Case No: PT-2020-000027

Neutral Citation Number: [2020] EWHC 2089 (Ch)

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

PROPERTY TRUSTS & PROBATE LIST (ChD)

Royal Courts of Justice
The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 30/7/2020

Before:

HHJ PARFITT (sitting as a judge of the High Court)

- -

Between:

ERIC WRIGHT GROUP LIMITED	**Claimant**
- and -	
COUNCIL OF THE CITY OF MANCHESTER	**Defendant**

- -

JUDGMENT

- -

Hearing date: 21 July 2020

Caroline Shea QC (instructed by **TLT LLP)** for the Claimant

Lesley Anderson QC (instructed by **Manchester Legal Services** of the Defendant)

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be on 10.30 on 30 July 2020.

HHJ Parfitt:

Introduction

1. The Claimant is the landlord and the Defendant is the tenant of a lease dated 11 February 1988 of 103 Princess Street, Manchester ("the Lease"). The Lease provides for rent review disputes to be determined by arbitration. In a preliminary award dated 16 December 2019 the appointed Arbitrator made findings interpreting the rent review provisions of the Lease ("the Award"). By this application, dated 13 January 2020, the Claimant seeks relief under s.68 and/or s.69 of the Arbitration Act 1996 arising in both cases from the Arbitrator's determining the Award without permitting the Claimant to file and rely on evidence relevant to the factual and commercial background to the Lease at the time it was signed.

2. I have been much assisted by the written and oral arguments of counsel for both parties. The judgment is structured as follows: (i) the Lease and the issue; (ii) the relevant arbitration law; (iii) the relevant contract law; (iv) the arbitration process; (v) the parties' submissions; (vi) discussion; and (vii) conclusion.

(i) The Lease and the Issue

3. The Lease is for 125 years less 10 days from 11 February 1988 at an initial rent of £96,130 p.a. subject to rent reviews every 5 years.

4. The Property is a grade 2 listed nineteenth century brick building, over several floors of about 20,000 square feet which the Claimant tells me is unmodernised and like a nineteenth century court building.

5. The Lease was part of a series of transactions where the freeholder (who is the Defendant) leased the Property to the Claimant who then sub-let it via the Lease to the Defendant, who then in turn let it to those (or at least some of those) in occupation.

6. The last agreed rent under the Lease was £386,000 p.a. and that has been effective from the review date of 11 February 2008. The rent for the review date from 11 February 2018 has not been agreed and is the subject of the arbitration relevant to this application.

7. The rent review provisions of the Lease are contained in Schedule 2. References to clauses below are to Schedule 2 of the Lease unless otherwise stated (in the disputed parts of Schedule 2 the Lease refers to its internal paragraphs as clauses so I have as well). The key provisions are:

> Clause 3 which states that the revised rent can be agreed in writing but if not agreed "determined…by the Arbitrator".
>
> Clause 4: "The revised rent to be determined by the Arbitrator shall be such as he shall decide should be the Best Rental Value at the relevant Review Date for the Premises making the Assumptions but disregarding the Disregarded

Matters and having regard to open market rental values current at the relevant Review Date.

Clause 1.3: ""Best Rental Value" shall be such sum as is equal to 71.7% of the best rental figure per square foot achievable for prime office accommodation within the City of Manchester (including for the avoidance of doubt the City Centre itself) multiplied by the total lettable area in square feet of the Premises…"

Clause 1.4 ""the Assumptions" mean the following assumptions at the relevant Review Date: (a)…the Premises are fit for and fitted out for use…(b)…the Premises are available to let by a willing landlord to a willing tenant… for a term equal to such term as would produce the best rental figure for prime office accommodation referred to in clause 1.3 hereof…(c)…the covenants…have been fully performed…"

Clause 1.5 ""the Disregarded Matters" mean: (a)…[the tenant's / sub-tenant's occupation]…(b)…goodwill…(c)…[voluntary improvements]… (d)…restriction on user…other than use…as offices…(e)…any restriction… on Tenant's ability to deal with its interest…"

8. The Claimant says the new rent must be benchmarked against the best rent achievable for prime office accommodation in Manchester.

9. The Defendant says the new rent must be benchmarked against the best rent achievable for prime office accommodation in Manchester which is like the Property.

10. It is obvious that the Claimant's construction will most likely lead to a higher rent: the arbitrator identifies what is the best achievable rent for prime office accommodation in Manchester at the date of the review and determines the rental figure at 71.7% of that "best achievable" figure which has nothing to do with the Property. The Property is benchmarked against the highest achievable notional office rent in Manchester (the "best" of the "prime" or "best of the best").

11. On the other hand, the Defendant's construction requires the Arbitrator to identify the best achievable rent for prime office accommodation in Manchester which is like the Property at the date of the review and determines the rental figure at 71.7% of that sum. The Property is benchmarked against the highest achievable notional rent for a property in Manchester which is like the Property (the "best" of only those "prime" properties that are like the Property).

12. The logic of the two constructions means that it would be impossible for the benchmark notional rent derived from the Claimant's construction to be lower than that derived from the Defendant's construction but the practical reality is that the Defendant's construction will lessen the benchmark rent and so reduce the figure arising from the rent review.

13. The Claimant, for present purposes at least, says substantially so: £240,000 p.a. difference against it or a reduction on capital value in the reversion of about £5 million (the witness statement of Mr Forrest at paragraph 36).

14. The Arbitrator agreed with the Defendant's construction although not on the basis put forward by the Defendant but on implied terms reasoning which was derived from the view of a legal assessor, who the parties agreed should provide an opinion on the construction issues between them.

15. The Claimant says that "Prime Office Accommodation" is a descriptive term which excludes the Property because the Property was not in 1988 and would not have been expected to ever fall within the class of "prime office accommodation". Accordingly, the Defendant's construction cannot be reached by the implied term route because it would be contrary to the express instruction to the arbitrator in the Lease to identify the best rent achievable for "prime office accommodation" which is a category which was always intended to exclude the Property.

16. The Claimant wants the Award set aside and the matter remitted to the Arbitrator because it was unfairly prevented from putting forward fact and circumstance evidence (including expert evidence) which would help prove that the proposed implied term is inconsistent with the express terms of the Lease.

(ii)The Arbitration Act 1996 ("the 1996 Act")

17. References to section numbers are to the 1996 Act. The Claimant challenges the Award under section 68, "serious irregularity", and seeks permission to make a challenge under section 69, "appeal on a point of law".

