Original (Lexis)

UK 34

HAYTER v NELSON AND HOME INSURANCE CO

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

[1990] 2 Lloyd's Rep 265, 23 Con LR 88

HEARING-DATES: 22 March 1990

22 March 1990

CATCHWORDS: Reinsurance -- Stay of action -- Arbitration award and judgment in favour of plaintiffs -- Defendant claimed indemnity from third party -- Whether defendants had commenced legal proceedings in respect of matter agreed to be referred to arbitration -- Whether parties in dispute -- Whether action should be stayed -- Arbitration Act 1975, s 1.

HEADNOTE: Under a whole portfolio retrocession treaty the third party agreed with the defendants to accept by way of retrocession 100 per cent of the whole portfolio treaty. The retrocession treaty expressly incorporated the reinsurance treaty and provided that the reinsurer (the third party) should in all circumstances follow the fortunes of the reinsured (the defendants) in respect of the reinsurance treaty. The retrocession treaty contained an arbitration clause which provided inter alia:

Any differences arising out of the Agreement . . . shall be referred to Arbitration in accordance with the provisions of the law of England relating to Arbitration . . .

It was common ground between the parties that this agreement was a non-domestic agreement and one to which s 1 of the Arbitration Act, 1975 applied. That section provided inter alia:

If any party to an Arbitration Agreement to which this section applies . . . commences any legal proceedings . . . in respect of any matter agreed to be referred, any party to the proceedings may . . . before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings and the Court unless satisfied . . . that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

The defendants claimed an indemnity against the third party in respect of sums which they had been ordered to pay to the plaintiff Lloyd's underwriters under an arbitration award and by a judgment. The claim for indemnity was based on the whole portfolio retrocession treaty. The defendants applied for summary judgment against the third party.

The third party applied for a stay of proceedings under s 1 of the Arbitration Act 1975. The issues for decision were (1) whether the defendants had commenced legal proceedings in respect of any matters agreed to be referred and (2) whether

the Court was satisfied that there was not in fact any dispute between the parties with regard to the matter agreed to be referred. [1990] 2 Lloyd's Rep 265, 23 Con LR 88

Held, by QB (Com Ct) (SAVILLE J), that (1) the words "disputes" and "differences" in the arbitration clause should be given their ordinary meaning; neither the word "disputes" nor the word "differences" was confined to cases where it could not then and there be determined whether one party or the other was in the right; and because one party could be said to be indisputably right and the other indisputably wrong did not entail that there was never any dispute between them;

(2) the present proceedings were in respect of a matter agreed by the parties to be referred within the meaning of s 1(1) of the Arbitration Act 1975; a difference existed between them in respect of their rights and obligations arising out of the agreement to which the arbitration clause referred;

(3) the words "there was not in fact any dispute" meant "there was not in fact anything disputable"; if there was no dispute between the parties there was very likely to be nothing agreed to be referred, since it was only disputes or differences that the parties had agreed to refer;

(4) when considering an application for summary judgment a factor to be taken into account ws the existence of an arbitration agreement between the parties, and only when it was readily and immediately demonstrable that the respondent had no good grounds at all for disputing the claim should that party be deprived of his contractual right to arbitrate; in the context of the 1975 Act this meant that only in such cases could the Court be satisfied that there was not in fact any dispute between the parties with regard to the matter agreed to be referred;

Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd, [1989] 1 Lloyd's Rep 473, applied.

(5) if the third party were not allowed to go behind the judgment given and the award made against the defendant then it was readily and immediately demonstrable that the third party had no good grounds at all for disputing the claim; the third party could only be bound by the judgment and the award by reason of the general legal effect of a judgment and an award of the present kind or by reason of an agreement between the defendants and the third party that the latter would be bound by judgments given or awards made against the former;

(6) there was no express provision in the retrocession treaty that the retrocessionaire would be bound by judgments given or awards made against the reinsured; and the submission that such an agreement was implicit in the retrocessionaires' promise in all circumstances to follow the fortunes of the reinsured in respect to the reinsurance treaty would be rejected; the Court was not satisfied that there was not in fact any dispute between the parties with regard to the matters agreed by them to be referred; a tribunal would be in

a far better position than the Court to judge whether or not by the words used in the agreement the third party undertook to be bound by judgments given and awards made against the defendants; the proceedings would be stayed under s 1 of the 1975 Act and the application for summary judgment failed.

