

## It's never too late for rent reviews

Ed John and Shanna Davison consider the impact of late rent reviews for both landlords and tenants.

It is the rule rather than the exception that rent is reviewed late. This is particularly so during a downturn when landlords are waiting for more positive comparable transactions to come to light and tenants, who will often have upwards-only rent reviews, have no desire to trigger the review. However, the consequences of a late review contain traps for the unwary, particularly tenants who might assume that a missed review works in its favour.

### TIME IS PRESUMED NOT TO BE OF THE ESSENCE IN RENT REVIEWS

There is a rebuttable presumption that time is not of the essence in rent review clauses.<sup>1</sup>

In simple terms, time is "of the essence" if the lease provides that if a trigger event (typically service of a notice) does not occur within a specified time, the right to review is lost. If time is not of the essence, the right to review the rent continues indefinitely until that right is invoked, abandoned or one or other party is "estopped" from invoking it.

### UPLIFT PAYABLE IN FULL WHEN REVIEW IS DETERMINED OR AGREED

The House of Lords in *Scottish & Newcastle Plc v Raguz*<sup>2</sup> unanimously decided that the liability for a balancing payment to reflect an increase in rent following a review falls due on the day the rent is agreed or determined and **not** when either the review period commences or when the review process is triggered.

So settlement of a rent review is comparable to the music stopping in a game of pass the parcel – the tenant left holding the tenancy is liable to pay the whole uplift along with the next instalment of rent. Conversely (subject to the terms of any sale) the landlord who holds the reversion when the rent is agreed or determined receives the whole uplift. This is so regardless of how long either party has held the tenancy or reversion.

If the parties agree that there is to be no uplift on review, it is advisable to produce a "nil increase rent review memorandum" to avoid uncertainty at a later date.

Upwards and downwards rent reviews are exceptional, but the rule in *Raguz* almost certainly applies in reverse. If the rent is revised downwards, the current tenant is entitled to the entire credit and the current landlord is obliged to pay it.

### EFFECT OF THE LANDLORD AND TENANT (COVENANTS) ACT 1995

Tenants who have assigned their interest are not completely off the hook. In *Raguz*, the Court held that the date on which the rent is agreed or determined is also the point at which a "fixed charge" becomes due under the Landlord and Tenant (Covenants) Act 1995.

If the current tenant defaults on the payment of a fixed charge (including rent), the landlord has six months from the due date to serve notice on a former tenant or guarantor to impose liability, but the Court held that the landlord was not obliged to notify the former tenant that the review had been instigated.

So, if the current tenant fails to pay the uplift, the landlord could serve notice on a former tenant or guarantor up to six months after the rent review has been agreed or determined (even in respect of a review which has been outstanding for many years) and they would still be liable for the balancing payment.

### STANDARD COMMERCIAL PROPERTY CONDITIONS (SECOND EDITION) (SCPC)

Condition 5 of the SCPC regulates the parties' positions where the seller is either a landlord or tenant and a rent review has been started before completion of the sale. It sets out a common sense approach whereby the seller has conduct of the review process until completion, and then the buyer takes over.

Condition 8 provides for an apportionment of any uplift in rent received by the buyer from a tenant following a rent review after completion.

Strangely, where the property itself is leasehold and there is an outstanding rent review, the SCPC do not provide for an apportionment of any uplift.

### REGISTRATION AND ONWARD SALES

A right of a former landlord to receive an apportionment of the uplift of any increased rent received by the buyer (whether under the SCPC or under any express provision) is a personal right against the buyer. If the property is transferred again without the rent review having been agreed or determined, that right is, in effect, extinguished. It is possible expressly to reserve the seller's right in an onward transfer, even if it is not a party to that transfer, under the Contracts (Rights of Third Parties) Act 1999.

A seller's right to receive a proportion of uplifted rent post-completion is not of itself registrable, but it can be protected by a legal charge or a restriction on the title register.

### LIMITATION PERIODS

The limitation period for a landlord to recover rent arrears is six years under section 19 of the Limitation Act 1980. But when does the limitation clock start ticking for a late rent review?

In *Bello v Ideal View*,<sup>3</sup> the court decided that a balancing payment following a rent review did not become due until it had been agreed or determined. Accordingly, the limitation period does not commence until that point, even if (as in the case of *Bello*) 13 years had passed since the rent review date.

### ABANDONMENT AND ESTOPPEL

The judge in *Bello* was clear, relying on the 1983 case of *Amherst v James Walker Goldsmith and Silversmith Limited*<sup>4</sup>, that mere delay was insufficient ground for a defence of estoppel, waiver, acquiescence or abandonment.

A tenant would only be able to raise a successful defence of estoppel if the landlord had represented that it did not intend to trigger the rent review and the tenant had altered its position to its detriment in reliance on that representation. This is unlikely to be a common scenario – it is more often the case that the

landlord remains silent on the issue and simply does nothing to trigger the review.

The judge held that there could be circumstances where a delay was so long that it amounted to a representation on which to found an estoppel, but the facts in the case did not support it.

### INTEREST

Where a late rent review is either agreed or determined by an expert, interest can only run on the uplift from the due date. Unless there is an express provision in the lease, there appears to be little scope for arguing that interest is payable in respect of the period between the rent review date and the date of agreement or determination.<sup>5</sup>

The position is different where the rent is determined by an arbitrator, who has a statutory jurisdiction to award interest under Section 49 of the Arbitration Act 1996. The arbitrator's discretion is very wide, with power to award simple or compound interest for such dates and at such rates as he considers appropriate. Logically, an arbitrator should only award interest on the uplift on each individual rental payment from the date it fell due, rather than backdate interest on the entire amount to the rent review date.

Parties should claim interest expressly as part of the arbitration process. If the parties forget to ask for interest and none is awarded, there is no prospect of an appeal to award interest.

RICS guidance<sup>6</sup> for surveyors acting as arbitrators suggests that where a landlord has been instrumental in delaying the review (perhaps in the hope of obtaining better comparables), the tenant should not be penalised (this clearly has less force where either party can invoke the review), but conversely, the landlord has been kept from his money while the tenant has had the benefit of it.

### CONCLUSION

Late rent reviews can be an expensive surprise for unsuspecting tenants. For new leases, tenants could negotiate a long stop date into the rent review provisions such as six years or the next rent review date. For existing leases, an incoming tenant could seek a retention and indemnity from the outgoing tenant to protect it against any uplift if the review is subsequently triggered by the landlord.



**Ed John**

T +44 20 7296 2532  
ed.john@hoganlovells.com



**Shanna Davison**

T +44 20 7296 5524  
shanna.davison@hoganlovells.com

*A previous version of this article was published in Property Law Journal on 5 December 2011.*

1 *United Scientific Holdings Ltd v Burnley Borough Council* (HL) [1978] AC 904, *Wilderbrook Ltd v Olowu* (CA) [2005] EWCA Civ 1361; [2006] 2 P. & C.R. 4; [2005] N.P.C. 133.

2 [2008] UKHL 65.

3 [2009] EWHC 2808.

4 [1983] 1 Ch 305.

5 *Trusthouse Forte Albany Hotels Ltd v Daejan Investments Ltd* (1980) 256 E.G. 915.

6 RICS Guidance Notes for Surveyors Acting as Arbitrators and as Independent Experts in Commercial Property Rent Reviews (8th edition) – November 2002, para G3.11.3.