Section 68

18. The relevant wording of section 68 is:

> "(1) A party to arbitral proceedings 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)…"

19. The Claimant confirmed through Ms Shea that the provision of section 68 defining "serious irregularity" relied upon was ground (a).

20. Section 33 states:

> "(1) The tribunal shall-(a) act fairly and impartially as between the parties, giving each a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters to be determined.
>
> (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

21. Both sides referred me to and relied upon the analysis and summary of the relevant principles made by Mr Justice Ramsey in London Underground Ltd v Citylink Telecommunications Ltd [2007] EWHC 1749 at paragraph 20 to 49. I have not set out the full extract but I have quoted those paragraphs and citations to which my attention was particularly drawn and underlined those of particular import here:

"20. Under section 68 of the Act, a party may challenge an award on the grounds of serious irregularity, as that term is defined in sections 68(2)(a) to (i), which has caused or will cause substantial injustice to that party.

21. There are therefore two questions which have to be addressed in this case: was there an "irregularity" and is there or will there be "substantial injustice"?

22. As Lord Steyn pointed out in Lesotho Highlands v. Impregilo SpA [2005] 3 WLR 129, at paragraphs 28 and 29, the requirement of "serious irregularity" imposes a high threshold and it must be established that the irregularity caused or would cause substantial injustice to the applicant. He said that these requirements were "*designed to eliminate technical and unmeritorious challenges*". The irregularity must fall within the closed list of categories in section 68(2) and nowhere in that subsection is there any hint that a failure by the tribunal to arrive at the "correct" decision is a ground for a challenge under section 68.

…

Section 68(2)(a)

26. This ground relates to a failure to comply with section 33 of the Act …

27. In Interbulk Ltd v. Aiden Shipping Co Ltd [1984] 2 Lloyd's Rep 66 …

30. Goff LJ then said this at 75*: "In truth, we are simply talking about fairness. It is not fair to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts or the law to the tribunal. In my judgment, the arbitrators in the present case failed to give that opportunity to the charterers in respect of an issue not raised in the arbitration…."…*

32. In Pacol Ltd v. Joint Stock Co Rossakhar [2000] 1 Lloyd's Rep 109, a decision under the 1996 Act, Colman J applied Interbulk and cited the following passages from textbooks:

(1) From Russell on Arbitration (21st Edition) at paragraphs 5-060 and 5-061 which stated:
"*The parties are entitled to assume that the tribunal will base its decision solely on the evidence and argument presented by them prior to the making of the award and if the tribunal are minded to decide the dispute on some other point, the tribunal must give notice of it to the parties to enable them to address the point.*"

(2) From Mustill & Boyd on Commercial Arbitration (2nd Edition) at p.312 was cited in the following terms:
"*If the arbitrator decides the case on a point he has invented for himself, he creates surprise and deprives the parties of their right to address full arguments on the case which they have to answer.*"

33. In Pacol, the arbitrators re-opened the question of liability when the only remaining matter was quantum. Colman J held that there had been a serious irregularity. He said at 115 after analysing, in particular, questions put to the parties by the arbitrators that:

> *"In those circumstances, what has happened in this case is that an award has been made on a basis which the claimants never had a reasonable opportunity of making the subject of their submissions or the subject of evidence." ...*

35. In Checkpoint Ltd v. Strathclyde Pension Fund [2003] EWCA Civ 84, a case which concerned the question of whether the arbitrator's use of personal knowledge in a rent review arbitration constituted a procedural irregularity, Ward LJ said at paragraphs 28 and 31 in respect of the test to be applied:

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

37. From these decisions I derive the following propositions relevant to grounds under section 68(2)(a) :

(1) The underlying principle is that of fairness or, as it is sometimes described, natural justice.

(2) There must be a sensible balance between the finality of an award and the residual power of a court to protect parties against the unfair conduct of an arbitration.

(3) It will generally be the duty of a tribunal to determine an arbitration on the basis of the cases which have been advanced by each party, and of which each has notice. To decide a case on the basis of a point which was not raised as an issue or argued, without giving the parties the opportunity to deal with it, will be a procedural irregularity.

(4) In relation to findings of fact:

(a) A tribunal should usually give the parties an opportunity to address them on proposed findings of major areas of material primary facts which have not been raised during the hearing or earlier in the arbitral proceedings.

(b) A tribunal has an autonomous power to make findings of fact which may differ from the facts which either party contended for. This will often be related to inferences of fact which are to be drawn from the primary facts which are in issue. Such findings of fact will particularly occur where there are complex factual or expert issues where it may be impossible to anticipate what inferences of fact might be drawn. In such a case the tribunal does not have to give the parties an opportunity to address those findings of fact.

(c) Where a tribunal has been appointed because of its professional legal, commercial or technical experience, the parties take the risk that, in spite of that expertise, errors of fact may be made or invalid inferences drawn without prior warning.

(5) In each case whether there is a procedural irregularity and whether it is serious is a matter of fact and degree which requires a judgment to be made taking into account all the relevant circumstances of the arbitration including an analysis of the substance of the arbitration and its conduct viewed as a whole.

…

Substantial Injustice

43. Paragraph 280 of the DAC Report, the last sentence of which was quoted with approval by Lord Steyn in paragraph 27 in Lesotho, states that:

> "*The test of "substantial injustice" is intended to be applied by way of support for 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. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice. In short, clause 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*."

44. In this case, one of the main grounds is the failure of the Arbitrator to comply with the requirements of section 33 of the Act. In that context the question arises whether a failure to adhere to those requirements of fairness is, in itself sufficiently serious or whether it has to be shown that the award would have been different if those requirements had been complied with.

45. In Cameroon Airlines v. Transnet Limited [2004] EWHC 1829 (Comm) Langley J stated at paragraph 102:

> "*I do not think that it needs to be shown that the outcome of a remission will necessarily or even probably be different but it does need to be established that the applicant has been unfairly deprived of an opportunity to present its case or make a case which had that not occurred might realistically have led to a significantly different outcome*."

46. In my judgment, the test for substantial injustice focuses on the issue of whether the arbitrator has come by inappropriate means to one conclusion whereas had appropriate means been adopted, he might realistically have reached a conclusion favourable to the applicant. It does not require the court to try the issue so as to determine, based on the outcome, whether substantial injustice had been caused."

[end of quotation]

22. In summary the Claimant must prove that the Award was reached in a manner which was unfair because the Claimant was not allowed to introduce the fact and circumstances evidence and had that unfairness not occurred then there was a real prospect that the Award would have been favourable to the Claimant.

