Neutral Citation Number: [2020] EWHC 3440 (Ch)

Case No: BL-2019-MAN-000129

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

Date: 17th December 2020

Before :

His Honour Judge Halliwell sitting as a Judge of the High Court

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Between :

(1) MICHAEL FIELD
(2) SARAH ELLEN BARNES

Claimants

- and -

(1) NETWORK RAIL INFRASTRUCTURE LIMITED
(2) FIRST TRANSPENNINE EXPRESS LIMITED

Defendants

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Mr Anthony Edwards (instructed by **Ramsdens Solicitors LLP**) for the **Claimants**
Mr Matthew Hall (instructed by **Hill Dickinson LLP**) for the **Second Defendant**

Hearing date: 9th November 2020

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APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII. The deemed date and time for hand-down is 10.00 am on 17th December 2020.

His Honour Judge Halliwell :

(1) Introduction

1. By these proceedings, the Claimants seek to challenge an arbitral award ("the Award") for serious irregularity under *Section 68(1)* of the *Arbitration Act 1996*. They maintain that the arbitrator failed to conduct the arbitration in accordance with the agreed procedure (*s68(1)(c))* or exceeded his powers (*s68(1)(b))* and thus seek an order setting aside the award or a declaration it is of no effect.

2. The Claimants are business tenants of licensed premises ("the Premises") at Stalybridge Railway Station. The Second Defendant is their immediate landlord. The First Defendant, is superior landlord. It has been joined as a party to the proceedings but has not actively participated.

3. The proceedings arise from a rent review arbitration between the Claimant and the Second Defendant in which it is contended the arbitrator, Mr Stephen Owens ("Mr Owens"), made the Award without giving the Claimants a reasonable opportunity to make representations, in advance, on his findings.

(2) Factual sequence

4. By an underlease dated 21st September 2012 ("the Lease"), the Second Defendant demised the Premises to the Claimants for a term of 15 years from 17th September 2012 at a rent of £13,000 plus VAT per annum subject to upwards only review. The review dates were at intervals of three years on 17th September 2015, 2018, 2021 and 2024.

5. In default of agreement, the reviewed rent was determinable by arbitration. By clause 3.4 of the letting conditions, the arbitrator was required to ascertain "…the rent at which the Premises might reasonably be expected to be let in the open market as between a willing landlord and willing tenant…having regard to the terms of this Lease other than those relating to the amount of rent and assuming that the Tenant has observed and performed all the covenants and conditions to be observed and performed by the Tenant under this Lease and that any destruction or damage to the Premises has been made good but disregarding:

    3.4.1 any effect on rent of the fact that the Tenant or any person deriving title under the Tenant has been in occupation of the Premises;

3.4.2 any goodwill which shall have become attached to the Premises since the commencement of the Term by reason of the carrying on at the Premises of the business of the Tenant or of any person deriving title under the Tenant; and

3.4.3 any effect on rent of any lawful improvement carried out by the Tenant or any person deriving title under the Tenant otherwise than in pursuance or fulfilment of an obligation to the Landlord or in compliance with any statutory requirements…"

6. The 17th September 2015 review was not initiated until well after the review date. Following his appointment as arbitrator, Mr Owens issued directions on 10th April 2019. After providing for the delivery of a statement of agreed facts followed by expert reports and written replies, Mr Owens directed, at Paragraph 17, as follows.

> "The parties agree that I will be entitled to take the initiative in ascertaining the facts on a point. In doing so I will be acting as Arbitrator, not as an expert, and will inform the parties in advance of what I intend to do and give them the reasonable opportunity to make observations on my findings before making my award…"

7. By this stage, the Claimants had appointed Mr Michael Westlake of Westlake & Co and the Second Defendant had appointed Mr Barry Crux of Barry Crux & Co as their respective experts. Following Mr Owens's directions, the Second Defendant delivered a report from Mr Crux dated 13th May 2019 and the Claimants delivered a report from Mr Westlake dated 14th May 2019.

