OUTER HOUSE, COURT OF SESSION

[2023] CSOH 69

P400/22

OPINION OF LORD RICHARDSON

In the petition

ARBITRATION APPEAL NO 3 OF 2022

Petitioners: Webster KC; Davidson Chalmers Stewart LLP
Respondent: MacColl KC; Currie Gilmour & Co

6 October 2023

Introduction

[1] By this petition the petitioners challenge the Part Award of an Arbitrator dated 12 April 2022 (the "Third Part Award").

[2] The petitioners challenge the Third Part Award on two grounds. The first ground is said to concern jurisdiction under rule 67 of the Scottish Arbitration Rules. A ground of appeal advanced on this basis does not require leave to appeal. As an alternative, the petitioners advance this first ground as a legal error appeal pursuant to rule 69 and 70 of the Scottish Arbitration Rules. The second ground advanced by the petitioners is also made on this basis. Grounds of appeal made under rules 69 and 70 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 2 of 2022* (P397/22)*)*, the respondent in the present proceedings also challenges the Third Part Award. The ground advanced by the

respondent in the related proceedings also alleges a legal error by the Arbitrator pursuant to rules 69 and 70 of the Scottish Arbitration Rules. The present petitioners are respondents in those proceedings.

[4] Against this background, following initial consideration of the papers in both sets of proceedings, a hearing was fixed, in terms of Rule of Court 100.8(4), to hear argument in respect both of the motion for leave by the petitioners in these proceedings and the motion for leave made by the respondent in the related proceedings (*Arbitration Appeal No 2 of 2022* (P397/22)*)*.

[5] However, at that hearing before me, both parties were in agreement that, before dealing with the motions for leave, I should hear the petitioners' jurisdictional ground of appeal based upon rule 67. As a result, I fixed a further hearing for that purpose.

[6] Ultimately, in advance of that hearing, 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 at the hearing and I heard argument from both parties in relation to their respective challenges to the Third Part Award. This Opinion deals with both of the grounds of appeal advanced by the petitioners. In my Opinion in the related proceedings (P397/22), which is being issued concurrently, I deal with the respondent's ground of challenge.

Background

[7] The Arbitrator noted at the beginning of the Third Part Award, that, notwithstanding his experience of over 30 years, he considered the background to the present proceedings to be somewhat unusual. He also considered that it was necessary to set out that background in detail. I agree on both points. I set out below the material parts of the procedural

background which I have taken from the Third Part Award. I did not understand this to be contentious between the parties.

Procedure leading up to the First Part Award dated 5 April 2019

[8] In 2012, the parties to the arbitration entered into a Minute of Agreement in terms of which the petitioners [the First Party] let heritable property to the respondent [the Second Party]. The Minute of Agreement contained an option to purchase the property. Exercise of that option by the respondent required service of a notice in terms of the Minute of Agreement. By a Minute of Variation, the parties agreed that where any dispute arose between them with regard to the Minute of Agreement and that dispute could not be resolved by mutual agreement, it was to be referred to the decision of an arbitrator.

[9] The respondent sought to exercise the option under the Minute of Agreement by service of notices dated 22 October 2015 and November 2015. A dispute then arose between the parties as to, among other things, whether the respondent had validly exercised the option.

[10] In 2017, the respondent raised an action in the Court of Session seeking, among other things: declarator that it had validly exercised the option; alternatively, rectification of the notices; and made a financial claim on the basis of unjustified enrichment in the event of the failure of the two primary conclusions. The action was defended by the petitioners. On 21 August 2017, the action was sisted for arbitration. The Arbitrator was appointed on 14 February 2018.

[11] Following a number of submissions on behalf of each of the parties together with discussions with the Arbitrator, the parties agreed that they wished the Arbitrator to address only the following question:

> "1. Whether 'management' of the First Party's interest includes [the first petitioner] being the appropriate and sole recipient of any formal notice concerning the First Party's property interest in the Subjects;"

[12] It is apparent that the Arbitrator had certain reservations about proceeding in this way. During a conference call on 16 August 2018 with the parties, the Arbitrator noted expressly that, on this basis, he was not to consider any arguments or make any determination at that stage on whether any notice served by the respondent was either valid or invalid. Each party expressly reserved their arguments in that connection and in respect of all other matters not covered by the question which had been referred to the Arbitrator pending resolution of that question. The Arbitrator noted further that the parties had assured him that they were of the view that what was proposed was the most efficacious way of proceeding with the arbitration.

