IRREGULAR - SERIOUSLY!

CHALLENGING ARBITRATION AWARDS UNDER SECTION 68 OF THE ARBITRATION ACT 1996

(1) Section 68 – the basics

1. S.68 allows a party to arbitral proceedings to apply to the court challenging an award in the proceedings on the ground of "serious irregularity" affecting the tribunal, the proceedings or the award.

2. An irregularity will only count as a "serious irregularity" for these purposes if:

   - It falls into one or more of the nine categories in s.68(2)
   - The court considers it has caused or will cause substantial injustice to the applicant

3. The nine categories in s.68(2) are as follows, with the two discussed below highlighted;

   (a) failure by the tribunal to comply with section 33 (general duty of tribunal);[1]
   (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
   (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
   (d) failure by the tribunal to deal with all the issues that were put to it;
   (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
   (f) uncertainty or ambiguity as to the effect of the award;
   (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
   (h) failure to comply with the requirements as to the form of the award; or
   (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

4. If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may:

[1] Section 33 imposes a duty on the tribunal to act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and to adopt procedures suitable to the circumstances of the particular case so as to provide a fair means for the resolution of the matters falling to be determined.

(a) remit the award to the tribunal, in whole or in part, for reconsideration,
(b) set the award aside in whole or in part, or
(c) declare the award to be of no effect, in whole or in part.

(2) Limitations on s.68 applications

5. As with s.69 appeals, a s.68 application may not be brought if the applicant has not first exhausted any available arbitral process of appeal or review, and any available recourse under section 57 (correction of award or additional award).

6. Any s.68 application 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.

7. Under s.73 if a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection in respect of any irregularity he may not raise that objection later, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.

8. "Forthwith" here means "as soon as reasonably possible": *Margulead v Exide Technologies* [2005] 1 Lloyd's Rep 324, per Colman J. In practice, this means that if the respondent can show that the applicant continued to take part in the arbitration without objection after the grounds of objection arose, the burden passes to the applicant to show that he did not know and could not with reasonable diligence have discovered those grounds at the time: *Thyssen Canada v Mariana Maritime* [2005] 1 Lloyd's Rep 640 per Cooke J.

(3) The key issues

9. The four key issues under s.68 are:

(a) What sorts of conduct count as a "serious irregularity"?

(b) When will a serious irregularity be treated as causing "substantial injustice to the applicant"?

(c) How should someone concerned by an award protect their position where there is the possibility of a s.57 application?

(d) When will the court set aside an award rather than remitting it?

(4) What sorts of conduct count as a "serious irregularity"?

10. Given the limitations of time, I propose to focus on two sorts of conduct that have been considered in the context of s.68 challenges to rent review arbitrations:
(a) Challenges under s.68(2)(a) on the ground that the arbitrator decided an issue on the basis of a point that neither side had raised.

(b) Challenges under s.68(2)(d) on the ground that the arbitrator failed to deal with an important issue.

S.68(2)(a): Cases where the arbitrator decided an issue on the basis of a point that neither side had raised

11. It will amount to a serious irregularity if the arbitrator decides the dispute on the basis of a point which was not in play, not "in the arena" and which the parties had no opportunity to comment on. In *London Underground v Citylink Telecommunications* [2007] 1 BLR, Ramsey J said:

> "It will generally be the duty of a tribunal to determine an arbitration on the basis of the cases which have been advanced by each party, and of which each has notice. To decide a case on the basis of a point which was not raised as an issue or argued, without giving the parties the opportunity to deal with it, will be a procedural irregularity."

12. In *JD Wetherspoon plc v Jay Mar Estates* [2007] BLR 285, Coulson J said:

> "... the arbitrator is entitled to arrive at his award by deploying the evidence that he has heard in a way that is materially different from the way in which the parties' valuers deployed that evidence, provided that the point has been put into the arena by the valuers themselves, and/or that it is a point with which they have had an opportunity to deal."

13. Many of the cases quote a passage in the judgment of Bingham J in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14:

> "If an arbitrator is impressed by a point that has never been raised by either side, then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission, then again it is his duty to give the parties a chance to comment. If he is to any extent relying on his own personal experience in a specific way then that again is something that he should mention so that it can be explored. It is not right that his decision should be based on specific matters which the parties have never had the chance to deal with. Nor is it right that a party should first learn of adverse points in a decision against him. That is contrary both to the substance of justice and to its appearance."

