IN THE SUPREME COURT OF NEW ZEALAND

SC 58/2013
[2014] NZSC 188

BETWEEN	ZURICH AUSTRALIAN INSURANCE LIMITED T/A ZURICH NEW ZEALAND Appellant
AND	COGNITION EDUCATION LIMITED Respondent

Hearing:	9 October 2013
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	A R Galbraith QC and M J Francis for Appellant M G Ring QC and P R Rzepecky for Respondent
Judgment:	19 December 2014

JUDGMENT OF THE COURT

A The appeal is allowed.

B There is no order for costs.

REASONS

(Given by Arnold J)

Table of Contents

Introduction

[1] This appeal concerns the circumstances in which a court should stay proceedings to allow a claim to be dealt with by arbitration in accordance with an agreement to arbitrate between the parties. The parties to the appeal had a difference of view in relation to their contractual arrangements. Cognition Education Ltd issued proceedings against Zurich Australian Insurance Ltd and sought summary judgment. Zurich applied for a stay of the proceedings to allow an arbitration to occur. The question is whether art 8 of sch 1 to the Arbitration Act 1996 requires a court to consider whether there is an arguable defence to the plaintiff's claim sufficient to resist an application for summary judgment before ordering a stay of proceedings.

[2] After the hearing of this appeal, the parties advised that they had settled their dispute. We have decided, however, that we should deliver judgment. The Court considered the approach to be adopted in relation to post-hearing, pre-judgment settlements in *Osborne v Auckland Council*.[1] It noted that, although a case which settles in these circumstances becomes moot, the Court retains a discretion to deliver judgment. Where a case raises issues that are of public importance (as opposed to being of significance only to the parties), and full argument has been heard, the Court may decide to deliver judgment notwithstanding any settlement. In this case, the issue is clearly important and of general significance, and we have heard full argument on it.

[3] Article 8 of sch 1 provides:[2]

> **8 Arbitration agreement and substantive claim before court**
>
> (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration *unless it finds* that the agreement is null and void, inoperative, or incapable of being performed, or *that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.*

---

1 *Osborne v Auckland City Council* [2014] NZSC 67, [2014] 1 NZLR 766 at [39]–[44].

2 (Emphasis added.)

> (2) Where proceedings referred to in paragraph (1) have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

At issue is the meaning of the italicised words.

[4] Article 8 is derived from the Model Law on International Commercial Arbitration adopted in June 1985 by the United Nations Commission on International Trade Law (UNCITRAL)[3] and endorsed by a resolution of the United Nations General Assembly in December 1985.[4] An important objective of the Model Law was to unify national laws dealing with international commercial arbitrations.[5] In the Model Law, art 8 does not contain the words "or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred". Their inclusion in art 8 of sch 1 was recommended by the Law Commission.[6] For ease of reference, we will refer to them as "the added words". Before we discuss their meaning, however, we will set out the circumstances giving rise to the issue.

Disagreement concerning claim under contract frustration policy

[5] The background is that the respondent, Cognition, had several contracts with the Abu Dhabi Education Council, an agency of the Government of Abu Dhabi, for the provision of management services for public schools, based on a public-private partnership model. It took out contract frustration cover with the appellant, Zurich. The policy contained an arbitration clause in the following terms:

> Any dispute, controversy or claim arising out of, relating to, or in connection with this Insurance Policy, shall be finally settled by arbitration. The arbitration shall be conducted in accordance with the Rules for the Conduct of Commercial Arbitrations of the Institute of Arbitrators and Mediators New Zealand in effect at the time of the arbitration and shall be conducted in English. The seat of the arbitration shall be Auckland, New Zealand or alternative[ly] Sydney, Australia if mutually agreed by all parties.

---

3 United Nations Committee on International Trade Law (UNCITRAL), *Model Law on International Commercial Arbitration*, (UNCITRAL, Vienna 1985) [Model Law].

4 *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law* GA Res 40/72, XL (1985).

5 At [2]. See also the Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration (appended to the Model Law) at [1]–[3].

