

DOUG STEVENS SEMINAR

- ▶ MONDAY 21st December 2015
 - ▶ 08.00HRS TO 09.00HRS
- ▶ VENUE : CBRE
 - ▶ `C-BAR`
 - ▶ Henrietta House
 - ▶ Henrietta Place
 - ▶ W1G 0NB

▶ SUBJECT

1. *ALLOWANCES FOR PHYSICAL FEATURES*
2. *ALLOWANCES FOR ONEROUS LEASE CLAUSES IN RENT REVIEWS*

*SEMINAR BY DOUG STEVENS TO 1st & 2nd YEAR GRADUATES
DELIVERED AS A POWERPOINT PRESENTATION*

ALLOWANCES FOR PHYSICAL FEATURES & ALLOWANCES FOR ONEROUS LEASE CLAUSES IN RENT REVIEWS

▶ *WE REFER TO ALL ADJUSTMENTS (POSITIVE & NEGATIVE) AS ALLOWANCES*

▶ *PHYSICAL FEATURES*

- ▶ *RETURN FRONTAGE*
- ▶ *HARD FRONTAGE*
- ▶ *MASKING*
- ▶ *SHAPE*
- ▶ *DISPROPORTIONATE FRONTAGE TO DEPTH*

▶ *ONEROUS LEASE CLAUSES*

- ▶ *KEEP OPEN*
- ▶ *ALIENATION*
- ▶ *USER*
- ▶ *FIXTURES & FITTINGS*
- ▶ *ALTERATIONS*

G-RAW Fully Glazed Return Frontage



FOREVER 21 Partial Return Frontage



RETURN FRONTAGE

- ▶ Where there is a return display frontage the effect on the value must depend on local evidence.
- ▶ If a percentage approach is adopted it should be borne in mind in valuation that for any given depth of return display frontage the benefit of that frontage in percentage terms will more normally decline as the width of the shop frontage increases (see *John Lewis & Co Ltd v Goodwin (VO)* and *Another LT 1980 RA 1* at page 24.)
- ▶ Return frontages are often unique and care must be exercised when translating evidence of one return into the valuation of another.
- ▶ Where a retail unit occupies a corner position it may have glazing on part of the side elevation and we refer to this as return frontage (R/F).
- ▶ JEWELLERS IN PARTICULAR LIKE CORNER SHOPS WITH R/F OR SPLAYED FRONTAGE
- ▶ If the returned glazed frontage runs for the entire length of the shop then it will be appropriate to apply a percentage additional to the value of the whole shop.
- ▶ Dependent on the quality of the return frontage (is it facing other retail units - does it substantially add to the prominence of the shop - Is there a secondary entrance from the return frontage elevation). One might add 10% or 7.5%, 5% or 2.5% to the total rental value of the ground floor to reflect the benefit of the return frontage.
- ▶ In a situation whereby the glazed return frontage *is* partial (ie. only part of the shops return frontage benefits from glazing and the rest is a solid structure an addition to the rental value should be made for the area of the shop which benefits from the glazed frontage). So, for example, if the first 10 feet of Zone A had a glazed return frontage then an addition of 10% / 7.5% / 5% / 2.5% would be added to the first 10 feet only.

RETURN FRONTAGE

- ▶ When negotiating for a landlord or for a tenant in relation to the value (or otherwise) of return frontage
- ▶ the following **positive arguments** could be advanced
- ▶ R/F increases prominence of the shop
- ▶ customers can see inside the shop thus enhancing the tenant's
- ▶ opportunity to attract more customers - the tenant has a greater opportunity to display their wares.
- ▶ The **negative arguments** would be:-
- ▶ Most retailers now seek the maximum amount of linear wall space and so do not want a glazed return frontage because they could not rack against that frontage and so lose linear wall space.
- ▶ The dressing of shop windows *is* time consuming and costly
- ▶ The insurance premises are higher for a unit with a glazed return frontage

