

# DOUG STEVENS SEMINAR

MONDAY 22<sup>nd</sup> OCTOBER 2018

08.00HRS TO 09.00HRS

VENUE : **CBRE**

**`C-BAR`**

**Henrietta House**

**Henrietta Place**

**W1G 0NB**

**SUBJECT**

**1. Q & A SESSION - CONFIDENTIALITY - DISCLOSURE - POWERS OF ARBITRATOR & EXPERT - ALIENATION & AGA's - L & T ACT 1988 - TERMINATING LEASES - INTERIM RENT-WILLING LESSOR/WILLING LESSEE - RENT REVIEWS v LEASE RENEWALS - WHY ARE HIGH STREET FAILING? - RENT FREE PERIODS AT LEASE RENEWAL?**

**50 mins**

**2. OPEN QUESTION TIME - 10 mins**

**NEXT SEMINAR 19<sup>th</sup> NOVEMBER**

Previous SEMINARS on website [www.douglasstevens.co.uk](http://www.douglasstevens.co.uk) **SEMINARS**

Q. YOU ARE ACTING FOR A RETAILER ON A RENT REVIEW IN A SHOPPING CENTRE. THE LANDLORD'S AGENT WON'T GIVE YOU THE INFORMATION YOU REQUIRE ON A RECENT LETTING AS IT IS SUBJECT TO A CONFIDENTIALITY AGREEMENT. THERE IS AN INDEPENDENT EXPERT APPOINTED WHAT DO YOU DO?

- ▶ A. THIS QUESTION COVERS THE ISSUES OF CONFIDENTIALITY & DISCLOSURE & THE POWERS OF INDEPENDENT EXPERTS
- ▶ Q. WHAT IS CONFIDENTIALITY & WHY IS IT USED.
- ▶ A. SOMETIMES THE PARTIES TO A TRANSACTION WISH TO KEEP THE DETAILS SECRET AND JOINTLY SIGN A NON-DISCLOSURE AGREEMENT (NDA)
- ▶ YOU SUSPECT THAT THE LANDLORD HAS DONE A 'SPECIAL' DEAL WITH THE TENANT AND YOU WANT THE DETAILS TO USE IN YOUR CASE.
- ▶ YOU HAVE IDENTIFIED A SPECIFIC TRANSACTION WHICH YOU REGARD AS RELEVANT (perhaps critical) TO THE CASE AND WANT THE LANDLORD (or the tenant) TO DISCLOSE THE INFORMATION
- ▶ Q. DO YOU HAVE ANY POWERS TO MAKE THE LANDLORD or TENANT GIVE YOU THE INFORMATION?
- ▶ A. NO
- ▶ YOU ARE SEEKING WHAT IS KNOWN AS SPECIFIC DISCLOSURE (Not a fishing expedition)
- ▶ Q. DO YOU ASK THE INDEPENDENT EXPERT TO GET THE INFORMATION - CAN HE/SHE UNLOCK THE CONFIDENTIALITY?
- ▶ A. AN EXPERT HAS NO POWERS TO ORDER DISCLOSURE OF INFORMATION BY THE PARTIES.
- ▶ Q. SO WHAT CAN YOU DO

A. YOU SHOULD MAKE ENQUIRIES TO TRY TO FIND OUT WHY THE DETAILS ARE CONFIDENTIAL

- ▶ WHILST THE EXPERT HAS NO POWERS TO MAKE AN ORDER FOR SPECIFIC DISCLOSURE
- ▶ OR TO COMPEL PRODUCTION OF ANY DOCUMENTS HE WILL MAKE HIS OWN ENQUIRIES AND WILL BE ENTITLED TO DRAW HIS OWN CONCLUSIONS AS TO WHY THE SHIELD OF CONFIDENTIALITY WAS PUT IN PLACE

▶ Q. WOULD THE ANSWER BE DIFFERENT IF AN ARBITRATOR WAS APPOINTED?

