

DOUG STEVENS SEMINAR

TO 1ST & 2ND YEAR GRADUATES - MONDAY 24th APRIL

60 minutes powerpoint presentation / question & answer session

SUBJECTS

1. *USE CLASSES ORDER / GDO`S*
2. *- AWARDS ON COSTS / CALDERBANKS -*
3. *POST DATED EVIDENCE*
4. *- RICS CONFLICTS OF INTEREST Global 1st Edition*
5. *DIFFERENT BASES FOR REVIEWING RENT*

6. NEXT SEMINAR 22ND MAY

7.

USE CLASSES ORDER - General Development Orders (GDO`s)

- ▶ Q. WHAT IS EXISTING USE VALUE ?
- ▶ A. THE VALUE OF PROPERTY / LAND IN IT`S EXISTING USE, ie Office or Retail shop
- ▶ Q. WHAT IS ALTERNATIVE USE VALUE ?
- ▶ A. THE VALUE OF THE PROPERTY/LAND USED FOR AN ALTERNATIVE PURPOSE - WHICH VALUE MIGHT BE HIGHER THAN THE EXISTING USE VALUE
- ▶ OFTEN OUR TASK AS SURVEYORS IS JUST TO CONSIDER THE EXISTING USE AND THE VALUE OF THE PROPERTY (OR LAND) FOR THAT USE.
- ▶ HOWEVER WE MAY BE REQUIRED FOR VALUATION PURPOSES OR FOR A DEVELOPMENT APPRAISAL TO CONSIDER WHETHER ALTERNATIVE USES MIGHT BE POSSIBLE AND WHETHER THOSE ALTERNATIVE USES HAVE A DIFFERENT (POSSIBLY HIGHER) VALUE.
- ▶ A pub might have a higher rental or capital value if let to say Metro Bank.
- ▶ An office building may have a higher value if converted to residential.
- ▶ In terms of the asset management of existing buildings understanding of the Use Classes and changes of use between those classes might help with a tenant mix policy in a shopping centre or a large mixed use block of property.
- ▶ For instance the introduction of food and beverage catering units or leisure uses such as cinemas may increase dwell time at a shopping centre.
- ▶ SO YOU NEED TO KNOW ABOUT PLANNING USE CLASSES AND WHEN / HOW CHANGES OF PLANNING USE ARE PERMITTED

PLANNING CONSENTS & CHANGE OF USE

- ▶ Q. HOW WILL YOU KNOW WHAT PLANNING USE A PROPERTY OR LAND HAS ?
- ▶ A. IT MAY BE STATED IN AN INVESTMENT BROCHURE OR IN A LEASE
- ▶ BUT BEWARE - THE VENDORS BROCHURE MIGHT NOT LIST ALL THE CONDITIONS TO A PLANNING CONSENT - THESE CONDITIONS MIGHT LIMIT POSSIBLE ADDITIONAL / ALTERNATIVE USES
- ▶ BUT BEWARE - THE LEASE MIGHT SAY THE PROPERTY CAN BE VALUED FOR CLASS A1 RETAIL or CLASS A2 or CLASS A3 BUT THERE MAY NOT BE PLANNING CONSENT FOR ALL OF THOSE USES
- ▶ TO BE SURE YOU NEED TO CHECK THE ACTUAL PLANNING CONSENT (and any conditions applying)
 - This may be done online at the relevant planning authority website
- ▶ Q. WHAT ISSUES CAN YOU SEE ARISING IF THE PLANNING CONSENT HAS ONEROUS CONDITIONS OR IF THE LEASE SPECIFIES USES FOR WHICH THERE IS NO CONSENT ?
- ▶ A. IF YOU ARE VALUING A PROPERTY YOU MAY NEED TO CONSIDER VACANT POSSESSION VALUE. THAT WILL INVOLVE WORKING OUT WHAT IT CAN BE USED FOR AND WHAT IT CAN LET FOR AND WHAT THE VALUE THEN IS. IF THE PLANNING CONDITIONS RESTRICT CERTAIN USES THEN THIS WILL IMPACT ON THE POTENTIAL USE AND THUS THE VALUE
- ▶ A. THE EXISTING TENANT COULD GO BUST AND YOU NEED TO KNOW WHAT PLANNING USE YOU HAVE TO RE-LET THE PROPERTY OR WHAT PLANNING CONSENT YOU MIGHT POSSIBLY GET BY CHANGE OF USE OR VARIATION OF CONDITIONS

USE CLASSES ORDER

- ▶ PLANNING USES AND PERMITTED CHANGES OF USE ARE COMPRISED WITHIN THE PLANNING ACTS AND ALSO IN GENERAL DEVELOPMENT ORDERS (or Amendment Orders)
- ▶ Q. WHAT IS THE PRINCIPAL PLANNING ACT FOR USE CLASSES ?
- ▶ A. The TOWN & COUNTRY PLANNING (USE CLASSES) ORDER 1987
- ▶ Q. WHAT ARE THE 4 PRIMARY USE CLASSES ?
- ▶ A. The 1987 Order places the use classes into four distinct categories - A B C & D
- ▶ (A) Primarily for RETAIL AND CATERING USES
- ▶ (B) OFFICE AND INDUSTRIAL AND WAREHOUSING USES
- ▶ (C) RESIDENTIAL AND HOTEL USES
- ▶ (D) LEISURE BASED USES

