

# SEMINAR 21<sup>st</sup> October 2019

08:00 to 09:00 hrs

VENUE - Savills

Subject: Q & A's

Disposing of Leases - Underletting - Liquidation - Official Receiver  
General Permitted Development Orders - RICS Money Laundering Guidelines  
Tenant only Break Clauses    Duties as an Expert Witness    50 mins  
Open Questions    10 mins

*SEMINAR BY DOUG STEVENS TO 1<sup>st</sup> & 2<sup>nd</sup> YEAR GRADUATES  
DELIVERED AS A POWERPOINT PRESENTATION*

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Q. YOU ARE ADVISING A TENANT ('T') WHO HOLDS A SHOP LEASE WHICH IS OVER-RENTED AND THEY WISH TO DISPOSE OF IT

WHAT ARE THE ALTERNATIVE MEANS OF DISPOSAL?

- ▶ A. ASSIGNMENT - SELLING THE LEASE TO ANOTHER 'T'
- ▶ UNDER-LETTING (SUB-LETTING) - GRANTING AN UNDERLEASE TO ANOTHER 'T'
- ▶ SURRENDER - OFFERING THE LEASE BACK TO THE LANDLORD ('L/L')
- ▶ CVA (CREDITORS VOLUNTARY ARRANGEMENT) IF THE BUSINESS IS NON-VIABLE

### ASSIGNMENT

▶ Q. EXPLAIN HOW YOU GO ABOUT ASSIGNING A LEASE?

- ▶ A YOU MARKET THE LEASE. FIND AN ASSIGNEE AND THEN APPLY FOR 'L/L's CONSENT TO ASSIGN
- ▶ BUT FIRST YOU CHECK THE LEASE TO SEE IF IT PERMITS ASSIGNMENT - AND IF SO WHAT TERMS AND CONDITIONS APPLY

▶ Q. WILL THERE BE AN AGA (AUTHORISED GUARANTEE AGREEMENT) IN THE LEASE?

- ▶ A. YES - ANY LEASE GRANTED AFTER 1<sup>st</sup> JANUARY 1996 WILL CONTAIN AN AGA

▶ Q. WHY?

- ▶ A. BECAUSE THE LANDLORD & TENANT COVENANTS ACT 1995 IMPOSED THIS REQUIREMENT

Q. WHAT OBLIGATION DOES THE AGA IMPOSE?

- ▶ A. AN OBLIGATION TO COMPLY WITH ALL THE LEASE TERMS ( PAYING RENT SERVICE CHARGE REPAIRS, etc, SHOULD YOUR ASSIGNEE FAIL ( GO BUST )
- ▶ Q. THE PROPERTY IS OVER-RENTED AND THERE IS POOR DEMAND. CAN YOU PAY A CAPITAL SUM (reverse premium) to the assignee?

▶ A. YES - AN UNLIMITED SUM

▶ UNDER-LETTING

▶ YOU DON'T WANT TO, or, CAN'T AFFORD TO PAY A REVERSE PREMIUM

▶ YOU WOULD PREFER TO DISPOSE BY GRANTING AN UNDER -LEASE

▶ Q. HOW DO YOU GO ABOUT THAT?

▶ A. MARKET THE LEASE TO FIND AN UNDER-TENANT

▶ BUT FIRST CHECK THE LEASE TO ESTABLISH IF IT PERMITS UNDER-LETTING - AND IF SO ON WHAT TERMS & CONDITIONS?

## SURRENDER

- ▶ Q. HOW WOULD YOU GO ABOUT SURRENDERING YOUR LEASE AS `T`?
- ▶ A. YOU OFFER IT TO THE `L/L`
- ▶ Q. IS THERE ANY OBLIGATION ON THE `L/`L TO ACCEPT THE SURRENDER?
- ▶ A. NO THE `L/L` WOULD ONLY WANT THE SHOP BACK IF THEY HAD DEVELOPMENT PROPOSALS OR WANTED A DIFFERENT/BETTER `T` OR COULD ACHIEVE A HIGHER RENT
- ▶ A SURRENDER CAN BE IN 2 MAIN FORMS -
- ▶ A SIMPLE SURRENDER - HAND BACK THE KEYS & THE ORIGINAL LEASE -or - more commonly
- ▶ A DEED OF RELEASE - A DOCUMENT CONFIRMING THE DATE & ANY OTHER CONDITIONS OF SURRENDER

