OUTER HOUSE, COURT OF SESSION

[2025] CSOH 7

P1120/24

OPINION OF LORD BRAID

In the petition

ARBITRATION APPEAL NO 3 OF 2024

Petitioners: Turcan Connell
Respondent: City of Edinburgh Council

16 January 2025

Introduction

[1] The petitioners wish to appeal the partial award of an arbitrator dated 7 November 2024 on the ground that the arbitrator erred on several points of Scots law (a legal error appeal). The arbitration was subject to the provisions of the Arbitration (Scotland) Act 2010 and the Scottish Arbitration Rules, as set out in schedule 1 to that Act. In terms of rules 69 and 70, a legal error appeal may be made to the Outer House only with the agreement of the parties or with the leave of the Outer House. The respondent has not agreed to the appeal and so the petitioners seek leave of the court.

[2] By virtue of rule 70(3) leave for a legal error appeal may be given only if the court is satisfied:

(a) that deciding the point of Scots law in question will substantially affect a party's rights;

(b) that the arbitrator was asked to decide the point; and

(c) that the arbitrator's decision on the point –

(i) was obviously wrong, or

(ii) if the point is of general importance, is open to serious doubt.

[3] There is no disagreement between the parties that the first two limbs of that test are met, nor for that matter do the petitioners contend that the arbitrator's decision was obviously wrong. The issue is whether, in relation to any of the proposed grounds of appeal, the second branch of (c) is also satisfied.

[4] Rule 70(5) provides that the Outer House must determine an application for leave without a hearing (unless satisfied that a hearing is required). Having perused the pleadings (which are in full terms), the productions (which included the pleadings in the arbitration, the notes of argument lodged by each party in the arbitration, and the arbitrator's decision) and the bundles of authorities lodged by both parties, I am well versed in the arguments on both sides. I do not consider that a hearing is required.

Section 75 of the Town and Country Planning (Scotland) Act 1997

[5] Since the dispute relates to an agreement entered into in 2003 between D and the respondent (a planning authority), pursuant to section 75 of the Town and Country Planning (Scotland) Act 1997, it is convenient to set out the material terms of that section as it was in force at that time in its original form:

> "75 **Agreements regulating the use of land**
>
> (1) A planning authority may enter into an agreement with any person interested in land in their district (insofar as the interest of that person enables him to bind the land) for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as may be prescribed by the agreement.
> ....

> (2) An agreement made under this section with any person interested in land may, if the agreement has been recorded in [...] the Land Register of Scotland, be enforceable at the instance of the planning authority against persons deriving title to the land from the person with whom the agreement was entered into.
>
> ....
>
> (3) Nothing in this section or in any agreement made under it shall be construed-
>
> (a) as restricting the exercise, in relation to land which is the subject of any such agreement, of any powers exercisable by any Minister or authority under this Act so long as those powers are exercised in accordance with the provision of the development plan, or in accordance with any directions which may have been given by the Secretary of State as to the provisions to be included in such a plan..."

The dispute

[6] The section 75 agreement in question pertained to an area of ground referred to in the agreement as the Development Site. The agreement was registered in the Land Register and thus, by virtue of section 75(3), it became enforceable at the instance of the respondent against singular successors of D. The agreement contained an arbitration clause.

[7] Subsequently, D sold to the first petitioner the majority of the land comprising the Development Site, with the exception of certain plots which it had previously sold. The first petitioner has since sold on some of the land to third parties, but still owns a substantial part of the Development Site. D did not assign its rights under the agreement to any of the petitioners (nor to any other party).

[8] The largest part of the dispute centres on the construction of clause 2 of the section 75 agreement, dealing with the provision of affordable housing in the Development Site. Insofar as material it provides:

> "2. Affordable Housing
>
> 2.1 D will allocate six areas on the Development Site for the development of affordable housing. Such areas will be nominated by D and shall be located two within Phase 1, one within Phase 2 and three within Phase 3 and shall be set aside and available only for the construction of the total affordable housing units.

