DOUG STEVENS SEMINAR

- MONDAY 24th JULY 2017
- 08.00HRS TO 09.00HRS

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

- SUBJECT

1. *PROPERTY CASE LAW YOU SHOULD KNOW*
2. *OPEN QUESTIONS*

SEMINAR BY DOUG STEVENS TO 1st & 2nD YEAR GRADUATES

DELIVERED AS A POWERPOINT PRESENTATION

NEXT SEMINAR 21st AUGUST

VALUATION - Permissible margins of error

- A PROPERTY VALUATION CAN BE NEGLIGENT IF IT IS OUTSIDE A "PERMISSIBLE MARGIN FOR ERROR".
- Q. WHAT WOULD YOU REGARD AS AN ACCEPTABLE MARGIN OF ERROR?
- A. CASE LAW CURRENTLY SETS THE FOLLOWING MARGINS -:
- 5% FOR SIMPLE RESIDENTIAL PROPERTY VALUATIONS,
- 10% FOR ONE-OFF COMMERCIAL PROPERTY VALUATIONS
- 15% WHERE THERE ARE "EXCEPTIONAL FEATURES".
- A CASE CAN BE MADE FOR HIGHER MARGIN THAN 15% - MANY COMMERCIAL VALUATIONS ARE MORE THAN 10% OUT.
- CASE LAW DEFINES 2 PRINCIPAL TYPES OF VALUATION NEGLIGENCE
- MISTAKE IN MEASUREMENT, GLARING OMISSION OF SOMETHING IMPORTANT, MISCALCULATION.
- VALUATION PRODUCED IS OUTSIDE AN ACCEPTED 'MARGIN FOR ERROR. OFTEN NO TECHNICAL MISTAKE BUT THE VALUATION IS OUTSIDE THE BOUNDARIES OF WHAT A COMPETENT VALUER WOULD BE EXPECTED TO PRODUCE
- Singer and Friedlander v John D Wood & Co [1977] 243 EG 212
- states that the margin of error can be 10% either side of a figure that can be said to be the right figure that a competent careful and experienced valuer arrives at after making all the necessary enquiries and paying property regard to the state of the market.
- **Capita Alternative Fund Services (Guernsey) Limited and Matrix Securities Limited V Drivers Jonas [2011]**
- Factory Outlet Centre (FOC) in an Enterprise Zone, Drivers Jonas lacked experience in valuing FOCs and EZ tax vehicles. Consequently they failed to identify/investigate key issues.
- HELD that the key measure of negligence was whether valuation fell within acceptable margin. Competent valuation in range £31.9m and £36.7m). BUT DJ valuation £48.1m.
- Damages assessed at the difference between what the companies paid for the property and what they would have paid for it based upon an accurate valuation. In this case £12m.
- THE ACCEPTABLE MARGIN FOR ERROR CAN VARY DEPENDING ON THE STATE OF THE MARKET AND THE TYPE OF PROPERTY. FOR INSTANCE, IF THE MARKET IS PARTICULARLY VOLATILE, OR VERY FLAT, SO THAT IF THERE ARE NOT MANY COMPARABLES, THE MARGIN WILL BE WIDER

MEASUREMENT

- **IF YOU EACH MEASURED THIS ROOM YOU WOULD END UP WITH SLIGHTLY DIFFERENT MEASURED AREAS**
- A SIGNIFICANT PERCENTAGE OF VALUATION NEGLIGENCE CLAIMS ARE DUE TO MIS-MEASUREMENT
- **Q WHAT MARGIN OF ERROR (DIFFERENCE) IS PERMISSIBLE FOR MEASUREMENT**
- **A 1% + / -**
- There is case law on the measurement of buildings, see: -
- *Kilmartin SCI (Hulton House) Limited and Safeway Stores*
- This involved a convenience store to be created in Fleet Street for which Safeway Stores had outbid Sainsburys. Safeway entered into an Agreement for Lease with Kilmartin for the store to be created and to provide 6,000 sq ft net internal area.
- Upon Practical Completion of the building there was a dispute between the parties as to whether the building created did actually provide 6,000 sq ft NIA.
- Each party had an Expert Witness who measured the store and they arrived at different conclusions.
- The judge's ruling was that measurements cannot be 100% accurate but should be accurate to within +/- 1%.
- This case looked closely at what the definition of net internal area (NIA) meant and concluded that it is "the usable area within a building measured to the internal face of the perimeter walls at each floor level". In this case ramps were not regarded as useable.
- The outcome of the case was that the NIA was in excess of the minimum area of 6,000 sq ft and accordingly Kilmartin's claim for specific performance of the Agreement for Lease was successful and Safeway were required to take the store.

COMPETITION ACT 1998

- Competition Act 1998 deals with restrictive practices engaged in by companies operating within the UK that distort, restrict or prevent competition.
- Property transactions – referred to in the Act as "Land Agreements" were excluded from the provisions of the Act. However the exclusion of Land Agreements from the Competition Act 1998 was revoked with effect 6 April 2011.
- Restrictive users, exclusivity agreements can be held to be anti-competitive
- Q. CAN RESTRICTIVE USERS & EXCLUSIVITY AGREEMENTS STILL BE GRANTED
- A. YES - SUBJECT TO CERTAIN PARAMETERS
- Martin Retail Group v Crawley BC (2013)
- Crawley Borough Council (CBC) managed a parade of shops on a housing estate
- Martin Retail Group (MRG) wanted to sell groceries (alongside news, confectionery, tobacco & stationery products)
- This activity prevented by strict user clause in MRG's lease (whereby CBC's letting scheme sought to control the retail mix)
- MRG requested a wider user clause as part of its 2011 lease renewal
- There was already a supermarket/convenience store in the parade.
- So CBC denied MRG's request
- Case heard by London County Court. Decision was that the user restriction was anti-competitive. MRG allowed to sell groceries

