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Are Property Agents To Blame For Upward Only Rent Reviews?

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Abstract

In negotiating commercial leases, many landlords and tenants employ property agents (brokers) to act on their behalf; typically these people are chartered surveyors. The aim of this paper is to explore the role that these brokers play in the shaping of commercial leases in the context of the current debate in the UK on upward only rent reviews. This role can be described using agency theory and the theories of professionalism. These provide expectations of behaviour which show inherent tensions between the role of agent and professional, particularly regarding the use of knowledge, autonomy and the obligation to the public interest.

The parties to eleven recent lease transactions were interviewed to see if the brokers conformed to the expectations of agency theory or professionalism. Brokers that acted for industrial and office tenants behaved as professionals in using their expertise to determine lease structures. However, those acting for landlords and retail tenants simply followed instructions and behaved as conduits for their clients, a role more usually associated with that of an agent within the principal-agent relationship. None of the landlords' brokers saw themselves as having responsibilities beyond their clients and so they were not promoting the discussion of alternatives to the UORR.

The evidence from these case studies suggests that agents are not professionals; to behave entirely as an agent is to contradict the essential characteristics of a professional. While brokers cannot be held entirely responsible for the lack of movement on the UORR, by adopting predominantly agent roles then they must take some of the blame. However, behind this may be a much larger issue that needs to be explored; the institutional pressures that lead to professionals behaving in this way.

Introduction

Commercial property leasing is under the microscope in the UK. The government is actively promoting flexibility and, in particular, is trying to discourage the use of the upward only rent review in leases. Meanwhile, landlord and tenant groups are conducting a very public argument over what is being offered and demanded in commercial leases.

Many landlords and tenants employ property agents to act on their behalf and to negotiate the main commercial terms of new leases; typically these people are chartered surveyors. For the purposes of this paper, chartered surveyors in this role are termed brokers; this is to avoid confusion. The aim of this paper is to explore the role that these brokers play in the shaping of commercial leases in the context of the current debate in the UK on upward only rent reviews. It is possible that brokers are influential in shaping their client's requirements; they may promote or be an obstacle to change on this established lease term. Alternatively, they may have little influence and simply be there to implement their client's wishes. This is investigated in case studies of recent lease transactions, using the behaviours suggested by agency theory and the theories of professionalism.

Broker as agent

It seems a relatively obvious starting point to see the relationship between a client and their broker as one of principal-agent. This is where one party (the principal) delegates to another (the agent). As a legal concept, this implies a relationship in which the principal retains the power to control and direct the activities of the agent. Pratt and Zeckhauser (1985) described the agency pattern as pervasive in business; business relationships are structured to enable principals to exert appropriate influence on the actions of agents. As Eisenhardt (1989) noted in her review of agency theory, it deals with relationships that follow the basic structure of a principal and an agent who are engaged in cooperative behaviour, but have partly differing goals and attitudes towards risk. Sharma (1997) also pulled the ideas of the theory together and said that the theory is founded on the triad of agent opportunism, information asymmetry (in favour of the agent) and differing attitudes to risk. Agency theory makes a basic assumption that agents will be self-serving and behave opportunistically if their interests diverge from those of their principals. This leads to concerns of moral hazard (inaction of agent) and adverse selection (information not being used in principal's best interest). Eisenhardt (1989) explains that the focus of agency theory is on describing and determining contract solutions to all of these problems, which may involve the monitoring of behaviour or, alternatively, the use of outcome based incentives. Clearly, delegation and control are firmly at the heart of the principal-agent relationship.

From the viewpoint of agency theory, the broker (for either landlord or tenant) who negotiates the multi-dimensional lease package would be seen as an agent in a principal-agent relationship. However, as has been noted, the broker is often a chartered surveyor i.e. a real estate professional. Sharma (1997) attempted to adapt agency theory to fit the relationship between a principal and a professional, recognising that in hiring professionals, a firm is buying knowledge and expertise; the knowledge asymmetry that this creates is particularly marked with a lay client. As Sharma notes, this leads to the violation of key assumptions within agency theory such as the power of the principal to design and enforce contracts. While Sharma attempts

to bridge the gap between the theories of agency and professionalism his adaptations are fundamental and do not sit easily within the agency framework. Therefore it is also necessary to consider the broker's role from the viewpoint of the theories of professionalism.

