[1991–92 Gib LR 321]

TARACHAND AND COMPANY LIMITED v. M. SERUYA, STYCH (Executrices of the Will of M. SERUYA), DOMSULI LIMITED and SERUYA HOLDINGS LIMITED

SUPREME COURT (Kneller, C.J.): June 3rd, 1992

Arbitration—award—setting aside award—extension of time—21-day time-limit for application to set aside may be extended if delay adequately explained, application arguable on merits, and no prejudice to respondent

Arbitration—award—setting aside award—award final unless error on face of record, misconduct of arbitration, or case stated on legal question—misconduct is personal turpitude or mishandling of proceedings causing miscarriage of justice, not mistake of fact, misunderstanding submissions or self-contradiction—question of law includes no evidential basis for award but not incomplete factual summary—duty to construe in favour of preserving award

Landlord and Tenant—rent—rent review—arbitrator's assessment—new business rent assessed on hypothetical open-market letting on terms of existing lease and to reflect current financial changes—to take account of provision for future reviews, tenant's intended use, and (if few comparators) business profitability

Landlord and Tenant—rent—rent review—arbitrator's assessment—if rent review clause requires fixing of reasonable rent for property, objective assessment, based on all circumstances except particular

parties' characteristics—if clause merely requires fixing rent in default of agreement, subjective assessment, including parties' circumstances, e.g. expenditure on property

Arbitration—powers and duties of arbitrator—exercise of professional judgment—may use own expert knowledge as evidence but may not rely on knowledge of special facts relevant to particular case without disclosure to parties

The plaintiff applied to set aside a rent review award made by an arbitrator.

The defendant leased business premises to the plaintiff for a term of 12 years at an annual rent of £12,000, with a rent review every three years. The parties were unable to agree on a revised rent after three years and therefore placed the matter before an arbitrator in accordance with the terms of the lease. The rent was to be assessed as if the buildings were being let with vacant possession.

The arbitrator considered two valuations submitted by each party and other documentary evidence. He treated the comparable rents submitted by the parties as general indicators only, as they had not been agreed with vacant possession. He referred to lettings in a building to which the parties had not referred in their submissions and on which they had had no chance to comment. He was also under a false impression as to the basis on which the premises in this other building were let. He mentioned the size and condition of the premises, and considered the parties' submitted ranges of value for the market rental. He referred to the criteria for assessment required under the lease. He fixed the rent at £21,300, a figure almost £6,000 above that offered by the tenant and only £300 below the landlord's offer.

The tenant's managing director complained to his solicitors and they discussed the possibility of appealing, but his solicitor did not warn him that the time-limit for doing so was due to expire. He was unable to arrange an appointment with his solicitor to discuss the matter further. He received a letter from the solicitor confirming the award. He consulted other solicitors and then demanded a meeting with his instructed solicitors, believing that his appeal had been lodged. No meeting took place and he received a letter requesting payment of the arbitrator's fees, solicitor's fees and rent arrears. He then received a notice from the defendant to forfeit the lease if he did not pay the new rent and sign a memorandum recording it within a week.

The tenant's managing director instructed new solicitors and paid the arrears of rent. The first solicitors denied that he had instructed them to appeal, stating that he had agreed he would negotiate with the defendant's principal and revert to them later. The managing director denied being informed of the implications of appointing an arbitrator, and said he had been given no opportunity to influence the choice of appointee.

The tenant applied, on the grounds of its solicitor's failure promptly to

advise it and to lodge an appeal, for an extension of time to apply to set aside the arbitrator's award under the Arbitration Ordinance.

Held, ruling as follows:

(1) Under O.73, r.5 of the Rules of the Supreme Court, the time in which to apply to remit or set aside an arbitral award, under ss. 19 or 20 of the Ordinance, or to have it declared void on the grounds of the arbitrator's conduct, was 21 days from the publication of the award by notifying the parties. That time could be extended before or after the expiration of the time-limit for the service of the appropriate summons. The applicant had to give an adequate explanation for his delay and to persuade the court that the application to remit or set aside had merit and that an extension would not prejudice the respondent. An extension might be conditional as to costs (paras. 21–22).

(2) The tenant would be given an extension of time to apply to set aside the award. Its delays in applying to set aside the award and for an extension of time (two and three months respectively) were not excessive and were adequately explained by the confusion between the tenant and its first solicitor as to what steps were to be taken. The second solicitor applied within 21 days of receiving the papers to set aside the award. Since the tenant had paid the new rent from the date specified by the arbitrator, the landlord would suffer no prejudice from an extension of time, and the tenant had an arguable case on the merits that the arbitrator had taken into account inaccurate information about other lettings without giving the parties an opportunity to comment (paras. 34–40).

