In The Supreme Court of Bermuda

CIVIL JURISDICTION
2025 No 318

PATTY COURT LIMITED (TRADING AS BLUKIDS) **PLAINTIFF**

-AND-

WASHINGTON PROPERTIES (BERMUDA) LIMITED **DEFENDANT**

Application for an extension of time in which to appeal; application for leave to appeal on a point of law from the decision of the arbitrator under section 29 (2) and 29 (3) (1) (b) of the Arbitration Act 1986; application for a stay of the prosecution of a winding up petition pending the appeal against the arbitrator's decision

In Chambers

Date of hearing: **30 MARCH 2026**

Date of Ruling: **14 APRIL 2026**

Appearances

Vaughan Caines of Forensica Legal for the plaintiff

Richard Horseman of Wakefield Quin Limited for the defendant

Ruling of Martin J

Introduction

1. This is the court's decision in relation to three separate applications in relation to an arbitration award given by Mr Delroy Duncan KC sitting as a sole arbitrator in relation to an arbitration under a lease agreement dated 18 March 2016 ("the Lease") between the plaintiff

and the defendant in respect of certain retail premises at the Washington Mall in Hamilton from which the plaintiff carried on business as a shop selling children's clothing and related items.

Summary and Disposition

2. For the reasons explained below, the court has decided to dismiss the application for an extension of time for the filing of an application for leave to appeal against the decision of the arbitrator and to refuse leave to appeal. In summary, the proposed grounds of appeal do not show that the decision of the arbitrator was plainly wrong so the test for the grant of leave to appeal has not been met. It follows that the court is required to refuse an extension of time for applying for leave to appeal and refuse leave to appeal. The court has also refused to grant a stay of the petition to wind up the plaintiff because (i) there is no arguable appeal that would justify a stay and (ii) a disputed cross claim is not a sufficient basis upon which to restrain a petition for winding up based on an undisputed liability. However, the court has extended the restraint on advertisement of the petition for a period of 28 days to enable arrangements to be made for the plaintiff to withdraw the funds paid into court and to pay the Award.

Background

3. The plaintiff was the tenant of a retail unit in the Washington Mall in Hamilton of which the defendant was the landlord under the terms of the Lease. The plaintiff was also the occupier of a storage unit (#310) in the basement of the defendant's premises at Washington Mall in which the plaintiff stored its retail stock for its shop in the storage unit. The occupation of the storage unit was governed by a separate agreement dated 31 December 2015 ("the Storage Agreement"). The parties treated the terms of the Lease and the Storage Agreement as being integrated, so that the terms of the Lease applied to the storage area and the terms of the Storage Agreement governed the occupation of the storage area and contained covenants which were binding on the plaintiff as obligations under the Lease (and vice versa)[1].

4. As is common in arrangements such as this. the Lease provided that (as a tenant) the plaintiff would pay both rent for the premises calculated at a price per square foot of its occupation and a service charge calculated as a percentage of the total square footage occupied relative to the entire premises to pay towards the landlord's annual maintenance costs of the entire premises[2]. Part of the service charge represented a proportionate share of the defendant's cost insuring the building against risks of fire and other perils as landlord. One of these perils was the risk of flood damage to the premises.

5. The Lease also provided that the landlord's insurance obligation did not cover the tenant's fittings, stock and equipment and imposed an obligation on the tenant to insure against these risks and to indemnify the landlord against all consequences of the tenant's failure to do so[3].

[1] This was confirmed by both counsel during the hearing and this was the basis on which the matter was presented to the arbitrator at the arbitration.
[2] Clauses 3B and 3G and the Schedule.
[3] Clause 3T (ii).

6. The Storage Agreement provided a separate charge for the occupation of the storage area and expressly stated that the landlord did not take any responsibility *"for loss or damage to any items howsoever caused."* [4]

7. On 21 August 2019 in the nighttime (or the early hours of 22 August) one of the water pipes burst in the ceiling of Unit #310 and caused extensive water damage to the stock stored in the plaintiff's storage unit[5]. The result was the stock was damaged beyond recovery and had to be removed and taken to the dump. The value of the stock was BD$73,000.00. The plaintiff also incurred expenses which were described as "relocation expenses" of BD$33,000.00.

8. The plaintiff was not insured against these losses. The plaintiff's failure to obtain insurance represented an undisputed breach of its obligation under this term of the Lease. However, the plaintiff nonetheless sought to recover these expenses from the defendant, and a claim was made by the defendant against its insurer. The insurer denied the claim on the basis of the provisions of the Lease and Storage Agreement which put the risk of loss to stock stored in the storage unit entirely on the plaintiff.

9. None of the facts set out above that gave rise to the event was in dispute, although the amounts claimed by the plaintiff were not admitted by the defendant. The dispute arose as to the legal consequences of these events and the proper interpretation and application of the terms of the Lease and the Storage Agreement to the undisputed facts relating to the flood event.

