

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BRISTOL DISTRICT REGISTRY

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 6 October 2017

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

Between :

Kenneth Peter Sowden
- and -
(1) Stephen Charles Smyth-Tyrrell
(2) Beaujolois Katharine Smyth-Tyrrell

Claimant

Defendants

William Batstone (instructed by **Foot Anstey**) for the **Claimant**
Guy Adams (instructed by **Clarke Willmott**) for the **Defendants**

Hearing dates: 18 August, 3 October 2017

Judgment Approved

HHJ Paul Matthews :

Introduction

1. This is my judgment on applications made under the Arbitration Act 1996 on behalf of Mr Kenneth Sowden (whom I shall refer to as “the tenant”) in relation to an arbitration under the Agricultural Holdings Act 1986 before Mr Michael Townsend, sitting as arbitrator, who made a final award dated 8 May 2017. This Award relates to 2 parcels of land at Bosawsack, near Constantine in Cornwall, held by the tenant under two separate written agricultural tenancy agreements, both dated 23 March 1978. The original landlord in relation to these tenancies was a Miss Coraleen Mary Moor Horsford, but the present landlords (and parties to the arbitration) are the defendants, Stephen Charles and Beaujolois Katherine Smith-Tyrrell. I shall refer to them as “the landlords.”
2. The tenant is not only tenant of these two agricultural holdings, but is also the freehold owner of a house and buildings and some land, which is surrounded by one of the two parcels of land (“lot 1”). He purchased this land from Miss Horsford on 25 August 1978. The arbitration concerned a series of four notices, all dated 19 March 2013, served by the landlords on the tenant. Two of the notices (one for each parcel) were under Case D in part 1 of schedule 3 to the 1986 Act, and two of the notices (again, one for each parcel) were under Case E in the same part of the same schedule.

The notices under Case D required work to be done by the tenant to remedy alleged breaches of terms of the tenancy agreements, whereas the notices under Case E were notices to quit on the basis that the breaches were irremediable.

3. Both sides to the arbitration were dissatisfied by the Award. In particular, the tenant was dissatisfied by a part of the award upholding the Case D notice requiring him to remove a concrete path on the land the subject of the tenancy running alongside his freehold house, together with a wall separating the path from the rest of the agricultural holding. The landlords were aggrieved by the failure of their claim to possession under the Case E Notices. On 12 May 2017 the tenant applied to the arbitrator under section 57(3) of the 1996 Act for the correction of the Award. I shall return to that.
4. On 5 June 2017 each side took steps in court litigation formally to challenge the Award. The tenant issued a claim form to challenge the Award under section 68 of the 1996 Act, on the grounds that there had been a serious irregularity, and under section 69 of that Act by way of an appeal on a point of law. The landlords, on the other hand, did not issue a claim form, but instead issued a simple application notice, in Form N244, seeking an extension of time under section 57(4) of the 1996 Act to apply to the arbitrator to exercise his powers under section 57(3) (either to correct or to clarify the Award), and also seeking an extension of time under section 70 (3) of the same Act for a challenge to the award under section 67 or 68, or to appeal the award under section 69. On the same day they also issued a claim form for judicial review of the arbitrator's award. On 5 July 2017, the landlords having realised that they had not actually issued proceedings under the 1996 Act, but merely given notice of an application to be made in (non-existent) proceedings, issued a claim form seeking the relief that they should have sought a month earlier. They therefore also issued an application (within that claim) for an extension of time in which to issue the claim form. For some reason, however, both claims have been allocated the same claim number by the court. If necessary, one of them will have to be allocated a different number.

The hearings before me

5. On 14 July 2017, there were listed before me the landlords' application under section 57(4), the landlords' application under section 70(3) (and the application for an extension of time in which to issue the claim form), and the tenant's applications under section 68 and 69 respectively. The time estimate was woefully inadequate, and in the event I was able to deal only with the landlords' application under section 70(3). I made no order on the application under section 57(4), as it was no longer pursued, and I dismissed the application under section 70 (3), for reasons given in an extempore judgment. I directed that the other two applications should be adjourned to 18 August 2017, allowing two hours. I should say that there was an argument between counsel when it came to drafting a minute of order subsequently, because they could not agree on what I had ordered, and I had to deal with the dispute on paper.
6. In relation to my order dismissing the application under section 70 (3), the landlords have filed an appellants' notice, seeking permission to appeal to the Court of Appeal. I understand that that application has not yet been considered, although I have approved the transcript of my extempore judgment. I add that, in relation to the landlords' application for judicial review, HHJ Jarman QC sitting in Cardiff refused

permission to apply on the papers on 3 August 2017. I understand that the landlords have sought to renew that application at an oral hearing, which is fixed for 17 October 2017 before HHJ Cotter QC, sitting here in Bristol.

7. On 15 August 2017, the arbitrator wrote to the parties, responding to the tenant's application of 12 May 2017. He said this:

“In his application dated 12 May 2017 the tenant has invited me to admit an irregularity in the conduct of the proceedings or in the award, pursuant to s.68(2)(i) of the Arbitration Act 1996. The alleged irregularity which I am invited to admit is that at paragraphs 9.18 to 9.21 of my award dated 8 May 2017 I treated the Lot 1 Case D notice to remedy as if it alleged that the construction of the concrete path and wall were a breach of clause (26) of the relevant tenancy agreement, when in fact that notice only alleged that it was a breach of clause (27), and I have found that there was no breach of clause (27). I invited the landlords' submissions in response, which were made in a letter from Clarke Willmott dated 3 August 2017. I have considered those submissions, but have concluded that there was an irregularity in the conduct of the proceedings and/or in the award, because the tenant is correct that the Lot 1 Case D notice to remedy only relied on clause (27), and not also on clause (26). I have already concluded that I cannot correct this irregularity under s. 57 (or s. 47), and I now admit this irregularity for the purpose of s.68(2)(i)...”

8. The reference to the arbitrator's having “already concluded that I cannot correct this irregularity under s. 57 (or s. 47)” is a reference to the arbitrator's earlier letter of 19 July 2017, where he says

“Furthermore, I do not believe that I can use either my Section 57 or my Section 47 powers to produce an additional Award which would contradict any part of the existing Award”.