6 See below at [25]–[28].

[6] A dispute arose between the Council and Cognition when the Council refused to make payments due under the contracts. Cognition ultimately settled the dispute with the Council, accepting less than its contractual entitlement. When it sought to recover the shortfall under its policy with Zurich, Zurich declined the claim. Cognition then sued on the policy and sought summary judgment. Zurich filed an appearance objecting to the High Court's jurisdiction on the basis of the arbitration clause and sought a stay of the proceedings under art 8(1) to allow an arbitration to proceed.

[7] A dispute then arose as to the order in which the applications should be dealt with. Cognition said that its application for summary judgment should be determined before, or at least in conjunction with, Zurich's protest to jurisdiction and stay application. If the summary judgment application was determined in its favour, there would be no dispute to refer to arbitration and therefore no basis for granting a stay under art 8(1). On the other hand, Zurich said that its protest and stay application should be determined first. If there were matters between it and Cognition that were capable of dispute, the Court was obliged to stay the proceeding to allow an arbitration to occur. It was irrelevant that an arbitrator might ultimately determine that Zurich did not have an arguable defence to Cognition's claim. The role of a court under art 8(1) was simply to ensure that the defendant was acting bona fide and was not abusing the process of the court, rather than to assess the strength of the defendant's case.

[8] The issue came before Associate Judge Bell.[7] Having reviewed the authorities, the Associate Judge said that:[8]

> … where a defendant invokes an arbitration agreement to seek a stay in response to an application for summary judgment, the question of the court's jurisdiction will be decided on the summary judgment basis, that is, whether the plaintiff can show that the defendant does not have a tenable defence to the plaintiff's cause of action. Because the test for stay is the inverse of the test for summary judgment, it is convenient for the two matters to be heard together.

This was, however subject to three qualifications:

---

7 *Cognition Education Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* [2012] NZHC 3257 [*Zurich* (HC)].

8 At [61].

(a) First, the Court should only give summary judgment "if it is satisfied that there would be no benefit in requiring the parties to take the matter to arbitration". The Associate Judge said that it may be difficult to persuade a court of this in respect of disputes in specialised areas.[9]

(b) Second, the court has a discretion to refuse an application for summary judgment even though grounds for summary judgment are made out. While that would ordinarily be exercised only rarely, there may be greater reason to exercise the discretion where arbitration has been agreed by the parties as their preferred method of dispute resolution.[10]

(c) Third, international arbitrations might be treated differently.[11]

[9] Zurich filed an appeal against Associate Judge Bell's decision. Despite some procedural difficulties, the Court of Appeal addressed the merits and upheld Associate Judge Bell's decision.[12] We will set out the Court's reasons to the extent necessary in the course of our substantive discussion of the issues. Zurich was granted leave to appeal to this Court on the following question:[13]

> Was the Court of Appeal correct to conclude that there will be no dispute for the purposes of art 8(1) of the First Schedule to the Arbitration Act 1996 unless the defendant has an arguable basis for disputing the plaintiff's claim as is sufficient to resist an application for summary judgment?

Summary of arguments

[10] The question is whether the words "unless it finds … that there is not in fact any dispute between the parties with regard to the matters agreed to be referred" in art 8(1) mean that the court should grant a stay only where it is satisfied:

---

9 At [54].
10 At [55]–[59].
11 At [60].
12 *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2013] NZCA 180, [2013] 3 NZLR 219 [*Zurich* (CA)].
13 *Zurich Australian Insurance Ltd t/a Zurich New Zealand v Cognition Education Ltd* [2013] NZSC 82.

(a) that the defendant has a sufficient case to withstand a summary judgment application, that is, it has an arguable defence;

or alternatively,

(b) that it is not immediately demonstrable either that the defendant is not acting bona fide in asserting that there is a dispute or that there is, in reality, no dispute.

For ease of reference we describe these as the broad and narrow tests respectively.

[11] We will not outline the parties' arguments in detail but rather will provide a brief summary of their positions. If any elaboration is needed, we will mention it in the course of our discussion.

