Case No: HT-2018-000038

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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION UNDER SECTION 69
OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION CLAIM

Before: The Hon. Mrs Justice O'Farrell

Between:

KNBY LND PR1 LIMITED — Claimant/ Applicant

- and –

1-3 UPPER JAMES STREET LIMITED — Defendant/ Respondent

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Paper application determined without a hearing
in accordance with CPR PD62

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UPON the application by the claimant for permission to appeal on a point of law arising out of the award of Mr Andrew Crease FRICS dated 15 December 2017

HAVING READ the arbitration claim form issued on 11 January 2018, the witness statement of Lewis Mark Brassey dated 11 January 2018 with exhibits, the defendant's response and the skeleton arguments of both parties

IT IS ORDERED that:

1. Permission to appeal is refused.

2. The claimant shall pay the defendant's costs of responding to the applications, such costs to be summarily assessed on paper if not agreed.

Dated: 18 April 2018

Brief reasons:

3. This is an application by the claimant, KNBY LND PR1 Limited, for permission to appeal on a point of law arising out of an arbitration award dated 15 December 2017 ("the Award") made by Mr Andrew Crease, FRICS ("the Arbitrator") pursuant to section 69 of the Arbitration Act 1996 ("the Act").

4. The application is opposed by the defendant, 1-3 Upper James Street Limited, on the ground that the decision of the arbitrator is not obviously wrong and it is not just and proper in all the circumstances for the Court to determine the question.

5. This matter concerns the rent review provisions in a lease of restaurant premises at 1-3 Upper James Street, London W1, granted by the defendant to the claimant.

6. The parties were unable to agree on the rent of the premises to be determined as at 25 March 2017. An application was made to the RICS and, on 24 May 2017, the Arbitrator was appointed.

7. On 15 December 2017 the Award was made, directing that the rent payable was £612,250 per annum. The valuation was based in part on an assumption that the premises were fully fitted out at no cost to the tenant. That assumption gave rise to a 10% uplift in the valuation of £56,544.

8. On 11 January 2017 the claimant issued an Arbitration Claim Form, seeking permission to challenge the Award by appeal on a point of law.

9. Section 69 of the Act provides:

> (1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings…
>
> (2) An appeal shall not be brought under this section except –
>
> (a) with the agreement of all the other parties to the proceedings, or
>
> (b) with the leave of the court…
>
> (3) Leave to appeal shall be given only if the court is satisfied –
>
> (a) that the determination of the question will substantially affect the rights of one or more of the parties,
>
> (b) that the question was one which the tribunal was asked to determine,
>
> (c) that, on the basis of the findings of fact in the award-
>
> (i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

10. It is common ground that the determination of the question of law identified in the application will substantially affect the rights of both parties and that the question was one which the Arbitrator was asked to determine. However, the defendant disputes that the decision of the Arbitrator was obviously wrong or that it is just and proper in all the circumstances for the Court to determine the question.

11. The assumptions set out in the lease include the following at Schedule 4:

> "1.3.4 That the premises are available to let by a willing landlord to a willing tenant by one lease without a premium being payable by the willing tenant and with vacant possession and that the Tenant would be such a willing tenant (but not so as to exclude others from being a willing tenant).
>
> 1.3.5 That at no expense to the willing tenant the premises are ready for and fitted out and equipped for immediate occupation and use for the purpose or purposes required by the willing tenant referred to in paragraph 1.3.4.
>
> …
>
> 1.3.8 that such willing tenant referred to in paragraph 1.3.4 has received in full and has already enjoyed completely the equivalent benefit of any concessionary rent free period or other inducement that a willing landlord might grant or give to a willing tenant for the purpose of fitting out the premises for its intended use."

12. The claimant's case in the arbitration was that paragraph 1.3.5, properly construed, required the Arbitrator to disregard the value of fitting out for use as a restaurant. Arguments included the general expectation that a tenant's fixtures and fittings which might lawfully be removed at the end of the term would not be taken into account, the demised premises excluded the tenant's fixtures and fittings, and the purpose of paragraph 1.3.5 was simply to preclude reliance by the tenant on a discount to reflect the need for fitting out: *Ocean Accident and Guarantee Corporation v Next* [1996] 2 EGLR 84.

13. The defendant's case in the arbitration was that the demised premises were required to be valued as fully fitted out and not as a mere shell, based on the express provisions of Schedule 4. Arguments included reliance on the required assumption in paragraph 1.3.5 that the fitting out had been carried out at no expense to the tenant, and submission that the decision in *Ocean Accident* could be distinguished because in that

case there was no required assumption that such works were carried out at no cost to the tenant.

14. The Arbitrator accepted the defendant's submissions that the express words used in paragraph 1.3.5 required the premises to be valued for rent review purposes on the assumption that all fitting out works had been carried out at no cost to the tenant. He considered that this formulation differed from the provision considered in *Ocean Accident* and therefore that decision was not applicable.

15. The claimant submits that the Arbitrator erred in law (i) in finding that paragraph 1.3.5 required a 'fully fitted out' assumption to be made and (ii) in relying on a passage from the Handbook of Rent Review, for the reasons set out in its case in the arbitration.

16. It is not for this Court to determine whether the decision was correct as a matter of law. Having regard to the express words used in paragraph 1.3.5, it was clearly open to the Arbitrator to find that the rent review provision contained an assumption that all fitting out works had been carried out at no cost to the tenant. The words used in the provision under consideration in *Ocean Accident* differed from the words used in paragraph 1.3.5. The reference to the passage in the handbook added little to the analysis. The determination was not obviously wrong.

17. It follows that it would not be just and proper for the Court to determine the question.

18. For those reasons the application for permission to appeal pursuant to section 69(2) of the Act is refused.