- ▶ In 2005 an Amendment Order was made to introduce A4 PUBS & A5 TAKEAWAYS
- ▶ NB IF THE PROPERTY WAS IN USE BEFORE 1987 EARLIER PLANNING ACTS MIGHT APPLY - ie TOWN & COUNTRY PLANNING (USE CLASSES) ORDER 1972
- ▶ This had numbered Use Classes - eg, Class 1 RETAIL Class II OFFICES
Class III INDUSTRIAL Class X WAREHOUSE - There were No use classes for restaurants or resi

- ▶ NB - THOSE PLANNING USES ARE STILL VALID USES AND STILL APPLY

1987 USE CLASSES ORDER (as amended by 2005 Amendment Order)

- ▶ **CLASS A 1 - SHOPS -- But there are sub-divisions within Class A 1**
- ▶ **A1(A) GOODS OTHER THAN HOT FOOD**
- ▶ **A1(B) POST OFFICE**
- ▶ **A1(C) TICKETS / TRAVEL AGENCY**
- ▶ **A1(D) SANDWICHES / OTHER COLD FOOD OFF PREMISES**
- ▶ **Q. DO COFFEE SHOPS (ie, Prets & Caffe Nero) CLASSIFY AS A1 SHOP or A3 RESTAURANT ?**
- ▶ **A. SHOP. If NO HOT FOOD sold and NOT TOO MANY SEATS for customers - or else A3 consent required**
- ▶ **A1(E) HAIRDRESSING A1(F) FUNERALS A1(G) DISPLAY OF GOODS FOR SALE**
- ▶ **A1(H) HIRING OUT OF DOMESTIC / PERSONAL GOODS A1(I) RECEPTION OF GOODS FOR LAUNDRY /REPAIRS**
- ▶ **CLASS A2 - FINANCIAL**
- ▶ **FINANCIAL & PROFESSIONAL SERVICES**
- ▶ **BANKS, BUILDING SOCIETIES, ESTATE AND EMPLOYMENT AGENCIES,**
- ▶ **PROFESSIONAL SERVICES (NOT HEALTH OR MEDICAL SERVICES), BETTING OFFICES**

1987 USE CLASSES ORDER (as amended by 2005 Amendment Order) Cont`d

- ▶ **CLASS A3** FOOD & DRINK RESTAURANTS AND CAFES
- ▶ **CLASS A4** DRINKING ESTABLISHMENTS PUBLIC HOUSES, WINE BARS OR OTHER DRINKING ESTABLISHMENTS
- ▶ **CLASS A5** HOT FOOD TAKEAWAYS FOR THE SALE OF HOT FOOD FOR CONSUMPTION OFF THE PREMISES
- ▶ **GENERAL DEVELOPMENT ORDERS (RIGHTS)**
- ▶ Q. WHAT IS A GENERAL DEVELOPMENT ORDER (GDO) ?
- ▶ A. A VARIATION TO EXISTING PERMITTED RIGHTS TO CHANGE PLANNING USE WITHOUT PLANNING CONSENT
- ▶ Since the credit crunch the govt have been making GDO`s often annually each April primarily to facilitate the creation of more residential units and to stimulate the High Street
- ▶ The April 2014 and 2015 GDO`s made important changes (see previous Seminars). The very latest is the
APRIL 2017 GENERAL DEVELOPMENT AMENDMENT ORDER which came into effect on 6th April 2017 - BUT IT MAKES
ONLY NOMINAL CHANGE TO THE 2016 GDO WHICH WE WILL FOCUS ON .
- ▶ GDO`s ALLOW / PERMIT CHANGES OF USE BETWEEN USE CLASS CATEGORIES - they are sometimes referred to as
PERMITTED DEVELOPMENT RIGHTS (as in planning terms a change of use counts as a development)

