Neutral Citation Number: [2019] EWHC 704 (Ch)

Case No: E30BS941

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
BUSINESS LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 25/03/2019

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

Merthyr (South Wales) Ltd	**Claimant**
- and -	
(1) Cwmbargoed Estates Ltd	**Defendants**
(2) Dowlais Top Investment Company Ltd	

- -
- -

Hugh Sims QC (instructed by **Veale Wasbrough Vizards LLP**) for the **Claimant**
Adam Deacock (instructed by **Blake Morgan LLP**) for the **Defendants**

Consideration on the papers without a hearing

- -

HHJ Paul Matthews :

Introduction

1. This is my judgment, after consideration on the papers, but without a hearing, of an application under s 69 of the Arbitration Act 1996 for permission to appeal against the arbitration award of Mark Banton dated 13 August 2018. That award arises out of a dispute between the parties to a lease, dated 14 March 1997 and made between the second defendant as landlord and CLH Ltd as tenant, concerning the calculation of an additional rent reserved by that lease, and known as Production Related Rent ("PRR"). This additional rent relates to the price or value of minerals mined from the demised land and subsequently sold or otherwise disposed of. In fact, the only mineral so mined has been coal.

2. The lease was granted, for a term of 999 years from 14 March 1997, of land forming part of Merthyr and Gelligaer Common, Mid Glamorgan, Wales. The current landlord is the first defendant. The current tenant is the claimant, CLH Ltd having assigned the lease to it in 2002 (both tenant companies at that time having a common director). That lease by clause 8 provided for the arbitration of any dispute by

> "an independent chartered surveyor experienced in mineral matters to be appointed by agreement between the parties or failing agreement to be appointed by the President for the time being of the Royal Institution of Chartered Surveyors … "

3. Rent, including PRR, was paid under the lease without any problem from 1997 until 2016, when the tenant company was sold and its beneficial ownership changed. Thereafter a dispute arose between the parties as to the calculation of PRR. An application was made pursuant to the lease to the Royal Institution of Chartered Surveyors for the appointment of an arbitrator.

4. Mr Banton was appointed on 19 May 2017. He is a chartered surveyor, with particular experience in dealing with minerals and mineral extraction. The arbitration hearing was held from 25 to 29 June 2018 in Bristol, at which oral evidence was given and legal arguments were put. A curiosity of the hearing is that the landlord called evidence from witnesses on both sides of the original transaction. The tenant however called witnesses from neither. As I have said, the award is dated 13 August 2018.

Procedure

5. The claimant issued the claim form on 10 September 2018 seeking both (i) leave to appeal, and, if leave be granted, to appeal against the final award under section 69 of the 1996 Act, on the basis of a mistaken construction of the lease, and also (ii) for the court to set aside the award and/or remit matters to the arbitrator, pursuant to section 68 of the 1996 Act, on the basis of an alleged serious irregularity. The claim was supported by a witness statement of Nicholas Martindale, the claimant's solicitor, dated 10 September 2018. The allegations of serious irregularity relate to alleged failures by the arbitrator to address issues which it is said were before him. In this judgment I am concerned only with the first issue, leave to appeal under section 69.

6. The papers were first referred to me on 19 September 2018. On 24 September 2018 I told court staff that the claim should first be served and then I could consider the defendants' reaction. A certificate of service was filed, dated 10 October 2018, as it happens on the same day as the defendants' acknowledgement of service. The defendants' Respondents' Notice, skeleton argument and a witness statement of Sian Jones, the defendant's solicitor, were all filed on 23 October 2018. The claimant filed a further written argument in reply to the defendant's skeleton argument on 12 November 2018, accompanied by a second witness statement of Nicholas Martindale dated the same day.

7. Following an enquiry by the defendants' solicitors on 17 December 2018 the papers were referred to me again and I asked court staff to ascertain whether the parties were agreed that the matters in dispute should be determined on paper or whether they sought a hearing. In fact this question was not put to the parties until 5 January 2019. By an email dated 9 January 2019 the claimant asked for a "rolled up" hearing. This was referred to me on 14 January 2019. The next day I saw this and asked whether the defendants agreed. The court wrote to the defendant solicitors on the 26 January 2019.

8. On 1 February 2019 the defendant solicitors emailed the court to say that the defendants did not agree with the claimant's proposal, but were concerned with the time being taken for this matter to proceed. That email was referred to me on 11 February 2019, when I was occupied with other, urgent matters. The defendants' solicitors telephoned the court again on 5 March 2019 and followed up with an email of 6 March 2019. As was explained to them, I was sitting at the Rolls building in London for 2 weeks from 25 February 2019, and then had a week's leave. I am sorry for the delay in dealing with this matter, which has been caused partly by pressure on resources in the court service and partly by unforeseen illness in October and November last year, and other work commitments of my own.

