REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

JOHN GRANT AND SONS LIMITED . . APPELLANT;
PLAINTIFF,

AND

THE TROCADERO BUILDING AND INVESTMENT COMPANY LIMITED . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, 1937, *Dec.* 2, 3, 6, 7.

1938, *April* 4.

Latham C.J., Rich, Starke, Dixon and McTiernan JJ.

Arbitration—Building contract—Progress certificate—Right to payment—Dispute—Reference to arbitration—Dissatisfied party—Action—Building contract approved by Royal Australian Institute of Architects, clauses 23, 34, 39-42.

In the general conditions, which were to be read and construed as forming part of a building contract, clause 39, dealing with progress certificates, provided that when the value of the work done, as computed by the architect, amounted to a certain sum, the builder should be entitled to receive certain payments, and the architect should give the builder certificates accordingly. It further provided that the builder should furnish the architect with a detailed statement of the amount claimed. Clause 42 provided that, in the event of a dispute arising between the proprietor, or the architect on his behalf, and the builder, as to the construction of the contract or as to the net local cost under clause 36 or as to any matter or thing arising thereunder (except matters

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arising under three specified clauses, which were to be left to the sole discretion of the architect) or as to the withholding, by the architect, of any certificate to which the builder might claim to be entitled, or as to the amount of any certificate final or otherwise, the dissatisfied party should give the architect seven days' notice that it desired the matter in dispute to be referred to arbitration, and, at the expiration of that period, unless then settled, the matter should be referred to arbitration. The award of the arbitrator was to be final and binding on both parties, and neither party was to be entitled to commence or maintain an action upon such matter in dispute until the matter should have been referred to, and determined by, arbitration, and then only for the amount to which the arbitrator should have found it entitled. The architect having given a progress certificate, the builder brought an action to recover from the proprietor the amount due thereon.

Held, by *Rich*, *Starke* and *Dixon* JJ. (*Latham* C.J. and *McTiernan* J. dissenting), that the giving of a progress certificate by the architect conferred upon the builder a right to payment of the amount certified, which right was not affected by the arbitration clause, since the proprietor had not brought that clause into operation by giving notice.

In pleas by way of cross-action the proprietor claimed damages in respect of alleged failure by the builder to execute and complete the works in the manner required by the specifications. In a replication the builder alleged in substance that this claim constituted a dispute between the parties which was referable under the contract, that the proprietor was the dissatisfied party, and that it had not referred the claim to arbitration in the manner required by the arbitration clause nor had it been so determined.

Held, by the whole court, that this replication was a good answer to the pleas by way of cross-action.

Held, further, by the whole court, that performance of the requirement in clause 39 to furnish the architect with a statement was not a condition on which his power to certify depended.

Clause 23 provided : " If, in the opinion of the architect, the work in respect of variations cannot be properly measured and valued, day-work prices should be allowed therefor, provided that vouchers or other sufficient evidence shall have been produced for verification to the architect or his nominee " within a specified time.

Held, by *Rich*, *Starke* and *Dixon* JJ. (*Latham* C.J. and *McTiernan* J. dissenting), that production of vouchers &c. to the architect or his nominee was not made a condition of the validity of the architect's progress certificate although it included day-work prices.

Decision of the Supreme Court of New South Wales (Full Court) : *John Grant & Sons Ltd.* v. *Trocadero Building and Investment Co. Ltd.*, (1937) 37 S.R. (N.S.W.) 535 ; 54 W.N. (N.S.W.) 191, reversed.

APPEAL from the Supreme Court of New South Wales.

An action on a building contract was brought in the Supreme Court of New South Wales by the builder, John Grant & Sons Ltd., against the proprietor, the Trocadero Building and Investment Co. Ltd., for the recovery of £5,000 alleged to be due from the defendant to the plaintiff on a progress certificate given by an architect appointed under the contract.

In a cross-action the proprietor claimed from the builder the sum of £7,500 on the ground that the builder had not executed or completed the works, matters and things with materials and workmanship of the best of their respective kinds nor in the manner respectively required by the specifications, general conditions and drawings.

The plaintiff demurred to the first, second, fifth, sixth, ninth, tenth, eleventh, twelfth and thirteenth pleas, and the defendant demurred to the second, third, fifth, sixth, seventh and eleventh replications. The ninth and thirteenth pleas constituted the cross-action.

In the course of argument, counsel for the defendant intimated that he did not intend to support the first plea, and that he did not intend to press a demurrer which had been filed to the eighth replication. This replication and demurrer were therefore omitted from the demurrer book, which was filed after argument had been entered upon.

The nature of the pleadings is sufficiently set forth in the judgments hereunder.

The contract recited that the builder had agreed to execute certain works, subject to the general conditions, for the sum of £51,990, to be paid to the builder at the times and in the events mentioned in the general conditions. It provided that the builder should perform and deliver up the works mentioned in the specifications and general conditions and in the drawings therein respectively referred to, and in the manner thereby respectively required. In the general conditions, which were to be read and construed as forming part of the contract, it was provided, by clause 2, that the work should be carried out in accordance with the directions and to the reasonable satisfaction of the architect, in accordance with the signed drawings, specifications and marginal sketches.

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The relevant clauses of the general conditions are set forth in full in the judgment of *Starke* J. They included clause 39, which made provision for progress payments on the architect's certificate, and clause 42, which provided that, in the event of a dispute arising between the proprietor and the builder, the dissatisfied party should give certain notice, and the matter in dispute should then be referred to arbitration. The builder received a certificate from the architect during the progress of the work, but the proprietor refused to pay the amount certified.

The Full Court of the Supreme Court held that the arbitration clause applied in respect of a refusal to make progress payments; that such a refusal was a dispute within the meaning of the contract; and that, in the circumstances, the builder was a dissatisfied party. The court ordered that judgment be entered for the plaintiff on the demurrers to the defendant's first, ninth and thirteenth pleas, and for the defendant on the demurrers to the second, fifth, sixth, tenth, eleventh and twelfth pleas and for the defendant on the demurrers to the plaintiff's second and eleventh replications. It further ordered that judgment be entered for the defendant generally upon the demurrers in the action and that judgment be entered for the plaintiff generally upon the demurrers in the cross-action: *John Grant & Sons Ltd.* v. *Trocadero Building and Investment Co. Ltd.* (1).

From that decision the plaintiff appealed to the High Court.

Windeyer K.C. (with him *Loxton*), for the appellant. The intention of the parties as expressed in the contract was that the architect should be the absolute arbiter of all matters except those mentioned in clause 42, as to which the validity of his certificate may lapse by reason of it coming within the provisions relating to arbitration. The certificate of the architect and an award by an arbitrator were both to be final and conclusive in their respective circumstances.

[DIXON J. referred to *Brodie* v. *Cardiff Corporation* (2).]

Unless challenged the architect's certificate has the same effect and validity as an arbitrator's award. Under the contract the architect is constituted the sole arbiter of all differences except the particular kind which may be referred to arbitration. This arbitration clause

(1) (1937) 37 S.R. (N.S.W.) 535; 54 W.N. (N.S.W.) 191.
(2) (1919) A.C. 337.

is dissimilar to the clause in *Scott* v. *Avery* (1). The obvious intention of clause 42 is to refer and make machinery provision for certain matters which are declared to be referable, namely, those specified in the clause and any other matters dealt with by the contract which require to be referred to arbitration. The whole contract contemplates that the architect should give decisions (See clauses 34, 39 and 40). The expression "dissatisfied party" in clause 42 refers to that party who is dissatisfied with the architect's decision. A dispute must be disputed in the way prescribed by the contract and must be in respect of such a matter as comes within the definition of "dispute or difference" as contemplated by clause 42 (*Kirsch* v. *H. P. Brady Pty. Ltd.* (2)); a mere refusal to pay is not such a dispute. A progress certificate, unless challenged, is something which is ascertained and definite; it is conclusive and creates an enforceable right to recover money in a court of law. Here the progress certificate has not been challenged and the appellant is entitled to sue upon it. It is clear from the contract that as regards a great many matters which might arise thereunder the decision of the architect was to be final. The word "thereunder" in clause 42 does not refer to the whole contract; the certificate of the architect in respect of non-referable matters is final, and, in the event of the procedure prescribed by the contract not being followed in respect of referable matters, is final also as regards those matters (*Clemence* v. *Clarke* (3); *Lloyd Bros.* v. *Milward* (4); *Chambers* v. *Goldthorpe* (5); *Piggott* v. *Townsend* (6)). Reference to arbitration is in the nature of an appeal (*Robins* v. *Goddard* (7)). The provision as to the giving of a certificate by the architect becomes inoperative only in the event of the notification of a dispute (*Dixon* v. *South Australian Railways Commissioner* (8)). In the absence of such a notification it was the architect's duty to give a certificate (*Hickman & Co.* v. *Roberts* (9)).