Some examples in rent review cases are as follows.

14. In *Guardcliffe Properties Ltd v City & St James* [2003] 2 EGLR 16, the demised premises were A3 premises in Newcastle. Etherton J remitted the award for reconsideration by the arbitrator under s.68 because of three serious irregularities which had caused substantial injustice to the landlord.

15. First, the arbitrator made a downward adjustment of £10,000 to reflect a hypothetical rent-free period, a deduction that neither party had raised. The landlord's surveyor had

been denied an opportunity of refuting the appropriateness of the deduction. The notional rent-free period was a very substantial one. The arbitrator ought to have allowed the parties, and, in particular, the landlord, an opportunity to comment upon the principle of a rent-free period and its duration. The landlord's surveyor said, in his witness statement that, if he had been given the opportunity, he would have refuted the appropriateness of the rent-free period allowed by the arbitrator, and would have backed this up with evidence from comparable lettings. In those circumstances, and bearing in mind the substantial amount of the discount over the 21-year period before the next rent review, the irregularity would cause substantial injustice to the claimant.

16. Second, the arbitrator made a deduction of £8,500 to reflect the tenant's ongoing liabilities for the upper parts that could not be used, which issue had also not been raised by either party. Again, the landlord's surveyor had been denied an opportunity of refuting the appropriateness of the deduction.

17. Third, the arbitrator analysed a premium paid for a comparable on the basis that the whole of the premium was attributable to fit-out costs, when only a small part was so applied. There was no factual basis for the arbitrator's decision to treat the entire premium of the comparable as payment for fit-out costs; that also gave rise to a serious irregularity.

18. By way of contrast, in *Warborough Investments Limited v. S. Robinson & Sons (Holdings) Limited* [2003] 2 EGLR 149, the s.68 challenge failed. The case is a complicated one and requires careful analysis to understand the basis on which the challenge was rejected. In essence, the arbitrator fixed the rent on a basis for which neither valuer had contended, but the relevant issue (an adjustment based upon the lack of retail use) had been raised in the evidence and had thus been put into the arena for the arbitrator to consider and decide. There was therefore no serious irregularity, even though the particular point which the arbitrator utilised in his award had been raised and then discarded by the tenant's valuer, whilst the landlord's valuer had not considered it at all. It was held that the arbitrator was not to be criticized for extracting from the submissions in that case an alternative argument which then formed the basis of his award.

19. The premises were light industrial premises on the Robinson's Industrial Estate in Derby. The review was of the ground rent payable at the rent review date, 17 February 1997. The user clause restricted use to light industrial or warehousing purposes only. The tenant's surveyor submitted that the appropriate rent was £2.28 per square yard, making £21,750 per annum. The landlord's surveyor submitted that the appropriate rent was £4.40 per square yard, making £42,000 pa. The arbitrator fixed the rent at £2.93 per square yard, making £27,900 per annum.

20. The key comparables were nearby premises at Osmaston Road whose rent was reviewed at the same time as the Robinson's Industrial Estate: in 1989 and 1997. The rent for the subject premises had been agreed at £1.94 per square yard in 1989. There were four comparable properties at Osmaston Road where the rents agreed (pounds per square yard) were as follows:

Unit No.	Rent agreed in 1989	Rent agreed in 1997	User clause
244	£3.10	£4.62	Light industrial, warehousing, or retail warehouse for sale of carpets and floor coverings
246	£3.00	£4.70	Light industrial, warehousing, or the retail sale of ceramic tiling products, tiling and decorating materials only
248	£2.17	£4.65	Light industrial or warehousing only
250	£2.46	[None – purchased by tenant before the review]	Light industrial or warehousing only

