OUTER HOUSE, COURT OF SESSION

[2025] CSOH 70

P581/24

OPINION OF LORD SANDISON

in Petition of

ARBITRATION APPEAL NO 2 OF 2024

Petitioners: Milloy; Ledingham Chalmers LLP
Respondent: R Sutherland; Blackadders LLP instructed by The McKinstry Company LLP

7 August 2025

Introduction

[1] In this appeal in terms of rule 68 of the Scottish Arbitration Rules, the petitioners challenge the decision of an arbitrator dated 14 June 2024 on the basis that there was a serious irregularity in the conduct of the arbitration. Leave to proceed with a separate challenge alleging legal error under rules 69 and 70 was previously refused on the basis that the express exclusion of any right of appeal in terms of the Administration of Justice (Scotland) Act 1972 in the contract containing the arbitration clause amounted to a decision by the parties to reject the potential availability of any right to apply to the court on the ground of alleged legal error under the Rules: [2024] CSOH 83.

Background

[2] The parties are members of a farming partnership pursuant to a partnership agreement dated 1 April 2012. The partnership agreement provides *inter alia* as follows:

> "19.1 Each partner shall at all times … be just and faithful to the other partners in all matters relating to the firm
> …
> 22.1 If any partner shall:
> …
> 22.1.4 commit any material breach or persistent breach of this agreement;
> 22.1.6 be guilty of any conduct likely to have a material adverse effect upon the firm's business or reputation;
> …
> then, upon the partners becoming aware thereof, and in any such case, the other partners may by notice in writing expel such partner from the firm and upon service of such notice such partner shall forthwith be deemed to have ceased to be a member of the firm."

[3] On 8 September 2022 a notice of expulsion in terms of clause 22.1 was served by the petitioners on the respondent. The petitioners considered that service of the notice was justified by what they alleged was the respondent's conduct towards them, including two assaults on the first petitioner in late 2020, which were said to constitute a breach of the duty to be just and faithful in terms of clause 19.1, as well as representing a material breach of the agreement in terms of clause 22.1.4, and by behaviour directed at the firm's employees and third parties dating back as far as March 2018, which was said to represent conduct of the kind struck at by clause 22.1.6.

[4] The respondent denied that he had engaged in any conduct falling within the ambit of clauses 19 or 22 and disputed the validity of the expulsion notice. Clause 28 of the partnership agreement provided for resolution of such disputes by arbitration, and the question of the validity of the expulsion notice was accordingly referred to an arbitrator. The petitioners and the respondent were respectively afforded periods to intimate and adjust their statement of claim and response, to include the factual matters and legal

grounds relied upon by them and the orders they sought, which they each duly did. An evidential hearing took place before the arbitrator between 13 and 15 May 2024. It was agreed amongst the arbitrator and the parties, and a procedural order was made to the effect, that the hearing would be conducted in accordance with the rules of evidence and procedure as they would apply in the Scottish civil courts.

[5] Following completion of the evidence, each side lodged written submissions. The petitioners claim that the respondent's written submissions raised new lines of defence not featuring in his pleadings, in particular that the expulsion notice was invalid due to delay in serving it once the other partners had become aware of the conduct in question, and that there had, separately, been a breach of natural justice in the process prior to its service. Counsel for the petitioners submitted that these matters had not been put in issue in the pleadings or evidence, that the evidential hearing would have been conducted differently had those issues been perceived to be live ones, and that the petitioners would be prejudiced if those arguments were entertained at the stage which had been reached.

[6] The arbitrator determined that the respondent had assaulted the first petitioner in late 2020 and that there had been another physical altercation in December of that year during which each had assaulted the other. He held that the assaults by the respondent constituted material breaches of his obligation to be just and faithful to the partners of the firm, but that the notice of expulsion had not been issued within a reasonable time following the assaults. He further held that an incident in March 2018 had involved the respondent verbally abusing a third party, who had felt threatened thereby, but that there was no evidence that that conduct had actually had a material adverse effect on the business of the firm and thus did not meet the threshold justifying expulsion under clause 22.1.6.