Section 69

9. So far as material, section 69 of the Arbitration Act 1996 provides as follows:

> **"69 Appeal on point of law.**
>
> (1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.
>
> […]
>
> (2) An appeal shall not be brought under this section except—
>
> (a) with the agreement of all the other parties to the proceedings, or
>
> (b) with the leave of the court.
>
> The right to appeal is also subject to the restrictions in section 70(2) and (3).
>
> (3) Leave to appeal shall be given only if the court is satisfied—

> (a) that the determination of the question will substantially affect the rights of one or more of the parties,
>
> (b) that the question is one which the tribunal was asked to determine,
>
> (c) that, on the basis of the findings of fact in the award—
>
> (i) the decision of the tribunal on the question is obviously wrong, or
>
> (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
>
> (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.
>
> (4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.
>
> (5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.
>
> (6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.
>
> […]"

What kind of procedure for determining leave?

10. A procedural question which arises at the outset is whether I should deal with the application for leave to appeal under section 69 on the papers, separately from the claim under section 68. In this connection, section 69(5) provides a default position that the question of leave is to be decided without a hearing, "unless it appears to the court that a hearing is required".

11. In *HMV Ltd v Propinvest Friar Limited Partnership* [2011] EWCA Civ 1708, Arden LJ (with whom Longmore and McFarlane LJJ agreed, though Longmore LJ also added some comments of his own) said:

> "39. … It is clearly part of the statutory policy that arbitration should be speedy and that, where possible, there should be a cheaper method of dispute resolution than court proceedings. This statutory policy has implications for the procedure which the court should adopt for dealing with applications for permission to appeal. I need not repeat the passage I have already set out from the judgment of Lord Diplock [in *The Nema* [1982] AC 724, 742-43], but it follows, it seems to me from what he held in that passage, that these applications should normally where possible be dealt with on paper.
>
> 40. … the point I wish to make is it must be rare that a court finds it necessary to call for further argument orally and also to direct a rolled up procedure as in this case. The danger of a rolled up process is that the judge does not answer the anterior statutory questions in section 69, namely whether the pre-conditions to

> the grant of leave to appeal in Section 69 are all satisfied. Those questions are ones which statute requires to be answered before the substantive issue on the appeal is fully argued."

12. As I have already said, however, the claimant asked that I deal with both the application for leave to appeal and the serious irregularity matters together in what it called a single, "rolled up" hearing. But in using this term the claimant evidently meant to include not only the permission point and the substantive appeal (if permission be given) but also the serious irregularity points under section 68 raised in the claim form.

13. The claimant referred me to the much earlier decision of Colman J in *Bulfracht (Cyprus Ltd v Boneset Shipping Co Ltd, "The MV Pamphilos"* [2002] EWHC 2292 (Comm), where there was similarly a claim containing an application to set aside an award for serious irregularity under section 68 and an application for permission to appeal under section 69. The judge said:

> "The logical approach to multiple applications of this kind is almost invariably to determine the application to set aside or remit for serious irregularity first and to consider the question of permission to appeal once it has been decided whether the award can stand. Although applications for leave to appeal under section 69 are normally on paper without an oral hearing, the course adopted in the present case of hearing oral argument on the application for leave at the same hearing as for the section 68 application is a sensible and more cost efficient approach, particularly having regard to the fact that the underlying facts and legal submissions relevant to both applications are so closely related."

14. The claimant argued that the issues under section 69 and 68 were interlinked. The defendants on the other hand resisted a "rolled up" hearing, on the basis that in the present case there was no clear link between the application for permission and the section 68 allegations. The reality is however that the only link between these allegations of irregularity on the one hand, and the issue of construction in relation to which it is said the arbitrator fell into error on the other hand, is that they all arise in the same dispute out of the same lease.

15. A mistake in the construction of the lease is a matter of law, on which no evidence about the hearing will be required. Whether the arbitrator dealt with the issues that were put before him, however, is a procedural matter, on which evidence of what happened at the hearing will be important. The two questions are just not the same. In any event, I have now read the papers relating to the section 69 application, and I am in a position to deal with that now. Having done so, there will be no appreciable saving of time by dealing with the permission question together with other matters together at a later hearing.

16. Accordingly, there is no reason not to apply the normal rule, as accepted by Colman J in *Bulfract* and emphasised by Arden LJ in the *HMV* case. I therefore decided to deal with the question of leave to appeal under section 69 on paper, leaving the issues about serious irregularity to be dealt with in due course.

