Appl E N T Pty Ltd v McVeigh (1996) 22 ACSR 84
Appl Lambe & Aust Postal Corp, Re (1999) 58 ALD 755
Appl McGlade v Lightfoot (2000) 63 ALD 147

[HIGH COURT OF AUSTRALIA.]

BURTON . . . . . APPELLANT;
PLAINTIFF,

AND

THE PRESIDENT, &c., OF THE SHIRE OF BAIRNSDALE . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *September* 8, 9, 10, 18.

Barton, O'Connor, Isaacs and Higgins JJ.

Building contract — Arbitration — Stay of action — Determination of contract by employer—Extension of time for completion—Inherent jurisdiction of Court—Supreme Court Act 1890 (*Vict.*) (*No.* 1142), *sec.* 152—*Abuse of process—Action frivolous or vexatious—Summary judgment—Rules of Supreme Court* 1906 (*Vict.*), *Order XIV.* (*A*).

One of the conditions of a contract between a Shire Council and a contractor for building a bridge provided that the contractor should complete the whole of the works on a certain day. Another condition provided that, if the contractor should, in the opinion of the engineer, fail to make such progress with the works as the engineer should deem sufficient to ensure their completion within the specified time, and should fail or neglect to rectify such cause of complaint for seven days after being thereunto required in writing by the engineer, it should be lawful for the Council to determine the contract. A third condition provided should "any doubt dispute or difference arise or happen touching or concerning the said works . . . . or in relation to the exercise of any of the powers of the Council or the engineer under this contract or any claim made by the contractor in consequence thereof or in any way arising therefrom or in relation to any impediment prevention or obstruction to or in the carrying on of the works of this contract or any part thereof (or any extras additions enlargements deviations or alterations thereon or thereof or any of them or any part thereof) by the Council or the engineer . . . . or any claim made by the contractor in consequence thereof or in any way arising therefrom or touching or concerning the mean-

ing or intention of this contract or of the specifications or conditions or any other part thereof . . . . or respecting any other matter or thing not hereinbefore left to the decision or determination of the engineer" every such doubt, dispute and difference should from time to time be referred to and settled and decided by the engineer. Subsequently the Council agreed to extend the time for completion and, by an indenture between the parties, the condition for completion on a certain day was rescinded and a new condition was substituted identical in terms except that a new date for completion was inserted. The Council, after the original date for completion and before the new date, purported to determine the contract in pursuance of the conditions in that behalf.

An action having been brought by the contractor claiming (*inter alia*) damages for breach of contract, for wrongful prevention of due and complete performance, and for wrongful determination of the contract, and upon a *quantum meruit* for work and labour done,

Held, that the matters in dispute were referable to the arbitration of the engineer, notwithstanding that the original time for completion had passed when the contract was determined, and, therefore, that the action should be stayed under sec. 152 of the *Supreme Court Act* 1890.

The Supreme Court, on a motion by the Council to enter summary judgment for them or for a stay, gave judgment for the Council.

Held, that the circumstances were not such that the Court should, under Order XIV. (A) of the *Rules of the Supreme Court* 1906, have given judgment for the Council, or, under its inherent jurisdiction, have stayed the action as being an abuse of the process of the Court.

Judgment of the Supreme Court varied.

APPEAL from the Supreme Court of Victoria.

The following statement of facts is taken from the judgment of *Barton* J.:—

"At some time in 1905 the defendant Shire called for tenders for the building of a new bridge over the Mitchell River at Bairnsdale. On 3rd November in that year plaintiff sent in his tender, by which he proposed to do the whole of the work, 'agreeably to the specified conditions for a bulk sum of £5,086 11s.,' and he subjoined estimates in detail. This tender was accepted, and on 21st February 1906, the plaintiff entered into a contract under seal with the defendant Shire to 'do perform execute and fulfil all and singular the works conditions stipulations and requisitions which are expressed and contained in or reasonably to be inferred from the specification

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and general conditions which are hereto annexed and from the drawings referred to therein . . . and which specification and general conditions with the tender of the contractor with the schedule of the quantities and prices upon which such tender was based and calculated are the documents forming the schedule hereto and to which the foregoing covenant shall extend.' The Shire, on its part, covenanted that, on the contractor observing the stipulations in the schedule, and executing the works, proceeding therewith, and supplying the materials therefor according to the specification, general conditions and drawings, within the respective times within which such works were thereby required to be performed, to the satisfaction in all respects of the shire engineer for the time being, the Shire should perform the conditions and stipulations to be performed by them, and should pay the contractor, 'at such times upon such conditions in such proportions and manner, and subject to such deductions' as were provided by the general conditions. The schedule consists of the tender, the detailed estimates, the general conditions, and the specification, plans and drawings.

"Of these documents, the most material to the present case are those parts of the general conditions which I will now read:—

"'Clause 4. The contractor is to make and execute in the like manner as aforesaid and with the like materials as aforesaid any extras additions enlargements deviations or alterations to from or in the works which the engineer may from time to time previously to the commencement or during the progress of the works by an order in writing require at and for the several prices or rates set forth in the schedule of prices annexed hereto and if any extras additions enlargements deviations or alterations shall comprise any description of work not named in such schedule the same shall be valued at rates to be fixed by the engineer whose decision shall be final and binding on all parties but no extras additions enlargements deviations or alterations whatever which shall be claimed by the contractor will be admitted or recognized under any circumstances or will be allowed or paid for by the Council which shall be done or executed without an order from the engineer in writing as aforesaid nor unless the total quantities and the rates of payment for

such extras additions enlargements deviations or alterations shall have been previously ascertained and certified by the engineer under his hand whose decision certified as aforesaid shall be final and binding on all parties and the contractor shall have no claim for loss damage or compensation on account of any extras additions enlargements deviations or alterations having been made anything herein contained to the contrary notwithstanding.