10. The defendant denied liability for the losses to the plaintiff's stock, relying on the terms of the Lease and Storage Agreement described above, and refused to reimburse the plaintiff for the loss claimed.

11. In the absence of reimbursement by the defendant (or its insurers) as landlord, one of the shareholders of the plaintiff cashed in his life insurance policy in order fund the replacement of the damaged stock. The plaintiff then withheld the rent for the premises for the period between 30 April 2019 and 21 May 2020 as an offset against the losses it claimed.

12. The defendant therefore claimed the arrears of rent on the basis (a) the rent was indisputably due (which was acknowledged by the plaintiff) (b) the Lease expressly provided that the tenant was not entitled to withhold any portion of the rent due and (c) there was no liability on the part of the landlord for the losses which could justify an equitable set off. The defendant ultimately commenced an arbitration proceeding to recover the outstanding rent in the amount of BS$64,513.50.

13. The plaintiff admitted the rent was due but counterclaimed for the BD$73,000.00 in stock and BD$33,000.00 in relocation expenses and claimed BD$1,000,000 as the loss of the value of the shareholder's life insurance policy. The defendant denied liability for the losses on the grounds already stated, denied liability for the claim for the value of the life insurance policy and put the plaintiff to proof on the value of its claims for the lost stock and relocation expenses.

[4] Clause 4 of the Storage Agreement.
[5] Email dated 22 August 2019 from the defendant.

14. The matter proceeded to arbitration before Mr Delroy Duncan KC. The arbitral award was dated 10 July 2025 ("the Award"). The terms of the Award granted the defendant judgment for the unpaid rent and dismissed the plaintiff's counterclaims on the grounds that the terms of the Lease and the Storage Agreement provided an absolute defence to the plaintiff's claims. The details of the Award on these issues will be briefly considered below in the context of the plaintiff's application for leave to appeal to the Court of Appeal on a point of law under section 29 (2) and section 29 (3) (b) of the Arbitration Act 1986.

15. An application for leave to appeal was not made within the time allowed under Order 73 Rule 5 (1) of the Rules of the Supreme Court 1985, namely 21 days. The details of how this happened will be considered below in the context of the plaintiff's application for an extension of time in which to seek leave to appeal.

16. As a result of the non-payment of the outstanding arrears of rent and the Award establishing the plaintiff's liability, and in the absence of a stay of enforcement of the Award or an order granting the plaintiff leave to appeal, on 26 September 2025, the defendant served a statutory demand on the plaintiff seeking payment of the amount due, and stating that a winding up petition would be issued int he event of non-payment within 21 days on the grounds of deemed insolvency.

17. The plaintiff's counsel indicated to the defendant's counsel in correspondence that an application for leave to appeal had been filed and that a date for the hearing of that application had not been given. The defendant did not issue a winding up petition in anticipation of the service of the application for leave to appeal. When no application was served, the defendant issued a winding up petition on 28 January 2026. This prompted the plaintiff to seek an injunction restraining advertisement of the petition, which was made on an *ex parte* basis and without notice on 20 February 2026.

18. The court granted the injunction and gave reasons for doing so in an *ex tempore* decision[6]. The plaintiff undertook to pay the unpaid arrears of rent into court and to issue the application for an extension of time in which to seek leave to appeal and leave to appeal on an expedited basis and to serve those applications on the defendant within 7 days and to obtain directions for an expedited hearing. Those directions were subsequently given on an inter partes basis, and the hearing of those applications was set down for 30 March 2026, along with a separate application made by the plaintiff for a stay of the petition in the event that leave to appeal was granted.

19. It is in these circumstances that the present applications came on for hearing. Logically it is appropriate to address each of the three applications in turn: the court will therefore address them in the following order (i) the application for an extension of time in which to seek leave to appeal against the Award (ii) the application for leave to appeal the Award and (iii) the application for a stay of the petition.

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[6] This decision was not published because it would have defeated the purpose of the injunction restraining advertisement of the petition. Those reasons will now be released at the same time as the publication of this Ruling.

The application for an extension of time in which to seek leave to appeal

20. Mr Caines' affidavit in support of the application for an extension of time stated that the simple reason for the delay in making the application for leave to appeal within the time allowed was his confusion as to the correct time limit: he was unsure if it was 6 weeks which is the time limit for appealing to the Court of Appeal from a first instance decision, or 14 days which is the time limit for appealing against an interlocutory decision, for which leave is required[7].

21. Having realised that the application for leave to appeal might be already out of time, on 8 August 2025 Mr Caines filed a document at the Supreme Court Registry entitled "*Application for an Extension of Time for Leave to Appeal*". However, the document did not follow the form of an ordinary application by way of Originating Motion or summons, and no spaces were left for the Registry to insert a return date along with various other inconsistencies with normal practice. The result was that the application was not issued by the Registry. Mr Caines waited in the expectation that there had been a delay, and that his application would be issued in due course and relayed that message to his opposing counsel. In the meantime, the defendant had issued the statutory demand.

