1929

*April 29, 30.
*June 13.

HAROLD WILLIAM KEAY (PLAINTIFF) . . . APPELLANT;

AND

ALBERTA CO-OPERATIVE WHEAT PRODUCERS, LTD., AND ALBERTA POOL ELEVATORS, LTD. (DEFENDANTS) . . . . . RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Arbitration—Action by member of Wheat Pool against the Pool—Whether statutory arbitration provisions applied to matters in question—Stay of action—C. 7 of 1924, Alta. (the Special Act), s. 18; Co-operative Associations Act, R.S.A., 1922, c. 160, s. 20; Arbitration Act, R.S.A., 1922, c. 98, s. 5.

Plaintiff entered into a "marketing agreement" with the defendant "Pool" (Alberta Co-operative Wheat Producers, Ltd.). It recited that plaintiff desired to co-operate with other growers in producing and marketing wheat, that the Pool had been formed with power to act as the agent of its members as to marketing, that plaintiff desired to become a member and to enter, with other growers, into the agreement, that the agreement, although individual in expression, was one of a series between the Pool and the growers of wheat in Alberta and should constitute one contract between the several growers signing it and the Pool. In the agreement plaintiff applied for a share of the capital stock of the Pool, which covenanted to allot same to him. Plaintiff agreed to deliver his wheat for certain years and the Pool agreed to market it. Provision was made for retention by the Pool, out of the returns for sale of the wheat, of its expenses, of 1% as a commercial reserve to be used for any of its purposes, and of an amount for investment in shares of an elevator company. After expiration of the agreement plaintiff brought action, claiming that he had not been given a proper accounting, nor payment of his proper proportion of the proceeds of the wheat sold, that certain excess earnings had been inequitably distributed among the Pool members, and that shares in an elevator company purchased with his money had not been put in his name; and he claimed an accounting, payment of his proper share, transfer into his name of said elevator company shares, and damages. The Pool moved to stay proceedings on the ground that the matters in controversy must be decided by arbitration. The Pool was in-

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

corporated under the Alberta *Co-operative Associations Act*, which provided for appointment of trustees, whose duties should be to conduct and manage all the business of the association, and (s. 20) that "every dispute between any member or members of an association * * * and the trustees, treasurer or other officer thereof, shall be decided by arbitration in manner directed by the rules or by-laws of the association." By Special Act (1924, c. 7) the Pool's incorporation and existing by-laws were confirmed, and it was provided that the provisions of the *Co-operative Associations Act* should (except as superseded) continue to apply to it. Under its by-laws the trustees had power to conduct and manage all its business, and to enter into and carry into effect the marketing agreement. By-law 57 provided that "every dispute between any member * * * and the trustees, treasurer or other officer" of the Pool should be decided by arbitration (with a proviso that this provision should not apply as between the Pool and any member who failed to fulfil any covenant in the marketing agreement).

Held: (1) Existence of a "dispute" was shewn by the allegations and demands in the statement of claim. Although it would have been better practice to allege, in the affidavits supporting the Pool's motion, that a dispute had existed prior to the commencement of the action, failure to do so was not fatal, provided the allegations in the statement of claim were consistent only with the existence of such a dispute. The issue of a writ to enforce a right claimed is, of itself, some evidence of the existence of a dispute.

(2) As to plaintiff's contention that any dispute was with the Pool, and not with its "trustees, treasurer or other officer" within the meaning of said arbitration provisions:—As it was the trustees' duty to carry into effect the provisions of the marketing agreement, a dispute as to the proper manner of carrying out those provisions was properly termed a dispute with the trustees. But, in any case, in view of the purposes of the Pool and the whole scheme and purpose shewn in the Pool legislation (*Municipal Bldg. Soc.* v. *Kent*, 9 App. Cas., 260, at pp. 284-5) it must be taken that the legislative intention was that the arbitration provisions should apply to all disputes arising under the marketing agreement, unless expressly excepted in the by-laws. (This conclusion received support from the proviso of by-law 57. It was unnecessary had it not been intended that the arbitration provisions should apply to the marketing agreement. By c. 7 of 1924, the by-laws, including by-law 57 with its proviso, had received legislative sanction, the legislature thus impliedly declaring that the arbitration provision should apply to disputes under the agreement except those covered by the proviso).

Judgment of the Appellate Division, Alta., [1929] 1 W.W.R. 413, affirmed, except that it was varied so as to stay proceedings instead of dismissing the action.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta (1), which reversed the judgment of Walsh J. (2), and dismissed the plaintiff's action.

(1) [1929] 1 W.W.R. 413. (2) [1929] 1 W.W.R. 96.