[STARKE J. referred to *In re An Arbitration between Hohenzollern Actien Gesellschaft für Locomotivbau and the City of London Contract Corporation Ltd.* (10).]

(1) (1856) 5 H.L.C. 811; 10 E.R. 1121.
(2) (1937) 58 C.L.R. 36, at p. 52.
(3) (1880) Hudson on Building Contracts, 4th ed. (1914), vol. II., p. 54.
(4) (1895) Hudson on Building Contracts, 4th ed. (1914), vol. II., p. 262.
(5) (1901) 1 Q.B. 624.
(6) (1926) 27 S.R. (N.S.W.) 25; 44 W.N. (N.S.W.) 26.
(7) (1905) 1 K.B. 294.
(8) (1923) 34 C.L.R. 71, at p. 95.
(9) (1913) A.C. 229.
(10) (1886) 2 T.L.R. 470; Hudson on Building Contracts, 4th ed. (1914), vol. II., p. 100.

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What constitutes a dispute or difference is discussed in *Russell* on *Arbitration and Award*, 13th ed. (1935), p. 303. Rights given by the contract are enforceable in a court of law without recourse to arbitration (*London and North Western and Great Western Joint Railway Cos.* v. *J. H. Billington Ltd.* (1); *London and North Western Railway Co.* v. *Jones* (2); *Standard Insurance Co. Ltd.* v. *Scandrett* (3)). The pleas are bad for, *inter alia*, duplicity. The twelfth plea does not show a challenging of the certificate as is contemplated by clause 42. The pleas are pleas in confession and avoidance. They do not traverse the existence of a contractual right; they admit such a right subject to the performance of a condition precedent. The respondent has not alleged a readiness and willingness to pay subject to the certificate being in order. The alleged condition is not a condition precedent to the appellant's rights under the certificate. [He was stopped on this point.] The fifth plea is demurrable because it is contrary to the provisions of clause 39 and it does not allege that the opinion therein referred to was communicated to the appellant. The sixth plea is bad; a mere refusal to pay is not a dispute within the meaning of the arbitration clause. The form of the contract here is different from the contract under consideration in *Lloyd Bros.* v. *Milward* (4), and, as that case shows, it is necessary that the alleged dispute should have been communicated to the architect. The plea does not allege (*a*) no award; or (*b*) that there is existing an arbitration; or (*c*) a desire for arbitration. Having regard to the great length of time which elapsed between the commencement of the action and the filing of the tenth, eleventh and twelfth pleas, the allegation therein that a reasonable time for the remission of matters to arbitration had not elapsed cannot be sustained. A readiness and willingness so to remit has not been pleaded. A party relying upon a claim of right to have a matter remitted to arbitration must show (*a*) the performance of any condition precedent before that claim is exercised, or (*b*) that he has been prevented from such performance and a readiness and willingness to perform the condition (*Bullen and Leake*,

(1) (1899) A.C. 79.
(2) (1915) 2 K.B. 35.
(3) (1923) 23 S.R. (N.S.W.) 254; 40 W.N. (N.S.W.) 22.
(4) (1895) Hudson on Building Contracts, 4th ed. (1914), vol. II., p. 262.

Precedents of Pleadings, 3rd ed. (1868), p. 61 ; *Chitty* on *Contracts*, 17th ed. (1921), p. 881 ; *Roberts* v. *Brett* (1) ; *Rawson* v. *Johnson* (2)). Here, the respondent has not averred the giving by him of a notice requiring the matter to be remitted to arbitration which was a condition precedent to the setting aside of the certificate.

Weston K.C. (with him *Shand* and *J. E. Cassidy*), for the respondent. It is a rule of pleading that upon demurrer judgment is given upon the whole record (*Bullen and Leake, Precedents of Pleadings*, 3rd ed. (1868), p. 820 ; *Stephen's Principles of Pleading*, 6th ed. (1860), p. 133). An allegation of the fulfilment of conditions precedent generally does not dispense with the ingredient of a cause of action. The first count in the declaration is a count for a breach of clause 39 of the contract on its face and nothing else. The second count is a count for breach of clauses 34 and 39 upon its face and nothing else. It is the existence of a dispute as to whether there has or has not been a breach of contract which prevents the bringing of an action. If clause 42 does not operate in the circumstances of the case as a bar to any action, it at least operates in the circumstances of the case to prevent an action upon the certificate being successful. An action must be preceded by an award, and, if that measure of settlement fail, the architect's authority to give a certificate which will found an action disappears (*Robins* v. *Goddard* (3) ; *Piggott* v. *Townsend* (4) ; *Kirsch* v. *H. P. Brady Pty. Ltd.* (5)). A certificate ceases to be final and conclusive if genuinely disputed (*Johns & Son* v. *Webster & Tonks* (6)). Having regard to the terms of this contract, the decision in *Lloyd Bros.* v. *Milward* (7) is not applicable. *Clemence* v. *Clarke* (8) is not of any assistance to the court in this matter. The effect of those two cases is not as suggested in *Chambers* v. *Goldthorpe* (9) ; the true view of those cases is as expressed in *Eaglesham* v. *McMaster* (10). It would have been a good plea had the respondent pleaded then for the first time that it disputed the

(1) (1859) 6 C.B. N.S. 611 ; 141 E.R. 595.
(2) (1801) 1 East 203 ; 102 E.R. 79.
(3) (1905) 1 K.B. 294.
(4) (1926) 27 S.R. (N.S.W.) 25 ; 44 W.N. (N.S.W.) 26.
(5) (1937) 58 C.L.R. 36.
(6) (1916) N.Z.L.R. 1020.
(7) (1895) Hudson on Building Contracts, 4th ed. (1914), vol. II., p. 262.
(8) (1880) Hudson on Building Contracts, 4th ed. (1914), vol. II., p. 54.
(9) (1901) 1 Q.B., at p. 635.
(10) (1920) 2 K.B. 169, at pp. 175, 176.

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certificate (*Robins* v. *Goddard* (1); *Kirsch* v. *H. P. Brady Pty. Ltd.* (2)), but the respondent did much more, it pleaded an antecedent dispute at relevant times. It was not essential to give notice upon the arising of a dispute as a condition of the arbitration. The proper construction of clause 42 is that if a dispute arises in a specified time as to specified things no party should be entitled to commence or maintain any action in relation to such dispute until it had been referred to arbitration as therein provided and any party might refer it to arbitration in the manner provided. The clause prohibits any action for breach of contract irrespective of whether there has or has not been a dispute with reference to that breach of contract, therefore the second plea is a good plea. A certificate must be a matter in the circumstances and in the manner specified in the subject contract; if it is it has such efficacy as the contract attributes to it, if it is not it has none. Certificate or no certificate, an award is necessary for the appellant to have any right under the contract. The essentials of a cause of action must be stated; this requirement is not satisfied by the general averment of a condition precedent if there is missing the allegation in the cause of action (*Hollis* v. *Marshall* (3); *Bullen and Leake, Precedents of Pleadings*, 3rd ed. (1868), p. 148). The pleas are good pleas. The tenth and twelfth pleas were drawn on different views of the law for more abundant caution. With regard to the replication pleaded to the fifth and seventh pleas, clause 42 does not impose any obligation upon a person to go to arbitration (*Kirsch* v. *H. P. Brady Pty. Ltd.* (4)); it deals with arbitration; the arbitration is not necessarily bilateral. The builder must, as a minimum, comply with the drawings and specifications.

