

SEMINAR 18 SEPTEMBER 2017

- ▶ Monday 18th September 2017
08.00HRS TO 09.00HRS

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

- ▶ SUBJECT
Q&A

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

Q. YOU ARE DEALING WITH A COMMERCIAL PROPERTY AND A DISPUTE ARISES. WHAT ARE THE BENEFITS OF USING ADR?

▶ **A. ALTERNATIVE DISPUTE RESOLUTION (ADR)**

- ▶ **ADR** refers to a range of techniques for resolving disputes without seeking redress from the courts.
- ▶ **Use of ADR is increasing – Courts slower and more expensive – costs awards against the losing party who rejected ADR offer from other party**
- ▶ **Q. WHAT ARE THE DIFFERENT FORMS OF ADR?**

▶ **A. NAMA** acronym

- ▶ **N Negotiation** is the process of getting parties together with a view to reconcile differences and establish areas of agreement, settlement or compromise.
- ▶ **A Adjudication** involves the appointment of an independent adjudicator who considers the evidence and makes a decision which is binding to all parties. It is widely used within the construction industry.
- ▶ **M Mediation** involves the appointment of an independent third party (the mediator) whose role is to help all parties to a dispute to come to an agreement. It is a voluntary process and all parties have to agree for mediation to go ahead. Mediation is not binding.
- ▶ **A Arbitration** involves the parties agreeing to refer the dispute to a third party (the arbitrator) and agree to be bound by the arbitrator's decision. Arbitration is governed by the Arbitration Act 1996. It is a quasi-judicial process

Q. WHAT IS P.A.C.T AND WHEN AND HOW COULD YOU USE IT ?

▶ A. PROFESSIONAL ARBITRATION on COURT TERMS

- ▶ A JOINT INITIATIVE BETWEEN THE LAW SOCIETY AND RICS
- ▶ IT IS A FORM OF ADR USED ON L & T ACT LEASE RENEWALS
- ▶ IF THE TERMS OF A NEW LEASE CANNOT BE AGREED THE DEFAULT POSITION IS THAT THE TERMS ARE DECIDED BY A JUDGE AT COURT
- ▶ HOWEVER IF BOTH SIDES AGREE THE MATTER CAN BE DECIDED BY PACT - WITH A SURVEYOR (or solicitor) ACTING EITHER AS AN ARBITRATOR (or as an EXPERT)

▶ Q. WHAT IS A CONSENT ORDER ?

- ▶ A. IT IS ISSUED BY THE COURT TO CONFIRM THE TERMS ON WHICH THE PACT ARBITRATOR (or EXPERT) WILL ACT. IT MAY CONFIRM THE VALUATION DATE AND IF AN INTERIM RENT IS TO ALSO BE DECIDED.

▶ Q. WHAT IS AN INTERIM RENT ?

- ▶ A. THE LEVEL OF RENT WHICH IS TO BE PAID BETWEEN THE EXPIRY DATE OF THE EXISTING LEASE AND THE COMMENCEMENT DATE OF THE NEW LEASE. S. 24 L & T ACT 1954
- ▶ If T takes up the new lease under section 24C of the Act the general rule is that the interim rent will be at the same level as the rent payable under the new tenancy unless there are material changes in value.
- ▶ If T does not take up the new lease then section 24D applies and the rent is set at a reduced level to cushion increase (if any) and to reflect the assumption of a yearly tenancy (rather than a term of years)

Q. YOU ACT FOR THE ASSIGNOR OF PREMISES THEY TOOK ON A LEASE 20 YEARS AGO. IF THE ASSIGNEE GOES BUST WILL YOUR CLIENT BE LIABLE FOR RENT ETC?

▶ A. YES YOUR CLIENT WHEN ASSIGNING THE LEASE WILL HAVE SIGNED AN AGA AUTHORISED GUARANTEE AGREEMENT

▶ Q. UNDER WHAT ACT WAS IT INTRODUCED?

▶ A. LANDLORD & TENANT COVENANTS ACT 1995

▶ ALL LEASES WITHIN THE L & T Act 1954 MUST NOW PROVIDE FOR AGA's

▶ BY ENTERING IN TO AN AGA THE ASSIGNOR (OUTGOING TENANT) EFFECTIVELY GUARANTEES THAT THE ASSIGNEE (INCOMING TENANT) WILL PAY THE RENT, ETC BUT ONCE THAT TENANT ASSIGNS THE LEASE TO ANOTHER PARTY THE ORIGINAL ASSIGNOR HAS NO FURTHER LIABILITY.

▶ AGA'S SEEK TO STRIKE A BALANCE BETWEEN THE UNCERTAINTY OF LIABILITY OF A TENANT WHO ASSIGNS A LEASE

AND

THE PROTECTION OF THE LANDLORD IF THE TENANT ASSIGNS TO A PARTY WHO MIGHT NOT HAVE THE SAME COVENANT STRENGTH AS THE ASSIGNOR.

AUTHORISED GUARANTEE AGREEMENTS (AGAs)

- ▶ NB There is no set form for an AGA, although the 1995 Act does set out what certain characteristics which an AGA must have and also certain characteristics which it cannot have. Each AGA may therefore have different conditions/qualifications. It is normally appears right at the end of a lease

- ▶ Typical wording –

On or before any assignment and prior to allowing the proposed assignee into possession or occupation of the Premises the Tenant and any former tenant who by virtue of s11 of the 1995 Act was not released from liability on any previous assignment of this Lease shall enter into an authorised guarantee agreement for the purposes of s16 of the 1995 Act in favour of the Landlord by way of deed in the form of the draft agreement set out in the... schedule to this Lease.