RENT REVIEW – WILLING LANDLORD & WILLING TENANT

- WILLING LANDLORD + WILLING TENANT in most rent review clauses (not in S.34 L & T Act 1954)
- **F. R. Evans (Leeds) v. English Electric (1978)** hypothetical L/L & T – It defines the characteristic of the willing landlord and the willing tenant
- VALUED ON ASSUMPTION THAT
- LANDLORD IS WILLING TO LET ON THE REVIEW DATE - IS NOT AFFECTED BY CASH-FLOW PROBLEMS – CANNOT WAIT FOR A PREFERRED TENANT TO TAKE OCCUPANCY OR FOR THE RENTAL MARKET TO PICK UP LANDLORD MUST ACKNOWLEDGE ALL THE FACTORS AFFECTING THE MARKETABILITY OF THE PREMISES, INCLUDING THE MARKET RENT OF PREMISES WHICH ARE COMPARABLE OR WOULD BE CONSIDERED AS VIABLE ALTERNATIVES BY A POTENTIAL TENANT.
- TENANT WILL BE DEEMED AS ACTIVELY SEEKING THE LETTING IN QUESTION - NOT AFFECTED BY LIQUIDITY PROBLEMS OR AS SEEKING A DISCOUNT ON THE BASIS THAT THE LETTING DOES NOT FULFIL ITS PARTICULAR NEEDS – WILL BE AWARE OF ALTERNATIVES
- LANDLORD CANNOT PUSH DEMAND FOR RENT TO LEVEL AT WHICH TENANT BECOMES UNWILLING
- **Dennis & Robinson ltd v Kiossos Establishment [1987]**
- **CASE WHERE NO MENTION MADE OF WILLING TENANT**
- **HELD** – IN ORDER TO GIVE FULL EFFECT TO ESTABLISHING AN OPEN MARKET RENT THE COURT HELD THAT IT MUST BE ASSUMED THAT THERE IS A WILLING LANDLORD AND A WILLING TENANT.
- " THOUGH IT IS ASSUMED THAT THERE IS A MARKET, THERE IS NO ASSUMPTION REQUIRED AS TO HOW LIVELY THAT MARKET IS. THE STRENGTH OF THE MARKET AND THE RENTAL VALUE OF THE PREMISES IN THE MARKET ARE MATTERS FOR THE VALUER'S DISCRETION BASED ON HIS OWN KNOWLEDGE AND EXPERIENCE OF THE LETTING VALUE OF SUCH PREMISES."

RENT REVIEW – ASSUMED SPECIFICATION OF THE PROPERTY

- SPECIFICATION – DOES THE LEASE REQUIRE YOU TO ASSUME THAT THE SPECIFICATION IS SHELL OR FITTED OR PART FITTED? ARE THERE ANY SCHEDULES OF FIXTURES AND FITTINGS ATTACHED? THE LEADING CASE ON THE ASSUMPTIONS WHICH ARE TO BE MADE REGARDING THE SPECIFICATION OF A UNIT IS
- London and Leeds Estates Ltd v Paribas Ltd [1995]
- *" the demised premises are fit for immediate occupation and use and that all fitting out and other tenant's works required by such willing tenant have already been completed "*
- *Q. WHAT DOES THIS MEAN - DO WE VALUE FITTED OR SHELL ?*
- THIS IS AN IMPORTANT JUDGEMENT. IT DETERMINED THAT WHERE SUCH WORDING OCCURS IT IS VALUATION NEUTRAL,
- Ie, IT DOES NOT MEAN THAT THE LANDLORD CAN VALUE FIXTURES AND FITTINGS OR THAT THE TENANT CAN ARGUE FOR A RENT FREE PERIOD FOR FITTING OUT.
- HOWEVER VARIATIONS ON THIS WORDING MAY MEAN THAT FIXTURES AND FITTINGS ARE TO BE VALUED.

RENT REVIEW – ADMISSIBILITY OF TRADING FIGURES

- Q. CAN YOU TAKE ACCOUNT OF TRADING FIGURES AT RENT REVIEW ?
- A. NO DISREGARDS OF TENANTS OCCUPATION & TENANTS GOODWILL – assume vacant possession & ignore tenants goodwill, ie, their established business – you cannot take account of their trading performance/ trading accounts even if you have this information
- Q WHY NOT ?
- A THIS WOULD CONFLICT WITH VACANT POSSESSION ASSUMPTION

  THE TRADING FIGURES WOULD NOT BE IN THE PUBLIC DOMAIN

  Cornwall Coast Country Club v Cardgrange Ltd [1987] 1 EGLR 146

ONE OF THE ISSUES ON AN "OPEN MARKET" RENT REVIEW WAS WHETHER THE TENANT SHOULD GIVE DISCOVERY OF DOCUMENTS RELATING TO THE PROFITS EARNED BY ITS GAMING BUSINESS. SCOTT J HELD THAT THERE WAS NO DOUBT THAT THE ARBITRATOR WAS ENTITLED TO TAKE INTO ACCOUNT THE INCOME-EARNING CAPACITY OF THE PREMISES BUT WENT ON TO HOLD (IN ESSENCE) THAT UNLESS THE EVIDENCE WOULD HAVE BEEN AVAILABLE IN THE MARKET TO PROSPECTIVE LESSEES IT WAS NOT ADMISSIBLE SINCE IT WOULD NOT HAVE INFLUENCED THE DEAL WHICH WOULD HAVE BEEN STRUCK BETWEEN THE HYPOTHETICAL PARTIES.

