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ENGLISH COURT OF APPEAL AFFIRMS VERY HIGH THRESHOLD FOR APPEALS AGAINST ARBITRATION AWARDS

HMV UK Ltd v Propinvest Friar Ltd Partnership (2011) CA (Civ Div)

(Arden LJ, Longmore LJ, McFarlane LJ)

Abstract
In a recent decision, the Court of Appeal re-affirmed the high threshold established by section 69(3)(c)(i) of the Arbitration Act 1996 – the provision stipulating that to allow an appeal on a point of law, it is necessary that "the decision of the tribunal on the question is obviously wrong".

The Court considered the meaning of the words 'obviously wrong'. Unless the arbitrator's decision can be shown to be a major intellectual aberration, and the error can be grasped by reading the award itself, and no appeal should be granted if the arbitrator might be right.

The Court also indicated that applications under section 69 should be processed on paper, and appeals to the Court of Appeal against refusal of leave should only be made in exceptional circumstances.

The Facts
Propinvest owned shop premises which were leased to HMV under a 25-year lease, which included five-yearly rent reviews. Upon such a rent review, the parties could not agree to the rent payable from March 2005. The dispute centred on the interpretation of a part of the rent review clause, which stated that the rent should be determined in accordance with whichever was the greater of the premises' market rental value or comparable rental value (CRV). The CRV concerned a notional, rather than realistic, retail unit. In this, the need for a provision for a fire escape was in question.

The dispute was referred to a property QC in arbitration. HMV argued that since the premises lacked a secondary fire escape they had had to have an alternative rear exit. This had been negotiated with a neighbouring unit. This secondary rear exit caused a loss in retail space, which ought to be taken into account in determining the CRV. However the arbitrator did not agree – the lack of secondary fire escape was irrelevant in determining the CRV as under the lease as it was to be assumed that the notional unit complied with all covenants and requirements.

HMV appealed under section 69(3)(c)(i) of the Arbitration Act 1996, stating that the arbitrator was obviously wrong, and that it would be just and proper for the Court to determine the question the arbitration notwithstanding (section 69(3)(d)).

A judge considered the matter on the papers and allowed an oral permission hearing with appeal to follow if granted. After hearing the application, a second judge refused permission on the ground that the arbitrator's decision was not obviously wrong.

HMV argued that since the first arbitrator had allowed the hearing, it was not apparent that the arbitrator's decision was obviously wrong. Propinvest stated that since the directions for valuation in the lease provided a complete code did not include an assumption that the notional premises were not compliant with the requirement for a fire escape, the arbitrator's decision was almost certainly right and the high threshold under s.69 of the Act was not met.

The Judgment

The rights of appeal under s.69 of the Act are severely restricted. An arguable error, or the notion that a different judge might have reached a different conclusion are insufficient to allow a challenge. The Court held that the word "obvious" denotes the required quality of the error – it must be severely egregious, or a major intellectual aberration.

On the facts, the arbitrator QC was a specialist in landlord and tenant law and rent review clauses and had been chosen for his expertise. The arbitrator's conclusion was one which it was open to him to adopt and was not obviously wrong.

Concerning the just and proper test, as the Court found that the arbitrator had not made an error of law, it was not necessary to decide whether HMV had satisfied the requirements of section 69(3)(d).

The Court also instructed that applications for leave to appeal under s.69 should normally be dealt with on paper. Appeals to the Court of Appeal against refusal of leave should only be made in exceptional circumstances.

Comment

Section 69 – "obviously wrong". The intention behind the 1996 Act was to curtail factual challenges being disguised as legal submissions[1]. It is accordingly unsurprising that the Court choses a strict adherence and interpretation of the statutory language. As stated in *National Trust for Places of Historic Interest or Natural Beauty v Fleming*[2]:

> The "obviously wrong" test is, self-evidently, a stringent one which will seldom be satisfied. It carries with it the implication that the error should normally be demonstrable on the face of the award itself, and that it should not require too close a scrutiny to expose it. The threshold is very much higher than the usual test of "a real prospect of success" which the court applies to applications for permission to appeal under CPR Rule 52.3(6)(a).

[1] *Demco Investments & Commercial SA v SE Banken Forsakring Holding AB* [2005] EWHC 1398 (Comm)
[2] [2009] EWHC 1789 (Ch)

For an example where this threshold had been passed, one might look to *Coal Authority v Davidson*[3], where the arbitrator's award was contrary to the assumptions on which the arbitration regime and Regulations had been based, or to *Watergate Properties (Ellesmere) Ltd v Securicor Cash Services Ltd*[4], which had very similar facts, where an arbitrator awarded rents payable which had already expired. The Court also seemed to have followed *Stern Settlement Trustees v Levy*[5], which had held that questions of construction were often a matter of impression for the arbitrator and were therefore unlikely to be held 'obviously wrong'. In holding that the error would have to be demonstrated on the face of the award itself, the Court was also applying accepted law[6]. Finally, it should be remembered that in international arbitrations, unlike this one, the Court will not entertain challenges of law where the law applied is not the law of England and Wales[7].

Section 69 – The just and proper test: This part of the Arbitration Act states that "[l]eave to appeal shall be given only if the Court is satisfied — 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." Such leave will usually not be given if, as here, the parties have chosen the arbitrator themselves[8], unless doing so would be unjust for an obviously wrong decision or question of law.

In affirming this pre-existing law on section 69 of the Arbitration Act, the Court has solidified existing law and clarified the application and appeal process, which should be followed strictly.

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[3] [2008] EWHC 2180 (TCC)
[4] [2005] EWHC 3438 (Ch)
[5] [2007] EWHC 1187 (TCC)
[6] *Walsall MBC v Beechdale Community Housing Association Ltd,* [2005] EWHC 2715 (TCC)
[7] *Reliance Industries Ltd v Enron Oil and Gas India Ltd* [2002] 1 All E.R. (Comm) 59
[[6] *Walsall MBC v Beechdale Community Housing Association Ltd,* [2005] EWHC 2715 (TCC)
[7] *Reliance Industries Ltd v Enron Oil and Gas India Ltd* [2002] 1 All E.R. (Comm) 59
[8] *Keydon Estates Limited v Western Power Distribution (South Wales) Limited*, [2004] EWHC 996 (Ch)