



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 68

P397/22

OPINION OF LORD RICHARDSON

In the petition

ARBITRATION APPEAL NO 2 OF 2022

**Petitioner: MacColl KC; Currie Gilmour & Co**  
**Respondents: Webster KC; Davidson Chalmers Stewart LLP**

6 October 2023

**Introduction**

[1] By this petition the petitioner challenges the Part Award of an Arbitrator dated 12 April 2022 (the “Third Part Award”).

[2] The petitioner challenges the Third Part Award on the basis of an alleged legal error by the Arbitrator 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] In related proceedings, (*Arbitration Appeal No 3 of 2022 (P400/22)*), the respondents in the present proceedings also challenge the Third Part Award. The ground advanced by the respondents in the related proceedings also allege legal errors by the Arbitrator pursuant to rules 69 and 70 of the Scottish Arbitration Rules. The present petitioners are respondents in those proceedings.

[4] As I set out in my Opinion in the related proceedings (issued concurrently with this Opinion), after certain other procedure, the parties reached an agreement that all of their challenges to the Third Part Award should be dealt with together. Accordingly, no issue of leave required to be resolved and I heard argument from both parties in relation to their respective challenges to the Third Part Award. This Opinion deals with the ground of appeal advanced by the petitioner. In my Opinion in the related proceedings (P400/22) I deal with the respondents' grounds of challenge.

[5] In order to avoid unnecessary duplication, this Opinion should be read along with the narrative of the background to the present proceedings which I have set out at paragraphs [7] to [33] in my Opinion in the related proceedings (*Arbitration Appeal No 3 of 2022* (P400/22)).

### **The petitioner's argument**

[6] Senior counsel for the petitioner challenged the finding by the Arbitrator in the Third Part Award that the petitioner had waived its right to insist upon advancing the claims set out in the letter dated 13 November 2020 (see paragraph [21] of the Opinion in the related proceedings (P400/22)).

[7] He advanced three arguments in support of this challenge.

[8] First, Mr MacColl submitted that it was not clear from the Third Part Award when or how precisely the Arbitrator considered that the petitioner had waived its right. It appeared that the Arbitrator was founding upon the email from the petitioner's agents dated 15 August 2019. The material parts of that email are in the following terms:

“Dear Mr Kelly,

Thank you for your email of 8<sup>th</sup> August. [...] In terms of further procedure, my client also agrees that it would be appropriate for you to issue a Direction requiring parties to lodge submissions in relation to the expenses of the arbitration.

Given the time that will be required for the framing of submissions, and recognising that one might expect parties to spend some time in seeking to negotiate an agreed position in relation to any expenses disposal, I would suggest that a period of say 4 weeks for the lodging of submissions would be reasonable.”

[9] However, Mr MacColl submitted that this email did not satisfy the requirements authoritatively set out by Lord Osborne in *City Inn Limited v Shepherd Construction*

*Limited* 2011 (SC) 127:

“[73] In *Evans v Argus Healthcare (Glenesk) Ltd*, the court decided that a pursuers' averments of waiver directed at the defenders' right to rely on the pursuers' failure to provide a deed of servitude were relevant for inquiry. Thus the averments of waiver related to the defenders' right to state a particular defence to the action for specific implement raised against them. That decision appears to me to show that the principle of waiver may apply to the stating of a particular defence to a claim. Reliance by the reclaimers on cl 13.8 I consider would be comparable to that. In his Opinion, Lord Macfadyen conducted a thorough review of the law of waiver. He stated his conclusions from that review in this way (para 11):

‘It is, in my view, sufficient for the purposes of the present case to take from those authorities the propositions that (1) that waiver is constituted by the giving up or abandonment of a right; (2) that such abandonment may be express or may be a matter of inference from the actings of the party in whom the right in question was vested; (3) that determination of whether abandonment is to be inferred requires objective consideration of the facts and circumstances of the case; and (4) that circumstances which are also consistent with retention of the right in question will not support an inference that the right has been abandoned. It appears also to be necessary, for the purpose of relevantly supporting a plea of waiver, to aver that the party taking the plea has conducted his affairs on the basis that the right has been abandoned, but the issues between the parties in the present case does not turn on that aspect of the matter.’

