OUTER HOUSE, COURT OF SESSION

[2026] CSOH 2

P325/25

OPINION OF LORD LAKE

in the Petition

ARBITRATION NO.1 OF 2025

Petitioner: Morrison; TC Young LLP – Civil Litigation
Respondent: Anderson, R; Nisbets Solicitors Ltd

13 January 2026

[1] The parties' dispute concerns a repairing obligation in a lease and, more particularly, an issue of dilapidations/repairs. The petitioner was the tenant and the respondent the landlord. In the Arbitration proceedings, the petitioners were the respondents. To avoid confusion that might arise from this, I shall refer to the parties as Landlord and Tenant in this Opinion. An arbitration has been commenced in terms of Clause 16 of the Lease and the part award of the arbitrator dated 28 March 2025 has already been the subject of a decision in this Court in relation to whether leave should be given to pursue an appeal to this court in respect of an alleged legal error. Leave was refused. This Opinion concerns a further challenge by the Tenant that there was a serious irregularity in the conduct of the arbitration leading to the decision.

[2] The appeal is brought in terms of Rules 68(2)(c) of the Scottish Arbitration Rules in schedule 1 to the Arbitration (Scotland) Act 2010. The relevant parts of this are in the following terms:

> "(1) A party may appeal to the Outer House against the tribunal's award on the ground of serious irregularity (a 'serious irregularity appeal').
>
> (2) 'Serious irregularity' means an irregularity of any of the following kinds which has caused, or will cause, substantial injustice to the appellant—
>
> …
>
> (c) the tribunal failing to deal with all the issues that were put to it,
>
> …"

[3] There was no dispute between the parties that, "serious irregularity appeals are intended as a long stop available only in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected". This is a quotation from the Departmental Advisory Committee on Arbitration Report on the Arbitration Bill 1996 in relation to the English legislation which is in terms largely the same as the 2010 Act. This quotation was cited with approval by Lord Woolman in *Arbitration Application No 1 of 2013*, [2014] CSOH 83, para [18].

[4] In the petition, the Tenants identify the issue which they claim was not considered and its role in relation to the submissions and award as follows:

> " …. whether the respondents' [ie Landlord's] obligation to put the Premises in a tenantable condition at the outset of the Lease had been discharged, which involved the interpretation of clause 6.1 of the Lease, required to be considered before the Arbitrator could consider whether the 'benchmark standard' displaced the Schedule of Condition in relation to missing parts of the Premises. "

This was referred to by the Tenant as the "Common Law Interpretation Argument" and I too call it that, simply as shorthand. In order to consider the submissions, however, it is necessary to be quite clear as to the nature of the point being made. In essence, the

argument invokes the doctrine of mutuality of contract. It states that because the Landlord was in default on its obligations to the Tenant, it is unable to enforce the Tenant's obligations to it. If it was upheld, its effect would be that there was no enforceable obligation on the Tenant to maintain the premises. Notwithstanding the name it was given by the Tenant for the purposes of the hearing before me, it is not an issue of interpretation of the identified clauses of the Lease, but a wholly different argument that the Lease was not enforceable because the Landlord was in breach. The "common law" element of the name is simply a reference to the source of the obligation which it is claimed the Landlords have breached.

Issues for consideration in the Appeal

[5] By reference to the judgment of Andrew Smith J in *Petrochemical Industries Company (K.S.C)* v *The Dow Chemical Company* [2012] EWHC 2739 at paragraph 15, the parties agreed that there are four issues that the court requires to consider in relation to an appeal under Rule 68(2)(c). They are:

1. Whether the matter in question was an 'issue' for decision.
2. Was that matter "put to" the arbitrator for decision.
3. If the first two questions are answered affirmatively, did the arbitrator fail to deal with the issue in the decision.
4. If the third question is answered affirmatively, whether the failure has cause substantial injustice to the tenant.

[6] There was no dispute that the Common Law Interpretation Argument was not addressed in the part award. It was also accepted that if this was an issue in the arbitration and had been put to the Arbitrator for decision, the fact that she did not address it and decide it would be capable of causing substantial injustice to the Tenants. This meant that

the questions before me were whether this was an "issue" for decision and whether it was "put to" the arbitrator. I have therefore focused on these issues and the authorities cited in support of them. Although the submissions for the Tenant included other authorities and dealt with other matters, they did not appear to bear directly on the issues in dispute.

