1 of 1 DOCUMENT: Victorian Reports/Judgments/1975 VR/HAMMOND v WOLT - 1975 VR 108 - 11 October 1974

12 pages

HAMMOND v WOLT - [1975] VR 108

SUPREME COURT OF VICTORIA
MENHENNITT , J

25, 27 September, 11 October 1974

Arbitration and awards -- Application for stay of proceedings -- Arbitration an inquiry of a judicial nature -- Right of parties to be heard on arbitration -- Whether right to call evidence an essential element of arbitration -- Reliance by arbitrator on own expertise in reaching determination -- Arbitration distinguished from assessment -- Necessity for submission to be in existence at time of commencement of proceedings -- Arbitration Act 1958 (No. 6200), s3, s5.

A building contract between the owners of land and the builder, which was on a printed form headed "Housing Industry Association. General Conditions - Fixed Price Contract. July, 1971 Edition", contained CL23 in the following terms: -

"23.(a) In the event of any dispute arising between the Owner and the Builder either during the progress of the said works or after completion or after the determination abandonment or breach of this Agreement as to the construction of the contract or the terms thereof or of any variation thereto or as to the quality or value sufficiency or insufficiency of any materials or labour or workmanship or as to any matter or thing of whatsoever nature arising under this Agreement or in connection therewith then either party may give to the other notice in writing of such dispute and he shall simultaneously therewith notify the President for the time being of the Housing Industry Association (Victorian Division) or his nominee of such dispute and shall lodge with the said President or his nominee the sum of $200 or such other sum as the said President or his nominee may direct with a request to the said President or his nominee to appoint a person (hereinafter called 'the arbitrator'). Any Award or Assessment made by the said Arbitrator shall be final and binding on the Builder and the Owner and neither shall be entitled to commence or maintain any action upon any such dispute which has been so referred to Arbitration until such dispute has been determined by the Arbitrator and then only in accordance with any Award Assessment or direction given by such Arbitrator.

"(b) Any Arbitrator appointed under the provisions of this Agreement shall at his own discretion act as Arbitrator or Assessor. Where he considers that any question arising out of the dispute refers to the quality or value of any work or materials supplied he may act as an expert and arrive at and make his assessment in such manner as he considers fit. Where any question arising out of the dispute shall relate to the interpretation or existence of any Agreement between the parties hereto then the Arbitrator should act as Arbitrator and allow the parties to appear before him and to produce witnesses and evidence to him relating to the dispute and on the evidence so given and on his own investigations and on any assessment which he may make arrive at his decision and make his Award.

"(c) Any Award or Assessment made by the Arbitrator shall be final and binding upon both parties hereto and either of them may enforce any such Award in accordance with the Arbitration Act or sue the other upon any such Assessment as a debt due and payable."

The owners issued a writ on 27 June 1974 claiming damages for breach of contract by the builder and a declaration that the contract had been rescinded by them. On or about 27 August 1974 the defendant builder served on the owners a notice in writing seeking to have disputes between the parties submitted to the arbitration of a person nominated by the president for the time being of the Housing Industry Association (Victorian Division) or his nominee. On 27 August 1974 the builder issued a summons seeking to have the plaintiffs' action stayed pursuant to s5 of the Arbitration Act 1958.

[1975] VR 108 at 109

Held: (1) With respect to the concepts of arbitration and arbitrator in the Arbitration Act 1958--

(a) arbitration involves an inquiry in the nature of a judicial inquiry;

Re Carus-Wilson and Greene (1886) 18 QBD 7, at p. 9; Re Dawdy (1885) 15 QBD 426, at p. 429; Re Hopper (1867) LR 2 QB 367, at p. 373; Gartside v Outram (1857) 26 LJ Ch 113, at p. 115; Ajzner v Cartonlux Pty. Ltd., [1972] VR 919, at pp. 928-9; Re Fenwick (1897) 18 LR (NSW) 405, at pp. 410-11, and the Myron, [1970] 1 QB 527, at pp. 534-5; sub-nom. Myron (Owners) v Tradax Export SA Panama City R.P., [1969] 2 All ER 1263, applied.

(b) on an arbitration the parties have the right to be heard if they so desire. See the cases referred to in relation to (a) above and Montrose Canned Foods Ltd. v Eric Wells (Merchants) Ltd., [1965] 1 Lloyd's Rep 597.

(c) if the parties have the right to call evidence if they so desire, that is an indication that the reference is to arbitration;

Re Carus-Wilson and Greene, supra; Re Hopper, supra; Re Fenwick, supra, and Re an Arbitration between Hammond and Waterton (1890) 62 LT (NS) 808, at p. 809, applied.

(d) whether it is an essential element of an arbitration that the parties have the right to call evidence if they so desire not decided;

(e) it is not inconsistent with arbitration for the arbitrator to be entitled to rely upon his own expertise in arriving at a determination.

Ajzner v Cartonlux Pty. Ltd., supra; Jordeson and Co. v Stora (1931) 41 Lloyd's LR 201 and Johnston v Cheape (1817) 5 Dow 247; 3 ER 1318, applied.

(2) The defendant did not bring himself within s5 of the Arbitration Act because--

(a) there is in CL23 a basic difference between arbitration and assessment in that arbitration involves an inquiry in the nature of a judicial inquiry whereas assessment, within the meaning of the clause, does not; and as the person appointed by the president or his nominee to whom any dispute is referred is at liberty in his discretion to decide the whole of any dispute or disputes or any part or parts thereof by either the process of arbitration or the process of assessment, there is not a submission within the meaning of s5 of the Arbitration Act because the person to whom the dispute is referred need not arbitrate on the whole or any part of the dispute or disputes referred;

(b) for s5 to apply there has to be a submission in existence at the time of the commencement of the proceedings by the plaintiffs and in the present case there was at the time of the issue of the writ by the plaintiffs not an agreement to submit differences but only an option in the parties to have differences submitted, which option was not exercised until the notice was given on or about 27 August 1974 which was the earliest date on which there was an agreement to submit differences.

John Grant and Sons Ltd. v Trocadero Building and Investment Co. Ltd. (1938) 60 CLR 1; [1938] ALR 550 (C.N.), and Plucis v Fryer (1967) 41 ALJR 192 applied.

(3) Accordingly, the defendant's application for a stay of the proceedings failed.

Summons

The material facts appear sufficiently from the headnote and from the judgment, infra.

[1975] VR 108 at 110

A. Endrey, for the plaintiffs.

C. S. Keon-Cohen, for the defendant.

Menhennitt . J:

This is an application by the defendant pursuant to s5 of the Arbitration Act 1958 to stay an action brought by the plaintiffs on a building contract.

The plaintiffs, who are the owners of land at Kallista, entered into a contract in writing dated 19 May 1973 with the defendant, who is a builder, for the erection of a dwelling-house on their land. I shall refer to that contract as the building contract. It was on a printed form headed "Housing Industry Association. General Conditions--Fixed Price Contract. July, 1971 edition".

In their statement of claim endorsed on the writ, which was issued on 27 June 1974, the plaintiffs allege that the contract was broken by the defendant and has been rescinded by them and they claim a declaration that the contract has been rescinded and damages. The defendant entered an appearance to the writ on 10 July 1974, and on 27 August 1974 he issued the summons seeking an order that the proceedings be stayed.

The building contract contains CL23 (to which I shall refer as "the disputes clause") in the following terms:--

"23.(a) In the event of any dispute arising between the Owner and the Builder either during the progress of the said works or after completion or after the determination abandonment or breach of this Agreement as to the construction of the contract or the terms thereof or of any variation thereto or as to the quality or value sufficiency or insufficiency of any materials or labour or workmanship or as to any matter or thing of whatsoever nature arising under this Agreement or in connection therewith then either party may give to the other notice in writing of such dispute and he shall simultaneously therewith notify the President for the time being of the Housing Industry Association (Victorian Division) or his nominee of such dispute and shall lodge with the said President or his nominee the sum of $200 or such other sum as the said President or his nominee may direct with a request to the said President or his nominee to appoint a person (hereinafter called 'the arbitrator'). Any Award or Assessment made by the said Arbitrator shall be final and binding on the Builder and the Owner and neither shall be entitled to commence or maintain any action upon any such dispute which has been so referred to Arbitration until such dispute has been determined by the Arbitrator and then only in accordance with any Award Assessment or direction given by such Arbitrator.

"(b) Any Arbitrator appointed under the provisions of this Agreement shall at his own discretion act as Arbitrator or Assessor. Where he considers that any question arising out of the dispute refers to the quality or value of any work or materials supplied he may act as an expert and arrive at and make his assessment in such manner as he considers fit. Where any question arising out of the dispute shall relate to the interpretation or existence of any Agreement between

the parties hereto then the Arbitrator should act as Arbitrator and allow the parties to appear before him and to produce witnesses and evidence to him relating to the dispute and on the evidence so given and on his own investigations and on any assessment which he may make arrive at his decision and make his Award.

"(c) Any Award or Assessment made by the Arbitrator shall be final and binding upon both parties hereto and either of them may enforce any such Award in accordance with the Arbitration Act or sue the other upon any such Assessment as a debt due and payable."

[1975] VR 108 at 111

In his affidavit in support of his summons the defendant proves that on or about 27 August 1974 he gave to the plaintiffs a notice in writing which recited that the parties had made the building agreement (CL23(a) thereof being set out in full), that the builder commenced to carry out the work of building the dwelling and that disputes have arisen between the plaintiffs and the defendant as mentioned in the said CL23(a), which disputes are set out in the schedule to the notice, and then continued: "NOW THEREFORE TAKE NOTICE that the Builder hereby gives you notice of such disputes and pursuant to CL23 of the said agreement requires such disputes to be submitted to the arbitration of a person appointed by the President for the time being of the Housing Industry Association (Victorian Division) or his nominee." There followed a schedule which lists 10 alleged disputes. There is no evidence or suggestion that any similar notice in writing was given by the defendant before about 27 August 1974.

S5 of the Arbitration Act 1958 is in the following terms: "If any party to a submission or any person claiming through or under him commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred any party to such legal proceedings may at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings apply to that Court to stay the proceedings and that Court or a Judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration may make an order staying the proceedings."

S3 of the Act commences as follows: "In this Act unless inconsistent with the context or subject-matter--'Submission' means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not."

It was agreed by counsel for both parties, and in my opinion correctly so, that the expression "a submission" in s4(1) of the Act means the actual submission of a dispute to an arbitrator or arbitrators, whereas in s5 the expression "a submission" bears the meaning given in the definition of s3, namely a written agreement to submit present or future differences to arbitration: see Re Davis and Brown's Arbitration (No.2), [1957] VR 127, at p. 135; [1957] ALR 267; Doleman and Sons v Ossett Corporation, [1912] 3 KB 257, at p. 270; Re Smith and Service and Nelson and Sons (1890) 25 QBD 545, at p. 553; [1886-90] All ER Rep 1091, and Russell on Arbitration, 18th ed., p. 39.

Counsel for the plaintiffs submitted that for a number of reasons the defendant did not bring himself within s5 of the Arbitration Act and that therefore his application for a stay under that section should be refused. One submission was that for s5 to be applicable there had to be a submission in existence at the time of the commencement of proceedings by the plaintiffs and that there was at the time of the issue of the writ by the plaintiffs not an agreement to submit differences but only an option in the parties to have differences submitted, which option was not exercised until the notice was given on or about 27 August 1974 which was the earliest date on which there was any agreement to submit differences. Another submission was that, whether CL23 is an agreement or an option, it is an agreement or option to submit differences not to arbitration but, at the discretion of the person appointed, to either arbitration or something different from arbitration, namely, assessment, and, accordingly, there is no agreement to submit differences to arbitration because the person appointed could in his discretion decide all the differences by a process other than arbitration, namely, assessment. I shall deal with these two submissions together because they involve the interpretation

and effect of the disputes CL23.

[1975] VR 108 at 112

Before turning to that clause it is appropriate to deal with one aspect of the submissions for the plaintiffs, namely, the meaning of arbitration in the definition s3 of the Act, that meaning being imported into s5. The expression "arbitration" is not defined in the Act although some indications of the nature of an arbitration are pointed to by the contrast between an arbitrator and a special referee referred to in s14, s15, s16, s17 of the Act.

It is unnecessary and undesirable for the purposes of this case to attempt an exhaustive definition of the concepts of arbitration and arbitrator. However, the authorities appear to me to establish the following propositions:--

(a) Arbitration involves "an inquiry in the nature of a judicial inquiry": per Lord Esher, MR, in Re Carus-Wilson and Greene (1886) 18 QBD 7, at p. 9; see also Re Dawdy (1885) 15 QBD 426, at p. 429; Re Hopper (1867) LR 2 QB 367, at p. 373; Gartside v Outram (1857) 26 LJ Ch 113, at p. 115; Ajzner v Cartonlux Pty Ltd., [1972] VR 919, at pp. 928-9; Re Fenwick (1897) 18 LR (NSW) 405, at pp. 410-1, and The Myron, [1970] 1 QB 527, at pp. 534-5; sub nom, Myron (Owners) v Tradax Export SA Panama City R. P., [1964] 2 All ER 1263.

(b) The cases to which I have just referred and Montrose Canned Foods Ltd. v Eric Wells (Merchants) Ltd., [1965] 1 Lloyd's Rep 597, also lead to the conclusion, I think, that on an arbitration the parties have the right to be heard if they so desire. It has been held that where on an arbitration there was no request for an oral hearing but both parties wrote to the arbitrator setting out their cases and put documents and information before the arbitrator, partly in response to his written request, the award made by the arbitrator should not be set aside: Star International Hong Kong (UK) Ltd. v Bergbau-Handel G.m.b. H., [1966] 2 Lloyd's Rep 16. However, in The Myron, Donaldson, J, said, at (QB) p. 535: "If either party wishes to see the whole of the other party's evidence and to be informed in detail of his arguments, he should require a formal hearing. Any such request must be granted and at the hearing the usual court procedure will be followed." Cases in which it has been held that an award of an arbitrator was not invalidated by the fact that the arbitrator or arbitrators had not heard the parties are, it appears to me, cases where the parties did not exercise their right to be heard or concurred in a procedure which involved them not being heard: see French Government v Tsurushima Maru (1921) 8 Lloyd's LR 403, at pp. 404-5; 37 TLR 961, at p. 962, referred to in The Myron, at (QB) p. 533.

(c) If the parties have the right to call evidence if they so desire, that is an indication that the reference is to arbitration: see Re Carus-Wilson and Greene; Re Hopper; Re Fenwick, and Re an Arbitration between Hammond and Waterton (1890) 62 LTNS 808, at p. 809.

(d) It is unnecessary to decide whether it is an essential element of an arbitration that the parties have the right to call evidence if they so desire. The cases to which I have last referred suggest that it is, although they are consistent with the view that the right to call witnesses if so desired is an indication that arbitration is intended without it being a necessary ingredient. In Jordeson and Co. v Stora (1931) 41 Lloyd's LR 201, the parties were heard and put evidence before the umpire and it was held that his award was not invalidated by the fact that on one point he took notice of a matter of law which came before him and certain limited matters of fact which were in his cognizance as an expert. This is similar to a Court taking judicial notice of certain matters. In Johnston v Cheape (1817) 5 Dow 247; 3 ER 1318, Lord Eldon, LC, said at (Dow) p. 264; (ER) p. 1324, that the arbitrator saw all the evidence. In Ajzner v Cartonlux Pty. Ltd., supra, Pape, J, said at p. 932 that Eads v Williams (1854) 4 De GM and G 647; 43 ER 671, was a case of arbitration but it seems to me with respect, not clear whether the persons authorized to determine the rent and terms of working of a mine were appointed as arbitrators or experts.

(e) It is not inconsistent with arbitration for the arbitrator to be entitled to rely upon his own expertise in arriving at a determination: see Ajzner v Cartonlux Pty. Ltd., supra; Jordeson and Co. v Stora, supra; Johnston v Cheape, supra.

[1975] VR 108 at 113

Whereas the terms "arbitration" and "arbitrator" have come to involve certain recognized concepts, the expressions "assessment" and "assessor" in the present context have not, although they suggest concepts more akin to those applicable to an expert assessing or determining the nature and extent of pre-existing rights and liabilities, without conducting an inquiry in the nature of a judicial inquiry (compare the meaning given to "assessment" in relation to land tax in Tooth and Co. Ltd. v Newcastle Developments Ltd. (1966) 116 CLR 167, at p. 170). The concepts involved in assessment are, I think, more akin to those involved in valuation than arbitration.

I turn then to the provisions of the disputes CL23. This clause is in an unusual form. The common form of arbitration clause provides that either unconditionally or, if certain steps have been taken, differences between the parties of a certain description shall be referred to arbitration or to an arbitrator (see for example the arbitration clauses dealt with in Heyman v Darwins Ltd., [1942] AC 356; [1942] 1 All ER 337; John Grant and Sons Ltd. v Trocadero Building and Investment Co. Ltd. (1938) 60 CLR 1; [1938] ALR 550, and Plucis v Fryer (1967) 41 ALJR 192, and Forms 4 and 5 in appendix 6 to Russell on Arbitration, 18th ed., at pp. 476-7). CL23 contains no such words. It provides that in the event of any dispute of an specified kind arising between the owner and the builder either party may give to the other notice in writing of such dispute and that he shall simultaneously therewith notify the president for the time being of the Housing Industry Association (Victorian Division) or his nominee of such dispute and lodge certain moneys, with a request to the president or his nominee to appoint a person who, it is said, is thereinafter called "the arbitrator". The clause goes on to provide that any award or assessment made by the arbitrator shall be final and binding on the builder and the owner and "neither shall be entitled to commence or maintain any action upon any such dispute which has been so referred to Arbitration until such dispute has been determined by the Arbitrator and then only in accordance with any Award, Assessment or direction given by such Arbitrator". It is provided in sub-clause (b) that any arbitrator appointed under the provisions of the agreement shall at his own discretion act as arbitrator or assessor. It is provided in sub-clause (c) that any award or assessment made by the arbitrator shall be final and binding upon both parties. It is, I think, clearly implicit from all these provisions that, upon notice of a dispute being given by one party to the other party and to the president or his nominee with a request to the president or his nominee to appoint a person and payment of the required sum and the appointment of a person by the president or his nominee, a dispute has then been referred to the person nominated by the president or his nominee. The questions still remain as to the capacity in which the dispute has been referred to the person appointed by the president or his nominee and whether there was an agreement to submit differences to arbitration before that reference took place.

[1975] VR 108 at 114

As to the former of these matters it was submitted on behalf of the plaintiffs that there is a basic difference between arbitration and assessment, that arbitration involves an inquiry in the nature of a judicial inquiry whereas assessment does not, that the person appointed by the president or his nominee to whom the dispute is referred is at liberty in his discretion to decide the whole of any dispute or disputes or any part or parts thereof by either the process of arbitration or the process of assessment and that, this being so, there is not a submission within the meaning of s5 of the Act because the person to whom the dispute is referred need not arbitrate on the whole or any part of the dispute or disputes referred.

The authorities to which I have referred establish that an arbitration involves an inquiry in the nature of a judicial inquiry and, at the least, that the parties have the right to be heard if they so desire. In my opinion, CL23 clearly recognizes the distinction between arbitration and assessment and makes it quite clear that the person appointed may at his option and in all matters act as either an arbitrator or an assessor. The fact that the person appointed is called an arbitrator is neutral as to his function (see Ajzner v Cartonlux Pty. Ltd., [1972] VR 919, at pp. 928-9) and the word "arbitrator" where first appearing in brackets in CL23 is used, I think, as a mode of reference to the person appointed rather than as an indication of his function, because the clause proceeds immediately to draw a distinction between arbitration and assessment by referring in the alternative to award or assessment, a distinction continued throughout sub-clauses (a) and (c) of CL23 and in sub-clause (b) the words "Arbitrator or Assessor" are used in the alternative. The words in the last sentence of sub-clause (a), "any such dispute which has been so referred to arbitration", if they stood

alone, might point to the conclusion that there has been a reference to arbitration alone. However, sub-clause (b), in my view, removes all doubt in the matter and makes quite clear two matters, namely, that there is a basic distinction between arbitration and assessment and that the person appointed is at liberty in his discretion to act as either arbitrator or assessor. The first sentence of sub-clause (b) says so in positive terms. The next sentence of that sub-clause makes it clear that in relation to a wide variety of matters, namely, "where he considers that any question arising out of the dispute refers to the quality or value of any work or materials supplied he may act as an expert and arrive at and make his assessment in such manner as he considers fit". This draws a clear distinction between acting solely as an expert and acting as an arbitrator. That this is so is reinforced by the next sentence which deals with a different subject-matter, namely, any question arising out of the dispute which relates to the interpretation or existence of any agreement between the parties. As to these latter matters it is provided that the person appointed should act as arbitrator and allow the parties to appear and produce evidence, the clear implication being that on other matters he need not act as arbitrator. But even on these matters the clause does not require the person appointed to act as an arbitrator but merely exhorts him to do so. The word used is "should" not "shall". Further, even on these matters, the clause goes on to provide that the person appointed is permitted to arrive at his decision, not only on what the parties say when they appear before him and the evidence given, but also on his own investigations and any assessment which he may make. Whilst the reference to investigations would still be consistent with arbitration, the reference to any assessment which he may make indicates, I think, that even on this class of matter the person appointed is not required to act as an arbitrator. The use of the word "should", to which I have referred, leads to the same conclusion. The distinction between arbitration and assessment is continued in sub-clause (c) which provides that the person appointed may make either an award or an assessment and it is provided that whereas an award may be enforced in accordance with the Arbitration Act, either party may sue the other upon any assessment as a debt due and payable, thereby recognizing that an assessment is not an award within the meaning of the Arbitration Act.

[1975] VR 108 at 115

It is unnecessary for me to decide exhaustively what is or is not comprehended in an assessment and the function of an assessor within the meaning of CL23. What is clear, in my view, is that assessment is something significantly different from arbitration and does not involve an inquiry in the nature of a judicial inquiry. The provisions of CL23 also make it quite clear that on all matters, except the interpretation or existence of any agreement between the parties, the person appointed is at liberty to act as an assessor and not an arbitrator, and, even as to that limited class of matter, whilst there are suggestions that the person appointed should act as an arbitrator, he is not required to do so. Accordingly, it would, in my view, be open to a person appointed pursuant to CL23 in his discretion to act as an assessor and make an assessment in respect of any dispute or disputes referred to him and in so acting he would not be acting as an arbitrator and any assessment made by him would not be the product of an arbitration. This being so it follows, I think, that whether CL23 is an agreement to submit any dispute or merely gives a party an option to have any dispute submitted, the submission is not to arbitration and, accordingly, is not a submission within the meaning of s5 of the Arbitration Act 1958. It follows that the defendant in the present case does not bring himself within s5 because neither he nor the the plaintiffs are parties to a submission within the meaning of that section. The consequence is that there is no power to stay the proceedings under s5 of the Arbitration Act 1958.

I should add that it does not follow from what I have decided that if a person were appointed pursuant to CL23 and made an award or assessment it would be a nullity. If it were established that what the person appointed had done was in fact an arbitration and that he had made a valid award it could be enforced as such and if it were established that he had made a valid assessment it could be sued upon as such. Further, as was decided by Crockett, J, in his unreported decision on 12 September 1972 in Walters and Marriott Homes Pty. Ltd. v Riddell, the existence of a power to act as an assessor would not establish misconduct by an arbitrator if it appeared that in making an arbitral award he had in fact acted as an arbitrator throughout. But I am confronted with the situation upon the appointment of the person appointed by the president or his nominee and it appears to me that, because the person appointed is at liberty to act in his discretion otherwise than as an arbitrator, there is not a submission to arbitration within the meaning of s3 and s5 of the Arbitration Act. Accordingly, for this reason the application by the defendant to stay the action must fail.

[1975] VR 108 at 116

I turn to the other matter relied upon for the plaintiffs, namely, that there has to be a submission in existence at the time of the commencement of proceedings by the plaintiffs and that there was at the time of the issue of the writ by the plaintiffs not an agreement to submit differences but only an option in the parties to have differences submitted, which option was not exercised until the notice was given on or about 27 August 1974 which was the earliest date on which there was an agreement to submit differences.

S5 does, I think, require that the submission shall exist at the date of the issue of the proceedings. It commences: "If any party to a submission or any person claiming through or under him commences any legal proceedings in any Court against any other party to the submission...in respect of any matter agreed to be referred any party to such legal proceedings may... apply" etc. This means, it seems to me, that the submission must exist when the proceedings are commenced. This construction of the section is, I think, reinforced by the concluding portion of s5 dealing with readiness and willingness. The applicant must show that at the time when the proceedings were commenced he was ready and willing to do all things necessary to the proper conduct of the arbitration. If at the time of the commencement of the proceedings there is a binding agreement to submit differences to arbitration, either because the agreement so provides or because an option to have them submitted to arbitration has been exercised, then the applicant is able to demonstrate his readiness and willingness. But, if at the time of the institution of the proceedings all the applicant had was an option to have disputes submitted and he has not exercised the option, it is difficult, if not impossible, for him to show that he was ready and willing because he had not even taken the necessary step to bring about a submission. The generality of the evidence relied upon by the defendant in the present case in order to establish readiness and willingness demonstrates the difficulty and even impossibility of an applicant saying that he is ready and willing if he has not even exercised his option to have the differences submitted.

In my opinion, it is also the position that, under disputes CL23, all the parties have is an option to have differences referred and there is no agreement to submit until the option has been exercised. The prime reason for this conclusion is, I think, the presence of the word "may" in the provision for giving notice of the dispute to the opposite party and to the president or his nominee. It is entirely in the option of the parties as to whether or not they give notice and until they do nothing is submitted to anyone. This conclusion is reinforced by the absence of any language directly referring any dispute to anyone. As I have said, the conclusion that a dispute or disputes are referred is a matter of implication, and, in my view, the true construction of the clause is that there is to be implied a provision that if one party gives to the other party and to the president or his nominee notice of a dispute and pays the required sum and a person is nominated by the president or his nominee, the dispute is then referred to the person nominated and, until that happens, there is no agreement to submit any differences to anyone. This means that, in the case of this clause, the agreement to submit differences within the meaning of s3 and s5 of the Act and the submission within the meaning of s4(1) are one and the same thing, but this is not an unusual situation because it happens whenever parties to a dispute who have no pre-existing agreement to submit differences enter into a submission to refer a particular dispute to an arbitrator.

[1975] VR 108 at 117

The question remains whether an agreement which gives either party an option to have differences submitted to arbitration is an agreement to submit differences to arbitration within the meaning of the definition s3 of the Act and, by incorporation, s5. In my opinion, it is not. The expression used is "agreement to submit" and the word "to" requires, I think, that the parties have agreed that the differences are to be submitted, not that, at the option of one or other of them, they may be.

The decisions of the High Court in John Grant and Sons Ltd. v Trocadero Building and Investment Co. Ltd. (1938) 60 CLR 1; [1938] ALR 550, and Plucis v Fryer (1967) 41 ALJR 192, appear to me to lead to that conclusion. In the former of those cases it was held by a majority for the High Court (Rich, Starke and Dixon, JJ) that the right of a builder to se under a building contract on a progress certificate given by the architect was not inhibited by the arbitration clause

in the contract since the proprietor had not brought the arbitration clause into operation by giving notice. The arbitration clause in that case provided that in case any dispute or difference of a specified kind should arise between the proprietor or his architect on his behalf and the builder "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...and neither party shall be entitled to commence or maintain any action upon such...dispute until such matter shall have been referred or determined as hereinbefore provided". Starke, J, at (CLR) p. 25 decided that the arbitration clause did not free the proprietor from its prima facie liability on the progress certificate "until the dissatisfied party has brought the arbitration clause into operation". Dixon, J, with whose judgment Rich, J, agreed, said at (CLR) p. 33 that payment must be made on the progress certificate "unless the dissatisfied party takes steps to obtain redress, by arbitration, against the status quo". He also said at p. 34 that the clause does not allow either party to proceed to arbitration, that it draws a distinction between the party aggrieved and the opposite party and that it intends that it shall be left to the party aggrieved to invoke the arbitration clause with all its consequences.

