

JERSEY / JUDGMENT

Jersey Sports -v- Barclays Private [2013] JRC 059 (14 March 2013)

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judgment

the bailiff: 1. The Court has before it two applications for leave to appeal against the decision of an arbitrator made in an arbitration between Jersey Sports Stadium Limited ("JSSL") and Barclays Private Clients International Limited ("Barclays"). JSSL seeks leave to appeal against the arbitrator's decision concerning the measure of damages and Barclays seeks leave to appeal against the decision as to the costs of the arbitration. 2. At the conclusion of the hearing before me, I refused leave in both cases. I now give my reasons.

Background

3. The award of the arbitrator ("the Award") ran to some 70 pages but, for the purposes of the issues that I have to decide, the position can be shortly stated. 4. JSSL is the owner of a property situated at the New Era complex in St Clement. Barclays has leased the ground and first floor of part of the property since 1968 but by a lease dated 5th February, 1982, ("the Lease") JSSL let the ground, first and second floor of parts of the property ("the Demised Premises") to Barclays for a term of 28 years and 210 days with a commencement date of 24th June, 1981, and an expiry date of 20th January, 2009. There was a subsequent variation to the Lease in August 1991 but nothing turns on that. 5. By letter dated 29th December, 2008, the parties agreed to extend the Lease for a further term of ten months expiring on 21st November, 2009. The only material aspect for present purposes of the December 2008 letter was that Barclays agreed, if required to do so by JSSL, to remove the strong-room which it had installed in the Demised Premises. 6. The Lease contained standard covenants to keep the Demised Premises well and substantially repaired and maintained. It is not necessary to describe the detailed terms of the covenants. 7. Barclays gave vacant possession of the Demised Premises in December 2009 and a dispute arose as to whether Barclays had complied with its obligations under the Lease, including in particular its repairing obligations and its obligation to remove the strong-room. 8. In due course the matter was referred to arbitration in accordance with clause 7 of the Lease. Advocate C R de J Renouf ("the Arbitrator") was appointed as arbitrator. As he correctly stated at para 1.22 of the Award, he had to determine the nature and extent of the obligations of Barclays under the terms of the Lease, the extent to which those obligations had not been fulfilled and the

quantum of any loss to JSSL resulting from any breaches on the part of Barclays. 9. The arbitration commenced on 23rd April, 2012, and in total ten days of evidence was heard during the course of April and June. Thereafter there were written closing submissions filed by each party followed by oral submissions on 24th July. The Award was delivered on 14th August, 2012. Following delivery of the Award, the Arbitrator requested both parties to provide written submissions on the issue of costs and they did so. There was no oral hearing on the question of costs. The Arbitrator's decision in respect of costs ("the Costs Award") was issued in writing on 5th October, 2012. The nature of the dispute before the Arbitrator 10. In its particulars of claim in the arbitration, JSSL claimed a total of £493,049 (rounded to the nearest pound) less credit for overpaid rental of £13,910 leaving a net claim of £479,139. This was estimated to be the cost of carrying out the repairs which should have been effected by Barclays as well as removing the strong-room together with associated costs. At a later stage, the particulars of claim were amended to include an alternative claim in the sum of £272,857, which was JSSL's estimate of the diminution in value of the reversion as a result of Barclays' failure to comply with its obligations under the Lease. 11. There was no dispute that, apart from some minor works which can be ignored for these purposes, JSSL did not in fact carry out any of the works necessary to restore the Demised Premises to the condition they should have been if the obligations under the Lease had been fulfilled. On 17th April, 2011, JSSL leased the Demised Premises to a new tenant Edgar Holdings Limited who took the premises in their existing condition, including the strong-room which had not been removed. The contention of JSSL was that the rent payable for the Demised Premises was less than it would have been had the premises been left in proper condition in compliance with the obligations under the Lease and the figure of £272,857 reflected that reduction in rental. 12. Much of the evidence before the Arbitrator was devoted to going through the individual items in the schedule of dilapidations relied upon by JSSL, with the parties arguing as to whether there was a breach of an obligation under the Lease and, if so, what the proper costs of remedying that particular breach was. However, the Arbitrator also heard evidence from two experts on whether there had been any diminution in the value of the reversion. On behalf of JSSL, Mr Buckley gave evidence to support his estimate of £272,857. Barclays' stance was that there was no diminution in the value of the reversion as a result of any breaches. However, although I have not been shown the transcript of any evidence, it would appear from the Award and from the closing submissions that the oral evidence of Barclays' expert, Mr Carter, was to the effect that there was no "material" diminution in the market value of the reversion, but that "material" could mean between £250,000 and £350,000. The upshot appeared to be that he was saying that the diminution in value could be anything between nought and a figure between £250,000 - £350,000. 13. I have been shown the written closing submissions of both parties as presented to the Arbitrator. It appears from the Award that, by the time of the hearing, the exact amount claimed by JSSL had varied somewhat from the sum stated in the particulars of claim. According to the schedule attached to the Award, the amount claimed (exclusive of interest and after deduction of the overpaid rent of £13,910) came to £424,811. Whatever the exact figure, it is abundantly clear from its closing submission that what JSSL was claiming was the cost of

