

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. W082 of 1992

BETWEEN

DOUGLAS WRIGHT  
T/A DOUGLAS WRIGHT ASSOCIATES

PLAINTIFF/  
Respondent

A N D

THE BANK OF NOVA SCOTIA  
JAMAICA LIMITED

DEFENDANT/  
Applicant

R. Henriques Q.C. and Edward Miller instructed by  
Orville Cox and Company for the Defendant/Applicant

P. Beswick instructed by Ballentyne Beswick and Company  
for the Plaintiff/Respondent.

IN CHAMBERS

Heard: 27th May, 2nd and 5th June 1992 and 28th July 1994

CORAM: COURTENAY ORR J.

I deeply apologise for the great delay in delivering  
this judgment and wish to assure everyone concerned that it is not  
an indication of any lack of regard for the rights of the parties,  
but is due rather to the pressure of work.

By clauses 1, 2 and 3 of its summons dated 19th May  
1992, the defendant/applicant, hereafter called the Bank, seeks  
an order in the following terms:

- "1. That the default judgment entered herein on  
28th April 1992 be set aside.
- 2. That there be a stay of execution of writ  
of the seizure and sale issued herein on  
the 28th day of April 1992; and that the  
monies paid to the bailiff by virtue of  
the writ be immediately returned to the  
defendant.
- 3. That all further proceedings in this action  
be stayed pursuant to section 5 of the  
Arbitration Act, the plaintiff and the  
Defendant having by an agreement in writing  
dated 10th January 1990, agreed to refer to  
arbitration the matter in respect of which  
this action is brought."

In the endorsement to his writ dated 10th April 1992  
the Plaintiff/respondent states as follows:

"The plaintiff's claim is against the  
defendant for payment of the sum of  
\$178,722.63, being the balance due and  
owing from the 23rd day of October 1991 for

professional services rendered by plaintiff to the defendant at the defendant's request and interest thereon as agreed between the parties at the rate of 43.2 per centum per annum, together with interest continuing at the same rate on the principal amount of \$148,765.63."

The plaintiff/respondent moved swiftly. Having served his writ, judgment in default of appearance was entered on the day after time for entering appearance had expired, and execution was levied the same day. Thereafter the bank filed a conditional appearance and brought this summons.

Mr. Beswick for the respondents did not oppose the application to set aside the judgment, so the arguments revolved around the request for a stay of further proceedings and that the matter be referred to arbitration.

Clause 5 of the written contract between the parties reads thus:

"Any dispute or difference between the parties which may arise out of or under this agreement shall be decided by agreement between the parties and failing agreement between the parties, by a person appointed by the President of the Jamaican Institute of Architects failing such agreement by the provisions of the Jamaica Arbitration Law."

#### THE BACKGROUND TO THE DISPUTE

The following matters are common ground between the parties:

The plaintiff/respondent Mr. Douglas Wright is an architect. On 10th January 1990 the parties entered into a contract by which Mr. Wright was appointed architect on a project in which the Bank sought to extend the building at its Half Way Tree Branch.

The contract contained the arbitration clause set out above.

On 29th July 1991, Mr. Wright submitted an invoice indicating what he considered "The current billing status of the project". There was some discussion of the invoice between Mrs. Gillian Sharpe, an employee of the Bank and Mr. Wright; but the extent of the discussion and the number of conversations are in dispute. The Bank did not agree with his method of calculating his fees.

On 30th July 1991, Mrs. Sharpe wrote on behalf of the Bank, to the President of the Jamaica Institute of Architects outlining the issues in dispute and without naming the firm of Architects involved, asked his advice "as to the correct procedure so that we can determine a fair and equitable consultancy fee to be charged to this project."

In the meanwhile on the 23rd August 1991, Mrs. Sharpe wrote to Mr. Wright enclosing a cheque in the sum of \$107,537.77 for fees for the project. The penultimate paragraph reads:

"As discussed we have requested guidance from the Jamaica Institute of Architects with respect to the fees for this project. Until their reply is received, we enclose the abovementioned sum as an interim payment for your services to date."

By letter dated 3rd September 1991, Mr. Victor Patterson who was then the President of the Jamaican Institute of Architects replied to Mr. Sharpe. He said he had consultations with members of the Practice Committee of the Jamaican Institute of Architects and a number of senior architects. In that letter he expressed an opinion which supported Mr. Wright's position.

