JUDGMENT : HIS HONOUR JUDGE PETER COULSON Q.C.: TCC. 4th April 2007

A: Introduction.

1. This is an application by JD Wetherspoon PLC ("JDW") for an order remitting the arbitrator's award for reconsideration on the grounds that, pursuant to section 68.2 of the Arbitration Act 1996, there has been a serious irregularity which has caused JDW a substantial injustice. The application is opposed by Jay Mar Estates ("JME"). The matter has been cogently argued by both counsel and I am very grateful for their submissions. Having considered the dispute carefully, I have concluded that there is no reason for me not to give judgment straightaway.

2. JDW are the tenants of licensed premises in Redditch owned by JME ("the property"). There is a five year rent review cycle. Clause 6.1.3.9 of the lease provided that, when conducting the review, it must be assumed that the property was being let in a shell condition.

3. On 12th January 2007 the arbitrator, Mr Michael Newman, published his rent review arbitration award which had the effect of increasing the annual rent from £90,000 to £97,750. In his award the arbitrator referred to a number of suggested comparables, including two licensed premises in particular. The first was 'Barracuda', at Unit 4B, The Quadrant, Redditch, which was adjacent to the property. The other was 'Huggies', at 11/12 Marketplace, Redditch. Although Barracuda was a shell, and therefore directly comparable, Huggies was fitted out, so an adjustment had to be made in order to arrive at a comparable rental figure for the purposes of the review.

4. In arriving at the adjusted figure for Huggies, the arbitrator made a number of findings which I set out in greater detail in paragraph 22 below. His conclusion on this point was set out at paragraph 18.10.10 of his award. He said this:

   "In conclusion on this point, I consider that the method employed by Mr DJ McElhannan of a percentage deduction is too simplistic and is not supported by evidence.

   I prefer the approach of Mr N Cassidy, but I do NOT ACCEPT his assessment.

   During my inspection I assessed the approximate capital value the tenant probably placed on the fittings, fixtures and furnishings.

   This is within my professional expertise as a valuer and expert on the valuation of the contents of in situ fittings, fixtures, furnishings and utensils of trade in licensed premises. I place this value as at 25th March 20006 at £150,000."

   He then undertook a calculation which utilised the £150,000 figure, from which various deductions were made, to arrive at a devalued rental figure of £70,500.

5. It is this exercise which lies at the heart of JDW's complaint. They say that this assessment was based on an inspection done after the parties had made their submissions, and the arbitrator erred because he did not give them an opportunity to address the £150,000 figure, or the calculations based upon it. They go on to say that, had he done so, they would have presented further evidence which would have resulted in the arbitrator reaching a different conclusion. JME, on the other hand, maintain that the arbitrator did not commit any sort of irregularity. Even if they are wrong about that, they reject absolutely the suggestion that there has been any sort of substantial injustice as a result of the arbitrator's use of the £150,000 figure.

6. Accordingly, I set out below the relevant principles of law which seem to me to be applicable to this application, and I then go on to analyse each of the two issues that have arisen, namely: (a) Does paragraph 18.10.10 of the award demonstrate a serious irregularity; and (b) If so, has it caused a substantial injustice?

B: Principles

a) The Relevant Sections of the 1996 Act

7. The relevant parts of s.68 of the Arbitration Act 1996 read as follows:

   "(1) A party to arbitral proceedings may (upon notice to the other parties and the tribunal) apply to the court challenging an award in the proceedings on the grounds 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) ...

   (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 ..."

8. The relevant parts of s.33(1) of the same Act read as follows:

   "(1) The tribunal shall --
   (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting its case and dealing with that of his opponent …"

b) Serious Irregularity/General.