"'Clause 11. If the contractor shall in the opinion of the engineer fail to make such progress with the works as the engineer shall deem sufficient to ensure their completion within the specified time . . . and shall fail or neglect to rectify any such cause of complaint for seven days after being thereunto required in writing by the engineer . . . then . . . it shall be lawful for the Shire Council by any instrument under its common seal delivered to the contractor or to his representative on the works or left on the contractor's usual or last known place of abode or business absolutely to determine this contract; and from and after the delivery of the said instrument as aforesaid the contract shall be absolutely determined and in the event of such determination happening the moneys which shall have been previously paid to the contractor under this contract shall be deemed to be the full value of the work executed and shall be taken and accepted by the contractor in full payment and satisfaction of all claims and demands under this contract and the contract and percentages and retention-money and also all materials implements and plant then being in or upon the works or near thereto for the purpose of being used or employed in or about the same shall remain the absolute property of the Council and may be disposed of as the Council shall think fit.

"'Clause 15. The contractor shall complete the whole of the works of this contract within nine calendar months from the date of signing the contract and for every day's delay in the completion of the works after that date the Council shall be entitled to deduct or set off as and by way of liquidated damages and not as or in the nature of penalty the sum of £5 per week reasonable working weather and if from any cause whether arising on the part of the Council or the Government or any officer or servant of the Council or otherwise howsoever the

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contractor shall be delayed or impeded in the execution of his contract the contractor shall apply to the engineer who shall from time to time if he think the cause sufficient but not otherwise allow by writing under his hand such extension of time as he shall think adequate. . . .

"'Clause 26. In the event of any doubt dispute or difference arising or happening touching or concerning the said works or any of them or relating to the quantities qualities descriptions or manner of work done and executed or to be done and executed by the contractor or to the quantity or quality of the materials to be employed therein or in respect of any extras additions enlargements deviations or alterations or any omission made in to or from the said works or any part of them therein or thereto or in relation to the sum to be paid by the contractor to the Council for penalties or the right of the contractor to be relieved or exempt therefrom or from any part thereof or on any ground whatsoever or in relation to the exercise of any of the powers of the Council or the engineer under this contract or any claim made by the contractor in consequence thereof or in any way arising therefrom or in relation to any impediment prevention or obstruction to or in the carrying on of the works of this contract or any part thereof (or any extras additions enlargements deviations or alterations thereon or thereto or any of them or any part thereof) by the Council or the engineer or any other person employed by the Council or any claim made by the contractor in consequence thereof or in any way arising therefrom or touching or concerning the meaning or intention of this contract or of the specification or conditions or any other part thereof or any plans drawings instructions or directions which may be furnished or given during the progress of the works or touching or concerning any certificate order or award which may have been made by the said engineer or in anywise whatsoever relating to the interest of the said Council or of the contractor in the premises or respecting any other matter or thing not hereinbefore left to the decision or determination of the engineer or to be governed by his certificate every such doubt dispute and difference shall from time to time be referred to and be settled and decided by the said engineer.'

"It was also provided (Clause 27) that it should be competent

for the engineer to enter upon the subject-matter of all matters therein left to his decision or determination without formal reference or notice to either party; and (Clause 28) that all awards of the engineer under the contract should be final and binding upon both parties; that it should not be competent for either party to take exception in law or equity to any hearing or determination by the engineer or to any certificate, order or award made by him, on the ground of want of jurisdiction, excess of authority, irregularity of proceeding or otherwise, and that all matters made the subject of any hearing, determination, certificate, order or award should be held both at law and in equity to have been properly submitted to him, and properly adjudicated upon.

"The evidence is that there were great delays in the performance of his contract by the plaintiff, and on 31st December 1906 —more than a month after the time for completion fixed by Condition 15—the plaintiff and the defendant Shire entered into a covenant for the extension of the time. This document recited the deed of 21st February 1906, that the contractor had failed to perform the works in the agreed time, and the plaintiff's application, to which the defendant Shire had agreed, for an extension for nine months from the 23rd November then past. The Shire then agreed to extend the time for completion for nine months, as asked, and the contractor covenanted to 'do and perform all the works matters and things by the said indenture contract plans specifications and general conditions to be by him done performed and executed,' on or before 23rd August 1907. Condition 15 was, therefore, rescinded, and another clause was substituted, binding the contractor to complete the whole of the works of the contract, on or before the 23rd August, to the engineer's satisfaction, and completion by the new date became imperative.

"The delay on the plaintiff's part continued after this extension, and on 9th March 1907 the engineer wrote to the plaintiff as to his 'continued delays,' expressing his opinion (see Condition 11) that the plaintiff was not making such progress as would ensure the completion of the work within the time allowed, and giving him notice under that condition that he required the plaintiff to rectify the cause of complaint by making such progress as would

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suffice to ensure completion within the contract time. From that time onward, it is sworn and not denied, the plaintiff did no work at all on the contract, but wholly failed and neglected to make any progress whatever with the works or to rectify the cause of complaint. There was much correspondence, and the plaintiff made many excuses and complaints, among the latter being that the engineers had ordered extras, alterations, additions, &c., the execution of which would delay him in completion. But nothing was actually done, and on 23rd April 1907 the defendant Shire gave the plaintiff formal notice under seal in terms of Condition 11 absolutely determining the contract for the cause already stated.