▶ A. YES

▶ Q. WHY

▶ A. AN ARBITRATOR CAN MAKE AN ORDER FOR SPECIFIC DISCLOSURE AND UNLOCK THE CONFIDENTIALITY

▶ Q. HOW DO YOU GO ABOUT OBTAINING AN ORDER FOR SPECIFIC DISCLOSURE FROM THE ARBITRATOR.

▶ A. YOU IDENTIFY THE TRANSACTION FOR WHICH YOU REQUIRE THE INFORMATION

▶ YOU PROVIDE REASONS AS TO WHY THE INFORMATION WOULD BE RELEVANT & SAVE COSTS

▶ THE ARBITRATOR WILL ASK THE LANDLORD TO GIVE REASONS WHY THE INFORMATION SHOULD NOT BE RELEASED ie, IT IS CONFIDENTIAL or perhaps NOT RELEVANT.

▶ THE ARBITRATOR WILL DECIDE (without having first seen the confidential information ) IF THE INFORMATION IS LIKELY TO BE MATERIALLY RELEVANT (and save time & costs) FOR HIM TO DECIDE THE RENT ON THE RENT REVIEW CASE

# POWERS OF ARBITRATORS & EXPERTS CONTRASTED

## ▶ POWERS OF AN ARBITRATOR



- ▶ CAN DECIDE OWN JURISDICTION
- ▶ CAN SEEK EXPERT AND/OR LEGAL ASSISTANCE
- ▶ MUST DECIDE COSTS & CAN AWARD INTEREST
- ▶ CAN COMPEL PRODUCTION OF DOCUMENTS (DISCLOSURE)
- ▶ CAN COMPEL ATTENDANCE OF WITNESSES
- ▶ CAN REQUIRE AN ORAL HEARING
- ▶ CAN ACT *EX-PARTE*, ie if one party will not co-operate/abide by set procedures he can continue to make an Award notwithstanding

## ▶ POWERS OF AN INDEPENDENT EXPERT



- ▶ VERY LIMITED (UNLESS THE LEASE SPECIFIES SUCH POWERS)
- ▶ CAN DECIDE COSTS (AWARD) (normally own costs only-not the parties costs) BUT only if lease specifies this or parties agree.
- ▶ CANNOT compel disclosure or witness summons or oral hearing
- ▶ BUT CAN speak to anyone, anywhere to establish information without disclosing this to the parties
- ▶ CAN determine rent outside parameters of parties
- ▶ EXPERT CAN also act without input of parties BUT is at more risk of a claim

# Q. SHOULD YOU ASK THE ARBITRATOR TO INVESTIGATE EVIDENCE ? NO SHOULD YOU ASK THE EXPERT TO INVESTIGATE EVIDENCE ? YES

## ARBITRATOR



## EXPERT

- ▶ WILL direct that parties produce a Statement Of Agreed Facts - so that documentation, lease terms, floor areas and evidence can be agreed (as far as possible)
  - ▶ CAN direct the form of evidence (ie, strict - or - proformas) that will be required/admissible
  - ▶ Arbitrator CAN make own investigations (S.34) BUT must reveal any findings to the parties for them to consider before he can use it to make the Award - so this adds to time and costs as parties then respond to those findings
  - ▶ Arbitrator can use evidence in his knowledge not provided by parties BUT ONLY if it is revealed to parties for them to consider
- ▶ CAN request a Statement Of Agreed Facts (SOAF) BUT parties under no duty to provide one
  - ▶ Has NO powers to direct form of evidence unless parties agree
  - ▶ EXPERT WILL make own investigations to confirm evidence from any source - he will do so because he could be found to be negligent
  - ▶ EXPERT CAN use own knowledge to decide the case - no obligation to reveal to the parties

Q. YOU ARE INSTRUCTED TO DISPOSE OF A SHOP LEASE IN A SHOPPING CENTRE BEFORE YOU MEASURE IT & PREPARE PARTICULARS,

WHAT DO YOU NEED TO CHECK IN THE LEASE?