[13] Following further submissions by all of the parties and a hearing, the Arbitrator issued a Part Award on 5 April 2019 (the "First Part Award"). In the First Part Award, the Arbitrator answered the question which had been referred to him in the negative. The Arbitrator concluded the First Part Award in the following terms:

> "52. At the Hearing, there was no discussion in relation to the arbitration expenses to date. In the circumstances, I expressly reserve meantime all questions relative to the arbitration expenses for the procedure in the arbitration to date to await submissions of the Parties in that connection which I shall request by a separate direction as well as seeking the Parties' views on further procedure in the arbitration in light of this Part Award."

The Second Part Award dated 22 November 2019

[14] Following the issuing of the First Part Award, the respondent sought, unsuccessfully, to obtain leave to appeal this Part Award from the Court of Session. Thereafter, the Arbitrator by email to the parties dated 8 August 2019, invited each of the parties to confirm its position in relation to further procedure in the arbitration.

[15] By email dated 8 August 2019, the solicitor for the first petitioner wrote as follows:

> "In terms of further procedure, as was alluded to at an earlier stage, it is our client's position that the Part Award, from a practical perspective, deals with the substance of this dispute. As such, our client's proposal for further procedure is that a Direction be issued seeking submissions in terms of the arbitration expenses."

[16] On the same date, the solicitor for the second petitioner confirmed the position of her client:

> "I can confirm that our client's position is in accords with that of [the first petitioner] - the substance of the dispute has, to our minds, been dealt with so that a Direction such as suggested by [the first petitioner's solicitor] seems appropriate."

[17] Finally, the solicitor for the respondent wrote to the Arbitrator on 15 August 2019 by email as follows:

> "Thank you for your email of 8th 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. Best regards"

[18] Thereafter, following certain further procedure, which included the issuing of the Part Award in draft to the parties, on 22 November 2019, the Arbitrator issued a further Part Award (the "Second Part Award").

[19] Paragraph [4] of the Second Part Award was in the following terms:

> "Following the decision [of the Court of Session refusing leave to appeal the First Part Award], I wrote to the Parties asking them to confirm what they considered should be the further procedure in the arbitration. All of 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."

[20] The Second Part Award concluded by making awards of expenses in favour of each of the petitioners.

Procedure leading up to the Third Part Award dated 12 April 2022

[21] On 13 November 2020, almost a year after the issuing of the Second Part Award, the solicitors for the respondent wrote to the Arbitrator in the following terms:

> "We refer to the above matter, in respect of which you will recall having been appointed as arbitrator by the President of the Law Society of Scotland on 14th February 2018. You will also recall having issued a substantive Part Award on 5 April 2019, together with a subsequent Part Award dealing with consequential expenses issues.
>
> Our client, [the respondent], now wishes those parts of the dispute between the parties which have not been dealt with by those Part Awards to be addressed and disposed of by you as arbitrator. In particular, it wishes you to address the subject-matter of conclusions 1 and 2(a) of the underlying Court of Session Summons (a copy of the relevant page of which is attached for your convenience). In addition, it [the respondent] wishes to state a damages claim which will be dependent on a finding that the Option was validly exercised and ought to have been honoured on the Option Date (6 January 2016), seeking payment in respect of the loss of profit which it would have made by letting the property from then until the ultimate transfer of the property to it.
>
> In these circumstances, we should be grateful if you would convene a preliminary meeting or set in train such other procedure as you may see fit in order to determine the steps that will require to be taken in order to obtain a final decree arbitral in relation to the wider aspects of the parties' dispute which the Part Awards have not addressed.
>
> This letter is copied to the separate agents for [the first and second petitioners] as undernoted, they also having been given prior notice of our client's intention to make this request of you."

[22] I should note that it is apparent to me from subsequent correspondence from the Arbitrator to the parties that, until he received the respondent’s letter dated 13 November 2020, the Arbitrator was unaware that any of the parties considered that there were substantive matters yet to be decided.

