

DOUG STEVENS SEMINAR

MONDAY 23rd APRIL

08.00HRS TO 09.00HRS

VENUE : CBRE

`C-BAR`

Henrietta House

Henrietta Place

W1G 0NB

SUBJECT

1. Q & A SESSION COVERING - S.26 L & T ACT - MEES - IPMS - S.30(f) L & T ACT - CONDUCT & CONFLICTS - WITHOUT PREJUDICE - CONTRACTING OUT - 50 mins
2. OPEN QUESTION TIME 10 mins

Q. THE PROPERTY YOU MANAGE HAS A LEASE EXPIRY DATE OF 25TH DECEMBER 2018. YOU RECEIVE A S.26 NOTICE FROM THE TENANT TERMINATING THE LEASE WITH EFFECT FROM 25TH MARCH 2019 SEEKING A NEW LEASE.

HOW IS THIS POSSIBLE? WHAT SHOULD YOU DO AS LANDLORD?

WHAT SHOULD YOU HAVE DONE AS LANDLORD?

- ▶ **A. THIS IS A QUESTION ABOUT LEASE RENEWAL UNDER THE LANDLORD & TENANT ACT 1954.**
- ▶ **IT CONCERNS A LEASE INSIDE THE ACT**
- ▶ **NOTWITHSTANDING THE SPECIFIED EXPIRY DATE IN THE LEASE IT DOES NOT COME TO AN END UNLESS ONE PARTY (THE L/L OR THE T) TERMINATES IT.**
- ▶ **IN THIS CASE THE T HAS TERMINATED ITS OWN LEASE - BUT WISHES TO RENEW IT**
- ▶ **Q HOW IS IT POSSIBLE FOR THE T TO EXTEND THE LEASE TERM BY 3 MONTHS IN THIS CASE? WHY MIGHT THEY HAVE DONE SO?**
- ▶ **A. IF L/L HAS NOT SERVED A S.25 NOTICE TO TERMINATE THE LEASE THE T CAN SERVE A S.26 NOTICE NOT > 12 MONTHS AND NOT < 6 MONTHS BEFORE THE CONTRACTUAL EXPIRY DATE. HERE THEY HAVE GIVEN 9 MONTHS NOTICE**
- ▶ **A. IT IS LIKELY THAT THE PROPERTY IS UNDER-RENTED AND THE T HAS JUST 'STOLEN' AN EXTRA 3 MONTHS AT THE LOWER RENT**

Q. WHAT SHOULD YOU DO AS LANDLORD?

- ▶ A. YOU MUST DECIDE IF YOU ARE HAPPY FOR THE T TO RENEW THEIR LEASE
- ▶ OR
- ▶ IF YOU WANT TO, AND ARE ABLE TO, OPPOSE THE LEASE RENEWAL ON ONE OF THE 7 GROUNDS UNDER S.30 OF THE ACT eg YOU WISH TO RE-DEVELOP THE PROPERTY
- ▶ A. IF YOU DO NOT OPPOSE THE RENEWAL YOU NEED NOT TAKE ANY ACTION
- ▶ A. IF YOU OPPOSE RENEWAL (ie, you want vacant possession) YOU MUST SERVE A COUNTER-NOTICE
- ▶ **Q. WHAT IS THE TIMESCALE WITHIN WHICH THE L/L MUST SERVE NOTICE OPPOSING THE RENEWAL**
- ▶ A. 2 MONTHS - FAILURE TO SERVE THE NOTICE IN 2 MONTHS MEANS THE L/L CANNOT GET V/P

- ▶ **Q. WHAT SHOULD THE L/L HAVE DONE BEFORE THE T SERVED A S.26 NOTICE**
- ▶ A. DETERMINED IF THE PROPERTY WAS UNDER-RENTED
- ▶ A. DECIDED IF YOU WOULD OPPOSE THE RENEWAL BECAUSE YOU WANTED V/P FOR DEVELOPMENT
- ▶ A. IN EITHER CASE YOU SHOULD HAVE SERVED S.25 NOTICE ON 26TH DECEMBER 2017

Q. WHY ON THAT DATE?

- ▶ A. TO PREVENT T FROM EXTENDING THEIR OCCUPATION IF AT AN UNDER-RENTED LEVEL

Q. YOU ARE L/L OF 2 SHOP UNITS. ONE IS VACANT AND ONE IS SUBJECT TO LEASE RENEWAL w/e 24TH JUNE 2018. BOTH HAVE AN EPC RATING OF F

WHAT SHOULD YOU DO ?