[7] The respondent's argument based upon breach of natural justice was rejected because the arbitrator did not consider that it was open to the respondent to raise that issue for the first time during submissions following conclusion of the evidence. The arbitrator also expressed doubts about the merits of the respondent's position on the substance of the issue. The petitioners' submission that the respondent's argument regarding delay in serving the expulsion notice should be rejected on the basis that it was not open to him to raise that issue for the first time during submissions following conclusion of the evidence was not specifically addressed, but the arbitrator disposed of matters by holding that the notice of expulsion was invalid as it had not been served within a reasonable period of the other partners becoming aware of the conduct which might have justified such service. He regarded that as being necessary on a proper construction of clause 22.1, and in particular on the basis that that clause allowed and contemplated service of a notice of expulsion "upon the partners becoming aware" of the events said to give rise to the right to expel.

Relevant statutory provisions

[8] Schedule 1 to the Arbitration (Scotland) Act 2010 (the Scottish Arbitration Rules) contains the following provisions (rules):

> "**24 General duty of the tribunal M**
>
> (1) The tribunal must—
> (a) be impartial and independent,
> (b) treat the parties fairly, and
> (c) conduct the arbitration—
> (i) without unnecessary delay, and
> (ii) without incurring unnecessary expense.
>
> (2) Treating the parties fairly includes giving each party a reasonable opportunity to put its case and to deal with the other party's case.
>
> …

68 Challenging an award: serious irregularity M

(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—

(a) the tribunal failing to conduct the arbitration in accordance with—

(i) the arbitration agreement,

(ii) these rules (in so far as they apply), or

(iii) any other agreement by the parties relating to conduct of the arbitration,

…

(c) the tribunal failing to deal with all the issues that were put to it,

…

(h) an arbitrator having not treated the parties fairly …"

Submissions for the petitioners

[9] Counsel for the petitioners moved the court to allow the appeal and to grant an order requiring the arbitrator to reconsider those aspects of his decision of which they complained. There were serious irregularities in the manner in which the arbitrator dealt with the respondent's argument based on the wording "upon the partners becoming aware thereof" in clause 22 of the partnership agreement. In particular: (a) the arbitrator decided the case based upon a matter that did not form part of the dispute which had been put in issue by the parties; (b) the procedure that the arbitrator adopted did not provide the petitioners with a reasonable opportunity to deal with the timing argument; (c) the procedure the arbitrator adopted was a clear departure from the approach which had been agreed between the parties, in that by sustaining a submission of which no fair notice had been given, he did not conduct the evidential hearing in accordance with the rules of evidence and procedure applicable in the Scottish courts; and (d) the arbitrator failed to provide any reasons for

rejecting the petitioners' submission that it was not open to the respondent to raise the timing issue for the first time during submissions following conclusion of the evidence.

[10] In circumstances where no fair notice was provided of the timing argument in advance of the evidential hearing, the petitioners did not have a fair opportunity to adduce relevant facts in response to it. Their preparations for the evidential hearing would have been materially different had they known in advance that the respondent was going to make such an argument. It proved to be determinative of the arbitration. The petitioners would suffer substantial injustice unless the serious irregularities identified were addressed.

[11] Rules 24 and 68 of the Scottish Arbitration Rules were referred to. There was no material difference between the relevant provisions of rule 68 and their counterparts within section 68 of the (English) Arbitration Act 1996. English authorities relative to the proper construction and operation of section 68 were accordingly of considerable assistance.

