APPROVED **[2024] IEHC 387**

THE HIGH COURT

2023 329 MCA

BETWEEN

PARKDENTON LIMITED

PLAINTIFF

AND

EURO GENERAL RETAIL LIMITED T/A EUROGIANT

DEFENDANT

JUDGEMENT of Mr Justice Nolan delivered on the 22nd day of July, 2024

Introduction

1. This application concerns an arbitration award of Mr. Mervyn Feely, dated the 12th of July 2023, concerning a rent review of premises at Unit 1 and 2, Parnell Centre, Parnell Street, Dublin 1. The Applicant is the landlord of the premises whilst the Respondent is the tenant. The matter in dispute is the quantum of the rent to be paid as of the 6th of January 2023. The rent revision provisions were set out in the lease between the parties, dated the 9th of November 2012, which outlined the mechanism and basis of assessment for the rent and the rent review date.

2. The arbitrator received submissions and oral argument was heard on the 21st of June 2023 and within a number of weeks, he delivered his award.

3. The Applicant says that it should be set aside pursuant to Article 34 of the Model Law on two grounds. The first is pursuant to Article 34(2)(a)(ii), that it was unable to present its case, whilst the second is pursuant to Article 34(2)(a)(iii), that the arbitrator's award contained matters beyond the scope of the submission and evidence in the arbitration.

Background

4. The premises in question is a relatively large retail unit fronting on to Parnell Street, at the corner of King's Inns Street. The ground floor retail area measures 5,719psf. while the first-floor storage area is 5,968psf. It seems to be anachronistic that the dimensions of the lease are in imperial measurement as opposed to metric, but that is the measurement of the industry, thus everything is measured in square feet.

5. The lease provided for a rent review at five-year intervals with the relevant rent review date being the 6th of January 2023. The premises was occupied in the past by the notorious nightclub, Stringfellows, up to 2006. However, since then it has been a discount store. It was empty for a number of years in around the crash of 2008.

6. The parties were unable to agree on the rent to be paid and therefore pursuant to the lease, Mr. Marvin Freely was appointed arbitrator by the President of the Society of Chartered Surveyors of Ireland by letter dated the 30th of March 2023, for the purposes of determining the matters in dispute.

7. He duly accepted the nomination and made directions which included that both parties exchange comparable evidence and further directed that a précis of the evidence be submitted. Thereafter, an oral hearing took place in the offices of the Society of Chartered Surveyors Ireland on the 21st of June 2023.

8. The arbitrator was furnished with the lease, two comparable schedules prepared by the Chartered Surveyors appointed by each side, namely David Potter for the Applicant and Hugh Markey for the Respondent. Thereafter, he was furnished with one précis of evidence from Mr. Potter and two from Mr. Markey.

9. In his award, Mr. Feely set out a statement of agreed facts which included the ground floor square footage, the ceiling height of the ground floor and the fact that the lease was for 20 years from the 7th of January 2023, with five-year rent reviews. The passing rent was €95,000 and the review term was for 15 years. The permitted use was as a discount retail store. There were no break options and repairs were on a full repair basis.

10. The arbitrator set out the basis of the rent review which was said to be "*open market rent*" without deductions, with vacant possession by "*a willing landlord to a willing tenant*".

11. He set out his assumptions which were that the premises were fit, ready and available for immediate occupation by the willing tenant at the relevant review date, capable of being used by the willing tenant for all purposes that would be permitted under the lease and calculating the open market rent. There was no work to be carried out by the tenant and the demised premises were in a good state of repair and decorative condition and all covenants on the part of the tenant had been fully performed and observed.

12. The arbitrator disregarded any effect on the rent that the tenant had been an occupation, any goodwill attaching to the premises by reason of the business carried out in it and any effect on retail value attributable to any works executed at the expense of the tenant with the consent of the landlord. It is my understanding that these are very straightforward and standard assumptions on the part of the arbitrator and no complaint is made nor issue taken with them.

The Applicant's Submissions to the Arbitrator

13. Mr. Potter on behalf of the Applicant, contended for a revised rent of €260,000p.a. between the two floors. For the ground retail floor, he ascribed a rate of €35psf., which made a total of €200,116.50, whilst for the first-floor storage area, he ascribed a rate of €10psf., making a total of €59,680, thus the total of €260,000.

