



Solicitors and accountants acting for tenants at rent review

In business tenancy law, the actual tenant's ability to afford the rent at review is generally considered irrelevant. So, the actual tenant faces a dilemma, because - unless the review goes to 'arbitration', in which case control is lost to the system - the tenant must decide what rent to agree and no tenant will willingly agree more than they can afford. Since, at present, affordability is a big issue, solicitors and accountants acting for tenant-retailers can encounter difficulties in obtaining instructions when the client is at a loss to know what to do.

It is vital the tenant understands the review process. When a shop is offered to let in the open market, as well as negotiating the best deal it can, a retailer will do one or both of two things. All retailers decide whether, on their projected figures, the rent would be affordable. The second thing, which is not something all retailers do, is to try to find out whether the proposed rent is realistic, compared with what other retailers nearby pay for their premises. Ascertaining what others pay for their premises is reassuring and helps avoid a hike in the rental benchmark, which can happen if the transaction were cited as evidence for nearby reviews. A Zone A value too high could destabilise the cost of the trading position for those retailers whose established presence is one attraction of the position in the first place.

Few retailers care about the wider long-term consequences of their expansion plans. Although a trading position is a 'community' for generating and attracting pedestrian flow (footfall), most retailers are single-minded. Some retailers pay top rents deliberately to ingratiate themselves with landlords, whilst others agree what they can afford at the time, expecting future rent reviews also to be based on affordability.



As soon as the lease is completed, affordability and business tenancy law part company. At rent review, it is assumed the actual tenant can afford, pro-rata, the same as everyone else, because the purpose of a review is to enable the landlord to receive the market rent for the premises. However, although each new letting in the open market reflects that particular retailer's affordability, the profit margin and, equally important, the rate of stock-turn, mean not all retailers can afford the same as everyone else. Furthermore - and this point is frequently overlooked, but highlighted by the state of the prevailing market - because rent is payable regardless of the profitability of the business, it is assumed the tenant is of independent means, even though most tenants rely entirely on their business cash-flow.

I look forward to helping you in some way

Do-it-yourself negotiation on behalf of...

The open market is made up of different 'affordabilities', so, in linking the review to "open market rent" (OMR) 'open' means everyone and anyone.

As indicative or comparable evidence, a new letting to an inexperienced first-time tenant at a rent that might amaze is as valid as any hard-driven bargain by a multiple retailer with hundreds of branches. So, since rents in the open market are unregulated, any tenant committing to a review to OMR is exposing its business to all manner of risks beyond its control (a situation that can strain compliance with the Turnbull report on internal control and risk management, to safeguard shareholders' investment and the company's assets).

Similarly, since, in the open market, different landlords are likely to have different investment performance strategies, risks also apply to the landlord's investment. Hence, the only way the actual landlord and actual tenant can have any control over the direction of the rental relationship is by recording their requirements in the lease, per the rent review guidelines.

In the open market, rent is a product; it does not occur naturally, as in, 'this is the rent for the premises'. To value rent, all the terms and conditions of the tenancy must be known, stated in advance or defined. However, because the rent at a new letting is often agreed before the lease is drafted and/or approved, it is possible for a completed lease to contain terms and conditions that could produce a different rent to what was agreed. The test of efficacy is whether the rent would be identical if there were a rent review on the same date as the term commencement.

(Where possible, I liaise with my client's solicitors for drafting or approving of the lease, to ensure the other side doesn't try to include any wording that would or could be disadvantageous to my Client. Or, when not involved in negotiations

beforehand, I can advise to ensure your client's intention or expectation is reflected in the lease.)

A rent review might be thought of greater benefit to landlords but, essentially, benefit is equal. A review ensures the tenant is not subsidised. Of course, retailers do not necessarily see it like that; and, for many, the only way the business can remain profitable is when costs are below market rate. Although total property costs would, for a multiple retailer, amount to approximately 12%-14% of turnover, to an independent retailer/local shopkeeper with one or two shops, the proportion could be 45-50%. A business plan is rarely straightforward, and with the gap widening between retailers that have what customers want, and those that do not, retailers not on the receiving end of profitable demand are often fighting to preserve an outmoded business model. When the survival of the tenant's business depends to a large extent upon the landlord not wanting any (hefty) increase, the tenant's reaction to a proposed increase is much more likely to be emotional, than dispassionate.

A tenant's failure to adapt its business style to changing circumstances cannot possibly be something for which the landlord should be expected to share responsibility. It is not a fault of landlords that rents have become uneconomical for some retailers, but a function of the market, which includes competition from other retailers, rental valuation methodology, and tenants straying from review guidelines. It is pointless for a tenant to agree what it can afford when that could vary over the years, because to pay more than necessary when business is booming can mean that rent fixed for the term, even if trade is suffering.