> 2.2 Subject to the provisions of clause 2.3 hereof, D shall use reasonable endeavours to enter into affordable housing contracts which, individually or cumulatively, shall provide for the construction of, or the sale of land for the construction of, the following amount of affordable housing units within the Development Site by each of the following stages of development:…
>
> […]
>
> 2.5 Unless otherwise agreed with the [respondent], affordable housing shall not be provided on the Development Site in blocks of more than 100 residential units.
>
> 2.6 Of the total affordable housing units, D shall be bound to procure that 70% shall be allocated for socially rented housing and 30% shall be allocated for share ownership schemes, subsidised LCHO and unsubsidised LCHO, or as otherwise may be agreed between D and the [respondent] at the time of the development of any part of such affordable housing provision.
>
> […]
>
> 2.11 It will not be necessary for 15% of the total relevant housing units in the implementation of each housing consent to be affordable housing units, and not all successors in title of D must exercise reasonable endeavours to enter into affordable housing contracts, provided always that, either individually or cumulatively, D or at least one successor in title of them to part or parts of the Development Site undertakes reasonable endeavours to enter into the affordable housing contracts referred to in the foregoing clauses."

"Total affordable housing units" was defined in the agreement as meaning: "the lesser of (a) 510 residential units and (b) the number which is 15% of all residential units to be constructed on the Development Site."

[9] A separate dispute also relates to clause 5.3, which provides, insofar as material:

> "D undertakes save to the extent hereinafter specified not to construct without the approval in writing of the [respondent] (which consent will not be unreasonably withheld or a decision thereon unreasonably delayed) any permanent road crossings nor alter any ground levels or locate any services within [a specified area] until such time as the [respondent] notifies D in writing that it does not require the transfer of [the specified area] or 1 January 2020 whichever is the earlier date SAVE THAT D shall be entitled without requiring the further consent of the [respondent] to construct the principal transport corridor to serve the Site (being [ ] Road or such other route or routes as may be determined in substitution for such Road), form such other roads, associated services and other works anticipated by and incorporated by reference in the Planning Permission and to construct such other services and others

> as are reasonably required in connection with the development of the Site provided always that in forming such roads, installing such services and carrying out such other works D will have due and proper regard to the need to ensure that in crossing [the specified area] the roads, services and other works are designed and located in a way which will enable them to be maintained replaced and investigated or renewed ..."

[10] The petitioners' principal complaint is that, properly construed, the agreement provides for a maximum number of affordable housing units on the Site; that the respondent breached clause 2 of the agreement (a) by granting planning permission over land not owned by the petitioners with the result that across the Site as a whole, the maximum number of affordable housing units was exceeded; and (b) by granting planning permission for blocks containing more than 100 residential units, again over land not owned by the petitioners, and without the petitioners' consent; and that the petitioners have title and interest to sue in respect of these alleged breaches. They further contend that the respondent breached clause 5.3 by requiring them to seek planning permission and roads authority consent for any roads within the Site. The respondent takes issue with all these points. The dispute was referred to arbitration, in accordance with an arbitration clause.

The arbitrator's decision

[11] The issues which the arbitrator had to resolve, insofar as material for present purposes, were:

(a) Which, if any, of any obligations owed by the respondent to D in terms of clause 2 of the agreement were the petitioners entitled to enforce as successors in title to D of only some parts of the Development Site?

(b) On a proper construction of clause 2, (i) did the respondent owe any duty to the petitioners to limit the amount of residential development granted planning

permission on the Site for use as affordable housing, including in relation to parts of the site not owned by it; and (ii) was the respondent obliged not to grant planning permission for affordable housing in a single block comprising over 100 units, even where an application for such was made by the owner or intended developer of such land (and where the land was not owned by the petitioner)?

(c) On a proper construction of clause 5.3, were the petitioners exempt from seeking planning permission and roads authority construction consent for any roads within the Site?

