

SEMINAR 17th OCTOBER 2016

At CBRE 'C' Bar 08:00 - 09:00

SUBJECT

- ❖ ARBITRATION AWARDS & INDEPENDENT EXPERT DETERMINATIONS -----
WHAT ARE THE DIFFERENCES ? 50 mins
- ❖ OPEN QUESTIONS 10 mins
- ❖ Next SEMINARS Monday 21st NOVEMBER 08:00
 Monday 19th DECEMBER 08:00
- ❖ Previous SEMINARS on www.douglasstevens.co.uk SEMINARS

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

ARBITRATORS & INDEPENDENT EXPERTS - THE DIFFERENCES

- ▶ Many parties making expert witness reports to Arbitrators and Experts 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

- ▶ (a) 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 they are 'proceeding in default' by the other, except where proceeding on their own initiative (see 20.10).
- ▶ (c) Arbitration procedure is regulated by the Arbitration Act 1996.
- ▶ (d) 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) 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) There is some (albeit limited) right of appeal against the award of an arbitrator on a point of law. An arbitrator's award may also be challenged in the courts on the basis that the arbitrator did not have jurisdiction 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) 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) 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) 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) 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.

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

RICS Dispute Resolution Service (DRS) - Application Form

RICS Dispute Resolution Service [DRS]

Request for the appointment of an Arbitrator or Independent Expert for a Commercial Property Rent Review in England, Wales or Northern Ireland.

▶ Notes to consider before completing the application:

- ▶ Please do not include a copy of the lease with this application form. The lease must be sent to the appointed dispute resolver by the referring party once the appointment has been made and you are aware of the identity of the appointed dispute resolver.
- ▶ RICS DRS reserves the right to copy the application and/or any accompanying documentation to the responding party and/or representatives. This is *on* the basis that your application is accepted.
- ▶ This application form is the contract between the applicant and the President/Chairman and we will rely entirely upon the information contained herein to help select someone who would have confidence of the parties. An incomplete or incorrect application can result in an application that maybe inappropriate. The information submitted on this application is accepted as being accurate and complete. Neither RICS or the appointed dispute resolver accept liability in relation to the appointment, if the information provided is inaccurate or incomplete.
- ▶ Your application is processed on the basis that appointments are often made on behalf of the President/Chairman of RICS by one of the duly appointed agents.

▶ Authority to appoint

- ▶ Do you require an appointment by: RICS President (England & Wales) RICS Chairman [Northern Ireland]

▶ Information about the property

- ▶ We need to know the nature and location of the property to aid the selection of an appropriately qualified and experienced dispute resolver. You must provide the full postal address including the postcode (even if its only the first half of the code).

▶

▶ Address : _____

▶

▶ Town/city : _____ Post code: -----

- ▶ Brief description of the property (e.g. prime retail/offices/restaurant). Also include details of the permitted use and any other relevant information:

▶

▶

▶

RICS APPLICATION FORM (continued)

▶ Information about the lease

▶ Date of the lease:----- Alleged date of review: ----- Amount of passing rent: -----

▶ Capacity required (please tick): Arbitrator Independent Expert Other (please state): -----

▶ Are there any special requirements listed within the lease?: Yes No (if there are no special requirements please state none below]

▶ Please indicate any **special requirements** stated in the lease relating to the proposed appointee. For example: experience, qualifications, time restrictions or if the decision requires reasons:

▶ _____

▶ Information about the parties and their representatives

▶ The parties representatives must be stated. Where a party is unrepresented, please ensure contact numbers and email addresses are included. RICS DRS will forward all relevant correspondence to them. Normally communications from DRS are sent by email.

▶ Therefore, it is important you provide email addresses.

▶ RICS will take reasonable steps to ensure that the appointed dispute resolver is free from conflict of interest. It is therefore essential that you provide details of the landlord and tenant (including any parent and/or subsidiary companies or related entities that a prospective appointee would need to consider in their conflict checks].