- ▶ THIS IS A QUESTION ABOUT **MEES**
- ▶ **MINIMUM ENERGY EFFICIENCY STANDARDS &**
- ▶ **EPC's ENERGY PERFORMANCE CERTIFICATES**
- ▶ THE REGULATIONS CAME IN TO FORCE ON 1ST APRIL 2018 - just 3 weeks ago
- ▶ **Q HOW DO MEES REGULATIONS AFFECT THE L/L LETTING THE VACANT SHOP?**
- ▶ **A THE SHOP CANNOT BE LET UNTIL IT HAS AN EPC RATING OF E OR BELOW**
- ▶ **Q HOW DO MEES REGULATIONS AFFECT THE L/L RENEWING THE LEASE ON THE OTHER SHOP?**
- ▶ **A THE LEASE CANNOT BE RENEWED UNTIL IT HAS AN EPC RATING OF E OR BELOW**
- ▶ **Q. HOW DOES THE L/L IMPROVE THE EPC RATING TO E OR BETTER ON THE 2 SHOPS?**
- ▶ **A. ON THE VACANT SHOP L/L CAN CARRY OUT WORKS TO IMPROVE THE RATING - OFTEN THE REPLACEMENT OF OLD LIGHTING WITH LED LIGHTING WILL DO THE TRICK**
- ▶ **A. BUT ON THE OCCUPIED SHOP THERE MAY BE AN ISSUE - MUST L/L OR T DO THE WORKS?**

- ▶ THE DATE OF COMMENCEMENT IS 1 APRIL 2018 FOR ALL NEW LETTINGS.
- ▶ THE REGULATIONS APPLY TO LETTINGS FOR DOMESTIC BUILDINGS FROM 1 APRIL 2020 AND FOR ALL COMMERCIAL BUILDINGS FROM 2023.
- ▶ EPC'S
- ▶ EPC'S THE MINIMUM STANDARD REQUIRED UNDER CURRENT REGULATIONS IS AN ENERGY PERFORMANCE CERTIFICATE (EPC) E
- ▶ BUILDINGS WITH AN EPC RATING OF F AND G MUST BE BROUGHT UP TO STANDARD BEFORE THEY ARE LET
- ▶ PROPERTIES THAT ARE NOT CURRENTLY COMPLIANT WITH MEES CAN LAWFULLY BE TRADED
- ▶ BUT A LEASE RENEWAL IS DEFINED AS A LETTING AND SO MUST COMPLY, IE, EPC RATING OF E OR BETTER
- ▶ **Q WHAT SHOULD YOU DO AS AN ASSET MANAGER**
- ▶ **A. PREPARE PLAN TO MAKE ALL PROPERTIES COMPLIANT TO PREVENT LOSS OF INVESTMENT VALUE**
LIAISE WITH TENANTS WHOSE COOPERATION IS REQUIRED WHERE PHYSICAL IMPROVEMENT IS NECESSARY
- ▶ **Q DOES MEES IMPACT ON VALUATION?**
- ▶ **A. YES THE VALUE OF NON-COMPLIANT BUILDINGS WILL BE NEGATIVELY IMPACTED IN TERMS OF OPEN MARKET RENTAL VALUE, FUTURE RENTAL GROWTH AND THUS INVESTMENT YIELD**

Q. YOU HAVE A SMALL PORTFOLIO OF 1 X OFFICE, 1 X INDUSTRIAL, 1 X RETAIL AND 1 X RESIDENTIAL PROPERTY TO VALUE AND YOU NEED TO CONDUCT A MEASURED SURVEY

WHAT MEASURING STANDARDS DO YOU ADOPT?

