

DOUG STEVENS SEMINAR 19TH MARCH 2018 @ 08:00 hrs
Delivered as a power point presentation to 1st & 2nd year graduates

- ▶ *DISPUTED LEASE RENEWALS & RENT REVIEWS*
- ▶ *THE COURT AND ARBITRATION PROCESSES*
- ▶ *PART 36 & CALDERBANK OFFERS* *50 mins*
- ▶ *QUESTIONS* *10 mins*

- ▶ *WE WILL FOCUS ON UNOPPOSED LEASE RENEWALS (ie, where the both the L/L & T wish to renew the lease and where the lease is inside the L & T Act 1954) &*
- ▶ *RENT REVIEWS (where the parties are unable to agree the rent by negotiation and the case is referred to a third party - Arbitrator or Independent Expert)*
- ▶ *WE WILL ALSO LOOK AT THE POSITION ON COSTS -*
 - LEASE RENEWAL - PART 36 OFFERS*
 - RENT REVIEW - CALDERBANK OFFERS*
- ▶ *+ A BRIEF LOOK AT PACT (PROFESSIONAL ARBITRATION ON COURT TERMS)*
- ▶ *Notes for this SEMINAR will be posted on www.douglasstevens.co.uk SEMINARS together with the previous 43 SEMINARS back to October 2014*
- ▶ *NEXT SEMINAR 23rd APRIL 2018 @ CBRE*

LEASE RENEWAL DISPUTE

- ▶ WE WILL USE AS AN EXAMPLE A LEASE OF A SHOP PROPERTY WITH A CONTRACTUAL EXPIRY DATE OF 25th DECEMBER 2018
- ▶ THE PARTIES (L/L & T) CAN AGREE THE TERMS OF A NEW LEASE AT ANY TIME WITHOUT EITHER SERVING A NOTICE (L/L S.25 NOTICE - OR T S.26 NOTICE) - EITHER BEFORE THE LEASE IS DUE TO EXPIRE OR AFTER THAT DATE IF NO NOTICES HAVE BEEN SERVED
- ▶ THIS MIGHT BE A RE-GEAR OF EXISTING LEASE OR THE GRANT OF A REVERSIONARY LEASE TO COMMENCE UPON THE EXPIRY OF THE EXISTING LEASE
- ▶ THE PARTIES CAN ALSO AGREE THE TERMS BY NEGOTIATION AT ANY TIME AFTER EITHER HAS SERVED A NOTICE TO BRING THE CURRENT LEASE TO AN END
- ▶ **BUT** ONCE A S.25 OR A S.26 NOTICE HAS BEEN SERVED THE MATTER IS 'IN COURT' AND SO THE COURT PROCESSES APPLY (unless the parties agree extensions of time - stays)
- ▶ IN OUR EXAMPLE THE L/L IS HAPPY FOR THE T TO RENEW THE LEASE
- ▶ LET`S SAY L/L SERVES S.25 (not more than 12 months and not less than 6 months before the contractual expiry date) TO TERMINATE LEASE and the specified termination date is w/e 25TH DECEMBER 2018 - IT IS A NON-OPPOSING NOTICE ie, NOT OBJECTING TO THE RENEWAL OF THE LEASE
- ▶ THE NOTICE WILL QUOTE THE TERMS ON WHICH THE L/L OFFERS TO RENEW THE LEASE
- ▶ ie THE LENGTH OF LEASE , THE RENT, THE REVIEW PATTERN (if applicable) & ANY OTHER TERMS - BUT NORMALLY STATING THAT THE LEASE WILL HAVE THE SAME LEASE CLAUSES AS THE EXISTING LEASE SAVE FOR MODERN UPDATING
- ▶ **Q WHAT MUST THE T NOW DO IF THEY WISH TO NEGOTIATE A NEW LEASE ?**

T WISHES TO RENEW AND REGISTERS A CLAIM AT COURT.

