



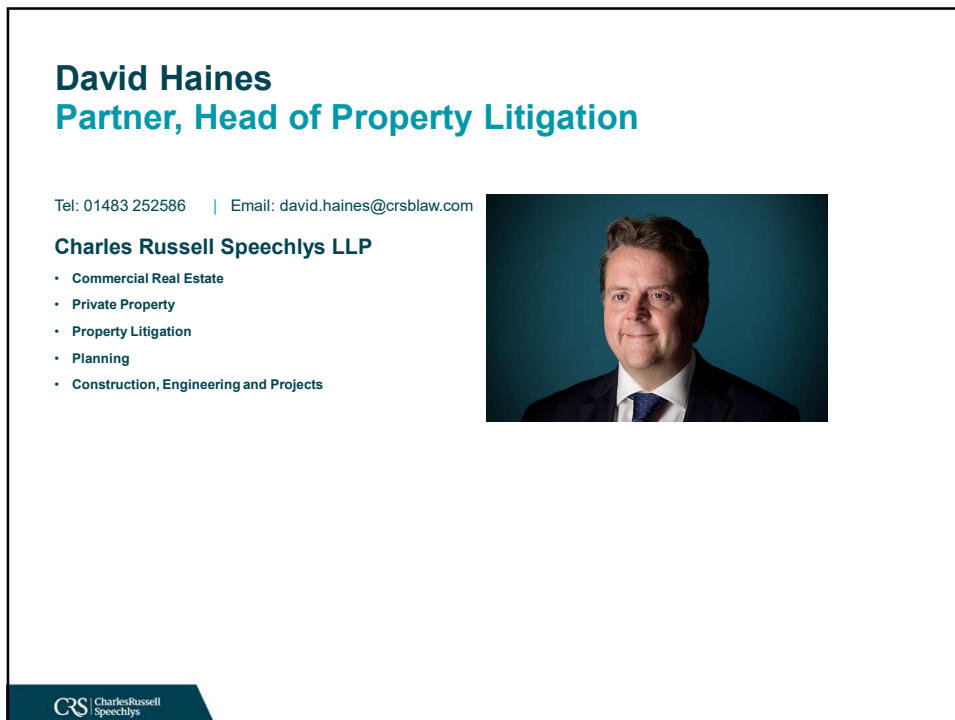
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RICS – Landlord and Tenant Arbitration
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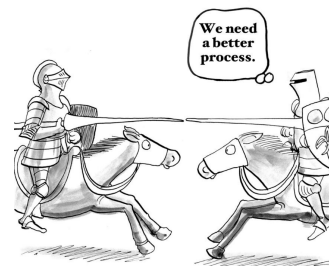
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Introduction

- Landlord and Tenant disputes suitable for arbitration
- How are disputes referred to arbitration?
- Arbitration Act 1996
- Rent Review and Arbitration
- Arbitration, Expert Determination, Court Proceedings and Mediation
- PACT
- Conclusion



Disputes suitable for arbitration

- The short answer!
- Disputes where arbitration mandatory:-
 - Contractual obligation under lease
 - Agricultural Tenancies Act 1995 – most FBT disputes
- Residential long leases

How are disputes referred to arbitration?

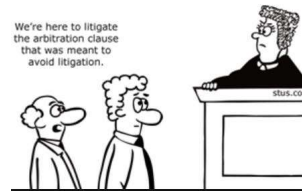
- What have the parties agreed?
- What will the parties agree?
- What issues are subject to determination by the arbitrator?

Arbitration Act 1996 (s.1)

- **General Principles:-**
 - Fair resolution by an impartial Tribunal without unnecessary delay or expense
 - Party autonomy (subject only to necessary public interest safeguards)
 - Presumption of non-interference by the Courts.
- Separability of Arbitration agreements/clauses – validity of the contract does not impact the arbitration provisions

Arbitration Act 1996

- Jurisdiction – a matter for the arbitrator (subject to a Court challenge under s.32)
- Stay of Court proceedings (s.9) – the Court is **obliged** to grant a stay unless it can be established the arbitration provisions are 'full and void'
- Practical point – check the Lease
- The arbitrator's duties (s.33):-
 1. Act impartially and fairly, giving each party a reasonable opportunity to put his case and dealing with that of his opponent
 2. Adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means of resolution of the dispute



Arbitration Act 1996

The Role of the Court

- Interim Injunctive Relief (s.44)
- Enforcement of arbitrator's Orders (s.42)
- Witness summons to appear at the hearing (s.43)
- Challenging a Final Award (s.67- 69):-
 1. Jurisdiction issue
 2. Serious irregularity
 3. Mistake of Law
- Enforcement of Final Award (s.66) – summary enforcement with the leave of the High Court

Arbitration Act 1996

The Procedure (in the absence of agreement) (s.34):-

- Form of Written statements of case/submissions
- Disclosure
- Exchange of evidence
- Location and timing of the hearing

- Provisional or interim awards (s.39) – ‘opt in’ power with the consent of the parties

Arbitration Act 1996

What can the arbitrator do?

