

The Need to Face Tough Reality on Upward Only Rent Reviews & Lease Guarantees



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As the debate rumbles on about the retrospective banning of upward only rent review clauses, many Retailers face the reality that their business can no longer support current rental demands or the prospect of upward only rent reviews in the future.

This situation has come about due to the absurd nature of leasing property in Ireland. Where the market has persisted with long leases typically involving no break options, upward only five yearly rent reviews and either personal or parent company guarantees.

Many Tenants are now clinging to the hope that regulation of existing contractual obligations has taken place before, referencing the provisions of The Landlord and Tenant (Amendment) Acts, of 1980 and 1994, and the potential for retrospective banning of upward only rent reviews on similar precedent.

While these "Acts" changed the relationship between Landlords and Tenants of business premises, notably the statutory right of lease renewal, it could also be argued that both achieved improvements, on security of tenure and occupation of what could otherwise be vacant premises.

The point being that a retrospective change in legislation today has the potential to seriously and negatively impact on many Stakeholders including the State (NAMA). It will be argued that leases have been signed at all points in history and in various economic cycles and that the basis of a lease agreement is informed consent and professional advice.

While it is impossible to be absolutely certain on the outcome; as to whether the interference with a contractual right, with a view to reconciling the common business or retail good, constitutionally affects private property rights or that a government decision to change this law would have a major impact on the legal basis for other agreements, on balance it has to be believed that the process will be lengthy.

The immediate alternative for Tenant's is to consider their current financial and trading position together with the terms of their lease.

Many leases typically contain full guarantees. That in the event of forfeiture or disclaimer by the Tenant, the Landlord may require the Guarantor to take up a lease or new lease of the premises for the term commencing on the date of such disclaimer and continuing for the residue of the term. The important point here is that there is only an option for the Landlord to compel the Guarantor to take a lease.

Section 132 of the Land Conveyancing Law Reform Act, 2009 seeks to outlaw upward only rent reviews in respect of business premises. However, the section does not apply where;

- the lease concerned, or
- an agreement for such a lease

is entered into prior to the commencement of this section (28th February 2010).

In circumstances where, the Retailer appears to be continuing to run their business simply to pay the rent and are struggling to the point of liquidation, perhaps it is time to point out to the Landlord the implications of any guarantee option being exercised subsequent to the commencement of Section 132, thereby outlawing upward only rent reviews.

There is now an immediate need to consider the value of negotiation, and to focus on sustainable rental payments, and for Landlords and Financial Institutions to move away from the assessment of capital values based on extraordinary high market rents.

The alternative to negotiation is to wait for the timing of possible legislative change and to watch more business failure and the build up of more vacant property. All of which, upon occupation, will then be subject to new lease and Section 132.

Clearly, this process of negotiation requires careful due diligence, and a bespoke approach to the circumstance of each and every tenant.

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We are not a large firm. Our emphasis is placed on partnership and service, providing our clients with a single point of contact that gives access to a strong understanding and experience of the business, while delivering bespoke solutions in speedier timeframes with enhanced values and financial outcomes.

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