OUTER HOUSE, COURT OF SESSION

[2020] CSOH 51

P789/19

OPINION OF LORD CLARK

In the petition

ARBITRATION APPEAL No. 2 of 2019

Petitioner: Bartos; CMS Cameron McKenna Nabarro Olswang LLP
Respondent: Thomson QC; Brodies LLP

28 May 2020

Introduction

[1] The petitioner and the respondent are parties to an arbitration. A preliminary issue arose, which the arbitrator dealt with in a part award. The petitioner brings this application under rule 58 of the Scottish Arbitration Rules, seeking to have the court specify a date by which the petitioner may apply to the arbitrator for clarification of the arbitrator's part award or the removal of an alleged ambiguity in it. The respondent opposes this application on the grounds that there is no need for clarification of the part award and no ambiguity in it, and separately that the application comes too late, having been brought some eight months after the end of the 28-day period stipulated in rule 58.

Background

[2] The respondent is the landlord of commercial office premises. The petitioner was the tenant of the premises under a 25 year lease, which commenced on 10 July 2006. The lease provided for rent review at particular dates. The rent review on 10 July 2016 was for the purpose of fixing the rent for the next ten years. The petitioner was the tenant at the rent review date and continues to act on behalf of the current tenant, which is an associated company. The petitioner assigned its interest as tenant to the associated company in 2018. The respondent raised an issue regarding the title and interest of the petitioner to bring this application, standing that its rights as tenant had been assigned. However, the petitioner gave an undertaking at the commencement of the hearing which resolved this matter and so it did not arise for determination in these proceedings.

[3] The rent review was remitted to arbitration. The arbitrator was to determine the Open Market Rent, as defined in the lease. The petitioner identified a preliminary legal issue and the parties agreed with the arbitrator that the issue should be decided by him in a part award. The issue concerned the interpretation of the definition of Open Market Rent, the key part of which states:

> "Open Market Rent means the annual rent (at the rate following the expiry of such rent free period of occupation as would normally be granted in the market at the time for fitting-out or similar purposes) for which the Premises if vacant might reasonably be expected to be let, without fine or premium, as one entity by a willing landlord to a willing tenant on the open market at and from the Review Date in question for a period of 10 years on the same terms in all respects as those in this Lease…"

The definition went on to refer to certain matters being

> "…omitted from this Lease (in so far as it comprises the notional lease on which such hypothetical letting is to take place), it being the intention of the parties that the Open Market Rent shall be equal to the true market rent of the premises at the review date in question…"

[4] The key point in the preliminary legal issue raised in the arbitration arose from the parties' competing interpretations of the definition of Open Market Rent and in particular the reference to the words "(at the rate following the expiry of such rent free period of occupation as would normally be granted in the market at the time for fitting-out or similar purposes)". In commercial leases, rent-free periods are normally granted with two basic purposes in mind. Firstly, to recognise that there will be a period (which may potentially vary in length, depending on the nature of the premises) during which the tenant will need to carry out fitting-out works; and secondly, to address market conditions which might require the giving of further inducements. The first point addresses the unprofitable occupation which arises during a fitting-out period and the second point recognises that part of the rent-free period which is to be regarded as an incentive to prospective tenants. The rent-free period gives the tenant the benefit of a discount to the rent for the duration of the lease or until the next review. For example, if the rent review is to fix the rent for the forthcoming ten-year period, and the rent-free period is deducted from that ten years, the result would be that if, say, the rent free period is two years then the tenant pays eight years' rent spread over the ten years.

[5] Fixing the rental figure in a rent review for commercial premises commonly proceeds upon the hypothetical basis that the letting is in the context of vacant possession, that is, the actual tenant is deemed to have moved out or never to have occupied the property in question. So, the hypothetical tenant is a new occupier who has to move in and fit-out the premises. However, in view of the fact that fitting-out is not normally required when the lease is continuing, the terms of a commercial lease commonly provide, put broadly, that the hypothetical tenant is deemed to have been the recipient of an appropriate fitting-out period as part of the rent-free period and that fitting-out period is then disregarded. In the present

case, that is the effect of the words "following the expiry of such rent-free period of occupation as would normally be granted in the market at the time for fitting-out or similar purposes". In other words, it is to be presumed that this aspect of the rent-free period is over when it comes to fixing the annual rent for rent review purposes. There was no dispute between the parties about the rent review being on the basis of a hypothetical let after the fitting-out period has ended. Thus, when calculating the new annual rent, the only element of a normal rent-free period that is taken into account is that which does not concern fitting-out, that is, what can be described as the inducement element.

