H. C. OF A. 1937. PALETTE SHOES PTY. LTD. v. KROHN.

property in the parcel of boots and shoes forwarded in fulfilment of the order did not pass until accepted by the customer. It was not until then that the parcel was appropriated to the contract with the assent of the buyer (*Goods Act* (Vict.), sec. 23, rule 5). In my opinion the judgment of *Lowe* J. was right, and the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Arthur Phillips & Just.*
Solicitors for the respondents, *Williams & Matthews.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

KIRSCH . . . . . APPELLANT ;
DEFENDANT,

AND

H. P. BRADY PTY. LTD. . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1937. MELBOURNE, *Mar.* 2, 3. SYDNEY, *May* 6. Latham C.J., Rich, Dixon, Evatt and McTiernan JJ.

Contract—Building contract—Construction—Payments dependent on architect's certificates—Form of certificates.

The conditions of a building contract contained provisions as a result of which payment to the builders was to be made, first, by payments of eighty per cent of the value of the work shown to be done by progress certificates by the architect until £2,000 was retained by the building owner; secondly, upon a certificate that the building was practically completed, by a payment making up ninety-nine per cent of the full certified value of the work done; thirdly, upon a certificate that the building had been completed to the entire satisfaction of the architect, by payment of the remaining one per cent. The

builders were required to deliver up possession as well as to obtain a certificate of final completion before they became entitled to payment of the ninety-nine per cent, and the remaining one per cent was not payable until six months after the date of the certificate of practical completion. The architect gave progress certificates entitling the builders to eighty per cent of the value of the work done, and, without obtaining any certificate of practical completion, the builders delivered up possession. The architect then gave the builders a certificate simply stating that the builders were entitled to a named sum and that it was a final certificate and showing the amount of previous certificates.

Held that (1) the builders could not recover either the whole or ninety-nine per cent of the total certified, because this document amounted neither to a certificate of practical completion nor to a certificate of entire satisfaction, and because, further, even if it could be treated as the former, six months had not elapsed from its date before the writ was issued, and, if it could be treated as the latter, there was no certificate of practical completion and, according to the contract, the final amount was payable only at the end of six months from the date of such a certificate; (2) the necessity for this purpose of a certificate of practical completion was not a matter which the builders could waive as being a term of the contract entirely for their benefit; (3) as there was neither a regular certificate nor an award under the arbitration clause, the condition precedent to the owner's liability in respect of the final balance had not been fulfilled and the builders could not recover.

Decision of the Supreme Court of Victoria (*Lowe* J.) reversed.

APPEAL from the Supreme Court of Victoria.

In an action brought in the Supreme Court of Victoria by H. P. Brady Pty. Ltd. against Rupert Vincent Kirsch for the amount shown in an architect's certificate, which the plaintiff alleged had been given pursuant to a building contract made between it and the defendant and which it alleged was by that contract made conclusive evidence between the parties that the amount was due and payable, the defendant disputed both the conclusiveness and the validity of the certificate and alleged that he, on his part, was entitled to recover damages against the plaintiff. The parties stated the facts in substantially the following form for the opinion of the Supreme Court:—

1. By an agreement in writing dated 22nd November 1933 and made between the plaintiff of the one part and the defendant of the other part the plaintiff agreed to execute certain works for the defendant in accordance with certain plans and specifications referred to in the agreement for the sum of £12,173.

H. C. OF A. 1937. KIRSCH v. H. P. BRADY PTY. LTD.

2. Shortly after the date of the agreement the plaintiff commenced to carry out the works and from time to time the plaintiff executed at the request of the defendant certain extra work in substitution for some of the works set out in the agreement and certain extra work in addition to the said works.

3. From time to time prior to 17th September 1934 the completion of the works and extra works was delayed by reason of matters set out in clause 30, sub-clauses *e*, *g* and *h* of the general conditions referred to in the agreement, in consequence whereof the plaintiff was unable to complete the works and extra works within the time specified by the agreement and the plaintiff requested of the defendant compensation in respect of such delay. The defendant asserts and the plaintiff denies that there were other delays not falling within the above clauses.

4. The plaintiff also applied for an extension of time within which to complete the works and extra works. The defendant made claims against Edward Campbell & Son Pty. Ltd. in respect of the delay occasioned by its failure to supply to the defendant structural steel required for the works and extra works within the time limited by its contract with the defendant, and it was subsequently agreed by all parties concerned that all claims arising out of the delay should be waived.

5. On or shortly prior to the dates set out hereunder the architects issued to the plaintiff progress certificates pursuant to clause 39 of the general conditions for the amounts set out hereunder in respect of work performed by the plaintiff up to the date of each respective certificate and the defendant subsequent to the dates set out hereunder paid to the plaintiff the amount of each such certificate :— Between 13th February and 25th September 1934, sums amounting in all to £13,400.

6. With the exception of the certificates referred to in par. 5 hereof and the document dated 8th August 1935 hereinafter mentioned no certificates have been issued by the architects to the plaintiff in connection with the works and extra works.

7. The plaintiff delivered up to the defendant within the meaning of clause 40 of the general conditions the works and extra works as they then stood on 17th September 1934, which works the plaintiff

alleges and the defendant denies were completed in accordance with the general conditions.

8. From time to time on various dates between 17th September 1934 and 8th August 1935 the plaintiff received from the architects requests to make good defects and other faults and to do work in accordance with the general conditions, which work the plaintiff asserts and the defendant denies has been done to the extent that the plaintiff was bound to do the same.

9. On or about 12th November 1934 the plaintiff at the request of the architects lodged a statement of the works and extra works done by it, with Mr. A. G. Quibell, the quantity surveyor.

10. On 8th August 1935 the architects issued to the plaintiff a document dated 8th August 1935, being a certificate for the sum of £2,050 14s. 10d.

