Neutral Citation Number: [2012] EWHC 3019 (TCC)

Case No: HT-12-183

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/11/2012

Before:

MR JUSTICE EDWARDS-STUART

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Between:

TURVILLE HEATH INC	**Claimant**
- and -	
CHARTIS INSURANCE UK LIMITED	**Defendant**
(formerly AIG UK LIMITED)	

- -
- -

Mr Peter Fraser QC (instructed by **Russell-Cooke**) for the **Claimant**
Mr Adam Constable QC (instructed by **Kennedys**) for the **Defendant**

Hearing dates: 5 October 2012

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Judgment

Mr Justice Edwards-Stuart:

Introduction

1. This is an application by the Defendant ("Chartis"), an insurance company,

   (1) For a stay of these proceedings pursuant to section 9 of the Arbitration Act 1996 ("the Act"); alternatively

   (2) For a stay of the proceedings pursuant to the inherent jurisdiction of the court under section 49 of the Senior Courts Act 1981.

2. The Claimant, Turville Heath Inc ("Turville"), resists the application. Turville's claim against Chartis arises out of losses caused in a fire at a property owned or occupied by Turville. Chartis asserts that it has admitted liability under the policy, but the policy contains an arbitration clause which applies to any dispute about the amount to be paid under the policy and that the parties elected to have the dispute resolved in accordance with the clause.

3. In these circumstances Chartis submits that it is entitled to have the proceedings stayed as of right under section 9 of the Act. Alternatively, if the court is not persuaded that the clause is a valid arbitration clause, the court should stay the proceedings under its inherent jurisdiction so that the parties can continue to resolve their dispute by the process that they have chosen.

4. In this application Turville has been represented by Mr Peter Fraser QC, instructed by Russell-Cooke, and Chartis has been represented by Mr Adam Constable QC, instructed by Kennedys.

The clause

5. The clause, which appears in the Part IX of the policy, which is headed "General Conditions", is in the following terms:

> '2. Arbitration
>
> If **you** and **we** fail to agree on the amount of loss, either party may make a written demand that each selects an independent appraiser. In this event, the parties must notify each other of their selection within twenty (20) days. The independent appraiser will select an arbitrator within fifteen (15) days. If an arbitrator is not agreed upon within that time, either party may request that the arbitrator be selected by the Association of British Insurers or Financial Services Authority. The independent appraisers will then appraise the loss and submit any differences to the arbitrator. A decision in writing agreed to by the two appraisers or either appraiser and the arbitrator will be binding. Each appraiser will be paid by the party that has selected the appraiser. Expenses will be allocated at the discretion of the arbitrator."

6. It is not disputed that the clause is capable of being invoked where there is a dispute about the amount to be paid under the policy, liability being otherwise admitted. For the sake of convenience, in the rest of this judgment I shall refer to this clause as the "arbitration clause": however, this is not to be taken as any predetermination of whether or not the clause is in fact an arbitration clause within

the meaning of the Act. It is, I think, common ground that the label which the parties apply to the clause is not determinative of its true status or function, although Mr Constable submits that the language used by the parties is a very strong indicator of their intention.

7. Section 6 of the Act provides:

> "Definition of arbitration agreement.
>
> (1) In this Part an "arbitration agreement" means an agreement to submit to arbitration present or future disputes (whether they are contractual or not)…"

The issues

8. Turville resists the application on the following grounds:

   (1) The clause is not an arbitration clause within the meaning of the Act and so Chartis is not entitled to a stay under section 9.

   (2) The dispute is not limited to the amount of the loss and so the clause does not apply: there are other issues between the parties, such as title to sue, estoppel, breach of a collateral agreement and breaches of both express and implied terms of the policy.

   (3) In the light of the matters raised under (2) it would be inappropriate for the court to stay the proceedings under its inherent jurisdiction since it is more convenient to have all the matters in issue resolved by one tribunal, which can only be the court.

   (4) In any event, the dispute resolution machinery under the clause has broken down or is inoperable and so the procedure is no longer available.

The facts and the history of the dispute

9. The insured is described as "Kathleen DuRoss Ford, Trustee" and the first residence insured under the policy is named as "Turville Grange, Turville Heath". The property covered includes the house, other permanent structures and the contents. The sums insured for this property were in excess of US$17 million.

