

Surveyors on the application either of the Landlord or of the Tenant and who shall act as an arbitrator in accordance with the Arbitration (Guernsey) Law, 1982 as amended and whose costs shall be in his award and whose decision shall be final and binding on the parties hereto.”

2. The parties were unable to agree the reviewed rent to be payable from 25 December 2012. The arbitrator, Tony Rowbotham, was appointed by the President of the Royal Institution of Chartered Surveyors (RICS) and he gave directions for the parties to make written submissions to him. His Final Award, dated 19 February 2015, determined that the market rental value of Unit 1 in accordance with the lease with effect from 25 December 2012 was £214,903.40. He ordered that his costs were to be divided equally between the parties.
3. The Appellant is aggrieved at the Arbitrator’s award on a number of grounds. I gave leave to appeal on 5 May 2015. Following a hearing on 9 December 2015, I reserved judgment. I now set out the reasons why I have decided to allow the appeal and remit the matter for determination by a different arbitrator.

Legal principles

4. Appeals from decisions of arbitrators in Guernsey continue to be fairly infrequent. It is apparent that guidance can properly be taken from materials used in England and Wales, but a note of caution needs to be added because the Arbitration (Guernsey) Law, 1982, as amended, has not developed as far as the Arbitration Act 1996. In particular, whereas section 68 of the 1996 Act provides for an appeal based on a serious irregularity affecting the tribunal, the proceedings or the award, which is an irregularity of a kind specified which the court considers has caused or will cause substantial injustice to the appellant, an appeal under the 1982 Law simply requires an appellant here to establish that the decision was wrong in law. Accordingly, whilst I have a degree of sympathy with the submission of Advocate Dunster, who appears on behalf of the Respondent, that I should ask myself whether there has been any substantial injustice from the approach taken by the Arbitrator, I have concluded that this additional consideration does not, as yet, form part of the Law of Guernsey. If such a greater element of flexibility is to be afforded to the Court, it is something for the legislature to address through amendment to the provisions in the 1982 Law or through adopting legislation based on the 1996 Act rather than its predecessor, the Arbitration Act 1950.
5. Pending such a change, I am satisfied that the test I set out in *Tostevin v Newhouse* (unreported, 9 August 2013) continues to be the correct one to apply. Indeed, Counsel were agreed about this. Section 19(2) of the 1982 Law provides:

“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; and on the determination of such an appeal the Court may by order –

- (a) confirm, vary or set aside the award, or*
- (b) remit the award to the reconsideration of the arbitrator or umpire together with the Court’s opinion on the question of law which was the subject of the appeal ...”.*

As is clear from the wording and the explanation summarised in Mustill and Boyd, *Commercial Arbitration* (2nd ed.), an appellant is required to demonstrate that the Arbitrator’s Award cannot stand because it is unlawful. It is not sufficient to persuade this Court that the Award being appealed is different from a decision that would be reached by the Court on the same material.

6. The importance of respecting the professional judgment of the Arbitrator is understandable. Had the parties wished any dispute between them to be resolved judicially rather than through arbitration, it was open to them to provide for such an outcome. I have, therefore, again reminded myself of the comments of Bingham J in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Limited* [1985] 2 EGLR 14:

“... as a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it.”

7. In relation to the appeal pursuant to section 19 of the 1982 Law, Advocate Shepherd, who appears on behalf of the Appellant, has to persuade me that the decision of the Arbitrator was, in whole or in part, wrong in law. Insofar as this involves what might be termed factual perversity, the Appellant has to demonstrate that the Award, or a part of it, falls so far outside the band of reasonableness available to him that the Arbitrator could not lawfully have reached his conclusion.
8. As a further (or alternative) route to challenging the Award, the Appellant alleges that the Arbitrator misconducted himself in the proceedings. In doing so, the Appellant relies on section 23 of the 1982 Law:

- “(1) Where an arbitrator or umpire has misconducted himself or the proceedings, the Court may remove him.*
- (2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside.”*

The use of the word “*misconduct*” in this section is potentially unhelpful because no one is suggesting that the Arbitrator has in any way behaved otherwise than in good faith. As has been explained in *Handley v Nationwide Anglia Building Society* [1992] 2 EGLR 113:

“It is an inappropriate word because it has a pejorative overtone. In almost every case, as in this case, the applicant disavows any intention to criticise the integrity and fair-mindedness of the arbitrator, so “misconduct” is an inappropriate word to use for what is, in fact, a technical breach of the rules of natural justice. I am quite certain that the arbitrator in this case did his best to come to a fair conclusion and I come to the conclusion with reluctance that his award must be set aside only because he did not give the applicant an opportunity to comment on the figures which the arbitrator pulled out of his own experience and his own perception of the rental values.”

