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WHY ARBITRATE?

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ABSTRACT

The lecture considers the subject of arbitration as a means of determining otherwise irreconcilable disputes. Although arbitration may be required over a wide range of subjects, the lecturer's considerable experience has been in the area of construction. He outlines how arbitration was carried out in the 1950s and the relationship between arbitrators and arbitrations and the courts. Since that time there have been radical changes to improve the system, and these are described, particularly the various Acts of Parliament relevant to the subject. The lecturer concludes that currently construction arbitration is in good heart, but that too much paper is still being generated.

KEYWORDS

The Law; Arbitration; The Courts

My title is calculated to intrigue rather than to enlighten. Let me now say that my intention is to look practically, and in the light of my experience at the claims upon contestants, in the circumstances of today, of arbitration as a satisfactory means of determining otherwise irreconcilable disputes. I shall adopt this prosaic approach to the subject partly, at least, because it seems to me to be appropriate, from the historical point of view, to do so. The giving of readings was a central constituent in the educational system of the Inns of Court, perfected in the 16th century and the earlier part of the 17th century. In Gray's Inn the Readers were appointed from the Grand Company of Ancients, who were utter (or more senior) barristers, whose maturity in practice within their senior status is indicated by the presence of the word 'Ancients' in their title. The Reader took a topical statutory provision as his theme. He identified the mischief which it was calculated to address, examined its effect, and considered — as a contemporary text records — "certain doubts and questions which he hath devised, that may grow upon

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the statute.'' His hearers then, in disputation, attempted to knock him off his perch, and, no doubt, from time to time succeeded; the whole exercise took two hours or thereabouts. The approach was, therefore, entirely practical and pragmatic. The readings in the Inns of Chancery appurtenant to Gray's Inn — Barnard's Inn and this Inn — were given by utter barristers of Gray's Inn and followed the form of the Gray's Inn Readings.

The Civil War disrupted the educational system of the Inns of Court, and in 1675 Gray's Inn sent its last readers to Barnard's Inn and Staple Inn, until, through the admirable enthusiasm of Master Sparrow and with the warm support of Gresham College at Barnard's Inn and of the Institute of Actuaries here, the Readings were revived. Gray's Inn welcomes your support, and thanks you for your hospitality.

A hiccup of 320 years is no reason for departing from the traditional model, although I do not entirely regret that the part of the model which required the Reader to assume the rôle of an 'Aunt Sally' for what must have been upwards of an hour on the occasion of each reading has not — so far at any rate — been reproduced.

I have indicated that I intend to address my subject from the point of view of my own experience. I should, therefore, indicate what that experience has been. I was called to the Bar and commenced practice in 1957. I retired from forensic practice at the Bar after 40 years in 1997, but continue to sit from time to time as an arbitrator and to function as an adjudicator or other such resolver of disputes. Between 1957 and the present, I have been concerned as advocate and arbitrator with the resolution of construction disputes. Much of my work as an advocate was done in arbitration.

Arbitration is, however, a protean creature, extending from the decision of disputes as to the quality of commodities on the basis of sight and smell on the one hand to the resolution of complex issues by means, at least superficially, very similar to proceedings in court on the other. I ought, therefore, to say a word to justify my experience of arbitration as being sufficiently broadly based to be significant. It has undoubtedly been at the leaden end of the market; although the sums at stake have, from time to time, been enough to make a simple soul like me sit up; the way to truth has been anything but a broad highway, the issues have been complex and the facts often obscure. Mounds of closely printed paper have lain in the way of the pursuit of the golden thread of relevance. If I thought that these difficulties were limited to my own area of experience, I should feel uneasy in standing and uttering before you here. However, discussion with my fellows — and, indeed, what I hope is rational inference (as well as some scattered personal knowledge) — tell me that many of the obstacles which have to be surmounted in pursuit of the true outcome in substantial construction disputes are of essentially similar nature to those of the obstacles which arise in course of the resolution of commercial disputes of

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all types — ship or aircraft construction, chemical engineering, IT projects and, indeed, trading, insurance and banking transactions generally. I therefore take heart of grace.

