DOUG STEVENS SEMINAR

MONDAY 17th DECEMBER 2018

08.00HRS TO 09.00HRS

VENUE : CBRE

`C-BAR`

Henrietta House

Henrietta Place

W1G 0NB

SUBJECT

1. Q&A's ON SERVICE CHARGES, RATING, SURRENDERS,

DDA, REPAIRS, ADR, PLANNING, PERMITTED DEVELOPMENT RIGHTS, L&T ACT 50 mins

2. OPEN QUESTION TIME 10 mins

NEXT SEMINAR 21st JANUARY 2019

Previous SEMINARS on www.douglasstevens.co.uk SEMINARS

SERVICE CHARGES

- Q. WHAT IS A SERVICE CHARGE?
- A. SERVICE CHARGES ENABLE AN OWNER TO RECOVER FROM THE OCCUPIERS THE COSTS OF SERVICING AND OPERATING A PROPERTY.
- Q. WHAT WILL IT COVER?
- A. IT WILL INCLUDE REASONABLE COSTS OF MAINTENANCE, REPAIR AND REPLACEMENT (USUALLY WHERE BEYOND ECONOMIC REPAIR) OF THE FABRIC, PLANT, EQUIPMENT AND MATERIALS NECESSARY FOR THE PROPERTY'S OPERATION, PLUS ANY OTHER WORKS AND SERVICES THE PARTIES AGREE ARE TO BE PROVIDED BY THE OWNER, BUT SUBJECT TO REIMBURSEMENT BY THE OCCUPIER.
- Q. WHAT DON'T THEY INCLUDE?
- A. INITIAL COSTS (INCLUDING THE COST OF LEASING OF EQUIPMENT) INCURRED FOR THE DESIGN AND CONSTRUCTION OF THE FABRIC, PLANT OR EQUIPMENT
- A. SETTING UP COSTS, INCLUDING COSTS OF FITTING OUT AND EQUIPPING THE ON-SITE MANAGEMENT OFFICES THAT ARE REASONABLY CONSIDERED PART OF THE ORIGINAL DEVELOPMENT COST OF THE PROPERTY ANY IMPROVEMENT COSTS ABOVE THE COSTS OF NORMAL MAINTENANCE, REPAIR OR REPLACEMENT. FUTURE REDEVELOPMENT COSTS
- A. COSTS BETWEEN THE OWNER AND AN INDIVIDUAL OCCUPIER, IE,- ENFORCEMENT OF COVENANTS - COLLECTION OF RENTS – COSTS OF LETTING UNITS – CONSENTS FOR ASSIGNMENTS – SUBLETTING – ALTERATIONS – RENT REVIEWS, ETC.
- A. COSTS ARISING OUT OF THE FAILURE OR NEGLIGENCE OF THE MANAGER OR OWNERS

Q. ON WHICH PROPERTIES ARE SERVICE CHARGES LEVIED?

- A. SHOPS/STORES IN SHOPPING CENTRES. SHOPS IN LARGE BLOCKS
- A. UNITS ON RETAIL PARKS & LEISURE PARKS
- A. OFFICES IN MULTI-LET BUILDINGS – INDUSTRIAL UNITS ON INDUSTRIAL ESTATES
- A. RESIDENTIAL UNITS IN BLOCKS
- Q. WHY ARE THE MAIN FACTORS WHICH GOVERN SERVICE CHARGE LEVELS?
- A. THE SIZE OF THE BUILDING/CENTRE - ECONOMIES OF SCALE
- A. THE TYPE & AGE OF BUILDING/CONSTRUCTION – MULTI-LET – COVERED/OPEN - GLASS/BRICK
- A. THE LEVEL OF SERVICES – AIR CONDITIONING – LIFTS /ESCALATORS
- Q. WHAT ARE TYPICAL SERVICE CHARGE RATES PER SQ FT FOR RETAIL?
- LARGE COVERED REGIONAL SHOPPING CENTRE – 1M sq ft +, ie WESTFIELD £15 – 18 psf
- OPEN SHOPPING CENTRE £3- £5 psf – security, cleaning – BUT less M & E as it is not an environmentally controlled environment
- RETAIL PARK £1.50 psf - landscaping
- Q. IS THE ADMINSTRATION OF SERVIUCE CHARGES GOVERENED BY ANY CODE ?
- A. YES AN RICS GUIDANCE WITH 9 MANDATORY PROVISIONS

RICS professional standards and guidance, UK Service charges in commercial property 1st edition, September 2018 comes in to effect APRIL 2019 (Replaces existing 3rd Edition)