In other words, “*misconduct*” has been used in section 23 as a term of art. In my view, this passage from *Handley* almost exactly describes the position in which I find myself. Section 23 contains two discretionary powers. Where the arbitrator has made a procedural error, including a technical breach of the rules of natural justice, and so misconducted himself, his award may be set aside and the Court may also remove him.

The Award

9. The Appellant’s case revolves around the way in which the Arbitrator analysed the parties’ submissions relating to Unit 8, Market Buildings, which has been referred to as “*the HMV Transaction*”. The Arbitrator set out his finding as follows:

- “8.6.3.1 Ms Watts analyses this transaction to a Zone A rate of £92.00 per sq ft and a net effective Zone A rent of £87.65 per sq ft, taking into account the reduced rent in the first two years and the three month rent free period.*
- 8.6.3.2 Mr Hall analyses the commencing rental of £142,000 per annum to a Zone A rate of £70.61 per sq ft over the first three years of the term, taking into account the three months rent free.*
- 8.6.3.3 The effective date of this transaction was April 2013, some three months after the effective date of the Subject Property. The increased rental, to £185,000 per annum, does not become payable until April 2016 which*

needs to be viewed in the context of the valuation date of December 2012.

8.6.3.4 *In the context of a rising rental situation I consider it normal when analysing rents to look at the average rent over the period between commencement and first review, in this case the three year period between April 2013 and April 2016.*

8.6.3.5 *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.”*

10. The typographic error made in para. 8.6.3.3 was corrected by the Arbitrator in a letter dated 18 March 2015. There is no dispute that the reference should have been to 2015 because it was common ground that the reduced rent on Unit 8 was for the first two years of the lease only and not until the first rent review on the third anniversary of the term. However, no account was taken of the analysis of the Respondent’s expert, Mr Hall, having referred only to the Zone A rate derived from the reduced annual rental being applicable for the first two years only. However one views this, the Arbitrator has fallen into error in this regard through simply adopting the arithmetic offered by Mr Hall. The Appellant’s complaint, though, is directed at para. 8.6.3.4, which describes an approach that had not been put into evidence by either party’s expert.

The parties’ contentions

11. Advocate Shepherd submits that it is a simple error of law for an arbitrator to introduce into his Award something different from the material put before him by the parties. He suggests that it had been agreed between the parties that the approach to adopt was to amortise rent adjustments in respect of comparable properties over the course of the entire term. This was accepted by Mr Hall on behalf of the Respondent when he acknowledged that any adjustment should be *“treated over the entire length of the lease or to the landlord or tenant break if applicable”*. In the absence of a break in the 15-year lease for Unit 8, this inevitably meant there was agreement as to the way to calculate the net effective rent. Accordingly, the calculation of Ms Watts and Mr Carter on behalf of the Appellant should have been used.
12. On behalf of the Respondent, Advocate Dunster submits that Mr Hall’s evidence to the Arbitrator demonstrates that there was no such agreement and that the net effective rent in respect of Unit 8 remained in dispute between the parties and so required resolution by the Arbitrator. In particular, he suggests that this disagreement arose because of the emergence of a concessionary letter, which Mr Hall had not fully factored in when offering his original calculation of a Zone A rate of £92. As a result, he clarified that the further information to which he became privy did not support his earlier analysis of the Unit 8 comparable. Mr Hall did not thereafter provide an analysis of Unit 8, instead commenting repeatedly that this comparable should be treated with extreme caution. In his subsequent letter dated 4 November 2014, in response to a query from the Arbitrator, Mr Hall presented the figure for the commencement rent of £70.61 per sq. ft. for Zone A, which was accepted by the Arbitrator.
13. Because the Arbitrator at para. 8.6.3.4 has referred to his own experience of what is *“normal”*, Advocate Shepherd further submits that the Arbitrator has strayed beyond what is permissible, whereas Advocate Dunster highlights how it is expected of an arbitrator that he will use his own knowledge and expertise in arriving at his Award. This difference of approach goes to the heart of section 23 of the 1982 Law, but is also relevant to the appeal under section 19.
14. In relation to use of personal knowledge and expertise, Advocate Dunster relies on the following passage from *Halsbury’s Laws of England* (5th ed, Vol. 62, at para. 457):

