



## ARBITRATION AT RENT REVIEW

The Landlord's Perspective

"If you can keep your cool whilst all about you are losing theirs and blaming it on you..."

MICHAEL LEVER

## **PLEASE NOTE**

All the information and comment in this ML Guide is for general information and assistance only and is not intended a substitute for specific advice.

All the information is believed accurate in May 2009 and relates to the law in England and Wales only.

I hope everything is self-explanatory, but if there is anything you do not understand or if you have any questions, then please contact me.

Thank you.

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## INTRODUCTION

A.1 At rent review, and when negotiations reach the point at which dispute resolution is the only way, or if when the process is used as a negotiating ploy, the phrases 'going to arbitration, or 'to go to arbitration' are used loosely, but actually disputes are normally referred to an arbitrator or an independent expert; and, in some leases, either the landlord or the tenant, or both parties, can chose which method to use. Rather than explain the differences between an arbitrator and independent expert, this ML Guide is about arbitration only, and from the landlord's perspective. I have covered all the main points, but please ask if there is anything in what you read that is unclear, or you do not understand.

A.2 When negotiations reach the point at which dispute resolution is the only way forward, and as the landlord you are considering whether to accept or reject the tenant's offer, please note business tenancy law is not concerned with what the actual landlord might want, but what rent the demised premises would fetch in the open market (assuming the open market is stated in the lease) if let by a hypothetical willing landlord to a hypothetical willing tenant, on a notional lease that assumes and disregards the various matters which are stated in the rent review guidelines in the lease.

A.3 During the negotiations between actual landlord and actual tenant, attitudes are subjective, and invariably influenced by the wider consequences for both parties. In other words, you (and the tenant) have some say in the matter, which means you can be forceful, or exercise discretion, or be as accommodating as you like. At arbitration, the approach is technical, objective, unemotional and governed by the arbitral proceedings. Consequently, both parties take a risk not only because of the extra costs involved, but also the uncertainty in having little or no control of the outcome. In other words, the overriding decision as to the rent to be awarded and the responsibility for costs rest with the arbitrator.

## THE APPOINTMENT

1.1 An arbitrator is an independent, unbiased, and emotionally detached person whose jurisdiction and powers are governed by Arbitration Act 1996 (successor to Arbitration Act 1950). Every lease is different so how the arbitrator is appointed will vary. Although some leases enable the parties to agree and appoint a suitable person to act as arbitrator, and older leases may require the appointment to be made by the President of the Law Society, or the Chartered Institute of Arbitrators or a local Chamber of Commerce, generally most leases require an arbitrator to be a chartered surveyor appointed by the President of Royal Institution of Chartered Surveyors (RICS) and, depending upon what the leases says, possibly for the person to have experience of the type of premises. In any event, the surveyor must have no involvement with either party, unless agreed or any conflict of interest disclosed and accepted beforehand.

1.2 Assuming the appointment procedure is administered by the RICS, either the landlord or the tenant, or both may apply to the RICS, depending upon the lease. The applicant pays an administrative fee currently £333 inclusive of VAT, for the appointment and undertakes to be responsible for the arbitrator's costs.

1.3 The RICS will write to ascertain whether any surveyors should not be appointed by reason of conflict of interest and something I do, when I make the application, is to list those surveyors whom I regard as unsuitable. The procedure takes 2-6 weeks, depending upon the availability of an impartial surveyor and, on appointment, the RICS writes to both parties to confirm the appointment and name and address of the arbitrator.

## THE ARBITRATOR

2.1 An appointment is personal to the appointed surveyor, but the arbitrator will be a principal or partner of a firm of surveyors, either based locally, regionally or nationally depending upon availability and the RICS selection procedure, and the type of property and/or requirements of the lease. On appointment, the arbitrator will write to both parties to ask if more time is required for negotiation or whether directions for conduct of the arbitration should be issued. The arbitrator will also confirm basis of costs.

2.2 To ensure and maintain impartiality, all communications with the arbitrator are sent to both parties. No 'without prejudice' correspondence during negotiations beforehand must be disclosed to the arbitrator.

## **PRINCIPLES**

3.1 An arbitrator is bound by the rules of evidence and the Award (of rent) cannot be more or less than the rental extremes submitted by the parties. An arbitrator is expected to use expertise in assessing relevance and quality of evidence and arguments and can make his own enquiries, but contentions must be proven, either from fact or experience.

3.2 An arbitrator cannot be sued for negligence but, provided a written reasoned Award is given, appeal can be made within 28 days on points of law or for irregularity, such as misconduct.

3.3 Rent has regard to provisions in the lease, including the guidelines for review, so, if in doubt or the parties cannot agree upon interpretation, an arbitrator is entitled to obtain legal opinion on points of law. Business tenancy law is a fast-moving subject and arbitrators are required to keep up to date.