- ▶ Q. Who / what is a guarantor?

- ▶ A. A PARTY WHO GUARANTEES THE TENANTS LIABILITIES UNDER THE TERMS OF THE LEASE

- ▶ CASE LAW ON AGAs

- ▶ **Good Harvest Partnership LLP v Centaur Services Limited** held that a guarantee of an assignee given by the outgoing tenant's guarantor was void.

- ▶ It was followed by **K/S Victoria Street and House of Fraser (Store Management) Ltd.**

- ▶ A guarantor can be liable for the new tenants liabilities under the terms of an AGA but only the terms of the AGA not all the lease terms.

Q. WHAT STANDARD/CODE SHOULD YOU ADOPT FOR MEASURING OFFICE PREMISES?

- ▶ A. INTERNATIONAL PROPERTY MEASUREMENT STANDARDS (IPMS) SINCE 1st JANUARY 2016
- ▶ PREVIOUSLY RICS Code of Measuring Practice (COMP) 6th Edition
- ▶ 3 X BASES IPMS 1, IPMS 2 & IPMS 3

▶ Q. WHY HAVE WE CHANGED OUR MEASURING STANDARD?

▶ A. TO ALIGN WITH MEASURING STANDARDS INTERNATIONALLY

- ▶ There were significant differences in what is included/excluded in measurements/floor areas in UK and abroad - up to 25% differences
- ▶ In creating IPMS, first for offices and then for other types of building classes including residential, industrial and retail, the IPMS Coalition hopes to enhance transparency and consistency in the way property measurement information is collected and reported globally and so is material to corporate occupiers, investors and developers,
- ▶ NEW BASIS FOR RESIDENTIAL – IPMS 1(external) IPMS 2 (internal) IPMS 3 (occupier)

▶ Q. WHAT IS THIS BASIS OF MEASUREMENT FOR INDUSTRIAL?

- ▶ A. GIA GROSS INTERNAL AREA & also for Leisure

▶ Q. WHAT BASIS OF MEASUREMENT FOR RETAIL?

- ▶ A. NIA NET INTERNAL AREA (WHAT IS DEDUCTED?) OR GIA FOR LARGER STORES

Q.. What are the principles you are to adopt as a Chartered Surveyor ?

- A. Real Estate Agency and Brokerage Guidance, AUGUST 2016 3rd edition
- 12 core principles - A MICRO DVD acronym
- **A**CT Act in an honest, fair, transparent and professional manner
- **M**ONEY Client money separately accounted for and insured
- **M**ARKETING Marketing and advertising material to be honest and truthful
- **I**NSURANCE Professional Indemnity Insurance
- **C**ONFLICTS Avoid conflicts of interest - if you can't then deal with them openly & fairly
- **C**LARITY Ensure that clients are provided with terms of business/engagement that are fair and clear especially in relation to fees & with details of the firm's Complaints Handling Procedure
- **C**OMMUNICATION Fair, clear, timely and transparent communications
- **R**EALISM Give realistic assessments of selling prices / rents based on market evidence and professional judgement
- **O**BLIGATIONS Identify client and your obligations to them & other parties - money laundering
- **D**ILIGENCE Carry out work with skill care diligence - ensure all staff employed have the skills to carry out tasks
- **V**IEWINGS Carry out viewings in accordance with clients wishes
- **D**ISCRIMINATION Always act in a non-discriminatory manner

Q. WHAT IS TIME OF THE ESSENCE ?

- ▶ A. THE PHRASE 'TIME OF THE ESSENCE' IS USED IN CONTRACTS, AGREEMENTS AND LEASES AND IF PRESENT SIGNIFIES THAT ANY REFERENCE TO TIME AND DATES ARE A VITAL ELEMENT OF THE PERFORMANCE OF THE CONTRACT. ANY FAILURE TO ADHERE TO THE TIME STATED IS A BREACH OF THE CONTRACT.

▶ Q. WHEN IS TIME OF THE ESSENCE?

- ▶ A. WHEN IT IS SPECIFICALLY STATED TO BE (OR IT IS IMPLIED FROM OTHER WORDING)

▶ Q. What is the leading case law on Time of the Essence?

- ▶ A. **United Scientific Holdings Ltd v Burnley Borough Council [1978]** Held that there should be no implication that time is of the essence in respect of time limits in a rent review clause unless there are sufficient contra-indications in the express words of lease

- ▶ Words such as “but not otherwise” create a deeming provision potentially making time of the essence

- ▶ Time of the essence frequently occurred in rent review clauses for service of L/L's notice or T's counter-notice or for application to a 3rd party Arbitrator or Expert. BUT such use is now uncommon - too many people got caught out.

- ▶ Rent review clauses now specifically state that Time is NOT of the Essence

Q. A TENANT TAKES A 10 YEAR LEASE FROM 24th MARCH 2012 WITH A TENANT ONLY OPTION TO EXERCISE A BREAK CLAUSE AT THE END OF THE 6th YEAR ON SERVING NOT LESS THAN 6 MONTHS NOTICE IN WRITING.

WHEN SHOULD THE TENANT SERVE THEIR NOTICE ?