- ▶ T HAS UNTIL EXPIRY DATE STATED IN THE L/L`S S.25 NOTICE (25TH DECEMBER 2018) TO REPLY AND TO MAINTAIN SECURITY OF TENURE - OTHERWISE RIGHT TO RENEW IS LOST
- ▶ T SERVES VIA A SOLICITOR TO THE LOCAL COUNTY COURT A **CLAIM FORM CPR PART 8 (Civil Procedures Rules)** FOR THE GRANT OF A NEW TENANCY UNDER S.24 OF THE L & T ACT 1954 (CPR PART 56 AND PRACTICE DIRECTIONS PD 56:3.5)
- ▶ IT IS A FORMAL CLAIM SET OUT IN A PRESCRIBED FORM
- ▶ THIS LODGES WITH THE COURT THE TENANTS RIGHT TO A NEW LEASE.
- ▶ IT DETAILS THE L/L AND T - THE EXISTING LEASE TERM AND RENT AND CONFIRMS RECEIPT OF THE L/L S.25 NOTICE AND THE DATE THEREOF & CONFIRMS THAT THE TENANT DOES STILL OCCUPY PREMISES FOR BUSINESS PURPOSES.
- ▶ IT PROPOSES THE T`S TERMS FOR A NEW LEASE - LEASE TERM - RENT - REVIEW PATTERN - USUALLY SAYS A NEW LEASE ON SAME TERMS (IE, SAME CLAUSES) AS EXISTING LEASE
- ▶ IT CAN PROPOSE A BREAK CLAUSE IF THE T WANTS ONE
- ▶ THE T IS NOT BOUND TO ACCEPT A NEW LEASE ON THE TERMS IT PROPOSES
- ▶ THE CASE IS NOW IN THE COURT SYSTEM AND IS ALLOCATED A CLAIM NUMBER - LEGAL COSTS WILL START TO MOUNT - BUT THE L/L AND T CAN STILL AGREE TERMS AT ANY TIME

WHAT HAPPENS NEXT ?

- ▶ THE T IS NOW THE CLAIMANT. THE L/L IS NOW THE DEFENDANT
- ▶ ON RECEIPT OF COPY OF T`S CPR PART 8 CLAIM FOR A NEW LEASE THE L/L HAS
- ▶ ONLY 14 DAYS TO FILE WITH THE COURT AN **ACKNOWLEDGEMENT OF SERVICE**
- ▶ THIS AGAIN IS IN A PRESCRIBED FORM AND SERVED BY SOLICITORS TO THE COURT.
- ▶ IT CAN EITHER STATE THAT THE TERMS OFFERED BY THE T ARE NOT CONTESTED OR MORE PROBABLY STATES THAT “ I INTEND TO CONTEST THIS CLAIM”
- ▶ ON A CONTINUATION SHEET THE TERMS OFFERED BY THE T ARE REPEATED AND THE TERMS REQUIRED BY THE L/L ARE RE-STATED
- ▶ IN MAKING THIS ACKNOWLEDGEMENT THE L/L STATES THAT “THE DEFENDANT APPLIES TO THIS COURT ON A DATE TO BE FIXED FOR A DETERMINATION PURSUANT TO S.24 OF THE L & T ACT 1954 FOR A RENT WHICH THE CLAIMANT T IS TO PAY FOR THE PREMISES WHILST IT`S TENANCY CONTINUES UNDER S.24 (IE, **AN INTERIM RENT**).
- ▶ IF THE PARTIES ARE STILL NEGOTIATING THEY CAN ASK THE COURT FOR A **STAY** (POSTPONEMENT) OF PROCEEDINGS WHICH THE COURT WILL NORMALLY GRANT
- ▶ UNLESS THE PARTIES HAVE AGREED TO A STAY **THE COURT WILL SET A DATE FOR A MEETING AT COURT TO SET THE DIRECTIONS** FOR THE CASE TO PROCEED OR WILL ISSUE A **CONSENT ORDER WITH DIRECTIONS** IF THE PARTIES HAVE BEEN ABLE TO AGREE THE DIRECTIONS.
- ▶

