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Segama NV v Penny Le Roy Ltd

Queen's Bench Division: Commercial Court

November 24 1983

(Before Mr Justice STAUGHTON)

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Landlord and tenant -- Issues arising out of rent review clause in lease -- Application by landlords under Arbitration Act 1979 for leave to appeal against arbitrator's award -- First issue as to admissibility in evidence of "post-review date comparables", ie rents of comparable properties agreed after review date -- Second issue as to whether it was proper for arbitrator to consider evidence of rents agreed between landlords of comparable properties and their sitting tenants or whether evidence should be confined to rents agreed for premises with vacant possession -- Held on the first issue, after a review of the authorities, that the arbitrator acted correctly in treating evidence of rents agreed after the review date as admissible -- Held on the second issue that the arbitrator was entitled to have regard to rents agreed between landlords and sitting tenants; it was a matter for the arbitrator to decide how far such evidence was of assistance -- The court had, however, to consider the application of section 1(4) of the Arbitration Act 1979 in the light of guidelines given by the House of Lords and Court of Appeal -- Although both the above issues were of some general importance, and determination of the second issue could substantially affect the rights of the parties, in neither instance had a strong prima facie case been established that the arbitrator might well have been wrong; in fact in the court's view he was right -- Accordingly, leave would not be granted to the landlords to appeal against the award

> This was an application by landlords, Segama NV, of a ground-floor shop and cellar at 43 Sloane Street, London SW1, for leave to appeal under section 1(3) of the Arbitration Act 1979 against the award of an arbitrator, Peter Henry Clarke LLB FRICS ACIArb, determining the revised rent under a rent review clause. The tenants, respondents to the application, were Penny Le Roy Ltd.

Kenneth Bagnall QC and Kirk Reynolds (instructed by Lovegrove & Durant, of Windsor) appeared on behalf of the applicants; Miss Joanne Moss (instructed by Rabin Leacock & Partners) represented the respondents.

Giving judgment, **STAUGHTON J** said: The applicants are the landlords, or, more accurately, mesne landlords, of a ground-floor shop and cellar at 43 Sloane Street, London SW1. I shall call them "the landlords". The respondents ("the tenants") are tenants under a lease of those premises for a term of 10 years from October 1 1977. The lease provided, in clause 5, as follows:**STAUGHTON J**

> 1. The lessors may require the rent payable hereunder to be revised by serving upon the lessees notice in writing to that effect not more than twelve nor less than three months before the expiration of the said term (hereinafter referred to as "the review date") and as and from the review date the revised rents calculated and determined in accordance with the following provisions of this clause shall become payable in all respects as the rents hereby reserved.
>
> 2. The revised rents shall be the greater of either

(i) the rent payable hereunder at the time of the service of the notice requiring the rent to be revised, or

(ii) the market rent of the demised premises at the review date.

3. The expression "the market rent" shall be deemed in this clause to be the yearly rental value of the demised premises, having regard to rental values current at the relevant time for similar property used for any purpose within the same use class under the Town and Country Planning (Use Classes) Order 1963 as that which includes the use of the demised premises permitted hereunder, let with vacant possession, without premium and subject to provisions similar to those contained in the lease, taking no account of

(a) any goodwill attributable to the demised premises by reason of any trade or business carried on therein, and

(b) any improvements carried out to the demised premises by the lessee otherwise than in pursuance of an obligation under this lease.

4. The market rent shall be determined by agreement between the parties hereto, but if they shall fail to agree such rent within three months after the service of the notice by the lessors requiring the rent to be revised the amount of the rent payable shall be determined by reference to the arbitration of an arbitrator nominated by the President for the time being of the Royal Institution of Chartered Surveyors on the application either of the lessor or of the lessee, and the cost of such arbitration shall be in the award of the arbitrator, whose decision shall be final and binding on the parties hereto.

By a supplemental lease dated September 11 1979 additional premises comprising part of the ground floor were demised from August 18 1978 for the residue of the term of the main lease, upon the same terms and with the same rights, reservations and covenants as expressed in the main lease, save as to the premises demised, the term

of years and the rents reserved. The rents payable initially under the main lease and the supplementary lease totalled £11,000 per annum.