## CVA

- ▶ Q. CAN A `T` SEEK A CVA TO RID THEMSELVES OF A SHOP LEASE?
- ▶ A. YES - IF THEY CAN PERSUADE AN INSOLVENCY PRACTITIONER AND A COURT THAT THEIR BUSINESS IS NON-VIABLE AND THEY NEED THE PROTECTION OF THE COURT FROM THEIR CREDITORS - THIS MIGHT INCLUDE CLOSING THE PROPERTY AND EFFECTIVELY EXTINGUISHING THE LEASE

Q. YOU ARE A LANDLORD OF A SHOP PROPERTY WHERE THE TENANT HOLDS A LEASE INSIDE THE L&T ACT 1954 DUE TO EXPIRE 25 DECEMBER 2023 PAYING £100,000 PAX .

THE TENANT HAS APPLIED TO YOU FOR L/Ls CONSENT TO UNDERLET AT £50,000 PAX.

WHAT DO YOU DO?

▶ A. YOU FIRST CHECK THE LEASE

Q. WHAT SPECIFIC TERMS ARE YOU LOOKING FOR WHEN EXAMINING THE LEASE?

- ▶ A.
- (i) DOES THE LEASE PERMIT UNDERLETTING?
  - (II) IS L/L'S CONSENT NOT TO BE UNREASONABLY WITHHELD (OR DELAYED)?
  - (III) WHAT DOES THE LEASE SAY IN RELATION TO THE RENT AT WHICH THE SHOP CAN BE UNDERLET?
  - (IV) DOES IT SAY IT CANNOT BE AT A RENT LESS THAN THE PASSING RENT? - OR - DOES IT SAY IT CAN BE AN UNDERLETTING AT A MARKET RENT?

Q. WHAT OTHER TERMS AND CONDITIONS MAY BE IN THE LEASE WHICH GOVERN WHETHER THE L/L SHOULD GIVE CONSENT TO THE UNDERLETTING?

▶ A. COVENANT STATUS OF THE UNDERTENANT

▶ PRE-EMPTION CLAUSE

▶ Q. WHAT STATUTE DEALS WITH L/L'S GIVING OR REFUSING CONSENT FOR AN APPLICATION FOR A LICENCE TO UNDERLET?

▶ A. LANDLORD & TENANT ACT 1988.

▶ S.1 PLACES THE LIABILITY ON THE L/L TO ACT REASONABLY WHEN CONSIDERING AN APPLICATION FOR LICENCE TO UNDERLET (OR INDEED LICENCE TO ASSIGN - SELL THE LEASE)

▶

**Qualified duty to consent to assigning, underletting etc. of premises.**

▶ (1) This section applies in any case where—

▶ (a) a tenancy includes a covenant on the part of the tenant not to enter into one or more of the following transactions, that is—

▶ (i) assigning,

▶ (ii) underletting,

▶ (iii) charging, or

▶ (iv) parting with the possession of,

▶ the premises comprised in the tenancy or any part of the premises without the consent of the landlord or some other person, but

(b) the covenant is subject to the qualification that the consent is not to be unreasonably withheld (whether or not it is also subject to any other qualification).

- ▶ (2) In this section and section 2 of this Act—
  - ▶ (a) references to a proposed transaction are to any assignment, underletting, charging or parting with possession to which the covenant relates, and
  - ▶ (b) references to the person who may consent to such a transaction are to the person who under the covenant may consent to the tenant entering into the proposed transaction.
- ▶ (3) Where there is served on the person who may consent to a proposed transaction a written application by the tenant for consent to the transaction, he owes a duty to the tenant within a reasonable time—
  - ▶ (a) to give consent, except in a case where it is reasonable not to give consent,
  - ▶ (b) to serve on the tenant written notice of his decision whether or not to give consent specifying in addition—
    - ▶ (i) if the consent is given subject to conditions, the conditions,
    - ▶ (ii) if the consent is withheld, the reasons for withholding it.

4) Giving consent subject to any condition that is not a reasonable condition does not satisfy the duty under subsection (3)(a) above.