GENERAL DEVELOPMENT ORDER - APRIL 2016

FROM EXISTING USE	TO NEW PERMITTED USE
A1 (SHOPS)	A2, OR UP TO 150M ² A3 SUBJECT TO PRIOR APPROVAL, OR UP TO 200 D2 SUBJECT TO PRIOR APPROVAL AND ONLY IF THE PREMISES WAS IN A1 USE ON 5TH DECEMBER 2013. A MIXED USE COMPRISING AN A1 OR A2 USE AND UP TO 2 FLATS MAY ALSO BE PERMITTED SUBJECT TO MEETING CERTAIN CONDITIONS. C3 IF THE CUMULATIVE FLOORSPACE OF THE BUILDING IS UNDER 150M ² AND SUBJECT TO PRIOR APPROVAL.
A2 (PROFESSIONAL & FINANCIAL SERVICES) WHEN PREMISES HAVE A DISPLAY WINDOW AT GROUND LEVEL, BUT EXCLUDING BETTING OFFICES OR PAY DAY LOAN SHOPS	A1, OR UP TO 150M ² A3 SUBJECT TO PRIOR APPROVAL, OR UP TO 200M ² D2 SUBJECT TO PRIOR APPROVAL AND ONLY IF THE PREMISES WAS IN A2 USE ON 5TH DECEMBER 2013. A MIXED USE COMPRISING AN A1 OR A2 USE AND UP TO 2 FLATS MAY ALSO BE PERMITTED SUBJECT TO MEETING CERTAIN CONDITIONS. C3 IF THE CUMULATIVE FLOORSPACE OF THE BUILDING IS UNDER 150M ² AND SUBJECT TO PRIOR APPROVAL.
A3 (RESTAURANTS & CAFES)	A1 OR A2
A4 (DRINKING ESTABLISHMENTS)	A1 OR A2 OR A3 EXCEPT BUILDINGS THAT MAY BE DEFINED AS "COMMUNITY ASSETS".
A5 (HOT FOOD TAKEAWAYS)	A1 OR A2 OR A3
B1 (BUSINESS)	UP TO 500M ² B8.
B2 (GENERAL INDUSTRIAL)	B1
B2 (GENERAL INDUSTRIAL)	UP TO 500M ² B8
B8 (STORAGE AND DISTRIBUTION)	UP TO 500M ² B1
C3 (DWELLINGHOUSES)	C4 (SMALL HOUSES IN MULTIPLE OCCUPATION)
C4 (SMALL HOUSES IN MULTIPLE OCCUPATION)	C3 (DWELLINGHOUSES)
SUI GENERIS (CASINOS & AMUSEMENT ARCADES/CENTRES)	D2, OR ONLY IF EXISTING BUILDING IS UNDER 150M ² A3 OR SUBJECT TO PRIOR APPROVAL. C3 IF THE CUMULATIVE FLOORSPACE OF THE BUILDING IS UNDER 150M ² AND SUBJECT TO PRIOR APPROVAL.
SUI GENERIS (BETTING OFFICES & PAY DAY LOAN SHOPS)	A1 OR A2. C3 IF THE CUMULATIVE FLOORSPACE OF THE BUILDING IS UNDER 150M ² AND SUBJECT TO PRIOR APPROVAL. A MIXED USE COMPRISING A BETTING OFFICE OR A PAY DAY LOAN SHOP, OR AN A1 OR A2 USE AND UP TO 2 FLATS MAY ALSO BE PERMITTED SUBJECT TO MEETING CERTAIN CONDITIONS.
Sui Generis (agricultural buildings)	A1, A2, A3, B1, B8, C1, C3, D2, all subject to meeting relevant criteria and Prior Approval.

AWARDS ON COSTS - CALDERBANKS

- ▶ WHEN NEGOTIATING RENT REVIEWS & LEASE RENEWALS BOTH SIDES INCUR COSTS (surveyors & legal)
- ▶ GENERALLY EACH SIDE PAYS IT`S OWN COSTS
- ▶ Q. IN WHAT CIRCUMSTANCES COULD ONE SIDE SEEK TO HAVE IT`S COSTS PAID BY THE OTHER SIDE
- ▶ A. BY NEGOTIATION (this would be unusual) - or- IF THE MATTER PROCEEDED TO ARBITRATION OR TO COURT AND ONE SIDE HAS WON
- ▶ The parties are free, once the (rent review or other) dispute has arisen, to agree how costs should be allocated and if the parties do not so agree, the allocation of costs is decided by the Arbitrator (or judge or Expert)
- ▶ IT MAY BE CLEAR FROM THE ARBITRATION AWARD WHICH SIDE HAS WON ie, got an Award at a rent closer to their valuation than the other side - BUT IT MIGHT NOT MEAN THAT THEY HAVE WON THE BATTLE TO RECOVER THEIR COSTS
- ▶ Q. WHY NOT ?
- ▶ A. BECAUSE THE PARTIES MAY HAVE MADE CALDERBANK OFFERS TO EACH OTHER AT RENTAL VALUES DIFFERENT TO THOSE VALUATIONS PRESENTED TO THE ARBITRATOR
- ▶ Q. WHAT IS A CALDERBANK OFFER ?
- ▶ A. AN OFFER (MADE BY ONE SIDE TO THE OTHER OR BY BOTH SIDES TO EACH OTHER) TO COMPROMISE/SETTLE A DISPUTE AT A FIGURE MADE WITH THE INTENTION TO RESERVE THE OFFEROR`S POSITION ON COSTS
- ▶ Q. IS THE CALDERBANK OFFER PRESENTED TO THE ARBITRATOR ?
- ▶ A. NO. NOT BEFORE THE AWARD IS MADE.
- ▶ A. YES - ONCE THE AWARD IS MADE AND THE PARTIES HAVE BEEN UNABLE TO AGREE WHO SHOULD BEAR THE COSTS OF ARBITRATION WHICH THE ARBITRATOR MUST THEN DECIDE
- ▶ NB WHEN AN ARBITRATION AWARD ON A RENT REVIEW (or a PACT Award on a lease renewal) IS PUBLISHED IT IS NOT FINAL UNTIL THE ISSUE OF COSTS IS DECIDED BY THE ARBITRATOR - or they notify the Arbitrator that they have agreed the matter of costs and the Arbitrator then still issues a Final Award (by and with the consent of the parties) .