- Professionals involved in the management of service charge accounts must act in accordance with the following principles:
- 1 ALL EXPENDITURE THAT THE OWNER AND MANAGER SEEK TO RECOVER MUST BE IN ACCORDANCE WITH THE TERMS OF THE LEASE.
- 2 SUBJECT TO SECTION 4.2.7, OWNERS AND MANAGERS MUST SEEK TO RECOVER NO MORE THAN 100% OF THE PROPER AND ACTUAL COSTS OF THE PROVISION OR SUPPLY OF THE SERVICES.
- 3 OWNERS AND MANAGERS MUST ENSURE THAT SERVICE CHARGE BUDGETS, INCLUDING APPROPRIATE EXPLANATORY COMMENTARY, ARE ISSUED ANNUALLY TO ALL TENANTS.
- 4 OWNERS AND MANAGERS MUST ENSURE THAT AN APPROVED SET OF SERVICE CHARGE ACCOUNTS SHOWING A TRUE AND ACCURATE RECORD OF THE ACTUAL EXPENDITURE CONSTITUTING THE SERVICE CHARGE ARE PROVIDED ANNUALLY TO ALL TENANTS.
- 5 OWNERS AND MANAGERS MUST ENSURE THAT A SERVICE CHARGE APPORTIONMENT MATRIX FOR THEIR PROPERTY IS PROVIDED ANNUALLY TO ALL TENANTS.
- 6 SERVICE CHARGE MONIES (INCLUDING RESERVE AND SINKING FUNDS) MUST BE HELD IN ONE OR MORE DISCRETE (OR VIRTUAL) BANK ACCOUNTS.
- 7 INTEREST EARNED ON SERVICE CHARGE ACCOUNTS – OR WHERE SEPARATE ACCOUNTS PER PROPERTY ARE NOT OPERATED, A PROPER AND REASONABLE AMOUNT OF INTEREST CALCULATED ON NORMAL COMMERCIAL RATES – MUST BE CREDITED TO THE SERVICE CHARGE ACCOUNT AFTER APPROPRIATE DEDUCTIONS HAVE BEEN MADE.
- 8 WHERE ACTING ON BEHALF OF A TENANT, PRACTITIONERS MUST ADVISE THEIR CLIENTS THAT IF A DISPUTE EXISTS ANY SERVICE CHARGE PAYMENT WITHHELD BY THE TENANT SHOULD REFLECT ONLY THE ACTUAL SUMS IN DISPUTE.
- 9 WHEN ACTING ON BEHALF OF A LANDLORD, PRACTITIONERS MUST ADVISE THEIR CLIENTS THAT FOLLOWING RESOLUTION OF A DISPUTE, ANY SERVICE CHARGE THAT HAS BEEN RAISED INCORRECTLY SHOULD BE ADJUSTED TO REFLECT THE ERROR WITHOUT UNDUE DELAY.

SERVICE CHARGES ARE BOTH A MINEFIELD AND A BATTLEFIELD FOR DISPUTES

- OCCUPIERS VIEW SERVICE CHARGE AS A COST OF OCCUPATION EQUIVALENT TO RENT
- WHERE TENANTS CAN CHALLENGE THE SERVICE CHARGE LEVEL THEY WILL DO SO
- SOME USE SERVICE CHARGE CONSULTANTS TO FORENSICALLY EXAMINE THE SERVICE CHARGE
- Q. SHOULD TENANT IN COVERED CENTRE IN AN EXTERNAL FACING UNIT PAY THE SAME AS MALL TENANT?
- A. NO
- Q. SHOULD AN ANCHOR STORE HAVE A CONCESSIONARY RATE?
- A. YES – BUT ONLY IF THE LEASE PROVIDES FOR IT – WEIGHTING IS COMMONPLACE
- Q. DOES THE LANDLORD ALWAYS RECOVER THE FULL SERVICE CHARGE COST?
- A. NO NOT ALWAYS -:
- LANDLORD CANNOT RECOVER FULL SERVICE CHARGE COSTS ON VOID UNITS
- WHERE TENANT HAS NEGOTIATED FAVOURABLE VARIATIONS TO STANDARD SERVICE CHARGE PROVISION -IE, INCREASES LIMITED TO RPI (RATHER THAN ACTUAL INCREASES)

  OR A CAPPED SERVICE CHARGE ie, IT CANNOT EXCEED A SET SUM

  IN THESE CICUMSTANCES THERE IS A SERVICE CHARGE SHORTFALL BORNE BY THE L/L

CASE LAW ON REPAIR V REPLACEMENT/IMPROVEMENT

- ***SHOPPING CENTRE ROOF - Q. SHOULD YOU PATCH AN OLD ROOF OR REPLACE IT ?***
- ***A. Postel Properties Ltd v Boots the Chemist (1996)***
- **The issue was the roof of a Milton Keynes shopping centre. The centre was constructed in 1975 and the roof had a life expectancy of 20 years.**
- **When repairs were carried out after 15 years, the landlord took the opportunity to replace the roof covering altogether.**
- **It was held that this was acceptable and the cost could be recovered from tenants. The reasoning was that the works were such that a reasonably minded building owner would have undertaken them and they did not amount to giving the landlord something different from what had existed before.**
- **Q. WHAT ABOUT UPGRADING EXISTING AIR CONDITIONING SYSTEM?**
- **A. In contrast, the case of Fluor Daniel Properties Ltd v Shortlands Investments Ltd (2001) established that a landlord cannot recover improvements when the premises or facilities in question are in proper working order.**
- **In this case, the landlord of a commercial block equipped with an air-conditioning system failed to convince the court that its demand for £2m under the service charge to recover expenditure on upgrading this system was justified.**

