rent

determinations

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APPLYING BASIC VALUATION METHODS FOR LUMP SUM VALUATIONS TO ANNUAL VALUES

SPENCER

The starting point is *Spencer v Comm* (1907) 5 CLR 418 (*Spencer's* case). This case defined market value in normative terms using the "willing buyer willing seller" theory. For annual values this can be easily translated into the "willing landlord willing tenant" theory. The attributes of a annual value agreement under *Spencer*:

- A RENTAL AGREEMENT IS HYPOTHESIZED. That is, it is immaterial whether or not there is a "market" for the property, an agreement between the hypothetical parties is assumed. The question is what rent would the hypothetical parties arrive at according to Spencer?

- BOTH PARTIES ARE WILLING. That is, the parties arrive at the rental agreement during amicable bargaining. There is no pressure, duress or any kind of coercion. This does make some rental agreements in large shopping centres difficult to use. For example, where a national retailer may negotiate a concession rent in one shopping centre to offset a "high" rent another. Such global factors are outside those affecting the value of the subject centres leading to "out of line" rents. Obviously such agreements would be very difficult to prove.

- SUBSEQUENT CIRCUMSTANCES ARE IGNORED. All those factors that could have affected the rental agreement but not reasonably foreseeable at the date of valuation are to be ignored. For example, a shopping centre may be detrimentally subjected to a road bypass 5 years after the lease has been negotiated. This factor is immaterial to the shopping centre's annual value. This underlines the importance of the date of valuation. Annual rental value is always and must be at a certain date. It is the correct annual value at that date.

- BOTH PARTIES ARE FULLY AWARE. It is assumed in the hypothetical agreement that both the landlord and tenant are fully aware of all factors that may affect annual value. A rental agreement under which one or other of the parties is unaware of an important factor is an "out of line" rent and cannot be used to determine annual value.

"OUT OF LINE" RENTS

Using lump sum theory, the following are out of line rents:

- Agreement date is too far from the date of valuation. That is, the lease agreement is too "old". The answer here is to look into the particular circumstances of the subject property. It may well be that the pace of the market may be much slower for some properties in some localities. For example, a slow growth country town. In such circumstances a lease agreement 2 years old may still be the best evidence of annual value particularly, where (as is invariably the case in a "slow" country town) there a dearth of lease agreements to use.

On the other hand in a strong growth centre such as Chatswood, Parramatta and North Sydney, a lease agreement 2 months old may be "out of line". However, there are usually a number of alternative lease agreements to use in determining annual value. For similar reasons, subsequent lease agreements can be used to determine annual value at the date of valuation. The only question is, whether or not some important happening has affected the market between the date of valuation and subsequent lease agreement. For example, the road bypass example above - *Daandine Pastoral Company*.

- If the rent is market rent and the terms and conditions of the lease are normal, then the annual value of the subject premises is the same as if it was vacant - *A G Robertson.* That is, the tenant does not enjoy a "profit rental" and therefore, would be indifferent to whether or not he/she moves to alternative premises at market rent. Strictly speaking, there may be an "inertia factor" to be included in the value of the lease to the tenant. That is, the cost of moving and/or loss of site goodwill.

- THE RENT IS TOO REMOTE FROM THE SUBJECT PROPERTY. The most comparable rental evidence is in the same building. However, most are in different buildings at different localities. The further away, the rental evidence, the more likely it is to be non comparable.

- However, if there is a dearth of rental evidence, then it may be necessary to use rents from other localities sometimes far away. Using lump sum theory it can be allowable to use rents from other "comparable" country towns or suburbs - *Bingham and Griffith Producers.* Using the rule in *Seatainers*, it is difficult to imagine any situation where there would be a lack of rental evidence.

- The comparable rent should be under "normal terms and conditions". That is, normal for that type of lease, in that locality, for the same land use, in a comparable building to a comparable tenant.

It is assumed that the "same land use" is the highest and best use of the premises and allowable under the lease agreement. It can be seen that whereas a lump sum sale cannot be divorced from the terms and conditions of the contract, neither, can a lease agreement be divorced from the terms and conditions of the lease agreement. Some judgments have made this fundamental error in looking at the "face" rent only as the rent. This is wrong. the two must be considered together.

It is well established that a premium can be adjusted to an "annual rental equivalent" (ARE) and added to the residue for comparison purposes. Lease incentives such as a rent free period or "free" fitouts are just premiums in reverse and are treated accordingly. If the terms and conditions are normal then rental paid is annual value subject to those terms and conditions.