There was disagreement between the parties as to what revised rent was appropriate from October 1 1982. Accordingly, the president of the Royal Institution of Chartered Surveyors, on March 11 1983, appointed Peter Henry Clarke LLB FRICS ACIArb as arbitrator to determine the revised rent. At the hearing of the arbitration the tenants contended for a revised rent of either £13,600 or £16,000; the landlords' figure was £35,500. The arbitrator, in a reasoned interim award dated July 21 1983, determined the revised rent at £18,250 per annum.

The landlords now apply under section 1(3) of the Arbitration Act 1979 for leave to appeal against the award. The subject-matter of the dispute is plainly not within the ordinary jurisdiction of the Commercial Court; but as in the first instance it is the law relating to arbitration which has to be applied, the application for leave to appeal is made, in accordance with the Rules of the Supreme Court, Order 73 rule 6, and the current practice, to a judge of the Commercial Court. If leave to appeal is granted, it then has to be determined whether the appeal itself should be heard in this court or elsewhere. The application was heard in chambers; at the request of both parties I give judgment in open court.

In clause 5(3) of the lease, which I have already quoted, it was provided that the market rent should be deemed to mean "the yearly rental value of the demised premises having regard to rental values current at the relevant time for similar property ... let with vacant possession". It was agreed, before me at any rate, that "the relevant time" means in this instance October 1 1982. The parties, as is customary, referred the arbitrator to rents agreed for comparable properties on or before that date. But by the time that the matter came to be argued before him, there were also available rents agreed for comparable properties after

October 1 1982. Paragraph 1 of the arbitrator's award reads as follows:

> The only issue of law which arose in this reference was the admissibility of post-review date comparables, that is to say rents of comparable properties agreed after the review date for the subject premises.

That is the first and main question of law which I have to consider on this application. It is plain to me that the point is of general importance to landlords and tenants. No doubt there are a great many leases containing similar clauses and raising the same problem. In the *Handbook of Rent Review* by Bernstein and Reynolds there is this passage at p 941:

> Whether evidence of transactions occurring after the review date is admissible, and, if so, for what purpose and to what extent, is controversial.

It is certainly not a one-off case.

The second question raised by the landlords before me is whether evidence was properly considered by the arbitrator as to rents of comparable premises agreed between existing landlords and existing tenants, or whether the evidence should have been confined to rents agreed by tenants who had not previously occupied the premises in question. Evidence of the former class was put before the arbitrator, and he clearly attached importance to it. I cannot detect in the award any suggestion that the relevance of that evidence depended on any question of law. But there are indications in it that the arbitrator had in mind that there might be a distinction between evidence of agreements with existing tenants and evidence of agreements with new tenants. Accordingly, I am prepared to assume that the landlords argued for such a distinction at the arbitration.

This second question is also, I think, one of some general importance. If indeed it is a question of law (which was not apparent to the arbitrator) it will probably affect a good many cases besides that presently before me.

I shall consider each of the two questions that I have mentioned in turn; and then a third point, that is whether the determination of either or both of them could, in terms of section 1(4), "substantially affect the rights of one or more of the parties to the arbitration agreement".

(1) Evidence of rents agreed after the review date.

The arbitrator has set out the contentions of the parties and his own conclusions with care, clarity and concision (in the second sense of that word). He held that the evidence was admissible; and he added (in para 17):

> I accept that the further away from the review date one progresses then the rental evidence will become progressively unreliable as evidence of rental values at that date. This is, however, a question of weight and not admissibility and is a matter for me to consider when reviewing the evidence.

I wholly agree with his conclusions. But the point is one of law; it was argued at some length before me; and it is of general importance. So I must state my own reasons.