TYPICAL COURT DIRECTIONS - SET OUT IN A CONSENT ORDER

- ▶ WORKING FROM THE DATE OF THE CONSENT ORDER DEFENDANT HAS 8 WEEKS TO ISSUE A DRAFT LEASE TO CLAIMANT
- ▶ CLAIMANT HAS 2 WEEKS TO RESPOND WITH AMENDMENTS IN RED
- ▶ DEFENDANT HAS 2 WEEKS TO MAKE COUNTER-AMENDMENTS IN GREEN
- ▶ (AS SURVEYOR ADVISING L/L (OR T) YOU MAY BE ASKED FOR YOUR INPUT ON HOW AN AMENDED CLAUSE IMPACTS ON RENTAL VALUE)
- ▶ 1 WEEK LATER PARTIES ARE TO HAVE WITHOUT PREJUDICE MEETING TO NARROW THE ISSUES
- ▶ 1 WEEK LATER CLAIMANT TO PREPARE AND SERVE ON DEFENDANT LIST OF TERMS NOT AGREED TO WHICH DEFENDANT CAN ADD HIS COMMENT WITHIN ONE FURTHER WEEK
- ▶ DISCLOSURE - 1 WEEK LATER PARTIES TO LIST DOCUMENTS THEY WISH TO SEE AND ALL THE LISTED DOCUMENTS MUST BE EXCHANGED WITHIN 2 WEEKS THEREOF.
- ▶ (AS SURVEYOR ADVISING L/L (OR T) ALL YOUR CORRESPONDENCE WITH THE OTHER SIDE WILL BE DISCLOSED)
- ▶ WITNESS STATEMENTS - WITHIN 3 WEEKS THE PARTIES SHALL EXCHANGE WRITTEN WITNESS STATEMENTS OF ALL WITNESSES OF FACT ON WHOM THEY INTEND TO RELY ON WITH ANY RELEVANT DOCUMENTATION. THESE WITNESSES ARE PERMITTED TO GIVE EVIDENCE AT TRIAL. THE WITNESSES MAY BE THE L/L AND THE T.
- ▶ (AS SURVEYOR ADVISING L/L (OR T) YOU MAY BE ASKED TO CHECK THAT THE WITNESS STATEMENTS DON'T IN ANY WAY CONTRADICT WHAT YOU WILL SAY IN YOUR EXPERT REPORT)
- ▶ EXPERTS EACH PARTY CAN NOMINATE AN EXPERT VALUATION WITNESS TO GIVE ORAL EVIDENCE IN COURT AT THE TRIAL. THEY ARE DIRECTED TO PREPARE AND EXCHANGE EXPERT WRITTEN REPORTS SIMULTANEOUSLY WITHIN 3 WEEKS OF THE WITNESS STATEMENTS
- ▶ (AS L/L OR T'S EXPERT WITNESS YOUR WRITTEN REPORT WILL BE THE KEY EVIDENCE AND IN COURT YOU WILL BE EXAMINED AND CROSS-EXAMINED ON THE REPORT AND THE EVIDENCE)
- ▶ 1 WEEK LATER EXPERTS ARE DIRECTED TO MEET WITHOUT PREJUDICE TO AGREE AS MUCH AS POSSIBLE AND IDENTIFY WHICH ISSUES ARE STILL IN DISPUTE
- ▶ THE EXPERTS MUST THEN WITHIN 1 WEEK AGREE A JOINT WRITTEN STATEMENT OF THE ISSUES AGREED AND IN DISPUTE
- ▶ LISTING THE CONSENT ORDER THEN SETS OUT A DATE ON WHICH THE CASE (IF NOT THEN AGREED) WILL BE LISTED BEFORE A CIRCUIT JUDGE - THIS DATE WILL FALL WITHIN A CALENDAR WINDOW, PERHAPS A ONE MONTH WINDOW, WITH A PROVISIONAL ALLOCATION OF COURT TIME OF SAY 1 X DAY AS EXPERT WITNESS YOU MUST MAKE YOURSELF AVAILABLE FOR THE WINDOW