HARD FRONTAGE

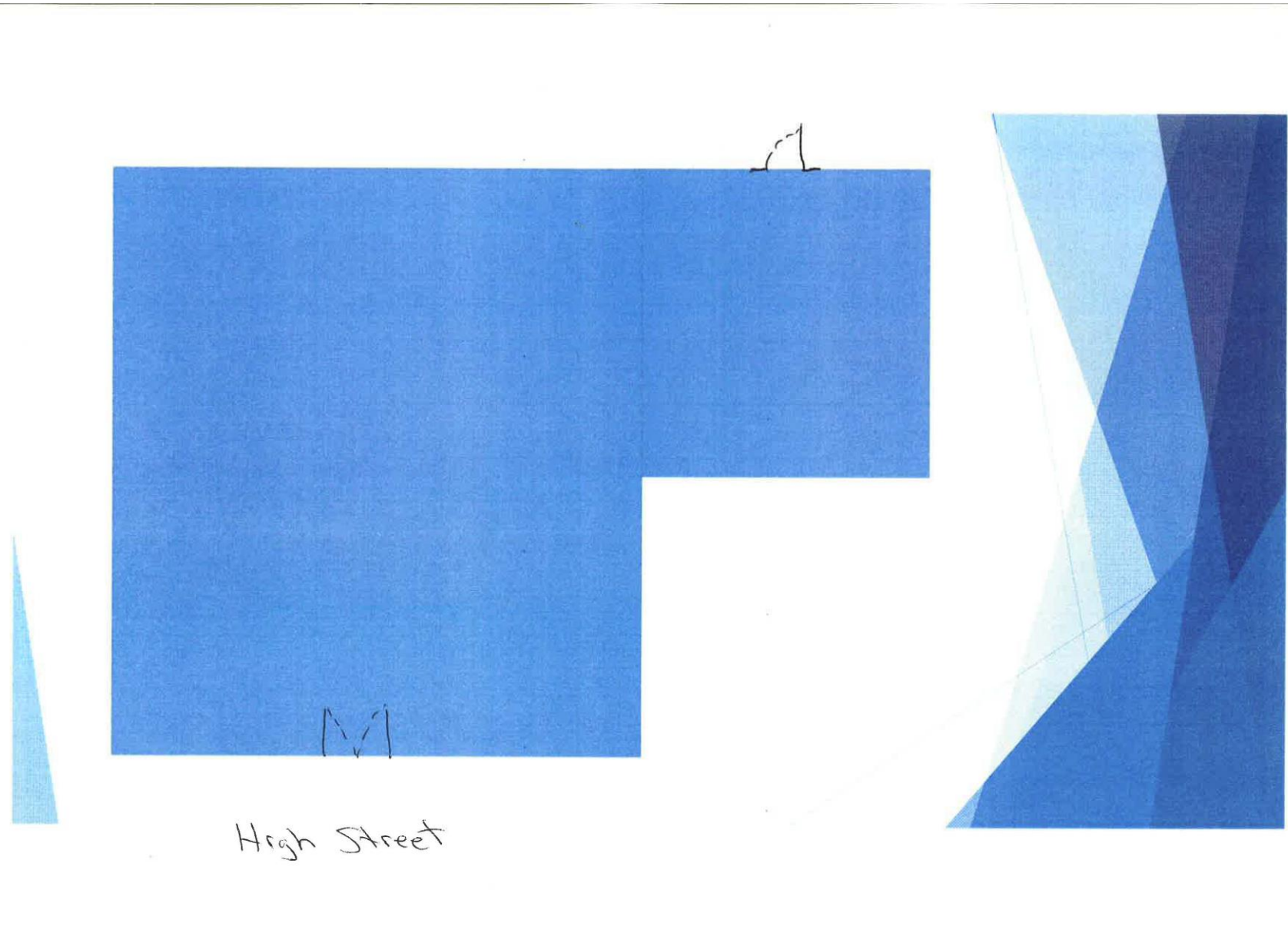


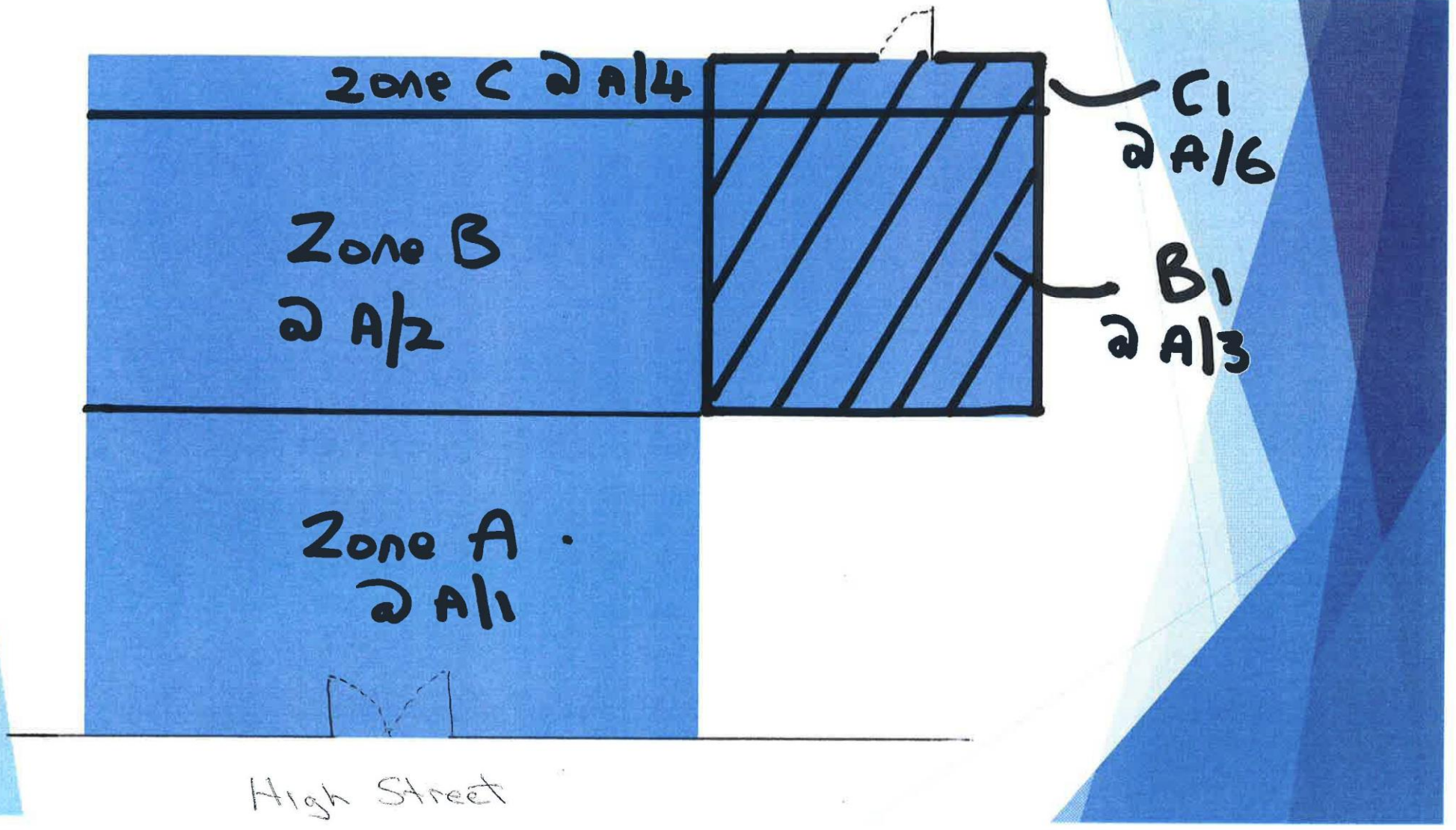