Broker as professional

The defining traits of a professional have been developed and discussed over many years in the literature. Parsons (1968) studied medical practices and was struck by the professional having an apparent denial of self-interest in order to serve society. Another study of medical practices undertaken by Friedson (1970) produced the observation that the right to control their own work is a characteristic peculiar to the professions. Larson (1977) analysed the rise of professionalism and observed that there was a common perception of professions having esoteric bodies of knowledge. Many researchers have formed the view that professionals have a large amount of control over what they do and how they achieve it. Dingwall (1983) summarized this observed trait by saying that "the professions presume to tell the rest of their society what is good and right for it: they can also set the very terms of thinking about problems which fall in their domain."

More recently, Sharma (1997) reviewed the literature on professionals and summarized the professional as one who applies a body of knowledge and techniques acquired through training and experience, has a service orientation and distinctive ethics, and a great deal of autonomy and prestige. Murdoch and Hughes (2000), having studied the nature of the professional in the construction industry, describe four characteristics that define the use of the term: a distinct body of knowledge, barriers to entry, serving the public and mutual recognition.

While some may dispute that professionals necessarily have the trait of serving the public, nevertheless this characteristic is usually embedded within the objects of a professional society. This is true of the Royal Institution of Chartered Surveyors (RICS) which is incorporated by a Royal Charter that sets out the objects of the organization. One of these objects is to maintain and promote the usefulness of the profession for the public advantage. As the (then) president of the RICS stated, in an explanation of the role of the RICS, "Our overriding duty is to act in the public interest, which distinguishes us from trade associations and lends the profession credibility, through membership of an organization with that duty" (RICS 2003).

There are questions of how the behaviour of professionals is controlled. Reuschmeyer (1983) described a commonly held model of professional autonomy and self regulation that arises as part of a 'bargain' with clients and society. In this bargain, competence and integrity are exchanged for trust and autonomy. However Reuschmeyer goes on to acknowledge alternative controls such as by third parties, notably the state. Also, some clients may exercise some control through choice of professional in the market and terms of employment.

Role of the chartered surveyor as broker in lease negotiations

The two bodies of work lead to certain expectations of a chartered surveyor as broker, some of which overlap but there are differences which highlight the inherent tension and potential conflict of interest in a dual agent/professional role.. From the view point of agency theory, the ideal situation seems to be that the broker acts as a conduit

of the principal, doing what he or she is told to do; the assumed self-serving nature of the agent is overcome by adequate controls..

The literature on professionals suggests that brokers should use their profession's body of knowledge to define and redefine problems in serving their client. The various measures of social control, including the professional's bargain with society, lead to an assumption that the professional is not inherently self-serving. However a key characteristic of a professional has been shown to be altruism and serving the public. Therefore as this is a stated object of the RICS it may be expected that a chartered surveyor would put the public good first and so may have to deal with a conflict between that of the client and of the wider public interest.

This would suggest that, when chartered surveyors are employed as brokers to negotiate a commercial property lease, they would use their expertise to advise their clients on lease structures and would negotiate the best deal for their clients with some degree of autonomy. However, they may also be expected to be considering the wider context and implications of their actions and to take this into account in their advice and approach to negotiations. Indeed the literature on professionals suggests that the behaviour of professional surveyors should exhibit characteristics that differ substantively from those found in a principal-agent situation.

The upward only rent review

One area where this behaviour in surveyors may be studied, particularly with reference to the duty to the public interest, is in the way that surveyors for landlords and tenants deal with the upward only rent review (UORR). This is a lease term that has been the subject of much public debate. In their analysis of leases with in the Investment Property Databank, Crosby *et al* (2005) showed that the UORR was the predominant type of rent review clause. This type of clause means that the rent at review can stay the same or increase, but never fall below the current rent.

The continued presence of the UORR in leases is despite pressure for change by the government and lobbying by tenant groups. The report by Burton (1992) argued that the UORR was counter to economic efficiency as artificially high levels of rents could be produced. This report was influential on government thinking and this, combined with complaints from tenants stuck with over-rented properties in times of recession have led to the UORR being a concern of government since then. Two codes of practice for commercial leases have had this as a main target. The current Code was sponsored by the government and produced by a working party representing property industry and tenant bodies (RICS 2002). It makes detailed recommendations on lease terms and specifically states that "The basis of the rent review should generally be open market rent. Wherever possible, landlords should offer alternatives which are priced on a risk adjusted basis, including alternatives to upwards only rent reviews".

However, the interim report monitoring the Code of Practice (Crosby *et al* 2004) showed that there had been virtually no change in the use of the UORR. Therefore, in May 2004 the ODPM published a consultation paper on this issue (ODPM, 2004). The British Retail Consortium, a trade association of retailers, in its response to the consultation document referred to UORRs as "an iniquitous system" and remarked that "landlords must offer tenants what they need rather than present them with terms that are often wholly inappropriate and totally inflexible."

