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Rent reviews

If you occupy your business premises as a tenant, the lease document may provide for the rent to be reviewed at intervals: normally every three or five years. There is inevitable scope for disagreement on the level of the new rent and a chartered surveyor, with an intimate knowledge of the property market, has a vital role to play in advising and possibly, in representing you. You need to be sure that you comply – and in good time – with the various steps required by the rent review process. If you fail to do so, the rent that the landlord asks for may apply automatically.



When do rent reviews usually occur and what is their purpose?

Rent reviews take place at whatever intervals agreed in the lease. Their purpose is usually to adjust the rent to the current market level at the review date (see below).

Can rents go down as well as up?

It depends on the terms of the lease. Some leases say that the rent will remain at the same level or increase (if market rents have increased) at the review date. This is often referred to as an 'upward only' rent review clause. Other leases allow the rent to go either up or down, depending on market rents at the time.

Are rent review clauses the same in all leases?

No. The rent review clauses in leases are often long and complicated. This is partly due to the fact that each lease will reflect the needs of the particular occupier to whom it relates. Professional advice – from a chartered surveyor or solicitor – will help you to understand the implications of the rent review clauses in your own lease.

How is the rent review activated?

Normally, the first step in the review procedure occurs when the landlord gives you written notice that the review is to be activated. This is called a trigger notice. A specific figure will normally be quoted for the new rent. If this does not seem reasonable, you must write and say so immediately. Keep a copy of all correspondence. There may be deadlines in the lease which, if you miss them, may mean that you have to pay what the landlord is asking. Contact your chartered surveyor or solicitor on the procedures and either try to agree a new rent with the landlord or get your chartered surveyor to negotiate on your behalf. Above all, do not ignore the issue, it will not go away.

What happens if I cannot agree the new rent with the landlord?

The lease will usually specify a procedure for resolving the disagreement. Normally, it will state that you should first try to agree the new rent with the landlord. If you cannot agree on the new rent, the lease will usually state that you should try to agree on the appointment of an independent third party (a chartered surveyor specialising in valuation) who will decide the new rent. If you cannot agree on the appointment of an independent third party, the lease will usually provide for the appointment to be made by the President of The Royal Institution of Chartered Surveyors (RICS) or the Chairman of RICS Scotland if the property is based in Scotland.

The independent third party may act either as an 'arbitrator' or as an 'independent expert'. There are important differences between the two.

The appointment of the independent third party does not prevent you from continuing to negotiate with the landlord to try to agree the new rent.

What are the main differences between the roles of the arbitrator and the independent expert?

The functions of an arbitrator are similar to those of a judge, though the process is private and less formal than that of a court. An arbitrator reaches a decision – which is called an 'award' – after taking evidence from the different parties. The parties can agree to submit evidence to the arbitrator in writing or orally. If the parties cannot agree, then the arbitrator decides how evidence will be taken.

The independent expert, too, may receive evidence and listen to arguments, but also has a duty to make his or her own investigations to determine an appropriate rent.

Who decides whether the independent third party is to act as arbitrator or independent expert?

The rent review provisions in the lease will usually specify the capacity in which the independent third party is to act. In a few leases one of the parties, usually the landlord, has the right to decide whether the independent third party should act as an arbitrator or independent expert.

How does the independent third party procedure work?

The purpose of appointing an independent third party is to achieve a fair, final and relatively quick, inexpensive and informal final settlement of disputes about rent, without having to go to court.

On what basis is the revised rent established?

The review provisions will usually require the independent third party to make a number of assumptions which will be set out in the lease. The rent will usually be assessed by applying evidence of rents agreed on the letting, rent review or lease renewal of broadly similar properties let on similar terms at approximately the same date. Remember that, if the rent review clause is **upward only**, the rent will adjust to the open market rental value only if this is higher than the current rent.



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How does RICS choose the arbitrator or independent expert?