Windeyer K.C., in reply. The proper construction of the contract as a whole is that any matters that might come into dispute should be immediately and finally dealt with by the architect.

Cur. adv. vult.

(1) (1905) 1 K.B., at pp. 301, 303.
(2) (1937) 58 C.L.R., at pp. 51, 61.
(3) (1858) 2 H. & N. 755, at p. 765; 157 E.R. 311, at p. 316.
(4) (1937) 58 C.L.R., at p. 51.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a judgment of the Full Court of the Supreme Court of New South Wales upon demurrers and cross-demurrers in an action by a builder against a building owner for payment for work done under a contract for the erection of buildings. The plaintiff sues for the value of work done by him as computed by the architect appointed under the contract and as shown in a certificate given by the architect. The action is not brought upon a final certificate, but upon a progress certificate. The defendant has set out in his pleas the whole of the deed which constitutes the contract. The pleas allege that certain disputes have arisen under the contract and that the terms of the contract require the award of an arbitrator before either party can sue in relation to matters in dispute. The plaintiff replies that under the contract the certificate of the architect is binding if an arbitration has not in fact taken place, that no arbitration has in fact taken place, and that the plaintiff was not ready and willing to go to arbitration. The defendant has also claimed damages by way of cross-action for certain alleged breaches of contract by the plaintiff and the plaintiff has replied that disputes have arisen as to these alleged breaches and that the defendant therefore cannot recover without an award of an arbitrator. Other points relating to the fulfilment of conditions precedent are raised by the pleadings, but the Supreme Court found itself able to determine the questions raised by the demurrers and cross-demurrers without reference to those points. The Full Court held that the pleas, in setting out the deed, sufficiently alleged facts which brought into operation a clause in the contract of the *Scott* v. *Avery* (1) type and that, accordingly, the pleas showed a good defence to the action, and that, for the same reason, the replications provided a good answer to the pleas by way of cross-action.

The contract is in a form which is widely used and which resembles in many particulars contracts which have been the subject of decisions in the courts in England and in Australia. There are, however, some variations from the form which has been interpreted in such

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

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cases as *Clemence* v. *Clarke* (1) and *Lloyd Bros.* v. *Milward* (2). Those cases were cases of actions upon final certificates and the questions which arose related to the effect of a final certificate where the contract provided that a certificate of the architect *or* an award of an arbitrator should be conclusive evidence that the works were duly completed and that the contractor was entitled to receive payment of a final balance. In my opinion it is unnecessary to examine the rather unsatisfactory position produced by the varying views which appear in the cases mentioned. In the first place, this is an action upon a progress certificate, not upon a final certificate, and it will be seen that the provisions relating to final certificates being binding and conclusive do not apply to progress certificates under the contract between the parties in this case. In the second place, in the present contract there is a clause of the *Scott* v. *Avery* (3) type and there was no such clause in the contracts in the decisions to which I have referred. In the third place, the contract between the parties in this case provides that a dispute as to the amount of any certificate may be referred to arbitration. There was no such provision in the contracts in the cases mentioned.

It is important first to examine the contract for the purpose of appreciating the differences between the provisions relating to final certificates and those relating to progress certificates. Clause 40 has a marginal note " Final Certificate " but it in fact relates not to any final certificate but to a certificate entitling the builder to payment of 90 per cent of the value of the work actually done. Such a certificate is not a final certificate. The provisions of clause 40 were examined in some detail in the recent case of *Kirsch* v. *H. P. Brady Pty. Ltd.* (4).

Clause 41 is the clause which provides for a final certificate. It is in the following terms :—" 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

(1) (1880) Hudson on Building Contracts, 4th ed. (1914), vol. II., p. 54.
(2) (1895) Hudson on Building Contracts, 4th ed. (1914), vol. II., p. 262.
(3) (1865) 5 H.L.C. 811 ; 10 E.R. 1121.
(4) (1937) 58 C.L.R. 36.

the final balance but without prejudice to the liability of the builder under the provisions of clauses 20 and 40." (It is unnecessary for the purpose of this case to consider clauses 20 and 40 in relation to clause 41, as the certificate which is sued upon is not a final certificate.) This clause makes a final certificate *or* an award conclusive evidence that the works have been duly completed and that the builder is entitled to receive payment of the final balance. There are obvious difficulties associated with a provision that either a certificate or an award shall be conclusive evidence as to the same matter and the questions which may arise have also been examined to some extent in *Kirsch* v. *H. P. Brady Pty. Ltd.* (1).

But in the case of a progress certificate, with which clause 39 deals, there is no provision that the certificate shall be conclusive evidence of anything. Clause 39 is as follows :—" When the value of the work done, including provisional or P.C. items, as computed by the architect and not included in any former certificates shall from time to time amount to the sum stated in the appendix or less, at the architect's reasonable discretion, the builder shall be entitled to receive payment at the percentage upon such value stated in the appendix until the balance in hand shall amount to the limit of retention fund stated in the appendix, after which time the builder shall be entitled to receive payment for the full value of all works executed and not included in any former payment and the architect shall give to the builder certificates accordingly. The builder shall furnish the architect with a detailed statement of the amount claimed."

It is upon clause 39 that this action is based. The clause provides that the builder shall be entitled to be paid certain sums, representing a percentage of the value of the work done from time to time, or, after a certain stage, representing the whole value of work done subject to the provision for a retention fund. The value must be computed by the architect. It is in respect of the value " as computed by the architect " and in respect of that only that the builder is entitled to receive payment. It is not necessary to decide in this case whether a progress certificate is a condition precedent to the right to receive a progress payment. Clause 39 does not so provide

(1) (1937) 58 C.L.R. 36.

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in any express terms. Even if such a certificate were a condition precedent, it would not necessarily follow that the certificate was conclusive evidence of what it certified. When a builder sues a building owner under clause 39, if the defendant insisted upon strict proof the plaintiff would, I think, have to prove that the architect had made the computation required, and the production of a certificate signed by the architect would not strictly be evidence of that fact. There is no provision in clause 39, as there is in clause 40, that the progress certificate shall be conclusive evidence of anything or even that it shall be evidence of anything. Accordingly, it is not necessary in this case to examine any difficulties which arise from provisions in contracts which provide that a certificate or an award shall each be conclusive evidence of the same thing. I therefore consider the case upon the basis that, while the contract requires that the architect shall give progress certificates to the builder, the contract does not provide that those certificates shall themselves be evidence of the right of the builder to be paid the amount mentioned in such a certificate.

It is quite probable that it was intended by the draughtsman of the contract that the progress certificate should be at least prima facie evidence, and perhaps, in some sense, conclusive evidence of the right of the builder to receive payment, but he has not inserted any provision in the contract which brings about that result.