▶ A. BEFORE 24th SEPTEMBER 2017

***** NB TIME IS OF THE ESSENCE FOR SERVING BREAK CLAUSES *****

▶ WHERE A DATE IS SPECIFIED FOR A BREAK NOTICE IT MUST BE SERVED BY THAT DATE - IF NOTICE IS LATE THE BREAK CLAUSE IS MISSED. SURPRISINGLY FREQUENT FAILURE TO SERVE NOTICE ON TIME

▶ IS IT SIMPLY A MATTER OF SERVING NOTICE ON TIME?

▶ **NO** EVERY QUALIFYING CONDITION IS TO BE MET, IE, PAYMENT OF RENT, SERVICE CHARGE INSURANCE, INTEREST IF DUE, REPAIR, VACANT POSSESSION

▶ 'HOTGROUP V THE ROYAL BANK OF SCOTLAND (2010)'. BREAK NOTICE WAS SERVED ON TIME BUT A COPY NOTICE TO BE SERVED ON THE PROPERTY MANAGER WAS LATE SO THE BREAK WAS NOT EFFECTIVE.

▶ 'OSBORNE V BRITANNIA LIFE (1997)', T TO PAINT 2 X COATS - FOUND TO HAVE APPLIED SINGLE COAT OF PAINT - ENOUGH TO INVALIDATE THE BREAK.

▶ RECENT CASE - MARKS & SPENCER PLC V BNP PARIBAS SECURITIES SERVICES TRUST CO (JERSEY) LTD [2014] HELD THAT L/L CAN KEEP OVERPAYMENT OF RENT

▶ Q. WHAT IS A MUTUAL BREAK CLAUSE? CAN THE L/L ALSO HAVE A BREAK CLAUSE IN A LEASE?

▶ A. YES IF THE LEASE IS CONTRACTED OUT OF L & T ACT 1954 - MUTUAL BREAKS ARE COMMON

▶ A. NO IF LEASE IS INSIDE THE ACT - BUT L/L CAN HAVE A RE-DEVELOPMENT BREAK CLAUSE

Q. HOW CAN L/L GET VACANT POSSESSION AT THE END OF A LEASE INSIDE THE ACT?

- ▶ A. BY SERVING 'HOSTILE' S.25 NOTICE OBJECTING TO GRANT OF A NEW LEASE
- ▶ Q. ON WHAT GROUNDS CAN A L/L DO THIS ? WHAT SECTION OF ACT - HOW MANY GROUNDS?
- ▶ A. S.30. THERE ARE 7 PROVISIONS (A) (B) (C) (D) (E) (F) (G) - GROUNDS OF OBJECTION

- ▶ NAME THE GROUNDS OF OBJECTION IN ORDER, ie S.30 (1) (A), S.30 (1) (B)
- ▶ 3 X BAD TENANT CLAUSES
- ▶ BAD TENANT GROUNDS
- ▶ 30 (A) **REPAIR** - WHERE UNDER THE CURRENT TENANCY THE TENANT HAS ANY OBLIGATIONS AS RESPECTS THE **REPAIR** AND MAINTENANCE OF THE HOLDING, THAT THE TENANT OUGHT NOT TO BE GRANTED A NEW TENANCY IN VIEW OF THE STATE OF REPAIR OF THE HOLDING, BEING A STATE RESULTING FROM THE TENANT'S FAILURE TO COMPLY WITH THE SAID OBLIGATIONS;
- ▶ 30 (B) **RENT** - THAT THE TENANT OUGHT NOT TO BE GRANTED A NEW TENANCY IN VIEW OF HIS PERSISTENT DELAY IN PAYING **RENT** WHICH HAS BECOME DUE;
- ▶ 30 (C) **BREACH** - THAT THE TENANT OUGHT NOT TO BE GRANTED A NEW TENANCY IN VIEW OF OTHER **SUBSTANTIAL BREACHES** BY HIM OF HIS OBLIGATIONS UNDER THE CURRENT TENANCY, OR FOR ANY OTHER REASON CONNECTED WITH THE TENANT'S USE OR MANAGEMENT OF THE HOLDING;
- ▶ NB TENANT CAN REMEDY EACH OF THESE – SO NOT A LIKELY OR PRACTICAL ROUTE TO GET POSSESSION

S.30 Grounds of opposition (d) (e) (f) (g)

- ▶ 30 (d) **ALTERNATIVE ACCOMMODATION** that the landlord has offered and is willing to provide or secure the provision of alternative accommodation for the tenant, that the terms on which the alternative accommodation is available are reasonable having regard to the terms of the current tenancy and to all other relevant circumstances, and that the accommodation and the time at which it will be available are suitable for the tenant's requirements (including the requirement to preserve goodwill) having regard to the nature and class of his business and to the situation and extent of, and facilities afforded by, the holding;
- ▶ 30 (e) **WHOLE v UNDERLETS** where the current tenancy was created by the sub-letting of part only of the property comprised in a superior tenancy and the landlord is the owner of an interest in reversion expectant on the termination of that superior tenancy, that the aggregate of the rents reasonably obtainable on separate lettings of the holding and the remainder of that property would be substantially less than the rent reasonably obtainable on a letting of that property as a whole, that on the termination of the current tenancy the landlord requires possession of the holding for the purpose of letting or otherwise disposing of the said property as a whole, and that in view thereof the tenant ought not to be granted a new tenancy;
- ▶ 30 (f) **DEVELOPMENT** 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;
- ▶ 30 (g) **OWN OCCUPATION** subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence.
- ▶ NB No statutory compensation payable for grounds (a) (b) (c) or (d). But is payable for (e) (f) & (g)
- ▶ 30 (d) is rarely used – but could apply in a shopping centre or office building or terrace of w/house units
- ▶ 30 (e) rarely used. It could apply in a multi-let building where a single let yields more rent than multiple lets
- ▶ 30 (g) is used. 5 year qualifying period as L/L. Recent supermarket examples.