- ▶ (5) For the purposes of this Act it is reasonable for a person not to give consent to a proposed transaction only in a case where, if he withheld consent and the tenant completed the transaction, the tenant would be in breach of a covenant.
- ▶ (6) It is for the person who owed any duty under subsection (3) above—
  - ▶ (a) if he gave consent and the question arises whether he gave it within a reasonable time, to show that he did,
  - ▶ (b) if he gave consent subject to any condition and the question arises whether the condition was a reasonable condition, to show that it was,
  - ▶ (c) if he did not give consent and the question arises whether it was reasonable for him not to do so, to show that it was reasonable,
  - ▶ and, if the question arises whether he served notice under that subsection within a reasonable time, to show that he did.



Q. WHAT IS THE MARKET RENT?

- HAS THE RENT OF £100,000 PAX NOW DROPPED TO £50,000 PAX?
- IS IT THE L/L OR THE T WHO IS RESPONSIBLE FOR PROVING THAT £50,000 PAX IS NOW THE MARKET RENT?

▶ A. IT IS `L/L`S RESPONSIBILITY TO PROVE THAT HE IS BEING REASONABLE BY REJECTING £50,000 PAX AS THE CURRENT MARKET RENT

▶ Q. DOES THE LEASE REQUIRE ANY UNDERLETTING TO BE CONTRACTED OUT OF THE L&T ACT 1954?

▶ IF SO, WHY IS THIS IMPORTANT?

▶ A. THE L/L DOES NOT WANT THE UNDERTENANT (SUB-TENANT) TO HAVE L&T ACT RIGHTS TO RENEW THE LEASE AND SO THERE IS FREQUENTLY A CONDITION OF ANY UNDERLETTING THAT IT IS CONTRACTED OUT OF THE S'S 24-28 OF THE L&T ACT 1954

▶ Q. IF THE UNDERLEASE IS GRANTED WHAT RENT DO YOU AS L/L RECEIVE £50,000 pax or £100,000 pax?

▶ A. £100,000 pax - YOUR `T` IS THE ORIGINAL `T` HOLDING A LEASE FROM YOU AT £100,000 pax

▶ Q. WHAT HAPPENS IF THE TENANT GOES BUST - WHAT CAN THE `L/L` DO TO GET RENT FROM UNDER-TENANT?

▶ A. A SUPERIOR LANDLORD CAN SERVE A SECTION 6 NOTICE UNDER THE LAW OF DISTRESS AMENDMENT ACT 1908 TO REQUIRE A UNDER-TENANT TO PAY ITS RENT DIRECTLY TO THE LANDLORD

▶ IF THE UNDER-TENANT GOES BUST THE AGA OPERATES AND `T` MUST PAY THE RENT/ARREARS

Q. WHAT HAS HAPPENED TO THOMAS COOK ?

▶ Q. ARE THEY IN ADMINISTRATION CVA (Creditors Voluntary Arrangement)?

▶ A. NO

▶ THEY ARE IN LIQUIDATION

▶ Q. WHY LIQUIDATION?

▶ A. BECAUSE THE SCALE OF THE LOSSES (£1.7bn) WAS SO GREAT THAT IT COULD NOT TRADE ITS WAY OUT OF TROUBLE IN AN ADMINISTRATION AND NO ONE WOULD INJECT MORE MONEY TO KEEP IT TRADING

▶ Q. WHO DEALS WITH A LIQUIDATION?

▶ A. THE OFFICIAL RECEIVER

▶ Q. WHO IS THE OFFICIAL RECEIVER?

▶ A. AN INDIVIDUAL WHO IS A CIVIL SERVANT OF THE CROWN

▶ Q. WHAT IS THE OFFICIAL RECEIVER'S (LIQUIDATOR'S) ROLE ?

▶ A. TO SELL ALL THE ASSETS TO RAISE AS MUCH MONEY AS POSSIBLE FOR THE CREDITORS

▶ Q. WHO APPEARS TO HAVE RESCUED THOMAS COOK FROM LIQUIDATION?

▶ A. HAYS TRAVEL

▶ Q. HAVE THEY BOUGHT THE WHOLE COMPANY - 550 BRANCHES ?

