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Residential rental price indexation clauses for liberalised units are upheld

On Friday, 29 November 2024, the Supreme Court clarified this issue by answering preliminary questions. The Supreme Court ruled that the indexation clause and the surcharge clause must be assessed separately. The indexation clause based on CPI is ruled permissible.

Since 2023, there has been discussion on the (validity of) residential rental price indexation clauses in (ROZ) leases for liberalised housing. This residential rental price indexation clause consists of an inflation adjustment based on CPI and an additional surcharge that in practice usually amounts to “a maximum of 5%.” Several courts have ruled that this clause would be unfair within the meaning of European Directive 93/13/EEC on unfair terms in consumer contracts. As a result, the indexation clause would be voidable. This would have a major impact for residential landlords, as future indexation would no longer be possible and past rent increases would considered not to have occurred.

On Friday, 29 November 2024, the Supreme Court clarified this issue by answering preliminary questions. The Supreme Court ruled that the indexation clause and the surcharge clause must be assessed separately. The indexation clause based on CPI is ruled permissible. In addition to indexation, the landlord has a legitimate interest in a surcharge clause, to compensate for cost increases over inflation and to keep the rent in line with the general house price value increase.

A surcharge clause is in principle not unfair, according to the Supreme Court. This is because the financial consequences of the clause are foreseeable for the tenant: frequency, method of calculation and maximum of the rent increase are fixed upfront. Moreover, the tenant usually has the option to terminate the lease if the rent is increased. The national legislature also considers a rent increase clause permissible and can regulate its effects through, for example, the temporary cap on rent increases (as currently in effect until 2029). This reasoning of the Supreme Court is fully in line with Loyens & Loeff’s white paper.

The Supreme Court does not explicitly address the most common rent increase clause of CPI + a maximum of 5%. We believe that, on the basis of this judgment, a surcharge clause of 5% is also permissible (also in line with the Attorney General's clear prelude to this in his conclusion). All the more so since, as also mentioned in our white paper, an annual rent increase of inflation plus 5% over the past years has roughly (and especially in Amsterdam) kept pace with the overall house price value increase.

The Supreme Court indicates that the outcome *may* be different in an individual case (because of specific circumstances at the time the contract was entered into). If the surcharge clause were to be unfair, then that clause must be disapplied and a surcharge would not be allowed, both for the past and going forward. The landlord must then pay back the overcharged rent.

The Supreme Court ruling is positive for investors of liberalised housing, particularly at a time when demand for liberalised rental housing remains undiminished.

Do you have questions or want to consult in response to this ruling? Please contact one of our colleagues.

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