Essentially the question is one of construction and divides into two parts. First, what is meant by "rental values current at the relevant time"? Does that phrase mean only rents actually agreed or does it mean the current worth of premises in terms of rent? No customary or technical meaning was proposed, save in so far

as one may appear from the authorities. I shall consider the cases later. As a matter of ordinary English, the word "value" is more consistent with the notion of worth than with the narrower concept of rents actually agreed. Since it is the worth of the demised premises at the relevant date that has to be ascertained, in terms of market rent, it seems to me entirely plausible that the arbitrator should be enjoined to have regard to the worth of similar property -- whether demonstrated by evidence of agreements reached before or after the relevant date. When the clause speaks of the "rental value of the demised premises", it evidently refers to worth rather than to an agreed rent. Why should the words "rental values", later in the same sentence, have a different meaning?

The second part of the question is whether, even if the arbitrator is directed by the clause to have regard to rents agreed for similar property on or before the relevant date, he is thereby precluded from having regard to any rents agreed subsequently. The rule that the expression of one of two things is the exclusion of the other might suggest that he is. But it requires more than such *prima facie* inference as that rule provides to exclude evidence which is otherwise relevant and admissible. See *W N Lindsay & Co Ltd v European Grain & Shipping Agency Ltd* [1963] 1 Lloyd's Rep 437, per Diplock LJ at p 445:

> Any clause in a contract relied upon as excluding evidence which would ordinarily be admissible is to be strictly construed.

There are six cases which are said to be in some degree relevant to this point. The first is *Bwllfa & Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426. At any rate the arbitrator thought the case relevant, although Miss Moss, for the tenants, expressly disclaimed its aid before me. There a dispute arose as to the statutory compensation payable to the owners of a mine, because the undertakers of a waterworks served them with a notice requiring them not to work coal under a certain parcel of land. Evidence was tendered that the value of coal rose after the date of the notice. It was held by the House of Lords that the evidence was admissible. The principle behind the decision is said to be found in the speech of Lord Macnaghten at p 431:

> If the question goes to arbitration, the arbitrator's duty is to determine the amount of compensation payable. In order to enable him to come to a just conclusion it is his duty, I think, to avail himself of all the information at hand at the time of making his award which may be laid before him. Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess if he can calculate? With the light before him, why should he shut his eyes and grope in the dark?

I agree with both counsel that the decision is not relevant to the present case. The task of the arbitrator in that case was to assess, at the date of the notice, a fact which at the time lay in the future; he had to discover what profit the owners of the mine would have made by working the coal in question. The headnote itself says so. If new material was available by the time of the hearing to answer that question with greater certainty, he should have had regard to it. Similar problems arise when a tribunal is required to forecast, as at a given date, how likely it is that some future event will occur. Such a determination is often required in the law of contract. In connection with the doctrine of frustration, Lord Sumner said, in *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 at p 454:

> What happens afterwards may assist in showing what the probabilities really were, if they had been reasonably forecast.

In each of those two situations, when the task is to make a finding as to some fact which lies in the future, or to assess the probability of some future event occurring, the *Bwllfa* case is powerful authority that evidence of later facts will be relevant. But I do not, with respect, see that it touches, one way or the other, on the question whether later events are relevant to the determination of the existing market rent on a given date.

In *Melwood Units Pty Ltd v Commissioners of Main Roads* [1979]

AC 426 it was necessary to assess compensation for the compulsory acquisition by the respondent of land for the purposes of an express-way. Compensation had to be assessed as at September 1965. At that date there had already been a grant of planning permission, in principle, for development of adjacent land as a drive-in shopping centre. After September 1965 two further events occurred. Definitive planning permission was granted; and a purchaser agreed to buy the adjacent land at $40,000 per acre. It was held that those events had been wrongly rejected as irrelevant to the assessment of compensation. Lord Russell of Killowen, delivering the advice of the Judicial Committee, said (at p 436):

> Now it is plain that in assessing values for the purpose of compensation for resumption on compulsory acquisition a tribunal is not required to shut its mind to transactions subsequent to the date of resumption. They may well be relevant or of assistance to a greater or lesser degree, and in the instant case the figure paid by David Jones Ltd was the only figure available at the date of assessment of the value of adjacent land to a person wishing to develop the land for its "highest and best use".