“An arbitrator must determine the rent on the evidence before him; he is, however, entitled and intended to use his own expertise in evaluating the evidence and he may arrive at his award by deploying the evidence in a way that is materially different from the way in which the parties’ valuers deployed it, providing that the award addresses a matter that has been put into the arena by those valuers and with which

they have had an opportunity to deal. The attribution of weight to different comparables is a matter of judgment for the arbitrator. The conduct of the reference is governed by the Arbitration Act 1996. An arbitrator is not liable in negligence.”

The principle was explained further by Ward LJ in Checkpoint Ltd v Strathclyde Pension Fund [2005] EWCA Civ 84 (at para 31):

“The best I can do to provide an acceptable test is to reformulate the question in this way: 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.”

15. The cases relied on by Advocate Shepherd propound the principle, familiar to judges, that, if a decision-maker is minded to reach a decision based on something not advanced by either party, it is necessary to invite the parties’ comments on the alternative approach before reaching a conclusion. A failure to do so can amount to a valid ground to challenge a decision based on something on which the parties have not been permitted to comment. This is apparent in the context of an arbitration from the judgment of Lord Denning MR in Fox v P G Wellfair Ltd [1982] 2 EGLR 11:

“If the expert arbitrator, as he may be entitled to do, forms a view of the facts different from that given in the evidence which might produce a contrary result to that which emerges from the evidence, then he should bring that view to the attention of the parties. ... Similarly, if an arbitrator as a result of a view of the premises reaches a conclusion contrary to or inconsistent with the evidence given at the hearing, then before incorporating that conclusion in his award he should bring it to the attention of the parties so that they may have an opportunity of dealing with it.”

16. There is a similar summary of the approach that should be taken by arbitrators in the RICS publication, *Surveyors acting as arbitrators in commercial property rent reviews* (9th ed., 2013, para. 18.6):

“If there are specific facts within the arbitrator’s own knowledge which cannot be shut out of their mind in making the award, these should be revealed to the parties and treated to the same scrutiny and procedures as agreed for the other evidence. An arbitrator’s finding, based on their own specific knowledge, would not comply with the general duty of the tribunal of ‘giving each party a reasonable opportunity of putting his case and dealing with that of his opponent’, and, as such, could constitute a serious irregularity. Provided that the details of such specific knowledge are revealed to the parties, and they are given reasonable opportunity for comment, there is no reason for such details to be excluded if the arbitrator believes them to be of relevance.”

Further examples of where arbitrators’ awards have been set aside where an opportunity to comment on matters not previously addressed in the parties’ submissions include the Handley case (*supra*) and Unit Four Cinemas Ltd v Tosara Investment Ltd [1993] 2 EGLR 11. In the last of those cases, Ferris J held that since the arbitrator adopted a basis of valuation as to which neither party had given evidence or made submissions, he had misconducted himself in law by, in effect, giving evidence to himself.

17. In the Zermalt Holdings case (*supra*), Bingham J explained the position as follows:

“I fully accept and understand the difficulties in which an expert finds himself when acting as an arbitrator. There is an unavoidable inclination to rely on one’s own expertise and in respect of general matters that is not only not objectionable but is desirable and a very large part of the reason why an arbitrator with expert qualifications is chosen. Nevertheless, the rules of natural justice do require, even in

an arbitration conducted by an expert, that matters which are likely to form the subject of decision, in so far as they are specific matters, should be exposed for the comments and submissions of the parties. 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 a 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 the decision against him. That is contrary both to the substance of justice and to its appearance, and on the facts of this case I think that the landlords' case is made out.”