[12] Mr Galbraith QC for Zurich argued for the narrow test. He submitted that there was a tension between two relevant principles – party autonomy and preventing abuse of the court's process. Party autonomy requires that, where parties have chosen arbitration as the mechanism by which their contractual disputes will be resolved, they should be held to that choice. On the other hand, the court is entitled to prevent an abuse of its process, as would occur, for example, where a defendant facing court proceedings for the enforcement of a liquidated debt deploys delaying tactics by raising a plainly meritless defence and seeking a stay under art 8(1) to enforce an arbitration clause. Permitting the court to refuse a stay in circumstances of this type would resolve the tension in a way that was principled and consistent with the prevailing international approach. To go further and permit the court to examine the merits of the dispute in the way that it could on a plaintiff's application for summary judgment is inconsistent with international best practice and undermines party autonomy, particularly given that it is accepted in New Zealand that issues of contractual construction (being generally questions of law) can be determined on a summary judgment application.[14]

---

[14] *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at 4 per Somers J and at 8 per Hillyer J; *Jowada Holdings Ltd v Cullen Investments Ltd* CA248/02, 5 June 2003 at [28]–[29]; and *Contact Energy Ltd v Natural Gas Corporation of New Zealand Ltd* CA 65/00, 18 July 2000.

[13] For Cognition, Mr Ring QC supported the broad test. He relied particularly on the legislative history of art 8(1). He submitted that in 1991 the Law Commission recommended the inclusion of the added words, which were at that time in the equivalent United Kingdom statute, in order to ensure that the tests for a plaintiff's summary judgment application and for a stay to allow an arbitration were the same: whether the defendant had an arguable defence to the plaintiff's claim. The Law Commission's recommendation was, Mr Ring submitted, adopted by Parliament in enacting the 1996 Act. On this approach, where a defendant has no arguable defence to the plaintiff's claim, there is no dispute to be referred to arbitration. As Mr Ring put it, the broad "no arguable defence" approach "entitles a plaintiff to expose that there is in fact and/or in law no defence, even if this requires extensive affidavits and legal argument". Mr Ring submitted that, when the Law Commission reviewed the 1996 Act in 2003, it endorsed its earlier position and did not recommend any change to art 8(1). Mr Ring referred to a number of decisions in which this interpretation of the added words has been applied and submitted that it gives the parties precisely what they bargained for, namely the application of New Zealand law to their dispute.

Background to the Arbitration Act 1996 and art 8(1)

[14] Prior to the 1996 Act, New Zealand had one statutory regime for domestic arbitrations, in the Arbitration Act 1908, and another for international arbitrations, in the Arbitration (Foreign Agreements and Awards) Act 1982.[15] Both the 1908 and 1982 Acts contained provisions dealing with staying proceedings to allow arbitrations to take place. We will address each in turn, before describing briefly the Law Commission's review of arbitration law which commenced in 1988.

Arbitration Act 1908

[15] Section 5 of the 1908 Act enabled a court to stay proceedings commenced in court if the parties had agreed to submit the matter to arbitration, subject to certain requirements. Relevantly, s 5(1) provided:[16]

---

[15] There is also legislation for investor/state arbitrations, the Arbitration (International Investment Disputes) Act 1979, which we can put to one side for present purposes.

[16] As amended by the Arbitration Amendment Act 1952 (emphasis added).

> **5 Power of Court to stay proceedings where there is a submission**
>
> (1) If any party to a submission … 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 those legal proceedings may, at any time before filing a statement of defence or notice of intention to defend or taking any other step in the proceedings, apply to the Court in which the proceedings were commenced to stay the proceedings; and that Court may, 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, make an order staying the proceedings.

[16] Two features of this provision are noteworthy. First, it conferred a discretion on the court.[17] Second, although it required the court to be satisfied as to the absence of a sufficient reason for not referring the matter to arbitration, it did not identify what might be a sufficient reason.