Example of Calderbank Offer

- ▶ “It is understood that you are the duly authorised agent acting on behalf of the lessor (lessee) of the above property.
- ▶ I am the duly authorised agent on behalf of the lessees (or lessors) .
- ▶ On behalf of the lessees I have been instructed **to settle the rent review with effect xx June 2016 on the above property at a rental figure of £xx,xxx (xx thousand xx hundred pounds) per annum exclusive.**
- ▶ **This offer will remain open for acceptance until Friday, 19 May 2017** and is made without prejudice save as to costs for the purpose of being disclosed to the Independent Expert in connection with the question of costs in the event of this matter being so determined once substantive issues have been determined.
- ▶ **If the offer is accepted within the stipulated time limit then any costs** due to the Arbitrator (*or Independent Expert as appropriate*) **will be shared equally between the parties.**

After that date the offer will be open to acceptance but on the basis that you are responsible for all of costs of the case
- ▶ This offer is made as a commercial compromise in order to minimise costs and does not represent either our own or our client’s opinion of rental value.
- ▶ Should your client require a longer period than until 19 May 2017 to consider this Calderbank offer, then you are required to notify us of the same and we will consider our response.
- ▶ **This letter is written “Without Prejudice Save as to Costs” with the intention that it may be drawn to the Arbitrator`s attention on the issue of costs and not otherwise”.**

IMPORTANT ELEMENTS OF CALDERBANK OFFER

- ▶ It should :
- ▶ BE SERVED ON SOMEONE AUTHORISED TO DEAL WITH THE CASE
- ▶ CLEARLY STATE THE (RENTAL) OFFER BEING MADE
- ▶ STATE A DATE FOR ACCEPTANCE WHICH PROVIDES A REASONABLE TIME FOR THE PARTY RECEIVING THE OFFER TO TAKE ADVICE AND CONSIDER IT.
- ▶ *Q. WHAT IS A REASONABLE TIME PERIOD*
- ▶ *A. 21 DAYS IS SAFE*
- ▶ STIPULATE THE CONDITIONS WHICH APPLY IF IT IS ACCEPTED ,ie, each side pay own costs and 50% of Arbitrator`s fees
- ▶ STIPULATE THE CONDITIONS WHICH APPLY IF IT IS NOT ACCEPTED IN THAT TIMEFRAME ie, OTHER SIDE TO PAY ALL OF ARBITRATOR`S COSTS AND ALL YOUR SIDES COSTS
- ▶ STATE THAT IT IS NOT A VALUATION IT IS A COMPROMISE OFFER TO SETTLE THE DISPUTE
- ▶ NOTIFY THE OTHER SIDE THAT IT WILL BE PRESENTED TO ARBITRATOR ON ISSUE OF COSTS
- ▶ *OPTIONAL VERSION*
- ▶ *IT CAN STATE THAT THE OFFER IF NOT ACCEPTED (IN 21 DAYS) WILL BE WITHDRAWN BY A CERTAIN DATE - ie, not left on the table for the other side to accept - particularly post delivery of Written Reports to Arbitrator (or Expert)*
- ▶ *There is some debate as to whether withdrawn Calderbanks are still valid - I believe so.*
- ▶ **NB CALDERBANKS ARE BINDING. IF YOUR OFFER IS ACCEPTED THAT IS A BINDING AGREEMENT**

Q. HOW DOES ARBITRATOR MAKE AN AWARD ON COSTS ?

- ▶ A. HE RECEIVES WRITTEN REPORTS (& REPLIES) ON COSTS FROM THE PARTIES
- ▶ THESE REPORTS WILL SPECIFY THE CLAIM THAT EACH PARTY IS MAKING AS TO HOW COSTS SHOULD BE AWARDED
- ▶ Q. WHAT COSTS CAN BE CLAIMED ?
- ▶ A. THE CLAIM / RECOVERABLE COSTS ARE THE ARBITRATOR'S FEES AND EXPENSES, THE FEES AND EXPENSES OF AN RICS PRESIDENTIAL APPOINTMENT AND THE LEGAL OR OTHER COSTS OF THE PARTIES. THESE SHOULD BE STATED SEPERATELY IN THE CLAIM
- ▶ EACH PARTY SETS OUT THEIR CASE AS HOW THEY THINK THE ARBITRATOR SHOULD AWARD COSTS ie, ALL TO THE WINNING SIDE, or 50/50 IF THERE IS NO CLEAR WINNER or A PROPORTIONATE AWARD
- ▶ THE GENERAL PRINCIPLE IS THAT *COSTS SHOULD FOLLOW THE EVENT ie, the winner should recover all their costs*
- ▶ *IF ONE PARTY (EXACTLY EQUALS OR) BEATS THEIR CALDERBANK THEY HAVE CLEARLY WON*
- ▶ *ie, if Award is £100,000 pax L/L's valuation at £150,000 pax T's valuation at £90,000 pax BUT L/L's Calderbank is £120,000 pax and T's Calderbank is £105,000 pax. The principle is that L/L should have accepted Ts Calderbank at £105,000 pax and the whole case and all the costs have been incurred because L/L didn't accept - so L/L pays all the costs*
- ▶ *HOWEVER it might not be so clear cut. T Calderbank might be at £95,000 pax - closer than L/L BUT still not 'correct'*
- ▶ *NEITHER PARTY OR ONLY ONE PARTY MAY HAVE CALDERBANKED.*
- ▶ *If Award was £100,000 pax and T's Calderbank was £99,000 pax this is a 'NEAR MISS'*
- ▶ Q. *SHOULD A NEAR MISS COUNT AS A WIN ?*
- ▶ A. *NO DEFINITIVE ANSWER TO THIS. YES IF PARTIES ASKED FOR NEAR MISSES TO COUNT OR IF ARBITRATOR THINKS THE MARGIN IS ACCEPTABLE*
- ▶ Costs may be awarded on an issue-by-issue basis - IE, A PROPORTIONATE AWARD say 75% to 25%
- ▶ Arbitrator has a discretion as to costs - that discretion should be exercised judicially
- ▶ The Award on Costs should be reasoned

