OUTER HOUSE, COURT OF SESSION

[2025] CSOH 86

P325/25

OPINION OF LORD LAKE

in Petition of

ARBITRATION APPEAL NO 1 OF 2025

Petitioner: Morrison; TC Young LLP Solicitors
Respondent: R Anderson; Nisbets Solicitors

23 September 2025

[1] The parties are in a dispute concerning a repairing obligation in a lease and, more particularly, an issue of dilapidations/repairs. An arbitration has been commenced in terms of Clause 16 within the lease. In this application, the petitioners challenge a decision of an arbitrator on two legal error grounds under the Scottish Arbitration Rules, rule 69. One of them is that there was a serious irregularity in the conduct of the arbitration. The second is that there was a legal error. The first ground does not require leave to proceed and this decision is not concerned with it. The second ground of challenge requires leave to be given under the rule 70. This opinion is concerned with the issue of whether leave should be granted. Having considered the papers I decided that it was appropriate to allow a hearing on this matter. At that hearing, I heard submissions from both the petitioner and the respondent.

[2] Rule 70(3) stipulates when leave may be granted. It is in the following terms:

> "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."

[3] The first point to consider is whether it is open to the parties to the lease to bring a legal error appeal under rule 69 or whether that default rule has been disapplied by their agreement. The arbitration clause in the lease, Clause 16, includes a proviso that, "Section 3 of the Administration of Justice (Scotland) Act 1972 and any statutory modification or re-enactment thereof being excluded." The respondent submitted that this meant that a legal error appeal was not competent. The respondent directed me to section 36(8) of the Arbitration (Scotland) Act 2010 which says that an express provision in a lease executed before the coming into effect of the Act which disapplied section 3 of the 1972 Act is to be treated as an agreement to disapply rules 41 and 69. In fact, the lease was not executed before the Act came into force but 14 months later. Although this means that this section does not apply directly, it was submitted that the wording is indicative of an intention to exclude legal error appeals and should be construed in that way.

[4] Section 36(8) is a transitional provision. It is intended to reconcile pre-Act arbitration agreements with the rules brought in by the Act. It was necessary to make provision to give effect to agreements to exclude references to the court which pre-dated the Act. If no provision had been made, the intention of parties in pre-Act agreements would be frustrated by the new rules. That consideration does not apply to agreements made after the Act was

made law. From that time, it was straightforward for parties who wished to exclude a legal error appeal to do so. Here the parties have not done so. This seems likely to have been the result of error. I was referred to the decision of Lord Sandison in *Arbitration Application (No 2 of 2024*) [2024] CSOH 83. Here, however, the lease does not contain a statement that the determination of the arbitrator is final and binding. It was such a stipulation taken with the reference to exclusion of section 3 which led Lord Sandison to his conclusion that legal error appeals were excluded in that instance.

[5] Having taken this view of Clause 16, it is not necessary to reach a decision as to whether a letter from the arbitrator to the solicitors for the parties dated 30 November 2023 and their inaction in response amounted to agreement to reinstate rule 69 regardless of the lease terms.

[6] Turning then to rule 70(3), it is convenient to start with the requirements of paragraph (c). In construing the lease, the arbitrator had regard to the words of the clauses in question, the terms of the lease as a whole and the requirement to give effect to business or commercial common sense. The arbitrator also had regards to the photographs contained in the schedule of condition annexed to the lease. In relation to the parts of the building depicted there, the repair obligations were held to be limited whereas, in relation to the remainder, the standard required is "good and substantial order and repair" (Determination, paragraph 26). It is apparent therefore that regard has been had to the contents of the schedule and effect has been given to it when determining the scope of the repair obligations. For the parts of the building shown, there is a departure from the generally stated standard (paragraph 28). As it appears that the arbitrator has taken into account the matter which the petitioner alleged was not considered, I consider that the decision is neither obviously wrong nor open to serious doubt.

[7] Although it is academic, for completeness I would add that I did not accept that the issue raised was of general importance. In this regard, I take the same approach as Lord Richardson in *Arbitration Appeal (No 1 of 2023)* [2023] CSOH 78. The alleged error concerns an interpretation of what were accepted to be bespoke provisions. The dispute was not as to the correct approach to interpretation but as to the application of well-established principles to the particular lease in question. While it was said that that the terms of the lease contained "boilerplate" wording, there was nothing to identify the manner in which such terms were relevant to the decision.

[8] The second ground alleges that there was a failure to provide adequate reasons. It is claimed that they,

> "were not sufficient to enable the petitioners to understand how, and why, the petitioner's arguments had been rejected by failing to deal substantively with the authorities advanced by the petitioners."

[9] During the hearing I noted my doubts as to whether this was an irregularity appeal rather than a legal error appeal. Nonetheless, even viewing it through the lens of legal error, the test for granting leave is not met.

[10] The test as to what is required for reasons is well established. It is sufficient that they to deal with the principal issues in dispute and, in doing so, they should leave the parties - with their knowledge of the background circumstances - in no real doubt as to why they had won or lost.

[11] Here the reasons set out, in a readily intelligible way, the basis on which the arbitrator concluded that the interpretation advanced by the respondent should be preferred. Little is said by the petitioners in this regard as to what the shortcomings in the reasons are other than the passage quoted above. There is no identification of any issue as to which they are uncertain of the basis of the decision. It was contended that the arbitrator

had not addressed the case *of Dem-Master Demolition Limited* v *Healthcare Environmental Services* [2017] CSOH 14. This was said to be "broadly similar" to the issue before the arbitrator and covered the "key legal issues". It was a decision following a proof. The legal issues in so far as they concern the correct approach to interpretation were not in substantial dispute. The terms considered in that case are similar to those considered by the arbitrator. However, it does not contain any rule of law or ratio binding on the arbitrator. *Dem-Master* was an application of the recognised rules to the lease in that case. The arbitrator's task was to interpret the lease in front of her in this case. While her decision does not refer to the case, it is of note that the conclusion reached avoids the concern raised in *Dem-Master* that one interpretation would render the schedule of condition otiose.

[12] The petitioner's concern appears simply to be a disagreement with the interpretation favoured by the arbitrator. That is not enough to make a decision either obviously wrong or open to serious doubt. Once again, although it is academic, there is no basis for concluding that the failure to state reasons as to the interpretation of bespoke lease provisions is a matter of general importance.