▶ A. THE ALIENATION PROVISIONS

- ▶ DOES THE LEASE PERMIT ASSIGNMENT OF THE WHOLE?
- ▶ DOES THE LEASE PERMIT UNDERLETTING OF THE WHOLE?
- ▶ DOES THE LEASE PERMIT UNDERLETTING OF PART OR PARTS?
- ▶ IS LANDLORDS CONSENT TO ASSIGN WHOLE / UNDERLET WHOLE/OR PART NOT TO BE UNREASONABLY WITHHELD OR DELAYED (LLCNTBUW or D)
- ▶ Q. IF THE LEASE WAS GRANTED AFTER JANUARY 1996 WHAT ADDITIONAL REQUIREMENT WILL BE IN THE LEASE IN RELATION TO AN ASSIGNMENT (and possibly an underletting)?
- ▶ A. THIS IS A QUESTION ABOUT THE LANDLORD & TENANTS COVENANT ACT 1995 AND AGA's (AUTHORISED GUARANTEE AGREEMENTS)
- ▶ L & T COVENANTS ACT 1995 CAME IN TO FORCE W/E JANUARY 1996
- ▶ IT APPLIES TO LEASES GRANTED AFTER THAT DATE
- ▶ Q. WHAT DOES IT DO?

A. AGA'S SEEK TO STRIKE A BALANCE BETWEEN THE UNCERTAINTY OF LIABILITY OF A TENANT WHO ASSIGNS A LEASE AND THE PROTECTION OF THE LANDLORD IF THE TENANT ASSIGNS TO A PARTY WHO MIGHT NOT HAVE THE SAME COVENANT STRENGTH AS THE ASSIGNOR.

▶ BY ENTERING IN TO AN AGA THE ASSIGNOR (OUTGOING TENANT) EFFECTIVELY GUARANTEES THAT THE ASSIGNEE (INCOMING TENANT) WILL PAY THE RENT, ETC BUT ONCE THAT TENANT ASSIGNS THE LEASE TO ANOTHER PARTY THE ORIGINAL ASSIGNOR HAS NO FURTHER LIABILITY.

▶ Q. IF YOUR LEASE ALLOWS UNDERLETTING WHAT CONDITIONS MIGHT IT IMPOSE?

▶ A LETTING MUST BE AT MARKET RENT

▶ LETTING MUST BE ON SAME LEASE TERMS WITH SAME RENT REVIEW PATTERN, REPAIRS etc

▶ **Allied Dunbar Assurance Plc v Homebase Ltd [2002] EWCA Civ 666 (17 May 2002)**

▶ The judgment makes clear that imposing covenants outside the terms of the sublease which would otherwise be breaches of the pre-conditions on subletting set out in the lease is not an effective means to sidestep the subletting restrictions.

▶ **NCR Ltd v Riverland Portfolio No 1 Ltd**, the Court held that a reverse premium (i.e. a payment made by the tenant to the undertenant) did not infringe the headlease provisions which prohibited the grant at a premium (i.e. a payment made by the undertenant to the tenant).

▶ IT MIGHT SAY THAT THE LEASE MUST BE CONTRACTED OUT OF L & T ACT 1954

▶ Q. DOES THE LEASE HAVE A PRE-EMPTION AGREEMENT?

▶ Q. WHAT IS A PRE-EMPTION AGREEMENT?

▶ A. WHEN THE TENANT FINDS AN ASSIGNEE ( purchaser ) FOR THE LEASE THE LANDLORD HAS RESERVED RIGHT TO MATCH THE ASSIGNEES OFFER AND TAKE THE LEASE BACK

▶ Q. WHY WOULD THEY WANT TO DO SO?

▶ A. TO EXERT CONTROL OVER WHO THE PROPERTY WAS LET TO AND AT WHAT RENT AND ON WHAT TERMS

▶ A BENEFIT TO THE TENANT IS THAT THE LEASE IS SURRENDERED - WITH NO FUTURE LIABILITY



Q. WHAT IF THE LEASE YOU ARE ASSIGNING (or underletting) HAS A PERMITTED USE FOR SALE OF FOOTWEAR AND YOUR PROPOSED ASSIGNEE (or undertenant) IS AN OPTICIANS?