▶ A. THIS IS A QUESTION ABOUT IPMS - INTERNATIONAL PROPERTY MEASURING STANDARDS

▶ PREVIOUSLY THE MEASURING STANDARD WAS RICS CODE OF MEASURING PRACTICE (COMP) 6th Edition

▶ Q. WHY HAVE WE CHANGED OUR MEASURING STANDARD?

▶ A. TO ALIGN WITH MEASURING STANDARDS INTERNATIONALLY

▶ “ to enhance transparency and consistency in the way property measurement information is collected and reported globally and so it is material to corporate occupiers, investors and developers,”

▶ IT IS NOW MANDATORY FOR CHARTERED SURVEYORS TO ADOPT IPMS (where new standard is set)

▶ Q. IPMS IS NOW MANDATORY FOR WHICH OF THE 4 SECTORS ABOVE IN OUR SMALL PORTFOLIO?

▶ A. OFFICES (published 2016 - operative from)

▶ RESIDENTIAL - (published 2016 - operative & MANDATORY FROM 1st MAY 2018)

▶ INDUSTRIAL (published 24th January 2018) BUT NOT YET MANDATORY

▶ RETAIL (it's still under consultation)

▶ OFFICE BASIS OF MEASUREMENT IPMS 1 IPMS 2 & IPMS 3

IPMS OFFICES

- ▶ OFFICE IPMS INTRODUCED 1st JANUARY 2016
- ▶ **IPMS 1** compares closely to **GROSS EXTERNAL AREA ("GEA")** with some differences (balconies and accessible rooftop terraces are included in IPMS 1 but excluded for GEA). IPMS 1 is particularly used in a planning context.
- ▶ **IPMS 2** compares closely but not exactly to **GROSS INTERNAL AREA ("GIA")**. In addition to the differences mentioned between IPMS 1 and GEA, areas occupied by the reveals of windows when measured and assessed as the internal dominant face are included in IPMS 2 but excluded for GIA. IPMS 2 is particularly used in a costings context.
- ▶ **IPMS 3-Office** compares to **NET INTERNAL AREA ("NIA")**, but has the largest number of differences between the old and new measure. IPMS 3 is particularly used in the context of agency and valuation; taxation; and property and facilities management.
- ▶ IPMS 3 is used for measuring the internal area of a building in exclusive occupation, including internal walls and columns (previously excluded from net internal area) It also includes some measurements that must be stated separately (balconies, covered galleries, rooftop terraces).
- ▶ All internal walls and columns within an occupant's exclusive area are included within IPMS 3 - Office. The floor area is taken to the internal dominant face and, where there is a common wall with an adjacent tenant, to the centre-line of the common wall.
- ▶ NB The dominant face may be to a window, ie, measuring over a window ledge.

IPMS 3 (offices) Continued

- ▶ Measurements should now be taken to what is known as the 'internal dominant face' (the area within each vertical section [wall] that makes up the perimeter of the building/unit).
 - ▶ This can include inside the window recess (to include inside glazing), as long as the glazing is 50% or more of the floor to ceiling height.
 - ▶ In a multi-let scenario, the area occupied by the dividing wall between two tenants' accommodation is included within the floor area and apportioned equally between the two as a limited use area.
 - ▶ **Q WILL THE RENTALISED AREA INCREASE WITH IPMS 3?**
 - ▶ **A ESSENTIALLY NO, THE USEABLE FLOOR AREA CALCULATIONS ARE REPRESENTATIVE OF THE FORMER NET INTERNAL AREA.**
 - ▶ **IN PRACTICE MANY PARTIES OBTAIN CLIENTS APPROVAL TO USE OLD RICS CODE OF MEASURING PRACTICE 6th EDITION -**
 - **BUT THAT APPROVAL MUST BE OBTAINED AS THE USE OF IPMS IS MANDATORY**
- RESIDENTIAL HAS IPMS 1 IPMS 2, IPMS 3 (3A, 3B & 3C MULTI-OCCUPANCY)**
- INDUSTRIAL HAS IPMS 1, IPMS 2, 1PMS 3A & IPMS 3B**