14. He supported this with the use of four comparisons, the first being another premises on Parnell Street, Asia Supermarket, a premises in Moore Street, Oriental Pantry, a unit in Smithfield where the Tesco store is situate and a unit in the Ilac Centre where Nisbets is located. He submitted that the premises, being a corner unit, was substantial with extensive footage of approximately 70ft. on Parnell Street, which had potential access onto the internal mall in the Parnell Centre and direct access to the Parnell Car Park.

15. In relation to each of the comparisons, he pointed to the rent per square foot which had been obtained and in the case of the Asia Supermarket was €37.5psf. on the ground floor and €10psf. on the first floor. In the case of the Oriental Pantry, the rate was €39psf. on the ground floor with no storage area. In relation to the Smithfield Tesco site, he quoted a rate of €34.17psf. but that this was a poorer location with a poorer quality unit. In relation to the Nisbet unit, he quoted a rent of €39psf. for the ground floor and €10psf. for the first floor which supported a rate of €35 psf.

The Respondent's Submissions to the Arbitrator

16. Mr. Markey, on behalf of the Respondent, put forward three comparisons, namely Burger King on Parnell Street, which reflected a rent of €7.85psf., based on adjustments, the Argos premises in the Ilac Centre, with a comparative rent of €7.54psf., based upon adjustments and the Lidl premises in the Irish Life Centre, Talbot Street, which had a comparative rate of €9.39psf., based upon adjustments.

17. He also argued that the premises was on the wrong side of Parnell Street, close to the Department of Social Welfare and The Salvation Army. He argued that the Respondent's business had declined 20% from the level achieved in 2016, due to the effect of the Luas construction works and changes in vehicular and pedestrian traffic forced upon consumers. He said that footfall and retail on Parnell Street had not recovered post Covid. There were a number of empty shop frontages on King's Inns Street, adjoining Parnell Street and that sadly somebody had recently been found dead nearby in March of 2022, something which Mr. Potter was not aware of.

The Ivy Building

18. Mr. Markey's report referred to a "*context comparable*", being the Ivy Building on Parnell Street, to be occupied by Flyefit. Precisely what is meant by a "*context comparable*" is not defined, but I presume it to be a similar type of premises to that occupied by the Respondent. He described the building as a 20-year lease with a break clause in year 10, with 12 months' rent free. It is situated at a much better location on Parnell Street, beside Tesco and opposite Lidl. However, there was an extended rent free and shorter term. This gave an adjusted figure of €7.90psf. Crucially however, Flyefit, the prospective tenant, only agreed to the lease subject to planning permission, which was refused and therefore the rental never proceeded. It is this "*context comparable*" which, in many ways, has caused the difficulty which has now arisen.

19. It is worth sitting out the paragraph of his report which was focused on by counsel for both parties. It reads as follows:-

> *"I have adjusted each of my comparables to reflect their different locations, lease terms and such as fast-food use. The average of my three primary comparisons is €7.85psf. and I have adopted this level as my opinion of value. This is reinforced by consideration of my "context comparable" which analyses, on an adjusted basis at €7.90psf.*

The evidence to support my rental figure for the storage area that first floor is derived from analysis of the proposed letting of part of the Ivy building besides Tesco on Parnell Street, to Flyefit. This shows a rate of €3 for first floor stores but, given the quality of the accommodation in the subject I believe a ratio of €2.50 is appropriate to apply to the subject it is also a rate which is approximately 1/3rd of the retail rate, it is hard to countenance a higher ratio being appropriate."

20. In his affidavit Mr. Markey said that he withdrew the "*context comparable*" at the beginning of the oral hearing, since Mr. Potter had objected to its inclusion on the grounds of the letting did not proceed. He said that he does not accept the characterization of this withdrawal, on the basis that it was not relevant or an appropriate comparable, he simply withdrew it because there was an objection. Either way both parties accept that the Ivy building was not before the arbitrator at the time he made his award.