CASES-REF-TO: Ellerine Brothers (Pty) Ltd v Klinger, (CA) [1982] 1 WLR 1375; Ellis Mechanical Services Ltd v Wates Construction Ltd, (Note) (CA) [1978] 1 Lloyd's Rep 33; Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd, (CA) [1989] [1990] 2 Lloyd's Rep 265, 23 Con LR 88

1 Lloyd's Rep 473; Kitchen ex parte Young, Re (1881) 17 Ch 668; Kostas Melas, The [1981] 1 Lloyd's Rep 18; M Eregli, The [1981] 2 Lloyd's Rep 169; Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH, (HL) [1977] 1 Lloyd's Rep 463; [1977] 1 WLR 713; Sethia (SL) Liners Ltd v State Trading Corporation of India (CA) [1986] 1 Lloyd's Rep 31; Sykes (F & G) (Wessex) Ltd v Fine Fare Ltd, (CA) [1967] 1 Lloyd's Rep 53.

INTRODUCTION: This was an application by the defendants, Mr Edward Ernest Nelson and another, as representative Lloyd's underwriters, seeking summary judgment against the third party Home Insurance Co in respect of their claim for an indemnity for sums which they had been ordered to pay to the plaintiff, Mr John William Hayter, a representative Lloyd's underwriter under an arbitration award and a judgment given by this Court. The third party applied for a stay of the proceedings under s 1 of the Arbitration Act 1975.

COUNSEL: Mr C Edelman for the defendants; Mr Jeffrey Gruder for the third party.

PANEL: SAVILLE J

JUDGMENTBY-1: SAVILLE J

JUDGMENT-1: SAVILLE J: In these proceedings the defendants (who are Lloyd's underwriters) seek summary judgment against the third party (Home Insurance Co) while the latter seek a stay of proceedings under s 1 of the Arbitration Act 1975.

The defendants' claim is for an indemnity in respect of sums which they have been ordered to pay to the plaintiffs (who are also Lloyd's underwriters) under (respectively) an arbitration award and by a judgment of this Court. In each case the plaintiffs were held entitled to recover the respective amounts in question from the defendants under a whole portfolio reinsurance treaty. The claim for an indemnity is based on the fact that under a whole portfolio retrocession treaty the third party agreed with the defendants to accept by way of retrocession 100 per cent of the whole portfolio reinsurance treaty. The context in which these arrangements were made was that the defendants agreed to "front" for the third party, since Lloyd's required that their own members should provide the reinsurance of the plaintiffs.

The retrocession treaty expressly incorporated the reinsurance treaty and provided that the reinsurer (the third party) should in all circumstances follow the fortunes of the reinsured (the defendants) in respect of the reinsurance treaty. The arbitration clause in the retrocession treaty provided as follows:

Any differences arising out of this Agreement, which cannot be settled amicably shall be referred to Arbitration in accordance with the provisions of the Law of England relating to Arbitration for the time being in force. The Arbitrators and Umpire shall be active or retired officials of Insurance Companies or Underwriters carrying out a similar type of Insurance or Reinsurance business to that covered hereunder and the venue of the Court of Arbitration shall be in London. [1990] 2 Lloyd's Rep 265, 23 Con LR 88

It is common ground between the parties that this arbitration agreement is a non-domestic agreement and thus one to which s 1(1) of the Arbitration Act 1975 applies. This sub-section provides as follows:

If any party to an Arbitration Agreement to which this Section applies, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the Agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings; and the Court, unless satisfied that the Arbitration Agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

As will be observed, if the conditions of this sub-section are met, the Court must stay the legal proceedings in question -- unlike s 4(1) of the Arbitration Act, 1950, the Court has no discretion in the matter. In these circumstances it seems to me that I must first consider the application for a stay made by the third party.