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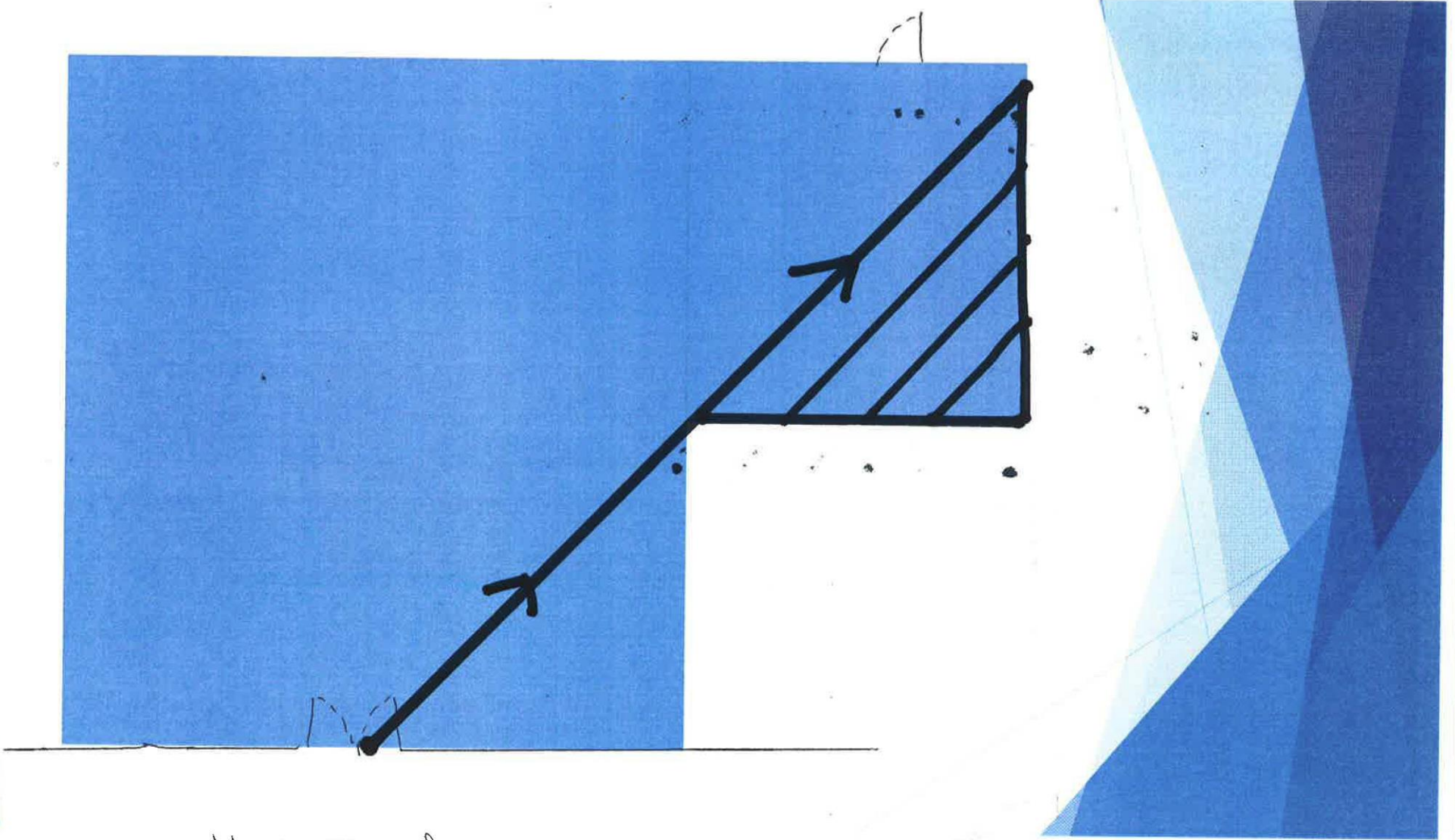
HARD FRONTAGE