The Arbitrator's Award

21. At the outset, Mr. Feely stated that since the letting did not proceed, he would not consider it further. He noted that both experts had given their opinions as honestly held beliefs, which ought to be respected, especially in the absence of more comparable open market evidence of high relevance. Ultimately, he came to the view that the rent per square foot for the ground floor retail area should be €23.44psf., making a total of €134,053.36, whilst for the first-floor storage area, the rent should be €2.50psf., making a total of €14,920. Adding it all up, it came to the sum of €148,973.36, which he rounded up to €149,000.

Article 34 (2)(a)(ii) and Article 34 (2)(a)(iii) of the Model Law

22. The UNCITRAL Model Law on International commercial arbitration was established in this jurisdiction in the Arbitration Act 2010 and radically changed arbitration law and

practice in Ireland. It promotes greater uniformity and assists the enforcement of arbitrator's awards between jurisdictions under international conventions. As such it is a crucially important piece of legislation with its roots in the New York Convention of 1958.

23. In rare circumstances, pursuant to Chapter VII Article 34, recourse to a court against an arbitral award may be made only by an application for setting it aside, in accordance with para. (ii) and (iii) of Article 2.

24. Article 2 reads as follows:-

> *"2) An arbitral award may be set aside by the court specified in article 6 only if:*
>
> *(a) the party making the application furnishes proof that:*
>
> *(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or <u>was otherwise unable to present his case;</u>*
>
> *(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or <u>contains decisions on matters beyond the scope of the submission to arbitration</u>, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;"* (emphasis added).

<u>The Court's Approach to Setting Aside Awards</u>

25. Barniville J. (as he then was) in *Ryan v O'Leary* [2015] IEHC 820 set out the courts attitude to setting aside awards of an arbitrator under the Model Law. He identified two

important principles which can be derived from Irish law. The first is the importance of the finality of arbitration awards, whilst the second is that an application to set aside an award is not an appeal from the decision of the arbitrator and does not afford the court the opportunity of second-guessing the arbitrator's decision on the merits, the facts or on the law.

26. The first principle, namely, the finality of awards, was stated very clearly in the context of the pre-2010 legislative regime by McCarthy J. in the Supreme Court in *Keenan v. Shield Insurance Company Ltd* [1988] IR 89. In that case, McCarthy J. described arbitration as a "*significant feature of modern commercial life"* and continued: -

> *"It ill becomes the court to show any readiness to interfere in such a process; if policy considerations are appropriate as I believe they are in a matter of this kind, then every such consideration points to the desirability of making an arbitration award final in every sense of the term."*

27. In *Delargy v Hickey* [2015] IEHC 436*,* Gilligan J. cited the dicta of McCarthy J. in *Keenan* with approval and commented *"Clearly there is a public policy ground in issue in relation to the desirability of making an arbitration award final in every sense of the term…".*

28. As Barniville J. said in *Ryan*:-

> *"There is no doubt, therefore, that the policy behind the 2010 Act and the Model Law is to uphold the finality of an award and, therefore, courts are required to construe narrowly the grounds on which an award may be set aside under Article 34 and to exercise the jurisdiction to set aside in a sparing manner."*

29. As far as the second principle is concerned, in *Delargy* Gilligan J. stated:-

> *"It is no function of this Court to attempt in any way to second guess the decision as arrived at by the arbitrator and this Court does not propose to do so… This Court does not consider that it is appropriate to revisit the merits of the arbitrator's award."*

30. The parties accept, as do I, that this application cannot be an appeal from the decision of the arbitrator (see *O'Leary trading as O'Leary Lissarda v Ryan* [2015] IEHC 820, McGovern J.).

31. With those important general principles in mind, I now address the grounds on which the Applicant seeks to set aside the award under Article 34 of the Model Law and set out my conclusions in relation to those grounds.

The Oral Submissions

32. In regard to the first-floor storage area, Mr. Downey BL, counsel for the Applicant, says Mr. Markey had no examples of a first-floor comparator. All his examples were adjustments. As against that Mr. Potter had actual examples. The arbitrator, even though he is an expert, can only rely upon the evidence which is before him. If he is going to import his own experience, he must say so and give reasons. He should have engaged further with the evidence before him. This was an unfortunate error, but he didn't join the dots. There was no relevant evidence to support a figure of €2.50 in relation to the first-floor storage area.

