

ARBITRATION – TIME FOR A SHAKE-UP

Vast changes are required to make the arbitration process on commercial rent reviews fairer and more responsive, according to Anthony Lorenz, Senior Partner at The Lorenz Consultancy.

In the process of arbitration, landlords and tenants work to resolve an area of rental or other dispute through with a third party independent surveyor acting as Expert or Arbitrator.

The RICS and Arbix are the main bodies responsible for the efficiency of this dispute resolution system, ensuring it works accurately and fairly for all. It's becoming increasingly clear that key areas require further examination and reform, with improvements needed across the board.

“One process abuse is when expert witnesses, the landlord and tenant's representatives, submit unrealistic rental valuations. “The landlord's experts pitch high, and the tenant's low, often more than 30% above and below the figure determined respectively, despite potential ‘Calderbank’ offers to settle.”

A Calderbank offer is one made to settle costs of a dispute after an Award and is hidden from the Arbitrator until the rent has been determined.

The current system clearly fosters wide variations in forecasting, and potential abuse.

Lorenz suggests therefore that “In a rent arbitration where the landlord's surveyor proposes £110,000, and the tenant's surveyor £90,000, if the determination decision is £92,000, the landlord has clearly lost.” Lorenz continues, “In this case, the landlord should pay 18/20ths – equivalent to the lost proportion of the difference – of the total costs.”

Setting the fees incurred on a winner-takes-all-basis would be sufficient to stop the abuse of the system by expert witnesses. “That way, experts acting for both parties would be encouraged to submit realistic

proposals” which would lead to quicker decisions. After all once Arbitration commences the Expert witnesses duty is not as an advocate but a valuer for the benefit of the Adjudicator.

Lorenz also recommends a new scale of charges for appointing Arbitrators or Expert witnesses to replace the current fixed fee of £369. “This fee is a big cost to smaller businesses. For a £3,000 a year shop and upper part in Pudsey, it’s very expensive, but a very minor cost for a 10,000 sq ft office in High Holborn, for example.”

The Lorenz Consultancy’s research indicates that arbitration applications by surveyors and commercial property consultancies have increased fourfold over the last five years – and for one crucial reason. “Bigger businesses often enter this process to try to gain the upper hand in negotiations,” Lorenz maintains. “If the fees were higher, this abuse may diminish. I believe the costs should be levied on a percentage of the rent – for example 1% of the reserved figure £5000 approx for a 10000 office floor in Holborn– and the minimum fee of £369 retained as a minimum.”

An increase in funding could improve the efficiency of the bodies appointing Adjudicators , selecting arbitrators less randomly. Appointing a forum of Senior Surveyors to vet and select applicants for each individual case, with appointees benefiting from a contribution to their fees from the RICS to protect them from abortive costs, could also be key to reform, Lorenz says.

“One of the biggest problems facing Arbitrators is a potential conflict of interest – their own firm can be conflicted from handling landlords’ or tenants’ rent reviews on adjacent or similar buildings. This is just one of the factors that makes being an appointed Arbitrator so unrewarding. A monthly abortive fee that covers Arbitrators for any reasonable conflict is, I believe, a key to shaking up the process.”

Combating delays is another crucial step forward that needs to be taken. Arbitrator’s awards frequently take two to three months or more to be released. Introducing a directive where the arbitrator’s award must be published within a month to six weeks of final representation, barring sickness and holidays, would galvanise the process.

“Some leases include a clause that requires determination within a month,” Lorenz concludes. “If leases can so direct, then the system can be changed to move things forward. If both parties knew that by holding an arbitration file open month after month without settling the negotiation, would incur fees of substance, this would encourage settlement. I hope that Arbix and the RICS will take note of these initiatives to help the system improve.”

Key to the reform of the negotiation process is the awareness that parties must try to settle negotiations without abusing the system. Do you have points you’d like to add? To continue the debate and to raise your thoughts,

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