Q. YOU OWN A 3 STOREY MIXED USE BUILDING WITH 2 X ADJACENT SHOP UNITS AT GROUND FLOOR WITH A1 RETAIL USE. BOTH SHOP TENANTS HAVE LEASES INSIDE THE ACT WHICH EXPIRE ON 25TH DECEMBER 2018. YOU WANT TO COMBINE THE 2 X SHOP UNITS INTO 1 X LARGER SHOP UNIT FOR A3 USE.

NO DEMOLITION OF THE BUILDING IS INVOLVED AND YOU DON'T YET HAVE PLANNING CONSENT

HOW DO YOU GET VACANT POSSESSION?

- ▶ A. THIS IS A QUESTION ABOUT S.30 OF THE LANDLORD & TENANT ACT 1954
- ▶ Q. WHAT SUB-SECTION OF S.30 DEALS WITH POSSESSION FOR RE-DEVELOPMENT
- ▶ A. S.30 (f)
- ▶ S.30 (f) *“that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding”*
- ▶ L/L SERVES ‘hostile’ S.25 NOTICE TO TERMINATE THE LEASE ON 25TH DECEMBER 2018 OBJECTING TO THE TENANT RENEWING THE LEASE.
- ▶ IN THE S.25 NOTICE THE GROUND OF OBJECTION IS S.30(f)
- ▶ Q. CAN YOU USE THIS GROUND WHEN NO DEMOLITION OF THE BUILDING IS REQUIRED
- ▶ A. YES

Q. WHAT IS DEMOLITION/RECONSTRUCTION/SUBSTANTIAL WORK OF CONSTRUCTION ?

- ▶ A. A FULL SCALE DEMOLITION AND RE-BUILD CLEARLY MEETS S.30 (f) OBLIGATION
- ▶ BUT WHAT ABOUT OUR CASE? NO DEMOLITION AS WE ARE PLAYING WITH G/F ONLY
- ▶ WE ARE SIMPLY CHOPPING A DOUBLING UP 2 SHOP UNITS AND CHANGING THE USE CLASS

▶ Q. DOES THIS COUNT AS A “SUBSTANTIAL WORK OF CONSTRUCTION”

- ▶ A. YES This is known as an “EGGSHELL TENANCY” & there is case law on this

▶ *Pumpninks of Piccadilly Ltd v Land Securities* [2002] EWCA Civ 621

- ▶ Tenancy of ground floor shop. It was an eggshell tenancy, i.e. the demise was internal skin only & excluded any part of the structure of the building. L/L wanted to carry out substantial works removing every physical element in the demise. L/L relied upon S.30(1)(f); i.e. that it intends to demolish the premises comprised in the holding.

T argued there were no structural parts to demise so it was impossible to demolish the premises.

- ▶ Court held that "The structure is the fabric which encloses the demise in so far as it is itself demised. The physical boundaries of the demise, be they constituted by walls, ceiling or floor, or only their surfaces, are premises within the meaning of the paragraph at least if they are of such physical quality as to be sensibly capable in ordinary language of being constructed or part of the construction, or of being demolished."

S.30 (f) Continued

- ▶ Q. CAN YOU USE GROUND S.30 (f) IF YOU DON'T YET HAVE PLANNING FOR CHANGE OF USE?
- ▶ A. YES

Betty's Café v Phillips Furnishing Stores [1959] AC 20 (House of Lords)

The court held that the relevant date for the landlord to show intention was the date of the court hearing not the date at which the landlord served the section 25 notice on the tenant.