"The plaintiff issued his writ on 1st August 1907 claiming £3,000 damages for breach of covenant, by wrongful prevention of due and complete performance, wrongful determination of the contract, and wrongful forfeiture of deposit and retention money, seizure of plant and tools, and forfeiture of materials. In the alternative the plaintiff claimed the same damages for breach of a contract (by parol) in substitution for the contract under seal. Again, alternatively, the plaintiff claimed £2,000 as a *quantum meruit* for work done and materials supplied. The plaintiff claimed in addition £1,058 for return of deposit, retention moneys, use of plant, damages for wrongful seizure of plant, and interest.

"The defendant Shire now took out a summons in Chambers to stay proceedings in the action, or in the alternative to enter judgment for the defendants, or in the alternative for an order to the plaintiff to give security for costs, and the facts above stated came before *à Beckett* J. on the return of that summons. On 29th August 1907 *à Beckett* J. dismissed the defendants' summons with costs, and gave leave to appeal. The defendants accordingly appealed to the Full Court of Victoria, who allowed the appeal, reversed the order of *à Beckett* J., and ordered judgment to be entered for the defendants in the action, with costs of the summons, the appeal, and the action generally."

From this decision the plaintiff now appealed to the High Court.

Arthur, for the appellant. This is not a case in which the Court should exercise either its inherent jurisdiction or its jurisdiction under Order XIV. (A) to give summary judgment for the defendants or to stay the action. There is a case upon which the plaintiff may succeed: *Bayne* v. *Riggall* (1). The defendants wrongfully determined the contract inasmuch as by ordering new work they prevented the plaintiff from making such progress as would ensure his completing within the extended time for completion. There is an implied contract that the defendants would not exercise their power to determine the contract during the extra time which the work occupied by reason of their wrongful act in giving orders for additional work at such a time as prevented the completion of the work within the specified time. A party to a contract cannot take advantage of a clause allowing him to determine the contract for delay if the delay has been caused by his wrongful act: *Dodd* v. *Churton* (2); *Lodder* v. *Slowey* (3); *Courtnay* v. *Waterford and Central Ireland Railway Co.* (4). The contract having been wrongfully determined, the plaintiff can treat it as rescinded and sue upon a *quantum meruit*: *Lodder* v. *Slowey* (3). The work which the plaintiff contracted to complete within the limited time was the work originally specified, and did not include the extras, alterations, &c., subsequently ordered by the engineer. The clause allowing the contract to be determined cannot be enforced after the expiration of the time originally fixed for completion: *Mayor of Essendon and Flemington* v. *Ninnis* (5); *Hudson on Building Contracts*, 3rd ed., vol. I., p. 602; even when the time for completion has been extended: *In re Higgins and Wright, and The Victorian Railways Commissioners* (6). If the delay has been brought about by the wrongful act of the defendants, the engineer was not empowered by Clause 11 to determine the question whether the plaintiff was making sufficient progress to complete the work within the specified time: *Roberts* v. *Bury Improvement Commissioners* (7).

There is evidence that the original contract was abandoned

(1) 6 C.L.R., 382.
(2) (1897) 1 Q.B., 562.
(3) (1904) A.C., 442.
(4) 4 L.R. Ir., 11.
(5) 5 V.L.R. (L.), 236; 1 A.L.T., 23.
(6) 11 V.L.R., 140; 6 A.L.T., 238.
(7) L.R. 5 C.P., 310.

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and that a new parol contract was entered into. The question whether the contract was properly determined is not one which should be referred to the determination of the engineer under Clause 26. His powers only exist while the contract is in existence, and when the contract goes the arbitration clause goes with it: *Bell* v. *Keesing* (1); *In re Higgins and Wright and The Victorian Railways Commissioners* (2). Even if the question whether the contract was properly determined is within Clause 26, the Supreme Court should, in the exercise of its discretion, have refused to stay the action: *In re Carlisle*; *Clegg* v. *Clegg* (3); *Redman on Awards*, 3rd ed., p. 200; *Barnes* v. *Youngs* (4); *Pickering* v. *Cape Town Railway Co.* (5). The Court should have allowed the plaintiff the opportunity of bringing fresh evidence. In any case the Court was wrong in giving judgment for the defendants, for the most they were entitled to was a stay so as to allow the plaintiff to have an arbitration if he chose.

[HIGGINS J. referred to *Buchanan* v. *Byrnes* (6).]

Starke (with him *Hassett*), for the respondents. The facts are not capable of reasonable litigation, and the law is not capable of reasonable argument, and therefore the Court could properly act under its inherent jurisdiction to stay or dismiss an action as being an abuse of the process of the Court: *Lawrance* v. *Lord Norreys* (7); *Salaman* v. *Secretary of State for India* (8); *Annual Practice* 1907, p. 312.

[HIGGINS J.—On an application of this kind there is not to be a preliminary trial: *Castro* v. *Murray* (9).]