Private restrictions on use can be equated to zoning or town planning restrictions for lump sum valuations. For example, restrictive user clauses.

- OFFERS AND OPTIONS ARE NOT EVIDENCE OF ANNUAL VALUE. This is because they are not concluded or binding agreements on BOTH parties - *McDonald v Dep Comm Land Tax.*

- A LEASE TO AN ADJOINING LESSEE. Such an agreement will not be evidence of annual value as invariably such leases are higher than the annual value - *Re Lucas and Chesterfield Gas.*

WHERE ANNUAL VALUES ARE DIFFERENT FROM LUMP SUM VALUES

The above argues that generally, lump sum valuation theory can be directly used to value annual values. However, there is one substantial difference that affects annual value:

- The quality or "credit worthiness" of the tenant is taken into account. Such personal factors are ignored in lump sum valuations because the credit worthiness of the purchaser is immaterial as the transaction is settled by a bank cheque paying out the vendor and/or mortgagees at date of settlement. However, in a rental agreement the landlord is taking a larger risk as the tenant is promising to pay rent in the future over a long period of time. Therefore, the risk to the future rent is an important factor in the bargaining equation. This is shown in shopping centres where the bargaining power of national retailers is much stronger than the small "mum and dad" boutiques and other variety stores (known as "wood chucks" in the retail industry). The large national companies pay considerably less per square metre than do the other tenants.

The same applies to commercial leases. Government departments expect and receive substantial rent discounts for the following reasons:

- The rent is "riskfree"
- The are rented is generally a whole floor(s)
- There is a high probability that such tenants will expand in the near future.

Therefore, the subsequent rental agreement must be based on rental agreements with equivalent tenants. For private tenants, stockmarket credit worthiness measures can be used to compare tenants for example, the ratio of dividend paid to asset backing.

"ANNUAL RENT'

The words "annual market rental value" used in the clause in *Woolworth's* case are unnecessary. "Annual value" is enough or at the most "annual rental value".

Reference to the "viability of the lessee's business" is irrelevant in determining the annual value (283) as are expected offers to the lessee or lessor at the end of the lease period. It is always a question of determining "market rent". If the rent revue period is unusually long (in this case 20 years) then that must be reflected in the annual value. That is, the annual value will be higher than an otherwise equivalent lease with rent review periods of 10 years.

"The valuer must have to determine the annual market rental value of the premises if let on the conditions of the lease and in my view, for the term of 20 years from 1 September 1986" (283).

"How can a rental be the fair open market value of the premises if it is fixed without any regard to the duration and conditions of the tenancy?" *re Lunds Lease* (1926) NZLR 541.

Clear words would be required to support the construction that the annual value of the rented premises should be determined without reference to the duration of the tenancy - *re Brechin* (1928) NZLR 241.

QUESTION OF MISTAKE - Legal and General (1985) 1 NSWLR 314

McHugh JA distinguished (331) between a mistake involving departure from the question referred to the valuer and mistake as to the process of valuation. If the latter, the parties are bound by the lease clause they agreed to. That is, it is a question of contract. However, there is still a question of damages against the valuer under tort - *Sutcliffe v Thackrah* (1974) AC 727. An example of departure from the question referred to the valuer is if he/she valued the wrong premises as this would not comply with the terms of the agreement between the parties.

The function of the rent review clause is not to adjust the existing rent because of inflation but rather to adjust the existing rent because it is out of line with equivalent market rents. The assessment of future inflation can be no more than speculation and that "there is no reason for thinking it is [a task] within the capacity of the real estate valuers" - *Capel* (this is in disagreement with the findings in *Lear's* case). Any potential effect of future inflation is already taken into account by the market in the annual market value.

In *Horowitz* the valuer wrongly held that the restrictive user clause is to be ignored. Held that the parties were bound by the wrong determination because of contract "...shall accordingly be final and binding on the parties to the lease".

The term "fair open market value" as used in *Capel's* case (unreported 1984) means "market value" as "market value" must be "fair" and "open".

THE USE OF THE AUCTION SCENARIO IN VALUATION

A useful way to conceptualize valuation problems is to imagine that the property is being put up at an auction. How would the parties bid? The same idea can be applied to the rental value of a lease. If the lease were put up at auction, how much rent would the parties bid?

RENOVATIONS

In *Bestwood* "..shall take a lease of the building as so renovated" means that at the review date the annual value is determined as the building stands and as renovated (199).

