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COMPENSATION FOR BUSINESS TENANTS: MISCHIEF AND MALADY

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ABSTRACT. *This article focuses upon the provisions and underlying policy of the Landlord and Tenant Acts of 1927 and 1954. It surveys the mischief that each Act was designed to address and, from the perspective of compensation for business tenants, examines critically the legislative response. It demonstrates that the safeguards afforded by the 1927 Act were poorly conceived, ill-constructed and ineffectual. Although the 1954 Act was intended to instil simplicity, certainty and fairness, it fails on all counts. The law remains highly technical, unduly complex, arbitrary in operation and in need of major overhaul.*

KEYWORDS: *business, tenants, compensation, regulation, reforms, goodwill, disturbance.*

I. INTRODUCTION

The remedy of compensation is traditionally geared towards redress for the actual loss and injury inflicted on the claimant. This convention features, for example, in tort law, contract law and, on a more localised level, under the Compulsory Purchase Act 1965. Nevertheless, this protocol was not to feature in the assessment of statutory compensation payable to a business tenant who is unable to obtain a lease renewal. Under the Landlord and Tenant Act 1927, the focus was upon the amount that the tenant's goodwill increased the future letting value of the premises. If it did not, no compensation whatsoever was payable. Unfortunately, the concept of goodwill was, for these purposes, highly stylised and defiant of ready understanding. The availability of financial recompense was, moreover, unduly restricted and mired in procedural technicality. Since the Landlord and Tenant Act 1954, however, the focus is no longer upon goodwill (which ironically is now unprotected). Instead, and again within an over-elaborate framework, compensation is gauged according to rateable values, which offer a measure that is both unpredictable and extraneous

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to the landlord and tenant relationship. Accordingly, both schemes failed to address the true financial impact that relocation might have upon an individual tenant's business.

The present legislative regime governing the rights of commercial tenants is to be found in Part II of the Landlord and Tenant Act 1954. Subject to exceptions, section 23(1) applies to any tenancy of premises which are occupied by the tenant in whole or in part for business purposes. The Act promotes the continuation of the tenant's business by recognising a defeasible right to a new lease of the tenant's holding[1] and offering compensation for so-called "disturbance". Security of tenure is the primary option with compensation relegated to "a second best … the exceptional procedure, rather than the normal remedy".[2] Although the 1954 Act was lauded initially for being "both strong and wide in its application",[3] neither characteristic is discernible in contemporary times.[4] This is particularly so with the provisions that govern compensation.

The road to the 1954 Act was both long and tortuous. From the first official consideration of legislative controls in 1889,[5] it was to take 38 years before any permanent statutory control was to emerge in the form of the Landlord and Tenant Act of 1927 and a further 27 years before the current legislative regime was enacted. Albeit in different ways, both statutory codes represented an uneasy compromise between maintaining the integrity of the contractual relationship and the furtherance of tenants' rights.[6] 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 whereas the 1954 Act made the unimaginative election to offer an arbitrary flat-rate award, geared to rateable values and a relevant multiplier. Unsurprisingly, the latter was regarded as "a very jejune effort to compensate … for what may be a serious loss" and denounced as "hopelessly and wholly inadequate".[7]

Unlike its forebear, the 1954 Act overlooks gains made by the landlord and real losses incurred by the parties. The lack of protection of goodwill has emerged as a potential source of injustice for tenants and undoubtedly underscores the need for further reform. There are two major illustrations of

[1] Landlord and Tenant Act 1954, s. 23(3) (defining the tenant's holding to embrace the premises that the tenant occupies for business purposes).
[2] The Leasehold Committee, *Interim Report on Tenure and Rents of Business Premises* (1949) Cmd. 7706, at [38].
[3] R.E. Megarry, "Landlord and Tenant Act 1954" [1956] 72 L.Q.R. 21, 21.
[4] M. Haley, "Contracting Out and the Landlord and Tenant Act 1954: The Ascendancy of Market Forces" [2008] Conv. 281.
[5] *Report from the Select Committee on Town Holdings with the Proceedings of the Committee*, House of Commons Papers, 1889, vol. 251.
[6] As Lord Silkin, HL Deb. vol. 188 col. 120 (29 June 1954), explained: "it does what we pretend we are very keen on not doing: although we always pretend that we are most keen on maintaining the sanctity of contracts."
[7] Sir Frank Soskice, HC Deb. vol. 528 col. 2480 (18 June 1954).

the inadequate nature of the extant compensation scheme. The first arises from the operation of section 30(1)(g) (a mandatory ground on which renewal can be opposed and compensation awarded in lieu) which is based on the intention of the landlord to occupy the demised premises.[8] The underlying policy is that "landlords should be entitled to their land back, notwithstanding the tenant's security of tenure, if they genuinely wish to use that land for their own business purposes".[9] In its present context, however, ground (g) can be employed by a landlord not only to regain possession, but also to commandeer the business of the former tenant and still pay flat-rate compensation. The ground applies even if the landlord is a business rival of the tenant. As Vos J. put it, the tenant could do nothing "when the predator took over its building and operation and simply changed the name above the door".[10] In this way, the landlord can effectively expropriate the business goodwill of that outgoing tenant and enjoy an unjustifiable windfall. Such is strikingly portrayed in *Gatwick Parking Service Ltd. v Sargent*, where the tenant's highly successful off-airport parking business was taken over by the landlord in return for compensation assessed at £13,750.[11] Such opportunity for profiteering was foreseen by the Leasehold Committee, which conducted the review upon which the 1954 Act was based, and it recommended that, when the premises have been made more valuable by the previous business use, compensation should be assessed with reference to that increment.[12] Although the potential for profiteering was highlighted during parliamentary debate and condemned as "an intolerable opening for sharp practice",[13] the Committee's recommendation was not followed. Over half a century later, the statutory deprivation of goodwill without compensation arguably contravenes Article 1, Protocol 1 of the European Convention on Human Rights,[14] but this remains untested.

The second shortcoming that highlights the inadequate nature of the present provisions concerns the operation of another of the mandatory and compensation grounds. This focuses upon section 30(1)(f), which deals with a landlord's intention to redevelop the premises. A modern strategy involves the landlord proposing unnecessary schemes of works solely in the hope of defeating the tenant's renewal rights. This practice came to

[8] This was not a novel ground as its precursor to is to be found in section 5(3)(b) of the Landlord and Tenant Act 1927. This original exception to renewal was, moreover, of minor importance and rarely invoked. Its abolition was proposed in the *Interim Report on Tenure and Rents of Business Premises* (1949), at [65].

[9] *Humber Oil Terminals Trustee Ltd. v Associated British Ports* [2011] EWHC 2043 (Ch), at [143] (Vos J.).

[10] Ibid., at [143].

[11] [2000] 2 E.G.L.R. 45.

[12] Leasehold Committee, *Final Report of the Leasehold Committee* (1950) Cmd. 7982, at [210].

[13] Mr. Turner-Samuels, HC Deb. vol. 522 col. 1826 (27 January 1954).

[14] M. Haley, "Section 30(1)(g) of the Landlord and Tenant Act 1954: The Unjust Relegation of Renewal Rights" (2012) 71 C.L.J. 118.

the fore in *S. Franses Ltd. v The Cavendish Hotel (London) Ltd.*,[15] where the landlord relied on works that were of no practical utility and which were to be carried out only if the tenant refused to quit the premises. If the tenant left voluntarily, the project would be abandoned. As it turned out, it was the conditionality of these plans that led the Supreme Court to declare that the landlord was not entitled to oppose renewal and not their underlying motivation or concerns about tenant protection. This case, however, illustrates that landlords, who are undeterred by the threat of compensation, regard it as an affordable cost to rid themselves of unwanted tenants. In *Franses*, for example, the landlord felt it to be worthwhile to pay 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. It affirms that compensation, disassociated from gains and losses, offers inadequate protection in such cases and negates a core purpose of compensation, which is to "facilitate negotiations on the granting of the lease and prevent much dispute and litigation on its expiry".[16] It demonstrates also that the prioritisation of renewal over compensation is, at times, illusory in both principle and practice.

This article will survey the background to the compensation provisions and consider the mischief that the Landlord and Tenant Acts were designed to address. Both codes will be analysed and exposed for being ill conceived and fundamentally defective. The Landlord and Tenant Act 1927 failed primarily because compensation, and the more remote possibility of a new lease, pivoted upon the elusive concept of "adherent goodwill". As illustrated in the writings of now long forgotten commentators such as Merlin, Hill & Phelps, Foa and Mustoe, the 1927 machinery was of limited scope, capricious in its workings and so complex that it was off-putting for potential claimants. Part II of the Landlord and Tenant Act 1954 suffered also at the hands of the parliamentary draftsman, but as regards compensation the primary drawback was its dependency on rateable values and the total disregard for the tenant's real-world losses. The blame for the unsatisfactory state of the law undoubtedly lies at the doors of Parliament.

Although it was, as Lord Silkin declared, "hardly a good precedent for anything",[17] the 1927 Act was destined to exert influence over future reforms. Various modern fault lines owe their heritage to the unsophisticated drafting conventions and the landlord centred ideology that tempered the 1927 legislation. This is evident, for example, in the provisions that concern contracting out and the five-year rule, the failure to acknowledge

[15] [2018] UKSC 62.
[16] *Governmental Policy on Leasehold Property in England and Wales* (1953) Cmd. 8713, at [50].
[17] HL Deb. vol. 188 col. 606 (8 July 1954).

suitable alternative accommodation as a compensation ground, the initial and different treatment of licensed premises and the original insistence that the tenant had to make an application to court before compensation became payable.[18] The byzantine complexity of the current statutory process also owes more than a nod to its forerunner. This legislative backstory is not, therefore, exclusively of interest to legal historians. Although the compensation for goodwill provisions are nowadays rarely considered, this is unfortunate as they provide essential understanding and insight as to why and how the 1954 Act was shaped. Hence, the necessity to analyse the workings of the original prototype.

Other failures are directly attributable to a myopia and lack of ingenuity on the part of the framers of the descendant business tenancy code.[19] In particular, this work will challenge the use of rateable values and a multiplier as an appropriate method of calculating compensation.[20] It will dispute the continuing need for a bespoke contracting out facility and untangle the inconsistent and perplexing timing requirements that govern such diverse matters as what rateable value to use, what multiplier to employ and when contracting out will be effective. A variety of reforms will be signposted, some of which will require a change to the underlying assumptions on which protection is founded whereas others are concerned with the implementing mechanisms that characterise the compensation scheme.

II. Antipathy and Reform

From the early 1880s, landlordism was under attack from politicians, the press, land reformers and academic writers alike.[21] The landlord class was vilified in society and, as Englander notes: "In perceptual terms the landlord was an ogre, the hardest of hard-faced men, one who preyed upon and tormented the lives of millions."[22] Due to an absence of empirical data, it is impossible to know whether this portrayal was accurate and, if so, to what extent.[23] Unsurprisingly, the UK Property Owners' Federation complained that landlords were the ones unfairly treated, lamenting that: "In no class would there be found a more generous body of people, and

[18] As J. Montgomerie, "Housing Repairs and Rents Act 1954, Landlord and Tenant Act, 1954" (1955) 18 M.L.R. 49, 57, observed: "he may have to pay not only his own but his landlord's costs before he can obtain his rather meagre dues."

[19] Ibid., at 58, commented that the relationship of landlord and tenant is "the plaything of politicians".

[20] Despite having presented the Bill before Parliament, even the Home Secretary, Sir David Maxwell Fyfe, HC Deb. vol. 522 col. 1763 (27 January 1954) acknowledged that "This basis is, I admit, rough justice, and one may call it arbitrary".

[21] See D.A. Reeder, "The Politics of Urban Leaseholds in Late Victorian England" (1961) 6(3) International Review of Social History 413.

[22] D. Englander, *Landlord and Tenant in Urban Britain 1838–1918* (Oxford 1983), 5.