[12] Insofar as the first of these is concerned, the arbitrator decided that the petitioners did not have title and interest to raise complaints against the respondent in respect of obligations said to be owed by the respondent under the agreement, except insofar as such obligations were owed to the petitioners as owners of the Site. The essence of his reasoning was that it was clear from section 75 that an agreement entered into pursuant to that section could be made only between a planning authority and a person both interested in and able to bind the land. D was such a person, but when it disponed parcels of land to third parties, it ceased to be such a person in relation to that land. The agreement then became enforceable against the various owners of the parcels of land disponed by D. The critical point was that liability under the agreement followed the land. Obligations owed in respect of parcels of land owned by third parties could be enforced at the instance of the respondent against the third party owners, but not against other owners of other parcels including those owned by the petitioner. As regards rights, the arbitrator accepted that a transferee of land subject to the section 75 agreement could acquire enforceable rights, but only in respect of land acquired and held by it. To allow a party to claim under the agreement in respect of a parcel of land to which he had no right or title would undermine the integrity of the

statutory provision. The arbitrator rejected the petitioners' arguments that a real personal burden had been created in favour of the petitioner, or alternatively that the agreement was enforceable by the petitioners as a *tertius* in terms of a *jus quaesitum tertio* created as between D and the respondent.

[13] In relation to the second issue, the arbitrator preferred the respondent's construction of the affordable housing provision, which was that, read as a whole, the agreement provided for a minimum, not a maximum, level of affordable housing units. Thus, he decided that the respondent was not obliged to limit the amount of affordable housing for which it granted planning permission on the Site; and, further, that the agreement of the petitioners was not required to allow the provision of affordable housing in blocks of over 100 units, or to the variation of clause 2.6 in relation to development of any land not owned by the petitioner. The arbitrator further decided that insofar as it was contended that the effect of clause 2 was to restrict the ability of the respondent to exercise its statutory powers in a particular manner, any such restriction would be counter to section 75(5)(a) of the 1997 Act in its then form, and unenforceable.

[14] In relation to the third issue, similarly, the arbitrator found that insofar as clause 5.3 purported to exempt the petitioners from the requirement to seek planning permission and roads authority consent for any roads with the Site, it was counter to section 75(5)(a) and unenforceable.

[15] Consequent to those findings, the arbitrator dismissed the petitioners' claim insofar as it was based on any alleged breach of clause 2.5 or 2.6, or of clause 5.3.

The grounds of challenge

[16] The petitioners contend that the arbitrator made the following eight errors of law:

[17] First, that his approach to construction of the section 75 agreement, resulting in his finding that the petitioners had title to sue only in respect of obligations pertaining to the particular parts of the Development Site owned by them, was inconsistent with the important principle of law that all of the obligations on one side of a contract were taken to be reciprocal to those on the other side in the absence of a clear indication in the contract to the contrary (there being no such clear indication here): *JH & W Lamont of Heathfield Farm* v *Chattisham Ltd* 2018 SC 440, per the Lord President (Carloway) at [20]; *Inveresk plc* v *Tullis Russell Papermakers Ltd* 2010 SC (UKSC) 106, per Lord Hope of Craighead at [42].

[18] Second, that in holding that the petitioners had title and interest only insofar as obligations were owed to them in respect of the land they owned, the arbitrator erred by failing to recognise that the enforceability of the section 75 agreement as a real burden could not sensibly be limited in the manner that he suggested, whereby owners of parcels of land which were formerly part of the entire development site could only enforce the agreement insofar as it related to activities carried out upon that land (as opposed to activities undertaken on the Site which affected the land owned by the successor in question). Reference was made in this regard to an article by Professor Paisley, *Personal Real Burdens*, 2005 Juridical Review 377, at 399.

[19] Third that the arbitrator erred in holding that the petitioners should not be regarded as enjoying a *jus quaesitum tertio* conferring on them the ability to sue. The requirements for the creation of a *jus quaesitum tertio* were all made out: see McBryde, *The Law of Contract in Scotland (3rd Ed)*, para 10.08). The arbitrator had focussed on whether successors of D were burdened by the section 75 agreement, but that was nothing to the point so far as the question of intention to benefit a successor was concerned.