[23] In any event, following further correspondence, it was agreed that the Arbitrator would convene a conference call among parties’ representatives to discuss matters. In this regard, the Arbitrator made clear that the conference call proceeded on the basis that each

party's participation in such a call was without prejudice to each party's pleas in any question with another party or parties.

[24] That conference call took place on 15 January 2021. In the Third Part Award, the Arbitrator described the hearing in the following terms.

> "43. At the hearing on 15th January 2021, the parties were at odds on a number of matters. The [respondent] wished to proceed to have the matters set out in the letter of 13 November 2020 determined by me. The [petitioners'] position was that there were a number of preliminary matters they wished to have addressed before there could be any consideration of those matters. Only if the [petitioners] were wrong in their position on all of the preliminary matters would I have to go on to address the merits of the dispute regarding the validity of the Notices and damages. The parties were agreed that they wanted me to determine matters and they accepted that my terms and conditions would still apply. Accordingly, notwithstanding the differences between the parties, it was agreed that the arbitration should proceed in a particular way. That was by way of the [respondent] lodging a Statement of Claim which would be answered by the [petitioners] all within agreed timescales and at the same time lodge any documents referred to or founded upon. The Parties were to liaise regarding further procedure and a conference call was to take place should agreement not be reached with me before then in relation to further procedure in the arbitration. It is important, in my view, to correctly characterise the nature of the discussions and be clear about what was agreed at that time. The procedure was agreed by the Parties. It was not a case of me issuing directions at my own hand without the agreement of the parties. In those circumstances, I wrote to the Parties' solicitors on 15th January 2021 as follows reflecting the procedure that had been agreed: -
>
> > 'Dear all,
> >
> > I want to thank all of you and Dr Sandison for what I believe were constructive discussions during our conference call this morning. As a result of those discussions, I make the following directions.
> >
> > As discussed and agreed, I direct that:
> >
> > 1. the [respondent] lodge with me by 5pm on Monday, 25th January 2021, its Statement of Claim together with copies of any relevant documents referred to or founded upon.
> >
> > 2. each [petitioner] lodge with me by 5pm on Monday 15th February 2021, Answers to the Statement of Claim together with copies of any relevant documents referred to or founded upon.

> 3. each party should, as before, intimate to each of the other parties any correspondence, documents or other materials sent to me and that at the same time as they are sent to me
>
> 4. parties liaise with each other after 15th February 2021 with a view to trying to agree, subject always to my views, what further procedure should be directed by me in the arbitration and in particular whether a period of adjustment of the Statement of Claim and Answers is required and
>
> 5. a conference call shall take place on Monday 1st March 2021 at 4pm should agreement not be reached with me before then in relation to further procedure in the arbitration
>
> Kind regards'".

[25] No issue was taken by either party of the Arbitrator's summary of matters.

[26] Thereafter, the parties prepared and lodged pleadings pursuant to the Arbitrator's timetable. Following adjustment by each of the parties and sundry further procedure, the Arbitrator fixed a hearing for 20 September 2021 in order to enable a series of preliminary matters raised by the petitioners to be argued and determined by him. These preliminary matters were as follows: (a) lack of jurisdiction; (b) *res judicata*; (c) personal bar and waiver; (d) prescription (both in respect of the claim concerning the validity of the notices and the damages sought); and (e) procedural discretion.

[27] On 12 April 2022, having heard the parties and having heard representations further to rule 55 of the Scottish Arbitration Rules in respect of a draft part award, the Arbitrator issued the Third Part Award. It is this award by the Arbitrator which both parties seek to challenge.

The Third Part Award

[28] For present purposes, it is sufficient for me to restrict myself to those parts of the Third Part Award which the parties are challenging.

[29] In respect of jurisdiction, the Arbitrator rejected the argument advanced by the petitioners that the effect of the first two Part Awards was not only to bring the arbitration then proceeding to an end but was, in the circumstances, to prevent any further arbitration in respect of the claims now advanced by the respondent. The Arbitrator pointed out that, directly as a result of what the parties asked him to address, the First and Second Part Awards expressly did not deal with the claims which were now being advanced by the respondent.

[30] Accordingly, the Arbitrator held that he did have jurisdiction to deal with the claims being advanced by the respondent in the letter dated 13 November 2021, provided that he first addressed and resolved all of the preliminary matters raised by the petitioners in favour of the respondent.

