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Established 1975



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# Current Review Sample

## What's in it for you?

Over the past few years, demand for shop property investment has rocketed: auction rooms packed, yields at record lows. Almost daily, another shopping centre, a portfolio changes hands, pass-the-parcel, in landlord paradise. But, despite all talk about property being the thing to invest in, hardly a word is uttered about the consequences for the tenant in having a new landlord.

So what's in it for you?

It would be nice to say nothing, but it's worse than that. The experience begins with the total price the new landlord pays for the investment, because that determines net yield and attitude. Some landlords are scared so will agree anything to keep a tenant happy but many are greedy, out for whatever they can get and that applies especially to buyers of centres and portfolios whose only real interest is money. Forget 'property performance', tenant dancing to the landlord's tune: the buzzword is making assets 'sweat'; squeezing the last drop out of the tenant at every opportunity, by increasing the rent and/or requiring payment and/or restructuring the lease. So what else is new?

The building insurance premium will likely go up. Not only the amount of cover but also premium because the new landlord does not have the same clout with the insurer: checking nothing untoward is vital but a hassle. Also, because the new landlord is likely to insure from exchange of contracts, the old landlord canceling on completion, the tenant having paid the premium to the old landlord has to pay the new landlord for another year and recover overpayment from the old landlord. Since many landlords can't be bothered, or become untraceable and many insurers do not refund the whole of the overpayment for cancelled policies, the tenant can be out of pocket.

Next, the idea the rent must be too low so at review the proposal is at stratospheric level. Whether rent should be so much greater depends upon the integrity of evidence and provisions of the lease but tenants can be doubly stressed by the landlord's sheer indifference to affordability. More accustomed to dealing with the general public than landlords, preference amongst retailers to be fair and reasonable does not cut ice: to quote Reed Personnel Services plc v American Express Ltd 1996 "not good for the tenant to say what is good for the landlord." A tenant thinks subjectively, concerned about profitability of the business and future plans and imagines the landlord similarly caring. The landlord is not; the landlord is immune to tenant bleating and whereas a landlord cannot be criticized for sticking to the objectivity of tenancy law, an uncompromising stance does nothing for an ongoing relationship.

As for existing discussions and negotiations, letters to lawyers, calls to agents unanswered, nobody on the landlord's side able to make decisions, everything on hold through no fault of your own is immensely frustrating. And when contact is resumed, how should a tenant communicate with a landlord whose only interest in the property and lease is how much can be made out of the tenant? The answer is to change your attitude, use silence and remember business tenancy law and valuation work both ways and the tenant is often in a stronger position.

Fundamentally, low yield is commensurate with prospects for capital growth. When a low yield is a reflection of investment demand, in effect, the investor has overpaid but instead of accepting the market for what it has become takes it out on the tenant. The need for revenge can be sweet or impossible to deal with but it's not your fault so never take it personally but use the opportunity to side-step what is expected. Landlords dislike not being 'in the know' so like as much information as possible about their tenants and their intentions to prepare for eventualities. The easy way to find out is to be blessed with a talkative tenant, the manipulative to court surveyors with instructions and, in the public domain, to read announcements and accounts. So, assuming sweating symptomatic of a landlord uncomfortable with high risk, the less the landlord knows about your business and your intentions the better for you. Other than politeness, it's not compulsory to be particularly forthcoming, especially since anything you say is bound to be used against you, so avoid chit-chat and be secretive and careful in whom you confide: even if not commercially sensitive, the slightest remark will determine attitude and can be misconstrued.

Esoterically, it is not necessarily part of a tenant's job to teach the landlord a lesson, since isolated cases are not enough to shift landlord thinking generally, but even so it would be good to get the message across: the more taken by landlords, the less money tenants have to help customers.. The challenge is to lead by example, shine and earn respect. As regular readers of CR know, I believe in a 'true path': a discipline with a reminder that straying causes problems for oneself and emits negative vibes at others, such as customers. Retailers paying lip service to integrity is rife and leads to downfall. (Why do I always think of Dixons?) Since landlords tend to resist changes to the system they are hardly likely to welcome them when they observe so many retailers only interested in how much can be extracted out of customers. (To blame the market is akin to telling customers off for having come to their senses)

For landlords, their surveyors and lawyers to regard the rough and tumble of negotiation and another undertaking on costs as all part of the property game ignores the fact the money has to come from somewhere. Retailing is a serious business, but amongst professional advisers, tenants have few allies.

Generally, it is easier for surveyors to act for landlords because acting for tenants requires a completely different attitude that is contrary to training. Methinks most tenants do themselves disservice: why rabbit on about rising property costs but then instruct surveyors whose business is to help landlords put them up! Little wonder such retailers invariably come-a-cropper. It's not that surveyors do not start off taking the tenant's side, but as the matter progresses, are likely to be inclined to think tenants should expect to pay whatever is fair and reasonable, to keep the landlord happy.

Property investment is risky. Other surveyors may disagree but, in my opinion, it is not necessary for a tenant to enrich the landlord.

I look forward to helping you in some way.

## Demand for Tenants v Demanding Landlords

Now that customers are reigning in expenditure, intense competition fueling wafer margins and property costs soaring, demand for tenants has never been greater. Large retailers would love to be rid of underperforming branches. Local companies with a few shops would like to prune, proprietors of small businesses to retire. Whether to reduce costs or pack it in completely, all a tenant needs to do is sell the lease.

The ideal is to surrender the lease to the landlord because that is the end of it. When the lease and/or business have greater value to another tenant or the landlord is not interested, the situation is no longer straightforward. For prime positions, previously off-pitch retailers are moving in but for the secondary positions, the supply of reliable tenants, able to withstand trading conditions, has almost dried up so the landlord is more likely to doubt a proposed assignee would satisfy requirements of the lease.