Throughout the period of my personal experience — and indeed for a good deal longer — the clearest, simplest and most compelling reason for the recourse of the parties to construction disputes to arbitration has been that the standard — and indeed tailor-made — forms of construction contracts under or out of which dispute has arisen have almost universally contained arbitration clauses, from compliance with the terms of which it has not been possible for the parties to depart otherwise than by common consent. While construction contractors are always contracting, their employers are ordinarily going through a once or twice in a lifetime experience — some of them would not wish for more. The overall extent of the willingness to submit to arbitration is, therefore, less cogent evidence of satisfaction with arbitration as a means of determining disputes on the employer's side than on that of the contractor. Nonetheless, it must, as it seems to me, be accepted that, for the last half century and more, the way in which parties to construction contracts have contracted has shown at least a general acceptance of arbitration as the preferred method of determining otherwise irreconcilable disputes. Why, against a background of changing circumstances, this should have been and is so is — apart from being my theme — a not uninteresting study of the relationship between the desirable and the available.

I shall begin at the beginning of the period of my experience and then swoop forward — time permits of nothing else — to the present.

The magnetic characteristics of arbitration have traditionally been reckoned to be privacy and confidentiality, speed, cheapness and finality and freedom to select the arbitral tribunal. In the middle of the last century, the extent to which these characteristics were, in fact, achieved in construction arbitrations — and indeed, I believe, in other arbitrations of broadly similar character — was limited.

There has been some recent debate as to the extent of the entitlement to privacy and confidentiality in arbitration, but it continues to be regarded as an attractive feature. Half a century ago, it was, without question, recognised as a legal characteristic which constituted an asset of arbitration. Speed, cheapness and finality are inextricably connected, and I will return to them in a moment.

Freedom to select the arbitral tribunal was undoubtedly seen in the 1950s by contractors and generally by their employers as an advantage of arbitration. There were principally two aspects to the choice. Firstly, should the qualifications of the tribunal be legal or, relevantly to the subject matter of the dispute, technical? Secondly, who, once the appropriate qualifications had been selected, should actually be appointed? The freedom was not untrammelled, since the choice had, by one means or another, to represent an

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agreed choice between the parties. Perhaps agreement on the name of an arbitrator at or about the time of the making of the agreement to submit future disputes to arbitration represented the nearest that it was possible to come to the making of a free choice. It was a choice which, however, had the disadvantage, if the aim were to have an arbitrator of relevant technical qualification, that it was made before the dispute or disputes to be decided had arisen, and so before the relevant technical qualifications could be accurately determined. The appointment by each of the protagonists of its own arbitrator to be joined by an umpire or third arbitrator selected by the arbitrators already appointed or by other agreed external means at least secured that each of the contenders had 'its own man', but, in the event of disagreement, the decisive voice was likely to be that of the umpire or third arbitrator — and a three person tribunal may be something of a luxury. Save in the unlikely event of each party to a dispute or disputes which had arisen proposing the appointment of the same person as arbitrator, it was a practical certainty that neither party would, once they had fallen out, secure the appointment of its first or probably second choice as a single arbitrator to determine the matters in dispute, since — human nature being what it is — the fact that the opponent had made the nomination was taken as ground enough upon which to found an implacable objection, so that in such a case the only realistic assumption to make was that the arbitrator would be either an agreed second or third choice or else the choice of an external appointing body.

As I have said, speed, cheapness and finality go together. Since, time out of mind, the formal resolution of construction disputes has involved the investigation and determination of complex factual issues, it would have been, and was in the 1950s, unrealistic to speak in anything like absolute terms of the rapid and inexpensive conduct and conclusion of construction arbitrations. What could have been, and was, realistically asked was whether the process was achieving finality as rapidly and as inexpensively as was reasonable practicable. Although there would no doubt have been, from time to time, thrills and spills of a fairly catastrophic character on the way to the making of a determinative and final arbitral award, there can, I think, be little doubt that, generally speaking, the cheapest and quickest way of arriving at such an award would have been by the appointment of an arbitrator or arbitrators who was, or were, put in complete control, with adequate powers, of the arbitral proceedings and whose directions and awards would have been unquestionable.

