

SEMINAR 17th JUNE 2019

08.00HRS TO 09.00HRS

VENUE : **CBRE**
'C-BAR'
Henrietta House
Henrietta Place
W1G 0NB

SUBJECT

Q & A

- Asset Management Issues
- S.26 L&T Act Notice
- Calderbank Offer
- Application for Licence for Alterations
- Tenant in Administration or CVA
- Arbitrator or Expert

50 mins

OPEN QUESTIONS

10 mins

SEMINAR BY DOUG STEVENS TO 1st & 2nd YEAR GRADUATES
DELIVERED AS A POWERPOINT PRESENTATION

NEXT SEMINAR : 22nd July 2019

To be held at Cushman & Wakefield, 43-45 Portman Square, London W1A 3BG

Speaker : Christopher Osmond of Cushman & Wakefield

Previous Seminars on www.douglasstevens.co.uk / SEMINARS

Q. YOU ARE ASSET MANAGER OF A RETAIL SHOP WHERE THE LEASE WAS GRANTED FOR A TERM OF 10 YEARS FROM 24 MARCH 2009 IT IS A PROTECTED LEASE (ie, inside the L & T Act 1954)

HAS THE LEASE COME TO AN END ?

▶ A. NO.

▶ UNLESS EITHER THE LANDLORD ('L/L') OR THE TENANT ('T') HAS SERVED A NOTICE TO TERMINATE THE LEASE

▶ Q. IF NO NOTICES HAVE BEEN SERVED WHAT IS THE STATUS OF 'T' ?

▶ A. 'T' IS HOLDING OVER UNDER SECTION 24 (S.24) OF LANDLORD & TENANT ACT 1954 (54 ACT)

▶ THE RENT STAYS THE SAME - ALL THE LEASE TERMS CONTINUE

▶ THE LEASE CONTINUES INDEFINITELY UNLESS THE 'T' DECIDES TO VACATE OR IF EITHER 'L/L' OR 'T' BRING THE LEASE TO AN END BY SERVICE OF A NOTICE.

▶ Q IF 'T' DECIDES THEY DO NOT WANT TO RENEW THE LEASE AND WISH TO VACATE - HOW DO THEY DO SO & WHEN WOULD THE LEASE END?

▶ A IF THE CONTRACTUAL EXPIRY DATE HAS NOT BEEN REACHED 'T' SIMPLY VACATES WITH NO NEED TO SERVE NOTICE

▶ WHERE THE EXPIRY DATE HAS PASSED 'T' MUST SERVE A S.27 NOTICE

THIS BRINGS THE LEASE TO AN END IN 3 MONTHS TIME

Q. IN TODAY'S POST YOU/YOUR SOLICITORS RECEIVE A SECTION 26 (S.26) NOTICE (54 ACT) FROM THE TENANTS TERMINATING THEIR OWN LEASE (Contractual expiry date 23rd March 2019) WITH EFFECT 16 JUNE 2020. THEY ARE ASKING FOR A NEW LEASE

▶ CAN THEY DO THIS?

▶ A. YES

▶ IF 'L/L' HAS NOT SERVED S.25 NOTICE 'T' CAN SERVE S.26 NOTICE TERMINATING THE LEASE NOT LESS THAN 6 MONTHS FROM THE DATE OF SERVICE OF NOTICE AND NOT MORE THAN 12 MONTHS FROM THE DATE OF NOTICE

▶ IF THE PROPERTY IS UNDER-RENTED 'T' BY SERVING THE S.26 WILL HAVE GAINED AN EXTRA 12 MONTHS (LESS ONE DAY) AT THE PASSING (UNDER-RENTED) RENTAL LEVEL

▶ Q. IF THE PROPERTY WAS UNDER-RENTED WHAT SHOULD THE LANDLORD HAVE DONE - AND WHEN SHOULD THEY HAVE DONE SO?

▶ A. 'L/L' SHOULD HAVE SERVED A S.25 NOTICE AT THE EARLIEST OPPORTUNITY - NOT MORE THAN 12 MONTHS BEFORE THE CONTRACTUAL LEASE EXPIRY DATE - I.E. 24th MARCH 2018.

Q. `T`s S.26 WILL BRING LEASE TO AN END ON 16th JUNE 2020. THEIR NOTICE PROPOSES A NEW LEASE 10 YEARS WITH TENANT ONLY BREAK AT 5th YEAR AT THE SAME RENT AS RENT PASSING

WHAT DOES THE `L/L` NOW NEED TO DO?

▶ A. `L/L` MUST DECIDE IF HE WANTS `T` TO RENEW THE LEASE - or - HE WANTS VACANT POSSESSION AND HAS VALID GROUNDS (S.30 a-g) FOR REFUSING GRANT OF NEW LEASE

▶ IF `L/L` IS OBJECTING TO `T` RENEWING LEASE THEY MUST SERVE A NOTICE ON `T`

▶ REFUSING GRANT OF NEW LEASE AND SPECIFYING THE GROUNDS OF OBJECTION

▶ Q. BY WHAT DATE MUST THEY SERVE THAT NOTICE?