33. He argues that the parties had agreed that the storage area would be valued at one third of the ground floor rent. He says there clearly was a consensus on this point, bearing in mind the specific words in Mr. Markey's report where he said:-

> "*I believe a ratio of €2.50 is appropriate to apply to the subject, it is also a rate which is approximately 1/3rd of the retail rate-it is hard to countenance a higher ratio being appropriate."*

34. Had the one third rule applied, that would have given rise to an award of approximately €8 for the storage space. Instead, the arbitrator must have relied upon evidence which had been excluded by considering the figure offered in relation to the Ivy building, which Mr. Markey adjusted to the figure of €2.50. Comparators serve a purpose in a rent review; they are a guide.

35. In relation to the ground floor, the arbitrator seems to have given equal weight to the comparisons furnished by both surveyors, coming somewhere in between, even though Mr. Potter's were actual comparisons whilst Mr. Markey's were adjusted or notional comparisons. There were no reasoned arguments as to why he made the deductions he made. He seems to have hit upon a happy medium between the two.

36. In this regard, he relies upon the case of *OAO Northern Shipping Company v Remolcadores De Marin SL* [2007] EWHC 1821, the decision of Mrs. Justice Gloster of the Queen's Bench Commercial Court, who, quoting from Ackner LJ in the *The Vimeira* [1984] 2 Lloyd's Rep 66 who said:

> "*The essential function of an arbitrator … is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain live issues. If an arbitrator considers that the parties or their experts have missed the real point … then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it …"*

She went on to say that these principles apply to *"unargued points of law or construction as they do to unargued questions of fact."*

37. At this point it is worth quoting another part of the judgment which both counsel relied on, where she said:-

> "*Thus, where there has been an irregularity of procedure, it is enough if it is shown that it caused the arbitrator to reach a conclusion unfavorable to the applicant which, but for the irregularity, he might well never have reached, provided always that the opposite conclusion is at least reasonably arguable."*

38. The point being that the arbitrator should not have regard to an exemplar which was not argued in front of him as the basis of his award. It is a matter of fundamental breach of natural and constitutional justice. Not only did the arbitrator fail to provide any reasons, but he must have based his determination on the Ivy building comparisons, which he had already ruled out, and which the parties had agreed was inadmissible and not for consideration.

39. Mr. Flynn BL, counsel for the Respondent, very carefully went through the award. He points out that the arbitrator was very experienced and indeed had inspected the premises. Therefore, his award was reached in a clear and logical way and not devoid of the evidence. He made his decision based upon the facts before him and gave reasons.

40. He points out that in a case such as this, the threshold to set aside the award under the Model Law is high. The real point which the Applicant makes is that he didn't get an opportunity of arguing the point. However, in point of fact, he had the opportunity and did address the argument in relation to the potential value of the first-floor storage space.

41. He noted that a unique feature of this particular property was that first-floor storage area is bigger than the ground floor retail area. It can only be accessed by going out of the store onto King's Inns Street, up a ramp and then gaining access by way of stairs.

42. In relation to the reference of a one third industry rule, referred to in the report of Mr. Markey, when you read the full paragraph, he is only referring to this property. Mr. Markey says clearly that there is no such one third rule. The arbitrator clearly excluded the Ivy building. He went through a reasoned approach to how the rent was arrived at and he says that Mr. Potter was not taken by surprise, the issue was argued in full. He too relies upon the case of *OAO* and the quote set out above.

The Issues

43. In summary, it seems to me that one of the key issues in this case is whether the arbitrator's engagement or non-engagement with the Ivy building "*context comparable*". If he did engage with it then clearly that would be a significant mistake or error, which could have implications for the award. If he didn't engage with it, then the opposite would apply. A second issue relates to the so-called one third rule. If that were to apply, then the rate for the first-floor storage area would be significantly higher. A third issue, which the Appellant argues, is that the arbitrator embarked on an arbitrarily series of adjustments to reduce the ground floor rent to 65% of the comparators given in evidence and seems to have given equal weight to the comparisons furnished by both surveyors, coming somewhere in between, even though Mr. Potter's were actual comparisons whilst Mr. Markey's were adjusted or notional comparisons.

The Award

44. At the outset, I think it is appropriate that the court should focus on the award actually made. It should be noted that the arbitrator prepared a detailed, professional and comprehensive report. He set out the basis upon which he was going to make his award. He noted the submissions of both chartered surveyors, in detail, setting out the comparisons each relied upon, their written and oral arguments for and against.