On 9th October 1991, the Bank wrote a letter terminating Mr. Wright's services and requesting a final invoice. Mr. Wright submitted such an invoice for \$420,681.05 by letter dated 23rd October 1991.

On 25th November 1991, Mrs. Sharpe spoke to Mr. Marvin Goodman, an Architect seeking his advice as to the proper basis on which Mr. Wright should be paid. He replied by letter dated 13th December 1991. He indicated that he had met with Miss Isaacs, an Architect, and they had agreed on the basis on which Mr Wright should be payed. This letter supported the Bank's position.

On 18th December 1991, the bank wrote to Mr Wright and enclosed a cheque for \$230,811.50 "on the understanding that same is in full and final settlement" of his invoice for services rendered. Mr. Wright replied by letter dated January 17, 1992 acknowledging the receipt of the cheque as part payment only.

I do not regard it as necessary to indicate the areas of disagreement on the facts leading up to the bringing of the action as the concern now is whether there should be a stay of the

proceedings.

**THE COURT'S POWER TO GRANT A STAY OF PROCEEDINGS**

Section 5 of the Arbitration Act sets out the provisions governing the power of the Court to grant a stay of proceedings. It is couched in the following terms:

"If any party to a submission, or any person claiming through or under him, commences any legal proceedings in the 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 pleading or taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court or a Judge thereof, is 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 any order staying the proceedings." (emphasis mine)

By Section 2 "submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

I will now set out the obligations which section 5 of the Arbitration Act places upon the applicant, and the Court, when a party seeks a stay of proceedings under the section.

The applicant must prove the following:

1. That a valid arbitration agreement exists, that is, that there is a written agreement to submit present or future differences to arbitration.
2. That the proceedings which he seeks to have stayed are of a type to which the section applies, this involves proof that:
  - a) They are legal proceedings commenced in a Court.
  - b) They are brought in respect of matters agreed to be referred to arbitration.
  - c) They are brought by a party to the arbitration agreement or a person claiming through or under such a person.

3. That the application is made in an appropriate manner, that is,
- a) The applicant is a party to the arbitration agreement or a person claiming through or under such a person
  - b) The applicant is a party to the legal proceedings
  - c) The application is made after the applicant has entered an appearance but before he has delivered any pleading or taken any other steps in the proceedings.

The Court must be satisfied that -

- a) The applicant was and is ready and willing to do all things necessary to the proper conduct of the arbitration;
- b) There is no sufficient reason why the dispute should not be referred to arbitration.

The arguments have centered on the following three issues, it being obvious that the other conditions were satisfied:

- 1) Whether the Bank has taken a step in the proceedings,
- 2) Whether the Bank has shown itself ready and willing to go to arbitration
- 3) Whether there is no sufficient reason why the dispute should not be referred to arbitration.

**HAS THE BANK TAKEN A STEP IN THE PROCEEDING SUCH AS TO DISQUALIFY IT FOR A STAY OF PROCEEDINGS?**

As noted above, Section 5 of the Arbitration Act, which is similar to its English equivalent, provides that an application for a stay may be made after appearance "and before delivering any pleading or taking any other steps in the proceedings". Mr. Beswick submits that in filing an application to set aside the judgement, the Bank has taken a step in the proceedings and this puts it outside the protection of the section.

Two brief points may be noted here. Firstly, the

application for a stay must be made timeously. (Turner & Goudy vs McConnell [1985] 2 All E.R. 34). In the instant case, the defendant issued the summons to set aside judgment and applying for a stay in one document on the very day after execution was levied. The defendant therefore acted promptly.

Secondly, the onus of showing that the action should proceed lies on the plaintiff/respondent. (See Hodgson v Railway Passengers Association Co. [1982] 9 Q.B.D., 188)

The authorities as to what amounts to a step in the proceedings do not all follow a clear pattern. Thus, demanding the delivery of a statement of claim is a step, if made by means of an application to the Court but not if made by letter, (Ives and Bacher v Williams [1984] 2 Ch. 478 at 484, 490 and 494).

Issuing a summons for further and better particulars is a step, so too is obtaining an order for interrogatories. (Chappell vs North [1891] 2 Q.B. 252).

On the other hand, it was held that making an application for interim relief, such as an injunction or the appointment of a receiver, designed to maintain the status quo pending the award, is not a step in the action since it is not inconsistent with the desire to have the main dispute decided by arbitration; see Compagnie due Senegal v Woods & Co. [1883] 53 L.J. Ch. 166 at 169.