▶ A. NO

A. THE OFFICIAL RECEIVER HAS GRANTED HAYS TRAVEL A 9 MONTH LICENCE TO RE-OPEN THE STORES & RUN THE BUSINESS

THE STORES HAVE RE-OPENED - EX-THOMAS COOK STAFF HAVE BEEN RECRUITED - THE RENT UP TO XMAS QUARTER DAY HAS BEEN PAID

▶ Q. DOES THIS MEAN THEY HAVE TAKEN OVER ALL THE LEASE LIABILITIES UNTIL THE END OF ALL THE LEASES, ie, THE POSITION OF EVERY `L/L` IS AS IT WAS PRE-LIQUIDATION?

▶ A. NO

▶ HAYS TRAVEL (WITH SAVILLS AS ADVISERS) WILL SEEK TO DO DEALS WITH ALL THE `L/L`s TO AGREE BETTER TERMS (including reduced rents, perhaps break clauses, service charge reductions, etc)

▶ Q. YOU ARE THE `L/L` OF A THOMAS COOK STORE. WHAT SHOULD YOU BE DOING?

▶ A. ASSESSING WHETHER YOU HAVE ANY OTHER OPTIONS WHICH ARE BETTER THAN ACCEPTING THE TERMS OFFERED BY HAYS TRAVEL

▶ IN THE MAJORITY OF CASES THE `L/L` WILL BE DELIGHTED THAT THERE IS NOT ANOTHER VOID

▶ IN SOME CASES THERE MAY BE OTHER INTEREST - SOME OF IT FROM OTHER TRAVEL AGENTS

Q. WHERE A SHOP IS NOT WANTED BY THE LICENSEE CAN THE LIQUIDATOR GET RID OF THE LEASE?

- ▶ A. YES IT IS CALLED DISCLAIMING THE LEASE
- ▶ THE POWER TO DISCLAIM
- ▶ A liquidator or trustee in bankruptcy may **disclaim** onerous property by giving the prescribed notice (Insolvency Act 1986 ss178-182 (companies));

## Q What are general permitted development orders (GPDO's) used for?

- ▶ A To make it quicker & easier for Govt to make changes to the Town & Country Planning (Use Classes Order) 1987 to reflect market changes.
- ▶ A They allow certain changes of use without the need for planning permission - often referred to as PDR`s (Permitted Development Rights)
- ▶ the local planning authority may have removed some of your permitted development rights by issuing an 'Article 4' direction. This will mean that you have to submit a planning application for work which normally does not need one.
- ▶ Article 4 directions are made when the character of an area of acknowledged importance would be threatened. They are most common in conservation areas.

## • Q WHAT ARE THE 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

## CLASS A1 HAS SEVERAL SUB-CLAUSES A1 (a) to (i)

- ▶ (a) for the retail sale of goods other than hot food,
  - ▶ (b) as a post office,
  - ▶ (c) for the sale of tickets or as a travel agency,
  - ▶ (d) for the sale of sandwiches or other cold food for consumption off the premises,
  - ▶ (e) for hairdressing,
  - ▶ (f) for the direction of funerals,
  - ▶ (g) for the display of goods for sale,
  - ▶ (h) for the hiring out of domestic or personal goods or articles,
  - ▶ (i) for the reception of goods to be washed, cleaned or repaired,
  - ▶ where the sale, display or service is to visiting members of the public.
- 
- ▶ NB IN MANY LEASES ON SHJOP PROPERTY THE USER IS CLASS A1 (a) only - to restrict other less desirable retail uses

## GPDO`S continued

- ▶ **April 2014** a GPDO made significant changes to help increase the number of residential units to help housing shortage and to help ailing High Streets.
- ▶ Change of use (temporary for 2 years) A1 retail to A2 financial or A3 leisure
- ▶ Class B1 office use could be converted to Class C3 residential if conversion completed by May 2016 + many other developments (changes) permitted
- ▶ **April 2015** permanent changes from A1 to A2 or A3 permitted (max 175 sq m)
- **April 2016**
- retail (A1) and specified sui generis uses to dwellinghouses (C3)
- premises in light industrial use (B2) to dwellinghouses (C3)
- previous temporary permitted development right to change buildings in office use (B1) to C3 dwelling houses is put on a permanent footing;
- ▶ The Government`s target was 1million new homes by 2020
- ▶ The issue is that over 6m sq ft of offices have been lost to residential and there is now a shortage of offices in London & nationwide