AT APPEAL, MR NEUBERGER HAS SUBMITTED THAT THE LEARNED JUDGE WAS WRONG. HE SAID THAT EVIDENCE OF ACTUAL EARNINGS, EVEN IF NOT AVAILABLE IN THE OPEN MARKET, WAS ADMISSIBLE TO TEST THE VALUE OF EXPERT ESTIMATES OF WHAT THE PROFIT-EARNING CAPACITY WOULD HAVE BEEN. IF IT SHOWED, AS APPEARED HERE TO BE THE CASE, THAT ACTUAL PROFITS WERE NOTHING LIKE WHAT THE EXPERT SAID THE MARKET WOULD HAVE ASSUMED, THE ARBITRATOR WOULD BE ENTITLED TO TAKE THAT INTO ACCOUNT IN ASSESSING THE VALUE OF THE EXPERT'S EVIDENCE. IN MY JUDGMENT, THIS SUBMISSION IS BASED UPON A FALSE ASSUMPTION ABOUT THE ISSUE BEFORE THE ARBITRATOR. HE IS CONCERNED NOT WITH THE ACTUAL EARNING CAPACITY BUT WITH HOW THE MARKET WOULD HAVE ASSESSED EARNING CAPACITY. THE OPEN MARKET MAY BE A FALSE MARKET IN THE SENSE THAT IT IS BASED UPON FALSE ASSUMPTIONS, BUT IT IS STILL THE OPEN MARKET. I DO NOT SEE HOW INFORMATION ABOUT PROFITABILITY WHICH THE MARKET DID NOT KNOW CAN BE RELEVANT TO THE QUESTION OF WHAT THE MARKET WOULD HAVE THOUGHT.

RENT REVIEW
TIME TRAPS – IS TIME OF THE ESSENCE?

- THE LEASE MAY CONTAIN TIMETABLES FOR THE SERVICE OF LANDLORD'S RENT REVIEW NOTICE OR TENANT'S COUNTER-NOTICE OR MAY SET A TIMETABLE FOR THE APPOINTMENT OF AN ARBITRATOR.
- YOU NEED TO CAREFULLY RECORD ANY SUCH MECHANISMS BECAUSE TIME MAY BE OF THE ESSENCE AND FAILURE TO ADOPT THE CORRECT TIMESCALES MAY RESULT IN THE LOSS OF THE ABILITY TO EXERCISE THE REVIEW OR THE ACCEPTANCE OF A TENANT'S RENTAL OFFER OR THE INABILITY TO HAVE AN ARBITRATOR APPOINTED.
- SEE CASE LAW BELOW:
- *United Scientific Holdings Ltd v Burnley Borough Council* ([1978] - Time is not of the essence unless it is stated to be.
- DEEMING PROVISIONS – Words that make Time of The Essence – In relation to service of notices or reference to 3rd party, ie *"but not at any at other time"*
- *Mecca Leisure Ltd v Renown Investments (Holdings) Ltd.*
- Starmark Enterprises Limited -v- CPL Distribution Limited
- Secretary of State for Communities and Local Government v Standard Securities Ltd

RENT REVIEW HEADLINE RENT CASE LAW

- HEADLINE RENT CLAUSES SEEK TO IGNORE ALL INDUCEMENTS NORMALLY AVAILABLE IN THE MARKET AT THE TIME OF THE REVIEW. THE "HEADLINE RENT" CASES OF 1994 WERE FOUR APPEALS HEARD SIMULTANEOUSLY BY THE COURT OF APPEAL AS TO WHETHER FOUR RENT REVIEW CLAUSES ACHIEVED THIS
- (CO-OPERATIVE SOCIETY LIMITED V NATIONAL WESTMINSTER BANK PLC)
- THREE SIMILAR CLAUSES SOUGHT TO DO SO BY DIRECTING A DISREGARD OF ANY EFFECT ON RENT OF ALL SUCH INDUCEMENTS. THE COURT OF APPEAL HELD THAT THIS DID NOT RESULT IN HEADLINE RENTS BECAUSE THE HYPOTHETICAL TENANT WOULD KNOW THAT HE WOULD NOT GET THE BENEFIT OF ANY SUCH INDUCEMENTS AND SO WOULD OFFER A COMMENSURATELY LOWER RENT TO TAKE ACCOUNT OF THAT FACT.

- IN THE FOURTH CASE, BROADGATE SQUARE-V-LEHMAN BROTHERS, THE DEFINITION OF THE REVIEWED RENT WAS "THE BEST RENT WHICH WOULD REASONABLY BE EXPECTED TO BECOME PAYABLE AFTER THE EXPIRY OF A RENT-FREE PERIOD OF SUCH LENGTH AS WOULD BE NEGOTIATED IN THE MARKET UPON A LETTING OF THE PREMISES AS A WHOLE". THE COURT OF APPEAL HELD THAT THIS WORDING LEFT NO ALTERNATIVE TO A HEADLINE RENT.
- IN BROADGATE SQUARE PLC V LEHMAN BROTHERS LTD THE LEASE PROVIDED FOR THE RENT TO BE REVIEWED TO THE BEST YEARLY RENT REASONABLY TO BE EXPECTED AFTER EXPIRY OF A RENT--FREE PERIOD OF SUCH LENGTH AS WOULD BE NEGOTIATED IN THE OPEN MARKET ON A LETTING OF THE WHOLE OF THE PREMISES, BETWEEN WILLING PARTIES, WITH VACANT POSSESSION WITHOUT FINE OR PREMIUM. THE COURT HELD THAT REFERENCE TO THE RENT--FREE PERIOD BEING OF "SUCH LENGTH AS WOULD BE NEGOTIATED IN THE OPEN MARKET" MADE IT IMPOSSIBLE TO RESTRICT THE WORDS TO ONLY RENT--FREE PERIODS FOR A TENANT HAVING TO MOVE IN/FIT OUT.
- THE COURTS TRY TO CONSTRUE HEADLINE RENT CLAUSES SO AS TO FAVOUR THE TENANT WHEREVER POSSIBLE.