10. The following are described in the schedule as interested parties under the policy:

> "1/ Turville Heath Inc and Heath Cottages Inc
>
> 2/ Kathleen DuRoss Ford Revocable Inter Vivos Trust, Distinguished Investment Corp, Trustee; Kathleen DuRoss Ford, Trustee; Kathleen DuRoss Ford Individually; Ford Properties, Inc, UKAR, Inc, KDF Toys, Inc, Turville Grange, Inc."

11. Turville Grange, which is a listed Grade II property, has a swimming pool enclosed in a Pool House. The Pool House was destroyed in a fire on 3 July 2009. Turville is the freehold owner of the property, and it is now accepted by Chartis

(to the extent that it was ever disputed) that Turville is entitled to maintain the claim under the policy in respect of the losses caused by the fire.

12. However, an issue has arisen as to whether it was in fact necessary to demolish the whole of the Pool House structure and rebuild it. Chartis suggests that part of the substructure could have been retained and reused. The amount that is involved in this issue is about £200,000. The claim under the policy, as presently quantified, is well in excess of £2 million.

13. Mrs Kathleen DuRoss Ford is the widow of Mr Henry Ford II, and a member of the Ford Motor Company family dynasty. To the extent that it may be relevant, I infer that she is an insured who is not without substantial resources.

14. Following the fire, loss adjusters appointed by Chartis attended the scene in the usual way. The fire damage had also been inspected by a Mr Frank Chopin, a trustee of the family trust. It appears to have been agreed that what remained of the Pool House should be demolished in order to make the site safe. This intention was notified or confirmed to Chartis in an e-mail from Mr Chopin dated 6 August 2009. Chartis acknowledged this e-mail without expressing any disagreement to the course proposed.

15. On 5 October 2009 planning permission was granted for the remedial works, which involved some improvements from the original structure. These improvements were largely ones that Turville wished to carry out but also included some that were required by the local authority. A contract for the works was entered into on 5 April 2010 with a contract sum of about £2.8 million (excluding VAT). In the course of this period various professional advisers were retained by Turville. These included Gardiner & Theobald ("G&T") who was retained to provide project management, to act as the employer's agent and to provide quantity surveying services. In addition Turville retained M&E consultants, an interior designer, an electrical designer, engineers to test the soil and ground conditions and other specialist engineers.

16. In the meantime, in December 2009, G&T produced an estimate of the cost of the works in the sum of £2.4 million, with a 10% contingency for design and estimating services.

17. On 12 April 2010 a Notional Cost Plan was prepared by John Austin & Partners ("JAP") on behalf of Chartis. This showed a building cost of about £1.6 million. It had been prepared on the basis of a like for like replacement and thus stripped out elements of betterment that had been incorporated in the scheme that had received planning permission.

18. In either late 2009 or early 2010 (there are conflicting statements about the date in the papers) Chartis made an interim payment of £600,000, which was followed by a further payment in May 2010 to bring the amount paid up to the amount identified in the JAP notional cost plan. In September 2010 Chartis offered to pay Turville an additional £112,550 to cover demolition costs and planning fees and £75,000 in relation to the contents. That offer was not accepted.

19. On 8 March 2011 Russell-Cooke, then as now acting for Turville, sent a letter of claim to Chartis. The claim was for £2.8 million in respect of the rebuilding costs and £235,000 for the contents. The figure of £2.8 million was said to represent the cost of rebuilding to the original plans but using the rates adopted by the contractor who had carried out the actual rebuilding. The sum of £2.8 million was made up of building costs of £1.981 million, together with professional fees of about £400,000 (representing about 20% of the building costs). VAT added a further £417,000.

20. The JAP cost estimate had allowed 12½% for professional fees, so the figures being put forward by each party at that time (excluding VAT) can be compared as follows:

Item	JAP	G&T
Building costs	£1,194,080	£1,981,352
Professional fees	£149,260	£401,254
Totals:	£1,343,340	£2,382,576

So the parties were a little over £1 million apart.

21. On 6 April 2011 Kennedys, on behalf of Chartis, responded to Russell-Cooke's letter of 8 March 2011 and notified Turville that Chartis was invoking the procedure set out in the arbitration clause. By a letter in reply dated 14 April 2011 Russell-Cooke said: "*We of course have no objection to operating the procedure set out in the policy should that be necessary*". They went on to say that so far as they were aware there were no coverage issues under the policy and so it seemed that it would be appropriate to appoint a quantity surveyor as Turville's independent appraiser.