[6] The appropriate time to be fixed for fitting-out is therefore plainly important, because it will be deducted from the notional rent-free period, leaving only the further inducement element. If the overall rent-free period would be two years, and the fitting-out is taken as being three months, three months is deducted from the two years and the tenant then pays eight years and three months of rent spread over the ten-year period. If the fitting-out period is taken as being one year, the tenant pays nine years of rent spread over a ten-year period. In short, the longer the fitting-out period is taken to be, the greater will be the deduction from the overall notional rent-free period, and hence a higher overall amount of money will be paid over the forthcoming ten years.

[7] On behalf of the respondent, the submission to the arbitrator was in effect that the definition of Open Market Rent meant that the arbitrator could calculate the actual time (not a notional time) it takes to fit-out the particular premises and then deduct that from any overall rent-free period (taking account of other incentives) given to tenants by the market. In its submissions in the arbitration, the petitioner contended that the definition meant that the arbitrator should look at the rent-free periods normally given in the market to tenants for fitting-out regardless of the actual time which might be required to fit-out the particular

premises in question. The petitioner argued that the market would not normally give a rent-free period relating to fitting-out with the result that no deduction fell to be made from the length of the rent-free period granted as an inducement, or at least would give a short rent-free period for fitting-out. If any such period was to be deducted from the rent-free period, it would be three months. In summary therefore, the respondent argued that the definition of Open Market Rate, so far as it relates to the time period for fitting-out, is concerned with the actual premises themselves, whereas the petitioner argued that it is concerned with what period the market would give.

[8] As noted, the arbitrator decided that he would determine the preliminary legal issue by means of a part award. He received written submissions from the parties, and heard evidence from two expert witnesses for the petitioner and one expert witness for the respondent. He also obtained a legal opinion from his legal assessor. On 11 December 2018, the arbitrator issued his part award.

The part award

[9] The part award is set out in the following structure. On the first substantive page, the nature of the question is explained, referring to the proper construction and interpretation of the provisions in the lease relating to rent review. Below this, under the sub-heading "Part Award" the arbitrator states:

> "I find that the Tenant's interpretation of the review clause is the interpretation which I favour, given the two interpretations presented to me as Arbitrator, but would stress the important rider set out in section H of the after mentioned legal opinion whereby the singular characteristics of the subject premises would require to be factored into any market consideration of the notional rent-free period for fitting out."

The arbitrator and a witness have signed that page, at the foot. The next section of the part award is headed "Findings to Part Award". This begins with an introduction setting out the procedural history of the arbitration and ends with the words "I set out below my findings in respect of various matters in dispute". Under reference to the testimony of the respondent's expert witness the arbitrator states:

> "I am persuaded that for rent review purposes, I see no objection to considering premises out with [*sic*] Edinburgh in terms of comparison with regard to the matter of fitting out of similar sized offices, but adjusted for the local Edinburgh market".

In relation to the testimony of one of the petitioner's expert witnesses, the arbitrator adds:

> "I do accept and recognise, that 3 months is often adopted by the rent review community/rent review market as a generality as a period in which premises may be fitted out in devaluations of lettings when rent-free periods are granted. However, this should not be used as a matter of course if it can be shown that a differing valuation/devaluation practice applies if the subject property has singular characteristics and this is supported by the valuation guidelines in the lease."

The arbitrator then sets out his "Findings in respect of the legal issue." He begins by accepting the content of the legal assessor's opinion and stating that he agrees with it. He then offers certain supplementary comments. The first of these is:

> "The rent review clause – read in its totality – gives a clear direction to establish what rent-free period (for fitting out) would normally have been granted in the market at the review date for "the Premises". It would be a perverse interpretation of the lease if the characteristics of the Premises were to be disregarded. Throughout the review clause, there is reference to the Premises and in particular, a stated floor area."