[23] Nevertheless, M.J. Lyons accepts the truth that "some landlords did conform to the infamous stereotype, some glaringly so": "British Liberals and Irish Land: The Late Victorian Transformation" (1983) 45 The Historian 167, 168.

in none was there so much victimisation."[24] Nevertheless, there are many anecdotal tales of tenant exploitation, accompanied by withering remarks concerning unscrupulous landlords, recorded in Hansard. The reform agencies also operated on the statistically unproven basis that the unfair treatment of tenants was common. These polemics against landlords, whether or not mere caricature, captured popular sentiment, were peddled by organisations such as the Town Tenants League[25] and, undoubtedly, drove the momentum for the changes that were to follow. Reform, as Montgomerie acknowledges, "is and will be designed to deal with grievances, real or imaginary of the moment".[26]

In 1889, and after several years of deliberation, the Select Committee on Town Holdings published its Report and acknowledged that business tenants were in need of statutory protection in the form of a system of compensation for improvements and loss of goodwill.[27] The perceived mischief was that landlords were demanding exorbitant rents, and sometimes an additional premium, from their business tenants as a condition of lease renewal. The threat of "absolutely capricious and wanton eviction"[28] could, as the 1920 Select Committee argued, coerce a tenant into paying "an unconscionable increase in rent in order to retain possession".[29] Renewals were, moreover, often for a duration that bore no resemblance to the original term and, with tenants frequently being made aware of their landlords' demands only at the last moment, alternative accommodation was difficult to source. This "form of legalised blackmail"[30] was facilitated by the laissez faire attitude adopted at common law, which as Merlin acknowledged, inflicted "hardship and legalised injustice" while maintaining "the old feudalistic power of the landlord".[31] There were no renewal rights and no compensation for improvements carried out by the tenant. An absence of compensation for loss of goodwill enabled "landlords to confiscate the fruits of the past labour and past enterprise of their tenants"[32] and, ironically, "to obtain a higher rent because of its existence".[33] The need was less acute in Scotland, which enjoys a markedly different leasing structure as developed through custom and practice. Most noticeably, it inherited the doctrine of "tacit relocation" from Roman law, which entails that, absent a landlord's

[24] *The Times*, 31 October 1913, 9.
[25] The League (established in 1906) represented over 200,000 shopkeepers and small businesses in England & Wales (see *The Times*, 31 October 1913, 9).
[26] Montgomerie, "Housing Repairs", 58.
[27] *Report from the Select Committee on Town Holdings*, at 11, 12. Reeder, "The Politics of Urban Leaseholds", 422, observes that "The sessions of this Committee became the battleground for the leading protagonists and opponents of the leasehold system".
[28] Mr. Lloyd George, *The Times*, 31 October 1913, 9.
[29] *Select Committee Report on Business Premises*, House of Commons Papers, 1920, vol. 6, at [4].
[30] Mr. Ellis Davies, HC Deb. vol. 204 col. 2334 (7 April 1927).
[31] S.P.J. Merlin, *The Landlord and Tenant Act 1927*, 2nd ed. (London 1931), vii, viii.
[32] Mr. Dalton, HC Deb. vol. 204 col. 2315 (7 April 1927).
[33] H.A. Hill and A.E. Phelps, *A Guide to the Landlord and Tenant Act 1927* (London 1928), xv.

notice to quit, the existing tenancy automatically continues beyond its term date.[34] In England and Wales, however, the common law did not operate any similar doctrine. As Lord Hailsham observed: "[the tenant] got what the lease gave him, and nothing more."[35] Accordingly, corrective legislation was "vital to the interests of the community".[36] This need became most pronounced in the post-1918 landscape, dominated by a decaying infrastructure, a shortage of premises, spiralling land values and the emergence of the property speculator, "crushing decent and respectable tradesmen out of their premises".[37]

The obstacles to reform were formidable and illustrate that the instinctive sense of injustice does not always translate easily into legal rights. There was political discord as to the way forward, the tenant's lament was believed to be exaggerated, the sanctity of the contractual relationship was jealously guarded and the dominant landlord lobby proved stubbornly resistant to change.[38] The view from the Conservative benches was that "The leasehold system, when it is worked by an ideal landlord, is very largely an ideal system".[39] Nevertheless, deputations on behalf of the Town Tenants League and other trade associations persisted in the clamour for reform and, to maintain electoral support,[40] Private Members' Bills were regularly introduced, but unfortunately stifled in equal measure.[41] It was to take a World War and the deliberations of a 1920 Select Committee[42] before permanent legislation emerged in the form of Part I of the Landlord and Tenant Act 1927.[43] After a stormy passage through Parliament (during which over 400 amendments were tabled), the Act instilled "new and untried principles into our law of landlord and tenant".[44] It was, as Lord Silkin Q.C. explained: "an attempt to adjust, in the interests of equity, the relationships between landlords and tenants, and to ensure that the tenant, at the end of his tenure of business premises … was not left high and dry without some compensation in respect of goodwill which he had acquired during the course of his tenure."[45]

Security of tenure had never featured prominently on the reform agenda and was previously only promoted as a temporary expedient.[46] The primary

[34] See the Scottish Law Commission, *Discussion Paper on Aspects of Leases: Termination* (2018) Discussion Paper no.165, at [2.1]–[2.17].
[35] HL Deb. vol. 326 col. 662 (6 December 1971).
[36] Mr. Lloyd George, *The Times*, 31 October 1913, 9.
[37] Mr. Andrew MacLaren, HC Deb. vol. 204 col. 2325 (7 April 1927).
[38] See generally M. Haley, *The Statutory Regulation of Business Tenancies* (Oxford, 2000), [1.02]–[1.15].
[39] Sir William Joynson-Hicks, HC Deb. vol. 204 col. 2302 (7 April 1927).
[40] See Mr. Dalton, HC Deb. vol. 204 cols. 2315–16 (7 April 1927).
[41] See Viscount Cave L.C., HL Deb. vol. 69 col. 310 (29 November 1927).
[42] *Select Committee Report on Business Premises* (1920).
[43] Legislation already existed in the agricultural and residential sectors with the Agricultural Holdings Act 1875 and Rent and Mortgage Interest (War Restrictions) Act 1915, respectively.
[44] Merlin, *Landlord and Tenant Act 1927*, vii.
[45] HL Deb. vol. 188 col. 120 (29 June 1954).
[46] *Select Committee Report on Business Premises* (1920), at [23]–[28].

focus throughout was upon safeguarding the financial interests of the tenant rather than ensuring the continuation of that tenant's business.[47] The belief was that a scheme of compensation for goodwill would adequately shield the business tenant from market forces and "have the effect of clipping the wings of the landlord and landlord class in this country".[48] Significantly, however, the 1927 code contained a secondary and default measure by which the court could order a new lease, but only when the goodwill compensation payable was demonstrably inadequate and it was reasonable to make the order. The template was unwittingly set for future reforms.

III. The Landlord and Tenant Act 1927

The workings and ideology of this flawed antecedent to the current law were to exert much influence over future reforms, both as to the form that tenant protection should adopt and, indeed, what it should eschew. Section 4 of the Landlord and Tenant Act 1927 was framed to afford compensation to a departing tenant for the loss of residuum goodwill, that is, goodwill that stayed with the premises and added to their future letting value. The focus was, therefore, upon the potential rental gain derived by the landlord, as evidenced by comparable premises in the locality. A specialist panel of referees was appointed to carry out the daunting task of localising any monetary value solely attributable to adherent goodwill. If the amount so calculated was inadequate recompense for the tenant having to move elsewhere, the court enjoyed the section 5 discretion, in delimited circumstances, to grant a new lease. This renewal right was defeasible, could be exercised only once and, subject to the maximum duration of 14 years, was on terms as agreed between the parties or divined by the court. While the emphasis under section 5 shifted from the landlord's gain to the tenant's loss, the problem for the tenant was it still had to establish the existence of adherent goodwill, which as the Leasehold Committee bemoaned: "in many – probably most – cases he is unable to do."[49] Although section 5 was rightly criticised for being a difficult provision, often resulting "in very prolonged and complicated litigation",[50] this trialling of security of tenure was to exert major influence on law reformers.

[47] It is to be admitted also that, unlike under the Business Tenancies (Northern Ireland) Order 1996 art. 21, there has never been compensation for the landlord when the tenant withdraws a renewal application or applies for a revocation of the new lease.
[48] Mr. MacLaren, HC Deb. vol. 204 col. 2321 (7 April 1927).
[49] *Final Report of the Leasehold Committee* (1950), at [125].
[50] Sir Reginald Manningham-Buller, HC Deb. vol. 522 col. 1864 (27 January 1954).

A. Restricted Catchment

The reach of section 4 extended to tenancies of premises, "used wholly or partly for carrying on thereat any trade or business".[51] Albeit these key terms were undefined in the 1927 Act, the understanding of what constitutes a "business" is more generic than a "trade"[52] and covers activities involving time, attention and labour, the incurring of liabilities to others and the purpose of making a livelihood or profit. The concept of a "trade" is much narrower and connotes buying and selling and includes such diverse commercial activities as the running of a guest house,[53] manufacturing[54] and the carrying on of a college.[55] It was specified in section 17 (3)(b) that the business of subletting residential flats, "shall not be deemed to be premises used for carrying on thereat a trade or business". This exclusion, however, was unnecessary as such premises would not attract adherent goodwill and, once occupied as residential premises, marked the cessation of business user thereon.[56] In contrast, the Act did not exclude the business use of subletting office space. While this distinction presumably was in recognition that some business user on the premises persisted, it would again be difficult to establish any adherent goodwill on the tenant's part that could trigger the statutory provisions.

The allusion to partial use for business purposes ensured that, in relation to mixed use premises, the entire property would fall within the statutory scheme.[57] Conversely, if the tenant sublet only the non-commercial part, the business premises used by the tenant would remain protected. The term "tenant" was defined widely in section 25 to include both lessees and assignees entitled in possession and having derived title by contract or by operation of law.[58] For example, the receiver of a tenant company could enforce the renewal rights on behalf of debenture holders.[59] If a joint tenancy was in existence, it would follow that one joint tenant alone could initiate a claim under the 1927 Act.[60] Section 17 did not, however, cater for all types of commercial tenant or business tenancy. Predictable exclusions included agricultural tenancies,[61] mining leases[62] and lettings to a tenant as the holder of any office, appointment or employment from the landlord.[63] Most

[51] Landlord and Tenant Act 1927, s. 17(1). These concepts continue to pervade the 1954 Act.
[52] As Jessel M.R. admitted in *Smith v Anderson* (1880) 15 Ch. D. 246, 259, "the Legislature could not well have used a larger word". This case concerned whether an investment trust amounted to a business partnership.
[53] *Ireland v Taylor* [1949] 1 K.B. 300.
[54] *Comm. of Taxation v Kirk* [1900] A.C. 588.
[55] *Brighton College v Marriott* [1926] A.C 192.
[56] See *Triplerose Ltd. v Beattie* [2020] UKUT 180 (LC).
[57] *Stuchbery v General Accident Fire & Life Assurance* [1949] 1 All E.R. 1026.
[58] Licences, of course, fell outside the statutory remit.
[59] *Gough's Garages Ltd. v Pugsley* [1930] 1 K.B. 615.
[60] *Howson v Buxton* (1928) 97 L.J. K.B. 749 (an agricultural holding case).
[61] These were governed by the Agricultural Holdings Act 1923.
[62] Landlord and Tenant Act 1927, s. 17(1); see *O'Callaghan v Elliott* [1966] 1 Q.B. 601.
[63] This exempted, for example, resident caretakers, gamekeepers, chefs and drivers.

controversially, section 17(3)(a) excluded a tenant who only carried on a profession from the premises from the goodwill and renewal provisions.[64] Manufacturers, charities and trade associations also fell outside the statutory scheme because they could not generate goodwill. Lamentably, these exceptions overlooked the harsh reality that "no class of business activity is immune from the dangers of exploitation by landlords"[65] and that for these tenants "the need for security of tenure … may be just as great".[66]