22. In their reply, dated 28 April 2011, Kennedys wrote:

> "As discussed, we understand that your client accepts that the insurance cover is on a *"like for like*" basis and that therefore your client is not entitled to additional costs arising out of improvements which were incorporated into the rebuild of the pool house, save for those necessitated by compliance with current public authority regulations as provided for under the Policy. As such there does not appear to be any dispute as to coverage, but simply as to the quantification of the amount your client is properly entitled to recover."

23. Each party then appointed its independent appraiser in accordance with the arbitration clause. Turville appointed a Mr Hackett and Chartis appointed a Mr Gordon, both of whom are quantity surveyors.

24. By a letter dated 13 May 2011 Russell-Cooke suggested that the appointment of the arbitrator should be delayed "*until the parties know the nature of any disagreement between the Independent Appraisers*". They went on to say that they had suggested this in part because until the parties knew the nature of any disagreement between the independent appraisers it would be less easy to identify the discipline of the arbitrator needed. Kennedys agreed to this suggestion, but on

condition that either party could give the other notice to reinstate the process, in which event the independent appraisers would have to appoint an arbitrator within 15 days. This appears to have been agreed.

25. On 29 July 2011 Kennedys wrote enclosing an updated cost assessment by JAP. The letter stated that having carried out further research, JAP had concluded that "*the vast majority of the substructures to include the swimming pool slab could and should have been salvaged in their entirety*". This resulted in £204,000 being removed from the cost plan in respect of this item. Overall, the July 2011 JAP cost plan represented a reduction of about £110,000 (including VAT) by reference to their previous plan.

26. On 10 August 2011 Russell-Cooke replied on this point as follows:

> "Whilst the majority of the comments you make in your letter are matters which will inevitably be dealt with by Mark Gordon and Mark Hackett, we do have some concern about the suggestion that the vast majority of the sub-structure to include the swimming pool slab could and should have been salvaged in its entirety. This seems to be based entirely upon the fact that JAP has been able to salvage a sub-structure at another site. No doubt you have advised your clients that evidence of this nature is unlikely to be persuasive. This is particularly so in circumstances where Cunningham Lindsay were instructed at the outset and could and should have explored this issue at the time when they were involved in discussing and agreeing the scope of work that was to be undertaken in order to reinstate the Pool House. If this point was to be made the time for it to have been made was at the time of the fire and prior to any work being undertaken. It is not appropriate for the point to be taken now by JAP who did not inspect the site at the time of the fire.
>
> As you are aware, Jeff Smith, the US Architect, was on site immediately following the fire in order to prepare the plans. If JAP persist in relation to the sub-structure point, we will incur the cost of obtaining evidence from Jeff Smith and will expect that to me met by your client in any event."

27. On 16 November 2011 Russell-Cooke wrote to Kennedys enclosing a further summary of the claim prepared by G&T. In relation to the building costs this showed a figure of £1,633,561, after deduction for betterment. To this was added a sum of £1,044,380 in respect of professional fees. Whilst the building costs had been reduced by about 40% to reflect betterment, the figure for professional fees had not been reduced at all. In the result, the amount of the claim was £2,677,942 (including VAT).

28. Thus the position at the end of 2011 was that the parties were (before VAT) about £300,000 apart on the building costs, of which some £200,000 represented the issue about the sub-structures. That item apart, therefore, the parties were reasonably close. However, there was an enormous difference between the parties in relation to the professional fees: about £850,000. At this stage the parties were still providing material to the respective independent appraisers and Kennedys were continuing to ask Russell-Cooke for numerous documents relating to the rebuilding costs. There was, in particular, a dispute about Chartis's entitlement to see a copy of G&T's fee arrangement with Turville.

29. On 7 February 2012 Russell-Cooke provided further cost information to Kennedys, including a revised summary from G&T in which the sum claimed for professional fees had been increased, by about £100,000, to £1,166,806.

30. In May 2012 Mr Gordon, the independent appraiser instructed on behalf of Chartis, produced a spreadsheet summarising the parties' positions on the claim. This showed that they were, according to Mr Constable, about £280,000 apart on the building costs, of which about £140,000 was in respect of the sub-structures issue (in this instance I have had to rely on the figures put forward by Mr Constable, which I did not understand Mr Fraser to challenge, because the figures in my copy of the relevant page of the spreadsheet are very difficult to read). The difference in the professional fees was now about £1 million. I think that Mr Constable's figures may have excluded a sum of about £140,000 claimed by Turville which are shown as a contingency for design, estimating and construction. If this is the case, then the parties were a little over £400,000 apart in relation to the building costs.