THE HYPOTHETICAL LESSEE

In *Legal and General* under "other valuation considerations" included the expression "some cognisance of the total occupancy by a tenant of such covenant as Coles Myer Ltd has to be made" was considered. Held that these factors required a discount in the rent being "example or indication that the market would require a discount because the letting in line was a single line of large premises and thus of necessity to a financially strong tenant" (364).

In *Bestwood*: "To have regard to the fact that even in an hypothetical leasing situation the number of prospective tenants is limited because of the nature and size of the premises and thus the large quantum of rent, is not to depart from the principle of determining market rental by reference to hypothetical lessors and lessees". (364)

The valuer should take into account the financial strength of the tenant. Why? Because this was an important consideration in the initial agreement (date of contract). Conceptual problems arise when the rent review clause is considered independently of the original terms of the agreement which were meant to apply throughout the lease period including the rent reviews.

CONFIDENTIALITY CLAUSES AND INCENTIVES

In *NMLA* case the valuer was asked to disregard matters in the "disregarded matters" clause. This included any rent free period or other incentives. Held that "disregard" does not mean "ignore". It still allows the valuer to determine rent from comparable leases not subject to incentives (515).

> "The critical element of the exercise is to ascertain the open market rent for the premises. What has to be disregarded is the distortion of the true values that may occur if factors such as cash premiums, rent free periods or other incentives have an effect on the rental actually paid by a tenant of the premises which are being used as comparable premises in the process of valuing. To achieve a true level of value it is those distortions that have to be disregarded. To treat "disregard" as the equivalent of "ignore" achieves the result that a true value is not achieved" (514).

On the other hand, in *Ropart* "taking no account of" required the valuer to ignore or to disregard the matters of which the contract states that he is to take no account. Rolfe J disagrees with *NMLA* case as "rewriting" the contract (518). "The finding of the open market rent was to be done making the assumptions, disregarding the disregarded matters and having regard to current open market rental values" (518).

However, the *Holman's* case is better law:

> "Once it is accepted that it is the market rental which is to be fixed by the valuation process, the substance of the respondent's arguments disappears. It is the rent which could be obtained in the marketplace for the premises upon terms similar to those of these leases, assuming willing but overly anxious potential landlord and tenant, and assuming that such parties will reach agreement. In determining this value, it is obviously necessary to look at other premises of similar quality and in similar locations and the terms upon which they are available in the market place. This inevitably involves a consideration of any incentives, with appropriate adjustments" (223).

In *Re Dickinson,* the arbitrator was able to subpoena evidence of the subject confidentiality clause. Although a New Zealand case, there would not appear to be any reason why a similar subpoena would not be successful under the Commercial Arbitration Act (Cth). The reason was one of "public policy" as the confidentiality clause was designed to protect the lessor only and therefore, cannot stand.

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TENANCY TRIBUNAL ACT 1994 & COMMERCIAL & RETAIL LEASES CODE OF PRACTICE

EFFECT OF THE NEW ACT & CODE

The new Act and Code now imposes particular responsibilities and obligations on landlords of certain premises defined in the Act and the Code.

Failure to comply with the provisions of the Code may result in; prosecution of a landlord (with maximum penalties of $5,000.00 and/or 6 months in jail), a tenant being granted a minimum 5 year Lease over the premises, the loss of the landlord's rights to recover outgoings and increases in rents/outgoings, the landlord's acceptance of lower rents, payment of compensation to a tenant and allowing a tenant the right to terminate or withdraw from a Lease in certain circumstances.

A landlord must be correctly advised and the landlord's future Leases must be correctly prepared and comply with the provisions of the Act and the Code. The Code was effective on and from 1 January 1995.

BACKGROUND

Following the failure of lengthy negotiations to produce a universally acceptable, voluntary code of conduct to govern dealings between commercial landlords and tenants, the Tenancy Tribunal Act 1994 was passed by the ACT Government on 11 October 1994. This Act and the associated Commercial & Retail Leases Code of Practice made important differences to the way you as commercial landlords conduct your leasing business. Similar legislative changes have been made in New South Wales and have been or are being investigated in Queensland, Western Australia, Tasmania South Australia and Victoria.

The ACT legislation was designed, among other things, to improve what was seen as a serious imbalance in bargaining power between many retail and commercial landlords and their smaller tenants, to stop demands for "key money", to regulate charges for outgoings and rent review methods and to set up a process for resolving disputes.

Although representative organisations, such as the BOMA were opposed to legislative regulation, it is now a fact of business life. Once the parties have developed an understanding of the new Act and Code, with their emphasis on full disclosure of information from the beginning of lease negotiations and time limits for providing and executing documents, there should be less to argue about. Both landlords and tenants, and their advisers, might save time and money in the process.