Law

A question of law

17. It is trite law that construction of a private contract, such as is contained in the lease in the present case, involves a point of law. In *The Nema (No 2)* [1982] AC 724, decided under the Arbitration Act 1979, Lord Diplock, with whom the whole House agreed, said (at 735):

> "Nevertheless, despite the disappearance of juries, literate or illiterate, in civil cases in England, it is far too late to change the technical classification of the ascertainment of the meaning of a written contract between private parties as being 'a question of law' for the purposes of judicial review of awards of arbitrators or decisions of administrative tribunals from which an appeal to a court of justice is restricted by statute to an appeal upon a question of law."

18. More recently, in a case (like the present) under the Arbitration Act 1996, *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] EWHC 426 (TCC), Akenhead J said:

> "26. Mr Bartlett QC reserves an argument for another court that the issue on this application was not a question of law because it involved a one off point of contractual construction, which even if wrong was one which an arbitrator could reasonably have adopted. That cannot be right. Questions of contractual construction do involve questions of law: the parties have legally made the law governing their particular relationship by agreeing the contract in question. Rules of interpretation apply as a matter of substantive law."

19. But questions of construction, based on the factual matrix supplied by evidence before the arbitral tribunal, but not of course before the court, have special characteristics. In *Trustees of Edmond Stern Settlement v Levy* [2007] EWHC 1187 (TCC), HHJ Coulson QC (as he then was) said:

> "13. Questions of construction are often a matter of impression. Whilst I can see how and why the Arbitrator could have come to a different view, I am unable to say that he was obviously wrong in reaching the conclusion he did. It seems to me that either interpretation was available to him and, as he was bound to do, he chose one over the other. I do not consider that he was obviously wrong in the choice he made. Furthermore, given that this is a question of construction that had to be answered against the background of the relevant factual material in accordance with the well-known principles in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 WLR 896, it should only be in the clearest cases that a Judge considering a section 69 application, who has not heard such evidence, should substitute his own construction for that of the Arbitrator, who has."

20. Notwithstanding this salutary warning, I conclude that section 69(1), limiting appeals to "a question of law arising out of an award" is satisfied in the present case. Since the respondent to the appeal has not consented to the appeal's being heard, it can only be made with the leave of the court: see section 69(2). The question of the grant of leave of the court is governed by section 69(3).

21. Looking at section 69(3)(a) and (b), I am satisfied that the question of construction was one which the arbitrator was asked to decide, and that determination of the appeal will substantially affect the rights of the parties. But the court cannot give leave unless *either* (i) the arbitrator's decision is "obviously wrong" *or* (ii) "the question is one of general public importance and the decision of the tribunal is at least open to serious doubt."

No appeal on facts

22. I only add that the terms of section 69(3)(c), governing the grant by the court of leave to appeal, make plain that there can be no appeal on the facts found by the arbitrator. Moreover, in this jurisdiction it is not legitimate to attempt to dress up an appeal on facts as a question of law as to whether the evidence was sufficient to justify the findings: see *Demco Investments & Commercial SA v SE Banken Forsakring* [205] 2 Lloyds Rep 650, [35]-[45]; *Surefire Systems Ltd v Guardian ECL Ltd* [2005] EWHC 1860 (TCC), [21].

A matter of general or public importance

23. There is no suggestion in the present case that section 69(3)(c)(ii) might apply. As HHJ Coulson QC (as he then was) said in *Trustees of Edmond Stern Settlement v Levy*,

> "11. It is common ground that the true construction of this one-off form of words cannot be a matter of general or public importance."

And, in the *HMV* case, Arden LJ said the same thing:

> "4. … That provision [*ie* section 69(3)(c)(ii)] is not one which can be used in the present case because the point which arises is one of the interpretation of a purely private arrangement contained in a lease…"

"Obviously wrong"

24. Accordingly, the question is whether the court considers that the decision was "obviously wrong". It is clear that this is a higher standard than, say, the test for the test for giving permission to appeal in ordinary litigation, where a real (*ie* not unreal or illusory) prospect of success is enough: see CPR rule 52.6. So judges may take different views about the construction of a clause without any being "obviously wrong".

25. In *Braes of Doune*, Akenhead J said:

> "28. … It is not enough that a part of his or her reasoning is wrong or that conceivably another tribunal might respectably have reached the opposite decision. I consider however that the test of obviousness is not only passed if the Award is obviously wrong to the judge considering leave after half an hour's reading of the papers by the judge considering leave. The reference in *CMA CGM SA v Beteiligungs-Kommanditgesellschaft MS Northern Pioneer* [2003] 1 Lloyds Rep 212 at Paragraph 23 that the judge should be able to digest the written submissions in 30 minutes does not impose such a restriction. If it takes four

> hours for the judge to understand the submissions and he or she then forms the view that the Section 69 criteria are established, those criteria are established.
>
> 29. To be 'obviously wrong', the decision must first be wrong at least in the eyes of the judge giving leave. However, any judge of any competence, having come to the view that it is wrong, will often form the view that the decision is obviously wrong. It is not necessarily so, however, as a judge may recognise that his or her view is one reached just on balance and one with which respectable intellects might well disagree; in those circumstances, the decision is wrong but not necessarily 'obviously' so."