[31] In respect of waiver, the Arbitrator noted the positions of each of the parties which had been briefly set out in their respective Notes of Argument:

> "142. The [petitioners'] case on waiver was set out briefly at Paragraph [28] of the [petitioners'] Note which is in the following terms: 'In any event, the [respondent'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 [petitioners] to conclude on the issue of expenses, amounts to a waiver of the [respondent's] ability to now present the Statement of Claim. The [respondent'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]'.
>
> 143. The [respondent's] position on waiver was also set out briefly in Paragraph 5.5 of the [respondent's] Note as follows: 'Similarly, there has been no waiver by the [respondent] of its rights to have the present disputes resolved by arbitration. The matters founded upon by the [petitioners] in their Note of Argument fall well short of there being any voluntary, informed and unequivocal abandonment of its right to arbitrate on these points City Inn Limited v Shepherd Construction 2011 (SC) 127 per Lord Osborne at [74]'."

[32] In the Third Part Award, the Arbitrator then set out the passage from Lord Osborne's judgment in *City Inn Limited* v *Shepherd Construction Limited* which both parties relied upon. It is worth setting out in full:

> "[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."

[33] Against that background, the Arbitrator set out his decision in respect of the waiver arguments at paragraphs [153] and [154] of the Third Part Award.

> "153. In my view, the factual matters founded upon by the [petitioners], in the particular context of the arbitration which I have set out, could amount to a waiver by the [respondent] of the right to advance a claim concerning the validity of a Notice which is said to form the basis for the alleged valid exercise of the Option.
>
> 154. I note, however, that Lord Macfadyen's summary quoted above, which, as I understood it, parties accepted to be a proper statement of the law, also states that 'it appears also to be necessary, for the purpose of 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'. While this is an arbitration, not court proceedings, that element is not specifically addressed in para [28] of the [petitioners'] Note. It seems to me that they indicate in para [27] of their Note re personal bar how they say they have conducted their affairs on the basis that the right has been abandoned. As the manner in which the [petitioners] are said to have conducted their affairs on that basis is not the subject of agreement in the Joint Minute of Admissions or otherwise admitted by the [respondent], it appears to me that, it would be necessary to have a proof before answer on how the [petitioners] have conducted their affairs on the basis that the right has been abandoned."

The petitioners' jurisdictional challenge

Arguments for the petitioners

[34] As a preliminary point, it was apparent from Mr Webster's submissions that, the issue of leave having been resolved (see paragraph [6] above), no distinction was made between the two alternative bases on which the jurisdictional challenge was advanced – namely, rule 67, on the one hand, and rules 69 and 70 on the other (see paragraph [2] above).

[35] As the jurisdictional challenge was initially presented to me by senior counsel, it consisted of two discrete arguments. Both of these arguments took as their starting point the submission that the issuing of the Second Part Award on 22 November 2019 brought to an end the arbitration proceedings which were then on foot – namely, those proceedings which had commenced with the appointment of the Arbitrator on 14 February 2018. It is worth

noting that this starting point would not appear to be contentious. Both the respondent and, indeed, the Arbitrator, concurred that the arbitration proceedings with which the Second Part Award was concerned came to an end with the issuing of that award (see paragraph [82] of the Third Part Award).

[36] From this starting point, the first argument advanced on behalf of the petitioners was that, following the issuing of the Second Part Award and the conclusion of those proceedings, the Arbitrator was *functus.* After the issuing of the Second Part Award, it was submitted, simply, that the petitioners had not agreed to any subsequent appointment of the Arbitrator or arbitration proceedings.

[37] The second argument was that, as a result of the conclusion of proceedings brought about by the issuing of the Second Part Award, all issues between the parties – including those raised by the respondent in the letter 13 November 2020 – had thereby been resolved. On the basis of this second argument, the point was that, following the issuing of the Second Part Award, no arbitrator could come to have jurisdiction to deal with any disputes between the parties.