In fact, in the 1950s and for some considerable time thereafter the discretions and decisions of arbitrators were subject to extensive oversight by the courts, and their powers were, in a number of respects, found to be inadequate to give them effective control over the proceedings before them without the intervention of the courts.

I look initially at judicial oversight.

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In the first place, arbitrators were not entitled to decide, in the event of dispute, the extent of their own jurisdiction: only the court, on an appropriate application, could make an authoritative decision. Secondly, the awards of arbitrators were open to being impugned before the court and invalidated on the ground of error or errors of law appearing on the face of the award. Thirdly, and perhaps most generally disruptively, there was an extensive entitlement in each party to require the tribunal to make its award in the form of a special case raising a question or questions of law for the determination of the court or to state a consultative case for the authoritative opinion of the court during the course of the reference. The adoption of either of these procedures inevitably led to additional expense and delayed the final resolution of the dispute, and the adoption of the first could well, and not infrequently did, lead to the necessity of a further hearing by the tribunal before the making of the final award, although, in some instances, it was possible in the award stating the case to anticipate the court's decision in the form: "If the court's answer is *A*, then the award is *B*. If the court's answer is *Y*, then the award is *Z*." Although it was a safeguard against arbitral aberration, the case stated procedure was undoubtedly cumbersome, slowing and expensive, and constituted an obvious clog on the tribunal's independence of mind, which might well — in the case of a lay tribunal — have been a reason for seeking arbitration in the first place.

I turn to the extent of the tribunal's powers. Although there was a general statutory provision that the parties to arbitration should, in addition to submitting themselves to giving evidence on oath or affirmation and producing documents: "do all other things which during the proceedings on the reference [the tribunal] may require", the court was also given power for the purposes of the reference to issue subpoenas and make orders for security for costs, discovery of documents and interrogatories, the preservation and interim custody or sale of the goods forming the subject matter of the reference, the securing of the amount in dispute in the reference, the giving of access to the subject matter of the reference and the granting of interim injunctions and the appointment of a receiver. It was by no means clear what the extent of the tribunal's general power was, and applications were not infrequently made both to the tribunal and to the court. This again caused inessential expense and tended to delay the final outcome.

The generally recognised advantages of arbitration were thus only very imperfectly attained in construction arbitrations. Why then did the standard forms of construction contract continue to contain arbitration clauses, and why was arbitration, as it was, actually resorted to when disputes arose? I think, firstly because privacy and confidentiality were highly valued (although it is questionable to what extent the ordinary construction dispute would have hit the headlines).

Secondly, the idea of a lay tribunal of the parties' choice (despite the limits on the freedom of choice) was attractive, and there were, in those days,

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lay arbitrators at work (architects, quantity and other surveyors and notably civil engineers), whose reputation for clear minded fairness was very high.

Thirdly — but by no means least significantly — there was no very satisfactory alternative to arbitration for the formal resolution of substantial construction disputes. Litigants who contrived to bring a complex construction action for trial before a judge of the High Court — ordinarily such actions were transferred by interlocutory order at an early stage for trial by an Official Referee — found themselves astride a fiery steed. They might well find, even as the case came on for trial, that they were being sent off to find a place in the Official Referees' Court. The home of construction cases in the High Court was with the Official Referees, who were appointed to undertake cases involving complex technical investigation. They were three amiable gentlemen, but none of them had been provided with relevant experience by his practice at the Bar and all of them shared the view — by no means unreasonable in itself, but discouraging to litigants who believed in the truth of their cause and yearned for it to succeed — that construction cases were much better settled than fought out. Nor did they scruple over making their view known. Although they were but three, they were by no means wholly taken up with construction work. They also tried cases concerned with accounts, landlord and tenant cases over dilapidations and other cases transferred to them — to help out — from the general business of the Queen's Bench Division. Sometimes they disposed of undefended divorces. Parties in dispute were certainly not throwing over their agreements to arbitrate in favour of litigation. English pragmatism was therefore at work. Things could be better — but they could certainly be worse, and the comfort of the established was generally preferred to the hazards of the new — even though change might bring improvement.