RENT REVIEW HEADLINE RENT & 'DAY ONE RENT'

- Broadgate Square-v-Lehman Brothers Where the following wording was adopted:
- " .. the best yearly rent which would reasonably be expected to become payable after the expiry of a rent-free period of such length as would be negotiated in the market upon a letting of the Premises as a whole....."
- THIS WORDING DOES NOT LIMIT THE INCENTIVES TO RENT FREE OR CAPITAL WHICH WILL BE THE EQUIVALENT OF THE PERIOD FOR FITTING OUT A UNIT – IT REQUIRES THE DISREGARD OF ALL INCENTIVES AND THEREFORE CONFERS A HEADLINE RENT.
- Rent reviews now seek to avoid headline rents and adopt wording similar to the following:
- "There shall be no discount, reduction or allowance to reflect (or compensate any incoming tenant for the absence of) any rent free or concessionary rent period which reflects the time it would take for the incoming tenant to fit out the demised premises so as to be ready for immediate use or any capital payment or other consideration in lieu thereof and which will be granted to the willing lessee in the open market at the relevant review date so that such open market rent shall be that which will be payable after the expiry of any such rent free or concessionary rent period for fitting out purposes which the willing lessee shall hereby be assumed to have enjoyed.
- DISREGARD ONLY IN RELATION TO FITTING OUT PERIOD – The wording above seeks to achieve what is referred to as a DAY ONE rent i.e. at rent review a tenant cannot argue that they require a rent free period to fit out the unit because they are already assumed to have had the benefit of such rent free period.
- Ie at rent review the tenant pays rent on `day one` of the assumed new lease

DISPUTE PROCEDURE

- HOW IS RENT REVIEW DECIDED IF PARTIES CAN'T NEGOTIATE A SETTLEMENT?
- LEASE NORMALLY PROVIDES FOR PARTIES TO APPLY TO RICS TO APPOINT AN ARBITRATOR OR EXPERT? -

  WHO CAN APPLY? – L/L OR T or either?
- Q. IF L/L ONLY CAN APPLY AND REFUSES TO DO SO WHAT CAN THE T DO?
- A. MAKE TIME OF THE ESSENCE
- In ***Barclays Bank plc v Savile Estates Limited [2002] EWCA Civ 589***, the Court of Appeal implied a time limit on the grounds of business efficacy. The rent review clause allowed the landlord (but not the tenant) to apply to the RICS for the appointment of an independent surveyor to determine the revised rent if the landlord and the tenant failed to agree the new rent by the review date. There was no time limit for the landlord making that application. The Court of Appeal held that the landlord had to make the application to the RICS within a reasonable time after the review date and the tenant was entitled to serve a notice making time of the essence in relation to that implied time limit.
- 3RD PARTY CAPACITY - ARBITRATOR (Umpire) or INDEPENDENT EXPERT - some lease give L/L option to choose?
- ARE THERE SET TIME FRAMES IN THE LEASE FOR MAKING APPLICATIONS –
- ARE THERE SET TIME FRAMES IN THE LEASE FOR THE EXPERT TO MAKE DETERMINATION

LEASE RENEWAL S.30(f)
DEMOLISH RECONSTRUCT / SUBSTANTIAL WORK OF CONSTRUCTION

LANDLORD & TENANT ACT 1954 Grounds to refuse new lease at renewal

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".

Ivorygrove Ltd. v. Global Grange Ltd
Held that works ancillary to demolition and reconstruction may be considered when looking at the totality of the work, provided they were on the "holding", and that there was nothing in Ground (f) which required the demolition or construction of structural or load-bearing features. Whether the relevant parts of the premises are load-bearing is simply one of the factors to be taken into account in determining whether there would be "demolition or reconstruction, or demolition or reconstruction of a substantial part, or substantial work of construction on the holding or part of it".

Pumperninks 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. This satisfied S.30 (f)

LEASE RENEWAL S.30(f)
PLANNING PERMISSION

- If the proposed building operations relied upon by the landlord would require 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”.
- **Betty’s Cafe ltd v Phillips Furnishing Stores Ltd: hl 1958**
- Lord Denning said: ‘Provided, however, that the notice is a good and honest notice when it is given, then it is clear to my mind that the ground stated therein must be established to exist at the time of the hearing . . To succeed [the landlord] must satisfy the trial judge that, at the time when the court comes to make its order, he is then willing to provide alternative accommodation, or then intends to reconstruct, or as the case may be . . In short, it comes to this: the landlord must honestly and truthfully state his ground in his notice and he must establish it as existing at the time of the hearing.’
- Substantial works must be to the Holding
- Marazzi v. Global Grange Ltd. and Ivorygate Ltd. v. Global Grange Ltd.
- The same landlord sought to get v/p of both buildings for a large hotel
- Won Ivorygate case because works were substantial in own right
- Lost Marazzi case because scope of works on this holding was limited

LEASE RENEWAL
PACT (PROFESSIONAL ARBITRATION ON COURT TERMS)

- What are the principal benefits of P.A.C.T?
- EXPERTISE Decision maker has relevant experience and knowledge in the subject matter
- FLEXIBLE Procedure is flexible and parties have control
- QUICKER Proceeds quickly or at a pace agreed by the parties
- CHEAPER Greater certainty in terms of costs which will be < Court costs
- When can P.A.C.T. be used?
- Tenant wishes to take up new tenancy and landlord does not oppose
- One party has made application to the court to fix the terms of the new tenancy (parties can agree to withhold making an application)
- Both parties agree to refer issues which are not agreed to an arbitrator or independent expert
- In *PGF II SA v OIMFS Company 1 Limited* (2013) the Court of Appeal held that it was unreasonable, except in limited circumstances, for a litigant to fail to respond to a proposal to mediate a dispute.
- Party rejecting offer of PACT or mediation may be punished by award of costs if unsuccessful ar Court