It is not suggested that the third party has delivered any pleadings or taken any other step in the proceedings; nor that the arbitration agreement is null and void, inoperative or incapable of being performed. Thus the two issues are whether the defendants have commenced legal proceedings --

. . . in respect of any matter agreed to be referred [and whether I am satisfied that -- ] there is not in fact any dispute between the parties with regard to the matter agreed to be referred.

What the parties in this case have agreed to refer to arbitration are any differences arising out of the retrocession treaty which cannot be settled amicably. The defendants' claim in the proceedings depends exclusively upon

rights which they assert they possess and corresponding obligations which they assert the third party owes under the retrocession treaty. The third party accepts the existence and validity of the retrocession treaty but does not accept or agree that the parties' rights and obligations thereunder are as asserted by the defendants. It has not been possible for the parties to settle the matter amicably, nor is it suggested that the third party is acting in bad faith. There remains therefore the question whether there are "differences" between the parties relating to these contentions.

Although there is some authority for the proposition that the word "differences" in an arbitration clause is wider than the word "disputes" -- for example, F & G Sykes (Wessex) Ltd v Fine Fare Ltd, [1967] 1 Lloyd's Rep 53 -- I shall proceed on the assumption that for present purposes the two words bear the same meaning.

In some cases the suggestion seems to be made that if it can be shown that a claim under a contract is indisputable, ie a claim that simply cannot be resisted on either the facts or the law, then there is no dispute or difference within the meaning of the arbitration clause in that contract. For example, in Ellis Mechanical Services Ltd v Wates Construction Ltd, [1978] 1 Lloyd's Rep 33 at p 37, Lord Justice Bridge, as he then was, said this: [1990] 2 Lloyd's Rep 265, 23 Con LR 88

To my mind the test to be applied in such a case is perfectly clear. The question to be asked is: is it established beyond reasonable doubt by the evidence before the Court that at least LX is due from the defendant to the plaintiff? If it is, the judgment should be given for the plaintiff for that sum, what ever X may be, and in a case where, as here, there is an Arbitration clause the remainder in dispute should go to arbitration. The reason why arbitration should not be extended to cover the area of the LX is indeed because there is no issue, or difference, referable to arbitration in respect of that amount.

To the extent that such observations are intended to define what is or is not a dispute or difference within the meaning of an arbitration clause of the kind under consideration, I am respectfully unable to agree with them -- more importantly they seem to me to be in conflict with the decision of the Court of Appeal in Ellerine Brothers (Pty) Ltd v Klinger, [1982] 1 WLR 1375. In my view, to treat the word "disputes" or the word "differences" in the context of an ordinary arbitration clause as bearing such a meaning leads not only to absurdity, but also involves giving those words a meaning which (though doubtless one the words are capable of bearing) in context is difficult to support.

The proposition must be that if a claim is indisputable then it cannot form the subject of a "dispute" or "difference" within the meaning of an arbitration clause. If this is so, then it must follow that a claimant cannot refer an indisputable claim to arbitration under such a clause, and

that an arbitrator purporting to make an award in favour of a claimant advancing an indisputable claim would have no jurisdiction to do so. It must further follow that a claim to which there is an indisputably good defence cannot be validly referred to arbitration since, on the same reasoning, there would again be no issue or difference referable to arbitration. To my mind such propositions have only to be stated to be rejected -- as indeed they were rejected by Mr Justice Kerr (as he then was) in The M Eregli, [1981] 2 Lloyd's Rep 169, in terms approved by Lords Justices Templeman and Fox in Ellerine v Klinger (sup). As Lord Justice Templeman put it (at p 1383):-

There is a dispute until the defendant admits that the sum is due and payable.

In my judgment in this context neither the word "disputes" nor the word "differences" is confined to cases where it cannot then and there be determined whether one party or the other is in the right. Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that that dispute did not in fact exist. Because one man can be said to be indisputably right and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them.