9. At the adjourned hearing on 18 August 2017, before the tenant was able substantively to make his applications, the landlords applied for a stay of those applications pending the decisions in the judicial review and in the appeal to the Court of Appeal. After hearing the parties, I gave a further extempore judgment, dismissing the application for a stay. That took up about half the two hours available. The remainder of the hearing was occupied by submissions from both sides on the tenant's application under section 68. Those submissions not being completed by the time the court rose, the matter was adjourned over again, to 3 October 2017, the earliest date on which both counsel and I were all free at the same time. I invited counsel for the landlords to prepare a note of the arguments made by him which I could read as part of my preparation for the resumed hearing. He was kind enough to do so. At the resumed hearing on 3 October 2017, I heard further from both counsel, and completed hearing the submissions on the tenant's applications.

Other considerations

10. Before I turn to the substance of the applications, I wish to record that I consider the present situation unacceptable. The arbitration commenced in May 2013 has taken four years to reach a final award. Thereafter the parties have chosen to make a series of applications to court under the 1996 Act, at least one appeal to the Court of Appeal,

and an application for judicial review. I was also told that, as at 4 July 2017, the legal costs of both parties in total exceeded £500,000 plus VAT. They must now be considerably higher. At each of the three half-day hearings I have held there have been two counsel and four solicitors. Arbitration is supposed to be a relatively speedy (I will not say cheaper) way of reaching a final resolution of a dispute. The policy underlying arbitration is undermined if the parties try to relitigate what has been decided. The dispute in this case is not only not yet finally concluded, but has also led to legal costs which are wholly disproportionate. I was told that the cost of removing the wall and path to which the tenant so strenuously objects would cost about £9,000, though I accept that the cost may not be the only reason for objecting.

11. I accept that I have seen no more than a small part of the case, and I assume that the parties on each side have been fully apprised of the financial implications of their instructions, but have nevertheless persisted with those instructions. Still, I cannot see how it is sensible to carry on this lengthy and expensive war of attrition. And, in any event, it is not just a question of what the parties want. There are also the interests of other court-users to be considered. Judicial and other court resources are nowadays scarcer than they used to be, and no-one should be entitled to consume a disproportionate share of them.

Serious irregularity

12. I turn first to the tenant's application under s 68. That section provides as follows:

“(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

- (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
- (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
- (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
- (d) failure by the tribunal to deal with all the issues that were put to it;
- (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
- (f) uncertainty or ambiguity as to the effect of the award;
- (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—

(a) remit the award to the tribunal, in whole or in part, for reconsideration,

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(4) The leave of the court is required for any appeal from a decision of the court under this section.”

The time bar question

13. As a preliminary point, and as foreshadowed by section 68(1), the landlords say that the tenant’s claim is time barred by virtue of s 70(2), which provides that:

“An application or appeal may not be brought if the applicant or appellant has not first exhausted—

(a) any available arbitral process of appeal or review, and

(b) any available recourse under section 57 (correction of award or additional award).”

14. Section 57 provides:

“(1) The parties are free to agree on the powers of the tribunal to correct an award or make an additional award.

(2) If or to the extent there is no such agreement, the following provisions apply.

(3) The tribunal may on its own initiative or on the application of a party—

(a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or

(b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.

These powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal.

(4) Any application for the exercise of those powers must be made within 28 days of the date of the award or such longer period as the parties may agree.

(5) Any correction of an award shall be made within 28 days of the date the application was received by the tribunal or, where the correction is made by the tribunal on its own initiative, within 28 days of the date of the award or, in either case, such longer period as the parties may agree.

(6) Any additional award shall be made within 56 days of the date of the original award or such longer period as the parties may agree.

(7) Any correction of an award shall form part of the award.”

15. As I have already said, on 12 May 2017 the tenant applied to the arbitrator under s 57(3) of the Act for certain relief. This was to ask the arbitrator to correct his award and/or to make an additional award, to deal with the following matters (at [1]):

“(1) To create formal dispositive parts of the Award recording the Arbitrator’s decision is in respect of the four notices dated 19 March 2013 served on the Tenant by the Landlords under Cases D and E in Part I of Schedule 3 of the Agricultural Holdings Act 1986 ... in respect of the agricultural holdings known as Lot 1 and Lot 2 at Bosawsack, Constantine, Cornwall ...

(2) To deal with the question whether the Tenant is liable to comply with the Case D notice to remedy a breach of the tenancy agreement dated 23 March 1978 ... by constructing the concrete path and retaining wall on Lot 1 when the notice ... particularised the breach as a breach of clause (27) of the Tenancy Agreement and the Arbitrator found that the Tenant had not breached clause (27) by constructing the path and wall?

(3) To deal with the question whether the Landlords are prevented by waiver, acquiescence or estoppel from requiring the Tenant to remedy a breach of the Tenancy Agreement constructing the path and wall by the Case D Notice?

(4) To give reasons for the Arbitrator’s determination in clause 9.20 of the Award that the Case D Notice should not be modified by deleting the item of work requiring the removal of the path and wall pursuant to article 5 (a) of the Agricultural Holdings (Arbitration on Notices) Order 1987...”

16. In addition, the application said:

“If the Arbitrator accepts that there is an irregularity in the conduct of the proceedings or in the Award but he decides that he is unable to make the changes sought by the Tenant in paragraph 11 above, then the Arbitrator is asked formally to admit the irregularity and thus facilitate the Tenant having the court to make the changes on application under section 68(2)(i) and (3)(b) of the 1996 Act.”