▶ A. WITHIN 2 MONTHS OF RECEIPT OF S.26 NOTICE (ie, in our case 15th August 2019)

▶ NB IF `L/L` FAILS TO OBJECT TO `T` RENEWING LEASE WITHIN 2 MONTHS THEY LOSE THEIR RIGHT TO DO SO.

Q. HAVING SERVED THE S.26 NOTICE BRINGING THEIR OWN LEASE TO AN END ON 16th JUNE 2020 WHAT ELSE MUST THE `T` DO?

▶ A. FILE AN APPLICATION IN COURT BY LATEST 15th JUNE 2020 - OR ELSE THEY WILL LOSE THEIR RIGHT TO A NEW LEASE AND MUST GIVE VACANT POSSESSION

▶ AS YOU WILL SEE THERE ARE `TIME TRAPS` FOR BOTH THE `L/L` AND THE `T`

▶ Q. `T` IS OBLIGED IN THEIR S.26 TO PROPOSE THE TERMS FOR THE NEW LEASE. ARE THEY BOUND TO STICK TO THOSE TERMS?

▶ A. NO THEY CAN CHANGE THEIR MIND ON LEASE TERM, RENT, RENT FREE BREAK CLAUSES, etc

▶ Q. IF IN OUR EXAMPLE (lease contractually expired 23rd MARCH 2019) THE PROPERTY WAS OVER-RENTED WHEN SHOULD THE `T` IF HE WANTS TO RENEW THE LEASE HAVE SERVED THE S.26 NOTICE TO BRING THE LEASE TO AN END?

▶ A. 24th MARCH 2018 (not more than 12 months)

▶ YOU WILL SEE THAT THE TIMING OF SERVING NOTICES IS TACTICAL & PRACTICAL

▶ `L/L` ALSO HAS SIMILAR DECISIONS TO MAKE IF THEY SERVE NOTICE FIRST - A S.25 NOTICE

▶ EITHER A **FRIENDLY S.25** INVITING `T` TO TAKE A NEW LEASE -or -

▶ A **HOSTILE S.25** OBJECTING TO `T` TAKING A NEW LEASE AS `L/L` WANTS POSSESSION

- ▶ Q. WHAT ARE THE 7 GROUNDS UNDER S.30 L & T ACT 1954 ON WHICH THE `L/L` CAN OBJECT TO THE `T` RENEWING THE LEASE.
- ▶ (a) (b) & (c) BAD TENANT GROUNDS - `T` not paid rent - not repaired - other breaches
- ▶ (d) ALTERNATIVE ACCOMMODATION - `L/L` can offer similar property to replace - goodwill
- ▶ (e) WHOLE v PARTS - Property worth more let as whole than in parts
- ▶ (f) REDEVELOPMENT - `L/L` intends to demolish or reconstruct and need v/p to do so
- ▶ (g) OWN OCCUPATION - `L/L` wishes to occupy himself - 5yr qualifying rule

- ▶ Q. IF `L/L` SUCESSFULLY OPPOSES `T` RENEWING THE LEASE AND SECURES V/P ARE THEY REQUIRED TO PAY COMPENSATION TO THE `T`
- ▶ A. YES - BUT NOT ON ALL GROUNDS

- ▶ Q. ON WHICH OF THE 7 GROUNDS IS COMPENSATION PAYABLE & AT WHAT AMOUNT?
- ▶ A (e) (f) & (g) ONLY
- ▶ STATUTORY COMPENSATION 1 x RATEABLE VALUE IF TENANCY < 14YRS - 2 X IF > 14YRS

Q. WHAT IS A CALDERBANK OFFER?

- ▶ A. THE NAME CALDERBANK COMES FROM A DIVORCE CASE - Calderbank v Calderbank
- ▶ THIS WAS AN OFFER TO SETTLE THE CASE - effectively a payment in to Court
- ▶ AN OFFER TO SETTLE A DISPUTE ISSUED WITH INTENTION OF PROTECTING POSITION ON COSTS.

▶ Q. IN WHAT CIRCUMSTANCES WOULD A CALDERBANK OFFER BE MADE?