(3) The arbitrator's award was final and binding unless there was an error on the face of the record, the arbitrator was guilty of misconduct or a special case was stated on a point of law. Misconduct could involve personal turpitude on the arbitrator's part, or the mishandling of the proceedings amounting to a substantial miscarriage of justice. It might include a refusal to hear material evidence but did not cover a mistake of fact, failure to understand the parties' submissions, or inconsistencies in his award. A special case could be stated if the record of factual evidence did not support the award, but an incomplete summary of the facts was not a question of law. The court had a duty to construe the award in the manner most favourable to its preservation (paras. 23–27).

(4) The arbitrator had to assess the new rent on the basis of a hypothetical letting on the open market on the terms of the actual lease save for the rent payable before the review date. The assessment should reflect changes in the value of money and the real increase in the value of property. Provision for future rent reviews had to be taken into account. The tenant's intended use would be considered and, if there were few other comparable undertakings from which to deduce open market rents, the business's profitability. If the rent review clause specified that a reasonable rent for the premises should be set, the arbitrator's decision would be an objective one based on all the circumstances relating to the

premises, including the terms of the lease, except the characteristics of the particular parties. If it provided merely that the rent should be fixed by an arbitrator in default of agreement by the parties, the rent would be assessed subjectively according to the parties' own circumstances such as their expenditure on the property (paras. 29–32).

(5) The arbitrator was at liberty to rely on his own expert knowledge as evidence but, under the rules of natural justice, could not rely on his knowledge of special facts relevant to the particular case without disclosing to the parties that he was doing so. Accordingly, the arbitrator could rely on his general knowledge of comparable rents in the area, but had to disclose his reliance on any particular comparator (para. 33).

(6) The court would not set aside the arbitrator's award. He had been appointed by the parties' solicitors and they were bound by his decision. His reference to the nearby building and the terms under which he believed it was let had been made in passing, as a comment on the parties' failure to include it in their submissions. It did not form the basis for his award and he had not stated the rental value of that building. He had considered the ranges of rental values submitted to him and rejected the tenant's submissions because they did not comply with the assessment criteria under the lease. He had expressly taken into account all the evidence before him. The tenant's application would be dismissed with costs to the landlord (paras. 42–46).

Cases cited:

(1) *Adams* v. *Great N. of Scotland Ry. Co.*, [1891] A.C. 31, referred to.
(2) *Associated Properties Ltd.* v. *Cecil Co. Ltd.*, Supreme Ct., Cause No. 1988–A–103, September 28th, 1989, unreported, considered.
(3) *Barton (W.J.) Ltd.* v. *Long Acre Secs. Ltd.*, [1982] 1 W.L.R. 398; [1982] 1 All E.R. 465, applied.
(4) *Bates (Thomas) & Son Ltd.* v. *Wyndham's (Lingerie) Ltd.*, [1981] 1 W.L.R. 505; [1981] 1 All E.R. 1077, applied.
(5) *Beer* v. *Bowden*, [1981] 1 W.L.R. 522n; [1981] 1 All E.R. 1071, applied.
(6) *British Gas Corp.* v. *Universities Superannuation Scheme Ltd.*, [1986] 1 W.L.R. 398; [1986] 1 All E.R. 978, applied.
(7) *Clark (James) (Brush Materials) Ltd.* v. *Carters (Merchants) Ltd.*, [1944] K.B. 556; (1944), 77 Ll. L. Rep. 364, applied.
(8) *Compania Maritima Zorroza S.A.* v. *Maritime Bulk Carriers Corp. (The Marques de Bolarque)*, [1980] 2 Lloyd's Rep. 186, applied.
(9) *Cook Intl. Inc.* v. *B.V. Handelmaatschappij Jean Delvaux*, [1985] 2 Lloyd's Rep. 225; [1985] T.L.R. 238, applied.
(10) *Foley* v. *Classique Coaches Ltd.*, [1934] 2 K.B. 1; [1934] All E.R. Rep. 88, applied.
(11) *Fox* v. *Wellfair (P.G.) Ltd.*, [1981] 2 Lloyd's Rep. 514; [1981] Com. L.R. 140, applied.
(12) *G.K.N. Centrax Gears Ltd.* v. *Matbro Ltd.*, [1976] 2 Lloyd's Rep. 555; (1976), 120 Sol. Jo. 401, applied.