AWARD OF COSTS AT COURT ON A LEASE RENEWAL

- ▶ TRIAL JUDGE DECIDES COSTS ON A LEASE RENEWAL
- ▶ IF L/L SUCCESSFULLY OPPOSES GRANT OF A NEW LEASE COSTS WILL PROBABLY BE AWARDED AGAINST THE T
- ▶ IF T OBTAINS A NEW LEASE WHEN L/L OPPOSED, COSTS WILL BE AWARDED AGAINST THE L/L.
- ▶ WHERE BOTH PARTIES AGREE TO THE GRANT OF A NEW LEASE BUT DISAGREE ON THE TERMS, THE COSTS AWARD WILL DEPEND ON HOW CLOSELY THE PROPOSALS OF THE PARTIES WERE REFLECTED IN THE ORDER, ie PROPORTIONATE.
- ▶ Q. DO PARTIES AT LEASE RENEWAL GENERALLY MAKE CALDERBANK OFFERS ?
- ▶ A. NO. THEY GENERALLY MAKE A PART 36 OFFER (**Part 36, Civil Procedure Rules**) (CPR) - NB They can make Calderbanks BUT PART 36 OFFERS ARE MORE COMMON
- ▶ PART 36 OF THE CPR ALLOWS A L/L OR T TO SET OUT THEIR PROPOSALS FOR A NEW LEASE IN A “WITHOUT PREJUDICE” OFFER LETTER - AT ANY STAGE OF THE LEASE RENEWAL PROCESS.
- ▶ THEY CANNOT BE REFERRED TO AT TRIAL. THEY ONLY AFFECT THE OUTCOME WHEN DEALING WITH THE COSTS OF THE COURT PROCEEDINGS.
- ▶ IF AN OFFER IS MADE AND NOT ACCEPTED AND AT TRIAL THE PARTY WHO MADE THE OFFER EQUALS OR BETTERS THE TERMS PROPOSED IN THE OFFER THERE WILL BE COSTS CONSEQUENCES FOR THE OTHER PARTY FOR NOT ACCEPTING. THE OFFER IS OPEN FOR ACCEPTANCE FOR A PERIOD OF NOT LESS THAN 21 DAYS. AFTER THIS PERIOD IT CAN STILL BE ACCEPTED BUT IT IS POSSIBLE FOR THE OFFER TO BE WITHDRAWN BY THE PARTY WHO MADE IT.
- ▶ Q. CAN AN INDEPENDENT EXPERT DECIDE COSTS ON A RENT REVIEW ?
- ▶ A. YES - IF THE LEASE PROVIDES FOR IT. NO IF IT IS SILENT OR SAYS THE COSTS WILL BE SPLIT 50/50
- ▶ IF EXPERT CAN DECIDE COSTS THEY ARE NORMALLY LIMITED TO THE EXPERT`S COSTS ONLY - NOT THE PARTIES COSTS
- ▶ Q. CAN THE PARTIES MAKE CALDERBANKS ?
- ▶ A. YES. EXPERT WILL ASK FOR REPORTS & REPLIES AND DECIDES AS AN ARBITRATOR (NOT as an EXPERT)ie, it`s an Award

POST-DATED EVIDENCE

▶ RENT REVIEWS ARE OFTEN NEGOTIATED OR DECIDED BY ARBITRATOR OR EXPERT MONTHS OR SOMETIMES YEARS AFTER THE ACTUAL RENT REVIEW DATE

▶ Q. IF RENTAL EVIDENCE ARISES POST THE REVIEW DATE IS IT STILL ADMISSIBLE ?