▶ Current landlord

▶ Firm name: _____

▶ Address: - _____

▶ Town/city : _____

Post code: _____

▶ Email: _____

Telephone: _____

▶ Original landlord: _____

▶ Parent associated companies: _____

▶ Current tenant

▶ Firm name: -----

▶ Address : -----

▶ Town/city: _____

Post code: _____

▶ Email: _____

Telephone: -----

▶ Original landlord: -----

▶ Parent associated companies: -----

RICS APPLICATION FORM (continued)

▶ Information about the parties and their representatives (continued)

▶ Landlord representative

▶ Title: _____ First Name: ----- Last Name: _____ Designation: ----- RICS Membership Number (if applicable) : _____

▶ Firm name: -----

▶ Address : _____

▶ Town/city: _____ Post code: -----

▶ Telephone : _____ Mobile: -----

▶ Direct line: _____ Email: -----

▶ Referring party: Yes No

▶ Tenant representative

▶ Title: _____ First Name: ----- Last Name: ----- Designation : _____ RICS Membership Number [if applicable]: _____

▶ Firm name: -----

▶ Address: -----

▶ Town/city: _____ Post code: _____

▶ Telephone: _____ Mobile: _____

▶ Direct line: _____ Email: _____

▶ Referring party: Yes No

▶ Conflicts of interest

▶ If there are any panel member(s] who in your view would have a conflict of interest in this case, you should list them below. Please also provide for each such person, brief but clear reasons for this statement.

▶ Your attention is drawn to the decision in Eurocom Ltd -v- Siemens Pie [201LJ] EWHC 3710 (TCC) to effect the misrepresentation in this statement could vitiate the process in its entirety, rendering any award made unenforceable.

Name	Firm	Reason

Please note: While the President/Chairman will give careful consideration to any representations, he/she will reach his/her own decision as to who is appointed

RICS APPLICATION FORM (continued)

▶ **How to pay**

▶ RICS charges an administration fee of **£369.00** inclusive of VAT to make an appointment. This payment is non refundable whether or not the President/Chairman makes the appointment (e.g. if the matter is settled by agreement and the application is withdrawn].

▶ **Please note:** from 1 October 2015 the application fee will be £395.00 inclusive of VAT.

▶ **You can choose to pay by the following:**

- ▶ Providing a cheque made payable to RICS. Please detail your name, the first line of the property in dispute and postcode on the reverse so that the payment can be allocated.
- ▶ A card payment. One of our advisors will contact you to arrange payment. Please tick this box:
- ▶ By using your bank or building society to pay the application fee.

▶ **RICS Bank account details:**

▶ Account number: **30786339** Sort code: 56-00-QS

▶ Swift Code: **NWBK GB2L**

▶ You must provide your name and the postcode of the property in dispute. This will ensure that your payment is correctly allocated and your application is processed. Please email a copy of the remittance to bacs@rics.org

▶ Debit my RICS trade account number:

▶ Account holders will be invoiced by our finance department. To apply for an account please email drs@rics.org

▶ RICS is unable to accept credit or debit card details by email due to PCI compliance regulations.

▶ Please be aware the applicant has responsibility to ensure that payment is complete. Applications are unable to be processed without full payment.

▶ **Application submitted by:**

▶ Name: _____ Firm name: _____

▶ Are you applying on behalf of the landlord or the tenant?: ----- Date: -----

▶ Submitting this application to RICS Dispute Resolution Service confirms that you have read and understand the explanatory notes contained in this application form. Your application is accepted on this basis.

▶ **Your privacy:**

▶ RICS takes the privacy and security of the personal information you provide very seriously. Your details are held in a secure database with authorised access only. We apply data processing policies in compliance with the Data Protection Act 1998 and the Privacy and Electronic Communications Regulations [EC Directive 2003]. RICS will not use the information you provide in this application to contact you with offers of products and services. Nor will RICS share your information with third parties for the purpose of sending you details of offers of products and services.

RICS APPLICATION FORM (continued)

▶ Explanatory notes:

- ▶ RICS has a duty to act independently and transparently when appointing a dispute resolver. On receipt of a request, ORS will select a suitably qualified dispute resolver who is free from conflicts of interest normally from the President's/Chairman's panel of dispute resolvers. Details of your application will be sent to prospective third parties to help them decide whether they are able to take on the appointment.
- ▶ After checking that the dispute resolver meets the criteria an appointment is confirmed on or on behalf of the President/ Chairman and the parties and the dispute resolver is notified.
- ▶ The application form contains sections to obtain information about the property, the lease and the parties. To help DRS select someone who will have the confidence of the parties we rely on the information given in your application.
- ▶ An incomplete or incorrect application can result in an inappropriate appointment. It is vital that you complete all sections of the application form; incomplete sections may result in delays.
- ▶ RICS is by law not required to provide a copy of the application form and/or related correspondence to the non applicant party and does not do so automatically. However, as a matter of good practice, RICS will provide a copy of the form and/or correspondence to the non-applicant party on request. As a matter of policy, RICS may forward the information contained in an application form, and any supplementary documentation in the case details, to the non-applicant party in the dispute and/or their Representative. Details of the case will also be sent to prospective dispute resolvers to help them decide whether they can or can not take on the appointment .
- ▶ If the dispute is resolved before the President/Chairman makes an appointment, you must notify RICS as soon as possible.
- ▶ The lease is the document that gives the parties the right to apply for a dispute resolver to determine the rent review. RICS does not have the duty or power to interpret the lease and decide whether or not your application is valid. RICS DRS acts in an administrative capacity and will make an appointment in accordance with your application. It is important
- ▶ that you check carefully to ensure that you have the right to make the application, and that your application is made in accordance with the requirements of the lease.
- ▶ You must confirm whether the lease requires the appointment of an Arbitrator or Independent Expert or other capacity. [Leases can sometimes be ambiguous. Some provide that only the landlord can apply to RICS, or decide whether the appointee acts as an Arbitrator or Independent Expert). Some t eases also require dispute resolvers to have experience in the letting and valuation of similar properties and/or their decisions are made within a specific time period after the appointment is made.
- ▶ Parties are reminded that by completing this application they agree that they maybe jointly and severally liable, under contract of statute, for payment of the dispute resolvers' reasonable fees [including abortive fees for any work undertaken if the matter is settled before a decision is given].

INVITATION TO ARBITRATOR OR INDEPENDENT EXPERT FROM RICS

Dear Mr / Mrs

The RICS President would like to approach you to act as dispute resolver in the matter reflected in the case details below.

Capacity Required: Arbitrator **(or Independent Expert)**

Special Requirements: "a Chartered Surveyor who customarily practises in property of the nature and type if the demised premises and has relevant and recent experience in valuing property of a like nature and kind to the demised premises." **(may ask for 10 years experience or 10 years standing at a recognised practice - or someone who can act either as an Arbitrator or an Independent Expert)**

Address of the Property in Dispute: ?

Property Description: Supermarket **(shop - restaurant - office, etc)**

Amount of Passing Rent: £XXX,000 **per annum**

Agreed or Alleged Date Rent Review: ?

Lease Date: ?

Party 1:	Tenant XXX Ltd
Party 2:	Landlord XXXX
Party 3:	Landlord's Representative (Applicant) XXX surveyors
Party 4:	Tenant's Representative XXX surveyors

Original Landlord: ?

Landlord Parent or Subsidiary Organisation: **XXX**

Original Tenant: **XXX**

Tenant Parent or Subsidiary Organisation: **XXXX**

Before answering the questions below, please read the following carefully:

Before answering the questions below, please read the following carefully:

Conflicts of interest

The RICS President has a responsibility to ensure that neither party can reasonably object to an appointment made. You will need to disclose any involvement in the matter, and in particular, any involvement that you or your firm has currently, or has had in the last five years, in relation to the subject property, a nearby property or a party to this dispute.

Please be aware that the RICS President may pass this information on to both parties for their comments before making an appointment. Please note the RICS President nonetheless always retains the ultimate discretion as to who will be appointed.

For further details regarding conflicts of interest, please refer to the RICS Conflicts of Interest Guidance Note available at www.rics.org.

Other current appointments

You need to tell us if you are currently appointed as either an Independent Expert or Arbitrator in a case which might have an involvement with the subject property, a nearby property or a party to this dispute and indicate whether or not you believe that you would have a conflict of interest as a result.

Lease requirements

Please review the case details carefully, and in particular the section outlining any special requirements in the lease listed by the applicant and concerning the appointment and/or the qualifications of the person to be appointed.

If there are such requirements, you will need to indicate specifically whether or not you comply with all of them. If you do not comply fully, you will need to provide a full and reasoned explanation as to why you are of the opinion that you are able nonetheless to accept the appointment. This will assist the RICS President in deciding whether to approach the parties over the matter, and/or whether or not to offer the appointment to you.

NB: The applicant is required to state specifically if there are no special requirements and this is stated within the special requirements heading. If this section is **blank**, please let me know.