23. I have referred to "real prospect" since it is a well-known procedural hurdle for dividing the real (those that "might well" occur and have "substance") from the fanciful, which for present purposes would mean irrelevant to the outcome. A fair observer of the process would consider there was only injustice where the procedural complaint was justified and material to the outcome.

Section 69

24. The relevant wording of section 69 is:

"(1)…a party to arbitral proceedings may…appeal to the court on a question of law…(2) An appeal shall not be brought under this section except - …(b) with the leave of the court…(3) Leave to appeal shall be given only if the court is satisfied: (a)…substantially affect the rights of…the parties,…(b)…the question is one which the tribunal was asked to determine…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 shall identify the question of law to be determined and state the ground on which it is alleged that leave to appeal should be granted…"

25. Ms Shea referred me to Finelvet AG v Vinava Shipping Co Ltd (The Chrysalis) [1983] 1 WLR 1469, Mustill J (as he was) at 1475A-D and in particular:

"…The arbitrator ascertains the law. This process comprises…the identification and interpretation of the relevant parts of the contract and the identification of those facts which must be taken into account when the decision is reached…It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator has arrived at another…"

26. The Claimant's case on section 69, set out in its application notice in compliance with the requirement at section 69(4) asserted that "the Claimant can only prove that the implied term is inconsistent with the terms of the lease if allowed to adduce evidence relating to the commercial and factual background at the date of the lease in 1988" and that it was wrong in law to determine the construction issue without having that evidence.

(iii) Construction of Contracts / Implied Terms

27. The relevant law and the principles relied on by the Claimant are well known.

Construction of Terms

28. I was taken to Arnold v Britton [2015] UKSC 36, Lord Neuberger at [14] to [23] and in particular at [21] and "…one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties". This type of evidence is sometimes referred to as "context". On the whole below I have referred to "fact and circumstances" and when I do so I am intending to include all that potential evidence that the Claimant described in its letter of 8 November 2019.

29. It was pointed out, correctly by Ms Anderson, that it was not the law that a contract cannot be interpreted unless there is evidence of the facts and circumstances which existed at the time it is made but rather such facts and circumstances can be relevant or admissible. Arnold v Britton provides a neat demonstration of this: at paragraphs [11] to [13] Lord Neuberger comments on the lack of facts and circumstance type evidence and says this is not surprising.

30. For present purposes it is worth stating the obvious that the nature and extent of the evidence available on any particular issue of construction will, on the whole, be for the parties to decide in the course of the relevant process, subject to any applicable law as to what evidence is admissible and then that evidence having been provided, for the relevant tribunal to assess, determine and give such weight as is appropriate.

31. I say "on the whole" because in the arbitration context, the parties could agree or the tribunal could determine that it would take the evidential lead rather than leave it to the parties (see s. 34(2)(g)). The general point is the same: the construction exercise can take place with whatever evidential materials are available and admissible to assist.

Implied Terms

32. Again, there was little or no dispute. I was taken to Marks and Spencer plc v BNP Paribas [2015] UKSC 72, Lord Neuberger at [14] to [32] and BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 52 ALJR 20, 26. The key point emphasised by Ms Shea is the fifth requirement for an implied term stated by Lord Simon in the Shire case: an implied term must not contradict any express term of the contract.

33. I was not taken through the paragraphs in detail, but I have also found of background assistance the discussion by Lord Neuberger in M&S about the interrelationship between the construction of the express terms of a contract and the process of implying terms. There is further helpful comment on this area in the 2019 supplement to Lewison, The Interpretation of Contracts, 6th ed. at paragraph 6.03. However, since I am not concerned about whether the result of the Award was correct but rather whether the process was unfair or contrary to law, I do not need to go further into the relationship between construction and implied terms. Certainly, the key proposition relied on by the Claimant, that an implied term cannot contradict an express term, is basic (or "contract law 101" as Ms Shea rightly put it).

(iv) The Arbitration Process

34. Both counsel took me through the history of the arbitration that led to the Award in some detail. In this section I focus on the relevant narrative and make comments and findings which are informed by those submissions. I also thank Ms Shea for producing a chronology which I have used as a reference point for this section. I am concerned in this narrative to identify the process which was discussed and agreed and which led to the Award. I am not attempting to give a comprehensive description of the correspondence merely an accurate and relevant one for my purpose.

35. A general point is that in the earlier part of the history, the Defendant was relatively slow in responding and the Claimant relatively quick.

36. Nothing turns on this, save that Ms Anderson says the Claimant was motivated by wanting a quick answer to make the decision not to put forward fact and circumstance evidence earlier. I do not draw that inference. I do not need to and it would not be fair to make such a conclusion on the material. I do not know why the Claimant took the steps that it did or with what motivations or intent. I prefer to look at what the Claimant did and what, objectively, it could have done or can be expected to have done and assess the fairness of the process on that basis.

37. The Arbitrator was appointed on 30 October 2018. Mr Ganguly was dealing with matters from the Claimant side and Mr Spratt from the Defendant side and then in due course both sides involved lawyers (including Ms Shea and Ms Anderson). I will continue to refer to the parties and not the particular individuals.

38. At the outset on 10 December 2018, the Defendant raised an interpretation issue but without saying anything about it. The Defendant suggested a two step procedure to resolve the "legal issue" first.

39. The parties and Arbitrator variously refer to a "legal issue", a "construction issue", an "interpretation issue" and "a preliminary issue". It does not matter what it was called what is clear is the disputes included the construction dispute that I have summarised above. There were other construction issues between the parties, but they are not the subject of this appeal and so I do not refer to them again.

40. On 11 December 2018, the Arbitrator wanted more detail on the legal issue and suggested various ways the issue might be progressed and concluded that perhaps once the Defendant was able to tell him what it was ("fully advised to me") a preliminary meeting to discuss how to move forward might be sensible.

41. On the same date the Claimant replied to say that it did not consider there was a legal issue because the dispute was only about valuation and should be resolved without lawyers. The Claimant wanted matters dealt with as soon as possible. Further emails followed on the same day but ended with the Arbitrator encouraging the Defendant to identify the legal issue shortly.

42. This was done by the Defendant on 19 December 2018 and supplemented on 2 January 2019 and, as relevant to the present issue, the Defendant explained that it contended that the construction of "best rental value" would involve having regard

to "prime offices" which were of "comparable size and specification" and "character" to the Premises. This was the first articulation of the Defendant's construction point. The conclusion urged on the Arbitrator by the Defendant has remained consistent. I also note that the relevant dispute has always been about the meaning of "prime office accommodation" in the definition of "Best Rental Value" and so in all about the meaning of the instructions to the arbitrator in clause 4.