[20] Fourth, that the arbitrator erred in his construction of clause 2. To the extent that his reasoning was based upon his prior conclusions regarding title and interest, his reasoning was flawed *in limine.* Having regard to the definition of affordable housing units, which provided for the *lesser* of two alternatives, properly construed the agreement sought to place a cap upon the total number of affordable housing units upon the Development Site.

[21] Fifth, that the arbitrator erred in finding that on a proper construction of the agreement, the agreement of the petitioners was not required for the variation of clause 2.5 or clause 2.6. Again, the view he reached was predicated on his unsound conclusion as to title and interest. The approach taken by the arbitrator stripped the relevant provisions of the section 75 agreement of any meaningful content.

[22] Sixth, that the arbitrator erred in, to any extent, basing his above findings upon his view of the effects of section 75(5)(a) of the 1997 Act. Even if the respondent's statutory powers were not fettered as a result of the obligations it undertook under the section 75 agreement, such a conclusion had no effect upon the proper construction of the obligations undertaken by it; so, even if it was statutorily empowered to act as it did in granting planning permissions for affordable housing, such conduct remained a breach of the terms of the agreement properly construed.

[23] Seventh, that the arbitrator erred in declaring that insofar as it was contended that the effect of clause 2 or any part thereof was to restrict the ability of the respondent to exercise its statutory powers in a particular manner, any such restriction would be counter to section 75(5)(a) of the 1997 Act, in respect that the relevant question was the proper meaning and effect of the section 75 Agreement, not whether the respondent retained its statutory powers. The error lay in the arbitrator proceeding on the basis that the proper construction of the agreement depended upon whether its statutory powers as such were

affected. Further, there was no warrant for the conclusion that section 75(5)(a) had effect so as to render the provisions of clause 2.5 unenforceable.

[24] Eighth, that for the reasons set out in the sixth and seventh grounds of appeal, the arbitrator erred in finding that clause 5.3 was unenforceable.

[25] In relation to all of these grounds of appeal, the petitioners aver that the points in question are all matters of general importance, and that the arbitrator's decision on all of them is on any view at least open to serious doubt. The dispute between the parties concerns the ability of successors to enforce, against a planning authority, obligations which are undertaken in agreements entered into under section 75 of the 1997 Act. Given the prevalence of such agreements, the questions of title to sue, and of construction which arise are in themselves matters of general importance. The scale and size of the Site and the developments being undertaken on it were also such as to imbue the points raised by the petitioners with the necessary quality of general importance.

The respondent's answers

[26] The respondent denies that the arbitrator erred in any of the eight respects averred in the petition.

[27] In relation to the first ground of appeal, there was no title to sue in the abstract. The petitioners' case principally related to alleged breaches of the section 75 agreement by the respondent by granting planning permission to the owners of other plots. The arbitrator did not err in finding that the petitioners had no title to sue, except in respect of obligations pertaining to those particular parts of the Site owned by the petitioners. As regards mutuality, the petitioners' argument was misplaced. The petitioners were not party to the section 75 agreement, nor had it been assigned to them; the petitioners' putative title was

based entirely upon section 75, not common law principles, as the arbitrator correctly held. There was nothing in the statutory scheme or in private law principle which explained how the petitioners had any title to sue in respect of section 75 planning obligations affecting other plots of land. The arbitrator's decision on the first ground of appeal was not open to serious doubt.

[28] In relation to the second ground of appeal, neither Professor Paisley's article nor the petition addressed or identified any legal mechanism of how it is that a successor to a plot subject to a section 75 agreement acquired any right to enforce in respect of other plots. It was striking that the law of title conditions – which can give rise to mutual enforcement – had strict title and interest requirements on top of specific rules about whether, for example, properties are "related". On the petitioners' approach, there were no such rules for planning obligations which would become mutually enforceable by owners across a development.

[29] In relation to the third ground of appeal, the arbitrator was correct to reject the petitioners' contention that they should be regarded as a *tertius* with an ability to sue under the law of *jus quaesitum tertio.* There was Outer House authority that third parties had no title to enforce a section 75 agreement: *Jordanhill Community Council* v *Glasgow City Council* [2018] CSOH 11, para [71], per Lady Wolffe.

