CA on appeal from Swindon County Court (His Honour Judge Weeks) before Chadwick LJ; Arden LJ. 8th March 2001

JUDGMENT : LORD JUSTICE CHADWICK

1. This is an application for permission to appeal against an order made on 12th October 2000 by His Honour Judge Weeks QC, sitting in Bristol in the Swindon County Court, on an application under paragraph 27(2) of Schedule 11 to the Agricultural Holdings Act 1986.

2. The applicant, Swindon Borough Council (to which I will refer as "the landlord"), is the person entitled to the reversion immediately expectant upon the determination of an agricultural tenancy of the holding known as Number 1, West Leas Farm, Elcombe, Swindon. The tenancy was granted by Wiltshire County Council to Mr Leslie Fearn (to whom I shall refer as "the tenant") upon the terms of a tenancy agreement dated 3rd December 1986. It is common ground that the tenancy is one to which the Agricultural Holdings Act 1986 applies. Section 12 of the Act provides that:

   "(1) Subject to the provisions of Schedule 2 to this Act, the landlord or tenant under an agricultural tenancy may by notice in writing served on the other require that the rent to be payable in respect of the holding as from the next termination date shall be referred to arbitration under this Act."

3. A notice under that section, dated 12th February 1993, was served by Wiltshire County Council (as the then landlord) on the tenant; and an arbitrator was appointed to determine all questions arising from that the notice. In due course, by two interim awards each dated 11th October 1995 and a final award dated 6th December 1995, the arbitrator made his determination. That determination included the amount of the rent to be paid under the tenancy.

4. The tenant was dissatisfied with the award. He applied to the County Court for the award to be set aside, remitted or varied. Wiltshire County Council was the respondent to that application. It took the point that the application was out of time. While the proceedings were pending, the present landlord, Swindon Borough Council, succeeded to the interest of Swindon County Council. The present landlord and the tenant sought to compromise the issues raised in the proceedings then pending in the County Court, and various other issues which had arisen between them in relation to the tenancy. For that purpose they entered into a deed dated 17th March 1998.

5. Clause 3.5 of the deed provides, at sub-paragraph (a), for the landlord to pay the tenant compensation of an amount equal to £6,900 plus VAT, if applicable, subject to the landlord reserving the right to deduct £2,400, being the outstanding rent due on 25th March 1998. It is plain from that provision that, in the accounting between the parties, it was their intention that outstanding rent should be taken into account by way of credit to the landlord.

6. Clause 4.3 of the deed is in these terms: *"The Parties agree that the provisions of this Deed are in full and final settlement of all or any claims that each of them may have against the other arising out of the Arbitration and the Proceedings and the subject matter thereof."*

7. "The Arbitration" and "the Proceedings" in that context are defined terms. Put shortly, they mean the arbitration which has led to the awards to which I have referred and the proceedings in the County Court under which that award was challenged.

8. Under the terms of the tenancy agreement the tenant is liable to pay rent for the holding by equal half-yearly instalments in arrears on 25th March and 29th September in each year. On 18th January 1999 the landlord served on the tenant a notice to pay rent said to have become due on 25th March 1997 in respect of the half-year from 30th September 1996 to 25th March 1997. Failure to pay within two months of the service of such a notice, if valid, would provide a ground, under Case D of Schedule 3 to the Act, upon which the landlord could rely following service of a subsequent notice to quit. The service by the tenant of a counter-notice in response to a notice to quit would have no effect in those circumstances - see section 26 of the 1986 Act.

9. A period of two months from the date of the notice to pay expired on 18th March 1999. By a letter dated 15th March 1999 -- that is a few days before the expiry of the two month period -- the tenant, through his solicitors, disputed liability to pay rent in respect of the half-year to 25th March 1997. He did so in reliance on clause 4.3 of the 1998 deed.

10. Notwithstanding that the validity of the notice to pay served on the 18th January 1999 was in issue, the landlord served a notice to quit on 18th March 1999. Shortly thereafter, the landlord (or its solicitors) realised that that notice was premature - in the sense that it was within the two months period - so a further notice was served on or about 24th March 1999.

11. The tenant's response was to require the effect of the notices to quit to be referred to arbitration; as he was entitled to do under section 28(4) of the Act. An arbitrator was appointed under paragraph 1 of Schedule 11 to the 1986 Act on 9th July 1999. The arbitrator delivered his award on or about 20th October 1999. The award itself is dated 15th October 1999. The arbitrator held that the notice to quit served on 24th March 1999 was effective. In reaching that conclusion he held, first, that rent in respect of the period from 30th September 1996 to 25th March 1997 had not been paid by the tenant; and, second, that the provisions of clause 4.3 of the 1998 deed could not be construed as an agreement to waiver rent due on 25th March 1997. Accordingly, he held that the notice to pay of 18th January 1999 (which he described, wrongly, as a notice to pay of 18th March 1999) was a valid notice: see section 6 in Appendix A to the award dated 15th October 1999.