21. The arbitrator's figure of £2.93 per square yard was arrived at as follows:

- He started with the 1997 rent agreed for 248 Osmaston Road, at £4.65 per square yard.
- He then said that this was "not totally reliable as it clearly does not reflect the complete prohibition against any retail operations when compared with the two adjoining settlements".
- He then looked at the 1989 rent review settlements for 244 and 246 Osmaston Road at an average of £3.04 per square yard. This was to be compared to the 1989 settlement for 248 Osmaston Road at £2.16 per square yard "and therefore the uplift for retail use at that time was 41%". (£3.04 - £2.16 = £0.88. £0.88/£2.16 = 0.41).
- The rent for the subject premises had been agreed at £1.94 per square yard in 1989. So at that time, the rent for the subject premises was 11.34% lower than that for 248 Osmaston Road, reflecting differences of quantum and prominence.
- There was no evidence submitted to suggest that the appropriate allowance for a restricted retail use should be any different in 1997 than it was in 1989.
- Therefore the 1997 settlement for 248 Osmaston Road should be adjusted first, by a 41% end allowance for the restricted retail consent to arrive at £3.30 per sq. yd. (£4.65-£3.30 = £1.35. £1.35/£3.30 = 0.41). Second, there should be a further adjustment of 11.34% to reflect differences of quantum and prominence between Osmaston Road and Robinson's Industrial Estate. £3.30 – 11.34% = £2.93.

22. The landlord's surveyor's was Mr Gillott. His original submission did not refer to the 1989 reviews at all. He relied on the 1997 reviews for Osmaston Road. He took number 248 at £4.65 as the best comparable, deducted 10% for quantum and added back 5% on the basis that he contended that the subject premises had a wider user clause than 248 Osmaston Road, to arrive at £4.40 per square yard.

23. The tenant's surveyor was Mr McNab. His original submission did refer to the 1989 reviews at Osmaston Road and the 1997 reviews in respect of numbers 244 and 247 Osmaston Road. He did not mention 248 because he understood it had been purchased by the tenant before the 1997 review. The tenant's surveyor dealt with the additional rent payable for the ability to use premises for retail purposes. He said that in relation to 248 and 250 Osmaston Road the landlord agreed, prior to the 1989 reviews, to allow limited retail use in return for a 25% uplift in the rent. He said that the rent agreed for the subject premises in 1989 reflected a quantum discount of around 20% from the Osmaston Road premises. He then said

> "You would have thought that in those circumstances it would have been a straight forward task to utilise the same formula in 1997, but in fact if you do, and base it on the settlements relating to Nos 244 and 246, you arrive at a figure of £2.78 per sq. yard … which is not compatible with the other evidence".

24. He then expressed doubts as to the reliability of the 1997 reviews for numbers 244 and 246, comparing them to evidence from a different estate, the Osmaston Park Industrial Estate, which he said was the premier industrial location in the City. He said if you took the rents agreed at Osmaston Park, and increased 25% to reflect the partial retailing permitted at numbers 244 and 246, the most you could justify was £3.75 per square yard. He thought the best approach was to work from the rents at Osmaston Park and discount for quantum and location and to adjust the final figure to reflect an increase in the gross income from the subject estate between 1989 and 1997.

25. The report does not say how Mr McNab worked out his 25%, but it seems to have been as follows:

> Average of rent for 244 and 246: £3.05
> Rent for 250: £2.46
> £3.05 - £2.46 = £0.59
> £0.59/£2.46 = 24%; round up to 25%.

26. In his counter submissions, Mr Gillott, the landlord's surveyor, said that the 1989 reviews were irrelevant and noted that Mr McNab, the tenant's surveyor, had not provided validation of them. In his counter submissions, Mr McNab referred to the 1997 review of 248 Osmaston Road, of which he had previously been unaware. He said that the rent could not have been recommended by a surveyor as it appeared to take no account of the fact that 248 Osmaston Road could not be used for any retail purpose. He said that the rent settlements for 244, 246 and 248 were all to be considered unsafe.

27. The landlord's arguments were as follows:

- o The exercise which the arbitrator conducted on the question of a possible uplift for retail use was not the same exercise as Mr McNab had conducted in his first report. The arbitrator was concerned with a different property (number 248 Osmaston Road as opposed to numbers 244 and 246), and that the arbitrator's exercise resulted in a higher percentage (41% as opposed to 25%).

- There was no evidence before the arbitrator that in calculating the appropriate deduction for lack of retail use it was appropriate to compare numbers 244 and 246 with number 248. Mr McNab's comparison was being between numbers 244 and 246 on the one hand and number 250 on the other.

- There was no material before the arbitrator to justify his assumption that the entire 41% differential in relation to number 248 was attributable to the lack of retail user.

- There was no material before the arbitrator to justify his conclusion that the same differential should apply in 1997 as in 1989.

- The agreed procedure for exchange of reports did not allow Mr Gillott an opportunity to comment on Mr McNab's challenge, in his supplementary report, to the reliability of number 248 as a comparable.