9. Section 68 of the 1996 Act cannot be used as a means of raising an appeal on a question of fact which would otherwise be prohibited (see ***Warborough Investments Limited v S Robinson and Sons Holdings Limited*** [2003] EWCA Civ 751). It is not to be used as a means of launching a detailed enquiry into the manner in which the arbitrator considered the various issues (see ***Weldon Plant v The Commission for New Towns*** [2000] BLR 496 cited with approval in ***World Trade Corporation Limited v C.Czarnikow Sugar Limited*** [2004] 2 All ER Comm). It is axiomatic

that the issue in any s.68 application is not whether the arbitrator reached the right conclusion (see ***St George's Investment Company v Gemini Consulting Limited*** [2005] 1 EGLR 5.

c) The Arbitrator's Own Experience

10. The arbitrator is fully entitled to make use of his own experience in reaching his conclusions, provided that it is of a kind and in the range of knowledge that one would reasonably expect the arbitrator to have, and providing that he uses it to evaluate the evidence called and not to introduce new and different evidence (see ***Checkpoint Limited v Strathclyde Pension Fund*** [2003] EWCA Civ 84). It is important to note that the arbitrator cannot:

    a. Use his expertise to introduce new evidence which he then fails to allow the parties to address (see ***Eastcheap Dried Fruit & Co v NV Gerbroedus Catz Handelsvereeniging)*** [1962] 1 Lloyds Rep 283; and

    b. Make an award based upon arguments or evidence that were not presented to him, or upon a basis that is contrary to the common assumption of the parties as represented to him: see the judgment of Bingham J (as he then was) in ***Zermalt Holdings SA v Nu-Life Upholstery Repairs Limited*** [1985] 2 EGLR, 14 at page 15 K-N, where he said:

"If an arbitrator is impressed by a point that has never been raised by the 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 a 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…"

11. The authority most often referred to on this topic is the decision of the Court of Appeal in ***Fox v Welfair*** [1981] 2 Lloyd's Law Reports 514. That was a building arbitration in which the claimant owners brought claims against the building contractors in respect of defects that had appeared in a block of flats. At the arbitration the respondent contractors, who by then were in liquidation, were not represented and neither were the NHBC, who stood behind them. Despite the fact that the respondents were not represented, the arbitrator rejected the bulk of the claims made against them, although he had made no relevant comment during the oral evidence called on behalf of the claimants; indeed, the claimants first learnt of the scale and nature of their defeat when they were provided with copies of the published award. In the words of Ackner J (as he then was) at first instance:

"The arbitrator failed to provide the applicants with a fair hearing, in that he failed to give them any opportunity to deal with the very serious deficiencies which he must ultimately have found in the presentation and/or proof of their claim."

He therefore set aside the award.

12. That decision was upheld by the Court of Appeal. Lord Denning MR concluded that the arbitrator had fallen into error. He said that he did not think it was the duty of the arbitrator to protect the interests of the unrepresented party, and he went on to say at page 522: *"In particular he [the arbitrator] must not throw his own evidence into the scale on behalf of the unrepresented party -- or use his own special knowledge for the benefit of the unrepresented party -- at any rate he must not do so without giving the plaintiff's expert a chance of dealing with it -- for they may be able to persuade him that his own view is erroneous."*

Dunn LJ said at page 528 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."*

Later in the same judgment he said that: *"…an arbitrator may be entitled to form a view that was different to the evidence that he heard, but if he did so he should bring that view to the attention of the parties."*

13. The authorities also demonstrate that, in a case of this sort, 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. It is instructive to compare and contrast two of the authorities referred to above. In ***St George's Investment*** the arbitrator utilised two deductions cumulatively in his calculations, when in fact the deductions had been presented to him as clear alternatives. His figure was therefore lower than either party had contended for, and the court concluded there had been a serious irregularity. By contrast, in ***Strathclyde v Checkpoint*** the arbitrator had used his own knowledge of the commercial letting market in a part of Berkshire to colour his view of the evidence, allowing him to conclude that the submissions that had been made to him by the landlord's expert were so plainly right that he made no deductions at all from the figure advanced by the landlord's expert. The Court of Appeal concluded that that was not a serious irregularity.