undertaking the repairs and of re-instating the Demised Premises by removing the strong-room. The only reference to the valuation evidence about the diminution in value of the reversion was at section 6 of its closing submission where JSSL explains why the evidence of Mr Buckley should be preferred to that of Mr Carter. However, at no point does it argue that the measure of damages should be the diminution in value (as assessed by Mr Buckley) rather than the cost of carrying out the repairs and removing the strong-room. On the contrary, it was clearly JSSL's case that it was the latter measure of damages which should be applied. 14. Barclays, on the other hand, submitted that the correct measure of damages was the cost of repair subject to a cap by reference to any diminution in the value of the reversion. Barclays argued that, on the evidence, JSSL had not suffered any diminution of the value of its reversion as a result of Barclays' breaches of the Lease and accordingly damages should be assessed at nil. In the event that this were not accepted, Barclays then went through the suggested repairs in detail and argued on an individual basis as to why some of them were not breaches and in any event the cost of repair and reinstatement should be less than contended by JSSL. The Award 15. At section 3 of the Award, the Arbitrator conducted a detailed review of judicial authority as to the measure of damages for breach of covenants to repair or reinstate. The Arbitrator then went on to consider each of the alleged breaches in turn, setting out very clearly in each case the alleged breach, the suggested cost of rectification, the arguments of JSSL and Barclays respectively in respect of a particular breach and his decision, which in each case was either to disallow the claim as not being a breach of the Lease or to award a sum which was either that claimed by JSSL or a lesser sum if he was persuaded to that effect by an argument on behalf of Barclays. He accepted in passing at para 4.29(e) the evidence of Mr Buckley, on behalf of JSSL that Edgar Holdings had managed to negotiate more advantageous lease terms because of the condition of the Demised Premises and that there was a diminution in the reversionary value of the Demised Premises in the sum of £272,857. However, having disallowed a number of claims on behalf of JSSL, he awarded damages on the basis of his finding as to the cost of remedying the breaches which he found proved. In total (he apparently made a further award when delivering his decision on costs) he awarded the sum of £194,500, inclusive of interest. That was of course much less than JSSL had claimed and was also less than the diminution in value of the reversion (which he had found) of £272,857. 16. JSSL now applies for leave to appeal on the basis that the Arbitrator erred in law in assessing damages by reference to the cost of repair and reinstatement rather than by reference to the diminution in the value of the reversion. The Court's approach to granting leave to appeal from an arbitration 17. As far as relevant, Article 21 of the Arbitration (Jersey) Law 1998 ("the 1998 Law") provides as follows:- "21 Judicial review of arbitration awards (1) Without prejudice to the right of appeal conferred by paragraph (2), the Court shall not have jurisdiction to set aside or remit an award on an arbitration agreement on the ground of errors of fact or law on the face of the award. (2) Subject to paragraph (3), an appeal shall lie to the Court on any question of law arising out of an award made on an arbitration agreement; and on the determination of such an appeal the Court may - (a) confirm, vary or set aside the award; or (b) remit the award to the reconsideration of the arbitrator or umpire together with the