11. On 25th September 1935 the document marked A6 (to which reference is made hereunder) was produced to the defendant by the plaintiff.

12. Prior to 8th August 1935 disputes and differences had arisen between the plaintiff and the defendant and the plaintiff and the architects as to the manner in which the plaintiff had performed the works and extra works and otherwise under the agreement.

13. The defendant alleges (as appears in his defence and counterclaim filed herein) that in breach of the agreement the plaintiff failed to complete the works within the time specified in the agreement or within a reasonable time and also alleges that the plaintiff in breach of the agreement has failed to complete the works and counterclaims against the plaintiff the sum of £4,570.

Clause 15 of the agreement provided :—" 15. The proprietor . . . by the architect, is to have full power to send artists or workmen upon the premises to execute fittings and other works that are not included in the contract, provided that such operations shall be carried on during ordinary working hours, and in such a manner as not to impede the progress of the works included in the contract; but the builder is not to be responsible for any damage that may happen to any such fittings or other works from causes not under his control. No such person shall be employed upon the

H. C. OF A. 1937.

KIRSCH v. H. P. BRADY PTY. LTD.

works against whom the builder shall make what the architect considers reasonable objections."

Clause 20 provided: "20. Any defects, shrinkage or other faults which may appear within the defects liability period stated in the appendix from the completion of the buildings, and arising out of defective or improper materials or workmanship, shall, upon the direction in writing of the architect, and within such reasonable time as shall be specified therein, be amended and made good by the builder at his own cost, unless the architect shall decide that he ought to be paid for the same, and, in case of default, the proprietor may recover from the builder the cost of making good the works."

Clause 30 provided:—"If the works be delayed by any of the following causes, the builder shall immediately apply in writing for an extension of time . . . (*e*) By the delays (not being delays caused by any act or default of the builder) of any persons engaged or nominated by the proprietor or the architect in pursuance of clause 15 hereof. . . . (*g*) By the builder not having received in due time necessary instructions or details from the architect, for which he shall have specifically applied in writing. (*h*) By any other matter, cause or thing beyond the control of the builder."

Clause 39 provided for the architect giving the builder progress certificates.

Clause 40 provided:—"When, in the opinion of the architect, the works are practically completed, the builder shall be entitled to receive from the proprietor, upon production of the architect's certificate to that effect and upon delivering up possession to the proprietor, an amount which, with the amounts previously certified to be due, shall be equal to the percentage stated in the appendix" (namely, ninety-nine per cent) "of the value of the work actually done, or of the contract price, as the case may be; and within the number of weeks stated in the appendix" (namely, twenty-six weeks) "of the date of the last mentioned certificate the balance of the value of the work actually done, or of the contract price, as the case may be (subject to any such addition or deduction as aforesaid) shall be paid by the proprietor to the builder upon the production of the architect's written certificate, stating the amount of such balance, provided that the builder

has executed or completed the works to the architect's entire satisfaction. In ascertaining the amount of such balance, the architect shall determine and decide what, if any, sum is to be paid or deducted for any breach of this contract which shall have been committed by the builder or proprietor, or for liquidated damages under the provisions of clause 31 hereof, and his certificate specifying the balance due shall be binding and conclusive."

Clause 41 provided :—" A certificate of the architect, or an award of the arbitrator, arbitrators, or umpire, hereinafter referred to, as the case may be, showing the final balance due or payable to the builder, shall be conclusive evidence of the works having been duly completed, and that the builder is entitled to receive payment of the final balance but without prejudice to the liability of the builder under the provisions of clauses 20 and 40."

The effect of other provisions of the agreement sufficiently appears from the judgments hereunder.

The document marked A6 above referred to was the architects' certificate dated 8th August 1935, given by Messrs. Alder & Lacey to the defendant and was in the following terms :—We hereby certify that H. P. Brady Pty. Ltd. contractors 2 Murray Street Richmond are entitled to the sum of £2,050 14s. 10d. on account of work done in connection with contract for erection and completion of factory premises Dawson Street Brunswick. Final certificate £2,050 14s. 10d. Previous certificates £13,400. Total to date £15,450 14s. 10d.

The questions of law submitted to the court were :—

(*a*) Was the said document marked A6 a valid certificate the issue of which was authorized under any and which of the provisions of clause 40 of the said general conditions ?

(*b*) Is the said document marked A6 conclusive evidence :—

(i) Of the works and extra works having been duly completed by the plaintiff ?

(ii) That the plaintiff was on the said 8th day of August 1935 entitled to receive payment of the said sum of £2,050 14s. 10d. ?

(*c*) Does the said document marked A6 preclude the defendant :—

(i) from recovering from the plaintiff any and which of

H. C. OF A. 1937. KIRSCH v. H. P. BRADY PTY. LTD.

the items of damage appearing in his counterclaim filed herein ?

(ii) from alleging and seeking to prove that the plaintiff has not executed or completed the works to the said architects' entire satisfaction ?

Lowe J. answered the questions :—(*a*) Yes—under the latter part of clause 40. (*b*) (i.) Yes. (ii.) Yes. (*c*) (i.) Yes, except such as fall within clause 20 of the general conditions. (ii.) Yes.

From that decision the defendant appealed to the High Court.