43. The Claimant replied on 3 January and asked that it be allowed to respond by 1 February. There were two factors involved in asking for more time: (i) instructing lawyers and (ii) talking to Mr Eric Wright because he had agreed the lease originally with the Defendant and it was believed he "may be able to assist with the points raised by Mr Spratt".

44. Before me, Ms Anderson emphasised that at this initial stage the possibility of getting facts and circumstance type evidence was in the Claimant's mind.

45. The Claimant met its deadline and responded on 29 January 2019. The approach taken was not to respond to the proposed construction (i.e. to agree or disagree) but to ask that the Defendant be required to put forward arguments but only if the Arbitrator considered there was an issue. If the Defendant did this then the Claimant could respond.

46. The Arbitrator took up the suggestion that he consider whether there was an issue and on 29 January 2019 expressed the view it could all be dealt with in the context of the valuation reports from each side and then if the Arbitrator felt legal advice was required, there could be further consultation with the parties about process.

47. Neither party liked this proposal. There were exchanges of emails in which the parties agreed to the Defendant putting forward its argument on the points of construction and then the Claimant responding.

48. On 13 March 2019, with the assistance of Ms Anderson, the Defendant proposed directions for formal preliminary issues with defined issues, sequential submissions and an oral hearing.

49. The Claimant, now through solicitors, commented on the directions by letter dated 4 April 2019. The important points made were that the Defendant should set out its case and then the Arbitrator should consider whether he thought there was a legal issue and if so the Claimant would make counter submissions and then the Arbitrator could appoint a legal assessor prior to making a determination.

50. The Arbitrator adopted part of the Claimant's suggestion and provided for sequential written submissions on what he described as "the preliminary legal issue" so that he would know what the parties' interpretations of the rent review clause were so that he could then proceed in liaison with the parties as to the best way forward.

51. After some extending of deadlines, those submissions were exchanged.

52. The Defendant's submissions dated 7 May 2019, at paragraph 6.2 said prime office accommodation should mean: "prime offices which are of comparable size,

character and specification to the demised premises". The Defendant's reasoning was as an application of the presumption of reality principle: on considering the hypothetical best market rent, the court should keep to the reality that the Property was what it was and identify the hypothetical office rent in Manchester for comparable properties. The Arbitrator would notice that the Property was a period building with fairly basic services and so it would be wrong when searching for prime office accommodation to consider Grade A specification offices.

53. The Claimant responded by submissions dated 30 May 2019. It set out the relevant legal principles, including that regardless of any contextual principles (of which the presumption of reality was an example), "clear words" must be given their effect regardless if that might seem imprudent. The Claimant explained that the law on construction allowed only one answer to the "prime office accommodation" issue – it meant what it said: "The subject matter of the rental values has been expressly provided for. There is no ambiguity, and the clarity and simplicity of the expression overrides any implied reference to the actual premises or premises in a similar location, state and condition". The Clamant offered a book definition of "Prime Property" and a general definition. The import of both was that the phrase meant what it said and should not be cut down or restricted. There was no evidence about the Property and the Claimant did not admit it was "a period property with fairly basic services" (albeit that is essentially why it tells me now the Property cannot be "prime office accommodation" but I recognise Ms Shea would say her submission just illustrated the lack of evidence in the process). As a final point, the Claimant categorised the Defendant's approach as implying words that were not there and, in that context, raised the law about implied terms.

54. I point out that the Claimant's "contextualism" must give way to "clear words" words approach was consistent with the Claimant not needing to put in evidence about facts and circumstances: when the words are clear, the role for fact and circumstance type evidence is necessarily more limited, which was the main thrust of the submissions. As the Claimant identified in its submissions, it was the Defendant by pointing out the particular characteristics of the Property who wanted context evidence to be considered. The Claimant said this should not override clear wording.

55. In an email to the parties dated 7 June 2019, the Arbitrator proposed that the parties discuss and possibly agree how to resolve the construction issues.

56. The Claimant responded on 14 June 2019 and proposed that a legal adviser / assessor be appointed under the power contained in section 37. It was an interpretation dispute that "was entirely legal in its nature". The adviser could ask for further documents or hearings and the parties should be able to comment following the advice by mutual exchange of submissions to the Arbitrator.

57. The Defendant agreed by email of 21 June 2019 but wanted the opportunity of responding to the Claimant's previous submissions at the pre-assessor stage.

58. By email dated 26 June 2019, the Claimant reiterated its view that this was a valuation matter only for the reasons it had set out and rebuttals would only lead to more rebuttals. The proceedings were already unnecessarily protracted.

59. On 26 June 2019, the Arbitrator gave further directions. This confirmed the appointment of a legal adviser / assessor, who would be asked, subject to further documents / hearings, to provide an opinion on the relevant issues to the Arbitrator. The parties would then have an opportunity to comment on the opinion or advice to the Arbitrator. There was no need for reply submissions on the Defendant's part since the purpose of the exchange of submissions was to enable the Arbitrator to understand the points in dispute so that the appropriate course of action could be determined.

60. The Defendant objected to not being allowed to reply to the Claimant's initial submissions. In an email of 2 July 2020 the Arbitrator kept to his proposed directions but then in a further email dated 24 July 2019 permitted the Defendant to reply and for any such reply to be sent to the legal advisor.

61. The legal advisor was appointed. I am not sure I have identified the final letter of appointment but presumably the gist was as set out in the document which the Defendant said they were happy with in an email dated 9 July 2019.

62. The Defendant's reply submissions dated 20 August 2019 set out more of the law on construction and emphasised the importance of context. The Defendant pointed out that the definition of "prime property" brought with it concepts of class, location and sector. In commenting on the Claimant's assertion about implied terms, the Defendant said that did not seek to imply a term but to construe the Lease.

63. In argument before me, the Claimant made much of the Defendant stating that it was not seeking to imply a term given that this turned out to be the basis upon which the Arbitrator was to find in favour of the Defendant Construction. It is of note, however, that this was only stated in reply to the Claimant's submissions that a term could not be implied. I understand the Ms Shea's forensic point but I do not consider it goes very far in the circumstances because, as I return to below, the Claimant has always said that "prime office accommodation" is plain in its meaning and cannot mean in any way "like the Property". There can, says the Claimant, be no comparison.

64. The legal advisor's opinion was dated 16 September 2019. The advisor agreed with the Defendant that the Defendant's construction was to be preferred but for different reasons and considering parts of Schedule 2 that the parties had not referred to in their exchange of arguments.