[38] As senior counsel developed his submissions, I pressed him as to how what I have described as the first argument (see paragraph [36]) was consistent with what the Arbitrator had set out as having occurred during and after the telephone conference between the parties on 15 January 2021 (see paragraph [24] above). (As I have noted above (at paragraph [25]) neither party had taken issue with this summary.) Following what the Arbitrator had said was agreed at that conference, the Arbitrator had set out a procedure which had then been followed by the parties culminating in the hearing on 20 September 2021. In broad terms, that procedure involved both parties lodging pleadings and then dealing with a series of preliminary matters raised by the petitioners before the merits of the

dispute were to be addressed. Accordingly, although, as the Arbitrator made clear (see paragraph [23]), the petitioners had initially reserved their position in relation to jurisdiction, it appeared, thereafter, that they had agreed to a process whereby the Arbitrator was: first, to determine the preliminary matters the petitioners had raised (including jurisdiction); and then, provided that he addressed and resolved all of the preliminary matters raised by petitioners in favour of the respondent, the Arbitrator was to deal with the merits of the claims being advanced by the respondent.

[39] In this regard, the position of the petitioners during the course of the arbitration proceedings which followed the telephone conference on 15 January 2021 can be seen most clearly from the Note of Argument which was lodged on their behalf in advance of the hearing before the Arbitrator on 20 September 2021. After setting out the petitioners' arguments in respect of each of the preliminary matters, the Note set out the following under the heading "Substantive defences":

> "[35] The Statement of Claim [lodged by the respondent] raises two matters: whether the Option was validly exercised; and if so, whether there has been loss sustained by the [respondent] as a consequence of breach of contract in not delivering title? <u>The [petitioners'] primary position is that these questions ought not to be determined by the Arbitrator until the preliminary matters set out above have been determined lest they operate to the exclusion of the substantive issues put in the Statement of Claim.</u>" (Emphasis added)

[40] In light of these points and the discussions which I had with him, senior counsel indicated, during the course of his submissions, that he no longer insisted on the first argument. In other words, he accepted that the Arbitrator had jurisdiction to deal with the claim being advanced by the respondent on the basis that had been agreed at the telephone conference on 15 January 2021. Given the agreed procedural background, it seems to me that senior counsel's concession in respect of the first argument was inevitable.

[41] Equally, Mr Webster submitted that the fact that the petitioners had engaged in the arbitration following the telephone conference on 15 January 2021 could not be taken as meaning that the petitioners no longer insisted in their challenge to the Arbitrator's jurisdiction in terms of the second argument.

[42] In that regard, Mr Webster developed his argument based upon the case of *Cargill SRL Milan (formerly Cargill SpA)* v *P Kadinopolous SA* [1992] 1 Lloyd's Rep 1. This case concerned arbitration proceedings concerning a dispute in relation to a cargo of wheat. The arbitrator had been appointed in early October 1986. However, nothing further had happened in the proceedings until June 1988, when the sellers, the plaintiffs in the dispute, had forwarded documents in support of their claims to the arbitrator. In terms of rule 2.8 of the arbitration rules which governed the proceedings, if neither party submitted documentation to the arbitrator within the period of one year from the date of appointment, then the claim was deemed to have lapsed unless the arbitrator in his or her absolute discretion determined otherwise. Accordingly, following the inactivity by the parties, the arbitrator issued an "interim" award in February 1989 in terms of which he held that the sellers' claim had lapsed. Thereafter, his decision was appealed on a number of occasions and eventually ended up before the appellate committee of the House of Lords. Ultimately, the points at issue before their lordships concerned the proper construction of the rules for appeals against the arbitrator's award. However, I understood Mr Webster relied on the case for passages from the speech of Lord Goff of Chieveley (with which all of their lordships concurred) where he said the following in respect of the arbitrator's award:

> "It is enough for me to say that (subject to any right of appeal) it [the arbitrator's award] conclusively determined that the arbitration was at an end and so finally disposed of the relevant matters which had been submitted to arbitration; such a determination is properly the subject matter of an award, carrying with it the usual consequences which flow from an award – in particular, it renders the arbitrator

> functus officio and prevents the unsuccessful claimant from rearbitrating or litigating the identical claim in the future […]
>
> In the present case the determination of the arbitrator, although it did not amount to a decision on the merits of the sellers' claim, nevertheless did finally dispose of the relevant matters in dispute because it finally determined that the seller's [sic] claim was deemed to have been withdrawn and abandoned and so could no longer be pursued against the buyers." (at page 5).