An additional hurdle imposed by section 4(1) was that the tenant had to show that it or its predecessor in title[67] had carried on a trade or business at the premises for a period of at least five years. This period was chosen after much deliberation in the House of Commons and, in the light that there was a movement in the Lords to make the qualifying period 15 years, was a compromise measure.[68] There was no requirement, however, that this user be continuous or that it continue until the end of the tenancy. The five years, moreover, did not have to be under one tenancy as a succession of short tenancies would suffice.[69] Problems might, however, be faced by a tenant who had previously been granted a new lease under section 5. Following the expiry of the renewed term, and although the tenant was debarred from claiming a further renewal, he could still claim goodwill created during the renewal period. Nevertheless, this was subject to the five-year qualification period having to run afresh as the previous goodwill had become spent. The reference to a predecessor in title could, moreover, generate anomalous outcomes. It entailed that a tenant under a six-year lease who, say, sublet the premises for two years, but by agreement resumed possession before the end of that two-year period, fell outside the statutory scheme. The tenant was unable to treat the subtenant as a predecessor in title.[70] Similarly, a freeholder was not the tenant's predecessor in title so any period of business use by the freeholder could not count for eligibility purposes.[71] A licensee, of course, could never be classified as the predecessor in title of the tenant.[72]

It was also possible for the parties to contract out entirely of the compensation and renewal provisions. Section 9 permitted this only when the agreement (whether written or parol) was made for adequate consideration. Such consideration might be found in the lease itself or lie outside the tenancy agreement. Most obviously, it could adopt the form of a diminution in

[64] Compensation for improvements was, however, available.
[65] *Interim Report on Tenure and Rents of Business Premises* (1949), at [68].
[66] Sir David Maxwell Fyfe, HC Deb. vol. 522 col. 1762 (27 January 1954).
[67] Not merely a predecessor in business: *Pasmore v Whitbread & Co. Ltd.* [1953] 2 QB 226.
[68] See HL Deb. vol. 69 col. 695 (8 December 1927).
[69] *Lawrence v Sinclair* [1949] 2 K.B. 77.
[70] *Williams v Portman* [1951] 2 K.B. 948. 2 QB 126.
[71] The tenant could still claim in its own right if it carried on its business for five years.
[72] *Corsini v Montague Burton Ltd.* [1953] 2 Q.B. 126. In contrast, the goodwill amassed by a licensee or sub-tenant could be factored into compensation payable: *Butlins Ltd. v Fytche* [1948] 1 All E.R. 737.

rent or the relaxation of a user/alienation covenant. In *Holt v Lord Cadogan*,[73] for example, the tenant was relieved from liability to paint the premises (saving £50) and given the right to make additions. This was assessed as being adequate for surrendering a compensation claim of £220. In *Lewis v Watney Combe Reid & Co.*, however, the acceptance of a yearly tenancy in full satisfaction of the tenant's statutory rights was regarded as inadequate consideration.[74] Although the consideration had to be provided when the contracting out agreement was reached, issues as to its adequacy could be determined only at the date of the tenant's claim when the extent of adherent goodwill was calculable. This might be many years after the consideration was provided. As under the present regime, such clauses were routinely imposed on a tenant with the landlord being prepared to wait and see whether it would be upheld. Unsurprisingly, section 9 was criticised as "failing in practice to afford any adequate restriction on contracting out".[75] It was denounced more vehemently by the Parliamentarian and solicitor, Mr. Leslie Hale, who claimed "That Act has always been a dead-letter because of its contracting out provisions. What is said about contracts negotiated freely … is a figment of a diseased brain, for it just does not exist".[76]

B. The Profession Carve-out

While it has been said that "All professions are businesses but not all businesses are professions",[77] a profession was deemed by section 17(3)(a) to be neither a business nor a trade. There were three problems associated with this disqualification. First, the distinction between the carrying on of a business or trade and the undertaking of a profession was not clearly drawn. The term "profession" undoubtedly enjoys a scope less certain than either "business" or "trade" and the accepted wisdom remains that it is "an occupation requiring either purely intellectual skill or manual skill controlled as in painting, sculpture or surgery, by the intellectual skill of the operator".[78] While a profession embraces, for example, clergy, lawyers, doctors, surveyors, architects and even performers,[79] in less obvious cases the court must resort to common sense and judicial pragmatism.[80]

[73] (1930) 46 T.L.R. 271.
[74] (1948) 152 E.G. 93.
[75] *Final Report of the Leasehold Committee* (1950), at [139]. The Committee recommended at [189]–[190] that contracting out of compensation rights should be permissible only with the prior approval of the court and when good cause could be shown.
[76] HC Deb. vol. 528 col. 2477 (18 June 1954). He had been a member of the Leasehold Committees set up in 1948 and 1950.
[77] *Christopher Barker & Sons v C.I.R.* [1919] 2 K.B. 222, 228 (Rowlatt J.). There a firm of stockbrokers was not carrying out a profession.
[78] *I.R.C. v Maxse* [1919] 1 K.B. 647, 657 (Scrutton L.J.).
[79] In *Robinson v Groscourt* (1700) 87 E.R. 547, performers of music and dance were classified as professionals.
[80] See Harman L.J. in *Abernethie v A.M. & J. Kleiman* [1970] 1 Q.B. 10.

Second, the pervading wisdom was that a profession could not generate residuum goodwill.[81] The strained logic was that the customer base would follow, say, a doctor to new premises.[82] Any goodwill, therefore, would be personal, not of appreciable value and peripatetic in nature.[83] This is not, however, an unchallengeable proposition. While, as the Leasehold Committee acknowledged, this might be true with "fashionable surgeons and famous counsel", the same could not be said of local doctors and dentists whose practices depended primarily upon community awareness that there was a surgery at the premises.[84] In those circumstances, it was artificial to distinguish between the residuum goodwill of a grocer and the goodwill of a medical practitioner that adhered to the premises.[85] As Lord Parmoor observed: "the goodwill of a doctor … is as much entitled to consideration as the goodwill of a man who is selling jam or fruit or anything else."[86]

Third, and while it appears that the legislature did not contemplate that there could be both a trade and a profession carried on simultaneously at the premises, it was possible for this duality to occur.[87] It was, however, still necessary for the tenant to establish residuum goodwill exclusive to the trade or business carried on.[88] If this could not be done, the tenant had no right to compensation or renewal.[89]

C. Statutory Goodwill

The key shortcoming of the 1927 machinery was its total reliance upon the existence of tenants' goodwill, which was "the crux, the solar plexus" of the scheme.[90] According to its popular acceptation, goodwill is a type of property that distinguishes an established business from a new business.[91] It is "the benefit and advantage of a good name, reputation, and connection of business. It is the attractive force which brings in custom".[92] Nevertheless, it is not always easy to attribute an accurate value to goodwill in this conventional sense because, as Lord Meston pointed out: "It is a

[81] *Stuchbery v General Accident* [1949] 1 All E.R. 1026.
[82] See Scrutton L.J. in *Whiteman Smith Motor Co. v Chaplin* [1934] 2 K.B. 35, 42.
[83] *Austen v Boys* (1858) 27 L.J. Ch. 714.
[84] *Final Report of the Leasehold Committee* (1950), at [127]. It has nothing to do with the non-transferable popularity and personal characteristics of the tenant.
[85] As Lord Macnaghten recognised: "Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade": *IRC v Muller & Co.'s Margarine Ltd.* [1901] A.C. 217, 224.
[86] HL Deb. vol. 69 col. 321 (29 November 1927).
[87] *Stuchbery v General Accident* [1949] 1 All E.R. 1026, 1031 (a solicitors' firm also undertook an insurance agency business from the premises).
[88] *H Morell & Sons Ltd. v Canter* 1947] 2 All E.R. 533.
[89] *Mullins v Wessex Motors* [1947] 2 All E.R. 727.
[90] Mr. MacLaren, HC Deb. vol. 204 col. 2325 (7 April 1927).
[91] *IRC v Muller* [1901] A.C. 217, 235 (Lord Lindley).
[92] Ibid., at 223, 224 (Lord Macnaghten). Lord Eldon in *Cruttwell v Lye* (1810) 34 E.R. 129, 130 noted that goodwill is "nothing more than the probability, that the old customers will resort to the old place".

snare and a delusion in the balance sheets of companies. It imports an illusory and often fictitious figure into the purchase price of going concerns – in other words, it is an undiluted nuisance."[93] This is not, however, the only style of goodwill that may exist[94] and significantly this was not the goodwill that the 1927 Act sought to protect.

Prior to the 1927 Act, the courts had tended to view the goodwill of a business as comprising one indivisible whole, with Lord Macnaghten observing that: "To analyse goodwill and split it up into its component parts … seems to me to be as useful for practical purposes as it would be to resolve the human body into the various substances of which it is said to be composed."[95] Nevertheless, with the enactment of the Part I provisions this segregation became necessary. The major obstacle was that the concept of goodwill was "very easy to describe, very difficult to define",[96] with adherent goodwill appearing as "a sort of elusive will-o'-the wisp which you cannot grasp".[97] The grievous failure of the legislature to promote any working definition of this pared down goodwill was due to a lack of vision and persistence.[98] It proved to be a task that "baffled the draftsmen and others who attempted it".[99] Hence, it was left to the judiciary to give meaning to this curtailed form of goodwill.

An attempt at deconstruction was undertaken by Scrutton L.J. in *Whiteman Smith Motor Co. v Chaplin*.[100] With the 1927 Act in focus, he famously offered a zoological depiction of the types of goodwill by invoking a "cat, dog and rat" metaphor. The "cat" will stay in its old home even though the person who has kept the house leaves. As Scrutton L.J. explained: "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."[101] Hence, "cat" goodwill is contained within the bricks and mortar on the site, remaining unaffected by a change of business name or style. It is with this type of goodwill that the 1927 Act was concerned. So-called "dog" goodwill attaches to the proprietor and not the premises[102] and the "rat" concerns those customers who neither follow

[93] HL Deb. vol. 180 cols. 526–27 (18 February 1953).
[94] See G.A.D. Preinreich, "The Law of Goodwill" (1936) 11 The Accounting Review 317 for the various manifestations that may arise.
[95] *IRC v Muller* [1901] A.C. 217, 224.
[96] Ibid., at 224 (Lord Macnaghten).
[97] Lord Jessel, HL Deb. vol. 69 col. 414 (1 December 1927).
[98] Lord Jessel, HL Deb. vol. 69 col. 696 (8 December 1927) lamented that "it passes the wit of both Houses … to find an adequate definition".
[99] Merlin, *Landlord and Tenant Act 1927*, 28.
[100] [1934] 2 K.B. 35, 42.
[101] Ibid. Lord Meston, HL Deb. vol. 180 col. 526 (18 February 1953) emphasised that "the only type of goodwill that is worth a farthing under the Landlord and Tenant Act, 1927, is the goodwill known as 'cat goodwill'".
[102] As Hill and Phelps, *Landlord and Tenant Act 1927*, xix, explained: "The proprietor of such a business can be sure of custom at almost any place at which he may choose to open a branch."

the place nor the person, but move their patronage elsewhere. These latter types of goodwill were untouched by the statutory scheme. The cat metaphor was, from the perspective of the 1927 legislation, inexact. The difficulty was that it also embraced site goodwill (the convenience of the situation of the premises), which was expressly excluded from the scope of the 1927 scheme. The absence of definiteness, combined with hindsight, provoked Evershed L.J. to comment that "if it is true that a cat has nine lives, we express the hope that in relation to the Landlord and Tenant Act it has lived the last of them and may now be decently interred".[103]

The compensation provision focused exclusively upon goodwill that stayed with the premises when the tenant left, that is, akin to the so-called "cat" goodwill. This statutory goodwill was very different from goodwill as "understood either in law or in ordinary business parlance".[104] The tenant had to establish goodwill that was "attached to the premises as a permanent thing and not something evanescent",[105] which existed "as a quality of the premises".[106] The core notion, as Viscount Cave acknowledged, was simple: "if he leaves goodwill behind him he is to be entitled to compensation."[107] Understandably, the compensatory award was capped in amount to the additional value bestowed[108] and represented what Maugham L.J. called "the goodwill rent".[109] Unfortunately, the determination of whether the goodwill asserted was indissolubly annexed to the premises or, instead, remained a separate asset gave rise to complicated factual issues and complex valuation assessments.[110] The isolation and evaluation of annexed goodwill was an extremely difficult and uncertain task. Inevitably, the Leasehold Committee concluded that the requirement to demonstrate adherent goodwill was "an almost insurmountable obstacle to the success of claims under the Act".[111]

D. An Undue Process?

The tenant's entitlements were subject to a variety of procedural, temporal and lasting value conditions. In the case of a tenancy terminated by landlord's notice to quit, the tenant had to serve a notice of claim on the landlord within one month.[112] Unsurprisingly, if it was the tenant who served

[103] *Mullins v Wessex Motors* [1947] 2 All E.R. 727, 729.
[104] *Final Report of the Leasehold Committee* (1950), at [125].
[105] Lord Jessel, HL Deb. vol. 69 col. 695 (8 December 1927).
[106] N.E. Mustoe, *The Landlord and Tenant Act 1927* (London 1928), 36.
[107] HL Deb. vol. 69 col. 312 (29 November 1927).
[108] *Hudd v Matthews* (1930) 2 K.B. 197.
[109] *Whiteman Smith v Chaplin* [1934] 2 K.B. 35, 47.
[110] See the pronounced dissatisfaction voiced by the Referees (Landlord and Tenant Act 1927) Association, *The Times*, 7 November 1931, 3.
[111] *Final Report of the Leasehold Committee* (1950), at [124]. As Sir David Maxwell Fyfe acknowledged, HC Deb. vol. 522 col. 1762 (27 January 1954): "It is one thing to say what the premises are worth, but it is rarely possible to prove how much of that figure has been contributed by the tenant's business."
[112] All references in the 1927 Act are to calendar months.

the notice then that tenant would forego any potential claim. The pitfalls of requiring such a rapid response were not lost on the Leasehold Committee who concluded, particularly with weekly tenants in mind, that the period set was "scarcely appropriate" and that "a tenant holding at less than a month's notice may actually have been ejected before the end of the month from the date of the notice to quit".[113] Many tenants, moreover, were "singularly ill-informed as to their rights"[114] and the landlord's notice to quit was not required to contain any information as to tenants' rights or the workings of the statutory machinery. For those who were legally advised, the tendency was to claim immediately on receipt of the landlord's notice to quit.

