Checkpoint Ltd v Strathclyde Pension Fund [2003] Adj.L.R. 02/06

BEFORE LORD JUSTICES WARD, MUMMERY and JONATHAN PARKER on appeal from Ch.Div, (The Hon. Mr Justice Park) : CA : 6th February 2003

JUDGMENT : LORD JUSTICE WARD :

The scope of this appeal.

1. The appellant, Checkpoint Ltd., the tenant of the respondent, the Strathclyde Pension Fund, seeks to set aside an award dated 18th May 2001 by an arbitrator, Mr T. Bloomfield FRICS, ACI ARB., on a review of the rent payable for the premises which he determined at £440,000 per annum. The award was challenged on the ground of serious irregularities of the kind within section 68 of the Arbitration Act 1996. On 21st March 2002 Park J. rejected that challenge but granted permission to appeal limited to the following grounds:-

   "(a) Whether, to the extent that the arbitrator took into account his own personal experience of specific transactions without giving the parties an opportunity to comment, the arbitrator committed a serious irregularity within section 68(2) of the Arbitration Act 1996, and, if so, whether the irregularity has caused substantial injustice to the [appellant].

   (b) Whether the arbitrator's failure to address the [appellant's] evidence concerning the over-supply of and poor demand for comparable premises in the immediate locality of the subject premises was a serious irregularity and, if so, whether this caused substantial injustice to the [appellant]".

The background.

2. The demised premises are a storage and distribution depot known as Arrow Point at 43 Western Road, Bracknell in Berkshire. The internal floor area is about 43,000 square feet of which some 28,000 square feet comprise the warehouse and nearly 15,000 feet are used as offices. This 34.7% office content is apparently a good deal higher than the standard office content for warehouse buildings.

3. The lease was granted for a term of 15 years from 2nd May 1995 at an initial annual rent of £220,000. A rent review clause provided for upwards-only rent reviews on 2nd May 2000 and 2nd May 2005, the rent to be "the open market yearly rent for which the premises could be expected to be let with vacant possession on the relevant review date in the open market by a willing lessor to a willing lessee …" If the lessor and lessee could not agree upon that open market rent, as happened here, the rent was to be determined by an independent surveyor appointed (if the parties could not agree his identity) by the President of the Royal Institution of Chartered Surveyors. The lease contained these provisions:-

   "15.2 The surveyor must be a chartered surveyor 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 this Lease at the date of the Surveyor's appointment. …

   15.4 The Surveyor will act as an arbitrator under the provisions of the Arbitration Acts (to whom the referral will be a submission to arbitration in accordance with the Arbitration Acts). The Surveyor's decision will be final and binding on every person who at any time is or has been the Landlord or Tenant or a Guarantor under this Lease."

4. Mr Bloomfield was appointed in January 2001. The parties were represented by chartered surveyors. The landlord appointed Mr Michael Garvey, a divisional director of Rogers Chapman based in their Thames Valley office in Bracknell. The tenant appointed Mr Kenneth Tapping of Croft & Co. in Windsor. Each submitted his initial written representations followed by supplemental written representation. The arbitration was to be conducted on the basis of those representations without an oral hearing. The parties submitted a statement of agreed facts which included their agreeing which transactions could be treated as comparable. Mr Garvey relied upon three lettings of units in Winnersh Triangle, Winnersh, also units at Lovelace Road, Bracknell, the Sterling Centre, Eastern Road, Bracknell and the Astron Centre, Western Road, Bracknell. The Winnersh site is apparently six miles from Arrow Point, but the travel time is only ten minutes. Mr Tapping submitted that Unit 3, Doncastle Road in the southern industrial area of Bracknell was the only property which was strictly comparable to the subject property in terms of specification, office content and date of transaction. The arbitrator visited Arrow Point and each of the properties which were the subject of the comparable rents.

The award.

5. Mr Bloomfield made his award on 18th May 2001. He accepted the landlord's submission that the rent should be £440,000 per annum. He rejected the tenant's submission that the open market rent was only £273,000.

6. In dealing with "the issues" he observed:- *"The parties' representatives adopt a completely different approach to their valuations of the property and that reflects in the comparables they have relied upon."*

7. He summarised Mr Garvey's "broad approach" looking "at comparables before and after the valuation date" relying "heavily on lettings at Winnersh Triangle to demonstrate the market rent for high office content properties" and also the Sterling Centre "to demonstrate the lowest level of rent that would be paid by a tenant for more standard warehouse and industrial units in Bracknell". Mr Tapping strongly disagreed, rejecting the evidence of the comparables at Winnersh Triangle or the Sterling Centre and looking to the rental achieved for Unit 3, Doncastle Road, for him the only strictly comparable property.