22. After some further back and forth between counsel for the defendant, Mr Caines issued a new application in November 2025, but Mr Caines says this new application was not issued by the Registry until 3 March 2026, well after the defendant had served the statutory demand, and had issued the petition, which was listed for hearing on 6 March 2026.

23. At the hearing of the application for an extension of time, Mr Caines accepted that in fact RSC Order 73 provides that the time limit for seeking leave to appeal against an arbitral award on a point of law is 21 days from the date of the award. In any event, the reason for the delay was his own misunderstanding, not that of his client and the length of delay was short: only 8 days out of time. However, Mr Caines acknowledged that the first attempt of filing the application was insufficient to meet the requirements of the RSC but submitted that the defendant was on notice of the intention to seek leave to appeal shortly after the deadline for filing had passed (although the exact date is not specified). Mr Caines submitted (in summary) that his client should not be penalised for his error, that he proceeded with all due diligence, the defendant has suffered no prejudice by the delay, his client has good grounds of appeal and that the interests of justice should therefore fall in favour of granting the extension of time.

24. Mr Caines relied upon a decision of Colman J in **AOOT Kalmneft v Glencore International AG[8]** for the legal principles to be applied to the grant of an extension of time for leave to appeal against an arbitral award, which were stated in the following terms:

> *"59. Accordingly, although each case turns on its own facts, the following considerations are, in my judgment, likely to be material:*

[7] See paragraphs 28-9 of Mr Caines' affidavit dated 23 February 2026 seeking an extension of time.
[8] [2002] 1 Lloyds Rep 128. Reference was also made to **Terna Bahrain Holding Company WLL v Al Shamsi** [2012] EWHC 3283 (Comm).

(i) the length of the delay;

(ii) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances;

(iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;

(iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;

(v) whether the arbitration has continued during the period of delay, and if so, what impact on the progress of the arbitration or the costs incurred in the determination of the application by the court might now have;

(vi) the strength of the application;

(vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined."

25. In approaching the question of whether to grant an extension of time in which to seek leave to appeal, the court is therefore required to make an assessment of the strength of the appeal, without of course making any determination of its ultimate merits. For this reason, consideration will first be given to the other factors in relation to the grant for an extension before turning to the test for the grant of leave to appeal on the main application.

26. Mr Caines submitted that there are three points of law which are of sufficiently cogent and arguable to justify the court in being satisfied that an extension of time should be granted, and (it follows) that would justify the grant of leave to appeal. He summarised these points as (i) the plaintiff has a beneficial interest in the insurance proceeds by reason of the service charge which was levied which included a portion of the landlord's insurance cover which included the risk of flood (ii) the comprehensive exclusion clause in the Storage Agreement was unconscionable (and therefore unenforceable) (iii) the exclusion undermined the fundamental purpose of the Storage Agreement rendering the landlord's obligations thereunder meaningless[9]. These points will be considered in more detail below.

27. Mr Caines submitted that the arbitrator recorded the arguments on these points but did not perform any analysis of them and based his decision wholly on the exclusion clause. It was therefore submitted that the arbitrator's decision was invalid and ought to be set aside in law.

28. Mr Caines therefore submitted that his client's application met all the criteria in Colman J's summary for the extension of time in which to apply for leave to appeal.

29. In response Mr Horseman took an economic approach. He combined his submission on the extension of time and the leave to appeal application and submitted that the grounds of appeal are unarguable and therefore leave to appeal should be refused, and that it necessarily follows that an extension of time for leave to appeal should also be refused.

[9] See paragraphs 9-22 of Mr Caines' affidavit in support of the extension of time.

30. Before going further, it is important to address one potential obstacle to Mr Caines' approach to the application. The Bermuda Arbitration Act 1986 is modelled on the English Arbitration Act 1979, the predecessor to the English Arbitration Act 1996, the latter of which Colman J was considering in **AOOT Kalmneft**. In particular, Colman J pointed out that section 80 (5) of the 1996 Act incorporated by express reference into its provisions the court's discretionary powers to grant an extension of time under the Civil Procedure Rules 2000 ("the CPR"), and his statement of the principles to be applied must be read in the context of the application of the court's general powers to extend time limits under the CPR.

31. The English Arbitration Act 1979 had no such provision and contains no express provision giving the court power to extend time at all. Likewise, the Bermuda Arbitration Act 1986 contains no such provision. English case law under the Arbitration Act 1979 on the court's power to extend time for leave to appeal is sparse. However, it appears that in practice the English court considered that it had a power to extend time for leave to appeal. This is derived more by inference than by any express statement of principle or direct source for that power. It appears that the English courts simply exercised the court's inherent case management powers to grant an extension of time.

32. The question arises that if that were so, why did the English legislature think it necessary to incorporate the ordinary case management powers of the court expressly into the English 1996 Act? The court's jurisdiction in relation to arbitrations is entirely statutory, and it is conventional to look for a statutory source of power before the court will feel confident in exercising it.