The claim of the plaintiff, therefore, is for payment of a sum as computed by the architect under clause 39. If he establishes that the amount claimed was so computed, then he is prima facie entitled to succeed. The defendant, however, pleads that, before the relevant progress certificate was given, there were in existence between the plaintiff and the defendant " questions and disputes as to whether the sum claimed for herein or any part of it was then or would become due or payable to the plaintiff and as to whether the architect was or was not at liberty to issue the said or any further certificate or certificates and the defendant was denying the right of the plaintiff to the payment of any part of the moneys claimed and the right of the architect to issue any certificate and the said questions, disputes and denial existed at all times from the said time to the present time all of which the plaintiff at all material times knew and was informed

of by the defendant" (sixth plea). Allegations of disputes are to be found also in the 10th, 11th, and 12th pleas. These pleas and the other pleas demurred to (which set out the whole contract including the arbitration clause) make it necessary to consider clause 42. I set out the relevant portions of clause 42, inserting figures for the purpose of showing the classes of disputes which fall within the clause: "Provided always that in case any dispute or difference shall arise between the proprietor or the architect on his behalf and the builder either during the progress of the works or after the determination, abandonment or breach of the contract" (1) "as to the construction of the contract, or" (2) "as to the net local cost under clause 36, or" (3) "as to any matter or thing arising thereunder (except as to matters left to the sole discretion of the architect under clauses 12 and 20, and the exercise by him under clause 19 of the right to have any work opened up), or" (4) "as to the withholding by the architect of any certificate to which the builder may claim to be entitled, or" (5) "as to the amount of any certificate, final or otherwise, the dissatisfied party shall give to the architect seven days' notice in writing that he desires the matter in dispute to be referred to arbitration and at the expiration of seven days unless the matters in dispute have been otherwise settled, such matters shall be submitted to arbitration in the following manner that is to say:—" (then follow provisions as to appointment of arbitrator, &c.) The clause continues: "the award made by the said arbitrator arbitrators or umpire (as the case may be) shall be final and binding on both contractor and proprietor and neither party shall be entitled to commence or maintain any action upon any such breach or dispute until such matter shall have been referred or determined as hereinbefore provided and then only for the amount of relief to which the arbitrator arbitrators or umpire by his or their award finds either party is entitled." Provisions follow as to costs and as to serving notice of dispute or difference and of demand for arbitration.

This clause provides for arbitration in the case of any dispute or difference arising (3) as to any matter or thing arising under the contract (with certain exceptions) or (5) as to the amount of any certificate, final or otherwise. It has been argued that clause 3,

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"any matter or thing arising thereunder," means any matter or thing arising "as to the net local cost under clause 36" or arising "under clause 36" which are the immediately preceding words. I do not think that this construction should be adopted because the other construction, that "thereunder" means arising under the contract, is not only more natural, but is supported by the character of the exceptions made in (3) relating to clauses 12, 20 and 19. These exceptions cannot rationally be construed as exceptions in relation to questions affecting "net local cost" under clause 36, or to questions arising under clause 36, as reference to the clauses mentioned will show.

The defendant alleges in his pleading that disputes or differences have arisen as to various matters or things arising under the contract and also as to the amount of the progress certificate sued upon. Clause 42 provides that in such a case (1) the dissatisfied party shall give notice that he desires arbitration and that unless the matters in dispute are settled otherwise they shall be submitted to arbitration; (2) the award made by the arbitrator shall be final and binding and *neither party* shall be entitled to commence or maintain any action upon the dispute "*until* the matter has been referred or determined as hereinbefore provided," that is, by arbitration; (3) the only action that will then be available shall be for the amount of relief to which the arbitrator, arbitrators or umpire by his or their award finds either party is entitled. The contention of the defendant is that his pleas allege that disputes or differences as to referable matters have arisen and that therefore the only action available to the plaintiff in respect of such matters is an action for the amount of relief to which an award declares that the plaintiff is entitled. This contention was upheld by the Full Court and, in my opinion, the judgment of the Full Court was right.

In relation to referable matters which are the subject of a dispute, the clause is, as I have said in *Kirsch* v. *H. P. Brady Pty. Ltd.* (1), a *Scott* v. *Avery* (2) clause, and the right of *either* party to sue in respect of such matters depends upon the existence of an award and then, when there is an award, he can sue only for what the award gives him.

(1) (1937) 58 C.L.R., at p. 51. (2) (1856) 5 H.L.C. 811; 10 E.R. 1121.

It is contended in opposition to this view that the defendant cannot rely upon clause 42 because his pleas do not allege either that an arbitration has in fact taken place or is taking place or that the defendant was ready and willing to submit the disputes to arbitration. Attention is called to the provision in clause 42 " that the dissatisfied party shall give to the architect " notice that he desires arbitration. The plaintiff's contention is that the defendant is the party who is dissatisfied with the architect's certificate, and that therefore he alone is the party who can bring about the arbitration, and that before he can rely upon clause 42 he should have taken steps to bring about arbitration or at least be in a position to show that he was ready and willing to proceed to arbitration. In my opinion this contention is not well founded. In the first place it may be observed that both parties may be dissatisfied as to a particular matter, for example, the builder might complain that the architect had certified for too small an amount and the building owner might complain that the certificate was for too large an amount. In such a case either party could plainly proceed to arbitration. Further, it may be observed that on a question of the construction of the contract (which is a referable matter) the architect cannot determine the question by a certificate, and once again either party could go to arbitration if they differed upon such a question. But further, and more generally, whenever one party declines to accede to a claim or contention of the other in relation to a matter arising under the contract there is then a dispute to which there are two disputants as parties. They can leave the matter in the condition of a continuing and persisting dispute, or, if either of them is not satisfied to leave the matter standing as an unresolved controversy, he is, in my opinion, a dissatisfied party who is entitled, by his own act, to procure a reference to arbitration. By way of illustration, I take a case in which the building proprietor disputes the correctness of the architect's certificate, alleging that it has been given for too large an amount. The builder is satisfied with the certificate, but is dissatisfied with the action of the proprietor in challenging the certificate and refusing to pay. The proprietor is dissatisfied with the amount of the certificate but does not desire to arbitrate about it because (it may be supposed) he is satisfied to leave things as

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they are, having received the benefit of the builder's work without paying for it. In such a case I am of opinion that the builder can himself bring about an arbitration because he is dissatisfied with a matter or thing (and a very important matter or thing) arising under the contract, namely, the action of the proprietor in challenging the decision of the architect and not paying. He is entitled to arbitration upon the question whether the architect's certificate is right or wrong and upon the question whether the proprietor is bound to pay the sum certified or some other sum.

For the reasons which I have given I think that both parties in this case are dissatisfied parties within the meaning of clause 42 and accordingly either party can go to arbitration. I agree with the view of the Supreme Court that where the matters in dispute are referable clause 42 prevents any action in relation to those matters except for the amount found to be due by an award. Similar considerations provide an answer to the defendant's cross-action.

The pleas in the present case also allege disputes as to referable matters existing before the certificate was given (See *Lloyd Bros.* v. *Milward* (1)). But this fact is not, I think,important in the present case, because clause 42 provides that there may be an arbitration as to the amount of any certificate and therefore necessarily after the certificate has been given. There was no such provision in the contract which was considered in *Lloyd Bros.* v. *Milward* (1), where it was held that disputes arising after the certificate was given could not be referred to arbitration under the contract.

A further point has been raised upon the final provision of clause 42, which I have not quoted at length. It provides that " in serving notice of dispute or difference and demand for arbitration " the party serving notice shall provide evidence that he has made a certain deposit by way of security for costs. It has been urged for the plaintiff that this provision shows that there must be a notice of the dispute and a demand for arbitration and that the notice and demand must be served. This is obviously the case, but this provision creates a condition precedent to an arbitration taking place under the clause and not a condition precedent to the application

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

of the clause. The existence of a dispute as to a referable matter is the essential thing which brings clause 42 into operation. Then a notice of a dispute and a demand for arbitration must be given by the person who takes steps to proceed to arbitration. There is nothing in this clause which, in my opinion, affects the view which I have expressed as to the significance of clause 42.

For the reasons which I have given the judgment of the Full Court should be affirmed so far as it deals with pleas 6, 10, 11 and 12 (which allege the existence of disputes as to referable matters) and with the replication to the pleas (9 and 13) by way of cross-action which also allege the existence of such disputes, namely, replication 6 (fifth replication to those pleas). The other pleas (2 and 5) demurred to were held good because they set out the whole deed including the arbitration clause with its *Scott* v. *Avery* (1) provision. But those pleas did not also allege the existence of disputes as to referable matters and therefore they should not, in my opinion, be held to be good for the reasons stated by the Full Court.