Mr Bagnall sought to distinguish that case on the ground that it was concerned with compensation, which must be fair, as opposed to a market, rent which is what tenants are prepared to pay and landlords to accept. For my part, I do not at first sight find the distinction very compelling.

The case of *Ponsford v HMS Aerosols Ltd* (1976), decided by Whitford J, is recorded by a brief note in the *Handbook of Rent Review* at p 1769. It was likewise a rent review case. The learned judge said this:

> Now an assertion has been made on the defendants' side that in coming to a conclusion as to what would be the appropriate rent for the period starting on June 25 1975 the person making the assessment is entitled to consider not only the state of the market up to that date but also the way in which the market has subsequently moved ... I think that the only sensible way to give effect to what was agreed between the parties is to hold, as the plaintiffs have suggested that I should hold, that the assessment should be made in the light of the assessor's knowledge as to the state of the market up to the period when the new rent was due to come into effect, but that there should be omitted from consideration any developments that may have taken place subsequent to that date.

So far as I can tell from that meagre evidence, the case was concerned with movement of the market, or with "developments", after the relevant date. I can readily understand why those should be left out of account: the issue was about the market rent on the relevant date, and not what it became thereafter in consequence of change, or movement, or developments. If the landlord or the tenant submitted that in fairness those factors should be taken into account, one can see why that contention failed.

Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd, undated and unreported but also recorded in the *Handbook of Rent Review* (p 1749) was decided by Judge Fay QC. The learned judge said this:

> Clearly the major problem I have to solve in arriving at a decision on value is the yield properly to be taken into account as at December 25 1973. About this I have a good deal of evidence ... I accept that at Christmas 1973 there were virtually no property sales being effected, and when later in 1974 the market redeveloped, it was at values considerably lower and yields considerably higher than prior to December 1973.

His Honour then referred to *Curling v Jones* [1963] 1 WLR 748; *Bwllfa & Merthyr Dare Steam Collieries v Pontypridd Waterworks Co* [1903] AC 426; *Re Bradberry* [1943] 1 Ch 5, and continued:

> If I were dealing with quoted shares instead of land the position would be clear enough. If shares had to be valued as at a certain day, for example for estate duty purposes, the value is the mid-market price on that day and it would be idle to urge that six months later that price was halved, or that on the day of valuation they were on a downward trend because of apprehensions which later were found to be well-founded. No, I must ask myself what a skilled valuer would

> have done at Christmas 1973 knowing all that had happened up to then but denied full knowledge of the catastrophes of 1974.

Again it appears to me that the judge was considering changes which occurred in the market after the relevant date, and not later evidence as a guide to what the market rent on the relevant date had been.

Duvan Estates Ltd v Rossette Sunshine Savouries Ltd (1982) 261 ESTATES GAZETTE 364 was an application for leave to appeal under the Arbitration Act 1979, decided by Robert Goff J. The learned judge said this (at p 365):

> The point in broad terms ... is that in considering a valuation of this kind it is proper to have regard to the relevant facts existing as at the review date, which is July 17 1978, and not to have regard to facts and events existing after that date. In support of that proposition he relied upon a passage at the end of the judgment of Whitford J in *Ponsford v HMS Aerosols Ltd*, a case which went on appeal [1979] AC 63; (1978) 247 ESTATES GAZETTE 1171. But I was provided with a transcript of Whitford J's judgment because on this point, apparently, the appeal was not pursued.
>
> As a general principle I entirely accept that; indeed, I do not understand that Mr Cohen on behalf of the landlord contested the principle as such.

However, he went on to hold that the arbitrator had not relied upon the disputed evidence in reaching his conclusion. "In those circumstances", the judge continued, "I do not think, on a bare reading of the reasons of the award, that the arbitrator was infringing the principle which both parties accept should be applicable". The material which the judge was referring to in those passages was indeed evidence of rents agreed after the review date. Thereafter he went on to consider other evidence subsequent to the review date, of a different nature. In relation to that evidence he did find an error of law on the part of the arbitrator. But as it was not one which could substantially affect the rights of the parties, he refused leave to appeal.

