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THE ABOLITION OF THE IRISH UPWARD-ONLY RENT REVIEWS

IP 1/12

The College of Estate Management

THE ABOLITION OF THE IRISH UPWARD-ONLY RENT REVIEWS

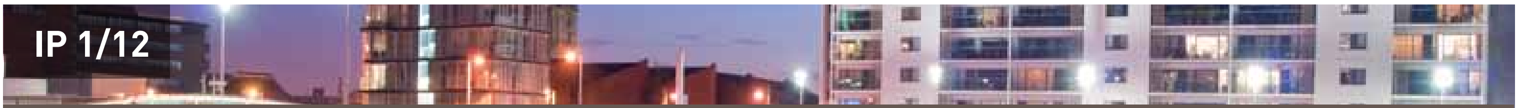
A CEM Occasional Paper based on an investigation into the effects of the legislative ban of upward-only rent reviews on the Irish retail property market by Sinead Joyce.

CEM OCCASIONAL PAPER SERIES February 2012

INTRODUCTION

This research concerns the Irish legislative ban on the use of upward-only rent reviews (UORRs) which came into effect on 28 February 2010. The ban has been a sensitive and topical issue as it only affects new leases drawn up after this date. Tenancies that were in place prior to this date continue to be subject to UORRs, creating two tiers in the Irish commercial market: i.e. tenants with new leases, and tenants with legacy leases. This study explores the Irish position and concentrates on the effects this legislation could have on the Irish retail sector and on restoring Ireland's economic growth. It also seeks to determine whether the Irish government was premature in implementing the legislative ban on UORRs. UK and Australian experiences are also explored, as the UK is now unique in allowing UORR clauses in new leases since Australia legislated against them in favour of indexation as an alternative rent review mechanism.

Historically, UORRs have been unique to common law countries which have a UK influence in their history, e.g. Ireland and Australia. Where a UORR clause exists, rents are reviewed in line with market conditions at a predetermined interval, generally every five years. If the open market rental value has increased over that time, the rent is adjusted upwards in line with market rents. If market rents have fallen, rental levels will remain at the same level they were at for the previous five years and cannot be reduced (Ward *et al*. 1998). Ireland's commercial lease trends have been predominately based on 'institutional leases', i.e. a 20- to 25-year lease term with a five-yearly UORR clause on a full repairing and insuring covenant.

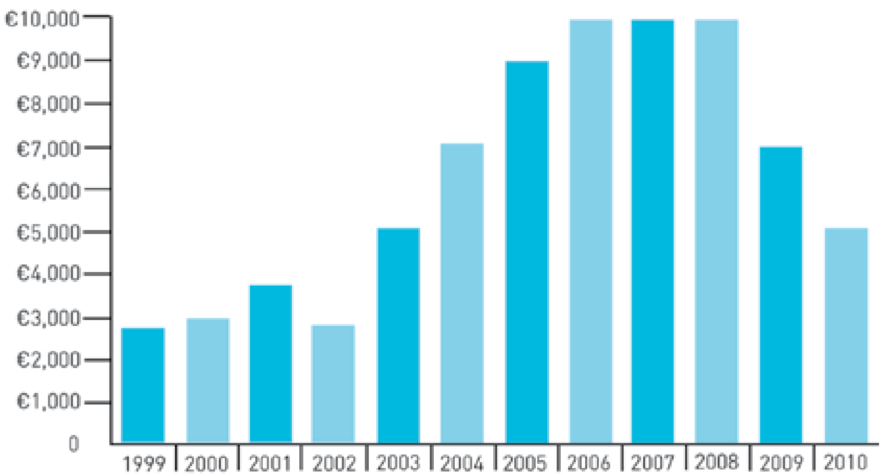


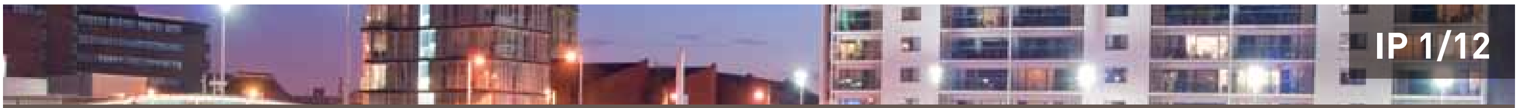
THE IRISH EXPERIENCE

The use of UORRs has only been called into question in Ireland since the property market began to decline in 2007. Prior to this, Ireland had enjoyed both an economic and a property boom since the turn of the century. The boom was fuelled by high employment rates and easy access to finance. This economic expansion earned Ireland the nickname 'the Celtic Tiger'. It was an era when the demand for property soared so quickly that supply simply could not keep up. Property rental values reached unprecedented heights and lease covenants were dominated by landlords' terms. Rental incentives focused on rent-free periods and fit-out contributions. The inclusion of UORRs was rarely called into question. However, in 2007 the property market started to slow and the Irish economy began to decline rapidly. Unemployment began to escalate as many companies were forced to close for business. As a result, the property market stood still; and, furthermore, credit availability dried up as corruption within Ireland's national banks was exposed.