[30] In relation to the fourth ground of appeal, the construction of clause 2 was not a matter of general importance being found as it was in a non-standard section 75 agreement which applies to a single development. The arbitrator had made clear that his construction of clause 2 was not tied to his decision on title to sue. The arbitrator's interpretation of the clause was not open to serious doubt. The "total affordable housing" referred to the maximum that the developer might be required to attempt to provide, which was why it

referred to the lesser of two potential amounts. It did not impose a cap on what they or others could choose to propose.

[31] In relation to the fifth ground of appeal, this turned on the proper construction of clause 2.5 of the agreement. That was not a point of general importance, nor was the arbitrator's decision open to serious doubt. In terms of section 75, as then in force, it was only someone who had an interest in land who could enter into a planning obligation. By parity of reasoning it is only the person with an interest in land – the owner – who could agree to a variation of a section 75 obligation with the planning authority. On the petitioners' construction, planning obligations in section 75 agreements for large developments would become ossified as soon as plots were sold subject to the planning obligations, because unanimity of all grantees would then be required to vary a provision in the terms of clause 2.5.

[32] In relation to the sixth ground and seventh grounds of appeal, the arbitrator's construction of section 75(5) was in accordance with appellate English authority on the equivalent English provisions, and was also consistent with binding Scottish Authority: *Elsick Development Co Ltd* v *Aberdeen City and Shire Development Planning Authority* [2017] UKSC 66, 2018 SC (UKSC) 75.

[33] In relation to the eighth ground of appeal, the proper construction of clause 5.3 was not a matter of general importance. The arbitrator did not err in law.

[34] As regards the test for leave, the arbitrator did not make any errors of law, far less were his conclusions open to serious doubt. No issues of general importance were raised by the grounds of appeal. Given the arbitrator's construction of clause 2 of the section 75 agreement, the arguments in relation to title to sue – even if they were considered to raise a

point of general importance – were academic in light of the factual and context specific construction of clause 2 of the agreement which applied in this development.

Decision

[35] The parties lodged a number of Outer House cases dealing with the approach to be taken when considering leave in legal error appeals: *Arbitration Application 1 of 2013* [2014] CSOH 83 (Lord Woolman); *Arbitration Appeal No 1 of 2019* 2019 SLT 1309 (Lord Bannatyne); *Arbitration Appeal No 1 of 2023* [2023] CSOH 78 (Lord Richardson). While it is clear from those cases (and the authorities referred to therein) that, in general, the ethos of the law is to strive to uphold arbitration awards in order to preserve the advantages of arbitration, and the bar for leave is deliberately set high, equally all of those cases were ones in which it was argued that the decision was obviously wrong, a test which it is all but impossible to satisfy in the majority of cases. In the present case, the petitioners do not assert that the arbitrator's decision was obviously wrong, but they do need to satisfy me not only that it is open to serious doubt, a lesser test, but that the point is also one of general importance. I was not referred to any authorities as to the meaning of "serious doubt", but on any view, in order to give content to "serious", it must entail more than that there is a possibility that the arbitrator's decision might be wrong. Beyond that, it is probably unwise to attempt to put a gloss on the statutory wording, by rephrasing it in some other way. It must always be a value judgment as to whether any doubt as to the correctness of the decision is a serious one, or not. As to whether a point is of general importance, one which arises out of a bespoke contract is unlikely to have any wider resonance (*cf*: *Arbitration Application 1 of 2013*, above, Lord Woolman at [33]). Likewise, factors such as the size and scale of the development,

while doubtless of importance to the parties, are not such as to imbue the points raised with the quality of general importance.

[36] As regards the first ground of appeal, I find the respondent's arguments to be the more compelling. Given that the petitioners are neither party to the original agreement nor assignees of D's rights, the authorities referred to by the petitioners are nothing to the point. It is not in dispute that the respondents could owe reciprocal obligations to the petitioners in respect of the land owned by them. The petitioners' argument does not explain by what mechanism the petitioners could have acquired rights in respect of land not owned by it. If a serious doubt arises, it is as to the soundness of that argument, rather than the arbitrator's decision.

