



**McAulay (Market Buildings) Limited v
Sports World International Limited**
Royal Court
5th May, 2015

**JUDGMENT
15/2015**

Application for leave to appeal a final arbitration award made on 19 February 2015.

**Approved Text
05.05.2015**

**IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)**

Between:

**McAULAY
(MARKET BUILDINGS) LIMITED**

Applicant

-and-

**SPORTS WORLD
INTERNATIONAL LIMITED**

Respondent

Leave to Appeal

Judgment handed down: 5th May 2015

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Applicant: Advocate S B Duerden

Cases, texts & legislation referred to:

The Arbitration (Guernsey) Law, 1982

Tostevin v Newhouse [2013] GLR 49

The Law and Practice of Commercial Arbitration in England (2nd ed., 1989)

Introduction

1. By an Application dated 10 March 2015, McAulay Market Buildings Limited seeks leave to appeal a final arbitration award of Tony Rowbotham made on 19 February 2015.
2. The Respondent, Sports World International Limited, indicated by way of an e-mail to the Applicant's Advocates dated 25 March 2015 that it did not intend to attend the hearing of the Application listed for 27 March 2015. Accordingly, the Application has proceeded on an ex parte basis and in the light of submissions made on behalf of the Applicant by Advocate Duerden at the hearing and on the material subsequently provided at my request.

3. The Arbitrator's Final Award dealt with premises known as Unit 1, Market Buildings, St Peter Port, in respect of which a dispute had arisen over the current market rental rate at the rent review date of 25 December 2012. The Applicant is aggrieved at the market rent found by the Arbitrator. The background, a copy of the Arbitrator's Award and some correspondence subsequently are set out in an Affidavit in support of the Application sworn by Advocate Duerden on 26 March 2015.
4. The Applicant's grounds of appeal identify a number of alleged shortcomings. The first is that the Arbitrator's Award incorrectly referred to a three-year period of rent reduction in relation to one of the comparable properties to which the parties had drawn attention (Unit 8) when it had been agreed that the correct period was only two years. In correspondence following his Award, the Arbitrator has acknowledged that he made an error. The second ground relates to the Arbitrator having preferred the evidence of the Respondent's expert on the valuation consequences of the rent incentive package operating in respect of Unit 8, which it is said arises, at least in part, from his misunderstanding of the proper rent reduction period. It is alleged that he failed properly to consider the submissions and responses of the parties. The third ground similarly relates to this misunderstanding because, without reference to the parties, the Arbitrator proceeded to rely on his own experience as to what was normal when analysing rents where the parties had agreed the approach to take so this was not something in dispute between them and in respect of which the Arbitrator had been invited to make a determination.
5. Section 19(1) of the Arbitration (Guernsey) Law, 1982, as amended, provides that "*Without prejudice to the right of appeal conferred by the next succeeding subsection, the Court shall not have jurisdiction to set aside or remit an award on an arbitration agreement on the ground of errors of fact or law on the face of the award.*" The right of appeal is then dealt with in section 19(2): "*Subject to the next succeeding subsection, an appeal shall lie to the Court on any question of law arising out of an award made on an arbitration agreement*". Such an appeal may only be brought with the consent of all parties to the award or, subject to section 20A, with leave of the Court (section 19(3)). Because the Respondent has not consented to the bringing of the appeal, leave is required.
6. Section 20A of the 1982 Law prevents the Court granting leave to appeal where the parties to the reference have agreed in writing to exclude the right of appeal. It was for this reason that I asked Advocate Duerden to provide a copy of the arbitration agreement, which is set out in the Sub-Lease in respect of Unit 1, dated 16 March 2007. Whereas clause 8.9 of that Sub-Lease provides that an Arbitrator's award "*shall be final and binding on the parties*" (thereby replicating the position set out in section 14 of the Law), I am satisfied that there is no exclusion agreement precluding me from considering the Application for leave to appeal on the merits.
7. The test for the Court to apply on an application for leave to appeal an arbitration award was set out in *Tostevin v Newhouse* [2013] GLR 49. Section 19(4) of the Law provides that "*The Court shall not grant leave under paragraph (b) of the last preceding subsection unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement*". Once again, I adopt the test derived from English decisions dealing with a similarly-worded statutory framework, asking myself whether it is in the interests of justice to the individual parties, and the need to promote the health of Guernsey's law, and to preserve the integrity of the arbitral process, that the question of law should be argued again. In doing so, I am conscious of the desirability of reading the Award in a reasonable and commercial manner and not endeavouring to pick holes in it.
8. At para. 22 of my judgment in *Tostevin v Newhouse* (*supra*), I also quoted from Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd ed., 1989), explaining that "*No reasons are given for the judge's decision to give or refuse leave to appeal, except in the very unusual case where the judge considers that the existing*