8. In his Report dated 13th May 2019, Mr Crux confirmed that, whilst satisfied he should assess the rent by applying the profits method of valuation, the tenants had withheld their trading or financial accounts and it was thus necessary for him to estimate total sales following an inspection of the Premises based on his professional experience and matters such as the number of barrels observed, on inspection, in the beer store. He estimated total sales in the sum of £406,981 (encompassing £349,781 of wet sales, £52,000 for catering and £5,200 in respect of snacks) so as to achieve a gross profit of £247,767. After deducting estimated amounts in respect of overheads and related expenses of £139,396, he calculated the net profit for the business at some £108,370. After a deduction of £2,878 for the return on capital, the divisible profit was £105,492. On a "rental bid" for 50% of the divisible balance, his valuation amounted to £52,746 which he rounded up to £52,750. In order to

test this figure and as a cross reference, Mr Crux then assessed the rent payable in respect of three comparables, licensed premises at Huddersfield, Leeds and York so as to yield a rental figure of £51,000.

9. In his Report dated 14th May 2019, Mr Westlake identified three alternative methodologies for determining the revised rent based on (1) the increase in the Retail Prices Index (2) comparable rents at various business premises at bus and railway stations in West Yorkshire; and (3) his own "Profit (sic) Rent" calculation achieved by (a) making an assessment of "the earning capacity per sq ft. of trade area", (b) applying a percentage (17.5%) to calculate - as he saw it - the "Fair Maintainable Operating Profit", (c) making a deduction for interest on the tenant's capital, (d) applying a percentage of 50% to the balance and (e) deducting £1,157 "to take recognition of onerous Lease Conditions". According to these three methodologies, Mr Westlake assessed the rental value at £13,715, £20,547 or £21,975 respectively. He concluded that the comparable method was preferable and thus reached a valuation of £20,500 per annum.

10. As originally envisaged, in June 2018 or thereabouts, the parties then delivered written replies setting out their respective responses to each Report.

    10.1. Mr Westlake stated that, whilst he had no issue with the "profits method", it was not to be regarded as "a 'tablet of stone'" and Mr Crux had failed, in his report, to make a convincing case for his valuation. He was of the opinion that none of Mr Crux's comparables could usefully be compared with the Premises.

    10.2. Mr Crux observed that there was no provision, in the Lease, for the rent to be valued with reference to increases in the Retail Prices Index and Mr Westlake's comparables were of no assistance since six of his comparables related to retail shops rather than a public house or other licensed premises and his remaining comparable was a historic letting with tenant's improvements which had not been taken into account. He challenged the methodology in Mr Westlake's "Profit Rent" approach on the basis that Mr Westlake had not provided good reason for assessing sales on a square footage basis or applying a percentage of 17.5% to achieve his Fair Maintainable Operating Profit.

11. On 27th September 2019, Mr Owens made the Award. After considering the Lease, he considered the methodology of the experts and the evidence adduced in support. In the absence of any provision in the Lease requiring him to take into consideration the Retail

Prices Index, he concluded that it was inappropriate for him to do so. He also considered that Mr Westlake's comparables were of no assistance where the permitted use was not as a public house and his other comparable was distorted by the absence of evidence on the effect of tenant's improvements given that the subject premises had apparently been let in shell condition with tenant's improvements to be disregarded.

12. Mr Owens concluded that he should value the Premises according to the profits method of valuation. In doing so, he preferred Mr Crux's "more conventional approach" for "estimating FMT [Fair Maintainable Trade] and the more detailed analysis of the various income streams" but "adopted an FMT between that of the parties at £350,000 per annum". Consistently with Mr Crux's methodology and in the absence of evidence to the contrary from Mr Westlake, he adopted a margin of 60.88% so as to yield a gross profit of £213,077. He deducted expenses in the sum of £119,879, calculated at 34.25% of turnover and made a deduction of £2,689 for return on capital, midway between the provision made on behalf of the parties ranging from £2500 to £2,878. This yielded a divisible balance of £90,509 so as to achieve £45,255 on a rental bid of £45,255. Consistently with the evidence of Mr Westlake, he then made deduction of 5% or £2,263 for "onerous lease provisions" on the basis that the landlord was entitled to terminate the Lease prior to expiry of the term in defined circumstances, such as where the Premises were required for the purpose of redevelopment. Mr Owens's determination was thus in the sum of £43,000, rounded up from £42,992.

13. On 4th October 2019, Mr Owens sent the Award to the parties. By letter dated 22nd October 2019, Ramsdens Solicitors for the Claimants asked Mr Owens to correct his award after observing it amounted to a rent increase of some 230%. Mr Owens has declined to do so and the Claimants issued proceedings.

14. By the Claim Form, the Claimants seek an order setting aside the Award or a declaration that it is of no effect on the following grounds.

