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that the minimum rate to be paid to apprentices is not to be less than the minimum rate prescribed by or under the appropriate State law leaves quite undetermined what is to be the position where the rate under the Federal award is greater than that under the State law. In that event sub-clause (*a*) must apply, and the minimum rate of wages fixed by it is to be paid—in this case 70s. per week.

Question answered No. Appellant to pay the costs of the appeal.

Solicitors for the appellant, *Dawson, Waldron, Edwards & Nicholls.*
Solicitors for the respondent, *Sullivan Bros.*

B. L.

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[HIGH COURT OF AUSTRALIA.]

THE LADY CARRINGTON STEAMSHIP COMPANY LIMITED . . . . . PLAINTIFF;

AGAINST

THE COMMONWEALTH . . . . . DEFENDANT.

H. C. OF A. 1921. SYDNEY, *Nov.* 18. Knox C.J., Higgins and Starke JJ.

Practice—High Court—Stay of proceedings—Submission to arbitration—Applicability of State Act as to arbitration—Questions of law involved—"Courts exercising Federal jurisdiction"—Arbitration Act 1902 (*N.S.W.*) (*No.* 29 *of* 1902), *secs.* 3, 6—*Judiciary Act* 1903-1920 (*No.* 6 *of* 1903—*No.* 38 *of* 1920), *sec.* 79—*War Precautions* (*Shipping*) *Regulations* 1918 (*Statutory Rules* 1918, *Nos.* 87-284), *regs.* 4, 5.

Sec. 6 of the *Arbitration Act* 1902 (N.S.W.) provides that "If any party to a submission . . . commences any legal proceedings in any Court against any other party to the submission . . . in respect of any matter agreed to be referred, any party to such legal proceedings may . . . apply to that Court to stay the proceedings, and that Court or a Judge if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission . . . may make an order staying the

proceedings." The word "submission" is by sec. 3 defined as meaning "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."

The plaintiff company having instituted an action in the High Court against the Commonwealth to recover compensation in respect of the requisitioning of its ship under the *War Precautions* (*Shipping*) *Regulations* 1918, the Commonwealth applied for a stay of proceedings in the action pursuant to sec. 6 of the *Arbitration Act* 1902 (N.S.W.), alleging a "submission" by the parties to arbitration.

Held, that even if sec. 6 applied to an action in the High Court (as to which *quære*) a stay should not be granted since several questions of law, including that of the validity of the Regulations, were involved which must come for decision before the Court.

Quære, whether in sec. 79 of the *Judiciary Act* 1903-1920, which provides that "the laws of each State, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising Federal jurisdiction in that State in all cases to which they are applicable," the term "Courts exercising Federal jurisdiction" includes the High Court.

SUMMONS.

An action was brought in the High Court by the Lady Carrington Steamship Co. Ltd. against the Commonwealth in which the plaintiff, by its statement of claim, alleged that on 6th May 1918 the plaintiff's steamship *Aughinish* was requisitioned by the defendant under the *War Precautions* (*Shipping*) *Regulations* 1918, and was held by the defendant under such requisition until 24th October 1919. (It was admitted that the requisitioning took place in New South Wales.) It was also alleged that the ship was held by the defendant upon certain specified terms and conditions, including terms as to payments to be made by the defendant for hire, for interest on unpaid hire money, for hire in respect of unmeasured spaces on the ship, for Federal and State light dues and for agency fees paid by the plaintiff. It was further alleged that as to some of these payments which had become due the defendant only paid a part and as to others had not paid anything, and that a demand had on 10th December 1919 been made for payment of the amount then owing and notice given that the plaintiff would claim interest from that date. The plaintiff claimed £8,095 4s. 3d., including £1,000 interest by way of damages.

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The defendant by summons applied that proceedings in the action might be stayed pursuant to sec. 6 of the *Arbitration Act* 1902 (N.S.W.). In support of the summons an affidavit was filed on behalf of the defendant in which it was stated that the ship was requisitioned by a letter in which it was stated that the terms of requisition were those contained in a standard form of charter-party, which would be forwarded later. The form of charter-party which was stated to have been referred to contained the following clause: "That should any dispute arise between the owners and the charterer, the matters in dispute shall be referred to two commercial persons in Melbourne, one to be appointed by each of the parties hereto, and the two so chosen shall appoint an umpire, and the decision of the arbitrators or umpire shall be final."

The summons coming on for hearing before *Higgins* J. was by him referred to the Full Court.

Brissenden K.C. (with him *H. E. Manning*), for the defendant. Sec. 6 of the *Arbitration Act* 1902 (N.S.W.) applies to an action brought in the High Court by virtue of sec. 79 of the *Judiciary Act*. There being no Federal Act dealing with arbitration, it must have been intended to include the laws of the States on that subject in sec. 79. Even if the *Arbitration Act* is not a law relating to procedure, sec. 79 applies to the laws of the States generally, so far as they are applicable.

Broomfield K.C. (with him *Milner Stephen*), for the plaintiff. There was no contract at all between the parties, and therefore no submission (see sec. 3). Where a ship is requisitioned under the *War Precautions (Shipping) Regulations* the owner is entitled to have compensation assessed by the Court, and the regulations, so far as they purport to fix the compensation or the mode of assessing it, are bad (*Newcastle Breweries Ltd.* v. *The King* (1)).

[KNOX C.J. referred to *Chester* v. *Bateson* (2).]