8. The arbitrator agreed with Mr Garvey's approach. He did not find Unit 3 Doncastle Road to be a reliable comparable because it was situated on the southern industrial area which had a high preponderance of traditional distribution uses compared with the western industrial area increasingly dominated by the computer, electronic and knowledge based sectors. He was of the opinion that the subject property enjoyed another advantage over Unit 3. He was of the view that the disadvantage to an occupier of landlord redevelopment breaks, which was the case with Unit 3, outweighed the advantage to the tenant of having lessee breaks, and he considered that might be very significant for companies, particularly from the high technology sector, taking a high office content building. He felt it was a factor likely to depress the rent.

9. He then considered the comparables in the Winnersh Triangle upon which Mr Garvey relied. Mr Tapping dismissed them completely, arguing that the location was unique and the dates of the transactions too distant from the valuation date for the subject property. The arbitrator once again found Mr Garvey's approach to be correct and Mr Tapping's to be wrong and he gave the following reasons for that conclusion:- *"Firstly it is a matter of fact that although the first letting of Unit 415 Winnersh Triangle was in September 1999, the second letting of Unit 650 was in August 2000. If one finds that they [provide] a better guide to the value of Arrow Point than say, Doncastle Road, which I have, then the fact that they occurred 8 months [before] and 4 months after the valuation date is not relevant unless there has been some dramatic changes in market conditions. Whilst both parties' representatives seem to have different views on the state of the market, neither of them suggest there has been any dramatic deterioration.* ***Secondly the parties know that I was instructed and personally involved with Winnersh Triangle for some years including the period within which these two lettings were achieved. My experience as letting agent confirms that companies considering Winnersh Triangle would consider similar type buildings in other locations such as Bracknell, Wokingham, Reading and Camberley and indeed potential lettings were lost to locations such as those mentioned, which were possibly inferior but cheaper than Winnersh Triangle.***" [I have added the emphasis because this is a passage to which the tenant takes exception].

10. The arbitrator justified his rejection of Mr Tapping's contention that Sterling Centre should be ignored. He explained why he accepted Mr Garvey's view about the comparability of the two buildings with their respective office content. Then he said in another passage to which the tenant takes exception:- *"Mr Tapping submits that there is no demand for high office content buildings in Bracknell and therefore the higher office content of the subject property will not be reflected in a better rent than say, the Sterling Centre.* ***As I have already stated my own experience in the market at Winnersh Triangle does not support that contention.***" (Again I add the emphasis).

11. He looked to the other evidence such as the relevance of a higher office content than the more traditional office content for warehouse and industrial units and he considered that the Doncastle Road evidence did not support Mr Tapping's submission. He rejected Mr Tapping's opinion that difficulties in letting the property in 1987 and 1995 were a true guide to the value of the property today, saying that, whilst market conditions in 1987 were *"extremely healthy"*, the *"high tech revolution in property with changes of the Use Classes Order was in its infancy"*. He concluded:-

"I therefore accept Mr Garvey's submissions that if one adjusts for differences between Arrow Point and the lettings at the two locations at Winnersh Triangle and Sterling Centre that one arrives correctly at a potential rental of £11 per square foot for the subject property.

There is lastly one further difference between the parties which I must consider. Mr Tapping submits that it is clearly understood in the market that as buildings increase in size there is a decrease in their rental value. Mr Garvey

however, argues that this is a simplistic view, there are separate bands in sizes and it is only when one moves from one band to the next that there is a change in rental value.

However, Mr Garvey having arrived at a potential rental of £11 per square foot with which I agree, he then makes a further discount down to £10.25 per square foot which appears to be his feel for the market rather than a discount for any particular factor. If there is a discount for size then I find that it is amply taken into account in this discount."

The challenge to the arbitrator's award.