[12] The concept of "serious irregularity" had two limbs: (1) the presence of one of the specified irregularities; and (2) substantial injustice to the appellant. Often the matters overlapped: *Compania Sud Americana de Vapores SA* v *Nippon Yusen Kaisha* [2009] EWHC 1606 (Comm), [2010] 1 Lloyd's Rep 436 at [38]. Conduct by an arbitrator which failed to adhere to the arbitration agreement or any other agreement between the parties relative to how the arbitration was to be conducted amounted to irregularity. Thus, where an arbitrator did not deal with a matter in accordance with the procedure agreed by the parties and ordered by the arbitrator, that amounted to serious irregularity provided an appellant could demonstrate that that had caused, or would cause, substantial injustice to him: *Newfield Construction Ltd* v *Tomlinson* [2004] EWHC 3051 (TCC), 97 Con LR 148 at [43]; *Pacol Ltd* v *Joint Stock Co Rossakhar* [1999] 2 All ER (Comm) 778, [2000] 1 Lloyd's Rep 109, [2000] CLC 315.

[13] A failure by an arbitrator to treat the parties fairly in terms of rule 24(1)(b) and (2) could amount to a serious irregularity on the basis that it represented a breach of rule 68(2)(a)(ii): *Cameroon Airlines* v *Transnet Ltd* [2004] EWHC 1829 (Comm), [2006] TCLR 1 at [107]. Where a party was not afforded a reasonable opportunity to put its case and to deal with the other party's case, that amounted to serious irregularity, again provided that the appellant could demonstrate substantial injustice. In *OAO Northern Shipping Company* v *Remolcadores De Marin SL ("The Remmar")* [2007] EWHC 1821 (Comm), [2007] 2 Lloyd's Rep 302 at [26] it had been observed that:

> "The Court's task on this type of application is not to second-guess the tribunal's views on any additional submissions which [parties] might have made if called upon to do so. It is sufficient if [those parties] have been deprived of the opportunity to advance submissions which were 'at least reasonably arguable', or even simply something better than 'hopeless' (per *Vee*, [*Vee Networks Ltd* v *Econet Wireless International Ltd* [2004] EWHC 2909 (Comm)] at paragraph 88)."

[14] Put another way, the question was whether, but for the irregularity which caused the arbitrator to reach a conclusion unfavourable to the petitioners, he might not have reached that conclusion: *Compania Sud Americana de Vapores SA* at [61].

[15] The appropriate starting point for identifying the serious irregularities in issue was to consider the terms of the first procedural order in the arbitration, by which the arbitrator prescribed the manner in which parties required to give notice and specify their respective arguments in advance of any evidential hearing. It represented the agreed approach between the parties, and ordered by the arbitrator, relative to the conduct of the arbitration. Its second paragraph provided:

> "The respondent will lodge and intimate by 5pm on 26 September 2023 his written response setting out: (i) the factual basis of his defence; (ii) the legal grounds upon which he relies; and (iii) the orders he asks the arbitrator to make."

It was accordingly incumbent on the respondent to include within his written response all the legal grounds he intended to advance during and at the close of the evidential hearing. At no stage in the arbitration did the respondent's pleadings contain any reference to an argument based on the wording "upon the partners becoming aware thereof" in clause 22.1 of the partnership agreement, nor did the respondent ever plead any other species of argument founding upon alleged delay in service of the expulsion notice. He pleaded a substantive defence regarding his conduct. That defence was that he had not breached his obligation under clause 19.1 of the partnership agreement to be just and faithful to the other partners. He denied that the alleged conduct had occurred. Subsumed within that was a denial of the gravity of the conduct alleged. He further argued that the expulsion requirements provided for within clauses 22.1.4 and 22.1.6 of the partnership agreement were not satisfied. There were no factual averments offering to prove circumstances from which the arbitrator was to be invited to find that the petitioners had delayed unreasonably in serving the expulsion notice. Given that the first procedural order was clear in its terms that such facts and legal grounds as were to be relied upon required to be included within the respondent's written response, the petitioners were entitled to proceed to the evidential hearing on the basis that the respondent was not putting in issue whether there had been delay in service of the expulsion notice, or whether the existence of any delay, if proven, could provide a legal ground to nullify the expulsion notice. The petitioners' preparations for the evidential hearing proceeded on that basis.