RATING THE VOA (Valuation Office Agency)

- **Rateable value**
- The VOA gives a rateable value to each non-domestic property and this is used by local councils to calculate a property's business rates.
- A property's rateable value represents the rent the property could have been let for on a certain date set in law.
- It may not be the actual rent paid on this date as the law makes a number of assumptions (such as the property being vacant, to let and in reasonable repair, and that the rent excludes any other charges, taxes or insurance).
- The rateable value is not the amount you pay, but it is used by local councils to calculate your business rates bill.
- **Setting a rateable value**
- For most properties that are rented, there are three stages to a valuation:
- The VOA collects rent evidence (rent and lease agreement details) for most non-domestic properties. This evidence is analysed and adjusted by VOA surveyors to ensure that all evidence is considered fairly. The approach will be different, depending on the type of property (for example, bed and breakfast properties are valued using different information from shops).
- For most properties, they set common basic values per square metre for similar properties in the same area. Larger properties may have a lower value per square metre.
- The VOA then adjusts the basic value per square metre to reflect the property's individual features and applies this to the floor areas.

RATEABLE VALUE & RENTAL VALUE
Q. WHAT ARE THE DIFFERENCES?

- A. VALUATION DATE Revaluation usually happens every 5 years. The most recent revaluation came into effect in England and Wales on 1 April 2017, based on rateable values from 1 April 2015. The 2 year gap is to allow time for appeals. There are still approx. 100,000 cases outstanding
- Rental valuations & rent reviews are carried out at specific dates – ie, current – or as specified in a rent review clause or lease renewal date. There is no requirement to value everything at the same date, ie, 1st APRIL 2015
- A. PHYSICAL STATE Rateable value is based on the property as it physically exists
- *REBUS SIC STANTIBUS* - value as it stands, ie, as is
- RATEABLE HEREDITAMENT may include plant and machinery and chattels,
- The rateable value takes account (and adds value for) any improvements made to a property (ie, plant such as air conditioning) – whereas no account is taken of any tenants improvements in a rental valuation or at rent review (unless the lease provides for this)
- Rental value may be based on an entirely hypothetical unit (as defined in the lease – EXAMPLE NIKE store at Oxford Street) ie, not as it stands BUT as it is defined in the lease
- STANDARD BUSINESS RATE MULTIPLIER £0.493 APPLIED TO RATEABLE VALUE
- NB There are different multipliers in Wales and the City of London.
- Businesses with a rateable value of £51,000 and under will see their bill cut by a third over a two-year period.

Q. WHAT IS A SURRENDER A OF COMMERCIAL LEASE?

- A. IT IS THE TERMINATION OF THE LEASE AND THE LIABILITIES OF THAT LEASE
- THE EFFECTIVE EXERCISE OF A TENANT BREAK CLAUSE DOES TERMINATE A LEASE
- THE EXERCISE BY A LANDLORD OF A PRE-EMPTION CLAUSE (LANDLORD DECIDING THAT HE WANTS THE LEASE BACK RATHER THAN ALLOW THE TENANT TO ASSIGN TO ANOTEHR PARTY) ALSO RESULTS IN A TERMINATION OF THE LEASE
- Q. IF THERE IS NO TENANT BREAK CLAUSE NOR A PRE-EMPTION CLAUSE CAN A TENANT WHO MAY BE STRUGGLING UNILATERALLY DECIDE TO SURRENDER THEIR LEASE?
- A. NO - ONLY BY AGREEMENT WITH THE LANDLORD
- Q. WHAT ARE THE 2 X TYPES OF SURRENDER?
- A LEASE IS SURRENDERED WHEN THE TENANT'S INTEREST IS TRANSFERRED BACK TO THE LANDLORD AND BOTH PARTIES ACCEPT THAT IT WILL BE EXTINGUISHED.
- A. SIMPLE SURRENDER BY OPERATION OF LAW
- IF THE LANDLORD AND TENANT AGREE THAT THE LEASE WILL BE SURRENDERED AND THEY ACT IN A WAY THAT IS INCONSISTENT WITH THE LEASE CONTINUING, THE LEASE WILL BE SURRENDERED 'BY OPERATION OF LAW'. THIS IS QUICKER AND CHEAPER THAN A FORMAL DEED
- TENANT CAN BY AGREEMENT WITH LANDLORD SEND THE KEYS AND THE ORIGINAL LEASE BACK TO THE LANDLORD
- THE KEY REQUIREMENT IS FOR SOME 'UNEQUIVOCAL' ACT ie, TENANT VACATING PROPERTY AND LANDLORD GRANTING A NEW LEASE OF THE SAME PREMISES TO ANOTHER PARTY AT THE REQUEST OF THE ORIGINAL TENANT.
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SURRENDER Continued