Discussion

18. I am satisfied that the principles applicable under the previous UK legislative regime to which I have referred can properly be applied under Guernsey's 1982 Law. Where an arbitrator wishes to reach a conclusion on a valuation basis that has not been advanced by either party, it is incumbent upon him to invite submissions from the parties. This is one of the principles of natural justice. By failing to adopt this course of action, the Arbitrator in the present case has adjudicated on a basis that has taken both parties by surprise. They have not been afforded a fair hearing.
19. This conclusion flows from the material that was placed before the Arbitrator on the approach to be taken to comparable properties. It is not necessary for me to decide whether there was an agreed approach to be taken (although had I needed to do so I would have been minded to conclude that there was a broadly agreed approach to be taken to comparables such as Unit 8), because what is in issue here is whether either party had advanced in evidence what the Arbitrator considered as the normal analysis looking “*at the average rent over the period between commencement and first review*”. Nowhere in the material of the parties is this approach described. The consequence is that the Arbitrator has taken upon himself to find that the proper approach is one that was not put to him. In those circumstances, before reaching his conclusion, it is the Arbitrator's duty to put this approach to the parties for their comments. I am satisfied that the Arbitrator did not do this. He could have done, as is shown by him reverting to the parties' experts with a series of requests for further comment. Because the Arbitrator did not seek comments, however well-meaning his approach might have been, he has made a procedural error and acted contrary to the rules of natural justice.
20. Because the Arbitrator has erred in law, the appeal must be allowed under section 19 of the 1982 Law and his Award is set aside. (Although the power to do so exists under section 19, it would not be appropriate to vary it.)
21. Another way of describing this outcome is to say that the Arbitrator made a procedural error in not seeking the parties' comments on his intended approach of considering the Unit 8 net effective rental based on the rent until the first review date only. Because this is, in my view, a sufficiently serious error, I am satisfied that it also amounts to the type of misconduct, in the terms of section 23 of the 1982 Law, warranting setting aside the award. Although the effect of section 19 is that I do not strictly need to do so, I will also exercise my discretion under section 23 and set aside the Arbitrator's Award.

Remitting the matter

22. The final issue for me to consider is what should properly happen next. Whilst Advocate Dunster invites me to remit the matter to Mr Rowbotham for his further consideration in the light of the Court's judgment and comments, Advocate Shepherd suggests that it is more desirable for a fresh pair of eyes to consider the dispute and so urges me to remove Mr Rowbotham and remit the dispute to a different arbitrator. Section 22 of the 1982 Law contains a power to remit an arbitration for reconsideration by the arbitrator.

23. In *King v Thomas McKenna Ltd* [1991] 2 QB 480, Lord Donaldson MR, dealing with the similarly worded section 22 of the 1950 Act, explained (at page 491) that:

“In my judgment the remission jurisdiction extends beyond the four traditional grounds [which had previously been stated to be: (1) where the award was bad on its face, (2) where there had been misconduct on the part of the arbitrator, (3) where there had been an admitted mistake and the arbitrator had asked that the matter be remitted and (4) where additional evidence has been discovered after the making of the award] to any cases where, notwithstanding that the arbitrators have acted with complete propriety, due to mishap or misunderstanding, some aspects of the dispute which has been the subject of the reference has not been considered and adjudicated upon as fully or in a manner which the parties were entitled to expect and it would be inequitable to allow any award to take effect without some further consideration by the arbitrator.”

24. In many cases, the type of error made by the Arbitrator is such that his ongoing involvement in the dispute is not an issue. However, taking into account what has happened since the issuing of this Final Award, I have decided that it is more appropriate for a different arbitrator to be appointed to make a fresh award. Such a new arbitrator would not be at such risk as I fear Mr Rowbotham would be of there being a perception that he has pre-judged matters.

25. The principal reason why I have reached that conclusion is because of the content of a letter written by the Arbitrator dated 29 July, 2015. Following my decision to grant leave to appeal, in the light of comments I made at para. 12 suggesting that some clarification of the reasons for this Award might usefully be sought from the Arbitrator, he was contacted by letter dated 24 June 2015. Initially, by letter dated 16 July 2015, the Arbitrator declined to respond further, contenting himself with the comments he had made in a previous letter dated 18 March 2015. However, in his letter of 29 July 2015, the Arbitrator has expanded on his reasoning. In commenting on the HMV transaction, the Arbitrator wrote:

“3. In respect of the HMV comparable, whilst I gave a weighting to this, I gave it a low weighting. I was very much persuaded by the tenant’s representative that this comparable should be treated with, in his words ‘extreme caution’, a comment repeated a number of times in his Submission and Counter Submission.”

