OUTER HOUSE, COURT OF SESSION

[2023] CSOH 78

P378/23

OPINION OF LORD RICHARDSON

in the Petition

ARBITRATION APPEAL NO 1 OF 2023

Petitioner: Davidson Chalmers Stewart
Respondent: Dentons

8 November 2023

Introduction

[1] The petitioner challenges the Part Award of an arbitrator dated 10 March 2023.

[2] The petitioner challenges the Part Award on two grounds. The first ground is said to concern a serious irregularity under rule 68 of the Scottish Arbitration Rules. A ground of appeal advanced on this basis does not require leave to appeal. As an alternative, the petitioner submits that the arbitrator has made a legal error. This ground of appeal is advanced pursuant to rules 69 and 70 of the Scottish Arbitration Rules. Grounds of appeal made under these rules require the leave of the court to proceed unless they are made with the agreement of the parties.

[3] The respondent does not agree to the legal error appeal being made by the petitioner. Accordingly, the petitioner seeks leave to advance its legal error appeal. The respondent has lodged grounds of opposition resisting the grant of leave.

[4] In terms of rule 70(5) of the Scottish Arbitration Rules, I am to determine the petitioner's application for leave without a hearing unless I am satisfied that a hearing is required. Having considered the papers, I am not so satisfied and, accordingly, deal with the issue of leave in this opinion.

Background

[5] The petitioner and respondent are, respectively, the tenant and landlord of a lease in respect of commercial subjects in Glasgow. The petitioner operates a hotel accommodation business from the property. The petitioner took occupation of the property in February 2011.

[6] A dispute arose between the parties because the petitioner alleged that the respondent was not maintaining the common parts of the property, a proper system of heating, and the windows of the property in accordance with the respondent's obligations under the lease. As a result of the petitioner's contention that the respondent was not complying with its obligations under the lease, the petitioner made deductions from the rental and services charges it made to the respondent from December 2017. From 10 March 2020, the petitioner has made no further rental payments.

[7] On 11 February 2022, the respondent served a pre-irritancy notice on the petitioner requiring payment of the outstanding rent arrears. The respondent subsequently served an irritancy notice on the petitioner dated 27 May 2022. On 22 June 2022, the respondent commenced proceedings at Glasgow Sheriff Court seeking declarator of irritancy and decree for ejection further to the notices that it had served.

The arbitration

[8] Clause 9 of the lease provides that any question between the parties in respect of the meaning of the lease or the rights and obligations of the parties under the lease is to be determined by arbitration. On 5 July 2022, the petitioner served a notice of arbitration and the arbitrator was appointed. The Sheriff Court proceedings were and remain sisted.

[9] In its notice of arbitration, the petitioner asserts that the respondent is in material breach of the lease and, accordingly, the respondent is entitled to the remedy of retention of rent. The petitioner also seeks a declaration that it would be entitled, in light of the breaches of contract by the respondent, to rescind the lease and to damages in the sum of £800,000 together with interest.

[10] The respondent answered the notice. The respondent asserted that it was not in breach of its obligations under the lease; that the petitioner was not entitled to retain payments of rent or any other charges due under the lease; that its irritancy notice dated 27 May 2022 was valid; and that the petitioner should pay it the outstanding rent arrears together with interest.

[11] Following further procedure, the arbitrator fixed a hearing for 12 December 2022 on the issues of (1) the petitioner's right to withhold payment for rent; (2) the relevancy of the petitioner's claim for abatement of rent; and (3) the validity of the irritancy notice dated 27 May 2022.

The Part Award

[12] The arbitrator issued the Part Award on 10 March 2023. For present purposes, the relevant parts of the Part Award may be summarised as follows.

[13] The arbitrator considered that the key to determining whether the respondent's notice of irritancy was operative was the provision of the lease which required the rent (as defined) to be paid "clear of any deduction, right of compensation or set-off whatsoever". (See paragraph 76 of the Part Award and clause 2 of the lease). The arbitrator considered that the question of whether or not the petitioner's claim for the abatement of rent was relevant also required to be considered against this wording (see paragraph 80).

[14] From this starting point, the arbitrator concluded that the wording of the lease did not displace the petitioner's right to claim for an abatement of rent (see paragraphs 87 and 92).