The economy continued to spiral downwards in 2008. Unemployment increased by 70% (The Economic and Social Research Institute (ESRI) 2008), and there was an 86% increase in the number of businesses that closed compared to 2007 (Farrell Grant Sparks, cited in Kehoe and Daly 2008). Many employers cited difficulties meeting the high minimum wage levels (€8.65 per hour in 2008 (and at the time of writing)), as well as an inability to meet 'boom time' rental costs. The retail sector, in particular, was hit hard as the population began to curb spending because of a lack of security in the employment sector. The price of consumer goods came into the spotlight, with retailers blaming high rental costs as being the barrier to reducing prices. Ireland had become internationally uncompetitive because it had allowed a credit-fuelled property bubble to inflate property values excessively. Prime rental levels in Dublin rose by 240% between 2000 and 2007 (McCarthy 2010). In 2007, prime retail yields were as low as 2%, with Zone A rents on Grafton Street in central Dublin reaching over €10,000 per square metre per annum (see Figure 1).

FIGURE 1 **Zone A rents on Grafton Street, Dublin, per square metre**





Since 2007, prime retail rents have decreased by 50% from peak levels (CBRE 2011a) and in 2011 stood at approximately €5,000 per square metre per annum (CBRE 2011b).

As many premises were forced to close, UORRs were blamed for keeping rental levels artificially high while open market rental values plummeted. The retail sector representatives Retail Excellence Ireland (REI) began to challenge the constitutionality of UORRs in commercial leases. REI's objective was to introduce emergency legislation to outlaw UORRs in an attempt to reduce retailers' principal outgoings.

In March 2009, the Irish government, after much lobbying from REI, indicated that it was considering legislating against the UORR clause if landlords did not take a flexible and pragmatic approach to rent negotiations and it urged property organisations to consider alternatives to the existing practice. The Society of Chartered Surveyors (SCS) responded by publishing results from an extensive survey, concluding that the market had already begun to correct itself as a result of negotiations that were taking place between landlords and tenants. The SCS proceeded to submit a recommendation to the Irish government that formal interference through legislation was unnecessary and would cause more harm than good to an already troubled property market (SCS 2009a). The Irish Auctioneers and Valuers Institute (IAVI) also discouraged the government from acting, warning that legislation could deter the return of development activity because of the implications it would have on raising finance and on negative development land values (IAVI 2009).

While the IAVI advised caution, they also proposed solutions such as allowing tenants and landlords to contract out of the Act in circumstances where it would be mutually beneficial, thus providing security for landlords in the form of a base rent and the security of longer leases for tenants who invest heavily in fit out and furnishings. The IAVI also recommended a base level of initial rent which would provide a rental floor and assist in financing major projects mirroring a provision of the Code for Leasing Business Premises in England and Wales 2007 (IAVI 2009).

On 1 December 2009, Ireland's justice minister, Dermot Ahern, announced that legislation was to be implemented to prevent the use of UORR clauses in business leases with effect from 28 February 2010. He observed:

'The time has come to end this practice. I look forward to more equitable business arrangements being put in place in the future which take account of the reality facing many business owners and retailer.'

(Ahern 2009)

When the government declared, however, that it had no authority to interfere with existing legal contracts it soon emerged that a two-tier market would be created. This meant that leases entered into prior to 28 February 2010 would retain their UORR clauses. The SCS and IAVI condemned the government's action while the REI expressed its dissatisfaction as it had not achieved its objective of protecting retail members on existing leases.

THE UK EXPERIENCE

UORRs are criticised as they can leave the tenant overexposed when there is a downturn in the property cycle. As rental values fall, UORR tenants continue to pay higher levels of rent than they would pay on the open market. UORRs also make it difficult to assign and sublet properties at a time when the tenant is already vulnerable and struggling to keep up with business costs – no tenant wants to sign into an UORR clause if there is an opportunity to opt instead for a new upwards/downwards rent review clause. The use of UORRs has been a contentious issue in the UK for nearly two decades. Their almost universal use within lease terms leaves little option for alternative basis for rent reviews to be considered.

The UK experienced a recession in the 1970s and again in the early 1990s, which saw the use of UORRs being called into question and prompted further research into their performance. Burton (1992, quoted in Scrimshaw 2007: 653) believed that retail business problems were compounded by unfair leasing practices and recommended 'the correction of contractual failure' by the immediate voiding of all UORRs.

