JUDGMENT : Mr Justice Morgan : Chancery 6th August 2008

1. This is an application under section 69(2)(b) of the Arbitration Act 1996 for permission to appeal against an arbitration award, dated 15 January 2008, of an arbitrator, Mr K. T. Woudman.
2. I refuse permission to appeal.
3. In accordance with the guidance given in ***North Range Shipping Ltd v Seatrans Shipping Corpn*** [2002] 1 WLR at [27] – [29], I will give brief reasons for my conclusion.
4. Christopher Hodsoll Limited ("the Company") was the lessee under a lease of a large country house. The lease imposed certain repairing and decorating obligations on the lessee. The lease came to an end and the lessor claimed damages for breach of the lessee's repairing and decorating covenants. The lessee's liability and the amount of any damages were some of the issues referred to arbitration and these issues were determined by the above-mentioned award. The arbitrator held that the lessee was in breach of its covenants and was liable for damages in a sum in excess of £188,000.
5. The Company had acquired the relevant lease by way of an assignment of it. The Claimants in these High Court proceedings, seeking permission to appeal, were parties to the relevant licence to assign granted by the lessor. In that licence, the Claimants were together described as "the Surety".
6. By clause 2 of the licence, the Company and the Surety jointly and severally covenanted that the Company would observe and perform the lessee's covenants in the lease.
7. By clause 3 of the licence, the Surety "further" covenanted that for so long as the Company remained liable under the lease, the Surety would pay and make good to the Lessor "on demand" all losses, damages, costs and expenses occasioned by any breach of the lessee's obligations under the lease.
8. After the end of the lease, there was certain correspondence between solicitors for the lessor and solicitors acting for the Company and the Surety as to the liability to pay damages for breaches of the repairing and decorating covenants in the lease.
9. The lease provided for certain disputes under it to be referred to arbitration. Initially the parties (here meaning the lessor on the one hand and the Company and the Surety on the other hand) did not agree on the appointment of an arbitrator. The lessor issued High Court proceedings for the appointment of an arbitrator. The Defendants to those proceedings were the Company and the Surety. An order for the appointment of an arbitrator was in due course made, I understand by consent.
10. The arbitration then got under way. The Claimant in the arbitration was the lessor and the Respondents were the Company and the Surety. I have not seen the pleadings in that arbitration. The Defendant in the proceedings before me, the lessor, has put in detailed submissions in which it is stated that the Surety did not raise any point in the pleadings as to the need for, or the absence of, a formal demand on the Surety, before the Surety would be liable for damages for the breaches of covenant which were alleged. However, on or about 3rd October 2007, the lessor's solicitors received a document called "Outline Submissions on behalf of the Respondents" in which, apparently, the Surety made the points that the Surety was not liable in the absence of a demand and that there had not been a demand. Following receipt of those submissions, the lessor's solicitor, on 4 October 2007, served a demand on the Surety for the damages which had been claimed against the Company and the Surety in the lessor's Statement of Case in the arbitration. There does not appear to have been an application by the lessor to amend her Statement of Case to rely on this demand of 4 October 2007.
11. There was an oral hearing in the arbitration. The hearing began on 8 October 2007 and ended on 10 October 2007. The arbitrator published his award on or about 15 January 2008.
12. Paragraphs 136 to 145 of the award dealt with the position of the Surety. The arbitrator referred to clause 3 of the licence but he did not refer to clause 2 of it. He appears to have proceeded on the basis that both sides accepted that a demand was needed in this case; he did not refer to any submission from the lessor to the contrary. He then directed himself as to the requirements of a valid demand, in a case such as this, by referring to Andrews & Millett, the Law of Guarantee at paragraph 7-007. He then considered a submission on behalf of the lessor that a valid demand had been served. For this purpose, the lessor relied on the course of correspondence and the terms of the application to the High Court to appoint an arbitrator (where the Surety had been a party to those proceedings). The lessor relied upon ***the Mannai*** test (see ***Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [***1997] AC 749). The arbitrator held that that was an appropriate test to be applied in this context. The arbitrator then held that there had been a valid demand on the Surety before the arbitration proceedings were commenced and he gave short reasons for that view.
13. In the present proceedings, the Surety submits that a demand was necessary and that no demand had been served. It is said that the arbitrator's decision that a valid demand had been served was obviously wrong. It is said that the application of ***the Mannai*** test was obviously wrong. It is further said that the points arising in this case are of general public importance and that the decision was at least open to serious doubt. It is also said that the decision substantially affects the rights of one or more of the parties and that it is just and proper for the court to determine the questions arising, despite the earlier agreement of the parties to refer this dispute to arbitration.

14. The questions decided by the arbitrator, which are sought to be challenged by the Surety, are as to whether the ***Mannai*** test was a helpful test to apply and whether the correspondence and the previous court proceedings amounted to a demand on the Surety.

15. In my judgment, it was plainly right for the arbitrator to apply the ***Mannai*** test. That test is of general application. It has been used by the Court of Appeal in a case involving issues similar to the present: ***Maridive & Oil Services v CNA Insurance Co*** [2002] 2 Lloyd's Rep 9 at [13].

16. Once it is decided that the arbitrator applied the right test to the particular documents in this case, then although his decision is to be regarded as involving a question of law, rather than a question of fact, it cannot be said to be a question of general public importance. It is instead a question which turns on the particular documents which are said to be relevant in this case, which cannot be said to be documents in wide or general use. The test for permission to appeal is therefore whether the arbitrator was "obviously wrong". In my judgment, he was not.

17. That is enough to lead to the conclusion that permission to appeal should be refused. However, as a number of other points have been raised by the parties I will deal briefly with some of them.

18. In my judgment, this was not a case in which a demand was needed in the first place. Clause 2 imposes liability on the Surety as a principal obligor without the need for a demand. The reference to a "demand" in clause 3 does not detract from that conclusion: see ***MS Fashions Ltd v Bank of Credit and Commerce International SA*** [1993] Ch 425 and ***TS & S Global Ltd v Fithian-Franks*** [2008] 1 BCLC 277. Accordingly, the result of the arbitration is appropriate even if the Surety were right to submit that there had not been a demand. Therefore, the outcome of this appeal will not substantially affect the rights of the parties. The same conclusion might be justified on the basis that the lessor had made an undoubtedly valid demand on 4 October 2007 and could have applied to amend her Statement of Case in the arbitration and the arbitrator might very well have permitted that amendment, applying the approach in ***Maridive*** (above). I say that this reasoning might justify the above conclusion because, in the end, I do not base my conclusion on this point. The fact is that the lessor could have sought, but did not seek, permission to amend from the arbitrator.

19. The lessor also says that any requirement for a demand to be made on the surety was waived by the Surety. However, that point was not apparently argued before the arbitrator and he did not address it and I do not think it would be right for me to consider it further.