

## **Appeals, Corrections and Rent Review Reasoning:**

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Whatever the outcome of the referendum Scotland and England will continue to stand together in the worldwide family of arbitration in allowing in certain circumstances, an appeal against an award on the grounds of an “error of law”.

Connected with an error of law is the giving of reasons as typically it will be within those reasons that an error of law may be identified. That begs questions: what is an error of law ? What level of reasoning has to be given ? And if the reasoning is incomplete what are the remedies for the parties ? What are the tribunal’s powers of correction ?

These questions were dealt with in *Arbitration Application 1 of 2013* [2014] CSOH 83 where the court showed Scotland’s arbitration-friendly approach.

### **Background**

The case was a documents-only rent review arbitration for a hotel. Parties were represented in the arbitration by their surveyors alone. Neither surveyor put forward independent expert evidence but instead expressed their own expert opinions on value and how it had been reached in the written submissions. The supporting documentation for the Landlord included confidential information about the trading performance of a comparable hotel. The arbitrator having issued an award declaring the revised rent, the dissatisfied tenant sought to have the award set aside through an appeal to the Outer House of the Court of Session.

The appeal was based on serious irregularity under rule 68 of the statutory Scottish Arbitration Rules, contained in the Arbitration (Scotland) Act 2010. The tenant *also* - in the same proceedings - sought leave (permission) to appeal on the basis of error of law under rule 69 of those Rules. This reflects the important point - already well established under the English Arbitration Act 1996 - that an appeal under rule 68 is an automatic right whereas an appeal for “error of law” under rule 69 requires leave.

The matter came before Lord Woolman. In his opening remarks he drew attention to the helpfulness of the English case law in this area and also on the founding principles in section 1 of the Scottish Act which must be applied in the

interpretation of the provisions of the Act.

With regard to serious irregularity appeals under rule 68 Lord Woolman indicated a restrictive approach of the court, noting the test to be “high”. He approved the observations of the pre-English Act Departmental Advisory Committee that (1) such appeals are designed as a long-stop available only in extreme cases where the tribunal has gone so wrong in its *conduct* of the arbitration that justice calls out for it to be corrected (author’s emphasis), and (2) if in spite of the irregularity the result of the arbitration would have been the same or very similar then there would be no substantial injustice and thus no basis for overturning the award.

### **Serious irregularity (rule 68) appeal**

The serious irregularity appeal under rule 68 was based on -

- (a) the arbitrator’s acceptance of the Landlord’s surveyor’s evidence even though he was also the representative;
- (b) the arbitrator having acted as an expert;
- (c) inadequate reasoning; and
- (d) the taking into account of confidential trading information of a comparable hotel.

On the first matter, as neither party’s representative had used an expert witness both representatives had used their best arguments which meant that inevitably there was some blurring of the line dividing the role of advocate and expert witness. However in terms of rule 28 it was for the arbitrator to determine the admissibility, relevance, materiality and weight of any evidence. He had done this and no irregularity in his conduct had been identified.

The second ground had been argued in this way: as the arbitrator had not given any or at any rate, sufficient reasoning on the key issues and his selection of figures in reaching his decision, it must be inferred that he had acted not as an arbitrator but as an expert. This was dealt with swiftly. There was nothing to indicate that he had done other than to use his expertise in evaluating parties’ submissions which was part of his role as arbitrator.

With regard to the reasoning Lord Woolman noted that whether the nature and length of reasons is sufficient will depend on the whole context in which the decision is given. Only essential issues required to be dealt with, not every matter raised. Even if the reasoning was poor and unimpressive an award might be upheld. The context here was that of a rent review arbitration which involved

professional judgment by the arbitrator. Such a case was not readily was not readily susceptible to elaborate analysis and while the reasoning was very brief it was sufficient to explain the decision on rental.

Finally, the taking into account of confidential evidence could not involve any irregularity under rule 68. At highest, it might be a point of law but not more. The serious irregularity appeal was therefore rejected.

### **Error of law application for leave (rules 69 & 70)**

Turning to the rule 69/70 application for leave, Lord Woolman expressed surprise that the tenant relied on the same factors as for rule 68, given that in terms of the 2010 Act an error of law under rule 69 could not at the same time be an irregularity under rule 68. As the petition did not identify errors of law, he refused leave (permission) to make an error of law rule 69 appeal.

He did however note that even had the complaints been errors of law, he would still have refused leave because :

- (1) the matters relied upon by the tenant had not been placed fairly and squarely before the arbitrator;  
and in any event:
- (2) the tribunal had not been obviously wrong on the matters of complaint. Following Arden LJ in *HMV UK v. Propinvest Friar Limited Partnership* [2011] EWCA Civ 1708, he took the view that “obviously wrong” was something in the nature of a major intellectual aberration or making a false leap in logic or reaching a result for which there was no reasonable explanation. Nothing of that kind had been demonstrated in what was essentially a matter of the arbitrator exercising his professional judgment on the basis of the submissions made to him;  
and in any event:
- (3) on general importance of the matters of complaint the lease was a bespoke one and any decision in relation to the rent review clause would not have wider resonance. Nor was there a lack of case law on interpretation of rent review clauses.

### **Clarification of reasoning in award (rule 58)**

Separately the Landlord had submitted that the rule 68 appeal was incompetent because the appellant had not exhausted the corrective power in rule 58 to seek clarification of the reasoning from the tribunal and it was not too late to do so.

Lord Woolman found that while the rule 58 power could not enable tribunals to change a decision, it did provide significant corrective powers beyond minor matters such as typographical errors. However as the rule 68 appeal was not restricted to reasons and the reasons were not inadequate, he refused the competency submission. Nor was there any need for an order for further reasons under rule 71(8).

## **Conclusions**

The key lessons to be drawn are :

1. An irregularity under r.68 is quite distinct from an error of law under r.69. While in non-arbitration cases many of the irregularities under r.68 might be characterised as “errors of law”, in the 2010 Act, the concept of “error of law” is restricted to an error in the law applicable to the merits of the case.
2. The admissibility or acceptance of evidence, such as that coming from a representative acting as an expert, or that which is confidential, is a matter for the arbitrator under r.28. The arbitrator’s decision on admissibility or acceptance cannot amount to a serious irregularity under r.68.
3. Only essential issues require to be dealt with in the award, not every matter raised. In a rent review arbitration it may be sufficient for an arbitrator to give brief reasons in his award of rent reached through the exercise of his professional judgment, provided that the reasons makes sense.
4. If it is thought that reasons are inadequate an application for clarification should be made to the arbitrator under r.58 within the time limits there set out. Not doing so may bar an appeal on inadequacy of reasons.
5. If a party relies on a point of law such as the meaning or interpretation of a rent review clause or other contractual provision, it must raise it expressly with the arbitrator. If it does not do so, it cannot raise it later as part of an application for leave under rules 69 and 70.