In my view this ordinary meaning of the word "disputes" or the word "differences" should be given to those words in arbitration clauses. It is sometimes suggested that since arbitrations provide great scope for a defendant to delay paying sums, which are indisputably due, the Court should endeavour to avoid that consequence by construing these words in arbitration clauses so as to exclude all such cases, but to my mind there are at least three answers to [1990] 2 Lloyd's Rep 265, 23 Con LR 88

such suggestions.

In the first place the assumption is made that arbitrations are necessarily slow processes, but whatever the position in the past, I cannot accept that as a general or universal truth today. As Mr Justice Robert Goff (as he then was) pointed out in The Kostas Melas, [1981] 1 Lloyd's Rep 18, arbitrators have ways and means (in particular by making interim awards) of proceeding as quickly as the Courts -- indeed in that particular case quicker than any Court could have acted. If a claimant can persuade the arbitral tribunal that in truth there is no defence to his claim (ex hypothesi not on the face of it a difficult task if the claim is truly indisputable) then there is no good reason why that tribunal cannot resolve the dispute in his favour without any delay at all.

In the second place, and perhaps more importantly, it

must not be forgotten that by their arbitration clause the parties have made an agreement that in place of the Courts, their disputes should be resolved by a private tribunal. Even assuming that this tribunal is likely to be slower or otherwise less efficient than the Courts, that bargain remains -- and I know of no general principle of English law to suggest that because a bargain afterwards appears to provide a less satisfactory outcome to one party than would have been the case had it not been made or had it been made differently, that bargain can be simply put on one side and ignored.

In the third place, if the Courts are to decide whether or not a claim is disputable, they are doing precisely what the parties have agreed should be done by the private tribunal. An arbitrator's very function is to decide whether or not there is a good defence to the claimant's claims -- in other words, whether or not the claim is in truth indisputable. Again, to my mind, whatever the position in the past, when the Courts tended to view arbitration clauses as tending to oust their jurisdiction, the modern view (in line with the basic principles of the English law of freedom of contract and indeed International Conventions) is that there is no good reason why the Courts should strive to take matters out of the hands of the tribunal into which the parties have by agreement undertaken to place them.

For these reasons I am satisfied that the present proceedings are in respect of a matter agreed by the parties to be referred within the meaning of s 1(1) of the Arbitration Act, 1975. A difference exists between them in respect of their rights and obligations arising out of the agreement to which the arbitration clause refers.

For the defendants Mr Edelman was disposed to accept that this was the position, for he conceded (in my view wholly correctly for the reasons that I have given) that his clients, had they so wished, could have referred their claims for an indemnity to arbitration pursuant to the arbitration clause in the retrocession treaty notwithstanding that (in his submission) there is no defence to the claims. His submission is, however, that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, within the meaning of s 1(1) of the Act, because his clients' claims are indisputable both as a matter of fact and as a matter of law. His clients have been adjudged liable to the plaintiffs after contested hearings; it is not suggested that his clients have failed properly and carefully to defend themselves -- and accordingly, Mr Edelman submitted, there were simply no good reasons why the third party should not indemnify his clients, especially in view of the promise to follow their fortunes. [1990] 2 Lloyd's Rep 265, 23 Con LR 88

This reasoning involves reading the words "there is not in fact any dispute between the parties" as meaning "there is not in fact any defence to the claim", ie as confining the word "dispute" in that context to disputable matters. Presumably, by parity of reasoning, a respondent to an arbitration who asserts that he has an indisputable defence to

the claim could start legal proceedings claiming a declaration to that effect and resist a stay on the same grounds. Be that as it may, Mr Edelman accepted that his submission involved giving the word "dispute" in the Act a different meaning from that which (for the reasons given earlier in this judgment) he agreed must apply to the word when used in ordinary arbitration clauses.