THE ACT

Basically the Act establishes a Tenancy Tribunal and other methods for settling disputes about certain types of leases and it provides for a Code of Practice for those Leases. It also changes "landlords" to "owners" and defines many of the terms used in the leasing process.

In s5, the Government tries to ensure that parties cannot avoid or contract out of the provisions of the Act or Code by either entering into the Lease outside of the ACT or by including clauses in Leases otherwise covered, to the effect that the Lease is governed by the laws of any other State or Territory. You should also be aware that the Magistrates Court has no control over a dispute to which the Act applies, but that you may in certain circumstances appeal from the Tribunal to the Supreme Court.

Disputes relating to Leases already entered into may only be covered by the Act if the particular conduct or behaviour causing the dispute happens after the "substantive commencement date" of the Act.

The Act provides for severe penalties; $5 000 or imprisonment for 6 months or both for such things as failing to give evidence to the Tenancy Tribunal or "obstructing, hindering or resisting" the Registrar of the Tenancy Tribunal.

The substance of the Commercial & Retail Leases Code of Practice came into effect on I January 1995. This is the basis of the Government's commercial and retail Leases package. The Act sets up the framework and the Code provides details of the day to day relations and obligations between parties to a Lease.

THE CODE

One of the first important points is the definition of "Lease" included in the interpretation clause of the Code. At common law there is a major difference between a "Lease" and a "licence". Under a Lease, a tenant has a right to "exclusive" possession but under a licence, the tenant does not have this exclusive right. The Code defines "Lease" to mean:

"... an agreement, whether in writing or not, that provides for the occupation of premises, exclusively or otherwise, whether for a fixed term, periodically or at will, and includes a Sublease or licence.....

So the Code is intended to apply to a wider variety of agreements or occupancy rights than perhaps its name suggests. Whether this was done on the basis of thoroughness or in an attempt to prevent parties avoiding the Code's provisions by calling a Lease agreement by another name, the effect is the same. The Code's application is very broad and is the definition of "Lease" used in this paper.

LEASES NOT COVERED BY CODE

It may be easier to begin by considering those Leases that are not covered by the Code. The Code will not apply to:

- Crown Headleases (explanation of Provisions 4)
- Agreements relating to the use of an unspecified portion of the common area of a shopping centre (cl 2).
- Leases granted under the and Land (Planning & Environment} Act 1991(cl 2)
- Lease for retail premises, or premises located in a shopping centre with a lettable area of more than 1000 square metres leased to a corporation that is not eligible to be incorporated as a proprietary limited company under the Corporations law (cl 5).
- Lease for premises for less than 6 months, at least until the tenant has been in continuous occupation of the premises for 6 months (cl 7).

Landlords must exercise extreme caution with short term Leases of 6 months or less. If a tenant **continuously** occupies the premises for longer than 6 months then the Code will apply to that tenancy and the tenant can demand a 5 year Lease. Consider the effect of a month to month tenancy as a short term measure before the sale or redevelopment of a building!

Most provisions of the Code will not apply to Leases entered into before I January 1995, but there are some important exceptions some of which are referred to in this paper. Before considering the Leases that that are covered by the Code, the Code considers a Lease to have been "entered into":

- when a person enters into possession of the premises under a Lease OR begins to pay rent under the Lease, whichever happens first.
- if both parties execute the Lease before the tenant enters into possession under the Lease or begins to pay rent under the Lease, as soon as both parties execute the Lease.

LEASES COVERED BY CODE

There are 3 relevant types of premises that are affected by the Act and Code:

- retail premises
- commercial premises
- "specified" premises.

The Act applies to those premises as follows:

RETAIL PREMISES: If less than 1,000 m^2 whether the tenant is an individual or a company.
If more than 1,000 m^2 only if the tenant is an individual and not a company.
If more than 1,000 m^2 if the tenant is a company and eligible to be incorporated as a Pty Ltd company.

COMMERCIAL PREMISES: If less than 300 m^2; "small commercial premises".
If more/less than 1,000 m^2 and in a shopping Centre same rules apply as to 1,000 m^2 retail premises.

SPECIFIED PREMISES: These are defined in the Code as being occupied by:

- incorporated Associations (eg clubs) or organisations eligible to be so incorporated
- unincorporated charities
- child care centres
- sports centres
- art galleries and
- gardening supply centres.

To make any sense of the above, the definitions in the Act are relevant:

- "**retail premises**" - means premises used or intended to be use wholly or predominantly for carrying on a business involving the sale or hire of goods by retail the provision of services by retail (shops).