Submissions for the Tenant as to the tests to be applied

[7] In relation to the question of whether the Common Law Interpretation Argument was an issue for decision, counsel for the Tenant referred me to the following comments of Akenhead J from *Secretary of State for the Home Department* v *Raytheon Systems Limited* [2014] EWHC 4375 (TCC), paragraph 33(g):

> "(ii) There is a distinction to be drawn between 'issues' on the one hand and 'arguments', 'points', 'lines of reasoning' or 'steps' in an argument, although it can be difficult to decide quite where the line demarking issues from arguments falls. However, the authorities demonstrate a consistent concern that this question is approached so as to maintain a 'high threshold' that has been said to be required for establishing a serious irregularity (*Petrochemical Industries v Dow [2012] 2 Lloyd's Rep 691, para 15* ; *Primera v Jiangsu [2014] 1 Lloyd's Rep 255, para 7*).
>
> (iii) While there is no expressed statutory requirement that the section 68(2)(d) issue must be 'essential', 'key' or 'crucial', a matter will constitute an 'issue' where the whole of the applicant's claim could have depended upon how it was resolved, such that 'fairness demanded' that the question be dealt with (*Petrochemical Industries* , at para 21).
>
> (iv) However, there will be a failure to deal with an 'issue' where the determination of that 'issue' is essential to the decision reached in the award (*World Trade Corp v C Czarnikow Sugar Ltd [2005] 1 Lloyd's Rep 422 at para 16*). An essential issue arises in this context where the decision cannot be justified as a particular key issue has not been decided which is critical to the result and there has not been a decision on all the issues necessary to resolve the dispute or disputes (*Weldon Plan Ltd v The Commission for the New Towns [2000] BLR 496 at para 21*)".

He noted that these had recently been quoted with approval by Bryan J in *The Republic of Kazakhstan* v *World Wide Minerals Ltd* [2025] EWHC 452 (Comm), paragraph 34.

[8] With particular reference to sub-paragraph (iii), counsel submitted that the outcome of the case depended on the decision taken in relation to the Common Law Interpretation Argument and that, as such, it was an issue. Reference was made also to the decision of Andrew Smith J in *Petrochemical Industries* at paragraphs 20 and 21. In relation to the question of whether a matter is an "issue" because its determination is necessary in order to reach a decision on the submissions made, I was also referred to *Buyuk Camlica* v *Progress Bulk Carriers* [2010] EWHC 442 (Comm), paragraph 29. The relevant passage there was also quoted with approval by Bryan J at paragraph 38 in the *Kazakhstan* case.

[9] In relation to whether the issue was "put to" the Arbitrator I was referred to the following passage from the judgment of the Privy Council in *RAV Bahamas Ltd* v *Therapy Beach Club* [2021] UKPC 8:

> "There is a degree of overlap between the considerations relevant to whether there is an 'issue' and whether it has been 'put to' to the tribunal. It is clear that this does not require the issue to have been pleaded or included in a list of issues. It is necessary to consider the arbitration proceedings as a whole, including the pleadings and the written and oral submissions. Having done so, in general, what is required is that the tribunal's attention has been sufficiently clearly drawn to the issue, as one which it is required to determine, that it would reasonably be expected to deal with it".

Again, this was quoted with approval by Andrew Smith J in *Petrochemical Industries*, this time at paragraph 35.

Analysis and Decision

[10] It is most convenient to consider whether the issue was put to the arbitrator by examining separately the three stages of the process; the period up to the hearing, the hearing itself and the further submissions after the hearing. Before that, it is useful to set out the relevant provisions of the lease. The repairing obligation is in Clause 6.1 and is imposes an obligation,

> "To carry out all work on the Premises necessary to ensure that at all times the Premises and the Common Parts are in good and substantial order and repair and in all respects suitable and fit for the Permitted Use, including such work arising from a hidden defect, but the Tenant shall not be obliged to keep the Premises or the Common Parts (including returning the Premises and the Common Parts to the Landlord upon the expiry of earlier termination of the Lease) in any better condition that that specified in the Schedule of Condition annexed and subscribed as relative hereto."

Clause 6.21 imposes the following obligation in relation to the end of the lease:

> "to leave the premises…. in such good and substantial repair and condition as shall be in accordance with the obligations undertaken by the Tenant under the Lease but declaring for the avoidance of doubt that the Tenant shall not be obliged to put the premises into any better condition that that evidenced by the Schedule of Condition."

[11] The Award notes that, by direction dated 19 November 2023, the Arbitrator required parties to provide notes as to the essential details of the dispute and the matters which each party considered required to be addressed. The note from the Landlord is recorded as identifying the issues as being the proper interpretation of Clauses 6.1 and 6.21 and the correct measure of loss. The Award records that the Note for the Respondent confirmed the issues in broadly similar terms. The arbitrator directed that parties should proceed rapidly to a hearing and directed that written submissions should be provided. Both parties provided submissions. Both address matters arising out of the matters said by the parties to be in issue - the proper interpretation of the identified clauses.

[12] There was reference in the Tenant's submissions to the condition of the premises at the outset and the schedule of photographs attached to the Lease. It is clear, however, that this is part of the argument that the obligations of the Tenant went no further than maintaining the premises in the condition that they were at the outset of the lease. It was accordingly an argument as to the content of the Tenant's repairing obligation. There is no mention whatsoever in these submissions of an argument based on mutuality that the

obligations – whatever their content - were not enforceable because the landlords were in breach of their obligations. That argument is not one that arises incidentally to or out of the issues identified for the hearing. They concerned the scope of obligations undertaken by the Tenant in the lease and turned on the interpretation of Clause 6.1 and 6.21. What the Tenant sought to argue, on the other hand, was that, irrespective of the scope of those obligations, they could not be enforced because of an antecedent breach.