- The retail uplift calculation made by Mr McNab was expressly disclaimed by him as leading to a result which was "incompatible with the other evidence", with the result that it was not reasonably foreseeable by Mr Gillott that the arbitrator would have rely on it and apply it.

- There was no material before the arbitrator to support a deduction of 41% in place of the 25% deduction made by Mr McNab in his (subsequently disclaimed) calculation.

28. The Court of Appeal rejected those arguments. The leading judgment was given by Jonathan Parker LJ, with whom Clarke LJ agreed. He said that there had been no breach of the section 33 duty of fairness for the following reasons:

- The complaint that the procedure for exchange of reports had the effect of denying Mr Gillott the opportunity to comment on the contents of Mr McNab's supplementary report was misplaced. Had the landlord wished to take that point, the time to take it was before the award, not afterwards.

- In making his award, the arbitrator accepted Mr Gillott's view that number 248 Osmaston Road was the most appropriate comparable, in preference to Mr McNab's view that the most appropriate comparables were the properties in Osmaston Park Industrial Estate. Having done so, the arbitrator went on to conclude, accepting the point made by Mr McNab in his supplementary report, that an adjustment needed to be made to the 1997 reviewed rent of number 248 to reflect the lack of retail user and to bring it into line in that respect with the subject premises. No complaint was made by the landlord in relation to this step.

- The arbitrator then had to decide what would be an appropriate deduction to reflect lack of retail user: a question which neither Mr Gillott nor Mr McNab had specifically addressed. The arbitrator concluded that he should look, "for guidance in that respect", to the 1989 figures relied on by Mr McNab in his first report. This was something that the arbitrator was entitled

to do. Mr McNab never disclaimed reliance on those figures. In saying that a straightforward application of his 25% formula to the 1997 rents of numbers 244 and 246 would produce a result which was "not compatible with the other evidence" he was not disclaiming the formula; rather, he was questioning the reliability of the 1997 rents as comparables.

- However, it was true that the arbitrator deployed the 1989 figures in a manner which was materially different from the manner in which Mr McNab had deployed them. Moreover, the arbitrator treated the 41% differential between (a) the average 1989 rents of numbers 244 and 246 and (b) the 1989 rent of number 248 as being attributable in its entirety to "uplift for retail use". That treatment of the 1989 figures, whilst not inconsistent with Mr McNab's first report, was not one which is to be found in that report.

- The arbitrator's failure to invite further representations on the question of the appropriate adjustment to the 1997 rent of number 248 Osmaston Road to reflect lack of retail user did not amount to a breach of the statutory duty of fairness. The issue of an adjustment of the 1997 rent for number 248, based on the lack of retail user, was clearly raised by Mr McNab in his supplementary report; and in his first report he had dealt with the significance of retail user by reference to the 1989 figures relating to numbers 244 and 246. Moreover, Mr Gillott had himself expressly recognised the significance of a user clause in comparing rental levels. So these matters had been put into the arena. The fact that Mr Gillott felt able to dismiss the 1989 figures summarily as "irrelevant", without engaging with Mr McNab's analysis of them, could not assist the landlord.

29. That was, then, a case where the arbitrator used the information placed before him in a way different to that in which the parties' surveyors had used it. Whereas Mr McNab had analysed part of the 1989 rent review information (the rents agreed for numbers 244, 246 and 250) as supporting a 25% increase in rental value to reflect restricted retail use, the arbitrator analysed a different part (the rents agreed for numbers 244, 246 and 248) to arrive at a 41% increase for restricted retail use. The Court of Appeal held that the arbitrator's failure to give the landlord a chance to comment on this was not a serious irregularity; and even if it was, the failure did not cause a substantial injustice because the landlord's case would not have been sufficiently different.

30. In *St George's Investment Company v Gemini Consulting Limited* [2005] 1 EGLR 5, the s.68 challenge succeeded. The rent review arbitration was conducted on paper. The subject premises were on the ground floor in an office building and the valuers agreed that the relevant evidence was that of lettings and rent reviews of other floors in the same building. The arbitrator determined the rent by taking a rent psf for an upper floor, derived from a rent review award in respect of the third floor. He reduced it by 40% to adjust it to a lower ground floor rent, and then made a series of further adjustments to it in respect of onerous lease terms (lease term, alienation, reservations concerning access and restricted user).