31. In the meantime, on 27 April 2012, Russell-Cooke wrote to Kennedys expressing their client's frustration with the progress of the claim. They described the ongoing delays as "*simply unacceptable*". The letter continued:

> "The key issue appears to relate to the substructure. The suggestion that the substructure could have been salvaged and reused following the fire, only requiring a lid on the top of the pre-existing burnt out substructure, is ludicrous and appears to be based on no credible evidence at all. We have already reserved our client's position on costs in relation to this argument. However, it is nonetheless a significant liability issue to which a substantial proportion of the loss will attach and must therefore be treated seriously.
>
> Raising issues such as liability in relation to the substructure have only enhanced the perception that the insurers are for some reason set on delaying this matter. Indeed the failure to progress the appraisal process since July 2011 adds weight to our client's concern (first raised with you in July 2011) that there has been a serious lack of bona fides on the part of the insurers.
>
> The appraisal process under the terms of the Policy is intended to determine loss only. Any issues of liability will therefore have to be determined through the Courts in the usual way. We are instructed to now pursue Court proceedings dealing with all aspects of the claim.
>
> We are instructed to delay that process until the end of 4 May to see if the meeting fixed for that day can make substantial progress. Our client will review the position after that meeting."

The spreadsheet produced by Mr Gordon, to which I have referred above, was one that was produced at the meeting that took place on 4 May 2012.

32. One 25 May 2012 Kennedys wrote a long letter in reply to Russell-Cooke's letter of 27 April 2012 suggesting that if there had been delays in the appraisal process, they were the responsibility of Turville. It refuted the suggestion that there was any dispute about liability: they said that the dispute only concerned how much should be paid.

33. On 15 June 2012 Russell-Cooke wrote to inform Kennedys that the engagement of Mr Hackett had been terminated and, since the dispute now concerned issues of both liability and quantum and that no progress had been made in resolving the dispute since May 2010, their client had issued court proceedings.

What the dispute is about

34. At the outset of his submissions Mr Constable conceded that there was no issue about title to sue and that, so far as Chartis was concerned, any payments to Turville would be a good discharge under the policy. In fact the latter undertaking is one that is usually given by an insured if there is any doubt about the matter. However, I am quite satisfied - from the position taken by each of the parties - that there is and can be no issue about Turville's title to sue under the policy. If it ever was a live issue, which I doubt, it is not now.

35. The other matters raised by Turville as being ones that raise issues of liability, rather than amount, are the following: that the claim includes damages for breach of contract, declarations about the meaning of the policy, estoppel, breach of a collateral agreement, breach of both express and implied terms and refusal to indemnify by Chartis. I shall take these in turn.

36. The fact that the claim is one for damages for breach of contract is a point that in my view goes nowhere. It is settled that in English law a claim under a contract of insurance is a claim for unliquidated damages: see the cases cited at footnote 35 to paragraph 28-012 of *MacGillivray on Insurance Law*, 11th Edn. However, as the same footnote points out, this does not mean that an insured can recover damages at large for an insurer's failure to pay: see *The "Italia Express"* [1992] 2 Lloyd's Rep 281; *Sprung v Royal Insurance (UK) Ltd* [1999] Lloyd's Rep IR 111. Accordingly, the fact that there is a pleaded claim for damages provides no pointer as to the true nature and scope of the claim in any particular case.

37. Declarations about the meaning of the policy: the declarations sought are to the effect that Chartis is obliged to indemnify Turville in respect of the loss suffered in the fire, that the starting point for the measure of indemnity is actual reconstruction cost incurred by Turville, and that Chartis is estopped from alleging that the substructure should not have been demolished or that Turville is not entitled to recover the full cost of demolition and rebuilding of the substructure. As to the first of these, there is no dispute that Turville is entitled to an indemnity. As to the second, this goes purely to amount. I will consider the estoppel point separately.