▶ A. YOU NEED TO CHECK THE PERMITTED USE AND USER CLAUSE IN THE LEASE

▶ DOES IT PROVIDE FOR ANY RETAIL USE WITHIN CLASS A1 USE CLASSES ORDER 1987

▶ IS LLCNTBUWOD OR ARE THERE SOME RESTRICTIONS?

▶ Q. IF THERE IS A GOOD ESTATE MANAGEMENT OR TENANT MIX PROVISIO COULD THE LANDLORD BLOCK THE ASSIGNMENT?

▶ A. NO - UNLESS THERE WAS A CLEAR TENANT MIX POLICY IN PLACE WHICH WAS IN OPERATION

▶ SEE CASE LAW Moss Bros v CSC Properties [1999] EGCS 47)

▶ A landlord of a shopping centre may reasonably withhold consent where the nature of the proposed incoming tenant's business does not accord with the landlord's tenant-mix policy, as long as that policy is known to the tenants and is a rational one

▶ Q. WHAT ACT NOW GOVERNS THE GRANTING (or refusal) OF LANDLORDS CONSENT TO ASSIGN/UNDERLET

▶ A. LANDLORD & TENANT ACT 1988

▶ PREVIOUS TO THIS ACT THE TENANT HAD TO SHOW THAT THE LANDLORD WAS BEING UNREASONABLE IN REFUSING CONSENT - NOW THE LANDLORD HAS TO ACT REASONABLY IN DECIDING ANY APPLICATION BY THE TENANT TO ASSIGN OR UNDERLET



## Q. WHAT ARE THE DIFFERENCES BETWEEN A RENT REVIEW AND A LEASE RENEWAL?

- ▶ A. RENT REVIEW GOVERNED BY THE TERMS OF THE LEASE.
- ▶ LEASE RENEWAL GOVERNED BY TERMS OF L& T ACT 1954 AND BY CIVIL PROCEDURES REGULATIONS (CPR)
- ▶ VALUATION DATE FOR RENT REVIEW FIXED/SET IN THE LEASE
- ▶ AT LEASE RENEWAL THE VALUATION DATE IS FLUID - EXPIRY DATE - WHEN NEW TERMS AGREED or COURT DATE
- ▶ BASIS OF VALUATION AT RENT REVIEWS DETERMINED BY RENT REVIEW CLAUSE (WHICH ARE VARIED IN FORM)
- ▶ VALUATION AT LEASE RENEWAL RIGIDLY DEFINED UNDER S.34 - BUT A MUCH SIMPLER VALUATION BASIS
- ▶ AT RENT REVIEW ONLY CONSIDERING RENT
- ▶ AT LEASE RENEWAL CONSIDERING RENT AND LEASE LENGTH, REVIEW PATTERN AND OTHER LEASE TERMS.
- ▶ AT RENT REVIEW IT IS INVARIABLY UPWARDS ONLY
- ▶ AT LEASE RENEWAL ITS UPWARDS & DOWNWARDS
- ▶ AT RENT REVIEW (UNLESS THERE IS A LEGAL POINT AT ISSUE) THE CASE, IF NOT AGREED BY PARTIES, WILL INVOLVE AN ARBITRATOR OR EXPERT BUT NOT NORMALLY SOLICITORS UNLESS THERE IS A LEGAL ISSUE TO BE DECIDED
- ▶ AT LEASE RENEWAL AS SOON AS EITHER SIDE SERVES A NOTICE AND AN APPLICATION (CLAIM) IS MADE TO COURT THEN SOLICITORS AND THE COURT IS INVOLVED ALTHOUGH PARTIES CAN NEGOTIATE A SETTLEMENT AT ANY TIME AND THEN FORMALLY WITHDRAW FROM THE COURT PROCESS
- ▶ AT RENT REVIEW THE TENANT IS CONTRACTUALLY COMMITTED UNTIL LEASE EXPIRY AND (EXCEPT BY NEGOTIATION) LANDLORD CANNOT SECURE VACANT POSSESSION AND TENANT CANNOT WALK AWAY.
- ▶ AT LEASE RENEWAL LANDLORD CAN OBJECT TO A NEW LEASE AND SECURE VACANT POSSESSION (IF COURT ACCEPTS THE GROUNDS OF OPPOSITION). TENANT CAN WALK AWAY AT EXPIRY OR GIVING 3 MONTHS NOTICE THEREAFTER.
- ▶ THIS MEANS THE LANDLORD HAS TO DECIDE IF HE WANTS TO GRANT A NEW LEASE OR NOT AND TENANT HAS TO DECIDE IF THEY WANT A NEW LEASE OR NOT. THE RENTAL LEVEL IS OFTEN KEY TO THAT DECISION.