12. The tenant sought to appeal on questions of law arising out of the award but Park J. refused to give permission to do so. There is no further appeal to this court on that part of the case. The hearing before Park J. was, therefore, confined to complaints of alleged serious irregularity. The first ground concerned the arbitrator's reasons for rejecting Unit 3 Doncastle Road as a comparable. Park J. held that that was an attempt to characterise a non-appealable decision of fact as a serious irregularity and that there was no justifiable basis upon which that could proceed. It no longer concerns us. The second irregularity was expressed in the claim form to be that in the award, the arbitrator:- *"referred on two occasions to evidence obtained through his own experience in an area known as Winnersh Triangle (from which the respondent primarily drew its comparables). Specifically, the arbitrator referred to the demand for properties in that area contrasted with demands for properties in the location of the premises, which was not for him in evidence in such terms."*

13. The third irregularity was alleged to be that the arbitrator:- *"did not deal with an important part of the evidence set out in the submission and counter-submission of the applicant's surveyor concerning the over-supply of and poor demand for comparable premises in the immediate locality of the premises."*

The statutory provisions.

14. Section 68 of the Arbitration Act 1996 governs the matter. It provides for challenges to the High Court on the grounds of "serious irregularity". It reads as follows:-

"(1) A party to arbitral proceeding may …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) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –

(a) failure by the tribunal to comply with section 33 (general duty of tribunal); …

(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; …

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may –

(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.

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.

(4) The leave of the court is required for any appeal from a decision of the court under this section."

15. The material part of Section 33 reads as follows:-

"(1) The tribunal shall –

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponents. "

16. Section 34, dealing with procedural and evidential matters, provides:-

"(1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.

(2) Procedural and evidential matters include - …

(g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law."

The judgment of Park J.

17. Dealing with the challenge that the arbitrator relied on his own experience in connection with matters not in evidence before him, the judge observed that the arbitrator was expected to some extent to draw on his personal knowledge because clause 15.2 required him *"to have relevant local knowledge"*. The judge rejected the tenant's attempt to distinguish between the general knowledge acquired by a surveyor, which it was accepted he could apply, and personal knowledge of specific matters which it was alleged should be disclosed to the parties to give an opportunity to comment. In the judge's view that distinction *"is easy to state in a broad way, but tends to break down when analysed with care"*. The judge concluded:- *"He was entitled to*

take his personal experience into account, and I do not accept that, when he mentioned in his award a specific component of that personal experience, he thereby infringed the general duty of fairness and impartiality required of him by section 33."

18. He then dealt with the need for the serious irregularity, if there were one, to have caused substantial injustice to the tenant and he held:- *"In my opinion it has not. Mr Fetherstonhaugh says that the award doubled the rent payable by the tenant and that that is a substantial injustice. I accept that the doubling of the rent is a substantial and heavy burden for the tenant. It does not follow that it is a substantial injustice but more importantly, I consider that Mr Fetherstonhaugh's argument about what constitutes the alleged substantial injustice fails to address the question of causation which subsection (2) raises. A crucial question is whether, even assuming that the doubling of the rent is a substantial injustice, the doubling of the rent has been caused by the alleged irregularity on the part of the arbitrator. I have to ask this question: if the arbitrator had not taken into account his personal experience of lettings at Winnersh Triangle, or if he had but had told the parties about it first so that they could comment, do I consider (see "the court considers" in the opening part of section 68(2)) that the arbitrator's award would have been different? Only if my answer is yes could I intervene under the section. I cannot say that the answer is yes. I think it probable that the arbitrator's award would have been exactly the same."*

He drew support from the judgment of Tuckey J. in ***Egmatra A.G. v Marco Trading Corporation*** [1999] 1 Lloyds Reports 862 to which I will refer later.

19. Dealing with the allegation that the irregularity was within section 68(2)(c), namely a failure to conduct the proceedings in accordance with the agreed procedure, the judge referred to the arbitrator's initial directions, with which the parties agreed, that:-
"If I use Inquisitorial Powers conferred on me under the Arbitration Act I will inform the parties of my findings and ask them to comment on the same."
The judge accepted the landlord's submission that that was a reference to some of the powers which the arbitrator has under section 34 of the Arbitration Act. He was satisfied that:-
"For the arbitrator to draw on his personal experience was not to use inquisitorial powers."

