OPINION OF LORD HAMILTON : OUTER HOUSE, COURT OF SESSION : 15th May 2001.

[1] By Partnership Agreement dated 6 May 1993 the pursuer and the four defenders contracted on the terms set out therein to carry on business together as partners in the business of solicitors. The pursuer retired from the partnership on 30 April 1995. The parties are in dispute as to the measure of the pursuer's financial entitlement against his former partners on such retiral. The pursuer has raised the present action in which he seeks payment jointly and severally from the defenders of a certain sum; he separately seeks an accounting of their intromissions with the partnership funds. In their defences the defenders, who are jointly represented, have tabled a plea that the action be sisted pending arbitration on the subject matter of the action. Mr Kennedy on their behalf moved that that plea be sustained.

[2] The defenders rely on Clause 17 of the Partnership Agreement. Insofar as material, it is in the following terms: *"If any dispute, difference or question shall arise out of these presents or as to the meaning, intent or construction hereof (or in respect of the accounts of the partnership, the retiral of any partner from the partnership, dissolution of the partnership, or any valuation herein provided for, or otherwise in relation to the partnership), whether arising during the existence of the partnership or after its termination, the same shall be referred to an Arbiter to be chosen by both the partners or, failing agreement, to be nominated by the Dean of the Faculty of Arbiters on the application of any party, and his decree arbital (sic), interim or final, shall be final and binding..."*.

[3] Mr Primrose for the pursuer opposed the defenders' motion. He submitted that Clause 17 was void from uncertainty. The expression "***chosen by both the partners***" was meaningless in the context of there being five partners. It was wholly uncertain who, in the dispute which had arisen, were "*both the partners" by whom the choice of arbiter was to be made. Nor was there any effective mechanism for nomination of an arbiter by a third party. There was no such body as "**the Faculty of Arbiters**" (nor any office of Dean of such a body). A number of arbitration institutions existed in Scotland but none answered that description. Nor, however far the court might be disposed to lean in favour of giving effect to an arbitration clause, could what had been provided be rewritten as "**Dean of the Faculty of Advocates**"*. Reference was made to ***Astro Vencedor SA* v *Mabanaft GmbH*** [1971] 2 All. E.R. 1301, particularly per Mocatta J. at p.1306f-g and to *Davidson on Arbitration* at para.7.05. Professor Davidson's views on the decision in ***Wylie Hill & Co* v *Profits and Income Insurance Co Ltd*** (1904) 12 S.L.T. 407 were well-founded. The Arbitration (Scotland) Act 1894 did not assist. For section 2 of that Act to be available there must first be a valid agreement to refer to a single arbiter and then either no provision for carrying out the reference in the event of refusal by a party to concur in the nomination or failure of any such provision. If there was no valid agreement to refer, the court had no power to nominate an arbiter. Reference was made to the *Stair Encyclopaedia of the Laws of Scotland* Vol.2 para.427.

[4] Mr Kennedy submitted that, if the court held the arbitration clause to be valid, the appropriate course was to grant the motion to sist, allowing parties then to consider whether they could agree upon the nomination of a particular arbiter; if not, any party could return either in this action or in a separate process for appointment of an arbiter by the court. Clause 17 clearly indicated an intention by the parties that any dispute among them in relation to the partnership be resolved by arbitration. The court should lean towards giving effect to that intention. It was also clear that it was intended that in the first instance the choice of arbiter be made by partners of the firm. "Both the partners" should in this context be construed either as "all the partners" or alternatively as "both the parties" (to the relevant dispute). Clause 16 (which provided that the singular should include the plural) might assist in construing "both" as "all". In the present case the alternative construction would involved "both" comprising (1) the pursuer and (2) the defenders as a single body. A partnership was a relationship of good faith and the exercise of choosing an arbiter would require to be undertaken by all interested parties on that basis. In relation to the default provision, it was accepted that there was no such body as the Faculty of Arbiters. If it was necessary to rely on that provision, then the court should recognise that there had been a patent error in expression and that what had been intended was "the Dean of the Faculty of Advocates". In any event, if there was a failure to agree on the choice of arbiter and the default provision was ineffectual, the power vested in the court by section 2 of the 1894 Act was available to secure the appointment of an arbiter. The Act had been passed against difficulties occasioned by the common law and was intended to facilitate the operation of arbitration clauses (see

section 1). Section 2 could be invoked where (1) one of the parties to an agreement to refer to a single arbiter refused to concur in the nomination and (2) either no provision had been made against that event or such provision had failed. Section 2 applied not only where there had been a subsequent failure of a default provision, but also where the default provision had from the outset been ineffectual.