The phrase in question does not appear in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards although the 1975 Act, by its title, purports to give effect to that Convention. The phrase did not appear in the original Arbitration Clauses (Protocol) Act, 1924, bringing into effect the League of Nations Protocol of Sept 24, 1923, nor in that Protocol, but was introduced by way of amendment to the 1924 Act by the Arbitration (Foreign Awards) Act, 1930, whence it found its way into s 4(2) of the Arbitration Act, 1950 before that sub-section was repealed by s 8(2) of the 1975 Act, when the New York Convention replaced the League of Nations Protocol.

There seems little doubt that the phrase "or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred" was inserted into the 1924 Act by later amendment as a result of a recommendation by the MacKinnon Committee on The Law of Arbitration whose report was presented to Parliament in March 1927 -- see Russell on Arbitration, 12th Ed (1931) at p 519. The recommendation in question is to be found in par 43 of this Report (Cmd 2817) in the following terms:

Our attention has been called to a point that arises under the Arbitration Clauses (Protocol) Act 1924. Section 1 of that Act in relation to a submission to which the Protocol applies deprives the English Court of any discretion as regards granting a stay of an action. It is said that cases have already not infrequently arisen, where (eg) a writ has been issued claiming the price of goods sold and delivered. The defendant has applied to stay the action on the grounds that the contract of sale contains an arbitration clause without being able, or condescending, to indicate any reason why he should not pay for the goods, or the existence of any dispute to be decided by arbitration. It seems absurd that in such a case the English Court must stay the action, and we suggest that the Act might at any rate provide that the court shall stay the action if satisfied that there is a real dispute to be determined by arbitration. Nor would such a provision appear to be inconsistent with the protocol.

I have not been able to find any report of the cases to which the Committee referred, so that it is not possible to examine the grounds on which a stay was ordered in those cases. On the face of it, if indeed the applicant for a stay could not or did not indicate "the existence of any dispute to be decided by arbitration" then the claims made in the legal proceedings could hardly be "in respect of any matter agreed to be referred" within the meaning of the 1924 Act, so no question of a stay could arise at all, since (under an

ordinary arbitration clause) it is only disputes (or differences) that the parties have agreed to refer. What therefore the Committee may have had in mind (though this is speculation) were cases where there was a dispute (or difference) within the meaning of the arbitration clause, so that the legal proceedings were "in [1990] 2 Lloyd's Rep 265, 23 Con LR 88

respect of a matter agreed to be referred", but where the party disputing the claim put forward no good grounds for doing so. In such cases, as the Committee put it, there was no "real dispute" in the sense of there being nothing disputable about the claim.

The words inserted into the 1924 Act are, as a matter of pure construction, very difficult to understand. On their face the words appear to indicate that there can be a matter agreed to be referred even though there is no in fact any dispute between the parties -- but as I have already pointed out, if there is in fact no dispute between the parties then there is very likely indeed to be nothing agreed to be referred, since it is only disputes (or differences) that the parties have agreed to refer. In the end I have concluded that this apparent absurdity can only be resolved by treating the word "dispute" in this context as indeed meaning something different from the word used in ordinary arbitration clauses, so that reading the phrase as a whole the words "there is not in fact any dispute" mean "there is not in fact anything disputable". To my mind this reading alone fits with the recommendation made by the Committee and the fact that it was the problem identified by the Committee which Parliament, as it would appear, was intending to resolve when adding the phrase under consideration to the 1924 Act by the amendment made in 1930. There are to my mind no good grounds for suggesting that the words used in the 1975 Act were inserted for any different purpose; and accordingly it seems to me that the same meaning must be given to them.

In a number of cases the parties (and the Courts) have assumed that where a claimant seeks summary judgment and the respondent seeks a stay under s 1 of the 1975 Act, the two applications are to be treated as the reverse sides of the same coin -- see, for example, SL Sethia Liners Ltd v State Trading Corporation of India Ltd, [1986] 1 Lloyd's Rep 31 at p 33. However, in Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd [1989] 1 Lloyd's Rep 473; the most recent authority drawn to my attention, Lord Justice Parker (with whom the other members of the Court of Appeal agreed) said this:

The purpose of O 14 is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. If the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived the plaintiff is entitled to judgment. If at first sight the point appears to be arguable but with a relatively short argument can be shown to be plainly unsustainable the plaintiff is also entitled to judgment. But O 14 proceedings

should not in my view be allowed to become a means for obtaining, in effect, an immediate trial of an action, which will be the case if the court lends itself to determining on O 14 applications points of law which may take hours or even days and the citation of many authorities before the Court is in a position to arrive at a final decision.

