OUTER HOUSE, COURT OF SESSION

[2019] CSOH 60

P406/19

NOTE BY LORD BANNATYNE

in the cause

ARBITRATION APPEAL No 1 OF 2019

Petitioner: Currie Gilmour and Co
First Respondent: Stronachs LLP
Second Respondent: Davidson Chalmers Stewart LLP

19 July 2019

Introduction

[1] The petitioner in terms of Rule 69 of the Scottish Arbitration Rules ("the Rules") seeks leave to appeal an alleged legal error by an arbitrator. Leave to appeal was opposed by the respondents. The issue before me was whether such leave should be granted.

[2] A legal error appeal is governed by the terms of Rule 70. The material provisions of Rule 70 for the purposes of the present case are:

> "(2) a legal error appeal may be made only –
> (a) with the agreement of the parties, or
> (b) with the leave of the Outer House
> (3) leave to make a legal error appeal may be given only if the Outer House is satisfied -
> (a) that deciding the point will substantially affect a party's rights,
> (b) that the tribunal was asked to decide the point, and

(c) that, on the basis of the findings of fact in the award (including any facts which the tribunal treated as established for the purpose of deciding the point), the tribunal's decision on the point –
(i) was obviously wrong, or
(ii) where the court considers the point to be of general importance…"

The issue

[3] It is argued by the petitioner that the arbitrator's decision was "obviously wrong" in a number of respects as set out in the petition. The respondents in their response to the motion argued that there is nothing "obviously wrong" identified in the terms of the petition.

The relevant law

[4] In considering the issue of the proper approach to the granting of leave I would refer to the opinion of Lord Glennie in Arbitration Application No 3 of 2011 at paragraph 8 where he observes:

> "In substance, therefore, the test for the grant of leave is the same in both jurisdictions (England and Scotland). Since the Act was closely and unashamedly modelled on the English Act, and reflects the same underlying philosophy, authorities on that Act (and its predecessor, the Arbitration Act 1979) in relation to questions of interpretation and approach will obviously be of relevance. There is no point in reinventing the (arbitration) wheel."

[5] Accordingly I have had regard to a number of English authorities in relation to the question of interpretation and approach.

[6] The most helpful analysis in respect to the above issues is given by Aikenhead J in *Braes of Doune Wind Farm (Scotland) Limited* v *Alfred McAlpine Business Services Limited* [2008] 1 Lloyd's rep 608 at paragraph 29 where he observes:

> "To be 'obviously wrong', the decision must first be wrong at least in the eyes of the judge giving leave. However, any judge of any competence, having come to the

> view that it is wrong, will often form the view that the decision is obviously wrong. It is not necessarily so, however, as a judge may recognise that his or her view is one reached just on balance and one with which respectable intellects may well disagree; in those circumstances, the decision is wrong but not necessarily 'obviously' so."

[7] This approach to the test of "obviously wrong" was adopted by the Court of Appeal in *HMV UK Limited* v *Propinvest Friar Limited Partnership* [2012] 1 Lloyd's rep 416 at paragraph 8 by Arden LJ giving the leading judgment with which the other two Judges concurred.

[8] The above analysis is consistent with the earlier observations of Lord Diplock in *Antaios Compania Naviera SA* v *Salen Rederierna AB* [1985] 1AC 191 at page 206 D-E where in considering and applying the phrase "obviously wrong" he gave the following guidance, namely: the court is searching for a conclusion which is so obviously wrong as to preclude even the possibility that the arbitrator was right.

The dispute

[9] The dispute before the arbitrator is summarised by him at paragraphs 23 and 24 of his Part Award where he states as follows:

> "23. In and about October and November 2015 the Claimant by itself or acting through agents purported to serve a Notice pursuant to clause 3 of the Minute of Agreement to exercise the Option. The Claimant did so by serving the notice upon Mr A alone and not on both Mr A and Mrs A.
>
> 24. The parties are in dispute about a number of matters. As I have indicated above the only matter with which I am currently concerned in this arbitration is to answer the Question as posed by the Parties and set out as Question 1 in paragraph 5 above without making any determination in relation to the validity of any purported Notice under Clause 3 of the Minute of Agreement."