Q. S.30 (1) (F) WHAT DOES L/L HAVE TO SHOW & WHEN ?

- ▶ A landlord who opposes the grant of a new tenancy under Ground (f) has to prove all the elements of his case as at the date of the trial of his grounds of opposition. *Betty's Cafés Ltd. v. Phillips Furnishing Stores Ltd*
- ▶ The test of intention is in two parts: does the landlord have the stated "intention" and does it have the means to make good that "intention"
- ▶ Has it been demonstrated that the project moved out of the zone of contemplation - out of the sphere of the tentative, the provisional and the exploratory - into the valley of decision. *Cunliffe v. Goodman*
- ▶ **DOES THE L/L NEED PLANS?**
- ▶ YES
- ▶ **DOES THE L/L NEED TO SHOW HE HAS THE FINANCE?**
- ▶ YES
- ▶ **DOES THE L/L NEED TO HAVE PLANNING CONSENT IN PLACE FOR THE DEVELOPMENT?**
- ▶ **NO IF THE PROPOSED DEVELOPMENT REQUIRES PLANNING PERMISSION, BUT HE DOES NOT HAVE PERMISSION, THE LANDLORD MAY STILL SUCCEED IN PROVING HIS CLAIM. THE TEST BECOMES, IN SUCH A CASE, "IS THERE A REASONABLE PROSPECT OF OBTAINING PLANNING PERMISSION?"**
- ▶ This is a lower standard than establishing whether the landlord will obtain planning permission "on the balance of probabilities".
- ▶ **What is demolition? Reconstruction? Substantial work of construction on the holding?**
- ▶ The nature and scope of the proposed works is critical
- ▶ Demolition" is self-explanatory.
- ▶ "Construction" means the addition of new or additional structures or parts of structures. "Reconstruction" has been held to mean: "physical rebuilding following demolition or partial demolition of the holding" and/or "a substantial interference with the structure of the premises and then a rebuilding, probably in a different form, of such part of the premises as had been demolished by reason of the interference with the structure".

Pumpninks of Piccadilly Ltd v. Land Securities plc,

Egg-shell lease - no structural element in demise. 2 shop units into one

Ground (f) was satisfied by demolishing as much as could be demolished of the eggshell, and incorporating it into a wider scheme of redevelopment, which changed the nature of the holding

Q. WHAT IS DDA ?

- ▶ A. DISABILITY DISCRIMINATION ACT 1995 (DDA) INTRODUCED IN PHASES 1996, 1999 AND OCT 2004 FROM WHEN PHYSICAL CHANGES WERE REQUIRED TO BE CARRIED OUT
EQUALITY ACT (EA) 2010 CONSOLIDATED/EXTENDED DDA REQUIREMENTS ON PROPERTY

- ▶ REQUIREMENT TO MAKE REASONABLE ADJUSTMENT TO ANY PHYSICAL FEATURE WHICH MIGHT PUT A DISABLED PERSON AT A SUBSTANTIAL DISADVANTAGE COMPARED TO A NON-DISABLED PERSON

- ▶ Q. WHEN IS REQUIREMENT TO COMPLY WITH DDA TRIGGERED?

- ▶ SINCE OCTOBER 2004 ANY NEW BUILDINGS AND OLDER BUILDINGS WHERE AN ALTERATION OR CHANGE OF USE IS MADE HAVE BEEN REQUIRED TO BE DDA COMPLIANT.

- ▶ Q. DO OLDER BUILDINGS NEED TO COMPLY?

- ▶ A. NO. LISTED BUILDINGS ARE GENERALLY EXEMPT IF THE WORKS WOULD PREJUDICE IMPORTANT FEATURES

- ▶ IF NO ALTERATIONS ARE CARRIED OUT TO A PRE-OCT 1995 PROPERTY IT NEED NOT COMPLY

- ▶ Q. WHY IS THIS RELEVANT TO MANAGEMENT – LETTING – RENT REVIEW – VALUATION?

- ▶ A. ANY EXTENSION - ANY ALTERATION - ANY CHANGE OF USE TO A NON-COMPLIANT BUILDING INVOKES A REQUIREMENT FOR DDA COMPLIANCE

- ▶ DOES IT NEED A RAMP FOR ACCESS - OR A LIFT - OR A LESS STEEP STAIRCASE

- ▶ FLOORSPACE MAY BE LOST TO IMPROVE ACCESS TO COMPLY WITH DDA AND THIS HAS RENTAL AND CAPITAL VALUATION IMPLICATIONS

Q. CAN YOU STILL GRANT A LEASE WITH A RESTRICTIVE USER OR EXCLUSIVITY?

- ▶ A. YES - BUT SUBJECT TO APPROPRIATE EXEMPTING CIRCUMSTANCES - SUCH THAT IT IS NOT ANTI-COMPETITIVE

▶ Q. WHAT STATUTE GOVERNS COMPETITION?