Q. YOU ARE A TENANT OCCUPYING A LEASE INSIDE THE L & T ACT 1954  
THE LEASE EXPIRY DATE 29<sup>TH</sup> SEPTEMBER 2018 HAS PASSED AND NEITHER SIDE  
HAVE SERVED A NOTICE  
WHAT IS YOUR STATUS?

- ▶ A. YOU ARE HOLDING OVER UNDER S.24 L & T ACT 1954
- ▶ Q. HOW LONG CAN YOU HOLD OVER?
- ▶ A. INDEFINITELY UNTIL L/L SERVES A S.25 NOTICE TO TERMINATE LEASE
- ▶ Q. WHAT RENT WILL YOU BE PAYING?
- ▶ A. THE SAME RENT AS YOU HAVE BEEN PAYING
- ▶ Q. YOU DECIDE YOU WANT TO RENEW THE LEASE BUT THE PROPERTY IS OVER-RENTED
- ▶ WHAT DO YOU DO?
- ▶ A. SERVE A S.26 NOTICE TERMINATING YOUR LEASE IN NOT < 6 MONTHS BUT REQUESTING A NEW LEASE AND PROPOSING THE NEW TERMS OF THAT LEASE
- ▶ Q. WHAT MUSTN'T YOU (YOUR SOLICITORS) FORGET TO DO?
- ▶ A. HAVING ASKED THE L/L FOR A NEW LEASE YOU MUST BEFORE THE EXPIRY DATE OF YOUR S.26 NOTICE REGISTER YOUR APPLICATION FOR A NEW LEASE WITH THE COURT

## Q. WHAT HAPPENS IF YOU DON'T REGISTER YOUR APPLICATION WITH THE COURT?

▶ A. YOU LOSE YOUR RIGHTS TO A NEW LEASE

▶ Q. ALTERNATIVELY YOU DECIDE AS TENANT THAT YOU DO NOT WISH TO RENEW THE LEASE WHICH CONTRACTUALLY EXPIRED ON 28<sup>TH</sup> SEPTEMBER 2018

## HOW DO YOU TERMINATE YOUR LEASE?

▶ A. YOU SERVE A S.27 L & T ACT NOTICE GIVING THE L/L 3 MONTHS NOTICE

▶ Q. DO YOU PAY INTERIM RENT FOR THIS PERIOD?