- ▶ TYPICALLY BANKS HAVE HARD FRONTAGES - FOR SECURITY /PRESTIGE ?
- ▶ WHY SHOULD THEY ATTRACT AN ALLOWANCE (DISCOUNT) ?
- ▶ ONLY A SMALL GLAZED WINDOW DISPLAY - CAN`T ATTRACT CUSTOMERS
- ▶ OFTEN ONLY ONE ACCESS POINT/ENTRANCE DOOR - LACKS FLEXIBILITY OF LAYOUT
- ▶ BUILDING MIGHT BE LISTED OR IN CONSERVATION AREA SO FRONTAGE PROTECTED
- ▶ GREATLY LIMITS POTENTIAL ASSIGNEES WHO MAY NOT WANT HARD FRONTAGE
- ▶ ALLOWANCES DEPEND ON DEGREE OF HARD FRONTAGE /AMOUNT OF GLAZING
- ▶ TYPICALLY 2.5% UP TO 5% DISCOUNT

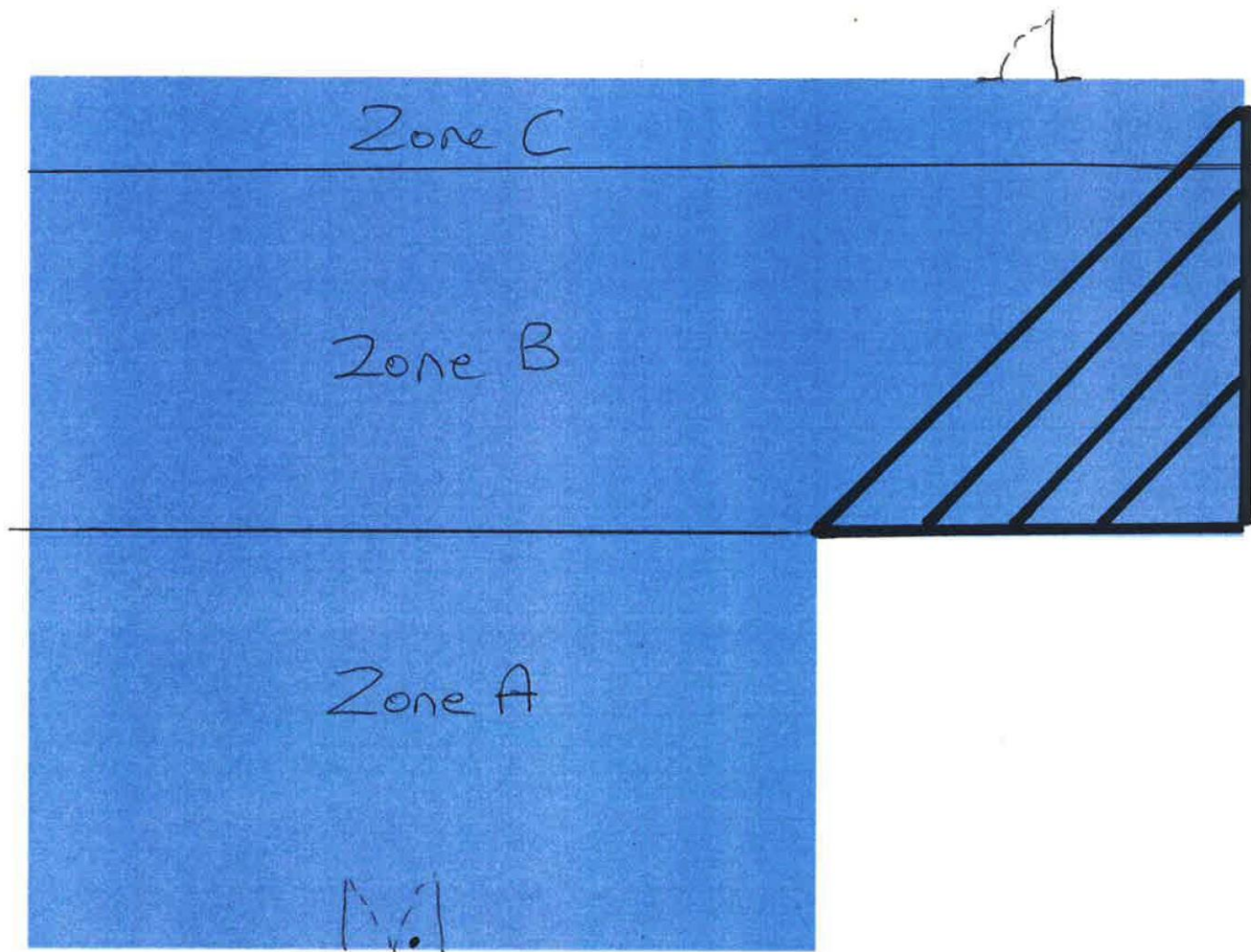
MASKING







High Street.

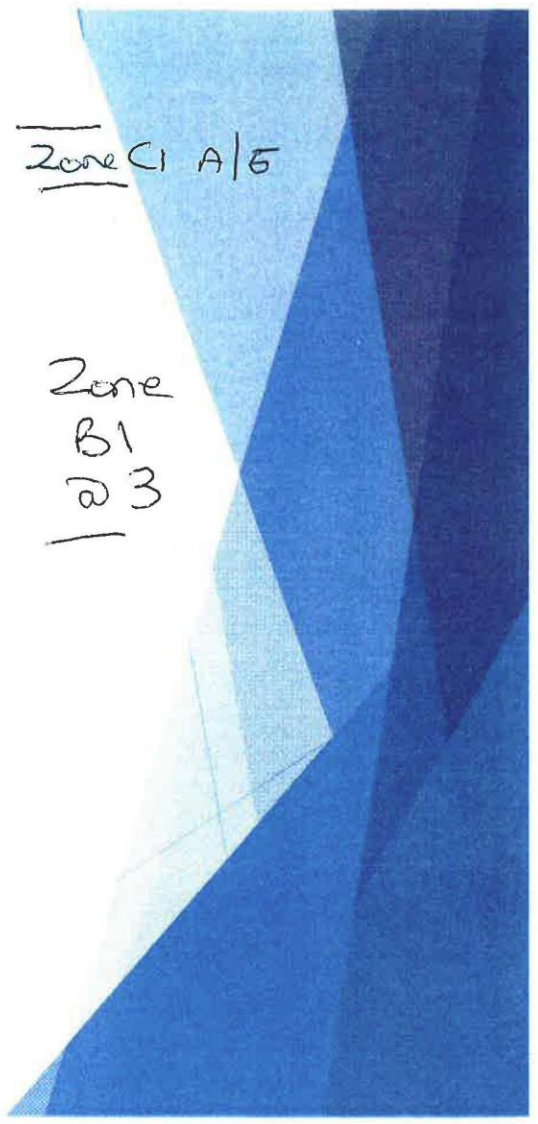


Zone C

Zone B

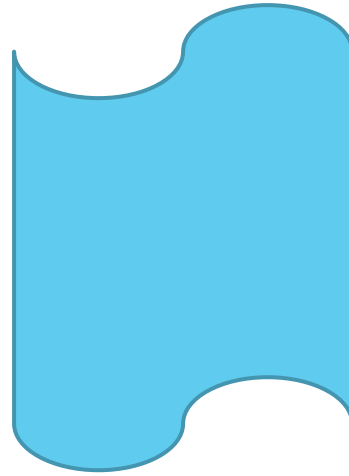
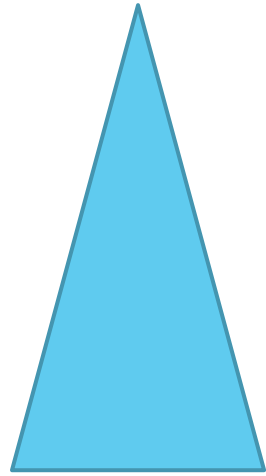
Zone A