In response, the UK's Office of the Deputy Prime Minister (ODPM) published a code of practice in 1995 to encourage landlords to offer more flexibility in terms of lease negotiations. This paper was largely ignored by the market. Meanwhile, Ward and French (1997) argued that leases without UORRs would provide a higher rental yield by up to an additional 2%, as well as higher initial rents, than leases with UORR clauses, in order to reflect the volatility of rental income. In 2002, the ODPM published a second code of practice, warning that if its recommendations (i.e. to encourage: transparent negotiations; tenants to take professional advice; disclosure of all leasing costs; and exploring alternative options to UORRs) were not introduced, the government would intervene by legislating against UORRs.

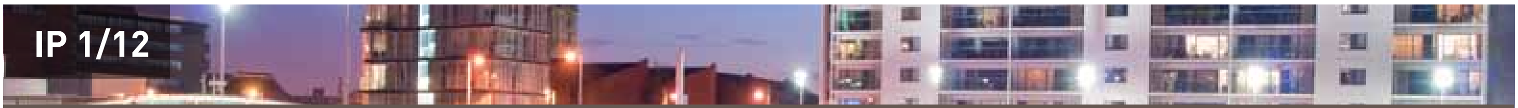
Meanwhile, Maxted and Porter (2003) found that lending institutions were against government interference on the grounds that it would decrease capital values and increase shorter lease terms; whereas Turner *et al*. (2005) estimated that lease lengths would be shorter but that capital values would not fall. Both Maxted and Porter (2003) and Key and Almond (2004) considered that the retail sector would be the most resilient to a ban on UORRs as prime retail pitches dominate demand. The ODPM released a consultancy paper in 2004, which outlined the advantages and disadvantages of UORRs (ODPM and the Welsh Assembly government 2004). This paper also provided six options in relation to the reform of UORRs, summarised below:

OPTION 1:	Do nothing.
OPTION 2:	Ban upward-only rent review clauses.
OPTION 3:	Ban upward-only rent reviews subject to a floor on the initial rent.
OPTION 4:	Give tenants the right to break off the lease if the UORR were to produce a rent above open market levels.
OPTION 5:	Limit lease length in order to limit the period of over-renting.
OPTION 6:	Require landlords to give prospective tenants priced options.

In 2004, the British Property Federation (BPF) collected data from 2,393 members' leases and found that reductions in lease lengths and the prevalence of break clauses meant that the UORR clause had had less of a significant impact on occupiers (cited in Key and Almond 2004).

In 2005, the University of Reading, in conjunction with ODPM (2005), published a report to monitor the effects of the 2002 *Code of Practice for Commercial Leases*. One of the report's main objectives was to 'assess the degree of choice' in relation to alternatives to UORRs in the commercial market. Overall, the report concluded that there had been progressively more flexibility in the market but that this was predominately a result of greater use of shorter lease lengths and tenants' break options. Following these findings, the British government decided to postpone the introduction of legislation but has reserved the right to legislate, if required, at a later date. Scrimshaw (2007) researched the effect of UORRs on UK prime retail capital values and found that: prohibiting the clause would result negatively on capital values, although the extent of this would depend on individual lease structures and properties; and that existing leases would not be affected.

Since then, new guidelines entitled *The Code for Leasing Business Premises in England and Wales 2007* were produced by the Joint Working Group on Commercial Leases (2007) to promote awareness within the leasing industry. This code is divided into three areas: the Landlord Code; the Occupier Guide; and Leasing Business Premises: Model Heads of Terms. The code states that landlords should offer alternative options



to UORRs when requested to do so, and give reasons if they are unable to do so. Suggested alternatives include the use of annual indexation or upwards/downwards reviews with a floor set at the level of the initial rent.

Despite the controversy, the property market in England and Wales has seen very few changes to lease provisions as a result of the introduction of these codes of practice. The problem is that observing the codes is voluntary and there are no legal repercussions if landlords do not abide by the proposals, apart from the threat, since 2002, of possible legislation. While some of the larger UK landlords have agreed to abide by the 2007 code, Charles Woollam of Donaldsons Property Consultants stated that:

'... small businesses generally have "small" landlords ... and they are the least likely to commit to the New Lease Code.'

(Quoted in Clift 2007)

In 2000, the Property Advisory Group (PAG) carried out research for the Department of the Environment, Transport and the Regions (DETR) to analyse why UORRs were still so prominent in the market (PAG 2000). The PAG reported that landlords feared a decrease in their properties' capital values, and that overseas investors were drawn to UORRs because they decrease the risk to income. Alternatives such as turnover rents were found to be too management-intensive, despite the potential profits, in contrast to UORRs, which are 'off-the-shelf' products requiring less maintenance in terms of time and costs for both parties. The pricing of alternative options also remained difficult. Furthermore, tenants did not rebel against UORRs as they recognised there was fierce competition for prime locations and feared the premiums that they could be charged if they were locked into a lease based on an up/down review.