The response to the consultation document by the British Property Federation, a trade association of landlords, included the counter argument that UORRs are a benefit in

that the relative certainty of income that they provide enables the property sector to have access to cheap capital and so encourage investment and keep rents low (BPF 2004). This response also included the claim that alternative rent review terms were being offered and rejected as occupiers do not necessarily want priced alternatives although they are aware of their availability, a point also noted in the report monitoring the code of practice (Crosby *et al* 2005). Consequently the government decided not to legislate on the UORR in the short term.

The debate on lease structures in general, and on the UORR in particular, has a high profile within the property industry. It has been carried out very publicly in the property press and the RICS and other groups have held seminars and debates. Given this, and the fact that the RICS is an author of the Code of Practice, any chartered surveyor involved in commercial leasing is likely to be very well aware of the debate. It is therefore a useful lease term for the purposes of this study as it should produce examples of where professionals take account of concerns wider than those of just their clients. Landlords' brokers may be expected to openly present and discuss alternatives to the UORR. Similarly, tenants' brokers, who tend to act for larger tenants, may be expected to discuss alternatives; this is not only for the benefit of their clients, but also to promote change for the benefit of the wider tenant community.

Research questions and methods

The aim of this research is to investigate the role of the chartered surveyor in the context of acting as a broker negotiating a commercial lease and to see how this conforms to the expectations provided by agency theory and those provided by the theories of professionalism. However, the issues of self-serving behaviour and control that arise within both fields are outside of the scope of this paper.

The first objective is to describe the role with respect to lease terms in general. Specifically, do brokers behave as professionals and use their expertise to advise clients on lease structures, or is their behaviour that of agents in that they are simply there to follow instructions? Do they have the autonomy in negotiations that is expected of a professional? The second objective is to see how the role is manifest in respect of the UORR. Do the brokers act as professionals and promote discussion of alternatives in their advice to their clients and approach to negotiation? Alternatively, do they behave as agents and take their lead wholly from clients? Do they behave as professionals and show an appreciation of the issue as a matter of wider public concern?

The basic framework of negotiation expected is shown in Figure 1, where the arrows show negotiation entirely between brokers engaged by landlord and tenant clients.

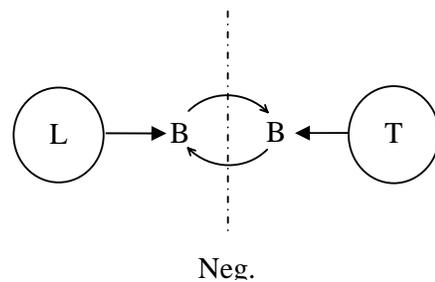


Figure 1: Expected relationships
(L = landlord, T = tenant, B = broker)

Method

Crosby *et al* (2005) conducted case studies of specific lease transactions to suggest reasons why upward only rent reviews still dominated the UK leasing market. They found that, generally, tenants are not seeking alternatives to the upward only rent review and landlords are not proactive in offering alternatives. This paper draws on these case studies to study the role of the brokers.

A case study approach was adopted as the most appropriate method to provide an insight into the client-broker relationship and the detail of the lease negotiations. Eleven case studies of recent individual transactions were undertaken; five in the retail sector and three each in the industrial and office sectors.

Choice of transaction

The lease data analysed by Crosby *et al* (2005) show that within IPD for the period 1997 to 2002 virtually 50% of transactions are in the retail sector and two-thirds of these are in shopping centres. Offices account for around 30% of transactions and industrials 20%. The VOA data is less biased towards retail and around 40% of transactions are in retail and offices and the remaining 20% in factories/warehouses over the 6 years from 1998 to 2003. These two sources suggested targets for the chosen transactions of between 40% and 50% retail, between 30% and 40% office and around 20% industrial/warehouse. However, the aim of the case studies was not to provide a representative sample of the whole population of transactions and it was felt that these breakdowns should create no more than a framework for the choice of property types.

The case studies were all chosen to include upward only market based rent reviews but also some where the full ratchet effect would be present. A balance was struck between the most onerous upward only provisions, namely those in leases having at least two reviews so that the ratchet effect can operate, and leases where there was only a single upward only review or where the tenant had the ability to break.

The transactions identified as having the appropriate lease characteristics were chosen so as to include, so far as possible, a spread of landlord and tenant types. Discussion of alternatives to the deeply embedded UORR was felt to be more likely with larger tenants and particularly those with negotiating strength, therefore transactions involving very small tenants were not included.