20. The judge then dealt with the allegation that it was a serious irregularity not to deal with an important part of the evidence of the tenant concerning over-supply of and poor demand for comparable premises. He held:- *"It is correct that the arbitrator said very little in his award about assertions by Mr Tapping in his two submissions that there was little demand in Bracknell for premises like Arrow Point. However, I do not think that he can be seriously criticised for not doing so, particularly when the criticism is that his decision in this respect exhibited a serious irregularity. My principal reason is that all the references by Mr Tapping to lack of demand for comparable premises in Bracknell were subservient to the ultimate submission that there was one decisive comparable, namely Unit 3 Doncastle Road, and that the rental value for Arrow Point should be the same as the rent which had been agreed for Unit 3."*

21. Having rejected that argument, the judge did not accept that it was then necessary for the arbitrator:-
"to have gone on from there to have worked out a rental value for himself, disregarding the Unit 3 rent but deducing a rent level from the existence of unlet premises and the alleged absence of demand".

22. So Park J. rejected the allegations of serious irregularity and dismissed the application. He was, however, persuaded to grant permission to appeal to this court on the two questions I set out at the beginning of this judgment.

The first ground of appeal: the arbitrator's taking into account his own personal experience.

23. It is agreed that this raises three questions: first, did the arbitrator's use of his personal knowledge amount to a serious irregularity, secondly did he use his inquisitorial powers, and thirdly, in either event, did the irregularity cause substantial injustice?

Using personal experience.

24. As set out in paragraphs 9 and 10 above, the arbitrator used his experience of prospective tenants' willingness to consider taking premises not in the Winnersh Triangle but in the possibly inferior but cheaper location of Bracknell. He also took his personal experience in the market at Winnersh Triangle into account in deciding that the higher office content of the subject properties justified better rents than the Sterling Centre. It is submitted by the appellant tenant that this was a serious irregularity within section

68(2)(a) because the failure to give an opportunity of dealing with evidence or argument not advanced by either party was a failure to act fairly and impartially as between the parties, giving each a reasonable opportunity of putting his case in dealing with that of his opponent. I can say immediately that there was no suggestion that the arbitrator showed partiality or bias, nor that the tenant did not have a reasonable opportunity to deal with the case as it was advanced by the landlord. The challenge is directed at the lack of fairness arising from not having been given the opportunity by the arbitrator to investigate, rebut or even comment upon what was in effect part of the evidence he was taking into account.

25. It is also suggested that a serious irregularity arose under section 68(2)(c) from a failure to conduct the proceedings in accordance with agreed procedures in that drawing on personal knowledge was, or was tantamount to, use of inquisitorial powers of which no notice had been given.

The tenant's case.

26. Mr Fetherstonhaugh ably put his case which I summarise as following:-
    i) An arbitrator may use his personal knowledge to evaluate the evidence and submissions before him but not to supplement or supplant that evidence: see ***Fox v Wellfair Ltd.*** [1981] Lloyd's Rep. 514.
    ii) If using knowledge of a specialised character rather than such as may be generally known to an expert in that area, then the arbitrator must afford the parties the chance to comment: compare ***Top Shop Estates Ltd. v Danino*** [1985] 1 EGLR 9.
    iii) When the arbitrator drew upon his own knowledge, he was using his inquisitorial powers as much as if he had consulted someone else: no different standard should be applied just because some of the information was "intracranial rather than external".
    iv) Here the arbitrator introduced new evidence, namely that Winnersh Triangle and Bracknell were part and parcel of the same *market* and subject to similar demand which was not the case advanced by either Mr Garvey or Mr Tapping. That information:
        a) was a special fact known only to him;
        b) was, therefore, fresh evidence, which
        c) was being used to supplant the evidence given in the case, not to evaluate it and which
        d) ought, therefore, to have been disclosed.

The landlord's case.

27. Mr Seitler, in his impressively cogent submissions, submitted:-
    i) ***Top Shop Estates Ltd. v Danino*** related to an arbitration governed by the Arbitration Act 1950 which was in different terms from the 1996 Act.
    ii) In drawing on his local knowledge, the arbitrator was doing what clause 15.2 of the lease required him to do.
    iii) The language of his award ("my experience … confirms …") makes it plain he was evaluating the evidence.
    iv) Identification of the market and demand was an application of general knowledge.
    v) It was known to both parties that the arbitrator's firm has acted as the lessor's agent in the letting of the units at the Winnersh Triangle and so the arbitrator was likely to have acquired information relating to those lettings.
    vi) Since it was not suggested that the arbitrator had made independent enquiries of third parties, he was not using his inquisitorial powers.
    vii) In answer to my enquiry during argument whether the jurisprudence in the administrative law field threw light on the problem, he helpfully supplied the fruits of that further research for which we are grateful. Mr Fetherstonhaugh was, of course, informed and given the opportunity to comment!