[16] Evidence was heard on 13 and 14 May 2024. Parties thereafter prepared and lodged written submissions, and oral submissions were heard on 15 May. In the respondent's written submissions, he introduced an argument regarding delay which had not been foreshadowed in his pleadings. He sought to found on the fact that the breaches alleged by

the petitioners had supposedly occurred in March 2018, late 2020, January 2021 and over a period of time up to August 2021. He drew attention to a notice of expulsion issued by the petitioners in August 2021, which was subsequently withdrawn, and sought to found on the fact that this notice had not been produced by the petitioners. During oral submissions on 15 May, the petitioners' counsel addressed the respondent's delay argument, observing under reference to Macphail, *Sheriff Court Practice* (4th Edition) at 9.07, 9.08, 9.28 and 9.29 that the question of delay was not properly in issue, having regard to the respondent's pleaded position. He submitted that the evidential hearing had been run on the basis of what the respondent had put in issue, and that that did not include the passage of time between the alleged breaches and the expulsion notice. It was submitted that, had this matter been put in issue, there would have been a much greater focus in evidence on whether there had been any delay, and about the circumstances of the August 2021 withdrawn notice. A fallback submission to the effect that, insofar as the evidence that was heard gave rise to any issue of delay which the arbitrator proposed to take into account, there was a reasonable explanation for such delay. It was noted that delay was a highly fact-sensitive issue and a full examination of the facts and circumstances was generally necessary in order to determine it. It was incumbent on the arbitrator fully to consider the petitioners' submissions and thereafter to rule on whether the delay argument should be entertained, and to provide reasons for his ruling. He failed to provide any such reasons.

[17] In addition to the delay argument, the respondent's written submissions also introduced for the first time an argument based on natural justice. Although not the subject of appeal in these proceedings, that was relevant insofar as it represented a second issue that was not signalled within the respondent's pleadings, but which he sought to argue only

after evidence had been heard. Counsel for the petitioners had also addressed the natural justice argument in his oral submissions.

[18] The arbitrator's decision was issued on 14 June 2024. He rejected the respondent's natural justice argument, explaining his reasons for doing so over seven paragraphs. In essence, the argument was rejected because the arbitrator did not consider that it was open to the respondent to raise the issue for the first time during submissions following conclusion of the evidence. He held that the respondent had assaulted the first petitioner on two occasions. He held that in late 2020 the respondent had assaulted the first petitioner and that there had been another physical altercation in December 2020 (not early 2021, as the first petitioner had stated in evidence) during which the first petitioner and respondent had each assaulted the other. He held that the assaults by the respondent constituted material breaches of the obligation within clause 19.1 of the partnership agreement to be just and faithful to the partners of the firm. However, he held that the expulsion notice had not been issued within a reasonable time following the assaults and was accordingly invalid and of no effect. He did not refer to the petitioners' submissions on this issue at all. His decision proceeded upon an issue that did not form part of the dispute between the parties. That amounted to a serious irregularity.

[19] The petitioners' formal objection to the advancement of the delay argument was not ruled upon; rather, it was simply ignored. That in itself was a serious irregularity. The arbitrator failed to follow a procedure that afforded the petitioners an opportunity properly to respond to the respondent's argument, in circumstances where it should have been apparent to him that there was a real risk of substantial injustice arising thereby. The crux of the matter was that the arbitrator decided the dispute on a basis which the petitioners had never had a reasonable opportunity of making the subject of evidence. Had such an

opportunity been afforded to them, the petitioners would have sought to adduce facts which would have been relevant to the delay issue. That would have included exploring in detail the factual circumstances surrounding the decisions to serve the August 2021 expulsion notice which was subsequently withdrawn, and to serve the operative expulsion notice. The reasons behind the timing of each notice, including the health of the first petitioner and the dynamics of the business, would have been expanded upon. Failing to afford the petitioners the chance properly to respond to the delay issue prior to making a decision on it amounted to a failure by the arbitrator to treat the petitioners fairly in terms of rule 24(2) and in turn a failure to conduct the arbitration in accordance with rule 68(2)(a)(ii).