14. In ***Warborough,*** another case previously cited in the this Judgment, both the judge at first instance and the Court of Appeal concluded that, although the arbitrator fixed the rent on a basis for which neither valuer had contended, 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.

d) Substantial Injustice

15. In ***Egmatra AG v Marco Trading Corporation*** [1999] 1 Lloyd's Rep 862 Tuckey J (as he then was) cited with approval Paragraph 280 of the DAC Report of February 1996 which described s.68: *"…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."*

This passage was also expressly endorsed by the Court of Appeal in ***Strathclyde v Checkpoint,*** where Ward LJ stated that, if the court was satisfied that the applicant had not been deprived of his opportunity to present his case properly and that he would have conducted his case in a similar way with or without the irregularity, the award would be upheld.

16. In ***Lesotho Highlands Development Authority v Impreglio SpA and Others*** [2005] UKHL 43, the most recent case on this point, Lord Steyn said that it must be established that the irregularity caused or will cause substantial injustice to the applicant. It was not good enough, he said, merely to assume a substantial injustice. The applicant must secure findings of fact which established the precondition of a substantial injustice.

17. This approach can be demonstrated in practical terms by reference to the judgments in ***Warborough.*** At first instance, Lawrence Collins J said that he did not consider that it would have been enough for the landlord to have shown that it would have made other investigations, and therefore may have been able to present other arguments to meet the new case. He said expressly that the applicant had to show that the irregularity was likely to have made a real difference to the result. On that case he was not satisfied that the evidence would have met that test. In the Court of Appeal this approach was repeated. At paragraph 39 of his judgment, Jonathan Parker LJ identified extensive evidence which, so it was said, the landlord's valuer would have put in to deal with the point that was said to arise out of the irregularity, but he went on to conclude at paragraph 58 of the same judgment that he was not satisfied that the witness statement would have been so different as to justify the conclusion that the lack of the opportunity in itself caused a substantial injustice.

C: Serious Irregularity In The Present Case

a) **Procedural**

18. The arbitrator gave directions which envisaged the exchange of submissions, followed by an inspection of certain properties, including an inspection of Huggies. There was no objection to this course, which is quite normal in this type of rent review arbitration. He offered the parties the opportunity to accompany him on his inspection, which they declined. Accordingly, it seems to me that no criticism can be made of the fact that the arbitrator inspected the various properties after the production of the written submissions and without either party in attendance.

b) **The Necessary Adjustment**

19. There was a major debate in the arbitration concerning whether Huggies was a valid comparable at all. Furthermore, even if it was thought to be a valid comparable, both valuers accepted that the rental for Huggies had to be adjusted to reflect the fact that it was a fitted-out premises. The parties are agreed that the particular sub-issue that arose for the arbitrator to decide in this respect was the value which the tenant would have placed upon the fittings as a part of the overall rent.

20. It is clear that this was a point which was dealt with in detail by the respective valuers. On behalf of the tenant, Mr Cassidy's first set of submissions calculated an adjustment of over £20,000 by taking the actual fitting out costs of £700,000 (which equated to £100 per square foot), devaluing that figure over 25 years, and then applying a 30% depreciation factor. His adjusted rental for Huggies was therefore £59,252. Paragraph 4.1.1 of his submissions said that the fact that the premises were fully fitted was "a significant incentive to the tenant". Mr McElhannan, on behalf of the landlord, proposed a 10% reduction in the rent to reflect the fitting out works, which produced an adjusted rent of £75,000. At paragraph 6 of his submissions he explained that he had placed limited weight on the re-letting to Huggies "as the adjustments to reflect the benefit of secondhand fixtures and fittings is subjective".

21. The issue was also covered in both valuers' written counter-submissions. Mr Cassidy's general conclusions in his counter-submission stressed the significant inducement which would be offered to an incoming tenant by a fitted out property. He also made a number of specific criticisms of Mr McElhannan's 10% reduction in respect of the Huggies rent. Mr McElhannan's response in respect of Huggies was to the effect that, from the landlord's perspective, the fixtures and fittings were redundant, "and would be of no value other than [to] an incoming independent operator, for a multiple operator would strip out and refit in their own corporate style."