There is no substance in the action, and therefore the Supreme Court had jurisdiction to give summary judgment for the defendants under Order XIV. (A) of the *Rules of the Supreme Court* 1906. The defendants are willing to have the form of the order altered to a stay of proceedings. The defendants are, at any rate, entitled to have the action stayed under sec. 152 of the *Supreme Court Act* 1890, for the arbitration clause of the

(1) 7 N.Z.L.R., 155.
(2) 11 V.L.R., 140; 6 A.L.T., 238.
(3) 44 Ch. D., 200.
(4) (1898) 1 Ch., 414.
(5) L.R. 1 Eq., 84, at p. 88.
(6) 3 C.L.R., 704.
(7) 15 App. Cas., 210, at p. 219.
(8) (1906) 1 K.B., 613.
(9) L.R. 10 Ex., 213.

contract applies to the matters in dispute in this action. In order to decide whether the action should be stayed on that ground, the Court must now interpret the contract, and the rights of the parties under Clause 26 of it. The effect of the agreement as to the extension of the time for completion is that the date fixed for completion is substituted in the original contract for the time there fixed for completion, and the contract is then to be interpreted as if that substituted date had originally been in the contract. The contract was properly determined under Clause 11. The whole structure of the contract shows that the word "works" in that clause includes extras, additions, &c. If it does not, there is no evidence of extras, additions, &c., for those matters can only be proved as provided in Clause 4, and, further, there is no evidence that those extras, additions, &c., must necessarily have delayed the progress of the work. If the extras, additions, &c., are included, then there is no room for the application of the principle that, if the employer has ordered extras, the time for completion must necessarily be extended. *Mayor of Essendon and Flemington* v. *Ninnis* (1); and *Dodd* v. *Churton* (2), were decided on the terms of the particular contracts under consideration. Here the words of Clause 11 are so comprehensive as to prevent the application of either of those cases. The question whether the contract was properly determined is referable to arbitration under Clause 26. That clause, by the words "or in relation to the exercise of any of the powers of the Council or the engineer under this contract," specifically refer to the circumstances which happened here. Those words were absent from the contract in *In re Higgins and Wright and the Victorian Railways Commissioners* (3). The determination of the contract under Clause 11 is only a determination *sub modo*.

The contract is at an end so far as enforcing any rights for further proceeding with work under it, but remains in force for the purpose of deciding the rights of the parties in regard to what has been done under it: *Russell* v. *Russell* (4); *Vawdrey* v. *Simpson* (5).

(1) 5 V.L.R. (L.), 236; 1 A.L.T., 23.
(2) (1897) 1 Q.B., 562.
(3) 11 V.L.R., 140; 6 A.L.T., 238.
(4) 14 Ch. D., 471.
(5) (1896) 1 Ch., 166.

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[HIGGINS J.—The parties are not remitted to the position *quo ante*: *Grassmere Estate Co. Ltd.* v. *Illingworth* (1). He also referred to *Botteril* v. *Ware Guardians* (2); *Hudson on Building Contracts*, 3rd ed., p. 77.]

If the plaintiff says that the contract was wrongly determined by reason of his having been prevented from completing the work, the question whether he was so prevented is a matter for arbitration. The plaintiff should, at any rate, be ordered to give security for costs, for he is only a nominal plaintiff and is bringing the action as trustee for his creditors: *Annual Practice* 1908, p. 940; *Lloyd* v. *Hathern Station Brick Co.* (3).

Arthur, in reply. The question of security for costs is not one this Court should deal with, as *à Beckett* J. exercised his discretion and refused to make an order.

[He referred to *Hudson on Building Contracts*, 3rd ed., vol. I., pp. 533, 579; vol. II., p. 118; *Piercy* v. *Young* (4); *Redman on Arbitration*, 3rd ed., p. 68; *Baldwin on Bankruptcy*, p. 360.]

[ISAACS J. referred to *Ranger* v. *Great Western Railway Co.* (5); *Plews* v. *Baker* (6).]

Cur. adv. vult.

September 18.

BARTON J. (after stating the facts as above set out, continued). Among the plaintiff's grounds of appeal is that under Order XIV. (A) of the *Rules of the Supreme Court* 1906 the application to enter judgment was out of time, more than ten days having elapsed from appearance. This may be so or not, but in the view on which I think this appeal should be determined, it is not material.

The main question upon which our judgment ought to proceed turns on the meaning and effect of the twenty-sixth general condition. Having regard to its terms, was not the respondent Shire entitled to ask for a stay of all proceedings in the action, and is not the plaintiff's remedy, if any, confined to a reference under that condition? That is the conclusion at which I have arrived by reason of the explicit and comprehensive nature of the clause.

(1) 15 V.L.R., 687; 11 A.L.T., 55.
(2) 2 T.L.R., 621.
(3) 85 L.T., 158.
(4) 14 Ch. D., 200.
(5) 5 H.L.C., 72.
(6) L.R., 16 Eq., 564.

It applies *inter alia* to "any doubt dispute or difference . . . concerning the said works or any of them or . . . in respect of any extras additions enlargements deviations or alterations or any omission made in to or from the said works or any part of them . . . or in relation to the exercise of any of the powers of the Council or the engineer under this contract or any claim made by the contractor in consequence thereof or in any way arising therefrom or in relation to any impediment prevention or obstruction to or in the carrying on of the works of this contract or any part thereof (or any extras additions enlargements deviations or alterations thereon or thereto or any of them or any part thereof) by the Council or the engineer . . . or any claim made by the contractor in consequence thereof or in any way arising therefrom or touching or concerning the meaning or intention of this contract or of the specification or conditions or any other part thereof or any plans drawings instructions or directions . . . or touching or concerning any certificate order or award which may have been made by the said engineer or in any wise whatsoever relating to the interest of the said Council or of the contractor in the premises or respecting any other matter or thing not hereinbefore left to the decision or determination of the engineer or to be governed by his certificate every such doubt dispute and difference shall from time to time be referred to and be settled and decided by the said engineer."

I cannot doubt that that clause covers everything which is claimed in this action. To whatever part of that clause one turns, one finds words sufficient to show that it was the intention of both parties that matters such as those which arise in this case should be referred to the arbitration of the engineer. It has been contended that the arbitration clause does not apply because of the termination of the original contract time before the cause of action, or part of it, arose. I do not think that objection can prevail. I am of opinion that, by the substitution of the new provision on 31st December 1906 for the original condition No. 15, the contract was altered as to the date of completion, but was not otherwise altered. That being so, I can find no reason for the argument that Clause 26 is not to apply.