- ▶ COMPETITION ACT 1998 - AIMS TO PREVENT ANTI-COMPETITIVE BEHAVIOUR
- ▶ BUT PROPERTY TRANSACTIONS (LAND AGREEMENTS) WERE INITIALLY EXCLUDED FROM THE ACT
- ▶ **HOWEVER ON 6 APRIL 2011 THE EXCLUSION OF LAND AGREEMENTS FROM THE COMPETITION ACT 1998 WAS REVOKED – MAKING ALL RESTRICTIVE AGREEMENTS NULL AND UNENFORCEABLE AT LAW.**

▶ Q. WHO ENFORCES IT?

- * A. IT IS GOVERNED BY THE COMPETITION AND MARKETS AUTHORITY (CMA) – FORMERLY OFFICE OF FAIR TRADING OFT

* CMA GUIDELINES

- ANTI-COMPETITIVE IF “PREVENTS RESTRICTS OR DISTORTS COMPETITION”
 - THE IMPACT ON COMPETITION MUST BE “APPRECIABLE” – 10% -15%
 - CONSIDER BOTH THE “PRODUCT DIMENSION” AND GEOGRAPHIC DIMENSION”
 - ECONOMIC BENEFITS AS A WHOLE CONSIDERED – SO EXEMPTION MAY BE GRANTED
 - RESTRICTION MUST BE SUFFICIENT TO ACHIEVE PURPOSE BUT NO MORE THAN SUFFICIENT
- ▶ RESTRICTIVE USERS AND EXCLUSIVITY AGREEMENTS STILL GRANTED WHERE IT IS CLEAR THAT IT WOULD NOT BE ANTI-COMPETITIVE.
 - ▶ IT IS COMMON TO RESTRICT THE EXCLUSIVITY TO A 5 YEAR PERIOD ONLY TO ENABLE A BUSINESS TO ESTABLISH ITSELF.

Q. WHAT IS SECURITY OF TENURE?

- ▶ A. SECURITY OF TENURE MEANS THAT WHEN A LEASE EXPIRES, THE LEASE DOES NOT COME TO AN END BUT CONTINUES BY OPERATION OF THE LAW UNTIL TERMINATED BY L/L OR T.
- ▶ IT IS THE RIGHT OF A TENANT HOLDING A LEASE WITHIN THE L & T ACT 1954 TO RENEW THEIR LEASE SUBJECT TO THE L/L'S OBJECTION ON ANY GROUNDS UNDER S.30
- ▶ Q. DOES IT APPLY IN EUROPE THE REST OF THE WORLD OR INDEED IN SCOTLAND?
- ▶ A. NO L & T ACT 1954 ONLY APPLIES IN ENGLAND WALES & NI + GIBRALTAR
- ▶ Q. CAN A NEW LEASE BE GRANTED WITHOUT SECURITY OF TENURE?
- ▶ A. YES IT IS BECOMING MORE COMMONPLACE - SUITS L/LS AS IT GIVES GREATER CONTROL
- ▶ Q. HOW DO THE PARTIES TO A LEASE 'CONTRACT OUT' OF THE L & T ACT 1954?
- ▶ A. HISTORICALLY A JOINT APPLICATION TO THE COURT WAS REQUIRED. NOW THE L/L PREPARES AND THE T SIGNS (BEFORE AN INDEPENDENT SOLICITOR) A STATUTORY DECLARATION WHICH SPELS OUT IN VERY CLEAR TERMS THAT THE T WILL HAVE NO RIGHTS TO A NEW LEASE UPON THE EXPIRY OF THE LEASE.
- ▶ Q. WHAT HAPPENS IF A T STAYS IN OCCUPATION AFTER EXPIRY OF CONTRACTED OUT LEASE?
- ▶ A. T HAS NO RIGHT OF OCCUPATION L/L CAN CHOSE TO CHANGE THE LOCKS AND TAKE V/P - OR - GRANT THE T A TENANCY AT WILL
- ▶ A TENANCY AT WILL IS USED BY A L/L WHO WANTS TO AVOID A TENANT FROM GETTING SECURITY OF TENURE. IT IS A SHORT FORM OF LEASE INTENDED FOR A SHORT PERIOD OF OCCUPATION .
- ▶ IT DOES NOT HAVE ANY FIXED LENGTH AND IT IS NOT A TENANCY WITHIN THE LANDLORD AND TENANT ACT 1954, SO IT AVOIDS THE SECURITY OF TENURE RULES.

VACANT POSSESSION (V/P) ACTUAL & ASSUMED.

▶ Q. WHAT DOES VACANT POSSESSION (V/P) MEAN?

▶ A. THE PROPERTY IS EMPTY - NOT OCCUPIED BY TENANTS, WORKMEN, OR FIXTURES & FITTINGS WHICH WERE DUE TO BE REMOVED

▶ Q. WHEN CAN A L/L OBTAIN V/P?

▶ A. IF LEASE IS CONTRACTED OUT OF L & T ACT 1954 TENANT HAS NO RIGHT TO RENEW SO LANDLORD CAN GET VACANT POSSESSION - ON EXPIRY DATE AT NO COST

▶ IF IT IS A L & T ACT LEASE V/P CAN POTENTIALLY BE OBTAINED ON 7 GROUNDS OF OPPOSITION S.30 (A - G)

▶ L/L AGREES TO ACCEPT A SURRENDER OF THE LEASE OR EXERCISES A PRE-EMPTION

▶ Q. IN WHAT CIRCUMSTANCES DO WE ASSUME V/P EVEN THOUGH A PROPERTY IS OCCUPIED?