> "Ground 68(2)(c)
>
> The Arbitrator failed, in breach of the procedures under (i) Clause 3.4 of the Lease and (ii) Clause 17 of the agreed Directions No. 1 to (a) properly consider the terms of the Lease and (b) provide an opportunity to the Parties to make observations on his findings.
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> Ground 68(2)(b)

Further the Arbitrator exceeded his jurisdiction by (i) finding an alternative Fair Maintainable Trade and/or rent other than that expressed by the Parties and failing to give the Parties and (sic) opportunity to make observations on the same".

(3) Jurisdiction and principle

15. It is for the arbitrator to decide all procedural and evidential matters under *s34(1)* of the *Arbitration Act 1996* subject to the rights of the parties to reach agreement. However, an arbitrator is under a statutory duty to act fairly and impartially between the parties, to give them a reasonable opportunity to put their case and deal with their opponent's case, and to adopt procedures suitable to the circumstances of the case, *Arbitration Act 1996 s33(1)* and *(2).*

16. A party to arbitral proceedings can challenge the award for want of substantive jurisdiction or serious irregularity under *Arbitration Act 1996 ss67* and *68*. It is also entitled to appeal on a point of law under *s69.*

17. By *section 68(2),* "serious irregularity" is defined so as to mean "irregularity of one or more of the…kinds" listed in *section 68(2)(a)* to *(i)* "which the court considers has caused or will cause substantial injustice to the applicant". This includes "(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67)" and "(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties".

18. In *Lesotho Highlands Development Authority v Impregilo SpA and others [2006] 1 AC 221,* the House of Lords provided guidance on the statutory jurisdiction when considering a challenge based on the currency in which an award was denominated. In passages of his speech at [27]-[31], Lord Steyn made the following observations in the light of the original guidance of the Departmental Advisory Committee on Arbitration Law – the DAC – that clause 68 which became *s68* of the *1996 Act* was "really designed as a long stop, 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".

    18.1. "…A number of preliminary observations about section 68 are pertinent. First, unlike the position under the old law, intervention under section 68 is only permissible after an award has been made. Secondly, the requirement is a serious irregularity. It is a new concept in English arbitration law. Plainly a high threshold must be satisfied. Thirdly, it must be established that the irregularity caused or will cause substantial

injustice to the applicant. This is designed to eliminate technical and unmeritorious challenges. It is also a new requirement in English arbitration law. Fourthly, the irregularity must fall within the closed list of categories in paragraphs (a) to (i)." [28].

18.2. "…nowhere in section 68 is there any hint that a failure by the tribunal to arrive at the 'correct decision' could afford a ground for challenge under section 68. On the other hand, section 68 has a meaningful role to play. An example of an excess of power under section 68(2)(b) may be where, in conflict with an agreement in writing of the parties under section 37, the tribunal appointed an expert to report to it. At the hearing of the appeal my noble and learned friend, Lord Phillips of Worth Matravers MR, also gave the example where an arbitration agreement expressly permitted only the award of simple interest and the arbitrators in disregard of the agreement awarded compound interest…" [29].

18.3. "By its very terms section 68(2)(b) assumes that the tribunal acted within its substantive jurisdiction. It is aimed at the tribunal exceeding its powers under the arbitration agreement, terms of reference or the 1996 Act. Section 68(2)(b) does not permit a challenge on the ground that the tribunal arrived at a wrong conclusion as a matter of law of fact. It is not apt to cover a mere error of law. This view is reinforced if one takes into account that a mistake in interpreting the contract is the paradigm of a 'question of law' which may in the circumstances specified in section 69 be appealed unless the parties have excluded that right by agreement…" [31]

19. In the *Lesotho* case, the House of Lords allowed an appeal from the Court of Appeal's conclusion that the arbitrators had exceeded their powers by expressing the award in currencies other than as stipulated in the contract. This was on the basis that, if the arbitrators had erred in reaching their conclusion, they had made an error of law which was within the scope of their powers. *Section 68(2)(b)* did not and does not furnish an applicant with grounds for challenging the erroneous exercise of an arbitrator's powers *simpliciter*.