# General Permitted Development Order (GPDO) 2019

comes into force on 25 May 2019

## CHANGES FROM CLASS A1

- ▶ **A1 (shops)**
- ▶ **A2**
- ▶ **A3** up to 150m<sup>2</sup> and subject to Prior Approval
- ▶ **B1** up to 500m<sup>2</sup> and subject to Prior Approval
- ▶ **C3** up to 150m<sup>2</sup> and subject to Prior Approval
- ▶ **D2** up to 200m<sup>2</sup> and subject to Prior Approval and only if the premises was in A1 use on 5th December 2013
- ▶ **A mixed use** comprising an A1 or A2 use and up to two flats may also be permitted subject to meeting certain conditions



## CHANGES FROM CLASS A2 FINANCIAL

- ▶ **A2** (professional and financial services) when premises have a display window at ground level, but excluding betting offices or pay day loan shops
- ▶ **A1**
- ▶ **A3** up to 150m<sup>2</sup> and subject to Prior Approval
- ▶ **B1** up to 500m<sup>2</sup> and subject to Prior Approval
- ▶ **C3** up to 150m<sup>2</sup> and subject to Prior Approval
- ▶ **D2** subject to Prior Approval and only if the premises was in A2 use on 5th December 2013
- ▶ A **mixed use** comprising an A1 or A2 use and up to two flats may also be permitted subject to meeting certain conditions

## OTHER CLASS A CHANGES

- ▶ **A3** (restaurants and cafes)
  - ▶ **A4** (drinking establishments)
  - ▶ **A4** (drinking establishment) with **A3** (restaurants and cafes)
  - ▶ **A5** (hot food takeaways)
  
  - ▶ **B1** (business)
  - ▶ **B2** (general industrial)
  
  - ▶ **B8** (storage and distribution)
- ▶ **A1** or **A2**
  - ▶ **A4** drinking establishment with **A3** (restaurants and cafes)
  - ▶ **A4** (drinking establishments)
  - ▶ **A1** or **A2** or **A3**  
**B1** up to 500m<sup>2</sup> and subject to Prior Approval  
**C3**
  
  - ▶ **B8** up to 500m<sup>2</sup>
  - ▶ **B1**  
**B8** up to 500m<sup>2</sup>
  - ▶ **B1** up to 500m<sup>2</sup>  
**C3** (subject to prior approval)

## CLASS C & SUI GENERIS

- ▶ C3 (dwellinghouses)
- ▶ C4 (small houses in multiple occupation)
- ▶ Sui Generis (casinos)
- ▶ Sui Generis (betting offices and pay day loan shops)
- ▶ C4 (small houses in multiple occupation)
- ▶ C3 (dwellinghouses)
- ▶ D2
- ▶ A3 only if existing building is under 150m<sup>2</sup> and subject to Prior Approval
- ▶ C3 up to 150m<sup>2</sup> and subject to Prior Approval.
- ▶ A1
- ▶ A2
- ▶ A3 up to 150m<sup>2</sup> and subject to Prior Approval
- ▶ B1 up to 500m<sup>2</sup> and subject to Prior Approval
- ▶ C3 up to 150m<sup>2</sup> and subject to Prior Approval
- ▶ A mixed use comprising a betting office or a pay day loan shop, or an A1 or A2 use and up to two flats may also be permitted subject to meeting certain conditions.
- ▶ D2

## IMPACT OF GPDO`s - RICS CASE STUDY

- ▶ The nature of the top concern varied according to local contexts, but included:
  - ▶ • loss of occupied employment space in Camden
  - ▶ • residential quality and impact on local infrastructure in Croydon
  - ▶ • suitability of some locations for housing in Leeds
  - ▶ • residential quality and impacts on neighbouring users in Leicester
  - ▶ • loss of affordable housing contributions in Reading.
- ▶ **BUT OPENING UP PERMITTED DEVELOPMENT RIGHTS HAS LEAD TO SOME PROBLEMS**
- ▶ Evidence of this reduction in quality included:
  - ▶ • ‘studio’ flats just 15 or 16m<sup>2</sup> (and an overall rate of just 30% meeting national space standards)
  - ▶ • no access to private or communal amenity space
  - ▶ • buildings with barely any changes done to convert from office to residential use
  - ▶ • residential developments in the middle of industrial estates
  - ▶ • 77% of units in the case study buildings were studio or one bedroom flats, only catering to a very narrow segment of the residential market. Two residents told us in some detail of the quality of life issues they faced in poor quality conversions.