17. As I have already said, the arbitrator did in fact admit an irregularity in his letter of 15 August 2017 ([7] above). Moreover, he declined to do anything further without either the agreement of the parties (which was not forthcoming) or the order of the court.
18. The landlords say that the tenant should have asked for *clarification as to the reasons* why the arbitrator had made the determinations that he had made. However, the tenant did not do so within the 28 day time limit set out in section 57 (4). So they say that the tenant is now time barred. They further say that the consequence is that the tenant cannot now pursue any application under any of sections 67 to 69 because the tenant did not first exhaust (that is, take advantage of) available recourse under section 57, as required by section 70 (2) (b).
19. In *Torch Offshore LLC v Cable Shipping* [2004] EWHC 787 (Comm), a claimant in an arbitration alleged that it had relied on two false allegations in entering a charterparty. The arbitrator found that the representations were false, but did not deal with the question whether the claimant had been induced to enter the charterparty by the second of them. The claimant did not ask the arbitrator to make an additional award under s 57, but instead applied to the court to set aside or vary the award under s 68 on the ground of serious irregularity.
20. Cooke J said:

“28. ... It seems to me that section 57(3)(a) can be used to request further reasons from the arbitrator or reasons where none exist. The policy which underlies the Act is one of enabling the arbitral process to correct itself where possible, without the intervention of the Court. Torch contended that it was clear that the arbitrator had not decided the issue and that therefore there was no ambiguity in the award which required clarification, but the very existence of a genuine dispute on this question militates against that argument. If there was unarguably a clear failure to deal with an issue, it could be said that there was no ambiguity in the award, but as set out in *Al Hadha* at paragraph 70, an award which contains inadequate rationale or incomplete reasons for a decision is likely to be ambiguous or need clarification. There was therefore room for an application by Torch under section 57, as an exchange of letters with the Owners in relation to this part of the Award would have revealed, so that the time limit of 28 days (for which section 57(4) provides) applied. In these circumstances Torch had available recourse under section 57, which had not been exhausted and section 70(2) therefore presents an insurmountable bar to Torch’s section 68 application.”

(The reference to *Al Hadha* is to the decision of HHJ Havelock-Allan QC in *Al Hadha v Tradigrain SA* [2002] 2 Lloyds Rep 512; see in particular at [65]-[72].)

21. The tenant says that he did however seek clarification from the arbitrator by his application of 12 May 2017, and in particular by asking him to admit an irregularity in the proceedings. By his letter of 15 August 2017 (see at [7] above), the arbitrator has now admitted one. Accordingly, says the tenant, no recourse is now available to him under section 57. Instead, section 68 must be used to obtain the remission of the award to the arbitrator to reconsider the question of the case D Notice. In this respect, the landlords say that the tenant has not relied in his claim form on the provision dealing with the case where the arbitrator admits an irregularity (s. 62(2)(i)). The tenant’s response is that he could not have done so, since the arbitrator had not

admitted the irregularity when he issued his claim form. In any event, the tenant says that the only kind of irregularity that can be admitted within subparagraph (i) is one within subparagraphs (a)-(h). Category (i) (say the landlords) is not freestanding, otherwise an arbitrator could admit an irregularity on any point at all, including his decision-making on the evidence, which is plainly not intended to be capable of challenge by way of an appeal.

22. On this point, it is only necessary for me to say that in my judgment the tenant, in seeking recourse under section 57, by paragraph (2) of his application of 12 May 2017 did sufficient to exhaust his right for the purposes of section 57(4) within the 28 day time limit, and accordingly he is not barred from pursuing an application under section 68 or 69. It is not the law that, whatever a party to arbitration does in applying to the arbitrator under s 57, the other party can always argue that the first party should have asked for clarification of the reasons for the Award and therefore has not exhausted his recourse under that section. It all depends on what he asks for. Here the tenant asked the arbitrator to deal with the problem caused by the fact that the Notice referred to a breach of clause (27) of the tenancy agreement (which the arbitrator found had not been breached) but the Award referred to a breach of clause (26) instead.

The tenant's challenge

23. I turn now to the tenant's challenge under section 68, for "serious irregularity". The tenant relies in the claim form on three of the sub-paragraphs of section 68(2), namely (d) (failure to deal with all the issues), (f) (uncertainty or ambiguity as to the effect of the award, and (h) (failure to comply with requirements as to the form of the award). But at the hearing the main thrust of the argument for the tenant was that, in relation to (d) the arbitrator did not deal properly with the argument that the Case D Notice, in particularising the breach and remedial work required, did not refer to the correct clause in the tenancy agreement ("the Case D Notice point"), and did not deal at all with the tenant's argument based on waiver or acquiescence. In relation to (f) the tenant complained of a failure by the arbitrator to provide formal dispositive parts to the Award. This was not addressed at the hearing, but to my mind there is nothing in this. It certainly cannot be said to cause substantial injustice. As to (h), the tenant argued that the award gave no reasons for refusing the tenant's application under article 5(a) of the Agricultural Holdings (Arbitration on Notices) Order 1987, that is, to delete the item of work relating to the wall and the path.

The Case D Notice point

24. I deal first with the issue relating to the Case D Notice point. Clauses (26) and (27) of the tenancy agreement provided (so far as material):

"(26) No fixtures are to be erected or installed anywhere on the holding by the Tenant without the previous consent in writing of the Landlord or his agent...

(27) Not to carry out any alterations or make any addition to the farm buildings (if any) or erect any new building or to make any other improvements within the meaning of Sections 49 and 50 of the Third Schedule to the Agricultural Holdings Act 1948..."