CONTINUED

- ▶ **PREPARATION FOR TRIAL** - CONSENT ORDER PROVIDES THAT -
- ▶ CLAIMANT MUST LODGE FULL BUNDLE OF DOCUMENTS WITH THE COURT NOT MORE THAN 7 DAYS NOR LESS THAN 3 DAYS BEFORE THE START OF THE TRIAL. IT SHOULD CONTAIN ALL THE DOCUMENTS ON WHICH BOTH PARTIES INTEND TO RELY , ie - NO SURPRISES
- ▶ BUT CLAIMANT MUST AT LEAST 14 DAYS BEFORE THAT GIVE TO THE DEFENDANT AN OPPORTUNITY TO STATE WHICH DOCUMENTS IT REQUIRES IN THE BUNDLE.
- ▶ A CASE SUMMARY NOT EXCEEDING 250 WORDS SHALL BE AGREED BY THE PARTIES BUT IF NOT EACH PARTY MAY PREPARE IT'S OWN CASE SUMMARY NOT EXCEEDING 200 WORDS.
- ▶ BECAUSE OF THE TIME WHICH HAS ELAPSED NEW EVIDENCE MAY HAVE ARISEN AND YOU MAY WISH TO UPDATE YOUR EXPERT REPORT
- ▶ AS A SURVEYOR & EXPERT WITNESS YOU WILL ATTEND MEETINGS WITH YOUR SOLICITORS AND BARRISTERS
- ▶ MANY CASES ARE SETTLED ON THE DOORS OF THE COURT - OFTEN BECAUSE ONE OR BOTH SIDES REALISE HOW MUCH THE COURT PROCESS (1 OR 2 or more days in court) WILL COST
- ▶ IF YOU APPEAR AS AN EXPERT WITNESS TO GIVE EVIDENCE YOU WILL BE EXAMINED BY YOUR OWN BARRISTER AND CROSS-EXAMINED BY OPPONENTS BARRISTER
- ▶ YOU ARE NOT ACTING AS AN ADVOCATE - YOUR DUTY IS TO THE COURT NOT TO YOUR CLIENT

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

DISCONTINUANCE

- ▶ IF A T CHANGES HIS MIND AND DECIDES THAT HE DOES NOT WANT A NEW TENANCY ONCE PROCEEDINGS HAVE STARTED, THE COURT PROCEEDINGS CAN BE DISCONTINUED AT ANY TIME AND THE TENANCY WILL COME TO AN END THREE MONTHS FROM THEIR DISCONTINUANCE (THOUGH THE T SHOULD BE AWARE THAT HE IS LIKELY TO SUFFER COST PENALTIES).
- ▶ THE L/L IS NOT PERMITTED TO WITHDRAW AN APPLICATION WITHOUT THE TENANT'S CONSENT.

PACT (PROFESSIONAL ARBITRATION ON COURT TERMS)

- ▶ PACT- A JOINT LAW SOCIETY / RICS INITIATIVE ESTABLISHED IN 1997
- ▶ ARBITRATOR ACTS IN THE CAPACITY OF THE CIRCUIT JUDGE DECIDING THE RENT AND PERHAPS LEASE TERM, REVIEW PATTERN, BREAKS AND BREAK PENALTIES - BUT DOES NOT MAKE THE ORDER FOR A NEW LEASE TO BE GRANTED).
- ▶ EXPERT ACTS AS AN EXPERT GOVERNED BY TERMS OF CONSENT ORDER
- ▶ BENEFITS OF USING PACT:
 - FLEXIBLE – PARTIES CAN CHOOSE WHETHER A LAWYER OR SURVEYOR IS APPOINTED AND WHETHER THEY ACT AS AN ARBITRATOR OR INDEPENDENT EXPERT.
 - QUICK – PACT CAN BE SET UP SPEEDILY AND SHOULD BE LESS TIME CONSUMING THAN GOING TO COURT.
 - EXPERT DECISIONS – ONLY PROFESSIONALS WITH HIGH LEVELS OF KNOWLEDGE AND EXPERIENCE IN THE SUBJECT MATTER ARE APPOINTED.
 - ADAPTABLE – THE SCHEME ALLOWS BESPOKE SOLUTIONS TO BE DEVELOPED TO SUIT THE NEEDS OF THE PARTIES.
 - CHEAPER - COSTS LIKELY TO BE MUCH LESS THAN COURT PROCESS
 - ARBITRATOR DECIDES THE COSTS OF THE CASE
 - PACT REQUIRES THE AGREEMENT OF BOTH PARTIES AND IF THE LEASE RENEWAL IS “IN COURT” IT REQUIRES A CONSENT ORDER
 - FOLLOWING THE JACKSON REFORMS PARTIES ARE ENCOURAGED TO CONSIDER ADR INCLUDING PACT TO REDUCE THE NUMBER OF CASES PROCEEDING TO COURT
 - A PARTY REJECTING THE OFFER OF PACT AND PROCEEDING TO COURT AND THEN LOSING THE CASE IS LIKELY TO
 - BE PENALISED WHEN COSTS ARE ASSESSED

