CASEBOOK OF ARBITRATION LAW

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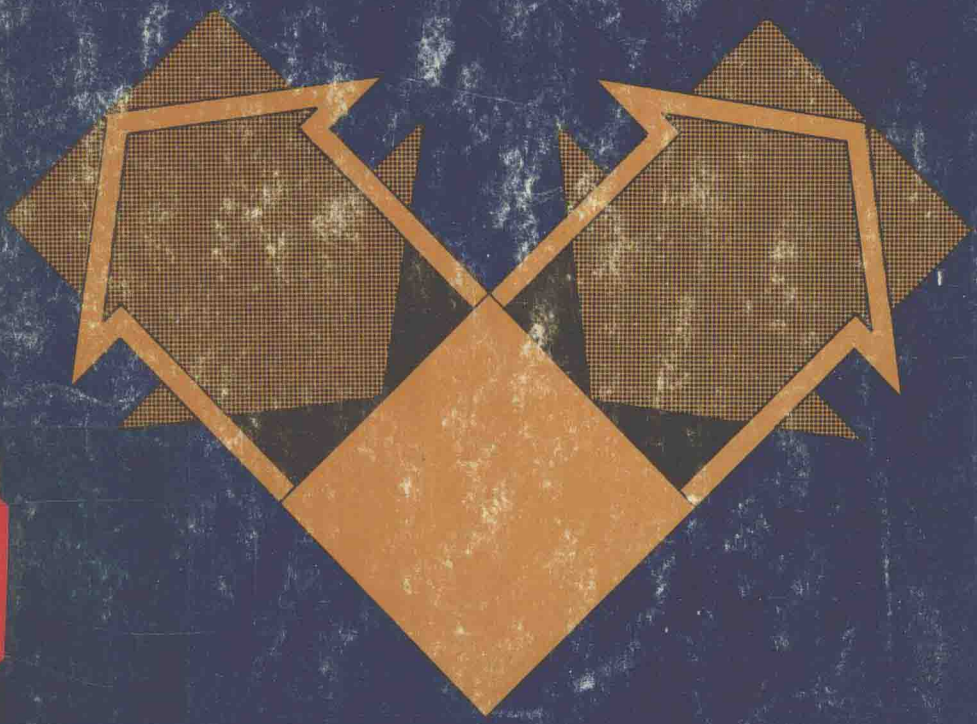

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Introduction

It would seem that my book *The Law and Practice of Arbitrations* met a real need, and I was fortunate to find reviewers universally kind to it. Indeed the only criticism was one made by a reviewer who complained that I had not mentioned that the Arbitration Act 1950 does not apply to Scotland or Northern Ireland. He apparently had not penetrated as far as page 2 of the text.

For the benefit of others similarly inclined, perhaps I should state in a prominent position that this book deals only with the law of England although, of course, the English law regarding arbitration has relevance in many jurisdictions.

Once again, this book is intended primarily for laymen rather than the lawyers. These have their own sources of information, confused and inadequate though they be.

For that reason, the cases reported here do not reflect the voluminous authorities on such strictly legal topics as when a step has been taken in an action or procedure after a case has been stated for the High Court. 'Other countries, the United States in particular, think very poorly of our system in arbitration of cases stated for the courts,' the Master of the Rolls, Lord Denning, has said. So do I. More space is therefore devoted to how to avoid a case stated than how to deal with one.

On the other hand, full treatment is afforded to what the courts have had to say about how an arbitrator should conduct himself and the arbitration, in the hope that this will prove a valuable reference book for an arbitrator to have at his elbow.

Since most of the words are not mine, I shall not be upset if the whole book is not read at a compulsive gallop. I have been at particular pains therefore to ensure that the index provides immediate and detailed references.

The learned editor of Hudson's *Building and Engineering Contracts*, Mr I.N. Duncan Wallace QC, has asked publicly why every opinion in the House of Lords now had to amount to a textbook in itself—'with the result that there are usually at least four conflicting textbooks in every case.' The appalling prolixity of modern judges is, indeed, a problem for the editor of a book such as this, both in the sheer volume he has to summarise and in the difficulty of discovering what is in fact the *ratio decidendi* of any particular case. Could not textbook writing be left to the textbook writers?

Perhaps it would help if present-day judges, like their predecessors up to 1825, were paid only by fees for the number of court cases of which they disposed: or if we invented a new system of remunerating them in inverse relation to the length of their judgments—so that any judge who merely said 'I agree' without feeling compelled to engaged in the work of supererogation by saying 'and have nothing to add' would take home the jackpot.