With respect to the Arbitrator, I take the view that this passage amounts more to an *ex post facto* justification of how he reached his conclusion of £70 per sq.ft. for Zone A in respect of Unit 1 rather than clarification of his reasoning in respect of Unit 8 as a comparable. For him to attempt at this stage to explain that the HMV comparable was given a low weighting runs contrary to how his Final Award, construed as a whole, reads. In Section 7 of that Award, the Arbitrator quite properly deals with the comparable evidence advanced by the parties where he decided to give a comparable property a low weighing, eg, in paragraphs 7.7.7 and 7.9.1 he expressly stated this. In contrast, his comment on the HMV transaction was (at para 7.3.16):

“I give weighting to this evidence, but the analysis is complicated, due to the nature of the transaction and the incentives offered to the tenant, who was at the time of negotiation with the landlord subject to a CVA.”

Indeed, under the heading “The Appropriate Zone A Rate to be applied to the Valuation”, the Arbitrator stated (at para. 8.7.1) his belief that “*the three pieces of evidence most pertinent to this transaction are those in the locality, being Unit 4 and Unit 8, Market Buildings and One High Street*”. The narrative in respect of each of these comparables identifying the particular differences the Arbitrator considered relevant is followed by the same wording each time: “*I consider that the Zone A rate to be applied to the valuation of the Subject Property should be below that of the comparable*”. There is no indication that the HMV transaction (Unit 8) has been given a low weighting by comparison to the other two. Accordingly, I regard the

content of the Arbitrator's letter as going beyond what is proper clarification as it is really supplemental reasoning. The inference that I think can properly be drawn from this letter is that the Arbitrator is now seeking to rationalise his decision by reference to something that did not feature on the face of the Award and in a manner that appears to be inconsistent with his previous reasoning. In my view, this compounds the procedural error into which he fell and provides the basis on which it makes more sense for a new arbitrator to be engaged to resolve the parties' dispute.

26. Although of less significance, I also consider that the Arbitrator's late reliance on Mr Hall's repeated comment of treating the Unit 8 comparable with "*extreme caution*" is going beyond what should be said by an open-minded arbitrator invited to clarify the terms of his Award. As I have just stated, at para 8.7.1 of the Award, the Arbitrator referred to "*the three pieces of evidence most pertinent*" so to recant from that finding and imply that he aligned himself to Mr Hall and largely disregarded the HMV Transaction, especially where his finding of the Unit 1 Zone A rate at £70 per sq.ft. was so close to the figure he found for Unit 8, does not, in my view, stand up to scrutiny.
27. For these reasons, having set aside the Arbitrator's Award under section 19 (or under section 23) of the 1982 Law, I consider it appropriate to direct that the arbitration be put to a new arbitrator, whether that is someone agreed between the parties or someone else appointed for that purpose (possibly even by way of an application pursuant to section 25 of the 1982 Law). Given the passage of time, if there is no agreement on the rent payable from the 2015 review date, a combined reference may now be most cost-effective for the parties.

Conclusion

28. This is an appeal where I share the reluctance expressed by Gatehouse J in the *Handley* case (*supra*). But for the Arbitrator's failure to invite the parties' comments on what he regarded as "*normal*", the Appellant would have struggled to persuade me that the Award is flawed because I would, more likely than not, have concluded that the minor errors in respect of the part of the Award dealing with the HMV Transaction were not such that they took the overall decision in monetary terms so far outside the band of reasonableness available to him that the Arbitrator could not lawfully have reached his conclusion. However, because of the close similarities between the 1982 Law and the previous 1950 Act in the UK, I am satisfied that the approach to be taken to the type of error that the Arbitrator has made is that the Award must be set aside for the reasons I have described. Further, in order for justice between the parties to be capable of being seen to be done, because the Arbitrator can reasonably be viewed now as having a firm view as to the correct outcome, I do not consider he can continue to act as the arbitrator when the matter is remitted, which is why I have concluded that his misconduct, within the meaning of that word in section 23, can only properly be dealt with by his removal.
29. In respect of the costs of this appeal, I would be minded to order that they follow the event and are payable by the Respondent to the Appellant on the standard recoverable basis unless either party wishes to argue for a different disposal. In default of any indication being given to the Greffe within 14 days of the handing down of this judgment, that is the order I will make. However, either party is at liberty to list the case in a suitable Interlocutory Court if a different outcome is desired.