## Q. WHAT GUIDANCE HAVE THE RICS RECENTLY ISSUED REGARDING MONEY LAUNDERING?

- ▶ A. COUNTERING BRIBERY AND CORRUPTION, MONEY LAUNDERING AND TERRORIST FINANCING 1st edition, February 2019
- ▶ TO TAKE EFFECT 1<sup>st</sup> September 2019
- ▶ IT IS IN RESPONSE TO THE HMRC REVISED GUIDELINES OF 2017
- ▶ THE UK MONEY LAUNDERING REGULATIONS WHICH WERE REVISED IN JUNE 2017.
- ▶ SINCE JUNE 2017, ALL ESTATE AGENTS ARE OBLIGED TO UNDERTAKE ANTI-MONEY LAUNDERING CHECKS NOT ONLY ON THEIR CLIENT, BUT ALSO ON THE COUNTERPARTY
- ▶ *“When a relevant person relies on the third party to apply customer due diligence measures it must immediately obtain from the third party all the information needed to satisfy the requirements of regulation 28(2) to (6) and (10) in relation to the customer, customer’s beneficial owner, or any person acting on behalf of the customer;”*
- ▶ RICS GLOSSARY OF TERMS
- ▶ **CUSTOMER DUE DILIGENCE (CDD) / KNOW YOUR CUSTOMER (KYC):** Taking the appropriate steps to ascertain who the customer or client is and, if relevant, their ultimate beneficial owner is and counterparty. These can be relatively simple checks to verify the identity of the customer/client or may entail deeper investigations. This is a legal and regulatory requirement in many countries.

## MONEY LAUNDERING:

- ▶ Concealing the source of the proceeds of criminal activity to disguise their illegal origin. This may take place through hiding, transferring and/or recycling illicit money or other currency through one or more transactions, or converting criminal proceeds into seemingly legitimate property.
- ▶ **PERSON OF SIGNIFICANT CONTROL (PSC):** Individuals or legal entities who have significant control or influence over a company. This control and influence can be exercised in a variety of ways, for instance the individual has absolute veto rights over decisions related to the running of the company.
- ▶ **POLITICALLY EXPOSED PERSON (PEP):** Individuals and the family members of such individuals, entrusted with prominent public functions by any country or international organisation. This includes heads of state or government, senior politicians, senior
- ▶ **RELIANCE:** The extent to which the required checks on individuals or companies have been undertaken satisfactorily by a third party, meaning that these checks do not need to be duplicated.
- ▶ **REPORTING:** Taking the appropriate action to draw attention to known or suspected activity involving money laundering, bribery or corruption issues and/or terrorist financing. The action of reporting may take the form of internal or external processes, and should as a minimum comply with the applicable laws as defined.

## RICS REQUIREMENTS & GUIDELINES

- ▶ This professional statement deals with bribery, corruption, money laundering and terrorist financing and is divided into three parts:
- ▶ 1 Mandatory requirements for anti-bribery and corruption and for anti-money laundering and terrorist financing.
- ▶ 2 Guidance setting out supporting good practice for anti-bribery and corruption and for anti-money laundering and terrorist financing.
- ▶ 3 Supplementary guidance on some of the concepts described in parts 1 and 2.
- ▶ Bribery and corruption mitigation controls will typically involve monitoring the activities of your own organisation.
- ▶ Meanwhile effective management of money laundering and terrorist financing risks involves being vigilant of the actions of outside parties that RICS regulated firms and members may do business with, such as clients and third-party introducers.
- ▶ Bribery, corruption, money laundering and terrorist financing are illegal and unethical. It is possible, however, that more than one of these activities can take place in a single transaction. You should be vigilant for this kind of activity both inside and outside your own organisation, with clients and third parties, and have procedures in place to identify, monitor, report and prevent it.