1929

KEAY v. ALBERTA CO-OPERATIVE WHEAT PRODUCERS, LTD.

The defendant, Alberta Co-operative Wheat Producers, Limited, moved before Walsh J. for an order that all further proceedings in the action be stayed, pursuant to s. 5 of the *Arbitration Act,* R.S.A., 1922, c. 98, on the ground that the matters in controversy must be decided by arbitration. The other defendant moved for an order dismissing it from the action on the grounds of non-disclosure of cause of action and misjoinder, and, in the alternative, asked for an order staying proceedings. The motions were dismissed (1). On appeal by the defendants, the Appellate Division held (2) that the matters in dispute in the action were properly the subject of arbitration and not the proper subject of litigation, and that the action should be dismissed. Special leave to appeal to the Supreme Court of Canada was granted to the plaintiff by the Appellate Division.

The nature of the action, the material facts of the case, and the statutory provisions involved, are sufficiently stated in the judgment now reported. The appeal was dismissed with costs, but the order of the Appellate Division was varied so as to stay proceedings instead of dismissing the action.

A. A. McGillivray K.C. for the appellant.

A. Macleod Sinclair K.C. for the respondents.

The judgment of the court was delivered by

LAMONT J.—In this appeal we have to determine whether the appellant (plaintiff) is entitled to maintain the action or whether the matter in controversy between the parties must be decided by arbitration.

The appellant is a grower of wheat in the province of Alberta and also a member of the Alberta Co-operative Wheat Producers, Limited (hereinafter called the "Pool"). The Alberta Pool Elevators, Limited, is a company organized and controlled by the Pool for the purpose of furnishing the Pool members with the elevator facilities necessary for the handling of their wheat.

The Pool was incorporated in August, 1923, under the *Co-operative Associations Act,* and, on or about April 1, 1924, the appellant and the Pool entered into an agreement, which I shall hereinafter refer to as the " Marketing Agree-

(1) [1929] 1 W.W.R. 96. (2) [1929] 1 W.W.R. 413.

ment." That agreement recited that the appellant was desirous of co-operating with other growers in the producing and marketing of wheat; that the Pool had been formed with power to act as the agent of its members so far as marketing of grain was concerned; that the appellant was desirous of becoming a member of the Pool and of entering, with other growers, into the marketing agreement, and that the Marketing Agreement, although individual in expression, was one of a series between the Pool and the growers of wheat in Alberta and should constitute one contract between the several growers signing the same, and the Pool. In the agreement the appellant applied for a share of the capital stock of the Pool, and the Pool, on its part, covenanted to allot the same to him. The appellant also agreed to deliver to the Pool all the wheat produced or acquired by him, except his seed wheat, during the years 1924 to 1927 inclusive, and the Pool agreed to receive and market the same. The agreement provided that out of the gross return from the sale of the wheat delivered to it the Pool might retain and deduct sufficient sums to pay the marketing and other charges and expenses of the Pool and, in addition, might deduct one per cent. of the gross selling price as a commercial reserve to be used for any of the purposes of the Pool. It also provided for the deduction of an amount, not exceeding two cents per bushel, to be invested, in the discretion of the trustees, in shares of the capital stock of any elevator company formed for the acquisition of grain elevators wherewith to handle the wheat of the Pool members.

After the expiration of the Marketing Agreement the appellant brought this action. In his statement of claim he set out the material provisions of the agreement and alleged that during the years 1924 to 1927 inclusive, he delivered to the Pool the wheat produced by him; that this wheat the Pool sold; that it deducted 1% of the gross selling price of his wheat to form a commercial reserve, and two cents a bushel which it invested in shares of the capital stock of the respondent, the Alberta Pool Elevators, Limited; that of these sums no proper accounting had been given to him, nor had the shares in the Alberta Pool Elevators, Limited, purchased with his money, been put in his name. He also alleged that although the Pool had from

1929

KEAY
v.
ALBERTA
CO-OPERATIVE
WHEAT
PRODUCERS,
LTD.

Lamont J.

time to time purported to account and make payments of the moneys payable to him, he had never had a proper accounting, nor had he received payment of his proper proportion of the proceeds of the wheat sold. He further alleged that in 1928 the Pool distributed one million dollars of excess earnings among the Pool members, not, however, on any equitable basis but in such a way as to favour those members who delivered their wheat at elevators owned by the Alberta Pool Elevators, Limited, as against those members at whose point of delivery the Pool had no elevator, and that such distribution was without moral or legal justification, and in derogation of the appellant's rights, and he claimed an accounting of the proceeds of the wheat he had delivered to the Pool, and of the deductions which had been made therefrom and payment to him of his proper share. He also claimed to have transferred into his own name the shares in the Alberta Pool Elevators, Limited, purchased with moneys deducted from the proceeds of his wheat, and $2,500 damages.