He goes on:

> "And that, having regard to the wording of the lease, we are concerned with the market for fitting out of the Premises, not an arbitrary market norm across a range of properties which need may not be comparable to the subject premises. That seems to me a more appropriate, plausible and sensible approach to the interpretation of the review clause – not extreme, but balanced."

He then turns to a "Summary of findings on the interpretation of the Rent Review Clause" ("the Summary section"). Among other things, he states:

"No evidence was led on the detail of "the London method" as a valuation approach in this instance. As a valuation tool, I see no objection in principle to it. I do not see it as being inconsistent with the terms and conditions of the Lease and the assumptions which the parties are directed to make in regard to the computation of the Open Market Rent.

Were this dispute to proceed further in Arbitration in respect of the quantum of rent, it would be a matter for the parties to table evidence which could be open market transactional evidence of comparable properties, wherever they can be found, to demonstrate open market practice in the length of rent-free periods and the extent that they are incentive and/or a rent-free period for fitting out; and perhaps also in conjunction with the latter (if thought appropriate) technical evidence, whether that be from project managers or architects or building surveyors experienced in fitting out of premises similar to the subject premises.

It is for the parties to prove their case having regard to such open market transactional evidence or technical advice/evidence, or such other evidence/argument, in order to satisfy the terms of reference contained within the Rent Review Clause, to filter out what would be a reasonable market rent free period for fitting out for the property of the size and nature of [the premises], from what would be an incentive to the hypothetical tenant to take on a property as large as [the premises] for any given lease duration at the relevant point in the marketplace within the context of the Edinburgh office market.

…Therefore it will be a matter for the parties to prove or disprove the extent to which the size of the premises, as specified in the lease, would contribute to the fitting out element of any rent free period which could be negotiated by the hypothetical tenant in the open market as at the review date, taking all factors into account for the premises."

[10] The opinion of the legal assessor, referred to in the part award, contains at section H *inter alia* the following:

"3.1.2 ... I would disagree with one aspect of the tenant's line of argument: that the particular circumstances of the premises are not relevant. Whether this matters for practical purposes, of course, depends upon whether there is a differentiating market treatment of premises of this nature in the context of fitting out; that is a question of valuation. By dint of this, it is theoretically possible for a valuation outcome which produces the same result as the Landlord's Contention, albeit this would derive from market led evidence rather than as a result of contractual interpretation.

3.2 One must therefore ask: what rent-free period for fitting out of the Premises would normally have been granted in the open market at the Review Date? Of course, this requires one to analyse the available market data at the time (including evidence of lettings in the open market of properties analogous to the Premises). This

> exercise is therefore a question of valuation judgement (and therefore one of fact) rather than a question of law.
>
> 4. What is clear, however, is that the parties have chosen to fix the hypothetical rent-free period with reference to what is "normally granted in the market" at the Review Date rather than, (as would have been eminently possible had the parties chosen different wording), with reference to the time that it would actually take the hypothetical tenant to fit out the (actual) Premises."

Under the subheading "Conclusion", the opinion states *inter alia*:

> "In the light of the foregoing, I consider that, on the balance, the Tenant's Contention is to be preferred BUT subject to the important rider that the characteristics of the Premises (eg their size) would require to be factored into any market consideration of the notional period of time for fitting out."

Events after the part award

[11] The petitioner was initially content with the part award. There was some discussion about it at a meeting between the parties' surveyors on 21 December 2018. From January to March 2019 the parties corresponded about potential settlement of the dispute, but this was not achieved. In the course of that correspondence, and indeed at the meeting prior thereto, each side advanced the proposition that it had been successful in the part award and how it should be understood. On 22 March 2019, the arbitrator issued a direction to the parties, giving a timetable for the lodging of initial submissions and then counter-submissions. On 24 May 2019, each party lodged initial submissions. The initial submissions made on behalf of the respondent included reference to evidence of an expert witness about the length of time it would take to fit-out the premises, stating this to be 18 months. The petitioner sought an extension of time, until 21 June 2019, to lodge its counter-submissions. By email dated 6 June 2019 the arbitrator stated that he would wish to have "the opportunity to cross-examine the Expert Witness evidence". In its counter-submissions, the petitioner took issue with the respondent's approach on the basis that it allegedly misinterpreted the part award,