Q. YOU ARE `L/L` OF A SHOPPING CENTRE WITH SEVERAL VACANT UNITS.  
A `T` HAS A BREAK CLAUSE WHICH HE CAN OPERATE BY SERVING 6 MONTHS NOTICE TO TERMINATE THE LEASE WITH EFFECT 24TH JUNE 2020  
THEY ARE WILLING TO DESIST FROM SERVING THE BREAK NOTICE IF THE `L/`L GRANTS THEM A 3 MONTH RENT FREE PERIOD.

WHAT DO YOU DO AS `L/`L ?

- ▶ A. MAKE A DECISION / JUDGEMENT AS TO LIKELIHOOD OF `T` ACTUALLY EXERCISING THE BREAK CLAUSE
- ▶ ARE THEY TRADING WELL? - ARE THEY TRADING POORLY ?
- ▶ HAVE THEY BEEN EXERCISING BREAKS IN OTHER CENTRES?
- ▶ WOULD GIVING IN A GRANTING A 3 MONTH RENT FREE IMPACT ON VALUE -or -
- ▶ DOES YOUR VALUATION ALREADY ALLOW FOR THE EXERCISE OF THE BREAK CLAUSE
- ▶ HOW MANY OTHER `T`s HAVE BREAK CLAUSES - HAVE YOU SET A PRECEDENT ?
- ▶ Q. IF `L/`L AGREES TO GIVE 3 MONTH RENT FREE AS CONSIDERATION FOR `T` NOT EXERCISING THE BREAK CLAUSE HOW IS THIS DOCUMENTED?
- ▶ A. A DEED OF VARIATION



IN MANY OF THE REPORTED COURT CASES SUCH AS A LEASE RENEWALS DECIDED BY A COUNTY COURT JUDGE THE JUDGES ARE OFTEN CRITICAL OF THE SURVEYORS (EXPERT WITNESSES) WHO PRESENT EVIDENCE TO THEM - SAYING THEY ARE

“ Guns for Hire “

“ Easy to see which side they are representing”

“ Your evidence is of little use to me “

### Q. WHAT ARE YOUR DUTIES WHEN ACTING AS AN EXPERT WITNESS ?

- ▶ **RICS GUIDELINES “Surveyors acting as expert witnesses “ 4th edition 2014**
- ▶ As a surveyor actively involved in a dispute that may come before a tribunal, you may find yourself carrying out one or more roles, including that of an expert witness.
- ▶ **A. Your primary duty as an expert witness is not to a client but to the tribunal where your expert witness report and evidence given:**
- ▶ **must be, and must be seen to be, your independent and unbiased product, and fall within your expertise, experience and knowledge**
- ▶ **must state the main facts and assumptions it is based upon, and not omit material facts that might be relevant to your conclusions; and**
- ▶ **must be impartial and uninfluenced by those instructing or paying you to give the evidence**

## DUTIES AS AN EXPERT WITNESS

- ▶ 2 Duty in providing expert evidence
  - ▶ 2.1 Your overriding duty as an expert witness is to the tribunal to which the expert evidence is given. This duty overrides any contractual duty to your client.
    - ▶ Your duty to the tribunal is to set out the facts fully and give truthful, impartial and independent opinions, covering all relevant matters, whether or not they favour your client.
    - ▶ This applies irrespective of whether or not the evidence is given either under oath or affirmation.
  - ▶ 2.2 Special care must be taken to ensure that expert evidence is not biased towards those who are responsible for instructing or paying you.
  - ▶ 2.3 Opinions should not be exaggerated or seek to obscure alternative views or other schools of thought, but should instead recognise and, where appropriate, address them. The duty endures for the whole assignment.
  - ▶ 2.4 As an expert witness you must be able to show that you have full knowledge of the duties relating to the role of an expert witness when giving evidence.

2.5 You are entitled to accept instructions from your employer and to give expert evidence on behalf of that employer.

Prior to accepting such instructions, you must satisfy yourself that your employer understands that your primary duty in giving evidence is to the tribunal and that this may mean that your evidence may conflict with your employer's view of the matter or the way in which your employer would prefer to see matters put.

2.6 Where you are acting, or have previously acted, for a party on a matter (in the course of, for instance, negotiations) and the matter requires, or may in the future require, the giving of expert evidence, you must throughout consider, and then decide, whether you can fully satisfy the overriding duty to the tribunal to provide evidence that is truthful, independent, impartial, and complete as to coverage of relevant matters (please refer to the RICS guidance note Conflicts of interest).