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Terms and conditions of a lease cannot be changed, except by rectification by the original parties, or mutual agreement, and because lease terminology is fashionable, guidelines vary from detailed to vague, but, whether the intention of the original parties is clear or interpreted, the guidelines are intended to be helpful: to enable the tenant to apply market circumstances at the valuation date to the level of rent.

A rent review is objective: not how much the actual tenant would agree, or the actual landlord would want, but what a hypothetical willing landlord would reasonably expect and a hypothetical willing tenant would pay; such parties to include the actual landlord and actual tenant. In addition to procedure for operating the review, time for agreement, method and cost of dispute resolution, and interest on any back rent, etc, the guidelines define the valuation basis for the terms of the lease between the hypothetical parties.

If the lease contains an "upward-only" review clause, then that does not mean the rent must go up; but that the rent payable after the review cannot be lower than before. Even so, when a lease contains

a review clause whereby the landlord expects a rent increase, that feeling can rub off on the tenant as well, so the tenant's first thought is likely to focus on the landlord's proposal, rather than how to agree a rent that accords with the review guidelines.

Landlords can prey on inexperience and unsuspecting - for example, an increase for inflation, or encouraging avoiding the expense of appointing surveyors - so when landlord and tenant communicate directly, it is not unusual for such tenants to settle for a quiet life. But, whereas avoiding confrontation may sometimes be commercially-expedient, it makes no sense, at least to me, for a tenant to

ignore the guidelines, by thinking that could upset their landlord, when the guidelines are designed to be helpful.

It is not compulsory for a landlord to want OMR, provided its acceptable rent does not exceed OMR. If you are acting for the tenant and as the tenant asks, but the landlord is unyielding, then for you and/or the tenant to reckon no real likelihood of a surveyor doing any better should, I suggest, be put to the test. It does not automatically follow that, merely because you on behalf of the tenant, or the tenant itself, are not making any progress, an experienced rent review surveyor would also get nowhere. To a landlord (whether or not represented by a surveyor overtly), a tenant, when negotiating themselves, or through a solicitor or an accountant, is often regarded a 'soft touch'.

For a do-it-yourself tenant, and/or with the help of its solicitor or accountant, persistence can pay and, as research shows, pretending to be angry can be beneficial, especially when dealing with someone who has few options, because it gives the impression you are dominant, strong and tough. But, such an approach to negotiation ought not be the usual course, because calling a landlord's bluff - for example, threatening to instruct a surveyor, or referral to 'arbitration' - will only work when the landlord is fearful of the prospect.

A landlord will wait to see whom the tenant has instructed, before deciding whether to enter into combat. Sometimes, my reputation can precedes me! A leading auctioneer told me he would warn buyers that, if I were known to be acting for the tenant at an outstanding or forthcoming review, the chances of the landlord getting the desired rent would be low. On at least three occasions that I know of different landlords have conceded offers from their tenants, rather than risk dealing with me. And, in 1976, a year after I established my practice, I was told by a director of a public property company

the reason they had instructed me to manage some properties was to avoid any possibility of my acting against them. Of

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course, it's not all plain-sailing and, especially when instructed to take over negotiations, I tread carefully, for there is no point in approaching the matter where the tenant left

off. In any event, generally, I do not start with an offer, because an impression could imply the lowest parameter.

In my opinion, things go wrong in the landlord and tenant relationship when review negotiations become subjective, and wider consequences for the actual landlord and tenant dominate. It is not simply a clash of personality or viewpoint. Costs can figure largely, the tenant baulks at the expense of referral, angles are not spotted or explored, so a new rent does not reflect the open market at the valuation date, but is a product of the past, based almost solely on other rent review and lease renewal agreements.

The cumulative effect can take its toll. To quote from *Wallshire Ltd v Aarons* [1988] "second best are rent reviews which are negotiated between valuers, because although their aim is to achieve the same end-result of deciding what the market rent is, their decision is not tested by the market; their decision, their agreement, is based on their conclusions about what the market would decide. Negotiated settlements therefore can be unreliable because of the possibility of error piled on error. They need ... an occasional window of reality provided by open market decisions."

The difficulty for a solicitor or accountant, when acting for a tenant, is that their advisory role differs from that of a surveyor. Normally, solicitors and accountants act only on client

instructions, whereas surveyors can act off their own bat. When the tenant tells you the landlord's proposal is excessive, or such like, and wants to reply with a counter-offer of what he could afford, how the response is received by the landlord is likely to be construed as an outburst, merely letting off steam.