as the respondent's interpretation was not, following the arbitrator's reasoning, available as a matter of law to be used for valuation purposes. On 18 July 2019, the arbitrator sent an email to the parties' representatives stating that he wished to have a hearing and that he wished to cross-examine the respondent's expert witness (who dealt with the fitting-out period). On 30 July 2019, the petitioner's representative sent an email to the arbitrator, expressing concern that the arbitrator was contemplating giving weight to the evidence of that expert witness for the respondent when the evidence was founded upon an interpretation of the lease that the arbitrator had rejected. The email contained a request for clarification of the position and requested a preliminary procedural meeting. The arbitrator responded by email dated 5 August 2019, stating that his suggested further procedure was not at variance with his part award. The present petition was then presented to the court on 29 August 2019 and a first order was pronounced on 3 September 2019.

Rule 58 of the Scottish Arbitration Rules

[12] Rule 58 of the Scottish Arbitration Rules is a default rule and so applies unless excluded or modified by the parties, neither of which occurred here. Its relevant provisions are as follows:

> "(1) The tribunal may correct an award so as to –
> …
> (b) clarify or remove any ambiguity in the award
>
> (2) The tribunal may make such a correction –
> (a) on its own initiative, or
> (b) on an application by any party.
>
> …
>
> (4) Such an application is valid only if made –
> (a) within 28 days of the award concerned, or

(b) by such later date as the Outer House or the sheriff may, on an application by the party, specify (with any determination by the Outer House or the sheriff being final)."

Submissions

Submissions on behalf of the petitioner

[13] The part award referred to the opinion from the arbitrator's legal assessor dated 16 November 2018 which favoured the petitioner's interpretation of the relevant provision with the qualification that the characteristics of the premises in question, such as the size, would require to be factored into the consideration of the rent-free period for fitting-out that the market would give. The petitioner referred to this as "the Market Meaning". The part award had rejected the respondent's interpretation, described by the petitioner as "the Time it Takes Meaning", which had come to be referred to by the parties in the course of the arbitration as "the London Method" of valuation. What could be described as the operative part of the award found largely in favour of the petitioner. However in the Summary there were certain observations and suggestions apparently based on the interpretation put forward by the respondent, that the arbitrator had rejected in the operative part of his award. The consequence had been that each party had claimed the part award to be in its favour. The respondent had sought to advance its claim based on its interpretation despite the arbitrator having rejected that interpretation. The petitioner had been obliged to oppose that meaning and approach. Looking at the part award, it effectively involved the arbitrator rejecting the "Time it Takes Meaning" but then stating that it could be used. He appeared to accept that evidence which was not market-based could be relevant. The Summary section was an unnecessary element of the part award. In the circumstances clarification of the part

award, and/or removal of at least parts of the Summary section, were essential or at the very least highly desirable. Among other things, this could avoid a later appeal.

[14] In relation to timing of the present application, there had clearly been a substantial delay. Avoidance of unnecessary delay is one of the founding principles of the Arbitration (Scotland) Act 2010. But the delay had to be viewed in context. On a fair reading of the operative part of the award, the petitioner had no reason to believe that the arbitrator would seek to subordinate it to the statements he had made in the Summary. Thus, the petitioner had no reason to apply to the arbitrator for correction within the 28-day period provided for in rule 58(4)(a). The part award, although dated 16 November 2018, was issued on 11 December 2018. On 24 May 2019, the written submissions for the respondent indicated continuing reliance on its interpretation. The arbitrator had indicated, in his email of 5 August 2019, that in relation to further procedure he wished to follow the points made in the Summary section of the part award and, by implication, disregard his rejection of the respondent's interpretation. It was not apparent on the first reading of the part award that it was ambiguous; rather, this emerged through the passage of time. The petitioner was not dilatory in seeking this remedy in the overall context of what had occurred. The delay was explicable and not unreasonable. In the circumstances, it was reasonable for the petitioner to be given the opportunity of applying to the arbitrator for correction of the part award to remove any ambiguity which is affecting procedure and the arbitration and in particular by removal of the unnecessary elements in the Summary section of the part award. Each party would benefit from such clarification. The respondent would suffer no irremediable prejudice. If any costs had been incurred by the respondent because of the delay in the present application, that could be dealt by an award of expenses. The respondent had played a part in the delay in that it had been open to the respondent to seek clarification of

