RENT REVIEW
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SEMINAR :

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(1) RENT REVIEW

1.1 TIME OF THE ESSENCE

1.1.1 The general rule is that time limits in a rent review clause are not strict [of the essence], unless expressly stated to be so by the use of those specific words.

1.1.2 This principle was established in the case: *United Scientific Holdings-v-Burnley Borough Council [1977]*.

1.1.3 SO THAT, if time is expressly stated to be of the essence for a step in the procedure that you fail to take in time, then you will lose out as a consequence.

1.1.4 Case law has however evolved since *United Scientific* so that whilst the general principle remains absolute, certain [limited] exceptions exist. The principal situations are summarised in the following table;

Provision	Time of Essence?	Authority	Year
Reference to a surveyor "as soon as practicable but in any event not later than three months "after service of notice	No	(1) *Touche Ross-v-Secretary of State for Environment.* (2) *Thorn-v-Quinton*	1983 1984
Landlord's trigger notice within three months of a specified date "but not otherwise"	Yes	(1) *Drebbond-v-Horsham* (2) *Norwich Union-v-Tony Waller* (3) *Norwich Union-v-Sketchley*	1978 1984 1986
If no timeous/objection lessee "shall be deemed to have accepted" the proposed increase	No	*Davstone-v-Al-Rifai*	1976
If no timeous counter notice landlord's trigger rent shall be deemed to be the market rent	Yes No	(1) *Henry Smith-v-AWADA* (2) *Mecca-v-Renown*	1984 1984

Provision	Time of Essence?	Authority	Year
If no timeous application for appointment of surveyor land-lord's trigger notice "void and of no effect"	Yes	(1) *Lewis-v-Barnett* (2) *Staines-v-Montagu*	1982 1986
If no timeous application for appointment of surveyor rent to be the rent payable immediately before the review date	Yes	*Greenhaven-v-Compton*	1985
"but such rent shall not in any event be less than" the rent payable immediately before the review date	No	*Metrolands-v-Dewhirst*	1985
If no timeous counter notice tenant "shall be deemed to have agreed to pay the rent"	No	*Taylor Woodrow-v-Lonrho*	1985
If no timeous application for appointment of surveyor amount proposed by tenant shall be the market rent	No	*Phipps Faire-v-Malbern*	1987
"Conclusively fixed"	Yes	(1) *Mammoth-v-Agra* (2) *Barratt-v-Greig*	1990 1991
Condition precedent that notice be served timeously	Yes No	*Chelsea-v-Millett cf* *North Herts-v-Hitchin*	1994 1992
If no counter notice served "market rent specified...shall stand"	No	*Bickenhall-v-Grandmet*	1994
The landlord's trigger notice to be served "*…at any time not more than 12 months before the expiration of each or any of the following years of the term that is to say every fifth year thereof* ***but not at any other time****…*" – the words in bold being pivotal.	Yes	*First Property Growth Partnership-v-Royal & Sun Alliance Property Services Ltd*	2002

1.1.5 Or put in brief language [dangerous though that can be], the general presumption is that time is <u>not</u> of the essence unless expressly stated to be so. Rare cases have construed the <u>exact</u> wording used in them as still making time of the essence, like ....."***but not otherwise***" in the *Sketchley* case of 1986!

1.1.6 "Deeming provisions" run the risk of making time of the essence – particularly if they are two-way – as it cannot reasonably be presumed that the courts have yet tested all subtle variations of wording in this regard.

1.1.7 In the absence of the specific "time of the essence" words, or otherwise being cases sitting "on all fours with" those in the table above, one would not expect a case to come before the courts in respect of which one party was suggesting that time of the essence be implied. Yet this happened recently in ***McDonalds Property Co Ltd-v-HSBC Bank plc [2001]***. Here, the claimant tenant was arguing that its landlord had lost its right to review and in so doing, was bravely challenging ***United Scientific***.

1.1.8 The tenant in ***McDonalds*** occupied under a lease that provided for seven-year reviews. The review in question should have been triggered by the service of a notice not more than twelve months nor less than six months prior to the review date. Following service of a trigger notice, it was open to the tenant to serve, within one month, a counter notice either agreeing with the landlord's proposed rent or specifying its own figure. In the event of a failure to agree, the landlord could apply for the appointment of a third party not earlier than two months after the service of the trigger notice.

1.1.9 As it turned out, the trigger notice was not served until 9th August 1999, more than a year after the review date of 24th June 1998. The tenant claimed that this notice could not be effective because it was out of time, i.e. seeking to impute that time was of the essence.

1.1.10 The court therefore had to consider the basic principle established in ***United Scientific***, which is that whilst there is a presumption that time is not of the essence, this can be rebutted where the lease in question contains "contraindications". The most obvious contraindication is an express provision that time is of the essence. However, other wording can also render time of the essence, as we have seen in the table above. The court did indeed note that the very structure of review machinery – notably the existence of a strict timetable, coupled with a default rent where this is not complied with – can make a time limit strict.

1.1.11 Here, the tenant argued that two such contraindications existed. First, there was a careful timetable designed to ensure that the new rent was settled prior to the review date. This was reinforced by the absence of any provisions governing either the timing of the payment of any shortfall in the rent, or interest on such payments. Second, it contended that the wording of the clause suggested a valuation at the date of the determination of the rent. Hence, a late determination would disadvantage the tenant and cannot achieve the rent anticipated by the parties. As to judgment, the judge was unsympathetic. On the first point, he was satisfied that *United Scientific* established that clear existence of a timetable does not in itself make time of the essence. The view is that where a review is late, the tenant is normally benefited by having had the use of the money in the meantime. However, if he feels disadvantaged by his landlord's failure to initiate the review within the prescribed period [in particular, with the default procedure only allowing the landlord to apply to the RICS – **please see *Leboff* and *Barclays* below**] – he can himself make time of the essence by serving a notice on the landlord to that effect.

1.1.12 As to the second point, the judge was not convinced that the review clause did impose a movable valuation date. Custom is, unless clearly stated to the contrary, that one values at the Review Date [term commencement anniversary].

1.1.13 He therefore concluded that there were no contraindications that were sufficiently "compelling" to render time of the essence.

1.1.14 SO THAT, “time of the essence” is still being found within review clauses containing wording which, on its face, is not unusual e.g. *First Property* in 2002 [last entry in table].