22. In his award the arbitrator:

a. Rejected Mr McElhannan's percentage deduction as too simplistic (paragraph 18.10.10), but accepted his view that the fittings, fixtures and furniture were still secondhand, and may be a liability to a new and hypothetical tenant (paragraph 18.10.8):

b. Accepted Mr Cassidy's figure for the fitting out costs at £100 per square foot (paragraph 18.10.8) and his overall approach (paragraph 18.10.10), but concluded that the resultant allowance was *"incorrect and*

unrepresentative" (paragraph 18.10.8) and produced an adjustment which the arbitrator expressly did not accept (paragraph 18.10.10).

23. In the light of this mixed bag of findings, the arbitrator had no alternative but to do his own assessment of the correct adjustment. That was the exercise that he undertook in paragraph 18.10.10 of his award, and which I have set out in paragraph 4 above. That produced an adjusted rental for Huggies of £70,500. In accordance with the arbitrator's specific findings, which I have summarised above, that figure was greater than the figure put forward by Mr Cassidy, but less than the figure proposed by Mr McElhannan.

24. Miss Taskis complains that there was a serious irregularity because the £150,000 figure, which the arbitrator used as his starting point for the calculation of the adjustment, had not been raised with the parties and, therefore, they had had no opportunity to make submissions upon it. She said it represented a new approach which the arbitrator was obliged to put to the parties before providing his award, and that his failure to do so comprised a breach of s.33 of the 1996 Act.

25. Cogent and forceful though those submissions were, I find myself unable to accept them. It seems to me clear that the particular sub-issue for the arbitrator on this point was the extra amount within the rent which the tenants of Huggies were prepared to pay to reflect the fact that the property was fitted out. That was, as everybody appeared to accept, an entirely subjective matter. Both valuers had striven to quantify this amount, and as summarised in Paragraph 22 above, the arbitrator accepted parts of each valuer's approach to the calculation but also rejected other parts of each approach. Having made those findings, it seems to me that the arbitrator was entitled to arrive at a valuation which reflected his own approach and which produced a result which was part way between the figures advocated by the respective valuers.

26. The subjective value of the fitted out element of the Huggies' rental was an issue in the arbitration and it was an issue on which both valuers made submissions. It was, therefore, plainly within the arena which the arbitrator was considering. His conclusion that there should be a starting-point of £150,000 was based on his findings on the respective submissions that he had received, and the application to those findings of his particular expertise. It was not something new which had to be put back to the parties for a further round of comments. I conclude that the arbitrator's conduct in the present case was similar to that of the arbitrators in ***Strathclyde v Checkpoint*** and ***Warborough*** and unlike the palpable errors perpetrated by the arbitrators in ***Fox v Welfair*** and ***St George's Investment***. I therefore conclude that there was no serious irregularity.

27. That decision is, of course, enough to defeat JDW's claim under s.68 of the 1996 Act. However, because I have heard clear submissions on the question of substantial injustice, and because I have reached such a firm view on that aspect of the application, it seems sensible for me to go on to address that second issue. I therefore do so on the assumption that I am wrong on the first issue, and that there was a serious irregularity because the arbitrator used the figure of £150,000 which had not been raised with the parties before the production of his award.

D: Substantial Injustice

a) **Introduction**

28. I am in no doubt that, on the basis of the award itself, together with the other evidence that I have seen, there has been no substantial injustice at all in this case, let alone one that demonstrates an arbitration or an award that has gone so wrong that justice calls out for it to be corrected. There are a number of separate reasons for that conclusion.

b) **The Relevant Comparable**

29. The first, and I consider most telling point, is that the alleged irregularity arose in respect of the arbitrator's assessment of the comparable rent for Huggies which he put at £12.06 per square foot. However, a large part of the arbitration was concerned with a consideration of the Barracuda premises. That was the adjoining property in respect of which the arbitrator found the relevant rental to be £13 per square foot (which was precisely the figure that the arbitrator arrived at for the property in question). At paragraph 20.2.1 of his award, the arbitrator found that Barracuda *"is the best comparable available"*. At paragraph 20.2.3, by contrast, he found that Huggies "*is a less suitable and more difficult comparison due to the fitted out state"*. At paragraph 21.2 he utilised the £13 per square foot rate from Barracuda to arrive at the rental for the property of £97,750.