65. The gist of the opinion on the relevant issue was:

    a. On the face of it the requirement to decide the best rent achievable for prime office accommodation in Manchester had nothing to do with the Property because it was not the Property that was the subject of the "Best Rental Value" definition (I add that this was consistent with the Claimant's construction).

    b. But, this would render otiose the requirement in clause 4 for the Arbitrator to take account of the assumptions and disregards, all of which modify characteristics of the Property for the purpose of the valuation exercise and

such modifications could only be relevant to the determination of the reviewed rent if those modified characteristics were brought into the "Best Rental Value" definition.

c. The way to bring these otherwise inconsistent provisions together was to imply the words "like the Premises" into the definition of Best Rental Value.

66. On 25 September, the Claimant requested an extension of time in which to prepare its comments on the opinion and this was agreed. The core submission made by the Claimant in response to the legal assessor's opinion, for present purposes, was at paragraphs 7 & 8 of the further submissions document dated 7 October 2019:

> "The Premises comprise 23,000 square feet of historic Grade 2 listed building which now has mixed use. It is at the edges of Manchester City Centre in a very secondary location. The Valuation Properties which the valuer is to identify must be "prime office accommodation within the City of Manchester <u>like the Premises in size, character and specification</u>". By definition, prime office accommodation within the City of Manchester will <u>not</u> be like the Premises in character or specification. If any office accommodation were like the Premises in character and specification, it would *ipso facto* not be "prime" office accommodation in the City of Manchester. The result of the implication of the words is that the valuer is required to identity Valuation Properties of a type which do not exist in the real world. It must be rejected accordingly, since the parties to the Lease cannot have intended that the rent be valued by reference to properties of a type that does not exist."

67. In the context of that submission, the Claimant also set out as follows:

> "It is accepted that this submission relies in part on matters which are in the nature of expert evidence. It is anticipated nonetheless that the proposition – that prime office accommodation cannot as a matter of fact be "like the Premises in character and specification" – is so self-evident that it will be accepted by the Arbitrator and will not be controversial between the parties. If this is not the case, in particular if the tenant does not accept that prime office accommodation of the like character and specification as the Premises simply does not exist, it is submitted that the Arbitrator must determine this question by reference to expert evidence."

68. The submission was also made, also relevant to present purposes, that because the Property cannot fall within the class of "prime office accommodation" the proposed implication of the words "like the Property" into clause 1.3 cannot take place because it would be contrary to the requirement to value "prime office accommodation".

69. The Arbitrator asked the legal advisor to consider the Claimant's further submissions and the legal advisor produced a further opinion dated 24 October 2019. In addressing the Claimant's classification argument, i.e. that the class of "prime office accommodation" excludes the class of "like the premises" (or that

"prime office accommodation" and "like the premises" are mutually exclusive), the legal advisor said:

> "As I am not a valuer, I am not in a position to judge whether it would have been true, in 1988, to say that offices of a character or specification like that of the Premises would have been by definition, not "prime". But even if that were the case, I do not consider that the implication can be avoided. The reader is driven to that result by the combination of the words used in paragraph 1.3 and paragraph 4. Valuers routinely value notional properties: indeed, in any case where a valuation is required of premises as hypothetically modified by certain assumptions and disregards, they are necessarily valuing a notional, rather than a real, property. So, in my view, the objection that the Premises would not have been considered "prime" in 1988 (if true) is not a good one."

70. The Arbitrator circulated that further opinion to the parties and invited further comment. The Claimant's comments were contained in a letter dated 8 November 2019. These addressed the legal advisor's passing remarks about not knowing whether the Property might have been considered "prime" in 1988 and made the request for evidence which is at the heart of this application. It is necessary for me to quote extensively from the letter:

> "It is submitted that it is self-evident, and in any event believed to be uncontroversial as between the parties, that in 1988 (1) on no account could the Premises themselves have been described as "prime office accommodation", and (2) no prime office accommodation existed in the City of Manchester that were or could have been like the Premises in character and specification". No criticism is made of [the legal advisor] in this respect. As she justifiably says, she is not in a position herself to know that. However, the parties both original parties to the Lease, are in a position to know that, and as stated above it is believed that this much is self-evident and uncontroversial.
>
> It may be argued that this takes the matter no further forward, since…[the legal advisor]…goes on to say that "even if that were the case, I do not consider that the implication can be avoided"…But…the same point is made again…in support of a different argument, namely…[implication of terms]…An implication that the Valuation Properties be prime office accommodation "of the same character and specification" as the Premises is – on the facts as they existed in 1988 – contradictory to the requirement that the Valuation Properties are "prime office accommodation"…
>
> If by contrast the Council does not agree the relevant facts, the Defendant hereby makes an application for permission to adduce evidence of those facts, as an essential aid to construing the rent review clause in the Lease…
>
> The evidence required comprises A. evidence of fact, as to (1) the character and specification of the Premises in 1988; (2) the commercial context in which the parties entered into the Lease; B. expert evidence as to (1) the relationship between the character and specification of the Premises in 1988

> and the prime office market in Manchester in 1988; (2) whether comparable properties of a similar character and specification to the Premises existed at that date or would at that date have been anticipated to exist over the duration of the Lease; (3) whether the Premises were classified as prime office accommodation at that time; (4) whether there existed at that time any prime office accommodation of the same character and specification as the Premises in the City of Manchester…
>
> It is anticipated that such evidence would show that in 1988 there was a fundamental difference between the character and specification of the Premises on the one hand and of prime office accommodation on the other. This evidence will provide the reason why the parties chose to gear the rent achievable for prime office accommodation in order to arrive at the rent payable for the Premises on review…
>
> [reference to Arnold v Britton and "the documentary, factual and commercial context"]…All three of these matters must be taken into account when construing the Lease…
>
> If the Defendant's evidence is accepted then it follows that the implied term…would be wholly contradictory to an express term…these are not matters that can be ignored. They are highly relevant, indeed essential to the process of construing the Lease, and specifically to the question of whether the term proposed can be implied. You as Arbitrator cannot make your final decision on the question of construction without being appraised of such evidence…"

71. By email dated 18 November 2019, the Defendant objected to the admission of further evidence. The Defendant said it would be contrary to the procedure adopted by the parties and was not justified at the late stage proposed. It would have been better if agreement had been sought a lot earlier on factual matrix type evidence but the late attempt to do so was motivated by an attempt to rectify the Claimant's case not finding favour with the legal assessor. The proposal would add time and costs and would be unfair on the Defendant and unnecessary.