It was important to study negotiations in different contexts to see if different combinations of factors produce different negotiations or outcomes. It was therefore essential to include parties who may themselves have experience of a range of transactions. Therefore, in order to try to ensure that the landlord and tenant interviewees were in a position to compare the experiences in the subject transaction with other negotiations, involvement in other recent deals was influential in the choice of transactions to study.

There were several possible sources of transactions, but data protection issues meant that, in order to use them, the research team would have lost control over the selection of the transactions. Therefore, it was decided to select transactions from those published in Egi. This is a large database of all types of transactions which provides out the basic lease terms, names of landlords and tenants and agents and therefore could be used for the purposes of this research for the initial identification of an appropriate transaction. Further details were then checked by obtaining a copy of the lease from the Land Registry in all cases where the lease was registered, ie in all those cases involving leases in excess of seven years duration.

The individuals responsible for managing the transaction and dealing with the brokers from within the tenant and landlord organizations were interviewed. All of the parties used a broker in some way. Each broker was interviewed except in the few instances where interviews with the principals revealed that they conducted the whole of the negotiations. The interviews were semi-structured and covered questions about the interviewee and on their relationship with the other parties as well as the background to the transaction and negotiations for the lease.

Each interview transcript was analysed to establish the nature of the relationship between client and broker using the propositions derived from the literature as the framework. The analyses of each interview within a transaction were compared to see if they confirmed each other or revealed discrepancies. Cross-case comparisons were then made to see if there were differences along the dimensions suggested by the literature or if other factors appeared relevant.

Results

The basic details of the transactions in the case studies are summarized in Table 1.

Case	Property type	Landlord type	Tenant type	Lease length/breaks
A	Unit in shopping centre	Investment company	Large UK retailer	10 years. No breaks
B	Unit in shopping centre	Institution	Large UK retailer	10 years. No breaks
C	Unit on retail park	Large property company	Large UK retailer	20 years. Break at 15 years
D	Unit in shopping centre	Institution	Small UK retailer	10 years. No breaks
E	Unit on retail park	Institution	Large UK retailer	15 years. No breaks
F	Unit on industrial estate	Large property company	UK public company	15 years. Breaks every 5 years
G	Unit on industrial estate	Large property company	UK public company	10 years. Breaks after 4 and 7 years.
H	Unit on industrial estate	Developer	Subsidiary of European company	10 years. No breaks
I	Offices	Institution	Public organization	6 years. Break after 2 years.
J	Offices	Large property company	Public organization	25 years. Break after 20 years.
K	Offices	Investment company	UK public company	10 years. Break after 5 years.

Occupiers and their brokers

The main findings from the interviews with the occupiers and their brokers are summarized by property sector in Table 2 (retail), Table 3(industrial), and Table 4 (office). All of the retailers were expanding throughout the country by taking new outlets. Those managing the transactions for the four major retailers were very focussed on this process of acquisition, an activity which was central to their jobs. This is in contrast with the other property sectors where most of the transactions were managed by general property or estates managers who had a much wider remit in their jobs covering all aspects of property.

The industrial and office occupiers saw the taking of space as an important but relatively small element of the business operations that were to be housed. However for the retailers the actual premises were clearly very important.

All of the occupiers were experienced in taking property with the exception of the office tenant in case J who, whilst having completed a small number of major transactions recently, does not acquire or dispose of space very often.

All of the brokers used by the retailers were specialists in retail agency work, and had both landlord and tenant clients. In the office and industrial sectors, four of the brokers employed by the occupiers were specialist corporate advisors whereas the other two brokers specialized in agency work.

The retail brokers had a very limited remit and there was no evidence of brokers driving leasing policies or defining acceptable lease terms. In the two retail warehouse lettings (transactions C and E) the broker simply introduced the retailer to the property but had no involvement in negotiations; in these cases the broker was not

interviewed. The other three brokers (in cases A,B and D) did negotiate the main lease terms but with the client setting the parameters within which the broker could negotiate. While it is likely that brokers are bringing feedback from the market that may influence lease terms, there was no sense of the brokers driving, or even advising, on terms. The brokers accepted this as their role. The smaller retailer, in transaction D, remarked that the landlord was really in control of the lease structure and that he had little power to influence terms, so again the broker did not appear to be influencing lease structures.

For most of the industrial and office occupiers, the brokers had leading roles in developing and implementing their clients' property strategies. They were very much seen as advisors by their clients. The brief provided by their clients was in terms of operational needs rather than lease requirements. There were exceptions to this: In case F the client's financial director was very clear on the lease structure he wanted despite not having a property background. He determined the property strategy, although there was some input into this from the retained advisor. In transaction G the property manager had a very clear idea of what he wanted and set detailed parameters for the broker to use in negotiating the basic lease package.