[20] The respondent's position in these proceedings missed the point. That the arbitrator determined the matter according to the evidence he heard was no answer to the petitioners' position that when deciding whether the expulsion notice had been validly issued, he ought not to have considered the delay argument at all.

[21] Substantial injustice had arisen due to the fact that, but for the irregularity in determining the matter on the basis of the timing issue, the petitioners had made good their case that assaults by the respondent had taken place, and had thus demonstrated material breaches of his obligation to be just and faithful to the partners of the firm. But for the arbitrator's decision on the timing issue, the petitioners would have succeeded. The court did not require to engage in a substantive analysis of exactly what further facts the petitioners might have sought to adduce, what further submissions they might have made thereon, or what the arbitrator might have made of those. All they had to demonstrate was that, if afforded the opportunity to proceed in such a manner, they would have been able to deploy a reasonable argument in response to the delay issue, or even one that was simply

better than hopeless; in other words, something that might have made a difference to the arbitrator's determination of the issue.

Submissions for the respondent

[22] On behalf of the respondent, counsel submitted that that there was no serious irregularity on the part of the arbitrator because his decision was a natural consequence of the limited evidence that had been placed before him. The scope and nature of the evidence led was a matter which the petitioners had directed. There could be no denial of due process when a submission was made that that evidence was insufficient to justify the remedy that the petitioners sought. The petition should be refused and the award confirmed in terms of rule 68(3)(a).

[23] The arbitrator was asked to uphold a notice of expulsion dated 8 September 2022, which proceeded on a narration of material and persistent breaches of the partnership agreement. The statement of claim detailed an alleged series of incidents between 22 March 2018 and 15 August 2021 which had initially been founded upon to justify a notice of expulsion dated 17 August 2021. It was narrated that no further action had been taken in relation to that notice because of assurances given as to the respondent's future conduct, but that that conduct had again deteriorated by December 2021 and had not improved by 8 September 2022, resulting in the service of the further notice of expulsion on that date. At the evidential hearing, the petitioners, the respondents and three other witnesses gave evidence. Each adopted a witness statement which had been lodged, and this evidence was supplemented through further questioning, cross-examination, and re-examination where appropriate. The witness statements of three further witnesses were accepted as their evidence without them being called.

[24] Delay only arose as in issue in the arbitration in the context of the absence of evidence before the arbitrator about any conduct justifying the service of the expulsion notice dated 8 September 2022. The respondent's submissions noted the lack of evidence that had been presented to the arbitrator by the petitioners about events from September 2021 onwards. Had the petitioners led witnesses at the hearing who could speak effectively to these events, or had they led more evidence about the details of the alleged continuing behaviour of the respondent from September 2021 than was in fact given at the hearing, any submission about that evidence would require to have been made based on what had actually been said.

[25] The arbitrator found *inter alia* that the respondent had assaulted the first petitioner in late 2020 and that he and the first petitioner had assaulted each other in the course of an incident in December 2020. He had considered, and either rejected as not made out for various reasons, or as immaterial, allegations about other events from March 2018 to September 2021. He held that the respondent's assaults constituted material breaches of his obligation to be just and faithful to the partners of the firm, contrary to clause 19.1 of the partnership agreement, but that there was no satisfactory evidence of incidents apart from those in 2020. That was a direct consequence of the very limited evidence which the petitioners had chosen to present. It was the limited nature of that evidence which had provided the basis for the respondent's submission. In light of the evidence before him, the arbitrator accepted the submission that the expulsion notice of 8 September 2022 was not issued in accordance with the requirements of clause 22.1. That was something that it was entirely within his powers to do. Each of the cases relied upon by the petitioners could readily be distinguished from the present circumstances.