- ▶ YOU DON'T NEED PLANNING CONSENT AT THE DATE OF SERVING 'hostile' S.25 NOTICE
- ▶ YOU DON'T NEED IT EVEN BY THE DATE OF THE COURT HEARING - BUT YOU WILL NEED TO DEMONSTRATE THAT YOU HAVE THE REASONABLE PROSPECT OF PLANNING CONSENT & YOU WILL NEED TO PERSUADE THE COURT OF YOUR INTENTION

▶ ***Cunliffe v Goodman [1950] 2 KB 237 at 254***

- ▶ Court held that the landlord must demonstrate : *"a firm and settled intention"* - proposal for doing the work has moved *'out of the zone of contemplation...into the valley of decision'*

LANDLORDS REQUIREMENT TO DEMONSTRATE INTENTION S.30(f)

- ▶ L/L SHOULD PROVIDE BY WAY OF EVIDENCE TO SUPPORT THE INTENTION UNDER GROUND (F) THE FOLLOWING - :
- ▶ A BOARD RESOLUTION - PLANS AND SPECIFICATIONS TO SHOW THE WORKS
- ▶ PLANNING CONSENT OR REASONABLE PROSPECT THEREOF
- ▶ BUILDING REGULATION CONSENT OR REASONABLE PROSPECT THEREOF
- ▶ LISTED BUILDING CONSENT (IF REQUIRED) OR REASONABLE PROSPECT THEREOF
- ▶ BUILDING CONTRACT IN PLACE OR ACHIEVABLE WITHIN GOOD TIME
- ▶ FINANCE OR ACCESS TO FINANCE TO CARRY OUT THE WORKS
- ▶ CONFIRMATION THAT PROJECT IS ACHIEVABLE, IE, NO OTHER PARTY CAN PREVENT IT / HOLD IT UP

- ▶ IN OTHER WORDS LANDLORD NEEDS HIS DUCKS IN A ROW - BUT NOT SUCH THAT HE MUST BE READY TO START THE DAY AFTER A SUCCESSFUL COURT HEARING
- ▶ Q. DOES THE L/L SECURING V/P BY SUCCESSFULLY OPPOSING T's RENEWAL OF THE LEASE HAVE TO PAY THE TENANT ANYTHING AS COMPENSATION ?
- ▶ A. YES 1 X RATEABLE VALUE (RV) OR 2 X RV IF T HAS BEEN IN OCCUPATION 14 YRS

Q. YOU ARE AN INVESTMENT AGENT & HEAR OF A £30M SUPERMARKET INVESTMENT FOR SALE. YOU PLACE IT WITH A PENSION FUND. YOU THEN LEARN THAT YOUR COMPANY ARE THE VENDORS AGENTS.
YOUR COMPANY OPERATES A CHINESE WALL / INFORMATION BARRIER.
ARE YOU OK TO ADVISE THE PENSION FUND ON THE PURCHASE?

- ▶ A. THIS QUESTION IS ABOUT CONFLICTS OF INTEREST - RICS STATEMENT & GUIDELINE - GLOBAL CONFLICTS OF INTEREST 1ST EDITION, MARCH 2017 - CAME IN TO EFFECT 1st JAN 2018
- ▶ “A conflict of interest may occur where you or your firm are acting for another person with competing interests at the same time (e.g. advising both the seller and buyer (or more than one buyer) of a single commercial property simultaneously)”
- ▶ IT IS CALLED DUAL AGENCY or DOUBLE DIPPING
- ▶ A. THE ANSWER IS NO. ONE COMPANY CANNOT ACT FOR THE VENDOR AND THE PURCHASER
- ▶ RICS Conflicts of interest - UK Commercial Property Market Investment Agency, 1st edition May 2017
- ▶ Section 2.3 states that *“The practice of dual agency within the UK commercial property investment market is not universally accepted and that there are no exception to this general rule. Consequently dual agency must not be undertaken under any circumstances”*
- ▶ Section 2.4 states that “for the avoidance of doubt, RICS professionals working within non-RICS regulated firms are also prohibited from undertaking dual agency in the UK under any circumstances”