1.1.15 **Can an aggrieved party make time of the essence?** A party that feels disadvantaged by the failure of the other party to take a step that the contract only allows him to take can himself serve a notice on that defaulting party making time of the essence for him to take that step.

1.1.16 Until eighteen months' ago there was only one case in the context of rent review that detailed this right, yet to my amazement it has apparently never been directly referred to in any subsequent similar situations.

1.1.17 In *Factory Holdings Group Ltd-v-Leboff International Ltd [1987]* – the Chancery Division of the High Court noted as an aside to the substantive issue in that case that the concept of a notice making time of the essence is applicable in the sphere of rent review clauses.

1.1.18 In that case the rent review clause allowed either party to apply to the RICS for appointment of an arbitrator. Whilst it might seem bizarre with the benefit of hindsight, that tenant founded his entire case on claiming that the landlord had lost his right to review by failing to make an RICS application. Needless to say, the judge noted that the tenant could himself have made such application!

1.1.19 However, the judge noted that the purpose of conferring on a party a right to serve notice making time of the essence is to afford him a remedy against inaction by the other party. It followed that a party is not entitled to serve a notice making time of the essence for taking a step in the procedure that it is open to that party himself to take.

1.1.20 I have devised a form of "*Leboff Notice*" which I have successfully used in respect of numerous rent review clauses that only allow landlord applications to the RICS. I started this when I worked in-house at *Barclays* in the early 1990's.

1.1.21 Then, in 2002, the use of that very type of notice succeeded for the tenant in *Barclays Bank plc-v-Savile Estates Ltd.* The Court of Appeal held that, where a rent review clause did not contain any strict time limit, it was possible for the tenant to make time of the essence for the "landlord only" RICS Application.

1.2 HYPOTHETICAL TERM

1.2.1 It is the preference of the courts to hold that the notional term is the "unexpired residue". This follows the relatively modern approach of the courts in commercial cases, namely that the "presumption of reality" must prevail.

I will illustrate with some examples:

1.2.2 In *Norwich Union-v-TSB [1986]* the words "let on the open market by a willing lessor to a willing lessee taking a lease otherwise on the terms and conditions of the actual lease" were held to mean that the assumed term was the unexpired residue.

1.2.3 In *Ritz Hotel-v-Ritz Casino [1989]* the words "for a term equivalent to the term hereby granted" were held to mean the unexpired residue.

1.2.4 In *Lynnthorpe Enterprises-v-Sidney Smith [Chelsea] [1990]* the premises were demised "for a term of fifteen years from the date hereof [hereinafter called "the said term"]". The lease provided for rent reviews on the basis of a letting "for a term of years equivalent to the said term". The Court of Appeal held that the parties were to be taken to have intended that the notional letting was a

letting on the same terms as those still subsisting between the parties in the existing lease. Applying that principle, it was clear that the hypothetical term was to be fifteen years from the original date of the lease, not fifteen years from the relevant rent review date.

1.2.5 One might have expected the specific wording in *Worcester City Council-v-A S Clarke [Worcester] [1994]* to have lead to an assumption of the original term as opposed to the unexpired residue. The words in that rent review clause were "for a term of ninety-nine years from the date hereof".

1.2.6 However, applying the "presumption of reality", that date could of course only have been the date when they signed the lease. It therefore followed that the valuation was of the "unexpired residue".

1.2.7 SO THAT, you will only have a successful case for arguing that the original term is assumed to commence from each review date if that specific, clear and unambiguous wording is embodied within the review clause.

1.2.8 A relevant situation to consider under this topic is that where the lease as granted may have included a fixed opportunity for the landlord to break. In *Millet [R & A] Shops-v-Legal & General Assurance Society [1984]* it was agreed between the parties that the notional term for valuation purposes was to be the unexpired residue. However, the dispute concerned whether a landlord's break clause exercisable "after the expiration of the first twelve years of the term hereby granted" was assumed to now be effective [this being the third review in a four yearly cycle] or to be assumed to be twelve years in the future from the Review Date. The judge found for the tenant's argument, namely that the hypothetical lease was therefore now assumed to be terminable at any time on the giving of not less than six months notice by the landlord. This obviously had depressing valuation implications.

1.3 RULES OF EVIDENCE

1.3.1 It is usual in arbitration proceedings for rent review that the "Strict Rules of evidence" do not apply.

1.3.2 We do however tend to go to the other extreme of virtually no quality by agreeing [or otherwise having imposed by the arbitrator] to allow photocopies of letters from a party to a transaction being the "proof".

1.3.3 The problem with this is that, regrettably, there are those who might in some way "tamper" with such evidence.

1.3.4 That is why, depending on the specific circumstances and parties involved, I often ask arbitrators to direct that whilst the Strict Rules are to be relaxed in the usual way, evidence will only be sufficiently proven to him if presented in Initial Submissions by way of original signed letters/proformae in both copies, with a specific statement from the signatory of each confirming that he/she was directly involved.

1.3.5 This increases the likelihood of accuracy, as you will appreciate.

1.3.6 At this point, please note the following terms used to describe the principal ways of rendering (documentary) evidence ‘admissible’; direct; agreed; or independently verified / corroborated, to the agreed and directed standard.

1.4 POST REVIEW EVIDENCE

1.4.1 Although often misquoted, those in our profession seem to rely upon the case of *Segama-v-Penny le Roy* for support that arbitrators can rely on rental evidence set after the Review Date.

1.4.2 In short, this case does establish the principle that arbitrators can admit post review evidence to their deliberations. But the weight they attach to such evidence should become more diluted the further the effective date is from the Review Date.

1.5 PRESUMPTION OF REALITY

1.5.1 You will appreciate that it has become almost standard practice of the courts to construe a disputed interpretation of a review clause against this backdrop. As such, we expect commonsense to [usually] prevail.

1.5.2 However, it remains perfectly possible for reality to be manipulated by careful – but clear – wording.

1.5.3 In *Beegas Nominees Ltd-v-Decco Ltd [2003]* the review clause in a 1996 lease of a warehouse on Stone Business Park provided for five-yearly anniversary upwards only review expressly assumed to "… *have the same value as units of at least 50,000 sq ft within a five mile radius of either Tamworth or Minworth* …".

1.5.4 The landlords [obviously] contended that this be literally and slavishly applied – the only adjustments possible to be for size, age, condition etc., but not for subject being a poorer location. The tenant argued that this was contrary to the presumption of reality.

1.5.5 It was held that whilst the "presumption" test is relevant in construing ambiguous clauses, it will not prevail in the face of clear provisions to adjust the normal valuation process.