▶ A. NO INTERIM RENT ONLY APPLIES IF L/L or T HAS APPLIED FOR AN INTERIM RENT

▶ S.24 A INTERIM RENT Introduced by LPA 1969

- L/L AND T HAVE RIGHT TO MAKE APPLICATION FOR INTERIM RENT. TIME LIMIT ON APPLICATIONS - CANNOT BE MADE MORE THAN **6 MONTHS** AFTER THE END OF THE OLD TENANCY
- START DATE FOR THE PAYMENT OF INTERIM RENT IS THE EARLIEST DATE WHICH COULD HAVE BEEN SPECIFIED BY THE LANDLORD FOR THE TERMINATION OF THE OLD LEASE IN THE L/L S.25 NOTICE OR THE EARLIEST DATE WHICH COULD HAVE BEEN SPECIFIED BY THE TENANT FOR THE START OF THE NEW TENANCY IN THE T S.26 REQUEST.
- Q. AT WHAT LEVEL IS THE INTERIM RENT SET?
- A. GENERALLY SAME AS NEW LEASE RENT UNLESS THERE HAS BEEN A CHANGE IN MARKET CONDITIONS (S.24 a)
- BUT IF T ASKS FOR NEW LEASE AND THEN DECIDES NOT TO PROCEED) INTERIM RENT CALCULATED AS MARKET RENT LESS ALLOWANCES FOR TENANCY FROM YEAR TO YEAR (10%) + TEMPERING THE EFFECT OF AN INCREASE. (S.24 d)

## Q. THERE ARE MAJOR CONCERNS THAT OUR HIGH STREETS ARE DYING WHAT ARE THE MAJOR CAUSES OF THE DECLINE?

### ▶ A. CVA's

### ▶ WHAT IS A CVA?

▶ A. If your limited company is insolvent, it can use a Company Voluntary Arrangement (CVA) to pay creditors over a fixed period. If creditors agree, your limited company can continue trading. Creditors include suppliers and landlords.

### ▶ Q. HOW IS IT POSSIBLE?

▶ A. INSOLVENCY ACT 1986 This Act introduced CVA's. It was intended to be a positive option to help companies in financial trouble. It was moderately used in the early years – featured quite strongly post-credit crunch from 2008 – but is now is almost a default position for companies who are under-performing. A commonly held view is that it's provisions are now being abused. Also Insolvency Act 2000

### ▶ Q. HOW DOES IT WORK?

▶ A. A company or limited liability partnership (LLP) can apply for a CVA if **all** the directors or members agree. Using an insolvency practitioner the company prepares a plan to pay unsecured creditors less than they are actually owed. The creditors are given the opportunity to vote on the proposed terms

### ▶ Q. WHAT NUMBER OF VOTES ARE REQUIRED FOR THE CVA TO BE CARRIED?

▶ A. 75% of unsecured creditors

## A. ONLINE SHOPPING

- ▶ ONLINE SHOPPING ACCOUNTS FOR APPROX 18% OF RETAIL SALES
- ▶ Q. DO WE STILL NEED BRICKS & MORTAR ie, PHYSICAL SHOPS?
- ▶ A. YES - SHOPPING IS A SOCIAL ACTIVITY - MANY CONSUMERS LIKE TO SEE AND TOUCH PRODUCTS RATHER THAN BUY ONLINE - MANY VIEW IN STORE AND THEN BUY ONLINE
- ▶ EVEN AMAZON ESTIMATE THAT THE CEILING FOR ONLINE PENETRATION IS LESS THAN 25%
- ▶ A. MINIMUM WAGE INCREASE
- ▶ THE INCREASE IN MINIMUM WAGE LEVELS HAS INCREASED THE WAGE BILL OF MANY RETAILERS BY APPROX 20% WHICH HAS PUT PRESSURE ON THEIR MARGINS/PROFITABILITY
- ▶ A. OVER-RENTEDNESS
- ▶ MANY RENTS ARE STILL AT MARKET HIGH 2007/2008 LEVELS DUE TO UPWARDS ONLY REVIEWS
- ▶ Q IS COMPETITION FROM OUT OF TOWN RETAIL PARKS & OUTLET CENTRES AN ISSUE?
- ▶ A. YES - THEY ARE OFTEN MORE CONVENIENT - FREE SURFACE CAR PARKING OUTSIDE THE STORE - LONGER TRADING HOURS