[43] On this basis, Mr Webster submitted that, in the same way, following the issuing of the Second Part Award, the Arbitrator in the present case was *functus* in a similar way. The fact that the Arbitrator had not determined all aspects of the parties' disputes did not matter. As in *Cargill,* the key point was that the arbitration proceedings had been brought to an end.

Arguments for the respondent

[44] Mr MacColl's primary response to the petitioners' argument was, in short, that the Arbitrator was entirely correct in his analysis in respect of jurisdiction. In other words, the Arbitrator was correct both that the first set of arbitration proceedings had come to an end with the issuing of the Second Part Award; and that the first set of arbitration proceedings had not dealt with either the issue of the validity of the notices or the damages claim being advanced by the respondent.

[45] Mr MacColl submitted that the Arbitrator's bringing to an end of the first set of arbitration proceedings in the Second Part Award had to be seen in the context of the scope of those proceedings. Notwithstanding the scope of the proceedings originally raised by the respondent in the Court of Session (see paragraph [10] above), Mr MacColl highlighted that the restricted scope of the first arbitration arose as a result of the parties' express agreement as to the question which the Arbitrator should answer (see paragraph [11] above). The parties had expressly reserved their respective positions in respect of whether any of the

notices given were valid or invalid and in respect of all other matters not covered by the question which had been referred.

[46] The Second Part Award only dealt with expenses because the resolution of that issue flowed from the First Part Award. However, Mr MacColl emphasised that, in his submission, neither the First Part Award nor the Second either separately or combined could be said to represent a decree of absolvitor. They did not preclude the Arbitrator from having jurisdiction to determine the claims raised by the respondent in its letter dated 13 November 2020.

[47] In relation to *Cargill,* Mr MacColl submitted that the observations of Lord Goff upon which the petitioners founded had no application to the present case. First, there was no equivalent in the present case to the rule which applied in that case that, in the absence of activity by the parties, resulted in the claim being deemed to have lapsed. Second, as a result, the key point was that in *Cargill*, as a result of that rule there had been a determination of the claim. Whereas, in this case, Mr MacColl submitted, there had been no such determination of the claims which the respondent now sought to advance.

Decision

[48] I have no hesitation in rejecting both of the petitioners' arguments in respect of the Arbitrator's jurisdiction.

[49] As a preliminary point, I entirely agree that the issuing of the Second Part Award on 22 November 2019 brought to an end the arbitration proceedings which were then on foot – namely, those proceedings which had commenced with the appointment of the Arbitrator on 14 February 2018. This conclusion is entirely consistent with rule 57(1) of the Scottish Arbitration Rules.

[50] Turning to the arguments of the petitioners, in relation to the first argument, as was ultimately accepted by senior counsel during the course of argument, in light of the undisputed procedural background, it is simply untenable that, following the telephone conference on 15 January 2021, the parties did not give the Arbitrator jurisdiction to consider both of the claims advanced by the respondent in the letter dated 13 November 2020. The parties expressly agreed to the procedural timetable set out by the Arbitrator whereby the preliminary matters raised by the petitioners were to be resolved in advance of any consideration of the merits of the respondent's claims. As I have set out above, that was the procedure which the parties followed and which culminated in the Third Part Award.

[51] In relation to the second argument, the petitioners do not take into account the fact that they, together with the respondent, restricted the scope of what, for ease of reference, I will refer to as the first arbitration. As I have noted above (at paragraphs [11] and [12]), following his appointment by the parties on 14 February 2018, the parties agreed that the only question which the Arbitrator was to answer was:

> "1. Whether 'management' of the First Party's interest includes [the first petitioner] being the appropriate and sole recipient of any formal notice concerning the First Party's property interest in the Subjects;"

The Arbitrator was asked expressly not to consider any arguments or make any determination at that stage as to the validity or otherwise of any notice served by the respondent. All of the parties expressly reserved their positions in relation to that issue. (The restricted nature of the scope of the first arbitration can be contrasted with the Court of Session action raised by the respondent which remains sisted.)

[52] The Arbitrator proceeded to determine the question referred to him in the First Part Award. Following the issuing of the First Part Award, the Arbitrator invited the parties'

views on further procedure in the arbitration. In response, as is recorded in the Second Part Award:

> "All of 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."