3.4 The referral of the dispute to someone with no vested interest in the outcome is an opportunity to explore points, knowing that, even if the opponent disagreed in negotiation, at least the arbitrator will take them into account. The onus is on the parties to include such points in submissions, because an arbitrator is not obliged to draw anything of significance to the parties' attention.

## **DIRECTIONS**

4.1 Directions are formal requirements for the conduct of the arbitral proceedings. The arbitrator will issue a draft order and the parties can agree various aspects. An arbitrator has a general duty to proceed expeditiously, but the parties are free to take as long as is reasonable, so for proceedings an arbitrator will go along with the wishes of the parties, or rule in the event of dispute.

4.2 Directions cover closing dates and content and form of submissions. Often a statement of agreed facts will be required, including, for example, description of the premises, agreed areas, etc - and comparable evidence to be cited possibly agreed. A statement of agreed facts is a binding contract, so it is important that the statement only contains facts that are agreed or makes it clear if they are not.

## **SUBMISSIONS**

5.1 The procedure may be formal with a Hearing or informal, in writing only, depending upon complexity and the wishes of the parties. Sometimes, barristers, solicitors and surveyors represent each party but, generally, the respective surveyors and the arbitrator are the only people involved.

5.1 It is not essential to cooperate since an arbitrator can proceed in default but, since the intention is to assist and possibly influence the arbitrator, both parties may make submissions - orally but normally in writing - sending them to the arbitrator by a specified date, whereupon the arbitrator exchanges submissions and gives each party the opportunity to make counter-submissions (cross-examination). Normally, but not necessarily, after counter- submissions, and any matters arising, have been dealt with, the arbitrator will inspect the property, usually unaccompanied, and after all submissions have been made and the arbitrator has considered the matter, notify the parties the Award is ready for collection/publication upon prior payment of costs.

## **EVIDENCE, CONTENT AND APPROACH**

6.1 An arbitrator is bound by rules so, for authenticity, evidence must be from personal experience, or confirmed/certificated/validated by the persons involved. It is not necessary for other landlords, tenants, or surveyors to provide evidence - they can be subpoenaed - but many people help. In general, reviews go to arbitration because of difference in valuation opinion regarding the evidence and/or interpretation of the lease.

6.2 To go to arbitration because you cannot come to terms with the tenant's offer or contentions, or to obtain the arbitrator's support, is not prudent, because you could be substantially out-of-pocket on costs. Where a tenant has offered nil increase, the attitude of being no worse off for going to arbitration other than on cost holds, except that costs, were the arbitrator to award nil increase, could be substantial and can include the possibility of having to also pay the tenant's surveyor's fees and legal costs.

6.3 'Without prejudice' communications are generally inadmissible so, for example, if the rent the tenant would have agreed before arbitration was 'without prejudice', it cannot be used as evidence. To ensure no inadmissible evidence is included, an arbitrator usually will not read the submissions until both parties have checked that no such evidence has been included.

6.4 Although I am acting for you, the primary duty of the parties' advisers is to help the arbitrator. In submission, I must state whether acting as expert or advocate, or if both then I must make it clear where I am acting as expert and when I am advocate. As expert, my duty is to help the arbitrator, as advocate I help you. Whilst arbitrators can give weight to expert opinion, advocacy does not weaken a submission.

6.5 Whether expert or advocate, my approach is not to reason what rent you want but, having regard to the definitions as to what a hypothetical willing tenant would pay and a hypothetical willing landlord would reasonably expect. I am representing you and do my best to influence the arbitrator, but I should do disservice and prejudice credibility if I were to present an opinion that in all honesty and truth could not be substantiated.

## **COSTS AND CALDERBANK**

7.1 Arbitration is litigation, so costs are an important factor, because costs are not only those of the arbitrator, but also the costs of the parties' advisers. Contrary to popular belief, each party does not necessarily pay half the costs. Per the Arbitration Act 1996, an arbitrator is empowered to award costs of proceedings and the jurisdiction overrides the lease. So, if the lease says each party is to bear half the costs and/or half the fee payable to the Royal Institution of Chartered Surveyors for the appointment of the arbitrator, then whether such requirements are observed is entirely within the arbitrator's discretion.

I look forward to helping you in some way

7.2 In the normal course, costs follow the award, unless circumstances warrant otherwise. If the award were such that the landlord could be regarded as having won, then the tenant would pay costs - and vice versa. The normal approach is whether in consequence of arbitration, one party is better off.

7.3 Under the Arbitration Act 1996, the Court can tax an arbitrator's costs and the winning party's costs in the event of unreasonableness. The going rate for arbitrators and experienced advisers is £200 to £350 an hour depending upon seniority and complexity and sometimes arbitrators will agree to cap costs - although costs can be minimised by avoiding irrelevancies.