I swing my camera forward to the present. There has been radical change, and it has, on the whole, been change directed towards the elimination or amelioration of the imperfections which I have noted. The central statutory text in the 1950s and for some time thereafter was the Arbitration Act 1950. Additions and modifications were enacted in the Arbitration Acts 1975 and 1979 and in the Consumer Arbitration Agreements Act 1988. Then in 1996, the Arbitration Act of that year was passed. The 1996 Act amplified earlier legislation and was motivated as the earlier legislation had been, by a fear — principally felt in the area of international trade and commerce, rather than specifically in the field of construction — that businessmen would take their arbitrations away from England unless there was a material reduction in the amount of judicial intervention in the conduct of arbitrations. It comes nearer to a codification of the law of arbitration than had ever been achieved before.

The introduction to the principal part of the 1996 Act makes the intention clear:

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"The provisions of this Part are founded on the following principles, and shall be construed accordingly:

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

(c) in matters governed by this Part the Court should not intervene except as provided by this Part."

The 1996 Act contains 110 sections and four schedules. I shall look selectively at its effect on the attractive, albeit imperfectly realised, features of arbitration which I have sought to identify. The Act says nothing about privacy and confidentiality, although it was suggested in the House of Lords, on Second Reading of the Bill, that it should assert confidentiality as a fourth principle. The common law, however, when not inconsistent with the Act, is not displaced. So, privacy and confidentiality, subject to such limitations as the requirements of policy may impose — not, I think, a fundamental limitation — remain an attraction of construction as of other arbitrations.

The 1996 Act contains no less than 12 sections dealing with the appointment and decision making of arbitrators and umpires. The foundation of the structure is, however, a recognition — and, indeed, assertion — of the entitlement of the parties to an arbitration agreement to make their own agreements as to the number, qualifications and procedure for appointment of arbitrators, and the purpose of the not unelaborate statutory edifice is to provide what the Departmental Advisory Committee, which saw the 1996 Act onto the Statute Book, referred to as a 'new and comprehensive arrangement', as compared with the previous 'incomplete regime', of background and fall back provisions — including, essentially as a last resort, intervention by the court — to amplify what might otherwise be over simple agreements between the parties and to minimise the risk of irreparable breakdown of agreed procedures. The principle of the parties' entitlement to choose the tribunal before which they are to appear is therefore affirmed, while the possible difficulty of achieving true and full implementation, in practice, of the agreement to choose is recognised, and steps are taken to minimise it. Here, then, an old attraction is not only recognised, but burnished.

When speed, cheapness and finality are reached, striking changes are embodied in the 1996 Act, although the 1996 Act was itself extensively foreshadowed by the Arbitration Act 1979. The essence of the changes is, in a drive towards speed, cheapness and finality, to extend the scope of the parties' autonomy by enhancing and clarifying the powers of the arbitral tribunal and, in a complementary way, by limiting the scope for intervention by the court.

The general objective is stated thus:

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"The tribunal shall

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
(b) adopt procedures suitable to the circumstances of the particular case avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters to be determined."

And it is made clear that the tribunal is to have regard to that duty: "in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

An immediately succeeding section clarifies the extent of the tribunal's control over procedural and evidential matters, and thus underlines the autonomous character of arbitration proceedings, but, at the same time, it makes clear that the tribunal, although the parties 'choice', is not to be at their beck and call.

"It shall be for the tribunal to decide all procedural and evidential matters subject to the right of the parties to agree any matter." The tribunal is thus generally made master of its own procedure, but subject to the entitlement of the parties to agree on specific, and I suggest limited, matter. I doubt whether this restraint upon the parties' entitlement to agree wholly as they will — designed, no doubt, to avoid unproductive clashes over the adoption of procedure regarded by the tribunal as undesirable — will prove to be a substantial stumbling block.

Procedural and evidential matters are defined as including the time and place of hearings, the language to be used, the supply of formal statements of claim and defence, disclosure of documents, the putting of questions to and answering of questions by the parties, rules, strict or otherwise, of evidence, and the form in which and the medium by which evidence is to be given. "Whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law" is also defined as among procedural and evidential matters.