(13) *Harewood Hotels Ltd.* v. *Harris*, [1958] 1 W.L.R. 108; [1958] 1 All E.R. 104, applied.
(14) *Hartley (R.S.) Ltd.* v. *Provincial Ins. Co. Ltd.*, [1957] 1 Lloyd's Rep. 121, applied.
(15) *Ismail* v. *Polish Ocean Lines (The Ciechocinek)*, [1977] 2 Lloyd's Rep. 134, *dicta* of Mocatta, J. applied.
(16) *Lear* v. *Blizzard*, [1983] 3 All E.R. 662; (1983), 268 E.G. 1115, applied.
(17) *M.F.I. Properties Ltd.* v. *B.I.C.C. Group Pension Trust Ltd*., [1986] 1 All E.R. 974; [1986] 1 E.G.L.R. 115, applied.
(18) *Oleificio Zucchi S.p.A.* v. *Northern Sales Ltd.*, [1965] 2 Lloyd's Rep. 496, applied.
(19) *Pearl Assur. PLC* v. *Shaw*, [1985] 1 E.G.L.R. 92; (1984), 274 E.G. 490, applied.
(20) *Ponsford* v. *H.M.S. Aerosols Ltd.*, [1979] A.C. 63; [1978] 2 All E.R. 837, applied.
(21) *Ransom (Inspector of Taxes)* v. *Higgs*, [1973] 1 W.L.R. 1180; [1973] 2 All E.R. 657, applied.
(22) *Southport Properties Ltd.* v. *Fabri Constr. Ltd.*, Supreme Ct., Cause No. 1988–S–115, November 21st, 1989, unreported, considered.
(23) *Tersons Ltd.* v. *Stevenage Dev. Corp.*, [1965] 1 Q.B. 37; [1963] 3 All E.R. 863, applied.
(24) *Universal Cargo Carriers Corp.* v. *Pedro Citati (No. 1)*, [1957] 1 W.L.R. 979; [1957] 2 Lloyd's Rep. 191, *dicta* of Parker, L.J. applied.
(25) *Williams* v. *Wallis & Cox*, [1914] 2 K.B. 478; (1914), 78 J.P. 337, applied.

Legislation construed:

Arbitration Ordinance, s.2(1):
"In this Part, unless the context otherwise requires,—
'the court' means the Supreme Court."

s.6: "An arbitration agreement, unless a contrary intention is expressed therein, shall be deemed to include the provisions set out in Schedule 1 . . ."

s.19(1): "In all cases of reference to arbitration the court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire."

s.20(2): "Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the court may set aside the award."

Schedule 1, art. 6: "The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively."

Rules of the Supreme Court, O.73, r.5(1): The relevant terms of this paragraph are set out at para. 21.

r.5(5): The relevant terms of this paragraph are set out at para. 21.

H.K. Budhrani for the tenant;
A. Serfaty for the landlords.

1 **KNELLER, C.J.:** Tarachand & Co. Ltd. ("the tenant") applied to the court to extend the time for making an application to set aside the award because its previous solicitors had failed to do so in time or at all although thus instructed by the tenant. It applied, further, to set aside the award made between it and Magdalena Seruya and Frances Stych (executrices of the will of Mark Seruya, deceased), Domsuli Ltd. and Seruya Holdings Ltd. ("the landlords"), by John Brian Francis ("the arbitrator"), on the ground that he misconducted himself or the proceedings by receiving and acting upon evidence relating to the letting of premises between third parties at Centre Plaza, in the absence of the tenant or anyone representing it. The landlords opposed the summons and the motion.

2 The landlords demised the premises at No. 171 Main Street to the tenant by a lease dated August 31st, 1988. The holding included a shop, two stores behind it and an office. This was for a term of 12 years from July 1st, 1986, at an annual rent of £12,000 for the first three years, and for each period of three years thereafter at rents determined in accordance with the provisions of the Schedule to the lease. The rent was therefore £1,000 a month.

3 At the end of the first three years the rent came up for review and the parties discussed it, hoping to settle it. Had they done so, the tenant was to pay the new rent from July 1st, 1989. They did not reach any agreement because the landlords demanded £1,800 a month and the tenant offered £1,300 and neither would budge, so at the end of the year, in accordance with the terms of the Schedule, their solicitors put the matter before the arbitrator, Mr. Francis, in a letter dated October 30th, 1990.

4 He was to act as sole arbitrator and conduct the arbitration in accordance with the provisions of the Arbitration Ordinance and the "*Guidance Notes for Surveyors acting as Arbitrators or as Independent Experts on Rent Reviews*," issued by the Royal Institute of Chartered Surveyors. Each party was permitted to submit two valuations and any other relevant documentary evidence by December 5th, 1990. They were to exchange written submissions by December 6th and cross-representations by December 19th. The arbitrator would publish his award by January 4th, 1991. He published it on January 15th.

5 The arbitrator determined that the tenant should pay the landlord £21,300 a year as rent for the three years from July 1st, 1989, which is an

increase of £9,300 a year. He referred in his award to lettings by other landlords and tenants in another building, Centre Plaza, to which the tenant and landlord, their valuers and solicitors had not referred and had had no opportunity to comment on.