High Street



Zone C A/B

Zone
B1
@3
|



ODDLY SHAPED SHOPS

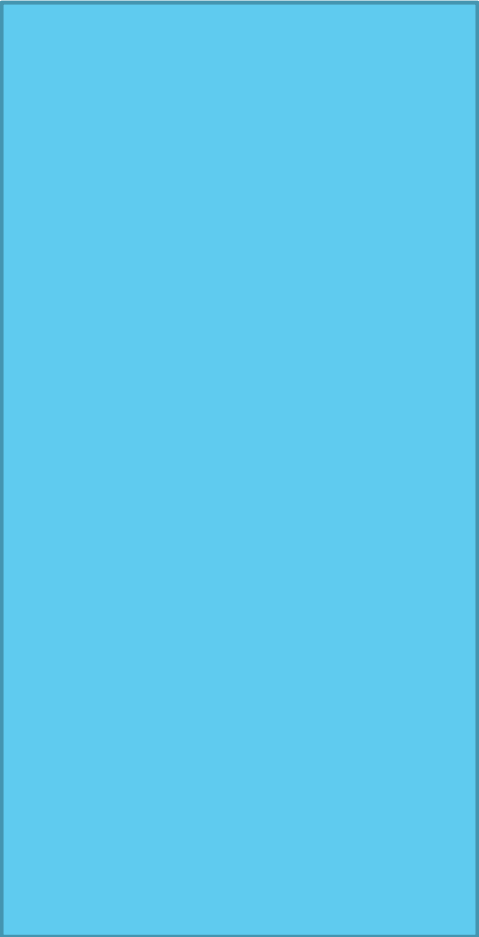
SEEK A % DISCOUNT ie, 5% -10% ON THE GROUNDS OF IRREGULAR SHAPE

DIFFICULT TO FIT OUT

DIFFICULT TO MERCHANDISE

DISPROPORTIONATE FRONTAGE TO DEPTH

▶ SHOP 30 FT WIDE X 60 FT DEEP



1,800 SQ FT 1,050 UNITS ITZA

▶ SHOP 60 FT WIDE X 30 FT DEEP



1,800 SQ FT 1,500 UNITS ITZA

Disproportionate Frontage to Depth

- ▶ PRINCIPLE ORIGINALLY DERIVED FROM A RATING CASE
- ▶ **WH Smith & Sons v Clee VO LT1978 RA 93**
- ▶ (14% Allowance for shop which was 7 units wide - 137 ft frontage x 46 ft depth)
- ▶ REASON – Zoning method over-values this unit
- ▶ **Triumph Securities Ltd v. Reid Furniture Co. Ltd (1986) 283 EG 107**
- ▶ Furniture shop on Kings Road - Arbitrators Award 14% for FTD
- ▶ THERE ARE MANY NEGOTIATED SETTLEMENTS FOR FTD, + ARBITRATION AWARDS + INDEPENDENT EXPERT DETERMINATIONS - RANGE FROM 5% UP TO 25% DEPENDENT ON DEGREE

KEEP OPEN

Absolute - or - Qualified covenant by tenant to keep the property open for trade

The tenant covenants *“to keep the demised premises open for trading at all usual times that retailers are open for trading in the locality save for when carrying out works to the Demised Premises and for reasonable periods immediately prior and subsequent to a permitted disposition affecting this property”*.

This is a qualified keep open clause – but still onerous

Let `s look at the example of a department store or foodstore on a 25 year lease

Why should the Tenant get an allowance (discount) from a full market rent ?

Answer it costs him heavily if he can't dispose of the store (which might be a loss making store). He may be trading at an unsustainable loss

Does this clause COMPEL the Tenant to remain OPEN & TRADING ?

KEEP OPEN

▶ NO in England

▶ *Co-operative Insurance Society Limited v Argyll Stores (Holdings) Limited [1997] 3 All ER 297.*

▶ The House of Lords overturned an order requiring Safeway, the anchor tenant in a shopping centre, to carry on trading in terms of its lease.