2.7 As an expert witness, you must not malign the professional competence of another expert witness.

If you feel that expressing doubts about the competence of another expert witness is both justified and necessary in order for you to present a full picture to the tribunal, you may bring to its attention where you consider the experience, knowledge and expertise of another expert witness is lacking, inappropriate or exaggerated, or where you consider evidence is biased, giving full reasons in support of your comments.

## DECLARATION BY SURVEYOR ACTING AS AN EXPERT WITNESS

- ▶ 1 'I confirm that my report has drawn attention to all material facts which are relevant and have affected my professional opinion.
- ▶ 2 'I confirm that I understand and have complied with my duty to the [specify the tribunal\*] as an expert witness which overrides any duty to those instructing or paying me, that I have given my evidence impartially and objectively, and that I will continue to comply with that duty as required.
- ▶ 3 'I confirm that I am not instructed under any conditional or other success-based fee arrangement.
- ▶ 4 'I confirm that I have no conflicts of interest.
- ▶ 5 'I confirm that I am aware of and have complied with the requirements of the rules, protocols and directions of the [specify the tribunal].
- ▶ 6 'I confirm that my report complies with the requirements of RICS - Royal Institution of Chartered Surveyors, as set down in the RICS practice statement Surveyors acting as expert witnesses'.
- ▶ **Q. WHAT IS THE DIFFERENCE BETWEEN AN EXPERT WITNESS AND AN ADVOCATE ?**
- ▶ **A. WHEN ACTING AS A SURVEYOR-ADVOCATE YOU OWE DUTIES TO YOUR CLIENT. HOWEVER, YOU ALSO OWE AN OVERRIDING DUTY TO THE TRIBUNAL TO ACT PROPERLY AND FAIRLY AS SET OUT IN THIS PROFESSIONAL STATEMENT.**

## Q. ARE THERE ARE SEPARATE RICS GUIDELINES FOR SURVEYORS ACTING AS SURVEYOR ADVOCATES?

### ▶ A. YES

- ▶ SURVEYORS ACTING-AS-ADVOCATES  
2<sup>ND</sup> EDITION PROFESSIONAL STATEMENT  
3<sup>RD</sup> EDITION GUIDANCE - PUBLISHED FEBRUARY 2017 - EFFECTIVE JUNE 2017

- ▶ Q. CAN YOU ACT AS AN EXPERT WITNESS & AS AN ADVOCATE IN THE SAME CASE,  
ie, ADOPT A “ DUAL ROLE “

### ▶ A. YES

- ▶ SO LONG AS YOU CLEARLY STATE IN RESPECT OF EACH ELEMENT OF YOUR EVIDENCE  
WHETHER YOU ARE ACTING AS AN EXPERT WITNESS OR AS A SURVEYOR ADVOCATE

- ▶ 2.1 As a surveyor-advocate you must:
  - ▶ (a) take personal responsibility for the conduct and presentation of your client’s case, and act in the best interests of your client
  - ▶ (b) advance the case you are presenting by all fair and proper means
  - ▶ (c) act promptly, diligently and competently in all respects
  - ▶ (d) not allow your integrity or professional standards to be compromised
  - ▶ (e) not deceive or mislead the tribunal or any opposing party
  - ▶ (f) take reasonable steps to ensure that the tribunal has before it all relevant decisions and legislative authorities

## Q. CAN YOU AGREE INCENTIVISED FEES WHEN ACTING AS AN EXPERT WITNESS?

### ▶ A. NO THESE ARE REFERRED TO AS “CONDITIONAL FEES” Guideline 10

- ▶ 10.1 You should not undertake expert witness appointment on any form of conditional or other success-based arrangement including where those instructing you are engaged on such a basis.
- ▶ 10.2 It is inappropriate to be remunerated by way of a conditional fee arrangement when acting as an expert witness but it may be an appropriate fee basis when acting as an advocate.
- ▶ When acting in a dual role as expert witness and advocate, where permitted in lower tribunals, a conditional fee arrangement may be acceptable because it will be seen as attached to the role of advocate.
- ▶ Such a dual role improves access to justice by reducing costs and therefore a conditional fee payment can be supported in these limited and strict circumstances.