1.6 SIDE AGREEMENTS ON SUB-LETTING

1.6.1 If the alienation clause prohibits sub-letting at less than the rent then payable under the [head] lease – a fairly standard clause – you breach this [by "side agreement"] at your peril.

1.6.2 In refusing leave to appeal to the Court of Appeal the House of Lords "stopped the buck" in 2002 in the case of *Allied Dunbar Assurance plc-v-Homebase Ltd*.

1.6.3 The reasoning was that a [head] landlord has a legitimate interest in the true terms of a sub-letting both because of their effect on the tenant's ability to fulfil its covenants and [perhaps crucially] the effect as evidence on the headlease rent review.

1.6.4 In the light of reduced privity of contract, sub-lettings usually occur by necessity to dispose of an over-rented property. The type of clause referred to has customarily been side-stepped by way of a side-letter at a lower rent [etc.,].

1.6.5 To do so in the light of *Allied Dunbar* – indeed the making of any side agreement affecting the operation of the leasehold covenants between the Parties without the express consent of the landlord – will amount to a negligent misrepresentation at best, and at worst – a fraudulent one. In either case, the landlord will be entitled to seek damages, to forfeit the Lease, or to apply for an injunction reversing the sub-letting.

1.6.6 Ways around it? The test is whether or not what you are doing by the side agreement affects covenants in the sub-lease to make them different to those in the Headlease. So the payment of a single lump sum [not instalments] reverse premium should work – but a cash flow and tax problem, of course. In *NCR* –

v – *Riverland* (2004), the tenant got around it (i.e a requirement not to underlet at less than the passing rent) by underletting on the same terms as the Head Lease including rent, but paying a reverse premium (£3,000,000!) to the sub tenant. But whatever the sum might be, unless the covenant is cast iron, what are the chances of them disappearing into the ether in the very near future?!?

1.6.7 Is it an onerous term warranting a distinct deduction? Analogous to prohibition against sub-letting … if obviously over-rented?

1.6.8 So how should an open market letting by sub-letting now sit in the "weight of evidence hierarchy"?

1.7 ARBITRATORS AWARDS AS EVIDENCE

1.7.1 The RICS seem to teach to their arbitrators that the abrogation of the rule against hearsay by the Civil Evidence Act 1995 defeats the judgment of ***Land Securities-v-Westminster City Council [1993]*** which held that arbitrators' awards were not admissible in proceedings before other arbitrators.

1.7.2 In my view this is not correct because, as noted in that judgment, an arbitrator's award is "not direct evidence of what is happening in the market". It is only evidence of what the arbitrator was able to conclude on the limitations of the evidence presented to him.

1.7.3 However, whether an arbitrator admits an arbitrator's award or not, is of little consequence in practice. What matters, is how much weight he attaches to it. And in this regard, both from the judgment in ***Land Securities*** and commercial commonsense within our profession, such should be very limited.

1.8 USER CLAUSE

1.8.1 In *Faucet Inn Pub Co plc – v- Ottley Corporation (2006*) 14 EG 174, a dispute arose at the first rent review of a restaurant let on a fairly standard modern commercial lease as to the meaning from a valuation perspective of 'assumption (iii)' in the rent review clause, which read '*the premises are let with vacant possession for immediate occupation and use for the uses for the time being permitted under this lease (or the actual use or uses if attracting a higher value)*'.

1.8.2 The actual User Clause provided for change of use in A1 or A3, subject to LCNTBUW.

1.8.3 In these proceedings, the defendant contended that assumption (iii) required The Expert to take account of any prospective use for which the landlord might reasonably be obliged to give consent in the future.

1.8.4 The claim was allowed.

1.9 KEEP OPEN CLAUSES

1.9.1 With conflicting case law decisions thusfar in England & Wales, a landmark ruling a couple of weeks' ago (March 2007) in Scotland's highest civil court awarded £600,000 in damages to *Douglas Shelf Seven* – a Glasgow property company – after the *Co Operative Wholesale Soceity* and sublesee *Kwik Save* breached a 'keep open' clause at The Whitfield Centre in Dundee.

1.9.2 Whilst this decision is not authoritative in England & Wales, it is likely to be persuasive.

1.10 ARBITRATION ACT 1996 – AN EVERYDAY GUIDE WITH PRACTICAL TIPS

1.10.1 Section 1 of The Arbitration Act 1996 sets out its "general principles" as primarily being:

(a) The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; and

(b) The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.

1.10.2 These words effectively form the backbone of The Act. In respect of paragraph [b] this is the preamble to what has come to be described as "party autonomy" embodied within The Act. In other words, that all sections other than those crucial to the efficacy of The Act make it clear that the parties to the arbitration are free to agree procedural elements, these [non-mandatory] sections specifying what will apply if they fail to reach agreement on individual points.

1.10.3 Section 4 of The Act describes these as "mandatory and non-mandatory provisions". Mandatory provisions are obviously standard and sacrosanct. The non-mandatory provisions tend to begin by the crucial words "unless otherwise agreed by the parties...", so that the parties can agree [in writing to each other and/or the arbitrator] to "tailor" them.

1.10.4.1 Removal of Arbitrator - Section 24 provides that a party to arbitration may [on notice to the other] apply to the court to remove an Arbitrator on the grounds that circumstances exist that give rise to justifiable doubts as to his

impartiality and/or that he does not possess the qualifications required by the Arbitration Clause [e.g. ten years experience in letting shops in the area].

1.10.4.2 This section is then effectively reinforced later by Section 73 [Loss of Right to Object] which, by its customarily self explanatory title, goes on to state that if a party continues to take part in proceedings without making a timely objection that the tribunal lacks jurisdiction or the proceedings have been improperly conducted etc., then he may not raise that objection later, unless he can demonstrate that, at the time he took part or continued to take part in the proceedings, he could not reasonably have known the grounds for the objection.

1.10.5.1 Arbitrators' Fees – Joint and Several Liability by the Parties - Section 28 expressly provides that the parties are jointly and severally liable to pay the Arbitrators' reasonable fees as are appropriate in the circumstances.

1.10.5.2 Further, that any party may apply to the court [upon notice to the other party and the Arbitrator] which may order that the amount of the Arbitrators' fees and expenses shall be considered and adjusted by such means and upon such terms as it may direct.