33. In **Secretary of State for the Environment v Euston Central Investments Limited**[10] Steyn LJ (as he then was) explained the policy behind the English Arbitration Act 1979 in the following terms:

> *"The objective of the Act of 1979 was to reduce the scope of the supervisory jurisdiction of the English courts. Contrary to the initial submission of Mr Gaunt [counsel for the appellant] it is not only the private interests of the parties that are relevant. There are wider interests at stake, notably the proper functioning of our arbitration system .... One of the aims of the Act of 1979 was to promote* ***speedy finality in the enforcement of arbitration awards****: The Antaios, per Lord Diplock at p 199 and per Lord Roskill at pp 208–209. Since nobody can prevent the losing party in an arbitration from applying for leave to appeal even in the most unmeritorious cases,* ***it is of supreme importance to the proper working of our arbitration system that there must be an effective procedure to ensure that applications for leave are promptly made. That is the policy of the Act of 1979.****"*
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> (Emphasis in bold added, underlining in the original)

34. This suggests that the policy of the 1979 Act was that a failure to observe the time limit in seeking leave to appeal would be fatal to an appeal. If so, the conventional approach to interpreting the Bermuda Arbitration Act 1986 which is modelled on the same wording would be to follow that line of interpretation. However, given that it appears to have been the practice in England for the court to exercise its case management powers to grant an extension of time for leave to appeal under the 1979 Act, I have taken the view that it is likely

[10] [1995] Ch 200.

that the incorporation of the court's case management powers in section 80 (5) of the English 1996 Act was to make express that which had always been implicit.

35. I have therefore approached the issue of jurisdiction on the footing that the present application is an application for an extension of time in which to apply *to the court* for leave to appeal, and therefore the RSC necessarily governs the application[11]. The RSC incorporates the general case management powers of the court to grant (when appropriate) an extension of time for the doing of any act required by the RSC, which includes RSC Order 73 Rule 5. The court is therefore satisfied that it can apply its ordinary case management powers under RSC Order 3 Rule 5 to grant an extension of time under RSC Order 73 Rule 5. Obviously if I am wrong in this interpretation, the application would automatically fail for want of jurisdiction.

36. In approaching the question of granting an extension of time, the court also agrees that the relevant considerations are those summarised by Colman J in **AOOT Kalmneft,** which broadly correspond to the test for the grant of extensions of time in other contexts[12].

Assessment of the grounds for an extension of time

37. It is true that a mistake made by a lawyer, or his or her failure to appreciate a nuance in legal procedure which is unclear, or obscure because of a lack of clear authority on its interpretation or application, may well give rise to a reasonable basis for the court to grant an extension of time. Unfortunately, this case is not an example of that situation. The provisions of RSC Order 73 Rule 5 are clear. If there had been a doubt, a sensible course would have been to seek an extension of time by agreement, or if that were refused, to file the application to preserve the position.

38. Nonetheless, the court can see the merit in not visiting the client with the consequences of their lawyer's failure to observe a time limit if the delay is slight and there are no other adverse consequences that cannot be compensated in costs and interest, notwithstanding the legislative policy of the upholding the finality of arbitral awards and their speedy enforcement. In this case, the court is sympathetic to the notion that the delay in getting the application for leave to appeal properly lodged was relatively short, the prejudice to the defendant could be addressed by an award of costs and interest, and that in a broad sense the court should not deny a litigant the opportunity to present his or her case without good reason. These factors (namely items (i) (iv) and (vii) in Colman J's summary) would militate in favour of the grant of an extension of time.

39. However, the court must also make an assessment of the strength of the application for the purposes of enlarging time (item (vi) in Colman J's summary), which is inextricably intertwined with the assessment of the main application for leave to appeal. The court cannot assess the strength of the application for the purposes of extending time without also assessing it for the purposes of the grant of leave to appeal. It is for this reason that I now turn to consider the strength of the application for leave to appeal.

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[11] RSC Order 1 Rule 2 states that subject to certain limited exceptions (none of which apply) the RSC apply to all civil proceedings in the Supreme Court.

[12] See eg **Norwich and Peterborough Building Society v Steed** [1991] EWCA Civ J-0227-1 and **Sayers v Clarke Walker (a firm)** [2002] EWCA Civ 645.

The relevant test on an application for leave to appeal against an arbitral award

40. The provisions of section 29 (4) of the Arbitration Act 1986 instruct the court that leave shall not be granted unless the determination of the point of law could substantially affect the rights of one or more of the parties to the arbitration agreement. The case law on the correct approach to take has been developed in the English courts on the interpretation of the standard that must be met for the grant of leave to appeal from an arbitral award on identical provisions in the corresponding English statutory provisions.