45. In relation to the "*context comparable*", he noted that Mr. Markey confirmed that the transaction did not proceed. He said: "*as such, I do not have to consider this further".*

46. He weighed the factors which he considered relevant together with the location and nature of the premises and the factual matters which had been given to him in good faith. He noted that his sole function was to determine the appropriate rent to apply from the rent review date on the basis set out of the lease. He recorded the respective parties' evaluation of both the ground floor area and the first-floor area.

47. He had the opportunity of visiting the area observed that part of the shop at the rear was raised. Mr. Potter had suggested that this would have no material effect on the performance of the shop while Mr. Markey had thought it was a security and an insurance risk. He found that there was no proof or evidence during his inspection of that negative effect. Further, he noted that the first-floor storage area was in use but maybe somewhat inefficiently. The lack of a lift was a hindrance and time consuming and that users of this form of space may prefer to have a cheap storage space on site.

48. He dealt with the turnover, the concept of a hypothetical lease, a willing lessee, market conditions, Covid19, for which he made no adjustments and City Centre footfall. He then analysed the four comparisons offered by the Applicant and the three by the Respondent. In relation to the first, Asia Supermarket, he felt that adjustments should be applied to reflect size, location, shorter term and treatment at rent reviews. He felt he could place little weight upon the second comparison, Oriental Pantry, but could place some weight upon the third comparison, the Tesco store in Smithfield. As far as the last comparison, Nisbet's was concerned, he placed little weight upon it. In relation to the Respondent's comparisons, he placed some weight upon the Burger King premises, little weight on the Argos and little weight on the Lidl premises, which he felt was not hugely helpful.

49. Crucially, in relation to the "*context comparable",* the Ivy building, he said as follows:- "*as outlined previously, this transaction did not proceed and as such I do not have to consider this further".*

50. He made certain findings under the heading of "*Formation of Opinions*". These included that Parnell Street benefited from the proximity of the Ilac Centre, coupled with a number of brand names and lack of apparent vacancies. He found the subject property to be on the periphery of the quality retail area and that the ranges suggested by Mr. Markey were

subjective and unsubstantiated with little factual detail provided to demonstrate the levels of differential suggested.

51. He found that the access to the premises benefited from the pedestrian crossing. In relation to the first-floor storage area, he said as follows:

> *"The first floor is extensive, and it may suit tenants who have relatively cheap storage space on site. The lack of a lift is a negative feature, as all deliveries need to be manhandled."*

52. Before he gave his reasons, he said that adjustments made by Mr. Potter in relation to the hypothetical term of the lease were not quantified. They were significantly less than those of Mr. Markey. As far as scale was concerned, he found that some adjustments should be allowed for scale of the comparisons against the subject premises and that Mr. Markey defined his adjustments which were helpful. By implication it would seem that Mr. Potter's were not helpful. He then set out his reasons and came to his conclusions.

53. He challenged both parties' figures and the basis upon which they were arrived at. He noted that Mr. Markey's range of ground floor rents were unhelpful and that there was no comparable evidence provided with actual rents paid. He made his own adjustments to the Respondent's figures for the short term, scale and due to Cap and Collar, which is the maximum and minimum interest rate that will apply, the nature of the rent review as well as their location. He even went so far as to set out what percentage of a deduction he was allowing for each of the matters that he took into consideration. This led him to a figure of €24.38psf.

54. He then considered the Applicant's figures and adjusted them to reflect a ground floor rental of €22.50psf. He concluded his analysis by saying-

> "*I have relied on the more recent comparisons located in close proximity to the subject premises. The above comparisons on Parnell Street, demonstrate rents, which would*

reflect between €22.50/sq.ft and €24.38/sq.ft. I have adopted the medium figure in arriving at €23.44/sq.ft for the ground floor area".

55. In relation to the first-floor storage space, he said: -

"In considering the first floor space Mr. Potter has provided first floor analysis of €10/sq.ft for small areas up to 615sq.ft but has not allowed for any quantum differences in scale and Mr. Markey has reflected €2.50/sq.ft for this area I have accepted Mr. Markey's valuation of €2.50/sq.ft for the first floor stores".