38. Estoppel: what is alleged by Turville is that immediately after the fire the damage was inspected by loss adjusters acting for Chartis who agreed that the most appropriate course of action was to proceed with the complete demolition of what remained of the Pool House. It is alleged also that it was agreed at about the same time that the most appropriate way of assessing the claim was to start with the contract sum for the reconstruction works and to remove any additions or enhancements, so as to ensure - amongst other things - that the claim under the policy was based on a price for which a contractor was actually willing to perform the works. All this may or may not be so (I express no view either way), but it concerns the amount of the loss, not whether Chartis is or is not liable in principle

to pay for the cost of rebuilding the Pool House. This is in truth a dispute about the correct measure of indemnity, not about whether or not the policy responds to the claim or whether or not a particular head of loss is excluded. The point at issue is the extent to which what was left of the existing structure had to be demolished. This goes only to the amount of the loss.

39. Breach of a collateral agreement: this is simply the estoppel point dressed up in new clothes. For the same reasons, I consider that it goes purely to the amount of the loss, and not to any issue about the scope of the cover.

40. Breach of express or implied terms: the first five particulars of breach set out in paragraph 37 of the Particulars of Claim amount to no more than various ways of saying that Chartis has failed to indemnify Turville in accordance with the provisions of the policy. The sixth ground is that Chartis has "*contrary to its previous conduct, refused to admit liability for the Pool House claim and for the replacement and rebuilding of the Pool House in accordance with Building Regulations and all statutory requirements*". In my judgment, this allegation mis-characterises the nature of the dispute. Chartis has admitted liability for the claim; what it has not admitted is that the measure of indemnity is to be calculated in the manner contended for by Turville. This is a dispute about amount, not about liability under the policy. The seventh ground is the collateral agreement point, with which I have already dealt above.

41. Paragraph 39 of the Particulars of Claim sets out a number of allegations of breach of the duty by Chartis to conduct itself with the utmost good faith towards Turville. In my judgment, these amount to nothing more than the previous allegations recast as breaches of the duty of utmost good faith. They are, once again, allegations - put in slightly different ways - to the effect that Chartis has not adopted a proper approach to the assessment of the measure of indemnity under the policy.

42. As I have already noted, English law does not give an insured a separate and discrete entitlement to damages for an insurer's failure to pay, or to pay the correct amount, under a policy. To the extent that there is any remedy in respect of this, it lies in the court's discretionary powers in relation to the award of interest and costs.

43. For all these reasons, therefore, I reject the submission that this claim involves anything more than a dispute about the amount of the loss. It therefore falls within the terms of the arbitration clause.

Is the arbitration clause a true arbitration clause within the meaning of the Act?

44. Mr Fraser submits that the process envisaged by the clause is one of expert determination, not arbitration. Further, it is only an optional process. Finally, the "arbitrator" is not empowered to make a determination of his own: it must be agreed with one or other of the independent assessors.

45. To some extent, the first point raised by Mr Fraser begs the question because it involves examining the true role of the "arbitrator" which is really part and parcel of the third point. I will therefore take the "optional process" point first.

46. In my view, there is nothing in this point. To the extent that it ever was an arguable point, it ceased to be so following the decision of Mr Justice Bingham (as he then was) in *The "Messiniaki Bergen*" [1983] 1 Lloyd's Rep 424. In that case the clause was in the following terms:

> "(b) Any dispute arising under this charter shall be decided by the English Courts to whose jurisdiction the parties agree . . . Provided that either party may elect to have the dispute referred to the arbitration of a single arbitrator in London in accordance with the provisions of the Arbitration Act, 1950 . . ."

47. The judge held as follows, at page 426:

> "The proviso is not an agreement to agree because upon a valid election to arbitrate (and assuming the clause to be otherwise effective) no further agreement is needed or contemplated. It is, no doubt, true that by this clause the parties do not bind themselves to refer future disputes for determination by an arbitrator and in no other way. Instead, the clause confers an option, which may but need not be exercised. I see force in the contention that until an election is made there is no agreement to arbitrate, but once the election is duly made (and the option exercised), I share the opinion of the High Court of Delhi in the *Bharat* case that a binding arbitration agreement comes into existence. Where the option agreement and the exercise of the option are both, as here, expressed in writing, the statutory requirement of a written agreement is in my view satisfied."

48. In my view, those conclusions dispose of the submissions made by Mr Fraser on this point: the clause was in writing and the option to invoke the machinery was also exercised in writing (as I have already mentioned).