T. W. Smith, for the appellant. Exhibit A6 is not a final certificate. Clause 40 does not say that twenty-six weeks must elapse between the giving of the first and final certificates. There must be a ninety-nine per cent certificate before there can be a final certificate. There may be one document but the amounts must be distinguished. The arising of a dispute does not oust the jurisdiction to give a final certificate. The decision in *H. P. Brady Pty. Ltd.* v. *Kirsch* (1) does not prevent this court determining matters which might otherwise have gone to arbitration. Clauses 39 and 40 make provision for three different types of certificates : (1) progress certificates, (2) a 99 per cent certificate, and (3) a final certificate. The first is dealt with by clause 39 and the other two are dealt with by clause 40. The final certificate is authorized only after the 99 per cent certificate has been given. Clause 40 entitles the builder to receive and obliges the architect to give first the ninety-nine per cent certificate, and then the final certificate when the necessary facts have occurred. In *Clemence* v. *Clarke* (2) two views were expressed, one by *Grove* J. and the other by *Lindley* J. Those views came before the Court of Appeal in *Lloyd Bros.* v. *Milward* (3) and that court preferred the view of *Grove* J. and rejected the view of *Lindley* J. The certificate is not a final one. The existence of the ninety-nine per cent certificate is a condition precedent that must exist before a final balance certificate can be given. If twenty-six weeks must run, they had not elapsed between 8th August 1935 and the date of the issue of the writ. Clause 41 provides for alternative tribunals, the architect or the arbitrator.

(1) (1936) V.L.R. 44.
(2) (1880) Hudson on Building Contracts, 4th ed. (1914), vol. II., p. 54.
(3) (1895) Hudson on Building Contracts, 4th ed. (1914), vol. II., p. 262.

Once a definite dispute has arisen between the owner and the builder or the architect and the builder as to a referable matter, then the jurisdiction of the architect is ousted and any certificate he may give after that date is inoperative; but there must be a definite identifiable subject of dispute before the jurisdiction of the architect can be ousted. A mere unformulated dispute will not oust the jurisdiction of the architect to give a final certificate (*Chambers* v. *Goldthorpe*; *Restell* v. *Nye* (1); *Dixon* v. *South Australian Railways Commissioner* (2)).

O'Bryan (with him *Doyle*), for the respondent. Three attacks have been made on the certificate: (1) That the certificate does not purport to be a final certificate; (2) that inasmuch as it was not preceded by a ninety-nine per cent certificate there was no jurisdiction in the architect to give a final certificate; and (3) in view of clause 42 of the contract the jurisdiction of the architect had been ousted by reason of the disputes that had arisen. The architect could only give certificates in circumstances described in clauses 39 and 40 of of the conditions. Clause 39 continues to operate up to the time of completion of the buildings. There is nothing in that clause that limits progress certificates to any part of the time. They go on until the whole work is completed. The intention is not to give the building owner twenty-six weeks from the practical completion of the building within which to pay the balance. It means that the builder is to be paid on production of the architect's final certificate and the architect is given twenty-six weeks within which to give that certificate. The architect is given twenty-six weeks to discover defects. The payment is to be made at a point of time within the period of twenty-six weeks. The obligation is thrown on the architect to give his final certificate within that time. The builder need not get an interim certificate but may wait until he obtains a final certificate and when he gets that he is entitled to be paid. Clause 41 is conclusive evidence of the due completion of the contract and is conclusive evidence that the builder is entitled to receive the balance due. The final certificate is not given until due completion and there is no need for there to be

(1) (1901) 1 K.B. 624, at pp. 634, 641. (2) (1923) 34 C.L.R. 71, at p. 95.

H. C. OF A. 1937.

KIRSCH v. H. P. BRADY PTY. LTD.

any postponement of payment. Clause 41 deals with a final balance certificate where there has been no ninety-nine per cent certificate. As to the arbitration clause ousting the right to give a certificate; the mere fact that a dispute arises is not sufficient to oust the right of the architect to give a certificate (*Lloyd Bros.* v. *Milward* (1)). In this case the arbitration clause does not come into operation earlier than a time when the dissatisfied party has given notice to arbitrate, and clause 40 does not oust the jurisdiction of the architect. If a certificate is given under clause 40, clause 41 makes it conclusive evidence of the works having been duly completed (*Hudson* on *Building Contracts*, 4th ed. (1914), p. 378).

Smith, in reply. On its face the certificate is not showing that it is a final balance certificate but it does show on its face that it is a certificate for a balance over and above certain previous certificates which were all given under clause 39. The production of a final balance certificate is a condition precedent to any obligation to pay the final balance (*Hudson* on *Building Contracts*, 5th ed. (1926), p. 296).

Cur. adv. vult.

May 6.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal from a decision of *Lowe* J. upon a case stated for the determination of questions of law in an action in the Supreme Court of Victoria. The plaintiff (respondent) who is a builder, sued the defendant (appellant) for a sum of £2,050 14s. 10d., certified by an architect to be due under a building contract. The building proprietor counterclaimed for liquidated damages for delay, for damages for loss of use of the premises and also for damages suffered by alleged defective work—altogether a sum of £4,574.

The builder agreed by the contract to execute the works referred to in certain specifications and general conditions (a factory building) and the proprietor covenanted with the builder to abide by and perform the conditions. The general conditions provided that, upon the architect giving certain certificates, the builder should be

(1) (1895) Hudson on Building Contracts, 4th ed. (1914), vol. II., p. 262.

entitled to receive certain payments. The plaintiff relied upon a certificate given by the architect which was in the following form :—

" To R. V. Kirsch, Esq., 8th August 1935.

Messrs. Latiners, Dawson Street, Brunswick.

We hereby certify that H. P. Brady Pty. Ltd. contractors 2 Murray Street Richmond are entitled to the sum of two thousand and fifty pounds fourteen shillings and tenpence on account of work done in connection with contract for erection and completion of factory premises Dawson Street Brunswick.

Alder and Lacey, per H. F. Alder.

Final Certificate	£2,050	14 10
Previous Certificates ..	£13,400	0 0
Total to date	£15,450	14 10."

The plaintiff contended that this was a final certificate within the meaning of clause 40 of the general conditions and also within the meaning of clause 41, and that it was binding and conclusive, so that the defendant was bound to pay the amount to which the certificate stated he was entitled.