41. As a result of the legislative policy to give effect to arbitral awards as an alternative to dispute resolution procedures in the courts, the cases based on the 1979 Act show that the test for leave to appeal against an arbitral award is much narrower and more onerous than the test for leave to appeal to the Court of Appeal from an interlocutory decision of the Supreme Court[13]. The standard is not merely 'arguability' or that the points raised carry a 'degree of conviction' or have a 'realistic prospect of success', which are the expressions commonly used to define the threshold for the grant of leave to appeal from a judge's interlocutory decision. The standard to be applied in the case of leave to appeal from an arbitral award is that the decision of the arbitrator is 'plainly wrong'.

42. This conclusion is derived from a series of judicial statements based on the language of the English Arbitration Act 1979, which is the model for the Bermuda Arbitration Act 1986, as well as the English Arbitration Act 1996, which consolidated and carried over the same test which had applied under the 1979 Act.

43. The point was expressed in pithy terms by Sir John Donaldson MR in **Seaworld Ocean Line SA v Catseye Maritime Company Ltd (Kelaniya)**[14], after reviewing the relevant leading authorities, in the following distillation of principle in relation to the 1979 Act:

> *"The 'Nema' guidelines instruct a court to consider, first of all, whether the case is what has been described as a "one-off case." If it is a one-off case which the general market and the commercial fraternity have no interest (it merely affects the rights of the particular parties) then the fact that they have chosen their own dispute settlor weighs very heavily in the balance. They have accepted him for better or worse in relation to all questions of fact, and there is a strong presumption that they have accepted him for better or for worse in relation to questions of law. That is not to say that, even in a one-off case, an arbitrator is to be allowed to cavort about the market carrying a small palm tree and doing whatever he thinks appropriate by way of settling the dispute. What is does amount to is that the courts will normally leave him to his own devices and leave the parties to the consequences of their choice. They will only intervene if it can be demonstrated quickly and easily that the arbitrator was plainly wrong."*

44. The restrictions on granting leave to appeal in the 1979 Act were reproduced (with some additions) in section 69 of the Arbitration Act 1996. In **HMV UK v Propinvest Friar Ltd Partnership**[15] Arden LJ (as she then was) explained the position as follows:

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[13] See **Aden Refinery Company Ltd v Ugland Management Company Ltd** [1986] 3 WLR 949.
[14] [1988] EWCA Civ J 0505-5 citing **Pioneer Shipping Ltd v BTP Tioxide Limited (The "Nema")** [1982] AC 724 and **Antaios Compania Naviera SA v Salen Rederierna AB (The "Antaios")** [1985] AC 191.
[15] [2011] EWCA Civ 1708 at [4] to [8].

"The crucial provision for our purposes is subsection (3)(c)(i). This establishes that it is a pre-condition to giving leave that the decision of the tribunal on the question was "obviously wrong". Subsection 3(c)(i) is available as a ground for giving leave as an alternative to subsection (3)(c)(ii) under that provision the point must be one of general public importance. That provision is not one which can be used in the present case because the point which arises is one of the interpretations of a purely private arrangement contained in a lease. If an appellant seeks to rely on subsection (3)(c)(i), it also has to satisfy other matters, including in particular in this case paragraph (d) of subsection (3), that it is just and proper in all the circumstances for the court to determine the question notwithstanding the agreement for arbitration.

It will be apparent from section 69 that rights of appeal from an arbitration award are severely restricted. It is not enough, therefore, simply to show that there is an arguable error on a point of law. Nor is it enough that the judge to whom the application for leave is made might himself or herself have come to a different answer. The required quality of the accepted error is that it must be "obviously wrong". Thus, the alleged error must be transparent. It must also, at the least, be clear. The word "obvious" is a word of emphasis which means that the courts must not whittle away the restriction on rights of appeal in subsection (c) (i) by being over generous in their determination of the clarity of the wrong. The words obviously wrong should be seen as reflecting the case law in the predecessor provision in section 1 (3) (b) of the Arbitration Act 1979[16]*.*

In the well-known case of The Nema [1982] AC 742–3, Lord Diplock held:

> *"Where…a question of law involved is the construction of a 'one-off' clause, the application of which to the particular facts of the case is an issue in the arbitration, leave should not normally be given unless it is apparent to the judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the clause by the arbitrator is obviously wrong. But if on such perusal it appears to the judge that it is possible that argument might persuade him, despite first impression to the contrary, that the arbitrator might be right, he should not grant leave…"*

The effect of the Arbitration Act 1979 in this regard was thus, in my judgment, carried through into section 69 of the 1996 Act. Lord Diplock referred to adversarial argument and to the court determining the question of leave without the benefit of adversarial argument. In the context, it seems to me that he meant primarily oral argument. Contrary to the passages I have cited, in this case this court has heard oral argument, as did the judge, but it is to be noted that Lord Diplock considered that this should not normally happen. The matter should therefore normally be dealt with on paper. I shall come back to these points at the end of my judgment. The point, however, that I wish to emphasise at this stage is that Lord Diplock was clearly contemplating that the error is one which can be grasped simply by a perusal, that is, a study of the award itself.