- "**commercial premises**" means premises used or intended to be used wholly or predominantly for non-retail purposes (offices).

- "**small commercial premises**" means commercial premises with a lettable area of not more than 300 m^2 in (note that the Code provides no method of determining the lettable area).

- "**shopping centre**" means a group of premises where at least 5 of the premises are retail, small commercial or specified premises or a mix of those all of the premises leased or to be leased have the same owner or all comprise Units within a single Units Plan the premises are in a single building or in buildings that adjoin or, if separated, are separated only by land owned by the owner of the premises (query with a Units Plan where the common property is owned by the Body Corporate!) and the group of premises is promoted as or generally regarded as a shopping centre, mall, court or arcade. All of the above criteria must apply.

A suitable "rule of thumb test" as to whether a Lease is covered by the Code is as follows:

- **Specified premises** - these will always be covered by the Code

- **Retail premises** - it would appear that the only retail premises that are exempt from the Code are premises over 1,000 m^2 and leased by a public company. Caution must be exercised in determining whether the premises are "retail" premises as you will note from the definition that retail involves the "sale or hire of goods" and the "provision of services by retail". There is no definition or assistance in the Code or the Act as to what the provisions of services may be. Until tested one would expect that this is any service provided to an "end user".

- **Commercial premises** - if less than 300 m^2 then the Code will apply (however note the extension to the area if the commercial premises is in a shopping centre - this is probably not likely to be a common occurrence). Given the uncertainty as to what constitutes retail premises and the fact that commercial premises is defined as being other than retail premises perhaps one should look at commercial premises as being purely manufacturing, storage, wholesaling and other activities that do not involve the predominant dealing with members of the public or end users.

WHEN DOES THE CODE START APPLYING TO LEASES? - Cl 5, d9 & cl 13

Generally speaking the Code will apply to:

- Leases entered into on or after I January 1995
- Leases renewed, or extended under an option on or after I January 1995 (here the Code will apply to all provisions of a Lease as renewed or entered into under an option).
- Variations to an already existing Lease where the provisions are made on or after I January 1995 (where the Code will apply only to that varied provision or provisions and only to the extent that it can be applied to the new provision/provisions in isolation).

Conduct by a party to a Lease that is:

- unconscionable
- coercive
- harsh and oppressive (after I January 1995)

is prohibited by the Code in respect of all Leases whether they were entered into before or after I January 1995, as is a demand for or payment of "key money".

MEDIATION

Under the Tenancy Tribunal Act, multiple rent review clauses and ratchet clauses in Leases entered into after I January 1994 will be void from 1 January 1995. In the case of multiple rent review clauses and ratchet clauses, as these provisions can no longer be put into effect, the Code provides that the parties may negotiate a new rent on the review date however, if they are unable to reach agreement, then the dispute can be referred for mediation. If the mediation fails then the rent will be determined to be the market rent which is set by applying the formula in the Code. This must be of concern to landlords if there is a falling market as rents will obviously then be reduced.

THE NEGOTIATING PROCESS

Probably the greater part of the Code concerns the negotiation process and related matters. It places a heavy emphasis on the importance of parties providing all necessary information in a timely manner to each other. The information must be correct, it must not be misleading and it must not omit any "material matter" (defined by Code cl 12 and cl 14).

If one party deliberately provides incorrect or misleading information or omits a material matter of which they were aware, or ought to have been aware, and the other party enters into the Lease because of this - then the party entering the Lease will be entitled to compensation for damage suffered as a result of the guilty party's actions, in addition to any other's rights they may have (cl 14 and cl 15).

As soon as possible the owner must provide the prospective tenant with a copy of the proposed form of Lease and must also tell them about the existence of the Code and the fact that a copy can be bought from ACT Government Shopfronts. The Lease is deemed or assumed to have commenced on the earlier of the following dates:

- when the tenant enters into the premises (under the Lease)
- the tenant first pays rent on the premises
- or the owner and the tenant sign the Lease document.

KEY MONEY Cl 58-61 & Cl 21 & 31

The payment or receipt of key money is prohibited by the Code and the tenant may recover any paid by applying to the Tenancy Tribunal.

SECURITY BONDS - Cl 99-103

Security bonds are defined by the Code and must not be more than the equivalent of 3 months rent. The bond must be held in Trust in an interest bearing account. The bond, together with any interest earned must be returned to the tenant within I month of the end of the Lease. The owner may account from the bond to cover unpaid rent and any outgoings or costs incurred for the repair of the premises.