31. Mr Jarvis QC summarised the principles to be derived from the authorities as follows:

(1) An arbitrator is entitled to use his expert knowledge to arrive at his award, provided it is of the kind and in the range of knowledge one would reasonably expect the arbitrator to have and providing he uses it to evaluate the evidence called and not to introduce new and different evidence. An arbitrator does not have blanket permission to use his own expert knowledge to arrive at an award. For example, if an arbitrator proposes to take into account evidence which is not being called it is his duty to expose those matters for comment by the party.
(2) The arbitrator is entitled to arrive at his award by deploying the evidence in a way which is materially different from the way that the parties' valuers deployed them, providing that the award addresses a matter which has been put into the arena by the valuers and with which they have had an opportunity to deal
(3) The issue is not whether the Arbitrator came to the right conclusion. The sole issue is whether he committed a serious irregularity in coming to the conclusion that he did.
(4) In deciding whether a serious irregularity has caused substantial injustice, the Court should not decide what rent the Arbitrator might have fixed if he had dealt with the case differently. The Court should try to assess how the aggrieved party would have conducted his case but for the irregularity. Only if the aggrieved party has suffered a substantial injustice because he was unable to present his case and so obtain a fair hearing of his case will the irregularity be treated as falling within s.68.
(5) The test of "substantial injustice" is intended to be applied by way of a support of the arbitral process and not by way of interference with that process. It is only in those cases where it can be said that what is happened was so far removed from what could reasonably be expected of the arbitral process that the Court will interfere. S.68 is a long stop which is only available in extreme cases where the arbitrator has gone so wrong in his conduct of the arbitration that justice calls out for it to be corrected. It is not a soft alternative to an application for leave to appeal.
(6) Pursuit of the overall objective of arbitral proceedings, and the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense, requires that the Courts accord a reasonably generous margin of appreciation to arbitrators in the discharge of their functions
(7) An arbitrator must not make an award based on arguments or evidence which were not presented to him or on a basis which is contrary to the common assumption of the parties as represented to him.

32. Applying those principles, Mr Jarvis held that the arbitrator's application of the additional discounts contravened the last principle. Neither valuer had suggested that it was appropriate to arrive at the rent in that way. He said:

> "There is always a danger in paper arbitrations where an arbitrator is deprived of the opportunity of testing arguments that he will arrive at a conclusion which is not envisaged by the parties. That will not be an unfair result if the parties had an opportunity to deal with the issues. The warning given by Colman J in *Pacol Limited v. Joint Stock Co Rossakhar* [1999] 2 All ER (Comm) 778 at p.787 F–H is relevant. "It is particularly important in arbitrations which are conducted on documents alone that the arbitrators should be alive to the dangers of introducing

into their awards matters which have never been, or have ceased to be, matters in issue between the parties. This case is a particularly glaring example of the arbitrators simply ignoring the definition of issues which had been arrived at prior to the time when they had to determine the issues then referred to them."

33. The tenant's valuer had applied discounts for onerous lease terms when analysing comparables outside the building, but not when adjusting the rent for the third floor. The arbitrator had invented his own method for getting to the rent which mixed up two different methods used by the valuers for getting to the rent. Because he had not given the parties an opportunity to comment on this new method, the landlord's valuer did not have the opportunity that it involved double counting, because the third floor rent already reflected any discount for onerous lease terms. The question of making onerous lease discounts from the third floor rent was not "in the arena". Mr Jarvis concluded:

> "It is perhaps unfortunate that when setting out his calculation in paragraph 16.7 of his Award the Arbitrator did not explain how he had arrived at this calculation. It seems to me that the Award as presently formulated gives the appearance that the Arbitrator has made his calculations on a basis which was contrary to the agreed assumptions between the parties and which appears to confuse the two methodologies of valuation. In a paper arbitration such as this, the Arbitrator could have avoided these problems by either writing to the parties seeking their comments as to the course which he proposed to adopt or since his fees had been paid on an interim basis he could have sent them a draft of the Award and invited their comments before publishing the Award. Had that been done, there is no doubt these proceedings would not have taken place."

