

Rent Review Arbitration Code 2010

General

- 1.1 This code has been approved by the Working Group established by the Minister for Justice and Law Reform to advise on the commercial rent review process with a view to achieving a uniform and transparent procedure for the resolution of disputes.

Definition of arbitration agreement

- 2.1 For the purposes of this code, unless otherwise agreed, the arbitration agreement shall mean the lease entered into between the parties or their predecessors in title and shall include any side letter, variation or indorsement varying its terms.

Application of code

- 3.1 The parties to the dispute are free to agree that this code, with or without modification, shall apply to the arbitration of their dispute.
- 3.2 If the parties have not agreed on the application of this code, the arbitrator is free to specify that it shall apply to the arbitration and may introduce such modifications as he or she deems appropriate for the efficient and fair conduct of the proceedings. The arbitrator shall inform the parties if the code is to be applied at the earliest opportunity and, in any event, where there is to be an oral hearing, before the commencement of the substantive hearing.
- 3.3 Where there is an agreement by the parties under paragraph 3.1 or a specification by the arbitrator under paragraph 3.2, this code shall apply to the arbitration and is in addition to the parties' rights and obligations under the arbitration agreement and the Arbitration Act 2010.

Duties of the arbitrator

- 4.1 It is the overriding duty of the arbitrator to deal fairly as between the parties and to bring to their attention any matter which might give rise to a perception of bias on their part.
- 4.2 The arbitrator shall determine the rent for the property as defined in the lease or the arbitration agreement.
- 4.3 In order to carry out his or her duty under paragraph 4.2, the arbitrator may inspect the property the subject of the dispute together with any other relevant property offered by way of comparative evidence.

Duties of the parties

- 5.1 In submitting to arbitration the parties agree to be bound by the arbitrator's determination and to comply with any direction lawfully given by the arbitrator.
- 5.2 It shall be the duty of the parties to the arbitration to honestly provide all relevant information or evidence to the arbitrator and not to knowingly mislead the arbitrator.
- 5.3 In providing any comparative evidence, no party (or his or her agent) shall conceal or withhold any fact or information material to the consideration of the comparison advanced. It is the duty of all parties (and their agents) to disclose particulars of any side agreement, rent-free period, break clause, contribution to fitting out costs or any other such relevant matter to the arbitrator.
- 5.4 Where a party or an agent is precluded from disclosing particular information because of the existence of a confidentiality agreement, the existence of that confidentiality agreement shall be disclosed to the arbitrator who may require evidence of the fact of its existence.

- 5.5 The duty in paragraph 5.3 refers to information which is within the knowledge of a party or his or her agents and, in respect of comparisons provided by some third party, any information imparted by that third party.
- 5.6 In disclosing information which has been received from a third party, the party making disclosure shall disclose all of the information which has been received.
- 5.7 The provisions in the preceding paragraphs shall apply as appropriate to any experts or witnesses who may be called to give evidence in the arbitration proceedings.
- 5.8 The provision of any information, whether under paragraph 5.2 or otherwise, and the agreement to any fact referred to in paragraph 7.4, shall be without prejudice to the rights of either party to raise any issue as to the relevance thereof in the proceedings before the arbitrator.

Arbitrator's circumstances

- 6.1 Any person approached in connection with his or her possible appointment as an arbitrator should disclose any circumstances likely to give rise to a perception of bias by either party to the proposed arbitration.
- 6.2 Where the person approached accepts the appointment, the duty of disclosure specified in paragraph 6.1 shall apply from the time of his or her appointment and throughout the arbitration.
- 6.3 Without prejudice to the generality of the foregoing, an arbitrator shall, prior to appointment or, if the appointment has been made, as soon as the information comes to his or her attention, disclose, to his or her knowledge, any circumstances concerning his or her personal or business dealings (or dealings of any associated firm) with the parties to the arbitration, their advisors or the subject matter of the dispute which would give rise to a

reasonable apprehension of bias. By way of example, an arbitrator should disclose whether:

- a) he or she has ever acted in a professional capacity for either of the parties to the arbitration;
- b) he or she has ever acted in a professional capacity for someone who is related to the parties, whether professionally or otherwise;
- c) either of the parties is personally known to the arbitrator;
- d) he or she has acted previously as arbitrator in a dispute involving one or other of the parties to the current dispute, or
- e) he or she or his or her firm or practice has any interest or professional involvement in any similar or neighbouring property the valuation of which might be affected by his or her award as arbitrator.