1.10.5.3 SO THAT, unfair or irrational as it may seem, an extreme example is that a landlord is perfectly at liberty to sue a "winning" party [i.e. server of a successful *Calderbank*] for all of his fees if the other party that should be paying him either will not or cannot [e.g gone bust].

1.10.6 Immunity of Arbitrator [from Negligence Action] - Section 29 provides that an Arbitrator is not liable for anything done or omitted in the discharge of his functions as Arbitrator, unless the act or omission is shown to have been in bad faith [i.e. deliberate, e.g. fraud].

1.10.7 Objection to Jurisdiction of Arbitrator - An objection that the Arbitrator lacks jurisdiction at the outset of proceedings must be raised by a party not later than the time he takes the first step in the proceedings. {See also Section 73 as discussed at 12.4.2 above].

1.10.8.1 General Duty of the Tribunal [Arbitrator] - Section 33 provides that the Arbitrator shall:

(a) Act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent; and

(b) Adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

1.10.8.2 Procedure & Evidential Matters - Section 34 provides that it shall be for the Arbitrator to decide all procedural and evidential matters subject to the right of the parties to agree any matter, with such specified as including – of practical relevance in rent review –

(i) Whether to apply Strict Rules of evidence [or any other rules] as to the admissibility, relevance or weight of any material [oral, written or other] sought to be – and in what manner such should be – presented; and

(ii) Whether and to what extent the tribunal should take the initiative in ascertaining the facts and the law [in other words, the Arbitrator making his own enquiries – although his award will be ***bona fide*** challengeable [appealable if he relies upon material he finds out for

himself without having first presented it to the parties for their comments].; and

(iii) Whether and to what extent there should be oral or written evidence or submissions [SO THAT, if you wish to retain your ongoing right to an oral hearing should you feel that "documents only" is not allowing you to properly test the evidence of your opponent, this should be ideally agreed with the other side – or failing that sought from the Arbitrator – in the initial Procedure].

1.10.8.3 Section 34[3] provides that the Arbitrator may fix the time within which any directions/timetable given by it are to be complied with and may if it thinks fit extend the time so fixed. In my view, case law prior to the Arbitration Act 1996 would still apply in this regard as to whether or not an Arbitrator unreasonably refuses a request by one side to extend the deadline [the test effectively being whether or not the request amounts to "inordinate and inexcusable" delay to the prejudice of the other side].

1.10.9.1 <u>General Duty of Parties</u> - Is set out in Section 40 as being that the parties will do all things necessary for the proper and expeditious conduct of the arbitral proceedings.

1.10.9.2 This includes complying without delay with any order of the Arbitrator as to procedural or evidential matters.

1.10.10.1 <u>Party's Default [Failure of One Side to Take Part]</u> - Section 41 provides that, unless otherwise agreed, the Arbitrator may continue the proceedings in the absence of a party that fails to lodge its Initial Submission [neé, ***Ex Parte***] <u>but only after</u> that party has failed to comply with "due notice".

1.10.10.2 In practice, an Arbitrator should follow this section by writing formally to a defaulting party by way of a "peremptory order" – namely a formal notice giving them a further, clear and reasonable deadline by which to submit their Initial Submission, pointing out that if they fail to do so by that [extended] deadline they will be barred from submitting and relying upon evidence and that the Arbitrator will proceed to his [first] award in any event.

1.10.10.3 Note – The fact that a party has been late in submitting [even if subject to such a Notice] should not in anyway prejudice that party's case in terms of the outcome on rent, albeit that it might present a proper case for penalising him on costs [if subsequently argued for and supported by the other side].

1.10.11.1 Agreed Settlement Prior to Arbitrator's Award - In my view it is sensible for parties in such circumstances to apply Section 51 and have the Arbitrator record their agreed settlement in an "agreed award" which otherwise stands as absolutely enforceable as if it were an award that the Arbitrator had himself come to.

1.10.11.2 You will appreciate the obvious security that this provides, with the potential [bonus] in terms of costs.

1.10.12 Awards Must Be Reasoned - Section 52 provides that, unless otherwise agreed by the parties [and if you do so, you forfeit your right to challenge/appeal] all awards of the Arbitrator [noting that each one is final in its own right] must be provided with reasons.

1.10.13 Arbitrator's Right to be Paid Before Releasing Award - Section 56 provides that the Arbitrator may refuse to deliver an award to the parties except upon full payment of his fees.

1.10.14.1 Correction of Award - Section 57 provides that in the absence of an alternative agreement between the parties, the Arbitrator may on its own initiative or on the application of a party correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission, or clarify or remove any ambiguity in the award.

1.10.14.2 But to do so, the party wishing the correction must apply to the Arbitrator **within twenty-eight days** of the Date of the Award.

1.10.15.1 Date of the Award - Section 54 provides that, unless otherwise agreed by the parties, the Arbitrator may decide what is to be taken to be the date of the award.

1.10.15.2 In our specialism, you will appreciate that Arbitrators will – unless otherwise agreed – date their awards simultaneous to writing to you seeking payment of their fees.

1.10.15.3 Bearing in mind that you must allow at least five days after you have sent your cheque to them for the Arbitrator to be satisfied that it is cleared, plus delays in postage, this strict twenty-eight day period can often be exhausted before you receive the award.

1.10.15.4 I therefore always seek to "tailor" this direction so that the Arbitrator only signs his award when writing to you seeking payment, deferring dating until he has been paid and is despatching.

1.10.16.1 Costs - Section 60 provides that if a rent review clause clearly specifies that no matter what the outcome of the arbitration the costs are to be paid in a particular way [e.g. equally, or the tenant shall pay them all in any event] such is null and void. A meaningless contractual provision. Costs of the arbitration will always be at the absolute discretion of the Arbitrator, in any event.

1.10.16.2 Sections 62-64 detail the Arbitrator's powers in respect of costs, as already briefly referred to in this Seminar.

1.10.17 Enforcement of Award - Section 66 [Mandatory – Obviously] provides that an award can be enforced in the same manner as a judgment of the court.

1.10.18.1 Challenging Arbitrators' Awards [neé Appeals] - Section 67 is again referring to challenging on the grounds of the Arbitrator's lack of jurisdiction [see Section 31 as already discussed]. Also, relates to Section 37 i.e. party barred/estopped on this ground if you continue to take part in proceedings without timely objection.

1.10.18.2 Section 68 [Serious Irregularity] can be explained in basic terms as being the failure of the Arbitrator to conduct the proceedings fairly and evenly between the parties. [Again, Section 73 applies insofar as losing your right to object if you continue without pointing out the failing even though you were – or could reasonably have been – aware of it].

