

**STILL HERE TO BITE YOU -
HEADLINE RENT REVIEW CLAUSES
March 09**

As most of us accept, there are two sides to most stories. It was intriguing to hear a multiple landlord suggest - in response to allegations of its inflexibility with requests from multiple retailers for rent reductions - that perhaps it should write to all of its tenants asking for a voluntary increase in rents payable as, surely, investment landlords are some of the hardest hit businesses in this recession.

You might reasonably assume that hard times for landlords will automatically and always mean great opportunities for tenants. Those few tenants choosing to take new space at the moment probably do have a golden opportunity to negotiate an impressive basket of concessions before they sign up. But what happens if you have a rent review?

Notwithstanding Codes of Conduct and persistent Government pressure, the upward only rent review remains the norm. With news of falling rents in the open market, you might reasonably assume that your rent therefore would, at least, not go up. If only life were so simple.

Many tenants will find that their forthcoming review has a “headline rent” review clause and, in a market with weak demand, this can make a worrying difference. In the rent review cases which went to the Court of Appeal and taught us about these issues, the impact of the one successful clause was enough to make anyone sit up and realise that this point is scary. In round terms, the new rent for one of the leases (1 Broadgate, London EC2) was set at £7 million per year when the arbitrator who calculated that £7 million figure also gave a figure of £5.25 million as the open market rent if the headline clause was ineffective (as the Arbitrator decided, but was overruled by the Court).

The headline rent clause is far more likely to cause serious unfairness in a time of low demand for property than would be the case when supply and demand are in equilibrium. Put simply, during a recession long rent-free periods become very common.

If your neighbour takes space in which to compete with you and has a ten-year lease at a rent of £50 per square foot but with two years rent-free, the reality for the neighbour is that it is paying between £30 and £40 per square foot (‘psf’), depending on whether you look at it to the first rent review date or to the date of the expiry of the lease. Clearly, though, if that comparable transaction next door to you is used to justify you having a rent increase from, say, £35psf so that you start paying £50psf (but have no rent-free period at all), your property costs become significantly higher than those of your neighbour and this puts you at a competitive disadvantage.

If things like this worry you or interest you, please contact me to get hold of a longer piece on this topic which, having set the scene, goes on to address four crucial headline rent issues:

- How is this trap set and why can it get “above market” rent out of the review process?
- Why is this trap so hard to spot?
- How should it be reacted to in contexts of a proposed lease or when taking over an existing lease?
- Is there any hope for a tenant facing a rent review under a clause of this nature?

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