AWARD OF COSTS AT COURT ON A LEASE RENEWAL

- ▶ TRIAL JUDGE DECIDES COSTS ON A LEASE RENEWAL
- ▶ IF L/L SUCCESSFULLY OPPOSES GRANT OF A NEW LEASE COSTS WILL PROBABLY BE AWARDED AGAINST THE T
- ▶ IF T OBTAINS A NEW LEASE WHEN L/L OPPOSED, COSTS WILL BE AWARDED AGAINST THE L/L.
- ▶ WHERE BOTH PARTIES AGREE TO THE GRANT OF A NEW LEASE BUT DISAGREE ON THE TERMS, THE COSTS AWARD WILL DEPEND ON HOW CLOSELY THE PROPOSALS OF THE PARTIES WERE REFLECTED IN THE ORDER, ie PROPORTIONATE.
- ▶ **Q. DO PARTIES AT LEASE RENEWAL GENERALLY MAKE CALDERBANK OFFERS ?**
- ▶ **A. NO. THEY GENERALLY MAKE A PART 36 OFFER (Part 36, Civil Procedure Rules) (CPR) - NB They can make Calderbanks BUT PART 36 OFFERS ARE MORE COMMON**
- ▶ PART 36 OF THE CPR ALLOWS A L/L OR T TO SET OUT THEIR PROPOSALS FOR A NEW LEASE IN A “WITHOUT PREJUDICE” OFFER LETTER - AT ANY STAGE OF THE LEASE RENEWAL PROCESS.
- ▶ THEY CANNOT BE REFERRED TO AT TRIAL. THEY ONLY AFFECT THE OUTCOME WHEN DEALING WITH THE COSTS OF THE COURT PROCEEDINGS.
- ▶ IF AN OFFER IS MADE AND NOT ACCEPTED AND AT TRIAL THE PARTY WHO MADE THE OFFER EQUALS OR BETTERS THE TERMS PROPOSED IN THE OFFER THERE WILL BE COSTS CONSEQUENCES FOR THE OTHER PARTY FOR NOT ACCEPTING. THE OFFER IS OPEN FOR ACCEPTANCE FOR A PERIOD OF NOT LESS THAN 21 DAYS. AFTER THIS PERIOD IT CAN STILL BE ACCEPTED BUT IT IS POSSIBLE FOR THE OFFER TO BE WITHDRAWN BY THE PARTY WHO MADE IT.

RENT REVIEW DISPUTES

- ▶ A COMMERCIAL LEASE WILL GENERALLY PROVIDE THAT WHERE THE L/L & T CANNOT AGREE THE REVISED RENT AT REVIEW DATE THEN THERE IS A PROCEDURE TO HAVE THE RENT DETERMINED BY A THIRD PARTY - ARBITRATOR -or - INDEPENDENT EXPERT
- ▶ IT MAY ALLOW THE PARTIES TO PRIVATELY AGREE UPON THAT THIRD PARTY AND/OR ALLOW THEM (or only one of them) TO APPLY TO THE RICS TO APPOINT ONE
- ▶ THE LEASE WILL GENERALLY SPECIFY WHETHER IT IS AN ARBITRATOR TO BE APPOINTED OR AN INDEPENDENT EXPERT (sometimes it gives L/L option to choose)
- ▶ ONE PARTY MAKES AN APPLICATION TO THE RICS (DRS Dispute Resolution Service) CONFIRMING THE DETAILS OF THE DISPUTE - PROPERTY ADDRESS & TYPE, THE PARTIES (and original parties) THE CURRENT RENT, THE DATE OF THE LEASE + A CHEQUE FOR £425
- ▶ AS THE APPLYING PARTY THEY ARE THE CLAIMANT.
- ▶ THERE MAY BE SPECIFIC TIMESCALES (timetraps) FOR THE APPLICATION TO BE MADE
- ▶ ONCE AN ARBITRATOR or EXPERT IS APPOINTED YOU CAN CONTINUE NEGOTIATING WITH THE OTHER SIDE - BUT ANY COMMUNICATION TO THE ARBITRATOR Or EXPERT MUST BE COPIED TO THE OTHER SIDE
- ▶ NB - THE PROCEDURES FOR AN ARBITRATOR DIFFER FROM THOSE OF AN EXPERT