- A. FORMAL SURRENDER
- A FORMAL SURRENDER IS WHERE THE PARTIES AGREE UPON THE TERMS OF THE SURRENDER AND A DATE FOR SURRENDER. THEY ENTER IN TO AN AGREEMENT TO SURRENDER ON THOSE AGREED TERMS AND ON THAT DATE AND ON THAT CATE IF ALL TERMS HAVE BEEN SATISFIED THE SURRENDER IS COMPLETED
- THIS WILL INVOLVE SOLICITORS AND OFTEN ACLCULATION OF A COMPLETION STATEMENT FOR ARREARS OF RENT & SERVICE CHARGE IF APPLICABLE
- *Levett-Dunn v NHS Property Services*
- TENANT SUCCESSFULLY ARGUED THAT THE RE-LETTING OF THE PROPERTY BY THE LANDLORD AMOUNTED TO SURRENDER BY OPERATION OF LAW. COURT CONSIDERED OTHER ACTS CARRIED OUT BEFORE THE RE-LETTING. HELD THAT NONE OF THE FOLLOWING CONSTITUTED A SURRENDER:
- ACCEPTANCE OF KEYS BY LANDLORD'S AGENT ON A WITHOUT PREJUDICE BASIS.
- CORRESPONDENCE REGARDING LIABILITY FOR PAYMENT OF UTILITIES.
- LANDLORD MARKETING THE PREMISES FOR RE-LETTING
- COURTS WILL CONSIDER ACTIONS OF THE LANDLORD AND TENANT AS A WHOLE AND THAT SINGLE EVENTS WILL BE CONSIDERED IN THE CONTEXT OF THE BROADER CIRCUMSTANCES OF THE CASE.

Q. WHAT IS DDA?

- A. IT REFERS TO THE DISABLED DISCRIMINATION ACT 1995
- **IT IS THE GENERIC TERM USED WHEN WE CONSIDER WHETHER BUILDINGS ARE COMPLIANT WITH STATUTORY REGULATIONS REGARDING ACCESS, etc, FOR DISABLED PERSONS**
- The 1995 Disability Discrimination Act (DDA) aimed to protect disabled people against discrimination – both in employment and when using a service or facility. It was implemented in three phases.
- Phase I in 1996 made it illegal to treat disabled people less favourably because of their disability.
- Phase II in 1999 obliged businesses to make 'reasonable adjustments' for disabled staff, like providing additional support or equipment. They also had to start making changes to the way they provide their services to customers, for example providing bank statements in large print.
- Phase III from October 2004 businesses have had to make physical alterations to their premises to overcome access barriers. The example people most readily think of is installing ramps for wheelchair users.
- DDA 1995 HAS BEEN SUPERCEDED BY THE EQUALITIES ACT 2010 & OCTOBER 2010 BUILDING REGULATIONS (PART M)

THE EQUALITY ACT 2010

- The Equality Act requires reasonable adjustments to be made in relation to accessibility. In practice, this means that due regard must be given to any specific needs of likely building users that might be reasonably met.
- Part M (Access to and use of buildings) of the Building Regulations 2010.
- Part M sets out minimum requirements to ensure that a broad range of people are able to access and use facilities within buildings.
- THE EQUALITY ACT 2010 (THE EA) BRINGS TOGETHER DISABILITY DISCRIMINATION ACT 1995, WITH AIM TO STRENGTHEN EXISTING PROVISIONS INTO SINGLE FRAMEWORK.
- EA IMPOSES DUTY TO MAKE REASONABLE ADJUSTMENTS TO A PHYSICAL FEATURE IN ORDER TO COMPLY WITH THE REQUIREMENTS OF THE EA.
- EA GUIDANCE TENDS TO DEMONSTRATE COMPLIANCE WITH PART M OF THE BUILDING REGULATIONS,
- BECAUSE SERVICE PROVIDERS AND EMPLOYERS ARE REQUIRED BY THE EA TO MAKE REASONABLE ADJUSTMENT TO ANY PHYSICAL FEATURE WHICH MIGHT PUT A DISABLED PERSON AT A SUBSTANTIAL DISADVANTAGE COMPARED TO A NON-DISABLED PERSON.
- IT REMAINS FOR THE PERSONS UNDERTAKING BUILDING WORKS TO CONSIDER IF FURTHER PROVISION, BEYOND THAT DESCRIBED IN APPROVED DOCUMENT M, IS APPROPRIATE.