the part award. The respondent's suggestion that the part award is in plain and unambiguous terms and that the arbitrator had merely confirmed an intention to proceed in accordance with them, disregarded entirely the arbitrator's own rejection of the elements of the respondent's interpretation, as set out in the operative part of his award.

Submissions on behalf of the respondent

[15] In relation to ambiguity in an arbitrator's award, reference was made to *World Trade Corporation Ltd* v *C Czarnikow Sugar Ltd* [2004] 2 All ER (Comm) 813. The part award required to be read in its entirety and was not susceptible to disaggregation in the manner contemplated by the petitioner. When the whole terms of the part award were considered, it was clear that there was no ambiguity in what the arbitrator had determined. Even in what the petitioner characterised as the operative part of the award (the first substantive page) the arbitrator's findings were made clear. The part award did not contain any ambiguity which might be clarified or removed. It was not capable of more than one meaning, nor was its meaning opaque. The petitioner was seeking to achieve not a clarification of the part award but rather a substantive rewriting so as to produce a wholly different result. The arbitrator had taken the view that the actual period for fitting-out did not require, as a matter of interpretation of the provisions in question, to be deducted from the rent-free period, but it could certainly be taken into account. He had also rejected the petitioner's argument that the period of fitting-out granted by the market had nothing to do with the subject premises. Removing the Summary section would materially alter the findings in the part award. The petitioner had not taken account of the whole of the part award in reaching its view as to ambiguity.

[16] In any event, viewed objectively, there was no reasonable basis for the egregious delay on the part of the petitioner in seeking to invoke rule 58. That rule required the petitioner to make any application for clarification or correction by 8 January 2019. If there was any ambiguity, it was apparent from the award itself and hence patent rather than latent. The present application was made some eight months after the date on which it ought to have been made to the arbitrator. Reference was made to cases in England dealing with similar provisions in the Arbitration Act 1996: *Rollitt (t/a CD Consult)* v *Ballard* [2017] EWHC 1500 (TCC), and *Terna Bahrain Holding Co WLL* v *Al Shamsi* [2012] EWHC 3283. The delay in the present case, having regard to the policy objectives underlying the 2010 Act, was extraordinarily long. There was no reasonable justification for the delay. On the issuing of the part award, the petitioner had available to it all the material it could relevantly require to decide whether the part award contained an ambiguity which it wished to be clarified or removed. In any event, the respondent's position as to the meaning and effect of the part award was clearly communicated to the petitioner as early as December 2018, and in writing in January 2019. Moreover, there could be no suggestion that either the arbitrator or the respondent had any responsibility for the petitioner's delay in making the application under rule 58. The respondent would suffer prejudice if the application was to be granted, given the further delay it would cause. The arbitrator had made it clear that he did not accept that there was any ambiguity in the part award or that his proposed further procedure was in any way at odds with the terms of the part award. Even if the court was to specify a period within which an application might be made to the arbitrator, it would serve no practical purpose because the present application was wholly without merit.

Decisions and reasons

Issue 1: is the part award unclear and/or ambiguous?

[17] In the part award, the arbitrator made his findings on the parties' respective submissions on the interpretation of the relevant provisions. It is clear from the part award, read as a whole, that he is not suggesting that it is the actual fitting-out period for these particular premises that is relevant; rather, it is the market consideration of the appropriate period of time for fitting-out, taking into account the size and type of these premises. The arbitrator therefore accepted the tenant's position that it is the market consideration rather than actual fitting-out time that is to be used, but he also rejected the tenant's position that the nature of the particular premises is not a relevant factor. In short, the point is how the market would view the notional fitting-out period for premises of this type.