25. The Notice alleged that the construction by the tenant of the concrete path and wall was a breach of clause (27) of the relevant tenancy agreement. The arbitrator expressly found that there was no breach of that clause. In fact, that construction was a breach of clause (26), and the tenant so accepted. The Award held that the construction was a breach of clause (26). The arbitrator, by virtue of his admission of an irregularity in the letter of 15 August 2017, appears to have accepted that he treated the Notice as alleging a breach under clause (26) which he found proved, as indeed it was admitted. He therefore awarded the remedy of that breach, and by reference to clause (26). On the face of it, therefore, there is nothing wrong with the Award itself. The problem lies, if at all, with the Notice.
26. The question which arises is whether the Notice, containing correct details of the breach alleged and the remedy required, but also referring to the wrong source of the obligation, was a valid notice. If it was valid, then there was no irregularity in the conduct of the proceedings or in the Award. If it was invalid, then there may have been one. In this connection, I was referred to a number of authorities. These included *Official Solicitor v Thomas* [1986] 2 EGLR 1, CA. That was an agricultural holdings case in which a Case D Notice had been served on the tenant complaining of a failure to pay interest, and requiring a remedy. The judge at first instance had held that the Notice was invalid because under the heading “Term or condition of tenancy” were written the words “Supplemental agreement to pay interest on landlord’s improvements”. The problem was that there were two supplemental agreements, and they were not further identified, and neither was the rate of interest given or the nature of the improvements done.
27. Nicholls LJ (with whom Slade LJ agreed) said:
- “The criticisms of the wording of the notice to remedy were confined to the description, in the left-hand column of the particulars, of the ‘term or condition’ of the tenancy which it was said the tenant had broken. The criticisms were that the inserted particulars were inaccurate and insufficient. The inaccuracy was that, as appears from the summary given above, the arrangements whereby the tenant agreed to pay the interest charges consisted of two supplemental agreements, not one. So the particulars should have read ‘supplemental agreements’ in the plural, and not ‘supplemental agreement’. The insufficiencies complained of were twofold. First, that the location of the agreements should have been identified by a reference to the memorandum and the correspondence (although it was not suggested that each letter needed to be identified separately). Second, that the rate of interest should have been stated, together with a short description of the nature of the improvements.
- Mr Barnes very frankly accepted that the tenant, as a reasonable tenant, could not have been misled by the wording in the notice. In *Carradine Properties Ltd v Aslam* [1976] 1 WLR 442, where a landlord served a non-statutory notice on a tenant under a break clause, the criterion employed by the court in deciding whether the notice was sufficiently clear was whether it could be said that any reasonable tenant reading it would have been misled by it. The same test was applied by this court in *Germax Securities Ltd v Spiegel* (1978) 37 P & CR 204 in considering the validity of a notice under section 25 of the Landlord and Tenant Act 1954. But in two decisions of this court, the need for strict compliance with the statutory requirements has been emphasised in the context of notices to pay

rent served pursuant to the 1948 Act or the 1977 Act. In *Pickard v Bishop* (1975) 31 P & CR 108), a notice to pay rent was held bad because the wrong person was named as landlord. In *Dickinson v Boucher* (1983) 269 EG 1159, [1984] 1 EGLR 12, a notice to pay rent failed because the sum demanded (£650) was in excess of that due (£625).

Oliver LJ, having quoted a passage from the judgment of Buckley LJ in the *Germax Securities* case, said this at p 1164:

‘There again, of course, we were not dealing with a strict requirement of a section such as the present, which is designed to operate on non-compliance by the tenant with a notice containing a particular formula. It seems to me that the approach of this court in *Pickard v Bishop* is one which, albeit in that case applicable to a misdescription of the landlord, must equally be applicable to the misstatement of the requirement with which the tenant is notified that he must comply.’

Mr Barnes submitted that the particulars given in this notice failed to pass the strict test applied in *Pickard v Bishop* and *Dickinson v Boucher*. I cannot accept this submission. The area of complaint is limited to the sufficiency and accuracy of the description of the term of the tenancy which the landlord is notifying the tenant has been broken. The intended purpose of that part of the notice is that the tenant should have drawn to his attention what is the source of the obligation which the landlord is saying the tenant has failed to fulfil in the respects particularised in the right-hand column. The achievement of that purpose requires the identification of the source with reasonable particularity. Normally the source will be a specific clause, readily identifiable, in a written tenancy agreement. In other instances, as here, it will not be. In either case the adequacy of the description is a question of degree, to be answered in the light of all the circumstances.

I cannot accept the tenant's submission to the effect that any inaccuracy in this description, however trivial or immaterial or however obviously a slip, and regardless of whether the tenant may be misled by it or not, is necessarily fatal. So to decide, with regard to the part of the notice with which this appeal is concerned, would be to carry the need for strict compliance with the statutory requirements to an absurd length, and for no apparent purpose. In the present case the description was terse, but it did identify the source as a supplemental agreement (which, plainly, was being contrasted with the tenancy agreement itself) and the essential subject-matter of that agreement (payment of interest on the landlord's improvements). The only inaccuracy relied on is the omission of the letter ‘s’ after the phrase ‘supplemental agreement’. Given that it is accepted for the tenant that, despite the inaccuracy and the terseness, this tenant could not reasonably have been misled, in my view the particulars given were good enough.

For these reasons, in my view the notice to pay and the notice to remedy were valid notices. It is not disputed that at the date of the giving of the notice to quit the tenant had not complied with either the notice to pay or the notice to remedy or, hence, that if either of those two notices was valid the notice to quit took effect, pursuant to the provisions of section 2 of the 1977 Act. Accordingly, I would dismiss the tenant's appeal and allow the landlord's cross-appeal, and in

answer to the question raised in the stated case declare that upon the facts found by the arbitrator the notice to quit dated May 20 1982 was a good notice to quit upon both of the grounds stated therein.”

28. That case concerned a similar kind of problem to the present one. The notice that was given there was alleged not to have given sufficient or accurate particulars of the term that was alleged to have been broken. It is right that the error in that case was very trivial. Essentially a single term had been used instead of a plural one. And the further complaints of insufficiency were modest. Nevertheless, the points made by the Court of Appeal are instructive. That court said that the purpose of that part of the notice was to inform the tenant of the source of the obligation. The adequacy of the description was a question of degree. It was not correct to say that any inaccuracy was necessarily fatal. The factors to be taken into account included how trivial the error was, however obviously it was a mere slip, and whether the tenant had been misled.
29. In *Dallhold Estates (UK) Pty Ltd v Lindsey Trading Properties Inc* [1994] 1 EGLR 93, Case D Notices were served by the landlord of an agricultural holding on the tenant asserting that unpaid rent was due on certain quarter days, when in fact it only became due when a letter enclosing the Notice was delivered to the tenant at a later date. The question was whether the Notice was nonetheless valid. The Court of Appeal held that it was. Ralph Gibson LJ (with whom Peter Gibson and Hirst LJ agreed, though each added some comments of his own) said:
- “In so far as the notice inaccurately asserted that the rent ‘otherwise due’ had been due on and from the quarter days listed, it did not mislead and could not reasonably have misled the tenant in any way. Furthermore, it did not and could not affect the clarity of the notice as to what the tenant was required to do or what the effect would be if the tenant did not comply with it. To treat this notice as invalid, therefore, would be to carry the need for strict compliance with the statutory requirement to a length beyond any useful purpose. The statutory purpose of the notice was fully satisfied. On this ground alone I would allow this appeal.”
30. In the present case the notice correctly stated the breach relied on and the work needed to remedy it. It also identified the source of the obligation as a clause in the tenancy agreement, but gave the wrong one (out by one, as it happens). Anyone looking at clause (27) would see clause (26) next to it. There was no evidence as to how this error had come about, nor any evidence as to what the tenant actually thought. But it is clear that the test here is an objective one. I was shown in particular the decision of the Court of Appeal in *Elim Court RTM Co Ltd v Avon Freeholders Ltd* [2017] EWCA Civ 89.
31. In that case Lewison LJ (with whom Arden LJ and Proudman J agreed) referred to the earlier decision of Etherton C in *Natt v Osman* [2015] 1 WLR 1536, and said:

“The outcome in such cases does not depend on the particular circumstances of the actual parties, such as the state of mind or knowledge of the recipient or the actual prejudice caused by non-compliance on the particular facts of the case: see [32] [of *Natt v Osman*]. The intention of the legislature as to the consequences of non-compliance with the statutory procedures (where not expressly stated in the statute) is to be ascertained in the light of the statutory scheme as a whole: see

[33]. Where the notice or the information which is missing from it is of critical importance in the context of the scheme the non-compliance with the statute will generally result in the invalidity of the notice. Where, on the other hand the information missing from the statutory notice is of secondary importance or merely ancillary, the notice may be held to have been valid: see [34]. One useful pointer is whether the information required is particularised in the statute as opposed to being required by general provisions of the statute. In the latter case the information is also likely to be viewed as of secondary importance. Another is whether the information is required by the statute itself or by subordinate legislation. In the latter case the information is likely to be viewed as of secondary importance. In this connection it must not be forgotten that while the substantive provisions of a bill may be debated clause by clause, a draft statutory instrument is not subject to any detailed Parliamentary scrutiny. It is either accepted or rejected as a whole. A third is whether the server of the notice may immediately serve another one if the impugned notice is invalid. If he can, that is a pointer towards invalidity.”

32. So the question is whether the missing information is of “critical importance” in the context of the scheme. Three pointers in particular are indicated by Lewison LJ: (i) Is the missing information particularised in the statute or merely required by its general provisions? (ii) Is the information required by the statute itself or by subordinate legislation? (iii) Can the server of the notice immediately serve another, if it is invalid? But of course they are not the only matters to take into account.

33. The relevant legislation is contained in the Agricultural Holdings Act 1986, Schedule 3, Case D, and the Agricultural Holdings (Forms of Notice to Pay Rent or to Remedy) Regulations 1987, Schedule, Form 2. So far as material, the former says this:

“At the date of the giving of the notice to quit the tenant had failed to comply with a notice in writing served on him by the landlord, being [...]

(b) a notice requiring him within a reasonable period specified in the notice to remedy any breach by the tenant that was capable of being remedied of any term or condition of his tenancy which was not inconsistent with his responsibilities to farm in accordance with the rules of good husbandry,

and it is stated in the notice to quit that it is given by reason of the said matter.”

34. Form 2 in the 1987 Regulations says this, again so far as material:

“1. I hereby give you notice that I require you to remedy within ... months from the date of service of this Notice the breaches, set out below, of the terms or conditions of your tenancy, being breaches which are capable of being remedied of terms or conditions which are not inconsistent with your responsibilities to farm the holding in accordance with the rules of good husbandry.

2. This Notice requires the doing of the work of repair, maintenance or replacement specified below.

Particulars of breaches of terms or conditions of tenancy

Term or condition of tenancy	Particulars of breach and work required to remedy it
------------------------------	--

.....”

35. So far as concerns the description of Case D in the 1986 Act, it is to be noted that there is no requirement for a statement as to which term of the tenancy was breached. Instead, the notice requires the remedy of the breach of any term. So, by implication, the notice must deal with both the breach and the work needed to remedy it. Turning to the form, paragraph 1 refers to “the breaches set out below” rather than (for example) “the terms of your tenancy set out below”. The notice requires “the doing of the work ... specified below” and does not refer to any terms as such.
36. In my judgment, since there is no requirement in the statute itself to particularise the term which is alleged to have been breached, and the only reference to particulars of the term in the form under the subordinate legislation comes in a box at the end of the general description (which does not refer to particular terms), I consider that the first two of the three pointers referred to by the Court of Appeal in *Elim* point away from holding the particulars of the term alleged to have been breached to be of critical importance in the context of the scheme. As to the third point, it is clear that it would now be too late to serve another notice if the first one were held to be invalid and again therefore this points away from treating the particulars of the term to be of critical importance. (But I add that, even if it were possible, I think it would not change the answer overall.)
37. More generally, it is clear from the material before me that all the relevant disputes were well known to the parties, at the time that the notice was served. There had been correspondence, and there was also another notice (under Case E) served at the same time. In my judgment, the error in the notice under case D referring to clause (27) could not have misled the reasonable tenant. Whilst this cannot be characterised as so trivial an error as was the case in *Official Solicitor v Thomas*, it is still minor. Overall, looking at the matter in the round, in my judgment the making of an error in the statement as to precisely which term of the tenancy has been breached in the present case does not render the notice invalid. Moreover, the tenant’s case is not that, had the Notice correctly referred to clause (26) in respect of this alleged breach, the landlords would have failed to prove it. On the contrary, the tenant has *admitted* the breach of clause (26). On that basis, in my judgment there was no irregularity in the Arbitrator awarding a remedy for the breach of clause (26).
38. I am aware that in his letter of 15 August 2017 to the parties, the arbitrator admitted that “there was an irregularity in the conduct of the proceedings and/or in the Award, because the tenant is correct that the Lot 1 Case D notice to remedy only relied on clause (27), and not also on clause (26).” With respect, however, whilst I agree with the premise, in the sense that the Notice expressly referred to clause (27) and not clause (26) in connection with this particular breach, it is not clear to me what the arbitrator is admitting to when he says that “there was an irregularity in the conduct of the proceedings and/or in the award”. Given that the Case D Notice was in my judgment valid, I would not myself have reached the conclusion that there was an irregularity in the conduct of the proceedings or the award. But I am not the arbitrator. There is a further question of course, which is whether any irregularity is “serious” within the meaning of section 68(2), but I deal with that later.