Please can you respond by completing the following questions:

Questions	Please delete as applicable		Notes
Are you able to accept this appointment?	Yes	No	If your answer is 'No', please delete as appropriate and return this form by email to me. If your answer is 'Yes', please complete the rest of this form and return it by email to me.
Does the subject matter fall within the sphere of your own professional practice, not merely that of your firm?	Yes	No	
Can you undertake the task without delay or unnecessary expense?	Yes	No	
Do you have appropriate professional indemnity cover?	Yes	No	
Have you made appropriate enquiries, and are satisfied that you have no current involvements that would give rise to a real or perceived conflict of interest?	Yes	Yes but see below	Please use the space below to provide any further information in relation to any of the above questions, if appropriate:
Have you made appropriate enquiries, and are satisfied that there are no involvements within the past five years that would give rise to a real or perceived conflict of interest?	Yes	Yes but see below	Please use the space below to provide any further information in relation to any of the above questions, if appropriate:
Can you confirm that you are not currently acting as an Arbitrator or Independent Expert in another matter that would conflict with this appointment?	Yes	Yes but see below	Please use the space below to provide any further information in relation to any of the above questions, if appropriate:
Do you comply with any special requirements (if stated) that may be listed in the case details	Yes	Yes but see below	Please use the space below to provide any further information in relation to any of the above questions, if appropriate:

Please use this space to provide any further information in relation to any of the above questions, if appropriate:

XXXXXXXXXXXXXXXXXXXXXXXXXXXX

Please note:

The RICS President will make an appointment on the basis of the information provided by the applicant and contained in the case details, subject to any amendment that may be put forward having been agreed by both parties.

If the RICS President confirms your appointment, you should contact the applicant directly and obtain all the required documentation, together with any deeds of variation or other documents under which you are appointed.

I look forward to hearing from you within the next five working days. Thank you for your assistance.

If you have any queries concerning this matter, please feel free to contact me direct.

Yours sincerely,

Case Officer, Alternative Dispute Resolution
Dispute Resolution Services



RICS

the mark of
property
professionalism
worldwide

Dispute Resolution Service

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



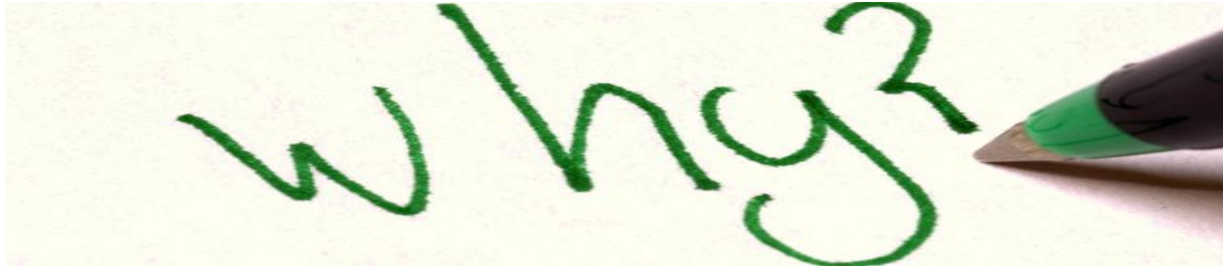
▶ EXPERT HAS NO POWERS TO CAP COSTS



- ▶ 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

APPEAL OR LEGAL CHALLENGE



ARBITRATION

- ▶ S. 67, for a ruling upon the substantive jurisdiction of the arbitrator
- ▶ S. 68, on the grounds of serious irregularity affecting the arbitration.
- ▶ S. 69 (unless otherwise agreed by the parties) on a question of law arising out of the award .
- ▶ A party can lose the right to object on the grounds above if it has not made that objection to the arbitrator as soon as it arises
- ▶ in any event an appeal against an award must be lodged within 28 days of the date of the award.
- ▶ Requirement under s. 70 that the challenger has first exhausted any available arbitration process of appeal or review and any available recourse by way of correction of the award or additional award.

EXPERT DETERMINATION

- ▶ Legal challenges to EXPERT DETERMINATION
- ▶ A party to an expert determination cannot apply to court to set aside the determination on the ground of an irregularity or error of law
- ▶ BUT challenge can be made:
 - a) Where evident that expert has departed from the instructions in a material respect (as opposed to carrying out that task in a deficient way, in which case although the independent expert may be sued for negligence, the determination will stand);
 - b) Where the dispute resolution clause (lease) allows a challenge in the case of manifest error, and the determination displays such an error; or
 - c) In the cases of fraud, collusion or partiality.
 - d) 6 years to make a claim (statute of limitations)

LIABILITY FOR NEGLIGENCE

ARBITRATION



EXPERT DETERMINATION

- ▶ Provided they have not acted in bad faith the arbitrator is not liable for negligence (S.29 Act).
- ▶ S.74 Act Arbitrator is immune from prosecution

- ▶ The independent expert is liable in damages for any losses sustained by a party through their negligence.