[17] In *Royal Oak Mall Ltd v Savory Holdings Ltd*, the Court of Appeal considered the approach to be adopted to the exercise of the s 5(1) discretion.[18] The Court held that the test to be applied was the same as that applied on a plaintiff's summary judgment: did the applicant for a stay have an arguable defence to the plaintiff's claim?[19] In adopting this view, the Court referred to the second edition of Sir Michael Mustill and Stewart Boyd's treatise, *The Law and Practice of Commercial Arbitration in England*, published in 1989.[20] There, the authors said that there were strong logical arguments for the view that a bona fide but hopeless defence to a claim should be ruled on by an arbitrator, given that the parties had chosen arbitration as the mechanism by which their disputes would be resolved,[21] but went on to say:[22]

> Whatever the logical merits of this view, the law is quite clearly established to the contrary. Where the claimant contends that the defence has no real substance, the Court habitually brings on for hearing at the same time the application by the claimant for summary judgment, and the cross-application

---

17 See *Roose Industries Ltd v Ready Mixed Concrete Ltd* [1974] 2 NZLR 246 (CA) at 249.

18 *Royal Oak Mall Ltd v Savory Holdings Ltd* CA 106/89, 2 November 1989.

19 At 9.

20 Sir Michael Mustill and Stewart Boyd *The Law and Practice of Commercial Arbitration in England* (2nd ed, Butterworths, London, 1989).

21 At 123.

22 At 124 (footnotes omitted).

> by the defendant for a stay, it being taken for granted that the success of one application determines the fate of the other.

[18] To put this in context, s 1(1) of the Arbitration Act 1975 (UK), which applied to stays of non-domestic arbitrations, contained the equivalent of the added words; s 4(1) of the Arbitration Act 1950 (UK) dealing with stays of domestic arbitrations did not. However, according to Mustill and Boyd, the United Kingdom courts treated the express qualification created by the added words in s 1(1) as implicit in s 4(1).[23] Accordingly, in situations where one party sought summary judgment under order 14 of the Rules of the Supreme Court (RSC) and the other sought a stay under s 1(1) or s 4(1) to allow an arbitration to occur, the court treated the stay application and the summary judgment application as being the opposite sides of the same coin.[24] The effect of the *Royal Oak* case was that a similar approach was adopted in New Zealand in relation to stay applications under s 5(1) even though the subsection did not contain the added words.

Arbitration (Foreign Agreements and Awards) Act 1982

[19] The 1982 Act was enacted to implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), to which New Zealand is a party.[25] The New York Convention applies to:[26]

> … the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.

Section 4(1) of the 1982 Act provided:[27]

> **4 Power of Court to stay Court proceedings in respect of matters subject to an arbitration agreement**
>
> (1) If any party to an arbitration agreement … commences any legal proceedings in any Court against any other party to that arbitration agreement … in respect of any matter in dispute between the parties

---

23 At 122.

24 At 124, fn 19. By way of example, the authors referred to *SL Sethia Liners Ltd v State Trading Corpn of India Ltd* [1985] 1 WLR 1398 (CA).

25 Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 38 (opened for signature 10 June 1958, entered into force 7 June 1959) [New York Convention].

26 Article I(1).

27 (Emphasis added.)

> which the parties have agreed to refer to arbitration pursuant to that arbitration agreement, any party to those proceedings may at any time apply to the Court to stay those proceedings; and the Court shall, unless the arbitration agreement *is null and void, inoperative, or incapable of being performed*, make an order staying the proceedings.

The italicised language was taken from art II(3) of the New York Convention. Obviously, it is narrower than the language of art 8(1) in that it does not contain the added words.