The examples in this paragraph are not intended to be exhaustive in relation to the duty of disclosure which is placed on the arbitrator by virtue of this code.

- 6.4 In the absence of an objection from either party, the arbitrator shall continue with the arbitration. However, if there is an objection from either party, the arbitrator shall consider whether there is a risk of a reasonable apprehension of bias and shall, if he or she considers that there is such a risk withdraw from the appointment.

Arrangements for arbitration

- 7.1 As soon as practicable (in any event not later than 30 days) after appointment, the arbitrator shall confer with the parties for the purpose of establishing:

a) the timeframe for the conduct of the arbitration and for the exchange of such documents as may not already have been exchanged, and

b) procedural directions for the conduct of the arbitration.

7.2 As soon as practicable after the dispute has been submitted to arbitration, each party shall provide any documents material to the rent review in dispute to the other party and to the arbitrator. The arbitrator shall consider whether the disclosure of additional material is warranted and shall set a timetable for the exchange of such material. The arbitrator shall also give directions as to the exchange of submissions and of any statements by witnesses or experts upon which the parties intend to rely.

7.3 Any directions for the conduct of the arbitration shall be given in writing at the earliest practicable date.

7.4 The arbitrator may also give directions that the parties or their representatives meet to agree and record such relevant facts as the arbitrator may direct and which are not in dispute. Such particulars may include:

a) the floor areas and ceiling heights of the property in question;

b) the basis of calculation of such floor areas;

c) the rateable valuation of the property;

d) the use or uses of the property;

e) planning permission granted in respect of the property;

f) any restrictions on user imposed by any competent local authority or otherwise;

g) any restrictions on user contained within the lease;

h) the frontage and depth of the property (if relevant);

i) the number of car parking spaces contained within the property and the identification any easements, rights, or privileges including the right to park cars on any property not part of the property in issue, and

- j) such other matters as the arbitrator may deem pertinent.

Costs of the arbitration

- 8.1 Acceptance of appointment as arbitrator shall be subject to the overriding principle that the arbitrator's fees shall be reasonable and not excessive having regard to the complexity of the matter and level of the rent in dispute.
- 8.2 If the parties have not made specific provision for the apportionment of the costs of the arbitration (which may include a provision to the effect that each party shall bear their own costs) the arbitrator may outline the principles which will govern the award on the matter of costs.
- 8.3 The arbitrator may also advise the parties that, in considering by whom such costs will be paid, he or she may have regard to the conduct of the parties to the arbitration and to any written offer of settlement made by one party to the other.
- 8.4 The arbitrator may also outline the basis on which their own fees will be calculated and may draw the attention of the parties to the fact that it may be possible for them to request that the costs of the arbitration be taxed by the Taxing Master or a County Registrar.
- 8.5 If the parties have not agreed as to the apportionment of costs, the arbitrator may, in his or her award as to costs, take account of the fact that the final award in respect of the reviewed rent is closer to the rent proposed by either of the parties during the arbitration proceedings and may make such allowance for this in the award as to costs as to him or her seems appropriate.
- 8.6 It is open to the parties to agree at any time that the arbitrator shall have the power to tax the costs of the arbitration and, if the parties so agree, the arbitrator shall have such power.

Appointment of experts by arbitrator

- 9.1 Unless otherwise agreed by the parties, if the arbitrator considers it necessary or one or other of the parties so request, the arbitrator may appoint one or more experts to report to him or her on one or more specific issues relevant to the rent review. The fees and expenses of the arbitrator shall in addition include the fees and expenses of any such experts.