In relation to tenancies not determinable by notice to quit, the claim notice had to be served no more than 36 nor less than 12 months before the termination of the tenancy. All time limits were strictly enforced.[115] The Leasehold Committee regretted that there was no warning given to the tenant and, whether through ignorance or imperfect knowledge as to entitlement, that the tenant might "fail to assert it until after the commencement of the last year of his lease, which is … fatal to his claim".[116] Difficulties as to timing were evident in *Allied Ironfounders Ltd. v John Smedley Ltd.*,[117] where the court considered the distinction between "terminated" and "terminable". The litigation focused upon a subtenancy and whether, for the purposes of the 1927 Act, it had been terminated by the landlord's more recent notice to quit or, instead, had fallen with the end of the head lease. The latter was regarded by Devlin J. as being the termination date. It followed that no valid claim notice had been served by the tenant within the statutory time frame and, hence, the court enjoyed no jurisdiction.

For the tenant who sought a new lease, the claim notice had to be served within the same time constraints as a compensation claim.[118] Although the Act employed the expression "in lieu of claiming such compensation", it was permissible for the tenant to make a monetary claim and, in the alternative, a renewal claim within the same notice.[119] Curiously, an omission to state the amount of compensation otherwise payable was no bar to renewal.[120] Instead, by virtue of section 5(1) the tenant had merely to allege that compensation, which would otherwise be payable, "would not compensate him for the loss of goodwill he will suffer if he removes to and

[113] *Final Report of the Leasehold Committee* (1950), at [135], [203].
[114] Ibid., at [135].
[115] See *Donegal Tweed Co. Ltd. v Stephenson* (1929) 45 T.L.R. 503.
[116] *Final Report of the Leasehold Committee* (1950), at [135]. The Committee commented also on the danger of "friendly" negotiations breaking down and leaving the tenant outside the time limits to make a claim.
[117] [1952] 1 All E.R. 1344.
[118] There was no prescribed form for this notice: *Gough's Garages Ltd. v Pugsley* [1930] 1 K.B. 615.
[119] *Simpson v Charrington & Co. Ltd.* [1935] A.C. 325.
[120] *British and Colonial Furniture Co. Ltd. v William Mcllroy Ltd.* [1952] 1 K.B. 107.

carries on business in other premises". Court proceedings for compensation could not be commenced until the expiration of two months from the date of service of the claim notice. This was to allow the landlord to make a renewal offer to the tenant. If within those two months, the landlord served a notice offering a new lease for a term not exceeding 14 years at a reasonable rent then the tenant could neither apply for compensation nor a new lease. If the tenant failed to accept the landlord's offer within one month of the offer notice, section 4(1)(b) deemed it to have been declined. As the Leasehold Committee noted, the tenant could lose its statutory rights by omission and this "places a further hazard in the way of an unwary tenant".[121]

As regards a claim for a new lease, under section 5(2) the proceedings were to be commenced not less than nine months before the termination of a fixed term lease or, if the tenancy was terminated by landlord's notice to quit, within two months after service of that notice. Once the tenant's notice was served, section 5(3) allowed either the tenant or the landlord (perhaps to expedite matters) to apply to the court for a new lease in lieu of compensation for goodwill. The court had no jurisdiction to extend these statutory time limits, but if renewal proceedings were incomplete before the termination of the original tenancy, an interim continuation could be ordered under section 5(13).[122]

It is a curious feature that section 6 provided that the tenant's claim to compensation or a new lease could be defeated by the landlord offering suitable alternative accommodation, which "would reasonably preserve to the tenant the goodwill of his business". The landlord had to make this offer within one month of the tenant's notice. Within this tight timeframe, the burden rested with the landlord to demonstrate the offer was firm, genuine and capable of immediate acceptance. If the offer was unsuitable, understandably the tenant's compensation claim remained afoot. This proviso, however, sits uneasily with the concept of section 4 goodwill, which stays with the premises and cannot be transferred. If compensation would otherwise be payable for the rental gain to the landlord, there could be scant justification for depriving the tenant of financial recompense for the irretrievable loss of adherent goodwill.[123] A possible caveat would be where the landlord owned a parade of shops and the tenant occupied one unit for business purposes. If the alternative accommodation offered was another unit in that parade section 6 might then operate to defeat the tenant's compensation claim. Beyond these narrow confines, however, the general rule was reinforced by section 4(1)(ii)(b), which allowed the

[121] *Final Report of the Leasehold Committee* (1950), at [136].
[122] See *British and Colonial Furniture Company Ltd. v William Mcllroy Ltd.* [1952] 1 K.B. 107.
[123] As Hill and Phelps, *Landlord and Tenant Act 1927*, xxii, appreciated, "if the tenant's claim is well founded no alternative accommodation can preserve his goodwill".

landlord to defeat the tenant's compensation claim by offering a new lease on reasonable terms of the existing holding. Unlike with alternative premises, the tenant is then shielded from loss of residuum goodwill. As a means of defeating a claim to a new lease, however, section 6 enjoyed more legitimacy. The tenant had already chosen to forego financial recompense due to its inadequacy and to risk all if a renewal claim could not be made out. If goodwill in its conventional sense was reasonably preserved by the offer of other accommodation, the tenant had little of which to complain.

The interrelationship between the compensation provisions and renewal was more awkward than might first appear and embodied the potential for double jeopardy. This arose because the tenant who elected to claim a new lease under section 5 did so "in lieu" of compensation otherwise payable. This entailed that, if a tenant failed to prove a claim for renewal, he would also be deprived of financial recompense. This would arise where, for example, the tenant was unsuitable or could not establish that there was a disparity between the compensation payable and the loss sustained. As Hill & Phelps explained: "The tribunal is given no jurisdiction to award compensation in such circumstances."[124] Similarly, if a new lease was ordered on terms that were unfavourable to the tenant, no alternative claim for compensation remained available. A different approach was, however, adopted in circumstances where the tenant made out its case for renewal, but was defeated by the landlord relying on one of the "just exceptions" listed in section 5(3)(b)(i)–(iv).[125] Even though by virtue of section 5 (3) renewal would "not be deemed to be reasonable", compensation would still be available for loss of adherent goodwill.[126]

E. The Valuation Exercise

Absent agreement between the parties, the valuer's task was an unenviable one.[127] In outline, the valuer was to compare the rental value which a new tenant would pay on the alternative assumptions that there had been no previous business carried on there (i.e. the "normal rent" as detached from goodwill) or that the premises had already been the home of an established business (i.e. the "goodwill rent"). The valuer was then to make necessary deductions for any appreciation in value which arose irrespective of the tenant's trade.[128] This explains why the matter was never determined simply by comparing the rental value of the premises at the commencement

[124] Ibid., at 27, where they also added that "A tenant, therefore, who elects to claim a new lease should be reasonably certain that he will be able to establish his claim".

[125] These were, respectively, owner occupation, pulling down and remodelling of the premises, other forms of redevelopment and promoting estate management.

[126] In *Terroni v Morelli* (1931) 75 S.J. 112, for example, the tenant was awarded £1,393 instead of a new lease.

[127] For a detailed analysis of the valuation process see W. Hill's notes in H.A. Hill and T.W. Naylor, *A Guide to the Landlord and Tenant Act 1927*, 2nd ed. (London 1934), xv *et seq*.

[128] See *Rialto Cinemas Ltd. v Wolfe* [1955] 2 All E.R. 530.

and at the end of the lease, as any increase in value "may be wholly independent of 'the direct result of the carrying on of the trade or business'".[129] Similarly, the profitability of the business offered only "a very slight guide to the value of the adherent goodwill".[130] Such profits might instead be attributable to such extraneous factors as personal goodwill, the advantages of the site or improved trade conditions.

Once the goodwill that would be expected to accrue to a new tenant carrying on the same business was identified, the referee had to isolate the effect that such goodwill would exert over the rent that might be obtained by the landlord. This exercise necessarily entailed that "where there is no corresponding benefit to the landlord the tenant would get no compensation at all".[131] In *British & Argentine Meat Co. Ltd. v Randall*, for example, the tenant's claim failed because another butcher would not be prepared to pay more for the premises than any other trader.[132] In such circumstances, there was nothing gained from the commercial endeavours of the previous tenant.[133] Similarly, if a higher rent was obtained from a new tenant in a different business (e.g. a florist) to the outgoing tenant (e.g. a butcher) no compensation would be payable. Here, as the Leasehold Committee acknowledged: "no part of the landlord's gain in the shape of the increase in rent can be attributed to adherent goodwill."[134] Conversely, the tenant could not be deprived of compensation merely because the landlord chose to let at a lower rent to a new tenant in a different line of business.[135] Even if the market was depressed, the tenant could still claim for compensation for loss of adherent goodwill provided the "gain" element was discernible.