[10] The question posed at paragraph 5 referred to by the arbitrator was this:

> "1. Whether 'management' of the First Party's interest includes TR being the appropriate and sole recipient of any formal notice concerning the First Party's property interest in the subjects…"

Discussion

Preliminary matter

[11] In terms of Rule 70(5) the application for leave to appeal has been determined without a hearing. Rather I have decided the matter on the basis of the papers before me and in particular I have treated the terms of the petition as the petitioner's submissions in support of their motion for leave to appeal and the respondents Grounds of Opposition as their submissions in reply. I have had regard to all other documents which were placed before me by parties.

The substantive question

[12] The substantive issue before the court in deciding whether leave to appeal should be granted is this: is there anything "obviously wrong" in the award of the arbitrator?

[13] I consider that it is clear from the well-established line of authority I earlier set out that the test of "obviously wrong" creates a very high hurdle for the petitioner to surmount. Thus, I may consider that the arbitrator is on balance wrong. However, that is not sufficient to hold that he is "obviously wrong" and to grant leave. It is necessary for the court to seek to find on the part of the arbitrator "a major intellectual aberration" (see: *Braes of Doune Wind Farms Limited* at paragraph 31 per Aikenhead J). Or to use the words of Lord Diplock in *Antaios Compania Naviera* the court is required to search for a view of the arbitrator which is "so obviously wrong as to preclude the possibility that he might be right".

[14] The decision of the arbitrator turned on questions of contractual interpretation. The respondents in their Grounds of Opposition to the motion describe such an issue in this way:

> It "is perhaps the *locus classicus* of a situation where the respectable legal intellects of respective decision makers might differ."

The respondents went on to argue:

> "As the court will instantly have recognised, two different judges could very well (and often do) arrive at very different conclusions on the proper interpretation and effect of contractual provisions."

[15] I consider the above submissions are correct. It is clear that when considering the construction of provisions in a contract two decision makers may often arrive at different conclusions and can do so where there is no "major intellectual aberration" on the part of either of the decision makers.

[16] There are six proposed grounds of appeal set forth in the petition.

[17] I have considered each of these proposed grounds. The respondents described these grounds as being "a set of intricate and nuanced disagreements with the position taken by the arbitrator." I believe this is a fair characterisation of the grounds advanced by the petitioner. It appears to me that the arguments advanced on behalf of the petitioner in their proposed grounds of appeal fail to reach the level of a manifest legal error which could cause the court to apprehend there is anything "obviously wrong" in the approach and reasoning of the arbitrator and in the decision he has reached.

[18] There is nothing in the arbitrator's approach, reasoning and decision which is so "wrong as to preclude the possibility that he might be right" or which amounts to "a major intellectual aberration".

[19] I do not as submitted by the respondents hold that the arbitrator was clearly correct. My analysis of the issue might have been different from that of the arbitrator but that is far from saying there is "a major intellectual aberration".

[20] I am satisfied that the possibility that the arbitrator was right cannot on any reasonable basis be excluded.

[21] The respondents in the penultimate paragraph of their Grounds of Opposition say this:

> "What is absolutely plain from the type of issue at the heart of the dispute – in the terms of the arbitrator's decision – is that respectable intellects might disagree over the questions of interpretation which the arbitrator had to address; and also over his reasons for interpreting the contractual documents as he did. Similarly, respectable legal intellects might reasonably differ as to whether the arbitrator was wrong. This is simply not enough to discharge the requirements of the onerous tests set by Rule 70."

[22] I wholly agree with what is said in the above paragraph.

Decision

[23] In the whole circumstances and for the foregoing reasons I find that the test provided for by Rule 70 has not been met. There is nothing "obviously wrong".

Disposal

[24] Accordingly I refuse leave to appeal.