It can, I think, be said of the learned judge's conclusion, which is relevant to the present case, first that it was *obiter*; secondly, that the point was apparently conceded; and, thirdly, that the *Melwood case* was not cited.

Finally, there is the decision of Judge Finlay QC, sitting as a judge of the Chancery Division, in *Gaze v Holden* (1983) 266 ESTATES GAZETTE 998. There a testator had by will granted an option to purchase a farm at a fair market value, "such value to be ascertained by a valuation in the usual way". At the date when the option was exercised the farm had been subject to a subsisting lease. The question was whether the arbitrator would be entitled to take into account the fact that the lease had been surrendered, if that should occur before the arbitrator made his determination. The learned judge said this (at p 1004):

> Mr Wood, as I understand it, was disposed to accept that the prices obtained, for example, on subsequent sales could be looked at as they furnished evidence of what the state of the market was at the date when the property fell to be valued. He instanced the case where the prices obtained on a subsequent sale might indicate whether the hypothesis that the market trend was a rising one or a falling one was well or ill-founded. But subject to that exception that subsequent events may furnish evidence of what the value was at the relevant date, his submission was that you were not entitled to look at subsequent events for the purpose of determining what weight should be given to contingencies which at the relevant date, for the purposes of the valuation, remained unresolved.

So the point in issue here was again conceded, but the concession was the opposite to that made in the *Duvan Estates* case. The judge continued:

> I have come to the conclusion that "valuation in the usual way" means taking into account events which have happened at the date when the property falls to be valued -- in this case February 8 1980 -- and taking into account not only the actualities at that date but the possibilities in relation to all the circumstances; and that the valuer has, as best he can, to form his own judgment as to how these possibilities and various prospects that are inherent in the then existing

> situation affect the value of the property as at that date; but he is not entitled to take into account events which happened subsequently and which resolve how these various possibilities and prospects in fact turn out. To do so would be to introduce into the valuation a species of foreknowledge which would not be available to any willing buyer or willing seller entering into a contract as at the date on which the property falls to be valued.
>
> The real exercise which the valuer is carrying out in making a valuation in accordance with the principles laid down by the testator in the first schedule of his will is the exercise of determining, applying to the problem all the skill and experience which he has, what a willing seller would be prepared to accept as a price and what a willing buyer would be prepared to pay. To endow either buyer or seller, or both of them, with foreknowledge of how events were going to turn out would make that exercise one which was entirely different in character to that which the testator had indicated as the appropriate method of valuation.
>
> In reaching that conclusion I am fortified, on reconsidering the authorities to which I have referred, by the fact that in the very first of them (the *Bwllfa case*) it is made clear that the House of Lords was not dealing with the matter as a case of valuation but as a case of determination of compensation. I have come to the conclusion (fortified, as I say, in that way) that the *Bwllfa* principle does not apply to the valuation that has to be effected for the purposes of administering the testator's estate in relation to this option.

It is apparent that the judge was considering the same type of problem as arose in the *Bwllfa case* and not the problem that arises in this case. He was considering whether later evidence could be taken

into account in assessing, at the date of the valuation, how likely it was that some future event would occur. That is not the problem which arises here -- since otherwise the case could have been decided on counsel's concession -- and I say no more about it. I do not regard *Gaze's case* as having any direct bearing on the present case.

In that state of the authorities the arbitrator was, in my judgment, entitled to hold that the evidence as to rents agreed after the relevant date was admissible, and I consider that he was right to reach that conclusion. If rent of comparable premises had been agreed on the day after the relevant date, I cannot see that such an agreement would be of no relevance whatever to what the market rent was at the relevant date itself. If the lapse of time before the agreement for comparable premises becomes greater then, as the arbitrator said, the evidence will become progressively unreliable as evidence of rental values at the relevant date. The same is no doubt true of rents agreed some time *before* the relevant date; but nobody suggested to me that those should be excluded. So, too, political or economic events may have caused a change in market rents, either before or after the relevant date. All those factors must be considered by the arbitrator in assessing the weight to be attached to a rent agreed for similar premises, whether before or after the relevant date. It may happen that no rents of comparable premises that were agreed on the relevant date, or for months beforehand, can be found, but a great number very shortly thereafter. It does not seem right to me that the arbitrator should be bound to disregard them.