▶ A. HISTORICALLY NO - FOLLOWING CASE LAW

▶ **Ponsford v HMS Aerosols Ltd (1976)**

▶ The learned judge Whitford said this:

▶ *“Now an assertion has been made on the defendants' side that in coming to a conclusion as to what would be the appropriate rent for the period starting on June 25 1975 the person making the assessment is entitled to consider not only the state of the market up to that date but also the way in which the market has subsequently moved ... I think that the only sensible way to give effect to what was agreed between the parties is to hold, as the plaintiffs have suggested that I should hold, that **the assessment should be made in the light of the assessor's knowledge as to the state of the market up to the period when the new rent was due to come into effect, but that there should be omitted from consideration any developments that may have taken place subsequent to that date**”.*

▶ **THIS JUDGEMENT EFFECTIVELY SAID POST-DATED EVIDENCE IS INADMISSIBLE**

▶ **BUT THE POSITION CHANGED FOLLOWING ANOTHER LEGAL CASE**

▶ Q. **WHAT IS THE NAME OF THE CURRENT CASE ON POST-DATED EVIDENCE ?**

A. **SEGAMA NV v PENNY LE ROY LTD (1984) 1 EGLR 109**

- ▶ In an Arbitration Award the Arbitrator took account of rental evidence which occurred after the rent review date and was appealed.
- ▶ In his Award he said *“I accept that the further away from the review date one progresses then the rental evidence will become progressively unreliable as evidence of rental values at that date. This is, however, a question of weight and not admissibility and is a matter for me to consider when reviewing the evidence”*.
- ▶ The first issue for the Court to decide was if evidence of "post-review date comparables", ie, rents of comparable properties agreed after review date should be admissible
- ▶ The Ponsford case was concerned with movement of the market, or with "developments", after the relevant date.
- ▶ The Segama judge said *“I can readily understand why those should be left out of account: the issue was about the market rent on the relevant date, and not what it became thereafter in consequence of change, or movement, or developments”*. He found that new comparable evidence was not a “development” or market movement.
- ▶ HELD The Arbitrator was correct to treat evidence of rents agreed after the review date as admissible and to apply appropriate weight to that evidence.
- ▶ So the position now is that post-dated evidence is admissible and it is down to the Arbitrator or Expert to accord it appropriate weight.
- ▶ Q. *WHEN WOULD BE TOO LONG A PERIOD FOR POST-DATED EVIDENCE TO BE ADMISSIBLE ?*
- ▶ A. *NO DEFINITIVE ANSWER - A QUESTION OF DEGREE AND PREDICTABILITY - ie, in a flat market a transaction 6, 9 or more months later may still be relevant as evidence - But in a rapidly rising or falling market a lesser period may be more appropriate*
- ▶ *Was the post-dated evidence at a rental level that was reasonably predictable, ie, was there a discernible trend which the new evidence followed ? If so it has more relevance and will be accorded more weight than if it was a wholly unexpected new level*

RICS CONFLICTS OF INTEREST

It is important that you are aware of a newly published guidance statement by the RICS
It is to address issues known as `double dipping` (acting for both sides in a transaction) and `dual agency` (introducing a property to more than one party and acting for them all) and principally to govern / manage conflicts of interest.

RICS professional statement, global 1st edition published March 2017

- ▶ This professional statement takes effect from 1 January 2018.
- ▶ RICS Rules of Conduct set an overarching obligation on both members and RICS regulated firms at all times to: *‘Act with integrity and avoid conflicts of interest and avoid any actions or situations that are inconsistent with its professional obligations.’*
- ▶ 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.

RICS CONFLICTS OF INTEREST Cont`d

- ▶ **Conflict of Interest** means:
 - ▶ (a) a situation in which the duty of an RICS member (working independently or within a non-regulated firm or within a regulated firm) or a regulated firm to act in the interests of a client or other party in a professional assignment conflicts with a duty owed to another client or party in relation to the same or a related professional assignment (a **'Party Conflict'**)
 - ▶ (b) a situation in which the duty of an RICS member (working independently or within a non-regulated firm or within a regulated firm) or a regulated firm to act in the interests of a client in a professional assignment conflicts with the interests of that same RICS member/ firm (or in the case of a regulated firm, the interests of any of the individuals within that regulated firm who are involved directly or indirectly in that or any related professional assignment) (an **'Own Interest Conflict'**)
 - ▶ (c) a conflict between the duty of an RICS member (working independently or within a non-regulated firm or within a regulated firm) under paragraph 2.2 to provide material information to one client, and the duty of that RICS member (working independently or within a non-regulated firm) or of a regulated firm under paragraph 2.1 to another client to keep that same information confidential (a **'Confidential Information Conflict'**).

RICS CONFLICTS OF INTEREST Cont`d

- ▶ **‘Confidential Information’** means: confidential information, whether held or disseminated electronically, verbally or in hard copy.
- ▶ **‘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.
- ▶ **‘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 nonregulated firm or within a regulated firm) or a regulated firm to advise or act fully in the interests of a client.