MINIMUM 5 YEAR TERM - Cl 33-39

The Code generally requires all Leases to be for a minimum total term of 5 years, (including any options). For example, a Lease may be for either 5 years or for 3 years with an option to extend the Lease for a further 2 years.

If a Lease does not have a 5 year term, it will still be valid, but the tenant can notify the owner in writing no later than 90 days before the Lease was to have ended that the tenant is extending the Lease so that the total period is 5 years.

The Code does however, recognise the need for shorter terms in certain circumstances, for example, the owner may intend demolishing the premises in 3 years time, or the tenant may only intend running the business for 3 years. In these circumstances it would be possible to have a 3 year term - that is the tenant may waive the right under the Code to a 5 year term - but only where a lawyer (who is not acting for the owner) explains the effect of the waiver and certifies in writing that this has been done.

Another example of terms less than 5 years being permitted by the Code occurs when such a term would be inconsistent with the terms of a Headlease under which the owner holds the property. Of course, if this is the case, it must be drawn to the attention of a prospective tenant by the owner.

RENT & RENT REVIEWS -Cl 42-60, 109, 121

A multiple rent review clause or a ratchet clause will be void (of no legal effect). Care must be taken in determining the method of calculating rent to be paid in the first year of a Lease - as under the Code any attempt to calculate the rent on the basis of two or more methods and adopting whichever is highest will be void and unenforceable.

This does not mean that the first year's rent cannot be calculated, for example, party on turnover and partly on a set amount. (ie $I,000/month plus 5% of turnover) rather, the method must be certain from the beginning. And remember that turnover rent whether relating to all or part of rent payments must be calculated an actual turnover (see cl 48 for exclusions from turnover etc).

If a rent clause was found to be void the parties may renegotiate an acceptable way of calculating the rent. If they cannot agree, the rent will be set at market rent for those premises. (See earlier comments in relation to multiple rent reviews and ratchet clauses - when does the Code start applying to Leases?).

The Code also sets out (51-60, Schd 3) the methods for determining market rental where this becomes necessary either when a Lease is renewed, during the term of the Lease or when an owner and tenant cannot agree on a rent value. These methods include the use of valuers, the division of costs for valuation and the use of mediation or referral to the Tenancy Tribunal in the case of continued disagreement between the parties.

How often you may change the rent is also governed by the Code. You should not include a clause in a Lease which allows you to increase the rent in the first 12 months of the Lease or more often than once a year after the end of the first year of the term. Any such clause will be void and legally unenforceable. You must include the date of any proposed rent reviews in the Lease. If you do not - you may not make any changes to the rent (On the rent review date.)

The Code also contains provisions relating to adjustments to turnover rent, the frequency of adjustments etc and, if your premises are in a shopping centre, (cl 109) the owner may ask the tenant to provide monthly turnover figures where rent is based on or includes a component of turnover. (This must not be

shared with anyone other than the few exceptions listed in ?cl 109). The owner should also be aware that terminating a tenant's Lease for the reason that their turnover is too low is not permitted (cl 12 1).

ALTERATIONS, DISTURBANCE, & REFURBISHMENTS - Cl 69-73

In the case of alterations/refurbishments being undertaken which might affect a tenant, an owner must advise the tenant in writing of the proposal and any steps which might be undertaken to ?minimise their effect at least 2 months before the alterations or refurbishments take place. Obviously in cases of emergency this length of notice will not be possible, but the Code requires an owner to give "reasonable notice". The owner should also remember where he/she wants a tenant to refurbish or refit the premises the Lease must contain a description of the type, extent and timing of the proposed work (ie painting, replacement of carpets/fittings, decorating etc).

Where an owner has:

- inhibited, in a substantial manner, access to the premises, (Compensation is not payable where the owner is responding to an emergency or is taking action in accordance with a statutory requirement or lawful direction from a Government agency).

- failed to rectify, as soon as practicable, any breakdown of plant or equipment under the care and maintenance of the owner.

- neglected to clean, maintain or repair a shopping centre, or in some other way, adversely affected the trade of the tenant without reasonable cause.

- a tenant is entitled, under the Code, to "reasonable compensation" for any actual loss or damage suffered as a result. Reasonable compensation will reflect any concessions already given to the tenant, for example, reduced rent, as the result of the possible or actual disturbance. If a shopping centre is being enlarged (lawfully under the terms of the Lease) or there is a change in tenancies within the centre this will not be sufficient to entitle a-tenant to compensation.