ALIENATION

- Q. WHAT ACT GOVERNS ACTIONS OF LANDLORD CONSIDERING TENANT`S APPLICATION FOR LICENCE TO ASSIGN ?
- A, LANDLORD & TENANT ACT 1988 S.1 LANDLORD MUST ACT REASONABLY –
- NO DELAYS – OBJECTION ON LEGITIMATE GROUND ONLY – see case law
- GO WEST V SPIGAROLO [2003] QB 1140
- LANDLORD & TENANT ACT 1988 It is simply now a case of whether or not that refusal was "reasonable". Here is was not, hence damages for the tenant.
- DESIGN PROGRESSION V THURLOE PROPERTIES [2004] EWHC 324
- THE TENANT APPLIED FOR A LICENCE TO ASSIGN. THE LANDLORD FAILED TO REPLY, ANTICIPATING THAT DELAY WOULD ALLOW IT TO GENERATE A BETTER LEASE RENEWAL.
  HELD: THE DELAY WAS UNREASONABLE AND A BREACH OF THE LANDLORD'S STATUTORY DUTY, AND WAS AN ACT CALCULATED FOR ITS OWN FINANCIAL ADVANTAGE. THE COURT AWARDED EXEMPLARY DAMAGES

ALIENATION
AGA'S

- 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.
- S.24(2) of the Act states that where a tenant is released from its covenants, a guarantor is also released "to the same extent as" the tenant. Where the tenant is only released from its obligations under the lease in so far as he is required to re-assume them under an AGA, equally the assignor's guarantor may be released from its obligations only to the same extent and may, accordingly, be required to guarantee the assignor's liability under the AGA

UNDERLETTING AT MARKET RENT

- TENANT APPLIES FOR LANDLORDS CONSENT & LICENCE TO UNDERLET
- LANDLORD CHECKS LEASE FOR SPECIAL CONDITIONS
- LANDLORD MUST ACT REASONABLY – L& T ACT 1988 S.1
- NO DELAYS – OBJECTION ON LEGITIMATE GROUND ONLY – see case law
- SUPERIOR LANDLORDS CONSENT OR DISCHARGE OF CHARGE?
- LANDLORD GRANTS LICENCE TO UNDERLET

- MOST MODERN LEASES PROVIDE THAT UNDERLETTING IS AT MARKET RENT
- CASE LAW:-
- BLOCKBUSTER ENTERTAINMENT V BARNSDALE [2003] EWHC 2912
- MOUNT EDEN V FOLIA [2003] EWHC 1815 Ch
- NCR V RIVERLAND [2004] EWHC 2073 (Ch) Sets out 10 principles

ADMINISTRATION CREDITORS VOLUNTARY ARRANGEMENT (CVA)

- Pillar Denton Ltd v GAME Retail Ltd (2014)
- **RENT AS AN ADMINISTRATION EXPENSE**
- G WAS A HIGH STREET RETAILER AND WAS THE TENANT OF HUNDREDS OF RETAIL PROPERTIES. THE RENT FOR MOST OF THOSE PROPERTIES WAS PAYABLE QUARTERLY IN ADVANCE. ON MARCH 25, 2012 RENT OF £10 MILLION BECAME DUE. G WAS UNABLE TO PAY AND WENT INTO ADMINISTRATION THE FOLLOWING DAY.
- AT FIRST INSTANCE THE JUDGE RELIED ON GOLDACRE (OFFICES) LTD V NORTEL NETWORKS UK LTD (IN ADMINISTRATION) [2009] EWHC 3389 (CH), [2010] CH. 455 AND LEISURE (NORWICH) II LTD V LUMINAR LAVA IGNITE LTD (IN ADMINISTRATION) [2012] EWHC 951 (CH), [2013] 3 W.L.R. 1132.
- HE CONCLUDED THAT QUARTERLY RENT FALLING DUE IN A PERIOD WHEN ADMINISTRATORS WERE USING THE PROPERTY FOR THE PURPOSES OF THE ADMINISTRATION AMOUNTED TO AN ADMINISTRATION EXPENSE, BUT RENT FALLING DUE BEFORE ADMINISTRATION WAS SIMPLY PROVABLE AS A DEBT IN THE ADMINISTRATION, DESPITE THE ADMINISTRATOR HAVING RETAINED THE PROPERTY FOR THE PURPOSES OF THE ADMINISTRATION
- IRRESPECTIVE OF THE DATE THE TENANT COMPANY ENTERS ADMINISTRATION, THE LANDLORD SHOULD BE PAID IN FULL FOR THE PERIOD THE ADMINISTRATOR USES THE DEMISED PROPERTY FOR THE BENEFIT OF THE ADMINISTRATION.

Disproportionate Frontage to Depth

- Q. IS THERE CASE LAW TO ENABLE A TENANT TO ARGUE FOR A DISCOUNT FOR A SHOP WITH DIS=PROPORTIONATE FRONTAGE TO DEPTH ?
- A. YES PRINCIPLE ORIGINALLY DERIVED FROM A RATING CASE

- WH Smith & Sons v Clee VO LT1978 RA 93
- (14% Allowance for shop which was 7 units wide - 137 ft frontage x 46 ft depth)
- REASON – Zoning method over-values this unit

- Triumph Securities Ltd v. Reid Furniture Co. Ltd (1986) 283 EG 107
- Furniture shop on Kings Road – Arbitrators Award 14% for FTD

- THERE ARE MANY NEGOTIATED SETTLEMENTS FOR FTD, + ARBITRATION AWARDS + INDEPENDENT EXPERT DETRMINATIONS – RANGE FROM 5% UP TO 25% DEPENDENT ON DEGREE

KEEP OPEN CLAUSE (KOC)