ARBITRATION & INDEPENDENT EXPERT CASE LAW

▶ **St George's Investment Co v. Gemini Consulting Ltd [2004] Judge John Jarvis**

- ▶ Rent review of premises at No. 1 Knightsbridge. Arbitrator applied a discount for the onerous features of the lease which neither party had put forward to him.
- ▶ **Held:** Arbitrator made his calculations on a basis which was contrary to the agreed assumptions between the parties and which appears to confuse the two methodologies of valuation upon which he was addressed. This led to a serious irregularity which caused substantial injustice (resulted in, inter alia, double counting).
- ▶ The Deputy Judge observed that the test of "substantial injustice" is intended to be applied by way of support of the arbitral process and not by way of interference with that process. It is only in those case where it can be said that what has happened was so far removed from what could reasonably be expected of the arbitral process that the Court will interfere. It is not a soft option to an application for leave to appeal.

▶ **Marklands Limited v Virgin Retail Limited [2003] Lewison J Chancery Division**

- ▶ Arbitration award - Appeal - question of law - Permission - Whether arbitrator wrongly construed directions concerning evidence contained in arbitration agreement (no) - Arbitration Act 1996 s 69
- ▶ Arbitration award - Challenge - Procedural irregularity - Issues and evidence - Whether arbitrator improperly excluded evidence (no) - Whether failure by arbitrator to address issues (no) - Arbitration Act 1996, s 68(2)
- ▶ **Held:** The application was dismissed. The attribution of weight to different comparables was a matter of judgment for the arbitrator and the manner in which he exercised that judgement did not indicate either a serious irregularity or an error of law. The argument the arbitrator was alleged to have ignored was not, in fact, presented during the arbitration and it was not an issue put to the arbitrator as required by s 68(2)(d).

▶ **EXPERT**

▶ **Zubaida v Hargreaves [1995]**

- ▶ "The issue is not whether the expert's valuation was right...it is whether he has acted in accordance with practices which are regarded as acceptable by a respectable body of opinion in his profession". Lord Hoffman

▶ **Bolam v Friern Hospital Management Committee [1957]**

- ▶ All that is required is to achieve the "ordinary skill of an ordinary competent man exercising that particular art".

▶ **Currys Group Plc v Martin**

- ▶ "Defendant negligent only if his determination was one which no reasonably competent surveyor could have reached. In particular, therefore, it did not suffice for the claimant to show that the defendant had been negligent in his methodology in a way that was adverse to the claimant, if the resulting valuation was nevertheless within the permissible bracket.

- ▶ **Lewisham Investment Partnership Ltd v. Morgan [1997] 51 EG 75.** This case concerned the determination of the rent on a unit in a shopping centre in London let to **Marks & Spencer** on seven-year rent reviews.

- ▶ Mr Justice Neuberger : 'If I were to conclude that the Defendant was negligent in respect of one or more of the specific allegations, it would still be necessary to consider whether his valuation fell within the permissible bracket because, if it did, then the Defendant would still escape liability'.

ARBITRATION ACT 1996 (Extracts Only)

▶ 1. General principles.

- (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
- (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

▶ 4. Mandatory and non-mandatory provisions.

- (1) The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.
- (2) The other provisions of this Part (the “non-mandatory provisions”) allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement.

▶ 33. General duty of the tribunal.

- (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
- (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined

▶ 34. Procedural and evidential matters.

- (c) whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended;
- (d) whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage;
- (e) whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done;
- (f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented;
- (g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law;
- (h) whether and to what extent there should be oral or written evidence or submissions.

- ▶ (3) The tribunal may fix the time within which any directions given by it are to be complied with, and may if it thinks fit extend the time so fixed (whether or not it has expired).

- ▶ **37. Power to appoint experts, legal advisers or assessors.**
- ▶ Unless otherwise agreed by the parties—
- ▶ (a) the tribunal may—
 - (i) appoint experts or legal advisers to report to it and the parties, or
 - (ii) appoint assessors to assist it on technical matters, and may allow any such expert, legal adviser or assessor to attend the proceedings; and
- ▶ (b) the parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person.
- ▶ **40. General duty of parties.**
- (1) The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.
- (2) This includes—
 - (a) complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal, and
 - (b) where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law (see sections 32 and 45).
- ▶ **43. Securing the attendance of witnesses.**
- ▶ (1) A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence.
- ▶ (2) This may only be done with the permission of the tribunal or the agreement of the other parties.
- ▶ (3) The court procedures may only be used if—
 - (a) the witness is in the United Kingdom, and
 - (b) the arbitral proceedings are being conducted in England and Wales or, as the case may be, Northern Ireland.
- ▶ (4) A person shall not be compelled by virtue of this section to produce any document or other material evidence which he could not be compelled to produce in legal proceedings.