Again, resisting an application for an interlocutory injunction by putting evidence and appearing in Court has been held not to be a step: Rousell-Uclaf vs G.D. Searle & Co. [1978] 1 Lloyd's Rep. 225. In that case Graham J said that the statute contemplated some positive procedural act on the part of the defendant rather than merely parrying a blow by the plaintiff, particularly where the attack consists of asking for an interlocutory injunction. And in Pitchers Ltd. vs Plaza (Queensbury) Ltd. [1940] 1 All E.R. 151 at p.156, Goddard L.J. as he then was, expressed the opinion that no step is taken in the action by a defendant opposing a summons under R.S.C. Order 14 (for summary judgment), who not merely raises the matter of the

arbitration clause in his affidavit, but also at the same time takes out a summons to stay the action. In the instant case, the defendant has acted similarly.

In Skopos Design Group Ltd. (trading as Anker Contract Carpets) vs Homelife Nursing Ltd. (The Times, March 24, 1988).

May L.J. giving the first judgment in the English Court of Appeal said:

"...although some of the authorities were difficult to reconcile, in each case an objective approach had been adopted to determine whether a step had been taken. The test was whether the defendant had impliedly affirmed the institution of proceedings and indicated a willingness to go to law."

(emphasis supplied)

The learned authors of Mustill on Arbitration (2nd Edition) summarized the law at page 472 in a passage which shows remarkable prescience of the later decision in Skopos (above).

They write:

"The reported cases are difficult to reconcile and they give no clear guidance on the nature of a step in the proceedings. It appears, however, that two requirements must be satisfied. First, the conduct of the applicant must be such as to demonstrate an election to abandon his right to stay, in favour of allowing the action to proceed. Second, the act in question must have the effect of invoking the jurisdiction of the Court."

"An extra-judicial proceeding in the action such as obtaining by correspondence a consent to enlargement of time for delivery of pleading is not sufficient.

The circumstances which accompany an act may be looked at to see whether the act amounts to an election to give up the right to stay. Thus, an application to the Court which might otherwise amount to a step in the proceedings is deprived of this characteristic if the applicant makes it clear - by stating that his application is without prejudice to a subsequent request for a stay or in simultaneously taking out a summons to stay - That he intends to insist on a reference to arbitration."

(emphasis mine)

I accept this as a correct statement of the law and in keeping with the decision in SKOPOS (supra) and other authorities cited above. I hold that both in principle and by that line of authorities to be preferred, a party only takes a step in the proceedings in the circumstances outlined in Mustill on

Arbitration quoted above.

I therefore find that the Bank in the instant case did not take a step such as to preclude it from seeking a stay of proceedings.

I now turn to the second issue to be decided:

**HAS THE BANK SHOWN THAT IT IS READY AND WILLING?**

Section 5 of the Arbitration Act provides that the applicant for a stay must show that he is ready and willing to do all things necessary to the proper conduct of the arbitration. The section requires that this state of affairs must exist both at the time when the proceedings were commenced and also at the time when the Court is asked to exercise its discretion.

In resolving this question it is appropriate at this stage to refer to some of the areas of conflict in the Affidavits of the parties.

Between the Bank's letter of 15th December 1991 to the plaintiff in which a cheque purporting to be in full and final settlement was enclosed, and Mr Wright's letter in reply dated 17th January 1992, the parties had a meeting in which Mrs Gillian Sharpe and Mr Powell of the bank took part.

Mr Wright in a further affidavit dated 19th May 1992 states that in that meeting he raised the issue of the arbitration clause and inquired of the possibility of arbitration but the Banks officers unanimously dissented, and indicated that they were not prepared to arbitrate. The two officers of the bank mentioned above, deny that the question was ever raised. I accept their statement. It seems to me more likely than not that they are speaking the truth as I would expect that this would have been a foremost point in the plaintiff's first affidavit if the day before in opposition to the summons, to set aside the judgment and to stay proceedings in favour of arbitration. It was an affidavit in which his mind was altered to the question of arbitration and in which he expressly stated that the "right to tender a notice under the Arbitration Act was never invoked by the defendant company, and at, no time did

either party seek to involve the provisions of the Arbitration Act."