- ▶ A. IN A RENT REVIEW (or lease renewal) DISPUTE
- ▶ BOTH SIDES CAN MAKE A CALDERBANK OFFER AND YOU CAN MAKE MORE THAN ONE
- ▶ THE KEY FACTOR IS THAT THE RECEIVING PARTY CAN DECIDE TO ACCEPT THE OFFER
- ▶ AND THAT ACCEPTANCE BINDS THE OFFEREE TO AGREE THAT FIGURE.
- ▶ SO AS A PARTY TO A DISPUTE YOU MUST ENSURE THAT YOU HAVE FULL APPROVAL TO MAKE A CALDERBANK OFFER - BECAUSE ACCEPTANCE THEREOF BY OPPOSING PARTY WILL BIND YOU

▶ Q. WHAT ARE THE NECESSARY ELEMENTS IN A CALDERBANK OFFER

- ▶ A. IT IS MARKED *'WITHOUT PREJUDICE SAVE AS TO COSTS'*
- ▶ THIS MEANS THAT IT WILL NOT BE PRESENTED TO AN ARBITRATOR OR INDEPENDENT EXPERT UNTIL THEIR DECISION AS TO RENT IS PUBLISHED AND THE ISSUE OF COSTS IS TO BE DECIDED

IMPORTANT ELEMENTS OF CALDERBANK OFFER

- ▶ It should :
- ▶ BE SERVED ON SOMEONE AUTHORISED TO DEAL WITH THE CASE
- ▶ CLEARLY STATE THE (RENTAL) OFFER BEING MADE
- ▶ STATE A DATE FOR ACCEPTANCE WHICH PROVIDES A REASONABLE TIME FOR THE PARTY RECEIVING THE OFFER TO TAKE ADVICE AND CONSIDER IT.
- ▶ **Q. WHAT IS A REASONABLE TIME PERIOD TO ALLOW THE OTHER SIDE TO ACCEPT?**
- ▶ **A. 21 DAYS IS SAFE**
- ▶ STIPULATE THE CONDITIONS WHICH APPLY IF IT IS ACCEPTED, ie, each side pay own costs and 50% of Arbitrator's fees
- ▶ STIPULATE THE CONDITIONS WHICH APPLY IF IT IS NOT ACCEPTED IN THAT TIMEFRAME ie, OTHER SIDE TO PAY ALL OF ARBITRATOR'S COSTS AND ALL YOUR SIDES COSTS
- ▶ STATE THAT IT IS NOT A VALUATION IT IS A COMPROMISE OFFER TO SETTLE THE DISPUTE
- ▶ NOTIFY THE OTHER SIDE THAT IT WILL BE PRESENTED TO ARBITRATOR (or Expert) ON ISSUE OF COSTS

EXAMPLE OF CALDERBANK OFFER

WITHOUT PREJUDICE SAVE AS TO COSTS

UNIT X

In relation to the outstanding rent review of the above effective from 25 September 2016 our client, the landlord of the above, hereby offers to compromise on the following basis:

1. That the rent payable from 25 September 2016 shall be £240,000 per annum.
2. That each party shall bear its own costs and one half of the Arbitrator's fees and charges.

This offer remains open for acceptance until 4pm Friday, 6 April 2018. Subsequently, the offer will remain open for acceptance but subject to a variation on (2) above.

The variation is that the offer remains open for acceptance until the date upon which the Arbitrator's Rental Award is published, but strictly on the basis that your client is responsible for all of our client's costs in relation to the arbitration proceedings and all of the Arbitrator's fees and charges.

This letter is written "without prejudice save as to costs" with the intention that It may be drawn to the attention of the Arbitrator on the issue of costs only.

Whilst writing, we would draw your particular attention to the fact that the offer contained within this letter is not to be construed, in any way, as our opinion of rental value, but is merely a proposal made by the landlord in a genuine attempt to compromise this dispute.

AWARDS ON COSTS - CALDERBANKS

- ▶ WHEN NEGOTIATING RENT REVIEWS & LEASE RENEWALS BOTH SIDES INCUR COSTS (surveyors & legal)
- ▶ GENERALLY EACH SIDE PAYS ITS OWN COSTS
- ▶ **Q. IN WHAT CIRCUMSTANCES COULD ONE SIDE SEEK TO HAVE ITS COSTS PAID BY THE OTHER SIDE**
- ▶ **A. IF THE MATTER PROCEEDED TO ARBITRATION (or Expert) OR TO COURT AND ONE SIDE HAS WON**
- ▶ The parties are free, once the (rent review or other) dispute has arisen, to agree how costs should be allocated and if the parties do not so agree, the allocation of costs is decided by the Arbitrator (or judge or Expert)
- ▶ **IT MAY BE CLEAR FROM THE ARBITRATION AWARD WHICH SIDE HAS WON ie, got an Award at a rent closer to their valuation than the other side -BUT IT MIGHT NOT MEAN THAT THEY HAVE WON THE BATTLE TO RECOVER THEIR COSTS**
- ▶ **Q. WHY NOT?**
- ▶ **A. BECAUSE THE PARTIES MAY HAVE MADE CALDERBANK OFFERS TO EACH OTHER AT RENTAL VALUES DIFFERENT TO THOSE VALUATIONS PRESENTED TO THE ARBITRATOR**
- ▶ **Q. WHAT IS A CALDERBANK OFFER?**
- ▶ **A. AN OFFER (MADE BY ONE SIDE TO THE OTHER OR BY BOTH SIDES TO EACH OTHER) TO COMPROMISE/SETTLE A DISPUTE AT A FIGURE MADE WITH THE INTENTION TO RESERVE THE OFFEROR`S POSITION ON COSTS**
- ▶ **Q. IS THE CALDERBANK OFFER PRESENTED TO THE ARBITRATOR?**
- ▶ **A. NO. NOT BEFORE THE AWARD IS MADE.**
- ▶ **A. YES - ONCE THE AWARD IS MADE AND THE PARTIES HAVE BEEN UNABLE TO AGREE WHO SHOULD BEAR THE COSTS OF ARBITRATION WHICH THE ARBITRATOR MUST THEN DECIDE**
- ▶ NB WHEN AN ARBITRATION AWARD ON A RENT REVIEW (or a PACT Award on a lease renewal) IS PUBLISHED IT IS NOT FINAL UNTIL THE ISSUE OF COSTS IS DECIDED BY THE ARBITRATOR - or they notify the Arbitrator that they have agreed the matter of costs and the Arbitrator then still issues a Final Award (by and with the consent of the parties) .