GLOSSARY OF TERMS

- ▶ **Conflict of interest**: where an agent acts for clients who have competing interests, or where an agent's personal interest conflicts with that/those of their client.
- ▶ **Dual agency**: where an agent has a contractual agency relationship with both the seller and the buyer at the same time
- ▶ **Information barrier**: the physical and/or electronic separation of individuals (or groups of individuals) within the same firm that prevents confidential information passing between them.
- ▶ **Informed consent**: consent given willingly, in writing where possible, by a party who may be affected by a conflict of interest, that party having demonstrated to the RICS member or RICS regulated firm concerned that the party understands
 - that there is a conflict of interest or a significant risk of one
 - the facts known by the RICS member or the regulated firm that are material to the conflict of interest
 - what the conflict of interest is or may be and that the conflict of interest may affect the ability of the RICS member or an RICS regulated firm to advise or act fully in the interests of a client.
- ▶ **Multiple introductions**: where an agent has competing contractual relationships simultaneously with several buyers.⋮

RICS RULES FOR CONDUCT FOR MEMBERS

https://www.rics.org/Global/RICS_regulation_rules_of_conduct_for_members_250717_SC.pdf

RICS RULES FOR CONDUCT FOR FIRMS 06 Jun 2017

- ▶ NB AN RICS STATEMENT IS MANDATORY
- ▶ AN RICS CODE OF PRACTICE is Mandatory or Recommended Good Practice
- ▶ AN RICS GUIDANCE NOTE is Recommended Good Practice
- ▶ This professional **statement** provides best practice advice to help meet the following RICS ethical standards:
 - ▶ 1 Act with integrity.
 - ▶ 2 Always provide a high standard of service.
 - ▶ 3 Act in a way that promotes trust in the profession.
 - ▶ 4 Treat others with respect.
 - ▶ 5 Take responsibility.

Q. YOU ARE NEGOTIATING A RENT REVIEW ON BEHALF OF A TENANT.
L/L QUOTED £50,000 pax YOU COUNTER-OFFERED £35,000 PAX IN AN
EMAIL MARKED “WITHOUT PREJUDICE”. YOU THEN MAKE ANOTHER
OFFER AT £40,000 PAX - BUT FORGET TO MARK THIS WITHOUT PREJUDICE
THE L/L ACCEPTS YOUR OFFER OF £40,000 pax. YOU DON`T HAVE CLIENTS
INSTRUCTIONS AT £40,000 pax
IS THE T NOW BOUND TO AGREE £40,000 pax?

- ▶ A. THIS IS ABOUT THE PROTECTION GIVEN BY THE “WITHOUT PREJUDICE” TAG
- ▶ IT ENABLES PARTIES TO NEGOTIATE WITH EACH OTHER MAKING NON-BINDING OFFERS PROTECTED BY THE “WITHOUT PREJUDICE” TAG.
- ▶ LUCKLY FOR YOU THE TAG ONCE APPLIED APPLIES FOR THE WHOLE CHAIN OF NEGOTIATIONS
- ▶ SO YOUR ERROR IN OMITTING TO STATE IT IN YOUR 2nd EMAIL OFFER IS OK
- ▶ THE WITHOUT PREJUDICE RULE IS A RULE OF LAW. IT IS PART OF THE LAW OF PRIVILEGE.
- ▶ Q. WHAT IS THE DIFFERENCE BETWEEN PRIVELEGE AND WITHOUT PREJUDICE.
- ▶ A. LEGAL PROFESSIONAL PRIVILEGE ENABLES LITIGANTS TO OBTAIN LEGAL ADVICE IN THE CONFIDENCE THAT THE ADVICE IS PROTECTED FROM PRODUCTION OR DISCLOSURE.
- ▶ A. WITHOUT PREJUDICE RULE ENABLES PARTIES TO A DISPUTE TO COMMUNICATE FREELY TO ACHIEVE A SETTLEMENT, WITHOUT BEING AT RISK OF HAVING THOSE COMMUNICATIONS PRODUCED AND DISCLOSED AND USED AGAINST THEM AND SO UNDERMINING THEIR CASE IN THE EVENT THAT A SETTLEMENT IS NOT REACHED

Q. YOU ARE THE L/L OF A NEWLY DEVELOPED RETAIL BLOCK. YOU WANT TO GRANT NEW LEASES TO T's BUT HAVE THE ABILITY TO GET VACANT POSSESSION IN 3 YRS
WHAT DO YOU NEED TO DO TO ACHIEVE THIS?

