CA on appeal from the TCC (His Honour Judge Anthony Thornton QC) before : Lord Justice Simon Brown, Lord Justice Longmore : 18th January 2001

JUDGMENT : LORD JUSTICE LONGMORE :

1. The short question in this case is whether a clause in an insurance policy which provides: *". . . any dispute or difference arising hereunder between the Assured and the Insurers shall be referred to a Queen's Counsel of the English Bar to be mutually agreed between the Insurers and the Assured or in the event of disagreement by the Chairman of the Bar Council"* is an arbitration agreement within the Arbitration Act 1996. Section 6 of the Act defines an arbitration agreement as: *". . . any agreement to submit to arbitration present or future disputes (whether they are contractual or not)."*

2. If the clause is an arbitration agreement, then it follows that any action brought under the insurance policy can, on the application of the insurers, be stayed pursuant to section 9(4) of the 1996 Act so that the dispute can be referred to arbitration. If it is not an arbitration clause, no application to stay under the Act can be made.

3. Judge Anthony Thornton QC, sitting in the Technology and Construction Court, has held that the clause is not an arbitration clause. He has decided that the reference to a Queen's Counsel is either a reference to him as an expert or, more probably, a reference for the purposes of a non-binding opinion. He has refused to order a stay under the Arbitration Act and has also refused a second application to grant a stay pursuant to the inherent jurisdiction of the court.

4. The matter arises in the context of a dispute about the need for remedial works to be done to a bridge on a residential development of Elstow, Bedford. The claimant is a builder of homes and other buildings on the development, and contracted with the first defendant, Survey Services Limited ("SSL") for design services in relation, in particular, to the bridge.

5. The claimant notified a claim to SSL by letter sent to their solicitors of 23 November 1998, giving them the opportunity to inspect the site and make any proposals for remedying the problem that had arisen. SSL must have passed this claim to their insurers, since the response to that letter was made by Fishburn Boxer, later Fishburn Morgan Cole ("Fishburn's"), who were instructed by SSL's insurers. But in early 1999 SSL went into liquidation and the claimant has therefore sought to bring a claim against the insurers pursuant to the Third Parties (Rights Against Insurers) Act 1930. On 13 March they obtained a default judgment in the sum of £369,506 against SSL at a time when Fishburn's were maintaining in correspondence that no claim could be made against the insurers under the 1930 Act, since it was a condition precedent to their liability under the policy that SSL should have paid the claimants the amount for which they were responsible by way of excess under the policy.

6. On 20 March 2000 the claimant's solicitors sent a letter before action to Fishburn's on the assumption that they were instructed by, the insurers. On 20 June they obtained permission from the court to join Mr Marshall as a representative underwriter to the proceedings in which they had already obtained a judgment against SSL. On 30 June Mr Marshall issued an application to stay the proceedings pursuant to section 9(4) of the Arbitration Act 1996 or, alternatively, to set the joinder aside. On 27 September Judge Thornton QC refused to stay the proceedings on the basis that there was no agreement to arbitrate. He said that the clause in the policy did not constitute an agreement to arbitrate unless it *"identifies the reference expressly as being to arbitration*" (page 6F of the transcript of his judgment).

7. The insurers challenged this construction of the clause. Mr Steven Phillips on their behalf has submitted in his skeleton argument, firstly, that the clause in its context in the insurance policy is intended to refer disputes to a Queen's Counsel for him to arbitrate those disputes. The fact that the words "***arbitration***" or "***arbitrator***" are not expressly used in the clause does not militate against the clause being an arbitration agreement, since it is clear that there is an intention that disputes be referred to - and, he submits, resolved by - a Queen's Counsel of the English Bar. He supports that by pointing out that, in the event of disagreement on Queen's Counsel, the Chairman of the Bar Council is to nominate the Queen's Counsel.

8. Secondly, he submits that the judge's alternative construction that the reference is to a Queen's Counsel as expert or, more probably, a reference to him for a non-binding opinion, is a most unlikely construction; and, furthermore, suffers itself from the defect that the words "***expert determination***" or "***non-binding opinion***" are no more used in the clause than the words "***arbitration***" or "***arbitrator***".

9. Mr Bowdery QC supports the learned judge's judgment. He submits, first, that one would expect to see in a clause, if it was an arbitration agreement, some reference to the concept of arbitration or to the Queen's Counsel being an arbitrator. Secondly, he submits that there is nothing in the clause to indicate that the determination by the Queen's Counsel is to be final and binding. Thirdly, he submits that, in the context of the general conditions of the insurance policy as a whole, it is plain that clause 1 is intended only to require the parties to refer to Queen's Counsel for a non-binding opinion, and to that extent he supports the preferred view of the learned judge.

10. For my part, I prefer the arguments of Mr Phillips. There is no need for a clause which deals with reference of disputes to say in terms that the disputes are to be referred to an "***arbitrator***" or to "***arbitration***". The necessary attributes of an arbitration agreement are set out in the second edition of ***Mustill & Boyd,*** *Commercial Arbitration* at page 41. But, for present purposes, the important thing is that there should be an agreement to refer disputes to a person other than the court who is to resolve the dispute in a manner binding on the parties to the agreement. That is what this clause in my opinion does, and it is therefore an arbitration agreement within the meaning of section 6 of the Arbitration Act 1996.