There was a very great deal of debate as to whether the

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contract was rightly determined or not, it being the contention on the part of the defendants that it had been rightly determined by them after the notice given by the engineer on 9th March, and that the questions which arose touching the extras, additions, alterations, and so on, were part of the contract in such a sense that the assumption to determine the contract by the defendants by the formal notice under Clause 26 operated upon that as upon all the other parts of the contract. On the other hand, counsel for the appellant argued that, owing to the construction of the various clauses in general, the provisions attaching to the determination of the contract did not apply to the case of the extras, additions, alterations, &c., of which he complained, and which he said must necessarily throw him out of time. I think it is not right, inasmuch as this case may go to the arbitrament of the engineer, to express a decided opinion upon these respective contentions. It is enough to say that, had it not been for this explicit and sweeping arbitration clause, I might have been of opinion that this was not a case which was so utterly hopeless that it ought to be got rid of under the inherent jurisdiction of the Court, having regard to the cases of *Bayne* v. *Riggall* (1), and *Goodson* v. *Grierson* (2), to take two cases out of many, in which practically the *ratio decidendi* was that the jurisdiction referred to should not be exercised unless where the action brought is positively hopeless. A stay of proceedings may not only be had by resort to the inherent jurisdiction of the Court where there is an abuse of the process of the Court, but it may be had by resort to sec. 152 of the *Supreme Court Act* 1890 in respect of a contract where there is an agreement to refer to arbitration, always supposing the matters in question come within the terms of the agreement. Holding as I do that the matters which the plaintiff says are in dispute are wholly referable to arbitration, and so clearly referable that the matter is not arguable, I am of opinion that this Court has power under sec. 152 of the *Supreme Court Act* 1890 to stay the proceedings, leaving it to the plaintiff, if he is so advised, to go to an arbitration before the engineer.

I am of opinion also that the order of the Supreme Court

(1) 6 C.L.R., 382.

(2) (1908) 1 K.B., 761.

dismissing the action was not quite the order to fit these circumstances, having regard to the section of the *Supreme Court Act* 1890 which I have mentioned. The proper order to make was an order staying proceedings, and that is the order I think this Court should now make. It will be for the plaintiff to choose, upon advice, how far he will go. It is somewhat scant comfort, no doubt, to the plaintiff to be told that he may have the benefit of an arbitration to be presided over by the engineer of the works whose determination is the subject matter of dispute. But under the law it seems to me that is the only remedy the plaintiff now has, that he has been tied up by the arbitration clause, that he cannot go on with his action, and that the only resort he can have is to arbitration under Clause 26.

I prefer not to go into many other matters referred to in argument in respect of which the arbitrator may be called upon to express an opinion, because it is desirable to leave his hands free as far as possible, in case further litigation, if I may so call it, takes place under the arbitration clause. There was one matter, however, to which I may refer. It is in respect of the line of authorities of which one is *Walker* v. *London and North Western Ry. Co.* (1). In that case, upon the time for completion of a contract having expired, the works were still proceeding, and the contractor being long out of time, the defendants gave notice to the plaintiffs under the power in that behalf contained in the contract to avoid the contract, and thereupon took possession of the works and of the materials and implements of the plaintiffs. It was held that, upon the true construction of the contract, the clause with reference to the avoidance of the contract and the forfeiture of the contractors' implements and materials could only be enforced before the time originally fixed for the completion of the works had expired. I am of opinion that this case is completely distinguishable from that case and others in its line. In delivering the judgment of himself and *Brett* J., *Archibald* J. said (2):—"There is no doubt that, as the engineer has power by the contract to vary or alter the works, the contractor must execute them with any variations made, and that he has bound himself to have them completed by the 31st of August 1873.

(1) 1 C.P.D., 518.

(2) 1 C.P.D., 518, at p. 531.

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"There is no provision in the contract for any extension of the time, and therefore, though his contract may involve an impossibility, the contractor is bound to perform it or make compensation in damages: *Jones* v. *St. John's College* (1). But the question as to the meaning of the clause remains.

"In *Roberts* v. *Bury Improvement Commissioners* (2), in which there was a clause somewhat similar, the defendants had given notice to determine the contract and to take possession of the works.

"Delay was in part occasioned by the act of the board in ordering extra works and otherwise, and it was held that the board were, notwithstanding, entitled to determine the contract and take possession of the works, but there it was assumed that the clause had been put in force before the time originally specified for completion had arrived and before any extension of time had been given.

"The clause in our opinion can only be acted on and enforced within the time fixed for the completion of the works, for time is clearly of the essence of the contract, and it is only with reference to the time so agreed that the rate of progress can be determined. If, as has happened, the time has been exceeded, there may be a new contract to complete in a reasonable time; but to give the clause in question any application to a reasonable time after the time originally fixed has expired, would be, without any express provision, to make the company judge in their own case of what was a reasonable time, and to enable them in their own favour to avail themselves of a most stringent and penal clause."

Now the reason for the decision in that case, which followed that line of reasoning, was that there was no provision for extension of the time, and, the contractor having got out of time, the contractee could not resort to the penal clause which was framed to prevent delays during the time which was fixed, and which had already been exceeded. That is a course of reasoning which does not apply here because, although it was after the time originally fixed, there was a new covenant entered into which amounts, in my judgment, to this, that the only

(1) L.R. 6 Q.B., 115. (2) L.R. 4 C.P., 755.

alteration of the original contract was that the time was extended from 23rd November 1906 to 23rd August 1907. That extension of nine months was granted not only in respect of the completion of the original works, but also in relation to all the other terms in the contract. Upon the execution of a deed like that it appears to me the reason upon which *Walker* v. *London and North Western Railway Co.* (1) was decided entirely ceases to apply to this case.