[20] However, s 3 of the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933, an earlier equivalent of s 4(1), did contain the added words. The 1933 Act was enacted to give effect to two international instruments binding on New Zealand: the Protocol on Arbitration Clauses 1923[28] and the Convention on the Execution of Foreign Arbitral Awards 1927.[29] In relation to staying court proceedings to allow an arbitration to occur, s 3 of the 1933 Act provided that, despite anything in the 1908 Act, the court was required to grant an application to stay in a case covered by the protocol "unless satisfied that the [arbitration] agreement or arbitration has become inoperative or cannot proceed, *or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred*".[30]

[21] The italicised words were included in the Arbitration Clauses (Protocol) Act 1924 (UK) as amended by s 8 of the Arbitration (Foreign Awards) Act 1930 (UK) following a recommendation made in the 1927 Report of the Committee on the Law of Arbitration chaired by MacKinnon J.[31] The Report noted that a court was required to grant a stay to permit an arbitration to proceed and that defendants had applied for stays in circumstances where they were unable or unwilling to identify any reason why they should not meet their obligations. The Report stated that it was absurd that the court had to stay an action in such circumstances and recommended that that the

---

28 Protocol on Arbitration Clauses 27 LNTS 157 (opened for signature 24 September 1923, entered into force 28 July 1924).

29 Convention on the Execution of Foreign Arbitral Awards 92 LNTS 301 (opened for signature 26 September 1927, entered into force 25 July 1929).

30 (Emphasis added.)

31 Report of the Committee on the Law of Arbitration (Cmnd 2817, 1927). This description of the background is taken from *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 (HL) at 355–357 per Lord Mustill.

legislation provide that a court could grant a stay if it was satisfied that that there was a real dispute to be determined by arbitration. That recommendation was accepted, resulting in the inclusion of the added words in the legislation.

[22] Lord Mustill described this development in the following terms:[32]

> In recent times, this exception to the mandatory stay has been regarded as the opposite side of the coin to the jurisdiction of the court under RSC Ord 14 to give summary judgment in favour of the plaintiff where the defendant has no arguable defence. If the plaintiff to an action which the defendant has applied to stay can show that there is no defence to the claim, the court is enabled at one and the same time to refuse the defendant a stay and to give final judgment for the plaintiff. This jurisdiction, unique so far as I am aware to the law of England, has proved to be very useful in practice, especially in times when interest rates are high, for protecting creditors with valid claims from being forced into an unfavourable settlement by the prospect that they will have to wait until the end of an arbitration in order to collect their money. *I believe however that care should be taken not to confuse a situation in which the defendant disputes the claim on grounds which the plaintiff is very likely indeed to overcome, with the situation in which the defendant is not really raising a dispute at all.* It is unnecessary for present purposes to explore the question in depth, since in my opinion the position on the facts of the present case is quite clear, but I would endorse the powerful warnings against encroachment on the parties' agreement to have their commercial differences decided by their chosen tribunals, and on the international policy exemplified in the English legislation that this consent should be honoured by the courts, given by Parker LJ in *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (in liq)* [1990] 1 WLR 153 (CA) at 158-159 and Saville J in *Hayter v Nelson and Home Insurance Co* [1990] 2 Lloyd's Rep 265 (QB).

[23] The observations of Lord Parker LJ in *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (in liq)*[33] to which Lord Mustill referred were made in the context of an application for summary judgment under RSC ord 14 and an application for a stay under s 4 of the Arbitration Act 1950 (UK) (which did not contain the added words, but was treated by the courts as if it did).[34] Parker LJ saw the purpose of ord 14 as being to enable a plaintiff to obtain a quick judgment where there was plainly no defence to its claim. Accordingly, if the only defence suggested involved a point of law and the court could see at once, or following brief argument, that it was misconceived, the plaintiff was entitled to judgment. But summary

---

32 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*, above n 31, at 356 (emphasis added).

33 *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (in liq)* [1990] 1 WLR 153 (CA).