Apart from the *Arbitration Act* 1902 there is nothing to oust the jurisdiction of this Court. Even if there was an agreement to refer to arbitration, it could not be enforced (*Scott* v. *Avery* (3)). This

(1) (1920) 1 K.B., 854. (2) (1920) 1 K.B., 829.
(3) 5 H.L.C., 811.

is not a case in which the Court should order a stay, for if the matter went to arbitration it would almost certainly have to come to this Court on the questions of law.

Brissenden K.C., in reply. The action should be stayed although the arbitration is to be held in Melbourne (*Kirchner & Co.* v. *Gruban* (1)).

[HIGGINS J. I doubt whether the High Court is a Court exercising Federal jurisdiction within sec. 79 of the *Judiciary Act*. If it is, sec. 15 of the *High Court Procedure Act* is unnecessary.]

If sec. 79 does not apply to the High Court, where parties to an action in the High Court have agreed to arbitration that agreement cannot be enforced. Sec. 79 was intended to render a body of law applicable to all Courts which derived their authority from legislation of the Commonwealth. The effect of requisitioning a ship under the *War Precautions* (*Shipping*) *Regulations* is to create a written agreement between the parties (reg. 5). The plaintiff relies in his statement of claim on express contract. The terms of that contract are contained in the charter-party.

KNOX C.J. This reference to us raises a number of questions which I think it is neither necessary nor expedient to decide on this application. The first question raised is as to the constitutionality of certain of the *War Precautions* (*Shipping*) *Regulations*. That question should not be decided by a Court consisting of three Justices. The next question is whether the New South Wales *Arbitration Act* 1902 applies so as to enable a stay of proceedings to be granted in an action instituted in the High Court which the High Court is competent to entertain. That may be a point of some difficulty, but it is one on which it is unnecessary to express an opinion at present. Another point raised is whether a notional agreement such as Mr. *Brissenden* suggests there is in this case—an agreement constituted by the taking of the ship under the *War Precautions* (*Shipping*) *Regulations* and the communication to the plaintiff of the terms of the charter—amounts to "a written agreement" in the definition of "submission" in sec. 3 of the *Arbitration Act* 1902. That question it is unnecessary to decide, because

(1) (1909) 1 Ch., 413.

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in the view I take, even assuming that all those points were decided in favour of the Commonwealth, there still remains a point on which this application ought to be refused, and that is, that there is sufficient reason why the matter should not be referred to arbitration in accordance with the alleged submission. It seems to me that the litigation of the matters raised by the statement of claim, and presumably to be put in issue by the Commonwealth, will involve almost necessarily the determination of the constitutional point, and will necessarily involve the determination of more than one point of law, and the effect of staying proceedings in this action would be that all those points would eventually have to come by a more or less roundabout method to the High Court through the arbitrators and the Supreme Court, whereas if the action be allowed to go on they will be decided in the ordinary course by the Justice of this Court who hears the action, or on a reference by him, or on appeal from him, by the Full Court. I therefore think that this is not a proper case for a stay of proceedings to be granted, even assuming that the Court has power to grant a stay in accordance with the provisions of the *Arbitration Act*.

HIGGINS J. I agree in the opinion that the proceedings should not be stayed as a matter of discretion, as stated by the Chief Justice. It is to be understood that we reserve our opinion as to the questions of powers, as to the applicability of the *Arbitration Act* of New South Wales, and as to the meaning of the word "submission."

I would like to add a few words, as the summons came before me originally. My difficulties, as expressed in Chambers, were due to the fact that the plaintiff appeared to be blowing hot and cold—to be approbating the charter-party and reprobating some of its terms. But I find on examination of the statement of claim that it is not based on the charter-party. The charter-party is not once referred to in the statement of claim. It is a claim for reasonable payment for the use of a ship, some of the claims being of a nature included in the charter-party and some not. Of course, in an action for reasonable payment the charter-party would naturally be

evidence, but to say that it is an action on the charter-party is, in my opinion, a mistake.

I should like to add also that I feel some doubt as to the applicability of sec. 79 of the *Judiciary Act* to the High Court at all. I doubt whether the procedure of the High Court as to trials is not governed by the *High Court Procedure Act*.

STARKE J. I agree that this application should be refused. It is made under sec. 6 of the *Arbitration Act* of New South Wales, which confers a power which, it is said, can be exercised by this Court by virtue of sec. 79 of the *Judiciary Act*. It is unnecessary to determine in the present case whether sec. 79 enables this Court to exercise the power contained in sec. 6. But if it does, then the very difficult question arises, as to which the facts are not sufficiently before us to enable us to determine it, namely, whether there is a "submission" in this particular case within the meaning of the *Arbitration Act*. Assuming all these matters in favour of the applicant, there still remains a serious and difficult question of law involved in the action which, in my opinion, is not proper to be submitted to arbitration. That question is whether the *War Precautions (Shipping) Regulations* so far as they fix a standard rate of charter for ships requisitioned under those Regulations are within the competence of the Federal Parliament. The arbitrator would have to determine that question before he could award any compensation for the taking of the plaintiff's ship. Such a question seems to me entirely beyond the ordinary province of an arbitrator. I agree therefore that a stay of proceedings in this action ought not to be granted.

Starke J.

Summons remitted to Justice in Chambers. Costs of argument to be dealt with by him.

Solicitors for the plaintiff, *Norton Smith & Co.*

Solicitor for the defendant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.