Q. WHAT TRIGGERS COMPLIANCE WITH EQUALITY ACT 2010?

A. ANY NEW BUILD AFTER THIS DATE OR BUILDING ALTERATION TO EXISTING BUILDING

A. A MATERIAL CHANGE OF USE OF EXISTING BUILDING

- WHERE THERE IS A MATERIAL CHANGE OF USE OF THE WHOLE OF A BUILDING - HOTEL -BOARDING HOUSE - PUBLIC BUILDING – SHOP THE BUILDING MUST BE UPGRADED, TO COMPLY WITH PART M1 (ACCESS AND USE).
- IT SHOULD BE NOTED THAT 'SHOP' INCLUDES USE AS A RESTAURANT, BAR OR PUBLIC HOUSE.
- IT NECESSARY TO ENSURE THAT:
- • THERE IS REASONABLE PROVISION FOR PEOPLE TO GAIN ACCESS TO THAT PART FROM THE SITE BOUNDARY AND FROM ON-SITE CAR PARKING WHERE PROVIDED, EITHER BY MEANS OF AN INDEPENDENT ACCESS OR BY MEANS OF A ROUTE TO AND THROUGH THE BUILDING;
- • THAT PART ITSELF COMPLIES WITH M1 (ACCESS AND USE); AND
- • ANY SANITARY CONVENIENCES PROVIDED IN, OR IN CONNECTION WITH, THAT PART COMPLY WITH REQUIREMENT M1: IF USERS OF THAT PART HAVE THE USE OF SANITARY CONVENIENCES ELSEWHERE IN THE BUILDING, THERE MUST BE REASONABLE PROVISION FOR PEOPLE TO GAIN ACCESS TO AND USE THAT SANITARY ACCOMMODATION, UPGRADED IF NEED BE.
- DEVELOPERS WILL NEED TO AGREE HOW THEY HAVE ASSESSED WHAT IS REASONABLE PROVISION WITH THE RELEVANT BUILDING CONTROL BODY.

REPAIRING CLAUSES

- Q. WHAT IS AN FRI LEASE?
- A. A FULL REPAIRING & INSURING LEASE – TENANTS REPAIRS AND PAYS INSURANCE PREMIUM FRI lease is worded such that L/L has rights to inspect the property to assess any disrepair (breach of repairing clauses)
- FRI lease will reserve rights for L/L to require T to carry out any wants of repair (disrepairs) & may reserve rights for L/L to enter to carry out the works
- Q. WHAT IS AN EFFECTIVE FRI LEASE ?
- A. WHERE L/L CARRIES OUT STRUCTURAL REPAIRS BUT RECOVERS COSTS FROM T BY WAY OF SERVICE CHARGE & T PAYS INSURANCE PREMIUM
- Q. WHAT IS AN IRT LEASE ?
- A. INTERNAL REPAIRING TERMS – WHERE TENANT IS RESPONSIBLE FOR INETERIOR ONLY
- FORFEITURE – if the disrepair is significant and L/L seeks possession from the T for breach of repairing covenant L/L can take action to forfeit the lease (i.e. get vacant possession)
- Forfeiture by L/L for breach of repair and relief therefrom for T are governed by statute
- DILAPIDATIONS – this is the general term used for wants of repair or decoration. Schedules used to notify tenants of the works of repair and decoration which the landlord wishes to be carried out under the terms of the lease are referred to as A SCHEDULE OF DILAPIDATIONS.
- INTERIM OR TERMINAL SCHEDULE OF DILAPIDATIONS Lease will normally permit L/L to serve a schedule during the term (INTERIM SCHEDULE) or at the end of the lease (TERMINAL SCHEDULE)

STATUTES DEALING WITH REPAIRS / DILAPIDATIONS

- LAW OF PROPERTY ACT 1925 L/L seeking forfeiture for breach of repair serves a S.146 Notice
- The notice stipulates the 'wants of repair' and gives a reasonable time period for works of repair to be carried out
- LEASEHOLD PROPERTY (REPAIRS) ACT 1938 To protect T's from overzealous L/L's T has protection from forfeiture by virtue of this Act
- L/L in serving S.146 must notify T of rights under LP (R) A 1938 – this applies to leases granted for a term of 7 years or more of which at least 3 years are unexpired
- Where L/L serves a S.146 T has 28 days to claim the benefit of the 1938 Act by a counter notice
- The effect of the counter notice is that no proceedings by action or otherwise may be taken by the L/L for forfeiture or for damages without the leave of the Court

LANDLORD & TENANT ACT 1927 SECTION 18 when L/L seeks damages for breach of covenant to put, keep or leave in repair the sum of damages must in no case exceed the amount (if any) by which the value of the reversion in the premises is diminished as a consequence of the breach of covenant

i.e. L/L cannot obtain a higher sum of damages than the loss he would suffer from a premises being in disrepair

known as S.18 DIMINUTION IN VALUE

- Q. DOES THE LEASE ALLOW L/L FULL ACCESS TO ASSESS DILAPIDATIONS AND CARRY OUT THE REPAIRS HIMSELF AND RECOVER COSTS FROM T ?
- A. YES GENERALLY – BUT ONLY IF LEASE PERMITS THIS – BUT SEE CASE LAW BELOW