Several defences were pleaded in the action and the case raises certain preliminary questions of law. The case shows :—

(*a*) That certain extra work in substitution for or in addition to the work set out in the agreement was executed by the plaintiff at the request of the defendant. The general conditions (clause 24) provide that the amount to be allowed on either side in respect of variations from the contract should be added to or deducted from the contract sum.

(*b*) That delays took place in the execution of the works, such delays being due to matters which under the general conditions entitled the builder to an extension of time. The defendant, however, alleged, and the plaintiff denied, that there were other delays which were due to the default of the builder, so as to entitle the proprietor to receive under clause 31 of the general conditions a sum of £1 a day as liquidated damages. Clause 31 provides that any sum so payable shall be deducted by the proprietor from any moneys due to the builder.

(*c*) That certain progress certificates were given from time to time and that the builder received the amounts to which those

H. C. OF A. 1937. KIRSCH v. H. P. BRADY PTY. LTD. Latham C.J.

certificates declared him to be entitled. Clause 40 of the general conditions provides for the giving of certificates which would entitle the builder to the payment of the balance of the value of the work done. It will be necessary to refer to this clause in detail. It is sufficient to say for the present that the proprietor contended that the certificate upon which the plaintiff sued was not a certificate or a final certificate within the meaning of clause 40 and that, as it had not been given in accordance with the provisions contained in that clause, it afforded no cause of action to the plaintiff.

(*d*) That there were various complaints made by the proprietor and by the architect on behalf of the proprietor with respect to alleged defects in the work done. Before the certificate was given disputes and differences had arisen between the plaintiff and the defendant and the plaintiff and the architect as to the manner in which the plaintiff had performed the works under the agreement and extra works and "otherwise under the said agreement." This circumstance raises questions as to the effect of provisions in the general conditions providing for arbitration in the case of disputes and also providing that a certificate of the architect or an award of an arbitrator should be conclusive evidence of completion of the works and of the builder's right to receive payment as therein stated. It will be necessary later to refer to the precise terms of the relevant clauses, 41 and 42.

The preliminary questions of law which the Supreme Court was asked to decide were as follows (the certificate the terms of which I have set out being referred to as "the said document marked 'A6'"):—

"(*a*) Was the said document marked A6 a valid certificate the issue of which was authorized under any and which of the provisions of clause 40 of the said general conditions? (*b*) Is the said document marked A6 conclusive evidence:—(i) of the works and extra works having been duly completed by the plaintiff? (ii) that the plaintiff was on the said 8th day of August 1935 entitled to receive payment of the said sum of £2,050 14s. 10d.? (*c*) Does the said document marked A6 preclude the defendant:—(i) from recovering from the plaintiff any and which of the items of damage appearing in his counterclaim filed herein? (ii) from alleging and seeking to prove

that the plaintiff has not executed or completed the works to the said architect's entire satisfaction ? "

It is contended on behalf of the defendant that the certificate did not even purport to be a final certificate. *Lowe* J. found against the defendant upon this contention and I agree with his decision for the reasons which he states.

The next question is whether the certificate given by the architect was a valid certificate the issue of which was authorized under clause 40 of the general conditions. Clause 40 is in the following terms :— " 40. When, in the opinion of the architect, the works are practically completed, the builder shall be entitled to receive from the proprietor upon production of the architect's certificate to that effect, and upon delivering up possession to the proprietor, an amount which, with the amounts previously certified to be due, shall be equal to the percentage stated in the appendix" (namely, ninety-nine per cent) " of the value of the work actually done, or of the contract sum, as the case may be ; and within the number of weeks stated in the appendix" (namely, twenty-six weeks) " of the date of the last mentioned certificate the balance of the value of the work actually done, or of the contract price, as the case may be (subject to any such addition or deduction as aforesaid) shall be paid by the proprietor to the builder upon the production of the architect's written certificate, stating the amount of such balance, provided that the builder has executed or completed the works to the architect's entire satisfaction. In ascertaining the amount of such balance, the architect shall determine and decide what, if any, sum is to be paid or deducted for any breach of this contract which shall have been committed by the builder or proprietor, or for liquidated damages under the provisions of clause 31 hereof, and his certificate specifying the balance due shall be binding and conclusive."

Clause 41 is as follows :—" 41. A certificate of the architect, or an award of the arbitrator, arbitrators, or umpire, hereinafter referred to, as the case may be, showing the final balance due or payable to the builder, shall be conclusive evidence of the works having been duly completed, and that the builder is entitled to receive payment of the final balance but without prejudice to the liability of the builder under the provisions of clauses 20 and 40."

H. C. OF A. 1937. KIRSCH v. H. P. BRADY PTY. LTD. Latham C.J.

Before the meaning of these clauses is considered it should be mentioned that possession of the building was delivered up to the proprietor on 17th September 1934. The certificate was dated 8th August 1935 and was produced to the defendant by the plaintiff on 25th September 1935. The writ in this action was issued on 23rd October 1935.

It is contended on behalf of the plaintiff that document A6 is a certificate showing the final balance due or payable to the builder within the meaning of clauses 40 and 41.

Clause 40 provides that a certificate may be given which will entitle the builder to receive from the proprietor an amount equal to 99 per cent of the value of the work actually done or of the contract sum. This certificate may be given when in the opinion of the architect the works are practically completed. I read these words as imposing a condition precedent and not as specifying the necessary content of the certificate. The certificate is, I think, to be a certificate to the effect that the builder is entitled to receive a stated amount. The right to receive the money arises only upon the production of the certificate and upon delivering up possession of the works to the proprietor. The word " upon " is used in connection with two separate events which may, and probably will, occur at different times. It is therefore not possible to read " upon " in each case as meaning " immediately upon." It must be read merely as requiring that the two events must take place before the obligation to pay comes into existence.

