenge these landlord-centric norms, they must do so from inside the legal regime. By choosing to explore these relationships from an EPR perspective we can see that tenants are attempting to re-forge the foundations of their relationships by using their standing in the market to disrupt the existing landlord-centric regime. Resistance under the 1954 Act regime shifts the underlying commercial norms around valuation and lease terms. In the next section, I explore below examples from the data relating to valuation under section 34, and agreement of lease terms under section 35 of the 1954 Act.

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[659] Int24L

6.5 Negotiating Commercial Renewal Terms

6.5.1 Rental Valuation: Section 34 1954 Act

Rent was identified by interview participants as the most critical term of the lease. It is said to be significant to both landlord and tenant for different reasons:

> *'[F]or every pound in rent that a tenant pays, um, that is a pound less profit for the tenant, but it's, you know, a Multiple of a pound for the landlord because it's about the landlord's capital value, so if a yield for the property was 5% then that £1 is worth £20 to the landlord. So, landlords can afford to pay more to agents and to solicitors than retailers can because, to retailers, agency and solicitor's costs are just costs, rent's just a cost, they're ancillary to their main purpose which is running a retail business'.*[660]

If the rent is too low, it affects landlords' investment in the property; too high and a tenant's profitability and viability of trade is affected. Rent is stand-alone the most important, and litigated, factor.[661] The lease renewal rent is agreed pursuant to section 34 of the 1954 Act. Traditionally, as the quotation above shows, the protagonists in commercial lease relationships are pitted against each other because of the 'division between the financial interests of landlord and tenant' under a standard commercial lease structure.[662]

Interviewees complained that judges reportedly did not understand the difference in valuation methodologies put forward by the parties' rental valuation experts and so the judge 'split the difference' between the experts and deduced rent as a mid-figure between the two.[663] This rendered pointless the specialisation and the technicality of experts in this area.

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[660] Int13S
[661] Dave Cowan, and others, 'Section 38 Landlord and Tenant Act 1954 - Failed Applications' (*ODPM* 2003) 1 <http://www.odpm.gov.uk/> accessed 22 July 2022.
[662] Blandy, Bright, Nield (n 49) 95.
[663] Int1S

More particularly, after spending £100,000 of legal costs, the parties deserved an outcome as the parties 'could have split the difference themselves'.[664] Significantly, in this particular case, the outcome had costs repercussions because 'the parties had submitted 'Calderbanks […] and, because judgment [on rent] fell in the middle, both sides were left with a large costs bill'.[665] The general consensus amongst interviewees was that the expertise in the county court was varied and resulted in inconsistent decisions. This made the decision to litigate riskier because an application of specialist principles could not be relied upon, and it was difficult to quantify the risk of a 'family law' judge returning a decision that no one expected.

However, for parties seeking to undermine and destabilise existing legal principles the muddiness is welcome in their attempts to re-base rents to current market levels. Rose has written that:

> *'[J]udges, who have to examine facts post hoc, tend to lean towards "mud" rules – applicable to individual circumstances and/or not obvious until litigated – when asked to adjudicate on property rights which have been readjusted by social understandings or where the power imbalance between the parties is inequitable'.*[666]

Market sympathy for struggling Multiples was a source of anxiety for landlords.[667] At the time of interviewing, during COVID-19, interviewees anticipated more 'tenant-friendly outcomes, noting that 'the sense in the market is that the judges have a lot of sympathy for tenants'.[668] This sentiment was driven by the protective dynamic of the 1954 which aims to

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[664] Int1S
[665] Int2S
[666] Carol Rose, 'Crystals and mud in property law' (1988) *Stanford Law Review* 577.
[667] Int6S
[668] Int6S

safeguard the 'vulnerable tenant', further compounded by the impact of COVID-19 and the forced closure of businesses.

In court decisions, the rent set by the court in a lease renewal hearing was noted to have increasingly become a figure that neither party was contending. The reason for this is that a county court judge 'confronted with two genuine expressions of opinion' would tend to find a midpoint.[669] This means that rent in the renewal market is not tested in the true open market on a take it or leave it basis. The key, then, is to manipulate the inputs – such as the parties' valuation evidence – influence the court's final determination of rent.

This perception of how county court decisions are made has influenced both legal and surveying practices. These practices have developed around the court process to push landlord and tenant valuations to opposite extremes, while each side 'cleverly' justifies their position. The extent of the manipulation is such that it is considered by interviewees and in case law as 'white magic', or 'an art, not a science'.[670] Whilst these practices were not 'illegal' interviewees considered distortion of valuation evidence to 'tip the scales' one way or the other 'questionable' and often brought into question the conduct of the parties. The consensus amongst interviewees was that when confronted with complex valuation evidence most judges opted for a mid-way valuation figure. For example, there is no comparable evidence in a (rapidly) falling market because comparables by nature evidence the market at a point in the past. Comparable evidence is incapable of looking forward.

Examining these data from a Foucauldian perspective of power and resistance captures the parties in the moment of resisting, challenging the application existing section 34 valuation

[669] Int2B
[670] See *WH Smith* (n 189).

conventions. Interviewees spoke of the section 34 court valuation process as problematic because if you go through the court process the rent is:

> *'[S]et not by the true market, but by some much less perfect facsimile of it in the Section 34 context. And having done quite a lot of Section 34 rent cases I can tell you that the rent that comes out of that process is usually a rent that neither party are contending for the simple reason that county court judges who set the rents, unless you really annihilate the valuer on the other side in cross examination, which of course is once in a blue moon'.*[671]

On one hand, the lack of valuation principle is a deterrent to those parties seeking a nuanced legal decision. Recent outcomes from the 'end-game' court process suggest that neither party gets the outcome that they want from the decision. This may indicate that the court framework is designed to encourage parties to settle out of court and the assumption might be that this framework serves a purpose in pushing parties to agree away from court, avoiding potentially damaging effects of litigation on their relationship.[672] Nonetheless the data disclose clear examples of the strategic deployment of litigation to their advantage to game the system. Interviewees explained that valuation principles are notoriously complex, in part because they are more 'art' than 'science'. Experts have slowly been distorting valuation evidence that they present to court because it is understood that the judges (not being valuers) can be swayed. Valuation is recognised as 'an inexact science, it is uncommon

[671] Int2B
[672] Blandy, Bright, Nield (n 49) 102.

for expert evidence to be accepted in its entirety and often the court will adopt the mantle of the valuer even though it is, perhaps, ill-equipped to do so'.[673]

Little by little valuation evidence has become distorted to either end of the spectrum on the basis that the judge tends to conclude somewhere around the mid-point. This has the overall effect of eroding orthodox valuation conventions.[674] Valuers acting for landlords spoke of similar practices at the upper end of the rental spectrum. The parties need an 'expert valuer' to give evidence to the judge as to the rent level, supported by comparable evidence. Practices then, both legal and surveying, have grown up around the court process to ensure that if the rent is an imperfect facsimile of market, then it will benefit the stronger party with the most creative valuers. Valuers spoke of being treated as the 'middlemen' making recommendations that clients will say '[they]'re not prepared to accept' because they want valuers to suggest more extreme valuations (whether high or low) pushing parties to extremes if the judge will determine the position by picking the mid-way figure.[675] The RICS published new guidance on comparable evidence in 2019 that sets down the approach that valuers should take to justify their assessment to ensure 'confidence' in valuation principles.[676] This involves being clear about comparable evidence employed and also 'standing back' and weighing up the 'differing degrees of quality and applicability' of the evidence, acknowledging that 'much of which cannot be precisely quantified'.[677]

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[673] Michael Haley, 'Business tenancies: interim rents and market values' (1993) May/June *Conveyancer and Property Lawyer* 228, 230.
[674] Linda Mulcahy and Wendy Teeder, 'Are Litigants, Trials and Precedents Vanishing After All?' (2022) 85(2) *Modern Law Review* 326, 327.
[675] Int4L
[676] RICS, 'Comparable evidence in real estate valuation 1st edition' (1st ed, RICS October 2019) 17.
[677] Ibid.

Larger corporate clients were not said to value independent valuation advice. Surveyors said there was 'a split' between their relationships with smaller and larger clients:

> *'[Smaller] retailers, smaller landlords up to a reasonable size listen to you [their view is] you're the professional, that's what we pay you for. On the other hand [if you act for] the 'big boysyour client will tell you, "they're not prepared to accept [your valuation advice] and that you've got to do better"'.*[678]

Whilst it is 'uncommon for evidence of an expert to be accepted in its entirety',[679] this behaviour has attracted the criticism of county court judges who disparage valuation experts for their 'partisan' approach, focussed on the 'interests of their respective clients rather than their role under the Civil Procedure Rules to assist the court'.[680]

These acts of resistance weaponize valuation methodologies to challenge traditional methodologies by introducing zero rents. Rather than frustrated with this approach, many of the professional interviewees seemed delighted. Each party seeks to slide the scale so that the 'mid-range figure' tips in their favour. Those advising Multiples spoke with delight at arguing for the lowest possible rental figure – zero – which is evidenced by a lack of demand for on-market lettings in the retail market:

> *'[T]he point I always love, is we were arguing for zero rents in some places'.*[681]

One interviewee gleefully remarked when discussing the likelihood of obtaining 'zero rents' in court, 'who knows, maybe we'll get a family judge [laughs]'.[682] When valuation

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[678] Int1S
[679] Haley (n 74) 233.
[680] *Franses 2021* (n 215) 57.
[681] Int17S
[682] Int39L

methodologies depart from their established principle, the judges themselves are determining whether the principle put forward is acceptable. This is the reverse of the purpose of expert valuation evidence which is, after all, intended to assist the judge. Resistance to law and legal principle is affecting application of the law and as these practices become the new norm.

This behaviour has manifested in court judgments critical of experts because rather than working together to narrow valuation issues 'both experts have made assumptions which have the consequence of minimising or maximising the comparable figure', each expert having taken an 'unhelpfully partisan approach' the judge had no option other than to apply 'a balance of probability' in determining rental valuation.[683] This is akin to the principle of 'order without law' extracted by Blandy from Ellickson's empirical work on cattle ranchers in Montana, where the law was ignored in favour of applying the community's own norms.[684]

The discretionary space of decision-making in 1954 Act renewals is 'a semi-autonomous space'.[685] It falls under the court's jurisdiction, but complex, ever-evolving 'art not science' valuation methodologies are used to justify the unjustifiable. The 'economic reality' here is that valuers are not faithful to established valuation convention. The reasons for this are that their opposite number is (or is suspected to be) playing the same game, or because their landlord/tenant demands it.[686] These acts of resistance would typically be viewed as a form of 'stabilising resistance' that occur in everyday life against forms of 'governmentalised, disciplinary power' that are designed and implemented to 'draw people towards the norm'.[687]

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[683] *Franses 2021* (n 215) 55-57.
[684] Blandy, Bright, Nield (n 49) 102.
[685] Blandy, Bright, Nield (n 49) 103.
[686] Int1BS
[687] Harding (n 411) 46.

Following criticism by the county court, valuation surveyors were more cautious and some openly condemned what their corporate clients had demanded as 'absolute perjury':

> *'[I said] "do you realise that I am a chartered surveyor? I have to (a) abide by the, um, guidance statements and practice, er, codes and under Part 35 of CPR I have to give an honest opinion. I am not acting for you; I'm acting for the cour". And they say, "yeah, but so what? We want you to argue [higher or lower]". You say, "I'm not arguing what you want me to argue". There's an awful lot of that and there's more pressure…I'm finding a lot more pressure on that'.*[688]

The role of the expert valuer is to assist the court. Whilst lease renewals proceed under the court's jurisdiction the process is only as good 'as the inputs into the system' in which case the court dances to the tune of the valuers' evidence:

> *'Each of the expert witnesses are supposed to be there to help the judge, i.e. be unbiased, impartial. And present straightforward evidence. In almost all the transcripts you will read, the judge says, "I could close my eyes and tell you which – tell you which side you are acting for. You are partisan, your evidence is clearly one-sided, you've not been much help to me"'.*[689]

As one barrister commented:

> *'[The surveyor] will imagine what the real market rent is and then take off anything between 15% and 20% then write a report on this basis. And then the landlord will go to its tame valuer who will do the same in reverse. And then a negotiation will take place, and a deal will be done, and generally the tenant, I think, gets some rent off'.*[690]

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[688] Int1
[689] Int11S
[690] IntB2

Expert evidence is meant to guide the court rather than serve the interests of the parties involved. Expert valuers must construct a comprehensive picture using comparable evidence derived from recent transactions. However, when there is a lack of such evidence—such as during periods of falling rental values or when rental data is obscured—the valuer's expertise in the market and their ability to reference local or national economic data becomes crucial. A biased approach is particularly unhelpful, as it fails to provide the judiciary with the robust evidential framework needed to navigate the complex interplay of science and art in valuation.[691]

Repetition of decisions based on fabricated valuation methodologies become, in turn, ingrained as new market norms.[692] An interesting snapshot here relates to interim rents and how news of these judicial outcomes influences the retail sector. Typically, interim rent is calculated on one specific date. But here is an experienced valuer speaking about creation of new legal precedent in the market:

> *'[S]omebody was telling me that they had a series of interim rents because of marked positions of changes in the market. Now I've never come across that and I was surprised to hear that. I didn't realise that you could have changing valuation dates. It really surprised me because I'm not sure where they actually got that from the legislation, to be able to have differing dates. But they set different markers and, yeah, when it was provable of a change in the market, they'd…they'd set different rents, over that longer period'.*[693]

[691] RICS, Comparable evidence in real estate valuation (1st ed RICS October 2019) 20
[692] Blandy, Bright, Nield (n 49) 88.
[693] Int20S

This is something that Multiples have been pushing for in the retail market, because the stepped valuation dates would give them a lower overall interim rent in a falling market. The idea of multiple valuation dates has spread in the market and now difficult to verify because of the reporting of county court decisions.

It is interesting that there is an alternative PACT system that permits parties to refer the renewal to a RICS arbitrator to determine the rent. This was, however, an unpopular option. Several interviewees suggested that this was because their client did not want a decision under the established rules, the point was to argue for change to the traditional application of the rules. The parties know that a jointly instructed valuation expert will not put them in the best tactical position. PACT was perceived as 'quite risky'[694], predominantly because 'our surveyor derives us benefits' (through advocating for their client's position) and for this reason corporates preferred the 1954 Act process, particularly as judges were perceived as 'sympathetic' to tenants. Manoeuvrability affects uptake of alternative systems of adjudication:

> *'Our client has complete trust in our valuation surveyor, and we always feel as though, erm…if you've got, I suppose from a tactical perspective, we want to see their expert report, because I think it always sort of assists our client and puts them in the best position, whereas if it's just a joint expert, we don't know what's going to come back. We know what we're going to get with our client surveyor, it's going to be as positive as it possibly can be'.*[695]

[694] Int15L
[695] Int33L

Similarly, the First-tier Tribunal has run a fast-track pilot scheme for those unopposed lease renewals issued in the London county court.[696] Unopposed lease renewals often have rent and lease terms outstanding. At the date of the interviews, it was confirmed that there had not been any outcomes from the First-tier Tribunal because matters allocated under the pilot scheme (approximately 200 leases according to Interview Data) had all settled within the allocated 20-week period.[697] The sector was divided on the trial describing it as 'a monumental failure and simultaneously a monumental success'.[698] This suggests that despite the opportunity for the lease renewal to be determined by a judge 'properly ticketed to do the work' the parties were not happy about the 'quick-time' adjudication process forcing quick decisions; there was also concern about 'uncertainty of outcome' with interviewees pondering if they would be better taking 'their chances in front of a non-specialist divorce judge'.[699]

6.5.2 Other Lease Terms, Section 35 1954 Act

Turning from valuation to consider agreement of other commercial lease terms a pervasive theme of the data was how commercial lease terms were evolving through targeted repetition of negotiation or pressing for the changes through the adjudication system. Tenants utilised the 1954 Act regime to shift the market's position on commercial lease terms. Broadly speaking the evidence for this is that Multiples can achieve more favourable commercial terms in the Lease Renewal Market than in 'on-market' negotiations. This is because power reversal

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[696] The pilot concluded in 2024 with immediate effect. See: PLA 'Nice while it lasted? FTT unopposed lease renewal pilot to end' <https://www.pla.org.uk/articles/blogs/blog-law-reform-committee-edition-3-nice-while-it-lasted-ftt-unopposed-lease-renewal-pilot-to-end> accessed 30 April 2024.
[697] Int5L
[698] Int2B
[699] Int2B

in the retail market and operation of the 1954 Act have elevated Multiple Tenants' position and enabled them to resist the typical monopolistic landlord position, which has created divergence between open market and lease renewal commercial terms.

Interviewees gave various accounts of market practices that had developed by the force of sheer repetition of negotiation across property portfolios. One theme that was borne out in different ways in the data is that the 1954 Act is intended to provide balance and fairness to commercial leasehold relationships. The statutory provisions of the 1954 Act are intended to provide the technical protection for both parties. To illustrate, both parties entered their new lease in an arm's length transaction and the lease contains terms that were dictated by market conditions and reflect the parties' bargaining strength at the date of the lease. On renewal of that lease, it is typical that commercial parties will wish to update some of the terms. Absent agreement between the parties, section 35 of the 1954 Act sets out the position on changing commercial terms. This section was interpreted by the House of Lords in *O'May*.[700] If parties cannot agree the lease terms (excluding rent or term) then section 35 directs the court to 'have regard to the terms of the current tenancy and to all relevant circumstances'.[701] The leading case of *O'May* suggests that these words 'compel something between an obligation to reproduce existing terms and an unfettered right to substitute others'.[702]

Generally speaking, the understood position is that the party seeking to deviate from an existing lease term must justify that the departure from the old lease is 'fair and reasonable'.[703] The overall effect is that institutional lease terms, having been widely introduced on a lease's

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[700] *O'May* (n 226) 731.
[701] Section 35(1) 1954 Act.
[702] *O'May* (n 226) 747.
[703] *O'May* (n 226) 727.

contractual inception, then became the baseline or 'banked' position on renewal. Parties were effectively restricted from re-negotiating the terms on renewal, unless able to justify that the departure was fair and reasonable, which was prohibitive in terms of court time, and cost. *O'May* concerned the request of the landlord to include a new service charge on renewal of a lease.

O'May set out the legal test as requiring the party departing from the terms of the existing lease to justify their departure from existing lease terms. The industry summarises this test and refers to it as 'reasonable modernisation'. Heads of terms for a lease renewal transaction are typically negotiated between agents and often they say the rest are 'subject to reasonable modernisation'.[704] This condensed 'test' is adopted by LexisPSL, stating that litigators should ensure that in drafting section 25 notices (pursuant to the 1954 Act), that landlords request new lease 'terms as per the existing lease subject to reasonable modernisation', as a 'starting point for negotiation'.[705] I asked interviewees what 'reasonable modernisation' meant. Some interviewees thought that this permitted the inclusion of 'purely statutory updates', other interviewees stated that they thought that it meant that the most powerful party would ultimately have their way in negotiations.

Several of the senior litigators interviewed identified arguments over lease terms as fruitless because they 'killed' arguments over lease terms going to trial because of cost and the primary focus of a county court hearing is always typically around rent, or length of the

[704] Int18L

[705] Lexis PSL 'Section 25 notice – Landlord agreeing to renewal under LTA 1954: Drafting Note' <https://www.lexisnexis.com/uk/lexispsl/propertydisputes/docfromresult/D-WA-A-BBA-BBA-MsSAYWC-UUA-UZEYAAUUW-U-U-U-U-U-U-ACYDDAADWU-ACYCWEWCWU-DYCEZVWVU-U-U/3/393746?lni=5XXC-BXY3-GXFD-808F-00000-00> accessed 3 March 2020.

contractual lease term. Further, there was said to be no value in pursuing change to other lease terms because of the costs of extending the trial period to hear the issues. Therefore, lease terms outstanding other than rent and term tended to be conceded or agreed in the face of trial. Negotiations tended to proceed until rent was agreed when at which point, typically, other outstanding lease terms would be quickly conceded or agreed. Although, litigators at the top-end of the litigation process saw these commercial negotiations as a side-dish to the main event, the purpose is subtle yet significant. These lease renewal negotiations are used to evidence changing market conditions, to achieve more favourable terms and lower rents.

Lease term negotiation may seem to be a fruitless endeavour, but the property valuers suggested negotiations had some value. Indeed this appears to tally with Crosby and Murdoch's overall impression that 'a noticeable number of respondents indicated a clear correlation between the changes negotiated and the rent ultimately agreed'.[706] If a party to the lease wished to make a material change to the existing lease terms in negotiating the new lease that 'dis-benefitted the other side then they had to compensate the other side for doing so'.[707] This, typically, would involve an adjustment on rent – upwards or downwards depending on who benefitted by the amendment. Interviewees used *O'May* to illustrate the principle that if the tenant accepted a new service charge regime typically the landlord would offer the tenant a lower rent to compensate them. However, tenants' advisors spoke of the tactic to 'completely re-write their lease' in accordance with their 'lease book, or bible' so that

[706] Crosby, Murdoch (n 225) 433.
[707] Ibid.

flooding the market with Multiple Tenants' standard commercial terms slowly become market standard over a period of time:

> *'The landlord effectively must look around and say "well, is anyone else agreeing these drastically different lease terms?" The answer is "yes, they are". We won't get anywhere in court arguing that we should be compensated for these material changes because they are now becoming the norm'.*[708]

Evidence of this can be seen in the recent *WH Smith case*, which in additional to a review of COVID-19 rent also considered changes to lease terms under section 35 of the 1954 Act. The judge, commenting on the inclusion of pandemic clause, determined that '[pandemic clauses are] something that all tenants want, and that the market has now priced it in'.[709] The judgment states:

> *'Pandemic clause*
>
> *170. A pandemic clause will be included, which will have the effect of halving the rent payable for the premises during any period in which nonessential shops are forced to close. In the first draft of my judgment, […] I presumed that as a matter of valuation, it should result in an upwards adjustment in the rent payable. I provisionally proposed a rental uplift of 10%, while inviting brief written submissions on the topic.*
>
> *171. On reflection and on consideration of written submissions, I have concluded that my provisional view was plainly wrong.*
>
> *172. [I was reminded] that there was evidence before the court from [tenant's valuer] about lease renewals between June and August 2020 which incorporated Covid*

[708] Int6S
[709] *WH Smith* (n 189).

> *discounts of over 20% and pandemic clauses, from which I agree it seems to follow that – with no pandemic clause – a further downward adjustment would have been required. It had been [tenant's valuer's] view in evidence that without a pandemic clause, a further 10% deduction would have been needed'.*[710]

Put another way, landlords would be forced to concede a rent reduction because 'pandemic clauses are factored into market valuation'.[711] For tenants, each lease success is significant because conjoined they become patterns of wins that evidence market conditions. Agreement on commercial terms, once repetition is established, become evidence or Foucauldian 'truth'; they become the market. Multiple Tenants can be seen to be widening the gap between on-market norms and Lease Renewal market norms. In *O'May*, the House of Lords determined that the landlord could not force new service charge provisions on a tenant. The provisions of an institutional lease ensure that the landlord can pass on costs of repair and services to the tenant. Multiples are now reversing this position. One surveyor commented that the market had overtaken *O'May*:

> *'Now remember the market is everything, what's happening in the marketplace now, tenants can get service charge caps, which weren't in the lease before. They can get break clauses that weren't in the lease before. They can make their rent inclusive of service charge, which they couldn't do before. All of which is because they can show that this is what is happening in the marketplace. It would be no use the landlord going and saying, this is a rack-rented lease, you've got to pay a full service-charge, no discounts on that, no break clauses, no it must follow the old terms of the lease. They aren't going to get anywhere with those arguments anymore. And the court isn't going*

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[710] *WH Smith* (n 189) 170-173.
[711] Emily Carroll 'Valuing the Retail Jungle' (University of Oxford, 25 October 2021) https://blogs.law.ox.ac.uk/research-and-subject-groups/property-law/blog/2021/10/valuing-retail-jungle-wh-smith-retail-holdings accessed 24 February 2022.

to make an award for a much higher rent for the landlord to be compensated for those things, because the tenant will be able to demonstrate that that is what is happening in the market'.[712]

I asked each interviewee what *O'May* meant, and the majority of interviewees (excluding barristers and senior litigators) spoke interchangeably of 'reasonable modernisation' signifying industry shorthand for the outcome in *O'May*.[713] The transactional lawyers gave a different account of the purpose of lease negotiations under the *O'May* framework. Their remit from their client, irrespective of the litigation process, is to push for commercial advantage whilst arguing under the guise of *O'May*. Solicitors confirmed that lease negotiations were fraught because of changing power dynamics. Reasonable modernisation has become unhitched from *O'May* and has come to represent the will of the most powerful market player:

'[O'May justification is] just the shittiest argument because it doesn't mean anything, it simply reflects power dynamic in the market. So, you find it just adds this air of tension in negotiations'.[714]

Interviewees commented that lease renewals had become increasingly combative since the Global Financial Crisis when the market shifted, and tenants' market ascendancy began. Since power dynamic changes in the mid-2000s these transactions have become increasingly contentious as each party fights to try to wrestle commercial advantage. The language used

[712] Int11S
[713] Int27L
[714] Int27L

in the interviews give an illustration of the level of animosity between these negotiating parties:

> *'But what [corporate tenants] tend to do is they are fitting [their standard terms] within the remit of what a renewal should look like. Most of the time, you don't control the process, and so, you need strong lawyering to get [the tenant] to the position that [they're] entitled to under the 1954 Act'.*[715]

Of course, landlords too want 'consistency across their whole portfolio' and 'modernisation in the form of their lease' so that they have parity across their portfolio.[716] The position has switched in the current market as tenants seek not just operational lease terms, but the purpose of 'reasonable modernisation' negotiations is to reduce costs of managing property portfolios:

> *'What the [tenant] client's cost cutting team will want, well it can vary massively, but for example all the standard lease bible points on a renewal they'll want - the renewal lease to be tighter in its provisions about insurance rent, or service charge. There'll be lots of exclusions, they'll add lots of exclusions into the service charge provisions, or a cap, which prevent the landlord from reclaiming lots of costs and shift the risk in the lease. They might want the rent to be paid monthly, to help with cash flow, rather than the quarterly. There's lots of different things that cost-cutting impacts on'.*[717]

This demonstrates how far the orthodox landlord-centric commercial position has reversed. Applying *O'May*, a tenant would be unable to justify limiting their financial exposure by a cap or exclusion because it would fundamentally change the balance of risk under the

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[715] Int7L
[716] Int15L
[717] Int34L

lease. Here there is evidence of tenants negotiating service charge caps on the Lease Renewal Market. Where the Lease Code has failed for decades, Multiples have made gains over the past five years through the power of private law negotiation practices augmented by the 1954 Act framework.[718] Several interviewees spoke of the confidence of Multiples understanding the availability of commercial terms in the market and seeking to make contractual gains that impact on the balance of risk and on costs across the term of the lease. As one solicitor said:

> *'I'm not giving anything away [because it's publicised] and I'm not acting on any matters involved in this, but when you see tenants like [corporate retailer] that are very big, that are very vocal, that will seek particular types of clauses in their leases and say "we want this and we want it across the portfolio, and if you don't give it to me I'm going to walk from your store"'.*[719]

Whereas a Multiple would typically have to justify inclusion of a new clause in relation to a lease of a specific property, the demand is for blanket inclusion across a portfolio irrespective of location or need. The situation of the Multiple is far removed from the position of the vulnerable dressmaker, able to obtain terms that shift the balance of risk between landlord and tenant across thousands of properties Where threats to walk away were unsuccessful, another bullish tactic was to run cases to court over marginal rent reductions and lease terms. The Interview Data state that this tactic is successful against SBLs and even some large prudent landlords who cannot justify the costs of running cases to court over marginal rent losses:

> *'[Some large corporate tenants] do have a reputation in the market, I know that talking to some surveyors that they feel [some large tenants have] pushed it too far. So, you'll*

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[718] Sally Wheeler 'Contracts and Corporations' in Peter Cane and Herbert Kritzer (ed) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, Oxford 2010) 142.
[719] Int28L

have a lease renewal where you're arguing and you go into court over two grand [of rent], and the landlord just thinks you're going to give in, but we don't. What happens, not long before the trial, the landlord gives in that two grand. Time, after time, after time. You just think that sometimes you're going to fall flat on your face and end up in court and then losing, but it's just so rare'.[720]

This is an example of Multiples utilising their bargaining power and position in the market to create a reputation and to use the terms agreed in each transaction to create a precedent in the market – patterns of successfully agreed commercial terms and concessions that would have been previously unattainable but through repeatedly obtaining these terms, creates change in the market. The Multiples' email information dissemination platform disseminates knowledge and instils confidence in negotiations. Recall the earlier discussion from chapter five where a solicitor recounts a Multiple contacting the group to say 'I've just got this wording in [the lease] so if you've got this landlord, don't back down on it, because they will give up and just let you have it'.[721] As one interviewee commented, 'isn't that *O'May* in reverse?'.[722]

6.6 Statutory Updates on Renewal: Green Lease Provisions

The benefits to Multiples of centrally managed portfolios are not confined to rent reductions, or inclusion of new pandemic clauses, or service charge caps. There are implications in relation to green lease provisions. One example is that Multiples are routinely requesting, and obtaining, service charge caps, which result in shortfalls in service charge regimes. The consequences might be SBT paying more than Multiples, or less spend on

[720] IntL9
[721] Int15S
[722] Int11L

maintaining the fabric of buildings because of the inability to recoup costs. A further, service charge issue related in relation to so called 'green lease' clauses and the implementation of 'green' works and recovery of cost of these works through a service charge regime.

Green lease clauses are designed:

> *'[T]o facilitate the property being used in a resource efficient manner and which takes account of energy efficiency and other sustainability goals and measures. It is not, therefore, confined to clauses relating to energy use but incorporates a variety of measures designed to improve the environmental protection of the building'.*[723]

Reasonable modernisation (as explained above) is understood to be at its core about updating an existing lease to reflect legislative changes. However, the Interview Data reveal surprising difficulties with the negotiation of MEES (Minimum Energy Efficiency Standards). MEES, introduced on 1 April 2018, sets a minimum baseline energy efficiency standard of E rating for buildings, meaning that properties with an F or G-rating are below standard and are unlettable. The legislation is however ambiguous because whilst the primary responsibility of maintaining the property lies with the landlord, agreement will need to be reached in negotiating commercial lease terms about the landlord accessing the premises to carry out works and, in an institutional lease, who will bear the cost of these works. The approach can be summarised as follows:

> *'Landlords will want to include MEES provisions, and a tenant might not want to agree to that, because the landlord may put in things in the service charge, for example, that allow them to recover the costs of improving the property to bring it up to MEES*

[723] Susan Bright and Hannah Dixie 'Evidence of Green Leases in England and Wales' (2014) 6(1) *International Journal of Law in the Built Environment* 10.

standard. But that, to me, is modernisation, because it's current legislation we can't contract out of it. And it's just who pays for it is the issue'.[724]

A landlord might try to incorporate green lease provisions into a lease on renewal under the Landlord and Tenant Act 1954. In the county court case of *Clipper Logistics Plc v Scottish Equitable Plc*, the court declined to include provisions in the new lease that sought to protect the landlord from risks associated with MEES, although it did allow a term to the effect that the tenant should return the premises with the same EPC rating as it enjoyed on the renewal date.[725] Although not binding, this decision suggests that the courts have indicated they will not tolerate an attempt by a landlord to pass on green liability to a tenant.

To comply with MEES, landlords will likely need access to the tenant's premises to carry out the works and the cost implications under a full repairing and insuring lease would be borne by the tenants through the service charge regime. The landlord is responsible for the condition of the premises, but there is nothing that prevents a landlord from recovering the cost of doing so through the service charge, other than negotiation power. The tension here is that the landlord wants a 'clear' investment lease, which means that the landlord can recover what it spends on the property and the tenant benefits, overall, from lower energy costs. The Multiples' argument is that they should not pay for energy efficiency works that will only increase capital value of the landlords' asset.

Interviewees commented that the position was different between 'on-market' negotiations to those tenants who benefitted from security of tenure:

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[724] Int23L

[725] *Clipper Logistics plc v Scottish Equitable plc* (county court 7 March 2022 unreported).

'So MEES, for example, you wouldn't have an argument over these kinds of things normally because everybody knows the position. Those kind of negotiation points don't arise when it's a new lease, or it's contracted-out'.[726]

Landlords have the power to negotiate carrying out MEES works and to recover costs in a new on market lease negotiation,[727] but do not have power in the market to achieve this on negotiation of a renewal lease, which is a significant indicator of Multiple Tenant power in the renewal market. Terms agreed on a renewal are an imperfect facsimile of the market. Interviewees confirmed that landlords who 'don't want substandard properties on their portfolio are going in and doing the work and paying for it themselves', but even so, negotiating access is tricky.[728] One solicitor commented that:

'Tenants don't like it. They don't want - in my experience anyway - the tenants don't want any landlord to go in and do work that may disrupt their trade. They don't want landlords to do it. Or to pay, really. Erm yep, they don't want the landlords to do it'.[729]

In other interviews it became clear that some landlords could not negotiate access to the premises to carry out these statutory works, let alone recover payment for them. The general position on renewal leases is that the:

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[726] Int23L
[727] See *WH Smith* (n 189) 31 where the landlord argued that its proposals 'represent reasonable modernisation as they reflect changes in law since the existing lease was granted in November 2007'. The landlord also confirmed that the MEES wording reflected the latest form of precedent lease for the Westfield Centre and was wording that 'new tenants were required to sign'.
[728] Int33L
[729] Int23L

> *'[T]enant can refuse consent for landlord to enter at their absolute discretion and if they do then we, as the landlord, we can't do the [MEES] works. And as tenant, they don't have to pay for anything'.*[730]

Another interviewee commented that:

> *'[T]he position that we usually get to is the tenant will pay via the service charge, unless the tenant, erm, refuses consent to the landlord going in. So, then it's up to the tenant to decide whether to let the landlord in'.*[731]

To manage the stalemate position on a renewal, the parties agree to negate the MEES legislation by agreeing that the non-compliant landlord will employ a statutory defence saying that they had no consent to enter the premises and carry out the works – the 'no-consent defence'.[732] The law firm Ashurst wrote a blog on this point, noting that this is a 'temporary fix' to the problem of 'owning a building that does not meet the required minimum energy performance standards'.[733] In many cases the most inefficient energy consumption related to 'bright lights and air-conditioning units', but landlords stated that they were reluctant to comply with 'MEES [and upgrade] these things, [if] the service charge will only permit recovery of replacement when it's beyond economic repair'.[734] One solicitor spoke of the conflict between outward facing CSR policies and internal negotiations:

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[730] Int1L
[731] Int4L
[732] An exemption is available under the MEES regulations if a landlord cannot obtain the necessary third-party consents to carry out the improvements (for example, consent from the planning authority, the tenant or mortgagee) despite using reasonable efforts or the consent is subject to unreasonable conditions.
[733] Ashurst, 'Are the MEES changes for commercial property in force yet?' 26 September 2023 <https://www.lexology.com/l >. Ashurst note that approximately 1bn sq. ft of space in the UK is below a 'B' rating, which by 2030 will not meet the requirement under existing policy and will no longer be lettable.
[734] Int4L

> *'It's a very curious world to be in, when Sunday evenings we've been watching the David Attenborough thing with the children [about] climate disaster, and then the next thing you're getting these [tenants] going "no, just no" to anything to do with sustainability, and "we'll do what we want". And you think, well, is that reasonable modernisation to put [sustainability] in [the lease]? Because it's a sort of fundamental legislative change'.*[735]

Multiples renting in high street locations are likely to pay lower rents and are likely to benefit from service charge caps. Further, Multiples' leases often contain provisions preventing landlords from entering to carry out MEES works. This is because landlords are more likely to be prohibited from entering premises to bring them up to standard required by climate change legislation. In the Green Lease Toolkit issued as Law Society Guidance in January 2023, solicitors are encouraged 'in all appropriate cases to discuss with their clients whether to include green provisions in leases they are producing and negotiating' and to consider the availability of model green clauses.[736] Further sector specific guidance is expected from the Law Society later this year. These provisions affect the capital value of those premises, have an impact on maintenance and investment in the fabric of the buildings.

6.7 Resisting Landlords' Opposition to Renewal

6.7.1 *S Franses Limited v The Cavendish Hotel (London) Ltd*

An overview of section 30(1)(f) is set out in chapter two (see section 2.3.7) together with an overview of the facts and decision in *Franses*.[737] The Supreme Court identified a subjective

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[735] Int4L
[736] Law Society Guidance, Better Buildings Partnership, 'Green Lease Toolkit' (*Law Society*, 29 January 2024) <https://www.betterbuildingspartnership> accessed 6 April 2024.
[737] *Franses* (n 263).

and objective aspect: the landlord must show that it has a genuine intention to carry out the works (subjective element); and ii) that it will practically be able to do so (the objective element). Subjectively, the landlord must show that its intention to carry out the works is firm and settled.[738] Objectively, the landlord must show there is a reasonable prospect of achieving that intention to carry out the works by his own 'volition' i.e. has obtained requisite planning consents and is in funds.[739] The 'acid test' following this Supreme Court ruling is 'whether the landlord would intend to do the same works if the tenant left voluntarily'.[740]

The Supreme Court reached a decision by looking at the issue from the perspective of 'the formal legal instruments' of the 1954 Act and determined that the 'commercial reality is that the landlord is proposing to spend a sum of money to obtain vacant possession'.[741] To do otherwise would be to 'demonstrate that prioritisation of renewal over compensation is, at times, illusory in both principle and practice'.[742] As Haley notes:

> *'The landlord felt it to be worthwhile to pay statutory compensation of £324,000 to obtain vacant possession. The preparedness of landlords to engage such tactics exposes weaknesses in the Part II provisions. The intention to carry out a scheme of development that is otherwise unwanted and non-essential most certainly does not promote the public interest upon which ground (f) is founded'.*[743]

The decision protects the position of the tenant on renewal, but the Supreme Court acknowledged that the decision in *Franses* would have consequences for the retail sector and

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[738] Ibid 16.
[739] Ibid 11.
[740] Ibid 19.
[741] Ibid 17.
[742] Michael Haley, 'Compensation for Business Tenants Mischief and Malady' (2020) 79(3) *The Cambridge Law Journal* 490, 493.
[743] Ibid.

on behaviour of commercial parties as 'tenants will attempt to launch a multi-spectrum attack on the subjective limb of the test of intention, broadening the scope and increasing the length of oral evidence'.[744] Lord Briggs acknowledged that the judgment:[745]

> *'[M]ay introduce an element of complexity and expense into proceedings in the county court which, for many years, have yielded to a simple technique for speedy resolution. But I can see no other way of giving effect to what seems to me always to have been the plain intention of Parliament'.*

The balance between landlord re-development and tenant's ability to request a new tenancy is set out in section 30(1)(f) of the 1954 Act ('ground (f)'), which provides that a landlord can oppose a lease renewal if:

> *'[O]n the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work or construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding...'*

The complexity of the legislative position is increased by the introduction of Section 31A by the Law of Property Act 1969, section 7(1)). This provides that:

> *'(1) Where the landlord opposes an application under section 24(1) of this Act on the ground specified in section (f) of section 30(1) of this Act … the court shall not hold that the landlord could not reasonably carry out the demolition, reconstruction or work of construction intended without obtaining possession of the holding if:*

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[744] Lamb Chambers, 'The Supreme Court gives us a new test of 'intent' under the Landlord and Tenant Act 1954' <https://www.lambchambers.co.uk/property/the-supreme-court-gives-us-a-new-test-of-intent-under-the-landlord-and-tenant-act-1954-s-franses-ltd-v-the-cavendish-hotel-london-ltd-2018-uksc-62/> accessed 22 May 2023.
[745] *Franses* (n 263) 72.

(a) the tenant agrees to the inclusion in the terms of the new tenancy of terms giving the landlord access and other facilities for carrying out the work intended and, given that access and those facilities, the landlord could reasonably carry out the work without obtaining possession of the holding and without interfering to a substantial extent or for a substantial time with the use of the holding for the purposes of the business carried on by the tenant.'

The intricacy for landlords in recovering a property from a tenant for redevelopment lies at an intersection of demonstrating its 'intention' to carry out works of redevelopment and demonstrating, practically, that the extent and duration of the works are sufficiently 'substantial', that they cannot be carried out with the tenant in situ, and would be disruptive in terms of time and extent to warrant denying the tenant a new lease.[746] The perception of interviewees is that the tenant's position must be protected so that re-development is not used as a ruse to 'bully and push the tenant out […] just because the landlord wants to move someone shiny in'.[747] Once the tenant has vacated the premises, it has no action or means available to hold the landlord accountable for failing to complete the redevelopment works that initiated its expulsion, allowing the landlord to circumvent security of tenure. Today's complexity lies in interrogating development plans to ascertain the landlord's intention to carry out the works as at the date of trial.[748] The most straightforward position is where there is one unit (ideally standalone) and the whole unit needs to be demolished and works carried out for its development.

[746] Section 30(1)(f).
[747] Int19L
[748] *Betty's Cafes Limited v Phillips Furnishing Stores Limited* [1959] AC 20 1 All ER 607.

It is interesting that none of the fifty-five interviewees thought the *Franses* decision was a validation of the law as they understood it. Broadly speaking, property professionals responded with surprise to the outcome and reasoning in *Franses*. This appears to be because, as echoed in the quotation above, it contravenes understood industry norms:

> *'It was an industry practice, and then it finally comes out and sees the light of day in the Supreme Court. And it's not to say it's right or wrong, but they said, "no". And everybody in the industry said, "oh" [laughs]. Well, everyone apart from Joanne Wicks [tenant's counsel]'.*[749]

Self-generated norms are 'informal agreements and understandings' that are distinct from 'legal rights'.[750] They give an understanding of how the commercial property sector, thinks and operates. *Franses* has had significant implications for development. The Interview Data give an insight into the commercial property industry operating more flexible, commercial norms than the strict application of the black letter of the law envisages. Here is a tenant's solicitor sharing their view as to how the *Franses* judgment sits within the norms of the sector:

> *'I was astounded, but pleased by the result, I've always said to clients in the past, "At the end of the day it is their [landlord's] property, so if the landlord wants to redevelop it and let it to someone else shouldn't they be given the opportunity to do so? You know, it isn't your property". But when you look at then the Franses case, you know, they were going to spend the money weren't they [to carry out works]? They were going to do all these works and then potentially undo them, just to get that tenant out, and still the*

[749] Int15L
[750] Blandy, Bright, Nield (n 49) 86.

court said, no. So maybe and, like, don't tell any of my clients this, but maybe it's gone a bit too far?'[751]

The interviewee speaks of the decision as running contrary to the understandings of property professionals that underpin commercial landlord-tenant relationships about entitlement to the property - namely that security of tenure is not absolute, and the property ultimately belongs to the landlord. The norm is generated in part because in this sector it is accepted that landlords' interests lie in preserving capital value. Furthermore, interviewees commented particularly on the amount of money that the landlord was prepared to expend, said in the case to be in the region of £776,707 excluding VAT, in addition to statutory compensation of £324,000 payable to the tenant.[752] These payments, for interviewees, supported the commercial logic that even though the works are 'fake', that there is a commercial acceptance in the sector that the landlord is prepared to buy back the premises. The Supreme Court are bound by 'rules of construction' of the 1954 Act and the decision is faithful to protection of the tenant's security of tenure.[753] However, the decision highlights that the decision is out of kilter with industry norms. The commercial property industry is a closed-off 'semi-autonomous social field', which sees the retail sector 'generating its own rules and decisions and means of enforcement, but which is also penetrated by the external legal system'.[754] The system is, of course 'penetrated by the external legal system' when matters go to court, but the interesting thing is that the system factors in judicial decision-

[751] Int6L
[752] *Franses* (n 263) 5.
[753] Blandy, Bright, Nield (n 49) 108.
[754] Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law & Soc'y Rev* 719.

making and the develops the law for its own ends.[755] Several interviewees were reflective of the gap between legal norms and the black letter law. Here is an example as one interviewee confesses to advising on the types of behaviour denounced in the *Franses* judgment:

> *'I spent many years of my life sort of redesigning schemes myself, telling landlords to, you know, stick in an extra staircase, put a lift in there. I'm guilty of what the Supreme Court has said is a Cavendish sin. In those cases, if I said to the clients "you need to do this", they would actually do it [to meet ground (f)]'.*[756]

Landlords have the statutory ability, under section 30(1)(f) to oppose the grant of a new tenancy to a sitting tenant if they meet the statutory grounds. The tenant could challenge the landlord's proposals, to resist the landlord's ability to redevelop. The Supreme Court anticipated the implications of the *Franses* decision would open the possibility of a 'forensic examination of the landlord's purpose or motive to a test of the genuineness of that intention'.[757] The Supreme Court thereby anticipates increased resistance through protracted, complex, costly proceedings surrounding re-development of commercial premises. Property professionals acting for Multiples referred to the decision with 'astonishment' and 'pleasure'. Notably, there was sympathy with the landlord's position – that the decision goes 'too far' and a sense that tactics of Multiples will be facilitated by the decision. Here is a property professional speaking about Multiples' changing tactical approaches to opposed lease renewals pursuant to ground (f), post-*Franses*:

> *'[S]o, obviously, the landscape changed after Franses. So, if I'm acting for a tenant now, I ask for pre-action disclosure, that is more extensive than typically I would have used*

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[755] Ibid.
[756] Int4B
[757] *Franses* (n 263) 17.

to. So, because it used to always be the case that all you had to do was to prove your intention as at the trial date. Effectively it didn't matter whether the work is solely to get the tenant out, or not. Now, obviously, if the sole reason for you to do your works is to ultimately get the tenant out, then that's not good enough anymore. And so, what ordinarily would happen is, you would get a client would come to you and would say, I want to re-develop this block. We've got tenants in there that have got '54 Act protection, what can we do in order to get them out so we can carry out this redevelopment? And, historically, because by the time you get to trial they will have got all their ducks in order and they will show that they have an intention to carry out the works, that would be fine. But now, if, before the clients come to a landlord's solicitor, they've already had internal dialogue, which says, right, we need to get this tenant out. The only way in which we can get the tenant out is to try and do some works to its unit. Um, let's get advice from X, Y and Z solicitors in order to try and put together a plan. Then arguably that correspondence will be disclosable and it will show that the whole set up of any proceedings that follow in relation to redevelopment works have been fabricated solely to get the tenant out of the unit. And if Franses is going to be applied on a strict basis, then that won't be good enough anymore. So, if I'm tenant side, I'm asking at a very early juncture, you need to send us all the internal correspondence at your client in relation to this property, so we can see what their true intention is'.[758]

Tenants' actions can be classified as 'moderating resistance' because tenants are utilising official litigation channels to expose the 'truth' concerning a landlord's development plans, with the aim of demonstrating that the landlord does not have the requisite intention.[759] Barristers confirmed that in the wake of the *Franses* judgment that 20 opposed lease renewal cases collapsed.[760]

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[758] In16L
[759] Int15L
[760] Int1B

6.7.2 London Kendal Street No3 Limited v Daejan Investments Limited

The position is further complicated if the landlord has plans to redevelop part of a building and in doing so it would impede the access or enjoyment of a different tenant, breaching covenants to quiet enjoyment. Multiples' resistance becomes more complex where works are to be carried out to one property (Unit A) but will likely affect the ability of another tenant to occupy (Unit B). Landlords in this position face difficulty because they do not meet ground (f) in relation to Unit B and are open to actions for breach of covenant of quiet enjoyment. Whilst landlords might have been tempted previously to bring UnitB into the re-development scheme seeking advice on this is no longer possible because they lack the requisite intention. In *London Kendal Street No3 Limited v Daejan Investments Limited,* details of which are set out in chapter two,[761] the tenant utilises multiple sources of law to ultimately test novel legal rights in court to disrupt or delay landlord re-development plans. The court considered a number of factors to determine that the landlord had the requisite intention under section 30(1)(f):[762] i) the programme of and timescales for works, ii) mechanics of the building contract, iii) financial compensation offered to the tenant; and iv) the undertaking supplied to the Court promising to carry out the works in order to determine that the landlord had the requisite 'intention' under section 30(1)(f).[763]

One interviewee discussed the tenant's position in the *Daejan* case as follows:

> *'[T]he landlord was seeking possession on redevelopment grounds, and we were challenging that. And the key point of our challenge was (we didn't dispute the fact that at some point in the future the landlord intended to undertake a redevelopment*

[761] *London Kendal Street No3 Limited v Daejan Investments Limited* [2019] L.&T.R. 22, 52.
[762] Ibid.
[763] Ibid.

of the property) but what we did dispute was - the timing of … effectively the way in which the landlord was seeking to use its ability to terminate the lease under the '54 Act, because it was part of a wider redevelopment. And, without getting into the kind of technicalities of it too much, effectively, what we were saying was, the only reason why they would do works to the holding at the time at which they were going to, or they said that they were going to, was to get us out. And, if we weren't in occupation, they wouldn't be doing those works now. And, you know, we had I think a three or four day trial on it. The county court judge that dealt with it, bless him, didn't really get the point and didn't really address it in his very muddled judgment. Um, and so we sought permission to appeal, we got permission to appeal, but then matters settled between the parties, and so we never got the answer to that. I mean… the High Court I think were quite excited at the prospect of having the opportunity of drilling down into the issue and looking at it properly. because I think the view across the industry was fairly unanimous that, actually, the judge just hadn't got to grips with the point that we were trying to make at first instance. And I think, you know, that is, oh, such a risk I think these days in the county court, I guess'.[764]

The *Daejan* case concerns a London development where the landlord has sufficiently deep pockets to defend this in court. The estimated cost of contesting a ground (f) hearing would be (as estimated by interviewees) in the region of a hundred thousand pounds per party. Landlords are prepared to throw money at the problem where the margins developing in London are higher, less so on the profit margins in some 'god awful town up north'.[765] The legal professional here comments that whilst ground f) was accepted as established, the nuance of the tenant's legal argument about phasing of the works was lost on the county court judge – but still delayed development for a considerable period of time. The average time for

[764] Int15L
[765] Int2B

multi-track and fast-track cases to reach court was 78 weeks.[766] It is conceivable that properties in small towns on high street locations owned by SBLs and MSLs are lumbered with mechanisms for re-development that are now too cumbersome and complex to be deployed in a cost-effective manner that is accessible and understandable landlords.

Interviewees spoke of the broader implications of the complexity and resistance by tenants to redevelopment:

> *'I think it is a genuine problem for development, particularly in respect of multi-occupational property. If you can knock the thing down, you're home free. Once you've got to rely on substantial work and demolition and construction or reconstruction then you can't often do it in a multi-occupied building. That's because it's easier to show, um, that you're basically going to demolish something than it is to show your planning, your plans and also, the substantiality test in ground(f) is a problem, as is the carve-out for tenants in section 31(a). Because the tenants, um, the law has evolved that substantiality has come to mean that the substantiality works have become measured by time. So, you've got all those cases that say about three months' work is okay. Well, sometimes you just can't do three months' work'.*[767]

In addition to the challenges to a landlord's 'intention' in *Franses*, and challenges from other tenants in multi-occupied buildings, there are also issues of aligning contractual lease end dates. Landlords who wish to develop shopping parades, for instance, may find that the leases end on different dates, sometimes years apart because no thought was given to modern estate planning or management at the grant of those leases sometimes decades before. Re-generating commercial property spaces requires longevity of planning and

[766] HMCTS, Management information June 2023 https://www.gov.uk/government/statistical-data-sets/hmcts-management-information-june-2023 accessed 12 February 2024.
[767] Int1B

foresight and knowledge of the law. Here is an in-house solicitor speaking about re-development of a site:

> *'We've got a really shitty shopping parade. Like it's awful. It's like the worst in Central London. There's a [coffee shop] on the corner and that's in my parade, …the rest of them are tat shops. And they all sell bongs and London souvenirs. Stuff like that. And we can't get rid of them because some idiot's granted them '54 Act protection, so to get them out we've got to pay them 200 grand stat comp and we need to look at the leases and tie the terms together for redevelopment. It's saying to the board "we think you should look at a ten-year process and actually start to get them outside the Act now, or consider re-development grounds …". I mean, I won't be working here then, so....'*[768]

These views are mirrored by property agents:

> *'What I do know is that, of course, it is a massive impediment to development, and if you think development is a good idea, if you think that urban regeneration is a good idea, and that's a subjective question of taste, but if we operate from the assumption that everyone agrees that a modern high street is a good idea then the '54 Act is a real problem, because of course when you get to big developments where you've got to get lots of tenants out you've got to get everyone lined up. Because if you haven't managed to get everyone lined up, if you haven't got all the pieces in motion at the same time, then this tenant is going to be able to oppose your otherwise cast iron ground f) notice on the basis that that tenant over there ain't going to be moving out, which means you're not within a reasonable time of the court order going to be able to undertake your development'.*[769]

[768] Int35L
[769] Int6S

Property professionals interviewed spoke of constraints, legal and ethical, that prevented them from advising landlords about re-development. Legal advice in overcoming this complexity is no longer forthcoming, and obtaining legal advice is evidence of a lack of the requisite intention:

> *'We don't want to be seen as guiding clients post Franses because, obviously, it's got to be their intention in terms of what they intend to do with the property, and I think in Franses that's where it fell down in the end in terms of the solicitors were telling them specifically what they need to do in order to avoid falling foul of the ground'.*[770]

Several interviewees stated that 'we're reluctant to take on [landlord] cases' following *Franses,* whilst litigators spoke of switching to tenant-centric work.[771] The consensus was that whilst the law had become increasingly complex, and difficult to navigate. Landlords are without legal advice, whilst Multiples (and their lawyers) thrive in the opportunities thrown up by uncertainty and ambiguity. The issue for landlords is aligning their works of construction and planning with the 1954 Act framework.

Several interviewees expressed frustration that the Supreme Court decision ignored the complex, multi-faceted world that landlords must navigate for development to be successful:

> *'[B]ecause in the Sumption world the landlord is perfectly able to work out what he wants to do, and that's just not the real world. The landlord needs help to work out what he wants to do'.*[772]

[770] Int15L
[771] Int27L
[772] Int1B

Another interviewee said the Supreme Court decision 'has buggered the way the [1954] Act works in *Franses* by preventing professional advisors from telling landlords what they need to do so that they can get a tenant out'.[773] While the *Franses* outcome may align with the original policy intentions of the 1954 Act, both landlord and tenant advisors believe that the decision has hindered development by paving the way for increased tenant resistance.

Multiple resistance to the 1954 Act regime is to nullify development rights and stifle change. In some cases, interviewees spoke of tenants served with a ground (f) notice knowing that 'the writing is on the wall but still using procedural tactics to spin it out because they just want to drag their feet' to continue trading, or to reach a deal with the landlord.[774] Several interviewees spoke of the implications of this on a proposed re-development:

> *'I'm doing something for a client in, [southern town] and they've got a big high street Multiple on the high street. And we've got a deal lined up with a hotel operator to create a hotel that's going to make a massive contribution to their holding, and the town and, you know … jobs. Now it's taken us a long time to get planning, we've fulfilled all the criteria, but now the tenants not playing ball, so we're going to have to take the thing to court. And that's probably going to delay this development until April next year [approximately 10 months]'.*[775]

Risks associated with costly litigation and the associated uncertainty, 'once you've taken the cost of that all into account and the tenant stat comp (they're getting twice RV, you know) it will just kill it [the redevelopment]'.[776] A culmination of complex legislative hurdles, temporal aspects, and having the resources to field tenant resistance put a breaker on landlords' ability

[773] Int5B
[774] Int2B
[775] Int3S
[776] Int2S

to oppose renewal in order to re-develop premises. Solicitors acting for Multiples spoke of the Multiple's stance as being:

> *'Why should I have to cede my shop to you just so you can make your money by redeveloping?'*[777]

The argument has shifted so that it is no longer about protecting tenants against the landlord bringing in a 'shiny' new tenant and has morphed into a rejection of redevelopment and disturbance of their occupation, asking 'why should you be allowed to disturb me at all?'.[778]

The outcomes of the *Franses* decision are that landlord-advisors stated that their landlord-clients with 'shopping centres have made it policy that they will no longer grant tenancies within the Act, because they know as soon as you've got a multi-occupation property where the lease endings aren't harmonised [development] it's not going to happen, you're not going to be able to get people out'.[779] Several interviewees reflected on the impact of the *Franses* decision:

> *'I mean it's fascinating isn't it that Cavendish is a sort of pro-tenant decision but the effect in the market is anti-tenant, isn't it?'*[780]

Of course (as we shall explore in chapter seven) landlords in smaller high street locations do not have the power to contract Multiples outside the 1954 Act this form of landlord resistance to Multiple power is only feasible for London-centric landlords.

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[777] Int3B
[778] Int3B
[779] Int13S
[780] Int4B

6.8 Conclusion

Chapter six aimed to examine the inner workings of the 1954 Act. It delved beyond the rhetoric surrounding its purpose to analyse the lease renewal process and its implications for the utilisation of the Act. Specifically, it investigated how commercial terms and rent levels are negotiated in new leases. Interview Data revealed that Multiples actively challenged and reshaped the landscape of commercial terms by leveraging the strength of their collective portfolio within the legislative framework. Multiples have reversed the position of power in the market and in doing so have taken over the landlord's position. Lease Renewal Market conditions are intended to be a facsimile (albeit an imperfect one) of on-market conditions. Multiples have created a significant gap between institutional 'on-market' lease terms and those available in the lease renewal market. The distribution of risk between landlord and tenant in the renewal lease market differs from that in on-market transactions. While this may lead to more favourable lease terms for Multiples, it raises important questions about the impact of this disparity on SBTs and SBLs, which will be examined in chapter seven. SBTs are not part of the collective Multiple resistance, and SBLs are unable regulate the behaviour of Multiples. Chapter seven will illustrate how the 1954 Act has strayed from its original purpose—protecting vulnerable independent tenants during renewals—and instead contributes to a commercial imbalance that affects both SBTs and SBLs.

CHAPTER 7 SBTS AND SBLS: THE CUMULATIVE EFFECT OF THE 1954 ACT

In chapters five and six this thesis considered the significance of power in creating and shifting market-based norms and commercial lease terms and the sophistication of Multiples in challenging Institutional Landlords. Chapter seven takes a different focus by exploring data relating to the perspective of SBTs (small business tenants) and SBLs (small business landlords) and the implications of Multiple power for these parties under the 1954 Act. Again, this thesis returns to its central argument that the EPR lens is not sufficient to explain what is happening in commercial lease relationships and that the implications of the 1954 Act for commercial lease relationships cannot be fully understood without adding power, as an additional factor, into the EPR lens. Chapter seven contests the prevailing perception of the 1954 Act as benign and challenges apathetical assumptions of the government and property professionals that the 1954 Act achieves balance between landlord and tenant.

7.1 The Business Tenant: A Fragmented Personality

The original policy narrative of the 'wretched dressmaker' captures the original policy intentions of the 1954 Act. The overarching purpose of the 1954 Act is to protect a tenant's goodwill: the intangible value that arises because of the customer base built by the tenant trading from that leasehold location and is particularly significant in retail space because of the strong ties between consumer footfall and the tenant's business and brand. Security of tenure is based on two inseparable strands: 'rent and tenure', because 'guarantee from eviction is of no value unless accompanied by protection against unreasonable increase in

rent'.[781] The rise of consumerism from the 1960s accelerated the growth of large corporate retail tenants fragmenting the personality of the retail tenant from multi-million-pound businesses at one end of the spectrum, whilst small independent retailers – the butcher, the baker, the candlestick maker – continue at the opposite end of the scale. The 1954 Act has different implications for different types of tenants. The data show that rather than protecting the SBT under the 1954 Act, the legislation results in commercial injustice for this category of tenant in two ways. First, SBTs do not have the clout, knowledge or power to negotiate security of tenure in the retail market and are effectively excluded from the regime's protection. Second, Multiples who obtain security of tenure under the 1954 Act can leverage preferable commercial terms by using the 1954 Act framework to force commercial change unavailable on the open market. This creates a vast dichotomy between the advantages available to the Multiple, whilst simultaneously producing significant disadvantages to the SBT.

7.2 1969: The Opening of Contractual Possibilities

The position of SBTs was affected when the ability to contract a new lease outside the 1954 Act was first introduced in 1969. The significant outcome of the Law Commission's 1969 review, set out in chapter two, was to introduce an alternative contractual possibility: that landlord and tenant could agree that the tenant's lease would not benefit from security of tenure.[782] The legislation was amended, as part of the outcome of the 1969 Law Commission review, so that tenancies under six months were automatically excluded from security of

[781] Leasehold Committee (n 20) 5.
[782] Law Commission (n 142) 50.

tenure, and it was accepted that 'there may be cases where a tenant is willing, for good reasons, to accept a tenancy for more than six months without rights under the [1954] Act'.[783]

By accepting a lease contracted outside the 1954 Act, a tenant is agreeing to forego legislative safeguards: rights to request a new tenancy at the end of the contractual term, and for that tenancy to be on fair and reasonable terms. Parties intending to enter a new lease without security of tenure are required to follow a procedure. Initially, when introduced in 1969, the procedure involved landlord and tenant applying jointly to the county court, under section 38(4) 1954 Act, for the court's approval to contract the lease outside the 1954 Act. The county court routinely approved the 'contracting out' of commercial leases by 'rubber-stamping' these applications.[784]

There was no intention in the 1969 review for contracting outside the 1954 Act to become 'standard' or 'unexceptional'.[785] Over time, however, interviewees spoke to patterns of contracting out that have emerged. The first pattern is that landlords, where possible, prefer leases not to benefit from security of tenure where possible. The data reveal that standard market practice where landlords are in control of the reversionary interest of a group of shops in a parade, or a shopping centre is that that these leases are granted without security of tenure. The reason is to retain control over tenant mix, as tenants do not have a right to remain on contractual expiry, and to avoid paying statutory compensation on vacating the premises. Interviewees, for instance, confirmed that:

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[783] Law Commission (n 142) 32-33.
[784] Int1L
[785] Bright (n 18) 240.

'[F]actory outlet centres across the board, they're all ex-Act'.[786]

Again, the EPR framework does not sufficiently explain why some leases are contracted inside or outside the 1954 Act The fact some property types are contracted inside, and others outside, the 1954 Act is not explicable by the conventional EPR lens. The diverse sources of law, the temporal aspects, the spaces of resolution, none explain why this option is employed in relation to types of retail site. Include power and resistance, however, and the introduction of contracting-out in 1969 introduced greater manoeuvrability and flexibility for landlords, which was justified on the proviso that 'the tenant is aware of the implications' of contracting outside the 1954 Act.[787] Initially, the contracting-out process required the parties to obtain a court order sanctioning the landlord contracting outside security of tenure. These court-centred procedural mechanisms were described as a 'rubber-stamping' exercise.[788] The court process was revised following the 2003 Law Commission consultation discussed in chapter two. These changes were designed to alleviate pressure on the court process and second to implement greater protection for the SBT. Receipt of a standard form statutory notice and requiring tenants to swear a declaration before an independent solicitor was intended to give tenants more opportunities to understand the implications of giving up security. This revised 2003 process requires the landlord to serve a statutory form of notice on the tenant, and the tenant is then required to either a sign a simple form declaration, or statutory declaration before a solicitor.[789]

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[786] Int6S
[787] ODPM, 'ODMP Panel on Business Tenancies Legislation, 2006' <review of Impact of Procedural Reforms> accessed 22 July 2022, 4.
[788] Int1S
[789] The form of statutory notice is included at Annex C.

7.3 The SBT (the Small Business Tenant)

Those qualifying as property professionals in the 1970s were temporally proximate to the origins and ethos of the 1954 Act:

> *'[C]ertainly the Jenkins report was still in the minds of some senior practitioners I learnt from. And what I got from them was this is very much a product of the post-war situation, extensive bomb damage in some areas, the risk …or the need for, um, smaller tenants to have security of tenure to be able to stay on in their premises and preserve goodwill'.*[790]

This reason is still strongly perpetuated as justifying the existence of the 1954 Act in academic literature and in the data collected for this thesis. A survey conducted by the Property Litigation Association in 2018 asked its members for comments about areas of commercial property law that they considered required reform.[791] Fifty-one percent of respondents (69 from 136 people) considered the 1954 Act fit for purpose, and eighty-five percent of survey respondent (117 people of 137 people) considered that the 1954 Act should not be abolished.[792] In free-text comments collected against this particular question, survey respondents stated that the 1954 Act did not 'need abolition' because 'small property tenants' in […] weaker bargaining positions need [its] protection'.[793] The following section explores the perception that the 1954 Act protects the SBT.

Here is a solicitor interviewee explaining the effectiveness of statutory declaration process under the 2003 Order at protecting the SBT:

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[790] Int4B. The reference to the 'Jenkins Report' is to the report of the Leasehold Committee (n 20).
[791] PLA (n 421) 6.
[792] Ibid.
[793] Ibid.

'I'll give you a specific example, it was actually a hairdressers ((laughs)). Now [the lease] was coming to the end and I was saying, you know… "It looks like you've got a protected tenancy, but can you recall whether you signed a statutory declaration to contract the Act out?" "Oh, well we can't remember". I said "Well, dig the documents out and we'll have a look". And, of course, [the declaration] it was stapled to the back. They'd signed the statutory declaration to contract out of the Act, but they had no understanding…I'm not sure if they even had legal advice at the time. No understanding of what it meant. And of course, the landlord was able to, sort of, kick them out at the end. And they'd built up a client base over the last ten years, so that would have been pretty difficult for them to move premises'.[794]

Note the laughter of the interviewee in identifying the vulnerable SBT as a hairdresser – today's 'wretched dressmaker'. Today's 'wretched dressmaker' is unable to negotiate security of tenure, which is ironic because the 1954 Act was enacted to protect the position of this SBT. Here is another interviewee explaining that it is standard in the market for the landlord to contract all unknowing and unwitting tenants outside 1954 Act protection:

'No, I don't think they [small tenants] know about it. I don't think they're well enough advised. The little sweetie shop down in [town], ((laughs)) that I went in when I heard that the landlord was chucking them out and I was, like, "where's your lease, where's your lease?" you know, they just hadn't thought to negotiate '54 Act. So, if you've got that type of tenant, as a landlord you're just saying to the tenant … it's standard to just… contract you out … And if they haven't got, you know, a friendly [law firm] onboard to say, "No, don't accept that …"'[795]

[794] Int33L
[795] Int6L

The interviewee here reflects that not only did the SBT not know of the 1954 Act, but also that standard market practice was to contract SBTs (or any tenant who does not know better) outside the 1954 Act. This undermines the protection that Parliament originally bestowed on the SBT. Several property surveyor interviewees routinely negotiated heads of terms with SBTs and were of the view that a SBT should not be able to access security of tenue because to grant a secure lease to a SBT denoted a commercially foolish landlord.[796] When asked whether a landlord would forgo granting security if they could, the response was in the affirmative:

> *'Absolutely, yes, they will because then there's no issues about repossession or the niceties of compensation if they do throw them out in due course if they satisfy one of the grounds for repossession'.*[797]

This exposes the lobbying power of the property sector in creating its own narrative and defence 'against [legislative] interference' by holding up protection of the vulnerable SBT as a shield against reform as being disingenuous.[798]

To curb the historic landlord monopoly over the terms of commercial leases, including contracting-out, the government introduced the Lease Code (see chapter two). The intention of the Lease Code is to introduce and promote fair commercial leasing practices. The Lease Code relies on self-regulation by professionals in the commercial property sector. The Reading Academics have evidenced that the Lease Code 'lacked teeth' and as a consequence the Lease

[796] Int2S
[797] Int 12S
[798] Bright (n 68) 155.

Code had little, or no, reach in the retail market.[799] Furthermore, the Reading Academics noted that surveyors interviewed as part of the exercise of monitoring the Lease Code were confirmed as acting for 'a wide range of clients, although they tend not to act for very small tenants, who remain unrepresented in commercial negotiations'.[800] The Lease Code provides that:

> *'The fallback position under the Landlord and Tenant Act 1954 is that business tenants have rights to renew their lease. It is accepted that there are a number of circumstances in which that is not appropriate. In such cases landlords should state at the start of negotiation that the protection of the 1954 Act is to be excluded and encourage tenants to seek early advice as to the implications'.*[801]

The 2020 Lease Code updates the 'circumstances' in which it may not be appropriate for a landlord to grant security. It acknowledges that landlords: 'sometimes insist that the lease excludes security of tenure under the 1954 Act […] where the tenant takes a short lease'. The Reading Academics note that the IPD (Investment Property Databank) confirms that in the retail sector the length of leases to SMEs are on average half the length of those granted to large corporate tenants.[802] The Lease Code also suggests that landlords may not 'want to give the tenant the right under the 1954 Act to challenge the landlord's opposition to renewal and delay the landlord obtaining possession while waiting for a court hearing', but whatever 'the

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[799] Crosby, Hughes (n 57) 14. For instance, their survey data showed that 'tenants with fewer employees were less likely to know about the 2007 code than larger tenants; only 14 per cent of smaller tenants were aware of the code'.
[800] Ibid 22.
[801] British Land, 'Commercial Lease Code' <https://www.britishland.com/sites/british-land-corp/files/sustainability/governance/external-commitment/commercial-lease-code.pdf> 3.
[802] Crosby, Hughes, Murdoch (n 71) 115 Pre-COVID-19, the average lease length granted to retail SMEs is approximately 6.7 years compared to approximately 12.2 years for large tenants.

landlord's explanation, the tenant should take professional advice before agreeing to give up the security of tenure that the 1954 Act normally provides'.[803] The importance of security of tenure (tenure and rent control) was most strongly articulated by thesis interview participants where a small independent tenant's business was concentrated into a single physical building:

> *'[A] small business which has got one shop, then everything you have is there. You can't afford to lose that shop'.*[804]

The position of the SBT is not enshrined in the Lease Code as warranting special protection, although the Lease Code 2007 states that current contracting out procedure was intended 'primarily [to] be of use to small business tenants who may otherwise not have access to reasoned advice when negotiating a lease'.[805] Business tenants often become 'more dependent upon their lease premises the longer they remain in occupation, which leaves SBT them in a progressively weaker bargaining position as the end of the lease approaches'.[806] The consequence for small independent tenants of taking a lease without security is that they are commercially exposed to the landlord at the end of the term and where they might be '*paying [a rent of] ten [thousand], the landlord's going to throw them out unless they pay twenty-three*'.[807]

Landlords resistance to the 1954 Act regime is an act of stabilising resistance that 'takes [small tenants] outside the norm of disciplinary power without landlords here resisting the

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[803] RICS, Lease Code 2007 <Code For Leasing Business Premises England And Wales 1st Edition> 30-31.
[804] Int3L
[805] RICS, Lease Code 2007 <Code For Leasing Business Premises Basis For Conclusions> accessed 19 January 2022.
[806] Sandi Murdoch and Neil Crosby, 'Looking after small business tenants' Paper to 7th Pacific Rim Real Estate Society Conference, Adelaide 2001, 8.
[807] Int2S

legal regime relying on their own market power'. Bright agrees that the 'landlord's strong market position' enables them to 'prevail upon tenants to agree to a contracted-out lease'.[808] Noting that standard leases of three years or less issued by the British Property Federation exclude security of tenure, Bright states that whilst security of tenure, rent, and commercial flexibility are important to the small tenant, the introduction of contracting-out possibilities in 1969 appears to have 'almost standardised' the exclusion of small tenants from the 1954 Act legal regime in relation to these shorter-term lettings.[809]

Behind the blanket justification of the continuation of security of tenure (that it protects the SBT), is the industry consensus that the SBT with less than 'three shops' would be too small to have the level of sophistication, or power, needed to negotiate 1954 Act protection because tenants 'at the very bottom of the market don't know it's there'.[810] Eleven out of fifteen of the property agents and valuers interviewed stated that SBTs, in their experience, would not obtain security of tenure.[811] The remaining four property agents practised in in-house roles or did not have experience of 'the lower order of occupier'.[812] This is not to say that every small tenant is denied security, just that the market norm is based on the commercial rationale of 'why would a landlord grant this if they did not have to?'[813] Security of tenure is typically negotiated at heads of terms stage between property agents. Even if these tenants are unrepresented at negotiation stage, once solicitors are instructed, it is still tricky for solicitors

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[808] Bright (n 68) 152.
[809] Ibid.
[810] Int2S
[811] In1S, Int2S, Int4S, Int5S, Int6S, Int7S, Int10S, Int11S, Int12S, Int13S, Int14S.
[812] Int8S
[813] Int6S. Further, Haley writes of the weakened bargaining power of a one-shop tenant who might persuade a court to grant a longer lease based on *CBS (UK) Ltd v London Scottish Properties Ltd* [1985] 2 EGLR 125. See Haley (n 74) 230.

trying to negotiate security of tenure for SBTs even though the RICS website states that its members 'should fully adopt it [the 2007 Code] as part of day-to-day business'.[814] Five of the lawyers I interviewed had direct experience of working in a local high street practice. Here is an interviewee speaking about representing SBTs:

> *R* *'[L]andlords seem to want those [leases to SBTs] excluding…which [you may think] seems odd, and quite often, because we act for quite a lot of sort unrepresented, like small business people who aren't necessarily property savvy and you'll get these heads of terms that they've agreed to. And they'll have agreed to, you know, an exclusion, probably without necessarily quite realising what they've been agreed to.*
>
> *I* *And do they [SBTs] tend to have had a property surveyor advising them?*
>
> *R* *Well no, often they don't, if they're like just sort of small business people they don't have surveyors to advise them. So quite often we'll get the heads of terms and then we'll be the ones saying, "Have you thought about a schedule of condition? Have you thought about, you know what the exclusion really means for you?" um… we try to get it [security] but usually you get landlords being sniffy going, "you know, you're going back on [gentlemen's agreement] … it's not agreed in the heads of terms".'*[815]

Bright noted smaller tenants' 'bitterness' over their inability to gain access to more preferrable commercial terms in the market,[816] on the basis that the 1954 Act is a piece of 'legislation in place to address the vulnerability of commercial tenants [[…] on expiry of the

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[814] RICS, Lease Code 2007 <Code_For_Leasing_Business_Premises_Basis_For_Conclusions> accessed 19 January 2022.
[815] Int2L
[816] Leasehold Committee (n 20) 5.

lease'.[817] As Bright notes 'it is of no surprise that the group likely to emerge worse off from free market negotiations are the small tenants'.[818] In 2009 concerns were raised that SBTs were not 'properly informed about the leasing choices they are making'.[819] Haley anticipated that tenants could be 'in a worse position than that which existed under the Landlord and Tenant Act 1927'.[820] The British Retail Consortium reported in 2004 that retailers 'often find it difficult to obtain leases that best meet their operational needs'.[821] The Law Commission in their 2005 report on unfair contract terms identified SBTs as being particularly 'at risk' and proposed 'micro-businesses' – those with fewer than nine employees – be protected.[822] Clearly, the 'three-shop' threshold had become internalised by the sector as representing the 'small unsophisticated tenant' because several interviewees used the same classification and applied the same 'rule of thumb' that the requisite level of sophistication was only present in a tenant that had a minimum of 'three shops' and would be akin to the 'very small businesses' that experienced the commercial inequality noted by the Reading Academics when monitoring the uptake of the Code of Practice for Commercial Leases in 2005.[823] Three shops, according to interviewees, is the threshold number of shops that a tenant needs to achieve the requisite level of commercial and legal consciousness necessary to negotiate and obtain security of tenure.

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[817] Bright (n 68) 138.
[818] Bright (n 68) 138.
[819] Ian Austin, Hansard HC Deb 3 col 30WS (July 2009).
[820] Haley (n 742) 525.
[821] BRC Commercial property leases: options for deterring or outlawing the use of upwards only rent reviews clauses. A response from the British Retail Consortium (British Retail Consortium 2004).
[822] Law Commission, *Unfair Terms in Contracts* (Law Com No.292, 2005) 2.32.
[823] Crosby, Hughes, Murdoch (n 71) 6.

'Three-shops' (or SBTs) were defined in opposition to the 'Multiple Tenant' who represented multiple physical retail bases that was less exposed because everything is not based in one shop. Multiples by contrast are sophisticated commercial parties with deep pockets who employ a tactical approach to the legislation and the power to obtain security of tenure or relinquish it depending on its own business model and whether the commercial deal was better on market or in the Lease Renewal Market.

There is then a dichotomy between the experiences of small tenants and Multiple Tenants. Multiple Tenants have expertise and bargaining power in the market. A Multiple tenant can resist the landlord – it can obtain security of tenure unless landlords are able to contract out desirable locations – retail outlets, some high demand locations in London. The norm is that Multiple Tenants obtain security of tenure if they require it, unless they are contracting in relation to a site where entry to the business model involves all tenants being excluded from security of tenure (typically designer outlets, certain shopping centres to facilitate a vibrant tenant mix). On the other hand, the industry norm is that SBTs do not have access to 1954 Act protection unless accidentally granted by an equally inexperienced landlord.[824]

Several interviewees commented in relation to the 1954 Act that 'one half [of tenants] doesn't know it's there, and the other half doesn't need it'.[825] This is not to suggest that large Multiple Tenants benefit from security in prime retail locations, but simply to suggest that the legislation had drifted considerably from its purpose. It cannot be justifiable that the SBT receives no 1954 Act protection at the end of its contractual terms, when large well-advised

[824] Harding (n 404) 46.
[825] Int2L

tenants do. The consequences of imbalance between the SBT not having security and Multiples having security are explored in more detail in section 7.8.

7.4 Increased Specialisation

Interviewees reflected on the complexity of the 1954 Act, which seemed at odds with its basic intention: to protect the SBT. Interviewees were puzzled as to how SBTs, without any legal or valuation advice, could engage with the 1954 Act legislation at all. SBTs might assume that Parliament has given them this protection and they should be able to exercise [the protection], however it is 'hedged with such incredible technicality that they're almost doomed to fail.'[826] Technicality aside, the cost of engaging with the 1954 Act process to pursue rights under the 1954 Act is prohibitive, as it requires engagement with the county court process which was estimated to cost between £50,000 to £100,000 per party.

Several interviewees spoke of the development of the black letter law, but also the procedures and practices that underpin it. For instance, PSLs (professional support lawyers) designed and wrote the new contracting-out process under the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003:

> *'When the contracting out changed in 2003, we [PSLs] all got together and we all agreed the protocol for it, effectively'.*[827]

Lawyers and PSLs spoke of 'making the law' and noted criticism as to the law's technicality:

[826] Int4L
[827] Int5L

'It's funny, I have had people say to me, "the law was really easy until the PSLs came, and now it's all complicated". And, of course, the answer is …"it was always complicated, it's just you didn't understand it before".'[828]

Increased sophistication of the law and legal practices, over time, leads to development of a legal regime that reflects the sophisticated, technical specialists in the commercial property sector. And the othering of non-specialised parties.[829] Leader refers to this as the 'displacement' of non-professionals in her work on negative perceptions of litigants in person in the context of increased professionalization as a form of social status.[830] PSLs are only employed in large law firms and therefore the law and legal practice is developed by lawyers for lawyers who specialise in this area of practice. The Interview Data suggest that whilst the contracting out procedure does not protect the SBT, it is another means of resistance and manoeuvrability available to Multiples.

Interviewees spoke of anxiety about property professionals acting for commercial landlords and tenants developing and utilising the 1954 Act framework for commercial manoeuvrability in the retail market. One example of this is the boiler plate definition of 'Term' in the modern commercial lease:[831]

[828] Int4L
[829] Harding (n 411) 48.
[830] Leader (n 618) 263.
[831] An extract from the MCL (modern commercial lease) <https://modelcommerciallease.co.uk/> accessed 5 September 2022.

"Term"

the period of this Lease [(including where applicable any continuation of that period under the 1954 Act)[21]];

"Term End Date"

[DATE];

"Term Start Date"

[DATE];

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18 The default position under **clause 2.8** is that the Landlord's decision would have to be reasonable.

19 Consider increasing this period if you think that it may take longer than five years to obtain any necessary consents and to rebuild following damage by an insured risk.

20 Include only where the Tenant's repairing obligation will be limited to keeping the Premises in the state of repair current at the date the Lease is granted.

21 Delete the words in square brackets if the Lease is contracted out.

Figure 7.1 Extract From MCL Lease

The words in square brackets in the definition of 'Term' … '[including where applicable any continuation of that period …]' are words of continuation and are included in the lease drafting if the lease has 1954 Act has protection. These additional words relate to the period when the tenant is holding over and seeking to renew. However, the additional wording should be deleted if contracted-out. Here is a property lawyer speaking about agreeing the contracting out process and then later arguing that 'continuation of the term' wording in the lease definition of 'Term' negate contracting out:

> *'[This] is something that I have raised a number of times with landlords [and is] the process where you kind of contract out of the '54 Act and you say the tenant agreed. [Then] even if you contracted out, if the definition of the term in the lease includes the words "and any continuation of the term" then the lease will be protected by the '54 Act. There's definitely been a number of occasions where there's been sufficient latitude in the drafting of the lease to allow me to assert [tenant] has '54 Act rights. And the kind of follow-on from that might even be the case that the particular property is one that the client doesn't want to take, but if [the landlord] wants to get us out [they] have to do so on a [statutory] ground under the '54 Act, which would equate to X, or Y in relation to this particular property … so "let's do a horse trade and let's say you don't have to pay us the stat compensation that we think you're required to pay us, because we say that we've got '54 Act rights and you don't claim any inter-applications in relation to us and we can walk away on a mutual drop-hands basis"'.*[832]

[832] Int15L

A different illustration relating to contracting out relates to the case of *TFS Stores Ltd*.[833] Numerous interviewees spoke of the *TFS* case during their interviews. TFS, trading as The Perfume Shop, had leases at McArthur Glen outlet park. These were contracted outside the 1954 Act under the 2003 Order to exclude security of tenure provided by ss.24 – 28 of the 1954 Act. A statutory notice had been served and statutory declaration sworn by a representative of TFS. TFS, who wished to remain in occupation, argued that the contracting out notices failed because the standardised wording included by solicitors in the statutory declaration was defective rendering the contracting out process invalid.[834] The standard form statutory declaration – see **Annex C** – includes the phrase 'I propose to enter in a tenancy of premises…for a term commencing on [ ]'. When the lease and the statutory declaration are issued for signature, it is often difficult to predict when the lease will complete. The contractual term of the lease typically commences on the date that the lease itself is completed and dated. Therefore, practice has developed, led by the PSL community and accepted by the industry as standard practice, that this section of the statutory form is completed as follows:

'for a term commencing on [the date of lease] [or] a date to be agreed between the parties]'

The court considered that this was a practical question that practitioners were best left to deal with because it would be exceedingly difficult to know with certainty the exact date that

[833] *TFS Stores Ltd* (n 296) 688.
[834] Ibid 37.

the lease would complete.[835] Tenant's tactics of resistance include challenging 'quite standard procedures, […] leaving a sense that even though we've got what's supposed to be a simple procedure, there's suddenly lots of question marks around it'.[836] TFS were ultimately unsuccessful. The insight here is that whilst the contracting out procedure does not protect the SBT, it is fertile ground for lawyers in generating uncertainty in the market where a party might be looking to negotiate and manoeuvre. The challenge exposed anxiety about leasing practice in the retail market. Here is a solicitor speaking about the *TFS* case and contracting out procedure:

> *'There are still bits that we disagree on because we don't know what the law is. There's a contracting out case about to go to the Court of Appeal quite soon. [The] tenant in that case just wants to stay there trading and it's saying that it has 1954 Act rights and that the contracting out was invalid. And we all know that it was perfectly valid, but until the court has said that the tenant can't be got out. So, the tenant is making more money from staying in this place trading than it is costing it to run the case, so it's just staying as long as it can'.*[837]

The perception amongst interviewees, and in the market more broadly, is that the Multiple here is manoeuvring and challenging market practices to remain trading in the premises for as long as possible. This may be unremarkable behaviour for many corporates; however, the purpose of this legislation is to protect vulnerable tenants. The hairdresser will not obtain security on their local high street where every Multiple would. The aim of the 1954 Act is to protect the SBT that has 'got one shop, because …everything you have is there …you can't

[835] Ibid 34.
[836] Int5L
[837] Int6L

afford to lose that shop'.[838] However, SBT is the least likely to obtain the protection of the 1954 Act and protect its goodwill. On the other hand, TFS (the Multiple) took a lease in a retail outlet (McArthur Glen) which are well-understood to be contracted out sites in the retail industry and then employed the technicality of the contracting-out process, at a cost of hundreds of thousands of pounds, to prolong their period of trading in the property.[839] The emphasis is on manoeuvring for revenue and for profit, not goodwill.

7.5 SBLs (Small Business Landlords)

The persona of the landlord has also evolved since 1954. Chapter two examines the rise of the Institutional Landlord. Beginning in the 1960s, the expansion of shopping centres and other retail developments led to a small number of Institutional Landlords capitalising on commercial rental values, which began to underpin pensions and stock market investments. On the other end of the spectrum, is the SBL (the small business landlord). The SBL, rather than own a parade of shops, more likely owns the freehold of a shop on a local high street, usually 'in smaller towns'.[840] Property surveyor interviewees gave several examples of the traditional SBL character, as the 'historic landlord' figure 'where dad owned it and it's been passed down through the family etcetera and they used to run a shop but decided to come out and then let it to a retailer and just take the income'.[841] Interviewees spoke of a new type of SBL that emerged over the past 20 years as investing their pension pot by purchasing a shop and living off the rental income on the basis that the income generated a 6-7% yield on their

[838] Int3L
[839] Int5L
[840] Int14S
[841] Int5S

investment, which was a preferrable rate of return to annuities or bonds.[842] UORRs over the decades have cast property as a steady investment option. More recently, as the retail market has declined advice has become more cautionary about the risks of tenants failing to pay rent, which will have a direct hit on pension income.[843]

SBLs, far from the figure of the 'Victorian moustache-twirling villain', often rent out retail property as the basis of retirement income. Recently, CVAs and COVID-19 have reduced or halted rent payments. There is little insight into the SBL negotiating against a 1954 Act protected Multiple. The Pawlowski - James Survey hints at underlying power discrepancies in the market because survey participants assured the reader that concerns about an excess of Multiple power in the retail market were 'unfounded', and that commercial tenants, even those with large portfolios, still needed 'protection of the Act'.[844] Other survey respondents commented that exploitation by Multiples is 'the exception' and another commented that 'landlord exploitation […] only happened at the margins and well-advised landlords can deal with it'.[845] On the high streets the disparity becomes more pronounced. SBLs are forced to engage with the 1954 Act regime, a regime that is manipulable by the party with the deepest pockets. SBLs tend to own the reversion of one-off shops and have frequently prioritised lettings to Multiples because of their covenant strength. The reversionary interest of these high streets is typically fractured, in contrast to that of a shopping centre or retail park where the whole reversionary interest is typically owned by the landlord.

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[842] Int15S
[843] Amy Austin, 'Advisers divided about holding property in SIPPs' *Financial Times* 3 October 2019
[844] Pawlowski, Brown (n 61) 163.
[845] Ibid 164.

Crosby et al in 2003, conducted a project aimed at considering the position of SBTs that was based on interviews data obtained from 46 property agents in the Midlands and Wales. The authors discovered 'few institutional landlords owned property' in the small regions, but Multiple retailers were 'represented in these towns', which provided 'an interesting about-face to the usual stereotype of landlord and weaker tenant with large [M]ultiple retailers taking premises from small business landlords'.[846] Without adding power and resistance into the EPR framework the dynamic in these landlord-tenant relationships is indiscernible.

This thesis has focussed, broadly speaking, on three different strands of the renewal process: rent, lease terms, and opposition to renewal where landlord seeks to redevelop. Agreeing the new rent pursuant to section 34 of the 1954 Act is perceived by property professionals 'unbelievably inefficient, time consuming, and costly'.[847] Earlier this thesis explored the tactics of Multiples. Genn wrote that there is 'surprisingly scant knowledge about the kinds of cases that actually reach the civil courts or the dispute resolution activity that takes place in the shadow of the courts'.[848] This is akin to consideration of discretionary spaces in decision-making.[849] Multiples learn through a network of transactions across the UK that feed into an iterative process informing negotiations and tactics. Multiple know that even soft targets, deals with SBLs, and mid-size landlords, feed into the broader evidence of terms. Several interviewees spoke to Multiples deploying the same tactical resistance whether the rent level is £6,000 per annum, or £1,000,000 per annum.[850] SBLs, having prioritised lettings

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[846] Neil Crosby, Cathy Hughes, and Sandi Murdoch, 'Do Small Business Tenants Need Protecting in Commercial Lease Negotiations?' (*University of Reading,* 2005) <University of Reading> accessed 22 July 2023, 6.
[847] Int10S
[848] Hazel Genn, *Paths to Justice: What People Do and Think About Going to Law*, (Bloomsbury Publishing 1999) 1.
[849] Blandy, Bright, Nield (n 49) 95
[850] Int8S

to Multiples because of their attractive covenant strength, are now faced by these tenants leveraging the strength of their appealing portfolios to challenge commercial terms. Even though landlords might be willing, there are cases where tenants are prepared to defend a matter that seems disproportionate to the financial outlay in bringing the claim - 'the arbitrary corollary between financial value and merit misrepresented what the value of the suit may be for the individual bringing it'.[851] The issue is that SBLs are ill-equipped to challenge more sophisticated Multiples because to do so requires 'embarking on [costly] legal proceedings': resources are 'crucially important to the outcome of litigation'.[852]

There is an alternative process available to manage the task of agreeing rents under section 34 1954 Act: PACT. Details of the PACT arbitration system are set out in chapter two. Interviewees confirmed that the PACT system was rarely used because both parties must consent to the process and apparently there was 'usually a bloody good reason' why one party or the other preferred not to use PACT. This is to justify a preference for more costly and drawn-out proceedings in the county court. The 1954 Act has a function, but it currently does not work cost effectively, which means that the people who need it are the people who cannot afford it. In a similar vein the pilot fast-track system for unopposed lease renewals, details of which are at section 6.5.1, demonstrated the parties' preference is for longer drawn out proceedings, rather than a quicker adjudication process. This indicates that the parties are not simply seeking a quick outcome before a property adjudicator, rather it is the process, duration, and cost of county court litigation that yields benefits.

[851] Sir Robert Peel, Hansard HC Deb vol 17 cols 1350-61 (20 June 1827).
[852] Genn (n 848) 247.

7.6 Perpetuating Inequalities Through the 1954 Act Framework

The parties are left facing a county court trial, which is a nightmare for smaller tenants and landlords because they:

> *'[C]an't afford £10,000 in fees, let alone the £50,000 or £100,000 in fees to go to court. And, remember, the costs will be exactly the same whether the rent is £20,000 a year or £2 million a year. Same amount of hours. Same court costs. Same barristers' costs'.*[853]

Interviewees spoke of Multiples as having the 'deeper pockets' drawing out the litigation process to negotiate, and achieve commercial terms, unavailable in 'on-market' negotiations.[854] Interview Data explored in chapter six supports the conclusion that Multiple Tenants are manipulating the litigation process to negotiate terms that are not available in 'on-market' negotiations – for instance, new service charge caps. For these reasons, the data shows a divergence between the commercial terms that are negotiable on-market, and off-market within the 1954 Act regime. Each small victory on lease terms, or rent, for tenants results in them making 'small gains and efficiencies across a huge portfolio, whereas you might not see those gains on one particular property'.[855] As Jeremy Bentham notes 'what to one man may be trivial, to another may be of high importance'.[856] In some cases, tenants might be prepared to defend a matter that seems disproportionate to the financial outlay in bringing the claim. After all, the arbitrary corollary between a claim's merit and its financial value might misrepresent the significance of the outcome to the claimant.

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[853] Int2B
[854] Int31L
[855] Int3L
[856] Jeremy Bentham, *A Protest Against Law Taxes* (London 1795) 34–36.

Of course, the majority of lease renewals do not go to the county court. Currently the typical position between institutional/mid-size landlords and Multiple Tenants is that each instructs a valuer to put in:

> *'[A] ridiculous report on rent that nobody in their right mind believes in [the parties] posture and dilly about knowing that six weeks before trial they will sit down and have a serious conversation. At which point a deal with get down because nobody wants to spend the money to do it properly'.*[857]

A number of interviewees spoke of the impact on SBLs. Bullish tactics are more effective against SBLs who lack broader experience and cannot justify the costs of running cases to court over marginal rent losses:

> *'[Some large corporate tenants] do have a reputation in the market, I know that talking to some surveyors that they feel [some large tenants have] pushed it too far. So, you'll have a lease renewal where you're arguing and you go into court over two grand [of rent], and the landlord just thinks you're going to give in, but we don't. What happens, not long before the trial, the landlord gives in that two grand. Time, after time, after time. Sometimes you think you'll fall flat on your face and end up losing, but it's just so rare'.*[858]

To take a matter such as this to court is in the region of £100,000 per party. SBLs were said to be happy to have a tenant and security of income in the current market and an occupier to pay business rates rather than risk having a void unit; so, they concede.

Whilst Multiples are threatening court over rent they are also pushing for better commercial terms: for instance, service charge caps. Professionals acting for both sides of

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[857] Int2B
[858] Int6L

negotiations saw that Multiples 'bully' SBLs to agree commercial terms. Increasingly, Multiples issue their own precedent lease an interesting reversal of decades of monopoly by the institutional lease. Several interviewees spoke of their Multiple tenant clients using the county court adjudication process to press for more commercially favourable terms against a smaller landlord, saying '[they] bully people'.[859] Furthermore, interviewees spoke of a shift in norms in the market in these transactions of Multiple Tenants issuing their own form of model lease – a complete reversal of legal and commercial norms from the inside of the legal regime. This effectively reverses the negotiation power dynamics making it more difficult and costly for the landlord to push back against the lease drafting; a tactic that closes negotiations.

Then, paying zero, or lower rents than SBTs, Multiples utilise the 1954 Act regime to nullify development and stifle change. In some cases, interviewees spoke of tenants served with a ground (f) notice knowing that 'the writing is on the wall but using procedural tactics to spin it out because they just want to drag their feet' to continue trading, or to reach a deal with the landlord.[860] Here is an interviewee speaking of the implications of this on proposed re-developments:

> *'I'm doing something for a client in [southern town] and they've got a big high street Multiple on the high street. And we've got a deal lined up with a hotel operator to create a hotel that's going to make a massive contribution to their holding, and the town, and jobs. Now it's taken us a long time to get planning, so we've fulfilled all the criteria, but now the tenants not playing ball, so we're going to have to take the thing*

[859] Int2S
[860] Int2B

to court. And that's probably going to delay this development until, you know, April next year [approximately 10 months]'.[861]

Once again, costly litigation and associated uncertainty; a culmination of complex legislative hurdles, temporal aspects, and having the resources to challenge tenant resistance just 'kill' redevelopment.[862] The argument has shifted so that it is no longer about protecting tenants against the landlord bringing in a 'shiny' new tenant and has morphed into a rejection of redevelopment and disturbance of their occupation, asking 'why should you be allowed to disturb me at all?'. Increased ability for tenants to resist redevelopment has resulted in changing attitudes about control over premises. Several professionals stated that the Multiple's viewed landlord's redevelopment as a more direct challenge to their profitability:

'Why should I have to cede my shop to you just so you can make your money by redeveloping?'[863]

The outcomes of the *Franses* decision are that three landlord-advisors stated that their landlord-clients with 'shopping centres have made it policy that they will no longer grant tenancies within the 1954 Act, because they know as soon as you've got a multi-occupation property where the lease endings aren't harmonised [development] it's not going to happen, you're not going to be able to get people out'.[864] This is an attempt to safeguard the property and prevent tenant resistance under the 1954 Act. Several interviewees reflected on

[861] Int3S
[862] Int2S
[863] Int3B
[864] Int2B

unfairness broadly perpetuated by the *Franses* decision because the 1954 Act worked well in neither party's favour:

> *'I mean, so that's fascinating isn't it that Cavendish is a sort of pro-tenant decision but the effect in the market is anti-tenant, isn't it [because it has stopped landlords from re-developing]?'*[865]

Of course, landlords in smaller high street locations do not have the power to contract Multiple-Tenants outside the 1954 Act and so high street locations with SBLs are likely to be occupied by Multiples paying low, or zero, rents, and where there is money for redevelopment these tenants '[will make sure that doesn't happen] because *Franses* prevents landlords from having advice and SBL need that advice most'.[866]

Tricker still is that if a landlord wanted to change the tenant mix, or obtained funds for redevelopment, these tenants can utilise the 1954 legislation to contest or block redevelopment. The problem is that smaller high street landlords (as is explained below) cannot simply re-develop and are therefore stuck with ailing 'red ticket towns' where 'everything is always on sale' because high street and arcades 'aren't attractive' but cannot be 'pulled down and rebuilt' because either 'lease endings aren't harmonised', or if the landlord wants to demolish the whole under section 30(1)(f) of the 1954 Act because works to part of a centre would be objected to by tenants.[867] Landlords have 'double trouble' because the 'buildings are deteriorating' meaning that existing tenants are paying low rents and are 'clinging on to the premises because they're paying very little for them, or they're

[865] Int4B
[866] Int4B
[867] Int1B

sitting there thinking sooner or later there's going to be a [statutory compensation] payday'.[868] In part, the issue of regeneration outside London and the south is that income of the population and their shopping spend is lower. But the parties are also lumbered with a legislative mechanism which is much too complex to operate managing costs and certainty.

This position has been compounded by the decision in *Franses*. The significance of the decision in the sector is explored below:

> *'When, for example, one of our large retail tenants gets served with a '54 Act with a ground of opposition of redevelopment their reaction, if they want to keep that store is, I'm going to make sure that they can't prove redevelopment'*.[869]

None of the professionals interviewed as part of this thesis considered that the 1954 Act protection had a positive impact on tenant mix, or on investment in the high street. On the contrary, one significant theme was the impact that the 1954 Act had 'on stagnation' of due to inability to re-develop.[870]

Broader questions emerge from the adjudication system that concern specialisation of the legal regime, displacement of smaller landlords and tenants, and the consequences of imbalance. A combination of factors contributes to imbalance between landlords and tenants. SBTs are excluded from its operation and benefit and smaller landlords cannot utilise the adjudication system because of its complexity and cost. Again, there are consequences of this imbalance. Several interviewees were keen to point out that landlords (large and small) pay

[868] Int1B
[869] Int9L
[870] Int1B

peoples' pensions.[871] Landlords also serve a purpose in society; currently the 1954 Act works for too few of its stakeholders.

7.7 SBTs at a Competitive Disadvantage

Whilst this valuation methodology works for certain types of investment properties, it does not promote investment in the high street, where ownership is much more piecemeal:

> *'[T]ake your typical town, you can purchase a shopping centre that's perhaps 30 to 40 percent of the retail mass of the town centre. So, you've now started up a monopolistic control on the market. That allows you to manipulate rents in your centre to maximise the rent by moving tenants out, new lettings, reconfiguring space so that you can produce optimum scenarios. That will create value, by creating value it triggers your ability to invest in your shopping centre, to again, hopefully, sort of renew that drive and move rents forward again. Take that now to the high street, and you maybe own half a percent of the retail mass, a quarter of a percent. So, you have no ability to move the market at all. Um, and let's say the guy down the street, it's his pension, and there's one tenant between three shops, [the tenant's] all for the lowest rent. So now you're in a race to the bottom because you've got no control. Which is great for the retailer... but, come rent review, there's no growth. So, y'know, when the council comes to all the owners and says "Would you all like to put in one percent of the value of your property to invest in the high street?", they all go "No, not really" ((laughs))'.*[872]

Whilst the development of shopping centres was facilitated by landlord control over the reversion of the centre, on the high street the position is reversed. This is because ownership of the high street reversion is typically fragmented because it is owned by many landlords, not

[871] Interviewee 14S particularly mentioned hearing the financial officer from Legal & General speaking on Radio 4 during COVID-19 lockdown about the role of Institutional Landlords in paying pensions.
[872] Int3S

one. The high street is characterised by a lack of landlord control – this is said to be over tenant mix. There was criticism and a focus on the fate of the SBT in the early 2000s from academics, Mary Portas and the government. To promote tenant mix and thriving high streets, Reading Academics noted that the government needed to recognise that a lack of 'fairness' between landlord and tenant warranted intervention by the government in market conditions.[873] Mary Portas also cited 'fairness' between landlord and tenant as 'key to ensuring the vitality of the high street' calling for 'widespread contracts of care between landlords and their commercial tenants'.[874] Bright writing about the leases granted to SBTs in 2006 concludes that 'just as it is regarded as unacceptable to impose unfair terms upon consumers, so too it is unacceptable to impose unfair terms upon small businesses'.[875] The work of Bright, Portas and the Reading Academics has led to a focus on the position of the SBT against monopolistic landlord market control, but there has been less, if any, focus on the ability of the SBT to compete against other tenants who are afforded 1954 Act protection. Historically, 'anchor tenants' or 'fashionable' established brands have been offered incentives by landlords to improve marketability of schemes.[876] SBTs are significant to the economy, yet historically more favourable lease terms – 'peppercorn rents offered to anchor tenants' tips odds in favour of larger retailers who only pay service charges and a business rates[877].

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[873] Cathy Hughes and Neil Crosby, 'The challenge of self-regulation in commercial property leasing: a study of lease codes in the UK' (2012) 4(1) *IJLBE* 23, 24.
[874] Mary Portas, *The Portas Review: An Independent Review into the future of our high streets* (Department for Business, Innovation and Skills 2011) 34.
[875] Bright (n 68) 138.
[876] Genecon LLP and Partners, 'Understanding High Street Performance' (December 2011) https://assets.publishing.service.gov.uk/ accessed 20 January 2021, 7.
[877] Ibid.

The thesis data show that the cumulative package of measures afforded to Multiples is potentially significantly different to the offering to SBTs. The 1954 Act offers more benefits to the Multiple than security of tenure – namely the ability to negotiate renewals in the Lease Renewal Market. Terms available here include service charge caps, pandemic clauses, challenges to valuation principles. Despite these underlying concerns about balance and fairness, survey data obtained from property professionals in 2015 and 2018 suggested that 'small property tenants' and those in weaker bargaining positions need its protection. [878] Survey participants go as far as suggesting that vulnerable tenants include 'retail tenants with portfolios of properties', and that 'tenant exploitation only happens at the margins well-advised landlords can deal with it'.[879]

7.8 Competition for Space in High Street Localities

It is ironic that Multiples can obtain security of tenure on the high street when SBTs cannot. Curiously, the 1954 Act is implemented to cure imbalance, but as it operates today it perpetuates inequities. It might be argued that SBTs and Multiples occupy very different eco-systems and SBTs are therefore unlikely to be disadvantaged by Multiples' preferential terms under the 1954 Act. However, the data show that the reverse is the case. By way of example, lockdown restrictions on physical stores, resulted in a rapid reconfiguration of Multiples' strategy in relation to their physical portfolios. COVID-19 changed consumer behaviour, notably a trend towards working from home and health and wellbeing at home. Consumers showed increased support for local businesses in part because on limitations on travel and

[878] PLA (n 421) 6 and the Pawlowski, Brown (n 61) 164.
[879] Pawlowski, Brown (n 61) 164.

because of a trend towards avoiding larger out of town locations. This made local physical retail stores more attractive to larger commercial retailers.

Interview Data with lawyers and in-house lawyers who advised supermarkets suggested that section 30(1)(g), which permits the landlord to oppose grant of a new tenancy should the landlord intend to occupy the holding for the purposes of their own business, leaves Multiples feeling vulnerable. Competition for supermarket space is fierce and retailers stated they felt vulnerable to rival supermarket purchasing the freehold interest in their store and using the 1954 Act legislation to request occupation at the end of a lease term on grounds of own occupation. Multiple supermarkets now insist on a contractual option to renew to guarantee them a 30-year term (two 15-year terms) to protect them against rival supermarkets:

> *'[W]hat we want in a new food store acquisition is the '54 Act protection, but also an option to renew. Because we've had a situation before where we've had a competitor buy the freehold and take back the store for their own use. So they're very paranoid about that happening and that's one of our required lease terms. I think we sometimes look at it [strategy] nationally, but it can be quite… regional. It depends how competitive the area is, like you'll find parts of London and the southeast that are super-competitive, but I mean … at the minute, it's really competitive in towns the northeast because the market, very specifically food retail, is, I'm sure you know this already, but it's in a very weird position at the minute because they've all been doing really well. They've been making lots of money and there are sites that people want to get into, particularly in residential areas. I guess there's always an element of 'are we in the right locations?' But the market for these sites is quite competitive (laughs). Anyway, the option to renew is, I suppose, that's maybe a way of the '54 Act letting down the tenant, because there is that option open, you know, it's just a tactic of certain big… to be honest, it sounds like I'm trying to not say [Multiple supermarket] but I don't think it was [them] that did it, but [Multiple supermarket] are the one that everybody thinks of when you say… they have the reputation of being the aggressive*

one who's likely to do things like this. But I mean, they're not really around in the acquisition market, although I think they they've rehiring an acquisitions team to get into new localities. And long-term thinking there's not much around…not many sites around and it's quite a good tactic really isn't it [buying the freehold of a rival supermarket](laughs))?'[880]

This is an insight into the traditional retail market, where tenants compete against each other for space – spaces in local high streets. Overall, COVID-19 has motivated Multiples to shift towards the local and to high street locations. To illustrate, earlier in 2024 Asda announced its intention to open 110 smaller convenience stores in smaller localities to compete in these areas with Tesco and Sainsbury's who have opened in smaller retail areas in recent years.[881] This brings together SBTs without security of tenure and Multiple Tenants who gain different benefits under the 1954 Act that impede the SBT's ability to compete.

7.9 Cumulative Consequences of the 1954 Act

The purpose now is to consider cumulative effect of advantages garnered by Multiples under the 1954 Act, as the very framework designed to protect the SBT affects its ability to compete against the collective power of Multiples leveraging knowledge under the legislation. Pulling together the threads of this thesis, Multiples are utilising the 1954 Act – both legislation and court process – to create a lease renewal market that is distinct from commercial terms available on market. The outcome of commercial negotiations under the 1954 Act are different to 'on-market' negotiations. Rents are determined by comparable

[880] Int14L
[881] BBC News, 'Asda to open 110 convenience stores in February' 5 February 2024 https://www.bbc.co.uk/news/business-68204352.

evidence – CVA zero rents are comparable evidence under the 1954 Act, and Multiples leverage the court process to strong arm reductions in rent and other costs – for instance through the introduction of service charge caps. SBTs, cannot negotiate security, are not offered comparable zero rents, and their service charge contributions are not capped. High street leases were often granted 'a long time ago inside the Act and we [tenants] were never going to give that up so the landlord on a high street with a load of protected tenants is kind of stuck with them really unless it wants to knock it down and start again or occupy it itself'.[882] In shopping centre, or sites where all tenants are outside the 1954 Act, Interviewees spoke of the contrast between shopping centres (under landlord control and contracted outside the 1954 Act) and the high street, where the reversion is more likely fragmented. Institutional Landlords, or Mid-Size Landlords, garner control by purchasing and/or amalgamating ownership of the ownership of a parade of shops, or of a whole shopping centre. From a landlord's perspective, even if tenants have security of tenure they are still able to exact control over the retail site. If a landlord is in control of the reversion of a shopping centre, or shopping arcade then the landlord can manipulate capital growth using the anecdotal 'LPQ' effect:

> *'[W]here a landlord has a parade of shops, a charity, takeaway, newsagents [he can] lift the rental tone by letting to a slightly fancier French sandwich shop, LPQ, [Le Pain Quotidien] or an American Apparel, which can transform this into a prime piece of retail space. This enables the landlord to say to that the parade is "on the up" and the new letting is "the best comparable evidence" because it is nearest to the valuation date'.*[883]

[882] Int2S
[883] Int3S

Here the valuer is speaking about section 34 valuation mechanism, which does not apply to open market valuation. The landlord has control over the rental evidence, but not over the tenant mix. This means at the end of the contractual term the tenant is entitled to call for a new lease unless the landlord can meet one of the statutory grounds under section 30 of the 1954 Act. As discussed in chapter six, the recent decision in *Franses* has meant that well-advised tenants and Multiples are able to challenge plans for re-development. Landlords of this type of site are moving to contract-leases outside the 1954 Act considering the decision in *Franses*.

The difference for a landlord in taking a site outside the 1954 Act, then this enables the landlord to manage tenant mix. It allows them to embrace pop-up stores and fads. One property surveyor recalled the period when:

> *'[T]he Chinese herbalist was springing up everywhere. Everybody had to have a Chinese herbalist. Um, [that was the period] before we got onto the fish that nibbled feet. Um... ((laughs)) the point of the story is that I didn't feel that they were appropriate to the tenant mix in the centre or that they would necessarily have longevity. But, in terms of driving rents and value within the scheme, they were probably essential'.*[884]

Landlords have flexibility to give an independent tenant, or a new craze, a chance without committing to that offering in the long-term. Landlords opt for this arrangement with shopping centres and outlet stores, for instance McArthur Glen in the *TFS* case, because it enables them to keep retailers and their merchandise current, reflecting changing fashions and consumer demand. Tenant mix has long been recognised as crucial in attracting customer

[884] Int4S

footfall and as a major contributor to success of a retail area. Portas' 2011 study on the health of the high street, concluded that shopping centre landlords struggled to manage tenant mix through use of user clauses in leases. Instead, they denied tenants 1954 Act renewal rights to retain control over tenant mix by refusing to grant a new lease on expiry if it did not align with the overall needs of the shopping centre. Managing tenant mix, creating attractive retail spaces is a critical part of driving up the capital value of the site. Multiples take contacted-out leases because busy attractive shopping centres with increased footfall means increased turnover, prominence and market share for the Multiple.

The issue with the high street, is that by and large, reversionary interests are fragmented. There is no collective landlord control that has oversight of either rental tone, investment, or tenant mix. This is an impediment to redevelopment, and investment. Instead, Multiples use information from their own portfolios and information from other Multiples to drive more favourable commercial terms. One individual landlord might accept a CVA rent 'cram-down', other landlords are then bound by it as comparable evidence. This may be evidence of zero rent where the Multiple has obtained the rent level against the most vulnerable SBL but then can share this information to be used on the rest of the high street by other Multiples. In the CVA arrangements, one of the criticisms of Multiples was that properties had been classified in groups from A-D: A most sought after London locations where Multiples offered to keep paying full rents, as opposed to Category C or D where tenants wanted to keep the store, but pay approximately 20-30% of the original rent.[885] Multiples are 'stuck with too many stores, inflexible leases, spiralling operating costs, their business in desperate need of

[885] *New Look* (n 305).

restructuring.[886] In some cases, Multiples have attracted criticism because rather than look at restructuring their businesses they have instead chosen to operate the same business model at a lower cost by cutting rents and other lease costs. Multiples have made deeper rent cuts in towns where there is less demand for space whilst paying higher or full rents to retain 'in demand' areas – those in key locations. Broadly speaking, smaller less popular towns where there are more SBLs have taken disproportionate rent cuts. This affects the capital value of those high streets.

One interviewee spoke about historic competition between the 'pound shop retailers' which landlords utilised to drive up rent levels to artificially high levels:

> *'Historically you had intense competition between Poundworld and Poundland, which drove up rents. And on the concept of what we call first-in last out only one of them would take the market share, because there wasn't room for both. So, hence the rents got to, well, not an artificially high level, but a level predicated by those particular operators, that wasn't then capable of being replicated across the rest of the landlord's asset, really. So, that also gave rise to problems in valuation terms as to, well, if that's the only evidence you've got... how are you going to discount it? So, more often than not, it resulted in the other retailers paying higher rents than they perhaps ought to. And what you've seen subsequently is Poundworld have gone bust. And Poundland, they're owned by Steinhoff, which is a massive South African corporation, so you don't really know how well or badly they're doing, but Poundworld by contrast, whose portfolio is typically older, they did a CVA and more than half of their shops went to zero rent'.*[887]

[886] Ibid.
[887] Int5S

Sassen writes of 'global processes [that] radically transform the social structure of cities',[888] and Layard of the extent to which towns, or high streets, are shaped, not by their 'human, but by corporate' bodies and by the implications of 'corporate agenda-setting and implementing powers for a piece of land'.[889] SBTs, for instance, are more likely to be occupying under inflated rents, whilst Multiples, Poundworld is a private equity based Multiple, have cut rents to zero. The implications of this are that potentially local occupiers are left paying higher rents than Multiples who then put in place arbitrary rent cuts across their portfolios. The overall impact of this is that Multiples can 'dig in' to their high street locations paying lower rents than SBTs, sometimes zero rents, and keep trading.[890]

7.10 Conclusion

In recent years, there has been frequent outcry in the press when a Multiple tenant closes a store. There is upset, even outrage, at the perceived abandonment of a town or high street by a John Lewis or a Marks & Spencer's.[891] Interviewees spoke of new life, and the regeneration of urban tissue after the departure of Multiples from high street locations:

> *'[Take] Altringham, which is just sort of on the outskirts of Manchester, it's a good example. Funnily enough they had quite a big Marks & Spencer's there which fell foul of the sort of recent cull that Marks & Spencer's had, and it was a new store as well. But they've sort of reinvented themselves. There's an award called Best British High Street and I think they won the main accolade, because they've dramatically changed*

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[888] Saskia Sassen, *Cities in a World Economy* (5th edn Sage 2018) 8.
[889] Layard (n 29) 20.
[890] BBC News 'Poundworld adds to retail gloom' *BBC News* (26 April 2018) <https://www.bbc.co.uk/> accessed 23 June 2023.
[891] Manchester Evening News 'Anger as closure of Marks & Spencer in Bolton announced' *Manchester Evening news* (18 January 2023) <https://www.manchestereveningnews.co.uk/news/greater-manchester-news/anger-as-closure-of-marks-26005793> accessed 23 June 2023.

the way that their high street works. [892] *So, whereas in the past they were relying on sort of your anchor stores if you like, like your Marks & Spencer's, they've changed things in the sense that they've gone for sort of more local businesses, and they've changed what was the old traditional sort of indoor market to a sort of food hub. So, it's a sort of a multi-let space, which encourages people to come in and try all sorts of different things. Quite sort of continental if you like. Quite similar to when we went to Valetta a couple of years ago in Malta. They had something very similar and you tend to have it in quite a lot of European cities where you will have people using the market for sort of the old traditional things like your fruit and veg etc, but then it's sort of brought back up, it's modernised in the sense that you've got quite a lot of food outlets and people can go in there, it's quite a community sort of atmosphere, which again, lending itself more to sort of hospitality and a more sort of local vibe, as opposed to it just… the high street just being flooded with sort of, I don't know, vanilla, stale sort of outdated high street stores. Erm, so it's sort of reinvented itself in a way. And I think a lot of high streets will probably go that way'.*[893]

This thesis argues that an excess of Multiple power is a malaise that weakens identity and sense of belonging, blocks re-development, drives down rents, hampers investment.[894] Failure of the 1954 Act to recognise the spectrum of tenants, means failure to protect the SBT against those competitive advantages afforded to the Multiple by its legislative infrastructure. One consequence of this failure to balance power between landlord and tenant is that the 1954 Act stagnates high streets and perpetuates Multiples setting the agenda for these retail spaces.

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[892] North West Place, 'Bruntwood on board at Altrincham's Stamford quarter' <https://www.placenorthwest.co.uk/bruntwood-on-board-at-altrinchams-stamford-quarter/> accessed 23 June 2023.
[893] Int30L
[894] Anna Domaradzka, 'Urban Social Movements and the Right to the City: Special Issue on Urban Mobilization' (2018) 29(4)Int *Journal of Voluntary and Nonprofit Organizations* 607, 610

Currently, the 1954 Act perpetuates the demise of the high street, and unless this is addressed, high street landlords are unable to shake off the Multiples' shackles and address tenant mix and diversity. These thesis data provide a granular insight into this dynamic and the tactical approaches, which have become norms that are assimilated into standard practices and approaches across the retail sector. Multiples have hundreds, thousands, of properties and these practices are unrolled across portfolios of properties on a nation-wide scale. Considering power and resistance is key in understanding the alignment of norms and practices within these property relations. The broad picture, painted by the data, is that outside London, landlords have less ability to resist tactics of Multiples preventing re-development of premises. This suggests that the 1954 Act has unintended negative implications for the vitality of smaller retail spaces such as arcades and high streets.

The broader issue is that in today's modern market conditions the ongoing intervention in private law rights on the basis the 1954 Act's workings is unsupportable where it elevates the interests of global and private equity Multiples at the expense of SBTs who are unable to compete against the advantages that the 1954 Act bestows. Smaller landlords are unable to stand up financially or tactically to Multiples wielding an expensive and inaccessible 1954 Act regime. The Multiple Tenants' hold is stronger in poorer localities and the implications of power imbalance here manifest through less investment in the structure of the building either through service charge or directly to sustainability provisions, stymieing of tenant mix, and suppression of SBT seeking to compete with Multiples' businesses. Overall, support for the 1954 Act continuance comes with a heavy health warning. First, it makes a mockery of the legislative principles if only Multiples benefit from 1954 Act protection. Second, here is evidence that Multiples utilise their 1954 Act protected portfolios to leverage preferential

terms that places SBTs at a commercial disadvantage. And third, keen to retain preferential terms, Multiples the decision in *Franses* prevents SBLs who have neither the means, nor the expertise from challenging renewal and re-developing their premises. In a post-*Franses* world, the 1954 Act contributes to commercial and geographical inequalities. If the 1954 Act is to be retained, then the extent that the 1954 makes to perpetuating social and economic inequalities needs to be considered.

The data analysis is now concluded and in chapter eight this thesis moves on to the overall conclusion.

CHAPTER 8 CONCLUSIONS

In this thesis I have explored the operation of security of tenure in commercial retail leases in practice. The commercial property sector is closed off from scrutiny, as is the operation of the 1954 Act, and therefore this thesis contributes to a limited scholarship by producing empirical data relating to commercial leases to assist in understanding how the legislation is applied in the retail market. Conducting semi-structured interviews with property professionals: surveyors, valuers, solicitors, barristers, and judges (the Interview Data) has enabled this thesis to answer the central research questions posed as to how the 1954 Act operates in today's retail market.

This thesis has analysed the practice of commercial leasing under the 1954 Act through Foucault's theory of power and resistance and has demonstrated that the 1954 Act operates on an assumption of landlord power that no longer represents the full reality of retail leasing practice. I have outlined the background to the 1954 Act in terms of its original policy intentions, which aimed to protect against a masculinist, commercialist abuse of the feminised vulnerable tenant. However, I have argued that Multiples tenants have simply usurped this masculine, commercialist position and that evolving practices under this reversed power dynamic disadvantages the SBTs' ability to compete, creating significant barriers to the economic success of the SBT, to tenant mix, and to redevelopment in certain geographical areas. In this chapter eight, I draw out the conclusions and original contribution that emanate from this thesis.

8.1 The Operation of the 1954 Act

The four research questions that guide this thesis are as follows:

i) Would the underlying drivers of the 1954 Act, based on Landlord market power, still be recognisable in today's retail market conditions and, if not, what is the current dynamic?

ii) To what extent are tenants subject to established landlord market power, and what, if any, strategies do tenants employ to resist the exercise of landlord power in the current retail market?

iii) How do the evolving power dynamics between landlords and tenants in the retail market post 1954 impact on security of tenure and their broader leasehold relationship? and

iv) How do the 1954 Act's mechanisms influence the negotiation of commercial lease terms within today's retail market?

The central theme of this thesis is power and resistance, which supports this thesis' assertion that the 1954 Act legislation reflects a power dynamic that no longer accurately represents the current retail market. As a result, the legislation fails to manage effectively the relationship and commercial leasing terms in the retail market. The main findings of the research questions are set out below.

8.1.1 Research Question 1

Would the underlying drivers of the 1954 Act, based on Landlord market power, still be recognisable in today's retail market conditions and, if not, what is the current dynamic?

The original purpose of the 1954 Act was to prevent an 'unscrupulous landlord' from taking advantage of the tenant's vulnerable position 'on renewal' and 'put all landlords in the same category as the ideal or good landlord'.[895] Overall, analysis of the Interview Data has revealed a shift in the underlying drivers of the 1954 Act, particularly concerning the balance of power between landlords and tenants. In certain market contexts, the original landlord-centric dynamic persists as indicated by the experiences of SBTs, and supermarkets competing to acquire physical space in high street locations (see sections 7.3 and 7.8). However, the Interview Data, also indicate the emergence of an alternative dynamic that diverges from the traditional power structure.

In chapters one and two (sections 1.1, 1.2, 2.1) this thesis outlines the social and economic factors that shape the power dynamics between landlords and tenants, which motivated the policies behind the 1927 Act, and 1954 Act. These policies aimed to prevent landlords from profiting at the expense of tenants whose operations generated goodwill and higher rent levels – consequently curbing an excess of landlord power. Following enactment of the 1954 Act, this thesis tracks the evolution of the legislation through consultations by the Law Commission and legislative changes in 1969, 1988, 1992 and 2003, outlining the intentions behind those amendments (see sections 2.2.1 – 2.2.4, inclusive). Furthermore, it examines the introduction of the Lease Code and the monitoring exercise undertaken by the Reading Academics from 1992 onwards, which was aimed at overseeing implementation of fairer lease terms due to their potential impact on the property market (see sections 1.5 and 2.2.3). Evidence presented in chapter two acknowledges the Reading Academics' work over two

[895] The Leasehold Committee (n 15) 142.

decades in monitoring the uptake of the Lease Code as a means of protecting tenants from landlord's monopoly over commercial terms (see discussion of UORRs in sections 2.2.3, 3.3 and 6.2). The ongoing academic monitoring exercise of the uptake of the Lease Code indicates that until recently the landlord-centric market prevailed. This thesis frames the discussion of power dynamics between landlords and tenants within a Foucauldian framework of power and resistance, as articulated in section 3.3 of chapter three. Power is incorporated in to enduring property relations (EPR) theory with the intention of grounding and contextualising EPR in relation to market practices.

The key findings from the Interview Data are set out in chapters five to seven (inclusive). The Interview Data illustrate complex and nuanced landlord tenant dynamics within an overview of the key findings show that the previously fixed dynamic of powerful landlord and vulnerable tenant is no longer dominant in the retail market. A spectrum of landlords and tenants emerged from the Interview Data, commonly referred to by participants. The tenant spectrum was linked to the number of physical shops the tenant operated as this indicated the tenant's level of professional sophistication. Landlords were characterised as either small business landlords (SBLs) who had their pension invested in the shop, commercial landlords, or Institutional Landlords who were subject to regulatory controls (see 1.4.3 and 7.5).

SBTs, categorised by Interviewees having three shops or fewer, remain vulnerable. The independent retailer (the dressmaker) is still present on high streets of England and Wales albeit represented by today's hairdresser (see section 7.3). These SBTs often lack commercial sophistication and cannot afford professional advice. The dynamic between landlords and SBTs reflects a familiar landlord-centric monopoly inherent in these relationships. The Interview Data offer valuable insights into operation of the 1954 Act, highlighting both its

achievements and failures in meeting its original policy aims. The Interview Data also modernise the picture. The ability to contract in and contract out affords powerful Multiples not just security of tenure but commercial advantages. Conversely, SBTs are doubly disadvantaged – lacking security of tenure and exposed to the anti-competitive practices of larger tenants. The Interview Data provided a unique insight into the commercial practices of SBTs and Multiples revealing that SBTs may face a different form of commercial harm because the 1954 Act enables Multiples are able to derive protections beyond simple security of tenure under the legislation. These practices potentially have anti-competitive impact on SBTs which are discussed in sections 7.6 to 7.10, inclusive.

Furthermore, the Interview Data yielded an insight into how the oversupply of retail property has affected relationships between landlords and Multiples. Multiples have employed various strategies to resist the long-held landlord monopoly over commercial terms utilising the 1954 Act framework to push through change. Examples of resistance by Multiples collectively re-basing rents (sections 5.3, 5.4.1 and 5.4.2), withholding rents (section 5.4.3) and relinquishing security of tenure (see section 5.5) challenge and change market norms.

In summary, while some market contexts maintain the original power dynamic favouring landlords, a strong alternative dynamic has emerged enabling tenants (particularly Multiples) to resist and even reverse unfavourable market practices. This is significant as it alters the landscape of commercial leasing. Additionally, the data provide an empirical foundation that contributes to the understanding of enduring property relationships. By integrating a Foucauldian framework of power and resistance into an analysis of these relationships, this thesis offers up a more perspective on how sector norms can shift over time. This illustrates that power is not static but dynamically influences the shape of commercial lease terms.

8.1.2 Research Question 2

To what extent are tenants subject to established landlord market power, and what, if any, strategies do tenants employ to resist the exercise of landlord power in the current retail market?

The Interview Data revealed that landlord-tenant dynamics under the 1954 Act were influenced by two intersecting factors: i) the type of retail centre and ii) its geographical location. The extent to which tenants are subject to landlord-centric practices varies significantly and is context dependent. Several factors, namely: geographical location, tenant type, landlord type, type of retail space all influence dynamics of power between landlord and tenant. The main factor that determined the nature of the relationship between landlord and tenant was the extent of the landlord's control over the reversion of the retail centre (see sections 7.2 and 7.3).

Examples from the Interview Data illustrate these patterns:

- **Outlet Villages** Where one landlord controlled of the reversion, leases were contracted outside the 1954 Act. Multiples accepted this model because it kept the outlet fresh and current. Unprotected tenancies were the price of trading in this location.
- **Shopping Centres** Here, landlords often retained control of the reversion and historically sought to contract leases outside the 1954 Act. This model enabled landlords to control and inflate rent levels, retain control over tenant mix and to redevelopment (see chapter seven). This model is not universally applicable but is dependent on demand for space at the Centre.
- **High Streets** Examples pertaining to high street varied. Interviewees gave examples of high streets whose reversions were in multi-landlord ownership and others under the control

of one landlord. High streets around London and the south-east were considered a more lucrative investment and landlords more likely to buy up the reversions of shopping parades to retain greater control over commercial terms. The reversions of high streets in less lucrative areas were more likely to be fractured and owned by several (often small) landlords. SBLs in these locations were at a disadvantage against Multiples.

In summary, sectors of the retail market are significantly more landlord-centric because of their control over a greater extent of the reversion of the retail centre. This is particularly the case in high-demand areas. Multiples in these situations accept leases outside 1954 Act protection, and on landlord-centric terms. However, the landlord-centric grip loosens outside London and the south-east grows progressively weaker the further north travelled save for exceptions such as Harrogate and Durham for instance. In these areas evidence suggests that established market power is reversed exposing landlords, particularly SBLs, to Multiple power. Below is an outline of practices employed by Multiples to resist and counteract landlord-centric control over commercial terms:

Typically, Multiples compete against each other for leases of physical retail spaces. However, the Interview Data indicate that Multiples have pooled information from their property portfolios (see section 5.3). This collaborative approach enables each retailer to negotiate with the benefit of collective knowledge gathered from thousands of transactions. It creates a database of terms that different landlords are prepared to concede. This means Multiples are negotiating from an enhanced position and are collectively obtaining better commercial terms in the Lease Renewal Market (see sections 5.5, 6.5.2, 6.6 and 7.6 – 7.10, inclusive).

A further example of resistance to landlord-centric terms involves Multiples relinquishing security of tenure in favour of open market terms. The purpose of the 1954 Act is the protection of tenants' occupation on fair commercial terms. Lease renewal rents have been distorted by decades of UORRs, preventing rents from rebasing to reflect the open market. Section 34 perpetuates the distortion because it utilises evidence from the market – sometimes open market, but lease renewal rental evidence – as the basis for the review. Tenants who have the protection of the 1954 Act are trapped within its framework, which does not accommodate turnover rents or alternative financial models. These limitations have prompted some Multiples (particularly fashion brands) to relinquish security of tenure in favour of commercial terms available in 'on-market' transactions. Details of this are set out in section 5.5. The increasing prevalence of online sales has reduced the importance of goodwill, particularly where there is an oversupply of retail space.

In conclusion, whilst SBTs typically find themselves subject to landlord-centric power dynamics, Multiples are employing strategies of resistance that involve pooling their efforts to share information and to find creative means of challenging landlord-centric terms. These acts of resistance have proved effective for Multiples. Conversely, those Multiples that are over-shopped or constrained financially by the imposed framework of the 1954 Act have discovered that relinquishing security allows for greater commercial freedom.

8.1.3 Research Question 3

How do the evolving power dynamics between landlords and tenants in the retail market post 1954 impact on security of tenure and their broader leasehold relationship?

The changing power dynamics were explored in chapter five (sections 5.1-5.3 of this thesis). Whilst the independent vulnerable tenant is still identifiable, a clear spectrum of tenants has emerged. Multiples are in the most powerful position. It is unexpected that the broader implications of the 1954 Act would be the empowerment of corporate Multiples to the disadvantage of independent SBTs. The changing dynamics were examined in chapter five where this thesis broadly considers empirical insights into today's market. Property glut has reversed economic conditions, often placing the sitting tenant is in the stronger position. There is evidence that Multiples wield portfolios, and operate collectively, to drive more favourable commercial terms. This is a clear shift to the market conditions in 1954 and operating from the 1960s to the mid-2000s.

The central tenet of Blandy et al's EPR theory is that property can only be understood by considering the wider dimensions of relationships necessitating an examination of the broader paraphernalia (norms, temporal aspects, and dispute resolution) that impact and shape these relationships.[896] However, this thesis has argued that the primary predictor as to whether a tenant will obtain security, or choose to retain security of tenure, is not the legislation, but power (see sections 5.2.2 and 7.3). Multiples are generally able to negotiate security of tenure, but SBTs cannot). Furthermore, whilst Blandy et al acknowledge the importance of power, this thesis contends that power should be integral in the reading of property relationships; without it, one cannot fully understand how norms or law are shaped, changed, or applied in the retail sector.

[896] Blandy, Bright, Nield (n 49) 85.

Historically, the legislation sought to protect goodwill through security of tenure and fair commercial terms. The 1954 Act compelled landlords to behave as good landlords ought to. In a landlord-centric market, landlords exploited the 1954 Act to perpetuate institutional lease terms that preserved rental values and capital growth. The notion of being 'highly presentiated' is an attempt to control and predict future outcomes in contractual documentation in the present.[897] Historically, landlords have locked tenants into institutional lease terms, securing value, as it was likely that the tenant would renew and the institutional lease would then form the basis of any future lease. Tenants accepted this arrangement to protect their goodwill. Blandy et al. and Crosby noted previously that retail leases were 'highly presentiated'.[898] The Interview Data provide insight into the shifting relational position driven by market power. Currently, the retail market has swung in favour of tenants, leaving landlords struggling to counter the actions of Multiples. Whilst Multiples would not necessarily want to lose security, for some there may be advantage operating outside confines of the legislation, either due to the availability of a more flexible financial model, or because of the cost of engaging with the county court process. Conversely, solvent Multiples are leveraging the 1954 Act to negotiate better financial terms utilising the expensive adjudication process against landlords to change industry conventions and block re-development (see sections 6.4 to 6.7, inclusive). The overall effect is that Multiples are figuratively ripping up old lease agreements and demanding improved commercial terms. Landlord-tenant relationships under current market conditions have become more responsive, flexible, and relational,

[897] Ian Macneil, 'Reinstatement (Second of Contract) of Contracts and Presentiation' 60(4) (1974) *Virginia Law Review* 589, 590.
[898] Blandy, Bright, Nield (n 49) 104.

though not necessarily more harmonious. In many instances, landlords are compelled to adapt and concede financial incentives to ensure endurance of existing lease relationships.

In conclusion, the shifting dynamics of the retail market have fundamentally altered the landlord-tenant relationship, creating a landscape marked by negotiation and adaptability. As Multiples leverage the provisions of the 1954 Act to secure more favourable terms, landlords are increasingly forced to reassess strategies and offer financial incentives to maintain existing tenant relationships. Ultimately, landlords are forced to collaborate with Multiples to meet mutual interests in changed market conditions. Careful consideration is required to consider how these evolving relationships will affect commercial lease terms, and their potential implications for SBTs.

8.1.4 Research Question 4

How do the 1954 Act's mechanisms influence the negotiation of commercial lease terms within today's retail market?