I would be less than gracious if I did not record my indebtedness to Mr Christopher Wright LLB, Barrister, who has helped in the task of checking

proofs and who has prepared the tables of statutes and of cases; and to Mrs Maureen Webb, who has had to cope with my handwriting. If this book has any merit they are entitled to share of it; and where it has fault, it is mine alone.

JOHN PARRIS
Oxford

Note

This book is intended as a companion volume to *The Law and Practice of Arbitrations,* also by John Parris.

To help readers to follow up in greater detail the legal propositions given in this book, references have been included after the proposition to the relevant section in *The Law and Practice of Arbitrations* (1974 edition).

These references are shown in heavy type and have been abbreviated as *LPA.*

Case references: Cases are cited in the text by the date at which they were first reported. This may not necessarily be the same as the date judgment was given. Full report references to every case are given at the back of the book in the table of cases.

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PART I

The nature of arbitration

'It is said to be called an Arbitrement either because the Judges elected thereon may determine the Controversie not according to the Law, but according to their Opinion and Judgment as honest men. Or else because the Parties to the Controversie have submitted themselves to the Judgment of the Arbitrators, not by Compulsion or Coertion of the Law but of their own accord. It is also called an Award, of the French word *Agarder*, which signifies to *decide* or *judge* and sometime in the Saxon or Old English, it was called a *Love-Day*, because of the Quiet and Tranquility that should follow the ending of the Controversie.'

Arbitrium Redivivum (1694)

Arbitration and valuation (see LPA 1.8)

Not every agreement to refer a matter to the decision of a third person is necessarily an arbitration.

At one time it was thought that a mere appraisal or valuation by a third party could never be an arbitration. The two cases that follow are included because they are commonly taken to support this view. It will be seen however that this is not so.

In the first case, Lord Esher is concerned solely with the point as to whether there was an arbitration agreement in writing or not; in the second, with the presumed intention of the parties. In the second case he concluded that there was no intention for arbitration because the parties did not intend a judicial hearing, but only that the third person should act on his own skill and judgment. This case however cannot be regarded as current law.

In re an Arbitration between Dawdy and Hartcup (Court of Appeal, 1885)

Dawdy was the tenant of Hartcup's farm who gave notice to quit. In accordance with the custom of the county of Suffolk, two valuers were appointed, one by the landlord and one by the tenant, for the purpose of ascertaining the sum the tenant was entitled to from the landlord on his outgoing. The valuers appointed an umpire and he held a hearing to receive evidence.

Application was made to enrol the award as a rule of court under the provision of section 17 of the Common Law Procedure Act 1854 (repealed) which were similar to those of section 26 of the Arbitration Act 1950.

Counsel for the appellant argued that the agreement provided that at the expiration of the tenancy the 'usual and customary valuation' should be made, and that this implied that the valuation was to be conducted according to the usual and customary rules, and by persons appointed in the usual and customary way. The usual and customary mode of making such a valuation was by appointing two valuers, who appointed an umpire if they could not agree. The subsequent words of the agreement contemplated the possibility of a dispute between the landlord and the tenant. There was a sufficient submission to arbitration. There was an agreement in writing, and, that being so, the court might look at the subsequent proceedings which are implied in the original agreement.

LORD ESHER MR: The only question which we have to decide is whether there is any submission in writing to arbitration which can be made a rule of court under the provisions of section 17 of the Common Law Procedure Act 1854.

That there was in this case in point of fact ultimately an arbitration between the parties I do not doubt; an umpire was appointed, and he had to arbitrate: the question is whether there ever was a written submission to arbitration. It has been admitted by [Counsel] in his very strenuous and able argument that, unless the agreement of 4 October 1882 contains a submission to arbitration, there has been no agreement in writing between the parties to submit the matters in dispute between them to arbitration. The only appointment of an umpire was a verbal one. The word 'arbitration' in section 17 of the Common Law Procedure Act has been construed as meaning an arbitration to be conducted according to judicial rules, where the person who is appointed arbitrator is bound to hear the parties, to hear evidence if they desire it, and to determine judicially between them. He must have a matter before him which he is to consider judicially.