While numerous reports on UORRs have been commissioned and published as the British government tries to reduce their use in the open market by encouraging alternatives such as up/down rent review clauses and index-linked reviews, the UK has been reluctant to introduce legislative action against UORRs because of research findings that highlight the negative effects implementing them would have, primarily on the property investment market.

THE AUSTRALIAN EXPERIENCE

The Commonwealth of Australia has also had its difficulties in relation to retail commercial leases, with reports coming to light about large corporate developers and investors (the predominate landlords in the retail market) taking advantage of small business tenants. Misuse of power meant that smaller retail tenants, in particular, were often obliged to pay for inappropriate items under service charges and, because tenants had no statutory renewal rights, they were also vulnerable to aggressive behaviour from landlords or their representatives during lease renewal negotiations. The eight Australian states and territories each introduced various legislative Acts to combat these issues as far back as 1985 (Crosby 2006). The Acts vary across the different states, so the scope for inclusion and the applicability of each state's legislation varies according to a property's use of floor space, rental levels and/or listing on the stock exchange. While the various Acts are wide-ranging in scope, a summary of the Victoria Retail Leases Act 2003 (see Table 1) shows how rent reviews, assignments and renewal rights are dealt with under the category 'Terms of Lease'.

Retail lease lengths in Australia differ to those in Ireland and the UK as they are predominately for less than seven years for smaller retail units, with the larger anchor stores enjoying approximately 20-year terms. As previously mentioned, Australian tenants do not have any renewal rights

TABLE 1 **Major issues covered by the Retail Leases Act 2003 for Victoria, Australia**

MAJOR CATEGORY OR ISSUE	*ISSUES WITHIN CATEGORIES*
Premises or tenants within the Acts	Definition of premises, definition of tenants, definitions of who or what are not included.
Provision of information during and after negotiations	Provision of draft leases and other information. Disclosure statements by landlords and tenants. Termination rights as a result of failure to deliver information and disclosure statements, notification, registration of leases.
Terms of the lease	Implied terms; regulation of actual terms such as rent review, outgoings, sinking funds, assignment, subletting, minimum term, refurbishment, renewal rights where they exist, etc.
Dispute resolution	Role of courts, mediation systems, role of registrars and small business commissioners, valuations, confidentiality of proceedings and evidence.
Unconscionable conduct	Incorporation of unconscionable conduct into retail leases. Lists of behaviour that might be construed unconscionable.
Other issues	Key money, compensation to tenants, trading hours, security deposits, personal guarantees, land and sales tax provisions, payment of rent during fit-out, management fees, advertising and promotion.

Source: Crosby (2006)

and can often be forced to pay significantly higher rental levels than new lessees to remain in the same unit (Crosby 2006). The Acts forbid the use of UORRs and instead offer various alternative lease basis, such as annually fixed increases, indexation and turnover rents. Only one basis is permitted per lease. The legislative ban against the UORR did not cause much upset in the Australian property market and, as such, there is a lack of information on its abolition. Some believe the reason for this is that the commercial leasing Acts are so all-encompassing that the ban on UORRs was swallowed up by them and people simply accepted it. The workings of the Australian property market stand in stark comparison to the almost exclusive use of UORRs in Ireland up until 28 February 2010 and the ensuing controversy.

While the Australian system allows landlords to refuse tenants' requests to sublet properties, they cannot dismiss a request for an assignment as easily, unless the assignee is either not of a similar financial standing as the current tenant or if the assignment would result in a prohibited use. This is in contrast to the Irish landlord and tenant legislation which states that permission from the landlord may not be unreasonably withheld.

Dispute resolution in Australia dictates that the parties must first mediate before courts will hear their case. This reduces the courts' involvement, as well as the costs incurred by both parties. Most states have set up a lease register and/or commissioner who can investigate breaches of the applicable Act, as well as impose consequences such as heavy fines and even the opportunity to terminate a lease on the grounds of non-compliance. Rental disputes in the Irish system are dealt with under the Arbitration Act 1954, while the property industry has called for a long overdue property database to register transaction details to improve transparency.

While the Australian Acts govern all aspects of retail leases, their primary objectives are to educate small business tenants, ensure full disclosure of information between parties and implement efficient dispute resolution methods. Australia's legislation relates exclusively to small retail tenancies; however, there is an argument that it should, and could, easily apply to all commercial tenancies. While the circumstances that had led up to its implementation, i.e. the bullying behaviour of corporate landlords, is not an issue in Ireland, the two property markets share many features and the introduction of certain aspects of legislation could be beneficial to Ireland, e.g. requiring the introduction of a lease register, as well as full disclosure of information and alternative methods of rent review. Other aspects, however, such as making it more difficult for tenants to sublet, would not be seen as a welcome intervention within the Irish property market.