11. The question is purely a matter of construing the relevant clause. The alternatives canvassed and supported by Mr Bowdery in the end come down to saying that the clause is an option that can be exercised by a party if he wishes, but without any concomitant obligation on the other party to comply. That is, in my view, an extraordinarily uncommercial and unlikely proposition for the meaning of a clause in an insurance policy such as this.

12. Since it is just a matter of construction, not much assistance can be gained from authority, but the question whether an agreement is an agreement to arbitrate or merely to value as an expert has occasionally had to be decided, and Mr Bowdery has referred us to one such case, **Re Carus-Wilson v Green** (1887) 18 QBD 7. There a contract for the sale of land provided that the timber was to be paid for at a valuation made by two valuers appointed by the parties, who were to appoint an umpire to decide if the valuers did not agree. The valuers did not agree, so the umpire decided. The aggrieved party applied to set that valuation aside on the basis that it was an arbitration award and thus, according to the legislation then in force, could be set aside on certain grounds. The Court of Appeal refused to entertain the application. The passage to which Mr Bowdery referred us is at page 9, where Lord Esher MR said this: *"The question here is whether the umpire was merely a valuer substituted for the valuers originally appointed by the parties in a certain event, or arbitrator. If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a persons is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of a mere valuation. There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. Such cases must be determined each according to its particular circumstances."*

13. For my own part, it seems to me that the clause in the present case falls fairly and squarely into Lord Esher's first category, where the intention is that the inquiry is to be in the nature of a judicial inquiry and that the Queen's Counsel is to hear the respective cases of the parties and decide on evidence before him. That is what Queen's Counsel are normally expected to do when matters are referred to them, and all the more so if the formality of the position is such that, if there is disagreement as to the identity of the Queen's Counsel, he is to be appointed by the Chairman of the Bar.

14. In the present case, the parties cannot, with respect to the judge, have intended a reference to a Queen's Counsel as an expert or for a non-binding opinion, because in that way no finality could be achieved. They must in my judgment have wanted a binding result, and the clause thus constitutes an arbitration agreement.

15. As far as Mr Bowdery's second point is concerned, it does not seem to me that it is necessary for the clause to say in terms that it is final and binding. Mr Phillips has referred us to section 58(1) of the Arbitration Act 1996. Of course that section presupposes that there is an arbitration agreement (as, in my judgment, there here is) but it does provide, in terms*: "Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them."*

16. As far as Mr Bowdery's third argument is concerned, there is in my judgment nothing in it. The context in which he invited us to consider clause 1 included clause 3 of the insurance policy. That provides*: "The Insurers shall only provide indemnity for claims where the initial action and all subsequent actions and/or litigation are brought in the courts of and subject to the law of the United Kingdom, the European Community or such other jurisdiction as shown in the Schedule."*

17. We are informed that there is, in fact, no schedule of other jurisdictions. It seems to me that that clause is basically intended as a geographical clause, which looks at where the original claim against the insurer was made and is primarily concerned to exclude claims against the insurer coming from jurisdictions such as the United States of America and possibly Canada. It does not seem to me that that clause can in any way determine the meaning of clause 1 of the General Conditions which, as I have said, is in my opinion an arbitration agreement.

18. In my view, the appropriate order is for the appeal to be allowed.

LORD JUSTICE SIMON BROWN:

19. I agree. Mr Bowdery QC helpfully sets out the three candidate meanings of this clause, General Condition 1, namely that the Queen's Counsel agreed or appointed under it acts (1) as an arbitrator; (2) as an expert; (3) as a counsellor engaged in alternative dispute resolution to provide merely a non-binding opinion in the matter.

20. General Condition 1 would, of course, be an arbitration agreement (that is "***an agreement to submit to arbitration present or future disputes***" within the meaning of section 6 of the Arbitration Act 1996) only if it bears the first of those three meanings. I share my Lord's view that it plainly does. The appointment of an expert, as Lord Esher MR explained in **Re Carus- Wilson v Green** (1887) 18 QBD 7, to which my Lord has referred, is designed essentially to prevent differences arising between the parties. General condition 1 expressly postulates that a difference or dispute has already arisen.

21. As to the suggestion that this was some sort of non-binding ADR clause, that seems to me nothing short of absurd. The condition goes to the lengths of providing, if necessary, for the Chairman of the Bar Council to appoint a Queen's Counsel to deal with the reference. That, to my mind, is quite inconsistent with any suggestion that the process required by the clause is simply an optional extra in the contract. Rather it makes business sense only if it provides for a final and binding determination of whatever dispute or difference is referred - if, in short, it is an arbitration agreement.

22. In the result, the appeal succeeds.

ORDER: Appeal succeeds with costs of the appeal and costs below. The proceedings to be stayed. Permission to appeal to the House of Lords refused. (Order not part of approved judgment)

MR S J PHILLIPS (Instructed by Fishburn Morgan Cole, 61, St Mary Axe, London EC3A) appeared on behalf of the Appellant
MR M BOWDERY QC (Instructed by Ashton Bond Gigg, Pearl Assurance House, Friar Lane, Nottingham NG1) appeared on behalf of the Respondent