The struggle for a test to determine when the arbitrator's use of personal knowledge constitutes a procedural irregularity.

28. The easy answer is when a right-minded observer would conclude that the information ought to be disclosed to the affected parties in order to give them the opportunity to assess it, comment upon it and if appropriate call further evidence to deal with it. Yet that is an answer which does not give much practical guidance. That it is not very helpful is perhaps unsurprising. As Lord Mustill observed in ***Reg v Secretary***

of State for the Home Department, Ex Parte Doody [1994] 1 A.C. 531, 560, what fairness requires in any particular case is "essentially an intuitive judgment".

29. Sometimes it may be possible to draw a line between permissible use of general knowledge and proscribed use of specialised knowledge. This was the distinction drawn by Dunn L.J. in ***Fox v Wellfair Ltd.*** at p.528: *"… it seems to me that an expert arbitrator should not in effect give evidence to himself without disclosing the evidence on which he relies to the parties, or if only one to that party. He should not act on his private opinion without disclosing it. It is undoubtedly true that an expert arbitrator can use his own expert knowledge. But a distinction is made in the cases between general expert knowledge and knowledge of special facts relevant to the particular case."*

30. That said, I do, however, also agree with Park J. in his judgment under appeal when he commented that:- *"The distinction between the general and the specific is easy to state in a broad way, but it tends to break down when analysed with care."*

    It will not always be easy to determine when special facts relating to a special or particular case become subsumed within the general knowledge which a busy and experienced expert is bound to acquire.

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.

32. If he uses knowledge of that kind he acts fairly; if he draws on knowledge outside that field then the rule is quite clear. As stated by Lord Denning M.R. in ***Fox v Wellfair Ltd***. at p.522:- *"His [the arbitrator's] function is not to supply evidence for the defendants but to adjudicate upon the evidence given before him. He can and should use his special knowledge so as to understand the evidence that is given – the letters that have passed – the usage of the trade – the dealings in the market – and to appreciate the worth of all that he sees upon a view. But he cannot use his special knowledge – or at any rate he should not use it – so as to provide evidence on behalf of the defendants which they have not chosen to provide for themselves. For then he would be discarding the role of an impartial arbitrator and assuming the role of advocate for the defaulting side. At any rate he should not use his own knowledge to derogate from the evidence of the plaintiffs' experts – without putting his own knowledge to them and giving them a chance of answering it and showing that his view is wrong."*

    Dunn L.J. put it this way at p.529:- *"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."*

33. Thus the question becomes: was the arbitrator supplying evidence of a market and demand in it, or was he adjudicating upon it? Was he evaluating the evidence before him or introducing new and different evidence? Again that is not always as easy to answer as it is to ask. In a sense the fact that respective tenants of Winnersh Triangle would consider locating their business in Bracknell was new inasmuch as neither Mr Tapping nor Mr Garvey had expressly said so. So where does one draw this line?

34. I found most helpful the judgment of Forbes J. in ***Winchester City Council v Secretary of State for the Environment*** (1978) 36 P & CR 455, a case referred to in the administrative law text books to which Mr Seitler directed us. That was a planning case where the inspector had viewed the property concerned. The relevant rules provided for procedures to be adopted where the inspector proposed to take into consideration "any new evidence". Forbes J. said at p.466/7:- *"What does "new evidence" in this context mean? It cannot mean that, because the inspector has not seen it before, everything that he sees is new evidence. If it meant that, every time that an inspector went on a view he would have to re-open the inquiry because he would be taking into account new evidence, and, of course, at that inquiry, in accordance with the terms of Rule 13(ii) of the Rules of 1974, he would have to go and have another view, and he would then be having further fresh evidence which would require him to re-open the inquiry once more, and one would have a never-ending case like a cat chasing its tail. The task of inspectors would then be even worse than it is at the moment. "New evidence" simply cannot mean that. I think that what it means is simply this: that, if what is seen on a view raises a point that was either not raised during evidence or argument at the inquiry or, if it was raised, was taken as being so peripheral as to be of virtually no account, then there is a duty to reconvene the inquiry or at least to give an opportunity of making representations. If, however, when*

[what] is seen on a view simply serves to underline or give greater emphasis to some point that was raised at the inquiry, then no such opportunity need to be given. Any other view of the matter seems to me to result in a multiplicity of opportunities for making further representations."