I am, therefore, of opinion that the appeal should be allowed; that the order appealed from should be discharged so far as it requires that judgment be entered in the action for the defendants; and that in lieu thereof all proceedings in this action should be stayed. As each party has succeeded in part, I think also that the justice of the case will be met by discharging so much of the order of the Full Court as relates to any costs.

It will result that there is no affirmative order as to costs.

O'CONNOR J. read the following judgment:—

As the application to Mr. Justice *à Beckett* was not made within ten days after appearance and there was no order under Order XIV. (A) of the Supreme Court Rules giving leave to make it later, it is quite clear that the judgment for the defendants directed to be entered by the Supreme Court cannot stand. The only question for our determination is, ought the action to be stayed?

The respondents contend that on the facts appearing in the affidavits they are entitled to invoke the power of the Court in two aspects—its inherent power to stay proceedings in any action which is an abuse of the process of the Court as being frivolous and vexations, and its power under sec. 152 of the *Supreme Court Act* 1890 to stay proceedings in any action where the parties have previously by a written instrument agreed to refer to arbitration the differences which are the subject matter of the action.

I agree with my learned brother *Barton* that the respondents have not shown that the action is frivolous and vexatious in the sense in which that expression is used in law. They

(1) 1 C.P.D., 518.

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rely upon a legal ground arising on the interpretation of the contract. If they are right it is plain that the action cannot succeed. It may be their contention is right; upon that I shall express no opinion, as it is the very matter which an arbitrator may have to decide. But we have to determine whether that question can be determined in this proceeding. *Primâ facie*, every litigant has a right to have matters of law as well as of fact decided according to the ordinary rules of procedure, which give him full time and opportunity for the presentation of his case to the ordinary tribunals, and the inherent jurisdiction of the Court to protect its process from abuse by depriving a litigant of these rights and summarily disposing of an action as frivolous and vexatious in point of law will never be exercised unless the plaintiff's claim is so obviously untenable that it cannot possibly succeed. See *Bayne* v. *Riggall* (1). The respondents' counsel have no doubt brought forward very strong arguments to show that they have rightly determined the contract, and that the plaintiff has now no cause of action. On the other hand Mr. *Arthur's* argument for the appellant, though not establishing to my satisfaction that the respondents acted in contravention of the contract, has satisfied me that his contention is worthy of consideration, and is certainly not so obviously untenable as to justify its being summarily disposed of by a Judge in Chambers. In so far, therefore, as the respondents have invoked the inherent jurisdiction of the Court, they must in my opinion fail.

For the purpose of dealing with the other aspect of the Court's jurisdiction I take it for granted that all conditions exist which entitle the respondents to invoke the power of the Court under sec. 152 of the *Supreme Court Act* 1890. That being so, two questions only arise on the facts of this case. First, are the matters in controversy in this action included in the agreement to refer contained in the 26th general condition? Secondly, is the Court satisfied "that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to the agreement?"

In respect of those questions the Court acts on principles entirely different from those on which it acts in considering

(1) 6 C.L.R., 382.

applications founded on the abuse of its process. It is the right of the applicant under sec. 152 to have the decision of the Court on the materials brought before it. The Court or a Judge, as the case may be, is the tribunal to decide there and then whether under the provisions of the section the applicant has made out his case for stay; if he has done so, he is entitled to the order. As to the latter of the two questions involved, I am completely satisfied that no reason exists why the matters in controversy in the action should not be referred. That is plain, I think, from the nature and subject matter of the contract. The other question involves the interpretation of Clause 26 of the general conditions, both in its own terms and in relation to the other conditions and to the contract generally.

The plaintiff's claim turns on the question whether the respondents, in putting an end to the contract by notice, rightfully exercised their powers under general Condition 11. General Condition 26 expressly makes referable to arbitration, amongst other things, any dispute or difference "in relation to the exercise of any of the powers of the Council or the engineer under this contract or any claim made by the contractor in consequence thereof or in any way arising therefrom," &c. Later on it includes a number of other subjects which are indirectly involved in the same matters of difference, and the condition concludes with these very comprehensive words:—"Or respecting any other matter or thing not hereinbefore left to the decision or determination of the engineer or to be governed by his certificate every such doubt dispute and difference shall from time to time be referred to and be settled and decided by the said engineer."

There can be no doubt that the matters in controversy in this action come within the express words of the portion of the condition which I have quoted. But it was urged by Mr. *Arthur* that the exercise by the respondents of their power under the 11th general Condition had the effect, to use its very language, "of absolutely determining the contract," and from that moment the contract came to an end for all purposes just as if it had never existed or had been rescinded by voluntary agreement of the parties, and that general Condition 26 therefore disappears with the rest of the contract. That position is, in my opinion,

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quite untenable. The exercise of the respondents' power to determine the contract by notice does not have the effect of rescinding the contract. If the power was legally exercised it took away from the contractor any right to further proceed with the works. It effected also a forfeiture of his plant and materials and any moneys due to him under the contract in the defendants' hands. But for all the purposes of determining the rights of the parties the contract still exists, whether those rights are to be determined by a Court of Justice or by an arbitrator. There is no reason, therefore, why general Condition 26, which, as I have pointed out, clearly includes the matters in controversy in this action, should not have full effect given to its provisions.