▶ **52. Form of award.**

- ▶ (1) The parties are free to agree on the form of an award.
- ▶ (2) If or to the extent that there is no such agreement, the following provisions apply.
- ▶ (3) The award shall be in writing signed by all the arbitrators or all those assenting to the award.
- ▶ (4) The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.
- ▶ (5) The award shall state the seat of the arbitration and the date when the award is made.

▶ **54. Date of award.**

- ▶ (1) Unless otherwise agreed by the parties, the tribunal may decide what is to be taken to be the date on which the award was made.
- ▶ (2) In the absence of any such decision, the date of the award shall be taken to be the date on which it is signed by the arbitrator or, where more than one arbitrator signs the award, by the last of them.

▶ **57. Correction of award or additional award.**

- ▶ (1) The parties are free to agree on the powers of the tribunal to correct an award or make an additional award.
- ▶ (2) If or to the extent there is no such agreement, the following provisions apply.
- ▶ (3) The tribunal may on its own initiative or on the application of a party—
 - ▶ (a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or
 - ▶ (b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.
- ▶ These powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal.
- ▶ (4) Any application for the exercise of those powers must be made within 28 days of the date of the award or such longer period as the parties may agree.
- ▶ (5) Any correction of an award shall be made within 28 days of the date the application was received by the tribunal or, where the correction is made by the tribunal on its own initiative, within 28 days of the date of the award or, in either case, such longer period as the parties may agree.
- ▶ (6) Any additional award shall be made within 56 days of the date of the original award or such longer period as the parties may agree.
- ▶ (7) Any correction of an award shall form part of the award.

▶ **61. Award of costs.**

▶ (1) The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties.

▶ (2) Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.

▶ **65. Power to limit recoverable costs.**

▶ (1) Unless otherwise agreed by the parties, the tribunal may direct that the recoverable costs of the arbitration, or of any part of the arbitral proceedings, shall be limited to a specified amount.

▶ (2) Any direction may be made or varied at any stage, but this must be done sufficiently in advance of the incurring of costs to which it relates, or the taking of any steps in the proceedings which may be affected by it, for the limit to be taken into account.

▶ **68. Challenging the award: serious irregularity.**

▶ A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

▶ Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

▶ (a) failure by the tribunal to comply with section 33 (general duty of tribunal);

▶ (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

▶ (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

▶ (d) failure by the tribunal to deal with all the issues that were put to it; (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

▶ (f) uncertainty or ambiguity as to the effect of the award;

▶ (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

▶ (h) failure to comply with the requirements as to the form of the award; or

▶ (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

▶ If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may

▶ remit the award to the tribunal, in whole or in part, for reconsideration,

▶ set the award aside in whole or in part, or

▶ declare the award to be of no effect, in whole or in part. The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

69. Appeal on point of law.

(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2) An appeal shall not be brought under this section except—

- (a) with the agreement of all the other parties to the proceedings, or
- (b) with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

(3) Leave to appeal shall be given only if the court is satisfied—

- (a) that the determination of the question will substantially affect the rights of one or more of the parties,
- (b) that the question is one which the tribunal was asked to determine,
- (c) that, on the basis of the findings of fact in the award—
 - (i) the decision of the tribunal on the question is obviously wrong, or
 - (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
- (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.

(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.

(7) On an appeal under this section the court may by order—

- (a) confirm the award,
- (b) vary the award,
- (c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or
- (d) set aside the award in whole or in part.

The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

- ▶ (8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.
- ▶ But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.

ARBITRATION ACT 1996 (Extracts Only)

- ▶ **73. Loss of right to object.**
- ▶ (1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—
 - ▶ (a) that the tribunal lacks substantive jurisdiction,
 - ▶ (b) that the proceedings have been improperly conducted,
 - ▶ (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or
 - ▶ (d) that there has been any other irregularity affecting the tribunal or the proceedings,he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.
- ▶ (2) Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling—
 - ▶ (a) by any available arbitral process of appeal or review, or
 - ▶ (b) by challenging the award,does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling.