IN THE HIGH COURT OF AUSTRALIA

SUNDELL

V.

THE QUEENSLAND HOUSING COMMISSION

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Thursday, 3rd December, 1953

H. E. Daw, Gov. Print., Melb.

C.12280/45

SUNDELL

v.

THE QUEENSLAND HOUSING COMMISSION

ORDER

Appeal allowed with costs. Order of the Supreme Court of Queensland discharged and in lieu thereof order that motion to the Supreme Court be dismissed with costs.

SUNDELL

v.

THE QUEENSLAND HOUSING COMMISSION

JUDGMENT

DIXON C.J.
WEBB J.
KITTO J.
TAYLOR J.

SUNDELL

v.

THE QUEENSLAND HOUSING COMMISSION

DIXON C.J.
WEBB J.
KITTO J.
TAYLOR J.

JUDGMENT

This is an appeal from an order of the Supreme Court of Queensland setting aside an award of an umpire for the sum of £7,203. 2. 7 in favour of the appellant. The award was made with respect to one of a number of disputes which were referred to arbitration by an instrument of reference executed by the parties on the 17th December, 1952.

The dispute between the parties arose in relation to a contract for the supply and erection for the respondent of a number of prefabricated houses. The contract, which was constituted by a memorandum of agreement made on the 24th May, 1950, and certain special and general conditions annexed thereto, was made between the supplier, a Swedish company, of the first part, the appellant, therein referred to as the contractor and whose obligation it was to erect the houses supplied by the supplier, of the second part, and the respondent as owner, of the third part.

The substantial question which arises in this case is concerned primarily with the meaning and effect of some of the general conditions which provided for the submission of disputes to arbitration and their settlement by that process. It is convenient to refer to those provisions before indicating the steps which were taken by the parties but before doing so it should, perhaps, be stated that the

respondent's objection to the award in question was based on the contention that it was made not only without jurisdiction but, indeed, in violation of an express provision contained in the instrument of submission.

The first of the general conditions of the contract relating to arbitration is Clause 23 which is in the following terms:

> "If any claim, difference, dispute, or question shall arise under the Contract or concerning anything contained in these conditions, the Special Conditions, the Agreement, Specification, Plans, or the various documents annexed hereto or the meaning or construction of any matter or thing in any way connected with these Conditions, the Special Conditions, the Agreement, Specification, Plans, or the said documents, then and in any such case such claim difference dispute, or question shall be referred to arbitration as hereinafter provided".

But in spite of the general terms of this clause it was not the intention of the contract that claims, differences, disputes or questions might at all times or in all circumstances be subject to arbitration for Clause 26(e) provides as follows:-

> "(e) The Arbitrators or their Umpire shall not have nor shall any of them have any power or authority to inquire into or determine any claims, dispute, or question with respect to which by the provisions of the Contract the decision or certificate of the Commissioner is to be final and binding, or any claim, demand, or application which is barred by the failure of the Contractor to oomply with the Conditions of the Contract as to the time of making the same. And if any of the particulars hereinbefore required to be furnished by one party to the other party wholly or in part comprise, include, or relate to any claim, dispute, question, demand, or application which the Arbitrators or their Umpire have not power or authority to inquire into or determine, then the Arbitrators or their Umpire shall strike out the whole of such particulars, or so much thereof as comprises, includes, or relates to any such claim, dispute, question, demand, or application, and shall disregard the same in making their award."

The words of this clause which operate to remove from the jurisdiction of the arbitrators "any claim, demand, or application which is barred by the failure of the Contractor to comply with the Conditions of the Contract as to the time of making the same" call for critical consideration in this case.

The machinery by which claims and disputes may be referred to arbitration is erected by a number of clauses of which particular reference should be made to the following:

> "24. If any of the parties require to have any claim, dispute, or question referred to arbitration, such party shall, before the expiration of thirty (30) days after the making or arising thereof, give to the other party concerned notice in writing to that effect, and shall also, with such notice, furnish to such other party full detailed particulars in writing of each such claim, dispute,and question which he desires to have so referred, under distinct and separate head, and specifying the amount, if any, claimed by him under each head."

> "26(a) Each Arbitrator shall be appointed by an instrument in writing signed by the person or persons appointing him, which instrument shall set out all matters specified in the particulars furnished, which, under the provisions of the Contract, the Arbitrators have power and authority to hear and determine, and no other matters; and if any matters are therein set out which under the provisions of the Contraot the Arbitrators have not power and authority to hear and determine, then with respect to those matters but not otherwise the instrument shall be null and void".

> "26(c) The party furnishing particulars to the other party shall be bound by such particulars, and the Arbitrators or their Umpire shall not have any power or authority to enquire into or determine any matter not specified in such particulars."

> "27. If any party desiring to have any claim, dispute, or question referred to arbitration nevertheless fails to give to the other party concerned the written notice and particulars hereinbefore required within the time limited for giving the same, then the right of the party failing to give such notice and particulars to require such claims, dispute, or question to be referred to arbitration shall be thereafter absolutely barred."

> "30. Neither the Owner or other Party shall have any power to revoke, annul, or interfere with the authority of the Arbitrators or their Umpire so far as regards any claim dispute, question, or matter of the Contract referred, or which may be referred, for his or their certificate, decision, or determination; and every certificate, decision, order, or award made or declared by the arbitrators or their Umpire shall be final and binding on, and may be enforced against, the parties to the Contraot concerned, notwithstanding any attempted revocation by any of them or otherwise."

It was pursuant to Clause 24 that the appellant on the 6th October, 1952, gave a notice which purported to require "the dispute that has arisen between us as to whether the Queensland Housing Commission is liable to pay to me the amount set forth in the particulars annexed

hereto" to be referred to arbitration. This notice, it should be said, referred to one of a number of olaims or disputes which had been made or which had arisen all of which were specified in the subsequent instrument of reference to which a more detailed reference will be made presently.

The claim concerning which this particular dispute arose was alleged to have been made more than thirty days before the giving of this notice and accordingly, it was contended, the right of the contractor to require it to be referred to arbitration was, in the language of Clause 27, absolutely barred. This contention was consistently asserted by the respondent and was the subject of what was intended to be a saving reservation contained in the instrument of referenoe. Indeed the contention of the respondent went further and asserted that not only was the right of the appellant to have the claim referred to arbitration barred by the provisions of Clause 27 but also that the appellant's claim itself was barred by the provisions of that clause. During the course of argument on the appeal, however, difficulties in the application of that clause become apparent for, although it provides that the right to require a claim to be referred to arbitration shall be barred if a notice under Clause 24 be not given within thirty days after the making of the claim the claimant party may require a dispute to be referred at any time within thirty days after the dispute arose. It is, of course, clear that a dispute within the meaning of this clause may arise concerning the subject matter of a claim made at a much earlier date. In these circumstances the claimant party may, in terms of the contract, require the dispute to be referred to arbitration although his right to require the claim so to be referred is barred. we have little doubt that arbitrators to whom such a dispute is referred would be entitled to adjudicate on the merits of the claim, butwe mention this circumstance because of the form

which the relevant part of the instrument of reference took. Before going to this instrument we should, however, point out, for what it is worth, that the evidence before the Supreme Court showed that not only was the claim made but also that the dispute arose more than thirty days before the appellant's notice was given under Clause 24.

The instrument of reference recited matters relating to the several disputes which had arisen and, in relation to the matter with which this appeal is concerned, it recited the notice of the 6th October, 1952, the appointment by the respondent on the same day of an arbitrator, that by notice on the 3rd December, 1952, the respondent appointed an arbitrator on its behalf to settle the dispute and, thereafter, that "the said .... notice bearing date 3rd September, 1952, was given without prejudice to the claim of the owner (which is denied by the Contractor) that the claim of the Contractor as set out in that notice is barred by the failure of the Contractor to comply with the General Conditions of Contract as to the time of making the same". This last recital was intended as a reiteration of the assertion that Clause 27 of the General Conditions operated to remove this claim or dispute from the jurisdiction of the arbitrators. The operative part of the instrument of reference purported by Clause (1) to refer "the said claims differences disputes or questions to the award order and final determination of .... the arbitrators nominated by the contractor and the owner respectively and in case the said Arbitrators should not agree then to the award umpirage and determination of such umpire ... as the Arbitrators shall by writing under their hands ... appoint to sit with them during the reference". Clauses (3) and (5) of the instrument of reference reiterated the provisions of sub-clauses 26(c) and 26(e) of the contract itself so that the instrument did not confer jurisdiction to enable the arbitrators to "inquire into

or determine ... any claim demand or application which is barred by the failure of the contractor to comply with the conditions of the Contract as to the time of making the same".

After a hearing the arbitrators agreed on all matters except that in dispute on this appeal and in respect of the relevant dispute the umpire, on the 1st May, 1953, made an award in favour of the appellant for £7,203. 2. 7. The terms of the award itself do not disclose the reasons which led the umpire to his conclusion but a covering letter signed by the two arbitrators and the umpire and which accompanied the award stated that "the arbitrators differed on the question of estoppel, and consequently various issues went to the Umpire for decision". The letter further stated that in order to expedite the matter reasons had not been given and intimated that these "ooould be stated in relation to matters of decision, if so desired".

Thereafter, on the 15th May, 1953, proceedings were instituted in the Supreme Court for the purpose of endeavouring to set the award aside on the ground that it was made without jurisdiction and in violation of the provisions of the instrument of reference. But before the application came on for hearing the respondent, apparently at its request, received from the umpire a statement of the reasons for his award and these were admitted in evidence by the Supreme Court. From these reasons, which were handed to the respondent on the 5th June, 1953 - and, apparently, not furnished to the appellant at all - it appears that the arbitrators had agreed that the "matters" relevant to this appeal "were out of time under Clause 24 of the General Conditions of the agreement but were unable to agree upon the question of estoppel in respeot of such matters and accordingly referred them for umpirage". Thereafter it is disclosed that the umpire was of the opinion that the conduot of the owner precluded it from "raising the time objection" and he indicated briefly his

reason for forming this view. Subsequently, he dealt with the merits of the claim and made the award referred to.

The Supreme Court, on the application made to it, considered the material to which we have referred and having concluded that the view formed by the arbitrator was erroneous in law set the award aside upon the ground that it was made without jurisdiction. The basis of that decision was that the claim of the appellant was barred, that the lapse of time which produced this effect was established before the arbitrators and that the umpire had erred in law in holding that the respondent was estopped from setting up the provisions of Clause 27.

In our opinion the application to the Supreme Court and the order setting aside the award proceeded on a misconception as to the meaning and effect of Clauses 26(e) and 27 of the General Conditions. Indeed it was the same misconception which had led the arbitrators and the umpire to consider the question of estoppel which, in our opinion, was quite irrelevant to a consideration of the rights of the parties. This misconception originated in the view that the effect of Clause 27 was to bar any claim or demand of the appellant which had been made more than thirty days before the giving of a notice under Clause 24 and, secondly, that Clause 26(e), in forbidding the arbitrators "to enquire into or determine ..... any claim demand or application which is barred by the failure of the contractor to comply with the conditions of the contract as to the time of making the same", expressly withdrew from them, or any umpire appointed by them, the right to make an award in respect of the subject claim or dispute. But one thing at least is clear. Clause 27 does not purport to bar the <u>claims</u> of either party; it operates to bar the right of either party to require that a "claim dispute or question" which is more than thirty days old shall be referred to arbitration. It is by no means a

distinction without a difference. For it is clear that what by clause 27 the parties were intending to accomplish was that neither should be entitled to require the other to join in a reference to arbitration in respect of any such claim dispute or question. This being so, it is reasonably obvious that there was no necessity to provide for the withdrawal of such matters from the jurisdiction of the arbitrators for such matters could not come before the arbitrators except with the consent and concurrence of both parties and if a party, notwithstanding that he was not compellable to do so, consented to go to arbitration it would be absurd nevertheless to withdraw the matter referred from the jurisdiction of the arbitrators.

The relevant words of clause 26(e) forbid the arbitrators from inquiring into or determining "any claim, demand or application which is barred by the failure of the contractor to comply with the conditions of the contract as to the time of making the same". No doubt the reason why it is sought to assimilate the language of clause 27 to this provision is because there is no other provision in the contract which purports to place a time limit on the making of "a claim, demand or application" but this circumstance alone is insufficient to produce the result contended for by the respondent. To make clause 26(e), in spite of its terms, refer to clause 27 is a course that might be defended under the pretext of reading the document as a whole in an endeavour to contrue it. But whatever justification there may be for moulding the language of one part of a document to fit another part in order to make a coherent whole it is not a process that is appropriate where, as here, a set of general conditions has been adopted to form part of a particular contract. In any case it is a mode of interpretation that can never have any effective application where, as here, the interpretation desired can be achieved only by an unjustified modification of the expressions used. The language of clause 27 is clear; it is the right to require a claim, dispute or question to be referred to arbitration which is barred so that a claim, dispute or question so barred could not come before arbitrators