In all but one of the industrial and office cases, the tenants' brokers' saw their role as being to take a lead on leasing issues and structures. Even in case K, where the broker was not retained, he saw his role as proactive in terms of shaping the lease for this property. In all of the industrial and office cases, the brokers were all responsible for the detailed negotiations of the commercial terms of the deal

The involvement of the retailers in lease negotiations varied. Three of the large retailers had direct negotiations with the landlord while the other one saw their solicitor as the key negotiator. The smaller retailer, in case D, is more reliant on his broker to negotiate the deal, remarking that, as a small player, landlords would not generally talk directly to him anyway.

In all of the office and industrial cases the client left negotiations to the broker and there were no real principal-principal negotiations. One tenant talked of a round table meeting at the end of the negotiation process to finalize things and another said he came back into the picture after heads of terms were agreed, to deal with the solicitors. One broker did involve his public sector client in a meeting with the landlord to reassure the landlord of the client's intentions.

Occupiers and discussion of the UORR

There was simply no discussion of alternatives to the UORR in any of the retail cases. The retailers had neither asked for an alternative to the upward only rent review nor asked their brokers to raise the issue. As Table 2 shows, all of the retailers expressed reasons why they had not pursued alternatives, but advice from the brokers was not mentioned. It appeared that they were making the decision to accept the 'standard' review type themselves with the exception of the small retailer (case D) who had received advice from his solicitor that the UORR is something that cannot be changed in the contract. The brokers confirmed that they had not asked for an up/down rent review, the reason being that they had not been instructed to ask and they viewed their role as to follow instructions. They also thought that any alternative to the UORR would increase the initial rent which they considered to be unacceptable to their clients.

The responses in the industrial cases on whether the upward only rent review had been discussed were mixed. In transaction H the client was unable to say whether the

UORR had been questioned as the advisor would have taken that decision. The broker recognised that he had this authority, and said that he had not pursued alternatives as this would have led to an increased rent. The client in transaction F had a start point of asking for an up/down review and said that his retained broker would have put this forward for negotiation. However, the broker said that that it was not an issue for his client particularly as there were breaks in the lease; he was not asked to discuss it so he didn't. He did not seem to be aware of the client's view on this matter. In transaction G the client had not questioned the UORR or asked his broker to do so; the broker confirmed that it had not been discussed and that he had not asked for alternatives because he had not been instructed to do so

The office tenants' brokers all clearly saw it as their job to make the decisions on whether to pursue alternatives to the UORR or not. The more active of the public sector organization in transaction I expected his broker to ask for an up/down review. However, his broker did not ask for alternatives and in the interview he explained why he saw no benefit for his client in having up/down reviews. The public organization client in case J was very much guided by his advisor as to what was negotiable. He was aware that his broker had tried to negotiate on this point without success, and was very aware of the landlord's dramatic refusal to consider the point. This broker said that he had pursued an up/down review on the basis that his client should have leverage due to the large amount of space and long lease being taken. However, the landlord had flatly refused.

The PLC client in transaction K did not know if the UORR was discussed in negotiations although he was aware that any alternative to the UORR would lead to a higher initial rent. His broker said he had suggested an up/down review, believing that occupiers should be proactive in exploring opportunities, but the landlord had refused.

Landlords and their brokers

All of the landlords, except one, had several brokers that they used regularly. The exception to this was in case I where one retained managing agent was employed although this was in conjunction with a local broker. Generally the landlords had long standing relationship with the firms involved in these transactions.

The role of the broker was described by both clients and brokers as being about implementation of policy rather than advice. The parameters for lease negotiations were clearly set by all of landlords and understood by the brokers, none of whom had a role in forming policy. The landlords set the criteria of what was acceptable and the brokers found occupiers and generally negotiated the main lease terms within those parameters. Once these terms had been agreed, the principals became involved.

Landlords and discussion of the UORR

The retail and industrial landlords all said that the nature of the rent review was not discussed. This was said to be because tenants had not raised the issue. There was no indication from them that they thought they should have actively offered this alternative. Their brokers confirmed that there had been no discussion about up/down rent reviews; again this was because the tenant didn't ask, and there was no hint that they felt that they should have offered. In the industrial cases just the opposite view was apparent, as the brokers felt it was not open to negotiation. Unsurprisingly, therefore, when asked how they thought the landlord would have reacted to a request for alternatives they said that they thought such alternatives would not have been acceptable to their clients.