DIFFERENT BASES FOR REVIEWING RENT

- ▶ Q. HOW MANY DIFFERENT WAYS CAN YOU THINK OF TO REVISE A RENT ?
- ▶ A`s. OPEN MARKET RENT REVIEW
- ▶ UPWARDS ONLY - UPWARDS & DOWNWARDS
- ▶ FIXED UPLIFT TO SET RENTS ie, Initial rent £1m Rent at yr 5 £1.25m Rent at yr 10 £1.5m
- ▶ CAPPED UPLIFT ie Rent at yr 5 cannot increase beyond 115%
- ▶ COMPOUND INTEREST UPLIFT ie 2.5% per annum - APPLIED ANNUALLY OR 5 YEARLY
- ▶ RPI (Retail Price Index) UPLIFT or CPI (Cost Price) UPLIFT
- ▶ RPI CAPPED & COLLARED say 4% (max increase) and 1% (min increase)
- ▶ BASE RENT + TURNOVER TOP-UP WITH/WITHOUT TURNOVER THRESHOLD
- ▶ BASE RENT + TURNOVER TOP-UP WITH RATCHET TO RE-SET BASE RENT
- ▶ TURNOVER ONLY
- ▶ NB Where there is a mixture of open market rents and base rents + turnover - beware situation where inadvertently a downwards rent scenario is created because the review clause requires an open market rent which might be below the base rent + turnover top-up currently being paid

Cont`d

- ▶ Q. YOU ARE L/L OF QUALITY SHOPPING CENTRE - WHAT REVIEW BASIS DO YOU CHOOSE ?
- ▶ A. OPEN MARKET or BASE + TURNOVER TOP-UP - AS YOU SEE GROWTH IN RENTS/TURNOVER
- ▶ Q. YOU ARE T OF A GOOD SECONDARY LARGE STORE - WHAT REVIEW BASIS DO YOU CHOOSE
- ▶ A. NO DEFINITIVE ANSWER - BUT POSSIBLY A FIXED CAPPED UPLIFT TO LIMIT ANY UPLIFT
- ▶ Q. ARE THERE ANY LIMITS ON THE RENTAL INCREASE AT OPEN MARKET RENT REVIEW ?
- ▶ A. NO. RENT COULD DOUBLE OR TRIPLE UNLESS THERE IS ANY CAP IN PLACE
- ▶ Q. RPI BASED RENTS WITH CAP & COLLAR LIMIT INCREASES TO ECONOMIC GROWTH AS MEASURED BY RPI - WHAT ARE THE DRAWBACKS OF THIS REVIEW BASIS ?
- ▶ A. RPI INCREASES OVER A PERIOD OF TIME MAY INCREASE THE RENT BEYOND OPEN MARKET LEVEL
- ▶ Q. WHY DO L/L`S OPT FOR BASE RENT (say 80%) + TURNOVER TOP-UP ?
- ▶ A. OPTIMALLY SO THAT THEY ENJOY T`s UPSIDE IF TRADING WELL - BUT DEFENSIVELY IF THEY CANNOT MAINTAIN A RENTAL TONE AT A 100% RENT
- ▶ Q. COMPOUND RENT INCREASES (say 2.5% per annum) MEAN THAT RENT DURING WHOLE TERM IS KNOWN - WHAT ACCOUNTING ISSUES ARISE WITH A LEASE OF THIS NATURE ?
- ▶ A. FOR ACCOUNTING PURPOSES THIS COUNTS AS A FINANCE LEASE (not an occupational lease) and so the total rent is averaged over the term and T must account for the average rent (not the rent passing)
- ▶ We will look at the wording / form of some of these different bases of reviewing rent

OPEN MARKET RENT REVIEW SUBJECT TO 80% GEARING WITH & A CAP

- ▶ In this case the rent review clause requires an open market rent to be agreed BUT only 80% of that rent will actually be payable and there is also a cap on the maximum rental increase which will apply
- ▶ *The open market rent shall be the yearly rent for which the Demised Premises might reasonably be expected to be let on the open market, with vacant possession, on the Rent Review Date, by a willing lessor to a willing lessee,*
- ▶ *but excluding the personal concession to the tenant and the Turnover Rent Provisions*
- ▶ *The Basic Rent payable under this Lease shall be reviewed on each of the Rent Review Dates and with effect from the Rent Review Date shall be the higher of:*
 - ▶ *the Basic Rent reserved by this Lease immediately before the Rent Review Date and*
 - ▶ *the open market rent on the Rent Review Date*
- ▶ *Provided that the Basic Rent payable will*
- ▶ *(i) be the higher of the Basic Rent payable immediately before the Rent Review Date and 80% of the open market rent at the Rent Review Date and*
- ▶ *(ii) will not be increased at review by more than 15% - ie, the rent cannot go up by more than 115%*

MIXTURE OF COMPOUND INTEREST UPLIFT & OPEN MARKET VALUE (OMV)

- ▶ EXAMPLE OF A LEASE ON A DEPARTMENT STORE FOR 35 YEARS
- ▶ The lease sets out the **annual fixed rental increases** for years 1 to 10, which equate to **3.00% per annum** until 2020.
- ▶ Thereafter the **rent is reviewed five yearly to the higher of** open market value, the passing rent or further fixed uplifts (2.5%) for years 11, 16, 21 and 26

▶ Year	Rental Uplift	Rent (pa)
▶ Sep-16	3.00%	£1,436,877
▶ Sep-17	3.00%	£1,479,983
▶ Sep-18	3.00%	£1,524,383
▶ Sep-19	3.00%	£1,570,114
▶ Sep-20	Higher of Year 10 or OMV	£1,570,114
▶ Sep-25	Higher of 2.50% or OMV	£1,776,440
▶ Sep-30	Higher of 2.50% or OMV	£2,009,879
▶ Sep-35	Higher of 2.50% or OMV	£2,273,994

- ▶ In this case at year 2020 you assess the open market rent and that rent is payable if it is higher than the compound increase rent (£1,570,114) - if not then £1,570,114 is payable

WORDING FOR RPI BASED RENT REVIEW - This one is to higher of Open Market rent or current rent with RPI uplift every 5 years.