We have been taken to the authority of Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd [2008] 1 Lloyds Rep 608 where there is a helpful analysis by Akenhead J. He uses the memorable phrase "a major intellectual aberration" in paragraph 31 of his judgment, which I have found to be a useful way of bringing to mind the error on which we are concerned, if there be an error, must be an obvious one."

45. Therefore, the hurdle that the plaintiff must clear on an application for leave to appeal is that the arbitrator's decision was obviously wrong, and clearly so on a perusal of the Award itself.

[16] This is the same provision as section 29 (3) (b) of the Bermuda Arbitration Act 1986.

The plaintiff's grounds of appeal on a point of law.

46. There are in reality four grounds of appeal advanced by the plaintiff which are said to raise points of law. The court will briefly address them in turn, applying the filter of whether the arbitrator's reasoning in the Award was "plainly wrong" or contained an "intellectual aberration".

47. The first is the general ground that while the learned arbitrator recorded the arguments advanced by the plaintiff in its counterclaim (at paragraphs 26-33 of the Award), he did not address them or analyse them in his assessment of the merits of the respective claims, but limited his analysis to the question whether the exclusionary language in the Storage Agreement barred the plaintiff's counterclaim.

48. In my view, there is no substance to this ground of appeal. It is well established that a decision maker, be they judge or arbitrator, does not need to provide a reasoned answer in his or her decision to address each and every argument raised by the parties *seriatim*, as if answering a pleading. It is sufficient if the reasons are adequate to inform the losing party why they lost, and to enable an appellate court to follow the reasoning to assess whether an error of principle has been made by the decision maker[17]. As already explained, in the context of an arbitration, the court's policy to is leave the arbitrator to his own devices in his or her decision making (in the words of Sir John Donaldson MR quoted above) unless the decsion is plainly wrong.

49. In this case, it may have been desirable for the arbitrator to explain that he did not need to address the plaintiff's arguments in detail because of his view of the effect of the exclusion of liability for damage to stock contained in the Storage Agreement. But in my view his conclusion that the exclusion of liability for all claims "howsoever caused" is an obvious and complete answer to all the plaintiff's claims is a sufficient explanation of his reasoning to meet all the plaintiff's arguments. In expressing his reasons in this way, in my view, there was no obvious error or intellectual aberration on the part of the arbitrator. It is very clear why the plaintiff lost.

50. The next ground of appeal (described as the 'first question' in Mr Caines' submissions) is whether the plaintiff was entitled to assert a beneficial interest in the proceeds of the insurance claim by the landlord because the tenant had paid a contribution to the insurance premiums for the premises, which included the risk of flood damage to the building.

51. At first sight, the way the point is presented implicitly suggests that the defendant had made a claim on the insurance policy in relation to the losses sustained by the plaintiff and that the plaintiff sought to have a right of subrogation to that portion of the insurance proceeds which related to the stock losses. This would have likely raised an interesting issue which (had the arbitrator ignored evidence to this effect) may well have met the high threshold for leave to appeal to be granted. Moreover, Mr Horseman accepted that had that been the case on the facts, the defendant would have had an obligation to reimburse the plaintiff for any insurance recoveries made in relation to the damaged stock.

[17] See **MD (Turkey) v Secretary of State for the Home Department** [2017] EWCA Civ 1958.

52. However, on closer enquiry during the course of argument, Mr Caines had to accept that there was no evidence before the arbitrator that any insurance claim had ever been made by the landlord (i.e. the defendant) on its policy and no evidence that any recoveries had been made by the defendant in relation to the stock damaged in the flood. On the contrary, the defendant's primary witness was never cross-examined on the basis of such a claim, and the only evidence before the arbitrator was that the attempt by the tenant (i.e. the plaintiff) to make an insurance claim through the landlord had been denied (as evidenced in the email dated 28 August 2019 between the insurance broker and the defendant).

53. In the light of those facts, it is difficult to see how the argument raised as the 'first question' is open to the plaintiff on appeal, the point never having been run. It follows that there is no basis on which to say that the arbitrator made an obvious error in his treatment of the evidence or in his application of the law to the evidence or that his decision was plainly wrong.

54. The 'second question' raised in the next ground of appeal is that the exclusionary language in the Storage Agreement is 'unconscionable' in the commercial context of landlord and tenant and that the arbitrator was wrong to give effect to it. This argument is based on the premise that the exclusion clause was (i) unreasonable in its terms and scope (ii) the parties were not of equal bargaining power (iii) the Storage Agreement was in standard form (iv) there was no realistic alternative but to agree to its terms.

55. The first strain of case law relied upon in this context relates to the principle that if an unusual or onerous clause is included in a contract, the court will be concerned to ensure that the clause has been properly drawn to the attention of the other contracting party. The celebrated decision of Lord Denning MR in **Thornton v Shoe Lane Parking Ltd**[18] was the starting point for this line of authority, following the old "ticket" cases where the customer or passenger had no practical opportunity to study the details of an exclusion clause before accepting its terms. Reliance was also placed on *dicta* contained in **Interfoto Library Ltd v Stilletto Ltd**[19] in relation to express notice being given to the party of the terms of an unusual or onerous clause.