26. Akenhead J went on, albeit in the context of concerned with section 69(3)(d) of the 1996 Act, to refer (at [31]) to the possibility that a "chosen highly respected arbitrator has simply had a major intellectual aberration." In the *HMV* case, Arden LJ referred to these words in saying:

> "He uses the memorable phrase 'a major intellectual aberration' in paragraph 31 of his judgment, which I have found a useful way of bringing to mind that the error on which we are concerned, if there be an error, must be an obvious one."

It seems to me that the kind of situation envisaged is one where the judge looks at the award and thinks "Something must have gone seriously wrong; that just cannot be right".

What material the court considers

27. In considering, for the purposes of whether to give leave, whether the decision is "obviously wrong", the court has regard to very limited material. In *The Nema*, [1982] 742, decided under the Arbitration Act 1979, Lord Diplock said (at 742-43):

> "Where ... a question of law involved is the construction of a 'one-off' clause, the application of which to the particular facts of the case is an issue in the arbitration, leave should not normally be given unless it is apparent to the judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the clause by the arbitrator is obviously wrong. But if on such perusal it appears to the judge that it is possible that argument might persuade him, despite first impression to the contrary, that the arbitrator might be right, he should not grant leave; the parties should be left to accept, for better or for worse, the decision of the tribunal that they had chosen to decide the matter in the first instance...."

28. As Arden LJ, quoting this extract from *The Nema*, said in the *HMV* case,

> "6. The words "obviously wrong" should be seen as reflecting the case law on the predecessor provision in section 1(3)(b) of the Arbitration Act 1979 …
>
> 7. The effect of the Arbitration Act 1979 in this regard was thus, in my judgment, carried through into section 69 of the 1996 Act … "

29. So Lord Diplock envisaged the court having regard only to the award itself for the purpose of deciding whether to grant leave. In *City of Plymouth v Jones* [2005]

EWHC 2356 (TCC), decided under the 1996 Act, HHJ Coulson QC (as he then was) said:

> "18. … The authorities make plain that the obvious error must normally be demonstrable on the face of the award itself: see, for instance *Foleys Ltd v City and East London Family and Community Services* [1997] ADRLJ 401 and *Hok Sport Ltd v Aintree Race Course Co Ltd* [2003] BLR 155. I also note that the Second Edition of the TCC Guide, published on 3 October 2005, states at paragraph 10.2.4 that, save in exceptional circumstances, the only material admissible on an application of this kind is the award itself, together with any documents attached to it."

30. The latter point is repeated in CPR PD 62 para 12.5 in broader language:

> "Unless there is a dispute whether the question raised by the appeal is one which the tribunal was asked to determine, no arbitration documents may be put before the court other than –
>
> (1) the award; and
>
> (2) any document (such as the contract or the relevant parts thereof) which is referred to in the award and which the court needs to read to determine a question of law arising out of the award.
>
> In this Practice Direction 'arbitration documents' means documents adduced in or produced for the purposes of the arbitration."

31. In my judgment, the phrase used by HHJ Coulson QC in the *Plymouth* case, "demonstrable on the face of the award itself" is a telling one. It is not intended that the parties should adduce copious evidence of the "factual matrix", and advance complex written arguments to show how this or that unforeseen consequence will follow if the undesired construction adopted by the arbitrator is allowed to stand. This is not a construction summons, nor indeed any kind of ordinary litigation, where it may be enough to obtain permission to appeal to show that the contrary interpretation is at least properly arguable, *ie* has a real prospect of success. It is an arbitration award, the product of a free choice by the parties to arbitrate rather than litigate. It is intended to be final except in rare cases. One of these is where the award is "obviously wrong" in law from looking at the face of the award.

32. The claimant submitted a detailed and lengthy first skeleton argument of some 26 pages, and a further skeleton argument of just over six pages. These were supported by two witness statements by its solicitor, one of six pages and the other of two, exhibiting a great many other documents. The whole claimant's bundle filed with the claim (but therefore not including the defendants' documents) runs to 566 pages. I bear in mind that this claim includes also a claim under section 68, and that some of the documents included may have been included to deal with that aspect of the claim. Nevertheless, this is still far too much material. Certainly very little of it was needed in order to determine the question of law on this appeal. I have read and considered the award itself, the witness statements, the skeleton arguments and the lease (though I do not think, in retrospect, that it was actually necessary to read the whole lease).

The Lease

33. The critical provision in the lease is that in clause 3.2, putting an obligation on the tenant to pay PRR:

> "By way of further rent the Production Related Rent during the first and each successive year of the Term by quarterly payments to be paid in arrears within 14 days of each Quarter Day in every year (each such payment to be calculated by reference to the tonnage of Minerals extracted and sold or otherwise disposed of from the Land during the Quarter ending on the relevant Quarter Day)."