GLOBAL LEASING PRACTICES

Research indicates that Australia has banned the use of UORRs and that the US retail market is based predominately on turnover leases. Further research indicates that only the UK and Ireland (in legacy leases only in the case of the latter) provide UORRS. A pan-European survey found that in 34 out of 36 countries, lease terms in Europe are for shorter periods – mostly less than 10 years, with the exception of Ireland and the UK (Ashcroft 2007). The countries analysed have leasing guidelines in place that contain various entitlements to lease renewals, from automatic to fixed periods. Rent reviews are adjusted annually to indexation and/or a fixed schedule and are in stark comparison to both the Irish and UK leasing systems.

While UK and Australian research has focused on small business tenants, both countries' markets are substantially larger than Ireland's, where the Retail Planning Guidelines (RPG) place a cap on permissible floor space. While the Irish government, like the Australian states, recognises the failure of voluntary codes, it is interesting to note that Australia immediately switched to turnover and index-linked rent reviews, whereas the Irish market focused solely on up/down rent reviews. Perhaps Ireland's property market needs to explore alternative options to ensure that the entire property market will not be based on a single review basis yet again. Various global research studies contradict the argument put forward that investors will not consider markets without the existence of a UORR clause. It appears, to the contrary, that omitting UORR clauses is the norm for all countries bar Ireland and the UK.

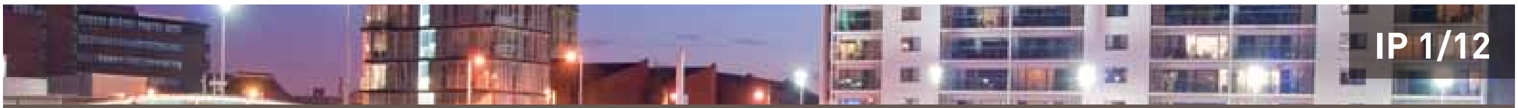
Ireland's current two-tier market has put tenants in legacy leases at a disadvantage compared to new tenants. The UK is now the only country that allows UORRs in new leases, which leaves it in a unique position to attract investors.

PRIMARY RESEARCH

The focus of this research was to explore and determine: whether the Irish government was premature in introducing a legislative ban on UORRs; the implications of this ban on the Irish retail market; and whether any alternatives were available to the government. As such, the research undertaken is sociological and predominately of a qualitative nature as it deals in opinions, theories and reactions to the implementation of the legislation. A number of key players within the property industry were selected for interview to explore sentiments towards the legislation, the effects of the legislation on capital and rental values, and to determine what the UK can learn from the Irish experience.

Five interviewees were selected as sample representatives, based on their exposure to the reality of the market and their professional experience. They were representative of the various stakeholders within the industry. Interviewees included: a chartered surveyor who represents both landlords and tenants on a daily basis; an investment adviser who acts on behalf of both Irish and international investors; a retail tenant representative; an Irish property academic; and an English property academic. It was deemed necessary to interview a representative from each of the above categories to achieve reliable, valid representations upon which the hypothesis could be credibly tested. The interview methodology used semi-structured, open-ended questions to encourage flexibility and depth in answers.

Overall, four out of the five interviewees felt that the Irish government was wrong to interfere with the property market and that the ban on UORRs has caused more harm than good because of its wider implications on the investment, rental and development markets. The retail representative, however, remains firm in his belief that UORRs are an unnecessary and unfair evil for the property market. One thing they did all agree on is that the Irish government's legislative ban against UORRs did not achieve what it set out to achieve and that it has resulted in a lose–lose situation for all involved.



RESULTS AND ANALYSIS

The following pages set out the findings and results from both the primary and secondary research undertaken and addresses the outcome of each research objective to allow the hypothesis to be tested.

Why the Irish government legislated to ban upward-only rent reviews

There was much unrest over the use of UORRs within the Irish commercial market since the downturn in the economy in 2007. Rental levels have plummeted ever since but tenants in existing leases are forced to pay higher-than-market rents due to the inclusion of the UORR covenant. As a result, the Irish government was subject to significant lobbying from the retail sector to abolish UORRs, which created considerable negative media attention. The research found that there is no support for an over-rented property market and acknowledges that some interference was necessary. However, the legislation in question did not alleviate the hardship for existing tenants in any form.

The effects of the legislation on capital and rental values and lease structures within the retail sector in Ireland

It is widely accepted that the legislation will result in higher market yields because the removal of a floor for rental values will increase the risk in investing in the property market. As a consequence, capital values will fall and all property assets will be worth less.

The rental market has also been significantly affected. As rental levels for those on legacy leases remain immobile, for those with uncompromising landlords struggling tenants have resorted to offering reverse premiums in the hope of escaping their legacy lease obligations. The existence of a two-tier market has significant repercussions for pre-legislation tenants who are now at a singular disadvantage in terms of facing higher fixed costs and difficulties in attracting assignees as a result of the ban on UORRs.