20. In *Checkpoint Ltd v Strathclyde Pension Fund [2003] EWCA Civ 84*, an arbitrator's award, on rent review, was challenged on the grounds he had relied on his own personal experience of specific transactions without giving the parties an opportunity to comment and failed to address the tenant's evidence concerning the over-supply of comparable premises and poor demand in the immediate locality. At first instance, Park J rejected both grounds. He "rejected the tenant's attempt to distinguish between the general knowledge acquired by a

surveyor, which it was accepted he could apply, and personal knowledge of specific matters which it was alleged should be disclosed to the parties to give an opportunity to comment" [17]. Although he accepted the arbitrator had said very little in his award about the issues of over-supply and poor demand, he considered these were "subservient to the ultimate submission that there was one decisive comparable". He was also mindful of the requirement for a *serious* irregularity [20].

21. The Court of Appeal dismissed the tenant's appeal. Ward LJ delivered the leading judgment. He concluded that the arbitrator had essentially used his own knowledge and experience, including his experience about the locality, to evaluate the evidence presented to him by the parties. He had done so as part of an adversarial rather than an inquisitorial process. At [44]-[46], he made the following observations.

> "[44] …Proceedings are conducted either in an adversarial or an inquisitorial manner. They are adversarial when the judge or arbitrator confines himself to the issues and evidence placed before him by the parties. They are inquisitorial when his able to open the inquiry into issues he deems relevant even if not raised by the parties and when he is able to investigate the dispute himself and seek out for himself evidence material thereto.
>
> [45] Here the arbitrator did not stray outside the issues joined between the parties…. He did not make independent enquiry of anyone, or carry out the kind of independent survey, such as a study of pedestrian flow so rightly criticised in Top Shop. He used his own knowledge. 'Intracranial' information is different from information gained externally because the former is already within the surveyor's experience which he may then deploy, whilst the latter is procured and would not have become part of that experience. The inquisitor does not interrogate himself: he prises information from others.
>
> [46] In my judgment no inquisitorial powers were exercised by the arbitrator."

22. Ward LJ also agreed with Park J's assessment of the issue about the arbitrator's failure to deal with the tenant's contentions about the over-supply of and poor demand for

comparable premises. Since it was of a subordinate character, it did not constitute an issue which needed to be resolved [51].

23. Whilst it was un-necessary to consider whether the putative irregularities had caused a *substantial injustice,* Ward LJ surmised that it would not have been enough for the tenant to rely simply on the fact that the review had operated to double the rent from the rate previously fixed. At [58], he said that "the court should not make its own guess at the rental figure and make a comparison with the amount awarded. Rather the court should try to assess how the tenant would have conducted his case but for the procedural irregularity. It is the denial of the fair hearing, to summarise procedural irregularity, which must be shown to have caused a substantial injustice. A technical irregularity may not. The failure to deal with a substantial issue probably will."

24. In *Warborough Investments Ltd v S Robinson & Sons [2003] EWCA Civ 751,* the landlord challenged an award based, in part, on a methodology introduced by the tenant's valuer for some historic comparables. The landlord challenged the award on the ground that the arbitrator had applied it to other comparables in a manner contrary to the approach of the tenant's valuer himself. It submitted that, by applying the methodology in this way without first giving the parties the opportunity to make representations, the arbitrator had committed a breach of his statutory duty of fairness under *Section 33* of the *1996 Act* and, in doing so, caused substantial injustice to the landlord. However, the challenge was dismissed on the grounds that, once the relevant methodology was "put into the arena", it was open to the arbitrator to apply it as he did notwithstanding the landlord's case that, had the arbitrator indicated he was minded to do so, the landlord's case would have been presented differently.

(4) Analysis

25. The Claimants' *section 68(1)(c)* challenge is based on putative breaches of the provisions of Clause 3.4 of the letting conditions and Paragraph 17 of Mr Owens's directions dated 10th April 2019.

26. I am not satisfied there is any room for a *section 68(1)(c)* challenge based on putative breaches of Clause 3.4 of the letting conditions. Clause 3.4 sets out the basis of valuation; not the agreed procedure for conducting the valuation. If the Claimants were able to demonstrate that Mr Owens somehow misinterpreted or failed to value the Premises consistently with Clause 3.4, this would be capable of amounting to an error of law.

However, this does not merit a challenge under *section 68(1)(c),* see, for example, *Lesotho (supra)* at *[31]*.