Moreover it is unlikely that if Mr Wright's contention were true, this alleged position by the bank was not mentioned in his letter of 17th January 1992, or in any subsequent correspondence of his attorneys.

A second area of sharp conflict is this: Mr Wright states that he had telephone discussions with Mrs Sharpe of the bank and in one such conversation it was agreed that the bank would request the assistance of the Jamaica Institute of Architects in resolving the dispute over the method of calculation, and that he made it clear that he was prepared to abide by the decision of the Institute.

In her affidavit of 19th May 1992, Mrs Sharpe denies that any such agreement was made, or that there was any discussion as to the plaintiff agreeing to abide by the decision of the president of the Jamaican Institute of Architects.

I accept the statement of the plaintiff as being more probable in view of Mrs Sharpe's letter of the 23rd of August 1991, to the plaintiff, in which she encloses "an interim payment" and says as discussed we have requested guidance from the Jamaican Institute of Architects with respect to your fees for this project, (emphasis supplied)

Mr Henriques argues that these letters between the bank and the president of the Jamaican Institute of Architects do not constitute an activity which satisfies the second method of solving disputes as stipulated in the arbitration clause which reads in part:

**"Any dispute or difference between the parties ... shall be decided by agreement between the parties and failing agreement between the parties by a person appointed by the president of the Jamaican Institute of Architect...."** (emphasis supplied)

The second method is the position underlined.

Mr Beswick, on the other hand says it is semantic to say that the president did not appoint himself and submits that although the letter did not mention that the dispute was with the plaintiff nor did it ask the president to appoint someone to

settle the dispute, but merely sought "guidance" it satisfies, the arbitration clause. I agree with Mr. Beswick, in that the dispute was clearly set out in the letter and it was addressed to the president of the Jamaican Institute of Architects who is the person who must make the appointment, and as I have already indicated, I accept that the plaintiff agreed to abide by his decision. I hold that in substance the request of the bank fulfilled the requirements of the second method. Mr. Beswick says that by seeking the advice of Goodman and Associates after receiving the decision of the president of the Jamaican Institute of Architects, the bank has clearly shown that it was not "ready and willing to do all things necessary to the proper conduct of the arbitration." I do not agree. The fact that the parties continued to communicate and that there was even a meeting about the 8th of January 1992, shows that negotiations were continuing. Nor does the dismissal of Mr Wright by the bank mean that the bank was not "ready and willing". (See Renshaw vs Queen Home Residential Mansions and Hotel Company Ltd. (1897 1 QB 662).

Further, inspite of my ruling as to the status of the bank's request for guidance from the Jamaican Institute of Architects, I think it was not unreasonable for the bank to have not regarded such action as being an exercise of the second method of solving the dispute under the agreement.

I therefore accept that the bank's position is as stated in the affidavit of Lenin Thompson dated 29th April 1992, that at the time, the action commenced, the bank was and remains ready and willing to do all things necessary to the proper conduct of the arbitration.

**SHOULD THIS MATTER BE REFERRED TO ARBITRATION?**

Section 5 of the Arbitration Act provides that the 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...may make an order staying the proceedings." This envisages an inquiry in two stages. The first, is as to the existence of the jurisdiction to grant a

stay, that is, whether the Court is satisfied that there is no sufficient reason why the matter should not be referred to arbitration. The second, is a true matter of discretion - whether the jurisdiction should be exercised. The first question has sometimes been erroneously described as a matter of discretion. It is not so.

In the decided cases the courts have not always expressly recognized this two fold inquiry, but in some instances it has been clearly noticed. Thus is Taunton-Collins vs Cromie (1964) 1 All E.R. 332 at 334 D. Pearson L.J. as he then was, said:

"As to the present case, it is just worth noting what is said in Section 4 of the Arbitration Act 1950, (Section 5 of the Arbitration Act of Jamaica) under which this question arises. That section, by Sub-section (1), provides that in an application of this kind when the applicant in reliance on an arbitration clause is seeking to obtain a stay of proceedings, the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and so on, may make an order staying the proceedings. Accordingly, this Court or the court below has or had to be satisfied that there was no sufficient reason why the matter should not be referred in accordance with the agreement, and, even if so satisfied, the court still has a discretionary power, as is indicated by the word "may".