Failure to deal with waiver/acquiescence

39. I turn next to the alleged failure of the arbitrator to deal with the tenant's argument on waiver and acquiescence. This is that, even if the Case D Notice were otherwise valid, the landlords were estopped or otherwise prevented by operation of the doctrines of acquiescence or waiver from relying on the breach of clause (26) by the construction of the path and the wall.
40. The matter was raised in paragraph 50(3) of the tenant's statement of case dated 20 November 2013:

“if there is a breach then Miss Horsford acquiesced in it or waived it or is otherwise estopped from complaining about it and the landlords can be in no better position...”

That statement of case is supported at the end by a statement of truth signed by the tenant. But the statement of case gives no sufficient particulars, and the tenant accepts that there is nothing in his witness statement evidence which amplifies or supports this argument.

41. The matter is however dealt with in more detail in the tenant's skeleton argument dated 27th of November 2015, [68]-[72]: in summary, it is argued that the wall and the path were completed by 1992, but the first complaint by the landlords came only in 2012. In the meantime there had been several rent reviews of the holding, including inspections by the landlord's agents, the tenant had participated in those reviews and paid rent in the reasonable belief that the landlord was content for the wall and the path to remain, and also the tenant continued to farm the holding and invest in it on the same basis.
42. The tenant's outline closing submissions dated 26 January 2016 also refer to the argument at [16]-[20]. These were of course put forward in the light of the evidence given at the arbitration. The argument is focused by this stage on demand for rent (not necessarily acceptance of it) with knowledge on behalf of the landlord of a breach of the terms of the tenancy. There is no argument of any positive representation (express or implied) by the landlord, or of any agreement (express or implied) between the landlord and the tenant, on which the tenant is argued to have relied to his detriment. It is put simply in the form that, if the landlord demands rent with knowledge of the breach, the landlord cannot thereafter complain of that breach for the purposes of serving a Case D Notice. This of course resembles the argument commonly found in cases of landlord and tenant disputes where the landlord seeks to forfeit the lease for breach of covenant, and the tenant relies on a waiver of the right to forfeit. But even then there is no suggestion that such a waiver would have any effect *on the underlying liability* for breach of covenant. The only thing that is waived in such a case is the right to seek forfeiture itself. Any underlying claim for damages for loss sustained continues to exist.
43. The award itself does not mention the argument in this context, although it does mention it in relation to the allegation of changing the use of the garden land and the siting of oil tanks: see paragraph 6.1(b) of the Award. The landlords accept that the arbitrator does not deal expressly with this argument, but say that he had no jurisdiction to do so, because the statute does not provide for the arbitrator to consider awarding relief from termination. They rely on *Parrish v Kinsey* [1983] 2 EGLR 13, CA (Watkins, May LJ), which refers to an earlier decision of the Court of Appeal in

Shepherd v Lomas [1963] 1 WLR 962. That was a case where the tenant failed to comply with a notice to repair, with part of which he was unable to comply as the landlord did not supply the necessary materials. The Court of Appeal held that a notice to quit, based on the tenant's failure to comply with *the rest* of the notice to repair, which did not require any assistance from the landlord, was nonetheless valid.

44. The Court of Appeal in *Parrish v Kinsey* also referred to the decision of that court in *Pickard v Bishop* (1976) 31 P & CR 108, where Lord Denning MR, referring to the effect of the agricultural holdings legislation, said:

“Every tenant farmer now has security of tenure for his life provided that he pays his rent and farms the land properly. The farm is thus a most valuable asset. But it is liable to be forfeited if the tenant farmer is late for two months with his rent after it is demanded. It is necessary for the landlord to make a proper demand. But, once given, if the rent is not paid within two months, the tenant farmer is out. He is given no days of grace. Even one day late is fatal. His cheque, as here, may be held up for only a day; nevertheless the landlord can say to him: ‘Out you go, you and your family, forever’. The hold-up may be due to a misunderstanding with the bank, but still the landlord can give him notice to quit. The court is powerless to help him. The statute contains no provisions to relieve him. Equity, it is said, cannot intervene. It is important that tenant farmers should know this to be the state of the law.”

45. Nicholls LJ in *Parrish v Kinsey* pointed out that the reference by Lord Denning MR to possible forfeiture was inapt. The question was simply

“whether the rent is due; whether notice to pay has been given; whether the notice to pay has been complied with; and, if it has not, whether a valid notice to quit has been given”.

It is thus clear that there is no *forfeiture* of the tenancy when a valid notice to quit is served, and thus no possibility of holding that a right to forfeit has been waived by an act (for example, demanding rent) electing to continue the tenancy instead of bring it to an end. I therefore accept that waiver of the right to forfeit is not an appropriate concept to apply by analogy in the present case.

46. The tenant's argument appears to be that because of the demand for rent with knowledge of the breach, the whole liability for breach of covenant has been waived, and therefore it ceases to exist as a basis for a Case D Notice. I do not accept this. As I have already said, waiver of the right to forfeit is a kind of election where the landlord has a binary choice, and must decide whether he treats the lease as continuing to subsist or not. But it has no effect at all on the underlying liability in damages arising from the breach of covenant itself. Thus, if the tenant's argument was (as I think it was) the simple one that a demand made of the tenant for the payment of rent with knowledge of the breach on behalf of the landlord destroyed the liability for breach of covenant and made it impossible for a Case D Notice to remedy to be based upon it, then the argument must fail.
47. On the other hand, I see no reason why a representational or conventional estoppel, if made out on the facts, could not apply to prevent a landlord from enforcing a liability for breach of covenant which otherwise would apply. For example, in *Chatsworth*

Estates Ltd v Fewell [1931] 2 Ch 224, a case I mentioned during the argument, Farwell J, dealing with the case of liability for breach of a restrictive covenant affecting land, said (at 231):

“In some of the cases it is said that the plaintiffs by their acts and omissions have impliedly waived performance of the covenants. In other cases it is said that the plaintiffs, having acquiesced in past breaches, cannot now enforce the covenants. It is in all cases a question of degree. It is in many ways analogous to the doctrine of estoppel, and I think it is a fair test to treat it in that way and ask, ‘Have the plaintiffs by their acts and omissions represented to the defendant that the covenants are no longer enforceable and that he is therefore entitled to use his house as a guesthouse?’”