[15] However, the arbitrator also concluded, based upon the wording of the lease and, in particular clause 2, that where abatement is claimed the rent must nonetheless be paid unless and until an abatement is fixed or established (see paragraph 95). In reaching this conclusion, the arbitrator expressly rejected the petitioner's argument that the retention of rent by the petitioner did not fall within the scope of the wording "clear of any deduction, right of compensation or set off whatsoever" in clause 2 of the lease (see paragraph 98).

[16] At paragraph 102 of the Part Award, the arbitrator said the following:

> "As to the argument noted at paragraph 69 above, that a landlord cannot irritate when itself in breach (on the principle of mutuality), this does not on the face of it take account of the express terms of the lease in the instant matter, which in effect, by implication, accept that certain 'deductions' could otherwise be due (brought about, for example, by a landlord breach of contract) but the parties have agreed notwithstanding this, that the Rent must simply be paid in the first instance."

The test for leave to appeal

[17] The test which must be satisfied in order for leave to be granted is contained in rule 70(3) of the Scottish Arbitration Rules which provides:

> "(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."

[18] The test for granting of leave was helpfully addressed by Lord Glennie in the first reported decision under the Arbitration (Scotland) Act 2010, *Arbitration Application No.3 of 2011* 2012 SLT 150 at paragraph 8:

> "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 the 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 re-inventing the (arbitration) wheel."

[19] From this starting point, I consider that the approach to be adopted by the Court in considering the decisions of arbitrators is neatly summarised by Bingham J (as he then was) in *Zermalt Holdings SA* v *Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14:

> "[…] as a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it."

The petitioner's legal error appeal

[20] The petitioner submits that the arbitrator's conclusion in paragraph 102 of the Part Award is flawed and obviously wrong. The petitioner submits as follows:

> "The reasoning proceeds on the basis that the right to exercise the remedy of irritancy arises where the petitioner has failed to pay rent irrespective of whether the landlord is in material breach. The tribunal failed to consider firstly whether the

> respondent was in breach of the obligations, and secondly whether those breaches were material and prevented the respondent exercising the remedy of irritancy applying the principle of mutuality of obligations." (statement 13 of the Petition)

[21] The petitioner also submits that the point raised is one of general importance and is open to serious doubt. The petitioner argues that the point raised is of importance to landlords and tenants more generally and is not restricted to the facts of the present dispute.

Decision

[22] I am satisfied that the requirements of rule 70(3)(a) and (b) are met in the present petition. However, I am not satisfied that either limb of rule 70(3)(c) is made out.

[23] The arbitrator has concluded, primarily on the basis of a construction of the material terms of the lease, that the petitioner's claims of breach of contract by the respondent could not provide a defence to the exercise by the respondent of its right to irritate the lease for non-payment of rent and other payments by the petitioner. In essence, the arbitrator held that the parties had agreed to a contractual scheme whereby the petitioner's obligation to pay the rent and other sums as they became due under the lease was not affected by the any claims the petitioner might have arising from alleged breaches by the respondent. As such, the proof of the petitioner's case of breach against the respondent did not arise at that stage. Furthermore, it follows from the arbitrator's construction of the terms of the lease, that the obligations which the respondent is said by the petitioner to have breached are not the counter-parts of the petitioner's obligation to make payment. Therefore, on the arbitrator's approach, the principle of mutuality of obligations provided no defence to the respondent's right to irritate the lease.

[24] I do not consider that the arbitrator's conclusion can be said to be "so obviously wrong as to preclude the possibility that he might be right" *Antaios Compania Naviera SA* v

Salen Rederierna AB [1985] 1 AC 191 at 206D-E. The arbitrator was engaged in an exercise of contractual construction. Plainly, as it is put in the case law, respectable intellects may disagree about the results of such an exercise (see *Braes of Doune Wind Farm (Scotland Ltd* v *Alfred McAlpine Business Services Ltd* [2008] 1 CLC 487 at paragraph 29). In my opinion, the Part Award simply does not disclose an error of the type required by rule 70(3)(c)(i).

[25] As to the second limb, I am quite satisfied that the point raised by the petitioner does not raise any issue of general importance. It turns on the proper construction of the bespoke terms of a commercial lease. There is no suggestion that either the lease as a whole or the relevant clauses are standard.

Disposal

[26] Accordingly, I will refuse the petitioner leave to appeal on the ground of a legal error, pursuant to rules 69 and 70 of the Scottish Arbitration Rules. I will have the case put out by order in order that I can be addressed on any further procedure in respect of the petitioner's ground of challenge under rule 68 of the Scottish Arbitration Rules.