72. The Arbitrator refused to allow the proposed further evidence in a decision contained in a letter dated 21 November 2019. The letter summarises the parties' positions. It recalls the section 33 obligations on the Arbitrator and the section 34 power to decide all procedural issues, including the admission of evidence. It refuses the request for further evidence on the basis (a) it would be contrary to the agreed procedure, (b) the agreed procedure was fair and proportionate (my summary) (c) the evidence would be of questionable relevance but if not then why has the Claimant not included it within submissions already (d) to let it in would delay matters further and increase costs (e) fairness does not require it because the Claimant has had the opportunity to say what they want to, which could have included the evidence they now say they want to adduce.

73. On 26 November 2019, the Claimant sought permission to appeal that ruling and a stay. On 29 November 2019, the Arbitrator refused that request and on 16 December 2019, the Arbitrator made the Award. So far as the material issue is

concerned, the Arbitrator (a) summarised the Landlord's Construction, the Tenant's Construction and the legal assessor's view (b) agreed that the characteristics of the Premises must play some part in the valuation process because of the assumptions and disregards clause (c) identified at paragraph 42 that the idea of "prime property" was at its core relative and so concluded that comparable premises for valuation purposes should be "of a similar nature to the subject property but not necessarily identical".

(v) The Parties' Submissions

The Claimant

74. Ms Shea, for the Claimant, submitted that the process agreed between the parties around the construction issue was incremental. At no stage was there an express opportunity for evidence to be relied upon because that was not necessary. The first stage was to identify the issues. Once that was done, there was no difficulty in the legal assessor going ahead. It was only when the implied term solution was put forward by the legal assessor, which changed the parameters of the issue because it was totally new to the parties, that the necessity for factual and expert evidence arose. Even then, the Claimant attempted to deal with that requirement by consent, and hoped that agreement from the Defendant as to the key points around the class of prime office accommodation excluding the Property would have meant evidence was not required. However, the Defendant ignored the invitation to agree and so evidence became essential for the Claimant to have its case on the implied term argument put forward fully and fairly. In those circumstances determining the preliminary issue without permitting that evidence was a serious irregularity, depriving the Claimant of the opportunity of putting its case, material to the outcome and given the financial consequences of that outcome, a cause of substantial injustice. It was an obvious error of law to construe the Lease and accept the implied term argument without regard to context evidence.

The Defendant

75. Ms Anderson said that the s.69 point added nothing to s.68: if there was no procedural irregularity in making the decision without the evidence then there was no error of law. There was also no error of procedure. The chronology demonstrates there was nothing akin to an ambush. The Claimant proposed the procedure which was followed. The outcome reached was the very outcome first put forward by the Defendant before the Claimant proposed the sequential submissions then legal assessor process. The Claimant's first reaction to the Defendant's conclusion about proper meaning was to refer to Mr Wright – the potential source of its factual evidence from 1988 – yet it chose not to put forward any evidence from him. It is wrong for the Claimant to categorise its position as a no opportunity case: they had that opportunity. Not only during the pre-assessor phase but they were given two chances to respond to the legal assessor's opinion and did so. The Claimant got the process they wanted. Throughout the Claimant urged speed of resolution and put forward procedures geared to that aim. It was only when the Claimant saw the likely outcome that it changed tack and opened up a full evidential examination to retrieve a losing cause. The Claimant had the opportunity throughout to put in context type evidence but did not but even the

letter of 8 November 2019 does not put forward or identify this evidence, only the conclusions.

(vi) Discussion

76. I will deal with the s.68 arguments first.

The Principles

77. I start with the deference to be shown to the arbitration process and the parties' choice to arbitrate. This is borne out by the citations in London Underground and is succinctly stated in item 7 in the checklist cited by Cresswell J in The Petro Ranger [2001] 2 Lloyds Rep. 348, 351 (set out at 2E-262 of Volume 2 of the White Book): "Section 68 is designed as a long stop; only available in extreme cases, where the tribunal has gone so wrong in its conduct of the arbitration in one of the respects listed in s.68, that justice calls out for it to be corrected".

78. Essential to the Claimant's position is the natural justice principle of the right to be heard. Justice may well call for correction where a party has not had the chance to present its case. A s.68 challenge succeeded on that ground in RJ v HB [2018] EWHC 2833 and Andrew Baker J put it this way at paragraph 27 (which helpfully articulates the principle within the circumstances relevant here):

> "There was no dispute before me but that it is a serious irregularity within s.68(2) of the 1996 Act for an arbitrator to decide a dispute on a basis significantly different to anything raised by or with the parties, if that causes or will cause substantial injustice. I say 'by or with' the parties because of course arbitrators are not restricted to choosing between whatever rival contentions are developed by the parties; but if they are to contemplate determining a dispute on some different basis, fairness dictates, and so the arbitrators' general duty of fairness under s.33 of the Act requires, that the parties be given notice and a proper opportunity to consider and respond to the new point."[my emphasis]

79. There is no doubt in the present case that the Claimant did have the "opportunity to consider and respond" to the new point. The implied term theory or argument was first raised by the legal assessor. The Claimant had the opportunity to respond and did so. The legal assessor provided a further opinion. The Claimant was given the further opportunity to respond and did so. It was only then that the Arbitrator made the Award taking all that material into account.

80. But the Claimant's complaint is not that it did not have a chance to argue its case but that it was not allowed to argue its case with the benefit of fact and expert evidence addressing the issue that "prime office accommodation" could not be "like" the Property.

81. I agree with the Claimant that the "opportunity to respond" concern is not limited to an exercise of the right to make submissions but also extends, in an appropriate case, to evidence. "Evidence" is the express subject of a number of the citations from authority that I highlighted in the extracts from the London Underground case above.

82. It was not cited to me but a case which directly raised the refusal of expert evidence as the subject of a s.68 challenge was K v S [2019] EWHC 2386 (Comm) Sir Jeremy Cooke, in particular at [39]. The court refused to interfere with a case management decision well within the tribunal's powers, but for present purposes what is clear is that a refusal to admit evidence could have been the subject of a s.68 challenge but in considering such challenge the court should have a high regard for the parties' choice to give procedural competence to the chosen tribunal (i.e. the first point I set out above).

The Key Question and Answer

83. The key question is whether the process in which the preliminary construction issue was determined without allowing the Claimant to put in its potential fact and expert context evidence was objectively unfair? This needs to be answered looking at the process as a whole.

84. I have no doubt that it was not unfair at all. My reasons follow. I have tried to break these down into the various points raised but there is some overlap.