6 Furthermore, the arbitrator believed that Centre Plaza was let with vacant possession and that the lessors were paid premiums for the lettings, whereas, in fact, Centre Plaza had been recently demolished and reconstructed and the shops on the ground floor re-let to the sitting tenants according to their entitlement under s.49(2)(*a*)(i) of the Landlord and Tenant Ordinance. The tenant's valuer and solicitor would have told the arbitrator all that, had they been invited to comment on or make submissions in respect of the lettings at Centre Plaza.

7 Mr. Robert Canepa, a director of one of the landlords, told the tenant's managing director, Mr. Moti Tarachand Viroomal, at the end of January 1991, that the arbitrator had fixed the tenant's rent at £1,775 a month. Mr. Viroomal says that was the first he knew of the award. Mr. Viroomal asserts that he telephoned his solicitor the next morning, who asked him to come and see him. They met on some date in February and his solicitor confirmed that the tenant's rent for the next three years was £1,775 a month. Mr. Viroomal said it was excessive and represented an increase of more than 77%. (His second solicitor estimates it at 77.5%). It was £25 a month less than the rent the landlord had demanded, and, in Mr. Viroomal's words, constituted "a token reduction." "Was it worth my while going to arbitration with the cost of valuers, solicitors and an arbitrator, for a rent of £25 a month less than that demanded by the landlords?" Mr. Viroomal recalls asking his solicitor—rhetorically, I think.

8 They discussed the possibility of an appeal but the solicitor did not warn him that the time for appealing had almost passed. Mr. Viroomal asked his solicitor for photocopies of the award, valuations and representations and received them all, save for the valuations, several days later, but only after many telephone calls. Mr. Viroomal considered the documents his solicitor sent him and then tried to meet him, but he was not available for several days and one appointment had to be deferred. It was made quite clear to the solicitor's staff that Mr. Viroomal wished to appeal and must see the solicitor without delay. The solicitor wrote to the tenant on February 21st, stating that the arbitrator had fixed the new rent from July 31st, 1989 at £21,300 a year and details of the award would follow soon. Mr. Viroomal described that letter as a "most unhelpful" one.

9 Mr. Viroomal replied on February 27th and complained that he had not been advised that an arbitrator would determine the new rent and therefore had had no opportunity to express any preference in the

appointment of one. The tenant's next solicitor was told by Mr. Viroomal that the first had advised him that the lease contained provisions for arbitration if the parties could not agree on the rent, but Mr. Viroomal, according to the second solicitor, would not have agreed to the appointment of a practising estate agent who was bound to favour the landlords and award a higher, rather than a lower rent. Moreover, Mr. Viroomal was never asked for his views on the valuations. The landlords knew the result a fortnight before the tenant did. It had been difficult to contact the solicitor or obtain all the material for deciding on whether to appeal.

10 Mr. Viroomal demanded a meeting with the solicitor before the end of the month, at which he expected to be told that the tenant's appeal against the arbitrator's decision had been lodged and the solicitor wished to continue to act for it. The solicitor's next letter crossed with Mr. Viroomal's and asked him to make out cheques for the fees of the arbitrator, the tenant's solicitor and the arrears of increased rent. There was no meeting between Mr. Viroomal and the tenant's solicitor, but Mr. Viroomal believed that the tenant's appeal had been lodged because there was no indication to the contrary.

11 He was upset when he received a letter dated March 22nd from the landlords' solicitor enclosing a notice, under s.14 of the Conveyancing and Law of Property Act 1881, to forfeit the lease on the grounds of failure to pay the additional rent and failure to sign a memorandum recording the new rent, if either were not done by March 28th. Mr. Viroomal realized then that the tenant's solicitor had not lodged an appeal and went to another solicitor on March 25th, who wrote to the first solicitor for all the relevant papers and adumbrated all Mr. Viroomal's complaints. On the same day, March 25th, the tenant's first solicitor wrote to the tenant advising it to sign the memorandum or pay the arrears of the increased rent demanded by the landlords' notice.

12 The tenant's first solicitor wrote to the second on March 26th with the tenant's papers. He added that Mr. Viroomal had agreed to the appointment of the arbitrator and to pay half his fee of £800. Mr. Viroomal had discussed his valuer's report at great length. He had been told by his first solicitor of the arbitrator's award when it was received and Mr. Viroomal had expressed his dissatisfaction with it, and so they had discussed the possibility of an appeal. Mr. Viroomal had added that the landlords' Mr. Robert Seruya had offered to reduce the new rent if the tenant's Mr. Viroomal would exchange a store for alternative accommodation on the first floor. It had then been agreed that Mr. Viroomal would carry on his negotiations with Mr. Robert Seruya and return to the first solicitor later. Finally, Mr. Viroomal had been able to see his first solicitor at any time with or without an appointment.