Clause 40 then provides for a further certificate which has been referred to in argument and is referred to in the contract (e.g., clause 42) as the final certificate. The final certificate is a certificate which states " the balance of the value of the work actually done or of the contract price," subject to additions for extra work or deductions for work not done or defective work or in respect of other matters for which the contract provides. The clause provides that, within twenty-six weeks of the date of the ninety-nine per cent certificate, the certified balance shall be paid by the proprietor to the builder upon production of the architect's written certificate, subject to a proviso with which I shall deal later. The " balance " is plainly a balance ascertained after allowing for all previous certificates,

including the ninety-nine per cent certificate. In my opinion the word "upon" in the phrase "upon the production of the architect's written certificate" should be construed in the same manner as the word "upon" in the prior part of clause 40 which I have already mentioned. The provision therefore means that, the final certificate having been produced, the balance is to be paid within twenty-six weeks from the date of the ninety-nine per cent certificate. The proprietor fulfils his obligations if at any time within the twenty-six weeks mentioned he pays the final balance as duly certified. Until the period of twenty-six weeks has elapsed he cannot be said to have failed in his obligations. Therefore, even when a valid final certificate has been given, the builder, in my opinion, has no cause of action upon the final certificate until twenty-six weeks after the date of the ninety-nine per cent certificate. In this case no ninety-nine per cent certificate was given and accordingly no final certificate in the sense which I have explained was given, and the writ was issued before twenty-six weeks had expired from the date of the certificate which was given. For these reasons I think that the plaintiff is not entitled to succeed in this action and that question *a* in the case should be answered in the negative.

Clause 40 provides that the final balance shall be payable upon production of the final certificate "provided that the builder has executed or completed the works to the architect's entire satisfaction." The certificate is described in the clause as a certificate "stating the amount of such balance." The proviso, in my opinion, establishes a condition precedent to the making of the certificate and does not relate to a matter which is required itself to be certified by the architect. It is only when the condition of the proviso has been satisfied that the architect is entitled to give a certificate. My brother *Dixon* has been good enough to call my attention to the case of *Harman* v. *Scott* (1). The reasoning in that case shows that when an architect gives a certificate which can only be given if a certain condition is fulfilled, it is to be presumed that the certificate was honestly given and that therefore the architect, who knows the limitations of his power, believes that any necessary condition

(1) (1874) 2 C.A. (N.Z.) 407.

H. C. OF A. 1937.

KIRSCH v. H. P. BRADY PTY. LTD.

Latham C.J.

was satisfied. When the condition, as in this case, relates to an opinion to be formed by the architect, the certificate may fairly be regarded as implying a statement by the architect that he has formed the necessary opinion. But clause 40 does not make the certificate conclusive evidence of this fact. The matter is carried further, however, by clause 41, which provides that a certificate of the architect showing the final balance shall be conclusive evidence of the works having been " duly " completed. The works cannot be " duly " completed unless they have been completed " to the architect's entire satisfaction " as required by clause 40—before the final certificate can be given. Thus by virtue of clause 41, a valid final certificate becomes, in the absence of any arbitration pursuant to clause 42, conclusive evidence that the condition required by clause 40 (completion to architect's entire satisfaction) has been fulfilled. But this result follows only from the giving of a final certificate in accordance with the terms of the contract. In this case, for the reasons which I have stated, I am of opinion that document A6 is not such a certificate and therefore question *b* (i) in the case should be answered in the negative. For the same reason (the absence of a valid final certificate) questions *b* (ii), *c* (i) and *c* (ii) should also be answered in the negative.

It is not necessary, in order to answer the questions in the case, to examine in detail the provisions of clauses 41 and 42 relating to arbitration. The arbitration clause is very general in its terms, covering, *inter alia*, disputes as to any matter or thing (with certain exceptions) arising under the contract, or as to the amount of any certificate, final or otherwise. The arbitration clause is introduced as a proviso and must be regarded as controlling, to the extent of its terms, prior provisions in the contract. It is therefore clear, in the case of this particular contract, that even after a final certificate has been given it is still open to either party to require arbitration and to have the dispute determined by arbitration unless the matters in dispute have been otherwise settled. Thus, even if the final certificate had been a valid certificate under clause 40, it would still have been open to the builder to require any dispute as to the amount of that certificate to be settled by arbitration. I

can find nothing in the facts of the case which prevents the proprietor from requiring an arbitration under clause 42 in relation to the matters which he has raised in his counterclaim.

Further, the arbitration clause provides that neither party shall be entitled to maintain an action for any alleged breach of the contract until the matter has been submitted to arbitration and an award obtained, and then only for the amount to which the award declares he is entitled. The principle of *Scott* v. *Avery* (1) therefore applies, and if this ground had been raised in the defence it would, in my opinion, have been an answer to the action.

An application was made to the Supreme Court under the *Arbitration Act* 1928 to have the matters in dispute referred to arbitration and the plaintiff successfully objected on the ground that the defendant did not show that at the time when the proceedings were commenced he was "ready and willing to do all things necessary to the proper conduct of the arbitration" within the meaning of sec. 5 of the *Arbitration Act* 1928 (Vict.) (*H. P. Brady Pty. Ltd.* v. *Kirsch* (2)). The order refusing reference to arbitration, however, does not prevent the court from answering the questions submitted in the case. It is unfortunate that the result of those answers will involve either arbitration or possibly new litigation but the relevant terms of the contract appear to me to be quite definite.

In the Supreme Court his Honour Mr. Justice *Lowe* took another view from that which I have expressed on some of the questions which arise. In particular he held that the builder was entitled, if he chose, to waive the provision for a ninety-nine per cent certificate because that provision had been inserted in the contract only for the benefit of the builder and that then the time for the payment of the final balance would run from the date of the builder's delivery up of possession. I find myself unable to agree with this opinion. The words "date of the last mentioned certificate" are quite clear. It is the date of the ninety-nine per cent certificate that fixes the commencement of the period of the twenty-six weeks which must elapse before the proprietor is bound to pay the final balance. The proprietor is intended by the contract to have the advantage

(1) (1856) 5 H.L. C. 811; 10 E.R. 1121.