All but most restrictive leases are likely to contain provisions enabling the tenant to assign the lease, subject to the landlord's consent not to be unreasonably withheld, possibly subject to conditions. In post-1996 leases, Landlord and Tenant (Covenants) Act 1995 the criteria for suitability may be listed. In some cases, "a respectable and financially responsible person" is the qualifier and it's that I'm discussing here.

The word "respectable" points to the behaviour of the person primarily in carrying on his business but probably also in the whole of his external relations. "Responsible" means able to pay the rent and perform the other obligations in the lease.

I advise my landlord clients on tenant applications to assign. My clients and I imagine other landlords too are concerned on three counts. Firstly that the particular requirements of the lease are being met; secondly, the proposed assignee should be able to afford the rent regardless of the profitability of the business; and last but not least that the proposed assignee's covenant will complement the investment.

The last concern is the most contentious, because case law is not in the landlord's favour (unless notice is served before the application) so is never mentioned to the tenant's advisers.

The second, affordability, is challenging because it can be regarded as invasion of privacy. In practice, there can be few tenants of sufficient means to enable them to pay regardless of how well their business is doing: for most tenants the ability to pay and the existence of the business are intertwined. But merely because tenants associate the two does not mean so should a landlord. Request for detailed information about personal liabilities and assets can meet resistance from the tenant's side arguing that, since the proposed assignee's business plan is good enough for the bank to lend upon, consent is being unreasonably withheld. In my opinion, a tenant whose proposed assignee withdraws because the landlord asks valid searching questions should be thankful at having avoided probability of assignee default.

For the first concern, the particular requirements are being met, the tenant should, if it wants to save money, read the lease, or ensure his agent does, before the lease is marketed and/or before any agreement between tenant and proposed assignee reached in principle. To offer the premises and put them 'under offer' to anyone that makes an acceptable offer to the tenant is not good enough. In *Venetian Glass Gallery Ltd v Next Properties Ltd* [1988], the Court said "the landlord is entitled to consider its own interests and not be bothered about other people's interests but it is only its interests qua landlord to which it must look" but also, "to look at the whole of situation as it stands.

” In *Old English Inns Plc v. Brightside Limited* [2004], one matter was whether the existing operations of the proposed assignee limited company generated sufficient profit before taking account of directors' remuneration to enable it to meet the additional expenditure of the annual rent under the proposed lease. That said, it would be artificial and not accord with commercial reality to hold that financial soundness turns on what policy is adopted on the person's part in relation to business expenses when that historic policy can immediately be altered if necessary and proper.

To minimize costs and save time, avoid non-starters. A test of reasonableness is whether the proposed assignee is on a par with the financial standing of the first tenant. (When the first tenant is the incumbent I am not certain whether the effective comparison date is date of lease or application.) When the proposed assignee is a first-time business tenant, a landlord is being asked to take a chance. Many landlords consider themselves judges of character so like to meet tenants but if respectability is not in doubt then assessing if the venture is likely to be successful is irrelevant. The only question is whether the landlord's interests, the applicant's ability to pay the rent and perform other obligations in the lease, are properly and reasonably satisfied based upon financial information provided. When the proposed assignee has an existing business, level of responsibility is important. If the rent of the subject premises is substantially greater than the responsibility elsewhere then the landlord must consider whether the applicant is financially suited to rent and other obligations in the lease.

To avoid need for surety or guarantor, a popular solution is a rent deposit. In deciding if a good idea, one must take into account existing and proposed commitments. When 3 or 6 months rent, possibly plus VAT, adds up to a substantial sum, the extra cost to the applicant in having to part with the money for several years could further burden the cost of the proposed commitment and thereby increase risk to the Landlord.

Before a landlord will consider application, undertaking on costs will have to be provided by the tenant's solicitors. Costs are payable whether or not the landlord's consent is granted and whether the matter proceeds to completion. Before applying, it makes sense to aim for a straightforward response. Although references can be presented with the application, I think it best to let the landlords apply because they have their own questions and replies are confidential. To be helpful, what is needed are full names, addresses and account details of referees, including where appropriate landlords or managing agents of existing premises and confirmation of rents.

A landlord acting unreasonably can be liable in tort for damages. To be upfront from the start will mean any claim the landlord is unreasonably withholding or delaying consent will be harder for the landlord to defend.

I look forward to helping you in some way.

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When a rent review is looming, it will pay you to contact me.

I specialise in reducing property costs for retailers.

A consultant surveyor actively involved in the commercial property market for more than 40 years, I started specialising in rent review and lease renewal in 1975. Consequently, I have a tremendous amount of practical experience and, although I never promise miracles, I can often substantially reduce proposals and achieve superb results.

I help businesses with one or more branches, throughout England and Wales. For superb negotiating skills and forward-thinking advice, many Clients have used my services regularly for more than 30 years, numerous retailers treat me as their 'property department' and many more count on me for professional advice at every step of their way.

I deal with all types of shop and commercial property, including banks, betting shops, restaurants, laundrettes, showrooms, offices, supermarkets, stores, retail warehouses, trade counters, in town centres, suburbs, shopping malls, factory outlets and retail parks; and I have advised on more than 5000 shops.

I can advice behind-the-scenes, or you may leave it all to me. Serving notices as necessary, I handle negotiations start to finish, keeping you informed and, where necessary, liaising with your solicitor so, instead of you being swamped with paperwork, all you have to do is say yes.

I look forward to helping you in some way

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