without the consent and concurrence of both parties. Why then should clause 26(e) purport to except from the jurisdiction of the arbitrators matters which the contract contemplates will not in the ordinary course come before them? And why if the relevant exception or prohibition in clause 26(e) refers to or includes a reference to such matters, is the prohibition effective only where the right of the contractor is barred? The truth of the matter is that the expression in clause 26(e) - "claims, demands or applications" - is used to denote claims, demands or applications which the contractor, as distinct from the owner, may make in pursuance of what he conceives to be his rights under the contract. It is not appropriate to describe steps taken by one party to require the other to join in the reference to arbitration of a disputed claim. The reference to arbitration of such a claim or dispute is not initiated by a further claim, demand or application; it is effected by the giving of a notice and the adoption of the alternative procedures provided by clause 25. The provisions of clause 27 render this procedure ineffective where the notice is not given within the prescribed time. It is notable that this clause does not in terms purport to go further and bar the right involved in the "claim, demand or question" and, having regard to the nature of the clause, it should not, except as a result of necessary implication, be so understood. The basis upon which it is urged that such an implication should be made is that it is the only clause in the contract which purports to bar a right of either party upon a lapse of time and, therefore, that it must have been in the forefront of the contemplation of the parties when the relevant exception in clause 26(e) was framed. Accordingly, it is said, that provision must have been intended to except from the jurisdiction of the arbitrators rights, claims or demands barred by clause 27. The clear answer is that clause 27 does not bar claims or demands; it bars the right of one party to require that a particular claim, dispute or question shall be submitted to arbitration. That this is so is apparent for if a right to require a particular dispute to be referred to arbitration constitutes a claim within the

meaning of Clause 26(e) it is a claim which either party, equally, is entitled to make. But it is only when the right is exercised by one party - the contractor - that the relevant prohibition in that clause operates; the subject matter of the dispute may still be referred to arbitration by the owner. There are, we think, clear indications that the right to require reference of a claim or dispute to arbitration is not, by itself, a "claim, demand or application" within the meaning of Clause 26(e) and accordingly the relevant dispute in this case was not withdrawn by the express provisions of that clause from the jurisdiction of the arbitrators. It may well be, of course, that a dispute may arise as to whether the right of one party to avail himself of the prescribed procedure for referring a claim to arbitration has become barred and such a dispute might, within the prescribed time, be itself referred to arbitration. But whether the right to require a dispute to be referred to arbitration is barred or not its reference by the joint action of the parties renders this question completely irrelevant. Once it is referred by both parties it becomes unnecessary to consider whether either party had the right to require the other party to refer it. This, of course, is what happened in this case. The parties agreed that the appellant's claim should be referred and so provided by their instrument of reference. Great stress, however, was laid on the circumstance that the respondent's notice under Clause 26 was given "without prejudice to the claim of the owner .... that the claim of the contractor .... is barred by the failure of the contractor to comply with the general conditions of the Contract as to the time of making the same." But this reservation was founded on a misconception as to the effect of Clause 26(e). The appellant's claim was not barred though his right to require it to be referred to arbitration may have been but since the

parties agreed that it should be referred this was of no consequence and it was quite immaterial that the respondent's notice was given without prejudice to his continued and wrong assertion that the contractor's claim itself was barred.

These reasons are sufficient to enable us to conclude that the appeal must succeed and it is unnecessary to consider the other matters raised by the appellant. It should be observed, however, that the reasons supplied by the umpire to the respondent formed no part of his award and could not properly be considered in determining whether there was error in law on the face of the award. Nor, in view of the conclusion which we have reached as to the meaning of clause 26(e) were they relevant to a consideration of whether the umpire had exceeded his jurisdiction.

There is one further matter to which we wish to refer. At an earlier stage we have pointed out that the reservation which the respondent sought to make in its notice of the 3rd December, 1952, was based on an erroneous view of its rights. It purported to reserve a right which the respondent did not have and, for that reason, it was devoid of any effect. But we do not wish to be understood as accepting the proposition that if there had been no misconception of the respondent's rights the instrument of reference would not have operated to confer jurisdiction upon the arbitrators to determine the appellant's claim. In our view an agreement, though purporting to be made by one party without prejudice to his rights, will operate according to its tenour and affect the rights of each party accordingly. This being so, it is clear that the instrument of reference operated to refer the appellant's claim to arbitration notwithstanding the reservation which the respondent sought to set up. The real question, of course, was whether the terms of the instrument containing, as it did the substance

of sub-clauses 26(c) and 26(e), operated to restrict the jurisdiction of the umpire in the manner contended by the respondent. For the reasons already given we are of the opinion that it did not and that the appeal must be allowed and the order of the Supreme Court of Queensland discharged.