13 The second solicitor wrote to the landlords' solicitors on March 27th with the tenant's cheque for the arrears of rent, adding that payment was made without prejudice to the applications to be made by the tenant to enlarge the time prescribed by the Rules of the Supreme Court, O.73 for the arbitrator's award to be remitted and for the application itself under s.19 of the Arbitration Ordinance. The tenant hoped the signing of the memorandum recording the new rent could be held in abeyance. The landlords' solicitors acknowledged receipt of the cheque but warned that the application to extend the time for applying to challenge the award would probably be resisted strongly, as indeed it was.

14 The second solicitor wrote to the first on April 9th saying that Mr. Viroomal recalled discussions relating to the report of the tenant's valuer and indicating what rent should be offered, but did not remember any mention of the appointment of the arbitrator. There then follows Mr. Viroomal's refutation of any discussion of the award when it was made or the possibility of an appeal, and so on and so forth.

15 The tenant has paid the new rent fixed by the arbitrator, so, it is claimed, the landlords would suffer no prejudice if the time to apply under s.19 of the Ordinance to have the award set aside under O.73, r.5 were extended. The grounds for having the time extended were expressed to be the neglect of the first solicitor who: (a) failed to tell the tenant of the arbitrator's award until the time for applying to have it set aside had nearly passed; (b) failed to reply promptly or at all to the tenant's numerous calls for details of the arbitration proceedings and the possibility of an appeal; (c) failed to lodge an appeal in time or at all despite repeated and unequivocal instructions; and (d) failed to tell the tenant its instructions to appeal had been ignored.

16 On May 29th, 1991 the court ruled that the tenant should serve both its summons and notice of motion on the arbitrator within seven days, and gave the arbitrator leave to file an affidavit within 14 days of service. The matter was to be set down for further hearing on a date to be fixed by the Registrar on application by either party, and the costs of and occasioned by the directions were reserved. There was no application thereafter for the matter to be re-listed.

17 The arbitrator was duly served but did not file an affidavit, and his solicitors have told the landlords' solicitors that he does not wish to do so. They, in turn, asked the Registrar by letter in April 1992 if the court wished to hear the parties' counsel, to which the answer was "No." The court regrets not having fixed a date for the further hearing in, say, June 1991, instead of leaving it to the parties to apply for it.

18 It is time to set out the main features of the award. The arbitrator noted that the parties agreed upon the description and area of the premises

and the effective date, which was July 1st, 1989. He rejected the landlords' submission that it was thereafter for the next nine years, which was when the lease expired, and accepted that it was for the succeeding three years, because although cl. 2.4 of the Schedule could be interpreted in the way the landlords chose, there could not then be two subsequent three-year reviews in 1992 and 1995 and an assessment of rent for the next, which was not only irregular but entailed making certain assumptions about the growth (or otherwise) of rents well beyond the usual period of three years.

19 He treated the "comparables" submitted by the valuers for the parties as general indicators because they were, to the best of his knowledge, not agreed with vacant possession, which was stipulated in the rent review provisions in the Schedule. He continued thus:

> "In fact, one would tend to look at the Centre Plaza building situated only a few metres to the North, which was let around that time with vacant possession. However, one must make allowances for the rating relief benefit and for the fact that premiums have been paid.
>
> Leaving aside differences between size, location and condition, the reality is that there can rarely be a true comparable, for most rental evidence is in respect of the renewal of leases with sitting tenants. On the other hand, those with vacant possession are usually new premises, which invariably enjoy rating relief. My task, therefore, is to consider whether the ranges submitted by the respective valuers are reasonably representative of market value as specified under the terms of the lease.
>
> Looking at an overview of all the cases submitted, the tenant's valuer considers that the market rental range as at July 1989 fluctuated between £15 and £18 per square foot, overall. The landlord's valuer believes this to be between £21 and £24.11."

20 He went on to state that he had inspected the premises in question, accepted the tenant's valuer's reference to the depth of the shop, noted its drab appearance in contrast with the high-standard fittings of its prestigious neighbour—but which could be emulated by the tenant for its shop—and went on to consider what rent the premises with vacant possession would have fetched at the beginning of July 1989. He wound up with these phrases:

> "Having considered all the evidence before me, and taking into account all the relevant factors required under this arbitration, I am of the opinion that the market rental value of the premises as at the review date is nearer to the level submitted by the landlord's valuer than that of the tenant's valuer.

I accordingly award and hereby direct that the rent for the period July 1st, 1989 to June 30th, 1992 shall be £1,775 per month (£21,300 per annum).