49. However, the third point raised by Mr Fraser is much more formidable. Neither party contends that the independent appraisers were to act as arbitrators. It is clear to my mind that they were to act as experts.[1] It was the differences raised by their respective appraisals that were to be submitted to the "arbitrator". The real question is: what was the true role of the "arbitrator"?

50. I consider, for the reasons given by Mr Constable, that the clause does not cease to be an arbitration clause simply because it provides that a decision in writing agreed by the two appraisers will be binding on the parties. That, as Mr Constable submitted, means no more than that if the appraisers are agreed as to the amount of the loss, there is no dispute to put before an arbitrator. Or, putting it another way, he submitted that there is nothing objectionable in the parties being able to withdraw their dispute from the arbitral process at any time. In almost any dispute resolution process it is open to parties to resolve their dispute by agreement and terminate the process.

51. In addition, I consider that there is also nothing particularly unusual about the two experts putting forward their respective views to the "arbitrator", which is what the clause appears to contemplate - although I do not think that it precludes the "arbitrator" from inviting evidence or submissions from the parties direct were he to consider that fairness requires it. To some extent, the mechanism anticipated

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[1] This is because they were under no duty to hear submissions from both parties: their role was to assess the loss on the basis of the material provided by the party in instructing them.

by this clause echoes the procedure that was (and I think still is) sometimes adopted in maritime or trade arbitrations, in which the tribunal consisted of two party appointed arbitrators and an umpire (sometimes appointed later), and by which, if the two arbitrators failed to agree, the umpire entered into the reference - becoming the sole decision maker - and the two former arbitrators became, in effect, advocates for the parties which had appointed them (see, for example, *The "Myron"* [1969] 1 Lloyd's Rep 411, at 415).

52. The real difficulty in my view lies in the fact that the clause provides that what will be binding is "*a decision in writing agreed to by the two appraisers or* ***either appraiser and the arbitrator***". I have already dealt with the first limb: it is the second limb that presents the problem.

53. It is quite clear that an arbitrator must act fairly and impartially: section 33 of the Act says so expressly. Section 1 of the Act provides that the object of arbitration is to obtain the fair resolution of disputes "by an impartial tribunal". Implicit in this is that it is the arbitrator alone who is to make the decision and not the arbitrator in conjunction with someone else (which is not to be confused with the tribunal's right to seek advice from experts or legal advisers, or to appoint assessors to assist it on technical matters, under section 37 of the Act).

54. Whilst of course it is possible that the "arbitrator" will accept the views and submissions of one party's independent appraiser to the complete exclusion of the other, that is far from inevitable. Indeed, it is more likely to be the exception. The process envisaged by this clause appears to contemplate that the "arbitrator", having considered the representations made by the two independent appraisers, will reach his or her own conclusions and will then notify the two appraisers of his conclusions or set them out in a draft decision. If either of the two appraisers is prepared to agree, all well and good. However, it must be at least possible that neither appraiser is prepared to agree to the provisional conclusions as they stand and that one or both of them may then indicate to the "arbitrator" that, if the provisional conclusions were modified in some particular respect or respects, he or she could then agree to them.

55. Mr Constable had two responses to this. First, that there would be no reason why the "arbitrator" could not still make a decision of his/her own on some issues to which one or other independent appraiser would be prepared to agree. Second, that there was no reason why the court should not treat the independent appraisers as arbitrators at this stage so that there would be a decision by a majority of a panel of arbitrators.

56. The first point seems to me to be hopeless. If the "arbitrator" cannot make a decision without having to secure or negotiate the agreement to it by another person, then it seems to me that it cannot be regarded as the decision of the "arbitrator" alone. I think it is implicit in Mr Constable's submission that he accepts this, which is why he submits that it will still be open to the "arbitrator" to make a sole decision on some points. But that, in my judgment, is not good enough: a sole arbitrator must be able and competent to make his own independent decision on all the matters put before him.

57. However, the second point is rather more subtle. If, by analogy with former maritime arbitrations, arbitrators (properly so called and acting as such) could become arbitrator advocates in the course of the reference, why can party appointed experts/advocates under this clause not become arbitrators when the situation so requires?

58. In my view, there are two answers to this. The first is a short one, namely that the clause does not provide for this to happen and there is no reliance on any custom and practice in the insurance industry that would impose or justify such a procedure. The second is, perhaps, more fundamental. By the time the appraisers have identified the differences between them that are to be submitted to the arbitrator, they will have already reached their own conclusions on the value of the claim. How then, can either or both of them now turn round and purport to act as an independent arbitrator? It is one thing for the arbitrator/expert to become an advocate; it is quite another for the expert/advocate to become an arbitrator (in the same case).