guidelines laid down by the appellate courts call for amplification, elucidation or adaptation to changing practices". Because I indicated that I would deal with the question of leave on the papers rather than adjourning for a further hearing once the materials I requested had been supplied, I will state my reasons briefly.

9. The question, or questions, of law raised by the Applicant's grounds of appeal are all founded on the Arbitrator's erroneous reference to the rent reduction period used in relation to Unit 8 being three years rather than two years. As I have already stated, the Arbitrator, in his letter dated 18 March 2015, has acknowledged that he made what he has described as "*a typographical error*". He enclosed with his letter a modified page correcting the date in para. 8.6.3.3 of his Award. I note, however, that he did not make any correction to para. 8.6.3.4, in which he refers to the "*average rent over the period between commencement and first review, in this case the three year period*" before reaching his conclusion in para. 8.6.3.5 to prefer the evidence given by the Respondent's expert about the appropriate Zone A rental rate. Because the arbitration award determines the rental for Unit 1 for the time being, if the approach used has resulted in a rental rate that is different from what it should be, it will, in my judgment, substantially affect the rights of the parties. This arises from the possibility that the rent being paid by the Respondent is lower than it should have been determined to be on the basis of the material and submissions put before the Arbitrator.
10. In those circumstances, although I have noted the explanation offered by the Arbitrator in his letter regarding the reasoning he adopted in reaching his Award, I consider that, at this stage of considering only whether leave should be granted, that it would be wrong to deny the Applicant the opportunity to elaborate on its arguments at a hearing of the appeal. Granting leave is not, of course, indicative that the appeal is bound or even likely to succeed, but rather follows from the Applicant satisfying the Court that in the interests of justice a hearing should be granted.
11. The Application for leave to appeal is, therefore, allowed. As regards the costs of making the Application, I propose to reserve them until the appeal comes on for hearing.
12. As a postscript, however, having considered the papers submitted to me, it strikes me that the mischief at which the appeal is directed is really para. 8.6.3.5 of the Award ("*For the reasons I find with Mr Hall and I believe that this rent should be analysed to a Zone A rate of £70.61 per sq ft.*"). It might be said that further clarification of the reasoning applied by the Arbitrator would assist the parties. I do not regard the Arbitrator's letter of 18 March 2015 as offering the type of clarification of reasoning that might be provided. This is because para. 4.4 of it proceeds on an assumption that is then explained to be flawed whereas what I consider might sensibly be asked by both parties is a fuller explanation of how the figure of £70 per sq ft Zone A was actually reached. In that regard, section 19(5) of the 1982 law might be invoked by agreement between the parties (and, in default of agreement and after hearing submissions on the issue, may be used in the event that the appeal proceeds) to require the Arbitrator to state the reasons for this part of his award in sufficient detail so as to enable the Court to consider the merits of the appeal.
13. In the light of raising that possibility, I do not propose to give any formal directions at this stage about how to progress the appeal. If the appeal proceeds and the parties cannot agree a timetable for the filing and service of their respective cases, the matter can be returned to the Interlocutory Court. If such agreement can be reached, the parties can liaise with the Greffe over a mutually convenient date for a short appeal hearing.