On being served with a writ in the action the Pool moved, pursuant to s. 5 of the *Arbitration Act,* for an order that all proceedings be stayed on the ground that, under the Special Act, c. 7 of 1924 (which confirmed the incorporation of the Pool and its existing by-laws), all the matters in controversy between the appellant and the Pool had to be decided by arbitration. The learned judge in Chambers (1), dismissed the application but struck out paragraph 42 of the statement of claim, in which the appellant claimed the right to inspect the books of the Pool, which right he said had been refused to him. On appeal the Appellate Division reversed the order of the Chamber judge and dismissed the appellant's action (2). Hence this appeal.

The statutory provisions material to the appeal are: Section 18 of chapter 7 of 1924; section 20 of the *Co-operative Associations Act;* and clause 57 of the By-laws. They read as follows:—

(18) All the provisions of the Co-operative Associations Act shall continue to apply to the corporation, except and so far only as the same are superseded by or are in conflict with any of the provisions of this Act or of any presently existing by-law of the corporation or of any by-law hereafter passed pursuant to the provisions of this Act.

(20) Every dispute between any member or members of an association

(1) [1929] 1 W.W.R. 96. (2) [1929] 1 W.W.R. 413.

under this Act, or any person claiming through or under a member, or under the rules or by-laws of the association, and the trustees, treasurer, or other officer thereof, shall be decided by arbitration in manner directed by the rules or by-laws of the association, and the decision so made shall be binding and conclusive on all parties without appeal, and application for the enforcement thereof may be made to the District Court.

(57) Every dispute between any Member or Members of this Association or under the By-laws and the Trustees, Treasurer or other officer thereof shall be decided by the arbitration as provided by the Arbitration Act, provided, however, that this provision shall not apply as between the Association and any Member who fails to fulfil any of the covenants contained in the Marketing Agreement.

The first question to be determined is, was there a dispute between the appellant as a member of the Pool and its trustees, treasurer or other officer? For the appellant it was contended, (1) that there was no evidence of the existence of any dispute, and (2) that if there was, the dispute was between the appellant and the Pool, and not with its trustees, treasurer or other officer.

In my opinion, the issue of a writ to enforce a right claimed is, of itself, some evidence of the existence of a dispute. In this case a perusal of the allegations set out and the demands made in the statement of claim establishes, beyond question, that the appellant was very decidedly disputing the correctness of the acts done and the proceedings taken on the part of those who were managing the affairs of the Pool, not only in reference to the payment to him of the proceeds of his grain and the investment of the two cents per bushel in shares of the capital stock of the Alberta Pool Elevators, Limited, in the name of the Pool, but also in reference to the distribution of the one million dollars excess earnings. It would, in my opinion, have been better practice if, in the affidavits filed in support of the motion, someone on behalf of the Pool had alleged that a dispute had existed prior to the commencement of the action. Failure to do so, however, is not fatal to the motion provided the allegations in the statement of claim are consistent only with the existence of such a dispute.

Then with whom was the appellant disputing? He claims it was solely with the Pool and not with its trustees; that the matters in dispute arose out of the Marketing Agreement which he had entered into with the Pool before he became a member thereof.

The Pool, being a corporate body, could have a dispute with the appellant only through its proper officers who

1929

KEAY v. ALBERTA CO-OPERATIVE WHEAT PRODUCERS, LTD.

Lamont J.

would act on its behalf. Subs. 1 of s. 3 of the *Co-operative Associations Act* provides that to secure incorporation under that Act the persons desiring to become incorporated shall file in the office of the Registrar a memorandum of association duly verified, together with a copy of the rules or by-laws agreed upon.

Subs. 3 in part reads as follows:—

> The said rules or by-laws shall contain provisions in respect of the following matters: (*f*) The appointment of trustees * * * whose duties shall be to conduct and manage all the business of the association.

The by-laws filed provide:

> The Powers of the Trustees are:—
>
> (*a*) To conduct and manage all the business of the Association and to do all acts and perform all duties stipulated to be done or performed by the Trustees by the Co-operative Associations Act or these by-laws, and any amendments thereto * * *.
>
> (*e*) To enter into and carry into effect, with or without modification, the Contract attached to the Memorandum of Association * * * (Marketing Agreement).