ARBITRATORS & INDEPENDENT EXPERTS - THE DIFFERENCES

- ▶ MANY PARTIES MAKING EXPERT WITNESS REPORTS TO ARBITRATORS AND EXPERTS OFTEN TREAT THEM BOTH THE SAME AND PRESENT SIMILAR CASES (OFTEN EXPECTING THE INDEPENDENT EXPERT TO BEHAVE LIKE AN ARBITRATOR).
- ▶ ARBITRATORS AND INDEPENDENT EXPERTS ARE TWO VERY DIFFERENT ENTITIES.
- ▶ ARBITRATION IS A QUASI-JUDICIAL PROCESS. ALSO CALLED A TRIBUNAL
- ▶ THINK OF AN ARBITRATOR AS A JUDGE



- ▶ A **QUASI-JUDICIAL BODY** IS AN ENTITY SUCH AS AN ARBITRATOR OR TRIBUNAL BOARD, GENERALLY OF A PUBLIC ADMINISTRATIVE AGENCY, WHICH HAS POWERS AND PROCEDURES RESEMBLING THOSE OF A COURT OF LAW OR JUDGE, AND WHICH IS OBLIGED TO OBJECTIVELY DETERMINE FACTS AND DRAW CONCLUSIONS FROM THEM SO AS TO PROVIDE THE BASIS OF AN OFFICIAL ACTION.
- ▶ IT IS GOVERNED BY THE ARBITRATION ACT 1996 (IN SCOTLAND - ARBITRATION ACT 2010) AND ALSO BY THE TERMS OF THE LEASE.



- ▶ ARBITRATOR FINDS (DECIDES) BETWEEN THE PARTIES VALUATION FIGURES - AND CAN'T GO OUTSIDE THEM

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, WITHOUT THE NEED FOR EVIDENCE.
- ▶ **DON'T THINK OF AN INDEPENDENT EXPERT AS A JUDGE (OR AS A VALUER)**



- ▶ THINK OF HIM AS A LETTING AGENT - YOU ARE EFFECTIVELY ASKING THEM “WHAT IS THE LEVEL OF RENT AT WHICH THEY COULD LET THE SHOP (OR RESTAURANT OR OFFICE ETC)” ON THE SUBJECT LEASE TERMS
- ▶ 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



- ▶ EXPERT IS NOT REQUIRED TO DECIDE BETWEEN THE PARTIES AND CAN DECIDE A RENT OUTSIDE THE VALUATION PARAMETERS OF THE PARTIES.

ARBITRATOR

- ▶ MAKES AN AWARD
- ▶ RICS HAS A DISPUTE RESOLUTION DEPT (DRS) WITH A PANEL OF ARBITRATORS
- ▶ Most leases contain provisions for appointment of an arbitrator to decide rent and other issues.
- ▶ Most leases refer to application by parties to the RICS - but allow for parties to privately agree an Arbitrator
- ▶ Acting as RICS appointee or privately appointed the Arbitrator must act the same & apply same principles
- ▶ Award must apply the lease terms and adopt the mandatory provisions of the 1996 ACT - BUT must also adopt any procedural agreements by the parties (PARTY AUTONOMY)

EXPERT

- ▶ MAKES A DETERMINATION
- ▶ RICS HAS A DISPUTE RESOLUTION DEPT (DRS) WITH A PANEL OF EXPERTS (some of whom are also Arbitrators)
- ▶ Some leases provide for an Expert to decide rent (or other issues)
- ▶ Some provide an either/or Arbitrator or Expert at election (normally of landlord) and may allow private appointment
- ▶ Expert makes determination strictly in accordance with the terms of the contract (lease) BUT can agree to variations of that contract if parties both agree
- ▶ No PARTY AUTONOMY unless Expert also agrees