26.1. In Paragraph 28(b)(i) of the Particulars of Claim, the Claimants contend that "in breach of Clause 3.4" the Arbitrator did "not properly or at all [to] consider that…the rent increase to £43,000 over a relatively short period of time would be an increase of 230% an unrealistic hike over such a short period of time in particular when the pub industry was in decline". Whilst it is true that Mr Owens's determination involved an unusually high increase in the level of the rent, it does not follow that Mr Owens thereby committed a breach of the agreed procedure. No such breach has been identified.

26.2. In Paragraph 28(b)(ii) and (iii), it is contended Mr Owens committed a breach of Clause 3.4 by failing to take into consideration the date on which the Defendants initially served notice initiating the rent review and the fact that this committed the Claimants to the Lease. However, these contentions were not pursued at the hearing before me. If they ever had a bearing on issues of valuation, they do not amount to breaches of the agreed procedure.

27. The Claimants contend that Mr Owens committed a breach of Paragraph 17 of his directions dated 10th April 2019 on the basis he "failed to notify the Parties in advance as to how he had calculated the FMT he intended to find and give them a reasonable opportunity to make observations on his findings before making the Award" (Paragraph 28(a)). By implication, they also contend, in Paragraph 28(a), that Mr Owens supplied evidence rather than evaluating it when determining the FMT of £350,000 and, in any event, he should have provided them with notice of his "calculations" before making his award so as to provide the Claimants with an opportunity to make further representations.

28. It is certainly the case that Mr Owens made the Award without first advising the parties he was minded to adopt the Profits Method according to Mr Crux's methodology or assess FMT in the sum of £350,000. In substance, this is the Claimant's main complaint in these proceedings. However, in my judgment, it does not furnish the Claimants with grounds for statutory challenge under *Section 68(2)(c).*

28.1. Consistently with *Checkpoint Ltd v Strathclyde (supra),* Mr Owens was fully entitled to conduct the arbitration as an adversarial process using his own knowledge and experience to evaluate the evidence presented before him. Paragraph 17 of Mr

Owens's directions dated 10th April 2019 did not derogate from that principle. It merely provided that Mr Owens was entitled, if he so wished, to take the initiative in ascertaining the facts on a point provided that, if he did so, he would inform that parties in advance of what he intended to do and give them a reasonable opportunity to make representations before making his award.

28.2. As it happens, Mr Owens did not take the initiative in ascertaining the facts. He chose to conduct the arbitration on an adversarial basis relying upon the evidence adduced by the parties. In doing so, he made directions for the parties to deliver a statement of agreed facts followed by expert reports and written replies. The parties availed themselves of the opportunity to do so. In making the Award, Mr Owens evaluated the evidence that had been presented to him. No doubt, in doing so he deployed his own professional knowledge and experience. However, there is nothing to suggest that he "supplied" or otherwise relied on specific facts that were not provided to him in the arbitration. Indeed, one of the criticisms of Mr Owens, in Paragraph 53 of Mr Edwards's Skeleton Argument dated 4th November 2020, is that Mr Owens did not attempt to ascertain the facts under his power in Paragraph 17.

28.3. On the Claimants' behalf, Mr Edwards was particularly critical of Mr Owens's determination of FMT amounting to £350,000. In Paragraph 60 of his Skeleton Argument, he stated that Mr Owens had made "the quantum leap of finding an FMT of £350,000 without explaining the methodology he has used…" and, at Paragraph 62, he stated that "the Arbitrator must have been relying on his own personal experience in a specific way to arrive at an FMT of £350,000 and should have explored this with the Parties". However, it can be seen from the Award itself that Mr Owens arrived at his FMT figure following an assessment of the approach of each expert and the evidence deployed in support. Mr Owens did not exclude Mr Westlake's approach from consideration; he also appears to have taken Mr Westlake's evidence into account. He reserved some criticism for Mr Crux, noting "the incorrect pricing adopted by Mr Crux in relation to Stalybridge, being some time after the rent review date". However, he also stated, in Paragraph 9.1.8 of his Award, that he "prefer[red] the more conventional approach adopted by Mr Crux in estimating FMT and the more detailed analysis of the various income streams". On this basis, at Paragraph 9.1.9, Mr Owens "…adopted an FMT between that of the Parties at £350,000 per annum". He did not provide materials or workings to show how he had arrived at a figure for FMT

in the sum of £350,000. However, it can only have been based on his evaluation of the evidence presented before him in the arbitration; in particular, his assessment, with the benefit of his own professional experience, of the evidence of Mr Crux and Mr Westlake. There is no reason to believe it was based on specific facts that were not disclosed to the parties.