## Q. WHAT ARE YOUR SUGGESTIONS TO REGENERATE THE HIGH STREET ?

- ▶ A. ACKNOWLEDGE THAT WE HAVE TOO MANY SHOPS IN SOME TOWNS AND ALLOW CHANGES OF PLANNING USE - EITHER BY PERMITTED DEVELOPMENT RIGHTS - or MORE COMPREHENSIVE NEW ZONING FOR NON-RETAIL USES
- ▶ A. FAST TRACK CPO (COMPULSORY PURCHASE ORDERS)
- ▶ A. MAKE CAR PARKING FREE (as on a Retail Park) - implications thereof?
- ▶ A. CHANGE THE BUSINESS RATES SYSTEM
- ▶ A. MAKE RENT REVIEWS UPWARDS & DOWNWARDS AS IN REPUBLIC OF IRELAND
  
- ▶ READ THE REPORT GRIMSEY REVIEW 2
- ▶ <http://www.vanishinghighstreet.com/wp-content/uploads/2018/07/GrimseyReview2.pdf>
- ▶ IT SUGGESTS 25 POINTS TO REGENERATE THE HIGH STREET
- ▶ INCLUDING THE APPOINTMENT OF TOWN CENTRE COMMISSIONERS AND COLLATION OF A FULL RECORD OF THE (disparate) HIGH STREET OWNERSHIPS

Q. WHY DO RENT REVIEW CLAUSES GENERALLY REQUIRE US TO ASSUME A PROPERTY IS LET BETWEEN A WILLING LANDLORD AND A WILLING TENANT

- ▶ A. THE ASSUMPTION IS MADE ENSURE THAT EVEN IF MARKET CONDITIONS ARE BAD WE STILL ASSUME A LETTING TAKES PLACE BECAUSE BOTH THE LANDLORD + TENANT ARE WILLING TO ENTER INTO A NEW LEASE
- ▶ The landlord is assumed to be willing to let the property and there is assumed to be a willing tenant (which may or may not be the existing tenant). They are hypothetical entities.
- ▶ THE WILLING LANDLORD (Lessor) & WILLING TENANT(Lessee) WERE DEFINED IN
- ▶ **F. R. Evans (Leeds) v. English Electric (1978)**
- ▶ WILLING LESSOR
- ▶ Assumed to be willing to let on the review date
- ▶ is not affected by cash-flow problems
- ▶ cannot wait for a preferred tenant to take occupancy or for the rental market to pick up
- ▶ landlord must acknowledge all the factors affecting the marketability of the premises, including the market rent of premises which are comparable or would be considered as viable alternatives by a potential tenant.
- ▶ Cannot press the demand for rent to a level at which the willing tenant is no longer willing



## WILLING LESSEE

- ▶ TENANT WILL BE DEEMED AS ACTIVELY SEEKING THE LETTING IN QUESTION
- ▶ IS NOT AFFECTED BY LIQUIDITY PROBLEMS
- ▶ IS NOT AS SEEKING A DISCOUNT ON THE BASIS THAT THE LETTING DOES NOT FULFIL ITS PARTICULAR NEEDS
- ▶ WILL BE AWARE OF ALTERNATIVES IN THE MARKET
- ▶ THE ASSUMPTIONS OF WILLING LESSOR & WILLING LESSEE APPEAR IN VIRTUALLY ALL MODERN RENT REVIEW CLAUSES

▶ Q. DO THEY ALSO APPEAR IN S.34 L & T ACT TO SET THE RENT AT LEASE RENEWAL?

▶ A. NO. THERE IS NO MENTION OF A WILLING LESSEE - ONLY OF A WILLING LESSOR

## ▶ S.34 Rent under new tenancy.

- ▶ (1) such rent as may be agreed between the landlord and the tenant or may be determined by the court to be that at which,
- ▶ “ Having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing lessor”
- ▶ there being disregarded—
- ▶ (a) any effect on rent of the fact that the tenant has or his predecessors in title have been in **occupation** of the holding,
- ▶ (b) any **goodwill** attached to the holding by reason of the carrying on thereat of the business of the tenant (whether by him or by a predecessor of his in that business),
- ▶ (c) any effect on rent of an **improvement** - completed not more than twenty-one years before the application for the new tenancy was made to which this paragraph applies,