In cases where there is an arbitration clause it is in my judgment the more necessary that full-scale argument should not be permitted. The parties have agreed on their chosen tribunal and a defendant is entitled prima facie to have the dispute decided by that tribunal in the first instance, to be free from the intervention of the Courts until it has been so decided and thereafter, if it is in his favour, to hold it unless the plaintiff obtains leave to appeal and successfully appeals.

In the case of a commercial arbitration the above remarks apply with even greater force, perhaps especially when the dispute turns on construction, or [1990] 2 Lloyd's Rep 265, 23 Con LR 88

the implication of terms or trade practice. Arbitrators and umpires in the same business or trade as the parties are certainly as well or better able than the court to judge what the parties must be taken to have meant or intended by the words or phrases that they have used, to judge what the parties at once have replied if an innocent bystander had asked what was to happen in a certain event not dealt with by the contract and to know what are the practices of the trade. Not only is the defendant entitled to have the dispute decided in the first instance by such persons but the Court should not in my view, save in the clearest of cases, decide the question without the benefit of their views.

In very clear cases a plaintiff is no doubt entitled to his summary judgment notwithstanding the clause, but, when a plaintiff seeks immediate judgment in other than a clear case and resists the submission of the dispute to the tribunal on which he has agreed, one is bound to wonder whether the course which he has taken is prompted by the knowledge that the chosen tribunal with its more intimate knowledge of the trade may reach a conclusion adverse to him in respect of which he might even fail to obtain leave to appeal or if he did obtain leave fail to demonstrate any error.

That case was concerned with an application for a stay under s 4 of the Arbitration Act, 1950, where of course the Court has a discretion, but to my mind the approach of the Court of Appeal must be at least equally if not more applicable to s 1 of the 1975 Act, since in the latter case there is no discretion given to the Court at all. It seems to me to be clear from the passage quoted from Lord Justice Parker's judgment, that when considering an application for summary judgment, a factor to be taken into account is the existence of an arbitration agreement between the parties; so that only in the simplest and clearest cases, ie where it is readily and immediately demonstrable that the respondent has

no good grounds at all for disputing the claim, should that party be deprived of his contractual right to arbitrate. In the context of the 1975 Act, this means that only in such cases can the Court be satisfied that there is not in fact any dispute between the parties with regard to the matter agreed to be referred.

At this stage I should mention that in the course of his argument Mr Edelman laid great stress on the case of Nova (Jersey) Knit Ltd v Kammgarn Spinnerei, GmbH [1977] 1 Lloyd's Rep 463; [1977] 1 WLR 713. In that case there was a claim on bills of exchange, and the defendants sought a stay under s 1 of the 1975 Act. The House of Lords held that the arbitration agreement between the parties did not extend to cover claims on the bills of exchange, so that on the basis there could be no stay. However the House of Lords also held (or at least expressed the view) that there was no dispute as to the claims on the bills of exchange. The only "defence" to the claim was an unliquidated cross-claim, and the House of Lords held that since it was established law that such a cross-claim could not form a valid defence, it could not be used to create a "dispute" on a bill of exchange.

The reasoning of the House of Lords was in the context of considering the appellants' second argument, that there was not in fact any dispute, within the meaning of s 1 of the 1975 Act -- see, for example, the speech of Lord Wilberforce at p 466, col 1; p 718B of the reports. Thus although the speeches themselves do not seek to distinguish between the meaning of the word "dispute" in that Act, and its meaning in what in the light of the first holding was necessarily a hypothetical (but unformulated) arbitration clause, I read them as referring to the former, rather than the latter. If this is not the correct [1990] 2 Lloyd's Rep 265, 23 Con LR 88

approach, then it is difficult to see how the Court of Appeal decision in Ellerine v Klinger (sup) can stand.