[13] It is apparent that in the run up to the hearing, the Common Law Interpretation Argument was not an issue that had been put to the Arbitrator. However, the Tenant submitted that the Common Law Interpretation Argument was put forward at the hearing. The Tenant said that the argument advanced at the hearing was that the Tenant's obligation was to *keep* in repair rather than to *put* in repair. By reference to *Napier* v *Ferrier* 1847 9D 1354, it was said that this meant that there was an obligation on the part of the landlord to ensure that the premises were in an appropriate state before the tenant's obligation arose and that is how the argument was put before the Arbitrator. It was submitted that this was vouched by the Tenant's solicitor's notes of the hearing which were lodged. The Landlord objected on the basis that they had not had a chance to consider these notes and could not be taken to have accepted them as an accurate account of submissions. While noting that qualification, I have had regard to the notes to ascertain if they are of assistance.

[14] The key passage within the notes is the one recording what was said in relation to the point from *Napier*. It is clear from what is recorded that the submission concerns the scope or content of the obligation on the Tenant and not whether that obligation is non-enforceable by reason of mutuality. Put broadly, the argument is that the Tenant's obligation is limited (or benchmarked) by the standard of the property at the outset. This is entirely in keeping with the earlier written submission and the identification of the issue for

the hearing as being the meaning of Clauses 6.1 and 6.21. The terms "mutual" or "mutuality" are not mentioned. Therefore, even taking into account what is said in the notes of the hearing, there is no basis to conclude that by the conclusion of the hearing the Common Law Interpretation Argument was put to the Arbitrator for decision.

[15] Following the hearing the Arbitrator sent an email dated 4 December 2024 to the parties attaching a draft of the part award. In the text of the email she said, "If either party has any comments or otherwise, then those are invited with 14 days of today's date, ie by close of business on 18 December 2024."

In response to that invitation the Tenant submitted a 10 page document containing what were described as "representations". They made recommendations as to the approach the Arbitrator should take to the issues, it made further submissions as to the approach to be taken to interpretation of contracts and submitted that no decision should be made until there had been a proof as to the circumstances surrounding the conclusion of the lease. They made submissions about what was said to be the rationale for the clauses in question, invited the arbitrator to revisit *Dem-Master Demolition Limited* v *Healthcare Environmental Services Limited* [2917] CSOH 14 and to consider it at greater length and to change parts of the award accordingly. They submitted that the Arbitrator should change the view she had taken as to the applicability of *McCall's Entertainments (Ayr) Limited* v *South Ayrshire Council (No 2)* 1998 SLT 1421. Leaving aside whether any of these matters were appropriate for submission at this stage, they all related to the interpretation of Clause 6.1 and 6.21.

[16] After noting these arguments, for the first time there was mention of the doctrine of mutuality in contracts and, in passing, in a single sentence, an assertion that, in the circumstances, the landlord was not entitled to enforce the repairing obligation against the tenant. This is relied on by the Tenant to establish that the issue of the Common Law

Interpretation argument was put to the Arbitrator. The representations claimed that it had been advanced both in previous written submissions and in oral argument. There was no basis at all for either of these claims. It was not a statement that could properly be made. It need not be considered further. This was the first reference to the concept of mutuality of contract and the first assertion that the landlord was not entitled to enforce the lease because of the state of the premises.

[17] The Landlord submits that it was too late at this stage to put a matter before the arbitrator on which she was required to make a decision. In response, the Tenant submits that there was nothing in the letter of 4 December limiting the scope of the submissions that might be made and that there is no limit in the Scottish Arbitration Rules, Rule 55, that imposes any such limit. Rule 55 states that an Arbitrator may send a draft award to the parties and, if this is done, "must consider any representations from the parties *about the draft*" (emphasis added).

[18] I do not consider it surprising that the Arbitrator's email of 4 December does not make any stipulation as to the scope of submissions. One of the founding principles of the 2010 Act, stated in section 1, is that that "the object of arbitration is to resolve disputes fairly, impartially and without unnecessary delay or expense". If it was possible, after a draft decision was intimated, to raise new matters for the first time that the Arbitrator was bound to consider, this object would be frustrated. It would be necessary to give the other party a chance to respond to the newly advanced argument as a matter of fairness. A hearing might be required. If such additional arguments were allowed once, there would be no reason why it should not be done a second or third time. There could be a substantial delay and substantial expense incurred. By the time of the email of 4 December, the Arbitrator had made a decision on the matters that had been put to her. Comments might be made on the

decision on those issues, but the email of 4 December was not an invitation to open up new lines of arguments and make new submissions. While this is implicit in the Arbitrator's email, it is express in Rule 55. The words italicised above indicate that the scope of the representations is limited. They must be about the draft. Here, the Tenant sought to go much further and open up new arguments and new issues which were not about the draft. These matters were not ones put to the Arbitrator for her decision.

[19] The effect of the foregoing is that applying the test from *RAV Bahamas*, the Common Law Interpretation Issue was not put to the Arbitrator. It was not necessary that she deal with it in order to address any of the issues that had been put to her. As a result, the award is not vitiated as a result of it not been addressed and there is no serious irregularity.