34. PRR is defined in clause 1.1, so far as relevant, as

> "a rent – (a) in respect of the Coal worked gotten or otherwise extracted from the Land and sold or otherwise disposed of during the Quarter in question calculated at the rate of: – (i) 60p per metric tonne where the Average Ex Site Coal Price is £39.99 per metric tonne or below; (ii) £1.20 … per metric tonne where the Average Ex Site Coal Price is between £40 per metric ton and £49.99 per metric tonne; (iii) £1.80 … per metric tonne where the Average Ex Site Coal Price is between £50 per metric ton and £59.99 per metric tonne; (iv) £2.40 … per metric tonne where the Average Ex Site Coal Price is between £60 per metric tonne and £69.99 per metric tonne, increasing incrementally by 60p per metric tonne as and when the Average Ex Site Coal Price reaches £70 per metric ton and each higher multiple of £10 per metric tonne; …"

35. Average Ex Site Coal Price is defined in paragraph 1 of the Third Schedule to the lease as follows:

> "the average gross invoice price per tonne (but excluding VAT or any similar imposition) for the relevant Quarter of all Coal at which a person is currently invoiced and priced by the Lessee or by any other lessee (or by any licensee or contractor of the Lessee or any other lessee) in a bona fide arm's length transaction and on the open market and the said average gross invoice price (as aforesaid) shall be determined (where required) by the Lessee giving to the Lessor a certificate as to the said average gross invoice price of all Coal (excluding as aforesaid) taken from the Land … and unless the Lessor within one month after receipt of such certificate notifies the Lessee in writing that the Lessor does not accept the said certificate then the Average Ex Site Coal Price shall be such sums as appears in such certificate".

The Award

36. The award summarised the dispute concerning the amount of PRR due under the lease as follows:

> "6.2 The Lease sets out that the amount of PRR for coal is calculated according to specified price bands. The PRR is 60p per metric ton where the "Average Ex Site Coal Price" is £39.99 or below. It increases to £1.20/t where the "Average Ex Site Coal Price" is between £40/t and £49.99/t inclusive. The PRR then increases by 60p/t for each £10/t increase in the "Average Ex Site Coal Price".

> 6.3 The PRR for coal is indexed upwards according to increases in the Retail Price Index. The PRR for other Minerals "worked gotten or otherwise extracted from the land and sold or otherwise disposed of during the Quarter in question is calculated at the rate of 33.3 per cent of the Average Ex Site Mineral Price of the same".
>
> 6.4 Since the grant of the Lease the only minerals extracted has been coal. Hence this dispute only concerns the PRR for coal.
>
> 6.5 Coal is extracted from the Land as part of the East Merthyr Phase 3 and 3a Reclamation Scheme. The coal is worked by opencast mining methods and is transported by dumptrucks to the adjoining Cwmbargoed Disposal Point (CPD). Coal from different seams is washed, crushed, screened and blended as necessary to suit customer requirements before being loaded onto rail wagons and sold.
>
> 6.6 The Landlord argued that the PRR should be calculated as the product of the tonnage of coal sold from the CDP and the total Average Selling Price as invoiced to the final customer, *ie* including all processing and washing costs (where applicable) whether invoiced separately or together but excluding transport costs.
>
> 6.7 The Tenant argued that the PRR should be calculated as the product of the gross tonnage of coal removed from the Land (as transported to the CDP) and the cost of extraction (adjusted as necessary) *ie* the Face Rate that would be applicable if the coal was being worked by contractor.
>
> 6.8 The parties each argued various secondary damage limitation points which would only be applicable if their primary arguments were unsuccessful. I have listed and considered these secondary arguments later in this Award as applicable.
>
> 6.9 Following the hearing the Landlord provided alternative interest calculations based on the different scenarios argued by the parties but these have not been agreed by the Tenant."

37. The award goes on to refer to some of the arguments put forward by the parties, and summarises the evidence adduced. Then the key issues are summarised as follows:

> "9.1 In this award I will not attempt to summarise the detailed arguments put forward by each party. However based on the parties' arguments I consider the following to be the key sequential issues to be considered for the determination of the Production Related Rent.
>
> i) <u>The Cwmbargoed Disposal Point</u>
>
> Was it envisaged that the Cwmbargoed Disposal Point would be used as the disposal point for coal extracted from the demised land?
>
> ii) <u>The Production Related Rent</u>
>
> Was it intended that the PRR would be calculated using the Average Ex Pit Selling Price, or on the sale or the supply of the Run of Mine coal?

iii) Ex Site

Does the phrase "Ex Site" within the phrase "Average Ex Site Coal Price" mean ex "the Land" or ex "the CDP"?

iv) Coal Washing Premium and Price Sharing Mechanism

Should the coal washing Premium and Price sharing mechanism as set out in the Tata contract influence the PRR?"