[26] In *Atkins Ltd* v *Secretary of State for Transport* [2013] EWHC 139 (TCC), [2013] BLR 193 at [24] it was held that "serious irregularity" within the meaning of section 68 of the Arbitration Act 1996 did not mean an error of fact or law on the part of the arbitrator and was not to be used as a ground for challenging his factual findings or legal reasoning. Where the court was asked to determine whether an arbitrator had failed to deal with all the issues put to him, there was no requirement to carry out a hypercritical or excessively syntactical analysis of what he had written. The court could only intervene under section 68 where an irregularity had caused substantial injustice ([36] - [39]).

[27] In the present case, the arbitrator approached the matter on the basis of the evidence and the facts that he found to be established. He had regard to the proper construction of clause 22.1. He had regard to the evidential requirements of the clause and the lack of evidence before him of any conduct justifying the service of the expulsion notice dated 8 September 2022. He correctly understood the submission for the respondent as being founded on the lack of relevant evidence, and the fact that the only evidence of any specific matter that had been led was historic in nature. The petitioners had not been denied an opportunity to raise any conduct of the respondent as a basis for justifying the expulsion notice dated 8 September 2022. Their written submissions indicated that the respondent's behaviour had improved after August 2021 and had then returned to the same type of behaviour as had taken place before service of the initial expulsion notice. Their choice as to what evidence they considered appropriate to lead at the proof was not one that the respondent was aware of at the time of the closing of the pleadings in the arbitration. The point did not emerge until after the evidential hearing itself. The decision of the arbitrator was based on the evidence he heard, and was justified by that evidence.

[28] There had been no serious irregularity of procedure on the part of the arbitrator, and no prejudice caused to the petitioners. They had simply failed to produce the requisite evidence for a finding in their favour. No substantial injustice could have been caused to them in those circumstances. Reference was made to *Arbitration Application No 4 of 2020* 2021 SLT 1105.

Decision

[29] It is appropriate to begin by recalling that serious irregularity appeals are designed as a long stop available only in extreme cases where the arbitral tribunal has gone so wrong in its conduct of the arbitration that justice calls out for correction: *Walsall Metropolitan Borough Council* v *Beechdale Community Housing Association Ltd* [2005] EWHC 2715; *Arbitration Application 1 of 2013* [2014] CSOH 83 at [34]. It follows that the court will not intervene on the basis that it might have done things differently, or expressed its conclusions on the essential issues at greater length. A serious irregularity appeal can only succeed if there has been substantial injustice. If the result of the arbitration would have been likely to be the same or very similar absent the alleged irregularity, then there is no basis for overturning the award: *Arbitration Application 1 of 2013* at [18].

[30] If the criticism of the arbitrator involves a failure to give adequate reasons, it is further necessary to bear in mind that the nature and length of the reasons to be given in an individual case will depend upon the whole context within which the decision is given. An arbitrator is only required to deal with the essential issues, not every point that is raised: *Fidelity Management SA* v *Myriad International Holdings BV* [2005] EWCH 1193 (Comm) at [9]. Further, an award may be upheld, even if the reasoning is poor and unimpressive: *Compton Beauchamp Estates Ltd* v *Spence* [2013] EWCH 1101 (Ch) at [79]. One approach is to ask

whether the award makes sense. A failure by the arbitrator to deal with a specific point need not constitute an irregularity. The question is whether, overall, matters have been dealt with by due process.