- ▶ A. THIS QUESTION IS ABOUT CONTRACTED OUT LEASES, ie, WITHOUT SECURITY OF TENURE
- ▶ AS YOU ARE STARTING FROM SCRATCH WITH NO EXISTING LEASES IN PLACE YOU CAN ELECT TO GRANT LEASES OUTSIDE THE LANDLORD & TENANT ACT 1954 L&T ACT 54 - ie, CONTRACTED OUT LEASES
- ▶ YOU DRAW UP A LEASE FOR A TERM CERTAIN OF 3 YRS.
- ▶ CONTRACTING OUT PROCEDURES
- ▶ THERE ARE 2 DIFFERENT PROCEDURES.
- ▶ WHICHEVER PROCEDURE IS USED IT MUST BE EFFECTED BEFORE THE LEASE IS COMPLETED.
- ▶ IN BOTH CASES L/L MUST SERVE A SPECIFIED FORM OF WARNING NOTICE ON THE T THAT IT WILL BE ENTERING INTO A LEASE WITHOUT THE BENEFIT OF SECURITY OF TENURE.
- ▶ FOLLOWING SERVICE OF NOTICE, TWO ALTERNATIVE PROCEDURES CAN BE ADOPTED :
- ▶ ADVANCE NOTICE PROCEDURE - T SHOULD HAVE AT LEAST 14 DAYS TO CONSIDER WARNING NOTICE.
- ▶ THEN T MAY SIGN A SIMPLE DECLARATION WHICH CONFIRMS THAT CONFIRMING THAT THEY HAVE RECEIVED AND READ THE WARNING NOTICE & UNDERSTAND THEY ARE GIVING UP THEIR RIGHT TO RENEW THE LEASE.
- ▶ STATUTORY DECLARATION PROCEDURE - WHERE SPEED IS IMPERATIVE (ie, 14 days too long) T MUST SIGN A PRESCRIBED FORM OF STATUTORY DECLARATION (IN THE PRESENCE OF AN INDEPENDENT SOLICITOR OR COMMISSIONER FOR OATHS & PAY A FEE OF £5/£10) CONFIRMING THAT THEY HAVE RECEIVED & READ THE WARNING NOTICE & UNDERSTAND THEY ARE GIVING UP THEIR RIGHT TO RENEW THE LEASE

CONTRACTING OUT CONTINUED

- ▶ AS L/L YOU WILL REQUIRE A CERTIFIED COPY (IF NOT THE ORIGINAL) OF THE RELEVANT DECLARATION PRIOR TO COMPLETING THE LEASE
- ▶ THE LEASE MUST BE FOR A 'TERM CERTAIN' eg, 3 YRS
- ▶ THE LEASE MUST CONTAIN :-
 - REFERENCES TO THE WARNING NOTICE
 - THE TENANT'S DECLARATION (WHETHER STATUTORY OR OTHERWISE)
 - THE PARTIES' AGREEMENT THAT THE LEASE IS TO BE EXCLUDED FROM THE STATUTORY SECURITY OF TENURE PROVISIONS
- ▶ Q. WHAT RIGHTS DOES THE T HAVE TO REMAIN IN OCCUPATION ON EXPIRY OF THE 3 YR TERM CERTAIN?
- ▶ A **NONE** L/L IS ENTITLED TO VACANT POSSESSION WITH NO COMPENSATION PAYABLE
- ▶ Q. CAN A L/L HAVE A BREAK CLAUSE IN A CONTRACTED IN (L & T ACT) LEASE?
- ▶ A. **NO** - UNLESS WHEN THE LEASE WAS GRANTED IT PROVIDED FOR A L/L's RE-DEVELOPMENT BREAK CLAUSE. TO OPERATE THIS RE-DEVELOPMENT BREAK CLAUSE L/L MUST SERVE A 'hostile' S.25 NOTICE (as on earlier question) QUOTING GROUND S.30 (F) & MUST PROVE INTENTION, etc & PAY COMPENSATION IF SUCCESSFULLY SECURING V/P