Discussion and Decision

56. As I noted above, one of the key issues in this case involves the arbitrator's engagement or non-engagement with the Ivy building context exemplar. In point of fact, the arbitrator said, not once but twice, that he did not consider the Ivy building. At para. 11. 3.16, he said that since the transaction did not proceed, he did not have to consider it further. Again, at para. 12, he said that since the transaction did not proceed, he did not have to consider it further.

57. Therefore, on the face of it, the arbitrator has said that he did not consider it. Nonetheless, the Applicant's case is based upon the premise that he must have, since he could not have gotten the figures from anywhere else. Therefore, it seems to me that the question to be asked is whether he could have gotten these figures from anywhere else. Mr. Flynn on behalf of the Respondent, says the arbitrator gave the matter serious consideration. These considerations, which included that the first-floor storage area, was bigger than the ground floor retail area and that the access to it was difficult, as well with the other matters which I have set out above.

58. It has to be remembered that the oral hearing wasn't simply submissions to the arbitrator but in fact was a form of an adversarial hearing in which each chartered surveyor, in essence, cross-examined each other.

59. It seems to me that there is no evidence that the arbitrator relied upon evidence that had been excluded. Both surveyors knew each other's case, including the "*context comparable"*. Correctly in my view, the arbitrator decided that he wasn't going to consider it. He had plenty of other information to rely upon to reach his conclusion in relation to both the ground floor retail space and the first-floor storage area.

60. Specifically dealing with the ground floor retail space, I see nothing wrong in the manner in which the arbitrator reached his decision. He had the submission of both parties, he had the comparisons of both parties, he analysed each property in turn, set out which ones he considered relevant and those which he didn't and then applied an adjustment. He gave reasons why he applied the adjustment. In relation to the Asia Supermarket, for example, he stated that he had analysed the figure, adjusted the rent for the subject premises at minus 5% for the shorter term, minus 10% on scale, minus 5% due to the Cap and Collar nature of the rent review and minus 5% for the location. He did that based upon his visitation to the premises, his analysis of the submissions of both parties and of course his experience.

61. In my view, it cannot be said that he did not consider the matter carefully or that he failed to give reasons or that he embarked on an arbitrarily series of adjustments to reduce the ground floor rent to 65%, without evidence. The argument of the Applicant is that he should have accepted, what was described as, the best evidence of the Asia Supermarket instead of making deductions from it. But in point of fact, whilst he said that the Asia Supermarket was considered best evidence, he considered certain deficiencies which I have set out above. Therefore, in relation to the ground floor I can see no flaw in the arbitrator's thinking.

62. In relation to the argument that the arbitrator relied upon the adjusted figures of the Respondent instead of the actual figures of the Applicant, I cannot accept this submission. It seems to me that the arbitrator carefully considered the comparisons offered by both sides and

accept, rejected and adjusted as he felt appropriate. I believe he has given carefully considered reasons.

63. Matters are a little bit more complicated when we get to the first-floor storage area where he said he accepted the valuation of Mr. Markey. Whilst he did not go through the same detailed analysis as he did with the ground floor retail space, he did criticise Mr. Potter for coming up with the figure of €10psf. because Mr. Potter had not provided any calculations in his analysis because he had not provided any calculations in his analysis. At para. 13 he specifically dealt with the first-floor storage area. He said that it was extensive and may suit tenants who have relatively cheap storage space on site. He felt that the lack of a lift was a negative feature as all deliveries needed to be manhandled. Further, he found that some adjustments should be allowed for scale of the comparisons against the subject premises. He went on to note that Mr. Markey's adjustments were helpful.

64. He carefully evaluated both approaches but relied more on the actual evidence on Parnell Street and those close to the subject premises. He summarised the comparable evidence he believed to be most relevant, as well as the adjustments.

65. In order to set aside the award of the arbitrator pursuant to Article 34(2)(a)(ii), the Applicant has a high hurdle. It submits that it was unable to present its case at the arbitration. In my view, that is not correct. Not only did Mr. Potter present his case, he did so to the best of his ability. He put forward his comparisons and he challenged those of Mr. Markey. He got an opportunity to, in essence, cross-examine Mr. Markey and make the case he had to make. For the Applicant's submission to be successful, I would have to find that there had been a fundamental breach of natural and or constitutional justice to the extent that the arbitrator determined the case on something that was never argued.

