McInnes et al. v. Western Assurance Co.

Arbitration—Staying proceedings—C. L. P. Act, sec. 167.

By a condition endorsed on a policy of insurance the company reserved to itself the power of having the loss or damage submitted to the judgment of arbitrators.

An action having been brought on the policy, and an application made under C. L. P. Act, sec. 167, to stay proceedings.

Held, 1. That the arbitration intended by the condition was not merely a valuation.

2. That the agreement between the parties was not void for want of mutuality, and that the case came within the scope of the statute.

3. *Per* Mr. Dalton—That the plaintiff was a "party" within the meaning of the 167th section.

Proceedings were accordingly stayed.

[Chambers, July 2, 7, 1870.]

Action on a policy of insurance against loss by fire on certain property of the plaintiffs.

The defendants applied to stay all proceedings in the action under the provisions of the C. L. P. Act, sec. 167, which enacts that when the parties to an instrument have agreed that any difference between them shall be referred to arbitration, and either of them commences a suit against the other, the court or a judge may, if no sufficient reason is shewn why such matters should not be referred, order all proceedings in such action to be stayed.

The application was founded on the conditions endorsed on the policy.

The ninth condition provided that "All persons assured by this Company and sustaining loss or damage by fire are to give immediate notice thereof to the Secretary or Manager of the Company or to the Agent of the Company, should there be one acting for it in the neighborhood of the place where such fire took place, and shall, within thirty days after such loss or damage, deliver to the Secretary or Manager or to the Agent of the Company, as aforesaid, a full and detailed account of such loss or damage, signed with their own hands, and verified by their oath or affirmation," [here follow certain particulars minutely set forth in the conditions] "and also shall produce such other evidence as to any loss or damage by fire as this Company or its Agents may reasonably require. * * * And whenever required in writing, the assured, or person claiming, shall produce and exhibit his books of account, invoices or certified duplicates thereof, where the originals are lost, and other vouchers, to the assurers or their agent in support of his claim, and permit extracts and copies thereof to be made; and until such proofs, declarations and certificates are produced, the loss shall not be payable; and if there appear any fraud or false swearing in the proofs, declarations or certificates, the assured shall forfeit all claim under this policy. When merchandise or other personal property is partially damaged, the assured shall forthwith cause it to be put in as good order as the nature of the case will admit of, aided by a surveyor of the Company, should the board of directors deem it so necessary; and shall cause a list or inventory of the whole to be made, naming the quantity and cost of each article. The damage shall then be ascertained by the examination and appraisal of each article by disinterested appraisers mutually agreed upon; one half the expenses to be paid by the assurers. And it shall be optional with the Company to replace the loss or damage, and to rebuild, or repair the building or buildings within a reasonable time. * * * * * And in case differences shall arise, touching any loss or damage, the Company reserves to itself the power of having the loss or damage submitted to the judgment of arbitrators, indifferently chosen in the usual way, who shall, before proceeding with the matter, name a third arbitrator, and the award in writing of the said arbitrators, or any two of them, shall be binding on the parties; each party to pay one half the expense of reference and award."

The next condition endorsed on the policy required that "Payment of losses shall be made in sixty days after the loss shall have been ascertained and proved."

The case was brought before Mr. Dalton, by consent of the parties.

C. Robinson, Q. C., shewed cause:

1. The plaintiff is not a party within the meaning of the C. L. P. Act, sec. 167.

2. There is no mutuality, the power being reserved to only one of the parties, and the plaintiff could not enforce an arbitration.

3. The conditions of the policy provide merely for a valuation, whilst the act speaks of an arbitration.

He cited Russell on Awards, last edit. referring to the corresponding section of the Imperial Act; *Cooke* v. *Cooke*, L. R. 4 Eq. 77; *Vickers* v. *Vickers*, L. R. 4 Eq. 536; *Elliott* v. *Royal Exchange Assurance Co.*, L. R. 2 Ex. 237, referred to in *Griggs* v. *Billington*, 27 U. C. R. 520; *In re Newton & Hetherington*, 19 C. B., N. S, 342.

Kerr, contra, cited *Russell* v. *Pelligrini*, 6 E. & B 1020; *Seligmann* v. *Le Boutillier*, L. R. 1 C. P. 681; *Wickham* v. *Harding*, 28 L. J. Ex. 215; *Randegger* v. *Holmes*, L. R. 1 C. P. 679; Russell on Awards, 3rd ed. 64, 65; *Scott* v. *Avery*, 8 Ex. 487; *Avery* v. *Scott*, 8 Ex. 497; *Scott* v. *Avery*, 5 H. L. C. 811; *Roper* v. *Lendon*, 1 E. & E. 825; *Hirsch* v. *im Thurn*, 4 C. B. N. S. 569; *Braunstein* v. *Accidental Death Insurance Co.*, 1 B. & S. 782; *Tredwen* v. *Holman*, 1 H. & C., 71; 31 L. J. Ex. 398; *Elliott* v. *Royal Exchange Assurance Co.*, *ubi sup.*; *White* v. *Kirby*, 2 Ch. Cham. R. 416; *Griggs* v. *Billington*, 27 U. C. R 535; *Re Anglo Italian Bank & De Rosaz*, L. R. 2 Q. B. 452; *Re Lord*, 24 L. J. Ch. 145; *Vickers* v. *Vickers*, *ubi sup.*

Mr. Dalton.—It is urged by the plaintiff that he is not a "party" in the sense of the clause, because he has not executed. But it is clear that one may be a party to a deed, or contract, both substantially and technically, without executing it.

Then it is said that there is no mutuality: that this is not an agreement of the parties to refer, but a mere power to refer reserved by one of the parties.

Mutuality is necessary in the proper sense in every contract. I am not aware of any thing peculiar to a reference in this respect. Both parties have agreed here to refer, the defendants by their seal, and the plaintiff by his acceptance of the policy. The circumstances in which there is to be a reference are, 1st. Differences touching loss or damage; and, 2nd. The election of the company to refer them. In