

**PROPERTY BAR ASSOCIATION
AND PROPERTY LITIGATION ASSOCIATION**

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**APPEALING ARBITRATION AWARDS ON POINTS OF LAW
UNDER SECTION 69 OF THE ARBITRATION ACT 1996**

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1. Introduction and Pre-history

Under the Arbitration Act 1950 and the Case Stated Procedure there had been a virtually automatic right to have any point of law arising out of an Award determined by the High Court; the exclusive jurisdiction of the Arbitrator was limited to issues of fact.

The enactment of the Arbitration Act 1979 indicated a conscious decision to move away from this approach, apparently because of concerns about its effect on the popularity of London as an international arbitration centre. The right to seek a ruling from the Court on a point of law (unless agreed by the parties) required leave, as well as being made subject to statutory conditions. It remained to be seen, however, how generous the Court would be in granting leave. The answer was given by Lord Diplock in Pioneer Shipping v BTP Tioxide (The Nema) [1982] AC 724: not at all generous!

The position was defined and refined in various cases, including some notable rent review cases (in the course of which it was suggested that the approach might need to be modified).

This is the pre-history of the position which is now governed by the Arbitration Act 1996, section 69 and CPR Part 62, in particular the Practice Direction to Part 62 (as from October 2010).

2. **Bibliography**

See the comprehensive treatment in the Handbook of Rent Review, section 11.8, and the Appendices where the relevant Parts of the 1996 Act and the CPR are reproduced. (Be sure to consult the Cumulative Supplement (Blue Paper) for the up-to-date commentary on the relevant procedures under the Practice Direction as from October 2010.)

3. **Section 69**

“69(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

An agreement to dispense with reasons for the tribunal’s award shall be considered an agreement to exclude the court’s jurisdiction under this section.

- (2) An appeal shall not be brought under this section except -
- (a) with the agreement of all the other parties to the proceedings, or
 - (b) with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

- (3) Leave to appeal shall be given only if the court is satisfied -
- (a) that the determination of the question will substantially affect the rights of one or more of the parties,
 - (b) that the question is one which the tribunal was asked to determine,
 - (c) that, on the basis of the findings of fact in the award –
 - (i) the decision of the tribunal on the question is obviously wrong, or
 - (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
 - (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

- (4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.
- (5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.
- (6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.
- (7) On an appeal under this section the court may by order –
- (a) confirm the award,
 - (b) vary the award,
 - (c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or
 - (d) set aside the award in whole or in part.

The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matter in question to the tribunal for reconsideration.

- (8) The decision of the Court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.

But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.”

Section 69 is supplemented by the following provisions of section 70:

- “70(1) The following provisions apply to an application or appeal under section 67, 68 or 69.
- (2) An application or appeal may not be brought if the applicant or appellant has not first exhausted -
- (a) any available arbitral process of appeal or review, and
 - (b) any available recourse under section 57 (correction of award or additional award).
- (3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.
- (4) If on an application or appeal it appears to the court that the award -
- (a) does not contain the tribunal’s reasons, or

- (b) does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal,

The court may order the tribunal to state the reasons for its award in sufficient detail for that purpose. ...”

Clearly, section 69 gives statutory effect to the restrictive policy behind The Nema guidelines, although Lord Phillips MR observed in The Northern Pioneer [2002] EW Civ. 1878 that the new provisions “open the door a little more widely to the granting of permission to appeal than the crack that was left by Lord Diplock” (in The Nema). It is accordingly possible to list Ten Hurdles which a party aggrieved by the decision of an Arbitrator in point of law will have to surmount. These are:

1. An appeal is only open to a “party to arbitral proceedings”. In LT&R Vowles v Aston [2005] EWHC 1459 Patten J held that a sub-tenant was not entitled to appeal under section 69 on a point of law arising in the arbitration to determine the rent under the headlease, although the sub-tenant was affected by the result, and had been invited to participate in the arbitration.
2. It must be established that there is “a question of law arising out of the award”. Whether the question is one of law or of fact must be judged in the light of the trenchant judgment of Steyn LJ in Geogas v Trammo Gas [1993] 1

Lloyds Rep 215, where he reviewed previous cases and observed: “this catalogue of challenges to arbitrator’s findings of fact points to the need for the Court to be constantly vigilant to ensure that attempts to question or qualify the arbitrator’s findings of fact, or to dress up questions of fact as questions of law, are carefully identified and firmly discouraged”. Even if the point identified in the prospective appeal as a “question of law” survives this test, Lewison J has pointed out in Marklands v Virgin Retail [2004] 2 EGLR 43 that the question must be one which can be found in the arbitration Award itself; it is not sufficient if it is a point of law which was argued before the Arbitrator but not dealt with in his Award. As Lewison J suggested, in such a case there might be alternative ways of addressing the point, such as an application under section 68.