WITHOUT PREJUDICE & PRIVELEGE

- ▶ SO BOTH ARE FORMS OF PROTECTION.
- ▶ AT ARBITRATION THE DIRECTIONS WILL INVARIABLY STATE THAT WITHOUT PREJUDICE STATEMENTS CANNOT BE PRESENTED TO THE ARBITRATOR - SO OFFERES YOU MAY HAVE MADE DURING THE COURSE OF NEGOTIATIONS BEFORE GOING TO ARBITRATION CANNOT BE REVEALED.
- ▶ THE SAME APPLIES IF IT IS A LEASE RENEWAL OR OTHER MATTER WHICH GOES TO COURT.
- ▶ SIMILARLY ANY LEGAL ADVICE YOU OBTAINED WILL BE COVERED BY PRIVELEGE
- ▶ WITHOUT PREJUDICE RULE APPLIES SO LONG AS
 - ▶ 1.THERE MUST BE AN ACTUAL DISPUTE
 - ▶ 2.THE COMMUNICATION IS A GENUINE ATTEMPT TO COMPROMISE THE DISPUTE.
 - ▶ 3. YOUR 'WITHOUT PREJUDICE' NEGOTIATIONS MUST BE KEPT PRIVATE OR YOU MAY LOSE YOUR RIGHT TO CONFIDENTIALITY.
- ▶ Q. CAN YOU PRESENT WITHOUT PREJUDICE COMMUNICATIONS IF A CASE IS SETTLED?
- ▶ A. YES THE WITHOUT PREJUDICE TAG FALLS AWAY
- ▶ SO AT ARBITRATION YOU COULD PRESENT EVIDENCE OF A COMPARABLE WHERE THE CORRESPONDENCE IS MARKED 'WITHOUT POREJUDICE' BUT THE CASE HAS NOW BEEN SETTLED.

Q. WHAT DOES WITHOUT PREJUDICE SAVE AS TO COSTS MEAN?
WHEN & HOW WOULD YOU USE IT?
WHAT ARE THE IMPLICATIONS ?

- ▶ A. A COMMUNICATION MARKED 'WITHOUT PREJUDICE SAVE AS TO COSTS' IS AN OFFER TO COMPROMISE A DISPUTE - ie, AN OFFER TO SETTLE - WHICH IS USED TO PROTECT A PARTIES POSITION ON COSTS. IT IS KNOWN AS A CALDERBANK OFFER
- ▶ AN OFFER ON THIS BASIS IS CAPABLE OF ACCEPTANCE BY RECEIVING PARTY
- ▶ THAT ACCEPTANCE WOULD BE BINDING - SO DON'T MAKE THE OFFER UNLESS YOU ARE PREPARED FOR IT TO BE ACCEPTED. GET CLIENT APPROVAL TO ISSUE A CALDERBANK
- ▶ IT IS USED IN ARBITRATION (and Independent expert cases where costs can be decided) & IN COURT
- ▶ **BUT** IT CANNOT BE PRESENTED TO THE ARBITRATOR (expert) OR JUDGE UNTIL THEY HAVE MADE AND PUBLISHED THEIR DECISION.
- ▶ THEY THEN ARE SHOWN THE CALDERBANKS (or Part 36 offers in Court) AND CAN SEE WHO MADE AN OFFER TO COMPROMISE/SETTLE THE DISPUTE WHICH WAS BETTER THAN OR CLOSER TO THE EVENTUAL DECISION - COSTS FOLLOW THE EVENT