LATENT / INHERENT DEFECTS

- **Q. WHAT IS AN "INHERENT OR LATENT DEFECT" ?**
- A. A LATENT DEFECT IS A FAULT OR DEFECT CAUSED BY FAILURES IN DESIGN, MATERIALS OR CONSTRUCTION METHOD WHICH MAY NOT BECOME APPARENT OR EASILY DETECTABLE UNTIL YEARS AFTER COMPLETION OF THE CONSTRUCTION PROJECT AND AFTER EXPIRY OF THE DEFECTS LIABILITY PERIOD.
- IT MIGHT BE THOUGHT THAT IF A BUILDING WAS DEFECTIVE THAT WAS THE L/L'S PROBLEM BUT SEE
- ***(RAVENSEFT PROPERTIES LTD* V *DAVSTONE (HOLDINGS) LTD* [1979] 1 EGLR 54; (1978) 249 EG 51).**
- **EXTERNAL STONE CLADDING HAD STARTED TO DETACH FROM A CONCRETE FRAME OF A 16-MAISONETTE BUILDING, RENDERING IT DANGEROUS. PRINCIPAL REASON FOR THE PROBLEM WAS LACK OF EXPANSION JOINTS.IT WAS NOT** REALISED THAT EXPANSION JOINTS WOULD BE NECESSARY.
- TO DEAL WITH PROBLEM ALL THE STONE CLADDING TAKEN DOWN & REPLACED IT WITH PROPER TIES, INCLUDING EXPANSION JOINTS (THE ABSENCE OF WHICH THE T`S CLAIMED WAS THE INHERENT DEFECT).
- T ARGUED THAT THIS REPAIR WORK FELL OUTSIDE THE SCOPE OF THEIR REPAIRING COVENANT BECAUSE IT AROSE OUT OF AN INHERENT DEFECT.
- THE COURT NOT ONLY REJECTED THE EXISTENCE OF A DOCTRINE OF INHERENT DEFECT BUT ALSO REJECTED THE TENANTS' CONTENTION THAT THEY SHOULD NOT BE LIABLE FOR ANY WORK UNDER THE COVENANT THAT ULTIMATELY NECESSITATES REMEDY OF AN INHERENT DEFECT. THE COURT ADOPTED A "FACT AND DEGREE" APPROACH, CONCLUDING THAT THE WORK WAS "REPAIR" WITHIN THE MEANING OF THE TENANT'S COVENANT.
- **NB RECENT EXAMPLE ON CHEESEGRATER BUILDING. FAULTY BATCH OF BOLTS TO RETAIN CLADDING.** NOVEMBER 2014 TWO BOLTS, THE SIZE OF A HUMAN ARM BROKE AND FELL FROM THE 738FT TOWER. CLAIM AGAINST STEEL FABRICATOR - **COVERED BY INSURANCE**

DELETERIOUS MATERIALS

- Q. WHAT ARE DELETERIOUS MATERIALS ?
- A. Materials or building techniques which are dangerous to health, or which are environmentally unfriendly, or which tend to fail in practice.
- Q. NAME SOME DELETERIOUS MATERIALS
- **High Alumina Cement (HAC)**
- **Wood wool slabs in permanent formwork to concrete.**
- **Calcium Chloride or Sodium Chloride in concrete.**
- **Asbestos Products.**
- **Marine or sea dredged aggregates.**
- **Lead, or materials containing lead, which may be ingested or absorbed.**
- **Calcium silicate bricks or tiles.**
- **Materials composed of mineral fibres wlth diameter of <3 microns or less or length of < 200 microns**
- **Decorative finishes containing lead or asbestos.**
- **Paints and wood preservatives containing Pentachlorophenol.**

Q. WHAT IS ADR AND WHY MIGHT YOU WISH TO USE IT ?

- **A. ALTERNATIVE DISPUTE RESOLUTION (ADR)**
- **ADR** refers to a range of techniques for resolving disputes without seeking redress from the courts.
- **Use of ADR is increasing – Courts slower and more expensive – costs awards against the losing party who rejected ADR offer from other party**
- **Q. WHAT ARE THE DIFFERENT FORMS OF ADR?**
- **A. NAMA** acronym
- **N Negotiation** is the process of getting parties together with a view to reconcile differences and establish areas of agreement, settlement or compromise.
- **A Adjudication** involves the appointment of an independent adjudicator who considers the evidence and makes a decision which is binding to all parties. It is widely used within the construction industry.
- **M Mediation** involves the appointment of an independent third party (the mediator) whose role is to help all parties to a dispute to come to an agreement. It is a voluntary process and all parties have to agree for mediation to go ahead. Mediation is not binding.
- **A Arbitration** involves the parties agreeing to refer the dispute to a third party (the arbitrator) and agree to be bound by the arbitrator's decision. Arbitration is governed by the Arbitration Act 1996. It is a quasi-judicial process or **INDEPENDENT EXPERT DETERMINATION**

Q. WHAT ARE THE VARIOUS TYPES OF PLANNING PERMISSION ?

- **FULL PLANNING PERMISSION:** grants permission for all aspects of the proposed development subject to various conditions
- **OUTLINE PLANNING PERMISSION:** establishes if the scale and nature of a proposed development would be acceptable to the local planning authority and/or when the applicant is seeking an agreement "in principle" to a proposed development, without being committed to a particular form of design or layout.
- **APPROVAL OF "RESERVED MATTERS"** Seeking permission for those aspects not dealt with in an outline planning permission, or seeking approval of aspects of a development which were reserved by a planning condition in an earlier grant of full planning permission.
- **HYBRID:** a 'hybrid' application can be made with outline planning permission for one part and full planning permission for another part of the same site.
- **RENEWAL OF PLANNING PERMISSION:** Where an outline or full planning permission was subject to a time-limiting condition which has since expired.This will be reviewed on current rather than previous planning policies. Applications for renewal of an earlier planning permission are usually granted anew, unless there has been a significant change in the relevant material considerations which are to be weighed in the decision.
- **REMOVAL OR ALTERATION OF A PLANNING CONDITION:** **An** applicant with a consent subject to conditions can apply to vary the condition concerned – deleting it or suggesting an alternative.