- NO **in England** *Co-operative Insurance Society LTd v Argyll Stores (Holdings) Ltd [1997] 3 All ER 297.*
- House of Lords overturned an order requiring Safeway, the anchor tenant in a shopping centre, to carry on trading in terms of its lease. They held that a keep open clause was not, other than in exceptional circumstances, specifically enforceable, since it was the settled practice of the Court not to make an order requiring a person to carry on a business
- **YES in Scotland** *Highland & Universal Properties Limited v Safeway Properties Limited 2000 SLT 414* on the Scottish legal principle of specific implement
- WHAT FACTORS INFLUENCE THE LEVEL OF DISCOUNT FOR KEEP OPEN?
- LENGTH OF LEASE - IS IT A LONG LEASE? (MORE ONEROUS IF SO)
- ABILITY TO ALIENATE – CAN TENANT ASSIGN OR UNDERLET WHOLE OR PART(S)
- TENANT DEMAND FOR THE STORE – IS THERE ONE OR MORE TAKERS FOR THE STORE?
- T NEEDS COMPARABLES TO ACHIEVE ALLOWANCE FOR KOC
- L/L MAY PRODUCE COMPARABLES WHICH SHOW NO ALLOWANCE FOR KOC
- TYPICAL ALLOWANCES 2.5%, 3.75% AND 5% DEPENDENT ON ABOVE 3 FACTORS
- NB WHERE THE KOC IS ON A UNIT WHICH IS NOT THE ANCHOR T IN A CENTRE A CLOSURE WOULD BE UNLIKELY TO CAUSE A SIGNIFICANT IMPACT – SO NO ALLOWANCE MADE

LEASE RENEWAL – LENGTH OF NEW LEASE

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.

ASSUMED TERM OF LEASE

- ASSUMED LEASE TERM – WITHIN THE RENT REVIEW CLAUSE IT WILL STATE WHETHER THE LEASE TERM YOU ARE TO ASSUME IS THE UNEXPIRED TERM OR IT MIGHT STATE A MINIMUM TERM (OFTEN 10 OR 15 YEARS) OR IT MIGHT STATE THAT IT IS FOR THE WHOLE TERM OF THE ORIGINAL LEASE.
- **CANARY WHARF INVESTMENTS (THREE) V TELEGRAPH GROUP LTD 2003**
- **NEUBERGER J HELD THAT ON A FAIR AND SENSIBLE READING OF THE LEASE "THE TERM OF THE HYPOTHETICAL LEASE, TO BE ASSUMED FOR RENT REVIEW PURPOSES, IS TO BE A TERM OF 25 YEARS FROM THE RELEVANT RENT REVIEW DATE, AND NOT 25 YEARS FROM THE DATE FROM WHICH THE ACTUAL LEASE RUNS.".**
- NB IN THIS CASE THE TERM LENGTH OF 25 YEARS WAS STATED. IN OTHER CASES WHERE THE TERM IS NOT STATED THE UNEXPIRED TERM IS ASSUMED
- THE LEASE TERM ASSUMPTION HAS VALUATION IMPLICATIONS WHERE THE ASSUMED LEASE TERM IS LONGER THAN THE NORM FOR THAT MARKET SECTOR OR SHORTER THAN THE NORM FOR THAT MARKET SECTOR.
- 5YRS MIGHT BE OK FOR A SINGLE SHOP UNIT – BUT 15/20/25 MAY BE TOO LONG AND MAY RESULT IN A POSSIBLE DISCOUNT. PERHAPS 2.5% TO 10% FOR ONEROUS LEASE TERM
- HOWEVER, 5YRS/10YRS WOULD BE REGARDED AS TOO SHORT FOR A LARGE STORE (DEPARTMENT STORE OR FOODSTORE) AND A DISCOUNT WOULD APPLY – PERHAPS 10%.
- FOR VERY LONG LEASE AT FULL (RACK) RENTS IE, 50 YRS – PERHAPS 5% -20% DEPENDENT ON LOCATION – DEMAND – ABILITY TO UNDERLET

LEASE RENEWAL – ASSUMED LEASE TERM

- *Basingstoke and Deane Borough Council v Host Group Ltd* [1988] 1 WLR 348)
- The rent review clause in this case required the valuer to ignore the actual location of the premises and to assume they were elsewhere.
- In particular Nicholls LJ said this:
- "Of course rent review clauses may, and often do, require a valuer to make his valuation on a basis which departs in one or more respects from the subsisting terms of the actual existing lease. But if and insofar as a rent review clause does not so require, either expressly or by necessary implication, it seems to me that in general, and subject to a special context indicating otherwise in a particular case, the parties are to be taken as having intended that the notional letting postulated by their rent review clause is to be a letting on the same terms (other than as quantum of rent) as those still subsisting between the parties in the actual existing lease. The parties are to be taken as having so intended, because that would accord with, and give effect to, the general intention underlying the incorporation by them of a rent review clause into their lease."
- However, if it is clear from the lease that the valuer is required to make an assumption of facts that is not true then he should do so.

RESTRICTIVE USER

- USER CLAUSES MAY BE ABSOLUTELY RESTRICTIVE, QUALIFIED, ie L/L's CONSENT IS REQUIRED OR OPEN WITHIN A SPECIFIED USE CLASS OR CLASSES.
- ABSOLUTE - USER CLAUSE SPECIFIES A SPECIFIC USE, ie, SALE OF FOOTWEAR ONLY
- Q. WHY IS THIS RESTRICTIVE?
- A. T CANNOT WIDEN HIS RANGE OF GOODS OR CHANGE TO ANOTHER USE – LIMITED FLEXIBILITY
- A. IF T WANTS TO ASSIGN OR UNDERLET MUST DO SO TO A FOOTWEAR RETAILER – LIMITS DISPOSAL
- RESTRICTIVE USERS ARE NOW LESS COMMONPLACE SAVE FOR SPECIALIST RETAIL LOCATIONS WHERE L/L WANTS FULL CONTROL, ie CARNABY STREET (Shaftesbury Estates) SLOANE STREET/KINGS ROAD (Cadogan Estates)
- DISCOUNTS OF 10% WERE COMMON – ie, *UDS Tailoring v BL Holdings (1982)* menswear only
- *Law Land v Consumers Association Ltd (1980)* – use restricted to Consumer Assoc only – T argued for low rent as only possible T- BUT the open market proviso in the rent review over-rode the absolute user restriction
- *Charles Clements v Rank City Wall (1978) A lease renewal with restrictive user* - only as a cutlers (knives & forks, etc) – 14% discount decided. L/L willing to open user BUT could not unilaterally do so as T was happy
- A USE RESTRICTED TO A2 USE (BANK) ONLY MIGHT ATTRACT A 5% ALLOWANCE IF YOU HAVE 5% COMPARABLES
- QUALIFIED - Several layers of qualification, ie, subject to good estate management, or tenant mix
- OPEN Consent for change of use will be given with L/L's consent not to be unreasonably withheld or delayed LLCNTBUW (OD)
- SEEK TO COMPARE 'LIKE WITH LIKE' ie, COMPARE THE USER CLAUSES AND THE COMPARABLE EVIDENCE
- USER CLAUSE MAY BE ABSOLUTELY RESTRICTIVE - BUT CHECK THE RENT REVIEW CLAUSE DOESN'T OVER-RIDE IT, ie, ASSUMPTION THAT THE SHOP IS AVAILABLE FOR USE FOR ANY CLASS A1 PURPOSE