(2) (1936) V.L.R. 44.

H. C. OF A. 1937.

KIRSCH v. H. P. BRADY PTY. LTD.

Latham C.J.

of awaiting the expiry of this period commencing at the time stated. The part of the clause (requiring the ninety-nine per cent certificate) is not, in my opinion, introduced solely for the benefit of the builder. The clause appears to me to become quite unworkable if it is excluded.

I agree with *Lowe* J. that the relation of an award to a certificate under a building contract depends upon the language used in each particular contract. I also agree that if a final certificate is given in accordance with the contract, it is binding and conclusive as provided in the contract, unless the necessary steps are taken to procure arbitration. In the circumstances of this case, however, where as I think, no valid final certificate has been given, and where arbitrable disputes have arisen, there is nothing which prevents the proprietor from obtaining arbitration by giving the necessary notice. Indeed, as I have already said, neither party can successfully sue the other in respect of any alleged and disputed breach of this contract without first obtaining an award.

For the reasons which I have given, all the questions in the case stated should be answered: No.

RICH J. I have had the advantage of reading and considering the judgment of my brother *Dixon*. For the reasons therein stated, with which I agree, I am of the opinion that the appeal should be allowed, the order of the Supreme Court discharged and the questions in the special case answered in the negative.

DIXON J. The architect gave five progress certificates while the premises were in possession of the builders who are the plaintiffs-respondents. A sixth and last progress certificate was given a few days before the builders relinquished possession. The premises were in fact delivered up to the proprietor, who is the defendant-appellant, more than six months before the issue of the writ. Less than six months before the issue of the writ, the architect gave a certificate upon which the builders rely as a final certificate concluding the proprietor and entitling them upon its production to immediate payment of the amount claimed.

The provisions of the contract dealing with progress payments entitled the builders to eighty per cent of the value of the work

done until the cumulative amounts of the twenty per cent withheld should reach £2,000, whereupon they were to receive the full value of all further work done. The architect was required to give progress certificates accordingly. Although the provisions relating to final payment contain much that is familiar and has long been found in building and engineering contracts, the meaning and application of the provisions have been made difficult by the manner in which the old expressions have been combined, arranged and modified. Nothing would be gained by a discussion of the subsidiary questions of interpretation to which the provisions so give rise. It is enough to say that, according to the construction I adopt, the following consequences are among those produced by the provisions:

1. When the builders have practically completed the works they are entitled to receive from the architect a certificate that they have done so.

2. That certificate may be given before or after the builders deliver up possession of the premises to the proprietor.

3. If the builders deliver up possession and produce such a certificate, they are entitled to be paid a sum which when added to the previous payments will amount to ninety-nine per cent of the value of the work done.

4. Although it may perhaps be unnecessary for the architect to specify in such a certificate the amount payable to make up the ninety-nine per cent (Cp. *Pashby* v. *Borough of Birmingham* (1)), on the other hand, a clear statement in writing that in order to make up that percentage the architect names a given sum as due to the builders under the contract would imply that the works were practically completed and therefore would amount to a sufficient certificate to that effect (See *Harman* v. *Scott* (2); *Clarke* v. *Murray* (3); *Machin* v. *Syme* (4); *Lowther* v. *Swan & Co.* (5); *Wyckoff* v. *Meyers* (6)).

5. The builders are entitled to payment of the remaining one per cent within a period of six months calculated not from the date of

(1) (1856) 18 C.B. 2; 139 E.R. 1262.
(2) (1874) 2 C.A. (N.Z.) 407.
(3) (1885) 11 V.L.R. 817.
(4) (1892) 18 V.L.R. 472; 14 A.L.T. 93.
(5) (1915) S.Af.L.R. Transvaal Provincial Div. 494.
(6) (1870) 44 N.Y. 143.

H. C. OF A. 1937.

KIRSCH v. H. P. BRADY PTY. LTD.

DIXON J.

delivering up possession as might have been expected, nor from the date of producing a certificate of practical completion, but from the date of that certificate itself.

6. A condition precedent to the builders' right to payment of the remaining one per cent is the execution and completion of the works to the entire satisfaction of the architect evidenced by production of the latter's written certificate, stating the amount of such balance.

7. If the builders are liable in damages for any breach of contract or in liquidated damages for delay and the liability has not been taken into account and adjusted in arriving at amounts already certified, the architect must determine the amount of the liability and deduct it in arriving at the final balance otherwise payable in respect of the one per cent.

8. The certificate specifying the final balance is binding and conclusive on the builders and proprietor, but the builders remain liable for defects, shrinkage or other faults arising from defective or improper materials or workmanship which appear within a period of six months calculated, not from delivering up possession, or from the date of the final certificate, but from "the completion of the buildings."

9. As with the certificate of practical completion, so with the final certificate, it is enough for the architect to specify the final balance and state that it is due and payable under the contract and thus impliedly certify his entire satisfaction that the works have been executed and completed. In the final certificate a statement of the final balance is indispensable.

In *Walker* v. *Black* (1) the Supreme Court of Victoria dealt with a provision requiring what may be called a preliminary or tentative certificate of completion under which the builders would become entitled to all but two and a half per cent of the value of the work done and a final certificate entitling them within twelve weeks of its production to payment of the residue. The court expressed the view that it was no objection that both certificates were contained in one document. An important distinction in the present case is that the final balance is payable within a period of time calculated,

(1) (1879) 5 V.L.R. (L.) 77.

not as in *Walker* v. *Black* (1) from the production of the final certificate specifying that balance, but from the date of the earlier or preliminary certificate of completion.