12. Paragraph 27(2) in Schedule 11 to the Agricultural Holdings Act 1986 is in these terms: *"Where the arbitrator has misconducted himself, or an arbitration or award has been improperly procured, or there is an error of law on the face of the award, the county court may set the award aside."*

13. The tenant made an application under that provision. There is no suggestion that the arbitrator misconducted himself or that the award had been improperly procured; but it is said that there is an error of law on the face of the award. If that contention were made out, then the County Court might either remit the award to the reconsideration of the arbitrator (see paragraph 28(1) of Schedule 11) or, itself, vary the award. Paragraph 28(2) of Schedule 11 is in these terms: *"In any case where it appears to the county court that there is an error of law on the face of the award, the court may, instead of exercising its power of remission under sub-paragraph (1) above, vary the award by substituting for so much of it as is affected by the error such award as the court considers that it would have been proper for the arbitrator to make in the circumstances; and the award shall thereupon have the effect as so varied."*

14. The grounds upon which it was said that there is an error on the face of the award appears in the particulars of claim delivered on behalf of the tenant on 5th November 1999 in the county court proceedings. The grounds were, first, that the arbitrator wrongly construed the terms of the deed and the order to the effect that they did not comprise all claims to rent falling due prior to 25th March 1998; and, second, that the arbitrator wrongly refused to take into account draft heads of terms, and drafts of the deed, in construing the deed and the order, when those documents made plain that it was the intention of the parties to compromise all or any claims in respect of the holdings. There was a third ground taken, namely that the notice to quit served on 24th March 1999 was not properly served, because it was no more than a copy of the notice which had been served earlier on or about 17th or 18th March. The third ground was not pursued before the judge; and the judge rejected the second ground. It is only the first ground that is now relevant.

15. The application came before His Honour Judge Weeks QC sitting in Bristol. By his order made on 12th October 2000, he set aside the award dated 15th October 1999. It is against that order that the landlord seeks permission from this court to appeal.

16. The judge, himself, gave permission to appeal. Nevertheless, in the appellant's notice filed in this court, the appellant seeks permission from this court: see section 6, Part B. The only basis upon which it could be necessary to seek permission from this court - in circumstances where permission had already been granted by a court below - is that this is an appeal to which the provisions of CPR 52.13 apply. The rule is in these terms:

> *"1.Permission is required from the Court of Appeal for any appeal to that Court from a decision of the County Court or the High Court which was itself made on appeal.*
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> *2.The Court of Appeal will not give permission unless it considers that*
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> *(a) the appeal would raise an important point of principle or practice; or*
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> *(b)there is some other compelling reason for the Court of Appeal to hear it."*

17. That application was considered on paper by Lady Justice Arden. She addressed the application on the basis that it was an application to which CPR 52.13 applied. Unless the application before here was an application to which CPR 52.13 applied, it was pointless, because (as I have said) the judge had already given permission to appeal below. But no reason had been advanced in the papers before her - which included a skeleton argument dated 25th October 2000 - in support of the proposition that the requirements of CPR 53.13 sub-rule (2) were met. In those circumstances she refused the application.

18. On this renewed application the applicant has raised the question whether this is indeed a case within CPR 52.13 at all. It is said that paragraph 27 in Schedule 11 of the Agricultural Holdings Act 1986 is part of the County Court's supervisory jurisdiction over lay arbitrators and ought not properly to be regarded as an appellate jurisdiction for the purposes of CPR 52.13. But, while it is understandable that the applicant landlord wishes to have a decision on the question of whether or not it could rely on permission already granted by His Honour Judge Weeks QC, it cannot be regarded as satisfactory for the matter to be raised in that way.

19. A decision on the present application that permission under CPR 52.13 is not required could not bind the tenant, who is not before us. The tenant would remain free to take the point that the Court of Appeal had no jurisdiction to entertain the appeal. In a case where permission under CPR 52.13 is required, the point is one which goes to jurisdiction - see section 55(1) of the Access to Justice Act 1999. If the landlord wished to rely on the permission that it had already obtained from His Honour Judge Weeks QC, then the proper course would have been for the landlord to raise, as a preliminary point on notice to the tenant, the question whether it was entitled to rely on that permission.