30. It seems to me, therefore, that the alleged irregularity arose in respect of the adjustment to a rental figure on a property – Huggies - which the arbitrator expressly found was not the best comparable. He decided that the best comparable was Barracuda, in respect of which it is not suggested there was any irregularity at all. In the circumstances, therefore, given that the arbitrator found that the best comparable was the Barracuda premises, and that that was let at a figure of £13 per square foot, precisely the figure he then utilised in his decision, it seems to me that it cannot be suggested that the alleged irregularity in respect of Huggies has caused a substantial injustice to JDW. In my judgment the irregularity, if that is what it was, has had no material effect at all, because it related to a property of marginal relevance to the ultimate issue.

c) **Costs of Fitting Out**

31. In his statement Mr Cassidy said that if, during the arbitration, the arbitrator had made plain to him the £150,000 figure, or the methodology by which he had arrived at it, then he would have introduced further evidence as to fitting out costs. This is set out at paragraphs 14 and 15 of his statement. However, as Mr Sefton correctly pointed out, the award made clear that JDW had already put in evidence relating to the costs of the fitting out (£100 per square foot) and that the arbitrator had accepted it. Thus it seems to me that JDW have not

demonstrated what further evidence they could have introduced on this topic and what (if any) difference such further evidence might have made.

32. In addition I also accept Mr Sefton's argument that the actual costs of the fitting out were, on the arbitrator's approach, irrelevant. The arbitrator made the point in his award that what mattered was not the capital cost of new fitting out works, but the tenant's assessment of the value to him of the fitting, fixtures and furnishings. Thus, further evidence of actual fitting out costs, which is what Mr Cassidy said he would have introduced, would have been irrelevant to the particular sub-issue in question (and the arbitrator's approach to it), and the absence of such evidence could not therefore give rise to a substantial injustice.

d) **Depreciation**

33. The final point made by Mr Cassidy is that he would have wished to make a submission as to the level of depreciation to be applied (see paragraph 16 of his statement). However, it does not appear that this point leads anywhere either, particularly given that paragraph 4.1.11 of the award makes plain that Mr Cassidy did indeed make submissions as to depreciation, which the arbitrator then considered. Again, I reject the suggestion that in some way Mr Cassidy has been deprived of providing full and detailed submissions to the arbitrator on depreciation.

e) **Summary**

34. Just standing back from the detail for a minute, I consider that this case is far removed from the sorts of cases which the House of Lords indicated in ***Lesotho*** were appropriate for judicial intervention on the grounds of substantial injustice. I do not think that it could be fairly said that this arbitration had gone off the rails in any way. Even assuming an irregularity, the point arose in respect of an argument about (and an adjustment to) a rental figure on one comparable property, which was not the most relevant comparable for the reasons explained by the arbitrator. Furthermore, the evidence does not suggest that there was any further evidence available to JDW or Mr Cassidy which could or would have made any substantial difference to the result. During argument, Miss Taskis properly accepted that it was difficult to say that, if the irregularity had not arisen, there would have been any significant difference to the result. It seems to me, therefore, that in the round the 'substantial injustice' test has not been made out in this case.

E: Conclusion

35. For the reasons set out above I dismiss the application under s.68.2. I conclude that there was no serious irregularity. More importantly, perhaps, I also conclude that, even if there had been a serious irregularity, it was not something which, on the evidence, did or could have given rise to a substantial injustice. It, therefore, seems to me that this application must fail on the second limb of the test in any event.

MISS CATHERINE TASKIS appeared on behalf of THE CLAIMANT (instructed by Sprecher Grier Halberstam LLP).
MR MARK SEFTON appeared on behalf of THE DEFENDANT (instructed by Kuit Steinart Levy).