▶ WHERE AN ASSESSMENT OF AN OPEN MARKET VALUE (RENTAL OR CAPITAL IS REQUIRED)

▶ Q. IS VACANT POSSESSION ASSUMED AT RENT REVIEW?

▶ A. YES ALMOST INVARIABLY

▶ Q. WHY?

▶ A. THE OBJECTIVE IS TO ACHIEVE AN OPEN MARKET RENT - ASSUMING THE PROPERTY IS VACANT AND AVAILABLE TO BE LET.

▶ Q. DO WE IGNORE THE FACT THAT THE EXISTING TENANT HAS BEEN IN OCCUPATION?

▶ A. YES - THE TENANT WILL BE TREATED AS HAVING MOVED OUT - OR AS HAVING NEVER OCCUPIED THE PREMISES - AND THE RENT WILL BE CALCULATED ON THE ASSUMPTION THAT THE TENANT HAS REMOVED ITS PROPERTY FROM ON THE PREMISES. THERE CAN BE EXCEPTIONS DEPENDENT ON THE WORDING USED IN THE RENT REVIEW

VACANT POSSESSION cont'd

- ▶ Q. IS V/P ASSUMED AT LEASE RENEWAL UNDER S.34?
- ▶ A. YES
- ▶ Q. WHAT IS THE BASIS OF VALUATION AT LEASE RENEWAL?
- ▶ A. S.34 L & T ACT 1954
- ▶ (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,
- ▶ Q. LOOKING AT THE PROVISIONS OF S.34 DO WE ASSUME V/P? IF SO WHY?
- ▶ A. YES WE DO ASSUME V/P AS WE ARE SEEKING AN OPEN MARKET RENT - NOT THE RENT WHICH THE CURRENT L/L AND THE CURRENT T MIGHT AGREE.

Q. WILL A COURT MAKE A TENANT TAKE A 10 YEAR LEASE WHEN THEY ONLY WANT A 5 YEAR LEASE?

- ▶ A. GENERALLY NOT.
- ▶ COURTS ARE RELUCTANT TO IMPOSE LONGER LEASE TERMS THAN TENANTS WANT TO TAKE
- ▶ BUT SEE **ICELAND FOODS LIMITED V CASTLEBROOK HOLDINGS LIMITED 2014**
- ▶ SUPERMARKET IN CHESHIRE OCCUPIED BY ICELAND FOR 20 YEARS. ICELAND SOUGHT A RENEWAL LEASE OF THE PREMISES FOR A FIVE-YEAR TERM. IT ARGUED THAT THE VOLATILE MARKET CONDITIONS MEANT THAT A SHORTER TERM OF FIVE YEARS WOULD BE APPROPRIATE. LANDLORD ARGUED FOR A 15-YEAR LEASE TERM. OTHER SUPERMARKETS IN THE LOCALITY HAD RECENTLY BEEN LET FOR 15 YEAR LEASE TERMS.
- ▶ COURT DETERMINED THAT THE RENEWAL LEASE SHOULD BE FOR A TERM OF 10 YEARS.
- ▶ A REASONABLE BALANCE BETWEEN THE TENANT'S NEED FOR FLEXIBILITY AND THE LANDLORD'S DESIRE TO PROTECT ITS INVESTMENT.
- ▶ EARLIER CASE IN NORWICH INVOLVING TESCO WHO WANTED A 10 YEAR TERM WITH TENANT ONLY BREAK AT 5TH YEAR. COURT HEARD THAT TESCO HAD NO EVIDENCE THAT THEY HAD EXERCISED ANY 5 YEAR BREAKS - AND SO DID NOT GRANT THEM A 5 YEAR BREAK.

Q WHAT IS INFORMED CONSENT? & WHEN DO YOU NEED TO OBTAIN IT?

- ▶ A. THIS IS A QUESTION ABOUT RICS professional standards and guidance, global Conflicts of interest 1st edition, March 2017 - COMES IN TO EFFECT 1st JAN 2018
- ▶ 1.1 An RICS member or regulated firm must not advise or represent a client where doing so would involve a Conflict of Interest or a significant risk of a Conflict of Interest; other than where all of those who are or may be affected have provided their prior Informed Consent.
- ▶ Informed Consent may be sought only where the RICS member or regulated firm is satisfied that proceeding despite a Conflict of Interest is:
 - ▶ (a) in the interests of all of those who are or may be affected and
 - ▶ (b) is not prohibited by law, and that the conflict will not prevent the member or regulated firm from providing competent and diligent advice to those that may be affected.
- ▶ 4.5 'Informed Consent' means: consent given willingly by a party who may be affected by a Conflict of Interest, that party having demonstrated to the RICS member working independently or within a non-regulated firm or regulated firm concerned that the party understands: (a) that there is a Conflict of Interest or a significant risk of a Conflict of Interest and (b) the facts known by the RICS member (working independently or within a non-regulated firm or within a regulated firm) or the regulated firm that are material to the Conflict of Interest and (c) what that Conflict of Interest is or may be and (d) that a Conflict of Interest may affect the ability of the RICS member (working independently or within a non-regulated firm or within a regulated firm) or a regulated firm to advise or act fully in the interests of a client.