66. However, I find that the arbitrator did not consider the Ivy building. He said so twice. There was no evidence to suggest that he attempted to mislead the parties. This is not a situation

where he hid the fact that the "*context comparable*" had been referred to and tried to introduce it through the back door. Therefore, under the first ground, I find that the Applicant was able to present his case.

67. In relation to the first-floor storage area, the argument is fundamentally based upon a premise that the arbitrator must have considered the Ivy building, which had a rent for the storage area of €3, adjusted by Mr. Markey to €2.50. Just because the arbitrator came to the same figure does not mean that he relied upon that "*context comparable"*. The evidence is that he came to that figure based upon his assessment of what the going rate should be for a storage area on that street. He considered its size, accessibility, location and the fact that the lack of a lift was a hindrance and time consuming. He agreed that tenants of this nature would prefer to have a cheap storage space on site. Further, in what seems to me to be something of a criticism of Mr. Potter, he noted that he hadn't provided any analysis for quantum differential in size.

68. Both parties have referred to the case of *OAO* and in particular the quote from *Vee Networks Ltd v Econet Wireless International Ltd* [2005] 1 Lloyd's Rep 192 at para. 90 which reads as follows:-

> *"The element of serious injustice in the context of S. 68 does not in such a case depend on the arbitrator having come to the wrong conclusion as a matter of law or fact but whether he was caused by adopting inappropriate means to reach one conclusion whereas had he adopted appropriate means he might well have reached another conclusion favourable to the applicant. Thus, where there has been an irregularity of procedure, it is enough if it is shown that it caused the arbitrator to reach a conclusion unfavourable to the applicant which, but for the irregularity, he might well never have reached, provided always that the opposite conclusion is at least reasonably arguable."*

69. In this case the arbitrator did not adopt an inappropriate means to reach one conclusion or another. There was nothing inappropriate in the manner in which he came to his conclusions.

I find that there was no irregularity of procedure. The fact that the arbitrator came to a conclusion which was unfavourable to the Applicant is not because the arbitrator relied upon the Ivy building, it is because he considered the submissions, had an oral hearing and visited the premises. On the basis of that combined knowledge and his own experience, he came to his award. He did so in circumstances where the Applicant had every opportunity to argue its case.

70. As I set out above, the real issue in this case is whether there is evidence to show that the arbitrator made his decision in relation to the ground floor retail area and first floor storage space based upon the Ivy building "*context comparable*". I cannot accept the argument that he did. I accept what he said as being truthful. I accept that he did not consider it "*context comparable*". That there was plenty of other information available to him, which he set out in his award, which allowed him to come to that conclusion.

71. In relation to the notional of one third rule, I find but there is no evidence to support such a rule exists within the industry. Further Mr. Markey did not say that there was such an industry rule. What he actually said was the rate that he was putting forward in regard to the storage area was approximately one-third of the rate that he was purposing for the retail area. I do not think the words "*it is hard to countenance a higher ratio being appropriate*" can be interpreted outside the context of this particular premises. Neither do I think there is any evidence to suggest that the parties were working under some misapprehension that it had been agreed that the first-floor storage area would be valued at one-third of the retail area. The rent for each premises will be decided upon its own unique features. In this case the first-floor storage area had significant deficiencies which were highlighted by the arbitrator. To apply an arbitrary one third rule is illogical. That being the case I find there is no merit to this argument.

72. Finally, I have concluded that the arbitrator did not act in any arbitrary manner. I do not accept that he preferred the adjusted figures of Mr. Markey. He had plenty of evidence and used that evidence appropriately giving reasons why he came to his award.

73. If this had been an appeal from the decision of the arbitrator, it is possible that the court could have taken a different approach. As Barniville J. (as he then was) set out clearly above, this is not an appeal, nor is it ever intended to be an appeal. The whole purpose of the Model Law is to support the work of the arbitrator and only in very limited circumstances, to interfere with it to the extent as set out in Article 34.

74. Those very limited circumstances do not arise in this case and therefore, I find that the Applicant has not discharged the onus upon it to set aside the arbitrator's award. I shall dismiss the application.