The language of the provision in the present case may perhaps be susceptible of a construction by which it is made to mean, in effect, that upon production of the final certificate the proprietor shall forthwith pay the balance to the builders and that they shall be furnished with that certificate within six months. The material part of the clause runs : " And within twenty-six weeks of the date of the last mentioned certificate, the balance of the value of the work actually done, or of the contract price, as the case may be . . . shall be paid by the proprietor to the builder upon the production of the architect's written certificate, stating the amount of such balance." Whether these words are capable of such a construction or not, I do not think it represents their true meaning, which, in my opinion, is that the retention money of one per cent shall not be payable for six months from the certificate of practical completion, and then only on production of a certificate of final satisfaction.

It is true that the clause dealing specially with the conclusive effect of a final certificate or an award after arbitration says that an instrument of either description showing the final balance due and payable to the builder(s) shall be conclusive evidence of the works having been duly completed, and that the builder(s) are entitled to receive payment of the final balance. But I do not think this necessarily means entitled to receive payment forthwith, i.e., before the expiration of the six months, and the evident meaning of the special provision naming that time would prevail. It appears to me to follow that whether or not the two certificates may be written at the same time and on the same piece of paper, the liability of the proprietor to pay the final balance of one per cent arises according to the tenor of the contract only if an instrument has been given by the architect which amounts to a certificate of practical completion, and does not become enforceable until the expiration of twenty-six weeks (six months) from the date of that instrument. As the other certificate must show the final balance,

(1) (1879) 5 V.L.R. (L.) 77.

H. C. OF A. 1937.

KIRSCH v. H. P. BRADY PTY. LTD.

Dixon J.

it is apparent that the combination of the two certificates in one document presents great difficulty.

The certificate upon which the builders rely simply certifies that they are entitled to £2,050 14s. 10d. on account of work done in connection with the contract and in a note under the signature gives the information that it is a final certificate, that the previous certificates amount to £13,400 and the total to date to £15,450 14s. 10d.

The instrument ignores the distinction between the preliminary certificate of completion, or certificate of practical completion, on the one hand, and, on the other, the certificate of the final balance. It proceeds immediately from the progress certificates to the certification of a single amount as the final balance payable. In my opinion it will not fulfil the purpose of a certificate of completion, or that of a certificate of the final balance, and does not satisfy the condition precedent to the proprietor's liability for payment of any amount beyond the progress payments. It will not operate as a certificate of practical completion because it expressly states an amount avowedly in excess of the ninety-nine per cent payable on such a certificate, and it does not expressly state the architect's opinion that the building is practically completed. That opinion can only be inferred or implied from the certification of the final amount payable. If that had been the correct amount, the implication would have been enough to complete the certificate according to the decisions cited above. If, on the other hand, an express statement of the architect's judgment had been made and no amount had been certified, a question would have arisen whether the decision in *Pashby* v. *Borough of Birmingham* (1), or the principles upon which it proceeded, might be applied to the present contract, and whether the amount payable in consequence of the certificate might be calculated *aliunde*. But it is quite another thing to reject as unwarranted by the contract all that the architect has expressly certified to, viz., the indebtedness of the proprietor in a stated amount and its finality, to imply therefrom a certificate of a fact not expressed, viz., the practical completion of the building, and then from that fact to impute a liability not final and in a less amount.

(1) (1856) 18 C.B. 2; 139 E.R. 1262.

It is, I think, more than doubtful whether upon its true interpretation the provision does not impliedly require a statement of the amount payable as ninety-nine per cent of the total when a certificate of practical completion is given. However that may be, I do not see how the document in question can fulfil the purpose of such a certificate and so enable the builders to recover a balance making up ninety-nine per cent of the total shown as finally earned. On the other hand, there are two objections which appear to me to be fatal to the use of the instrument as a certificate of the final balance due and payable. In the first instance, I think the final balance referred to by the contract is the residue (subject to proper deductions) not covered by a certificate of practical completion that has been given. In the next place, under the terms of the contract, as I construe it, payment of the final balance is not enforceable until six months after a time described in the contract as "the date of the last mentioned certificate." Now the last mentioned certificate is that of practical completion, and none has been given. Even if it were found possible to treat the certificate in question as satisfying the requirement of a certificate of practical completion sufficiently for the purpose of setting the six months running, the case of the builders would not be advanced, because the writ was issued much less than six months from its date.

Lowe J. considered that it was possible in the circumstances of the case to reckon the twenty-six weeks from the date of the delivery up of the premises to the proprietor. He regarded the provision for a certificate of final completion and payment of ninety-nine per cent as introduced exclusively for the benefit of the builders and as having been waived by them. The appendix to the contract describes the ninety-nine per cent as payable on delivery up of possession. His Honour inferred that the contract contemplated an order of events in which delivery of possession followed a certificate of practical completion. The steps in the learned judge's reasoning are set out fully and very clearly in his judgment and it is not necessary for me to repeat them. It is enough to say that when the contract stated the date of the certificate as the terminus *a quo* of the twenty-six weeks, his Honour understood it to mean that date if any such certificate were given. If in consequence of the builders

H. C. OF A. 1937. KIRSCH v. H. P. BRADY PTY. LTD. Dixon J.

waiving such a certificate and payment thereon none were given, then delivery of possession would become the *terminus a quo*. It is here that I find myself impelled to depart from the reasoning of *Lowe* J. In providing that six months should elapse after a certificate of practical completion before the proprietor should be called upon actually to pay the final one per cent constituting retention money, the contract appears to me to have prescribed something which in part was for the advantage of the proprietor. It, in effect, says that he is to be protected by the requirement that the architect shall form the opinion that the buildings are practically complete and then by the retention after the architect has done so of a sum of money for six months so that if defects appear or the architect's opinion should prove misguided, there will be at least some means of indemnifying the proprietor, either wholly or in part. I do not think that the builders are the only persons interested in the giving of a certificate of practical completion. They may, of course, waive immediate payment, but I do not think they are entitled to dispense with such a certificate. It follows that I do not think that the words " if any " should be understood in the sentence making the date of the certificate the commencement of the six months. Nor do I think the schedule contains sufficient warrant for the view that a certificate of practical completion must precede the delivery of possession, although no doubt it commonly will do so.