34 See above at [18].

judgment should not be available where determination of the point(s) of law took hours of argument and reference to many authorities, particularly where there was an arbitration agreement. Parker LJ said that this applied with particular force to disputes turning upon construction of contracts, the implication of terms or trade practice. In these instances, those well-versed in the particular area would, in general, be better placed than judges to determine what the parties must be taken to have meant.[35]

[24] Returning to the position in New Zealand, despite their presence in the 1933 Act, the added words did not appear in s 4 of the 1982 Act. The Court of Appeal considered the significance of this in *Baltimar Aps Ltd v Nalder & Biddle Ltd*, a case involving an application for stay to allow an international arbitration to proceed.[36] The Court considered that the absence of the added words in s 4 meant that the courts did not have the power to examine the reality of the dispute in the way that was possible in the context of a summary judgment application.[37] Rather, the Court considered that s 4 allowed a very limited ability for judicial intervention in cases where the parties' dispute fell within an international arbitration agreement, so that the ability of a court to refuse a stay was highly constrained. The Court said:[38]

> There may be a case for intervention if the party seeking the arbitration is acting in bad faith and thereby abusing the Court's process by applying for a stay, but there is no suggestion of that here. Resort to arbitration in respect of a mere refusal to pay an amount indisputably due could amount to such an abuse.

The Court went on to note that the position in respect of domestic arbitrations was different, citing the *Royal Oak Mall* case.[39]

Law Commission's review of arbitration law

[25] In 1988, the Law Commission published a discussion paper on arbitration.[40] Following a period of consultation on that discussion paper, the Commission

---

35 *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (in liq)*, above n 33, at 158-159.
36 *Baltimar Aps Ltd v Nalder & Biddle Ltd* [1994] 3 NZLR 129 (CA).
37 At 134.
38 At 135.
39 At 135.
40 Law Commission *Arbitration: a discussion paper* (NZLC PP7 1988).

published a report in 1991.[41] That report contained a draft Arbitration Act, which was intended to provide the legislative framework for domestic and international arbitrations, replacing both the 1908 and 1982 Acts. The draft Act was based largely on the UNCITRAL Model Law, although there were some adaptations and elaborations made to it. The Commission summarised the position under the draft Act as follows:[42]

> In most cases, the conduct of international arbitrations will be governed by Schedule 1 which is essentially the Model Law. Non-international ("domestic") arbitrations will generally be governed by Schedule 1 as supplemented and modified by Schedule 2. Domestic arbitral parties may opt out of those additional provisions of Schedule 2, and international arbitral parties may opt into them.

[26] Schedule 1 to the draft Act was based on the Model Law. One of the modifications made to it related to art 8, where the Commission recommended the inclusion of the added words. The Commission explained this as follows:

> 308 The proposed addition at the end of article 8(1) [of the added words] may be explained by a passage in the Mustill Committee report:
>
> > Section 1 of the Arbitration Act 1975 has a ground for refusing a stay which is not expressed in the New York Convention, namely "that there is not in fact any dispute between the parties with regard to the matter agreed to be referred". This is of great value in disposing of applications for a stay by a defendant who has no arguable defence. ((1990) 6 Arbitration International at 53)
>
> The phrase makes explicit in this provision the element of "dispute" which is already expressly included in article 7(1) when read with s 4. The same reasoning underlies the recommendation in the Alberta [Institute of Law Research and Reform] report that a court be empowered to refuse to stay an action if "the case is a proper one for a default or summary judgment".
>
> 309 In the course of our consultative activity, we received a number of suggestions that the efficiency of the summary judgment procedure as it has developed under the High Court Rules should not be lost by reason of any implication that a dispute where there is no defence must be arbitrated under an arbitration agreement. We agree. Although it may be argued that if there is no dispute, then there is no "matter which is the subject of an arbitration agreement" within the meaning of article (8)(1), it seems useful to spell out that the absence of any dispute is a ground for refusing a stay.