I further direct that each party should pay his own costs and that the costs of the award shall be born equally by both parties"

21 I turn to the law. First come the provisions of the Rules of the Supreme Court relating to the time for applying and for serving a summons or notice to remit or set aside an award, namely "within 21 days after the award has been made and published to the parties": see O.73, r.5(1). It is the same for an application at common law for a declaration that an award is void on the grounds of the arbitrator's conduct: see *Cook Intl. Inc.* v. *B.V. Handelmaatschappij Jean Delvaux* (9). An award is made and published when the arbitrator gives notice to the parties that it is ready. If the application is founded on evidence by affidavit, "a copy of every affidavit intended to be used" must be served with the notice of originating motion, the originating summons or summons (O.73, r.5(5)). There are no relevant provisions in the Ordinance or any rule or regulation in force in Gibraltar, so O.73, r.5 applies in these matters.

22 The time for serving a summons or notice to remit or set aside an award may be extended by order of this court before or after the expiration of the 21 days, either before or after it has been served. This confers a discretion on the court which must be exercised judicially but is otherwise unfettered. Generally, however, time-limits should be observed, so the applicant should give a satisfactory explanation for the delay (the longer the delay the more difficult this will be) and persuade the court that the application to remit or set aside the award has merits and that extending the time will not prejudice the respondent: see *Ismail* v. *Polish Ocean Lines (The Ciechocinek)* (15) ([1977] 2 Lloyd's Rep. at 137–138, *per* Mocatta, J.); and *Compania Maritima Zorroza S.A.* v. *Maritime Bulk Carriers Corp. (The Marques de Bolarque)* (8) ([1980] 2 Lloyd's Rep. at 189). The applicant, in the words of Parker, L.J. in *Universal Cargo Carriers Corp.* v. *Pedro Citati (No. 1)* (24) ([1957] 2 Lloyd's Rep. at 195), "is, of course, at mercy, and stringent terms as to costs can be imposed . . ."

23 Secondly, comes the statute law. An award made by an arbitrator is final and binding unless a contrary intention is expressed in the agreement, according to s.6 and Schedule 1 of the Ordinance. The Supreme Court may set aside the award of an arbitrator, however, if, among other things, he has misconducted himself or the proceedings (see ss. 2(1) and 20(2)), or it can remit a matter for his reconsideration (s.19(1)). These are, as the word "may" indicates, matters of discretion.

24 Thirdly, the case law. No decision of a Gibraltar court was cited, although *Associated Properties Ltd.* v. *Cecil Co. Ltd.* (2) and *Southport*

Properties Ltd. v. *Fabri Constr. Ltd*. (22) should have been. Some English ones were laid before the court which seem, with respect, good law and apt for arbitrations in Gibraltar, since the sources for the Ordinance include three English Arbitration Acts. They are cited in *Associated Properties Ltd.* v. *Cecil Co. Ltd*. and they yield, in my view, these guidelines.

25 Misconduct means personal turpitude on the part of the arbitrator or a mishandling of the proceedings which amounts to some substantial miscarriage of justice, *e.g*. he refuses to hear evidence on a material issue: see *Williams* v. *Wallis & Cox* (25). It does not cover his failure to understand the parties' contentions or the contradictions and inconsistencies included in his award: see *Oleificio Zucchi S.p.A.* v. *Northern Sales Ltd*. (18).

26 Statute apart, the arbitrator's decision is final because the parties chose him; they usually select someone with special knowledge and experience in this class of business; they voluntarily submit their differences to him; they agree to accept his decision; and they expect a quick, cheap solution to their dispute. The finality of his decision is subject to three exceptions, namely, where (i) there is an error on the face of the award; (ii) the arbitrator has been guilty of misconduct; and (iii) a special case is stated on a question of law: see *Tersons Ltd.* v. *Stevenage Dev. Corp*. (23).

27 All questions of fact are within the sole domain of the arbitrator. He should set out accurately the relevant evidence supporting his conclusions so that a reasonable man can accept them as true. An incomplete summary of the facts is not a question of law, and a mistake of fact does not amount to misconduct. If the facts set out in the record reveal that there is no evidence to support the award, the aggrieved party should ask the arbitrator to pose it as a question of law in a special case: see *R.S. Hartley Ltd*. v. *Provincial Ins. Co. Ltd*. (14); *G.K.N. Centrax Gears Ltd.* v. *Matbro Ltd*. (12); and *Ransom (Inspector of Taxes)* v. *Higgs* (21).