The landlords all said that they had never been asked for an up/down review. When asked how they might have responded to such a request in this transaction, the use of property pricing software was mentioned by the institutions and the property companies in the industrial sector. However the other two landlords (cases C and H) were not sure how they would have responded; the developer (case H) said that his response would have been entirely dependent on negotiating an onward sale, as he would not have been able to agree to such a clause without knowing the reaction of the investors and having the sale in place. None of them mentioned the broker as a source of advice on this issue.

The brokers were asked how they would have responded had the retailers asked for an up/down review. This was a situation they had neither come across nor discussed with their clients, and they had no clear view of how their clients would react. However, they all said that they would refer such requests back to their clients none of them suggesting that they would take the lead in advising their client.

Although two of the office tenants' brokers believed that they had asked for alternatives, only one of the office landlords recollected this, (case J). He acknowledged that he had not welcomed the proposal. One of the other landlords was clear that his reaction to such a request would have been to refuse, as the tenant had a break and so could leave if they thought the imminent rent review would produce a rent that was too high; it was in this transaction that the tenant's broker believed he had asked for alternatives (Case K). Interestingly, this landlord's broker said quite categorically that he would not have provided an up/down review. There was no indication that he would consult first although this was the same view as his client.

In the third case, where the landlord had not been asked, there was some uncertainty from the interviewee as to how he would have reacted; property pricing software was mentioned as the organization did own it, but he had never had cause to use it. The broker was did not recollect that the UORR had been discussed remarking that in general where discussions arise the point is quickly conceded by tenant.

Table 2: Retailers and their brokers					
	Case A	Case B	Case C	Case D	Case E
Type	Shopping centre	Shopping centre	Retail warehouse	Shopping centre	Retail warehouse
Client property department	Yes	Yes	Yes	No	Yes
Job title of client contact	Head of property strategy and acquisitions	Acquisition manager	Head of property strategy and acquisitions	Chief executive	Regional property manager
Any regular relationship between client and broker	Retained for acquisitions	Retained for acquisitions	None	Retained for acquisitions	None
Nature of broker's normal work	Agency work for landlords and tenants	Agency work for landlords and tenants	N/A	Agency work for landlords and tenants (mainly landlords)	N/A
Input of client	Location strategy Parameters on lease terms	Location strategy Parameters on lease terms	Location strategy Lease terms Negotiations	Location strategy Parameters on lease terms	Lease terms Negotiations
Remit of broker	Input into location strategy. Find property. Negotiation of main lease terms within set parameters	Find property. Negotiation of lease terms within set parameters	Introduce property	Provide ideas on locations Find property. Negotiation of main lease terms within set parameters	Introduce property in suitable location
Client involvement in negotiations	None. Broker and solicitor finalized deal	Direct negotiation with landlord once main terms agreed	All negotiations direct with landlord	None Broker and solicitor finalized deal	All negotiations direct with landlord and landlord's broker
Discussions on alternatives to UORR – client's view	Not asked for as could break deal	Not asked for. Wouldn't expect to get it or would be higher rent	Not asked for as not of concern	Not asked for as solicitor advised not negotiable	Not asked for. Would have led to higher rent
Discussions on alternatives to UORR – broker's view	Not asked for as not instructed to	Not asked for as not instructed to	N/A	Not asked for. Previously discussed with client.	N/A

Table 3: Industrial occupiers and their brokers			
	Case F	Case G	Case H
Client property department	No	Yes	Yes
Job title of client contact	Finance director	Property manager	Head of property
Any regular relationship with broker	Retained property advisor	None	Retained property advisor
Nature of broker's normal work	Occupier asset management	Agency work for landlords and tenants (mainly landlords)	Advisor to occupiers
Client input	Business/property strategy Parameters on lease terms	Detailed parameters on lease terms.	Operational needs for which lease is required
Remit of broker	Involved in strategy meetings Find properties Negotiate lease terms	Find properties Negotiate main lease terms within very detailed parameters	Determine lease structure Find properties Negotiate lease terms
Client involvement in negotiations	Meeting with principals and advisors after most issues (including legal) sorted just to finalize deal.	Client dealt with solicitors after broker agreed main terms.	Broker and solicitors finalize deal. Client not involved in negotiations.
Discussions on alternatives to UORR – client's view	Will accept UORR but expected broker to have asked for up/down review Alternatives not usually available except perhaps at higher rent	Not asked for. Wouldn't expect to get alternative Not of great concern if initial rent is reasonable	UORR is standard in leases. Do not know if broker asked for an alternative – that is detail that is left to them
Discussions on alternatives to UORR – broker's view	UORR not an issue to client as had breaks so not asked to discuss it	Didn't ask for alternative. Not discussed. UORR accepted by both parties.	Didn't ask for alternative as rent would increase.