CASE LAW ON REPAIR V REPLACEMENT/IMPROVEMENT

- ***SHOPPING CENTRE ROOF - SHOULD YOU PATCH AN OLD ROOF OR REPLACE IT ?***
- ***POSTEL PROPERTIES LTD V BOOTS THE CHEMIST (1996)***
- **THE ISSUE WAS THE ROOF OF A MILTON KEYNES SHOPPING CENTRE. THE CENTRE WAS CONSTRUCTED IN 1975 AND THE ROOF HAD A LIFE EXPECTANCY OF 20 YEARS.**
- **WHEN REPAIRS WERE CARRIED OUT AFTER 15 YEARS, THE LANDLORD TOOK THE OPPORTUNITY TO REPLACE THE ROOF COVERING ALTOGETHER.**
- **IT WAS HELD THAT THIS WAS ACCEPTABLE AND THE COST COULD BE RECOVERED FROM TENANTS. THE REASONING WAS THAT THE WORKS WERE SUCH THAT A REASONABLY MINDED BUILDING OWNER WOULD HAVE UNDERTAKEN THEM AND THEY DID NOT AMOUNT TO GIVING THE LANDLORD SOMETHING DIFFERENT FROM WHAT HAD EXISTED BEFORE.**
- **WHAT ABOUT UPGRADING EXISTING AIR CONDITIONING SYSTEM ?**
- **IN CONTRAST, THE CASE OF FLUOR DANIEL PROPERTIES LTD V SHORTLANDS INVESTMENTS LTD (2001) ESTABLISHED THAT A LANDLORD CANNOT RECOVER IMPROVEMENTS WHEN THE PREMISES OR FACILITIES IN QUESTION ARE IN PROPER WORKING ORDER.**
- **IN THIS CASE, THE LANDLORD OF A COMMERCIAL BLOCK EQUIPPED WITH AN AIR-CONDITIONING SYSTEM FAILED TO CONVINCE THE COURT THAT ITS DEMAND FOR £2M UNDER THE SERVICE CHARGE TO RECOVER EXPENDITURE ON UPGRADING THIS SYSTEM WAS JUSTIFIED.**

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 ?

Q 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

HEDLEY 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

LATENT / INHERENT DEFECTS

- **Q. WHAT IS AN "INHERENT OR LATENT DEFECT" ?**
- A. A LATENT DEFECT IS A FAULT OR DEFECT CAUSED BY FAILURES IN DESIGN, MATERIALS OR CONSTRUCTION METHOD WHICH MAY NOT BECOME APPARENT OR EASILY DETECTABLE UNTIL YEARS AFTER COMPLETION OF THE CONSTRUCTION PROJECT AND AFTER EXPIRY OF THE DEFECTS LIABILITY PERIOD.
- IT MIGHT BE THOUGHT THAT IF A BUILDING WAS DEFECTIVE THAT WAS THE L/L'S PROBLEM BUT SEE
- ***(RAVENSEFT PROPERTIES LTD* V *DAVSTONE (HOLDINGS) LTD* [1979] 1 EGLR 54; (1978) 249 EG 51).**
- **EXTERNAL STONE CLADDING HAD STARTED TO DETACH FROM A CONCRETE FRAME OF A 16-MAISONETTE BUILDING, RENDERING IT DANGEROUS. PRINCIPAL REASON FOR THE PROBLEM WAS LACK OF EXPANSION JOINTS.IT WAS NOT** REALISED THAT EXPANSION JOINTS WOULD BE NECESSARY.
- TO DEAL WITH PROBLEM ALL THE STONE CLADDING TAKEN DOWN & REPLACED IT WITH PROPER TIES, INCLUDING EXPANSION JOINTS (THE ABSENCE OF WHICH THE T`S CLAIMED WAS THE INHERENT DEFECT).
- T ARGUED THAT THIS REPAIR WORK FELL OUTSIDE THE SCOPE OF THEIR REPAIRING COVENANT BECAUSE IT AROSE OUT OF AN INHERENT DEFECT.
- THE COURT NOT ONLY REJECTED THE EXISTENCE OF A DOCTRINE OF INHERENT DEFECT BUT ALSO REJECTED THE TENANTS' CONTENTION THAT THEY SHOULD NOT BE LIABLE FOR ANY WORK UNDER THE COVENANT THAT ULTIMATELY NECESSITATES REMEDY OF AN INHERENT DEFECT. THE COURT ADOPTED A "FACT AND DEGREE" APPROACH, CONCLUDING THAT THE WORK WAS "REPAIR" WITHIN THE MEANING OF THE TENANT'S COVENANT.
- **NB RECENT EXAMPLE ON CHEESEGRATER BUILDING. FAULTY BATCH OF BOLTS TO RETAIN CLADDING.** NOVEMBER 2014 TWO BOLTS, THE SIZE OF A HUMAN ARM BROKE AND FELL FROM THE 738FT TOWER. CLAIM AGAINST STEEL FABRICATOR - **COVERED BY INSURANCE**

Sunlife Europe Properties Ltd v Tiger Aspect Holdings Ltd (2013)