Court's opinion on the question of law which was the subject of the appeal, and where the award is remitted under sub-paragraph (b) the arbitrator or umpire shall, unless the order otherwise directs, make his or her award within 3 months after the date of the order. (3) An appeal under this Article may be brought by any of the parties to the reference - (a) with the consent of all the other parties to the reference; or (b) subject to Article 23, with the leave of the Court. (4) The Court shall not grant leave under paragraph (3)(b) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement; and the Court may make any leave which it grants conditional upon the applicant complying with such conditions as it considers appropriate." 18. Article 21 replicates almost exactly the provisions of Section 1 of the Arbitration Act 1979. That provision itself introduced a considerable change in the degree to which the courts would interfere with awards made by arbitrators. The effect of the change was summarised by Lord Diplock (with whom the other Law Lords agreed) in *Pioneer Shipping Limited-v-BTP Tioxide Limited* [1982] AC 724 at 742-744 as follows:- "My Lords, in view of the cumulative effect of all these indications of Parliament's intention to promote greater finality in arbitral awards than was being achieved under the previous procedure as it was applied in practice, it would, in my view, defeat the main purpose of the first four sections of the Act if judges when determining whether a case was one in which the new direction to grant leave to appeal should be exercised in favour of an applicant against objection by any other party to the reference, did not apply much stricter criteria than those stated in *The Lysand* [1973] QB 843 which used to be applied in exercising the former discretion to require an arbitrator to state a special case for the opinion of the court. Where, as in the instant case, a question of law involved is the construction of a "one-off" clause the application of which to the particular facts of the case is an issue in the arbitration, leave should not normally be given unless it is apparent to the judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the clause by the arbitrator is obviously wrong. But if on such perusal it appears to the judge that it is possible that argument might persuade him, despite first impression to the contrary, that the arbitrator might be right, he should not grant leave; the parties should be left to accept, for better or for worse, the decision of the tribunal that they had chosen to decide the matter in the first instance. For reasons already sufficiently discussed, rather less strict criteria are in my view appropriate where questions of construction of contracts in standard terms are concerned. That there should be as high a degree of legal certainty as it is practicable to obtain as to how such terms apply upon the occurrence of events of a kind that it is not unlikely may reproduce themselves in similar transactions between other parties engaged in the same trade, is a public interest that is recognised by the Act particularly in section 4. So, if the decision of the question of construction in the circumstances of the particular case would add significantly to the clarity and certainty of English commercial law it would be proper to give leave in a case sufficiently substantial to escape the ban imposed by the first part of section 1(4) bearing in mind always that a superabundance of citable judicial decisions arising out of slightly different facts is calculated to hinder rather than to promote

clarity in settled principles of commercial law. 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 had been wrong in his construction; and when events to which the standard clause fell to be applied in the particular arbitration were themselves "one off" events, stricter criteria should be applied on the same lines as those that I have suggested as appropriate to "one off" clauses." 19. Lord Diplock then goes on to consider the question of law which arose in that particular case which was whether the performance of the contract had been frustrated. On that aspect he had the following to say at 744:- "Whether a particular event or series of events made further performance something radically different from that which was undertaken by the contract involves, as is indicated by Lord Radcliffe's adverb and its oft-used variant "fundamentally," a question of degree upon which, though faced with the same facts, different opinions may not unreasonably be held by different men. In deciding how to exercise his discretion whether to give leave to appeal under section 1(2) what the judge should normally ask himself in this type of arbitration, particularly where the events relied upon are 'one-off' events, is not whether he agrees with the decision reached by the arbitrator, but: does it appear upon perusal of the award either that the arbitrator misdirected himself in law or that his decision was such that no reasonable arbitrator could reach?" 20. In my judgment, Jersey law should adopt a similar approach to that enunciated by Lord Diplock when considering whether to grant leave to appeal against an arbitration award pursuant to Article 21(3). Cases in Jersey such as *Le Gros-v-Housing Committee*

[1974] JJ 771 and *Olcott Investment Limited-v-Mark Amy Limited*

[1998] JLR 621 predated the 1998 Law which now governs the position of appeals from arbitration awards and they should therefore be treated with caution. Discussion 21. As already stated, the Arbitrator calculated the amount of his Award by reference to the cost of carrying out the works necessary to remedy Barclays' breaches of contract. JSSL argues that he erred in law in this respect and that the correct measure of damages in this case was the diminution in the value of the reversion. 22. I am in no doubt that leave for JSSL to appeal to this Court should be refused and that was the decision I announced at the conclusion of the hearing. There are two grounds for my decision. 23. In the first place, what JSSL now seeks to argue is completely contrary to the stance which it took before the Arbitrator. It is clear that all parties and the Arbitrator were aware that the works of repair had not in fact been carried out and were not going to be; the Demised Premises had been let to the new tenant in their existing condition. It is true that, in its particulars of claim, JSSL pleaded in the alternative that the measure of damages was the diminution in value of the reversion, but this was not its primary contention. It is quite clear from the particulars of claim, the closing submissions and the Award itself that JSSL was contending strongly that the correct measure of damages was the cost of carrying out the necessary repairs and removal in order to remedy the breaches of contract by Barclays. No doubt, this stance was influenced by the fact that, on JSSL's case, the cost of such repairs exceeded the diminution in value; thus they were claiming over £400,000 whereas, on their