28.4. Mr Edwards also submitted that there was no evidence to support Mr Owens's determination of a gross profit margin of 60.88%. It is true that this was apparently based on Mr Crux's evidence and methodology. However, there were no obvious flaws in Mr Crux's analysis. Once in "the arena", Mr Owens was entitled to rely on it in the sense envisaged by Parker LJ in *Warborough (supra).*

28.5. Since he was content to rely on his own assessment of the evidence adduced in the arbitration and thus did not take the initiative in ascertaining the facts, Mr Owens was not under a duty under Paragraph 17 of his directions to inform the parties about his intentions before delivering the Award.

29. As an alternative ground for statutory challenge, the Claimants rely on *Section 68(2)(b) of the 1996 Act*. The Claimants' case, as formulated in Paragraph 28(c) of the Particulars of Claim is that, in determining FMT and rental value, Mr Owens "exceeded his jurisdiction by finding for a sum which he had not been given authority to find inasmuch as the Defendants asked the Arbitrator to find £406,000 FMT and the Claimant asked the Arbitrator to find £278,650. The Defendants and the Claimants asked the Arbitrator to find rent as £52,500 and £20,500 respectively yet in the absence of the usual wording "…or any sum the Arbitrator may find properly due…" the Arbitrator exceeding his jurisdiction found for £350,000 FMT and £43,000 rent respectively on an unknown basis. AND/OR the Arbitrator exceeded his jurisdiction when he found for £350,000 FMT and rent at £43,000 without notifying the Parties pursuant to Clause 17 of Directions No. 1".

30. In my judgment, this ground for challenge is misconceived.

30.1. *Section 68(2)(b)* is, of course, limited to action taken by the arbitrator *exceeding his powers.* Contrary to Paragraph 28(c) of the Particulars of Claim, it does not apply to challenges for want of substantive jurisdiction. In such a case, awards can be challenged under *Section 67*.

30.2. In *Lesotho (supra)* at [29], Lord Steyn indicated that an arbitrator might exceed his powers for the purposes of *Section 68(2)(b)* if he acts contrary to an agreement in

writing with the parties. However, there is no suggestion of this here. Mr Owens was appointed as arbitrator, under the provisions of Clause 3.4 of the letting conditions, to determine "the rent at which the Premises might reasonably be let in the open market…" At no point was it ever agreed that Mr Owens was limited to a choice between the precise amounts specified in Mr Crux and Mr Westlake's professional valuations. Had an unusual provision been intended on these terms, the parties could have been expected to provide for it expressly and unambiguously. They did not do so. It follows that Mr Owens was not limited to the amounts specified in the experts reports and he was entitled to make an award within the range of valuations before him.

31. I am not satisfied there is any irregularity in the Award. There is thus no room for *serious* irregularity. However, on the hypothesis that such an irregularity could be discerned, it would not be of such a nature as to cause *substantial injustice* to the Claimants within the meaning of *Section 68(2)* of the *1996 Act.*

32. Consistently with the guidance of the DAC Report to which Lord Steyn referred at [27] in *Lesotho (supra),* these provisions were "really designed as a long stop, 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".

33. On the Claimants' behalf, it is submitted that, by virtue of the Award, the rent was reviewed from £13,000 to £43,000; far higher than might reasonably have been expected. Whilst the factual background against which the rent was originally negotiated is obscure, this observation is legitimate and unavoidable. The review date fell less than three years after the parties entered into the Lease and there is no suggestion that the market for such property was rising anything like as sharply as Mr Owens's determination would indicate. However, this does not, in itself, amount to a substantial injustice, see *Checkpoint (supra).* In the present case, Mr Edwards submitted that, had the Claimants been aware Mr Owens was minded to adopt Mr Crux's methodology and take £350,000 as the FMT, they would have wished to make further representations before he made his Award. However, it was always open to the Claimants to present their case differently. Indeed, if their main concern is that, in the absence of their accounting records, Mr Owens's determination was ultimately based on estimates of their turnover and profit which could be incorrect or inaccurate, they cannot escape some responsibility for this themselves. They could have

eliminated the attendant risk by adducing the accounting records. They chose not to do so. Indeed, as matters stand, they have still not done so.

(5) Disposal

34. The Claim is dismissed. I shall hear further from counsel in relation to consequential directions and costs.