S.68(2)(d): failing to deal with a key issue

34. Arbitrators do not have to deal with every argument on every point raised but only with essential issues; s.68(2)(d) is confined in its application to essential issues as distinct from the reasons for determining them: *Fidelity Management SA v Myriad International Holdings BV* [2005] 2 Lloyd's Reports 508. In *Van der Giessen-de-Noord v Imtech Marine* [2009] 1 Lloyd's Reports 273, Christopher Clarke J said:

> "It is likely to be a serious irregularity under section 68 for the tribunal to fail to deal with all essential issues. But it may do so concisely. A failure to deal with an issue is not the same as a failure to set out the reasoning for rejecting a particular argument. Such a failure is remediable under section 70(4) ."

35. The proper approach of the court to s.68(2)(d) was described by HHJ Lloyd QC in *Weldon Plant v. The Commission for New Towns* [2001] 1 All ER Com 264:

> "… section 68(2)(d) is not to be used as a means of launching a detailed inquiry into the manner in which the tribunal considered the various issues. It is concerned with a failure, that is to say where the arbitral tribunal has not dealt at all with the case of a party so that substantial injustice has resulted, e.g. where a claim has been overlooked, or where the decision cannot be justified as a particular key issue has

not been decided which is crucial to the result. It is not concerned with a failure on the part of a tribunal to arrive at the right answer to an issue. In the former instance the tribunal has not done what it was asked to do, namely to give the parties a decision on all the issues necessary to resolve the dispute or disputes (which does not of course mean decisions on all the issues that were ventilated but only those required for the award). In the latter instance the tribunal will have done what it was asked to do (or will have purported to do so) but its decision or reasoning may be wrong or flawed. The arbitral tribunal may therefore have failed to deal properly with the issues but it will not have failed to deal with them."

36. In *Metropolitan Property Realizations Limited v Atmore Investments Limited* [2008] EWHC 2925 (Ch), the review was under a lease of small parade of shop units with residential flats on the floor. The arbitration was conducted on paper. The tenant's valuer said in his submissions that, having regard to the nature of the development, the income likely to be received from sub-tenants, the costs liabilities under the lease, shopping patterns at the time of the review and general demand for units in such a location there would not be a market for such a lease at a rental in excess of that already paid. The evidence of the cost/income spreadsheet showed minimal benefit for a great deal of effort. He concluded that a 57 year lease term on a property of this nature in such a location was inconceivable in the current market. The only way a tenant would be persuaded to take a 57 year lease of a property of this nature in such a location would be on a peppercorn basis.

37. He did not argue that the rent should be calculated by taking the gross income which could be derived from sub-letting and then applying a discount; he simply said there would be no market for the hypothetical lease.

38. The landlord's valuer assessed the likely income from the shops and flats and then applied discounts for management, voids, and the 21 year review pattern, to arrive at the net income which the tenant would receive. That, he said, was the rent which would be paid under the hypothetical lease.

39. However, on this calculation, equating the income for the notional tenant from sub-letting the units with what that tenant would pay the landlord, the notional tenant under the fair rent calculation would derive no benefit for itself from taking the lease. It was difficult, therefore, to see why any prospective tenant would actually wish to take on the lease on these terms. This flaw in the methodology, however, was not one that was pointed out by the tenant in the arbitration.

40. The arbitrator rejected the tenant's evidence that there was no market. He had no doubt that, if there was a profit rent to be made for the 57 year term, there would be investors in the market wanting that opportunity. He accepted the landlord's valuer's approach.

41. Sales J allowed an application under s.68. There was no element of profit in the rent calculated by the arbitrator. The management charge was not profit, but a cost incurred by the tenant in obtaining the net rent. There was a "glaring illogicality contained in the central reasoning in an award" which entitled the Court to intervene. Even though the tenant did not present distinct submissions in the arbitration on the question of a flaw in the calculation, it was still incumbent on the Arbitrator to reason through his

award in a logical way, satisfying himself that the calculation which he adopted into his award was coherent in light of the commercial approach which he decided should be applied and sufficient to answer the basic issue which he had to resolve. He failed to identify the amount of the notional tenant's profit which was appropriate and failed to allow for an element of such profit in the calculation of fair yearly rent, which he had himself identified as a relevant factor to be taken into account. The award: "cannot be regarded as a rationally sustainable resolution of, or dealing with, the basic issue which he had to determine."

42. This failure by the Arbitrator fell within s.68(2)(d) (failure by the tribunal to deal with all the issues that were put to it) in that it amounted to a "serious irregularity" by virtue of which he failed to deal with the basic issue which he had to decide.

43. This does seem something of a stretch when s.68(2)(d) refers to "the issues that were put" to the arbitrator, and the particular issue that Sales J criticised the arbitrator for not addressing was never put to the arbitrator.

