OUTER HOUSE, COURT OF SESSION

[2026] CSOH 46

P243/26

OPINION OF LORD LAKE

in the Petition of

ARBITRATION APPLICATION NUMBER 1 OF 2026

Petitioner: Drummond Miller LLP
Respondent: Gillespie MacAndrew LLP

15 May 2026

[1] The petitioner seeks to appeal a decision of the arbitrator dated 30 January 2026 on the basis that he has erred on a point of Scots law (Scottish Arbitration Rules, rule 69). The respondent does not agree that the appeal should take place so the petitioner has applied for leave to appeal in terms of rule 70. Paragraph (3) of that rule is in the following terms:

> "(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, is open to serious doubt."

As noted in the answers to the petition, what is meant by "obviously wrong" has been considered in several previous cases.

[2] The four grounds of challenge in the petition can be considered in turn.

Encroachment

[3] The dispute considered by the arbitrator concerns ownership of and rights in a volume located within a residential building in Glasgow. The volume is situated above the first floor flat of the petitioner and passes through the second floor on which the respondent's flat is situated and continues up to the underside of the roof. For the purposes of his decision, the arbitrator defined two parts of the volume which he called the Intermediate Area and the Lightwell Area. The former is the space between the ceiling of the bathroom in the petitioner's flat and a projection of the joists supporting the floor of the respondents flat above. The Lightwell Area is the space enclosed on one side by a projection of the joists supporting the floor of the respondents flat above and, on the other, by the underside of the roof.

[4] The following questions, among others, were put to the arbitrator.

1. Is the [petitioner] the exclusive owner of the whole of the lightwell from the first-floor bathroom to the underside of the roof light at second level?
2. Alternatively, does the [petitioner] have a right in common in the lightwell (from the first-floor bathroom to the underside of the roof light at second level) and, if so, with which other proprietors of the whole tenement?
3. If the [petitioner] does have ownership in either form, on the pleaded cases, has the [respondent] encroached upon the [petitioner's] rights of ownership in the lightwell?

[5] The arbitrator gave a negative answer to the first two questions. He found that the petitioner's title includes only the Intermediate Area and the boundary between that area and the Lightwell Area above is the centre line of the joists dividing them. This meant that

the third question did not arise but the arbitrator nonetheless considered it and gave a negative answer.

[6] The petitioner asserts that the finding on the first question and the finding on the third question are contradictory and that this discloses an error of law. However, as is apparent from the questions, the third one arises only in the event that the petitioner was found to have sole title to the whole of the lightwell (ie the Lightwell Area and the Intermediate Area) or pro-indiviso title to the whole of the lightwell. The arbitrator was not asked to decide what the position would be if the petitioner had no title at all to the Lightwell Area. This means that this point was not one that the arbitrator was asked to decide and the test in rule 70(3)(b) is accordingly not met.

Interpretation

[7] This challenge focuses on a "refusal" of the arbitrator to explain why he preferred one analysis or position over the other and the absence of an analysis of case law cited to him. As these concerns the adequacy of reasons, the challenge would have to be brought under rule 68 (Serious Irregularity) rather than rule 69. The tests in rule 70 are not met.

Use of historic evidence as a tool for interpreting construction of deeds

[8] The arbitrator rejected the petitioner's submission that the respondent would have to show that the position for which it argued was supported by use and possession of the lightwell (Award, para [28]). The arbitrator noted that the issue was one of interpretation of the respondent's title deeds and, like any other issue of interpretation of a deed, evidence of what had taken place after the deed was granted was not relevant to the issue. Taken in isolation, the arbitrator's conclusion cannot be said to be an error as it is an established

position in relation to interpretation of writings that they have their meaning as soon as they are produced or signed and that later actings cannot change that. The petitioner refers to the Tenements (Scotland) Act 2004, section 3. That, however, does not concern interpretation of deeds. It does not appear that there has been an error by the arbitrator, still less an obvious one.

Whether the entirety [of the lightwell] was a pertinent to flat 1/1

[9] The petitioner claims that the arbitrator erred in determining that the extent of the area owned by him is limited by the terms of a 1968 sasine deed which forms part of the prior titles to his flat. For this purpose, the petitioner again relies on the Tenements (Scotland) Act 2004, section 3, and argues that it means that in determining whether something is a pertinent of a flat, a geographically (or spatially) limiting description is not a bar. This is presented as a challenge to para [27] of the Award.

[10] It is necessary to consider the relevance of the point about the terms of the sasine title being geographically limiting and where it fits within the Award as a whole. As para [27] of the Award makes clear, the issue of the extent of what was conveyed by the 1968 sasine deed arises only if the arbitrator is wrong in his primary conclusion that the permitted exception to the "curtain principle" in which regard may be had to sasine deeds in the interpretation of a Land Register title is to be construed narrowly. It was, in essence, an *esto* position. In relation to the "curtain principle" the arbitrator set out his view as to why the narrow approach should be taken and the result that it is only the prior sasine title for the respondent's property interest which may be considered and not that of the petitioner's title (Award, para [17]). That has the effect of excluding consideration of the 1968 deed. There is

no challenge to that part of the Award and, as a consequence, the 1968 deed is irrelevant to the decision. Accordingly, there is no error, far less one that is obviously wrong.

Servitudes

[11] No legal error is identified in relation to this ground. What is averred appears to be a complaint as to procedure.