That section is succeeded by a provision which gives interlocutory powers to the tribunal and, with later sections, removes the former obscurity as to the powers of the tribunal and those of the court and the relationship between them. It provides that the parties may agree as to the powers exercisable by the tribunal for the purposes of and in relation to the proceedings, and adds that, in the absence of agreement otherwise, the tribunal may order a claimant to give security for costs, give directions for the keeping, examination or testing of property owned or possessed by a party which is the subject of the arbitration proceedings or gives rise to a question therein, direct a party or witness to give evidence on oath or affirmation, and administer an oath or make an affirmation and give directions for the preservation of evidence.

The tribunal is given effective default powers, and the court has enforcement and default powers of last resort.

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As to the conduct of proceedings, therefore, the 1996 Act has strengthened the arbitral tribunal's hand, and made it clear that the power of the court in aid of the effectiveness of arbitration in determining disputes is a power of last resort, not to be used unless all else has failed or is threatening to prove ineffective.

The erstwhile embarrassment caused in affected cases by the tribunal's inability authoritatively to determine the scope of its own jurisdiction is cured. It is now provided that the tribunal may, by award, rule on the existence of its own jurisdiction unless otherwise agreed by the parties. Objections as to lack of jurisdiction must be made promptly if they are to be made at all. There is a narrowly drawn alternative to seeking an award on jurisdiction, in the form of an application to the court for the determination of the question of jurisdiction in issue. It is a course which may only be adopted if the parties agree in writing, or the tribunal gives permission and the court is satisfied that determination of the question is likely to produce substantial savings in costs, that the application has been made without delay and that there is good reason for decision by the court. The Departmental Advisory Committee made it clear that it regarded the alternative procedure as designed only to be used in very exceptional cases, and it is not fairly to be regarded, as it seems to me, as a dilution of the principle that interventions by the court are to be kept to an inescapable minimum, to which I now come.

In the 1950s, as I have noted, an award was open to direct assault on the ground of error on its face, and arbitral tribunals were open to the judicial control implicit in the case stated procedure. The courts were also poised to intervene to remedy substantial mishap occurring in the course of determination of references to arbitration on the grounds, regarded particularly by lay arbitrators as rather woundingly expressed of misconduct on the part of the arbitrator.

The case stated has gone, save that the 1996 Act does provide that, in the absence of agreement between the parties to the contrary, the court may, on the application of a party, determine a question of law arising in the course of arbitration proceedings. Such an application may only be made with the agreement of all parties or, absent such agreement, with the permission of the tribunal, and if the court is satisfied that the determination is likely to produce substantial savings in costs and that the application was made promptly. The Departmental Advisory Committee was urged not to continue with this provision, which derives, although it differs, from the consultative case procedure. But the Committee took the view that the procedure provided could be useful to the parties and could also have a wider use in the development of the law, where, for instance, a particular case incorporates a new general legal consideration. The provision therefore avoided the brandishing of Occam's razor.

For the rest, challenges to arbitrator's awards are now comprehensively dealt by three sections of the 1996 Act.

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The first relevant section deals with the particular case of lack of substantive jurisdiction. It secures that a party relying on lack of jurisdiction shall have an entitlement to challenge on that ground in two sets of circumstances, in which consistency requires that there should be such an entitlement, but where its existence might be in doubt were no express provision made. It does not infringe the principle of restraint on judicial intervention.

The next section is much more general. It inters misconduct, but gives an entitlement, provided it is not lost by acquiescence, to challenge an award on "the ground of serious irregularity affecting the tribunal, the proceedings or the award." It allows the court to remit the award for further consideration or to set the award aside, wholly or in part, or to declare the award to be of no effect, wholly or in part, making it clear that there is to be no setting aside or declaration of ineffectiveness unless remission would be inappropriate. In defining serious irregularity, the section lists nine types of plain inadequacy or unfairness, and identifies the need for the court to satisfy itself that the irregularity in question "has caused or will cause substantial injustice to the applicant." In a fallen world the section is, as I see it, necessary, nor is it inconsistent with pursuit of the advantage of speed, cheapness and finality, since it is aimed to discourage officious intervention by the court.