- Security for costs
- Preservation of property
- ‘Unless Orders’ and/or strike out
- Injunctions, Declarations, Specific Performance, Rectification

How to appoint an arbitrator?

- The contract
- Nominated body
- The Court

Arbitration Act 1996

Arbitrator's fees:-

- Time spent / % of amount in dispute
- Appointment fees
- Disbursements
- Advance payments
- Withholding the Award

Arbitration Act 1996

Costs (s.61- s.65)

- Agreement – before or after the dispute has arisen
- Power to award costs (s.61) – general principle is costs follow the event
- Discretion – unless “in the circumstances this is not appropriate in relation to the whole or part of the costs”
- Quantum – ‘reasonable costs’ recoverable, with any doubt resolved in favour of the paying party

- Interest – simple or compound interest unless the parties agree otherwise (s.49)

Rent Review - Arbitration v Expert Determination

- One of the most common areas for arbitration/expert determination
- What does the lease say?
- Why does this matter?
- Who is to be appointed?

Rent Review - Arbitration

- Quasi – judicial function subject to statute
- Act upon evidence before the Arbitrator
- Paper and/or hearing
- Wide powers e.g disclosure, “Unless Orders”
- Court intervention possible if “serious irregularity”
- Immune from any claim in negligence

Checkpoint Ltd v Strathclyde Pension Fund [2003]:

“An arbitrator is entitled to use his expert knowledge to arrive at his award...provided that he uses it to evaluate the evidence called and not to introduce new and different evidence.”

Rent Review – Expert Determination

- The expert is to use his/her opinion
- The expert is not confined to making the determination based upon the evidence presented by the parties
- The function of the expert is as provided by the parties agreement
- No quasi-judicial powers granted by statute
- Very difficult to challenge an expert determination

Arbitration v Court Proceedings

- Agreement v unilateral
- Private v public
- Informality (comparatively) v formality
- Control v No control over decision maker
- Challenge v appeal
- Costs
- Speed

Arbitration v Expert Determination

- Arbitration Act 1996 v Contract
- Evidence v Evidence and Opinion
- Challenging a determination
- Costs
- Speed

Arbitration v Mediation

- Determination v Agreed Settlement
- Decision Maker v Mediator
- Cost
- Speed

Mediation - Process

- Agreement to mediate
- Time to mediate
- Choice of mediator
- Preparation – instructing the mediator, Position Statements
- The Mediation Agreement
- The mediation itself
- Costs
- Potential sanctions for unreasonably refusing to mediate

Mediation – Advantages and Disadvantages

- Speed
- Cost
- A willingness to compromise
- Is a legal determination required?
- Success rates: (1) On the day
(2) After the mediation
- Why does mediation work?
 - Time/Expense of litigation
 - The mediator
 - Sanctions

PACT (Professional Arbitration on Court Terms)

- **Introduced – July 1997 by RICS / The Law Society**
- **ADR mechanism for business lease renewals**
- **Allows the parties to appoint an expert or arbitrator**
- **The “standard” process:-**
 - Preliminary meeting
 - Exchange of written representations / counter-representations
 - Scott Schedule
 - Oral hearing
 - Determination

PACT (Professional Arbitration on Court Terms)

What can PACT determine?

- New rent
- Interim rent
- Other terms
- Detailed drafting of lease terms
- **Who makes the determination?**
- **Law Society / RICS Dispute Resolution Service can decide the third party**
- **Agreement of both parties necessary**
- **Referral can be pre or post the issue of Court proceedings**
- **Heads of Terms**

PACT (Professional Arbitration on Court Terms)

The Award:-

- Arbitrator – with reasons
- Independent Expert – no reasons unless parties agree otherwise

- Withholding the Award

- Costs:-
 - Arbitrator – power to award costs
 - Independent Expert – by agreement
 - Quantum of any costs award

- Appeals

PACT (Professional Arbitration on Court Terms)

Advantages of PACT:-

- Flexible
- Cost effective
- 'Expert' appointed to determine issues

- Why is PACT not more popular?

- 1954 Act Pilot Scheme, January 2018

- RICS Evidence Note: Surveyors and Lawyers involved in tenancy renewals under PACT [2nd Ed, May 2018]

- Model/Precedent Forms

Conclusion – Landlord and Tenant Arbitration

- Why is arbitration not more popular?
- Costs
- Business Lease Renewals – PACT
- The future?