	Case I	Case J	Case K
Client property department	Yes	No	Yes
Job title of client contact	Estates manager	Director of resources	Estates manager
Any regular relationship with broker	Retained advisors and property managers.	Retained advisor	None
Nature of broker's normal work	Occupier services	Occupier services	Agency work for landlords and tenants (evenly split)
Client input	Operational requirements of internal customers	Operational requirements Framework on lease terms as informed by broker's advice	Operational requirements Parameters of lease terms.
Broker input	Advice on lease structure Finding property Detailed negotiations	Advice on lease structure Finding property Detailed negotiations	Advice on lease structure Finding property Detailed negotiations
Client involvement in negotiations	None	One meeting with landlord at suggestion of broker. Principal and broker present.	None
Discussions on alternatives to UORR – client's view	Will accept UORR but expected the broker to ask for up/down review.	Guided by broker who advised that is not a major issue. Aware that broker tried to achieve this but that landlord refused.	Does not know if UORR discussed. Sees UORR as an industry standard. Would expect higher rent for alternatives.
Discussions on alternatives to UORR – broker's view	Broker didn't ask for alternatives as does not see no benefit to client	Broker asked for alternative to UORR. Request was not instigated by client.	Asked for up/down review but was refused. Request not instigated by client

Discussion

In the industrial and office sectors there is evidence of the tenants' brokers taking the role of advisor and being proactive in determining the best lease structures for their clients. However one suggestion flowing from the literature is that the expertise of the client is a key determinant of the extent to which the broker has such influence. However, while two of the tenant clients were not property experts this seemed to be less significant in shaping their relationship with the broker than the broad nature of their jobs. These clients all had wide responsibilities which meant that the actual acquisition of a property was only a small part of their concerns.

In both the industrial and office sectors the retained brokers were largely specialist corporate advisors and had roles as advisors to the tenants. They were influential on property strategies in general. With the exception of one non-retained broker in the industrial sector, all of the tenants' brokers saw themselves as shaping the lease. In some cases the leasing strategy was done jointly with the client, making the broker influential, but not entirely in control. These clients were not in direct touch with negotiations giving their brokers autonomy and opportunity for brokers to make

decisions. The attitude of the brokers could be seen in their approach to the UORR; they saw it as their job to decide whether or not to pursue alternatives. This independence of thought seemed to result in two brokers not asking for alternatives where their principals believed they had and one broker who did ask when his principal had not asked him to.

However in the retail sector there is little evidence of the tenants' brokers driving the lease structure agenda or taking the role of professional advisor. In contrast with the other property sectors, all of the brokers used by the retailers specialized in agency and were only employed for acquisition work. Notably they all had both landlord and tenant clients. The clients in the current cases were focussed on acquisitions and gave their brokers well defined parameters and limited remits; the brokers in turn saw their role as to follow instructions. The lay client also appeared to set parameters although to a large extent he was simply accepting the requirements of the landlords. Nevertheless, his broker was not driving the agenda. While the broker may influence terms through their knowledge of the market, the high degree of principal involvement in negotiating meant that their brokers were not behaving autonomously.

In many cases therefore, the actual organizational and negotiating relationships are more complicated than was shown in Figure 1. Figure 2 shows that the client organizations typically have their own in-house chartered surveyors and that, particularly in the retail sector, these people often engage in their own negotiations (shown by dotted lines) with their equivalent on the other side of the transaction.

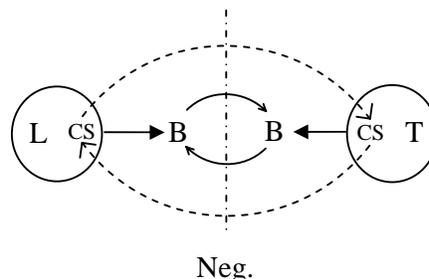


Figure 2: Observed relationships
(L = landlord, T = tenant, B = broker, CS = client's in-house chartered surveyor)

The retail clients clearly did not think that alternatives to the UORR were available, or if they were it would involve a higher rent which they would not accept. These views did not appear to have been shaped by their brokers. Given that the retail brokers accept their roles as following instructions, it is unsurprising that in none of the five cases did they pursue alternatives to UORRs. The brokers shared this expectation of a higher rent and knew that this was not acceptable to their clients and they did not see it as their role to take the initiative on changing this.