[31] Bearing those principles in mind, I turn to the specific matters alleged to amount to irregularity in the conduct of the arbitration presently under examination. It is firstly contended that the arbitrator's decision that the notice of expulsion relied on by the petitioners was served only after the expiry of a reasonable period of time from the occurrence of any events justifying its service was a decision on something that was not part of the dispute before him. I disagree. The principal thing which the arbitrator was asked to do by the petitioners was, as it was expressed in the arbitral pleadings, to "uphold" the notice of expulsion; in other words, to affirm that it was a valid and effective such notice. That request necessarily involved an assertion - by the petitioners, not by the respondent - that nothing in the circumstances pertaining to the notice, including the timing of its service by reference to the occurrence of the events said to justify that expedient, deprived it of such validity or efficacy. Given that the contractual term enabling its service referred to that being permissible "upon the partners becoming aware" of the relevant circumstances, the question of its timing was necessarily put in issue as an intrinsic part of the petitioners' assertion that it was valid and effective, being precisely the assertion which they were asking the arbitrator to vindicate.

[32] Even in the absence of such express stipulation, the proper construction of any power to rescind a contract on account of its serious breach by one party would be that such power was exercisable only within a reasonable time of such breach: *Ford Sellar Morris Properties plc* v *EW Hutchison Ltd* 1990 SC 34 at 37, 1990 SLT 500 at 502 (a proposition said to be "obvious"); *James Howden & Co Ltd* v *Taylor Woodrow Property Co Ltd* 1998 SC 853

at 871, 1999 SLT 841 at 853. That further emphasises the inherent need to deal with the question of timing as part of the assertion of the validity of the expulsion notice. I accordingly reject the contention that this was not an issue squarely before the arbitrator for determination as part and parcel of his task of deciding the question of that validity.

[33] The second contention for the petitioners was that the procedure adopted by the arbitrator did not afford them a reasonable opportunity to deal with the argument that the expulsion notice came too late to be effective. It follows from what I have already observed about the nature of the issue which gave rise to that argument that the petitioners ought to have appreciated that that was a matter for them to deal with as an element of their assertion of the validity of the notice. They were free to lead whatever relevant evidence they chose about the issue. They did lead evidence about alleged behaviour on the part of the respondent which was supposed to have happened after the events of late 2020 which the arbitrator found established. If they had succeeded in making out at least some of those allegations, then the question of the timing of the notice might either not have arisen at all, or else might have been less significant than it in fact transpired to be. The real problem for the petitioners was that (essentially because they chose, for no very obvious reason, to rely largely on hearsay evidence about the more recent alleged behaviour by the respondent) they failed to establish to the satisfaction of the arbitrator any relevant behaviour after December 2020. In that state of affairs, the question of the timing of the notice became very pertinent and was, naturally enough, made the subject of submission by the respondent. The petitioners could and did in turn make such submissions as they saw fit in relation to the question, but their real problem was not the procedure adopted by the arbitrator, but the substantive view that he had taken of the evidence they had adduced. I deal later with the question of what could have happened had the petitioners been more alive to the potential

significance of the timing issue at an earlier stage in the arbitration, but observe for present purposes that I can identify no material irregularity in the procedure adopted by the arbitrator in allowing parties to adduce such evidence as they saw fit and make the submissions which they considered apt in reaction to the evidence which emerged.

[34] The petitioners' next and related complaint was that the evidential hearing was not conducted, as it had been agreed it would be, in accordance with the rules of evidence and procedure applicable in the Scottish courts. Again, I do not consider that this complaint is well-founded, it once being appreciated that the question of the timing of the expulsion notice was intrinsic to its validity, and that the prominence that question might take on as an issue in the arbitration would depend on how the evidence of the behaviour said to found the service of the notice emerged and was assessed by the arbitrator. It is commonplace in Scottish litigation that there are issues which may or may not take on significance depending on how evidence develops and which, if they turn out to be material, are routinely addressed in submission and play their appropriate part in the ultimate decision on fact and law which requires to be made. It would be quite unrealistic to expect every such potential issue to be specifically identified in advance of proof, or to construe the procedural order issued by the arbitrator as requiring such identification. The primary purpose of pleadings is to identify the scope of the evidence to be led, not to list every possible legal issue which might or might not emerge once evidence within that scope is led. There may be arbitrations in which parties agree, expressly or by clear implication, either at the outset or during the course of the process, strictly to circumscribe the factual or legal issues which the arbitrator may and may not properly take into account; indeed, at least some of the English decisions cited to me (especially *Newfield*) might be regarded as examples of such cases. In the present arbitration, however, the agreement and consequent

order that the rules of evidence and procedure applicable in the Scottish courts would apply vouches no such limitation on the points of law which might be found relevant by the arbitrator in the determination of the dispute; rather the reverse.