38. The award then sets out what it calls "the factual matrix". In relation to the CDP, this included the background to the lease negotiations, leading to the conclusion (at [10.14]) that it was

> "inconceivable that the use of the CDP to export coal, processed as necessary, was not considered by the Landlord and Tenant to be the most likely option (if not the only realistic option) when the Lease was granted."

39. In relation to the PRR, the award says that the Landlord argued that the PRR should relate to the Average Selling Price (AFP) of the coal. It says that the Tenant argued that the PRR should relate to the cost of producing coal. The award summarised what it called "the most important evidence" and concluded (at [10.24]) that the Landlord was right, and that the PRR should be based on the sale price of coal rather than the cost of production.

40. In relation to the phrase "Ex Site", the award says that the Tenant argued that the site was the "land" as defined in the lease and therefore it was necessary to determine the price of the coal "ex Land". It says that the Landlord argued that the "Ex Site" wording was used to eliminate haulage or other costs from the price. After considering the arguments advanced, the award concluded (at [10.30]) that the phrase

> "simply means to exclude haulage costs. It should not be interpreted as Ex the Land."

41. In relation to the Coal Washing Premium, as the award held that

> "the parties intended the PRR should be calculated according to the selling price of coal from the CDP",

it was

> "necessary to determine if the Coal Washing Premium and/or the Price Sharing Mechanism as set out in the Tata contracts should be included in the selling price calculation".

42. The award then set out some of the arguments and the evidence on this point. It concluded as follows:

> "It is the Tenant's business to produce saleable coal and to sell it from the CDP. As argued for by the Landlord the washing costs have to be incurred in order to produce saleable coal. I agree with the Landlord's argument that the coal washing

> Premium is simply part of the selling price of washed coal from the CDP. Therefore the costs should be used to calculate the PRR".

43. Finally, the award considered the Price Sharing Mechanism. After considering the evidence and the arguments, the award concluded

> "that the price sharing mechanism should be used to calculate the sale price of coal. Consequently it should be used to calculate the PRR."

44. The award therefore concluded in this way:

> "11.1 The PRR should be calculated by adopting the Average Ex Site Coal Price as being the total Average Selling Price of coal from the CDP including the coal washing Premium That and the Price Sharing Mechanism.
>
> 11.2 Therefore I award that Production Related Rent due to the Landlord is £6,042,577.11 … plus interest."

Arguments

Arbitrator not a lawyer

45. The claimant first of all seeks to rely on the fact that the arbitrator was not a lawyer to support the view that the decision on a point of construction was "obviously wrong". It says:

> "4. It is an oddity of this case that a question of law – the construction of an instrument – should be placed for determination in the hands of a non-lawyer. But, absent the consent of the parties, or direction of the arbitrator for legal assistance beyond counsel's submissions, neither of which occurred, the arbitrator is left with the tasks of receiving and understanding legal argument and determining the point of law by applying legal principles. Those are not tasks he has any qualification for, and it is a technical task which it can now be seen from the Award he was not capable of (though he did not indicate any discomfort in doing so to the parties during the course of the arbitration).
>
> 5. This provides initial insight into why this Court is invited to conclude it would be appropriate for leave to be granted and for the appeal to be heard, and why it is complained significant matters put before the arbitrator were not addressed: it is respectfully submitted the arbitrator was unable to determine the matter in the correct manner, and his conclusion in the Award was seriously flawed."

46. Whilst the court's function now is to decide whether to give leave and not to decide the construction issue again, I think it right to say that, in my judgment, this criticism is misplaced. The parties were entitled to agree to arbitrate rather than litigate if they wished, and to select anybody, qualified lawyer or not, to carry on the arbitration. The arbitrator appointed is a qualified surveyor with experience of dealing with minerals and mineral extraction, which is exactly the subject matter of this lease, and at the heart of the dispute between the parties. There is simply no reason to suppose that he has misconstrued the lease merely because he is not a lawyer.

47. Moreover, because the parties have selected arbitration to resolve their dispute, it is not necessary that the arbitral tribunal produce a result which is as precisely correct in law as might be produced by resort to the litigation system, with its professional lawyer-judges, detailed legal procedural rules and its hierarchy of appeals. It is sufficient if the arbitral tribunal produce a result which (so far as concerns this case) is not "obviously wrong" on the face of the award. If it does, then it is final. This is the product of the policy adopted by Parliament in enacting both the 1979 and 1996 Arbitration Acts.