28 The sanctity of arbitrators' awards is such that it is the duty of the court to look at them in the way most favourable to their preservation: see *James Clark (Brush Materials) Ltd.* v. *Carters (Merchants) Ltd*. (7) ([1944] K.B. at 568, *per* Tucker, L.J.). So much is this so that the general rule is that the parties cannot object to an award if it includes an error of law or fact: see *Adams* v. *Great N. of Scotland Ry. Co*. (1).

29 When it comes to rent review clauses and their interpretation, the English authorities yield these guidelines: Such a clause enables the landlord to obtain, from time to time, the market rental which the premises would command if let on the same terms on the open market at the review date. Thus, the rent payable is adjusted to reflect changes in

the value of money and the real increase in the value of property during a long term. An arbitrator should fix the rack rent on the basis of a hypothetical letting on the terms of the actual lease but excluding the rent actually quantified and payable before the review date. If the terms include provisions for future rent reviews the arbitrator must take them into account or else he would be taking into account a factor which did not exist and the result would probably be a 20% or more higher rent and a windfall for the landlord: see *M.F.I. Properties Ltd.* v. *B.I.C.C. Group Pension Trust Ltd.* (17); and *British Gas Corp*. v. *Universities Superannuation Scheme Ltd.* (6).

30 The terms of the rent review clause are important. Thus, if they are "a reasonable rent for the premises" it will be the rent at which those premises might reasonably be expected to be let on the open market by any landlord to any tenant. The arbitrator would take into account all the circumstances of the case, including the terms of the lease, its duration and who is responsible for what repairs. It would be assessed on an objective basis: see *Ponsford* v. *H.M.S. Aerosols Ltd.* (20).

31 If the phrase were "such rent as shall have been agreed between the parties or to be fixed by the arbitrator in default of agreement" then it would be assessed subjectively by the arbitrator. He would fix a fair rent for these premises for this particular landlord and this particular tenant. The circumstances he would take into account might cover the parties who built and paid for the premises and tenants' expenditure on improvements, if any: see *Foley* v. *Classique Coaches Ltd.* (10); *Beer* v. *Bowden* (5); *Thomas Bates & Son Ltd.* v. *Wyndham's (Lingerie) Ltd.* (4); and *Lear* v. *Blizzard* (16).

32 The use which the tenant is entitled to make of the demised premises should be taken into account: see *Pearl Assur. PLC* v. *Shaw* (19). This may make no difference if it is a shop with no peculiar features in a business area, because there would be plenty of comparable premises from which open market rents can be deduced and the tenant's accounts should not be looked at for the purpose of seeing what the lessee could afford to pay: see *Harewood Hotel Ltd*. v. *Harris* (13) ([1958] 1 All E.R. at 110, *per* Romer, L.J.). If it were a theatre, racecourse or petrol filling station its likely profitability would be relevant and its market rent would depend on average takings. It could be a pointer to what the tenant might be prepared to pay in order to spare himself the disruption of moving to other similar premises in the area: see *W.J. Barton Ltd*. v. *Long Acre Secs. Ltd.* (3).

33 An expert arbitrator should not give evidence to himself without disclosing the evidence on which he relies to the parties. He can use his general expert knowledge to reach his award without disclosing it, but not his knowledge of special facts relevant to the particular arbitration before

him, which would mean he was guilty of technical or legal misconduct because he had failed to observe the rules of natural justice: see *Fox* v. *Wellfair (P.G.) Ltd.* (11). More particularly "in assessing rents, an expert arbitrator can rely on his general knowledge of comparable rents in the district. But if he knows of a particular comparable case, then he should disclose details of it before relying on it for his award" ([1981] 2 Lloyd's Rep. at 529, *per* Dunn, L.J.).

34 Should the time for applying to have the award set aside be extended? Here in this case, the arbitrator's award was signed on January 15th, 1991. Assuming that he gave notice the same day to the landlords and tenant that the award was ready, that would be the date of its publication, so the tenant should have applied to have it set aside by February 6th. It moved for this on April 8th, which is 60 days or two calendar months out of time. It applied on May 2nd to have the time extended for applying to have the award set aside, and that was 84 days, or a week short of three months' delay. Mr. Viroomal's affidavit in support was sworn on May 3rd and was not served with the motion. The time-limits and the mandatory rule that affidavit evidence on which the motion is founded must be served at the same time have not been observed by the tenant.

35 The delays are not, in the circumstances, lengthy. It was two months in *The Marques de Bolarque* (8) and eight months in *Ismail* v. *Polish Ocean Lines* (15). The delays in this case are due to the confusion between the tenant and its first solicitor as to what step the tenant wished to take after the award. The tenant's Mr. Viroomal swears that the intention was always to challenge it and his first solicitors say, in a letter of March 2nd, that it was to negotiate with the landlords a reduction of the rent in return for surrendering to them part of the landlords' premises demised to the tenant and used as a store for alternative accommodation on the first floor of the building. (I see that in the fourth recital of the indenture of lease dated August 31st, 1988, the tenant and landlord "agreed that in consideration of the tenant surrendering one of the three stores demised to it with the shop in the holding . . .")