1.10.18.3 Successful challenges [appeals] of Arbitrators' awards are very rare. Under The Act, success will almost invariably mean that the award is remitted [sent back] to the Arbitrator for correction [unless the successful appeal is because he lacked jurisdiction, whereupon it will be set aside and a fresh Arbitrator appointed].

1.10.18.4 Two recent cases are:

(a) *Checkpoint Ltd-v-Strathclyde Pension Fund [2003]* - the Court of Appeal held that an Arbitrator had not acted improperly by relying on his own personal knowledge of the local market. The review clause had expressly required the Appointment of an Arbitrator with local experience, and he had done no more than to rely upon "*information*

of the kind and within the range of knowledge one would reasonably expect him to have acquired".

Had he drawn on information from outside that knowledge i.e. had he "given evidence to himself" only without first putting it for the parties' comment [*Fox-v-Wellfair (1981)*] that would have been acting improperly.

It therefore follows that in:

(b) *Guardcliffe Properties Ltd-v-City & St James [2003]* - the Arbitrator was held to have overstepped the mark by making adjustments that neither side had argued for without first inviting their comments.

(c) In *St George's Investment Co – v - Gemini Consulting Limited (2004)* EWHC 2353 - the landlords challenged the arbitrator's award of rent of ground floor offices, contending that he had taken another arbitrator's award of the third floor offices in the same block and erroneously made a series of discounts, some of which had not been sought by The Parties (and in respect of which he had not invited their comments), and others of which amounted to 'double discounting' because the £ rate from the third floor offices had already been discounted by that arbitrator for similar features.

Finding for the landlords (and therefore remitting the award to the arbitrator) the court reviewed the established principles. An arbitrator can use his 'expert knowledge' to arrive at the award, but only so long as;

1) It is the type of knowledge he would be expected to have; and

2) that knowledge is used to interpret the evidence presented to him, not to introduce new evidence; and

3) If he has 'new evidence' – of either fact or expert opinion – he must not use it until and unless he has first put it to The Parties for comment.

1.10.19 Time Limit for Appeal/Challenge - Section 70 again sets a twenty-eight day time limit from the Date of Award.

1.11 PROPERTY MANAGEMENT ISSUES

1.11.1 *Go West Ltd-v-Spigarolo [2003]* - clarifies The 1988 Act re landlord's response to a tenant's application to assign, insofar as the actual response either way from the landlord necessarily brings to an end the "reasonable period" for his response as required by The Act. In other words, the Court of Appeal here found that if a landlord refuses consent to assign more quickly than it needed to, "time" is no longer an issue. It is simply now a case of whether or not that refusal was "reasonable". Here is was not, hence damages for the tenant.

1.11.2 In *Coltrane-v-Day [2003]* - The Court of Appeal held that rent can be paid by cheque where the landlord has previously accepted this or where the specific cheque is accepted. Provided that the cheque is cleared on first presentation, the rent is regarded as paid on the date the cheque is delivered.

1.11.3 In *Williams-v-Kiley [2003]* - it was held that closely inter-related user covenants in leases of a group of properties may indicate a "letting scheme" – as such each tenant can enforce user covenants against the other without reliance upon the landlord's intervention.

1.12 INDUCEMENTS

1.12.1 RICS has produced as an Appendix to The Red Book, valuation information paper No.8 '*The Analysis of Commercial Lease Transactions*'. This deals specifically with the devaluation of inducements on new lettings.

1.12.2 It concludes that there is no single correct approach; indeed, that there is no 'right' answer!

1.12.3 It does however set out four alternative approaches, including worked examples that show the practical applications of the various methods and periods.

1.13 COMPARABLE EVIDENCE

1.13.1 In *Marklands Limited – v – Virgin Retail Limited (2003)*, the landlord argued that the premises being so large, they could be divided into smaller units and let separately. So, if the value as a whole was £100.00 Zone A, and in parts £130.00, the landlord, when deciding to let as a whole, would need a rent in excess of £100 and nearer to £130 to entice it to that option.

1.13.2 Rejecting the landlords argument, the judgement noted that it was not possible for the landlord to say that it could enter into a different kind of transaction than it was already (assumed) 'willing' to enter into as per the terms specified in the lease.

1.14 SHOP LEASES SHORTEN

1.14.1 The *Annual Lease Review* from the IPD and BPF published in December 2006 noted, *inter alia*, that the average retail lease is now 7.8 years (down from 8.7 years in 2005) – based on evidence from 75,000 tenancies.

1.14.2 Fewer than 5% of leases were for more than 15 years, although these accounted for 22% of the total passing rents, showing that units with higher rents are signed for longer leases.

(2) LEASE RENEWAL

2.11 LANDLORD & TENANT ACT 1954 MODERNISATION

2.11.1 The 1954 modernisations came into effect from 1st June 2004. Notices served after that date require the new provisions to be followed, principal points from which are summarised as follows:

Section 25 Notices

The same as before so far as time limits, but landlords must now set out proposals, including rent. This must be accompanied by a 'health warning' to the tenant that these are proposals only, advising that they seek professional advice from a surveyor, lawyer or accountant(?!?).

Whilst the old provisions required a counter notice from the tenant within two months of the date of the Section 25 notice, this has now been dispensed with.

Application to Court

Whereas only the tenant could apply before, it is now the case that either the tenant **or the landlord** can apply. Deadline to apply is either the date specified in the Section 25, or the day before the date specified in the Section 26 request. The parties can agree to extend these deadlines indefinitely – so long as they always remember to update the agreement to extend before it expires (otherwise the tenant loses its right to renew).

Extending the deadline to apply allows you time to negotiate without the costs – and often unwelcome speed – of CPR, yet still retaining your rights to renew.

If negotiations become frustrated, either side can end the deadline extension. Remember that the Section 26 Request can still be a tactical tool for a tenant if he fears redevelopment, used to flush the landlord out sooner rather than later. The landlord has a maximum 2 month period to counter your Section 26, upon receipt of which you would immediately apply to court and **simultaneously** serve those proceedings on the landlord. The CPR 'clock' has now started, to give you a trial date (moment of proof for the landlord) hopefully within the 6-12 month period you specified.

Interim Rent

Whilst only the landlord could apply before, it is now the case that either the landlord or the **tenant** can apply.

It is important to note that the deadline specified by Section 24A (3) for making such an application is 6 months after the termination of the current tenancy.