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-PARTIE, 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
- ▶ 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

DUTIES

ARBITRATOR



EXPERT

- ▶ ACT FAIRLY - IMPARTIALLY
- ▶ APPLY RULES OF NATURAL JUSTICE BY GIVING PARTIES OPPORTUNITY TO PRESENT THEIR CASE
- ▶ ADOPT SUITABLE PROCEDURES TO AVOID UNNECESSARY EXPENSE/DELAY
- ▶ GIVE WRITTEN AWARD WITH REASONS
- ▶ DECIDED COSTS IN FINAL AWARD

- ▶ ACT EXPERTLY WITH NO BIAS
- ▶ MAKE THOROUGH INVESTIGATIONS
- ▶ PROVIDE REASONS (only if required to)
- ▶ DECIDE COSTS (if required to)

DATES



ARBITRATION

- ▶ ARBITRATOR CAN DECIDE WHEN TO ISSUE PROCEDURAL DIRECTIONS AND WHAT TIMETABLE TO ADOPT SAVE THAT IF THE PARTIES AGREE THE (NON-MANDATORY) DIRECTIONS AND TIMETABLE THE ARBITRATOR MUST ADOPT THESE.
- ▶ ARBITRATOR WILL DATE AWARD WHEN HE HAS MADE IT- BUT PARTIES CAN REQUEST THAT IT IS DATED WHEN ISSUED (IE, WHEN HE HAS RECEIVED PAYMENT).
- ▶ DATE OF AWARD SETS THE CLOCK RUNNING (28 DAYS) FOR LEGAL CHALLENGE / APPEAL.



EXPERT DETERMINATION

- ▶ MUST FOLLOW ANY DATES SPECIFIED IN LEASE FOR CONTACTING PARTIES, REQUESTING SUBMISSIONS (EXPERT WITNESS REPORTS) COUNTER-SUBMISSIONS (EXPERT WITNESS REPLIES - IF LEASE ALLOWS) AND MAKING DETERMINATION. - UNLESS BOTH PARTIES AGREE TO VARY THESE
- ▶ GENERALLY THE PARTIES WILL ASK EXPERT TO ISSUE DIRECTIONS & TIMETABLE
- ▶ EXPERT DATES DETERMINATION WHEN HE HAS MADE IT.
- ▶ EITHER PARTY HAS 6 YEARS FROM DATE OF EXPERT DETERMINATION TO MAKE A CLAIM

EVIDENCE

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
 - ▶ 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
 - ▶ EXPERT CAN use own knowledge to decide the case - no obligation to reveal to the parties

TO INVESTIGATE OR NOT TO INVESTIGATE



ARBITRATION

- ▶ Generally an Arbitrator WILL NOT carry out own investigations as it will add to the time & cost - as each finding must be put back to the parties for them to consider and report on
- ▶ Plus it might be considered that the Arbitrator is “entering the arena”, if an Arbitrator raises new issues or considers evidence not presented by the parties - ie, interfering in issues not raised by the parties
- ▶ BUT if both parties (party autonomy) want the Arbitrator to investigate he/she must do so and share any information with the parties.

EXPERT DETERMINATION

- ▶ ABSOLUTELY ESSENTIAL for Expert to carry out own investigations.
- ▶ The Determination is the Expert’s expert opinion of value on which there might be a claim for negligence
- ▶ The Expert Determination is NOT a finding between 2 parties who might have both mis-measured or overlooked key evidence, or misinterpreted the lease, or both got something wrong