DEMOLITION - Cl 74

The owner can include a termination clause in the Lease to cover the possibility of demolition during the term of the Lease. The Code defines "demolition" to include any major work that cannot be done while tenants arc occupying the premises. Before the owner can terminate a Lease on this ground, he/she must:

- provide details of the works to the tenant, showing that it will be carried out within a reasonable time after termination.

- provide at least 6 months notice in writing before the proposed termination for a 5 year lease, and 3 months written notice if the Lease term is 12 months or less.

- pay the tenant reasonable compensation - whether or not you proceed with the work. You may take into account any concessions given to the tenant in calculating the compensation.

DAMAGED PREMISES - Cl 75- 79

If premises are damaged so badly that a tenant cannot use them you may not take rent or payment for outgoings ("abatement of rent"). This prohibition does not apply if the tenant has caused the damage or has done some act to cause your insurance policy on the building to be voided or cancelled. Where the damage is so severe that it is not possible or economical to repair the premises you must, within 2 months of the damage happening, give the tenant notice of the fact. Either the owner or the tenant can then terminate the Lease with 7 days notice with no compensation to the tenant. The tenant should have insurance to cover his/her losses in such a case.

If the tenant can still make some use of the premises he/she must pay only an amount of rent and outgoings in proportion to the use still possible. If the owner decides to repair the damage but do not do so within a reasonable time the tenant can claim compensation as a result. If the owner does not tell the tenant that he/she is not going to repair major damage or does not give the tenant notice within 2 months of the damage, the tenant can also claim compensation. Of course, if both the owner and tenant agree to terminate the Lease in the case of major damage the owner may do so.

EMPLOYMENT RESTRICTIONS - Cl 81j

A Lease must not attempt to limit a tenant's right to employ people of their own choosing - except to set minimum standards of competence and behaviour by employees or contractors and to ensure tenants comply with any industrial award or agreement or enterprise agreement which affects a shopping centre where the premises are located.

ADDITIONAL REQUIREMENTS FOR PREMISES IN SHOPPING CENTRES

The Code includes a number of additional requirements in respect of the relationship between owners and tenants in shopping centres. These relate to:

- management information - such as the provision and use of monthly turnover figures only where the Lease provides for rent to be worked out in relation to turnover (cl 109).

- statistical information - where a tenant must pay any amount in outgoings for the gathering of statistical information (and that requirement must be included in the Lease). The Lease must also contain a provision to ensure that the tenant has access to the information(cl 110).

- advertising and promotion costs - where a Lease requires a tenant to contribute to these costs for an opening promotion the owner must provide details of proposed expenditure to the tenant and at least I month before the opening promotion - this must be provided before you collect any of the money. Where the tenant has to contribute to these costs, under a Lease the owner must give the tenant a marketing plan that sets out the details for spending in that accounting period and any amount of money previously levied for advertising and promotion. This must be provided at least I month before the start of each of the owner's accounting periods (cl 111-113).

If the owner does not provide the necessary information when he/she should, the tenant may not have to pay the advertising/promotional costs or may obtain a refund of what the tenant has already paid. The owner should keep any money left over from advertising and promotional costs at the end of the accounting year in a marketing fund for future advertising and promotions of the shopping centre.

OTHER NON-SPECIFIC OUTGOINGS Cl 114

Any charge to the tenant must be related to the tenant. Where an outgoing relates to more than one tenant or a group of premises (ie non-specific outgoings) the owner may only recover the costs from those tenants who share the benefit of the outgoings and the owner must calculate the amount any tenant pays according to the area of the tenant's premises. (See p92 Explanation of Provisions for example).

TRADING HOURS - Cl 118-119

There must be set "core hours" when the shopping centre is open for business and if the owner includes any clauses about trading hours in the Lease they must usually be the "core hours". As well as complying with any laws about trading hours, the owner must have the written agreement of the majority of all tenants to make any changes to "core hours". In a new centre the owner can set the "core hours" by agreement in the Leases.

The owner may reach an agreement with a tenant to allow the tenant to trade outside the "core hours" but the tenant must pay any extra costs of the owner as a result for opening and operating them, including advertising and promotion.

RELOCATION - Cl 115-117

If the owner has included a clause about relocating tenants to enable him/her to renovate or alter the premises or centre it must also include:

- a requirement to advise tenants in writing at least 3 months before work beings
- an offer of alternative comparable premises on similar terms
- advice that the tenant may elect to terminate the Lease within I month of the relocation notice (giving 3 months notice)
- provision for you to pay reasonable relocation costs and compensation costs - that takes into account any concessions you have given to the tenant.