[35] The final allegation of serious irregularity advanced by the petitioners concerns the lack of stated reasons by the arbitrator for entertaining the notice timing argument in the face of their objections. In this regard an unfavourable comparison was drawn with the fairly extensive reasons given by the arbitrator for refusing to accept that it was open to the respondent to advance an argument that events preceding the service of the expulsion notice amounted to a breach of the requirements of natural justice. That comparison is misplaced. The natural justice issue was not part and parcel of the petitioner's assertion of the validity of the expulsion notice. It was a quite free-standing issue advanced by the respondent by way of defence to what might otherwise have been regarded as an entirely valid notice. The respondent was just as able to state that matter as an answer to the case made against him at the stage of settling his pleadings as he was when formulating his submissions once the evidence had been heard. It did not depend to any extent on how evidence on the subjects covered by the pleadings might emerge in the course of the evidential hearing. He chose not to state it at all until making his submissions after that hearing. That situation called for the arbitrator to decide whether he should entertain the argument, and he decided that it was not *pars iudicis* to take account of such a submission and that it had been made too late in the day. For good measure, he explained that he was also unpersuaded of its substantive merits. The contrast with the issue of the timing of the expulsion notice is clear. The arbitrator regarded that issue as a matter which arose directly out of the greater exercise of construction of the notice in which he was necessarily engaged, not as an unconnected defence. That alone was sufficient explanation as to why the timing issue required to be

addressed despite the petitioners' opposition. The petitioners were, in any event, left in no substantial doubt as to why their expulsion notice was not upheld. In such circumstances, any deficiency in explaining why the matter was being entertained at all could not amount to a serious irregularity.

[36] Turning to the question of whether anything done by the arbitrator which might have amounted to an irregularity could have caused substantial injustice to the petitioners, this resolves into the question of what the petitioners could have done to address the question of the lapse of time between the occurrence of the last incident which would have justified service of the expulsion notice and the date of its actual service. The arbitrator was very clear in holding that "a period of in excess of twenty months *cannot* constitute a reasonable period of time" (*emphasis* added). The sort of evidence which the petitioners say they would have adduced had they been aware of the potential impact of the timing of the service of the expulsion notice on its validity turns on their own subjective reasons for not acting sooner, such as the state of health of the first petitioner, the need to take into account the family relationships amongst the parties, and the various exigencies of running the business of the partnership. Self-evidently, none of that was capable of altering the period of time which as a matter of fact elapsed between December 2020 and September 2022, and the prospects of anything of the kind resulting in a conclusion that the lapse of that period was, after all, a reasonable time for service of the notice are so remote as to be capable of being safely discounted. Put simply, the petitioners' failure to establish any relevant conduct on the part of the respondent after December 2020 left them with nowhere to go as a matter of law. Against that background, they were bound to fail in establishing the validity of the notice whether or not they had led evidence of the kind which they now

maintain that they would have led had they appreciated the significance of the timing issue earlier than they did.

Conclusion

[37] The petitioners have failed to establish the occurrence of any material irregularity in the conduct of the arbitration, or to show that anything of which they complain, even if regarded as such an irregularity, could have resulted in the doing of any substantial injustice to them. The arbitrator's award will, in terms of rule 68(3)(a) of the Scottish Arbitration Rules, accordingly be confirmed, and the petition dismissed.