The Arbitrator then dealt with the question of expenses in the Second Part Award.

[53] On this basis, it is clear that the issues with which the first arbitration was concerned never included the disputes which the respondent referred to arbitration in its letter dated 13 November 2020 (see paragraph [21] above). Accordingly, the conclusion of the first arbitration by way of the First and Second Part Awards in no way affected the jurisdiction of the Arbitrator to resolve those disputes.

[54] Furthermore, I do not consider that the *Cargill* case assists the petitioners. In the present case, there is no equivalent of rule 2.8 which had, in that case, the effect of disposing of the entire claim being advanced. As a result, in the present case, the scope of the first arbitration was expressly limited to the determination of the question I have set out in paragraph [51] above. Those proceedings expressly did not involve the determination of the claims which were raised by the respondent in the letter dated 13 November 2020.

[55] For these reasons, I reject the petitioners' argument that Arbitrator erred in concluding that he had jurisdiction to deal with the claims advanced by the respondent in the letter dated 13 November 2020.

The petitioners' waiver argument

Arguments for the petitioners

[56] As a starting point, senior counsel made clear that the petitioners took no issue with the Arbitrator's reasoning on the waiver argument other than its final step. The petitioners'

argument was, in short, that the Arbitrator had erred in concluding that he required to hear evidence on the issue of whether the petitioners' had conducted their affairs on the basis that the respondent had waived its rights.

[57] The petitioners' argument was that the Arbitrator ought to have recognised that the petitioners' agreement to conclude the first arbitration was sufficient to satisfy this element of the test for waiver. By agreeing to conclude the first arbitration, the petitioners had given up the right to argue further points before the Arbitrator. Senior counsel stressed that as this was a plea of waiver it was not necessary for the petitioners either to plead or prove that they had been prejudiced (*Armia Limited* v *Daejan Developments Limited* [1979] SC (HL) 56 at page 69). The Arbitrator had considered what the petitioners had given up in his analysis of the plea of personal bar (at paragraph [139c] of the Third Part Award) but, it was submitted, he had not taken this into account in his consideration of the waiver plea.

[58] Paragraphs 138 and 139c of the Third Part Award are in the following terms:

> "138. As I understand it, the matters set out in para [27] of the [petitioners'] Note are those which they contend demonstrate that they acted to their prejudice and thus they meet what I have called the second limb of the test in Gatty.
>
> 139. The first point here is that there is no agreement in the Joint Minute of Admissions (or anywhere else) that the factual position is as asserted by the [petitioners]. However, for current purposes, I will address matters on the assumption that what is asserted by the [petitioners] could be proved by them. In my opinion, even if the [petitioners] were able to prove what they assert, I do not consider that meets the test in Gatty i.e., that 'B acted upon such belief to his prejudice'. I say that because I do not consider that the matters founded upon by the [petitioners] amount to prejudice of the kind I believe was anticipated in Gatty. That is real, material prejudice, not prejudice which is de minimis. I say that for the following reasons:
>
> […]
>
> c. I am not persuaded by the [petitioners'] submission regarding the prejudice they are said to have suffered because they 'surrendered rights'. No specification is given of the surrendered rights other than that they are said to include 'their ability to submit any other question arising out of the Minute of Agreement to arbitration'.

> Although it is not entirely clear, the [petitioners], as I understand it, refer to the right to state certain defences they would have to the [respondent's] claims. The means or mechanism by which that is said to come about is not explained. In my view, if the [respondent] was to be held to be able to proceed with the claim concerning the validity of the Notices, I do not see that the [petitioners] would be prevented from advancing any of the arguments or defences they had previously made out in connection with validity including that the [respondent] was in breach of contract and accordingly could not properly exercise the Option. I do not accept that, in the circumstances I have set out above, any such rights were 'surrendered' by the [petitioners]."

[59] Mr Webster also asked rhetorically what the petitioners were expected to demonstrate? The first arbitration had come to an end. He pointed to the factors which the petitioners had relied upon in respect of their personal bar argument. They thought that the dispute had been resolved. They had incurred legal expenses in bringing the first arbitration to an end. They had, thereafter, as a result of their reliance on the respondent's conduct, not ingathered or preserved evidence which would have been relevant to the claims the respondent was now advancing. These were all matters which had been before the Arbitrator. Accordingly, Mr Webster urged me to set aside the Third Part Award and to find that the respondent had waived the claims which it now sought to pursue.