Q. WHAT IS THE PRINCIPAL PLANNING ACT?

- A. TOWN AND COUNTRY PLANNING ACT 1990
- PART III OF THE ACT IS CONCERNED WITH CONTROL OVER DEVELOPMENT
- IT FOCUSES ON EFFECTIVELY PUTTING INTO PUBLIC OWNERSHIP, UNDER DEMOCRATICALLY ACCOUNTABLE REGULATION, ALL SIGNIFICANT CONSTRUCTION OR DEMOLITION DECISIONS BY PRIVATE LANDOWNERS.
- THIS WAS SEEN NECESSARY TO ENSURE THAT PRIVATE DEVELOPMENT DID NOT RUN CONTRARY TO THE COMMUNITY'S INTEREST.
- THE ORIGINAL ACT WHICH FIRST STIPULATED THAT ANY NEW "DEVELOPMENT" REQUIRED PLANNING PERMISSION WAS THE TOWN AND COUNTRY PLANNING ACT 1947, (which came into effect on 1 July 1948)
- THE 1947 ACT GRANTED PLANNING TITLE FOR ALL PRE-EXISTING USES AND BUILDINGS
- DEVELOPMENT AS DEFINED BY THE ACT CONSISTS OF
- ANY BUILDING, ENGINEERING OR MINING OPERATION, OR THE MAKING OF A MATERIAL CHANGE OF USE IN ANY LAND OR BUILDING.
- SPECIFIED CATEGORIES OF DEVELOPMENT ARE GRANTED AN AUTOMATIC PLANNING PERMISSION BY LAW, AND THEREFORE DO NOT REQUIRE ANY APPLICATION FOR PLANNING PERMISSION. THESE CATEGORIES ARE REFERRED TO AS PERMITTED DEVELOPMENT

Q WHAT ARE GENERAL PERMITTED DEVELOPMENT ORDERS (GPDO'S) USED FOR ?

- A THEY ALLOW CERTAIN CHANGES OF USE WITHOUT THE NEED FOR PLANNING PERMISSION - OFTEN REFERRED TO AS PDR'S (PERMITTED DEVELOPMENT RIGHTS) ie OFFICES TO RESIDENTIAL
- Q. WHAT IS A PRE-APP
- A. A PRE-APPLICATION PLANNING ENQUIRY WITH THE LOCAL PLANNING AUTHORITY (LPA)
- UNTIL RECENT YEARS DISCUSSIONS WITH PLANNERS PRIOR TO THE SUBMISSION OF AN APPLICATION WERE LARGELY INFORMAL IN NATURE.
- LPA`S UNDER PRESSURE TO MEET PERFORMANCE TARGETS ON PLANNING APPLICATIONS DECIDED THEY SHOULD CHARGE FOR THEIR RESOURCE ON THE PRE-APPLICATION STAGE OF AN APPLICATION.
- THEY ARE NOW ALLOWED TO CHARGE A FEE TO CONSIDER AN INITIAL ENQUIRY, BEFORE A FORMAL PLANNING SUBMISSION IS MADE.
- FEES USUALLY START AT £180.00 AND RISE ACCORDING TO THE SCALE OF THE PROPOSED DEVELOPMENT.
- THE APPLICANT HAS THE CHOICE TO APPLY FOR BASIC OR A DETAILED RESPONSE COVERING HIGHWAYS OFFICER etc.

- Q. WHAT IS THE CURRENT USE CLASSES ORDER ?
- A. TOWN & COUNTRY PLANNING (USE CLASSES) ORDER 1987
- Q WHAT ARE THE 4 MAIN USE CLASSES ?
- A CLASS A Retail A1 Financial A2 - Restaurant A3 - Pub A4 - Take-away A5
- CLASS B Offices B1 - Industrial B2 B3 B4 B5 B6 B7 B8 (Warehouse)
- CLASS C Hotels C1 – Colleges Hospital C2 - Residential/dwellinghouses C3
- CLASS D Non-Residential D1, museums - D2 cinema, bingo, gym
- SUI GENERIS Non-classified

Q. IS THE LANDLORD & TENANT ACT 1954 PT 2 STILL FIT FOR PURPOSE ?

- A NO if you are a landlord (L/L). YES, probably, if you are a tenant (T)
- It is 64 yrs old – introduced post-war to protect new businesses.
- Q WHAT ARE THE KEY PROVISIONS
- A. SECURITY OF TENURE - COMPENSATION
- Problems for L/L –: 1. L/L can`t easily get vacant possession to effect development or tenant mix changes. 2. Must prove grounds of opposition to new lease. 3. Must pay statutory compensation (except on grounds S.30 a-d) . 4. After lengthy/expensive lease renewal negotiations T can still walk away giving 3 months notice.
- Benefit for T –: 1. Security of tenure – they can renew lease unless L/L has valid grounds of opposition to a new lease. 2. Compensation for loss of business & improvements 3. The rent assessment at lease renewal is upwards & downwards
- Problems for T – Court procedures are lengthy and costly.
- Q IS IT LIKELY L & T Act 1954 WILL BE REPEALED ?
- A. UNLIKELY. LEASE LENGTHS ARE SHORTER – MORE USE OF CONTRACTED OUT LEASES ON NEW LETTINGS
- L/L`S PREFER LEASE CONTRACTED OUT OF L & T ACT SO THEY HAVE CONTROL AT LEASE EXPIRY