[18] This is made clear in what the petitioner described as the operative part of the part award, quoted above, where, having accepted the tenant's interpretation, this is stated as being subject to the "important rider" that "the singular characteristics of the subject premises would require to be factored into any market consideration of the notional rent-free period for fitting-out." I do not regard the petitioner's characterisation of this as "the operative part" of the part award as correct, because the whole of the part award requires to be taken into account. However, even if this passage is viewed on its own, the position is quite clear. The arbitrator's references to the testimony of the expert witnesses is consistent with that position. His focus is on the market and he accepts that the size and singular characteristics of the office premises can be relevant to how the market approaches the question. His findings on the legal issue are again in tune with his earlier statements. In particular, the statement that

> "The rent review clause - read in its totality - gives a clear direction to establish what rent-free period (for fitting-out) would normally have been granted in the market at the review date for 'the Premises'",

sums up the position. His lack of objection to the London method as a valuation approach, and his view that it is not inconsistent with the terms and conditions of the lease, recognize that the market approach may support that method. Importantly and helpfully, he then sets out examples of the evidence which might bear on that matter, including

> "open market transactional evidence of comparable properties, wherever they can be found, to demonstrate open market practice in the length of rent-free periods and the extent that they are incentive and/or a rent-free period for fitting-out"

and perhaps also technical evidence of fitting-out of premises similar to the subject premises or other evidence. This evidence would allow him

> "to filter out what would be a reasonable market rent free period for fitting-out for the property of the size and nature of [the premises]…within the context of the Edinburgh office market".

[19] The opinion of the legal assessor supports and reinforces these points. He disagrees with the tenant's argument that the particular circumstances of the premises are not relevant, although whether these actually matter "depends upon whether there is a differentiating market treatment of premises of this nature in the context of fitting-out". He repeatedly refers to how the market would approach the issue and explains that this is a matter of evidence for the purposes of valuation and not a matter of legal interpretation. When expressing his view that the on balance the tenant's interpretation is to be preferred he adds the important rider that "the characteristics of the Premises (eg their size) would require to be factored into any market consideration of the notional period of time for fitting-out."

[20] It seems to me that the petitioner's position in the present case is wrongly predicated on there being in effect two starkly contrasting potential interpretations, the Time it Takes

Meaning and the Market Meaning, and that the arbitrator had to choose one over the other. The arbitrator and his legal assessor clearly accept that it is the approach in the market that is relevant and reject the contention for the respondent that as a matter of interpretation it is only the actual fitting-out period for the premises that is relevant. However, their clear and recurrent theme is that the approach taken in the market to the notional time for fitting-out may well have regard to the characteristics of the particular premises, that being a matter of evidence rather than interpretation.

[21] For these reasons, I do not accept the petitioner's contention that the part award needs to be clarified or that any part of it should be removed.

Issue 2: the timing of the application

[22] Rule 58 gives the court discretion as to whether to allow longer than the 28-day period for an application to be made to the arbitrator for correction of an award. In *Terna Bahrain Holding Co WLL* v *Al Shamsi*, Popplewell J (at [27]) gave the following helpful summary of the how the courts in England have dealt with time limits, albeit in the context of a challenge to an arbitration award:

> "27. The principles regarding extensions of time to challenge an arbitration award have been addressed in a number of recent authorities, most notably in *AOOT Kalmneft v Glencore International AG* [2002] 1 Lloyd's Rep.128, *Nagusina Naviera v Allied Maritime Inc [2002] EWCA Civ 1147*, *L Brown & Sons Ltd v Crosby Homes (North West) Ltd* [2008] BLR 366, *Broda Agro Trading (Cyprus) Ltd v Alfred C Toepfer International GmbH* [2011] 1 Lloyd's Rep.243, and *Nestor Maritime SA v Sea Anchor Shipping Co Ltd* [2012] 2 Lloyd's Rep.144, from which I derive the following principles:
>
> (1) Section 70(3) of the Act requires challenges to an award under sections 67 and 68 to be brought within 28 days. This relatively short period of time reflects the principle of speedy finality which underpins the Act, and which is enshrined in section 1(a). The party seeking an extension must therefore show that the interests of justice require an exceptional departure from the timetable laid down by the Act.