- 35 YEAR LEASE. PREMISES FITTED OUT WITH STATE-OF-THE-ART FITTINGS IN EARLY 1970S.
- T FAILED TO COMPLY WITH REPAIRING OBLIGATIONS - PREMISES WERE IN A POOR STATE.
- WHEN LEASE EXPIRED L/L CLAIMED £2.172M PLUS INTEREST FOR REMEDIAL WORK HE CARRIED OUT.
- T ARGUED THAT THE COST OF REPAIRS WAS £700,000 - SUBJECT TO S.18 (1) L & T ACT 1927 CAP.
- Q. SHOULD T HAVE COMPLIED WITH REPAIRING COVENANTS BY RETURNING TO PREMISES WITH 1970S EQUIPMENT - REPLACED THEM WITH MODERN EQUIPMENT.
- A. COURT HELD THAT
- T OBLIGED TO RETURN PREMISES IN GOOD AND TENANTABLE CONDITION AND WITH INSTALLATION SYSTEMS IN SATISFACTORY WORKING ORDER. T IS NOT REQUIRED TO DELIVER UP THE PREMISES WITH NEW EQUIPMENT.
- STANDARD OF REPAIRS JUDGED BY REFERENCE TO THE CONDITION OF THE EQUIPMENT AT THE START OF THE LEASE, NOT THE CONDITION THAT WOULD BE EXPECTED OF AN EQUIVALENT BUILDING AT THE EXPIRY OF THE LEASE.
- T ONLY OBLIGED TO REPLACE BROKEN EQUIPMENT ON A LIKE-FOR-LIKE BASIS.
- T NOT REQUIRED TO UPGRADE EQUIPMENT IN LINE WITH CURRENT STANDARDS.
- IE, T IS ENTITLED TO PERFORM COVENANTS IN THE MANNER LEAST ONEROUS TO THE T.
- JUDGE CARRIED OUT OWN VALUATION. AWARDED £1,353,254 + INTEREST.

RENT REVIEW - 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 POSTION 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*

LEASE RENEWAL CHANGES TO THE OLD LEASE

- Q WHEN RENEWING A LEASE DOES THE NEW LEASE HAVE TO FOLLOW THE TERMS OF THE OLD LEASE ?
- A. YES BUT MODERN UPDATING IS ACCEPTABLE
- HOWEVER SIGNIFICANT CHANGES ARE NOT ACCEPTABLE UNLESS THERE IS A COMMERCIAL CONSIDERATION I.E. AN ADJUSTMENT TO THE RENT
- **O'May v City of London Real Property Co. Ltd [1983] 2 ac 726.**

1. THE DEFENDANT LANDLORD DEMISED PREMISES IN A MODERN OFFICE BLOCK TO THE TENANTS FOR FIVE YEARS.
2. ON THE EXPIRY OF THE TERM THE LANDLORD PROPOSED A NEW FIVE-YEAR TERM, BUT WITH THE OBLIGATIONS AS TO MAINTENANCE, REPAIR AND SERVICE OF THE BUILDING TRANSFERRED TO THE TENANTS, IN RETURN FOR A SMALL REDUCTION IN RENT.
3. THE PROPOSALS WOULD HAVE CREATED A 'CLEAR LEASE' RESULTING IN THE BUILDING BECOMING COMMERCIALLY MORE VALUABLE FOR THE LANDLORD.
4. AT FIRST INSTANCE THE COURT ALLOWED THE VARIATION BUT THE COURT OF APPEAL REVERSED THE DECISION.
5. THE APPEAL TO THE HOUSE OF LORDS WAS DISMISSED ON THE BASIS THAT THE COURT SHOULD NOT SANCTION A DEPARTURE FROM THE CURRENT LEASE WHICH WAS INTENDED TO IMPOSE SUCH ENORMOUSLY FLUCTUATING OBLIGATIONS ON THE TENANTS, WHOSE INTEREST WAS LIMITED.
6. THE HOUSE OF LORDS CONFIRMED THAT THE NEW LEASE SHOULD NOT DEPART FROM THE CURRENT TENANCY TO IMPOSE ONEROUS OBLIGATIONS ON THE TENANT

LEASE RENEWAL CHANGES TO THE OLD LEASE (Cont`d)

- O`MAY ESTABLISHED THE FOLLOWING GUIDELINES WHICH SHOULD BE CONSIDERED BY THE TENANT'S SOLICITOR WHEN REVIEWING THE "OTHER" TERMS OF A RENEWAL LEASE:
  - THERE MUST BE GOOD REASON FOR IMPOSING THE CHANGE – IS THE CLAUSE FAIR AND REASONABLE FOR BOTH OF THE PARTIES
  - CAN THE DETRIMENT TO THE OPPOSING PARTY BE ADEQUATELY COMPENSATED FOR ?
  - WOULD THE PROPOSED CHANGE MATERIALLY IMPAIR THE TENANT'S SECURITY AND PROFESSION HAVING REGARD TO THE PURPOSE OF THE LANDLORD AND TENANT ACT 1954?
  - IS THE NEGOTIATING POSITION OF THE SITTING TENANT WEAK, TAKING INTO ACCOUNT CURRENT MARKET CONDITIONS
- ESSENTIALLY, THE NEW LEASE SHOULD TAKE THE FORM OF THE CURRENT LEASE, SUBJECT TO "REASONABLE MODERNISATION".
- SOME EXAMPLES OF ACCEPTED MODERNISATION ARE AS FOLLOWS:
  - UPDATING THE ALIENATION PROVISIONS IN LINE WITH S19 OF THE LANDLORD AND TENANT COVENANTS ACT 1995;
  - MAKING AMENDMENTS TO GUARANTOR'S LIABILITY AS A RESULT OF THE CASE "GOOD HARVEST"
  - INCLUDING PROVISIONS RELATING TO COMMERCIAL RENT ARREARS RECOVERY (CRAR).