L & T ACT - Important clauses

- S.24 CONTINUATION The lease continues indefinitely until brought to an end by L/L or T or by T vacating upon contractual expiry date, ie, no notices served by either party.

- Once contractual expiry date passed T is holding over (whether or not notices have been served). Existing lease terms and rent apply (subject to S.24a Interim Rent)

- Where the Tenant is holding over after the expiry of the contractual term, the Tenant will have to give 3 months notice to terminate the tenancy, such notice expiring on ANY day (not now a quarter day only).

- Where the Tenant has vacated the premises by the contractual termination date, the tenancy will come to an end on that date and is not continued by the Act. NO requirement on T to serve notice before vacating. Uncertainty for L/L – who if undecided about serving notice should check T`s position.

- S.24 a INTERIM RENT New provision introduced by LPA 1969 – amended in RRO 2003

- 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

- The 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.

- If T renews lease Interim Rent S.24(a) is now generally same as new lease rent unless change in market conditions

- If T asks for new lease and then decides not to proceed Interim Rent S.24(d) calculated as market rent less allowances for tenancy from year to year tempering the effect of an increase.

Continued – assuming lease expiry 24th JUNE 2019

- S.25 NOTICE L/L Notice to terminate lease. Friendly (offering T new lease) or Hostile (objecting to new lease on specified ground(s))
- Served not > 12 months before contractual lease expiry – so 25th JUNE 2018 Nor < 6 months – so 26th DECEMBER 2018
- Notice now contains warnings to T – Must specify terms for the new lease
- Can`t be served if T has served S.26.
- S.26 NOTICE – T Notice to terminate lease requesting a new lease – Why?
- Served not > 12 months and not < 6 months before contractual expiry and specifies terms on which T wishes to renew the lease (but is not bound by those terms). Can`t be served if S.25 already served
- T must then also make an application to the Court for a new lease BEFORE the expiry date in the S.26 Notice (or loses rights) unless the matter is already before the Court.
- L/L has 2 months to respond to T`s S.26 Notice – time of essence if he wants to go hostile – but not if he wishes to offer a new lease
- NB S.25 or S.26 Notices can be served to take effect post contractual expiry date. If no S.25 served T can extend lease by serving S.26 – so in our example T`s shop is under-rented he could serve S.26 notice TODAY to terminate lease w/e 18th DECEMBER 2019 and so extends lease which would have expired on 23rd JUNE 2019 – T gains 5+ extra months at low rent

Continued

- S.27 **Section 27 of the 1954 Act provides the tenant that does not wish to renew its tenancy with a flexible right to end the tenancy on or after contractual expiry giving not < 3 months notice.**
- Serving notice is preferable as it prevents a continuation tenancy from arising. Where a tenant intends to rely on Section 27(1A), it should take great care to ensure it vacates fully and on time.
- Where the tenancy has continued beyond contractual expiry by virtue of Section 24 of the Act under Section 27(2), the tenant may serve not less than three months' notice to bring the tenancy to an end at any time.
- Once this notice has been served, it is irrevocable and the tenant has no right to remain in the property once the termination date passes
- If the tenant has previously served a S.26 Request, it cannot later serve a S.27 notice

- S.28 **Renewal of tenancies by agreement.**
- Where the landlord and tenant agree terms for a new lease, on terms and from a date specified in the agreement, (expiry date or a later date) the current tenancy shall continue until that date but no longer, and shall not be a tenancy to which this Part of this Act applies.
- Sections 24 – 28 These are the sections of the Act which deal with the rights of the T to a new lease.
- It is these provisions which are excluded when a lease is contracted out of the L & T Act 1954 (by agreement of the parties and by swearing of statutory declaration)
- S.29 **Order by Court for grant of a new tenancy or termination if L/L has successfully**
- **opposed renewal**

Continued

- 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,
- (3)Where the rent is determined by the court the court may, if it thinks fit, further determine that the terms of the tenancy shall include such provision for varying the rent as may be specified in the determination, ie RENT REVIEWS]
- S.35 **Other terms of new tenancy.**
- [(1)] The terms of tenancy granted by court (other than terms as to the duration and rent) shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court; and in determining those terms the court shall have regard to the terms of the current tenancy and to all relevant circumstances.
- **O'May v City of London Real Property Co** Ltd (1983). O'May principles of fairness and justice. Rent is last matter to be agreed after all other lease terms. Modern updating allowed but no party can insist on material changes to the lease terms unless they are fair or unless the other party is properly compensated by an adjustment to the rent