Any significant delay beyond 28 days is to be regarded as inimical to the policy of the Act.

(2) The relevant factors are:

(i) the length of the delay;

(ii) whether the party who permitted the time limit to expire and subsequently delayed was acting reasonably in the circumstances in doing so;

(iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;

(iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;

(v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration, or the costs incurred in respect of the arbitration, the determination of the application by the court might now have;

(vi) the strength of the application;

(vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined.

(3) Factors (i), (ii), and (iii) are the primary factors."

[23] I also note that *Gold Coast Ltd* v *Naval Gijon SA* [2006] EWHC 1044 (Comm) deals with an application for retrospective extension of time to apply to the arbitrator to correct an award. In England, this matter is governed by section 79 of the Arbitration Act 1996. Section 79(3) provides that the court should not exercise its power to extend a time limit unless it is satisfied that available recourse to the tribunal had been exhausted and that a substantial injustice would otherwise be done. It is of interest that in *Gold Coast Ltd* Gloster J, when considering the matter of substantial injustice, referred (at [29]) to what Colman J said in *AOOT Kalmneft* v *Glencore International AG*, about the principles and criteria governing the court's discretion. The views of Colman J were approved by the Court of

Appeal in *Nagusina Naviera* v *Allied Maritime Inc*, and in turn founded upon by Popplewell J in his summary noted above. But whether or not the test of substantial justice is interpreted as involving those same principles and criteria is not of relevance for present purposes. In view of the fact that in Scots law there is no threshold requirement of substantial injustice to be met in relation to rule 58, I do not apply that test here.

[24] As rule 58 does not specify the test or the criteria to be met, the discretion is, in my view, to be exercised in the interests of justice. This allows me to have regard to all relevant factors. That said, the principles summarised by Popplewell J do seem to me to provide helpful criteria in considering the interests of justice and I have taken these into account. In the present case, it seems to me that there are strong pointers against granting the application. Firstly, the delay is substantial, being some eight months or so. Secondly, the petitioner caused or contributed to the delay. It makes this application on the basis that, looking solely at the terms of the part award, one can allegedly discern that it requires clarification or removal of an ambiguity. It received the part award on 11 December 2018 and must therefore have been in a position very shortly afterwards to identify the alleged lack of clarity or ambiguity. Thereafter, the respondent's position on the meaning of the part award was stated to the petitioner. By 11 January 2019 at the latest, the petitioner must have been aware of the meaning the respondent placed upon the part award. At that point, even if somehow the petitioner had failed to identify any potential ambiguity from the terms of the part award itself, it was obvious that a different meaning was being taken from it by the respondent. It would plainly have been appropriate and reasonable to consider the terms of the part award in light of the clear statement of the respondent's position. That position was reiterated on several occasions thereafter. Thirdly, the respondent did not in any way contribute to the delay, nor did the arbitrator. The suggestion that the respondent ought to

have itself requested clarification is unfounded: the respondent formed a view which is broadly consistent with the proper meaning of the terms of the part award. By early June 2019, the petitioner was made aware of the arbitrator's position that the expert evidence, including that for the respondent on the period for fitting-out, would be examined. This was reiterated on 18 July 2019. I therefore conclude that the petitioner ought to have been aware of the alleged lack of clarity or ambiguity shortly after 11 December 2018. Failing that, the petitioner should certainly have known of the matter by 11 January 2019. The issue was then repeatedly revisited. I reject the contention that the petitioner only properly became aware of the alleged problem when the email of 5 August 2019 from the arbitrator was received. Fourthly, for the reasons I have given in relation to the points raised about the alleged lack of clarity or ambiguity, the petitioner's case for correction is not a strong one; indeed, it is not well-founded. Lastly, the petitioner's position runs counter to the first of the founding principles of the 2010 Act: that the object of arbitration is to resolve disputes *inter alia* without unnecessary delay. In all of those circumstances, it would not be in any way unfair for the petitioner to be denied the opportunity of making its application for correction under rule 58.

Disposal

[25] For these reasons, I refuse the petitioner's application.