[74] It appears to us that further support for the position of the respondents on this ground of appeal is to be found in *Millar v Dickson* in the Opinion of Lord Bingham of Cornhill. Although the case concerned was a criminal one, taken to the Privy Council on a devolution issue, relating to the status of temporary sheriffs, his Lordship dealt with the law of waiver in this way (para 31):

'In most litigious situations the expression "waiver" is used to describe a voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise.'

For present purposes, it appears to me that that observation is of importance, having regard to the view expressed that the principle of waiver might operate in relation to the opportunity of a party to raise an objection. That seems to me to show that, for the purposes of deciding the nature of a right that may be waived, a wide view should be taken. That view directly supports the respondents' contention that the opportunity conferred upon the reclaimers by cl 13.8.5 to object to a claim for an extension of time may be the subject of a plea of waiver."

[10] In particular, Mr MacColl submitted that the actions of the petitioner which were founded upon by the Arbitrator could not be said to be "unequivocal". In his submission, the words of the email could not be said to go that far.

[11] Mr MacColl's second argument was that the Arbitrator had erred in allowing the respondents a proof before answer in respect of the question of whether they had conducted their affairs in reliance on the petitioner's alleged waiver. Mr MacColl's short point was that, as the Arbitrator had himself recognised (at paragraph [154] of the Third Part Award), the respondents had no pleadings making any averments in this regard. As such, the respondents had not put any factual matters in issue for proof.

[12] Finally, Mr MacColl submitted that the Arbitrator's decision to allow the respondents a proof before answer on this limited question was inconsistent and illogical. There was no proper basis for the Arbitrator's decision, on the one hand, to conclude that the petitioner's actions might amount to waiver without hearing evidence, but, on the other, to allow the respondents a proof before answer on the question of the conduct of their affairs.

### **The respondents' arguments**

[13] In response, Mr Webster submitted that the Arbitrator had been clear in the Third Part Award as to what he had considered constituted the waiver by the petitioner. The Arbitrator founded upon the correspondence from the petitioner, and in particular, the email dated 15 August 2019, which had been issued following the First Part Award and in response to the Arbitrator's invitation to each party to confirm its position in relation to further procedure in that arbitration. The Arbitrator had been fully entitled to consider, as he did, the terms of this correspondence against the agreed factual background (see paragraph [298] of the Third Part Award).

[14] In this regard, Mr Webster drew my attention to paragraph 13 of the Joint Minute of Admissions prepared for the hearing before the Arbitrator on 20 September 2021. (This was the hearing after which the Arbitrator issued the Third Part Award). Paragraph 13 provided:

“[13] The Arbitrator invited parties to confirm what should be the further procedure in the arbitration on or about 8 August 2019. The parties confirmed that the formal procedure in the arbitration should be brought to an end and that the only outstanding matter was the expenses of the arbitration.”

[15] In relation to the second argument, Mr Webster submitted that the petitioner's argument proceeded on a misreading of the Third Part Award. In paragraph [154], the Arbitrator had made clear that he considered that the respondents had set out, in the context of making an argument based on personal bar, how they had conducted their affairs following the petitioner's waiver. The Arbitrator had not erred in reaching this conclusion.

[16] As to petitioner's criticism of the Arbitrator's conclusion that proof was only required on the question of the respondents' conduct, Mr Webster emphasised that his primary position was that there was no need for proof at all. (This was the position he

advanced in the related proceedings – see paragraphs [56] to [59] of the Opinion P400/22). As the Arbitrator had pointed out (see paragraph [264] of the Third Part Award), this was not a case where a third party decision maker, who had had no involvement in the relevant factual background, was looking at that background to determine whether there had been a waiver. He submitted that if I did not accept the respondents' primary submission in respect of waiver, the Arbitrator could not be faulted for proceeding as he had on the basis of what was before him.

### **Decision**

[17] I consider that the petitioner's ground of appeal must be rejected.