[27] This passage from the Law Commission's report was given prominence in the argument because it appears to treat the added words as equivalent to the summary

---

41 Law Commission *Arbitration* (NZLC R20, 1991) [the 1991 Report].

42 At [2].

judgment test of "no arguable defence". Mr Galbraith submitted, however, that this extract had to be read against the background of an earlier extract from the Commission's report, as follows:

> *Binding force of arbitration agreements*
>
> 125 The 1923 Protocol and [the New York Convention] each require Contracting Parties to recognise the validity of arbitration agreements which fall within their scope (article 1 and article II). That recognition has for some time been implicit in the statutory law of arbitration and that will continue in the proposed new statute. The recognition is not for instance made express in the provisions of the 1933 and 1982 Acts giving effect to the Geneva and New York treaties. Rather, in the earlier statutes and in the proposed one, it is given specific content and express support in the statutory provisions for the operation of the arbitral process, especially those providing (1) for the stay of court proceedings which are brought in respect of matters which fall within the arbitral obligation and (2) for the recognition and enforcement of arbitral awards. There is now thought to be no need for separate express recognition of the binding force of the agreement to arbitrate. The proposed Act will make no change to that general position. We now turn to those specific issues of stay and enforcement.
>
> *Stay of court proceedings brought in respect of an arbitrable matter*
>
> 126 Even if the arbitration agreement is binding in law, its effect could be nullified if a party to the agreement were able to bring court proceedings and the court were able or even required to decide the dispute which, the parties agreed, was to be arbitrated. The 1923 Protocol requires tribunals (courts) of the Contracting States on being seized of a dispute subject to an arbitration agreement to refer the parties, on the application of either of them, to the decision of the arbitrators (article 4). The [New York Convention] imposes the same obligation (article II(3)). (We shall see that the territorial scope of the two provisions differs, with the [New York Convention] having a wider application, para 148.) Although the Model Law is slightly more elaborate (by requiring the request to be made before the requesting party files the first substantive pleading), it is to the same effect (article 8). That extra requirement is a sensible application of the principle of waiver. If a party which could have applied to require a matter to be referred to arbitration fails to do that and participates in the national court process it can properly be held to that election.
>
> 127 All three provisions recognise that there are limits to the propositions they state with the consequence that in some cases the court proceeding should continue and the matter should not be referred to arbitration. Under the 1923 Protocol, article 4, the competence of the national court is not prejudiced if "the agreement or arbitration cannot proceed or [has] become inoperative"; and under both the [New York Convention], article II(3), and the Model Law, article 8, there is no reference if the court finds that the agreement is "null and void, inoperative or incapable of being performed". The latter formulas appear indistinguishable from the 1923 one, and the New Zealand and United Kingdom legislation did not make distinct provision in respect of the stay provision in the 1923 Protocol once legislation to give effect to the [New York Convention] was

> enacted (para 123 above). Accordingly we conclude that article 8 of the Model Law (in Schedule 1 to the draft Act) will give effect in New Zealand law to the 1923 and 1958 [ie, New York Convention] treaty provisions requiring the stay of court proceedings and placing limits on that requirement.
>
> 128 As discussed in the commentary to article 8, we propose an elaboration of the grounds for refusing a stay: that there is not in fact any dispute between the parties with regard to the matters agreed to be referred. This addition makes explicit in article 8 what has already been stated in article 7 when read with s 4; it emphasises the value of summary judgment processes in the court when there is not a real dispute between the parties and, for instance, debtors might be trying to use arbitration simply to delay meeting their debts. That elaboration does not, in our view, widen the power of the courts to refuse a stay and allow the court proceedings to continue notwithstanding an agreement to arbitrate.

[28] Although we will discuss these passages in more detail later in this judgment, we note two features of [128] of the report at this point. First, the Commission saw the added words as making explicit what was implicit "in article 7 when read with s 4". Article 7 of sch 1 deals with the form of an arbitration agreement. Section 4 of the Commission's draft Act contained a definition of "arbitration agreement", as follows:

> **arbitration agreement** means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not[.]

This definition, which appears in identical terms in s 2 of the 1996 Act, refers to agreements to submit "disputes" to arbitration. On the face of it, the Commission was intending to emphasise that the underlying premise of the definition was the existence of a "dispute", so that if there was no dispute, there was nothing to submit to arbitration. Second, the Commission did not see its "elaboration" (that is, the inclusion of the added words) as widening the power of the courts to refuse a stay and allow proceedings to continue, an observation emphasised by the appellants.