The New Point Issue

85. Ms Shea and Ms Anderson disagreed over Ms Anderson's categorising the Claimant's position as having been "ambushed". Ms Shea said that it was not that at all: the legal assessor was quite entitled to take the approach that she did and there is nothing wrong with a point not taken by the parties being developed by the legal assessor and then finding favour with the Arbitrator. The unfairness is not being allowed to introduce factual and expert evidence that would be highly material to that new point. I agree with Ms Shea that the Claimant is not claiming to have been ambushed by the implied term argument – rather the Claimant wants a fair opportunity to put in evidence that will deal with it.

86. It is essential however to focus on the relevant argument that the Claimant wanted its evidence for and to see if fairness required the Arbitrator not to proceed to the Award without allowing the Claimant the opportunity to adduce that evidence.

87. This was a rent review arbitration and the job of the arbitrator was to determine the new rent. In order to do that he had to comply with the terms of the Lease and the parties were entitled to a rent review carried out within the terms of the Lease, that being how the parties to the Lease chose to balance their respective interests in the amount of the new rent.

88. At the beginning of the process the Defendant identified that its case was that the arbitrator's role under the Lease was to determine the rent by reference to prime office accommodation "like" the Property. It was inherent in that proposition that it was meaningful, i.e. that the arbitrator could carry out that exercise.

89. The Claimant's case was that the arbitrator under the Lease was not concerned with any sub-set of prime office accommodation "like the Property" but need only identify the best achievable rent from prime office accommodation in Manchester. This was the plain and obvious meaning of clause 1.3 of the Lease which is part of the clause 4 instruction to the rent review arbitrator (see for example paragraphs

10(2) and 24 of its submissions dated 13 May 2019 and in particular 24 saying: *…the clarity and simplicity of the expression overrides any implied reference to the actual premises or premises in a similar location, state and condition*).

90. Stepping back from the detail of the analysis and the arguments, the Claimant's complaint is that the legal assessor did not agree with the Claimant's construction of clause 1.3 as set out in those first submissions. The Claimant's objection to the implied term approach is that it would contradict clause 1.3 as interpreted by the Claimant but if the Arbitrator (or legal assessor) had accepted the Claimant's construction of clause 1.3 then the implied term would have been irrelevant. The purpose of the implied term was to make sense of clause 1.3 bearing in mind that clause 4 contains instructions to the arbitrator which are additional to the instruction derived from clause 1.3. It follows, therefore, that the evidence which the Claimant wanted to admit was to demonstrate that its construction of clause 1.3 was correct. This contention was something "in play" from the beginning.

91. I consider, therefore, that the Claimant's reliance on the fifth of Lord Simon's implied term principles ("it must not contradict any express term") is beside the point as the reasoning would never get there. The legal assessor only implies the term because of the view, which the Arbitrator found persuasive, that the relevant express term did not have the meaning contended for by the Claimant. If, contrary to that view, it was considered that the plain meaning of clause 1.3 could be read into clause 4 without problem, as the Claimant contended, then there would be no question of an implied term.

92. On this basis alone, I consider the Claimant's position hopeless on this application – the Claimant's construction argument was live and addressed by the Claimant throughout. The implied term theory did not create a new issue to which fact and circumstance evidence became relevant. From the perspective of the Claimant's case the issue remained what it always had been: the proper construction of "prime office accommodation".

Evidence Within Reasonable Scope

93. I agree with Ms Anderson that it is relevant that the Claimant's first response to the Defendant's email setting out its contested for meaning was to say it would seek input from Mr Wright. The only relevant and admissible input that could come from Mr Wright was context evidence – the very evidence that in November 2019, when the developing process leading to the determination had reached its final stages, the Claimant asked to rely upon.

94. I take on board that by November 2019 the Claimant wanted expert evidence as well but for present purposes that is a distinction without a difference. The conclusion to which any of this evidence would be relevant would be that the Defendant was wrong, the Lease does not require the meaning of prime office accommodation to be cut down by reference to any characteristics of the Property because "prime office accommodation" means what it says.

95. I invited Ms Shea to answer the question raised by the legal assessor in her second opinion, as to how the Claimant reconciled the provisions of the Lease that did make the rent review relative to the Property with its absolute construction of prime

office accommodation? Her answer, fairly but tellingly, was that the Claimant need not say because it would depend on the evidence that they were not allowed to put in but it could, for example, include rectification to remove those clauses that on the Claimant's case were redundant but on the legal assessor's view had to be taken account to give unitary meaning to the whole of clause 4.

96. Even on that basis the focus and scope of the potential evidence was to rebut the Defendant's construction and uphold the Claimant's construction and the potential relevance of that evidence, on the assumption that it was relevant, was clear from the outset. The Claimant's instinctive reaction to ask Mr Wright is objectively indicative that the evidence the Claimant was asking for in November 2019, was always a reasonable area for exploration arising out of the Defendant's "like" the Property construction. The Claimant had the opportunity, had it wanted, to propose a wider evidence centred approach to the "prime office accommodation" / "like the Property" issue had it wanted. It did not do so.

97. A similar point arises if Mr Wright's evidence were what the Claimant now says: we all knew the Property was not "prime" and "prime" would never include the Property. This was the very thing which the Claimant raised by its January 2019 email – Mr Wright "may be able to assist with the points raised". The points raised were in terms that regard needed to be had to comparable properties and not just those which generated the highest rent. It would be expected that any approach to Mr Wright would soon produce evidence of the "of course we agreed to peg the new rent to the highest rents for prime office accommodation because…" type. The potential scope of the evidential inquiry remains the same now as it was in January 2019. The implied term approach changes nothing about the evidential parameters in this case.

98. The Claimant's response to this argument is to emphasise the incremental nature of the process. It may have thought to talk to Mr Wright at the outset, but the process adopted meant it was not relevant to obtain and rely on any evidence about the factual circumstances. The Claimant did not need to address the Defendant's conclusion on construction, until it had seen the Defendant's arguments. The Defendant's arguments did not raise any concern because the Claimant knew it could defeat them and would have done so without factual circumstance evidence. The implied term argument changed all that – it then became necessary for the factual circumstance evidence to be introduced.

99. I am not persuaded. A party who contends for a particular conclusion – here that prime office accommodation should be given its natural and ordinary meaning and not be qualified by "like the Property" – should bring forward its whole case when it has the opportunity to do so and in the manner consistent with the process being followed.