35. I confess I did not find ***Top Shop Estates Ltd. v Danino*** to be as important a case as counsel may have thought. On the one hand it was dealing with misconduct under section 23 of the 1950 Arbitration Act whereas the 1996 Act is concerned with procedural irregularities. As for the statements of principle in the case, the claimant's submissions on the law were not controversial and the case really depended on its own facts. Counsel in that case largely, and rightly, relied on ***Fox v Wellfair Ltd***. Leggatt J. accepted those propositions, and so do I.

Did the arbitrator act unfairly in this case using his personal knowledge of the Winnersh Triangle lettings?

36. I think not. I must deal first with the arbitrator's view of the market and the demand. It is necessary to see the way the case was presented. The starting point was that after the arbitrator had given directions that he was prepared to consider "comparables agreed between the parties", the parties agreed that the transactions relating to identified units were capable of being regarded as comparable. Whether they were or were not was a major question for the arbitrator to resolve.

37. Mr Garvey stated in his first written representation as follows:-

"11.2 High office content developments such as those undertaken by Slough Estates at Winnersh have established the demand for this type of space where occupiers want the flexibility to operate administrative, as well as core business activities, from the same premises. …

12.10 I accept that Winnersh Triangle is regarded as a premier business location and clearly the levels of rent achieved over many lettings reflects this. Nevertheless, the willing tenant when considering a rental bid for the subject property will be aware of this evidence and the levels of rent necessary to secure high office content accommodation. It would no doubt make adjustments for specific location, in the same way as I have in my valuation but the evidence is nevertheless relevant. …

13.4 … The Slough Estates Development at Winnersh Triangle is one of the closest examples to the subject property and I have highlighted just two of the many lettings that have occurred over the past few years. …

14.10 I consider the evidence arising from Winnersh Triangle to be particularly helpful as it demonstrates the level of premium rent that occupiers are prepared to pay in the market. I do, however, accept that Winnersh Triangle is a premier business location and that an allowance should be made for this, together with an allowance for the fact that the properties here are new/more modern with a high office content."

I agree with Mr Seitler that it is implicit in this submission that Winnersh and Bracknell were parts of the same market and subject to similar demands.

38. In his first written representation, Mr Tapping expressed a very different view. His submission was:-

"The best evidence that is available is as a result of the letting of Unit 3, Doncastle Road in May 2000. …

There is seemingly no other evidence in the market of a similar style of building, at similar date. This leads me to the conclusion that this is an irrefutable item of evidence setting the rental trend for the subject building. …

The subject building is a distribution unit and is used as such by the occupiers. The location is some distance from the motorway junctions and is in fact, due to the immediate road layout, somewhat difficult to access when being approached from Bracknell town centre direction. It is pointless comparing the subject unit to new units at the new high tech distribution park at Winnersh Triangle for this "locational" reason as well as for many other reasons."

39. In his counter-submission Mr Garvey said:- *"It is not "pointless" to compare the subject property with Winnersh Triangle as this is a location where high office content warehouses have been developed and successfully let. Within my valuation I have made adequate allowance for the location advantage enjoyed by Winnersh Triangle, although this does not detract from the appropriateness of comparison."*

40. Mr Tapping's response was:-

"It is in my view very odd to suggest that in May 2000 there was a market in the Greater Thames Valley area (presumably an area including Winnersh, Reading etc.), characterised by good tenant demand and to include Bracknell in the same statement. … Developers built high office content sheds where they believed there is a strong element of tenant demand – i.e. in Winnersh Triangle but not in Bracknell. There is no evidence in the local market to suggest that demand for high office content exists or produces a higher tenant rental bid.

I have already stated my concern over including the Winnersh Triangle as comparable evidence as it is a different style of development with high tech warehousing, its own motorway junction and the estate has always attracted higher rental bids than available buildings within Bracknell itself."