CAPPING COSTS

▶ CAPPING OF COSTS



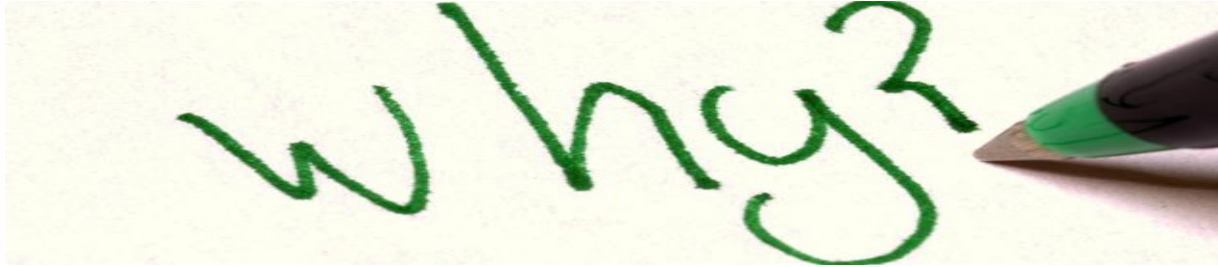
▶ EXPERT HAS NO POWERS TO CAP COSTS



- ▶ ARBITRATOR CAN CAP COSTS
- ▶ TO PREVENT BIG LANDLORD 'BULLYING' SMALL TENANT
- ▶ TO PREVENT BIG TENANT 'BULLYING' SMALL LANDLORD
- ▶ THE RECOVERABLE COSTS IN ANY CASE SHOULD BE PROPORTIONATE TO THE CASE. ARBITRATOR DECIDES
- ▶ Ie, IS AN ORAL HEARING WITH COUNSEL NECESSARY OR IS IT OVERKILL, IS A WITNESS SUMMONS NECESSARY

- ▶ THE PARTIES CAN AGREE TO CAP COSTS BUT THE EXPERT HAS NO POWERS TO LIMIT COSTS
- ▶ HOWEVER THE LEASE RARELY REQUIRES EXPERT TO DECIDE (AWARD) THE PARTIES COSTS (JUST HIS OWN COSTS)
- ▶ IF EXPERT (TECHNICAL OR LEGAL) ADVICE IS REQUIRED NORMALLY PARTIES AGREE TO PAY 50% EACH

REASONS FOR AWARD/DETERMINATION



- ▶ UNLESS PARTIES SPECIFICALLY AGREE THE ARBITRATOR IS OBLIGED BY 1996 ACT TO GIVE REASONS IN THE AWARD
- ▶ IF PARTIES AGREE TO DISPENSE WITH REASONS THEY HAVE NO GROUNDS TO CHALLENGE/APPEAL AWARD
- ▶ AWARD MUST CONTAIN FULL REASONS ON ALL ISSUES
- ▶ UNLESS LEASE SPECIFIES EXPERT HAS NO DUTY TO GIVE REASONS
- ▶ EXPERT ENCOURAGED BY RICS TO GIVE REASONS BUT ONLY IF BOTH PARTIES WANT REASONS (not just one party)
- ▶ WHERE REASONS NOT REQUIRED/AGREED EXPERT WILL PROVIDE EITHER A RENTAL FIGURE ONLY OR A DETAILED VALUATION

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 IT`S OWN COSTS
- ▶ Q. IN WHAT CIRCUMSTANCES COULD ONE SIDE SEEK TO HAVE IT`S COSTS PAID BY THE OTHER SIDE
- ▶ A. BY NEGOTIATION (this would be unusual) - or- IF THE MATTER PROCEEDED TO ARBITRATION 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

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**
- ▶ **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 ON ISSUE OF COSTS
- ▶ **OPTIONAL VERSION**
- ▶ *IT CAN STATE THAT THE OFFER IF NOT ACCEPTED (IN 21 DAYS) WILL BE WITHDRAWN BY A CERTAIN DATE - ie, not left on the table for the other side to accept - particularly post delivery of Written Reports to Arbitrator (or Expert)*
- ▶ *There is some debate as to whether withdrawn Calderbanks are still valid - I believe so.*
- ▶ **NB CALDERBANKS ARE BINDING. IF YOUR OFFER IS ACCEPTED THAT IS A BINDING AGREEMENT**

DIFFERENCES BETWEEN A RENT REVIEW AND A LEASE RENEWAL

- ▶ 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 WHEREAS AT LEASE RENEWAL THE VALUATION DATE IS FLUID
- ▶ 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 - 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.