Q WHAT IS A CONFLICT OF INTEREST

1. A A CONFLICT OF INTEREST IS ANYTHING THAT IMPEDES OR MIGHT BE PERCEIVED TO IMPEDE AN INDIVIDUAL'S OR FIRM'S ABILITY TO ACT IMPARTIALLY AND IN THE BEST INTEREST OF A CLIENT. NB PERCEPTION IS IMPORTANT

2. RICS Conflicts of interest, global, 1st edition. PUBLISHED MARCH 2017 - EFFECTIVE 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)
- Have other obligations or pressures that detract from or affect your relationship with the client (e.g. acting as an expert witness where you/your firm has an interest in the outcome of the proceedings)
- Comprehensive & robust systems for checking conflicts must be in place and efficiently applied

Q How to Identify & Manage Conflicts OPEN SHIRT acronym

- O OPENNESS The best way to deal with potential conflicts is Openness
- P PARTIES you must declare any concerns to all parties, being as clear and open as you possibly can. Where client confidentiality is a concern, you can still discuss your worries, giving the other side(s) enough information to make a decision about whether they are content for your firm to take the instruction. Managing a possible conflict: can you separate out work that may conflict and just take on neutral work?
- E ERECT In a larger firm a Chinese Wall (Information Barrier) can be erected between those surveyors and staff acting for different clients? Once you have agreed how a potential conflict will be managed, confirm this with the client(s) in writing.
- N NO If there is a clear conflict or it is likely to be perceived to be a conflict of interest or if you can't disclose enough information for all parties to make an informed decision, then you should say NO and refuse the instruction.

Conflict of interest - How to deal with it - what standards apply ?

- **SHIRT acronym**
- **S Self** Put yourself in your clients position. Would you be happy with the conflict ?
- **H High** standard of service - the best possible advice, support or performance of the terms of engagement you have agreed. Would the potential conflict of interest impact on your ability to provide good and impartial advice to each of your clients?
- **I Integrity** - open and transparent - never allowing bias, conflict of interest or undue influence of others to override your professional or business judgements and obligations.
- **R Respect** - Treat others with respect. If you are proceeding in the knowledge that there may be a conflict of interest and/or withholding potentially important information from at least one of your clients are you treating those clients in a fair and respectful manner?
- **T Trust** - Act in a way that promotes trust in the profession. What is the impact if you were to proceed knowing that there is a potential conflict of interest?
- ▶ **BRIBERY ACT 2010** If you sell a development site to a party who has offered to retain you to let it /sell it on post-development this must be disclosed to the seller client. You cannot receive gifts or money to influence you to over or under value a property.

Q. WHAT IS AN INFORMATION BARRIER ?

- ▶ A. 'INFORMATION BARRIER' MEANS: THE PHYSICAL AND/OR ELECTRONIC SEPARATION OF INDIVIDUALS (OR GROUPS OF INDIVIDUALS) WITHIN THE SAME FIRM THAT PREVENTS CONFIDENTIAL INFORMATION PASSING BETWEEN THEM.

- ▶ Q. WHAT IS DOUBLE DIPPING (OR DUAL AGENCY)

- ▶ A. DOUBLE DIPPING (A COLLOQUIAL TERM FOR DUAL AGENCY) IS USED TO DESCRIBE A SITUATION WHEREBY AN AGENCY ACTS FOR BOTH THE SELLER AND BUYER IN THE SAME DEAL.

- ▶ Section 2.3 of the new RICS Conflicts of Interest 1st Edition 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”.

Q WHAT ARE GENERAL PERMITTED DEVELOPMENT ORDERS (GPDO'S) USED FOR ?

- ▶ A TO MAKE IT QUICKER & EASIER FOR GOVT TO MAKE CHANGES TO THE TOWN & COUNTRY PLANNING (USE CLASSES ORDER) 1987 TO REFLECT MARKET CHANGES.
- ▶ A THEY ALLOW CERTAIN CHANGES OF USE WITHOUT THE NEED FOR PLANNING PERMISSION - OFTEN REFERRED TO AS PDR`S (PERMITTED DEVELOPMENT RIGHTS)

▶ Q. WHAT IS THE CURRENT USE CLASSES ORDER ?

▶ A. TOWN & COUNTRY PLANNING (USE CLASSES) ORDER 1987

• Q WHAT ARE THE 4 MAIN USE CLASSES ?

- A CLASS A Retail A1 Financial A2 - Restaurant A3 - Pub A4 - Take-away A5
- CLASS B Offices B1 - Industrial B2 B3 B4 B5 B6 B7 B8 (Warehouse)
- CLASS C Hotels C1 - Colleges Hospital C2 - Residential/dwellinghouses C3
- CLASS D Non-Residential D1, museums - D2 cinema, bingo, gym

- SUI GENERIS Non-classified

Q WHAT ARE THE FOUR MAIN METHODS OF SALE ?