36 The tenant's second solicitors obtained the relevant papers from the first on March 27th, and 21 days from that date was April 17th, so the filing of the motion to set aside on April 8th was within that period, but the application of May 2nd to extend the time was still out of time. The delay, as I have said, is not a very long one. It was due to the misunderstandings by the tenant and its first solicitor, which, in my judgment, affords an adequate explanation for the delay.

37 The tenant has paid the rent awarded by the arbitrator from July 1st, 1989, so there is no prejudice to the landlords if the time for making the application to set aside the award is extended.

38 Was there an arguable case on the merits? Mr. Budhrani submitted that there was because the arbitrator took into account the Centre Plaza lettings which were not in the parties' valuers' or solicitors' submissions and comments. He relied on his knowledge of them which was incorrect and he never gave the parties' experts or solicitors an opportunity to comment on it, which if he had done, might have led him to correct his belief the Centre Plaza lettings were relevant.

39 Mr. Serfaty submitted that there were no merits in the tenant's application. The arbitrator had set out the representations and cross-representations as an appendix to the award and considered them. He had inspected the premises. He had described comparable rents as general indicators of value. When he wrote "Centre Plaza . . . which I would have expected people to refer to," he was only remarking on its lettings in an aside and he was not declaring that they had been taken into consideration by him. They were not essential to his decision. He chooses between the two valuations and selects a rental below that put forward by the landlords.

40 Clearly, the motion of the tenant was arguable on its merits. The upshot is that its application to extend the time for applying and for serving the notice to set aside the award is granted.

41 Now Mr. Francis, the arbitrator, had special knowledge and experience of this class of business. He is an expert arbitrator and not a legal arbitrator. He was chosen by the parties' solicitors and the parties are bound by that act.

42 I return to the award. Under the heading "Market Values," the arbitrator has taken account of the comparable rents submitted by the landlord and the tenant, and declared that comparable rents serve as a general indicator of value but no more, for the cases were not agreed with vacant possession, as required by the rent review provisions in the Schedule. Then he declares that in fact the vacant possession lettings in the Centre Plaza building, a few metres to the North, with allowances for rating relief benefit and the payment of premiums would be what he would tend to look at. Then he returns to the usual run of comparable rents, and mentions that they depend on the size, location and condition and the fact that the rents are for the renewal of leases with sitting tenants. Leases with vacant possession, he remarks, are usually new premises which invariably enjoy rating relief.

43 He is on course again when he adds:

> "My task, therefore, is to consider whether the ranges submitted by the respective valuers are reasonably representative of market value as specified under the terms of the lease.

> Looking at an overview of all the cases submitted, the tenant's valuer considers that the market rental range as at July 1989 fluctuated between £15 and £18 per sq. ft. overall. The landlord's valuer believes this to be between £21 and £24."

44 Later, under the heading "The Premises," he accepts the tenant's valuer's point about the depth of the shop but rejects his range of rents because it is not in line with the criteria required under the lease. He disregards the drab condition because the tenant could put that right. He reminds himself that he has to keep his mind on what rent the premises would have fetched in July 1989 on the basis of vacant possession. He concludes, under the heading "The Award":

> "Having considered all the evidence before me and taking into account all the relevant factors required under this arbitration, I am of the opinion that the market rental value of the premises as at the review date is nearer to the level submitted by the landlord's valuer than that of the tenant's valuer."

45 He has written that he has to consider whether the ranges of rent submitted by the valuers are reasonably representative of market value because that is what the terms of the lease say he should do. He has recorded that he considered all the evidence before him and took into account all the relevant factors he was obliged to consider under the arbitration. He has not indicated he took into account the rent for the Centre Plaza building. He has not recorded what it was or is. He has, so to speak, stepped aside and mused on the valuers' not including it. He has, in my view, a little professional dig at them, and no more. He has then stepped back into line and kept to the two ranges that the valuers submitted. I do not accept that he gave evidence to himself.

46 Remembering the sanctity of the award of an arbitrator, I am not persuaded by the tenant that it should not be preserved. The motion must be and is repelled. I order that on the application to enlarge time for applying for and serving a summons or notice to set aside award, time is extended to May 28th, 1991. The costs of, occasioned by and incidental to the application to enlarge time are to be paid by the applicant to the respondent in any event. The motion to set aside the award is dismissed with costs. The costs of, occasioned by and incidental to the issue of whether or not the arbitrator should be served with applications are to be paid by the applicant to the respondent.

Orders accordingly.