In Plucis v Fryer the High Court (Barwick, CJ, McTiernan, Kitto, Taylor and Owen, JJ) in a joint judgment held that the arbitration clause in the building contract under consideration in that case produced the result that, if there was a dispute within the contract, the existence of the dispute automatically and without any notice being given under the arbitration clause prevented the commencement or maintenance of any action upon the dispute until the reference to arbitration was completed and then allowed of action only upon the award made in the arbitration. The High Court in Plucis v Fryer did not disagree with the decision in John Grant and Sons Ltd. v Trocadero Building and Investment Co. Ltd. (which I shall refer to as Grant's Case) but distinguished that decision on the ground that the arbitration clauses in the two cases were significantly different. The arbitration clause dealt with in Plucis v Fryer provided that in case any dispute or difference of a specified kind should arise between the proprietor and the builder "then either party shall give to the other notice in writing of such dispute or difference and at the expiration of seven days unless it shall have been otherwise settled such dispute or difference shall be and is hereby submitted to arbitration...and neither party shall be entitled to commence or maintain any action upon such dispute or difference 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". The Full High Court distinguished the decision in Grant's Case on the ground that the majority of the Court in Grant's Case construed the arbitration clause as dependent for its entire operation upon the giving of notice by the dissatisfied party desiring the reference of the dispute to arbitration and that consequently the existence of the dispute did not automatically preclude any right of action to settle it. The Full Court in Plucis v Fryer also held that the majority in Grant's Case apparently held that in the arbitration clause in that case the words "any such dispute" in the prohibition on commencing or maintaining proceedings referred only to a dispute which the dissatisfied party had notified as one he desired to refer to arbitration. In Plucis v Fryer the Court held that in the arbitration clause under consideration in that case the words "any such dispute" in the portion of the clause prohibiting the commencing or maintaining of proceedings referred to a dispute of the kind specified in the opening words of the clause, whether or not notice of that dispute had been given by either party.

[1975] VR 108 at 118

In my opinion, the disputes CL23 in the present case falls within the category of case held by the High Court in Grant's Case as not prohibiting the commencement of proceedings until notice has been given. Indeed, the present clause more clearly falls within that category than the clause under consideration in Grant's Case because in Grant's Case the conclusion resulted from the fact that it was only the dissatisfied party who could give notice. The clause in that case also used the expression that the dissatisfied party should give notice that he desired the matter in dispute to be referred to arbitration. In the present case, although either party may give notice, the provision is that either party may give notice whereas in Grant's Case the provision was that the dissatisfied party shall give notice. All the considerations which influenced the majority in Grant's Case to conclude that legal proceedings were not prohibited until notice was given appear to me to apply even more strongly to the present case and to lead to the conclusion that there was no agreement to submit differences, within the meaning of s3 and s5 of the Act, when the legal proceedings were instituted

by the plaintiffs.

This conclusion is reinforced by the provision in sub-clause (a) of CL23 that neither the builder nor the owner "shall be entitled to commence or maintain any action upon any dispute which has been so referred to Arbitration. Those words make it quite clear that it is only actions on disputes which have been referred to arbitration which the owner is prohibited from commencing. In this respect also the clause corresponds with the construction put on the arbitration clause in Grant's Case as distinct from the clause dealt with in Plucis v Fryer. It is unnecessary for me to consider the effect of the word "maintain" in the portion of the provision I have quoted because what I have before me is an application under s5 of the Arbitration Act to stay the action and, as I have held, for that section to be applicable the defendant must show that the plaintiffs and the defendant were parties to an agreement to submit differences at the time of the issue of the writ and for the reasons I have given I have concluded that they were not. For this reason also the defendant's application must fail.

[1975] VR 108 at 119

Accordingly, I find that the defendant fails to bring himself within s5 of the Arbitration Act both because the plaintiffs and the defendant were not parties to an agreement to submit differences to arbitration and also because, at the commencement of the legal proceedings, they were not then parties to an agreement to submit differences to anyone or for any purpose. These conclusions make it unnecessary to consider the other grounds upon which it was contended that the defendant did not bring himself within s5.

It is ordered that the defendant's application by summons dated 27 August 1974 for an order that the plaintiffs' action herein be stayed pursuant to s5 of the Arbitration Act 1958 be dismissed and that the defendant pay the plaintiffs' taxed costs of the defendant's application, including costs reserved on 29 August 1974. I certify that this was a matter proper for the attendance of counsel.

Order

Order accordingly.

Solicitors for the plaintiffs: Weigall and Crowther.

Solicitors for the defendant: Ellison, Hewison and Whitehead.

ALEX CHERNOVA