The second plea relies upon a provision in clause 39 that the builder shall furnish the architect with a detailed statement of the amount which he claims. I have already quoted clause 39. The last sentence, referring to the detailed statement, is not so expressed as to constitute a condition precedent to the builder's right to receive payment of moneys under the clause. There are no words which, as between the builder and the building owner, can be relied upon as making the provision a condition precedent in the sense which is necessary if non-fulfilment is to amount to a defence in this action. The last sentence of the clause is separate and detached from the earlier portions. The first part of the clause is : " When the value of the work done . . . as computed by the architect . . . shall amount to " &c., " the builder shall be entitled to receive " &c. This part of the clause does establish a condition precedent to the right of the builder to receive payment. The last sentence is not similarly associated with the part of the clause providing for the builder's right to receive payment. The effect of the last sentence is quite different. As already stated, the right of the builder under the clause is to receive a percentage or the whole of

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

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an amount representing a value computed by the architect. Until the architect makes the computation, the builder can have no right under the clause. If the architect cannot make, or declines to make, the computation unless the builder furnishes the detailed statement, the result is that the condition precedent contained in the initial words of the clause has not been satisfied and therefore the builder cannot recover. If, however, the architect makes the computation and gives a certificate, then it cannot be argued that the condition precedent to the builder's right to recover has not been fulfilled. If the architect, thinking that he has sufficient information without the detailed statement, gives the certificate without requiring the statement, he will have to answer to the building owner for any damage resulting from the breach of his duty owed to the owner. But such a breach of duty (by the architect) to the owner does not enable the owner to refuse to pay the builder if the architect has made the computation required. The failure to provide the detailed statement would be a breach of contract by the builder, and the building owner could recover from him the damages, if any, resulting from the breach. Thus the last sentence can have ample operation and effect without being construed as a condition precedent. For the reasons given I am of opinion that the second plea is bad.

The fifth plea relies upon clause 23, which is as follows: "If, in the opinion of the architect, the work in respect of variations cannot be properly measured and valued, day-work prices shall be allowed therefor, provided that vouchers or other sufficient evidence specifying the time and materials employed shall have been produced for verification to the architect or his nominee at or before the expiration of the week following that in which such work shall have been done." The structure of this clause is very different from that of clause 39. In this case the production of the vouchers or other sufficient evidence is made a condition of the exercise by the architect of the power to allow day-work prices. Unless this condition is satisfied, the architect has no authority to allow such prices. An architect has no power, as against the building owner, to waive conditions provided for in the contract unless he is specifically authorized to

do so (*Sharpe* v. *San Paulo Railway Co.* (1)). In my opinion, therefore, plea 5 does show a good defence to the part of the claim to which it is applicable, and the plaintiff's demurrer to this plea should be overruled.

The second and eleventh replications rely upon absence of readiness and willingness in the defendant to go to arbitration. For the reasons given, I am of opinion that these replications are bad.

As the ninth and eleventh pleas are bad it is not necessary to deal with the replications to them, viz., 3, 5 and 8.

The defendant's first plea has been abandoned.

With the exception stated as to the fifth plea I agree with the judgment pronounced by the Full Court. As demurrers by the defendant to the whole declaration are, in my opinion, good, judgment should be entered for the defendant generally upon the demurrers in the action.

RICH J. I have had the advantage of reading the judgment of *Dixon* J. and agree with it.

STARKE J. This action was brought in the Supreme Court of New South Wales. The plaintiff—the appellant here—declared upon a building contract in a form approved by the Royal Australian Institute of Architects, Sydney, and the defendant—the respondent here—raised by plea a cross-action for breach of the same contract. The action came before the Supreme Court upon demurrers to pleas and replications. The demurrers depend upon the proper construction of the contract which must be stated in some detail.

The contract was to erect dancing and shop premises in Sydney and to execute the works in accordance with specifications, drawings and general conditions of contract for the sum of £51,990 to be paid at the times and in the events mentioned in the conditions. Architects were nominated for the purposes of the contract and they were given general control and supervision of the works.

The conditions of the contract relevant to this action are, I think, 23, 34, 39, 40, 41, and 42, but are better stated at length than summarized :—23. " If, in the opinion of the architect, the work in

(1) (1873) 8 Ch. App. 597, at pp. 605, 608.

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respect of variations cannot be properly measured and valued, day-work prices shall be allowed therefor, provided that vouchers or other sufficient evidence specifying the time and materials employed shall have been produced for verification to the architect or his nominee at or before the expiration of the week following that in which such work shall have been done." 34. "If the proprietor refuse or neglect to pay the amount of any certificate given by the architect during the progress of the works for the period of ten days after the same shall have been presented to him for payment the builder shall be entitled to interest on the sum mentioned in such certificate as then payable at the rate of ten per cent per annum from the date of certificate to date of payment." 39. "When the value of the work done, including provisional or P.C. items, as computed by the architect and not included in any former certificates shall from time to time amount to the sum stated in the appendix or less, at the architect's reasonable discretion, the builder shall be entitled to receive payment at the percentage upon such value stated in the appendix until the balance in hand shall amount to the limit of retention fund stated in the appendix after which time the builder shall be entitled to receive payment for the full value of all works executed and not included in any former payments and the architect shall give to the builder certificates accordingly. The builder shall furnish the architect with a detailed statement of the amount claimed." 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 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 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 for liquidated damages under the provisions of clause 31 hereof and his certificate specifying the balance due shall be binding and conclusive. Except in case of error omission misdescription fraud dishonesty or fraudulent concealment relating to the works or materials or as to any matter dealt with in the certificate and save as regards all defects and insufficiency in the works or materials which a reasonable examination would not have disclosed but even in such cases after 18 months it shall be absolutely binding and conclusive." 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."

The appendix provides :—

Value of works for progress payments	£2,000
Percentage of value to be advanced	80 per cent
Limit of retention fund	£2,000
Percentage payable upon delivery up and possession	90 per cent
Number of weeks in which balance is to be paid	4 weeks.

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42. "Provided always that in case any dispute or difference shall arise between the proprietor or the architect on his behalf and the builder either during the progress of the works or after the determination, abandonment or breach of the contract as to the construction of the contract or as to the net local cost under clause 36 or as to any matter or thing arising thereunder (except as to matters left to the sole discretion of the architect under clauses 12 and 20 and the exercise by him under clause 19 of the right to have any work opened up) or as to the withholding by the architect of any certificate to which the builder may claim to be entitled or as

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to the amount of any certificate final or otherwise, the dissatisfied party shall give to the architect seven days' notice in writing that he desires the matter in dispute to be referred to arbitration and at the expiration of seven days unless the matters in dispute have been otherwise settled such matters shall be submitted to arbitration in the following manner that is to say :—In the event of the submission to arbitration being in respect of a claim for damages for breach of contract and the amount claimed is more than £150 or when the amount involved exceeds £150 in respect of any other matter or matters which by these general conditions of contract it is provided shall be submitted to arbitration should a dispute arise in regard thereto and whether the amount involved arises on balance of account or otherwise, such matter or matters shall be submitted to the arbitration of.....of..... or in the event of his death or unwillingness to act to another member of the said institute of architects to be nominated by the proprietor being members of the Royal Australian Institute of Architects and to.....of.....or in the event of his death or unwillingness to act to another member of the said Master Builders' Association to be nominated by the builder being members of a Local Master Builders' Association or to an umpire to be appointed by the arbitrators before entering on the reference who if the said arbitrators shall fail to agree or to make an award within three months of the submission to them of the dispute or difference shall enter on the reference in lieu of them Provided however that if the parties to the dispute or difference shall so agree and in any case if the net amount claimed or involved in the dispute and whether on balance of account or otherwise as aforesaid is £150 (one hundred and fifty pounds) or less than that sum, the reference shall be to a single arbitrator who shall be..... a member of the Royal Australian Institute of Architects or of the Local Master Builders' Association and the award made by the said arbitrators or umpire (as the case may be) shall be final and binding on both contractor and proprietor and neither party shall be entitled to commence or maintain any action upon any such breach or dispute until such matter shall have been referred or determined as hereinbefore provided and then only for the amount of relief to which the

arbitrator arbitrators or umpire by his or their award finds either party is entitled and the costs of the submission reference and award shall be in the discretion of the said arbitrator arbitrators or umpire (as the case may be). In serving notice of dispute or difference and demand for arbitration the party serving such notice shall provide evidence that he has deposited with the hon. secretary of the Local Institute of Architects or the secretary of the Local Master Builders' Association the sum of fifty pounds (£50) by way of security for costs of the arbitration proceedings."