Arguments for the respondent

[60] In responding to the petitioners' arguments, senior counsel also advanced his own challenge to the Third Part Award which also focussed on the Arbitrator's findings in respect of the petitioners' plea of waiver. The respondent's primary position was that, for a number of reasons, the Arbitrator had erred in concluding that the petitioners had pled a relevant case of waiver. The respondent advanced this argument in separate petition proceedings (*Arbitration Appeal No 2 of 2022* (P397/22)). My Opinion in those proceedings has also been issued today.

[61] As to the petitioners' argument, Mr MacColl noted that the petitioners accepted, pursuant to Lord Macfadyen's opinion in *Evans* (see above at paragraph [32]), that in order to make out a plea of waiver they required to aver and prove that they had conducted themselves in reliance on the alleged waiver. On this basis, he submitted that it was not open to the petitioners to assert that any surrendering by them of rights in concluding the first arbitration represented conduct in reliance. When one considered the chronology of events which led up to the Second Part Award (see paragraphs [15] to [17] above), it was clear that each of the petitioners (who at that time had separate legal representation) had sought the disposal of the first arbitration by way of a determination of expenses prior to any representation being made on behalf of the respondent. On this basis, the petitioners' representations to the Arbitrator could not be said to be "in reliance" upon anything done by the respondent.

[62] Beyond this, Mr MacColl's point was that the petitioners had simply not pled any conduct by the petitioners in reliance on the abandonment of a right by the respondent. The Arbitrator had noted this absence in his decision (see paragraph [33] above). As the petitioner had not put anything in issue on the question of reliance, there was no basis upon which either the Arbitrator, or, for that matter, the Court, could uphold the petitioners' plea of waiver.

Decision

[63] I consider that the petitioners' arguments based on the Arbitrator's treatment of waiver are without merit.

[64] In order to make out a plea of waiver, the petitioners require to satisfy each of the elements set out authoritatively by Lord Macfadyen in *Evans* (above at paragraph [32]). For

present purposes, the critical question is whether the Arbitrator erred in concluding that he required to hear evidence in order to determine whether the petitioners have conducted their affairs on the basis that the respondent has abandoned its right to pursue further claims in the arbitration.

[65] The first difficulty with the petitioners' argument that the Arbitrator was in error is that they do not expressly address this point of the conduct of their affairs in the context of a plea of waiver either in their Answers or in the Note of Argument prepared for the hearing before the Arbitrator on 20 September 2021.

[66] Equally, I recognise, as did the Arbitrator, that the petitioners do address the prejudice that they argue they have suffered in the context of the petitioners' plea of personal bar (at paragraph [24] of the petitioners' Note of Argument in the Arbitration). I also agree with the Arbitrator that the petitioners' position in paragraph [24] of their Note of Argument does set out how they say they conducted their affairs following what they contend was the waiver by respondent – namely, the agreement by the respondent's agent that the first arbitration should be brought to an end by email dated 15 August 2019 (see paragraph [17] above).

[67] In this regard, I also do not consider that the petitioners are assisted in this argument by their reliance upon their agreement to conclude the first arbitration. As is clear from the background set out above (see paragraphs [14] to [19]), the proposals by each of the petitioners (who were then separately represented) in respect of the disposal of the first arbitration pre-dated the communication from the respondent dated 15 August 2019. Accordingly, given the sequence of events, I do not consider that, in itself, the formation of the agreement between the parties to bring the first arbitration to an end can properly be said to be conduct of the petitioners' affairs on the basis of the respondent's waiver.

[68] This brings me to what I consider to be the insuperable problem for the petitioners: namely, that matters set out by the petitioners as to how they conducted their affairs after receipt of this email are neither matters of agreement between the parties nor have they been the subject of proof. (I note that these matters were not referred to in the Joint Minute of Admissions before the Arbitrator). These were also not matters which fell within the knowledge of the Arbitrator.

[69] For these reasons, I reject the petitioners' argument that Arbitrator erred in law in deciding that he required to hear evidence as to whether the petitioners conducted their affairs on the basis that the respondent had abandoned its claim.

Disposal

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