Q. HOW DOES ARBITRATOR MAKE AN AWARD ON COSTS?

- ▶ A. HE RECEIVES WRITTEN REPORTS (& REPLIES) ON COSTS FROM THE PARTIES
- ▶ THESE REPORTS WILL SPECIFY THE CLAIM THAT EACH PARTY IS MAKING AS TO HOW COSTS SHOULD BE AWARDED
- ▶ Q. WHAT COSTS CAN BE CLAIMED?
- ▶ A. THE CLAIM / RECOVERABLE COSTS ARE THE ARBITRATOR'S FEES AND EXPENSES, THE FEES AND EXPENSES OF AN RICS PRESIDENTIAL APPOINTMENT AND THE LEGAL OR OTHER COSTS OF THE PARTIES. THESE SHOULD BE STATED SEPERATELY IN THE CLAIM
- ▶ EACH PARTY SETS OUT THEIR CASE AS HOW THEY THINK THE ARBITRATOR SHOULD AWARD COSTS IE, ALL TO THE WINNING SIDE, OR 50/50 IF THERE IS NO CLEAR WINNER OR A PROPORTIONATE AWARD
- ▶ THE GENERAL PRINCIPLE IS THAT **COSTS SHOULD FOLLOW THE EVENT IE, THE WINNER SHOULD RECOVER ALL THEIR COSTS**
- ▶ IF ONE PARTY (EXACTLY EQUALS OR) BEATS THEIR CALDERBANK THEY HAVE CLEARLY WON
- ▶ IE, IF AWARD IS £100,000 PAX L/L'S VALUATION AT £150,000 PAX T'S VALUATION AT £90,000 PAX BUT L/L'S CALDERBANK IS £120,000 PAX AND T'S CALDERBANK IS £105,000 PAX. THE PRINCIPLE IS THAT L/L SHOULD HAVE ACCEPTED T'S CALDERBANK AT £105,000 PAX AND THE WHOLE CASE AND ALL THE COSTS HAVE BEEN INCURRED BECAUSE L/L DIDNT ACCEPT - SO L/L PAYS ALL THE COSTS
- ▶ HOWEVER IT MIGHT NOT BE SO CLEAR CUT. T CALDERBANK MIGHT BE AT £95,000 PAX - CLOSER THAN L/L BUT STILL NOT 'CORRECT'
- ▶ NEITHER PARTY OR ONLY ONE PARTY MAY HAVE CALDERBANKED.
- ▶ IF AWARD WAS £100,000 PAX AND T'S CALDERBANK WAS £99,000 PAX IS THIS A 'NEAR MISS'
- ▶ Q. SHOULD A NEAR MISS COUNT AS A WIN?
- ▶ A. NO DEFINITIVE ANSWER TO THIS. YES IF PARTIES ASKED FOR NEAR MISSES TO COUNT OR IF ARBITRATOR THINKS THE MARGIN IS ACCEPTABLE
- ▶ COSTS MAY BE AWARDED ON AN ISSUE-BY-ISSUE BASIS - IE, A PROPORTIONATE AWARD SAY 75% TO 25%
- ▶ ARBITRATOR HAS A DISCRETION AS TO COSTS - THAT DISCRETION SHOULD BE EXERCISED JUDICIALLY
- ▶ THE AWARD ON COSTS SHOULD BE REASONED
- ▶ WHERE A LEASE PROVIDES THAT AN EXPERT CAN DECIDE COSTS IT IS LIMITED TO THE EXPERTS COSTS AND AN AWARD IS MADE BY THE EXPERT

Q. YOU ARE ASSET MANAGER OF AN OFFICE BUILDING. A `T` OCCUPIES 2 FLOORS OF ADJOINING OFFICES AND WISHES TO INSERT AN INTERNAL STAIRCASE BETWEEN THEM

`T` MAKES A FORMAL APPLICATION SEEKING `L/L`'s CONSENT

HOW DO YOU DECIDE WHETHER TO GIVE `L/L` CONSENT?