The question is therefore whether it is readily and immediately demonstrable in the present case that the third party has no good grounds at all for disputing the claim. To my mind this can only be the case if the third party are not allowed to go behind the judgment given and the award made against the defendants. Indeed, Mr Edelman did not seek to contend otherwise, in my view correctly, for only a short examination of the judgment and the award shows that a number of complex and difficult issues were debated in these proceedings between the plaintiffs and the defendants.

There are, as it seems to me, only two possible ways in which the third party could be bound by the judgment and the award, namely, by reason of the general legal effect of a judgment and an award of the present kind, or by reason of an agreement by the between the defendants and the third party that the latter would be bound by judgments given or awards made against the former. Mr Edelman did not seek to support his argument on the first of these grounds, doubtless because the third party were not party or privy to either the judgment

or the award. Just as surety is not bound (in the absence of agreement) by a judgment or award obtained by a creditor against the principal debtor, it seems to me that a retrocessionaire (again in the absence of an agreement) is not bound by a judgment or award against the reinsured -- cf Re Kitchen ex parte Young, (1881) 17 Ch 668.

There is no express provision in the retrocession treaty that the retrocessionaires will be bound by judgments given or awards made against the reinsured. Mr Edelman's submission is that such an agreement is implicit in the retrocessionaires' promise in all circumstances to follow the fortune of the reinsured in respect of the reinsurance treaty. He accepts, as I understand it, that the retrocessionaires may not be bound by all judgments or awards, but only those where the reinsured has taken all reasonable steps to defend the proceedings. The difficulty, however, which to my mind Mr Edelman faces is twofold. In the first place, there is no authority on the meaning of a "follow the fortunes" clause of this or indeed any other kind, though the use of such clauses is commonplace in the business of reinsurance and retrocession. In the second place (and more importantly) it is clear from the text book writers that there is or appears to be very considerable uncertainty (not to say confusion) as to what is intended to be meant and agreed by the use of the phrase "follow the fortunes" -- see Kiln, Reinsurance Law in Practice, pp 32-35; Golding, The Law and Practice of Reinsurance (1965) at p 65 and Butler & Merkin on Reinsurance Law, Chapters 1.1 and 1.4. In the present case the phrase appears in the retrocession treaty in the way I have set out above -- but in the reinsurance treaty (incorporated into the retrocession treaty and thus part of it) a similar phrase appears in the "Errors and Omissions" clause, which on its face has little if anything to do with the reinsured being bound by judgments given or awards made against the party they were reinsuring. Indeed it is interesting to note that the phrase "follow the fortunes" also appears in the reinsurance agreement at the end of the arbitration clause.

To my mind those versed in the business concerned are, to use the words which I have already quoted from Lord Justice Parker's judgment, in Home Insurance v Mentor Insurance (sup) as well or better able than this Court to judge what the parties must be taken to have meant or intended by the particular stipulation upon which the defendants place reliance. In the end, I am not so sure that [1990] 2 Lloyd's Rep 265, 23 Con LR 88

Mr Edelman is right in his suggested construction of the "follow the fortunes" clause appearing in the retrocession treaty that I am satisfied that there is not in fact any dispute between the parties with regard to the matters agreed by them to be referred. I not only consider the meaning of this clause to be open to doubt, but I also consider that a tribunal of the kind the parties stipulated for in their arbitration clause in this case, namely, a tribunal of precisely the kind adverted to by Lord Justice Parker is in a far better position than this Court to judge whether or not

the words used in the agreement, the third party undertook to be bound by judgments given or awards made against the defendants. Accordingly, I shall stay these proceedings under s 1(1) of the Arbitration Act, 1975 and the application for summary judgment must fail.

DISPOSITION: Application dismissed

SOLICITORS: Bray Walker; Richards Butler.

SEND TO: DEJONGH, J.S. T.M.C. ASSER INSTITUUT ALEXANDERSTRAAT 20-22 DEN HAAG NEDERLAND 2514 JM NETHERLANDS .