20. The only basis upon which this court can entertain an application for permission to appeal in circumstances such as the present is that the permission is required from this court because the appeal is an appeal to which CPR 52.13 applies. If permission under CPR 52.13 is not required, then the application is misconceived because the landlord already has the permission it needs. It can rely on permission granted by His Honour Judge Weeks. If permission under CPR 52.13 is required, then in deciding whether or not to grant it, we have to apply the test set out in sub-rule (2): would the appeal raise an important point of principle or practice, or is there some other compelling reason for the Court of Appeal to entertain it?

21. Faced with that problem, Mr Roger very frankly acknowledged that he would prefer to pursue his application for permission to appeal on the basis that CPR 52.13 did apply to this case, rather than to embark on an application

which would lead, after hearing the tenant, to a decision on the question. We put him to his election; and he elected to stand on the position that this was indeed a case to which CPR 52.13 applies.

22. Nevertheless, it would not, of course, be right for this court to consider granting permission under CPR 52.13 unless it was itself satisfied that, at least prima facie, it had jurisdiction to act on that basis. For my part, I feel no constraint in entertaining the application on the basis that this is a case in which permission under CPR 52.13 is required. It is unnecessary, and I think inappropriate, to decide the point; but the provisions of CPR 52 Practice Direction 17.1, concerning statutory appeals, and the decisions of this court in ***Tanfern v Cameron-McDonald*** [2000] 1 WLR 1311, ***Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*** [2000] 3 WLR 1824 and ***Clarke v Perks*** [2001] 1 WLR 17 - see, in particular, at paragraph 13 - seem to me to point clearly to the conclusion that the basis upon which the application was originally made was correct.

23. With that introduction, and on the basis that I have indicated, I address, first, the question of whether the appeal would raise an important point of principle.

24. The point of principle on which the applicant landlord relies is now identified in a supplemental submission prepared by counsel for the purposes of this renewed application and dated 14th February 2001. It is said that the important point of principle relates to the proper approach for the court to take where a question of construction of a document has been determined by an arbitrator after hearing evidence about the factual matrix against which the document ought to be construed; but where that factual matrix has not been incorporated into the arbitrator's award so as to be part of the material which the court can consider under paragraph 27 of Schedule 11 of the 1986 Act. It is said that the correct thing for a court to do in those circumstances is to remit the award for further consideration by the arbitrator; with the benefit of the court's prima facie view on the construction of the document.

25. For my part, I can imagine nothing more calculated to cause confusion than for the court to give a prima facie view as to the construction of the document without examining the context in which it was executed; and then to send the document back to an arbitrator to reconstrue it on the basis of some material which the court has not taken into account. Nevertheless, that is what the landlord submits should be done. It said, further, that it would be wrong for the court to set the award aside and substitute its own determination on the question without the benefit of the material which persuaded the arbitrator to reach the conclusion that he did.

26. In my view that submission is misconceived. An arbitrator appointed to conduct an arbitration under the Agricultural Holdings Act 1986 is obliged, if requested to do so, to give reasons for his award: see paragraph 21 of Schedule 11 to that Act and section 10 of the Tribunals and Inquiries Act 1992. In the present case the arbitrator did give reasons for his award; no doubt he was requested to do so for the obvious reason that it is difficult to see how, save in exceptional circumstances, an award could be challenged under paragraph 27(2) of schedule 11 (that is to say, on the grounds that there is an error of law on the face of the award) unless the court can see the process of reasoning which led arbitrator to his conclusion. A non-speaking award is almost impossible to challenge on the grounds of error of law. That is why, in cases of this nature, parties require speaking awards.

27. It follows that in deciding whether there is an error of law on the face of the award, the court must look at the reasons given for the award. It must assume that those are the reasons which led the arbitrator to reach the conclusion which he did. The court cannot proceed on the basis that there were some other reasons - known only to the arbitrator and which he chose to not to disclose - which affected his mind. It must assume that the reasons which led the arbitrator to his conclusion are the reasons, and only the reasons, which he has included in the statement of the reasons. That is the approach which the judge adopted in the present case. He found that there was an error of law on the face of the award; in that the arbitrator had failed to appreciate that a claim for rent in an amount which was fixed by the award in the first arbitration was a claim arising out of the first arbitration and so was a claim within the scope of clause 4.3 of the deed.

28. Having reached that conclusion, paragraph 28(2) of Schedule 11 of the Agricultural Holdings Act required the judge to consider whether to remit the matter to the arbitrator for reconsideration or whether to decide for himself whether the award should be varied. I can envisage circumstances in which it might be appropriate for a court to remit a question of construction to be determined by the arbitrator after making findings of fact. Such a case might arise where the arbitrator had indicated that he had not considered the document which he had to construe in the light of background facts known to the parties. Whether or not to remit the matter to the arbitrator is for the court to consider in each case.