7.4 The arbitrator may provide a reasoned Award so, after submission and counter-submission, the conclusion can be in two stages: 1) Upon prior payment of the arbitrator's costs, publication of an Interim Award of rent with reasons, 2) After the Interim Award, further submissions and publication of a Final Award for costs. (Normally, the arbitrator's costs for the Final Award are separate to the total cost paid before publication of an Interim Award.)

7.5 To minimise the risk and uncertainty of arbitration, landlord and/or tenant can protect their respective positions regarding costs using what is known as a Calderbank offer (*Calderbank v Calderbank* 1975). Arbitral proceedings start when the RICS confirms the appointment and, at any time during negotiations beforehand, or before directions or closing dates for submission, counter-submission, or after Interim Award, either party can make a "without prejudice save as to costs" offer in writing to settle at a stated rent by a specified date on condition that acceptance would mean each party bearing its own costs, half the arbitrator's costs and the RICS application fee. (An offer made 'without prejudice' is binding if accepted.) If not accepted, then the offer would remain open for acceptance until another specified date on condition the other party pays all the costs involved. If the Interim Award of the arbitrator is equal to or more than the rent in the Calderbank, then the party that made the offer can disclose the Calderbank to the arbitrator in submission for the Final Award and ask for costs.

7.6 Although there is no set wording, whether a Calderbank is valid will depend how it is phrased. Essentially, a Calderbank is not so much about the actual rent, so much as a desire to avoid the costs of agreeing that rent, so it must be that an offer of compromise which, as a matter of principle, must be “couched in such terms as to enable the offeree to make a carefully considered comparison between the offer made and the ultimate relief it is seeking in all respects”. For a Calderbank to be successful, the onus is on the offeror to satisfy the arbitrator to determine in the offeror’s favour. Moreover, since an offer of compromise must be a genuine offer of compromise, (and whether a particular offer is a genuine offer can involve an evaluation upon which minds might differ), case law holds that where the offeror can change its mind – “a walk-away” offer – such offers are not a genuine compromise.

7.7 Factors as to whether rejection of an offer is unreasonable include sufficient time to consider the offer, whether the offeree had adequate information to enable it to consider the offer, and whether if any conditions are attached then those conditions would be reasonable. When an offer refers to additional costs, for example, such costs should be estimated otherwise the offeree would have no idea whether the offer was equal to or better than the outcome. Similarly, if the offer contains conditions that the lease does not require to be met, such as paying the parties’ own fees and costs, it would not be unreasonable for the offeree to reject the offer.

## TIME SCALE

8.1 An arbitrator appointed does not preclude further negotiation between the parties and often an arbitrator will agree to hold the matter in abeyance so, some time can elapse between date of appointment and date for submissions. Even if proceedings start immediately, it can take time to agree directions. Although issues are aired in negotiation, rarely are parties honest with one another, so it does not follow the same contentions would be used in submissions and, depending upon complexity, holidays, points arising out of lease analysis and the arbitrator’s efficiency, the time-scale, start to finish, would normally be at least 3 months, maybe more.

## MISCELLANEOUS

9.1 The rent offered by the tenant before arbitration may be higher than the rent opined by the tenant's surveyor in submission. The higher amount might have included irrelevant factors: there is nothing to stop a tenant offering more than the market rent ; that is not uncommon when an inexperienced tenant starts negotiations and later instructs a surveyor. Therefore, as arbitration involves technical criteria, it does not follow the rent discussed in negotiations would be the rent awarded.

9.2 An arbitrator is empowered to award interest on the rent, but interest is not normally levied on costs. The awarded rent is recoverable immediately, whether an appeal is made, subject to the actual payment requirements in the lease.

9.3 On receipt of the Award, please adjust the building insurance cover for loss of rent. (Strictly, the loss of rent cover adjustment should be made on the review date (using the proposed rent.) On Award an increase in rent is normally recoverable from the review, unless the lease states otherwise, but insurance cover cannot be back-dated, so claims between review and Award could result in an uninsured shortfall: on award, the loss of rent cover can be changed to the correct figure. Subject to the lease, interest may be payable on the shortfall and normally I provide the computations and amount.

9.4 The Award can be used as Memorandum of rent, so please keep it with your part of the Lease. However, the parties will often complete a separate Memorandum to record the revised rent.

## **WHEN YOU INSTRUCT MICHAEL LEVER**

10.1 Arbitration is one of my specialties.

10.2 The ability to read a lease carefully, to find angles and explore ways of interpreting the provisions, and assessing the evidence, requires a calm mind and meticulous thinking. I have extensive experience, having published a booklet and articles on the subject, and have a track-record of superb results.

10.3 Winning at arbitration is about telling the truth, being honesty and reasoning convincingly, so the arbitrator agrees with not only to what is stated but also says yes when reading between the lines.

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