case, the diminution in value was only £272,000. 24. Now that the Arbitrator has found that Barclays was not in breach of the terms of the Lease to the extent contended for by JSSL and that the cost of remedying those breaches is much less than contended by JSSL (to such an extent that the cost is less than the diminution in value of the reversion), JSSL has now done a volte-face and seeks to argue that, contrary to what it was arguing before the Arbitrator, diminution in value is the correct measure of damages. 25. In my judgment, such an approach should not be encouraged. The whole point of arbitration is that, for better or worse, the parties agree to argue their case before the arbitrator and to be bound by his decision. They do this in the knowledge that the right of access to the Court to correct any errors is severely limited because of the provisions of Article 21 of the 1998 Law. In my judgment it would be quite contrary to the policy described by Lord Diplock - which is reflected in Article 21- for a party to put forward one argument before the Arbitrator and then, when the outcome does not please him, seek leave to appeal on a point of law in order that he can put forward a completely contrary argument before the Court. 26. The second ground for refusing leave to appeal is that it does not appear to me that the Arbitrator misdirected himself in law or that his decision was such that no reasonable arbitrator could reach. To explain this, it is necessary to describe in a little more detail the issue which divides the parties. 27. The Arbitrator was referred to a text book Dowding and Reynolds, *Dilapidations; The Modern Law and Practice* 4th Edition ("Dowding") and quoted extensively from that text book in his Award as well as from a number of the cases referred to in Dowding. It is not necessary for me to descend into such detail and in any event Dowding has not been made available to me. However, it is of note that neither Advocate le Sueur nor Advocate Benest sought to criticise the Arbitrator's summary of the applicable principles. In my judgment they were right not to do so. It is well established that, in matters of remoteness and measure of damages, Jersey law is similar to English law and English cases are likely to be of assistance. It seems to me that the Arbitrator summarised the principles and relevant case law very well. 28. One starts from the position that it is trite law that, where a party sustains a loss by reason of a breach of contract, the measure of damages is intended, so far as money can do it, to place the party in the same situation as if the contract had been performed. See *Snell-v-Beadle*

[2006] JCA 14. This principle is as applicable to breaches by a tenant of the terms of a lease as it is to any other breach of contract. 29. It follows that, where a tenant has failed to perform his covenant to repair, reinstate etc, the damages recoverable will depend on what loss the landlord can be said in fact to have suffered. In many cases, that loss will equate to the cost of carrying out the works. This is because, if the tenant had performed his obligations, the landlord would receive a property in good repair. The measure of his loss is the cost of putting the property in good repair, so that he has what he should have received if the tenant had not breached the lease. 30. However, this will not invariably be the case. Let us take a case where the landlord has agreed to sell the leased property for redevelopment at the conclusion of the lease, so that it will be knocked down and replaced by one or more new buildings. In that event, it does not matter to him whether

the property is returned at the end of the lease in good condition or not. It is going to be knocked down in any event. There has therefore been no diminution in the value of his reversionary interest and he has suffered no loss as a result of the tenant's failure to comply with the repair covenants under the lease. In those circumstances one would not expect the Court to award any damages. 31. Although one might expect that to be the position applying ordinary principles of the measure of damages, in *Joyner-v-Weeks*

[1891] 2QB 31, the English Court of Appeal held that, despite the fact that the landlord had suffered no actual financial loss, he was still entitled to damages assessed by reference to the cost of the repairs. That was immediately seen as being an inappropriate result and consequently Parliament enacted Section 18(1) of the Landlord and Tenant Act 1927, which imposed a statutory cap on damages of the amount of the diminution in value of the reversion of the demised premises in cases where there was a breach of a covenant in a lease to put, keep or render up in repair. Somewhat bizarrely, that cap does not apply to very similar covenants in leases, such as covenants to reinstate alterations and covenants to decorate. 32. The correctness of *Joyner-v-Weeks* has been much doubted over the years and in my opinion it should not be applied as a matter of Jersey law. In my judgment, the correct test for any breach of covenant under a lease, whether a covenant to repair, reinstate or otherwise is that which I have just described, namely that damages must be assessed by reference to the loss which the landlord has actually suffered. 33. In the example which I have given at paragraph 30, it is obvious that the true loss is not the cost of repairs. However, in many cases the answer is not as clear cut. What is the test to be applied there? 34. In *Ruxley Electronics & Construction Limited-v-Forsyth*