▶ A. FIRST CHECK THE LEASE

▶ Q. DOES IT PERMIT ALTERATIONS ? - IF SO INTERNAL NON-STRUCTURAL ALTERATIONS - or - STRUCTURAL ALTERATIONS ?

▶ NB IF IT IS A LISTED BUILDING ANY ALTERATIONS MAY BE PROHIBITED

▶ NB IN A MULTI-STOREY OFFICE BUILDING STRUCTURAL ALTERATIONS MIGHT BE PROHIBITED TO PRESERVE THE STRUCTURAL INTEGRITY OF THE BUILDING

▶ LET`S ASSUME STRUCTURAL ALTERATIONS ARE PERMITTED

▶ YOU AS `L/L` WILL WANT TO SEE FULL PLANS AND SPECIFICATIONS OF WORKS AND ENSURE THAT ANY WORKS ARE CARRIED OUT IN A TIMELY AND ORDERLY FASHION

THERE ARE 3 TYPES OF ALTERATIONS CLAUSES:-

- ABSOLUTE - Total prohibition on any alterations
- QUALIFIED - Landlords consent is required
- OPEN - Landlords consent will not be unreasonably withheld

- ▶ **Q. IF A LEASE STATES THAT `L/L`'s CONSENT IS REQUIRED DOES THE `L/L` HAVE TO GIVE THAT CONSENT?**
- ▶ **A. YES - LANDLORD & TENANT ACT 1927 S.19 (2) APPLIES & OVER-RIDES THE LEASE**
- ▶ In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against the making of improvements without a licence or consent, such covenant condition or agreement shall be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that such licence or consent is not to be unreasonably withheld;
- ▶ BUT - `L/L` CAN IMPOSE CONDITIONS - SUCH AS RE-INSTATEMENT AT LEASE END
- ▶ **Q. DOES `T`'s PROPOSED ALTERATION HAVE TO BE AN IMPROVEMENT FROM THE `L/L`'s STANDPOINT**
- ▶ **A. NO - IMPROVEMENT ASSESSED FROM POINT OF VIEW OF THE TENANT**

Q. WHAT IF `L/L` REFUSES `T`'s APPLICATION FOR CONSENT FOR ALTERATIONS?

- ▶ [S.3 of the 1927 Act](#) `T` must give `L/L` notice of his intention to make improvement, with specification and plan showing the proposed improvement etc.
- ▶ If the `L/L` wants to object he must serve a counternotice within three months and the tenant may then apply to the County Court for a certificate that the improvement is a proper improvement, ie,
 - ▶ (a) is of a nature to add to the letting value of the holding at end of the tenancy; and
 - ▶ (b) is reasonable and suitable to the character thereof; and
 - ▶ (c) will not diminish the value of any other property belonging to the `L/L`
- ▶ THERE IS A `TEST OF REASONABLENESS` APPLIED
- ▶ Q IF `T` CARRIES OUT IMPROVEMENT WITH `L/L` CONSENT DO THEY PAY RENT ON THE IMPROVEMENT
- ▶ A. NO
- ▶ NB IT IS LITTLE USED IN PRACTICE BUT :-
- ▶ [1927 Act S.3\(1\)](#) allows the landlord to offer to execute the improvement himself in consideration “*of a reasonable increase of rent*”
- ▶ THE BENEFIT OF `L/L` CARRYING OUT THE WORKS IS THAT THEY CAN THEN VALUE THE IMPROVEMENT

ADMINISTRATION – Company administration under the Insolvency Act 1986 & Enterprise Act 2002.

- Insolvent company enters administration **which** allows reorganisation of the company's affairs or realisation of its assets for the benefit of creditors. Company's affairs controlled by insolvency practitioner (not the company's directors).
- Administration requires a Court Order – filed by creditors or directors of company (or by CVA – COMPANY VOLUNTARY ARRANGEMENT) or a party which has a floating charge
- ▶ Key aim is to rescue the company (not the business that the company carries on) so that it can continue trading as a going concern.
- ▶ If rescue is not possible administrator must attempt a better result for the company's creditors than would be likely if the company were put into **liquidation**
- ▶ If administrator cannot achieve better result for creditors the purpose of the administration is to realise the company's property (ie, assign the lease or sell freehold) to make a distribution to the company's secured or preferential creditors ie, the bank.
- ▶ NB If administrator trades the shops then rent must be paid. If not traded then no rent payable
- ▶ Administration ends after 1 x year, unless creditors or court agree an extension but many companies remain in administration for years.
- ▶ No liability for business rates – therefore L/L leaves property in administration until ready to take it back - hence many vacant properties in admin to save rates bill

Q. YOU ARE ASSET MANAGER OF A PROPERTY WHERE THE `T` IS PLACED IN TO ADMINISTRATION.

YOU WOULD IDEALLY LIKE TO TAKE POSSESSION OF THE PROPERTY.
WHAT ARE YOUR RIGHTS TO DO SO?