▶ They held that a keep open clause was not, other than in exceptional circumstances, specifically enforceable, since it was the settled practice of the Court not to make an order requiring a person to carry on a business

▶ YES in Scotland

▶ *Highland & Universal Properties Limited v Safeway Properties Limited 2000 SLT 414* on the Scottish legal principle of specific implement

▶ WHAT FACTORS INFLUENCE THE LEVEL OF DISCOUNT FOR KEEP OPEN ?

▶ **LENGTH OF LEASE** - IS IT A LONG LEASE ? (MORE ONEROUS IF SO)

▶ **ABILITY TO ALIENATE** – CAN TENANT ASSIGN OR UNDERLET WHOLE OR PART(S)

▶ **TENANT DEMAND FOR THE STORE** – IS THERE ONE OR MORE TAKERS FOR THE STORE ?

▶ TYPICAL ALLOWANCES 2.5%, 3.75% AND 5% DEPENDENT ON ABOVE 3 FACTORS

ALIENATION

Assignment -- Pre-emption -- Underletting

- ▶ ASSIGNMENT - Assignment of part is almost always prohibited
- ▶ A lease prohibiting assignment of the whole is restrictive (onerous)
- ▶ L/L has full control. T cannot dispose of lease. Few examples -5% allowance
- ▶ PRE-EMPTION - L/L reserves a pre-emption right so that when T wishes to sell lease (assign) and applies to L/L for consent L/L exercises right to take a surrender matching terms which the T can achieve in the open market ie, if best premium offer for lease was £50,000 - L/L pays £50,000 for a surrender
 - ▶ Is this an onerous provision ?
 - ▶ T argues that no one will submit a full offer as they know L/L can over-ride
 - ▶ Counter argument is that by surrendering T is off the hook (ie, no AGA)
- ▶ UNDERLETTING - Underletting of the whole is invariably permitted
- ▶ A lease prohibiting underletting of whole is restrictive -5% allowance
- ▶ Underletting of part or parts is common for larger shops + multi-level shops, ie offices above
- ▶ A restriction on underletting part/parts of large shop/multi-level is onerous -5% allowance

RESTRICTIVE USER

- ▶ USER CLAUSES MAY BE ABSOLUTELY RESTRICTIVE, QUALIFIED ,ie L/L `s CONSENT IS REQUIRED OR OPEN WITHIN A SPECIFIED USE CLASS OR CLASSES.
- ▶ ABSOLUTE - USER CLAUSE SPECIFIES A SPECIFIC USE, ie, SALE OF FOOTWEAR ONLY
- ▶ WHY IS THIS RESTRICTIVE ?
 - ▶ 1. T CANNOT WIDEN HIS RANGE OF GOODS OR CHANGE TO ANOTHER USE - LIMITED FLEXIBILITY
 - ▶ 2. IF T WANTS TO ASSIGN OR UNDERLET MUST DO SO TO A FOOTWEAR RETAILER - LIMITS DISPOSAL
- ▶ MUCH LESS COMMONPLACE EXCEPT IN SPECIALIST RETAIL LOCATIONS WHER L/L WANTS FULL CONTROL, ie CARNABY STREET (Shaftesbury Estates) SLOANE STREET (Cadogan Estates)
- ▶ DISCOUNTS OF 10% WERE COMMON - ie, *UDS Tailoring v BL Holdings (1982)* menswear only
- ▶ *Law Land v Consumers Association Ltd (1980)* - only one tenant for that use - but the open market proviso in the rent review over-rode the absolute user restriction
- ▶ *Charles Clements v Rank City Wall (1978)* To use only as a cutlers (knives & forks, etc) - a 14% discount was decided. L/L could not unilaterally open up the user at lease renewal
- ▶ QUALIFIED - Several layers of qualification ,ie, subject to good estate management, or tenant mix or
- ▶ OPEN Consent for change iof use will be given with L/L `s consent not to be unreasonably withheld or delayed LLCNTBUW (OD)

- ▶ USER CLAUSE MAY BE ABSOLUTELY RESTRICTIVE - BUT CHECK THE RENT REVIEW CLAUSE DOESN`T OVER-RIDE IT , ie, ASSUMPTION THAT THE SHOP IS AVAILABLE FOR USE FOR ANY CLASS A1 PURPOSE

RESTRICTION ON STRUCTURAL ALTERATIONS

- ▶ MANY LEASES PERMIT TENANTS TO CARRY OUT INTERNAL ALTERATIONS WITH L/L`S CONSENT

- ▶ MOST LEASES (ESPECIALLY IN SHOPPING CENTRES) OR WHERE THERE ARE OFFICES OR RESIDENTIAL ABOVE PROHIBIT TENANT FROM CARRYING OUT STRUCTURAL ALTERATIONS - THIS IS TO PRESERVE THE STRUCTUARL INTEGRITY OF THE LANDLORD`S BUILDING

