



July 2014

Upwards only rent review upheld

On the 1st July, 2014, the Supreme Court reversed the decision of Judge Charleton delivered on the 25th March, 2013, in relation to the High Court case of Ickendel Limited v Bewley's Café Grafton Street Limited [2012] 694 SP. The case was taken by Ickendel Limited ("Landlord") to invoke the rent review provisions in the lease which the Landlord claimed was an upwards only rent review. The lease was for a term of 35 years entered into on the 22nd September, 1987. The Landlord sought a declaration confirming that the review of the rent for the term commencing on the 1st January, 2012, was equal to the greater of (a) the rent payable for the period from the 1st January, 2007 to the 31st December, 2011 or (b) the revised rent for the five years from the 1st January, 2012, reviewed in accordance with the terms of the lease i.e. the open market rent.

This was contested by Bewley's Café Grafton Street Limited ("Tenant") primarily on the basis that the rent review provisions were ambiguous which allowed for a varied interpretation. The Tenant claimed that the rent payable from the 1st January, 2012, was equal to the greater of (a) the rent payable initially under the lease from the commencement of the term, 1987, up to and including the 31st December, 1991 or (b) the revised rent for the five years from the 1st January, 2012, reviewed in accordance with the terms of the lease i.e. the open market rent. The High Court refused to make the declaration as contended by the Landlord and held in favour of the Tenant confirming that the rent was to be reviewed upwards or downwards provided that the reviewed rent was not lower than the original rent payable in 1987 which was deemed the baseline rent. The findings of Judge Charleton predominately rested on his interpretation of the wording "...preceding five year period..." which he construed as the rent reserved in 1987 instead of 2007 which was when the most recent rent review took place.

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The Landlord appealed the High Court decision which was overturned by the Supreme Court. The Supreme Court held that there was no ambiguity with the rent review provisions and that the expression "...the preceding period..." was the period preceding the relevant period of five years the subject of review which commenced on the 1st January, 2007 and ended on the 31st December, 2011. It was also held that the absence of the word "...immediately..." or such other qualifying word before the wording "...preceding period..." did not mean that it could not be construed as the immediately preceding period.

The High Court decision left uncertainty in relation to the interpretation of rent review provisions in leases which would have contained similar provisions. However it is worth noting that it is case specific and that the implications would have been limited in that it may have only applied to leases with provisions of a similar nature.

Although the Supreme Court decision may not be favourable for tenants who are struggling to pay their rent and whose rents were negotiated prior to the downturn in the economy on an upwards only basis, nevertheless the decision is a welcome outcome for landlords. The outcome is also favourable to foreign investors as it ensures that any investment or proposed investment in properties that have the benefit of an upwards only rent review are secured. In time the decision will have little impact as upwards only rent review clauses have been banned since the 28th February, 2010.

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