[5] The Arbitration (Scotland) Act 1894 section 2, insofar as material, provides: *"Should one of the parties to an agreement to refer to a single arbiter refuse to concur in the nomination of such arbiter, and should no provision have been made for carrying out the reference in that event, or should such provision have failed, an arbiter may be appointed by the court, on the application of any party to the agreement...."*.

[6] As regards the default provision in Clause 17, that in my view is ineffectual as being void from uncertainty. It cannot be said that "the Faculty of Arbiters" is an obvious mistake for "the Faculty of Advocates". While the Dean of the latter body, as the holder of an office well suited to nominate an arbiter, is not uncommonly selected for such a purpose, there were by 1993 at least two institutions in Scotland (the Scottish Branch of the Chartered Institute of Arbitrators and the Scottish Council for International Arbitration) specifically concerned with arbitration, including the nomination at the request of parties of an arbiter to resolve disputes. While the latter is an unlikely candidate in respect of a wholly domestic dispute, the possibility that the former was in the minds of the parties to the Partnership Agreement cannot, in my view, be excluded. In these circumstances there is a real uncertainty, irresolvable on the face of the deed, as to the holder of what office was intended, failing agreement under the earlier part of the clause, to be the nominator of an arbiter.

[7] That earlier part also gives rise, in my view, to insuperable difficulties. Clause 17 in certain places clearly acknowledges (as does the rest of the deed) that the number of partners is more than two. The use of *"any"* rather than *"either"* in the phrases "*the retiral of any partner"* and *"the application of any party*" points to a larger number. But the critical phrase *"chosen by both the partners"* leaves wholly uncertain who in a five partner firm are to exercise the choice. A dispute within such a firm might readily be more than bipartite (as the phrase "on the application of any party" recognises) and even if, as appears to be the situation in the present case, the dispute is essentially between one partner and the rest, it is wholly uncertain how the choice on the multi-party side is to be made - whether, for example, a majority rather than a unanimous decision among the four defenders would suffice for that choice. For the purposes of construction it is irrelevant that, if put to the test, there might in fact be a consensus among the four defenders. While a provision that the choice be made by all the partners would in the present context have been both intelligible and valid, Clause 16 is not apt to allow "both" in Clause 17 to be read as "all". There is such uncertainty, in my view, as to whether or not "all" was intended that I feel bound to hold that this part of the clause is also ineffectual.

[8] The result, in my opinion, is that Clause 17 as a whole is void from uncertainty. In the present circumstances section 2 of the 1894 Act cannot cure that difficulty. It is clear, in my view, that when a purported default provision is ineffectual (whether from the outset or by subsequent failure) section 2 may, if the first part of that section is satisfied, empower the court to make a nomination. The section envisages that it may operate where no provision has been made at all for the carrying out of the reference in the event of a refusal of a party to concur in a nomination. Even if "should such a provision fail" imports failure due to events after the deed was executed, "no provision" would, in my view, include ineffectual provision as well as the total absence of any provision. Likewise, while in some contexts a mere agreement to agree without effective provision for determination by a third party in the event of failure to agree may render a provision null, section 2 and section 3 (which deals with references to two arbiters) each envisages that the court may exercise its power of appointment where there has been a refusal to concur (and there is no effectual default provision). It may also be that a mere reference to arbitration by a single arbiter would without more be valid and allow the operation of section 2 (see *McMillan & Son Ltd* v *Rowan & Co* (1905) 5 F. 317), though the learned author of the article on arbitration in the *Stair Encyclopaedia* (Vol.2 para.427) expresses some doubts as to enforceability in such a situation. However, the earlier part of section 2 proceeds on the hypothesis that there is an agreement to refer (to a single arbiter), which agreement is not capable of being carried

through by reason of one of the parties to it refusing to concur in the nomination of such arbiter. It does not empower the court to appoint an arbiter when there has been no agreement at all to refer to such arbiter. Nor, in my view, does it empower the court to make an appointment where a purported agreement does not expressly or by necessary implication identify who are the persons to make the nomination.

[9] Accordingly, the parties to this case have in their Partnership Agreement failed, in my view, to make a provision which, with the invocation of the Act or otherwise, binds them to resolve their disputes by arbitration. I shall accordingly repel the defenders' second plea-in-law and refuse their motion to sist for arbitration. I shall, for the avoidance of doubt, also repel their first plea-in-law which, although not argued, seeks a disposal also based on the proposition that the jurisdiction of this court is excluded by reason of a valid provision for arbitration. The case will now be put out for discussion of further procedure.

Pursuer: Primrise; Shepherd & Wedderburn, W.S.
Defenders: Kennedy, Solicitor Advocate; Balfour & Manson