As a consequence of this, it has been held that if a man is, on account of his skill in such matters, appointed to make a valuation in such a manner that in making it he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge, and his skill, he is not acting judicially; he is using the skill of a valuer, not of a judge. In the same way, if two persons are appointed for a similar purpose, they are not arbitrators, but only valuers. They have to determine the matter by using solely their own eyes, and knowledge, and skill.

We must, therefore, look at the agreement and see whether one or more persons are appointed to value, and in what way they are to act. The agreement says that there is to be the usual and customary valuation, but there is nothing to show the mode in which, or the persons by whom, the valuation is to be made. It means nothing more than that the usual and customary items are to be taken into account. Then it says that, when any valuation of the covenants shall be made between the tenant and the landlord, or his incoming tenant, the persons making the valuation shall take into consideration certain specified matters. I think the agreement contemplates the making of the valuation by the landlord and the tenant themselves; at any rate, the possibility of their making it. Obviously there are to be two persons, but I can see nothing in the first part of the clause other than this, that two persons are to be appointed as valuers, not arbitrators; that they are to be valuers in the ordinary sense of the word, ie, persons skilled in agriculture, who can determine the whole matter by the use of their own eyes, and knowledge, and skill. There is nothing to show that they are to hear the parties, and determine judicially between them. The case comes within the authority of *Collins v Collins* (1858) and *Bos v Helsham* (1866) which decide that persons so appointed are valuers, nor arbitrators. *In re Hopper* (1867) is not inconsistent; there the judges of the Court of Queen's Bench only said that, if those cases bore the construction which counsel had attempted to put on them, they could not agree with them; they did not say that they thought the cases had been wrongly decided. Blackburn J said:

> 'The cases of *Collins v Collins* and *Bos v Helsham* go to this extent, that, where compensation is to be settled by a particular person, that is not necessarily an award. In that I quite agree. An appraisement is not necessarily an award. If those cases are to be supposed to go as far as to decide that an agreement to assess compensation and ascertain value could not

be a matter of arbitration, and there is to be no award, I should certainly pause before I concurred in them.'

In re Hopper, therefore, in no way takes away from the authority of *Collins v Collins* and *Bos v Helsham*. In the present case, I come to the conclusion, on the construction of the agreement, that the two persons who are indicated are to be mere valuers, not arbitrators.

A material provision contained in the agreement in *In re Hopper* is wanting in the present case; there was there a distinct provision in the agreement that, if the two valuers appointed by the landlord and tenant should disagree in their valuation, the amount of compensation to be paid to the tenant should be referred to the umpirage of such persons as the valuers should in writing appoint. The parties had agreed that, in case of difference, an umpire should be appointed to determine as arbitrator, and he was an arbitrator, if the valuers were not. We have no right to insert such a provision in the present agreement, unless it is a matter of necessary implication; it is not enough to say that there is a reasonable inference that the parties intended it. There is no such necessary implication, and therefore there is no agreement in writing to submit the matter in dispute between the parties to arbitration. The appointment of an umpire is not of itself a submission of arbitration; it is only a consequence of such a submission. The case does not come within section 17, and there is no power to make the agreement a rule of court. The decision of the Divisional Court was right.

In re Carus-Wilson and Greene (Court of Appeal, 1886)

Carus-Wilson sold land to Greene, the purchaser, to pay for standing timber at a price to be arrived at in the following manner:

'Each party shall appoint a valuer and give notice thereof by writing to the other party within fourteen days from the date of the sale. The valuers thus appointed shall, before they proceed to act, appoint by writing an umpire and the two valuers, or, if they disagree, their umpire shall make the valuation. Each party shall pay the charges of his own valuer, and one half the charges, if any, of the umpire. If either party shall neglect to appoint a valuer or to give notice to the other party within the time aforesaid, the valuer appointed by the other party shall make a valuation alone which shall be binding on vendor and purchaser.'

The valuers disagreed and the umpire thereupon determined the price. The vendor, being dissatisfied with the price, applied to the Divisional Court to set aside the award on various grounds. The Divisional Court held they had no power to do so since it was not an award but a valuation. The argument in the Court of Appeal on behalf of the vendor appellant is included, although unsuccessful, since the present author regards it as impeccable and it has been adopted in later cases as a correct statement of the law.