For these reasons the respondents are entitled to an order under sec. 152 staying proceedings in this action, and in my view the learned Judge of first instance, and afterwards the Supreme Court, ought to have come to that conclusion. I am, therefore, of opinion that the judgment of the Supreme Court should be varied accordingly by substituting a direction to stay proceedings in place of the direction to enter judgment for the defendants. I agree with the view of my learned brother Barton as to costs.

ISAACS J. read the following judgment:—

The Full Court of Victoria stopped the action at the threshhold, and ordered judgment to be summarily entered for the defendants. The power to do so depends upon whether the case comes within either Order XIV. (A.) of the Rules of 1906 or the recognized circumstances in which the inherent jurisdiction is properly exercised. Order XIV. (A) is not relied on by the respondents. Their application under r. 1 of that Order was not made within the time limited by the rule, nor was the time extended. Learned counsel informed the Court that *Hodges* J. subsequently stated that the Court did not think it necessary to extend the time, and proceeded under the inherent jurisdiction.

The respondents accordingly rested upon that jurisdiction only. The Privy Council in *Haggard* v. *Pelicier Frères* (1), stated the broad general principles upon which it should be exercised. Lord *Watson* said:—"Their Lordships hold it to be settled that a

(1) (1892) A.C., 61, at p. 67.

Court of competent jurisdiction has inherent power to prevent abuse of its process, by staying or dismissing, without proof, actions which it holds to be vexatious. In *Metropolitan Bank* v. *Pooley* (1) the Lord Chancellor (the *Earl of Selborne*), speaking with reference to the dismissal of an action on that ground, said that:—'The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from the abuse of its own procedure.' The same principle was again laid down by the House of Lords in *Lawrance* v. *Norreys* (2). In that case the Appeal Court had refused to allow proof and dismissed the action, and Lord *Herschell* observed (3):—'It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases'." Lord *Watson* for the Privy Council then added:—"In the remarks made by Lord *Herschell*, as to the caution with which the power of summary dismissal on such grounds ought to be exercised, their Lordships unhesitatingly concur."

These observations pronounced by the highest authority for us show the reason of the Court's exceptional action, and the great care which must be observed in its application.

The Full Court of Victoria have apparently dealt with the case as if it were before them in the ordinary course, and not as if the question were whether the plaintiff's action were an abuse of the Court's process, and should accordingly be at once interrupted and put out of Court as unworthy of further consideration.

I do not say what would probably be the result of construing Clauses 11 and 15 of the contract, if the case were absolutely before the Court for determination. It is enough for the present purpose to say that a very important question, the answer to which is not at all obvious, presents itself, as to whether the period of completion to which the contractor limited himself includes whatever extras, additions, and alterations, the engineer at any time before the expiration of that period, might direct. *Dodd* v. *Churton* (4), shows how carefully the contract must be looked at to answer that question. The contention cannot be

(1) 10 App. Cas., 210, at p. 214.
(2) 15 App. Cas., 210.
(3) 15 App. Cas., 210, at p. 219.
(4) (1897) 1 Q.B., 562.

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regarded as unarguable or without substance. And although the appellant has not so far furnished much evidence as to the extent and character of the alterations in plans, regarding the matter as if the proper time had arrived when he was bound to do so, and the materials were nevertheless left as they are, yet, on the other hand, he ought not to be debarred from having an opportunity of more fully proving his case, because it cannot be said that the respondents have demonstrated the impossibility of those alterations affecting in fact the time for completing the original work, or that, if they did, the legal result would be unaltered. It appears to me, therefore, that it was not a case for the application of the extraordinary inherent jurisdiction, and that, exercising the caution which the Privy Council and the House of Lords are both careful to require, the order for summary judgment in favor of the defendants ought not to have been made.

Then as the action has to proceed, the next question arises under the statutory jurisdiction of the Court as to whether it should be permitted to go on in the ordinary course or be stayed and allowed to go to arbitration. That depends on the construction to be placed on Clause 26 of the contract. Unless the appellant has agreed to refer to arbitration the question whether the power of determining the contract was lawfully exercised by the respondents, no order to stay should be made. As *Jessel* M.R. said in *Piercy* v. *Young* (1):—"It is the bounden duty of the Court to decide whether the matter in question is one which the party proposing the reference has agreed to refer to arbitration." If there has been such an agreement the Court's duty is laid down by Statute: *Supreme Court Act* 1890, sec. 152. On the corresponding English enactment Lord *Selborne* L.C. in *Willesford* v. *Watson* (2) used language very appropriate to the present case. He said:—"We are told that this is an arbitrary tribunal, final and without appeal, and so forth, and that these are not fit questions to go before the arbitrator. But I think that the legislature and the Act of Parliament under which the Court is now asked to act have given the answer to that argument. If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary

(1) 14 Ch. D., 200, at p. 208. (2) L.R. 8 Ch., 473, at p. 479.

Courts, then since that Act of Parliament was passed a *primâ facie* duty is cast upon the Courts to act upon such an agreement."

The appellant contends, first, that the subject matter of the dispute is not within the terms of Clause 26. On the whole I think that Mr. *Starke's* argument should prevail. Whatever the consequences, the words are too comprehensive, and the general intention too clear, to cut down the primary meaning of the language used by the parties.

No sufficient reason has been alleged why the matter in dispute cannot be or ought not to be referred, the engineer is not shown to have taken up any biassed position, or any vindictive or fraudulent attitude, or to have disqualified himself in any way, and the situation is apparently, in fact, precisely what the parties contemplated as possible when the bargain was made.

In these circumstances the appellant ought to be bound by the agreement he has made, and the action stayed.