[1995] 3 All ER 268 the plaintiff had entered into a building contract whereby the contractor agreed to build a swimming pool. The specification provided that the depth of the pool should be 7'6". In fact, the pool as built was only 6'9" at its deepest point. The trial judge found as a fact that the pool as built was perfectly safe to dive into; that there was no evidence that the shortfall in depth had decreased the value of the pool; that the only practicable method of achieving a pool of the required depth would be to demolish the existing pool and construct a new one; that he was not satisfied that the claimant intended to build a new pool at such cost; that such cost would be wholly disproportionate to the disadvantage of keeping the pool as built; and that it would be unreasonable to carry out the works. 35. The question was whether, on the basis of his findings, the judge had been right to refuse to assess damages on the basis of the cost of the works necessary to reconstruct the pool so as to achieve the depth contracted for. In upholding the decision of the judge, and reversing the Court of Appeal on this point, Lord Lloyd of Berwick in the House of Lords said at 285:- "If the court takes the view that it would be unreasonable for the plaintiff to insist on reinstatement, as where, for example, the expense of the work involved would be out of all proportion to the benefit to be obtained, then the plaintiff will be confined to the difference in value." 36. Lord Mustill said at 277:- "As my Lords have shown, the test of reasonableness plays a central part in determining the basis of recovery, and will indeed be decisive in a case such as the present when the cost of reinstatement

would be wholly disproportionate to the non-monetary loss suffered by the employer." 37. It was therefore held that damages were limited to the difference in value irrespective of whether or not the plaintiff had an intention, given sufficient damages, to reinstate. 38. Reasonableness is of course related to the particular work contracted for because, as Lord Jauncey pointed out at 275:- "In taking reasonableness into account in determining the extent of loss it is reasonableness in relation to the particular contract and not at large. Accordingly, if I contracted for the erection of a folly in my garden which shortly thereafter suffered a total collapse, it would be irrelevant to the determination of my loss to argue that the erection of such a folly, which contributed nothing to the value of my house, was a crazy thing to do." 39. Although Ruxley was not a case which concerned a lease, the principle laid down in the case is of general application and is therefore equally applicable to a breach of lease by a tenant in failing to repair etc. 40. In my judgment the position is correctly stated in paragraphs 31-02 to 31-05 of Dowding . The true rule is that the damages recoverable will in all cases depend on what loss the landlord can be said to have suffered. In an appropriate case, that loss will equate to the cost of carrying out the works together with, where appropriate, an allowance for the time they will take to carry out; in others, it will be limited to the damage to the reversion, if any, as a result of the failure to carry out the works; in others it may be nominal or nil. The principal consideration in deciding whether or not it is appropriate to assess damages by reference to the cost of carrying out the works which the tenant should have done is whether, in all the circumstances, it is reasonable for the landlord to carry out the works. 41. The discussion in all the cases to which I have been referred relates to or envisages a situation where the cost of repair exceeds the diminution in value of the reversion; the question therefore is whether it is reasonable for damages to be assessed by a reference to the cost of the works or whether damages should be limited to the amount of the diminution of the reversion. That was the situation which JSSL thought existed before the Arbitrator. It was arguing that damages should be assessed by reference to the cost of repairs even though these exceeded the diminution in value of the reversion and even though the repairs were not in fact going to be carried out. 42. However, the position I have to deal with is the reverse. The cost of repairs has been assessed by the Arbitrator at £168,204 whereas the diminution in value of the reversion is £272,857. In those circumstances, what is the true loss suffered by the landlord as a result of the tenant's breach of contract? 43. In my judgment, the starting point in such a case must be that the landlord's true loss is the cost of effecting the repairs. If he carries out the repairs, the property will then be in the condition which it would have been if the tenant had complied with this obligation and he will have suffered no loss; there would be no continuing loss to the value of the reversion. In such a case, if damages were awarded by reference to the diminution in value of the reversion and the landlord then carried out the repairs at a lesser cost, he would profit to the extent of the difference between the cost of the repairs and the diminution in value of the reversion. I asked Advocate Le Sueur if his researches had shown any case where damages had been awarded by reference to the diminution in value of the reversion where that diminution had been greater than the cost of carrying out the repairs. He accepted