Rents for tenants committing to new leases will be based on the performance of the open market without being subject to a base level. However, it is envisaged that market rental levels will increase to reflect the expected extra costs in obtaining finance for property investments due to the increased risks attached to rental income.

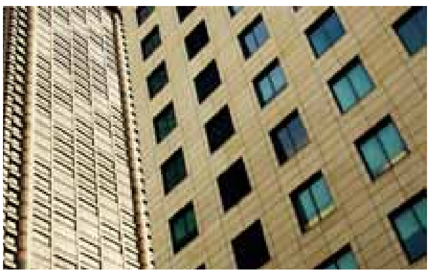
Lease structures will also be subject to change and while the market in general is moving towards shorter leases, the retail market will continue to be let predominately on medium- to long-term leases. The removal of UORRs will result in landlords withdrawing rental incentives as they experience increased financial exposure. This will have a significant impact on tenants who are moving premises, expanding or setting up a new retail business because of the increased costs involved in fitting out new premises. These costs could previously be reduced by negotiating a rent-free period and/or fit-out contributions from landlords. Negotiations and heads of terms will be drastically altered as a result, but the larger effect will be that tenants will be reluctant to sign a new lease because of the extra up-front expenses now required.

To establish the possible effects of the ban on the Irish investment market

In compiling this research it is apparent that we will not know the true extent of the implications the ban will have on the Irish investment market until the oversupply of property stock erodes and the property market becomes active once again. This is likely to take many years and by this time it will be too late to eradicate the repercussions of this legislation.

Undoubtedly, property funding will, henceforth, be considerably more difficult to secure, not only because of lessons learnt in the past three years about levels of debt and oversupply of stock, but also because there is now a higher risk inherent in property investment as a result of the removal of the base rental level that the UORRs once provided. Finance will only be available for investments with the least perceived risk. International investment will also be severely hampered as Ireland's economic status has become the source of much negative media attention. This will deter many international investors from entering the Irish market as an unstable economy with severely reduced consumer spending does not offer a safe investment opportunity. In the long term, when Ireland's economy eventually returns to growth, it is not expected it will ever experience the level and rate of growth it once did during the Celtic Tiger era.

Investors may be deterred by the prospect of expensive finance deals that may not be worth the risk following the removal of the security offered by the UORR covenant. Those who are willing to take the risk will have difficulty in securing funding, which will hamper new development, and which itself can result in an undersupply of property, therefore pushing up rental values for well-pitched properties. New and existing retailers will be disheartened by the lack of modern premises on offer while new investors will be discouraged by the inherent risk of upwards/downwards rent reviews and the existence of a two-tier market, a situation which is incompatible with maintaining a healthy and stable commercial property market.



Alternative courses of action to the legislation

Ireland has been in a tenant-led market for the last couple of years as a result of the oversupply of, and lack of demand for, commercial property. The market had already turned to cater to tenants' demands and this begs the question as to whether the legislation was indeed necessary. It would have been an ideal time to take similar action to the UK when it introduced *The Code for Leasing Business Premises in England and Wales 2007*. If Ireland had tested a similar approach prior to legislating, perhaps it could have found a way to educate tenants about the rights and responsibilities of entering into lease covenants and could have avoided the negative repercussions the legislation has had on the Irish property market.

One alteration that could have been made to the legislation would have been to allow a UORR at the first review, with up/down reviews thereafter. This would improve the likelihood of success in obtaining funding for new investments, while maintaining Ireland's five-yearly review pattern, giving tenants earlier exit options and encouraging medium-term leases of 10 years.

A third alternative would have been to introduce a property transaction database to fully disclose information on each property transaction. This would provide transparency within the industry, improve the accuracy of rental comparables, reduce the effect of side letters and confidentiality clauses and help to restore faith in the Irish commercial property market.

Global experience

The UK's property market structure is similar to Ireland's and its government has been considering the implications of introducing a similar ban on UORRs for almost two decades. The UK government's objective is to encourage the use of alternatives to UORRs within the market, as there is a feeling that their universal use is anti-competitive and unfair. Detailed analysis has been carried out into the likely impact such legislative action would have on the market. The outcome to date has been a decision not to interfere as lease terms are naturally becoming shorter so that the impact of the UORR clause on tenants is relatively small. It was also concluded that tenants were not requesting alternatives to UORRs because other issues were more important to them. Today, the UK is the only country to still provide UORRs but it relies on a voluntary code to offer alternatives during lease negotiations. While UORRs still dominate property agreements, market research has found that smaller tenants are less informed and less concerned about the implications of lease covenants, and are more concerned to discourage any delay in opening their business. Larger tenants, on the other hand, are much better informed and usually employ professional surveyors to negotiate on their behalf.

Globally, however, the use of indexation dominates the property market with annual rent reviews. This system appears to work well for both landlord and tenant and does not appear to hinder the investment market.