48. That arbitration is different from litigation in this respect is easily shown. For example, in *Keydon Estates Ltd v Western Power Distribution (South Wales) Ltd* [2004] EWHC 996 (Ch), another case where leave was sought under section 69, Lloyd J said:

> "25. … It seems to me that the parties having chosen their experienced and learned arbitrator, they should be left with his decision and not have the opportunity of challenging it by way of an appeal to the court."

Claimant's Grounds of Appeal

49. The claimant argues (in very brief summary) that according to the lease it is the tonnage of coal *extracted or taken from the land* which is relevant, and yet the award looks to the tonnage of minerals sold to the end customer. The claimant relies on the phrase "from the Land" in clause 3.2 and also in para 1 of the Third Schedule, as well as on provisions in clauses 4.6-4.9 for accounts, the landlord's right of entry on to the demised land, and use of a weighbridge. Reliance is also placed on provisions for certification by the Tenant. Accordingly, the sale or supply or other disposal must be "from the Land", rather than from somewhere (however adjacent) off the Land.

50. Under Ground 1, the claimant criticises the formulation of the "key sequential issues" in paragraph 9 of the award. It says that the first key issue (whether the CDP would be used as the disposal point for coal) was not an issue at all, because the tenant accepted that it was most likely to be so used. It says that the second key issue is not an issue either, because there was no dispute that the PRR would be calculated using the AESCP. The real issue was what this term meant. The claimant accepts that the third issue (whether Ex Site meant from the Land or from the CDP) covers at least part of the dispute between the parties. The claimant argues that the fourth key issue (the influence of the CWP and the PSM on the PRR) misses out a logically prior question (whether the parties contemplated that the AESCP would apply to Run of Mine coal and not to washed coal).

51. Under Ground 2, the claimant complains that the award does not consider or analyse relevant parts of the lease, but concentrates on the factual matrix, so that it fails to "carry out the iterative exercise required" by "the process of construction". Objection is taken to the admission of evidence of the subjective intentions of the parties. Complaint is also made about points raised in the award which were not argued, and also there was a mis-statement of the tenant's position.

52. Under Ground 3, the claimant complains that the

> "arbitrator misdirected himself in the construction process by (i) omitting to take into account significant undisputed matters of fact, forming part of the relevant background matrix of fact and (ii) wrongly including reference to evidence which was irrelevant as a matter of law."

The claimant develops these complaints over the next seven paragraphs of the skeleton argument.

53. Ground 4 is an allegation of irregularity by the arbitrator in failing "to determine whether the tenant may either itself, or by a contractor, cause a sale to be made either to it (by a contractor) or buy it to a third party (connected to it) on a proper open market basis ex site, and in those circumstances the amount due to be paid (or due and owing) would be limited to that ex site price. This is not relevant for the purposes of the appeal under section 69, and I can pass over it.

54. Under Ground 5, the claimant largely repeats complaints made earlier in the skeleton argument in connection with the terms of the lease. In particular, the complaint is that the arbitrator has misconstrued the definition of PRR in clause 1.1 (incorporating the term Average Ex Site Coal Price from paragraph 1 of the Third Schedule). According to the claimant, relying on a close textual analysis, it should have been construed as referring to sales or disposals from the land to the CDP and not from the CDP to an end customer.

55. Ground 6 is an allegation of irregularity by the arbitrator in failing "to determine whether the defendant (landlord) was entitled to challenge certificates before December 2016". It does not raise a construction issue and once again I can pass over it for present purposes.

Defendants' answer

56. The defendants in their skeleton argument (some 27 pages in total) submit amongst other things that the claimant's argument involved interpreting a lease which based the PRR on *actual* sales and *actual* sale prices into one based on a *notional* sale, and meant that references in the lease to *sales of coal* by the tenant in fact meant *supplies of extraction services* by a contractor. They also submitted that the claimant's argument involved the idea that the parties did not contemplate the very event which happened (*ie* that the tenant would purchase the CDP), that the lease contemplated only sales of "run of mine" coal, for which there was no market, and that the tenant intended to pay a royalty which would increase if its *costs* increased and its profit went down, rather than a royalty which increased if its *revenue* increased and therefore its profit increased.

57. The defendants submit that the award found as facts (which cannot be the subject of an appeal under section 69)

    i) that it was "inconceivable that the use of the CDP to export coal, *processed as necessary* was not considered by the landlord and tenant to be the most likely option … when the lease was granted" (at [10.14]) (emphasis supplied); see also at [10.28] ("all … parties expected that the CDP would be used to process, blend and dispatch the coal … ")

ii) that the parties could only have contemplated PRR being based on the sale price of coal rather than the cost of extraction (at [10.24]);

iii) that Ex Site simply connoted a sale with transport costs excluded;

iv) that in any event the demised land and the CDP ("the entire coaling operation") would be thought of as part of one site (at [10.30]).