that he was not aware of any such case. 44. Support for the approach in the preceding paragraph is to be found in the observation of Lord Lloyd in *Ruxley* at 282 where he said:- "In building cases, the pecuniary loss is almost always measured in one of two ways: either the difference in value of the work done or the cost of reinstatement. Where the cost of reinstatement is less than the difference in value, the measure of damages will invariably be the cost of reinstatement. ..." That observation was of course made in the context of a building contract but it seems to me that the principle is equally applicable in the case of a claim for breach of a covenant to repair, reinstate etc under a lease. 45. Without the benefit of much fuller argument, I do not rule out the theoretical possibility of a court awarding damages by reference to diminution in value of the reversion even where that figure exceeds the cost of repairs if it were satisfied that it was reasonable for the landlord not to carry out the repairs, but is hard to think of an example. 46. No such argument was put before the Arbitrator on this occasion. Because of the way in which JSSL conducted its case, there appears to have been no evidence about the reasonableness or otherwise of JSSL deciding not to carry out the repairs but to lease the property in its unrepaired state to Edgar Holdings. It is clear to me that the onus would lie on a landlord to show that it acted reasonably in not undertaking the remedial work where the cost of that work was less than the diminution in value of the reversion and there appears to have been no evidence before the Arbitrator aimed at fulfilling that onus. 47. In the circumstances, I am satisfied that there is no reasonable prospect of JSSL succeeding in showing that damages should be awarded by reference to the diminution in value of £272,857 notwithstanding that that sum exceeds the cost of the remedial work and accordingly I refused leave for that reason as well. Application for leave to appeal re costs 48. I turn now to consider Barclays' application for leave to appeal against the Costs Award. 49. In the Costs Award, the Arbitrator sets out the history of the arbitration, including the various offers made by the parties. I do not think it necessary to repeat all that the Arbitrator rehearsed. For the purposes of the submissions before me, the key events would seem to be as follows:- (i) On 16th March, 2011, a without prejudice save as to costs offer was made by Barclays to JSSL in the sum of £120,000 plus costs to be taxed if not agreed. That was rejected on 4th April, 2011. (ii) On 25th May, 2011, Barclays suggested mediation, subject to the provision by JSSL of outstanding discovery. That was rejected by JSSL on 18th July, 2011, on the basis that " ... it was not appropriate or worthwhile in the light of on-going without prejudice negotiations, the additional costs the mediation process would incur, the current stage of proceedings and costs incurred to date, and the risk that a mediation hearing could pose to the agreed arbitration hearing dates and the timetable... ". JSSL went on to state that it " ...may have been a suitable dispute mechanism early this year, before extensive costs had been incurred, but that it is not appropriate at this stage. " At the same time, JSSL proposed a settlement, inclusive of costs and interest, of £553,000. That was rejected by Barclays on 5th August, 2011. Barclays again raised the question of mediation but this was rejected by JSSL on 9th August, 2011, essentially on the same grounds as previously and also on the basis that JSSL did not believe that Barclays genuinely wished to settle matters. (iii) On 14th October, 2011, Barclays amended its defence to plead that any damages to which JSSL

were entitled should be limited to the diminution in the value of JSSL's reversionary interest in the Demised Premises, which Barclays asserted to be nil. (iv) On 7th November, 2011, JSSL said it would accept the sum of £422,000. Although it was not indicated whether that was inclusive of costs and interest, Advocate Le Sueur stated in his submission on costs to the Arbitrator that it was and that JSSL was effectively asking for £177,000 as settlement for damages. That offer was rejected by Barclays. (v) That appears to have been the end of the negotiations and, after an unsuccessful attempt by Barclays to refer a preliminary point of law to the Royal Court, the arbitration finally commenced on 23rd April, 2012. As already indicated, evidence was heard over a total of 10 days with written submissions and oral submissions being heard thereafter. The Arbitrator summarised the effect of his Award by saying that JSSL's originally pleaded claim was for £479,138 whereas the Award resulted in a net award of £154,293 plus interest. 50. The Arbitrator then summarised the parties' respective submissions in relation to costs. Again, it is not necessary to set these out in detail. Essentially JSSL argued that it should be awarded all of its costs, with 50% being on the indemnity basis. It further submitted that, in default of the Arbitrator accepting its primary argument, no more than 15% should be deducted from a standard costs award in its favour, on the basis that JSSL had succeeded on the substantive issues of the strong-room and the diminution in value of the landlord's reversion. 51. The reason for arguing for 50% of its costs on an indemnity basis was that Barclays had denied any liability at all on the basis that the 2008 letter constituted a surrender and re-grant of the 1982 lease with the result that all the repairs pre-dated that date and were therefore outside the terms of the lease, that the notice given by JSSL to remove the strong-room had not been validly served, and that there had been no diminution in value of the Demised Premises. Barclays had either lost or abandoned all three of these arguments. JSSL also argued that it should not be penalised for its refusal to mediate on the basis that it had been reasonable for it to reach that decision. 52. Barclays submitted that it should pay JSSL's costs up to 25th May, 2011, on the standard basis but that thereafter JSSL should pay Barclays' costs on an indemnity basis. This was because JSSL had unreasonably refused to entertain mediation which was proposed on 25th May, 2011, or even sensibly engage in negotiations; and that in addition the Award did not substantially beat the offer of 16th March, 2011, of £120,000 plus costs. As a fall-back position, Barclays submitted that each party should bear its own costs. This was on the basis that JSSL had in fact lost on a number of individual claims and that much of the time had been spent on such matters, that JSSL's claim had been grossly inflated and that it had refused to engage in mediation. 53. The Arbitrator reminded himself of the principles to be applied on an award of costs. He summarised the effect of the decisions in *Watkins-v-Egglishaw*