The third section gives, inconsistent agreement between the parties excepted, an "appeal to the Court on a question of law arising out of an award" made in arbitral proceedings. The leave of the court is required, unless all parties consent to pursuit of an appeal. Leave is to be given only if the Court is satisfied:

(a) that the determination of the question will substantially alter the rights of one or more of the parties;
(b) that the question is one which the tribunal was asked to determine (in other words, unforced errors are out, unless of course they show serious irregularity);
(c) that, on the basis of the facts found, the tribunal's decision is obviously wrong or, the question being one of general public importance, at least open to serious doubt; and
(d) that, despite the parties agreement to seek arbitration, it is just and proper in all the circumstances for the court to determine the question.

The court is authorised to confirm or vary the award, to remit it in whole or in part, or to set it aside in whole or in part; but may set aside only if remission is inappropriate. This provision lies at the heart of the difference between old interventionism and modern party autonomy, subject to modest safeguards against disaster. I believe, on the whole, the modern world is better suited by, and prefers, the new approach.

After that rather breakneck canter over no more than part of the terrain, may I, breathless as I am, seek to identify what appear to me to be some, at

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any rate, of the features of present-day arbitration which enable it to hold its own as a formal means of determining construction disputes. And here, I think, it is sensible to begin by observing that the lack of an alternative, which I identified as part of the story of the success of construction arbitration in the middle of the last century, no longer exists. The Technology and Construction Court (which has replaced the Official Referees Court) is manned by nine judges headed by a judge of the High Court. No case is loo long or too complex for it. It is in every way equipped to provide an effective alternative to arbitration. So, the attractions must be positive.

Firstly, then — I do not take the points in any order other than the random — construction arbitration is much more cosmopolitan than it was 50 years ago. The world gets ever smaller and entire Englishness more rare. Foreign parties prefer arbitration because it is less alien, and particularly is this so in a three-man tribunal with two arbitrators of the principal contestants own choice.

Next, privacy and confidentiality continue to be highly valued.

Thirdly, the lay, but technically qualified, arbitrator retains his attractions, particularly now that the interventionist clogs and pitfalls in arbitrations of yesteryear are diminished to what a good many would accept as the inescapable minimum.

Fourthly, the avoidance of unnecessary cost and the avoidance of inessential delay in arriving at finality remain desired objectives, and are furthered by the changes which I have observed.

And finally — I seek to make the point delicately, but I must make it because I consider it to be important — there is, I believe, a perception today that the reforms of civil proceedings in court which have recently taken place, admirable as no doubt they are, desperately needed as their concentration on time and cost saving and management no doubt was, tend to lead, in some court cases, to such a fascination with the ingenuities of management that the ultimate objective of civil litigation — namely the final and authoritative resolution by peaceful means of otherwise irreconcilable differences — drops into second place. In arbitration, on the other hand, although the tribunal is given a free hand when it comes to devising speedy and efficient procedures, there can be, and it is perceived that there can be, no masking the sole ultimate objective of the contract into which the parties have entered, namely the final and authoritative resolution by peaceful means of otherwise irreconcilable differences.

Leaner and nimbler than once it was, I believe that construction arbitration is in good heart. What we have not managed yet to do is to reduce the tyranny of paper to order. The problem is endemic to commercial proceedings. It is easier — and cheaper — to copy than to select for relevance. In consequence, even with the use of well intentioned devices such as a core bundle — 1,500 documents from a possible 20,000, say — far too

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many documents still come before the tribunal. My friends have, *ad nauseam*, heard me say that the only effective cure is to revert to the use of pens, ink, the copy clerk, the Dickensian high desk and the letter book. But this is, perhaps, too extreme a remedy. There must too be a limit to the amount of the expensive time of the intelligent selector that can affordably be devoted to discarding the inessential. But I am prompted to wonder whether, in the face of oceans of paper, some stout hearted and clear sighted arbitrator, with time on his hands — perhaps a rare bird — might be moved to invoke S.34(2)(g) of the 1996 Act, the terms of which I have read to you, and decide himself (with the freedom of the inquisitor) to take the initiative in ascertaining the facts.

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