100. In answer to this the Claimant says it is unfair because the Claimant chose not to explore the facts and circumstance evidence where the Claimant was not concerned about the "presumption of reality" argument given how weak it was. But the objective relevance of the facts and circumstances evidence, assuming in the Claimant's favour that it would be relevant, was the same. It is only the Claimant's

subjective risk that changes. This is an unpromising basis for changing process in mid-stream, to say the least.

101. The "scope of evidence" point crosses with the scope of the issue point I summarised above. The starting point about the nature of the evidence which the Claimant says is relevant is Arnold v Britton: facts and circumstances known to the parties at the time of entering the Lease which inform the objective understanding of the language they chose to use. The evidential scope of that enquiry and/or the potential need for such evidence remained the same throughout the process that led to the Award. If the Claimant had relevant evidence to bring forward, it could and should have done so[1].

102. Ms Shea makes a separate and more nuanced point which is that the process the parties agreed on for the preliminary award was submissions only and so there was no expectation that evidence might be required. It seems to me this is to import a technical distinction between submissions and evidence into the arbitral process which is inappropriate. There was no reason why a party could not put forward such material as it wished in the various submissions raised (certainly that was the view expressed by the Arbitrator when refusing the permission sought). Indeed, it is notable and an express recognition of there being no technical limit to what could be considered during the process that the Arbitrators' directions for the legal assessor included the assessor being able to ask for further documents.

103. In any event, given that the "like the Property" was central so early on, had the Claimant wanted to propose a process that would have included evidence it could (and on this premise) should have done.

The Arbitrator's s.34 discretion regarding evidence and procedure

104. It is for the tribunal to decide "all procedural and evidential matters" (and in particular s.34(2)(f) and (g) – "the time, manner and form in which such material should be exchanged and presented" and "whether and to what extent there should be oral or written evidence or submissions"). The Arbitrator's decision about the Claimant's evidence application was a plain exercise of that power.

105. Under s.33 the Arbitrator was bound to have regard to "reasonable opportunity" for the parties to put their cases and "adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense".

106. As was pointed out by Lord Mustill (quoted by Ward LJ above) what fairness requires is largely an intuitive judgment. Looking at the history of the process adopted between the Arbitrator and the parties that led to the Award, my overall impression is that the Arbitrator exercised his powers under s.34 with due regard for

[1] This seems self-evident but as an example from the procedurally different summary judgment context, Arc Aggregates Ltd v Branston Properties Ltd [2020] EWHC 1976, Zacaroli J at [61] "If a party contends that construction of a contract depends upon matters of fact that need to be established at trial, it is its responsibility to place before the court whatever evidence it thinks necessary to support its case…it is not enough to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

the parties s.33 rights and not only cannot be faulted with regard to the procedural decision not to allow the Claimant's new evidence but that it was plainly correct.

107. The process agreed was submissions led. This was common to the parties and had benefits of economy and efficiency compared say to a structure with pleadings / evidence / hearing. The proposal by the Claimant which is the subject of this application would have changed that and inevitably cut across the previously agreed process and would have led to much increase of cost and duplication of effort and delay. From the s.33 perspective I would not have expected the Arbitrator to allow such a change unless fairness compelled that outcome. Fairness did not.

The Claimant's Application was more about opportunism than substantial injustice.

108. The Claimant's final demand for more evidence was raised in its letter of 8 November 2019. It had had the opinion of the legal assessor raising the implied term argument since on or soon after 16 September 2019. If, contrary to my view, the implied term argument really changed the evidential scope as much as the Claimant says then it would have been expected that the Claimant would have been in a position much sooner to make an application for the admission of evidence (rather than saying the Claimant might need to do so if everyone else wouldn't agree with the Claimant) and to have that evidence to hand so that its admission could be better considered. It did neither.

109. The letter of 8 November 2019 leans heavily on the legal assessor's illustrative reference to not knowing whether the Property might have been regarded as "prime" in 1988 in the second opinion of 24 October 2019 as the hook to hang the evidence request.

110. But the legal assessor's point was that this was irrelevant to the implication of the term: the relative and notional nature of the base review rent required under the Lease made the real-world circumstances neither here nor there.

111. So, even if I am wrong in my assessment that the Claimant could and should, if it wanted, have put in fact and circumstance evidence much earlier (i.e. bring forward its whole case on its construction argument at first submission stage and/or suggest a different process than the one it did) there was no good reason why it did not put its new evidence forward (or try to do so) as soon as practicable after receiving the first opinion.

112. Again, the Arbitrator's refusal of permission and his making the Award thereafter on the material available, seems to me unassailable and fair and correct for the brief reasons that he gave.

Section 68 Conclusion

113. In the light of that analysis and discussion I can return to the requirements of section 68: there has been no failure on the part of Arbitrator to comply with his section 33 duty.

Section 69

114. I can deal briefly with the section 69 permission application. The question of law stated in the application, as required by s.69(4) is "[the Arbitrator] purported to determine the question of construction without first determining the relevant facts". I do not think this is a question of law but a question of procedure.

115. It is a recasting of the section 68 issue: the Arbitrator should have allowed the Claimant to adduce evidence relevant to facts and circumstances, he did not and so in making his award without that evidence he did so unlawfully. But that would only be the case if it were unfair. It is not unlawful to determine a construction issue on whatever material there is available (even without apparently, having the full document available – see Hancock v Promontoria (Chestnut) Limited [2020] EWCA Civ 907).

116. Nevertheless, assuming in the Claimant's favour there might be a question of law somewhere, I set out my findings on the criteria in s.69(3):

    a. I am not satisfied that the determination of whether the Arbitrator was right to construe the Lease without reference to whatever evidence the Claimant would put forward would substantially affect the parties' rights because I do not know what evidence would have been put forward and I am not satisfied that it would have made any difference to the outcome.

    b. The Arbitrator was asked to allow the Claimant to put in evidence but I do not think he was asked to determine whether the law forbade him from deciding the construction issue without the Claimant being allowed to put in context type evidence (which is a different point).

    c. The Arbitrator's decision to go ahead without allowing the Claimant to put in fact and circumstance evidence was not obviously wrong (on the contrary I think it was obviously right) neither was it a matter of general public importance.

    d. It would not be just or proper for the court to determine the issue – on the contrary this court should recognise the authority conferred on the Arbitrator by the Lease to determine this question subject to the obligations under s.33 and with the powers provided by s.34, which he has done.

117. I refuse permission under section 69.

(vii) Conclusion

118. For the reasons set out above, the Claimant's challenges to the Award based on the refusal to allow the Claimant to put in fact and circumstance evidence are dismissed.

HHJ Parfitt