Nevertheless, the general rule was that, if adherent goodwill existed, the premises "could be let at a higher rent".[136] The task of discriminating between the elements contributing to that added value was not, however, straightforward. As Sir David Maxwell Fyfe acknowledged: "It is one thing to say what the premises are worth, but it is very rarely possible to prove how much of that figure has been contributed by the tenant's business."[137] The process was made unduly elaborate by several negative directions and disregards. These were designed to ensure that, if the landlord could show that the premises were to be let at a higher rent for reasons

[129] *Whiteman Smith v Chaplin* [1934] 2 K.B. 35, 52 (Maugham L.J.).
[130] Ibid., at 50 (Maugham L.J.).
[131] Lord Parmoor, HL Deb. vol. 69 col. 320 (29 November 1927).
[132] [1939] 4 All E.R. 293.
[133] *Clift v Taylor* [1948] 2 K.B. 394.
[134] *Final Report of the Leasehold Committee* (1950), at [126].
[135] *Ireland v Taylor* [1949] 1 K.B. 300.
[136] Section 4(1). An argument to the contrary had to be supported by strong witness evidence: *Hudd v Matthews* (1930) 2 K.B. 197.
[137] HC Deb. vol. 522 col. 1762 (27 January 1954). As Maugham L.J. commented in *Whiteman Smith v Chaplin* [1934] 2 K.B. 35, 51, "This question must often be a very difficult one to answer otherwise than by an intelligent guess".

wholly unconnected with the tenant's goodwill, compensation would not be forthcoming.[138] First, section 4(1)(b) provided that, when the premises were to be demolished in whole or in part, this must impact on the residuum value of the goodwill to the landlord. If the demolition was total, then as Hill & Phelps commented: "it is unlikely in this event that that he will derive any benefit from the goodwill attached by the tenant to the premises."[139] If demolition was partial only, then the valuer would have to attribute value to the remaining part of the premises. By way of a safeguard against a post-hearing change of intention by the landlord, the court had the discretion under section 5(3) to impose a requirement that (if, say, the redevelopment or the occupation did not occur within a specified timeframe) the landlord was to compensate the tenant.[140] For these purposes, the legislative spotlight shifted beyond the loss of adherent goodwill and focused upon the tenant's actual loss inflicted by having to move premises. It was, as Mustoe observed, "another kind of compensation".[141]

Second, section 4(1)(c) discounted all addition to the rental value of the premises attributable to the fact that the premises were licensed premises. While it is not to be doubted that "Premises which are licensed have an added value by reason of the mere fact that they are licensed",[142] this value is not directly due to the tenant having plied his trade at the premises. Hence, this proviso added nothing as compensation would not, in any event, be payable for the license. Its inclusion, however, "caused considerable difficulty"[143] and made it necessary to attach a "somewhat difficult to determine"[144] value to an unnecessary exclusion. Scrutton L.J. criticised the "somewhat obscure words" of this licensing exclusion,[145] recognising that it virtually negated compensation as regards licensed premises that exclusively sold alcohol.[146] This did not mean that all licensed premises were entirely excluded from protection as it remained possible for the tenant to have goodwill over and above the value of the licence.[147] As Du Parcq J. observed: "If the tenant loses his lease, he loses his customers, and they are very likely to remain attached to the old premises."[148] Hence, in *Whitley v Stumbles* the tenant ran a fishing hotel and was still able to demonstrate goodwill independent of the license to sell alcohol.[149]

[138] See *Mariner v Hays Wharf Proprietors* (1947) 150 E.G. 344.
[139] *A Guide to the Landlord and Tenant Act 1927* (London 1928), 19. This outcome was reached in *Hopkins v the Master, Wardens & Commonality of Skinners of London* [1949] E.G.D. 142.
[140] This compensation could not exceed the amount of the loss which the tenant had suffered.
[141] Mustoe, *Landlord and Tenant Act 1927*, 48.
[142] *Simpson v Charrington* [1935] A.C. 325, 341 (Lord Macmillan).
[143] H.A. Hill and T.W. Naylor, *Landlord and Tenant Act 1927*, 26.
[144] E. Foa, *The Landlord and Tenant Act 1927: A Memorandum* (London 1928), 20.
[145] *Simpson v Charrington & Co. Ltd.* [1934] 1 K.B. 64, 75 (an off-licence).
[146] See *Kruze v Benskins Brewery Ltd.* (1930) Sol. Jo. 379.
[147] *Simpson v Charrington* [1935] A.C. 325, 342 (Lord Macmillan).
[148] *Dartford Brewery Co. Ltd. v Freeman* [1938] 4 All E.R. 78, 82.
[149] [1930] A.C. 544.

Third, section 4(1)(d)(ii) disregarded all value which is attributable exclusively to the situation of the premises (i.e. site goodwill).[150] This was appraised as another of those "adventitious and extraneous causes at work not in any way attributable to the carrying on by the tenant of his trade or business".[151] Accordingly, increased goodwill arising from, for example, the beneficial site of the premises, the expansion of the neighbourhood, the increase in the use of motor-cars, better transport links and the landlord's foresight were to be ignored for compensation purposes. As Scott L.J. remarked: "the landlord shall not be called on to pay for any value in his hands, when possession passes to him, which is not solely and directly attributable to the efforts of the tenant."[152] In *Schooley v Nye*,[153] for example, the tenant had a lease of a garage adjacent to two large hotels. The landlord argued successfully that the goodwill which attached to the garage was due to its proximity to the hotels. As it was location-based goodwill, it was something on which the tenant could not rely. In less clear-cut instances, Merlin admitted that it was a difficult and perplexing task "to disintegrate what may be termed the 'site value' … from the 'goodwill' of the premises created or carried on there by the tenant".[154] He employed the example of a fruiterer's shop at the entrance of a railway station. At the end of the lease, it would become necessary to superimpose upon "station goodwill" further goodwill peculiar to that tenant. There can be no doubt that the identification of location-based goodwill involved a degree of intuitive guesswork.

Fourth, and by way of a safeguard for the landlord, section 4(1)(d)(i) required that regard be had to the intentions of the tenant as to its future trading and business activities. Consequently, the court was able to attach conditions that geographically limited where the tenant could continue to trade. The seemingly logical notion is that "if a tenant receives compensation for goodwill on quitting his premises he should not enjoy absolute liberty to set up a competitive trade or business at other premises in the immediate neighbourhood".[155] The provision, however, made no sense whatsoever in the context of a statutory scheme focused exclusively upon adherent goodwill that did not follow the tenant. It was, therefore, counter-intuitive to contend that residuum goodwill could be diminished by the tenant continuing to operate his business in the locality.[156]

Finally, section 4(1)(e) specified that any value created or increased due to restrictions placed by the landlord upon the letting for a competitive business of other premises in the neighbourhood would negate or, at least, reduce an

[150] Accordingly, no regard was had to the added value of premises, for example, in Harley Street to doctors and in Hatton Garden to jewellers.
[151] *Simpson v Charrington* [1935] A.C. 325, 342 (Lord Macmillan).
[152] *Clift v Taylor* [1948] 2 K.B. 394, 401.
[153] [1950] 1 K.B. 335.
[154] Merlin, *Landlord and Tenant Act 1927*, 31.
[155] Foa, *Landlord and Tenant Act 1927*, 21.
[156] *Whiteman Smith v Chaplin* [1934] 2 K.B. 35, 42 (Scrutton L.J.).

award. In such circumstances, the increase to the rental value of the premises would not be generated by the tenant. Instead, it would be a market generated in whole or in part by the restraints imposed in the lease. In other words, landlords could create or possess "adherent goodwill" as well as tenants.

IV. A Changing Ethos

The primacy of compensation was to survive until the enactment of Part II of the Landlord and Tenant Act 1954. Once more a World War stimulated the political appetite for change. A depleted stock of commercial buildings, coupled with the revival and expansion of business activity, encouraged profiteering by landlords and speculators alike. In this setting, the threat of compensation continued to offer a manifestly inadequate counterweight to the law of supply and demand.

In late 1948, the Leasehold Committee was established to determine whether business tenants should be given enhanced rights at the end of their leases. In its Interim Report, the Committee, as chaired by Lord Uthwatt, concluded that affording the prima facie right to a new lease was the only means of promoting "the moral standards of good landlords".[157] It was further envisaged that, if the tenant failed to obtain a renewal, it could claim compensation for adherent goodwill. The reforms were framed as a special, emergency measure, intended to last until the distorted letting market had self-corrected.

In its Final Report, the Committee (now chaired by Jenkins L.J.)[158] again prioritised security of tenure over compensation, but now recommended that reform should be permanent in nature.[159] The difficulty faced was the extent to which the rights of the tenant were to be strengthened. The Committee felt that the problems for tenants had been overstated and that the landlord's common law rights should not be unduly compromised. Consequently, it did not endorse the prima facie right to renewal, but instead advocated a scheme under which the tenant had to establish special circumstances in order to qualify for a new lease. These circumstances would usually involve the tenant demonstrating a substantial diminution in the value of its business as a going concern in the event of non-renewal.[160] The tenant's claim could, moreover, be defeated on a series of fault based and non-fault based "just exceptions". If the tenant was

[157] *Interim Report on Tenure and Rents of Business Premises* (1949), at [51]. It added at [38] that "The business tenant occupies his premises in order to trade or to pursue his profession: he does not wish to be compensated for being prevented to do so".

[158] Lord Uthwatt had died in the intervening period. Otherwise there was no change to the membership of the Committee.

[159] *Final Report of the Leasehold Committee* (1950), at [145]–[151].

[160] As regards professions, the test envisaged was "a substantial diminution in the net profits derived by the tenant" (ibid., at [175]). For non-profit making bodies the test was to be "a substantial increase in the cost or decline in the efficiency of the activities of the concern".

denied a renewal, compensation for adherent goodwill would operate as a substitute and without the tenant having to make a separate claim.[161] Ironically, the valuation method as utilised under the 1927 Act was to remain the general basis of compensation under this proposed scheme. This produced the irony that, although a professional tenant might be able to obtain a new lease, it would be barred from claiming compensation. The Leasehold Property (Temporary Provisions) Act 1951 emerged as a standstill expedient that applied to tenants of shop premises and permitted a maximum of two renewals, each not exceeding one year.[162]

The issue of tenants' rights was revisited in 1953 when a White Paper acknowledged that improved security of tenure should be available on a permanent measure for all business tenants.[163] The White Paper did not fully endorse either scheme promoted by the Leasehold Committee and, instead, recommended that business tenants should have the prima facie right to a new lease at a reasonable market rent. This right was, however, to be defeasible on grounds noticeably more extensive than under the 1927 regime. The White Paper dismissed any suggestion that compensation would be dependent upon the existence of adherent goodwill. Instead, it was to be assessed according to a rudimentary formula based on rateable values and an appropriate multiplier. While accepting that simplistic computation was "arbitrary and does not precisely match the merits of every individual case",[164] the White Paper could not accept that recompense be based on the totality of the loss that the tenant might incur.[165]

Later in that year, the Landlord and Tenant Bill was brought before Parliament, with Part II adhering to the policy and principle as set out in the White Paper. It was, Lord Simonds L.C. remarked, "an attempt to do what was imperfectly and unsatisfactorily done by the Landlord and Tenant Act 1927".[166] The Bill was significant in that it permitted a business tenant to remain in occupation of the premises at the end of the contractual term and, moreover, to apply to the court for a new lease. For the deserving, but unsuccessful, tenant the possibility of flat-rate compensation was to be available to "give the tenant something to help him to re-establish his business elsewhere".[167] It was expected that this extension of tenants' rights would stimulate negotiation and settlement. As Lord Rochdale optimistically

[161] Ibid., at [207].
[162] See generally D. Lloyd, "Leasehold Property (Temporary Provisions) Act, 1951" (1951) 14 M.L.R. 465. A similar piece of legislation still applies in Scotland in the guise of the Tenancy of Shops (Scotland) Act 1949, which caters for a chain of one-year renewals (but no compensation), but is viewed as "an unnecessary anomaly in Scottish commercial lease law" (Scottish Law Commission, *Discussion Paper*, at [6.9]).
[163] *Government Policy on Leasehold in England and Wales* [1953] Cmd. 8713.
[164] Ibid., at [50].
[165] "[It] would be very difficult to evaluate justly, would probably lead to much uncertainty and litigation, and would sometimes be an inequitably onerous burden on the landlord" (ibid., at [48]).
[166] HL Deb. vol. 188 col. 114 (29 June 1954).
[167] Sir David Maxwell Fyfe, HC Deb. vol. 522 col. 1764 (27 January 1954).

proclaimed: "A good landlord certainly will not complain of that. The poor landlord has no right to complain and the tenant cannot expect any more."[168] The emergent Landlord and Tenant Act 1954 is not, however, a tenant's charter. The reforms were designed to make only limited inroads on the common law and to maintain the lessor's investment value in the premises. This is reflected in the mandatory grounds of opposition that are listed in section 30(1) and the absence of a system of rent control during the contractual term. The core values of landlordism were, thereby, preserved and, as with its predecessor, tenants' rights were to be earned by overcoming strict, albeit now better publicised, procedural hurdles.