- ▶ HOWEVER SOME LEASES PROHIBIT STRUCTURAL ALTERATIONS WHERE THERE ARE NO STRUCTURAL ISSUES See example below -;

- ▶ *Not to erect or suffer to be erected any new buildings on the demised premises or any part thereof nor make any alterations or addition whatsoever in or to the buildings for the time being comprised in the demised premises nor to cut, maim or injury or suffer to be cut maimed or injured any of the roofs, walls, timbers, wires, pipes, drains, appetences, fixtures or fittings thereof or of which the demised premises form part nor to do or suffer in or upon the demised premises or the remainder of the Building or other premises as aforesaid any wilful or voluntary waste or spoil.*

- ▶ WHY IS THIS A PROBLEM FOR SOME TENANTS - ie, WHAT STRUCTURAL WORKS ARE THEY LIKELY TO DO ?

- ▶ TAKE THE EXAMPLE OF A LARGE STORE LIKE HAMLEYS - LONG LEASE - NO STRUCTURAL ALTERATIONS

- ▶ THEY MAY WISH TO MOVE ESCALATORS OR LIFTS OR OPEN UP FLOOR SLABS

- ▶ ALL OF THOSE WORKS ARE STRUCTURAL - SO L/L CAN SAY **NO** - OR - YES FOR SOMETHING IN RETURN

- ▶ Examples on Bond Street. Tenant pays huge £10m premium to take an assignment of a lease. Then submits his plans for to alter the property to the L/L who says **NO** - “there are no structural alterations permitted” - “ but I will consent if you pay more rent or change other lease terms in my favour”

- ▶ Example - Arcadia will not sign any lease for a TopShop store that prohibits structural alterations

- ▶ THERE ARE A FEW EXAMPLES ON LARGER STORES WHERE A 10% ALLOWANCE (DEDUCTION) WAS MADE - FOR MANY STANDARD SIZED UNITS ON STANDARD LENGTH LEASES IT IS DIFFICULT TO SUPPORT A CASE FOR AN ALLOWANCE

LEASE LENGTH

- ▶ HISTORICALLY LEASES WERE FOR 99 YEARS AND MORE RECENTLY 25 YEARS
- ▶ **CURRENT AVERAGE LEASE LENGTH IS 6.75 YEARS**
- ▶ SO TENANTS SEEK AN ALLOWANCE (DISCOUNT) IF THEY HAVE A LONG LEASE - DEFINED AS ONE WHICH IS LONGER THAN A LEASE WHICH MIGHT NOW BE GRANTED IN THE OPEN MARKET
- ▶ NB TO ASSESS IF THE LEASE IS LONG COMPARE IT WITH OTHER PROPERTIES OF A SIMILAR NATURE THEN IF DEALING WITH A RENT REVIEW ESTABLISH WHAT THE ASSUMED TERM IS - IT MIGHT DIFFER FROM THE UNEXPIRED TERM ie 5 YRS LEFT ON LEASE BUT REVIEW CLAUSE ASSUMES 10 YRS
- ▶ DIFFERENCE BETWEEN 5 YR ACTUAL OR ASSUMED TERM AND ACTUAL/ASSUMED 10 YR TERM - 5%
- ▶ LOOK FOR EVIDENCE IN THE SAME TOWN/CENTRE OF SIMILAR PROPERTY
- ▶ ON DEPARTMENT STORES, VARIETY STORES & FOOD STORES LEASE TERM MIGHT BE 25 - 99 YRS
- ▶ THERE WILL BE ARBITRATION AWARDS & EXPERT DETERMINATIONS TO PROVIDE EVIDENCE FOR STORES
- ▶ **WHAT FACTORS ARE RELEVANT TO ASSESS LEVEL OF ALLOWANCE ?**
- ▶ **LENGTH OF LEASE COMPARED TO THE RELEVANT COMPARABLES** - Larger if it is longer
- ▶ **QUALITY OF LOCATION - PRIME OR SECONDARY** - Larger allowance for poorer location
- ▶ **LEVEL OF POTENTIAL DEMAND** - Larger allowance if limited demand
- ▶ **ALIENATION RIGHTS (CAN IT BE UNDER-LET AS WHOLE OR IN PART(S))** - Larger allowance if restrictive
- ▶ TYPICAL ALLOWANCES (DISCOUNTS) 2.5% UP TO 20% DEPENDENT ON ABOVE FACTORS