I shall not go through the pleadings, which are lengthy and rather involved, but shall endeavour to state the substance of the matters arising by way of demurrer on the above conditions of contract.

The plaintiff alleges that he has an architect's progress certificate for £5,000 under the latter part of clause 39; that is, for works executed and not included in former certificates after the balance in hand pursuant to that clause amounted to £2,000. Progress certificates are for the benefit of the builders to enable them to obtain payments on account during the progress of the works. And clauses 39 and 34 taken together make it clear that an obligation is imposed upon the defendant to pay the amount of the certificate when granted. The amount constitutes a debt due to the plaintiff (*Pickering* v. *Ilfracombe Railway Co.* (1)). Unless the contract so provides progress certificates are not conclusive and payments made under them are "provisional and subject to adjustment or to readjustment at the end of the contract," and also, I think, in cases of error or mistake before its end (*Tharsis Sulpher and Copper Co.* v. *M'Elroy & Sons* (2)).

But until readjusted or submitted to arbitration under clause 42 the defendant is not freed from his obligation. And so prima facie the plaintiff should succeed upon his declaration.

The defendant by his pleas opposes or answers the declaration in the following manner:—

1. That the progress certificate included amounts in respect of variations and vouchers or other sufficient evidence were not produced for verification to the architects as required by clause 23. The architect may, no doubt, have required such verification

(1) (1868) L.R. 3 C.P. 235.

(2) (1878) 3 App. Cas. 1040, at p. 1045.

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before giving his certificate but the clause creates no condition founding the authority of the architect to give a certificate. The requirement is not an " essential preliminary " to the architect's authority (Cf. *Colonial Bank of Australasia* v. *Willan* (1)).

2. That a " detailed statement of the amount claimed " as required by clause 39 was not furnished to the architect before the progress certificate was given. Again the clause creates no condition founding the authority of the architect to give a certificate.

3. That the operation of the arbitration clause 42 freed the defendant from its prima facie liability on the progress certificate of the architects.

This is the substantial question in the case and is by no means easy of solution. It is a question of construction how far clauses are independent of or modify each other. Neither party is entitled to commence or maintain an action in respect of disputes or differences as to matters mentioned in clause 42. Arbitration is therefore a condition precedent to any right of action in respect of such matters. No arbitration, however, can take place until a dispute or difference within the meaning of clause 42 has arisen. A referable dispute may touch the construction of the contract or any matter arising thereunder which in its context means under the contract or the amount of a certificate final or otherwise.

The validity of a certificate may depend upon the construction of the contract or be a matter or thing arising under the contract and it may therefore form the subject of a dispute referable to arbitration. And the amount of a certificate as a subject of dispute is explicitly stated.

The frame of clause 42 indicates that certificates in case of dispute are open to revision and review by arbitration and consequently modify the provisions of clauses 39, 40 and 41. The dispute must go to arbitration, for clause 42, as already indicated, prevents commencing or maintaining any action " upon any such dispute " until arbitration has been held. But clause 42 goes further and prescribes how the arbitration clause is brought into operation. The dissatisfied and not the satisfied party must give notice that he desires the matter in dispute to be referred to arbitration. Both

(1) (1874) L.R. 5 P.C. 417, at p. 443.

parties may be dissatisfied, in which case either party might give the required notice.

The provisions of clause 42 dealing with the remission of matters in dispute to arbitration are not self-executing; that is to say, the clause does not of its own force and effect refer a dispute to arbitration but requires that the dissatisfied party shall give notice that he desires the matter in dispute referred and then, at the expiration of seven days, the matters in dispute are remitted to arbitration unless otherwise settled.

In my opinion, therefore, clause 42 does not free the defendant from its prima facie liability on the progress certificates until the dissatisfied party has brought the arbitration clause into operation.

The defendant's pleas allege disputes between the plaintiff and the defendant existing at the time of the giving of the certificate and afterwards as to the validity and amount of the certificate and also that a reasonable time had not expired for taking steps to remit the matters in dispute to arbitration. But it is not alleged that the defendant as the dissatisfied party or any dissatisfied party gave notice that it desired such matters to be referred to arbitration. Consequently the second and fifth pleas, based on clauses 39 and 23 of the conditions, and the sixth, tenth, eleventh and twelfth pleas, which do not allege that the arbitration clause was brought into operation, are bad. The defendant's ninth and thirteenth pleas by way of cross-action and the plaintiff's fifth replication to these pleas remain for consideration. The substance of the pleas by way of cross-action is that the plaintiff did not execute or complete the works with materials and workmanship of the best of their respective kinds pursuant to the contract nor in the manner required by the contract whereby the plaintiff was damnified.

By its fifth replication to these pleas (being par. 7 in the amended demurrer book) the plaintiff alleged in substance that the defendant's claim constituted a dispute between the parties which was referable under the contract, that the defendant was the dissatisfied party and that it had not referred the claim to arbitration in the manner required by the arbitration clause nor had it been so determined.

In my opinion the fifth replication answers the pleas by way of cross-action for the reasons already assigned upon the proper

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construction of the contract. Other replications were pleaded to the pleas by way of cross-action but the parties paid little, if any, attention to them on the argument and they do not seem to require further mention.

Several cases were referred to during the argument but none I think govern the construction of the contract now before us. Only the following need be mentioned. In *Lloyd Bros.* v. *Milward* (1) an action was brought by the plaintiffs to recover from the defendant the balance due under a building contract. Disputes had arisen between the parties upon the question whether the works had been completed and whether extras had been properly ordered. But a self-executing clause in the contract, as I understand the judgment, had remitted the dispute to arbitration. The architect gave a certificate of the final balance due after the disputes had arisen but the court was of opinion in these circumstances that the arbitration clause controlled the certificate clause and that the disputes had been remitted to arbitration.

In *Eaglesham* v. *McMaster* (2), however, the certificate of the architect was made a condition precedent to any right of payment and apparently controlled the arbitration clause.

Robins v. *Goddard* (3) related to three actions brought by the plaintiffs against the defendants to recover moneys due upon the certificates of an architect under a building contract. The defendants pleaded that the certificates were in respect of work done and material supplied not in accordance with the contract and also counterclaimed on the same ground. The contract contained a clause that no certificate should be considered conclusive evidence as to the sufficiency of any work or materials to which it related. There was also an arbitration clause giving the arbitrator power to open, review or revise any certificate but not making arbitration a condition precedent to any right of action. It was held that the defendants were entitled to their ordinary legal remedies in respect of the defence and counterclaim partly because of the express provisions of the contract and partly because the arbitration clause

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

(2) (1920) 2 K.B. 169.

(3) (1905) 1 K.B. 294.

subjected certificates to revision and because arbitration had not been made a condition precedent to action.

Piggott v. *Townsend* (1) adopts the reasoning in *Robins* v. *Goddard* (2), and so does *Johns & Son* v. *Webster & Tonks* (3).

In my judgment the appeal should be allowed and there should be judgment in demurrer for the plaintiff on the first, second, fifth, sixth, tenth, eleventh and twelfth pleas on the first and third counts and upon the fifth replication to the ninth and thirteenth pleas by way of cross-action being the seventh replication on the record.