The purview of Part II of the 1954 Act is strikingly different and more generous than that of its predecessor.[169] There is no requirement that the tenant or a predecessor in title had carried on a trade or business at the premises for a period of not less than five years. Hence, compensation (and, of course, renewal) remain available regardless of how long the business has been operated from the premises.[170] It was not originally possible to contract out of security of tenure, but there remained throughout the prospect of sidestepping compensation by agreement (whether or not supported by consideration). The inclusion of the professions within section 23(1) is the most noticeable expansion. In addition, the reference to the activity of companies and societies acknowledges that commercial activity carried on by such bodies is protected even though not technically classified as a trade profession or employment.[171] Such commercial enterprises were not captured by the 1927 Act. As with its predecessor, licensed premises such as inns and public houses were to be treated differently with such premises originally falling outside the protection of Part II. They remained so until the Landlord and Tenant (Licensed Premises) Act 1990.[172] The justification for this unequal treatment was throughout unconvincing and turned on the fact that compensation for loss of a liquor license was already catered for by the (now repealed) Licensing Act 1953.[173] This duality of treatment, however, marked a departure from the usual focus of the 1954 Act, which looks at business occupation of the premises regardless of the type of business conducted thereat.[174]

[168] HL Deb. vol. 188 col. 135, 1954 (29 June 1954).
[169] Landlord and Tenant Act 1954, s. 23(1) covers a "trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate".
[170] The general rule in section 43(3), however, is that a tenancy granted for a term certain not exceeding six months falls outside the Act.
[171] E.g. running a members' tennis club (*Addiscombe Garden Estates Ltd. v Crabbe* [1958] 1 Q.B. 513) and supplying residential accommodation for staff (*Lee-Verhulst Investments Ltd. v The Harwood Trust* [1973] 1 Q.B. 204).
[172] This change was part of a package of measures brought forward following a 1989 Monopolies and Mergers Commission inquiry into the brewery industry.
[173] See Lord Mancroft, HL Deb. vol. 188 col. 630 (8 July 1954).
[174] As Lord Ogden, HL Deb. vol. 188 col. 629 (8 July 1954) acknowledged: "the fabric, the building, needs protection … even though the licence comes under special provisions of the licensing Statutes."

By way of further contrast, and whereas the 1927 legislation referred to the premises being "used" for business purposes, its successor required that the demised premises instead be "occupied".[175] This assumes significance in the context of incorporeal hereditaments (such as fishing rights and easements generally). Such hereditaments can be used,[176] but tradition has it that they cannot be occupied.[177] This explains the explicit recognition in section 32(3) that such rights as "enjoyed" by the tenant "in connection with the holding" are to be included in any new tenancy. Without such specific provision these rights would seemingly not pass on renewal. To conclude otherwise would be to promote the existence of a "holding" unlike any other and, as an incorporeal hereditament has no rateable value, it offers nothing to which compensation could be geared. The better view, therefore, remains that incorporeal hereditaments are incapable of being occupied and remain as an abstraction ancillary to the demise.

Unlike its predecessor, the 1954 Act does not expressly exclude the business of subletting residential flats. Such explicit exclusion was, as shown, unnecessary under the purposes of the 1927 Act. Similarly, it did not require any special treatment in the subsequent code because the head tenant would have to establish occupation (not merely "use") which, when subletting has occurred, is a conceptual impossibility. As Lord Nicholls explained: "The Act looks through to the occupying tenants …. Intermediate landlords, not themselves in occupation, are not within the class of persons the Act was seeking to protect."[178]

V. Compensation under the 1954 Act

Section 37 of the Landlord and Tenant Act 1954 (as amended) affords compensation for the loss of the contingent right to renewal. This right is engaged only when the landlord has relied exclusively on one or more of the "compensation grounds"[179] as set out in section 30(1)(e), (f) and (g). These grounds of opposition (which relate respectively to uneconomic subletting, redevelopment and owner occupation) serve only to prioritise the current (and possibly prospective[180]) management interests of the landlord over the tenant's renewal rights. The interrelationship between these provisions was designed to maintain the balance between the promotion of good estate management, the advancement of the wider public interest and the survival

[175] For the different meanings and multi-faceted role of "occupation" within the Part II framework, see M. Haley, "Occupation and the Renewal of Business Tenancies: Fact, Fiction and Legal Abstraction" (2007) J.B.L. 759.
[176] *Whitley v Stumbles* [1930] A.C. 544.
[177] *Land Reclamation Co. Ltd. v Basildon DC* [1979] 2 All E.R. 993.
[178] *Graysim Holdings Ltd. v P&O Property Holdings Ltd.* [1995] 4 All ER 831, 842 (HL).
[179] This terminology was introduced by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003.
[180] The court can make a declaration under section 31(2) that grounds (e) or (f) will be made out within 12 months of the termination date specified in the renewal documentation.

of the tenant's business. If one of the compensation grounds was established, compensation was available instead to recompense the tenant. Denial of a new lease on any other ground will deprive the tenant of entitlement to a financial award. The logic is that a tenant in breach of covenant is undeserving of compensation and, less convincingly, that a tenant who is offered suitable alternative accommodation simply does not require it.

Although the 1927 Act had allowed an offer of suitable accommodation to trump the tenant's claims, this carve-out was, as demonstrated, both anomalous and superfluous.[181] Ironically, under the descendant code this exclusion from compensation remains counterintuitive. While the acceptance of alternative accommodation might operate to mitigate long term losses, it does nothing to ease the immediate impact of relocation. The offer of a new lease of different premises, usually unwanted by the tenant, is radically different from a renewal of the tenancy of the existing holding. Despite this blatant promotion of the landlord's management interests, there is no payment for the tenant who has to cease business temporarily, lead customers away from the original premises, effect alterations to the new premises, incur removal costs and "the hundred-and-one disadvantages that a general dislocation or an interference with his business necessarily entails".[182] A better balance of policy and fairness would be to allow the tenant the choice between the alternative accommodation or compensation for disturbance. If the tenant accepts the landlord's offer, then the relocation costs incurred should surely be reimbursed as they are a direct consequence of the tenant's failure to obtain a statutory renewal. These proposals would advance the underlying policy of section 37, which is to ensure that the tenant is compensated on having to quit the existing premises.[183]

A further throwback to the 1927 machinery was that, in its original form, section 37 demanded that the tenant make an application to court for a new lease as a pre-requisite to a compensation award. This required a tenant, who had no chance of renewal and/or would prefer compensation, to the make an expensive and time-consuming application for a new lease. Similarly, a tenant who decided to forego the entitlement to a new lease was disqualified from claiming compensation.[184] This imitation of the prior legislation was clearly unwarranted. Although under the 1927 Act the tenant necessarily had to make a timely claim to activate any entitlement whatsoever, this was not so with the Part II provisions. Under the latter, the statutory rights of a qualifying tenant arise automatically and independently

[181] This ground of opposition is now framed within section 30(1)(d) of the 1954 Act and is the only mandatory ground that is not also a compensation ground.
[182] Sir Frank Soskice, HC Deb. vol. 528 cols. 2479–80 (18 June 1954).
[183] *Cardshops Ltd. v John Lewis Properties Ltd.* [1983] Q.B. 161, 179 (Ackner L.J.).
[184] As Sir Frank Soskice, HC Deb. vol. 522 col. 1792 (27 January 1954) questioned: "Why should the landlord reap the advantage of an added increment in the value of the premises just because the tenant has not sought renewal?"

of the parties' actions.[185] Admittedly, it might take the service of appropriate renewal documentation and possibly a timely court application to keep those rights live, but their origination is not dependent on such procedural steps being taken.[186] Somewhat belatedly, the Law Commission advocated that compensation be payable whether or not the tenant had made such an application.[187] This recommendation was imported into section 37 (via the Law of Property Act 1969) with the effect that "quitting is the only thing that the tenant is required to do in order to obtain compensation. He is not required to serve any kind of notice or make any kind of application".[188] Nevertheless, it remains necessary for the tenant to engage in litigation so as to defeat the landlord's opposition if it is based in part on a non-compensation ground.

A. Quantum

Undoubtedly, the major flaw with the extant provisions concerns how compensation is calculated. The tenant after quitting the holding is entitled under section 37(2) to flat-rate compensation based on the rateable value of the premises.[189] The ultimate award is the product of the prescribed multiplier (since 1990 one) as judged at the date the tenant vacates the property[190] and either the rateable value of the holding at the time of service of the renewal documentation or, when 14 years' occupation can be established, twice that rateable value. As to the latter, Lord Silkin suggested that three or four times the rateable value "would not be unreasonable".[191]

Section 37(8) explicitly recognises that different multipliers can be prescribed for different cases, but offers no guidance. Except for early transitional adjustments, no variations of treatment have so far been made. Interestingly, it was argued unsuccessfully that, in connection with licensed premises, publicans should be entitled to "special" compensation gauged to a higher multiplier than other tenants.[192] The claim for preferential treatment was based upon the reality that rateable values are assessed differently for licensed premises[193] and the realisation that "the balance of power between the landlord and tenant in such cases is different from that in the

[185] *Sun Life Assurance v Racal Tracks Ltd.* [2001] EWCA Civ 704.
[186] *Bacchiocchi v Academic Agency Ltd.* [1998] 1 W.L.R. 1313.
[187] *Report on the Landlord and Tenant Act 1954 Part II* (1969) Law Com. No. 17, at [47].
[188] *Garrett v Lloyds Bank* (unreported) (1982) 7 April (HC) (Walton J.).
[189] Mr. West, HC Deb. vol. 528 col. 1859 (18 June 1954) was incredulous, saying: "How can anyone say that an amount equal to the rateable value would adequately compensate that man for being deprived of his property and his business?"
[190] *International Military Services Ltd. v Capital & Counties plc* [1982] 1 W.L.R. 575. There the tenant benefited as the multiplier had been increased since the service of the landlord's termination notice.
[191] HL Deb. vol. 180 col. 523, 1953 (18 February). He later lamented that double rate compensation was "mean" and "quite inadequate" (HL Deb. vol. 188 col. 128 (29 June 1954)).
[192] Mr. Redwood, HC Deb. vol. 168 col. 41 (26 February 1990).
[193] Being based on the annual level of trade (excluding VAT) that a pub is expected to achieve if operated in a reasonably efficient way: see https://www.gov.uk/introduction-to-business-rates/pubs-and-licensed-trade (last accessed 13 July 2020).

ordinary run of cases under the 1954 Act".[194] The model employed in Northern Ireland has, however, much to commend it. This uses different multipliers according to years of occupation, that is, less than 5 years, exceeding 5 years and less than 10, exceeding 10 years and less than 15 and exceeding 15 years.[195] Such gradation more fully reflects the entrenched sentiment that the longer the tenant has been in business, the greater the financial impact on quitting the premises.

The mechanism of rateable values appealed to the Government as it offered simplicity and certainty. As the Solicitor General enthused: "Both landlords and tenants know what sum the landlord will have to pay and the tenant will receive. Each can make his plan accordingly. They will not have to wait month after month until the result of lengthy litigation is known."[196] It was estimated that, driven by 1954 rateable values, the average compensation would work out at a meagre £75 or, in the case of a tenant who had occupied for 14 years, £150.[197] As Lord Silkin bemoaned "it would be a very poor business where the profits did not exceed the rateable value".[198] The mooted alternatives of gauging compensation according either to the landlord's profit or the tenant's loss were rejected. The former signalled an unsatisfactory retreat to adherent goodwill whereas the latter "would be purely arbitrary and would work very hardly upon the landlord".[199] Compensation is not, therefore, designed to recompense a tenant for loss of goodwill and aims to offer a fair and reasonable contribution to the tenant's costs of setting up elsewhere. It gives rise to a statutory debt that is enforceable only after the tenant has quit the premises (and already incurred displacement costs) and while the landlord remains in funds. Most certainly, it is not to be viewed as compensation for the extinguishment of an interest[200] or a breach of contract.[201]

A timid, landlord-centric stance is discernible with the choice of rateable value and a multiplier. Clearly perturbed by the valuation debacle under the previous regime, Parliament opted for a solution that was unhitched from the notion of goodwill. It is, therefore, ironic that the spectre of goodwill still features large in the section 34 calculation of both the interim rent and the market rent payable on renewal. Within those confines, goodwill in its conventional form acts as a disregard from market rental values. As

[194] Lord Williams, HL Deb. vol. 517 col. 416 (22 March 1990).
[195] The Business Tenancies (Northern Ireland) Order 1996, art. 23(2).
[196] Sir Reginald Manningham-Buller, HC Deb. vol. 522 col. 1868 (27 January 1954).
[197] Sir Frank Soskice, HC Deb. vol. 528 col. 2480 (18 June 1954).
[198] HL Deb. vol. 180 col. 522 (18 February 1953).
[199] Lord Simonds L.C., HL Deb. vol. 188 col. 116 (29 June 1954).
[200] Accordingly, the payment of section 37 compensation does not preclude a claim for disturbance under the Land Compensation Act 1973: *Evis v Commission for New Towns* (unreported) 5 July 2001 (LT).
[201] This would afford a bespoke level of compensation. In *Jaura v Ahmed* [2002] EWCA Civ 210 (CA), for example, compensation was calculated taking on board the loss of profits on sublettings, expenditure on fixtures and fittings and interest.

it must necessarily be assessed for it to be disapplied, there can be no reason why it could not readily factor into the calculation of compensation.