[2002] JLR 1 , and *Pell Frischmann-v-Beau Valley*

[2007] JLR 479 . He also referred to *Café de Lecq Limited-v-R A Rossborough*

[2012] JRC 154 and *Bespoke Investments Limited-v-Lincoln Nominees Limited*

- [2005] JRC 098 on the significance of a refusal to enter mediation when considering issues of costs. 54. Having set out the principles, the Arbitrator concluded that this was not a case for indemnity costs in either direction. He also held that the refusal by JSSL to mediate was not unreasonable. He gave as his reasons that:- "(a) The subject matter of the dispute was extremely technical and is unlikely to have resulted in a successful outcome.
- (b) The offer to mediate came quite late in the day and because of the nature of the dispute is unlikely to have resulted in a saving of costs and would have also resulted in an unacceptable delay in the final resolution of the dispute." 55. He went on to hold that, in relation to evidence as to the valuation of the diminution in the reversion, that aspect had taken up two days and, on the basis that JSSL had been entirely successful on this point, Barclays should pay the costs on the standard basis of that aspect. As to the remainder, he accepted that JSSL had pleaded its claim in such a way that it was exaggerated and also was confused and confusing. He felt this was not such an extent that he should deprive JSSL of its costs but he should make a reduction of 15%. He therefore awarded JSSL 85% of its costs on the standard basis. Barclays' contentions 56. Advocate Benest argued that the Arbitrator erred in law in his reasons for not finding that JSSL's failure to mediate was unreasonable. The fact that a dispute was complicated or technical did not make it unsuitable for mediation or render a refusal to mediate reasonable. He submitted that the Arbitrator failed correctly to apply the principles established in *Bespoke* and the cases referred to in the judgment in that case. 57. Alternatively, Advocate Benest contended that the decision on costs was one to which no reasonable arbitrator could come. The fact that a mediation is suggested at a relatively late stage in proceedings is not necessarily a ground for holding that a refusal to mediate is reasonable. In any event, the Arbitrator was wrong on the facts to state that mediation was only suggested at a late stage. Barclays first proposed mediation in May 2011 which was at a relatively early stage in the proceedings. The arbitrator had also failed to take account of the other grounds put forward by Barclays in its submission on costs, namely the exaggerated and confused nature of JSSL's claim, the fact that JSSL had lost on a substantial number of individual issues and the fact that it had only just beaten the offer by Barclays. Discussion 58. As already stated, an appeal lies only on a question of law. The meaning of that phrase was explained in the well-known passage from the judgment of Lord Radcliffe in *Edwards-v-Bairstow*
- [1955] 3 All ER 48 at 53 as follows:- "If the case contains anything *ex facie* which is bad law and which bears on the determination, it is, obviously, erroneous in point of law. But without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been an error in point of law." 59. Thus, as Lord Diplock said in the passage quoted at para 19 above, the Court must consider whether the arbitrator misdirected himself in law or whether his decision was one which no reasonable arbitrator could reach. 60. There is no criticism by

Barclays of the Arbitrator's summary of the applicable principles on matters of costs. These are to be found in the well-known passages from *Watkins-v-Egglishaw*

[2002] JLR 1 at para 7 -9 and have recently been affirmed by the Court of Appeal in *Flynn-v-Reid*

[2012] JCA 169 at paras 13 - 14. 61. The relevance of a refusal to mediate has also been considered by the courts of this jurisdiction. The leading authorities are *Bespoke Investments Limited-v-Lincoln Nominees Limited*

[2005] JRC 098 and *Café de Lecq Limited-v -R A Rossborough*

[2012] JRC 154 . 62. In *Bespoke* , having referred to observations by Lightman J in *Hurst-v-Leeming*

[2003] 1 Lloyds Rep 379 and of Dyson LJ in *Halsey-v-Milton Keynes General NHS Trust*

[2004] 4 All ER 920 at 927, *Bailhache, B* summarised the position as follows at paragraphs 9 and 10:- "9. The fundamental principle in determining whether or not to penalise a party in costs for refusing to engage in mediation is whether the successful party acted unreasonably in so doing. The question whether mediation had a realistic prospect of success is a factor in that equation, but only one of several. The character of the litigants may be relevant. The costs to be incurred in preparing for mediation may be disproportionate to the costs of preparing for trial, particularly if the offer to mediate is made at a late stage proceedings. Again, if mediation is proposed late in the day, there may well be an unacceptable delay in the final resolution of the dispute. All these matters are to be taken into account.