Whilst it used to be the case that the interim rent tended to be some 10% - 20% less than the new rent, it is now the case that it will usually be the same as the new rent (except perhaps in cases of substantial rental growth and / or major variation of lease terms).

Section 27 Notices

The 1997 case of *Esselte – v – Pearl Assurance* has now been codified by sub section 1A to give tenants the option of simply vacating before the term end date as an alternative to giving a Section 27 (1) notice.

However, if you remain in occupation after the term end date, you will then still be 'holding over' and must then give 3 months notice ('to quit') under

Section 27 (2). It is however modified in this section so that this three month notice period can now end at any time, as opposed to what was hitherto the strict requirement that it expired on a Quarter Day.

2.12.1 **RENEWAL OBJECTIONS**

These are summarised as an *aide memoire* reflecting relevant case law as follows:

(a) **"Tenant's failure to repair"**

Landlord must prove:

- the tenant's obligation to repair;
- the state of repair;
- that the disrepair results from tenant's breach of its obligations;

the effect of the above should disentitle tenant from obtaining a new lease.

(b) **"Persistent delay in paying rent"**

Questions for the court are:

- has the landlord been put to trouble or expense in recovering rent on a number of occasions?
- if so, should the landlord be freed from the risk of repetition in the future?

"Persistent delay" means that the tenant must have fallen into arrears on more than one occasion.

(c) **"Other breaches"**

Landlord must show other substantial breaches of the tenant's obligations under the lease. The breach must be substantial and therefore cannot be a minor breach and must concern an obligation that the tenant is under. The ground does extend to reasons connected with the tenant's use or management of the holding and can include breach of planning control.

(d) **"Alternative accommodation"**

Landlord must establish:

- an offer of, and willingness to provide, alternative accommodation;
- reasonable terms, having regard to the current tenancy;
- that the accommodation is suitable to the tenant's requirements. This is a question of fact but the court will take into account the tenant's business, current location and size of premises and the goodwill generated from the current location. Therefore a landlord may not succeed if offering accommodation from a prime city site to premises in the middle of nowhere.

(e) **"Complex sub-lettings"**

This is rarely used as the necessary requirements are seldom fulfilled. It applies where a sub-letting of part of the property created the current tenancy. A landlord will succeed if it can show that it can let the whole premises at a higher rent than the combined rent of the sublettings in existence.

(f) **"Demolition, reconstruction or substantial construction"**

Landlord must show:

- a fixed and firm intention to demolish or reconstruct the premises or to carry out substantial works. The intention must be established at the date of the hearing and must be the intention of the competent landlord. Tenants may therefore apply for an early court hearing in the hope that the landlord will not have sufficient evidence to prove intention. Proof of intention is key to success on this ground. The court may wish to see board resolutions, planning applications/permissions, funding agreements, etc. If the landlord cannot prove intention at the court hearing, but the court considers that it will do so in the near future, the court may order a shorter tenancy so as not to impede the development later when the landlord can establish intention.
- that work could not reasonably be done without regaining possession of the whole of the premises. If the tenant can show it could operate from part of the premises whilst the works are carried out the ground will fail.

(g) **"Own occupation"**

Landlord must show an intention to occupy the premises:

- for the purpose of a business;
- as a residence.

Again, as in (f), intention must be proved. In addition, (g) cannot be used where the landlord purchased the reversion within 5 years of the termination of the current tenancy.

Grounds (a), (b), (c) and (e) give a discretion to the court whether or not to allow a renewal. The other grounds, if they are established, are mandatory and a renewal lease must be refused.

If a new lease is refused under the no-fault grounds, (e), (f) or (g), but on no other ground, the tenant will be entitled to compensation as detailed in the Act.

2.12.2 **Statutory Compensation –** if a landlord succeeds on grounds (e), (f) or (g) – and no others – then tenants are entitled to statutory compensation. Even if there is an exclusion clause in the lease, so long as the tenant (or its predecessor in business) has occupied the holding for 5 years or more (whether under this tenancy or a series in succession) – and must still be in occupation at the time.

2.13 EXPERT REPORTS UNDER CPR - THE "RULES" ALONG WITH SOME GUIDANCE ON THE GIVING OF EXPERT EVIDENCE ARE SUMMARISED AS FOLLOWS:

There are a number of formal requirements for an expert's report and it is important for an expert to adhere to them. Under Part 35 of the Civil Procedure Rules 1999 an expert's report should be in writing and should include the following:

1. The expert's qualifications.

2. Any literature or other material, which the expert has relied on in making the report.

3. All facts and instructions given to the expert. Attaching the letter of instruction to the expert is a common way of meeting this requirement.

4. Which of the facts stated in the report are within the expert's own knowledge, and which are not.

5. The identity and qualifications of the person who carried out any examination, measurement, test or experiment which the expert has used for the report and whether or not the test or experiment was carried out under the expert's supervision.

6. Where there is a range of opinion on the matters dealt with in the report the expert should:

    a. summarise the range of opinions;

    b. give reasons for his own opinion;

7. A summary of the conclusions reached.

8. If the expert is not able to give his opinion without qualification, the qualification should be stated.

9. A statement that the expert understands his duty to the court and has complied, and will continue to comply, with that duty.

Finally, the expert's report must be verified by a Statement of Truth. This requirement is often overlooked but experts should be aware that the Statement of Truth is an important part of the report and is no mere formality. In addition, knowingly giving a false Statement of Truth is a serious matter, as it can amount to a contempt of court. The following wording is appropriate for a Statement of Truth:

"I confirm that in so far as the facts stated in my report are within my own knowledge, I have made clear which they are and I believe them to be a true and that the opinions I have expressed represent my true and complete professional opinion".

The report should then be dated and signed by the expert as an individual and not in the name of any company or firm.

It is important than any expert who is instructed appreciates the duty the expert owes is to the court. The report should therefore be addressed to the court and not the instructing firm.

But it is the <u>way</u> that a Report is written that serves to persuade the Court. You see, the tenant has the inherent advantage. That is because, in civil cases, the claimant "goes first". In Lease Renewal, the <u>tenant</u> is of course the claimant. It is therefore the Expert Report of the tenant that is the first thing to be considered by the Judge under examination [as opposed to <u>cross</u>-examination] of that Expert by the tenant's advocate. [I use the term "advocate" because a Barrister is often more expensive than is required in the modern context; a Solicitor-advocate, or similar lay advocate accepted by the Court, is more than sufficient].