29. In the present case there was no reason for the judge to think that the arbitrator had failed to take into account those matters of background fact which he, the arbitrator, thought were relevant; and in order to discover what matters of background fact the arbitrator thought relevant, the judge was entitled to look at the reasons in the award itself. There is no question of principle involved. The principle is plainly set out in the provisions in section 28. The court must decide, if it finds that there is an error of law on the face of the award, whether the appropriate course to take is to deal with the matter itself or whether the more appropriate course to take is to remit back to the arbitrator. It will be a question to be decided in each particular case; and there is no principle that one course must always be adopted rather than the other.

30. I reject, therefore, the submission that this is a case in which the first limb of CPR 52.13(2) applies. So I must go on to consider whether there is some other compelling reason why the appeal should be heard by the Court of Appeal.

31. The reasons advanced are, first, that the appeal raises a question of law. It is said that, if permission is not granted, there will have only been one consideration of the question of law before a legally qualified tribunal. There seem to me to be two answers to that contention. The first is that it was open to the parties, had they chosen, to appoint by agreement a legally qualified arbitrator. Paragraph 1(1) of Schedule 11 provides that the arbitrator shall be a person appointed by agreement between the parties. It is only in default of agreement that application needs to be made to the President of the Royal Institution of Chartered Surveyors. It may well be that if the President of the Royal Institution appoints from his panel, the parties will end up with a chartered surveyor rather than a lawyer. But in a case where the issue to be determined on arbitration is purely a question of law, the parties have the ability to agree a legal arbitrator if that is what they want. The second point is that this was an arbitrator who, plainly, was experienced in matters of this kind and who approached the construction of this document in what, if I may say so, was a lawyer-like way.

32. Further, of course, if it be the case that there will have been only one consideration of the question of law before a legally qualified tribunal, that must be a consequence which Parliament has intended may well follow in circumstances where section 55(1) of the 1999 Act applies. It cannot be a compelling reason for this Court to entertain all appeals on matters of law where there has been consideration by only one legally qualified tribunal below. If that were intended Parliament would not have enacted the section in the terms that it has.

33. It is then said that the landlord will have had no right of appeal at all. It is pointed out that this is not a case of successive appeals by the same party. But section 55(1) of the 1999 Act is not confined to cases where the party seeking to appeal to this court has been the unsuccessful appellant below. The section plainly envisages that its provisions will apply in cases where a party has succeeded on the first round but failed on the second round; and where it seeks to reinstate the judgment or award which it originally obtained. That may be a factor which will lead the court to the view that justice requires the matter to be entertained here; but if it is to have that effect, that must be because of the strength of the case, not because this happens to be a case in which the decisions below have gone different ways.

34. Thirdly, it is said that the learned judge reversed the arbitrator's award; and that he indicated that, if was within his power to grant permission to appeal, he would do so. That is indeed so; as appears from the order which he made. But the test which the judge was applying was the ordinary test: whether or not this was a case in which it could be said that there was no real prospect of success. In a case to which CPR 52.13 does not apply permission to appeal will be granted unless the court is satisfied that there is no real prospect of success. But the fact that it cannot be said that there is no real prospect of success does not lead to the conclusion that there is some compelling reason why the Court of Appeal should entertain the appeal. In this context, a compelling reason would arise, in my view, only if the court were satisfied that the prospect of success was so high that there was a serious risk of injustice if the appeal were not entertained.

35. It is then said that the defendant's appeal is meritorious. In effect that is a submission that there is a high degree of probability that an appeal would succeed. For my part, I am not persuaded that that is so. It seems to me that the judge is very likely to have been right for the reasons that he gave.

36. I am not persuaded that the threshold requirements possed by CPR 52.13 are satisfied in this case. I would refuse this application.

37. **LADY JUSTICE ARDEN**: I agree. I simply wish to add this in the context of this case.

38. A compelling reason would only be shown, in my judgment, in this case if there was a high prospect of success. In this court Mr Roger has submitted that there was a convention between the tenant and the landlord that there were no rent arrears due and that that was their understanding, or at least their convention, immediately before signing the deed dated 17th March 1998. But, as far as I can see, that is not an argument which has previously been advanced in these proceedings. In all the circumstances I do not consider that this application has the requisite prospect of success.

39. I would therefore dismiss the application.

40. **LORD JUSTICE CHADWICK**: The application is refused.

Order: Application dismissed. (Order does not form part of approved Judgment)

MR M ROGER (Instructed by Burges Salmon, Bristol) appeared on behalf of the Appellant.
The Respondent did not appear and were not represented.