In general the landlords' brokers were not setting the agenda on lease terms and were not seen as professional advisors. In all three property sectors the parameters for the lease discussions were set by the landlords and the brokers saw themselves as implementing their clients' strategies. However the interviews revealed a more mixed picture on the specific UORR lease term. The retail landlords and their brokers

agreed that there had been no discussion on this point because the tenants had not brought it up. In the interviews some of the landlords had been keen to demonstrate flexibility; however there had clearly been no discussion between principal and broker on how the matter should be handled if it did arise. Nevertheless the brokers saw it as a matter to be referred back to their clients to determine how to respond; they did not themselves determine what would be an acceptable outcome.

In the other two sectors, while there was agreement that the issue had not been raised, the ‘what if’ question produced an interesting result. While some of the landlords had, as in the retail sector, presented indications of flexibility, the brokers were quite definite that it would not be acceptable and that they would fend off any ideas of up/down reviews if they were suggested by the tenant. It is possible that the landlords may have been keen to show a particular attitude on alternatives to UORR to the researchers given their role as evidence collectors for Government but it was striking that the brokers themselves were apparently not open to alternatives.

Conclusions

Professionals are expected to use their expertise to advise clients. The case studies showed little evidence of this basic requirement in the brokers’ relationship with landlord or retail clients, despite the fact that these brokers are chartered surveyors. The surveyors followed instructions and behaved as conduits for their clients, a role more usually associated with that of an agent within the principal-agent relationship. A basic requirement of this relationship is that the goals of the clients should always be served. The goal of retail clients was clearly to have the lowest possible initial rent, this was particularly apparent in their approach to the UORR. The brokers were pursuing this goal in negotiations, seemingly without question or discussion, confirming their role as agent. If they had been behaving as professionals then it would have been expected that they would have taken a more proactive approach and, for example, advised their clients on the positive and negative aspects of this approach in the long term.

While not exhibiting the characteristics of professionals in terms of use of expertise, some of the landlords’ brokers are possibly not even behaving as ‘good’ agents, as they are apparently acting counter to their client’s stated goals in their total refusal to consider alternatives to the UORR. This is in spite of the landlords’ apparent wish to be flexible, which, in the parlance of agency theory, suggests a situation of moral hazard i.e. the broker is not performing the tasks that the principal believes he or she is doing. Nevertheless, none of the landlords were actually proactive in offering alternatives to the UORR and their brokers went along with this. Given the government interest in this lease term, by simply allowing this inaction, not acting as professionals and not fully implementing the Code of Practice, the surveyor- broker may be hastening the day when the government decide to ban this lease term, which would presumably be seen as counter to their clients’ interests.

In the industrial and office case studies there was evidence of professional conduct with the brokers using their expertise in determining lease structures. While many of the brokers concentrated on the implications for the initial rent when considering the UORR, this was clearly linked by them to the fact that the leases were short or had breaks. Even though this meant that the effects of the UORR would not be so marked, in several instances the brokers did initiate discussion of alternatives.

The literature suggested that professionals should carry out their role with some autonomy. There was evidence of this in the office and industrial case studies but none in the retail sector.

Many of the clients in these case studies were themselves chartered surveyors. This raises the question of whether these surveyors are using their expertise as professionals to serve their own organizations. This question is particularly relevant to the surveyors working for retail organizations in considering whether they are serving their internal clients by taking a short term approach to the UORR. Some of these surveyors had thought through the issues and had rational reasons for not pursuing alternatives, but others appeared to be simply adopting this approach without question.

Professionals are expected to act in the public interest and this is embedded in the objects of the RICS. The interests of the client and of the public may coincide, but the latter is paramount. The actions of the landlords' brokers regarding the UORR can be considered in the wider context of the professional's duty to the public interest. None of the landlords' brokers saw it as their job to actively promote the discussion of alternatives to the UORR. This is despite the recommendations of the Code of Practice, published by the RICS. The RICS have actively promoted the debate on lease terms and the use of the code, however these brokers are simply not taking it on board. They see their clients' interests as maintaining the UORR and are not taking on the wider concerns.

The brokers for the tenants, and their surveyor-clients should, as professionals, have the public interest in mind. However, there was little evidence of this happening. This was particularly apparent with the retailers' in-house surveyors and their brokers; they could arguably have used their positions in large retail organizations to encourage change in lease structures for the wider benefit, particularly of smaller tenants, but instead took a much narrower perspective.

The evidence from these case studies suggests that agents are not professionals; to behave entirely as an agent is to contradict the essential characteristics of a professional. Brokers clearly cannot be held entirely responsible for the lack of movement on the UORR, although where they adopt predominantly agent roles then they must take some of the blame. However, behind this may be a much larger issue that needs to be explored; the institutional pressures that lead to professionals behaving in this way.

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