

JD WETHERSPOON-V- JAY MAR ESTATES (4 April 2007)

-RENT REVIEW ARBITRATOR CAN REACH HIS OWN CONCLUSIONS

The Message: A rent review Arbitrator is permitted to rely on his own experience in determining the issues before him.

The Case: The High Court has dismissed an application by a tenant to set aside an Arbitrator's Award on the grounds of serious irregularity and substantial injustice (JD Wetherspoon PLC-v- Jay Mar Estates (4/4/2007)).

JD Wetherspoon ("JDW") is the tenant of licensed premises in Redditch. The Lease provides for 5 yearly rent reviews on the assumption the premises is let in a shell condition. The Arbitrator, Mr Michael Newman, determined on 12 January 2007 that the annual rent payable from 25 March 2006 should be increased from £90,000 to £97,500.

In making his Award, the Arbitrator particularly relied on 2 comparable licensed properties in Redditch. The first is called Barracuda and was let as a shell so was directly comparable. The second is called Huggies and was fitted out so the rent payable needed adjusting in order to remove the element of the rent referable to the premises having been fitted out.

JDW objected to the fact that the Arbitrator assessed the capital value of the fittings, fixtures, and furnishings at Huggies at £150,000 by making his own calculations and not by reference to the figures put to him by each party's valuer. They claimed they were not given an opportunity to address the £150,000 figure and, if they had been, they could have presented further evidence which would have changed the Arbitrator's conclusion.

An Appeal against an Arbitration Award is governed by S.68 of the Arbitration Act 1996 and this requires there to have been a serious irregularity which has resulted in substantial injustice to the party appealing. A failure to act fairly and to allow a party a reasonable opportunity to put its case will amount to a serious irregularity.

The Court made it clear that, whilst an Arbitrator cannot introduce new evidence which the parties have not had a chance to address or make an Award on arguments or evidence not presented to him, he can make use of his own experience provided he uses it to evaluate the evidence called and not to introduce new evidence. In particular, an Arbitrator can deploy evidence put to him in a materially different way to the way the parties' valuers utilised that evidence.

The Landlord's valuer argued that the rent of Huggies should be assessed at £75,000, having reduced the actual rent by 10% to reflect the fitting out works. JDW's valuer took the actual fitting out costs of £700,000 and devalued that figure over 25 years and applied a 30% depreciation factor and this resulted in an annual rental of £59,252. The Arbitrator followed JDW's valuer's approach but not the allowances he had made and made his own calculations which resulted in a rent of £70,500.

The Court held that the Arbitrator was entitled to arrive at a figure which reflected his own approach and which produced a result which was part way between the valuers' figures. The value of the fitting out was a subjective issue which was heavily canvassed and the Arbitrator had simply applied his own experience in calculating the rental value and he had not raised anything new which had to be put first to the parties.

Furthermore, the Court held that Barracuda was the comparable which the Arbitrator primarily relied on so any irregularity in the calculation of the rental value of Huggies had no material effect and, accordingly, there was no substantial injustice even if the Arbitrator had not proceeded correctly. The Arbitrator also pointed out that he could not actually see that there was any further evidence that JDW could have adduced to affect the result anyway.

The application to set aside the Award therefore failed on all counts.