The authorities reveal that the basic stance of the Courts has been that parties who have agreed to arbitrate should be held to their agreement. For example, in Wickham vs Harding (1859) 28 LJ EX 215 Bramwell B. against whose order at first instance staying proceedings, the plaintiff had appealed, said, in the Court of Appeal at page 217:

"...a bargain is a bargain, and the parties ought to abide by it, unless a clear reason appears for their not doing so."

and Lord Moulton pointed out in Bristol Corporation vs John Ayr & Co (1913 AC 241 at 256 that prior to the Common Law Procedure Act, 1854 a party to a submission could refuse to go to arbitration and the only remedy was an ineffective action in damages, since no damages could be proved; but with the passing of that Act submissions to arbitration could be made the subject of indirect decrees of specific performance.

The onus of persuading the Court, rests on the plaintiff Mr Wright, who is required to show that it is proper to refuse a

stay. The Courts have expressly acted on this principle or assumed it to be axiomatic in the vast majority of cases decided under Section 4 of the English Arbitration Act of 1950 and its predecessors, which are in terms similar to Section 5 of Arbitration Act of Jamaica.

Thus in Ford vs Clarkson's Holidays Ltd. [1971] 3 All E.R. 454 at 459, Edmund Davis L.J. (as he then was) said:

"Once a party moving for a stay has shown that the dispute is within a valid and subsisting arbitration clause the burden of showing cause why effect should not be given to the agreement to submit is on the party opposing the application to stay."

At first there was only a prima facie presumption in favour of a stay. (See Willesford vs Watson [1873] 8 Ch. Appeals 473 at 486; Law vs Garrett [1878] 8 Ch. D. 26 at 37; Lyon vs Johnson [1889] 40 Ch. D. 579). In Law vs Garrett (supra) Baggallay L.J. delivering the judgment of the Court said at page 37:

"We entirely concur in the views expressed by Lord Selbourne in the case of Willesford vs Watson, to the effect that if since the passing of the Common Law Procedure Act parties choose to determine for themselves that they will have a forum of their own selection instead of resorting to the ordinary Courts, a prima facie duty is cast upon the Courts to act upon such arrangement."

In more recent times there has been a shift in the position of courts of high authority, and there is now a very strong bias in favour of enforcing arbitration agreements. A strong cause for refusing a stay must be shown.

Thus in Bristol Corporation vs John Air & Co. [1913] A.C. 241 at 258 and 259 Lord Moulton said in the House of Lords:

"...the Court should start with an earnest desire to keep the parties to the domestic tribunal which was contemplated both in the contract and throughout the execution of the works..."

I think that in each case the Court is bound to consider all the circumstances ... It must consider all the circumstances of the case, but it has to consider them with a strong bias, in my opinion, in favour of maintaining the special bargain between the parties though at the same time with a vigilance to see that it is not driving either of the parties to a tribunal where he will not get substantial justice."

Again Scrutton L.J. in Metropolitan Tunnel and Public Works vs London Electric Railway Co. [1926] A.C. 371 at 390, after citing a portion of the passage quoted above from the judgment of

Lord Moulton in Bristol Corporation vs John Air (supra) as to the strong bias in favour of the special bargain said this:

"I approach this matter from that point of view with a strong bias in favour of maintaining the special bargain between the parties."

In Halifax Overseas Freighters vs Rasno Export; Techno-prominport and Polskie Linie Oceaniczne P.P.W. (The Pine Hill) [1958]

2 Lloyd's Report 146 at 151 McNair J. described the onus on the plaintiff as one of putting before the Court compelling reasons why he should not be held to his contract. (See also Smith, Coney and Barrett vs Beecher, Gray and Co. [1916] 2 Ch. 86.)

In The Eleftheries [1970] P.94 the headnote reads in part:

- "Held (1) That where plaintiffs sued in breach of an agreement to refer disputes to a foreign court, and the defendants applied for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction was not bound to grant a stay but had a discretion whether to do so or not.
- (2) That the discretion should be exercised by granting a stay unless strong cause for not doing so, was shown, the burden of proving such strong cause being on the plaintiffs."

As noted above Lord Moulton in Bristol Corporation vs Aird (supra) advised that the Court in matters of this nature must look at all the circumstances of the case. Fortunately, from time to time the Courts have made pronouncements as to the effect of certain factors, and one may obtain some guidance from these dicta. However, the warning of Lord Parker in Bristol Corporation vs John Air (supra) at p. 260 is most apposite. He said:

"My Lords, it appears to me that it is absolutely impossible to define, and certainly undesirable to attempt to define, with any precision what circumstances will prevent the Court from exercising its discretionary power."

