

## Interim Rent and Covid-19 Pandemic - Tactical Considerations

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Many tenant businesses will sadly fail during the course of the Covid-19 pandemic and a recession is likely to follow. Many workers who have set up a home office will continue to work from home. All these factors will reduce the demand for commercial space. This is bad news for landlords as it means that commercial rents are likely to plummet. This article examines interim rents and tactical considerations against this backdrop.

### Interim rent – the basics

Interim rent was originally introduced as section 24A of the Landlord and Tenant Act 1954 by the Law of Property Act 1969. The provisions have subsequently been amended and can now be found in sections 24A to 24D of the 1954 Act.

Section 24A provides that either party may apply to have an interim rent determined if either: (i) the landlord has served a section 25 notice; or (ii) the tenant has served a section 26 request. No interim rent is payable if the tenancy is simply allowed to continue under s.24 without either party serving an s.25 notice or s.26 request.

Interim rent is the rent payable for the period from “the appropriate date” to the commencement of the new tenancy. “The appropriate date” is the earliest date that could have been given in the s.25 or s.26 notice: s.24B. In many cases the interim rent will be the rent under the new tenancy (if granted), but there are important exceptions which are likely to be relevant during and after the Covid-19 crisis.

There are, in effect, two regimes for interim rent: section 24C and section 24D. The amount payable will differ according to (a) whether or not the tenant is in the whole of the property comprised in the tenancy and (b) whether or not the landlord has stated he will oppose the grant of a new tenancy.

### Section 24C

Where the relevant notice (s.25 or s.26) was given at a time when the tenant was in occupation of the whole property, and the landlord did not oppose the grant of a new tenancy, then the rent under the new tenancy will also be the interim rent: 24C. In other words, the new rent will be backdated to the earliest date on which the old tenancy could have been terminated by notice or request. There are two important exceptions. These are set out in section 24C(3) as follows:-

*(a) the landlord or the tenant shows to the satisfaction of the court that the interim rent under that subsection differs substantially from the relevant rent; or*

*(b) the landlord or the tenant shows to the satisfaction of the court that the terms of the new tenancy differ from the terms of the relevant tenancy to such an extent that the interim rent under that subsection is substantially different from the rent which (in default of such agreement) the court would have determined under section 34 of this Act to be payable under a tenancy which commenced on the same day as the new tenancy and whose other terms were the same as the relevant tenancy.*

The “the relevant rent” means the rent which (in default of agreement between the landlord and the tenant) the court would have determined under section 34 of the Act to be payable under the new tenancy if the new tenancy had commenced on the appropriate date (within the meaning of section 24B).

There is no guidance given in the 1954 Act as to what constitutes a substantial difference in rent for the purposes of s.24C(3)(a) and (b). In *Palser v Grinling* [1948] A.C. 291 the House of Lord held that “substantial” (portion of the rent, in that case) was equivalent to “considerable, solid, or big”. It is therefore unlikely to be enough to avoid the “de minimis” principle. In *Charles Brooker, Leslie Brooker v Unique Pub Properties Ltd* [2009] EWHC 2599 (Ch), 2009 WL 3197567 HHJ Hughes QC Sitting as a Deputy High Court Judge rejected the submission that 10% difference would be a substantial difference stating at [91]-[93]:

*91....The interim rent will be the new rent unless there is a “substantial difference” between the rental value at 27th December 2007 and the new rent of £18,000. I have to decide whether there is a “substantial difference” between the two. No guidance is given in the Act.*

*92. If I find that the market has risen substantially since 27th December 2007, I could adjust the interim rent downwards. On the other hand, if I find that the market has fallen substantially since that date then I can adjust the interim rent upwards.*

*93. Mr Wonnacott suggested that a difference of more than ten per cent should be regarded as substantial. I disagree. In the event, the new rent has*

*been set at about 12.5 per cent above the passing rent but I doubt that Mr Wonnacott would regard that increase as substantial.*

Conversely, in *MacWilliam v Clough* [2014] PLSCS 58 (Manchester County Court) where the market rent at the date of hearing (September 2013) was approximately 40% lower than the date from which the interim rent started (April 2008) the judge held that this amounted to a substantial difference for the purposes of the application of s.24C(3)(a). The judge therefore ordered the interim rent at £37,566 per annum compared with £22,232 per annum under the new tenancy.

## Section 24D

Where s.24C does not apply – i.e. where the tenant is not in occupation of the whole of the property or where the grant of a new tenancy is opposed by the landlord – the interim rent will be determined pursuant to s.24D. The interim rent under s.24D(1) is the rent “*which it is reasonable for the tenant to pay while the relevant tenancy continues by virtue of section 24*”.