44. In *Dodds v West Register (Public Houses III) Ltd* [2008] 22 EG 169 (CS), the lease was of a tied pub, with the lease including a beer tie. The arbitrator failed to take into account the effect that the beer tie would have on the tenant and this was a serious irregularity. The case is only reported in the Estate Gazette Case Summaries and no transcript is available, but it does appear from the report that this was simply a case of the arbitrator failing to deal with a key issue put to him.

(5) When will an serious irregularity be treated as causing "substantial injustice to the applicant"?

45. In *Vee Networks Limited v. Econet Wireless International Limited* [2004] EWHC 2909 (Comm) at [90] Colman J said:

> "The element of serious injustice in the context of section 68 does not in such a case depend on the arbitrator having come to the wrong conclusion as a matter of law or fact but whether he was caused by adopting inappropriate means to reach one conclusion whereas had he adopted appropriate means he might well have reached another conclusion favourable to the applicant. Thus, where there has been an irregularity of procedure, it is enough if it is shown that it caused the arbitrator to reach a conclusion unfavourable to the applicant which, but for the irregularity, he might well never have reached, provided always that the opposite conclusion is at least reasonably arguable. Above all it is not normally appropriate for the court to try the material issue in order to ascertain whether substantial injustice has been caused. To do so would be an entirely inappropriate inroad into the autonomy of the arbitral process."

46. In the rent review context, the applicable test was stated in *Checkpoint Ltd v Strathclyde Pension Fund* [2003] 1 EGLR 1. There, the demised premises were a storage and distribution depot in Bracknell. The lease provided that the rent on review was to be determined by an independent surveyor arbitrator experienced in the letting and/or valuation of property of a similar nature to the premises, situated in the same region as the premises and used for similar purposes. The landlord's surveyor relied on

three lettings of units in Winnersh Triangle and three in Bracknell. The tenant's surveyor submitted that a unit in the southern industrial area of Bracknell was the only true comparable. The arbitrator accepted the landlord's submissions and fixed the rent accordingly. On the relevance of the Winnersh Triangle units, the arbitrator referred to his own experience as a letting agent, which was that companies considering Winnersh Triangle would consider similar type buildings in Bracknell. The tenant challenged the award under s.68. He alleged that the arbitrator had wrongly relied on his own experience of letting units in Winnersh Triangle without giving the tenant the opportunity to deal with that in evidence, and failed to deal with an important part of the tenant's evidence concerning the over-supply of and poor demand for premises in the immediate locality.

47. Park J dismissed the application, and the Court of Appeal agreed. The Court held that B was entitled to use his personal knowledge of letting units in the Winnersh Triangle lettings to evaluate the evidence submitted to him. The test was:

> "is the information upon which the arbitrator has relied information of the kind and within the range of knowledge one would reasonably expect the arbitrator to have acquired if, as required by the terms of this lease, he is experienced in the letting and/or valuation of property which is of a similar nature to the premises, is situate in the same region as the premises and used for purposes similar to those authorised under the lease"

per Ward LJ (with whom Mummery and Jonathan Parker LJJ agreed) at para 31.

48. That made it strictly unnecessary for the Court to consider the question of whether, if there had been a serious irregularity, it had caused substantial injustice to the tenant. Ward LJ did, however, address that issue. He said:

> "[57] I find it impossible to decide whether there has been a substantial injustice based on what the arbitrator might have found if he had dealt with the case differently. It is all too hypothetical for me.
>
> [58] In my view the approach has to be much more amorphous. The court should not make its own guess at the rental figure and make a comparison with the amount awarded. Rather the court should try to assess how the tenant would have conducted his case but for the procedural irregularity. It is the denial of the fair hearing, to summarise procedural irregularity, which must be shown to have caused a substantial injustice. A technical irregularity may not. The failure to deal with a substantial issue probably will. I am not sure I would have found that if any of the irregularities were proved in this case the tenant would have been put at such a disadvantage that a substantial injustice had been caused. Once the arbitrator had accepted Mr Garvey's case, as broadly he did, then the die was cast."

49. He referred with approval to the judgment of Tuckey J in *Egmatra AG v Marco Trading Corp* [1998] CLC 1552. Tuckey J cited paragraph 280 of the report of the Departmental Advisory Committee which led to the enacting of the 1996 Act which said:

> "The test of "substantial injustice" is intended to be applied by a way of support of the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action.... In short, clause 68 [which is now section 68] is really designed as a longstop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected."