10. Having said all that, it must be borne in mind by all litigants and their counsel that mediation is often a cost-effective and appropriate way to resolve disputes. It is the duty of legal advisers to consider routinely whether or not mediation may be a suitable means of brokering differences between persons in dispute. It is one of the most useful tools in the kitbag." 63. It is also the case that beating a payment in or an offer made without prejudice as to costs is not necessarily conclusive as a factor in leading to an order for costs in favour of the successful party (as Page Commissioner said at paragraph 17 of his judgment in *Pell Frischmann*

[2007] JLR 479) although it will invariably be a highly material consideration. 64. In my judgment, the Arbitrator's decision on costs discloses no error of law. He summarised the relevant cases accurately and then went on to ask himself the correct question, namely whether the refusal by JSSL to mediate was unreasonable. He concluded on the facts that it was not and gave his reasons as summarised at paragraph 53 above. I do not accept Advocate Benest's submission that the Arbitrator was deciding as a matter of principle that, because the subject of a matter was extremely technical, it was therefore unsuitable for mediation. His reference to the subject matter being extremely technical was in the context of his view that it was unlikely to have resulted in successful outcome in this particular case. The trial judge or arbitrator is in the best position to assess that matter. He

has the feel of the case and will have seen how the parties case developed at trial. He will be in the best position to assess whether mediation would have been likely to have been successful or not and whether a party acted reasonably or unreasonably in refusing to engage in mediation. I can detect no error of legal principle on the part of the Arbitrator; this was merely a fact specific decision as to whether the refusal to mediate by JSSL, on the particular facts of this case, was unreasonable or not. 65. As to whether his decision on costs was a decision to which no reasonable arbitrator could come, I do not think Barclays have come anywhere near meeting this high threshold. I accept that another arbitrator might have given a greater discount because of the exaggerated nature of JSSL's claim and its failure on a substantial number of issues and another arbitrator might have reached a different view in relation to the refusal to mediate. But that is the essence of a discretionary decision; and by going to arbitration, the parties accept that they will be bound by the arbitrator's decision. An appeal can only be brought if a decision is so outside the band of reasonableness that no reasonable arbitrator, applying the correct principles, could have reached that decision. The fact remains that JSSL was successful and was awarded more than Barclays had offered. In my judgment the Costs Award was well within the bounds of reasonableness and accordingly the Arbitrator cannot be said to have erred in law. 66. For these reasons I similarly dismissed Barclays' application for leave to appeal against the Arbitrator's decision on costs. 67. As to the costs of this application, one possible order might have been that Barclays should be awarded its costs on the standard basis of JSSL's application for leave to appeal and JSSL should be awarded its costs on a similar basis in relation to Barclays' application for leave to appeal. However, this would involve two sets of taxation and the incurring of further costs where the parties have already incurred very substantial legal fees. Both counsel very sensibly accepted that a more appropriate order in this particular case would be to make no order as to costs, which is the order I made. Authorities Arbitration (Jersey) Law 1998. Pioneer Shipping Limited-v-BTP Tioxide Limited [1982] AC 724. Le Gros-v-Housing Committee

[1974] JJ 77 . Olcott Investment Limited-v-Mark Amy Limited

[1998] JLR 62 . Dowding and Reynolds, Dilapidations; The Modern Law and Practice 4th Edition. Snell-v-Beadle

[2006] JCA 164 . Joyner-v-Weeks

[1891] 2QB 31 . Landlord and Tenant Act 1927. Ruxley Electronics & Construction Limited-v-Forsyth

[1995] 3 All ER 268 . Watkins-v-Egglishaw

[2002] JLR 1 . Pell Frischmann-v-Beau Valley

[2007] JLR 479 . Café de Lecq Limited-v-R A Rossborough

[2012] JRC 154 . Bespoke Investments Limited-v-Lincoln Nominees Limited

[2005] JRC 098 . Edwards-v-Bairstow

[1955] 3 All ER 48 . Flynn-v-Reid

[2012] JCA 169 . Hurst-v-Leeming

[2003] 1 Lloyds Rep 379 . Halsey-v-Milton Keynes General NHS Trust

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