RESTRAINT OF TRADE Cl 120

The Lease cannot include any attempt to prevent a tenant from also carrying on business outside the centre, either during or after the Lease, unless they want to use the name of the centre in connection with that outside business.

TENANTS' ASSOCIATION - Cl 122

The owner cannot make a tenant join this type of body nor can you prevent them from joining one.

CONCLUDING NEGOTIATIONS & ACCEPTANCE Cl 40-42

This may seem a lot of work to reach the stage of completing preparation of a Lease. Lawyers may be tempted to use "cover all provisions" which provide for the Lease "to be taken to include" certain provisions of the Code. Remembering that the Code requires parties to conduct their dealings with one another in accordance with the Code (cl 10), that the Code will generally apply where anything in the Lease is in conflict with the Code (cl I 1) and that a Lease will be taken to include any provisions required by the Code whether or not they have been addressed in the Lease (cl 12).

The parties having worked their way through negotiations to the point where their requirements and those of the Code are satisfied, the Lease documentation can be concluded. As a written Lease is binding once both parties have signed it, the last party signing the Lease must advise the other party within 7 days. The owner must promptly lodge the document for assessment of stamp duty.

If the Lease is to be unregistered the owner must give a copy of the stamped Lease to the tenant within 21 days of the receiving its back from the Office of the Commissioner for Revenue. Where a Lease is to be registered the owner must have this done as soon as possible and then give a copy of the stamped, registered Lease to the tenant within 21 days of the Registrar General's Office returning it. Leases for an initial term of 3 years or more must be registered.

RENEWAL & TERMINATION - Cl 94-98

A tenant is entitled to write to the owner during the last 12 months of the Lease to find out if the owner is going to renew the Lease. The owner has 1 month to answer the tenant. In his/her reply he/she must either offer a renewal or tell the tenant he/she does not intend to renew the Lease. Any offer to renew must include information of the terms and conditions, including rent in the first year proposed for the new Lease.

If the owner does not reply to the tenant within 1 month of receiving their request then the Lease will be effectively extended from the date by which he/she should have replied until he/she does respond (eg: see p 80 of E of P). Also if the owner withdraws the offer to renew the Lease it will be considered to be

extended by the time between when the offer was made and when it was withdrawn. (In addition to extensions under cl 54 and cl 96). If the tenant does not want to extend the Lease they can terminate it at any time after the current Lease would have expired by giving the owner 1 month's notice in writing.

ASSIGNMENTS, SUBLEASES & MORTGAGES OF LEASES - Cl 83- 93

Whilst the Code recognises a tenant's possible need to assign/transfer, underlet or mortgage the Lease in the course of the tenant's business, the Code also gives the owner the right to either accept or reject a tenant's proposal to do so. It provides a process for the tenant to propose an assignment/transfer or underletting or mortgage of the Lease to the owner and gives the owner the opportunity to accept the proposal and provides a list of acceptable reasons to refuse the tenant's request. In the cases of assignments or underleases, a change in the use or premises, the bad financial position or lack of business skills of the new tenant, or the tenant not being able to produce a current Certificate of Occupancy for the premises are acceptable reasons.

In the case of a mortgage, the application may be refused if the tenant does not have sound finances or the ability to meet all of their obligations under the mortgage. Obviously there will be costs incurred in deciding whether or not to accept a tenant's proposal and the owner may seek to recover the costs from the tenant. The owner should be aware that your tenant (and if a company the guarantors) no longer have continuing obligations under the Lease there is an approved assignments/transfer.

A disclosure statement must be provided to the "new tenant" however previous disclosure statements may operate.

Except for those few times that the Code provides a way of settling unresolved disputes the owner must resolve all other disputes in accordance with the process of mediation and referral of disputes to the Tenancy Tribunal as set out in the Tenancy Tribunal Act 1994.

LEASE PURPOSES

Many owners have gone through the expensive process (application fees and possibly betterment tax) of having the purposes provision in their Leases amended to enhance the use to which the property can be put. The only reference to Lease purposes in the Code is that "the provisions of the Code are subject to the provisions of any Lease purpose in a Crown Headlease". The disclosure statement requires that the "permitted use of the premises" be declared and the owner is reminded of the obligation not to provide any misleading information in the disclosure statement which in turn might lead to a termination of the Lease by the tenant and/or a claim for compensation.

Leases and disclosure statements will need to be carefully drafted to avoid any difficulties in the event that a tenant is allowed to enter into occupation and use premises for purposes which are not strictly in accordance with the Crown Lease.