Much unnecessary complication occurs from a mystifying lack of symmetry between the timing and countback requirements that dictate the tenant's entitlement. First, the appropriate multiplier to employ is judged at the date of quitting the premises. Second, the relevant rateable value to adopt is that at the date of the service of the renewal documentation. Third, the entitlement to double rate compensation and the ability to contract out (the 14 years and the five years respectively) are both retrospectively computed from the termination date specified in the renewal documentation. The disorderly nature of these timelines serves only to undermine the certainty and simplicity that was heralded.

B. Rateable Values

Practical problems, complexity and widespread dissatisfaction are associated with the concept of rateable values. Non-domestic rating law, as Kerr J. acknowledged, "arouses high passions and stimulates serial litigation".[202] The Federation of Small Businesses views the existing system of non-domestic rates as being "out-dated, unfair and not related to the ability to pay, or changing economic circumstances".[203] The Federation has made repeated calls for the business rates system to be fundamentally reformed and, as a result of its lobbying, major changes are on the horizon.[204] Even the Treasury Committee concluded that the present scheme was "broken" and added that "Businesses deserve a system that is reactive to changes in the modern economy and fit for purpose".[205] Clearly, non-domestic rateable values offer no stable foundation for compensation purposes.

Rateable values are currently the product of the open market rental value of the property (as estimated by the Valuation Office Agency) and a multiplier. They are traditionally reassessed every five years, though this is likely to be reduced to three years. Changes to rating values will inevitably influence the compensation payable. Hence, if the appropriate rateable value increases then so will compensation. If it decreases, as occurred post-2017 in many regions in England and Wales,[206] this will diminish

[202] *Queen v Trafford Council* [2018] EWHC 1687 (Admin), at [1].

[203] https://www.fsb.org.uk/standing-up-for-you/policy-issues/local-government-and-communities/business-rates (last accessed 13 July 2020).

[204] See the policy paper, *HM Treasury Fundamental Review of Business Rates: Terms of Reference*, 11 March 2020, available at https://www.gov.uk › business-rates-review-terms-of-reference (last accessed 13 July 2020).

[205] The Treasury Committee Report, *Impact of Business Rates on Business*, 31 October 2019, HC 222 2019–20, 3.

[206] See P. Greenhalgh, L. Johnson and V. Huntley, "An Investigation of the Impact of 2017 Business Rates Revaluation on Independent High Street Retailers in the North of England" (2019) 37 Journal of Property Investment & Finance 241.

the financial entitlement of the tenant. Transitional relief whereby any increases are phased in gradually may also be problematic, with the timing of service of the notice/request under section 37(5) assuming potential significance. A further distortion might occur with the various forms of rates relief available that are "to some extent arbitrary, administered inconsistently and add complexity to a system that is already onerous".[207] The tenant who pays discounted rates or no rates will still be entitled to compensation geared to the listed rateable value. This possibility simply reinforces the air of unreality surrounding the compensation process.

Difficulties also arise concerning the fundamental issue of what constitutes a hereditament for the purpose of rating legislation.[208] This might be problematic when there are two leases of separate suites, say in an office complex, granted by the same landlord to the same tenant. It is not always straightforward to determine whether each is to be regarded as a separate hereditament or, instead, whether they have merged into a single hereditament.[209] The latter option will bring with it a discount based on economy of scale ("quantum") and impact on compensation payable for disturbance. Further complications may arise when no separate valuation is shown for the holding. In such a situation, an appropriate apportionment (where the holding is merely part of a rated hereditament) or aggregation (where the holding comprises of separately rated parts) needs to be made.[210] Apportionment also assumes significance as regards split reversions, that is, where the ownership of the reversion has been divided subsequent to the grant of the lease. In this instance, section 37(3B) now provides that the owners of the parts are together to be treated as the landlord for renewal purposes and compensation apportioned between them according to the rateable value of their respective parts. If the rateable value still cannot be ascertained, it is taken to be the value which, apart from any exemption from assessment to rates, would have been entered in the valuation list as the annual value of the holding. As regards apportionment, aggregation and deemed rateable values, section 37(5) offers a right of appeal.[211]

Section 37(5)(a) is mandatory in nature and stipulates that the rateable value "shall" be that as shown in the valuation list at the time of the service of the landlord's section 25 notice or the tenant's section 26 request for a new lease. This outwardly innocuous provision, however, has the potential to generate unfairness. Such was demonstrated in *Plessey & Co. plc v Eagle Pension Funds*.[212] The tenant's premises were damaged by fire in

[207] *Impact of Business Rates on Business* (2019), at 4.
[208] See *Woolway (Valuation Officer) v Mazars LLP* [2015] UKSC 53.
[209] See *Roberts (Valuation Officer) v Blackhouse Jones Ltd.* [2020] UKUT 38 (LC).
[210] See *Ludgate House Ltd. v Ricketts* [2019] UKUT 278 (LC).
[211] Section 37(5) emphasises that the outcome of that appeal will dictate the amount of the rateable value for compensation purposes.
[212] [1990] R.V.R. 29.

1977 and a substantial reduction was made to the valuation list. The premises were reoccupied in 1978, but their rateable value was not upgraded until after the landlord had served its section 25 notice. It fell to the Lands Tribunal to determine what rateable value was applicable to premises. The landlord argued that the listed rateable value of £17 should be employed. The tenant countered that it should instead be computed according to the value that should have been attributed to the holding, which produced a rateable value of £21,097. It was held that the relevant rateable value was that as at the time the landlord's notice was served, that is the lower sum.[213] The 1954 Act was precise as to the date the rateable value was to be gauged and a strict construction had to be adopted. This literal approach to statutory interpretation, as to the appropriate day that rateable values crystallise, is not confined to the 1954 Act and appears in other areas of landlord and tenant law, such as the Rent Act 1977[214] and the Leasehold Reform Act 1967.[215] The consistent message is that, even though the listed amount is incorrect, and excessively so, there will be no alteration made. The scope for hardship, therefore, extends beyond the Part II provisions and spotlights that the need for reform is urgent.

Additionally, and since the abolition of domestic rates in 1990, section 37(5A) provides that, in relation to mixed use properties, the value of the domestic premises is excluded from the calculation. These composite properties are valued for both business rates and Council Tax. Nevertheless, the 1954 Act contains a special provision that allows the amount of compensation to be increased by the court to equate with the tenant's reasonable expenses in moving from the domestic property. This demonstrates that, when rateable values offer inadequate redress, the focus can shift to losses actually incurred by the tenant. Parliament could adopt a similar tactic to ensure that the loss of goodwill (as defined in its conventional sense) is the subject of an additional award when statutory compensation is inadequate. As Ahlinder concludes: "For the protection to be efficient, the fundamental basis for calculation of any compensation should be the tenant's actual losses."[216]

C. Double Rate Compensation

For the higher rate valuation to apply, section 37(3)(a) requires that, during the whole of the 14 years immediately preceding the termination of the

[213] Unlike with apportionment, aggregation and deemed rateable values, and due to the mandatory language of section 37(5)(a), there is no scope for appeal to the valuation officer.
[214] *Guestheath Ltd. v Mirza* [1990] 2 E.G.L.R. 111.
[215] *MacFarquhar v Phillimore* [1986] 2 E.G.L.R 89.
[216] E. Ahlinder "Business Tenant Protection – For Whom? For What? How? Security of Tenure within UK, Swedish and Australian Law" (2017) 26 Australian Property Law Journal 159, 194.

current tenancy,[217] the premises have been occupied for the purposes of a business carried on by the occupier or for those and other purposes.[218] If the tenant has occupied only part of the current holding for the 14-year period, section 37(3A) now provides that there will be a separate calculation for the part that was occupied for the 14-year period and that which was not. Previously, it had been necessary to have occupied the entirety of the holding for 14 years.[219] As demonstrated in *Department of Environment v Royal Insurance plc*,[220] the traditional understanding of what constituted 14 years' business user was strict. There the High Court held that the claim for double rate compensation failed because the tenant under a 14-year lease had taken physical occupation one day after the term began. Somewhat harshly, Falconer J. concluded that this was not occupation for the full 14 years. Fortunately, a more flexible approach was taken by the Court of Appeal in *Bacchiocchi v Academic Agency Ltd.*,[221] where the tenant had intended (albeit mistakenly) to quit on the proper date and to remain responsible under the tenancy until that time. The *Royal Insurance* case was declared to have been wrongly decided. Simon Brown L.J. acknowledged that the determination of whether business occupation had persisted for the appropriate period should cater for short periods, at the beginning, mid-term or end of the contractual lease, where the premises stand empty. In the absence of a rival claimant to the status of occupier, fitting out or closing down periods were properly to be included in the calculation. The tenant should not be expected to maintain occupation by storing goods on or making token visits to the premises simply to satisfy the statutory requirements. As Ward L.J. put it: "It is an affront to common sense to require a pot and pan to be left on the premises until the clock strikes midnight on the last day. Common sense surely dictates that there be an allowance for considerable leeway."[222]

If a change of occupier occurs during the 14-year period, and in order to maintain entitlement to double rate compensation, section 37(3)(b) requires that the new occupier must have succeeded to the business of its predecessor. Accordingly, the emphasis is on business continuity rather than the identity of the occupier.[223] Unlike with the 1927 Act, this suggests that, if the tenant takes over the business of the freeholder, the freeholder's period of occupation can be factored into the 14-year calculation.

[217] The termination date is that specified in the landlord's section 25 notice or the tenant's section 26 request: section 37(7). It is not necessarily the date the contractual tenancy ends or when the tenant quits the premises.
[218] As regards mixed use premises, it is not necessary that the residential occupation be for 14 years.
[219] *Edicron Ltd. v William Whitely* [1984] 1 W.L.R. 59.
[220] (1987) 54 P. & C.R. 26.
[221] [1998] 1 W.L.R. 1313.
[222] Ibid., at 1326.
[223] *Cramas Properties Ltd. v Connaught Fur Trimmings Ltd.* [1965] 1 W.L.R. 892.

D. Contracting Out

Although contracting out of the full protection afforded by the 1954 Act was not permissible until 1969, contracting out of section 37 has always been possible.[224] This is catered for in section 38(2)(a), which is unfortunately an inelegant and obtuse provision. It renders void certain agreements (whether contained in the lease or an extraneous document) that purport to exclude or reduce compensation for disturbance. The invalidating effect of section 38(2)(a) arises where, during the whole of the five years immediately preceding the date on which the tenant is to quit the holding, the premises have been occupied for the purposes of a business carried on by the occupier or for those and other purposes. The facility was appraised as "driving a hole through the scheme and then providing this lucky dip in place of compensation".[225]

Unlike the Landlord and Tenant Act 1927, which allowed contracting out by agreement only when supported by adequate consideration, no such requirement features in the 1954 scheme. Hence, there is nothing to protect the tenant from being induced unfairly to barter away its entitlement. It is to be recalled that the 1927 Act also required the tenant to establish five years' business use before any entitlement arose. Although no such hurdle is to be found in the Part II code, a variation of the five-year rule is imposed by section 38(2)(a), which governs the ability to contract out of compensation. This was framed naively to allow a landlord, who intended to use the premises itself within the next five years, to let them in the intervening period without having to pay compensation. As Sir Lucas Tooth observed, "contracting out is appropriate only where the tenancy is intended to be temporary, and is in fact temporary"[226] and as Lord Mancroft emphasised, "[it] ensures that if, contrary to expectation, the tenancy proves not to be temporary, the tenant is entitled to compensation, despite the contracting out provision in the agreement".[227] The five-year rule is seen by some to offer a safeguard for the tenant primarily because landlords, without the ability to contract out "obviously would insist on a higher rent".[228] Not all, however, have shared this sentiment with one politician describing it as a "most dangerous feature"[229] and another exclaiming that "I entirely fail to see where this magic of five years comes in. I cannot see why the five-year period should suddenly change the entire status of the tenant".[230]

[224] In Northern Ireland (except as to public authority landlords) no contracting out whatsoever is allowed: the Business Tenancies (Northern Ireland) Order 1996, art. 24.
[225] Sir Lynn Ungoed-Thomas, HC Deb. vol. 514 col. 2379 (30 April 1953).
[226] HC Deb. vol. 528 col. 2476 (18 June 1954).
[227] HL Deb. vol. 188 col. 621 (8 July 1954).
[228] Ibid. See also *Bacchiocchi v Academic Agency* [1998] 1 W.L.R. 1313 (Ward L.J.).
[229] Mr. West, HC Deb. vol. 522 col. 1860 (27 January 1954).
[230] Mrs White, HC Deb. vol. 528 col. 2482 (18 June 1954).