Counsel for the appellant argued: The umpire being appointed to settle a dispute which had arisen between the valuers of the respective parties is in the position of an arbitrator, not of a mere valuer. This case resembles that of *Turner v Goulden* (1873). It may be that the intention was not that he should hold a formal judicial inquiry and hear witnesses, but that he should decide upon inspection, relying on his own skill and knowledge; but it does not necessarily follow from this that he was not an arbitrator. No action would lie against him for negligence or want of skill in the performance of his functions: *Pappa v Rose* (1871) and *Tharsis Sulphur Company v Loftus* (1872). There is no contractual relation between the umpire and either of the parties, and therefore he could not be sued, whereas a mere valuer would be liable to an action for negligence or incompetence as for a breach of the contract to bring due skill and care to the performance of his functions. These considerations tend to show that the umpire was an arbitrator. Counsel also cited *In re Dawdy and Hartcup* (1885), *In re Hopper* (1867), *Bos v Helsham* (1866), *Collins v Collins* (1858) and *Stevenson v Watson* (1879).

LORD ESHER MR: 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 an 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 person 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. I think that this case was clearly not one of arbitration, and that it falls within the class of cases where a person is appointed to determine a certain matter, such as the price of goods, not for the purpose of settling a dispute which has arisen, but of preventing any dispute. At the time when the umpire was appointed, it cannot be pretended that any dispute had arisen. The vendor and purchaser had respectively agreed to sell and to purchase the timber at a price to be fixed by valuation and, the price not yet being fixed, there was nothing in dispute between them. If the valuers could not agree as to the price an umpire was to be appointed, but nothing need be known to the vendor and purchaser about the matter; there cannot be said to be anything in dispute between them. It was said that there was no contractual relation between the umpire and the parties. I do not see that that is necessarily so. The parties may have delegated it to the valuers appointed by them respectively to employ the umpire for them and then there would be a contract. My reason for holding that the umpire here was not an arbitrator is that he was, in my opinion, merely substi-

tuted for the valuers to do what they could not do, viz, fix the price of the timber. He was not to settle a dispute which had arisen, but to ascertain a matter in order to prevent disputes arising. For these reasons, I think the decision of the court below was right.

LINDLEY LJ: I agree. This is an application to set aside what is called an award. But the question is whether this condition of sale provided for anything more than a mere valuation, which was to be made by two valuers, or, if they could not agree, by a third valuer to be appointed by them. A valuer may be, in one sense, called an arbitrator, but not in the proper legal sense of the term. In the ordinary cases of arbitration there is a dispute which is referred. The object of the valuation, on the other hand, is to avoid disputes. There is nothing in the nature of a dispute when the valuer is appointed. It is a term of the agreement for sale that the timber shall be valued and that the purchaser shall take it at the valuation. It is a mere matter of fixing the price, not of settling a dispute.

LOPES LJ: Whether an umpire is to be regarded as an arbitrator or a valuer must, in my opinion, depend on the circumstances and the documents in each case. Having regard to the circumstances and documents in the present case, I feel clear that the umpire was to be a mere valuer. I cannot see how he could be in any different position from that of the two valuers appointed by the parties respectively. He is merely substituted for them upon their being unable to fix the price. He is not called in to settle judicially any matter in controversy between the parties. No such controversy in fact existed. He is by the exercise of his knowledge and skill to make a valuation of the timber, the object being to prevent disputes from arising, not to settle them after they have arisen. For these reasons, I think the appeal must be dismissed.

Appeal dismissed

Quasi-arbitration (see LPA 1.9)

In the case that follows it was held that a person in the position of an arbitrator is not liable to either party for failing to use due skill in coming to an opinion about the quality of goods; but see now the views of Lord Salmon in *Sutcliffe v Thackrah* (post).

Pappa v Rose (Court of Exchequer Chamber, 1871)

This was an appeal from the Court of Common Pleas. The defendant was a broker who was employed by the plaintiff to sell a quantity of Smyrna raisins for him. The contract note for the sale read: 'Sold by order and for the account of Mr D. Pappa to my principals, Messrs S. Hanson & Sons, to arrive, 500 tons black Smyrna raisins, 1869 growth, fair average quality in opinion of selling broker'. The buyers rejected the goods and the defendant inspected them and gave his opinion that they were not of fair average quality.

The plaintiff, who was as a result obliged to sell the raisins at a lower price, brought an action for damages, alleging that the defendant had contracted to use 'due care, skill and diligence' in examining the goods. Bovill CJ held that the defendant was a quasi-arbitrator and was not therefore liable for want of skill in determining the quality. The Court of Common Pleas affirmed this decision. The plaintiff then appealed.