DIXON J. The appeal is from a judgment of the Supreme Court of New South Wales given upon cross-demurrers to pleas and replications. The action is brought by a contractor to recover the amount of a progress certificate given by the architect under a contract for the construction of a building in George Street, Sydney. The pleas and replication demurred to relate to two counts of the declaration, the first and third. The third count differs from the first in one respect only, namely, in introducing a statement of the effect of an interest clause contained in the contract and claiming interest up to the date of the writ upon the amount of the unpaid progress certificate. The declaration does not set out the provisions of the contract. The two counts state the substance of the promise or promises to make progress payments, and, in the case of the third count, to pay interest on the amount unpaid under a certificate, and then allege fulfilment of the conditions so stated, that is to say, the doing of work, not included in previous certificates, to the required value as computed by the architects, their giving the certificate and its presentation to the defendant. The counts contain the usual general statement that all conditions were performed, &c., and then conclude with an allegation of the defendant's failure to pay the sum sued for, not of the defendant's refusal to do so.

In its pleas the defendant brings the terms of the contract before the court by setting out the entire instrument in the first plea and incorporating it by reference in the others. This course does not entitle the defendant, for the purposes of demurrer, to treat the

(1) (1926) 27 S.R. (N.S.W.) 25; 44 W.N. (N.S.W.) 26.
(2) (1905) 1 K.B. 294.
(3) (1916) N.Z.L.R. 1020.

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plaintiff's declaration as if it contained a complete statement of the contract. But it enables the defendant to use in answer to the declaration any averments or traverses contained in a plea, if upon the true construction of the contract they afford a defence.

The clauses of the contract, thus appearing, which deal with the manner of payment, the certification of the work by the architect and the reference of disputes to arbitration, are framed upon a plan the general nature of which it is desirable to state before dealing with the pleas. Progress payments are to be made to the builder whenever the value of the work done in the meantime, as computed by the architect, reaches £2,000. As the building proceeds the builder is to receive a progress payment for every two thousand pounds worth of work done. The value of the work done is to be computed by the architect and he is to give certificates accordingly. Of the value, thus computed, eighty per cent only is to be paid until the twenty per cent withheld amounts to £2,000 and after that the full value of all further work certified must be paid. When the architect thinks that the work is "practically completed" he is then so to certify. Upon the production of such a certificate and upon giving the proprietor possession of the building, the builder is to receive payment of what will bring the sum he has received up to ninety per cent of the value of the work. Four weeks after the giving of the certificate of practical completion the remaining ten per cent becomes due if the architect gives a certificate that the works have been completed to his entire satisfaction, stating the amount of the balance payable. This final certificate is to be binding and conclusive, except that for a limited period of eighteen months certain specified grounds of complaint are to remain open. There follows a general agreement to refer disputes to arbitration, expressed in the form of a proviso. The description of differences covered by the clause includes breach of contract, disputes as to the construction of the contract and disputes as to the architect's withholding a certificate to which the builder claims that he is entitled and as to the amount of a certificate final or otherwise. The frame the clause takes is a proviso that, if a dispute of the kind specified arises, then the dissatisfied party shall give notice that he desires it referred and that, unless within seven days the dispute is otherwise settled,

it shall be submitted in the manner the clause proceeds to prescribe and neither party shall be entitled to commence or maintain any action upon any such breach or dispute until such matter has been referred or determined as thereinbefore provided and then only for the relief awarded.

This preliminary abstract of the more directly material parts of the contract is enough to make intelligible the nature of the pleas demurred to, with which I shall now deal *seriatim*. The first with which the appeal is concerned is the second plea. It is a plea to both the counts I have mentioned. It sets up as an answer to the validity of the progress certificate upon which the counts depend the failure on the part of the plaintiff to fulfil what is evidently conceived to be a condition preliminary to the valid grant by the architect of a certificate. The clause relating to progress certificates ends with the sentence: "The builder shall furnish the architect with a detailed statement of the amount claimed." The second plea alleges that the plaintiff did not do so. In my opinion it is quite clear that performance of the requirement to furnish the architect with such a statement, although, doubtless, a condition precedent to the architect's obligation to grant a progress certificate, is not an essential condition upon which his power to certify depends. The plea is, therefore, bad. It was supported in the Supreme Court on the ground that, a dispute having arisen, the action was not maintainable unless and until it was referred and then only upon the award. The same ground is taken under other pleas and, in considering them, it becomes necessary to see how far it is warranted by the true interpretation of the contract. But under the second plea the question does not appear to me to arise at all; for the simple reason that neither the facts averred nor those confessed include or involve the existence of a dispute. A mere failure to pay is consistent with the absence of any dispute.

The fifth plea, which is next in order in the demurrer book, depends on analogous considerations. There is no averment of a dispute. It is framed to raise a defence depending upon an interpretation of a clause relating to the allowance of day-work prices in respect of variations which cannot be properly measured and valued. The interpretation set up would make the power of the architect to allow

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such prices contingent upon the builder's compliance with a requirement that he shall produce to the architect within a certain time vouchers and the like. In my opinion the right of the builder to day-work prices may depend upon the fulfilment of this condition, but the power of the architect to adopt day-work prices in arriving at the value of the work for the purpose of his progress certificate does not, and it is not competent to go behind the certificate for the purpose. I think that the fifth plea is bad.

The evident purpose of the sixth plea is to set up as a ground for invalidating the progress certificate the existence of disputes between the parties before and at the time when the architect assumed authority to issue the certificate. The plea, however, concludes with an allegation that the disputes "existed at all times from the said time to the present time," and it contains a description of the nature of such disputes which includes a question "as to whether the architect was or was not at liberty to issue the said or any further certificate." This sufficiently states a dispute as to the authority of the architect to issue the certificate sued upon, and, as the dispute is said to have existed after as well as before the certificate was given, enough may be involved in the averment to enable the defendant to rely, as an answer to the action, upon the interpretation which he places upon the arbitration clause. Such a dispute means a denial of the efficacy of the certificate and that must depend upon the construction of the contract. An action to recover the amount of the certificate may be said to be "an action upon any such dispute" within the meaning of that part of the arbitration clause excluding the right to commence or maintain an action without referring the matter. If this be so, the plea discloses enough in point of fact to form a foundation for a contention that upon the true construction of the contract the cause of action is answered on one or other of two grounds; that is to say, either on the ground that the existence of disputes disables the architect from issuing a valid progress certificate, or on the ground that a dispute as to the validity of the certificate when issued disentitles the builder to sue for the amount appearing by the certificate to be due notwithstanding that no notice has been given by the proprietor of his desire that the matter should be referred.

Under building contracts containing clauses confiding to an architect or engineer authority to certify so as to conclude one or both of the parties wholly or in part and a clause for the settlement of disputes by arbitrators, a situation is created in which there is inherent the question how far the arbitration clause qualifies the clauses relating to the certificates of the architect and the engineer. Although instances of this question have arisen in different form in the courts and are the subject of reported decisions, the form of clause commonly in use contains no attempt to deal with the problem by express provision. The contract now before us is particularly difficult to interpret in this respect as well as in many other respects. The decisions in which one or another aspect or consequence has arisen of the necessity of determining the mutual relation of the two sets of provisions are not very satisfactory and, in any case, they appear to me to afford very little or no guidance in the construction of the clauses now in question. The conclusion I have reached upon this question of interpretation is that not until notice of his desire that a matter in dispute should be referred to arbitration has been given by a party professing to be dissatisfied is the power of the architect to certify in respect of the matter suspended or the obligation of the proprietor to pay in accordance with a certificate already given superseded.