56. On the facts in this case, there is no evidence to support the argument that the terms of the clause were not drawn to the attention of the plaintiff: the contract was on one page and signed by the plaintiff's director. There is therefore no foundation for the application of this line of cases to the execution of the Storage Agreement, and the terms of the exclusion are expressed in plain language. There is therefore no plausible basis to suggest that the arbitrator's rejection of these arguments was plainly wrong or resulted from an intellectual aberration.

57. The second strain of cases cited in support of this ground of appeal were decided under the Unfair Contract Terms Act 1977, which now only applies to contracts between parties trading in a business-to-business context, with consumer contracts being dealt with under the Consumer Rights Act 2015. At the time the cases relied upon were decided, they applied to consumer-to-business contracts as well.

[18] [1971] 2 QB 163.
[19] [1989] 1 QB 433.

58. The principle relied upon in support of the claim that the exclusion clause is unconscionable is derived from a passage in **Smith v Eric Bush**[20] which sets out a four factor test including whether the parties were of equal bargaining power, whether the plaintiff could reasonably have obtained alternative protection, the difficulty of the task for which liability was excluded and the practical consequences of upholding (or striking down) the clause.

59. The first and most obvious point that was taken against this line of authority by Mr Horseman is that it arises in a statutory context that does not apply in Bermuda. He also drew attention to the passage in the speech of Lord Griffiths in that case which confirmed that

> *"At common law, whether the duty to exercise reasonable care and skill is founded in contract or tort, a party is as a general rule free, by the use of appropriate wording, to exclude liability for negligence in discharge of the duty."* [21]

60. Applied to the context of the present facts, it is clear from this statement of general principle that, in the absence of a statutory power conferred upon the court to disapply the terms of a contract (and assuming that the terms of the clause were drawn to the attention of the party affected), at common law the parties to a contract are generally entitled to restrict their liability thereunder.

61. The second point is that the two contracting parties were on an equal footing in the sense that they were both business entities, and the nature of the contract was not unusual or specialised. There is no suggestion that the plaintiff did not understand the term, and despite Mr Caines' submissions to the contrary, the term was not unusual or onerous in its commercial context. Mr Horseman pointed out that the risk to the contents of the storage units for each individual tenant could not reasonably or realistically be borne by the landlord, as it would be impossible to quantify or insure against, as each tenant's goods or stock would carry potentially vastly different values. He submitted that it was perfectly sensible in a landlord and tenant context for the burden of insuring against damage to the contents of the storage units to be borne by the individual tenant, as provided in the Lease and Storage Agreement.

62. The court agrees with those submissions. There is no basis on which it can be sensibly argued that the term was unreasonable or onerous, nor that the plaintiff had no choice but to accept it. The plaintiff could have made alternative arrangements to store the goods elsewhere or could have avoided the risk altogether by insuring the goods themselves, as they were supposed to under the express terms of clause 3T (ii) of the Lease. The inevitable conclusion on this point is that there is no arguable error of law disclosed by the arbitrator's decision in failing to accept the plaintiff's argument on this ground, still less an obvious or aberrational error that would justify the grant of leave to appeal against the Award.

63. The 'third question' raised by the proposed grounds of appeal is whether the effect of the exclusion clause was such as to remove the effective purpose of the agreement. The principle relied upon in support of this ground of appeal is that the court will not give effect to an exclusion which renders the performance of the obligation undertaken by a contracting party utterly meaningless and of no effect. The case cited in support of this principle in the

[20] [1990] 1 AC 831.
[21] At page 856 E.

submissions was **Photo Production Ltd v Securicor Ltd** in which the old doctrine of **Suisse Atlantique Societe d' Armement Maritime SA v NV Rotterdam Kolen Centrale**[22] **("Suisse Atlantique")** that a fundamental breach of contract discharged the contract and rendered an exclusion clause invalid was laid to rest.

64. **Canada Steamship Lines Ltd v the King**[23] was cited by Mr Caines in argument before the arbitrator for the proposition that where a clause purports to exclude liability for a particular type of breach of contractual duty, the express wording of the clause must be wide enough to cover the type of breach in respect of which liability is sought to be excluded.

65. In this case, the Storage Agreement provided expressly that the defendant did not accept responsibility for any loss or damage to the goods stored in the storage unit "howsoever caused". The arbitrator construed those words as being wide enough to cover the damage to stock in the context of the contractual allocation of risk between the parties, citing **Transocean Drilling UK Ltd v Providence Resources Plc**[24]. Construing the contract as a whole (including the insurance obligation in the Lease), and applying the canons of construction explained in **Arnold v Britton**[25], the arbitrator held that the assumption of all risks relating to the risk of damage to the stock stored in the storage unit had been assumed by (or allocated to) the plaintiff[26].