As it was the duty of the trustees to carry into effect the provisions of the Marketing Agreement, I am unable to understand why a dispute as to the proper manner of carrying out these provisions is not properly termed a "dispute with the trustees." In my opinion it is, but I think there are other and broader grounds upon which this appeal may be disposed of.

In the first place I would adopt as applicable here the principle laid down by Lord Watson in *Municipal Building Society* v. *Kent* (1), where His Lordship said:—

> But the question whether certain proceedings are to be regarded as disputes between the society and its members, arising within the society, appears to me in the case of each statute to depend upon the intention of the legislature, to be gathered from the whole provisions of the Act.

The object of the promoters of the Pool as disclosed in the memorandum of association and by-laws filed, and the intention of the legislature as disclosed in the Special Act which confirmed and validated the incorporation of the Pool, under the *Co-operative Associations Act*, was to ensure the existence of a corporate body whose most important function would be to receive the wheat of its members and market the same and return to them the proceeds thereof, subject to the deductions therefrom provided for in the Marketing Agreement and in the by-laws. The Marketing Agreement provides that each grower signing the

(1) (1884) 9 App. Cas. 260, at pp. 284-5.

same shall become a member of the corporate body, and the by-laws provide that all members shall sign the standard Marketing Agreement current at the time of their entrance as members. It was by virtue of his membership in the Pool that the appellant was entitled to have the Pool market his wheat under the terms of the Marketing Agreement. It is true he signed the Marketing Agreement before a share of the capital stock of the Pool had been allotted to him, but in the agreement he applied for a share and obtained a covenant from the Pool that his application would be granted. The whole scheme of the Pool legislation was the co-operative marketing of the wheat of the Pool members through the medium of a corporate body composed of themselves, and upon terms agreed upon and embodied in the Marketing Agreement, which agreement, as its recital shews, was not to be considered as simply an individual contract with each grower, but was to constitute one contract of which one contracting party was the Pool and the other the members of the corporate body. Such being the purpose of the legislation, can it reasonably be contended that the appellant's rights under the Marketing Agreement are entirely disassociated from his membership in the Pool, or that the legislature did not contemplate the application to that agreement of the arbitration provisions found in the Act and in the by-laws? In view of the fact that the marketing of the wheat was the chief purpose of the Pool; that it was incorporated under the *Co-operative Associations Act* which provided that the trustees should conduct and manage all its business, and that all disputes between a member and the trustees should be decided by arbitration, and in view of the fact that the by-laws expressly provide that the trustees shall carry into effect the Marketing Agreement, and that the Special Act has not only confirmed the incorporation of the Pool but has declared that all the provisions of the *Co-operative Associations Act* shall continue to apply, except in so far as they are superseded, I am clearly of opinion that the legislative intention was that the arbitration provisions should apply to all disputes arising under the Marketing Agreement, unless expressly excepted in the by-laws.

This conclusion, in my opinion, receives support from the proviso of by-law 57, which expressly states that the

1929

KEAY
v.
ALBERTA
CO-OPERATIVE
WHEAT
PRODUCERS,
LTD.

Lamont J.

arbitration provisions shall not apply as between the Pool and any member who fails to fulfil any of the covenants contained in the Marketing Agreement. If it had not been intended that the arbitration provisions should apply to the Marketing Agreement there was absolutely no object in inserting the proviso in the by-law. As the by-laws were, in the Special Act, declared to be valid and binding, clause 57, with its proviso, has received legislative sanction. Impliedly, therefore, the legislature, by sanctioning the proviso, has declared that the arbitration provision shall apply to disputes under the Marketing Agreement, except those covered by the proviso.

The only other point to which I need refer is: Should the appellant's action have been dismissed or only stayed? It was dismissed by the Appellate Division although the motion asked only that it be stayed. Under s. 20 of the *Co-operative Associations Act,* when the arbitration has taken place and the decision given, that decision shall be binding and conclusive on all parties without appeal. There is, however, nothing binding or conclusive until the arbitration has taken place. In his affidavit Mr. Sinclair states that he was informed by R. D. Purdy (Pool manager) that the Pool was, at the time this action was commenced, and still is, ready and willing to do all things necessary for the proper conduct of the arbitration. No doubt this was, and still is, so. As, however, the plaintiff's right of action would exist should the arbitration fail to decide the matters in dispute, the proper course, in my opinion, was to grant a stay of proceedings rather than to dismiss the action.

I would, therefore, dismiss the appeal with costs but would vary the order so as to stay proceedings instead of dismissing the action.

Appeal dismissed with costs; order below varied.

Solicitors for the appellant: *McGillivray, Helman & Mahaffy.*

Solicitor for the respondents: *A. Macleod Sinclair.*