Should the UK implement similar legislation?

The UK has observed the Irish legislative experience with interest. The UK has never considered retrospectively banning UORRs within their research and so it has the opportunity to watch and learn from the Irish experience. However, although fundamentally similar, the Irish property market differs to that of the UK's quite significantly in some respects:

- Owing to VAT regulations prior to July 2008, Ireland has significantly longer lease terms that dictate multiple reviews which increase the burden of UORRs on the tenant. The UK has much shorter lease terms and so the impact of the UORR is not as significant since the tenant has the option to exit the lease contract much earlier.

- Secondly, Ireland's prime retail sector does not consist of as many large retailers as in the UK and so Ireland's smaller business tenants are exposed to greater risk owing to the nature of longer leases and multiple rent reviews.

- The third distinction that must be considered is the far-reaching impact of the occupier market crash which has been a significant factor in the current state of Ireland's economy. The UK, being much larger and much more diverse, would not have been affected to the same degree.

The UK government has conducted a vast amount of research into the possible abolition of UORRs and has undertaken a cost–benefit analysis prior to making a decision. The Irish government deemed it unnecessary to carry out research into the possible implications of a ban prior to implementing legislation.

Owing to the differences between Irish and British economies and lease structures and the approaches taken by the governments, the UK should not implement legislation against UORRs, as the market has corrected itself through adopting shorter lease terms, the availability of a property transaction database and having in place a method (*The Code for Leasing Business Premises in England and Wales 2007*) to assist tenants in informing themselves of their rights and responsibilities.

CONCLUSION

The primary aim of this research was to test the hypothesis, and to determine whether, the Irish government was premature in implementing a legislative ban on UORRs. The objectives were to explore, analyse and guide the research and ultimately to prove or disprove the research hypothesis.

Having researched the use of UORRs, it has been established that only Ireland and the UK use this review mechanism and that every other country with a developed property structure uses turnover and indexation (generally annually) as the basis for review. This research has concluded that a property market can function well and attract investors without the use of UORRs.

The UK has carried out extensive research into the possible abolition of UORRs but still remains reliant on a voluntary code to offer other alternatives to tenants. UK research shows that larger tenants are well informed and take professional advice before committing to a lease while smaller business tenants are less informed, do not request alternatives to UORRs, and prefer to negotiate on other aspects of a lease. The UK also operates a property transaction database, as well as offering a guide containing model heads of terms and general advice for leasing premises, which is widely available to promote tenant awareness. Given these facilities, coupled with the shorter lease terms and the UK's unique advantage in attracting investors by offering UORRs, it is not advisable for the UK to legislate against the use of UORRs.

Since Ireland implemented the legislative ban on UORRs it has witnessed an acceleration in the difficulties experienced by tenants in legacy leases. These tenants now have to deal with significantly higher business costs, longer lease terms and greater difficulty in successfully assigning their leases compared to new tenants. This contrast results in a two-tier anti-competitive leasing structure. Capital values have decreased, rental values will increase, and lease structures will change as a direct result of the legislation. The increased cost of funding for investment will have repercussions for the Irish property market once growth returns. The threat of a retrospective ban on existing leases loomed up until December 2011, despite legal advice that such a measure would create uncertainty in the market, hinder growth and lead to further instability in the Irish economy.

Alternatives to the legislation included allowing the new VAT rules to work their way through to the leasing industry, thereby creating naturally shorter leases. An implementation of the long-awaited property transaction database would create greater transparency and a better, fairer, functioning market. To date, this process has not begun. Side letters and confidentiality agreements should be discouraged by the primary property organisations as they distort values and create further ambiguity in a profession that already suffers from a poor public image.

Had the Irish government engaged in research into alternatives to, and the repercussions of, legislation then perhaps the country could have avoided these market difficulties and such turmoil in the market. Promises to implement a retrospective ban on all leases added further uncertainty and hampered the property market further.

The research carried out has proved this paper's hypothesis to be true:
The Irish government was premature in introducing a legislative ban on upward-only rent reviews.

RECOMMENDATIONS

Firstly, it is apparent that smaller business tenants are more likely to be shortsighted when committing themselves to leases. Their primary objective is to get their business up and running and they are less concerned with the legal implications of lease covenants. New tenants must protect themselves when negotiating lease terms by informing themselves of their implications. Smaller business tenants are the most vulnerable to onerous lease terms and while they wish to keep their spending on professional fees to a minimum, paying for professional advice prior to signing a lease is less costly in the long term than living with an onerous lease. While tenants have a responsibility to educate themselves, the Irish government, in conjunction with the primary property organisations, should set up similar guidelines to those in *The Code for Leasing Business Premises in England and Wales 2007* to inform, educate and create awareness about the Irish commercial property leasing structure.