I would be so bold as to say that, short of an obvious script, the tenant's advocate and tenant's Expert must have a clear "understanding" of how to present their case, and pre-empt the stance of the opposition, comfortably before the actual day of trial. I can happily provide you with more "tips for success" flowing from our regular attendance and success in Court. Similarly for renewals of shop leases in Scotland [**please see more later*****].***

The Court of Appeal's finding in *General Medical Council – v – Meadow (2006)* that an expert witness is <u>not</u> entitled to immunity from disciplinary proceedings by his professional body, is obviously of some comfort to RICS re its Practice Statement.

But short of re running the arbitration – which is of course totally impractical – what in practice can RICS do about incomplete or potentially biased presentations?

It is therefore down to each arbitrator to acquire some bottle to now reason their findings on both the expert evidence presentations, as well as the evidence of fact.

(3) WITHOUT PREJUDICE & SUBJECT TO CONTRACT

3.14 WITHOUT PREJUDICE

3.14.1 The words "without prejudice" can be applied as a rubric or title to written communication, incorporated as an express statement or simply made clear in verbal communications.

3.14.2 The purpose of allowing communication on a "without prejudice" basis is to promote negotiated settlement.

3.14.3 Without prejudice communications are, *prima facie*, privileged. The privilege attached to "without prejudice" communications belongs to both parties and can only be waived if both sides consent. In the context of rent review, they cannot therefore be shown to an Arbitrator and a party cannot be compelled to disclose any such communication. Therefore, things may be said in the capacity of advocate during negotiations in the safe knowledge that a different statement may need to be made in the capacity of Expert Witness in front of a tribunal. The potential embarrassment of conflicting statements or expressions of opinion being produced by an opponent is therefore removed.

3.14.4 You may agree by compromise elements of a dispute, which might later be retracted in representations as an Expert Witness. E.g., a return frontage allowance.

3.14.5 A letter in a sequence of "without prejudice" communications is treated as being "without prejudice" even if that specific rubric or heading is missing. Authority is provided by *Paddock-v-Forrester [1842]* with the heading on the first of a series of letters investing later ones with that privilege and *Oliver-v-Nautilus SS Co [1903]* where the "without prejudice" label on a later document invested an earlier one with the privilege.

3.14.6 Communications clearly made with the intention of seeking settlement need not incorporate the words "without prejudice" as long as that was the purpose. Authority is provided by *Chocoladefabriken Lindt & Sprungli AG-v-Nestlé Co [1978]*.

3.14.7 In *Rush & Tompkins-v-Greater London Council [1983]* the House of Lords held that when the same parties [e.g. landlord and tenant] are negotiating in respect of the same subject matter [e.g. a property] the without prejudice content of any previous negotiations between them [e.g. the last rent review five years ago] remains privileged from disclosure in the current set of negotiations.

3.14.8 However, it is useful to compare *Peter Bertrum Limited-v-Standard Life Assurance Co. [1990]* where in Landlord & Tenant Act 1954 lease renewal proceedings, the plaintiff's Expert Witness was requested to admit that he had acted as Witness in an Arbitration for other premises in the same street. Basically the witness was arguing for a different figure. The judge ruled that the evidence was admissible. It was also held that the witness, as agent for the other tenant, with different landlords, could claim no privilege for those negotiations in the present proceedings.

3.14.9 Interestingly, use of the wording "without prejudice" does not work [i.e., commands no privilege] if the statement is not made with any genuine attempt to negotiate a settlement. (Re *Daintrey, ex p Holt [1893]*).

SUBJECT TO CONTRACT

3.14.10 In essence, incorporation of the word "subject to contract" clearly prevents a statement from being taken to be an offer. There should therefore be no risk of the details contained in such a statement becoming binding as a consequence of the recipient communicating acceptance.

3.14.11 Under the law of England and Wales, property dealings are almost always carried out on a "subject to contract" basis. In effect, therefore, most "offers" made on a subject to contract basis are, in reality, merely expressions of interest at a particular level.

3.14.12 If an offer refers, for example, to "documentation to follow" it may be construed as being made "subject to contract" without actually incorporating those words (*Henderson Group plc-v-Superabbey Limited [1988]*).

(4) SCOTLAND

4.15 TENANCY OF SHOPS [SCOTLAND] ACT 1949.

4.15.1 A major difference between the law of Scotland and England [& Wales] is the lack of statutory control of business leases in Scotland.

4.15.2 There is, however, an exception to this in the form of this Act which, whilst giving limited security of tenure rights to shop tenants only [with certain exceptions, primarily: travel agents & dry cleaners], can prove crucial in practice.

4.15.3 I have found that it is seldom used in practice, and often forgotten about by both lawyer and surveyor practitioners in Scotland.

4.15.4 "Shops" generally are covered by the act, with specific exclusions by case law being travel agents [*Right-v-St Mungo Property Co. Ltd (1955)*] and dry cleaners [*Boyd-v-A Bell & Sons Ltd (1970)*].

4.15.5 The Act can be evoked when a shop lease is due to expire and the landlord has sent the tenant a notice to quit.

4.15.6 You will be aware that, in Scotland, a lease will only formally end on its contractual term date – its "ish" – **if** either the landlord or the tenant intimates that he wants the lease to end by sending the other a notice to quit [minimum period of **forty days**]. If neither does so, the law presumes that both want the lease to continue and it is automatically extended for a further year [assuming the lease was longer than twelve months in length] by the principle of "tacit relocation" [silent renewal].

4.15.7 If either party wants to end the lease at the expiry of extended period, he then requires to serve the notice to quit [minimum forty days] as before. Usually, this will be what you find landlords tend to do. That is when you normally negotiate a renewal, almost as if it were a rent review in Scotland, albeit with some debate of the detail terms of the lease. You usually do not feel that you are in a disadvantaged negotiating position by the fact that you have no actual right to renew. That you do, as a fact [and as disregarded in England] have established goodwill and occupation that the landlord could now fully extinguish if he chose not to renew your lease. The reality therefore is that you are in an inherently weaker negotiating position. By definition, the landlord has the upper hand. Sometimes landlords look to exploit this, either by inference or sometimes even more overtly. As an example of the latter, this could be by immediately erecting an agents "to let" board on your property after service of the Notice to Quit. There is disturbing evidence of an increasing trend of landlords doing this, particularly in cases where the reality [usually countered by the statutory protection in England] is that the property could well command a premium rental because of the "inherent goodwill" **you** as the actual tenant has given to it and/or, as another example, it is a shop located immediately adjacent to a health centre [and you are a chemist].