The court's assessment

66. The analysis by the arbitrator confirms that clear reasoning was applied to the arguments raised by the plaintiff (contrary to the premise of the earlier ground that no reasons were given). That analysis also shows that the arbitrator construed the contractual obligations of the parties by reference to well established legal principles. The arbitrator is a highly experienced and eminent leading counsel, and it is clear from the Award that he carefully analysed the legal issues in a detailed and closely reasoned decision. The plaintiff has not shown that the Award was based on a misapprehension of the facts, or a misapplication of the relevant legal principles to those facts, or a misinterpretation of the relevant contractual documents. The Award is therefore not susceptible to challenge on the ground that the decision was plainly wrong or resulted from an intellectual aberration.

67. The court is not here purporting to determine the ultimate merits of the appeal nor holding that the arbitrator's decision is unassailable; the court is merely deciding that the threshold required to obtain leave to appeal from the arbitrator's decision on a point of law has not been crossed.

68. It follows that the plaintiff has failed to meet the test for (a) showing the strength of the application justifies the grant of an extension of time in which to seek leave to appeal and (b) showing the strength of the grounds of the proposed appeal justifies the court granting leave to appeal.

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[22] [1967] 1 AC 361.
[23] [1952] AC 192.
[24] [2016] EWCA Civ 372.
[25] [2015] AC 1619.
[26] See paragraphs 41-54 of the Award.

69. Therefore, applying the guidance in Colman J's summary in **AOOT Kalmneft** as to the assessment of the strength of the application (item (vi)), the court has decided to refuse to grant an extension of time in which to apply for leave to appeal. In addition, applying the reasoning of Arden LJ in **HMV UK**, the court must also refuse leave to appeal on the grounds that the plaintiff has not shown that the Award was plainly wrong.

Stay of winding up petition pending appeal

70. The necessary consequence of the court's refusal of leave to appeal is that the court will also refuse to stay the petition to wind up the company on the grounds of the failure to pay the petition debt, which is based on the Award. If there is no arguable appeal, then there is no reason to stay enforcement.

71. That said, it is appropriate to add that the court would not have been prepared to continue the present stay of the petition pending the appeal even if leave had been granted. The reason is that the petition debt is (and has always been) undisputed. It is well established that a disputed cross claim is not a sufficient ground for a debtor to set up an equitable set off claim to resist the enforcement of an undisputed debt by way of a winding up petition[27].

72. The effect of the Award is that the plaintiff's claim for the loss of the value of the stock and the "relocation" expenses is unsustainable. It also bears mentioning in this context that the plaintiff's claim for the value of the sum assured under the cancelled life policy is not based on any coherent legal theory. In the first place the life policy was not surrendered by the plaintiff, so the plaintiff suffered no loss; in the second place, the sum assured by a life policy is only triggered by the death of the policyholder, which has not occurred; and in the third place, the shareholder's decision to raise money to provide working capital by cashing in a life policy might give rise to a claim *against the plaintiff* in debt or as a contribution to surplus capital, but it does not give rise to a claim against a third party. Obviously, and in any event, any such claim would be limited to the value of the surrendered policy, not the sum assured.

73. This is relevant to mention because the application for a stay of the petition was in part based on the perceived unfairness of making the plaintiff pay the petition debt when the amount of that obligation is insignificant in comparison to the value of the plaintiff's alleged cross claim for the recovery of the sum assured. For the reasons explained above, no such claim could ever be made.

74. The court is mindful of the potential for commercial consequences that might impact the plaintiff's business if the petition is advertised and presented before the plaintiff has had the opportunity to arrange for the petition debt to be paid, and this will involve a payment out of court of the sum paid in, pursuant to the court's earlier order which was intended to 'hold the ring' pending the *inter partes* hearing.

75. In the course of submissions, the defendant indicated an intention to allow the plaintiff time to make arrangements to pay the debt. In order to give some structure to that opportunity, the court will extend the injunction restraining the advertisement of the petition for a period of 28

[27] See **Glencore Grain Ltd v Agros Ltd** [1997] Bda LR 7 (CA).

days from the date of this Ruling in order to allow the plaintiff to make the necessary arrangements to have the funds paid out of court. In order to assist in that process, the court hereby orders that the funds paid into court by the plaintiff are to be paid out of court to the plaintiff (or to the plaintiff's order) as soon as reasonably practicable together with any accrued interest. This should be expressly reflected in the Order that gives effect to this Ruling.

Costs

76. It follows from the decisions that have been recorded above, the plaintiff has been wholly unsuccessful and must bear the costs of the applications, which are to be taxed on the standard basis if not agreed.

Order

77. The plaintiff's attorney is to prepare an Order reflecting the terms of this Ruling in a form to be agreed with the defendant's attorneys. The court will also release its *ex tempore* ruling dated 20 February 2026.

Dated this 14 day of April 2026

THE HON. MR. JUSTICE ANDREW MARTIN

PUISNE JUDGE OF THE SUPREME COURT