Similarly Scrutton L.J. in the earlier case of Czarnikow vs Roth Schmidt & Co. [1922] 2 KB 479 - 488 speaking of the approach of the Courts in these matters said that they:

"...consider the merits of the case including the fact of the agreement of the parties and either stay the action or allow it to proceed according to the view they form of the best method of procedure; and they have always...declined to fetter their discretion by laying down any fixed rules on which they will exercise it."

I also bear in mind that factors which may be insufficient in themselves, may yet have the cumulative effect of justifying the refusal to stay. (Per McNair J in Helifax Overseas. The Pine Hill (supra) at p.152)

I have considered all the circumstances of this case but wish to highlight a few which the courts have traditionally regarded as important.

Firstly, delay. Here the Bank has acted promptly, so no blame can be attached to it in this regard. I have also taken into consideration the delay in delivering this judgment, and do not regard it as something which should affect my decision having regard to all the circumstances of the case.

Secondly, Expense. Mr. Beswick submitted that the issue to be decided is a point of law, and to send the matter to arbitration would involve extra expense for the parties. Here the weight of authority is against him. In Smith vs Pearl Assurance Co. Ltd. [1939] 63 LI L Rep. 1 it was held that it is immaterial that a person resisting a stay is too poor to sustain the extra expense of an arbitration. This case was followed in Ford vs Clackson's Holidays (supra).

Thirdly, Issues of Law. Both sides have agreed that the issue to be decided is one of construction. The plaintiff, Mr Wright, puts it this way in his affidavit of 14th May 1992 at paragraph 21:

"...the sole issue in dispute as stated by the Defendant company in paragraph 4 of the Thompson affidavit is whether the construction cost which is used as the basis of determining the Architect's project fees for the portion of the project omitted prior to the tender stage are to be based on the Quantity Surveyor's estimate of construction prior to the inclusion of this portion of the project, or upon the latest preliminary estimate of construction."

Mr. Beswick submits that this is a pure question of law and that there is no agreement here to submit questions of law of arbitration. He argued that such a point of law should be sent to the Courts, and that this is especially so as it is agreed that the agreement in this case does not contain a Scott vs Avery clause, making the publication of an award in arbitration a condition precedent to bringing an action.

Mr. Henriques, on the other hand advanced the argument that the clause providing for arbitration is wide enough to cover questions of law and fact and that the issue here is one of mixed law and fact.

I agree with both points made by Mr. Henriques. The arbitration clause, Clause V reads as follows:

"Any dispute or difference between the parties which may arise out of or under this Agreement, shall be decided by agreement between the parties and failing agreement between the parties by a person appointed by the President of the Jamaican Institute of Architects and failing such agreement by the provisions of the Jamaican Arbitration Law."

I am fortified in my view that the dispute involves a question of law and fact, by the fact that there is a difference of opinion on the issue among the profession of Architects and by the very affidavit of Mr Wright the plaintiff. In paragraph 22 of his affidavit of 14th May 1992 he says:

"The aforesaid issue is entirely one of construction of the agreement between the parties, and will necessarily involve consideration of questions of custom and law." (emphasis mine)

I am of the opinion that evidence would be needed both as to the technical terms used in the agreement and the custom in the profession in order to construe the contract.

In all the circumstances therefore, I hold that there is no sufficient reason why this matter should not be referred to arbitration. I am bolstered in this finding by the case of Metropolitan Tunnel and Public Works, Ltd. vs London Electric Railway Company[1926] Ch.371.

In that case a contract for engineering works provided that disputes should be referred to an arbitrator, who was to be an engineer. One of the parties took out a summons for the construction of a clause in the contract. It appeared that evidence would be needed, both as to custom in such matters and as to the meaning of technical terms used, before the clause could be construed. It was held by the Court of Appeal, overruling Lawrence J. at first instance, that the proceedings should be stayed.

Should I exercise my discretion and stay the action? In view of all the circumstances and the authorities cited above I regard it as appropriate to stay the action. In coming to this conclusion, I wish to point out that there is nothing to prevent the appointment of an

arbitrator who is versed in the law.

The action is therefore stayed but on condition that the Bank proceed with dispatch to do all things necessary for arbitration.

There shall be costs to the defendant/applicant, to be taxed if not agreed.

Liberty to apply.