41. An analysis of that evidence shows that there were differences of view about the market and the demand. Those were the differences which the arbitrator had to resolve. In my judgment he was engaged in the proper process of evaluating the evidence before him and properly using his own knowledge to that end. Moreover he said so. In the first sentence to which exception is taken he expressly says: "My experience … confirms … [in effect that the Winnersh units are comparable]." It seems to me that in deciding whether or not Winnersh Triangle and Bracknell were in the same market and subject to similar demands, the arbitrator relied on his experience that Winnersh and Bracknell were acceptable alternative locations, and that cheaper rents sometimes made Bracknell even more attractive. In my judgment one would reasonably expect that a surveyor with knowledge of the lettings in the Winnersh Triangle and in Bracknell would also know what, if any, comparability existed between those two locations and the extent to which, if at all, prospective tenants were prepared to take property in either location. He was explaining why he preferred the landlord's case. He was not in effect setting out fresh evidence going to a point which had not previously been raised or raised only in some peripheral way. His experience went to the heart of the matter.

42. Consequently, I am satisfied that there was no unfairness in not disclosing this information for further comment and consequently no procedural irregularity. The judge rightly rejected the challenge to the award on this point.

43. The arbitrator also drew on his "*own experience in the market at Winnersh Triangle*" to reject Mr Tapping's submission that there was no demand for high office content buildings in Bracknell and that therefore the higher office content of the subject property would not be reflected in a better rent than the Sterling Centre. Here it seems to me as plain as can be that the arbitrator was drawing upon general knowledge of the market to reject the tenant's case. That is what he was expected to be doing. I fail to see how exception can be taken to that passage and I find no procedural irregularity there.

Did the arbitrator fail to conduct the proceedings in accordance with the agreed procedure that if he used his inquisitorial powers, he would inform the parties and ask them to comment?

44. This is also easy to answer. Proceedings are conducted either in an adversarial or an inquisitorial manner. They are adversarial when the judge or arbitrator confines himself to the issues and evidence placed before him by the parties. They are inquisitorial when he is able to open the inquiry into issues he deems relevant even if not raised by the parties and when he is able to investigate the dispute himself and seek out for himself evidence material thereto.

45. Here the arbitrator did not stray outside the issues joined between the parties as to whether the Winnersh units were *"most instructive"* or *"pointless"*. He did not make independent enquiry of anyone, or carry out the kind of independent survey, such as a study of pedestrian flow so rightly criticised in ***Top Shop***. He used his own knowledge. "Intracranial" information is different from information gained externally because the former is already within the surveyor's experience which he may then deploy, whilst the latter is procured and would not have become part of that experience. The inquisitor does not interrogate himself: he prises information from others.

46. In my judgment no inquisitorial powers were exercised by the arbitrator.

Conclusion.

47. On the first ground of appeal the judge was right to reject the challenge of serious irregularity in the arbitrator's taking into account his own personal experience and in my judgment that ground of appeal fails.

The second ground, namely whether the arbitrator failed to deal with the issue of over-supply of and poor demand for comparable premises in the immediate locality of the subject premises..

48. The first question that arises is what is meant by *"all the issues that were put to it [the tribunal]"* in section 68(2)(d), the failure to deal with which would constitute the procedural irregularity. The words must be construed purposively. In my judgment it does not mean each and every point in dispute. That has never

been part of the judicial, or arbitral function. In ***English v Emery Reimbold & Strick Ltd.*** [2002] 1 W.L.R. 249 the Court of Appeal held as follows:-

*"17. … In **Egil Trust Co. Ltd. v Pigott-Brown** [1985] 3 All ER 119, 122 Griffiths L.J. stated that there was no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case.*

*"When dealing with an application in chambers to strike out for want of prosecution a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties and, if need be, the Court of Appeal, the basis on which he has acted. … (See Sachs L.J. in **Knight v Clifton** [1971] Ch 700, 721)".*

18. In our judgment these observations of Griffiths L.J. apply to judgments of all descriptions …

19. It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be stated and the manner in which he resolved them explained. … It does require the judge to identify and record those matters which were critical to his decision."

49. In my judgment "issues" certainly means the very disputes which the arbitration has to resolve. In this case the dispute was about the open market rent for this property. The arbitrator decided that. In order fairly to resolve that dispute the arbitrator may have subsidiary questions, "issues" if one likes, to decide en route. Some will be critical to his decision. Once some are decided, others may fade away.

50. Here the issue which was critical because it was either "most instructive" or it was "pointless", was whether the transactions at Winnersh Triangle were properly to be regarded as comparable. The arbitrator decided that.