- ▶ A. Private Treaty
- ▶ Informal Tender
- ▶ Formal Tender
- ▶ Auction

Private Treaty

- ▶ Q What are the characteristics of private treaty
- ▶ Sale by private treaty is the most common method
- ▶ A Party autonomy - can be private and confidential or open market
- ▶ A No obligation to sell but no certainty on timescale or completion of transaction

Informal Tender

- ▶ Can follow on from private treaty to draw negotiations to a close in a ‘best bids’ process
- ▶ Terms of the bidding process to be clearly set out and sent to all prospective bidders covering timing, funds or financial arrangements, any conditions on board approval, solicitors etc.
- ▶ Reserving the vendor’s right “not to accept the highest or any offer made”

Formal Tender

- ▶ Also known as sealed bids
- ▶ Generally used where public accountability is an issue
- ▶ Exercises more control
- ▶ Comprehensive marketing and legal information provided with an ITT (invitation to tender)

- ▶ **Advantages**
 - ▶ Parties bidding blind with no opportunity to impose conditions or increase or decrease their offer after submission
 - ▶ Fairness
 - ▶ Can lead directly to a sale contract
 - ▶ Even in a formal tender vendor can state that they are not obliged to accept the highest or any offer received

AUCTION

- ▶ Quick and relatively certain method of sale (subject to realistic reserve)
- ▶ Best means of disposing of quirky property
- ▶ Higher brochure cost
- ▶ Open sale

Q WHAT STATUTES & REGULATIONS GOVERN PROPERTY SALES?

▶ **Misrepresentation Act 1967**

Agent has a duty of care to avoid a misrepresentation of fact or a false statement which has the effect of inducing the party to purchase

Q What is a disclaimer - is it effective ?

A Use of a disclaimer clause clearly notified to the party may protect the vendor and agent if the disclaimer is fair and reasonable

Headley Byrne & Co Limited vs Heller & Partners (1964)

Agents liability for negligent statements subject to three tests

- Foreseeability - was the damage reasonably foreseeable
- Proximity - was the legal relationship between the agent and the purchasing party sufficiently proximate
- Fairness - was it fair just and reasonable for a duty of care to arise

▶ **Estate Agents Act 1979**

- ❖ Introduced to regulate estate agency particularly in relation to clients money
- ❖ S.18 Agree terms - especially level of fees & when payable
- ❖ Under Section 21 notification of a personal interest in a property
- ❖ Policed by the Trading Standards Office of each Local Authority

STATUTE AND REGULATIONS continued

- ▶ **Unfair Trading Regulations 2008**
 - ▶ **Misleading Marketing Regulations 2008**
 - ▶ **Consumer Protection Regulations 2008 (CPR's)**
 - ▶ **Business Protection Regulations 2008 (BPR's)**
-
- ❑ These regulations largely supercede the previous three main Acts.
 - ❑ Fundamental difference is that the regulations now apply to potential buyers and vendors extending the duty of care not just to actual clients but to potential clients, potential viewers and potential buyers in addition to the actual buyer
 - ❑ In addition to the giving of false or misleading information it is regarded as an unfair practice to hide or fail to provide information, to fail to demonstrate professional diligence and to exert undue pressure on any party
 - ❑ It is policed by the Competition Markets Authority (CMA) previously the Office of Fair Trading (OFT)

RETURN FRONTAGE



- ▶ **Q. NAME 3 X FACTORS THAT ARGUABLY ADD VALUE TO THIS RETAIL UNIT**
- ▶ **A. ADDED PROMINENCE -EXTENSIVE DISPLAY OF GOODS - CUSTOMERS CAN SEE IN AND BE DRAWN IN**
- ▶ **Q. NAME 3 X FACTORS TO ARGUE AGAINST ANY ADDED VALUE**
- ▶ **A. CAN'T RACK OUT - HIGHER INSURANCE COSTS - WINDOW DRESSING COSTLY/TIME CONSUMING**

LANDLORD & TENANT ACT 1954 (Part 2)

- ▶ Q. A LEASE INSIDE THE ACT WAS GRANTED FOR A TERM OF 10 YEARS FROM 25TH DECEMBER 2006 - AT WHAT DATE DOES THE LEASE COME TO AN END?
- ▶ A. NEVER - UNLESS A NOTICE IS SERVED OR TENANT WALKS OUT ON 24TH DECEMBER 2016

- ▶ Q. A LEASE OUTSIDE THE L & T ACT WAS GRANTED FOR A TERM OF 5 YEARS FROM 25TH DECEMBER 2012 - AT WHAT DATE DOES THE LEASE COME TO AN END?
- ▶ A. 24TH DECEMBER 2017

- ▶ Q. WHAT ARE THE MAXIMUM AND MINIMUM TIME FRAMES FOR A LANDLORD TO SERVE A S.25 NOTICE TO TERMINATE A TENANTS LEASE?
- ▶ A. NOT MORE THAN 12 MONTHS NOT LESS THAN 6 MONTHS
- ▶ SAME TIME FRAME FOR TENANTS S.26 NOTICE

RESTRICTIVE USER?

- ▶ A LEASE CONTAINS THE FOLLOWING USER CLAUSE AND RENT REVIEW CLAUSE

USER - *TO USE ONLY FOR THE SALE OF FOOTWEAR*

REVIEW - *THE PREMISES MAY BE USED FOR ANY USE WITHIN CLASS A OF THE TOWN & COUNTRY (USE CLASSES) ORDER 1987*

- ▶ Q. CAN THE RETAILER SELL ANYTHING ELSE EXCEPT FOOTWEAR ?

- ▶ A. NO

- ▶ Q. CAN THE RETAILER GET A DISCOUNT FROM OPEN MARKET RENT BECAUSE OF THE RESTRICTIVE USER ?

- ▶ A. NO

- ▶ THE RENT REVIEW ASSUMPTIONS OVERRIDE THE RESTRICTIVE USER CLAUSE