The Interview Data identified the 1954 Act regime as the 'device' that Multiples have utilised to depart from 'open market' lease terms in the retail market. In chapter six I explore the result of Multiples' resistance in the retail market (see sections 6.4 to 6.7, inclusive). Multiples have sought to evidence new market conditions and as a result have created divergence between the commercial terms available in 'On-Market' and 'Lease Renewal Market' negotiations. Commercial terms achieved in the Lease Renewal Market are utilised as an evidence base to justify and further perpetuate commercial change, and to justify downward adjustments to rental levels. The provisions of the 1954 Act are intended to replicate open market conditions, but are manipulable, and Multiples have become increasingly successful at utilising the 1954 Act to creating a distorted facsimile of open

market. Interviewees gave insight into ongoing negotiations in the retail market and that whilst landlords were able to maintain existing norms in relation to new 'on market' lease negotiations, this is not the case in relation to lease renewal negotiations. To make effective change across the Lease Renewal Market, Multiples have formed a collective network of resistance with other Multiples to make meaningful inroads against landlord-centric lease terms. The investment lease model evolved in a landlord-centric market where tenants had the benefit of security of tenure under the 1954 Act, but on the basis of commercial terms that benefitted landlords and promoted capital growth. Tenants were afforded protection, but on landlord terms. This model of leasing is no longer uniform because Multiples have broken through the monopoly through their collective action. Interviewees spoke of Multiples successfully negotiating service charge caps, re-based rents, altering the balance of risk in leases.

Interviewees cited the 1954 Act framework, and the county court process in particular, as an important tool in applying pressure to achieve more favourable commercial lease terms. The Interview Data identified the 1954 Act litigation process as a site of resistance, a battle ground in challenging monopolistic landlord-friendly commercial terms. The prevailing assumption that the landlord is in a powerful position relative to the tenant is exposed as two-dimensional as repeated examples were offered up of Multiples shifting the position on institutional lease terms (see section 6.5.2). The broader significance of diversification between On-Market and Lease Renewal Market is explored in sections 7.5 to 7.10.

The dynamic for the SBT has not changed despite the reversal of market conditions. Goodwill remains important to the SBT they are more connected to the goodwill generated by their store, which is often connected to their livelihood and personal income (section 7.3).

The glut of property should theoretically make the SBT's situation more secure because Multiples are reducing their physical property portfolios and landlords are more likely to turn to local independent tenants as alternatives to fill high street stores. However, Multiples have negotiated advantageous financial terms – zero rents, rent cuts, and capped service charge contributions because landlords cannot curtail this excess of Multiple power. These concessions contribute to a more uneven financial high street where SBTs struggle to compete not just against brand recognition of a Multiple, but against the significantly more favourable terms available to Multiples in the same location (see section 7.8).

In conclusion, while the diversification between the open-market and Lease Renewal Market offers more favourable commercial terms for Multiples, the challenges faced by SBTs have arguably increased. The importance of goodwill to SBTs underscores their deep-rooted connection to their local communities and the personal stakes involved in their operations. However, as Multiples leverage their financial power to negotiate more favourable commercial terms, SBTs find themselves disadvantaged by an increasingly uneven playing field. Moving forward, means need to be found to advocate for fairer terms not just for the most powerful tenants, but smaller vulnerable tenants and for the vibrancy of retail spaces, including the high street.

8.2 Potential Reform of the 1954 Act

The Law Commission launched a new consultation in November 2024 in relation to the 1954 Act. The aim of the consultation is to consider i) whether, and in what circumstances, business tenants should have security of tenure, and ii) whether the 1954 Act currently works

and meets the needs of business tenants and landlords.[899] Reform of the 1954 Act would necessitate a consideration of dynamics between the parties and the governments vision for landlord-tenant relationships. The original legislation was the state's deployment of measures intended to deter negative landlord behaviour and force 'good landlord[ism]' for the benefit of society.[900] Whilst negative landlord behaviour is certainly still in existence, it is no longer the complete picture. The Interview Data suggest a growing disparity between the commercial terms available to Multiples and those offered to SBTs, whose economic contributions are often tied to local communities. While the 1954 Act was originally intended to protect SBTs, the research indicates that it has, in practice, inadvertently empowered Multiples at the expense of SBTs, exacerbating inequalities in lease negotiations. The 1954 Act is not fulfilling its intended purpose: it fails to safeguard the goodwill cultivated by SBTs within their physical premises. Moreover, the Act inhibits development and capital growth, disproportionately favouring Multiples. Multiples are utilising the 1954 Act regime to their commercial advantage to challenge, and in some cases dismantle, decades of landlord-centric market conditions. The Act favours those with the resources to navigate and manipulate the county court process—typically large corporations with extensive networks of physical stores. The court process is utilised by the party with the deepest pockets to pressurise their opponent to concede commercial terms. These terms then amount to evidence of the market position on that term.

This has resulted in distortion in the retail market as there is divergence between terms available on the 'Open Market' and on the 'Lease Renewal Market', see section 6.6 in relation

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[899] Law Commission, 'Consultation on right to renew business tenancies' (19 November 2024) https://lawcom.gov.uk/consultation-on-right-to-renew-business-tenancies-published/ accessed 16 January 2025.

[900] The Leasehold Committee (n 15) 126.

to statutory updating and MEES provisions. There are implications for SBT as they are unable to obtain either security of tenure, or reasonable lease terms to protect their goodwill. It is increasingly difficult for the SBT to compete against Multiples operating on more flexible and favourable commercial terms that are not available to them (see section 7.9).

One potential course of action would be to retain the 1954 Act in its current form – in effect 'do nothing'. This approach aligns with the prevailing trend in legal reform since the 1980s, which has aimed to preserve the commercial balance originally established by the legislation (as noted in discussions surrounding the 1988 reform – see section 2.2.2). Proponents of the 1954 Act's retention might argue that mid-sized tenants benefit from the protections of the legislation and, furthermore, that SBTs operate from smaller high street ecosystems, and are therefore insulated against Multiples and more aggressive landlords. There is evidence however from the Interview Data and the wider industry that COVID-19 has strengthened Multiples' desire increase their high street presence. This draws SBTs and Multiples into closer proximity. See section 7.8 above for further discussion. It cannot be tenable for the 1954 Act to protect mid-size or Multiple Tenants when the 1954 Act fails to protect the goodwill of SBTs. Multiples are utilising the 1954 Act to dismantle decades of landlord-centric market conditions. This dynamic has distorted market conditions, and the legislation no longer protects fair market practices for the SBT.

A second option might be repeal of the legislation on the basis that SBTs operate without it and in the current market – property glut – it is a piece of legislation that only really matters in certain sought after locations and the tenants seeking entry are already prepared to accept leases outside the 1954 Act in areas of high demand - outlet stores, desirable high streets and shopping centres. SBTs would not be disadvantaged because they neither know of its

existence, nor currently benefit from its protection. In fact, it may improve their position because it may result in an overall levelling-up of commercial terms in retail locations if the Multiple is forced to negotiate in the open-market on the same footing as other tenants. Furthermore, the legislation is a barrier to financial investment and to redevelopment, which affects the vibrancy of retail spaces and tenant mix. It also stands in the way of modern leasing practice – shorter lease terms, more flexible rental models, and quicker cheaper dispute resolution.

Alternatively, the Law Commission might propose reintroducing compulsory security of tenure for all tenants – returning to the pre-1969 position. The issue is this proposal for reform is that shopping centres, out-of-town outlet sites have evolved so that they are outside the 1954 Act. The implication of this is that landlords retain control over the reversion and over tenant mix. To return to compulsory security of tenure would be out of kilter with the way that the 1954 Act shapes retail spaces through contracting inside, and outside, the 1954 Act. This would inevitably curtail landlord's ability to control tenant mix, and would affect vibrancy of retail spaces because of lack of control over tenant mix and development.

It is perhaps time for the Law Commission to consider a framework that balances interests of tenants against not only landlords but to ensure framework commercially fairer to SBTs and potentially consider how the 1954 Act impacts on lease transactions, on commercial terms, on re-development and financial investment in the affected properties. Thought needs to be given by the government and local authorities about what communities want from modern retail spaces, including high streets, shopping centres and how the 1954 Act facilitates or stymies those plans. A more nuanced approach to security of tenure might be to consider how

to reform the 1954 Act to balance tenant mix, healthy commercial competition, environmental issues and sustainable buildings.[901]

8.3 Future Research Possibilities

This thesis goes some way in yielding an insight into the implications of the 1954 Act for commercial lease negotiations and the retail market. It is apparent from this thesis that the power dynamic ingrained in the 1954 Act – an excess of landlord power – no longer represents the market position. Future research might involve gaining further insight into specific retail locations by adopting a case study approach. Case studies provide the ability to drill down and explore different leasing practices to give insight in different locations and types of retail properties. This would assist with connecting the theoretical findings from this project with different contexts with the aim of modelling successful leasing practices.

Doctrinal analysis alone would not have identified the broader effects of the 1954 Act, specifically that the 1954 Act perpetuates commercial inequalities against the SBT that it was originally crafted to protect, whilst augmenting the position of the Multiple. Currently the 1954 Act favours corporates over communities, monopolies over independent tenants, and stagnation over development. Further research would aim to bridge the gap between the findings of the thesis and real world application.

8.4 Conclusion

> *'[The 1954 Act] works no significant injustice to either landlord or tenant and parliament has more important things to be doing'.*[902]

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[901] D'Adda (n 583) 742.
[902] Pawlowski, Brown (n 61) 163.

The contemporary role of the 1954 Act has exacerbated the fragmentation of tenants across a spectrum from SBTs to corporate Multiples. This thesis has highlighted the disparities in protections and advantages afforded to each. Originally conceived to safeguard the interests of the independent vulnerable tenants (the dressmaker, today's hairdresser), the legislation has paradoxically come to represent the interests of large, solvent, corporate entities. It is a profound irony that a statute designed to protect the little man (or woman) from a presumed excess of landlord power now inadvertently contributes to commercial subjugation of SBTs whilst privileging Multiples in the current retail market.

Since this legislation was originally conceived and debated at the turn of the twentieth century, the dynamics of the marketplace have evolved considerably. Today Institutional (or large commercial) Landlords engage in competitive, typically adversarial, commercial struggle. However, the bigger picture is that the 1954 Act has failed to establish and maintain a cohesive regime that accommodates the full spectrum of business tenants; SBTs are outside its protections, while others would prefer to eschew its protections because modern lease terms are not available, its protection, if a tenant needs to pursue legal recourse, is not economically viable. It is predominantly the Multiple that reaps benefits of the 1954 Act.

The implications of power dynamics between landlord and tenant are profound for re-development, for financial investment in retail spaces, and the ability of SBTs to compete against Multiples. It can be argued that whilst the 1954 Act has facilitated growth within the retail sector, the government have turned a blind eye to landlord-centric lease terms and the exclusion of SBTs. The 1954 Act was, historically, synonymous with investment and growth. However, this thesis has argued that the 1954 Act operating in the current retail market is far removed from its original intention – financial growth and stability. The imbalance in

commercial terms perpetuated by the 1954 Act perpetuates Multiples' commodification of retail spaces, including high streets. People, communities, are attempting to pushback against and '[resist] the commodification of urban space'.[903] This is vividly illustrated by the response of the local community in Walthamstow village, where residents express a strong desire to preserve their high street from being homogenized by corporate tenants with portfolios of stores and for their 'whole [high]street to become a chain'.[904] Gail's Bakery is coincidently a new and rapidly expanding tenant 'thanks to a venture capital-fuelled expansion' – in other words, a private equity Multiple.[905]

In conclusion, this thesis emphasises the importance of local communities understanding the ramifications of the 1954 Act on retail spaces, and on high streets. The opposition to Multiples should not simply be viewed as a challenge to SBTs because of the competition of a more alluring global brand, but stemming from a recognition of the commercial inequalities that the legislation works against the SBT in favour of the Multiple – and the potential impact on the tenant mix, on investment, on development all which affect the fabric of local economies – the place where people live and work.

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[903] D'Adda (n 583) 742.
[904] Esther Addley, '"There's nowhere else like this": the backlash against plans for a Gail's bakery in Walthamstow' *The Guardian* (London 16 August 2024) < https://www.theguardian.com/uk-news/article/2024/aug/16/backlash-over-gails-bakery-plan-in-walthamstow-village> accessed 1 September 2024
[905] Ibid.

Annexure A

Question Schedule

Interview Question Schedule

1. Introduction and background
    - Length of career
    - Type of firm and work LL or T

2. Global Financial Crisis/ COVID – How security of tenure legislation has responded/evolved in relation to different social/economic circumstances.
    - How has the retail market changed over your career/ past 10-20 years?
    - How have you seen security of tenure legislation adapted over your career in different economic situations? Can you give an example?
    - Which properties are typically contracted inside/outside the Act – high street, shopping centres, offices – what % in/ outside?
    - What is the effect of being contracted in/out? How does that effect management of those properties?
    - What is the purpose of the 1954 Act legislation?
    - When would a landlord not wish to renew? (What about the implications of business rates?)

3. The Transactions
    - What types of properties are contracted in/out? Types of Landlord?
    - Talk me through a typical transaction
    - How long does the renewal process take – how does that compare to a new lease/ contracted out? Why is that?
    - Do you notice any patterns - How many go to court? Which parties go to court? Which issues? Why is that?
    - Could rent level be agreed in a different way? PACT/ Arbitration?
    - How do power dynamics play out between parties? Are dynamics static?
    - Are parties always represented by agents?
    - What do heads of terms cover/which terms are agreed?
    - Has the new tribunal approach to uncontested lease renewals affected transactions, if so how?

4. Decision making
    - What are the factors that affect your client's decision making? What pressures does in-house legal face on renewal?
    - How do transactional/litigation lawyers use/apply the law in negotiating lease renewals?
    - How is the law applied in agreeing renewal terms?
    - Where does reasonable modernisation come from and how is it used in negotiations?
    - What kind of impact does that have on the transaction/outcome of the lease terms - this grey area/ bargaining room?
    - How does the client/the property agent interpret the principles in *O'May*/reasonable modernisation?

- What drives the client's decision-making?
- How do transactional and litigious lawyers apply the law?
- Is the negotiation of a new lease renewal the same as the negotiation of a new lease (either inside or outside the 1954 Act)? For instance, are there points that are easier to agree – eg uninsured risks etc?
- How does this apply to including new legislation – MEES etc?

5. Is the 1954 Act fit for its original purpose?
    - What do you think is the purpose of the 1954 Act today?
    - is the legislation fit for purpose?
    - How could the legislation be improved/ adapted?
    - Negligence cases – what happens when security is lost? How/when is legislation needed?

6. Legal culture
    - On average, how long does the negotiation of a lease renewal take?
    - How/why is this different to a contracted-out lease?
    - What does that mean for costs/ time?
    - Is this work pressurised? If so, what makes it pressurised?
    - (if participant raises point, ask about tension between clients and lawyers).
7. Panels
    - Do the law firms collaborate/ agree approaches?
    - How is work allocated between firms on a panel?
    - How is lease renewal work perceived by clients and by firms?

Annexure B

Participant Information and Consent Form

Research Project

Security of Tenure: Landlord and Tenant Act 1954

I am working on a project looking at lease renewals pursuant to the Landlord and Tenant Act 1954 and security of tenure, and the retail industry's evolving practice in relation to these transactions.

I am looking to conduct a series of interviews with property lawyers and surveyors regarding the purpose of the legislation and the approaches that are adopted to lease renewals negotionas for property portfolios by both landlords and tenants.

The outputs of the research project will be academic journal papers and data that can inform policy and practice.

Conduct of the Research and Your Participation

- What we are looking to do is conduct short interviews (about 45 minutes) with experienced property lawyers and surveyors about this issue. In terms of participation, we are asking you for one short interview.
- For convenience, the interviews will be over the phone, unless face-to-face offers greater convenience.
- The interview will be recorded and then transcribed in order that the data from your and other interviews can be analysed and compared Emily Carroll, a senior lecturer at the University of Birmingham. Emily will be supervised by Professor Lee and Professor Cavoski.

Safeguarding the Interests of the Participant

Researchers at the University of Birmingham take research ethics very seriously. As such, the following safeguards will be in place for this project:

- Your name and your organisation will not be revealed in any of the journal publications. You will be assigned a code (for example, 'PM1') and this will appear on the interview transcript and all journal publications (should you be quoted). Any quotes or other references to your interview data will have anything that might reveal your identity removed.
- The only people having access to your interview recording and transcript are Emily Carroll, Robert Lee, and Aleksandra Cavoski.
- Your interview recording and transcript will be stored in a secure University private cloud called BEAR, or equivalent.
- You are able to withdraw from the project at any time (including mid-interview) without needing to explain.
- You have the right to ask for your interview transcript to be withdrawn from the project database up to four weeks after your interview. The recording and transcript would be destroyed.
- All recordings and transcripts will be destroyed after 10 years.
- You are able to ask the research team questions if any of the above is unclear.

Many thanks for considering my request for assistance with this project.

Emily Carroll, January 2020

Consent Form

Security of tenure: Landlord and Tenant Act 1954

I confirm that I have read and understand the information sheet for the above study. I have had the opportunity to consider the information and ask questions. Where I have asked questions, they have been answered satisfactorily.	☐
I understand that my participation in the project is voluntary and that I can withdraw from the project at any time without providing a reason and without penalty.	☐
I understand that I can ask to have my data withdrawn up to four weeks after the date of the interview, without providing a reason and without penalty.	☐
I understand that the data I provide will be used for the production of journal papers and other academic publications.	☐
The provisions made to ensure that your and your organisation's identity will not be revealed in any journal or other academic publication have been explained and are understood.	☐
The provisions regarding data storage, the people having access to the interview transcripts and transcript disposal after ten years have been explained and are understood.	☐
I agree to the interview I provide being recorded, transcribed and analysed.	☐
I agree to the use of anonymised quotes in journal papers and academic publications.	☐
I agree to participate in this project.	☐

Name of Participant	Date	Signature
Name of Researcher	Date	Signature

Annexure C

Form of Statutory Notice and Declaration Pursuant to the 2003 Order

Statutory Notice and Declaration

I .....(*name of declarant*) of.....(*address*) declare that

1. I/ .....(*name of tenant*) propose(s) to enter into a tenancy of premises at.....(*address of premises*) for a term commencing on .....

2. I/The tenant propose(s) to enter into an agreement with..... (*name of landlord*) that the provisions of sections 24 to 28 of the Landlord and Tenant Act 1954 (security of tenure) shall be excluded in relation to the tenancy.

3. The landlord has, not less than 14 days before I/the tenant enter(s) into the tenancy, or (if earlier) become(s) contractually bound to do so served on me/the tenant a notice in the form, or substantially in the form, set out in Schedule 1 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003. The form of notice set out in that Schedule is reproduced below.

4. I have/The tenant has read the notice referred to in paragraph 3 above and accept(s) the consequences of entering into the agreement referred to in paragraph 2 above.

5. (*as appropriate*) I am duly authorised by the tenant to make this declaration.

DECLARED this.....day of.....

To:

.....

.....

..... [*Name and address of tenant*]

From:

.....

.....

..... [*name and address of landlord*]

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