Section 24D(1) is not to be read as allowing the court to undertake a “*roving commission to consider every fact that might bear on reasonableness*”: *English Exporters (London) Ltd v Eldonwall Ltd* [1973] Ch. 415 Ch D at 429G–429HA. A reasonable rent for the tenant to pay is determined:-

- (1) by assessing it in a fair and practical way, having regard to the actual circumstances which it is contemplated at the start of the interim rent period will apply during the period for which the rent is to be paid;
- (2) by assuming a notional tenancy on the terms of the relevant tenancy (i.e. the current tenancy);
- (3) on the assumption that the notional tenancy is one from year to year;
- (4) by reference to the provisions of s.34(1) and (2) as applicable to that notional tenancy;
- (5) having regard to:
  - (a) the rent payable under the terms of the relevant tenancy (i.e. current tenancy); and
  - (b) to the rent payable under any sub-tenancy of part of the property comprised in the relevant tenancy (i.e. current tenancy).

In *Eldonwall* Megarry J noted, that the interim rent under s.24D is not the same as “*the reasonable rent*” without more. The intention of Parliament had been to ‘cushion’ the impact of the new open market rent which is being retrospectively imposed.

In *Neale v Witney Electric Theatre* [2011] EWCA Civ1032 the court assessed the passing rent under the relevant tenancy at £43,000 per annum. The judge had held that the s 34 market rent under a tenancy from year to year in accordance with s 24D would have been lower by some 25%. Nevertheless he awarded an interim rent as the same level as the passing rent. The tenant appealed. The Court of Appeal dismissed the appeal. Laws LJ described the assessment of “*the rent which it is reasonable for the tenant to pay*” in section 24D(1) as “*the overriding provision*”. Etherton LJ stated that, at least in that case, the judge was exercising “*a broad discretion to fix what he considered as a reasonable rent*”.

The dicta of *Neale* were applied by Sales J in *Humber Oil Terminals Trustee Ltd v Associated British Ports* [2012] EWHC 1336 (Ch). On the question of interim rent the parties adopted starkly divergent positions. The passing rent under the old lease was £4,045,244. The tenant asserted that the interim rent should be substantially less, namely £2,300,000. The landlord submitted that the interim rent should be £24,903,000.

Sales J carried out a careful analysis of section 24D. He held that the provisions of s.24D had been intended to create an approach broadly equivalent to that used in setting the amount of a *quantum meruit* and other common law remedies, where reasonable payment is to be made for some benefit conferred. He held that the “*governing obligation*” was that in section 24D(1), that is the rent “*which it was reasonable for the tenant to pay*”. It was the “*main guiding principle*”. The other two elements fall to be read and applied in the light of that obligation.

## **Tactical considerations**

The current flux of the market and the closure of many courts during the pandemic, which will cause substantial delays in getting lease renewal claim heard, open up the possibility that the rent on the relevant date (i.e. the earliest date that could have been given in the s.25 or s.26 notice) and the rent at the date of the hearing will “*differ substantially*”. It also opens up interesting arguments to what extent the pandemic and the forced closure of many business premises will affect “*the rent which it is reasonable for the tenant to pay*”, applying the dicta of *Neale* and *Humber Oil Terminals Trustee*.

Whether interim rents during the pandemic will benefit landlords or tenants is yet to be seen. If the market continues to fall, the interim rent may be higher than the rent eventually determined as payable under the new tenancy, thus benefitting landlords. Conversely, if the pandemic merely results in a momentary blip, then the interim rent may be lower than the rent under the new tenancy, thus benefitting tenants. Only time (and good valuation evidence) will tell.

Advisors will also want to consider the potential tactical advantage of making an application for interim rent in order to have control of the process. This is because under s.24A(2) neither party may make an application if the other has already made an application and has not withdrawn it. There is however no provision for the other party to be required to consent to the withdrawal (by contrast with s.24(2C)). It is as a result potentially possible for an application to be made by one party for interim rent, only for it to be withdrawn after the end of the six months from the termination of the tenancy. This would deprive the other party of the opportunity to make any application for interim rent at all. Advisors will need to be astute to this possibility, whether acting for the landlord or the tenant.

If acting for a tenant, advisers will also want to consider whether the client is able to serve an s.26 notice. This is because liability for interim rent is, in effect, determined by the date of service of the relevant notice. In circumstances where the market rent on the contractual expiry date is likely to be less than the current passing rent, a tenant will want to serve a s.26 notice as soon as possible (six months prior to the contractual term date) in order to reduce its rental liability with effect from that date.

In the current market, landlords who have not yet served a section 25 notice may want to consider whether it is better to hold off doing so in order to extend the period during which the rent is payable under the existing lease. If a section 25 notice or section 26 request has already been served, landlords may wish to seek to agree the new rent or have it determined as soon as possible (although long delays are very likely as County Courts are struggling to cope with remote hearings) as it appears inevitable that rent will fall in, at least, the short-term.

If a new tenancy is agreed at a lower rent without an interim rent having been agreed, advisors must be astute to the right of tenants to make an application for interim rent and a rebate from the landlord.

Finally -evidence, evidence and evidence. The provisions in 24A-D do, broadly speaking, create a rebuttable presumption that the interim rent will be the same as the new rent. The party who wants to argue for a different interim rent must therefore ensure that the relevant evidence is available. In the circumstances it will be crucial to get good valuation evidence from a reputable valuer in order to be able to advise clients on the tactics of making an application for interim rent in these turbulent times.

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