HIGGINS J. read the following judgment:—

I concur. In my opinion the disputes between the plaintiff and the defendants are clearly within the clause in the agreement providing that disputes shall be settled by the engineer. The action ought, therefore, to be stayed, under sec. 152 of the *Supreme Court Act* 1890.

As for the order made by the Full Court of Victoria directing judgment to be entered for the defendants, we are informed that it was made under the general jurisdiction of the Court, apart from Order XIV (A). The application was made after the time allowed by that Order; there was no order extending the time; and the Full Court plainly intimated that the order was not made under the Rules, but under the inherent power of the Court to prevent abuse of its process. It is my opinion that the Full Court were led, by a very natural process, I admit, to take a wrong attitude. They dealt with the matter as if they were deciding it on the merits, whereas they had merely to decide whether there was anything in fact or in law that was fairly triable or arguable. They went into the dispute elaborately because the learned primary Judge had based his refusal of the

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defendants' application on a finding that the written contract had been abandoned and a new contract made. Chiefly because of this finding, we also have been taken over all the same ground in a three days' argument. The Full Court after examining the whole case presented came to a clear opinion that the plaintiff could not succeed, and determined to cut the matter short, and to give judgment for the defendants at once. I do not wish to pronounce finally as to matters which may come before the engineer. I may say, however, that I am not at all surprised to find the Full Court, on the materials before it, coming to so strong a conclusion, both as to the construction of the contract, and as to the alleged abandonment. But the fact that such a conclusion has been reached adverse to the plaintiff, is not a ground for ordering judgment against him without trial, and without full opportunities of proof of his alleged facts. The rule is that every plaintiff is entitled to have his action tried unless it can be shown obviously that the action is frivolous or vexatious, or otherwise an abuse of the process of the Court. A litigant is entitled to use, not to abuse, the process of the Court. The arguments put before us on behalf of the plaintiff, as to the construction of the agreement, and as to the effect of the facts stated in the letters, if proved, may not be sustainable; but they are not unworthy of serious discussion, not unworthy of evidence. It is surely absurd to argue for days as to a plaintiff's case being arguable. On an application to stay proceedings in an action under the general jurisdiction the test put by *Mellor* J. in deciding that the stay shall be ordered, was that the case could never get to the jury—that the plaintiff would manifestly be nonsuited: *Dawkins* v. *Prince Edward of Saxe Weimar* (1). The general power under which the Court acted is certainly not wider than that given by Order XIV. when a plaintiff applies for summary judgment; yet under that Order it has been held that, if there is a triable issue, the defendant may defend, even though it may appear that the plaintiff is likely to succeed.

In the case of *Jacobs* v. *Booth's Distillery Co.* (2), an action was brought against two defendants upon a memorandum of charge and two promissory notes. One of the defendants did not

(1) 1 Q.B.D., 499, at pp. 502-3. (2) 85 L.T., 262.

defend. The other defendant, who had received an indemnity from his co-defendant, stated that he had been told that he incurred no liability by signing, and that he signed the memorandum and promissory notes relying upon that representation. On an application under Order XIV. a Master ordered the amount claimed to be paid into Court within seven days, with judgment if the sum was not so paid. This order was affirmed on appeal by *Day* J. and was again affirmed by the Court of Appeal. The case then came before the House of Lords. Lord *Halsbury* L.C. put the matter in a form which appears to be very conclusive and to settle the matter. He said (1):—"There are some things too plain for argument: and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it was not in aid of justice that such things should continue, Order XIV. was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights." Lord *James of Hereford* said:—"The view which I think ought to be taken of Order XIV. is that the tribunal to which the application is made should simply determine, 'Is there a triable issue to go before a jury or a Court?' It is not for that tribunal to enter into the merits of the case at all. It ought to make the order only when it can say to the person who opposes the order, 'You have no defence. You could not by general demurrer, if it were a point of law, raise a defence here. We think it impossible for you to go before any tribunal to determine the question of fact.' We are not expressing any opinion upon the merits of the case. It appears to me that there is a fair issue to be tried."

So, under Order XXV., r. 4, there is power to strike out a pleading on the ground that it discloses no reasonable cause of action or of defence; and in any such case, or in case of the action being shown by pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered. This rule applies to a wider area of cases than the general power; and yet it has been held not to apply except in plain or obvious cases; and if there is a point of

(1) 85 L.T., 262.

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law that requires any serious discussion, it should be set down for argument: *Hubbuck* v. *Wilkinson* (1). The pleading must be "obviously frivolous or vexatious, or obviously unsustainable," if it is to be struck out (per *Lindley* L.J. in *Attorney-General of the Duchy of Lancaster* v. *London and North Western Railway Co.* (2)). The pleading must be "so clearly frivolous that to put it forward would be an abuse of the process of the Court": *Young* v. *Holloway* (3). I think it would serve no purpose for me to add to what has been already said by my colleagues on the other points argued.

Appeal allowed. Order appealed from discharged. Parties to abide their own costs of all proceedings.

Solicitors, for the appellant, *Secomb & Woodfull* for *C. H. Becher*, Sale.

Solicitors, for the respondents, *Hughes & Permezel* for *C. C. Greene & Son*, Bairnsdale.

B. L.

[HIGH COURT OF AUSTRALIA.]

THE ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES . } APPELLANT;

AND

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ADAMS AND OTHERS . . . . RESPONDENTS.

SYDNEY, *Aug.* 12, 13, 14, 17, 18, 27.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Will, construction of—Gift for charitable purposes—"Charitable benevolent or philanthropic institutions"—Power in trustees to apply to non-charitable purposes.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

(1) (1899) 1 Q.B., 86.

(2) (1892) 3 Ch., 274, at p. 277.

(3) (1895) P., 87, at p. 90.