[18] First, I consider that the Arbitrator is perfectly clear in the Third Part Award as to what he considered could, subject to the unresolved question of the respondents' conduct, constitute a waiver by the petitioner. Paragraph [153] of the Third Part Award refers back to the factual matters which had been founded upon by the respondents. The Arbitrator set these out at paragraph [142] of the Third Part Award as follows:

"142. The [respondents'] case on waiver was set out briefly at Paragraph [28] of the [respondents'] Note which is in the following terms: "In any event, the [petitioner's] conduct in not inviting the Arbitrator to consider the issue of the validity of the notices, nor the issue of damages, when invited to do so: and allowing the arbitration with the [respondents] to conclude on the issue of expenses, amounts to a waiver of the [petitioner's] ability to now present the Statement of Claim. The [petitioner's] actions were a voluntary, informed and unequivocal election not to make any further claims in the arbitration other than expenses, which the Arbitrator has resolved. *City Inn v Shepherd Construction* 2011 (SC) 127 per Lord Osborne at [73] - [74]".

[19] Accordingly, is quite clear to me that the Arbitrator considered that the petitioner's action in agreeing to conclude the arbitration which was then proceeding (the "first arbitration") when construed against the relevant factual background was capable of

constituting a waiver. In particular, in relation to the background, at paragraph [148] of the Third Part Award the Arbitrator drew attention to the way in which the question he addressed in the First Part Award had been formulated (see paragraphs [11] and [12] of the Opinion P400/22). First, in agreeing to the question which he had addressed in the First Part Award, all of the parties had expressly instructed him not to consider the question of the validity of notice served by the petitioner. Second, the parties had expressly reserved their rights in respect of this point and in respect of all other matters not covered by the question referred pending resolution of that question. Finally, the parties had also informed him that they were of the view that what had been proposed was the most efficacious way of proceeding with the arbitration.

[20] A further important part of the background to which the Arbitrator drew attention was the duty, incumbent on parties and enshrined in rule 25 of the Scottish Arbitration Rules, to ensure that the arbitration is conducted without unnecessary delay and without incurring unnecessary expense.

[21] Against this background, I do not consider that the Arbitrator erred in concluding that the petitioner's actions satisfied the test set down authoritatively by Lord Osborne in *City Inn Limited v Shepherd Construction Limited* (above at [9]). Viewed objectively against this background, the agreement by the petitioner to the disposal of the first arbitration following the issuing of the First Part Award, and the determination of the single question referred to the Arbitrator, constituted the giving up by the petitioner of the rights it had expressly reserved when that question had been formulated.

[22] As to the particular criticism made by the petitioner that its actions were not sufficiently "unequivocal", given the terms of the email from the petitioner's agent dated 15 August 2019, I consider that this argument overlooks the fact that waiver need not be

constituted by express words. As Lord Macfadyen makes clear in *Evans v Argus Healthcare (Glensk) Limited* (see paragraph [9] above), waiver may arise as a matter of inference from a party's actions. I agree with the Arbitrator that it is reasonable to infer from the petitioner's action in agreeing to the disposal of the first arbitration that it was giving up its rights to pursue further the issues arising from the validity of the notices set out in its letter dated 13 November 2020 to the Arbitrator.

[23] I consider that Mr MacColl's second argument proceeds on the basis of a misreading of the Third Part Award. When the Arbitrator says in paragraph [154] of the Third Part Award that the element of conduct is not "specifically addressed" by the respondents in their Note of Argument, I do not understand him to be concluding that the respondents were not asserting that they had so conducted their affairs. On the contrary, as the Arbitrator goes on to make clear in paragraph [154], he considers that the respondents' position in respect of personal bar makes it clear that the respondents do assert that they have conducted their affairs on the basis that the petitioner had abandoned its right. However, it is in respect of these matters that the Arbitrator considers, correctly in my opinion, that he needs to hear evidence.

[24] Finally, I consider that Mr MacColl's final argument is also without merit. I do not consider that there can be said to be any inconsistency in the Arbitrator's treatment of the various constituent elements of waiver. There is a clear distinction between reaching a conclusion as to what can be inferred from the actions of the petitioner in agreeing to the disposal of the first arbitration based on the agreed facts and documents before him, on the one hand; and, on the other, in considering that he requires to hear evidence as to how the respondents' conducted themselves thereafter, which was not a matter of agreement.



[25] For these reasons, I reject the petitioner's argument that Arbitrator erred in law in the Third Part Award in respect of his treatment of the respondents' waiver argument.

### **Disposal**

[26] Accordingly, I will refuse the petition and reserve all questions of expenses meantime.