59. The final question is what is the effect of a decision of the "arbitrator" with which neither of the independent appraisers is prepared to agree? In my view, the answer is that it has no effect. It does not bind the parties and so it can have no effect in law. The parties would then have no alternative but to have recourse to litigation. As Longmore LJ observed in *David Wilson Homes Ltd v Survey Services Ltd* [2001] BLR 267, at 269:

> "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."

Since the operation of the arbitration clause in this case will not necessarily produce a decision that is binding on the parties, that is a strong pointer to the clause not being an arbitration agreement within the meaning of the Act.

60. For these reasons I conclude that this clause is not an arbitration clause within the meaning of the Act. Accordingly the application for a stay under section 9 of the Act fails. I now turn to the question of whether or not there should be a stay under the inherent jurisdiction of the court.

Should there be a stay of the proceedings under the inherent jurisdiction?

61. In this context I was referred to *El Nasharty v J Sainsbury plc* [2004] 1 Lloyd's Rep 309, a decision of Mr Julian Flaux QC, sitting as a deputy judge of the High Court, in which he noted that the Court has wide case management powers and a wide discretion as to whether or not to grant a stay in circumstances such as this. I need not set out the facts of that case which are not relevant to this dispute.

62. The first point that I propose to consider under this heading is whether, as Turville submits, the procedure under the arbitration clause has broken down and become

inoperable or incapable of being performed. Turville relies on the delay since the parties notified each other of the appointment of the independent appraisers on 6 May 2011, the fact that they have incurred fees in excess of £100,000 in respect of the services of the independent appraisers and the fact that during the process the difference between the parties on quantum has not diminished but has substantially increased.

63. In my judgment, Turville's case on this point is virtually unarguable. As I pointed out in *R&C Electrical Engineers v Shaylor Construction* [2012] EWHC 1254 (TCC), there is a difference between circumstances which prevent the contractual machinery being operated, and circumstances in which one party refuses to operate it although in a position to do so - because in the latter situation the problem is capable of being cured. In this case, Turville has unilaterally dispensed with the services of its appraiser and started these proceedings. It is not suggested that Turville cannot now reappoint Mr Hackett.

64. I do not consider that Turville has begun to show that the machinery of the arbitration clause has broken down or is incapable of being operated. I do not doubt that Turville has found it frustrating and more protracted than it had expected, but that is a different matter. I see no reason why the process should not continue: the independent appraisers must now be in a position to appoint an arbitrator who should be able to deal with the matter fairly swiftly. The question is whether I should exercise my discretion to stay these proceedings in order to enable that to happen. To that question I now turn.

65. Mr Constable relied on the decision of the House of Lords in *Channel Tunnel Group Limited v Balfour Beatty Construction Ltd* [1993] AC 334, in which Lord Mustill, when referring to the inherent jurisdiction of the court to stay an action said this:

> "I also have no doubt that this power should be exercised here. This is not the case of a jurisdiction clause, purporting to exclude an ordinary citizen from his access to a court and featuring inconspicuously in a standard printed form of contract. The parties here were large commercial enterprises, negotiating at arms length in the light of a long experience of construction contracts, of the types of disputes which typically arise under them, and of the various means which can be adopted to resolve such disputes. It is plain that clause 67 was carefully drafted, and equally plain that all concerned must have recognised the potential weaknesses of the two-stage procedure and concluded that despite them there was a balance of practical advantage over the alternative of proceedings before the national courts of England and France. Having made this choice I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go. The fact that the appellants now find their chosen method to slow to suit their purpose, is to my way of thinking quite beside the point."

66. Mr Fraser invited me to draw the opposite conclusion to that suggested by this passage, noting the reference by Lord Mustill to clauses that feature inconspicuously in a standard printed form of contract. He pointed out, quite

correctly, that this was such a clause and that there was no evidence that his clients had given it any thought before entering into the contract. However, as Mr Constable has pointed out, Turville did not protest when Kennedys gave notice of their client's intention to invoke the process but, rather, seemed to welcome it ("*We of course have no objection to operating the procedure . . .*").