From a modern perspective, there is scant logic for maintaining this five-year rule or, indeed, any separate provision for the contracting out of compensation. The present irony is that, since the amendments of 2004, it is a more straightforward and incontestable measure to contract out of security of tenure than merely to contract out of the compensation provisions. Section 38A facilitates the exclusion of Part II protection by landlord's notice and tenant's declaration without the need for court approval and without any wait and see period. It follows that the bespoke facility concerning compensation will only be relied upon where the landlord has inadvertently failed to adhere to the timing or notice formalities of section 38A. Although there is no authority on point, it seems clear that an agreement that is void as regards excluding renewal could still be held valid in the context of compensation.

Further critical observations may be made concerning the ability to contract out of compensation. First, the short-termism of this approach is out of kilter with the reality that commercial leases were then most frequently granted for terms of seven, 14 and 21 years. The perceived danger was that section 38(2) "is giving landlords every possible inducement to grant tenancies for not more than five years … and insist upon a provision that the compensation provisions in this Act shall not apply".[231] Second, in a modern setting it is possible for compensation to be excluded in a lease of longer duration than five years. This is because the exclusion is not void *ab initio,* but will be rendered so only when, at the end of the lease, the five years' occupation can be established. Until that time, the agreement will be effective if the lease is prematurely terminated before the qualifying period is satisfied or there is a late change in the tenant and the nature of the business carried out on the holding.[232] This tactic undeniably runs contrary to the underlying policy of the five-year restriction.

Third, the somewhat oblique language of section 38(2) has proved to be problematic and this is particularly so with the expressions "whole of five years" and "immediately preceding". While these indicate, respectively, that continuous occupation is required and must continue up to the date of quitting the holding, the calculation of five years' occupation for these purposes has not proved always to be a straightforward exercise. In *London Baggage Co. (Charing Cross) Ltd. v Railtrack plc (No 2)*,[233] there was continuous physical use for five years and yet Pumfrey J. upheld the validity of the contracting out clause. Occupation itself was not the conclusive factor, rather the legal character of that occupation was decisive. If the tenant had quit at the termination date specified in the

[231] Lord Silkin, HL Deb. vol. 188 col. 620 (29 June 1954).
[232] Section 38(2)(b) provides that the five years does not continue if the occupation is by a successor in title who is not also a successor in business.
[233] (Unreported) 11 December 2000 (HC).

landlord's notice, the exclusion clause would have been effective. The tenant, however, remained in occupation as a tenant at will and it was this holding over that took the tenant over the five-year threshold. Pumfrey J. emphasised that the counting back exercise for the purposes of section 38(2) was to begin on the date that "the tenant under a tenancy to which this Part of the Act applies is to quit the holding". Due to a tenancy at will falling beyond the reach of the 1954 machinery, at the end of that tenancy it had not been a tenancy to which the Act applied. Hence, the additional period of occupancy fell to be discounted from the computation. This outcome prevents a tenant holding over after the contractual tenancy simply to be able to claim compensation when the five-year period lapses.

Although Pumfrey J. believed that the same reasoning must apply when the tenancy at will arose prior to a tenancy subject to the Part II regime, this is less convincing. The reference is to a tenancy to which "this Part of the Act applies" and the requirement remains that the five years are to be counted back from the date the tenant "is to quit the holding". Take the scenario where the landlord permits occupation under a contractual licence for 18 months and, at the lapse of the licence period, grants the former licensee a four-year tenancy, with a proviso that no compensation will be payable. On the expiry of that fixed term, the tenant seeks compensation for loss of renewal rights. According to Pumfrey J., the contracting out clause would remain valid. Nevertheless, this approach cannot be right as, in contrast with the facts of the *London Baggage* case, there is now a holding which the tenant is able to quit and prior to that time the tenant has held under a tenancy to which the Act applied. Hence, the earlier period of occupation should, indeed, be factored into the process.

Additional difficulties associated with the five-year rule faced the Court of Appeal in *Bacchiocchi v Academic Agency Ltd.*[234] The tenant held under a 20-year lease which was protected by the Part II provisions. The tenancy terminated on August 11, but the tenant mistakenly believed that it ended on 29 July and quit on that earlier date. The tenant sought double rate compensation, but the landlord relied upon a contracting out clause. The issue was whether, by moving out 12 days early, the tenant had preserved the validity of the contracting out. The appellate court rejected the landlord's submission and held that occupation could persist even though the premises were closed. The invalidating tendency of section 38(2) continued when a tenancy comes to an end, as here, during a period of closure. The tenant's conduct was viewed merely as an incident of winding down the business at the end of the tenancy.

[234] [1998] 1 W.L.R. 1313.

VI. Conclusion

Part I of the Landlord and Tenant Act 1927 marked an ignominious, legislative attempt to deal effectively with the problems faced by business tenants. This statutory prototype was unduly restricted and overly technical in operation.[235] It pivoted upon the concept of adherent goodwill, which for the parties, valuers and judges alike proved to be unpredictable and chimeric in nature. While the scheme potentially embraced two million premises,[236] the process was over complicated, costly and ignorance of it widespread. For example, during its initial eight years no more than 1,500 claims were made[237] and, nearing its expiration in 1952, only 550 claims were initiated.[238] By way of a portent for the future, the majority of claims were for a new lease in lieu of compensation.[239] Unsurprisingly, the statutory scheme was regarded as "unworkable in practice"[240] and, as the Leasehold Committee complained "certainly falls short of the measure of protection intended by Parliament".[241]

Unfortunately, in the lead up to the Landlord and Tenant Act 1954 the issue of compensation was overshadowed by extensive parliamentary debate concerning leasehold enfranchisement, statutory rights for residential tenants and the prioritisation of security of tenure for business tenants.[242] The neglect most certainly shows. These distractions, coupled with an unwavering view that an undue burden should not be placed on landlords, entailed that the compensation scheme as set out in section 37 emerged as an awkward, half-hearted and poorly drafted measure. As Lord Silkin commented: "experience has shown that we have been far too timid, and that, whereas we went into those measures with the best of intentions, they have not been capable of carrying out effectively the purpose for which they were passed … this Bill is in exactly the same category."[243]

Parliament, while distancing itself from the debacle of adherent goodwill, nevertheless drew much inspiration from the discredited 1927 scheme. The calculation of compensation continued to ignore actual losses incurred, remained arbitrary in nature and overlooked entirely the privation associated with moving to suitable alternative accommodation. Payment was to be delayed until after the tenant has quit the premises

[235] In *Clift v Taylor* [1948] 2 K.B. 394, 400, Scott L.J. bemoaned that the scheme had "not been framed with a clearer exposition of its general purpose and with more precision in the use of terms".
[236] Merlin, *The Landlord and Tenant Act 1927*, vii.
[237] *The Times*, 3 July 1937, 9.
[238] Sir David Maxwell Fyfe, HC Deb. vol. 522 col. 1761 (27 January 1954).
[239] *The Times*, 3 February 1937, 11.
[240] Lord Hailsham, HL Deb. vol. 326 col. 663 (6 December 1971); see also the views of The Chartered Auctioneers' and Estate Agents' Institute, *The Times*, 26 June 1951, 9.
[241] *Final Report of the Leasehold Committee* (1950), at [141].
[242] See M. Haley, "The Statutory Regulation of Business Tenancies: Private Property, Public Interest and Political Compromise" (1999) 19 LS 207.
[243] HL Deb. vol. 188 col. 121 (29 June 1954).

and the technical nature of the Part II scheme preserved similar traps for the unwary. As Wilkinson bemoaned: "Tenants who are unaware of the procedure or do not comply with the time limits lose their rights completely."[244] This danger was especially acute until the reforms of 1969 because, as under the 1927 Act, the tenant was required to go "through some kind of stately minuet"[245] by having to make a court application as a prerequisite of making a compensation claim. The condonation of contracting out of the entitlement to compensation, but not originally out of the renewal provisions, also harks back to the 1927 Act as does the five-year rule, clumsily reinvented in the context of agreements excluding compensation.

Admittedly, since the financial crisis of 2008 market forces have been kinder to the business tenant, with many landlords having to provide rental incentives to attract tenants. For the present, this has undoubtedly diminished the practical value of the Part II provisions and dulled the momentum for reform. The 1954 Act, however, has not fallen into desuetude. It retains vitality as regards older leases and, when market dynamics shift, there will still be landlords who seek to take advantage of their commercial dominance, particularly over small businesses. It is, therefore, worrying that the official attitude is that the existing provisions deal adequately with any unfairness as to goodwill.[246] The present compensation scheme remains for the tenant a hit-and-miss affair.[247] Ironically, absent recompense for lost goodwill, the tenant could well be in "a worse position than that which existed under the Landlord and Tenant Act 1927".[248] This is especially worrying with the boom in deep-pocketed, corporate[249] and pension fund landlords[250] who have the monied might to override the renewal rights of their tenants. The dependency on rateable values is unreliable and, particularly in light of the promised overhaul of the non-domestic rating system, mercurial in nature. Rateable values are not the simple and certain yardstick that they were in 1954 and it is now not possible for a tenant to know much in advance what award will be made. While it is fanciful to think that flat-rate compensation will now be abandoned, it does not have to continue in its present incarnation. Rental values offer a more

[244] As H.W. Wilkinson, "The Law Commission Report on the Landlord and Tenant Act 1954, Part II" (1969) 32 M.L.R. 306, 307. If the tenant forgoes the right to a new lease by inaction and tardiness, the right to compensation also falls away.

[245] Wilkinson, "The Law Commission Report", 307. Fortunately, that condition was jettisoned in the reforms of 1969.

[246] *A Periodic Review of the Landlord and Tenant Act 1954 Part II* (1992) Law Com No 208, at [3.29].

[247] As Lord Simonds, HL Deb. vol. 188 col. 116 (29 June 1954) predicted: "To some the amount will seem too much; to others it will seem too little."

[248] Mr. West, HC Deb. vol. 522 col. 1858 (27 January 1954).

[249] See G. Hammond, "Should Tenants Fear the Rise of the Corporate Landlord?", *The Financial Times*, 4 April 2019.

[250] See G. James, "Commercial Property Can Save Your Pension", *FT Adviser*, 10 April 2019, available at https://www.ftadviser.com/pensions/2019/04/10/commercial-property-can-save-your-pension/?page=3 (last accessed 13 July 2020).

realistic and stable base upon which compensation should be calculated[251] and there can be little objection to the use of stepped multipliers as employed in Northern Ireland. Similarly, there could be a bolt on provision (akin to s. 37(5A)) that ensures that, where ground (g) is invoked, the tenant's goodwill (if any should exist) can be protected. A separate provision for contracting out of compensation is, moreover, inappropriate and, in a system that since 1969 has facilitated the contracting out generally of the Part II scheme, clearly superfluous. Put simply, contracting out should now be an all or nothing affair. This change would abandon the patently unsatisfactory five-year "wait and see" rule and advance the prized notions of certainty and simplicity.

Absent fundamental reappraisal, the compensation provisions will remain a potential cause of hardship and unfairness for business tenants. Although the law reform agencies have either been unable or unwilling to engineer a system that is both just and effective, this article has suggested reforms that would produce that desirable outcome. Nevertheless, and even if change is officially advocated, the history of business tenancy regulation casts doubt on "whether Parliament could resist the temptation to reduce it to nonsense" as it passes through the stages of becoming law.[252]

[251] Ahlinder, "Business Tenant Protection", 176–80.
[252] Montgomerie, "Housing Repairs", 58.