Secondly, a distinction must be made between high-street settlements and UORRs – among the media coverage and hype these two different creatures have been classed as the same animal. The progressively increasing use of side letters and confidentially agreements has distorted and cloaked real market values and has reduced transparency in the market even further. This action should be discouraged and prevented by the primary property organisations in Ireland.

Thirdly, implementing the property transaction database is of paramount importance to the Irish property market. The database must fully disclose details of each transaction. This will introduce transparency and will go a long way to improve the relationship between landlord and tenant. While the property profession has called for such a database for many years, the Irish government has only just committed to it. Its implementation should not be delayed.

Finally, research should be conducted into the variances between indexation and upwards/downwards reviews. Ireland's sudden leap to upwards/downwards reviews risks over-reliance on one review mechanism yet again, reducing choices in the review process. As annual indexation is used on a global basis, research should be carried out into the possible advantages, disadvantages and implications of this mechanism in light of Ireland's economic position.

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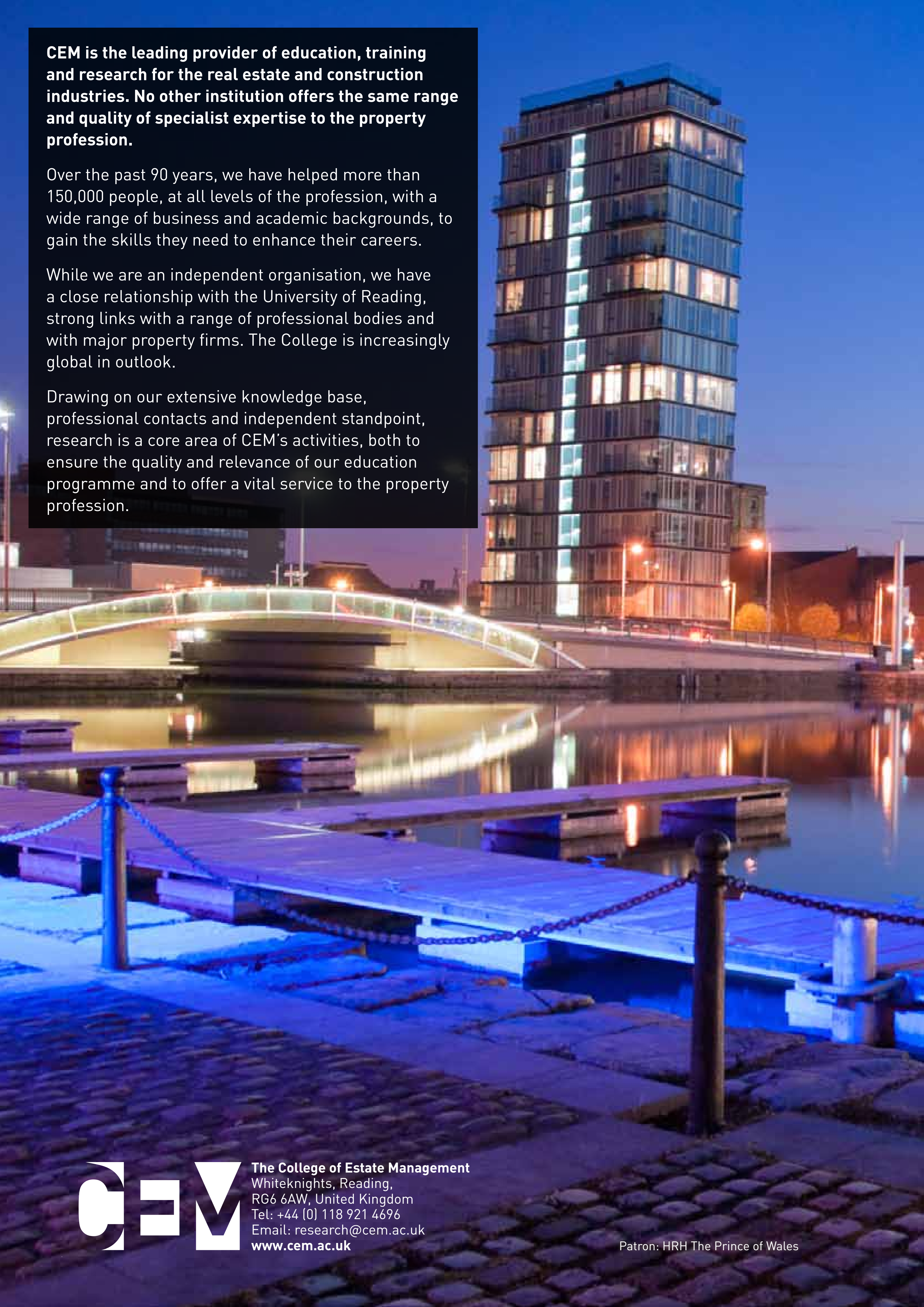

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