67. Mr Fraser reminded me that the court should not lightly preclude a party from having access to the courts, particularly where the stay could only encompass matters of quantum and not issues of liability. However, since I have held that all the matters raised in this dispute fall within the scope of the clause, the points made by Mr Fraser against a stay lose some of their force. Nevertheless, I consider that he is right to submit that the right of the party to come to court should only be ousted in clear circumstances.

68. However, that said, it is for the party resisting the stay to demonstrate why the stay should not be granted: see *DGT Steel & Cladding v Cubitt Building & Interiors* [2007] BLR 371. It seems to me that the factors relevant to my decision here include the following:

(1) The clause was not the subject (so far as I am aware) of any discussion between the parties prior to entering into the contract of insurance.

(2) The clause is in a printed clause in a standard form of policy.

(3) Turville freely participated in the process when it was first invoked.

(4) It is now more than three years after the fire and the 18 months since the parties invoked the process.

(5) Whilst the parties still remain far apart, it is clear that a substantial amount of work has been done by each of the independent appraisers (whose combined fees now total about £100,000).

(6) The independent appraisers are now in a position, or at least must be very close to it, to identify the differences between them that can be submitted to the "arbitrator".

(7) Whilst it is possible that the "arbitrator" might reach a decision to which neither of the appraisers is prepared to agree, I see no reason why the "arbitrator" and at least one of the appraisers should not be able to reach agreement - albeit after negotiation of a type that would not be possible in an arbitration - as to the amount to be paid in respect of the claim. At any rate, I consider it more likely than not that this will happen.

(8) Whilst the parties are apart by an amount which is in excess of £1 million, by far the largest item in dispute is Turville's professional fees and the one that has increased most significantly during the process.

(9) Whilst to some extent the delays to date may have been contributed to by the conduct of Chartis, I do not consider that the overall delay has been by any means one sided: both parties have contributed to it.

(10) The fact that the "arbitrator" appointed has the power to make an award in relation to expenses (which is not one with which one or other of the two independent appraisers have to agree).

(11) Whether continuing with the arbitration clause process is likely to be any slower, and therefore less economical, than fresh proceedings in court.

69. Mr Fraser has also submitted that if the court were to find that the clause was not an arbitration clause within the meaning of the Act, then the appointing body under the arbitration clause could not be asked to appoint an "arbitrator" because the court would have found that the person appointed would not be an arbitrator. I see no reason why, if the independent appraisers are unable to agree on a person, the appointing body cannot appoint a suitable person to act as the "arbitrator" as defined in the clause. The function of the person appointed will be similar to that of an arbitrator, but he or she will not have the ability to make a decision without securing the agreement of one of the two appraisers. I cannot see why the person to be appointed should have any different attributes than would be required if the clause was an arbitration clause within the meaning of the Act. Accordingly, I reject this submission.

70. Taking into account all the matters that I have set out above, I consider that the strongest factors are that the parties entered into the arbitration clause process without protest and have invested considerable sums in that process. On the conclusions that I have reached there is no question of any parallel proceedings in court concerning issues of liability and so the "arbitrator" can deal with all the matters in dispute. Since issues such as estoppel have been raised, it may perhaps assist if that person is legally qualified or has some experience of litigation, but that is not a matter for me.

71. It seems to me that given the amounts that have been spent on the services of the independent appraisers (about £40,000 in the case of Mr Gordon who has been instructed by Chartis, and about £60,000 in the case of Mr Hackett), the fairest and most appropriate course would be for the process to continue. In my judgment it would be unfair on Chartis to pull the plug at this stage for no reason other than the fact that Turville has become frustrated by the delays. Whatever the responsibility for the delays to date, I consider that the most important factor now is whether one or other route is likely to produce a speedier and more economic solution.[2] I am far from satisfied that there will be any speedier resolution of the dispute if it is continued by way of litigation in this court rather than by the process under the arbitration clause.

72. For all these reasons, I consider that broad case management considerations point in favour of allowing the arbitration clause process to continue, rather than abandoning that process in favour of proceedings in this court. That is also, in my view, the fairest course in the circumstances. I therefore grant a stay of these proceedings under the inherent jurisdiction of the court.

73. I will hear the parties on any questions arising out of the form of relief or costs, if these cannot be agreed.

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[2] See *Ahmad Al-Naimi v Islamic Press Agency* [2000] 1 Lloyd's Rep 522, per Waller LJ at 526.

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