Q. WHY DO YOU THINK THERE IS NO MENTION OF WILLING LESSEE IN S.34?  
WAS IT AN OVERSIGHT?

- ▶ A. UNLIKELY - THE TERMINOLOGY WAS KNOWN AND USED IN THE L & T ACT 1927 WHICH PRINCIPALLY DEALT WITH COMPENSATION FOR TENANTS LOSING POSSESSION TO LANDLORDS
- ▶ AS THE L & T ACT 1954 GAVE TENANTS SECURITY OF TENURE IT IS PRESUMED THAT THE TENANT WILL WISH TO RENEW THE LEASE AND SO IS, OF COURSE WILLING - SO NO MENTION IS MADE IN S.34
- ▶ Q. YOU ARE ACTING FOR A LANDLORD AT LEASE RENEWAL AND THE TENANT WILL AGREE THE LENGTH OF THE NEW LEASE AND THE LEVEL OF RENT BUT WANTS A RENT FREE PERIOD
- ▶ WHAT IS THE TENANTS CASE FOR A RENT FREE PERIOD?
- ▶ A. TENANTS WILL ARGUE THAT S.34 ASSUMES THE PROPERTY IS VACANT AND THAT THE OUTGOING TENANT HAS REMOVED THEIR TRADE FIXTURES & FITTINGS AND SO THE INCOMING TENANT NEED A RENT FREE PERIOD TO FIT OUT
- ▶ TENANTS ARGUE THAT IF THE EVIDENCE FOR THE NEW RENT IS DERIVED FROM AN OPEN MARKET AND RECEIVED A RENT FREE PERIOD WHEN THAT LEASE WAS GRANTED - THEN THEY SHOULD ALSO RECEIVE A RENT FREE PERIOD
- ▶ Q. WHAT DO YOU AS LANDLORD ARGUE AGAINST THIS?
- ▶ A. S.34 MAKES NO MENTION OF VACANCY POSSESSION - IT SIMPLY ASKS YOU TO DISREGARD THE EFFECT ON RENT OF THE TENANTS OCCUPATION
- ▶ S.34 DOES NOT MENTION AN ASSUMPTION THAT THE TENANT REMOVES THEIR TRADE FITTINGS

Q. LEASE RENEWALS IF NOT AGREED BY NEGOTIATION ARE DECIDED BY A COUNTY COURT JUDGE  
ARE THERE ANY COURT DECISIONS ON THIS ISSUE OF RENT FREE PERIODS AT LEASE RENEWAL?

- ▶ A. YES THERE ARE 4 CASES DECIDING IN FAVOUR OF A RENT FREE PERIOD
- ▶ HMV MUSIC LIMITED v MOUNT EDEN LAND LIMITED (2012)
- ▶ ICELAND FOODS LIMITED v CASTLEBROOK HOLDINGS LIMITED (2014)
- ▶ BRITEL FUND TRUSTEES LIMITED v B&Q Plc (2016)
- ▶ ODEY ASSET MANAGEMENT GROUP LIMITED V TELFORD PROPERTIES LIMITED (2016)
- ▶ THE COURTS IN THESE CASES DECIDED THAT, WHERE A RENT FREE PERIOD WOULD BE REQUIRED IN THE OPEN MARKET (WHICH INCLUDES THE PERIOD FOR FITTING OUT AND ANY MARKET INCENTIVE), THE S.34 RENT SHOULD BE DISCOUNTED BY APPLYING THE ENTIRE RENT FREE PERIOD OVER THE TERM OF THE LEASE (OR UNTIL THE FIRST BREAK CLAUSE).
- ▶ THIS IS STILL A MAJOR POINT OF DISCUSSION WITH MANY PRACTITIONERS HOLDING THE VIEW THAT A HIGH COURT JUDGE MIGHT REACH A DIFFERENT DECISION
- ▶ SO 64 YEARS AFTER ITS INTRODUCTION IN 1954 WE ARE STILL DEBATING WHAT S.34 L & T ACT 1954 ACTUALLY MEANS WHEN SETTING THE NEW RENT AT LEASE RENEWAL