▶ A. `L/L`'s RIGHTS DEPEND ON WHETHER ADMINISTRATOR USES THE PREMISES & REMAINS IN OCCUPATION.

▶ IN THAT EVENT RENT AND RATES ARE PAYABLE - SO `L/L` HAS NO LOSS

▶ A. IF ADMINSTRATOR DOES NOT OCCUPY THEY ARE NOT LIABLE FOR RENT & RATES -

▶ BUT `L/L` DOESN'T` HAVE TO PAY THE RATES WHILE PROPERTY IS IN ADMINISTRATION

▶ Q. CAN THE `L/L` FORFEIT THE LEASE TO GET POSSESSION?

▶ A. POSSIBLY A lease often allows `L/L` to forfeit the lease should their tenant go insolvent.

▶ HOWEVER In administration a statutory moratorium prevents `L/L` from taking action against `T` without the consent of the administrator or without the leave of the Court.

▶ AS THERE ARE NO RIGHTS TO RELY ON THE BEST ROUTE TO GET POSSESSION IF ADMINSTRATOR DOES NOT WANT THE PROPERTY (ie, it has no value) IS TO NEGOTIATE A SURRENDER (which will normally mean paying the Administrators costs)

▶ Q. WHAT HAPPENS IN A CVA (COMPANY VOLUNTARY ARRANGEMENT)?

A CVA DOCUMENT - THE TERMS ON WHICH A `L/L` IS ASKED TO VOTE

- ▶ A COMPANY PROPOSING A CVA DRAFTS THE TERMS THEY PROPOSE FOR THE CVA
- ▶ IT IS SENT TO THE `L/L`s (and other creditors) FOR THEM TO ASSESS & VOTE ON
- ▶ BELOW ARE EXTRACTS FROM A RECENT CVA OF A RETAIL COMPANY
- ▶ **MORATORIUM**
- ▶ With effect from the Effective Date, no Creditor shall be entitled to take or continue any legal process, other process, action or self-help remedy against the Company
- ▶ THE SHOPS ARE PLACED IN CATEGORIES 1, 2, 3, etc REFLECTING THEIR PROFITABILITY
- ▶ THE CVA PROPOSAL IS TAILORED TO EACH CATEGORY
- ▶ CVA Period” means the period from the Effective Date to the date which is no longer than 2 years and 6 months from the Effective Date the CVA is passed.
- ▶ **MONTHLY RENTS**
- ▶ the Contractual Rent or Turnover Rent payable to the Category 1 Landlords under the terms of the Category 1 Leases shall be paid in equal monthly instalments in advance beginning on the Next Payment Date ie 100%
- ▶ **PARTIAL WAIVER OF ARREARS**
All amounts which remain due and owing to the Category 2 Landlords for Arrears will be compromised and released absolutely by the Category 2 Landlords for a sum equivalent to 10% (ten per cent) of the determined value of the Arrears

AS ASSET MANAGER YOU ARE ASKED IN THIS CASE TO ACCEPT ONLY 10% OF ANY ARREARS

▶ REDUCED RENT

- ▶ Category 1 leases 100% rent
- ▶ THE COMPROMISED LEASE RENT PAYABLE TO EACH CATEGORY 2 LANDLORD SHALL BE 70% (SEVENTY PER CENT) OF THE CONTRACTUAL RENT OR TURNOVER RENT PAYABLE UNDER THE TERMS OF THE RELEVANT CATEGORY 2 LEASE.
- ▶ THE COMPROMISED LEASE RENT PAYABLE TO EACH CATEGORY 3 LANDLORD SHALL BE 50% (FIFTY PER CENT) OF THE CONTRACTUAL RENT OR TURNOVER RENT PAYABLE UNDER THE TERMS OF THE RELEVANT CATEGORY 3 LEASE.

▶ AS ASSET MANAGER OF A CATEGORY 2 or 3 SHOP YOU ARE ASKED TO ACCEPT 70% or 50% OF THE RENT

▶ L/L NOTICE TO TAKE POSSESSION

- ▶ IF AT ANY TIME WITHIN 90 DAYS FOLLOWING THE EFFECTIVE DATE,
- ▶ A CATEGORY 2 LANDLORD REQUIRES THE COMPANY TO VACATE A CATEGORY 2 PREMISES, IT SHALL BE ENTITLED TO DELIVER TO THE COMPANY A NOTICE (SCHEDULE 27 (*NOTICE TO VACATE*) LAW TO CONSTITUTE A VALID SURRENDER, FORFEITURE OR IRRITANCY (AS THE CASE MAY BE),
- ▶ GIVING NOT LESS THAN 60 DAYS' NOTICE TO THE COMPANY TO THAT EFFECT. ONCE GIVEN PURSUANT TO THIS CLAUSE,
- ▶ A NOTICE TO VACATE MAY NOT BE WITHDRAWN BY THE CATEGORY 2 LANDLORD, SAVE BY AGREEMENT WITH THE COMPANY. THE COMPANY WILL VACATE THE RELEVANT CATEGORY 2 PREMISES ON OR BEFORE THE EXPIRY OF THE 60 DAY NOTICE PERIOD.