- ▶ **"Base Figure"**
- ▶ the Index figure for *[insert month and year]* or (if none) the nearest Index figure in time prior to *[insert month and year]*;
- ▶ **"Index"**
- ▶ the Retail Prices Index published by the Office for National Statistics or any official publication substituted for it;
- ▶ **"Index Figure" "Indexed Rent"**
- ▶ a figure calculated in accordance with the following formula:
- ▶ Where:
- ▶ A = the Initial Rent
- ▶ B = Index figure for the month immediately before the relevant review date and
- ▶ C = Base Figure
- ▶ Provided that for the purposes of calculating the Indexed Rent, in each individual year between Review Dates it shall be assumed that the Index figure shall increase by no more than 4% nor less than 1% and "B" shall be the sum of the Index figures for each year between the Review Dates as so adjusted.
- ▶ A definition of the terms is required because the basis of government Index might change
- ▶ We will now look at an example of an RPI rent review to open market or RPI whichever is higher

RPI FIGURES TO CALCULATE RPI INCREASE ON A RENT REVIEW W/E NOV 2016
 (2011 RENT IS £60,085.80 pax) AND THERE IS A 1% COLLAR AND A 4% CAP

RPI (BASE 100 AT 1987)

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
2016	258.8	260.0	261.1	261.4	262.1	263.1	263.4	264.4	264.9	264.8	265.5	267.1
2015	255.4	256.7	257.1	258.0	258.5	258.9	258.6	259.8	259.6	259.5	259.8	260.6
2014	252.6	254.2	254.8	255.7	255.9	256.3	256.0	257.0	257.6	257.7	257.1	257.5
2013	245.8	247.6	248.7	249.5	250.0	249.7	249.7	251.0	251.9	251.9	252.1	253.4
2012	238.0	239.9	240.8	242.5	242.4	241.8	242.1	243.0	244.2	245.6	245.6	246.8
2011	229.0	231.3	232.5	234.4	235.2	235.2	234.7	236.1	237.9	238.0	238.5	239.4

- ▶ CALCULATE INCREASE IN RENT FROM NOV 2011 TO NOV 2016
- ▶ CALCULATE %age INCREASE FOR EACH YEAR ENDING NOVEMBER
- ▶ DOES IT FALL BELOW 1% - IF SO STILL APPLY 1% - DOES IT EXCEED 4% - IF SO THEN ONLY ADD 4%

▶ ANSWER	PASSING RENT	£60,085.80
▶	RPI for Start month / year	238.5
▶	RPI for End month / year	265.5
▶	Percentage change	11.32%
▶	RPI Adjusted Rent per annum	£66,886.62

- ▶ NB In the above case the rent increases were not below 1% or above 4% and the resultant rent was way above the open market rent.

TURNOVER RENT WORDING - example T pays base rent (say 80% of open market rent) + a turnover top-up at say 6% of Gross turnover where that figure exceeds the base rent.

- ▶ The rent review provisions seek an open market rent to be agreed/decided - but the rent payable will be 80% thereof + any turnover top-up. For example -:
- ▶ Open market rent say £100,000 pax. So base rent is £80,000 pax. Turnover for year say £1m. Turnover top-up would be £0 pax (6% of £80,000 is £1.33m).

BUT if Turnover £2m then Turnover top-up is £40,000 pax (£2m at 6% = £120,000 less base rent £80,000)

So rent payable (with turnover top-up) is £120,000 pax.

- ▶ The lease will contain many definitions to ensure that a full/true Gross Turnover is derived to assess the turnover top-up

▶ Turnover Rent Provisions

- ▶ "Turnover Period" means each period of 12 months during the Term ending on an Account Date
- ▶ "Turnover Certificate" means a certificate signed by or on behalf of the Tenant certifying the amount of the Gross Turnover for the Turnover Period in question and the number of days of Closure in the Turnover Period.
- ▶ "Turnover Rent Percentage" means (say) 6% of Gross Turnover.
 - ▶ "Gross Turnover" means the aggregate of all sums of money or other consideration received or receivable for all goods sold leased hired or otherwise disposed of and for all services sold or performed and from all business of any nature whatever conducted at in from or upon the Demised Premises or any part of it by the Tenant and any other occupant whatsoever without prejudice to the generality of the above shall include : sales -business transmitted from or satisfied elsewhere but performed from the Demised Premises - all income from advance mail electronic telephone computer or similar orders received or fulfilled at or from the Demised Premises - the value of gift vouchers purchased at the Demised Premises;
 - ▶ In calculating the amount of the Gross Turnover no deduction shall be made for:doubtful debts
 - ▶ (in the case of transactions paid by credit or charge card) discounts or commissions payable by the Tenant to the provider of the credit