I recognise that different judges may take different views on this issue; but, for my part, I feel bound to say that I consider that the arbitrator's conclusion was right.

(2) Evidence of rents agreed between existing tenants and landlords.

The question of law here is, according to Mr Bagnall, whether "market rent" means open market rent, or whether it includes a rent agreed between a landlord and a sitting tenant. He points to the words in the lease:

> ... having regard to rental values current at the relevant time for similar property ... let with vacant possession.

In my judgment, that is not the right question. I suspect that the market rent, to be ascertained for the

demised premises, must be a rent which would be paid in the market for those premises with vacant possession. But even if that is right, it does not follow that the arbitrator must exclude from consideration any rents agreed for similar property between an existing landlord and an existing tenant. He may think it right, as one of the steps in his determination, to adjust any such rent to what it would have been for vacant possession; whether the adjustment would be up or down, or none at all, I do not know, and Mr Bagnall put nothing before me to suggest an answer. I can see that an adjustment may be required. But I do not consider that such evidence must as a matter of law be altogether excluded.

My reasons for reaching that conclusion are essentially the same as I have already set out in connection with the construction of clause 5(3) under the first issue. First, what the arbitrator must have regard to is the *worth*, in terms of rent, of similar property let with vacant possession at the relevant time. In ascertaining that worth, he can have regard to the rents agreed at a different time, for similar property not let with vacant possession. But he must consider how far evidence of rents so agreed helps him to determine the answer to the actual question which is before him.

Secondly, even if such evidence were not within the category which the arbitrator is required to take into account, it is not expressly or by implication excluded from his consideration, for the reasons which I have already given. Accordingly I consider that the arbitrator was right on this issue also. Furthermore, it is not an issue upon which, as far as I am aware, different judges are likely to take different views.

(3) "Substantially affect the rights of one or more of the parties to the arbitration agreement."

This arises under section 1(4) of the Arbitration Act 1979. Issue (1), on the findings of the arbitrator, made a difference only to the extent that the rent would have been £19,250 per annum instead of £18,250 if he had decided it in a different sense. The arbitrator does not expressly say how different his award would have been if he had decided issue (2) otherwise than he did; but it is clear that the difference could well have been substantial.

The landlords say in their notice of motion that they are also landlords of 44 and 45 Sloane Street, where rent review is pending before the same arbitrator. That the case is of some importance to the landlords can be inferred from the fact that they appeared before me by leading counsel. But should I take their other rights and interests into account in deciding whether to grant leave to appeal in this case? Mr Bagnall points out that section 1(4) refers to "the rights of *one or more* of the parties to the arbitration agreement". He argues that if the rights of one party only are substantially affected, the question of law qualifies under section 1(4).

If the other two properties are taken into account, I have no means of knowing how substantially the rights of the landlord will be affected. Issue (1) makes a difference of £1,000 a year for five years in relation to 43 Sloane Street. In the context of a rent of £18,250 a year that is not substantial. In the absence of any other information, I suppose that I must assume figures of a similar order for 44 and 45. The total amount in issue would then be £15,000 instead of £5,000. That is bordering on substantial in the context of this case. But I do not accept that it is right to take the other two properties into account. That a point of law is of general public importance has to be considered in deciding whether the discretion should be exercised in favour of granting leave to appeal. I do not consider that the general importance of the point to one of the parties is also relevant under section 1(4). The subsection provides that leave shall not be granted unless

> the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement.