An example in the context of the 1986 Act is *John v George* [1996] 1 EGLR 7, where the Court of Appeal held that an estoppel by convention prevented landlords from giving a Case B notice to quit under the 1986 Act.

48. So, in my judgment, if there had been a proper case of representational or conventional estoppel run at the hearing which had been supported by the evidence and could have made a difference to the result, the arbitrator would have been bound to deal with it. However, on the material before me, the ‘pure’ estoppel argument was barely mentioned, was peripheral and was not materially supported by the evidence. The arbitrator in fact referred to a similar argument in respect of the siting of the oil tanks. But he did not do so in relation to the complaint in relation to the wall and the path. I therefore assume that he did not consider it material to be dealt with expressly.
49. In *London Underground Ltd v Citylink Telecommunications Ltd* [2007] EWHC 1749 (TCC), Ramsay J dealt with section 68(2) (d) in this way:

“40. Section 68(2)(d) provides for situations where there has been a ‘failure by the tribunal to deal with all the issues that were put to it’.

41. This ground was considered by Morison J in *Fidelity Management SA v. Myriad International Holdings BV* [2005] EWHC 1193 (Comm) at paragraph 9 where he summarised the following propositions which were extracted from the decision of Colman J in *World Trade Corp v. Czarnikow Sugar* [2005] 1 Lloyd’s Rep 422:

“1. Section 68(2)(d) is "designed to cover those issues the determination of which is essential to a decision on the claims or specific defences raised in the course of the reference".

2. HH Judge Humphrey Lloyd was correct in *Weldon Plant Ltd v The Commission for New Towns* [2001] 1 All ER (Comm) 264 to state that Section 68(2)(d) is not to be used as a means of launching a detailed enquiry into the manner in which the tribunal considered the various issues. It is concerned with a failure, that is to say where the arbitral tribunal has not dealt at all with the case of a party so that substantial injustice has resulted, eg where a claim has been overlooked or where the decision cannot be justified as a particular key issue has not been decided that is crucial to the result. It is not concerned with a failure to arrive at the right answer to an issue.

3. Arbitrators do not have to deal with every argument on every point raised; they should deal with essential issues.

4. "Deficiency of reasoning in an award is. . .the subject of a specific remedy under the 1996 Act [section 70(4) of the Act]. It is accordingly self-evident that:

(1) failure to deal with an "issue" under section 68(2)(d) is not equivalent to failure to deal with an argument that had been advanced at the hearing and therefore to have omitted the reasons for rejecting it;

(2) Parliament cannot have intended to create co-extensive remedies for deficiencies of reasons one of which (section 68) was a general remedy which might involve setting aside or remitting the award in a case of serious injustice and one of which (section 70(4)) was designed to provide a specific remedy for a specific problem;

(3) the court's powers under section 68(2) being engaged only in a case where the serious irregularity has caused substantial injustice, the availability of the facility to apply for reasons or further reasons under section 70(4) would make it impossible to contend that any "substantial injustice" has been caused by deficiency of reasons."

5. Accordingly, section 68(2)(d) is confined in its application to essential issues, as distinct from the reasons for determining them.

6. "If one simply approaches that provision by asking whether that which has not been dealt with is capable of being formulated as an essential issue of the nature of what would be included in an agreed list of issues prepared for the purpose of a case management conference if instead of an arbitration the matters were to be determined in court, the answer should normally be obvious."

42. I respectfully accept that summary as setting out the relevant considerations."

50. Similarly, in *Van der Giesen-de-Noord v Imtech Marine* [2008] EWHC 2904 (Comm), Christopher Clarke J said this:

"14. It is likely to be a serious irregularity under section 68 for the tribunal to fail to deal with all essential issues. But it may do so concisely. A failure to deal with an issue is not the same as a failure to set out the reasoning for rejecting a particular argument. Such a failure is remediable under section 70(4); see Colman J in *Margulead Ltd v Exide Technologies* [2004] 2 All ER (Comm) 727 and in *World Trade Corporation Ltd v Czarnikow Sugar Ltd* [2004] 2 All R (Comm) 813; and Morison J in *Fidelity Management SA v Myriad International Holdings BV* [2005] EWHC 1193 (Comm)."

51. The judge also referred to the decision of Ramsay J and cited with approval the first three paragraphs from the extract of the judgment of Morison J in *Fidelity Management*, the last of which is (and I repeat):

“Arbitrators do not have to deal with every argument on every point raised; they should deal with essential issues.”

52. In my judgment, the wider waiver argument was hopeless in law. But in any event both it and the narrower ‘pure’ estoppel form of the argument were peripheral, unsupported by the evidence and could not be described as “essential” issues. It is therefore not surprising that the arbitrator did not deal with either in terms. In my judgment, not to deal with them expressly was not in the circumstances an irregularity.

Failure to give reasons for decision

53. Thirdly, there is the argument that the award gave no reasons for refusing the tenant’s application under article 5(a) of the 1987 Order, that is, to delete the item of work relating to the wall and the path. What the award says about this is found at paragraph 9.20:

“I determine that the requirement to remedy should not be deleted on the grounds that it is unnecessary or unjustified and I determine that the notice should not be modified.”

54. By implication, what this means is that the arbitrator considered that the requirement to remedy was necessary and justified. Although that is very tersely expressed, it is a reason for refusing to delete or modify the requirement under article 5 (a). It is clear on the authorities that I have cited that an arbitrator is not obliged to deal with every point in detail or, in the case of peripheral points, at all. In the context of this case, I see no reason why the arbitrator need have spent any longer on this point. Accordingly, in my judgment, it is not an irregularity for the arbitrator to have dealt with it in this way.

“Serious irregularity” and “substantial injustice”

55. Even if I were wrong, and any of the matters complained of *did* amount to an irregularity within section 68 of the 1996 Act, it is only a “serious irregularity” which gives rise to a discretion in the court to remit the award to the arbitrator or to grant some other relief under that section. Section 68 (2) provides that:

“ ‘serious irregularity’ means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant...”