3. It must be shown either that the parties have agreed that an appeal should be brought or that the Court should have given leave.
4. It must be shown that the question of law was one which the Arbitrator was asked to determine.
5. It must be established that the determination of the question of law will substantially affect the rights of one or more of the parties. The height of this Hurdle has been raised since the 1979 Act, which merely required that the question “could” substantially affect the rights of one of

the parties, whereas now it must be shown that it “will” do so. As Lewison J held in Safeway Stores v Legal and General [2005] 1 P&CR 9, it is sufficient, where leave to appeal is sought on a number of grounds, if the determination of all the points which the Arbitrator got wrong would substantially affect the rights of one or more of the parties; it is not necessary to take each point in isolation.

6. It must be shown that, on the basis of the findings of fact in the award, either the decision of the arbitrator on the question is obviously wrong, or the question is one of general public importance and the decision of the arbitrator is at least open to serious doubt. It will be rare, in a property arbitration, that the second limb can be satisfied. Accordingly, what the applicant for leave will have to show is that the decision on the question of law was “obviously wrong”. It is (perhaps unsurprisingly) difficult to obtain any clear idea from reading the cases (including those where The Nema guidelines were applied under the 1979 Act) precisely what will suffice to convince the Court that a decision is “obviously” as opposed to “arguably” or “possibly” or even “probably” wrong. It is submitted that this test inevitably introduces an element of subjectivity and thus of uncertainty and unpredictability. From the practitioner’s point of view this may often mean that the correct advice to the the client

should be to “have a go”, if the prospects seem good of overcoming all the other Hurdles.

7. It must be shown that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question of law. It might seem surprising that, where all the other Hurdles had been surmounted, there would still be this sort of “long stop provision”. The application of this principle is nonetheless illustrated in the case of Trustees of the Stern Settlement v Levy (No.2) [2009] 1 Lloyds Rep 345, where the Judge observed: “The Stern Trustees seem hell bent on taking almost every point and to avail themselves of every procedure to challenge Mr Levy’s claims and the decisions of the Arbitrator, irrespective of cost and resources. Given the weakness of the challenge before this Court and the waste of time, cost and resources in pursuing the point in the context of an overall arbitration of very modest proportions, I am satisfied that it is not just and proper for the Court to determine this question of law in any event”.
8. It must be shown that there are no other restrictions on the right to appeal. It is possible (but rare in property documents) for the right to appeal to be expressly excluded. It is more common for the parties to agree, in the course of the arbitral process, that there shall no appeal or agree that no reasons shall be given for the Award

(which has the same effect). (Section 70(2) also requires all other remedies to be exhausted prior to leave being sought, but this is hardly likely to arise in a property case.)

9. The previous Hurdles all apply to the stage of obtaining leave. Even assuming those Hurdles to have been surmounted, it is still necessary to convince the Court, hearing the appeal, that the Arbitrator was wrong. It may be thought that if the Court has accepted that he was “obviously wrong” then it will be much easier for the Court to decide that he was just “wrong”, but the circumstances in which the substantive appeal will be decided are different, and it is not, of course, impossible for one Judge to think to be right what another Judge has thought to be “obviously wrong”!
10. Finally, a Hurdle which must be overcome is to persuade the Court to reverse the Arbitrator on the question of law rather than merely remitting it to him for reconsideration. Although the section sets out a presumption in favour of remitting, it is thought that in most section 69 appeals arising in property cases there will be little point in remitting the question of law itself to the Arbitrator, although it may well be necessary to remit other matters for reconsideration in the light of what the court has decided on the question of law.

4. Procedural changes introduced by the Part 62 Practice Direction (from October 2010)

In relation to applications for permission to appeal under section 69, the procedure has been radically overhauled with effect from October 1, 2010, with the stated aim of controlling the amount of material submitted in connection with the permission to appeal process. The important points to note in connection with documents are set out in the Practice Direction to CPR 62, as follows:

- (a) the arbitration claim form must now not merely set out the grounds for the challenge, but must also append the award (paragraph 12.1);
- (b) any further evidence beyond the award itself is discouraged (and, in the case of arbitration documents, virtually forbidden – see paragraphs 12.5 and 12.10), and should only be filed (with the claim form) if it is necessary to establish the matters set out in paragraph 12.4 (which replicate section 69(3)(a) to (d));
- (c) the applicant's skeleton argument must be filed at the same time as the arbitration claim form, and must (among other requirements) not exceed 15 pages in length (para 12.1(3) and 12.2-3);
- (d) if the respondent wishes to contest the application, it must now file a respondent's notice (paragraph 12.6);
- (e) a respondent's notice must also be accompanied by a skeleton argument (paragraph 12.7);

- (f) any evidence upon which the respondent proposes to rely is subject to stringent rules identical to those governing the applicant (paragraph 12.8);
- (g) any evidence in reply from the applicant is also subject to similar stipulations (paragraph 12.9);
- (h) the bundle for the hearing should contain only the claim form, the respondent's notice, the award and any other arbitration documents for which a case has been made out, and the skeleton arguments (paragraph 12.15).

The documents in relation to any other type of arbitration application (e.g. an application to set aside an award under section 68 remain subject to the rules set out in the existing text of paragraph 11.10.9.

5. **Conclusion**

The Table set out in 11.8.18 of the Handbook of Rent Review summarises the results in the reported cases where appeals have been attempted under section 69. The results are not encouraging for the prospective appellant, suggesting that The Nema still rules us from the grave!