This is an important protection to the party who has succeeded in the arbitration (in this case the tenants). He is not to be harried further upon insubstantial matters. I think that the subsection refers to a question the determination of which on appeal will directly affect the rights of one or more of the parties, and not one

which will indirectly affect one of the parties if the determination is used as a precedent.

Conclusion

Both the issues in this case are of some general importance. The appropriate guideline is, accordingly, that provided by Lord Diplock in *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724 at p 743:

> Leave should not be given ... unless the judge considered that a strong prima facie case had been made out that the arbitrator had been wrong in his conclusion.

That was said in the context of a commercial contract where it could be assumed that the parties had decided, for good or evil, to make the arbitrator the final judge of fact and law in their dispute, subject only to the rights which are conferred by the Arbitration Act 1979. But the same wisdom applies, not merely to commercial contracts but to an agreement such as the present where landlords and tenants of premises in Sloane Street agreed that the rents payable on a review should be determined by the arbitrator.

Lord Diplock's guideline has recently been interpreted by the Master of the Rolls, Sir John Donaldson, in *Antaios Compania Naviera SA v Salen Redienna AB* (1983) unreported, at p 3 of the transcript:

> I am, of course, construing Lord Diplock's speech as if it had read "But leave should not be given, even in such a case, unless the judge considered that a strong prima facie case had been made out that the arbitrator might well have been wrong in his construction" rather than "the arbitrator had been wrong in his construction". I think that this must have been his intention as otherwise where there are known to be differences of judicial opinion on a matter such as this, whether leave to appeal was granted or refused would depend upon the accident of whether the judge hearing the application did or did not take the same view as the particular arbitrator. This cannot have been the intention of Parliament. If I am wrong in so construing Lord Diplock's speech, then I think that this is one of those cases in which it is permissible to remind oneself that the speeches in *The Nema* were intended to provide guidelines rather than to remove the discretion granted to the judge hearing the application, and that guidelines, by definition, permit of exceptions, albeit great care must be exercised to ensure that the exceptions do not become so numerous as to blur the edges of the guidelines or even render them invisible.

Later the learned Master of the Rolls said this, at p 9:

> It is quite different if there are known to be differing schools of thought each claiming their adherents among the judiciary, and the Court of Appeal, given the chance, might support either the school of thought to which the judge belongs or another school of thought. In such a case leave to appeal to the High Court should be given provided that the resolution of the issue would substantially affect the rights of the parties (section 1(4) of the 1979 Act) and the case qualified for leave to appeal to the Court of Appeal under section 1(7) of the 1979 Act, as no doubt it usually would.

Ackner LJ at pp 21-22 and Fox LJ at p 24 made observations to the same effect.

On issue (1) in this case, the relevance of rents agreed after the review date, so far from considering there to be a strong prima facie case that the arbitrator was wrong, I consider that he was right. But this is a point upon which there may well be different schools of thought among the judiciary. It is also a point of general importance. So it qualifies in that respect as a question of law for which leave to appeal should be granted. The problem is that it does not, in this case, affect the rights of one or more of the parties substantially. So it is caught by what Lord Diplock called "the ban imposed by the first part of section 1(4)", which exists, as I have said, for the benefit of the successful party in the arbitration. Much as I might consider it advantageous to the public if the issue were settled by a decision of the Court of Appeal, I cannot grant leave.

Issue (2), the relevance of rents agreed between existing landlords and tenants, does affect the rights of the parties substantially, or, at any rate, may well do so. It is also a point of general importance. But again I do

not consider there to be a strong prima facie case that the arbitrator was wrong, and I do consider that he was right.

And in this instance there is no material to suggest that different schools of thought exist among the judiciary. (It might be argued that this issue is infected with doubt, because I decided it by a similar process of reasoning to that which I adopted on issue (1), where there are or may be different schools of thought. I do not find such an argument convincing.) Accordingly, whether I follow the precise words of Lord Diplock in *The Nema* or the explanation of the Court of Appeal in the *Antaios* case, I ought not to grant leave to appeal on issue (2).

The application is dismissed.

The landlords' application was dismissed with costs. Leave to appeal was refused.