▶ AS ASSET MANAGER YOU NEED TO DECIDE WITHIN 90 DAYS IF YOU WANT THE PROPERTY BACK - ie YOU CAN RE-LET IT - or - HAVE ANOTHER PURPOSE IN MIND ie DEVELOPMENT

ARBITRATOR -or - EXPERT?

Q. YOU ARE THE ASSET MANAGER AT A LARGE PROPERTY COMPANY OR ESTATES SURVEYOR AT A LARGE RETAILER.

WHEN TAKING NEW LEASES WITH A RENT REVIEW IN WOULD YOU OPT FOR AN ARBITRATOR OR INDEPENDENT EXPERT TO DECIDE THE RENT AT RENT REVIEW?

- ▶ **A. THERE IS NO DEFINITIVE ANSWER TO THIS**
- ▶ **FIRSTLY YOU MUST HAVE AN UNDERSTANDING OF THE 2 DIFFERENT ROLES & POWERS WHICH ARBITRATORS AND INDEPENDENT EXPERTS HAVE**
- ▶ **YOU ARE ALSO MAKING A DECISION WHICH WILL NOT BE TESTED FOR 5 YRS DURING WHICH THE MARKETS MIGHT CHANGE**
- ▶ **AS A `L/L` IN A MARKET OF FALLING RENTAL VALUES GENERALLY AN ARBITRATOR WOULD BE BETTER THAN AN EXPERT AS THEY WILL TEND TO LOOK AT AN ESTABLISHED TONE RATHER THAN INTERPRET WHERE THAT TONE SHOULD NOW BE. AS A `T` YOU WANT AN EXPERT**
- ▶ **AS A `L/L` IN A RISING MARKET GENERALLY AN EXPERT WOULD BE BETTER - IT IS EASIER FOR THEM TO INTERPRET WHERE THE RENTAL SHOULD BE IN THE ASBENCE OF CLEAR EVIDENCE**
- ▶ **SO AS A `T` AN ARBITRATOR WOULD BE BETTER IN A RISING MARKET.**

ARBITRATORS & INDEPENDENT EXPERTS - THE DIFFERENCES

- ▶ ARBITRATION IS A QUASI-JUDICIAL PROCESS.
- ▶ ARBITRATION IS GOVERNED BY THE ARBITRATION ACT 1996 (IN SCOTLAND - ARBITRATION ACT 2010) AND ALSO BY THE TERMS OF THE LEASE
- ▶ THINK OF AN ARBITRATOR AS A JUDGE



- ▶ ARBITRATOR FINDS (DECIDES) BETWEEN THE PARTIES VALUATION FIGURES - AND CAN'T GO OUTSIDE THEM
- ▶ HE CAN USE HIS EXPERIENCE TO DECIDE WHICH OF THE PARTIES CASES AND EVIDENCE IS MORE RELEVANT - BUT MUST NOT GIVE HIMSELF EVIDENCE
- ▶ SO IT IS UP TO EACH PARTY TO PROVE WHAT THEY PRESENT IF IT IS FACTUAL -or- BE PERSUASIVE IF THE POINT IS SUBJECTIVE AND IT IS OPINION EVIDENCE.
- ▶ AS A PARTY YOU ARE PRESENTING EVIDENCE AND A SERIES IF STATEMENTS ON ALL THE ISSUES MATERIAL TO THE MAKING OF A DECISION AS TO RENTAL VALUE.
- ▶ SEE SCALES ABOVE - THE ARBITRATOR EFFECTIVELY WEIGHS ALL THE STATEMENTS AND EVIDENCE TO ARRIVE AT HIS DECISION. YOUR ROLE IS TO PERSUADE HIM THAT YOUR CASE IS STRONGER THAN YOUR OPPONENTS. YOU DO THIS BY PRESENTING A WELL STRUCTURED CASE WHICH IS EASY TO FOLLOW.
- ▶ THINK HOW THE ARBITRATOR WILL DECIDE THE CASE AND THEN PRESENT YOUR CASE ACCORDINGLY

INDEPENDENT EXPERT

- ▶ UNLIKE BOTH JUDGES AND ARBITRATORS AN EXPERT DETERMINING A DISPUTE BRINGS HIS OR HER OWN KNOWLEDGE TO BEAR ON THE ISSUES, AND IS ENTITLED TO FORM A VIEW BASED ENTIRELY ON HIS OR HER OWN EXPERTISE
- ▶ DON'T THINK OF AN INDEPENDENT EXPERT AS A JUDGE (OR AS A VALUER)