Tuckey J. observed:

> "So this is no soft option clause as an alternative to a failed application for leave to appeal."

50. In the *Warborough* case, Jonathan Parker LJ made observations on whether, if there had been a serious irregularity, it had caused substantial injustice to the landlord. He referred to Ward LJ's judgment in *Checkpoint* on this issue and said:

> "In the instant case, I am not satisfied that the case which Mr Gillott would have put had he been afforded the opportunity to submit a further report along the lines indicated in his witness statement would have been so different as to justify the conclusion that the lack of that opportunity in itself caused a substantial injustice, regardless of what the outcome of the arbitration would have been. Nor, for that matter, am I satisfied that the outcome in that event would have been materially different. Accordingly I agree with the judge that the appeal fails on this question also…
>
> In my judgment, pursuit of the overall objective of arbitral proceedings as set out in subparagraph (a) of section 1 of the 1996 Act ('the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense') requires that, to borrow an expression from another context, the courts should accord a reasonably generous margin of appreciation to arbitrators in the discharge of their functions.
>
> That said, however, I do not regard the instant case as a borderline case. In my judgment the instant case is plainly not a case in which the arbitrator has gone so far wrong in his conduct of the arbitration that justice calls out for it to be corrected."

51. In *Gemini* Mr Jarvis said:

> "It seems to me more likely that the Arbitrator has become confused with the two methodologies and that had the Arbitrator given the Claimant the opportunity to address him on this issue, the Arbitrator would have realised that he would have been acting against the common assumption of the valuers and that such a calculation would have resulted in double counting. I am therefore satisfied that a substantial injustice to the Claimant has occurred because of the irregularity."

52. In the *Metropolitan* case, Sales J held that the irregularity had caused substantial injustice, in that the tenant had been deprived of the benefit of a rationally sustainable arbitral award, and the award which has been made is flawed in a manner which may

cause the tenant substantial financial detriment in having to pay an excessive amount of rent under the lease for a very extended period of time.

(6) How should someone concerned by an award protect their position where there is the possibility of a s.57 application?

53. S.57(3) provides that the tribunal may on its own initiative or on the application of a party correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.

54. An application under s.57 is possible in cases where, for example, the parties mistakenly agreed a floor area which was too small: *Craske v Norfolk County Council* [1991] 1 EGLR 221, or where the arbitrator failed to give effect to a matter which is common ground between the parties: *Gannet Shipping Ltd v Eastrade Commodities Inc* [2002] 1 Lloyd's Rep 713, or attributed evidence to the wrong parties: *Mutual Shipping Corp of New York v Bayshore Shipping Co of Monrovia "The Montan"* [1985] 1 WLR 625.

55. S.57 does not, however, allow the arbitrator to change his award because he thinks he made an error in his award, unless that results from an error on the part of the parties or the arbitrator in arriving at the award. It does not enable the arbitrator to have second thoughts about the merits of his decision, but it does enable him to ensure that his award correctly reflects his true intention: *CNH Global NV v PGN Logistics* [2009] 1 C.L.C. 807. There must be an error affecting the expression the arbitrator's thought, not an error in the thought process itself.

56. S.70(2) provides that a s.68 application may not be brought if the applicant has not first exhausted any any available recourse under s.57.

57. The problem here is the 28 day time limit and the fact that a s.57 application may be unsuccessful. The only safe course is to apply to the court under s.68 and to the arbitrator under s.57 at the same time. The threat of the s.68 application may persuade the arbitrator to sort out the problem.

(7) When will the court set aside an award rather than remitting it?

58. There are two statutory provisions which create a strong presumption in favour of remitting the award to the arbitrator.

59. First, under s.70(4), if on an application it appears to the court that the award does not contain the tribunal's reasons, or 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.

60. Second, under s.68(3), it is provided that "The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."

61. This means, in practice, that it is only in cases of actual or perceived bias that the Court is likely to set aside the award. In most cases, the best that can be achieved is remission, with the serious risk that the arbitrator may end up making the same award.

Falcon Chambers
Falcon Court
London EC4Y 1AA
Tel: 020 7353 2484
Fax: 020 7353 1261
E-mail: jourdan@falcon-chambers.com

Stephen Jourdan QC

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