The clause dealing with progress payments is not well drawn, but I think it makes it sufficiently clear that it is the duty of the architect to compute the value of the work and, as every two thousand pounds worth is completed, to give a certificate therefor. Thereupon the proprietor falls under a liability to pay the amount shown by the certificate as due. This liability is confirmed or established by the interest clause, which provides that, if the proprietor refuse or neglect to pay the amount of any certificate given by the architect during the progress of the works for the period of ten days after the same is presented to him for payment, the builder shall be entitled to interest at ten per cent per annum. There follows a provision for suspending operations, determining the contract and asserting a lien, in the event of continued failure to pay. The contract does not make a progress certificate binding and conclusive upon the parties, because, of course, it is necessary that the sufficiency and

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soundness of the work should not be finally judged until the building is completed. But it confers upon the builder a right to payment of the amount certified. In considering the effect of the arbitration clause in qualifying or abrogating that right, it must be remembered that it is in the nature of a proviso cutting down rights otherwise absolutely conferred. It may be true that it is drawn with the purpose of making the legal rights of the parties, in the events which it covers, depend upon the award of arbitrators, so that in the absence of such an award they shall have no rights capable of being put in suit, that is, no actionable rights which the courts can claim jurisdiction to enforce notwithstanding the agreement to refer. But it must not be overlooked that this is only true subject to the limitation that the events which the clause covers must first occur. The contract does not make reference to arbitration and award a condition precedent to the accrual of any actionable right at all. The grant of a progress certificate and of a final certificate completes the title to an actionable right and, unless the proprietor disputes the validity of the certificate on grounds involving the construction of the contract or the justness of the amount certified, that right is, so far as I can see, unaffected by the arbitration clause. As the clause is framed to cut down or transmute rights otherwise absolute, ambiguous expressions and doubtful inferences should not be pressed to make the derogation greater than the context appears to require. The determining question is, I think, what does the clause prescribe as the events upon the occurrence of which rights shall cease to be actionable. Is it enough that a dispute of the kind defined shall arise or must the other conditions which it sets out also be fulfilled ? I think that the clause does not take effect so as to qualify a liability expressly imposed by other clauses of the contract until notice is given of a desire for a submission. It is only " the dissatisfied party " who can give such a notice. The clause covers, of course, many disputes which may arise independently of the architect's certificate and before any relevant actionable liability could accrue. But, whether it takes the form of a certificate or decision or direction of the architect or some other act or omission of the builder in the course of the works or some other step taken by the architect or by a party under the contract, it appears to me

that a grievance to be redressed is what the words " the dissatisfied party " contemplate. The clause does not, I think, mean that whenever there is a difference there must be an arbitration. One alternative is expressed, viz., settlement by agreement. The clause supposes that something is done which will stand or prevail unless steps are taken by the party who objects. That dissatisfied party is required to arbitrate and not to litigate. But I think he need do neither and, in that event, he obtains no relief. The thing which stands may be a progress or other certificate of the architect and under the express provisions of the contract that carries with it a liability to pay. If the party dissatisfied with the source of that liability, viz., the certificate, does give notice, then " unless the matters in dispute have been otherwise settled, such matters shall be submitted to arbitration in the following manner." The clause proceeds to prescribe the manner. After doing so, it provides (*a*) that the award shall be " final and binding," and (*b*) that " neither party shall be entitled to commence or maintain any action upon any such breach or dispute until such matter shall have been referred or determined as hereinbefore provided." The last expression appears to me to refer to the words " submitted to arbitration in the following manner." The sequence in which the successive directions and restrictions contained in the clause are set out produces upon a reader the impression that, first, the party dissatisfied must give notice, then, unless there be agreement in the meantime, there shall be a submission, and the result is to be a binding award and the exclusion of the alternative, namely, litigation. The natural way of understanding these successive statements is that they ensue from and are contingent upon the action of the dissatisfied party. He has his course pointed out to him and, if he takes it, he can relieve himself of any liability otherwise flowing from an apparently regular fulfilment of the conditions of the contract. Neither party can then make the matter in dispute the subject of litigation. But, if what may be called the *status quo* involves a right on the part of the builder to payment, the payment must be made unless the dissatisfied party takes steps to obtain redress, by arbitration, against the *status quo*. But it cannot be supposed that the rights of the satisfied party remain for ever unenforceable unless

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the dissatisfied party chooses to arbitrate. The clause does not, as many provisions do, allow either party to proceed to arbitration. It draws a distinction between the party aggrieved and the opposite party, a distinction which is not meaningless, but, in my opinion, conforms to the general intention of the clause. For I think it intends that it shall be left to the party aggrieved to invoke the arbitration clause with all its consequences. Unless the dissatisfied party does so the certificate of the architect stands and imposes an enforceable liability. For these reasons I think the sixth plea is bad.

The ninth plea is by way of cross-demand. It incorporates the deed by reference and, by way of cross-action, sues for unliquidated damages for breach of contract. The breach alleged is a failure to execute and complete the works with the best materials and workmanship and in the manner required by the specifications. To this plea, the plaintiff replied in the seventh replication, being the fifth replication to the ninth and thirteenth pleas, that the claim in the plea is a dispute and the defendant is the dissatisfied party within the meaning of the arbitration clause and yet has not referred the claim to arbitration. This, in my opinion, is an answer to the plea by way of cross-action. The plea by way of cross-action does not sue on a liability arising in the course of the due and intended performance of the contract like that under an architect's certificate which must be discharged unless it is displaced by resort to arbitration on the part of the party dissatisfied. It is a complaint by the party dissatisfied with what has been done, seeking redress. It is the subject of dispute and, in my opinion, falls within the arbitration clause, which, as I construe it, disentitles the dissatisfied party from any remedy but arbitration. I, therefore, think that replication answers the plea and that the plaintiff is entitled to judgment in demurrer in respect thereof.

The tenth plea differs from the sixth in no respect material to the view I have expressed, except in an averment that at the commencement of the action a reasonable time had not expired for the defendant to take steps to remit the matter to arbitration. I do not think that anything short of notice will suspend or defeat the right to payment under a certificate. The plea is, in my opinion, bad.

The eleventh plea combines with the same matter as is averred in the tenth the matter averred in the fifth plea and is, in my opinion, bad.

The twelfth plea combines with what is contained in the tenth plea averments contained in the sixth plea and is, in my opinion, bad.

The thirteenth plea is a plea of cross-action for breach of contract and is answered, like the ninth plea, by the seventh replication, that is, by the fifth replication to the ninth and thirteenth pleas. For the reasons I gave in dealing with the ninth plea I think that the plaintiff is entitled to judgment in demurrer on this plea and replication.

I do not think that I am called upon to discuss the remaining replications to the ninth and thirteenth pleas. No issue of fact could arise under the fifth replication to these pleas.

The judgment of the Supreme Court did not determine the action, for the demurrers did not affect pleas to or replications in relation to all counts of the declaration. The judgment was, therefore, interlocutory, and this appeal did not lie without leave (See *Hope* v. *R.C.A. Photophone of Australia Ltd.* (1)). But no objection to the competence of the appeal was taken, and, in any case, leave would have been granted.

In my opinion the appeal should be allowed with costs and judgment in demurrer given for the plaintiff on the second, fifth, sixth, tenth, eleventh and twelfth pleas to the first and third counts of the declaration and upon the fifth replication to the ninth and thirteenth pleas by way of cross-action.

McTIERNAN J. I agree with the judgment of the Chief Justice.

Appeal allowed with costs. Rule of Supreme Court discharged. In lieu thereof order as follows :—It appearing that the defendant's first, second, fifth, sixth, tenth, eleventh and twelfth pleas are bad and that the plaintiff's seventh replication, being the fifth replication to the defendant's ninth and thirteenth pleas, is good Order that judgment in demurrer for the plaintiff be entered on the demurrers to the said first, second, fifth, sixth, tenth, eleventh and twelfth pleas and on the demurrers to the said seventh replication and that judgment be entered for the plaintiff generally upon the demurrers in the action and cross-action.

Solicitors for the appellant, *Allen, Allen & Hemsley.*

Solicitors for the respondent, *Fawl & Hudson Smith.*

J. B.

(1) (1937) 59 C.L.R. 348.