51. I therefore agree with Park J. that the references by Mr Tapping to the lack of demand for comparable premises in Bracknell were subservient to the ultimate submission that there was only one decisive comparable, in his view Unit 3, Doncastle Road, and that the rental value for Arrow Point should be the same as the rent that had been agreed for Unit 3. He nailed his colours to the Doncastle mast. Being of this subordinate character, the evidence of the over-supply of and poor demand for comparable premises did not constitute an issue which needed to be resolved. It remained merely a point of dispute and it could not on the facts of this case be elevated into an "issue" within the meaning of section 68(2)(d).

52. That being my judgment, it is strictly not necessary to consider the factual basis for rejecting this ground of appeal. I will allude to the arguments only briefly. Dealing with "*general demand level*", Mr Tapping said in his first submission:- *"Looking at the market for industrial and warehousing accommodation in Bracknell itself, it is clear to see that the level of demand for warehousing units is very low. Some new developments such as the Sterling Centre have taken over a year to find occupation. Indeed, the completion of this scheme pre-dates the subject rent review and even today, some units within that development remain available. There are a number of units in the market which have been marketed by professional agencies for some time. Notably the Western Centre, directly opposite the subject property, are high office content warehouses and these have been on the market for over 18 months."*

53. In response Mr Garvey said this:-

"JT considers that "the demand for warehousing units is very low" in Bracknell. I agree that some units are sticking on the market and that is why I suggest that market conditions have been fairly static between 1999 and the present day. Nevertheless when deals are concluded they are at high levels of rent and on long lease terms. The evidence clearly demonstrates this.

JT mentions the Western Centre again, but provides no details. One of the units that has "been marketed by professional agents for some time" might be the Astron Centre on Western Road … I act for the landlord … Terms are being negotiated with an occupier presently who is prepared to take a long lease at the quoted rent. … Therefore, the availability of the units referred to by JT is not necessarily as simple as it seems."

54. Mr Seitler forcefully, and in my judgment correctly, demonstrates that the topic was dealt with by Mr Tapping in a very general way and that it was difficult to identify the properties that he was referring to with any reliable degree of accuracy. He took us to the detailed evidence. It is true that the arbitrator dealt

only tangentially with this. He said at one point:- *"Whilst both parties representatives seem to have different views on the state of the market, neither of them suggest that there has been a dramatic deterioration."*

55. That seems to be a reference to Mr Tapping's view that looking at the market the level of demand was very low. Mr Garvey agreed to the extent that units were "sticking on the market". If, however, the market was not deteriorating then the arbitrator was justified in inferring that the length of time units were on the market did not lead to a conclusion that the market was weak.

56. I, therefore, agree with the judge's conclusion that:- *"There was no serious irregularity if, given that the evidence did contain what Mr Garvey had written, the arbitrator did not feel impelled to start on a whole new line of reasoning about what ought to have been the impact on the rental value of Arrow Point of the existence of unlet warehouse buildings in Bracknell."*

If there was a serious irregularity, has it caused substantial injustice to the tenant?

57. As I am satisfied there was no serious irregularity, it is strictly unnecessary to deal with this question. Adverting only briefly to the arguments addressed to us, Mr Fetherstonhaugh submits that a doubling of the rent from the level at which it was fixed in 1995 cannot be justified where the evidence for increases in market rents over the review period came nowhere near supporting such a level of increase. Mr Tapping in his witness statement served to support the claim to set aside the award argued that "at minimum, on the arbitrator's own figures" an appropriate rent would have been at least £42,000 less than the rent fixed by the arbitrator. On the other hand, Mr Seitler produced a table of comparable rents analysed by the degree of office content to support the arbitrator's assessment of rent at £10.25 per square foot. I find none of that particularly helpful. 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.

59. In this connection I endorse the views of Tuckey J. in the ***Egmatra*** case (see para. 19 above). He cited paragraph 280 of the DAC Report where they 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, and I agree with him:- *"So this is no soft option clause as an alternative to a failed application for leave to appeal."*

Conclusion.

60. I understand the tenant's surprise that in an arbitration of kind not only was the rent doubled but the landlord's expert's figure was accepted without a penny reduction. The result is a very substantial increase in the rent. But surprise, even sympathy, for the tenant's predicament, does not justify a finding that there was any serious procedural irregularity in the conduct of this arbitration, still less that a substantial injustice has been caused thereby. I would therefore dismiss the appeal.

61. **Mummery L.J.:** I agree.

62. **Jonathan Parker L.J.:** I also agree.

Guy Fetherstonhaugh (instructed by Macfarlanes) for the Appellant
Jonathan Seitler (instructed by Nabarro Nathanson) for the Respondent