So how does the Tenancy of Shops [Scotland] Act 1949 help?

4.15.8 It can be invoked when a shop lease is due to expire and the landlord has sent the Notice to Quit. If the tenant is unable to obtain a renewal on satisfactory terms, he may, within twenty-one days, apply to the sheriff court for a renewal of the lease.

4.15.9 The sheriff may renew the lease for a period not exceeding one year on such conditions [including rent] as "in all the circumstances he thinks reasonable". The word "may" is used in its normal sense i.e. the sheriff's power is discretionary [*Robertson-v-Bass Holdings (1993)*]. That said, it is in my experience usually exercised.

4.15.10 The conditions imposed may include a rent increase to the current rental value [in respect of which the tenant would, in my experience, be well placed to "assist" the sheriff by providing – via the tenant's solicitors – a comprehensive and user-friendly report and valuation, including a clear and concise explanation of the "zoning" process; this is not usually done in Scotland. As I say, not only is The Act seldom evoked, the few surveyors who have had any involvement of it tend simply to write a short letter. The "quality report" should therefore prevail, thereby securing at or close to the rent you are seeking for this one-year extension].

4.15.11 The parties will thereafter be considered to have entered in to a new lease for that one-year period. If the landlord wants to remove the tenant at the end of it, he will require to send a fresh Notice to Quit [*White-v-Paton (1953)*].

4.15.12 Although no case seems to have turned on the point, it has been the practice for renewals to be granted from the date of expiry of the Notice to Quit [i.e. the leases "ish"] rather than from the date of the Sheriff's decision. If it were otherwise, a year's renewal from the latter date would effectively result in an extension beyond the one-year maximum which The 1949 Act permits.

4.15.13 **Interim order** - if the Sheriff is satisfied that it will not be possible to dispose finally of the application before the Notice to Quit takes effect [i.e within the forty days] he may make an interim order authorising the tenant to continue in occupation for a period up to three months, at such rent and on such terms as he thinks fit.

4.15.14 **Further applications** - a further application may be made by the tenant at the end of the renewal term, and at the end of any future "extensions" that may be granted. Such an application is of course only competent if the landlord has sent a fresh Notice to Quit to which the tenant can respond.

4.15.15 However, if the landlord does not serve a fresh notice, a new application to the court will not be necessary, because of course a fresh renewal will have been effected for the three-month period envisaged by tacit relocation [*White-v-Paton (1953)*].

4.15.16 Each application should be considered on its own merits, without the court being influenced by any argument that might have been advanced in earlier applications.

4.15.17 **Appeals** - the unsuccessful party has the appeal rights available in a summary cause.

4.15.18 **Grounds for refusal** - the Sheriff may dismiss the tenant's application for renewal if he is satisfied that such is just on certain statutory grounds which bear a remarkable resemblance to those which apply in England and Wales [under Section 30 of The 1954 Act], such including: material breach of lease [including of user clause]; tenants bankruptcy; landlord has offered to sell the property to the tenant; landlord has offered suitable alternative accommodation; the tenant has given the landlord notice to quit [!]; that greater hardship would be caused to the landlord by renewing the lease, than not doing so [usually if the landlord needs to use the property for his own business].

4.15.19 It must be remembered that these are not exclusive grounds, as the sheriff has an overriding discretion to dismiss a tenant's application "*if in all the circumstances he thinks it reasonable to do so*".

4.15.20 But, as I say, in my experience it will usually be granted if the tenant is well represented both legally and on expert valuation.

4.15.21 **Tactically**, it is a very sharp tool. In my experience, a landlord is only likely to be inclined to seriously consider attempting to "ransom" you as a reasonable quality covenant by his erecting a "to let" board **if** he works on the reasonable assumption that this will succeed by affording him a higher rent than would have been secured on a level playing field, hence increasing the value of that shop as a standalone investment, and being of even greater assistance by way of new evidence in a managed block or scheme.

4.15.22 By definition, therefore, it is a rather short term target for the Landlord. It is a way of attempting to secure something of a windfall gain.

4.15.23 By effective use of the Tenancy of Shops Act, you kill that opportunity altogether. You therefore invariably end up agreeing to renew for the length of lease you wanted at, or far closer to, your actual opinion of current rental value.

4.16 ARBITRATION [ARBITERS]

4.16.1 **Reasons** - There is not yet any statutory provision or judicial decision expressly requiring an Award given in an ordinary domestic arbitration in Scotland to contain reasons for the decision. Such is, however, usual in practice [certainly if both sides request this at the outset], and indeed may now be implicitly required by the Human Rights Act 1998 [i.e. the European Court of Human Rights has interpreted the "*right to a fair trial*" – article 6 of the European Convention on Human Rights – as implying an obligation to give a reasoned decision (*Van der Hurk-v-The Netherlands [1994]*)].

4.16.2 **Correcting Errors** - Unlike England and Wales, there is no statutory provision to allow this. I therefore advise parties to agree this in the "arbitration agreement" at the outset, otherwise the only course potentially available to correct what might be an obviously careless arithmetic error to your detriment might be via the Court of Session.

4.16.3 **"Natural Justice"** - The equivalent of *Fox-v-Welfare* in Scotland is probably enshrined in *Fountain Forestry-v-Sparkes (1989)* i.e. if the Arbiter intends to rely on specific knowledge or his own enquiries, such must first be put to the parties for comment.

4.16.4 **Costs [expenses]** - In Scotland, unless the lease specifically provides otherwise, the Arbiter only has discretion to award his own fees [expenses].

4.17 **JOINT & SEVERAL LIABLITY**

4.17.1 Sometimes found in older Scottish leases, usually near the start, to the effect that '*the tenants hereby bind and oblige themselves and their permitted successors and assignees jointly and severally to observe and perform throughout the currency of this lease the conditions, obligations and others specified or referred to herein……'* warrants a distinct end deduction at Third Party, probably of up to 5%.

4.18 **IMPORTANT NOTE**

4.18.1 It should be appreciated that the preceding Seminar Notes should only be taken as general or preliminary guidance, not to be applied slavishly to a specific case. Advice on how best to deal with a particular set of specific circumstances can be made available from either Paul Raeburn or Neil Burridge and no liability can be accepted for the consequences of actions taken based upon this document without prior consultation.

4.18.2 Contact details are:

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