

Commercial Property

What To Do At Rent Review.

The idea behind the rent review is to give a realistic return to the property owner from his investment throughout its life. Indeed without periodic rent adjustment property would not be as available as it is today and perhaps more expensive. It would be confined largely to those in a position to purchase. But how can the tenant be sure that the rent review he is dealing with is equitable and that he is not being over charged? In times of buoyant economic activity it is easy to be persuaded that growth is better than facts might suggest. Not all locations experience growth or at the same pace. In fact given intense competition some locations are static or even in decline. How then is the rent review to be dealt with?

The Lease

A number of basic steps if followed will help. Before the rent review notice arrives examine the lease to see exactly what the rent review provision is (get a copy of the signed document from your solicitor now). Don't rely on a draft, get the signed document. The rent review is a creation of the lease, nothing more. If the lease is badly drafted (and many are) there may be some ambiguity that will alter the basis for assessing the new rent, this can operate for or against you. For example I recently examined a lease that had no commencement date. It was blank. The rent review clause provided for a review from the non-existing commencement date. There could never be a rent review during the entire term of that particular lease. In another case the rent was, according to the lease, to rise in line with the cost of living index. The Court agreed that there was no such thing (the consumer price index should have been used) and there could be no rent review in that lease either.

The rent review clause in the lease will direct how the new rent is to be assessed. Usually this is to open market value disregarding goodwill and assuming a willing lessor and lessee. It is these "assumptions" and "disregards" that will alter the open market criteria and they will be written to that effect. However it is for the landlord to prove the rent demanded in line with the qualifications in the lease. Proof in many cases is difficult and is dependent on similar lettings. Ask for that proof in writing. Check out the details. This simple process will often show savings on the asking rent. In situations where there are a number of rent reviews occurring together in say a shopping centre or industrial estate, the rent reviews will often start with the largest or dominant tenant using the strength of that business to justify an increase. This increase is then used as the basis for higher rents among the other occupiers and so on.

The property market, according to economists is imperfect. In other words, there is a lack of knowledge, particularly amongst the users or tenants. This imperfection or lack of information is utilised to great effect by landlords.

How Much?

So you have read the lease, the rent review notice has arrived and you have asked the landlord to justify the rent in writing. Next step is the landlord or his agent calls around for a chat and asks you to place a figure on the amount you think is reasonable. Say nothing, or if

you do make sure it is on a without prejudice basis. Otherwise your negotiating position will be compromised. There is no 'horse trading' involved, only facts. Check out these facts by insisting on details of similar and comparable rents, in writing. Don't be too concerned with other rent reviews, who-knows how they were arrived at? If the rent should increase at the review then evidence from open market lettings will support it. Don't be persuaded by the argument that "*all the others are paying it*". Look for that evidence in writing.

Be quite sure that if the lease says open market rent, and most do just that, then evidence of inflation or any other measure is useless. Fairness is seldom used as a measure of rent for obvious reasons.

Does Size Matter?

What size is your premises? It is surprising how many differing results you can get to this question. In my experience quoted sizes are often wrong. Are you paying rent on stores, loos and kitchen? Should you be? There is a code of measuring practise designed to overcome these ambiguities. It will be used as the basis of arbitration if matters progress that far.

Market evidence where available, must be analysed to make it relevant to the situation in hand. For example, a very large premises would command a discount for size in the open market. Quite simply it is cheaper to construct. Age and design have enormous effect on market rents. A discount is usually appropriate here also. As will the location in relation to neighbouring businesses. The differences can be quantified.

Watch for the 'upwards only' rent review clause. This little creation is designed to make sure that the rents never fall. However it does not mean that they always rise. Perhaps the tenant paid too much at the start of the lease. Over rented commercial space is not uncommon. Rents do fall even in to-days very active market. Retail warehouses are one example where supply in some locations far exceeds demand.

Improvements can cause problems. Many tenants carry out improvements without insuring that they will be ignored at rent review. If not specifically excluded by agreement then you will be paying rent on the improvement. It does not matter that you paid the cost of installation. Sometimes there are ways around this but it is complex. I recall the very expensive situation where the tenant constructed a fine office block next to his factory only to be presented with a rent demand by the landlord. Don't let this happen to you.

Arbitration - the Choice is Crucial

You do the investigation and you are convinced that the increase requested by the landlord cannot be justified. The lease will usually provide for such disputes to be resolved through arbitration. Don't be afraid to use it. If evidence supporting the increase has been slow to come it will have to be presented prior to or at arbitration. One word of caution here, the choice of arbitrator is absolutely crucial. Detailed knowledge of the Arbitration Acts and the rules of hearsay evidence is required. The arbitrator should not be someone who sees his role as referee. The arbitrator's award is binding and he has discretion as to costs. While arbitration of such disputes has certain advantages its primary benefit is to the landlord in that it keeps the matter private. It has a number of disadvantages especially as there is no appeal. It is generally in the tenant's interest to have the arbitrator act as expert. It makes arbitration very simple. Most landlords however resist this and many leases are drafted accordingly.

Rent reviews can be very straightforward and if properly handled, place both parties in no better or worse position than the original letting contemplated. However it is up to each tenant to ensure that such an outcome is achieved by using the lease properly. Better still get professional advice.

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13 February 2006*