Falcon Chambers

A tale of two reference amounts

How will the ban on upwards only rent reviews work where the reviewed rent is the higher of two variable amounts?

Introduction

There has been a lot written about the ban on upwards only rent reviews. This ban will take effect when Schedule 37 of the English Devolution and Community Empowerment Act 2026 comes into force. That works by introducing two new schedules into the 1954 Act. Schedule 7A is the one that bans upwards only rent reviews.

One important topic which has not received attention in published articles on the ban is this. How will the ban work where the rent review clause includes two variable amounts?

E.g. a clause that says the rent on review will be the higher of:
- the original rent varied in line with the RPI; and
- the open market rent at the review date.

The key terms used in Schedule 7A

In essence, the ban applies if:
- you have a business tenancy entered into after Schedule 7A comes into force;
- in which the rent on review can't be predicted with certainty from the outset, the rent on review is a variable amount, and the new rent on review will or could be higher than the variable amount.

That is set out in paragraph 6(1), which tells you when the ban applies. It applies to a tenancy at a time when:
- it is a business tenancy with a rent review;
- the rent review terms do not "specify the new passing rent";
- the rent review terms include "elements 1 and 2";
- the tenancy was granted or varied to include such terms after Schedule 7A came into force, other than under certain pre-commencement arrangements.

The "**new passing rent**" is the rent contractually payable under the rent review clause.

The lease will only "**specify the new passing rent**" if you can say with certainty at the time the rent review clause was agreed what the rent will be at a future rent review date. E.g. a stepped rent, or one that increases at 2% p.a.

Element 1 is that:

> "An amount of rent (the "**reference amount**") is determined by reference to—
> (a) the effect of inflation or any other index or multiplier on the rent,
> (b) the amount of either or both of the following—
> (i) actual rent for premises;
> (ii) a hypothetical market rent, or other notional rent, for premises, or
> (c) the amount of the tenant's turnover".

That covers most of the standard varieties of variable rent review, including one in a subtenancy where the rent is linked to the headlease rent, and an equity rent review, where the rent on review is a percentage of the rent which the tenant receives from occupiers of the property: see Woodfall §§8.59 and 8.60. In both those cases, the rent on review is determined by reference to "the actual rent for premises".

Element 2 is that:

> "The amount of the new passing rent—
> (a) will be different from the reference amount, or
> (b) could be different from the reference amount (whether or not the amount could, alternatively, be the reference amount)."

If all those conditions are satisfied, then the ban applies. It is set out in paragraph 9:

> "(1) This paragraph applies in relation to a particular rent review if the amount of the new passing rent determined in accordance with the rent review terms would be larger than the reference amount.
>
> (2) That includes cases where the amount of the new passing rent would be—
> (a) smaller than the rent under review, but
> (b) still larger than the reference amount.
>
> (3) The rent review terms are of no effect to the extent that they would result in the new passing rent being larger than the reference amount.

(4) The amount of the new passing rent is instead to be the same as the reference amount."

How does this work where there are two reference amounts?

The drafting throughout assumes there is only one "reference amount".

What if there are two?

E.g. a clause of the kind referred to above that says the rent on review will be the higher of:

- the original rent varied in line with the RPI; and
- the open market rent at the review date.

Both of those are reference amounts.

I have seen a letter from someone in the correspondence unit of the Ministry of Housing, Communities & Local Government to a firm of solicitors on this topic. It says that where there are two or more reference amounts, the higher option would still be valid if both parties have agreed that this could be the case, and that the Government will issue guidance following the passage of the Bill that will cover these issues.

But neither such a letter, nor Government guidance, is likely to be given much weight by the Courts. It is a question of statutory interpretation where the usual principles apply.

You could argue that in paragraph 9(1), the singular includes the plural by virtue of s.6 of the Interpretation Act 1978 so it should read: "This paragraph applies in relation to a particular rent review if the amount of the new passing rent determined in accordance with the rent review terms would be larger than the reference amount**s**".

In that case, paragraph 9(1) would not affect the operation of the clause, because the "new passing rent" will not be larger than the two reference amounts, although it will be larger than one of them.

But s.6 of the 1978 Act only applies "unless the contrary intention appears".

And it is well arguable that the contrary intention does appear, for this reason.

If you can have two reference amounts, and can validly agree that the rent on review will be the higher, then you can have a rent review clause which says that the rent on review will be the higher of:

- the market rent on the review date;

- the market rent at the date the lease was granted or the previous review date.

Both of those are clearly reference amounts.

But a clause like that would likely have much the same effect in practice as a traditional upwards only rent review clause, which it is clearly the object of Schedule 7A to ban.

If there can only be one reference amount, then given the purpose of Schedule 7A, it seems clear that, to achieve the purpose of Schedule 7A, it must be the reference amount that produces the lower figure.

Conclusion

In conclusion, Schedule 7A leaves it wide open how the ban on upwards only rent reviews works where there the rent review clause has two variable amounts with the higher amount being the reviewed rent.

Whether landlords will seek to include such provisions in leases granted after the ban comes into force is uncertain. And if they do, it is also uncertain whether tenants will agree to that.

But if that does happen, there is bound to be litigation about whether on review the rent is the higher of the two, or the lower.

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