It remains to deal with an independent answer given to the views I have adopted. It is said that the provision giving conclusive effect to a certificate showing a final balance operates to give validity to the certificate in question, whatever may be the interpretation of the preceding clause or clauses of the contract. The provision says : —" A certificate of the architect, or an award of the arbitrator, arbitrators, or umpire, hereinafter referred to, as the case may be, showing the final balance due or payable to the builder, shall be conclusive evidence of the works having been duly completed, and that the builder is entitled to receive payment of the final balance." I do not think this gives conclusive effect to a piece of paper professing to be a certificate or award independently of its authority. It deals with the effect of an instrument given under an authority elsewhere conferred.

In the present case the certificate shows on its face that nothing but progress certificates had been given, and it does not profess to be either a certificate of practical completion entitling the builders to ninety-nine per cent or a certificate of the final balance based on the one per cent residue.

In my opinion the certificate is ineffective.

It does not appear whether the architect's authority still subsists, but, if it does not, then, on the view I take, the builders' only recourse appears to be to invoke the arbitration clause. If so, it may be unfortunate that they successfully resisted the proprietor's application to refer the action or stay it.

I think the appeal should be allowed, the order of the Supreme Court discharged and the questions in the special case answered in the negative.

EVATT J. In this case I am in agreement with the judgment of my brother *Dixon*. I am not prepared to deny that, by the employment of a certain amount of violence, it is possible to place upon the relevant clauses of the agreement an interpretation favourable to the present respondent. But the construction contended for by the appellant gives to the words and the arrangement and order of the words a natural and grammatical sense. It is not too much to ask that contracting parties who are desirous of giving conclusive effect to a quasi-arbitrator's certificate of liability should express that intention quite clearly.

I agree that the appeal should be allowed.

MCTIERNAN J. In my opinion the appeal should be allowed.

Interim payments were made by the defendant to the plaintiff of the sums mentioned in six progress certificates issued under clause 39 of the general conditions referred to in the contract. Possession of the building having been given to the defendant, the plaintiff would, upon the production of a certificate of practical completion, have become entitled by clause 40 of the contract to receive a further payment, which with the interim payments, would have been equal to the percentage of the value of the work mentioned in the appendix to the contract, that is, ninety-nine per cent. But no such certificate

H. C. OF A. 1937. KIRSCH v. H. P. BRADY PTY. LTD. McTiernan J.

was issued, nor was any further payment made to the plaintiff. Clause 40 contemplates that the certificate of practical completion would be the penultimate certificate. For, after providing that the plaintiff would be entitled to receive the above-mentioned percentage of the value of the work done upon delivery of the possession of the building and upon production of that certificate, it proceeds " and within the number of weeks stated in the appendix of the date of the last mentioned certificate, the balance of the value of the work actually done, or of the contract price, as the case may be (subject to any such addition or deduction as aforesaid) shall be paid by the proprietor to the builder upon the production of the architect's written certificate, stating the amount of such balance, provided that the builder has executed or completed the works to the architect's entire satisfaction." The entries in the appendix fixing the percentage upon which the amount of the penultimate certificate is based, and the number of weeks in which the final balance is to be paid are respectively as follows: " Percentage payable upon delivery up of possession ninety-nine per cent," and " Number of weeks within which balance is to be paid twenty-six weeks." The stipulation that twenty-six weeks should elapse from the date of the penultimate certificate of practical completion is clear and unambiguous, and it provides, as *Lowe* J. said, a weighty argument for the conclusion that the issue of the said certificate is a condition precedent to the issue of a certificate which in the contemplation of the contract would be a final certificate of the defendant's residual liability. But his Honour was of opinion that the plaintiff was entitled to decline to exercise his right to receive payment of the stipulated percentage before the final settlement of the account, holding that the condition was for the plaintiff's benefit, and that if no penultimate certificate was given the above-mentioned entries from the appendix showed that in those circumstances the intention exhibited by the contract was that the period of twenty-six weeks should run from the time that possession was delivered up to the defendant. The result at which the learned judge arrived was reasonable and practicable. But the period of twenty-six weeks is so clearly expressed to run from the date of a penultimate certificate of practical completion that the date of the delivery of possesson cannot, consistently with the language of clause 40, be substituted for the date of

such certificate. Moreover, the stipulation that this certificate should be issued is for the benefit of the defendant, the proprietor, because the time allowed to him within which to make the final payment runs from the date of the certificate. The contract does not require that it should be produced before or simultaneously with the delivery of possession. The construction adopted by the learned judge in making the time run from the delivery of possession has the effect of abridging the time which the contract contemplates that the defendant would have to make the final payment. Clause 40 departs from the form adopted by the Royal Institute of British Architects (*Encyclopædia of Forms and Precedents*, 2nd ed., vol. 2, p. 466), by making the time run from the date of the certificate and not from the happening of an event. Clause 41 cannot be relied upon to authorize the document which the plaintiff contends is a final certificate, for the office of this clause is limited to giving efficacy according to its tenor to any certificate of the architect validly authorized by the conditions.

I agree with the Chief Justice that the principle of *Scott* v. *Avery* (1) applies to the arbitration clause in the contract, and I am of the opinion that all the questions should be answered: No.

Appeal allowed. Questions in the case stated answered: No.

Solicitors for the appellant, *Moule, Hamilton & Derham.*
Solicitor for the respondent, *H. H. Hoare.*

H. D. W.

(1) (1856) 5 H.L. Cas. 811; 10 E.R. 1121.