[37] The same can be said of the second and third grounds of appeal, where the respondent's arguments are also to be preferred. In relation to the former ground, even if the views expressed in Professor Paisley's article are such as to give room for an alternative view, they are not such as to raise a serious doubt as to the correctness of the arbitrator's decision. Even if the views expounded by Professor Paisley were generally accepted as being correct, that does not explain why the successor to a plot subject to a section 75 agreement acquires any right to enforce in respect of other plots. Even if that is wrong, the argument that this agreement, correctly construed, has created a personal real burden is weak. In relation to the third ground, *Jordanhill Community Council* v *Glasgow City Council*, above, supports the view that third parties have no title to enforce a section 75 agreement. Again, any serious doubt is as to the petitioner's argument, rather than the arbitrator's decision.

[38] The fourth ground of appeal is squarely directed at the correct construction of the particular section 75 agreement entered into in this case and whether it imposed a maximum

or minimum requirement for affordable housing units. Even if the arbitrator was wrong in reaching the conclusion he did on title and interest, he went on to construe the agreement on its own terms, applying the recognised principles of contractual construction (see para [50] of his award). The word "lesser" which appears in the definition does not do the heavy lifting required of it by the petitioner. All that the definition does is provide a mechanism for ascertaining whether the number of units is one figure, or another. Thereafter it is a question of construction of the agreement as a whole as to whether the figure so arrived at is the minimum number of such units which the developers must attempt to provide, or whether it is a number which must not be exceeded by the developer. At best for the petitioners, the use of "lesser" in the definition is neutral as to whether the figure arrived at is a minimum or maximum requirement. For the reasons advanced by the respondent, I consider that the construction arrived at by the arbitrator was correct. At any rate, that construction is not open to serious doubt.

[39] The fifth ground of challenge is also directed at a proper construction of the agreement, this time of clause 2.5, and the meaning of "unless otherwise agreed". The arbitrator's conclusion that this must refer to an agreement reached with the owner of the land in question is not open to serious doubt. As he pointed out, the alternative construction, that the petitioners had the power to control what happens on parcels of land not owned by it (which would entail that the agreement of every owner on the Site was required), makes no sense.

[40] The sixth and seventh grounds of challenge are that the arbitrator erred in basing his views to any extent on section 75(5)(a) of the 1997 Act as it then stood. Its terms are set out above. Having regard to the authority referred to by the respondent (and to *Windsor and Maidenhead RBC* v *Brandrose Investments Ltd* [1983] 1 WLR 509, also referred to by the

arbitrator at para [52]), I do not entertain any serious doubt as to the correctness of the arbitrator's reasoning as to the meaning and effect of section 75(5)(a). In any event, he makes clear in that same paragraph that his reliance on that provision merely supported the conclusion he had already reached on the correct construction of the clauses in question; it did not underpin his reasoning.

[41] The eighth ground of challenge is directed at the proper construction of clause 5.3. As the reporter acknowledges, it is not happily worded. Even if a different construction might have been reached, the decision is not open to serious doubt. The reporter did more heavily rely on section 75(5)(a) in reaching this decision, but, as above, there is no serious doubt as to his reasoning in this regard.

[42] Turning to the question of general importance, the fourth to eighth grounds of appeal on any view are specific to the construction of the particular section 75 agreement in this case and are of importance only to the parties. Likewise, whether a *jus quaesitum tertio* was created is so closely tied in to the particular terms of the agreement that I do not consider that it is of general importance. The points raised by the first two grounds of appeal could more easily be seen to be of general importance; but I have ultimately reached the view that they, too, are so closely linked to the petitioners' construction of clause 2 of the section 75 agreement with regard to affordable housing (which they are unable to pursue further) that they are not of general importance. As the respondent puts it, those arguments are academic in light of the construction of clause 2, and as such, do not raise a point of general importance. Finally, the importance and size of the development do not turn any of the legal points raised into ones of general importance.

Disposal

[43] For all these reasons, I have decided that all grounds of appeal fail both limbs of the relevant test. I shall refuse leave to appeal.