56. In *Compton Beauchamp Estates Ltd v Spence* [2013] EWHC 1101 (Ch), Morgan J discussed the concept of ‘serious irregularity’. He said:

“34. A party may challenge an arbitration award on the grounds of ‘serious irregularity’. For this purpose it must be shown that there is an irregularity within one of the paragraphs of section 68(2) and that the irregularity has caused or will cause ‘substantial injustice’ to the party relying on section 68.

35. The requirement that the party relying on section 68 shows ‘substantial injustice’ was discussed in the report, dated February 1996, on the Arbitration

Bill, which became the 1996 Act, of the Departmental Advisory Committee on Arbitration Law ('the DAC report') in the following terms:

'280. Irregularities stand on a different footing. Here we consider that it is appropriate, indeed essential, that these have to pass the test of causing 'substantial injustice' before the court can act. The court does not have a general supervisory jurisdiction over arbitrations. We have listed the specific cases where a challenge can be made under this Clause. The test of 'substantial injustice' is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice. In short, Clause 68 is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.'

36. The courts have consistently followed the lead given in that paragraph of the DAC report. It was approved by the House of Lords in *Lesotho Development v Impregilo SpA* [2006] 1 AC 221 at [27]. Lord Steyn in that case at [35] further stressed the requirement that the applicant show that the irregularity caused substantial injustice. The approach identified in the DAC report was also applied by Morison J in *Fidelity Management SA v Myriad International Holdings BV* [2005] 2 Lloyd's Rep 508. That case considered section 68 generally and, in particular, section 68(2)(d). As to section 68(2)(d), the judge followed earlier authority in holding that there was no failure 'to deal with an issue' just because an arbitrator did not set out each step by which he reached his conclusion or did not deal with every point made by the parties. There is a difference between a failure to deal with an essential issue, which is an irregularity within section 68(2)(d), and some other failure of reasoning, which is not. A failure of reasoning might in some cases allow a party to seek clarification under section 57(3) or might allow a party to seek an order from the court under section 70(4). Further, a failure of reasoning may give rise to an irregularity within section 68(2)(f) or may mean that the form of the award does not comply with section 52(4), thereby enabling a party to contend that there is an irregularity within section 68(2)(h). I will, later in this judgment, consider in detail the scope of the duty of an arbitrator to give reasons for his award.

37. The reasoning in the relevant passage of the DAC report and in the above cases was influenced by the fact that the usual model of arbitration which is

governed by the 1996 Act is a consensual arbitration. However, I consider that it is clear that where (as in the present case) the arbitration is governed by the 1996 Act by reason of the operation of sections 94 and 95 of the 1996 Act, then the 1996 Act applies to such an arbitration in the same way as it applies to a consensual arbitration: see *Peel v Coln Park LLP* [2010] EWCA Civ 1602 at [23] and [25].”

57. In my judgment, the emphasis on the need to show that what has happened is “so far removed from what could reasonably be expected of the arbitral process” demonstrates that section 68 is not a process of appeal in the conventional litigation sense. Lawyers must therefore not approach it as if it were. Instead, they should focus on the result and ask themselves a question to the effect of “Is this so unfair that it cannot reasonably have been expected of the process?”

The Case D Notice

58. On this basis, I consider the question of the Case D Notice. Here the arbitrator thought that he was dealing with an allegation of a breach of clause (26) of the tenancy agreement, and found it proved. (Indeed, it is admitted by the tenant.) The arbitrator therefore awarded its remedy. On the other hand, he found no breach of clause (27). Even if this had been an irregularity in the process, on the ground that the Notice actually referred to clause (27), there would be no injustice, let alone substantial injustice. Each side was professionally (and expensively) represented, evidence was adduced, and arguments were made. The tenant admits the breach. If the Notice had referred to clause (26), there would have been no possible ground of challenge. In my judgment, the process has reached a result which cannot be said to be so unfair or unexpected, and (on the face of the Award) for the right reasons. Accordingly, there is no substantial injustice caused here.

The estoppel/waiver argument

59. Next, I turn to the estoppel/waiver argument. The argument was pleaded, albeit in a bare form. It was based on participation in rent reviews and demand for rent with knowledge by the landlord of the breach. It played a minor part in the arbitration hearing. No substantial evidence was adduced in support. In relation to this breach, it is not mentioned in the award (though it is mentioned and rejected in another context). Even if it were to amount to an irregularity, there would be no substantial injustice caused.

Reasons for refusal to delete

60. Lastly, there is the refusal to delete the remedy under article 5(a) of the 1987 Order. Even if the refusal was too shortly expressed, and could somehow amount to an irregularity, once more I cannot accept that it amounts to substantial injustice within the meaning of section 68(2).

Application for permission to appeal under section 69

61. The final matter with which I must deal is the tenant’s application for permission to appeal under section 69. The challenge to the award on a point of law is set out in detail in paragraphs [45]-[62] of the particulars of claim. At an earlier hearing the

landlords said that this claim had been given up. The tenant on the other hand says that it has not been given up, and that the position is that there is no need to address it pending the determination of the application under section 68. So the tenant asked for it to be adjourned generally with liberty to restore, but then to be struck out if no application to restore had been made by a certain date.

62. Under section 69(3), the court shall give permission to appeal 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 is 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”.

63. The question raised by this claim is set out in paragraph [58] of the particulars of claim:

“The question of law that arises from the Award is this: on the facts found by the Arbitrator, and given the statutory requirements, is the Case D Notice valid and effective to render the Tenant liable to remove the path and wall?”

64. That is a matter with which I have already dealt in the earlier part of this judgment, following argument by the parties and analysis of the material. I gave the answer Yes, the notice is valid and effective to render the tenant liable to remove the path and wall. Accordingly, having determined the very point after argument, condition (c)(i) of section 69(3) is not met. Even if I had any serious doubt for the purposes of condition (c)(ii) (but I do not), I do not consider the matter to be of ‘general public importance’, and so condition (c)(ii) is not met either. Accordingly, I cannot give permission.

Conclusion

65. Accordingly, I dismiss the tenant’s claim under both section 68 and section 69.