While some landlords do overstate, the proposal may in fact be close to market rent. Generally, particularly when substantial increase is proposed, the tenant's reaction is anticipated. A emotional plea is unlikely to cut any ice. Although a review is a function of tenancy management, the tenant may forget, or not realise, the process is nothing personal.

It is vital to respect the guidelines. *Bellinger v South London Stationers Ltd* [1979] provides an example of what can go wrong: "we would hardly need to add that we do not accept your revised figure" was not considered sufficiently specific to constitute a counter-notice. A tenant may reason what it would agree if it were the landlord, but, per *Reed Personnel Services plc v American Express Ltd* [1996], it is "not good for the tenant to say what is good for the landlord." In any event, what is 'reasonable' is invariably a matter of opinion and, per *Rogers v Rosediamond Investments (Blakes Market) Ltd* [1978], a surveyor's opinion of rent is preferred to that of the tenant.

Whether through a solicitor or an accountant, a tenant trying to negotiate a rent review without involving a surveyor can leave the tenant with the feeling the cards are stacked in favour of the landlord but, ***in my experience, how negotiations are handled from the start can make a difference to the outcome.***

Independent Expert Determination of rent review - costs defeated



Case History

Acting for Roy Paln, a menswear retailer in Cheylesmore, Coventry, I arranged referral of a rent review to an independent expert (and the rent determined devalues to the lowest Zone A in the area).

The lease requires the tenant to pay all costs of the determination (the expert's fees) if the determination were within 10% of the landlord's proposal at the date of the application to the RICS. The expert, a partner in a well-known national firm, determined my Client should pay all costs. However, at the date of my application to the RICS, the landlord had not proposed a rent, so I reasoned the provision for costs did not apply. Also, I reasoned apportioning responsibility for costs was a separate issue which was nothing whatsoever to do with the expert, but an arrangement the parties agreed would apply after the determination.

The landlord's surveyor did not agree but, because I stuck to my guns, the expert found himself in an invidious position, so the landlord said he would obtain legal opinion. Whilst waiting for the lawyers, the landlord's surveyor sent me a memorandum for my Client to sign to confirm the new rent.

I obtained my Client's signature, but rather than return the memorandum to the landlord's surveyor for completion, I said that, because the expert's determination on costs formed part of the determination, the entire

determination was invalid pending resolution of the issue.

I emphasized that, whereas I was not going to recommend the revised rent should not be agreed, I did not think it should be payable until after the issue of costs was finally disposed of, so if the landlord's legal opinion did not agree with my opinion, then I should arrange for my Client's solicitors to apply to the court for a declaration. However, I went on to say I should, without prejudice, return the memorandum for completion and payment of the rent without further ado if the landlord would agree to pay half the expert's costs.

The landlord realizing the matter could take months to resolve, not to mention mounting legal costs, duly capitulated.

Cheylesmore is one of the better suburbs of Coventry and the main shopping comprises a long parade of shops fronting Daventry Road and the smaller Quinton Parade diagonally opposite. Netto has bought an old pub site nearby and is building a new supermarket. The main long parade is a mix of multiple retailers, banks and local shopkeepers. As well as Roy Paln, (who originally had 4 shops in the parade (all of which I dealt with) but now has 2, I have acted for 9 other retailers in Cheylesmore, 3 in Quinton Parade (2 lease renewals, 1 rent review), 1 in Quinton Road (a rent review), 4 in Daventry Road (2 rent reviews, 2 lease renewals) and 1 in Queen Isabel's Avenue (lease renewal).

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I specialise in rent reviews and business tenancy advice for landlords and retailers, in England and Wales.

A commercial property surveyor for more than 40 years, I started specialising in rent review in 1975. With experience of all types of shops, including banks, betting offices, off-licences, pubs and restaurants, cafes and takeaways, launderettes, and car showrooms, supermarkets, stores, retail warehouses, trade counters, from high streets, suburbs and shopping malls, to factory outlets, trade counters and retail parks, at rents £5000 to over £250,000 a year, I have dealt with more than 5000 properties.

Many Clients have used my services regularly since 1975, and numerous landlords and retailers count on me for help and forward-thinking advice at every step of their way.

Next time you are on the internet, please visit www.michaellever.co.uk where you will find details of my services, including case histories, photos, fees and charges, and the ML Guides to rent review, lease renewal and shop investment.

"Numbers are the most important issue but, for me to arrive at the right figure, the words must add up"