Discovery of documents

- 10.1 Either party to the arbitration may apply to the arbitrator to order the discovery of documents which they believe to be in the possession of the other party and material to the dispute and the arbitrator may direct such discovery. The arbitrator shall warn the parties that failure to comply with an order for discovery may result in adverse inferences being drawn and may, in an appropriate case, result in an interim award being made in favour of the party seeking discovery.

Oral hearing

- 11.1 An oral hearing shall be held unless the parties have agreed otherwise.

Evidence on oath or affirmation

- 12.1 The arbitrator may require that the evidence of witnesses shall be given on oath or affirmation and that an affidavit of verification shall accompany all documentary evidence.

Comparative evidence

- 13.1 In relation to any comparative evidence of property transactions, including information about rent levels within the same area, the arbitrator may request the provision of the following information in respect of each and every such comparison that is intended to be adduced in evidence before him or her:

- a) the address of the property;
- b) the name of the landlord;

- c) the name of the tenant;
- d) the type of property concerned;
- e) the effective date of the transaction in question;
- f) the nature of the transaction (letting, assignment etc.);
- g) whether to the knowledge of the party submitting the comparison the parties to the transaction which is the subject of the comparison were at arms length.
- h) the floor area and basis for calculation of floor area;
- i) the rent agreed;
- j) any stipulations as to payment of rent, rent free period or rent review;
- k) the capital contributions made by either party to the transaction;
- l) map showing location of property;
- m) means of knowledge of the transaction;
- n) whether the transaction is capable of being verified by either of the parties to the transaction or by a third party who was privy to the transaction, and
- o) the identity of the person or party providing the information if it is not within the personal knowledge of the party relying upon the comparison to give evidence on that information.

The arbitration

- 14.1 The arbitration should take place as soon as is reasonably practicable which, save in exceptional circumstances, should be no later than two months from the date of the arbitrator's appointment.
- 14.2 During the arbitration the parties shall be treated with equality and shall be given a full opportunity of presenting their case.
- 14.3 All statements, documents, expert reports or other information supplied to the arbitrator by either party or a retained expert shall be provided simultaneously to the other party.

14.4 No party (or agent) shall have any private communication with the arbitrator relating to the dispute.

14.5 Having held the oral hearing or received submissions and counter submissions, the arbitrator shall make his or her award in writing as soon as is practicable and, in any event, shall endeavour to send to both parties the terms of the award which it is proposed to make within one month of receipt of all relevant information.

14.6 Paragraph 14.5 is without prejudice to the arbitrator's entitlement to require the payment of his or her fees and expenses before he or she sends to both parties the terms of the award which it is proposed to make and to the arbitrator's entitlement to a lien on the proposed award in respect of such fees and expenses.

14.7 The written award shall state clearly the reasons upon which it is based and shall, in any event, include but is not limited to:

- a) the evidence, including comparative evidence, considered during the course of the arbitration proceedings;
- b) the weight given to such evidence, and
- c) the basis for the weight which was given to such evidence.

Remedy for breach of disclosure duties

15.1 Prior to issuing a final award the arbitrator shall send to both parties the terms of the award which it is proposed to make. In the absence of an application in accordance with paragraph 15.2 the arbitrator shall, after the expiration of 50 days from the date of the proposed award, issue a final award in those terms.

15.2 If either party is of the view that there has been a breach of the disclosure duties under this code which may have had a material impact upon the

proposed award, an application may be made to the arbitrator within 50 days of the date of the proposed award to revisit the arbitration. The application shall be copied to the other party simultaneously and shall set out full and detailed particulars of the breach alleged and of the evidence to be relied upon. Should the period of 50 days expire on a day that is a Saturday, a Sunday, a public holiday or fall between the 24th December and 1st January in any year, the period of 50 days shall be extended to the next working day thereafter.

- 15.3 If the arbitrator considers that there may have been a breach of the disclosure duties that may have had a material impact upon the proposed award he or she shall, as soon as practicable, seek a response from the other party. If, having considered such response, the arbitrator considers it appropriate, he or she shall reopen the arbitration for the purpose only of addressing the issue raised and may thereafter issue such final award as the circumstances require.