- ▶ THINK OF THEM AS A LETTING AGENT - YOU ARE EFFECTIVELY ASKING THEM “WHAT IS THE LEVEL OF RENT AT WHICH YOU COULD LET THE PROPERTY IF IT WERE VACANT AND TO LET ON THE SUBJECT LEASE TERMS”?
- ▶ EXPERT IS NOT REQUIRED TO DECIDE BETWEEN THE PARTIES AND CAN DECIDE A RENT OUTSIDE THE VALUATION PARAMETERS OF THE PARTIES.
- ▶ EXPERT DETERMINATION IS PURELY CONTRACTUAL. THE CONTRACT IS THE LEASE - AND THE TERMS OF THE CONTRACT VARY LEASE BY LEASE
- ▶ THERE IS NO LEGISLATIVE UNDERPINNING - I.E. NO ACT WHICH GOVERNS AN INDEPENDENT EXPERT DETERMINATION
- ▶ THERE IS NO PROCEDURAL CODE - SAVE THAT RICS PROVIDES GUIDANCE NOTES FOR INDEPENDENT EXPERTS (9TH EDITION)
- ▶ UNLIKE BOTH JUDGES AND ARBITRATORS AN EXPERT IS VULNERABLE TO CLAIMS IN NEGLIGENCE- I.E. CAN BE SUED
- ▶ THE EXPERT SHOULD USE HIS EXPERT AND MARKET KNOWLEDGE - YOU SHOULD MAKE SURE THEY DO SO
- ▶ EXPERT CAN AND SHOULD MAKE HIS OWN INVESTIGATIONS - TO VERIFY EVIDENCE - TO ESTABLISH THE STRENGTH OF THE MARKET - THE STRENGTH OF DEMAND
- ▶ YOU SHOULD DIRECT THEM TO CONTACT ANYONE WITH INFORMATION WHICH SUPPORTS YOUR CASE - AS, UNLIKE AN ARBITRATOR, THE EXPERT CAN USE WHATEVER INFORMATION HE DISCOVERS.

ARBITRATOR

- ▶ **(a) SCOPE** The arbitrator acts (as does a judge) only on evidence and arguments submitted to them, but they are able to draw the parties' attention to matters of which they may not be aware. They are also able to take the initiative in ascertaining facts and the law (see 18.5). The award must lie between the extremes contended for by the parties. The arbitrator is, however, expected to use their expertise in assessing the relevance and quality of the evidence and arguments submitted.
- ▶ (b) The arbitrator cannot decide without receiving evidence from the parties, or from one of the parties when acting ex-parte
- ▶ (c) Arbitration procedure is regulated by the Arbitration Act 1996.
- ▶ **(d) DISCLOSURE** A party to an arbitration can seek and (through the courts) compel disclosure of documents or the attendance of witnesses (see 17.8).
- ▶ (e) An arbitrator may not delegate any duties, powers or responsibilities, although they can seek assistance (see section 13).
- ▶ **(f) COSTS** In an arbitration the arbitrator can award that one party shall pay all or part of the arbitrator's fees and all or part of the other party's costs. They can also assess the quantification of those fees and costs
- ▶ (g) The arbitrator's fees can be determined by the court under the Act (see 24.6).
- ▶ **(h) LIABILITY** There is some (albeit limited) right of appeal against the award of an arbitrator on a point of law or on the grounds of 'serious irregularity'. If a serious irregularity is shown, the court may (in whole or part) remit the award, set it aside or declare it to be of no effect.
- ▶ (i) Provided they have not acted in bad faith the arbitrator is not liable for negligence (see s. 29 of the Act).

INDEPENDENT EXPERT

- ▶ **(a) SCOPE** The independent expert has the duty of investigation to discover the facts, details of relevant comparable transactions and all other information relevant to their valuation (though they may receive information regarding these matters from the parties).
- ▶ (b) The independent expert bases their decision upon their own knowledge and investigations, but may be required by the lease to receive submissions from the parties.
- ▶ (c) There is no legislation governing procedure for the independent expert and they have to, therefore, settle their own contract with the parties.
- ▶ **(d) NO DISCLOSURE** independent expert has no powers to obtain documents or summon witnesses.
- ▶ (e) The independent expert has a duty to use their own knowledge and experience in arriving at their own decision. However, during the course of the investigation the independent expert may seek routine administrative or other assistance from any other person. This is always provided that they are in a position to vouch for the accuracy with which such tasks are carried out.
- ▶ **(f) COSTS** An independent expert has no power to make any orders as to their fees, or as to the costs of a party, unless such a power is conferred upon them by the lease or by agreement between the parties.
- ▶ (g) There is no procedure for formal determination of an independent expert's fees.
- ▶ (h) There is no right of appeal against the determination of an expert, although in some very limited circumstances the court may set it aside.
- ▶ **(i) LIABILITY** The independent expert is liable in damages for any losses sustained by a party through their negligence. This is so notwithstanding that the court will not interfere with a final and binding determination that they have made.