58. The defendants respond to the grounds of appeal (in summary form) in the following way. Under Ground 1, the defendants say that the claimant has incorrectly summarised the award and its own arguments, but that the arbitrator in substance dealt with all the issues that needed to be dealt with. In particular, the arbitrator rejected the claimant's argument that sales of coal by the tenant from the CDP were not contemplated, and held that the words Ex Site do not restrict sales to any particular location (and do not exclude the CDP), and that the arbitrator expressly decided that the AESCP would include the price of coal in whatever condition it was sold, including washed coal.

59. Under Ground 2, the defendants say that there is nothing in the submission that the arbitrator misdirected himself as to the correct approach to interpretation of the lease. The arbitrator received extensive submissions based on the relevant authorities. There was no need for the arbitrator to set out his reasoning in full. And there is no basis for interfering with the arbitrator's view that the tenant's proposed construction was commercially absurd.

60. Under Ground 3, the defendants say that the arbitrator's finding that Ex Site simply meant that the price of transport was excluded depended on the factual matrix and the arbitrator's own commercial experience. He also visited the site. They also say it is wrong to suggest that the arbitrator was not aware that the CDP was in separate ownership at the time of the lease.

61. Under Ground 5, the defendants say that there is no evidence to support the suggestion that the lease contemplated sales "to the CDP" (which in any event never took place), and no reason to suppose that the parties meant that the PRR was to be calculated on anything other than the actual sale price of the coal, given that the lease was for 999 years. They also note that there is no appeal against the arbitrator's conclusion that the coal washing premium formed part of the sale price of the coal, and therefore would in principle be included in the PRR. There is no basis for saying that washed coal was to be excluded from consideration.

Claimant's reply

62. There is then a "claimant's brief argument in reply", running to just over six further pages. I assume that it was seriously intended that I should read this and cross refer it to the earlier (lengthy) skeleton arguments. I have therefore done so. But to my mind it was an almost futile exercise. Indeed I have made this perhaps over-lengthy summary of the arguments partly in order to show just how futile.

The court's function

63. In my view it would be quite wrong for me, in considering whether to give leave to appeal, to go through these detailed arguments (of which I have given the barest summary) and try to work out on paper, as if involved in a construction summons, just what is the true construction of the relevant parts of the lease. At this stage, that is not my function. Apart from anything else, there would be no point in a leave requirement which at the same time answered the substantive question. But, in any event, I did not see the witnesses give evidence, and I cannot have the same grasp of the factual matrix as the arbitrator did: *cf Trustees of Edmond Stern Settlement v Levy* [2007] EWHC 1187 (TCC), [13], quoted earlier, at [18]. Instead I stand back, looking at the terms of the award, the relevant terms of the lease and the main points of the arguments made, and ask myself, is the decision of the arbitrator *obviously wrong*?

64. I reiterate that at this stage I am not concerned with the questions of alleged irregularity under section 68 of the 1996 Act. They will have to be dealt with in due course. I am only concerned today with whether I should give leave to appeal under section 69. To my mind, the fact that the skeleton arguments presented to me are so long and so detailed in effect gives a strong hint as to the answer.

Conclusion

65. My overall view is that this is not a case where the award can be demonstrated to be obviously wrong, or even just wrong, by reference to its own terms, even when the lease is read alongside it. In order to show that the award is "obviously wrong", the claimant has instead thought it necessary to embark on a minute textual analysis of the lease, coupled with a forensic examination of the factual matrix (based on evidence from witnesses which I did not see or hear), with a view to demonstrating this or that conclusion which, it is then submitted, would be a commercial nonsense.

66. In my judgment, this is not what section 69 is for. These parties have chosen to arbitrate their dispute before a professional arbitrator experienced in the particular business sector concerned. As in the *Keydon Estates* case, I see no reason why they should not be left with his decision. And, as Colman J said in *Aoot Kalemneft v Glencore International AG*, Comm Ct, 27 July 2001, albeit in a different context,

> "50. … the 1996 Act is founded on a philosophy which differs in important respects from that of the CPR".

He also pointed out in that case that

> "51. … the twin principles of party autonomy and finality of awards … pervade the Act…"

67. I conclude without hesitation that, even if the claimant has managed to show that there is room for another view of the lease's provisions than that contained in the award (something which Lord Diplock in *The Nema* considered would *not* justify giving leave), it is very far from demonstrating that the award is on its face "obviously wrong". Accordingly, I must refuse the application for leave to appeal.

The section 68 application

68. So far as concerns the application under section 68 of the 1996 Act based on alleged serious irregularity, the matter is now ready for hearing. So I will direct that this be listed for hearing as soon as possible, with a time estimate of four hours (to include judgment if appropriate), with one hour's judicial pre-reading. In practice that is likely to mean that a day is set aside, with the hearing to begin at 11:30 am.