The President will appoint a chartered surveyor with specialist training and experience to act as arbitrator or independent expert. A person will not be appointed if there is a real danger or even reasonable perception of bias, but it should be realised that the arbitrator or independent expert will be someone who has had a lot of experience in the market. He or she will probably have had dealings with other properties in the area. It is generally considered to be in the interest of both landlord and tenant that the person appointed has significant knowledge of the market and appropriate expertise. This can only be achieved if the person appointed has been active in the market and dealt with similar properties.

On what basis is the arbitrator or independent expert paid?

Following the appointment, the arbitrator or independent expert will ask you and your landlord to agree to the fee to be charged. Fees are open to negotiation and are usually agreed, but the arbitrator or independent expert has a duty to proceed even if agreement has not been reached. If you or the landlord feel that the fees are too high, there are procedures for challenging them in court after the rent review has been settled.

Does the landlord or tenant need to be professionally represented in arbitration or independent expert proceedings?

Arbitration and expert determination proceedings are usually less formal, when compared to court proceedings, and it is not obligatory for you or the landlord to be represented, either by a chartered surveyor or a solicitor. However, expert advice can be invaluable, both in interpreting the precise terms of the lease (which will have an effect upon rent) and in obtaining details of transactions relating to other premises which may influence the level of rent. Landlords are very often advised by chartered surveyors and may be expert in property matters themselves.

Presenting a case to an arbitrator without professional help can be risky. A surveyor who acts for you in dealings with the arbitrator is best placed to present specific evidence of comparable transactions and also to give an opinion as an 'expert witness', based on professional knowledge and judgement. Where disputes are referred to independent experts, the presentation of a case may be somewhat less important because an independent expert must make his or her own investigations and use his or her personal knowledge when making a decision. Nevertheless, it is advisable to use professional help to present a case.

What happens when the arbitrator or independent expert has reached a decision?

The decision – an arbitrator's 'award' or independent expert's 'determination' – is usually released after his or her fees have been paid.

Who pays the fees of the arbitrator or independent expert?

The lease normally stipulates responsibility. In the case of the independent expert, the fees will usually be payable equally by the parties. Sometimes the expert has discretion and will determine that, one party may be liable to pay all, or a specific proportion, of the fees. In an arbitration, the arbitrator has complete freedom to decide how the fees and the costs of the parties are to be apportioned. This is the case even if the lease states that one party should pay all of the arbitrator's fees.



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When does the new rent become effective?

Once the arbitrator's award or independent expert's determination has been issued to the parties, any increase in the rent previously payable will become payable immediately and will be effective from the rent review date, even if that date has passed. Often, leases will provide for interest to be paid on the increase in rent from the date of the rent review until the date of payment.

Is an award or determination final?

An arbitrator's award is final and binding, and it cannot be challenged in court merely because one party disagrees with it. However, in very limited circumstances involving points of law or misconduct by the arbitrator the High Court (the Court of Session in Scotland) has the power to set it aside on points of law or misconduct by the arbitrator. There is no right of appeal against an independent expert's determination. However, if it can be shown that the expert has been negligent, it may be possible to obtain compensation by way of damages through the court.

Are there alternative and possibly cheaper ways to settle a rent dispute?

Yes. The parties can, of course, settle a rent dispute by negotiation. Alternatively, it is possible for the parties, by agreement, to refer the dispute to a mediator. Mediation can be described as negotiation which is helped along by an independent third party. The role of the mediator is to help the parties to find common ground, prevent them from becoming entrenched and help them move towards an agreed and amicable settlement.

Mediation can produce a quicker and less expensive resolution which satisfies both parties. A mediator is different from an arbitrator or independent expert in that he or she would have no authority to impose a rent upon either party. Rather, the role of the mediator is to help the parties to reach an agreed settlement.

Information regarding the whole range of dispute resolution procedures, including mediation and the Small Business Scheme may be obtained from the RICS Dispute Resolution Service (rics.org/drs). Advice on rent reviews, arbitration and expert determination procedures is available from RICS Rent Review and Lease Renewal (E: drs@rics.org).



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