KELLY CB: If it were necessary for us to determine the question whether the contract in this case was for Smyrna raisins of the fair average quality of the growth of 1869, I should not hesitate to say that it was for raisins of the growth of 1869, and that they were to be fair average quality generally, and not of 1869, but that question does not arise here, but whether in undertaking to give his opinion as to the quality of the raisins the defendant, who was the selling broker, undertook not only to use due care, but also due skill in examining the raisins in order to form a correct opinion of their quality. Now I am clearly of opinion that there was no obligation on the defendant to exercise any degree of skill in the matter whatever. He had entered into a contract of an unusual character for a broker to make, and in order to carry out and give effect to such contract he must be considered impliedly to have undertaken to deliver an opinion as to the quality of the raisins sold, if called upon to do so. What more than this had he undertaken to do, unless perhaps it was to look at the raisins on which he had to give an opinion? I am of opinion that he was not bound to do more, and certainly not to bring any skill to the examination of the raisins for the purpose of forming his opinion on their quality. It was for the parties themselves to determine whether he was a person of competent skill to decide as to the quality of the raisins. The defendant has been treated as in the position of an arbitrator, but that has only been by way of

illustration. If A and B agree to submit any question to the opinion of a third person that does not bind such third person to give any opinion at all, but if he contracts to give his opinion or award on the matter, he is as much bound to do so as A and B are bound to abide by it when it has been given. But though such arbitrator, when he has undertaken to give his award, is bound to give it, he is not bound to bring any skill in the matter, for that forms no part of his undertaking. There cannot be a better illustration of this than what often occurs in the case of an arbitration, where the parties have thought proper to refer the dispute, not to a lawyer, but to a surveyor or other lay person, and in the course of the enquiry before such arbitrator some important question of law has perhaps arisen. Has such arbitrator undertaken to possess any skill in the law in order to determine such question? Clearly not, and it is for the parties who submit the case to arbitration to take care that the person to whom they refer it is competent to deal with the matters which may come before him. The same principle applies here, and on the ground that there is no contract, express or implied, on the part of the defendant, to exercise any skill whatever in determining the quality of the raisins, I am of opinion that this action is not maintainable, and that therefore the nonsuit was right, and the judgment of the court below ought to be affirmed.

MARTIN B: I am of the same opinion. This is a case in which there was a contract for the sale of Smyrna raisins of the growth of 1869, and the contract contained these words — 'of fair average quality'. If those words stood alone, the question would have been whether the raisins delivered were of fair average quality, but the parties agreed that the selling broker should decide that matter. They were at liberty to do so if they chose, but there was no contract, express or implied, on the part of the selling broker to bring any skill in giving his decision. The parties were content to take him for better or worse, and he is not liable for a wrong decision if given without fraud.

BLACKBURN J: I also am of opinion that the judgment of the court below should be affirmed. I give no opinion on the first question, namely, as to whether the raisins were to be of the average quality as compared with those of other years generally, or as compared only with those of 1869, because the opinion I have arrived at on the second question renders it unnecessary to determine the first question. The second question is whether the defendant undertook to use any skill in forming his opinion as selling broker as to the quality of the raisins. In making the contract of sale, he made it part of the agreement that the raisins should be of fair average quality in the opinion of the selling broker, which must therefore be an undertaking that he was to give an opinion as to the quality of the raisins. I do not decide whether, under these circumstances, the defendant was an arbitrator or not, or what would be the liability he would incur if he were to misconduct himself, but I think he is not responsible for the opinion he gave, and it would be highly inconvenient if it were otherwise, and an action could lie against him by either of the parties to this contract. The case of *Jenkins v Betham* (1855) is very different, as there the defendant contracted to use proper skill as a valuer for the plaintiff. So here, if the cause of action had been shaped for not using proper skill as a broker, the defendant might have been liable for not possessing such skill.

MELLOR AND LUSH JJ. concurred.

Judgment affirmed

Note

In the case of *Jenkins v Betham* referred to, the defendants were held liable for negligence. They were employed exclusively by the plaintiff to value dilapidations or property belonging to the vicarage, as between the incoming and outgoing incumbents. Jervis CJ said:

> 'The cause of action is that the defendants by holding themselves out as valuers and surveyors of ecclesiastical property, represented themselves as understanding the subject, and qualified to act in the business in which they professed to act and this induced the plaintiff to retain and employ them.'