The Arbitration Act 1996

[29] As ultimately enacted, the 1996 Act was based substantially on the Commission's draft Act. This is made clear in the report of the Government

Administration Committee, to which the Bill was referred for consideration. The report says:[43]

> This bill follows the Law Commission's Report No 20 entitled "Arbitration" (1991) based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1985. The objective of the UNCITRAL Model Law on arbitration is to allow parties to do what they want to do by limiting the scope for judicial intervention and by giving parties the power to agree on their own rules for the conduct of arbitrations and the determination of their disputes. Where the parties do not agree on the rules for arbitrations, the decision making power generally passes to the arbitrator.
>
> The adoption of the Model Law will promote international consistency in legal regimes and harmonise our law with that of other jurisdictions, notably some of our key trading partners such as Australia, Canada, California and Hong Kong. This will advance New Zealand's objective of trade law harmonisation, for example, under the Closer Economic Relations agreement with Australia, and the Asia-Pacific Economic Council. A country that has adopted the Model Law is perceived as a suitable place for arbitration by the international trading community and such a perception can be only to New Zealand's advantage.

[30] This extract emphasises the desire to harmonise the New Zealand regime with other regimes internationally and to enhance New Zealand's international reputation as a suitable place for arbitration. These objectives are reflected in the purposes section of the 1996 Act, s 5, which relevantly provides:

> **5 Purposes of Act**
>
> The purposes of this Act are—
>
> (a) to encourage the use of arbitration as an agreed method of resolving commercial and other disputes; and
>
> (b) to promote international consistency of arbitral regimes based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985; and
>
> (c) to promote consistency between the international and domestic arbitral regimes in New Zealand; and
>
> (d) to redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards; and
>
> …

[43] Arbitration Bill 1995 (117-2) (Select Committee report) at ii [Select Committee report].

> (f) to give effect to the obligations of the Government of New Zealand under the Protocol on Arbitration Clauses (1923), the Convention on the Execution of Foreign Arbitral Awards (1927), and [the New York Convention] … .

[31] The 1996 Act distinguishes between arbitrations that are "international" and those that are not. International arbitrations are defined in art 1(3) of sch 1:

> An arbitration is international if—
>
> (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
>
> (b) one of the following places is situated outside the State in which the parties have their places of business:
>
> (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement:
>
> (ii) any place where a substantial part of the obligations of any commercial or other relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or
>
> (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

[32] Under s 6, arbitrations held in New Zealand, whether non-international or international, are governed by the provisions of sch 1, although it should be noted that some articles in sch 1 are expressed so as to allow the parties to opt out of them.[44] The provisions of sch 2 also apply in respect of arbitrations held in New Zealand, but this is subject to the qualification that the parties are free to opt out of them, or, in the case of an international arbitration, must choose to opt into them.[45] In relation to arbitrations held outside New Zealand, arts 8, 9, 35 and 36 of sch 1 apply "with any necessary modifications".[46] The significance of this is that the added words apply to applications for a stay of proceedings to allow an arbitration to proceed whether the place of arbitration is New Zealand or overseas. As will be

---

44 See, for example, arts 3(1), 21 and 23.
45 Section 6.
46 Section 7.

developed further below, art 8(1) engages New Zealand's treaty obligations, in particular, under the New York Convention.[47]

Subsequent developments

[33] In 2001, the Law Commission published a discussion paper entitled *Improving the Arbitration Act 1996*.[48] Following a period of consultation, the Commission published its final report in 2003, chapter 18 of which was devoted to the added words in art 8(1) of sch 1.[49] In that chapter, the Commission noted the justifications in its 1991 report for the inclusion of the added words and then referred to *Todd Energy Ltd v Kiwi Power (1995) Ltd*, where Master Thompson expressed the view that the inclusion of the added words (interpreted broadly) was a "serious error" and had the potential to create problems.[50] The Commission concluded its discussion by saying:

> 247 We are not prepared to revisit this issue. The efficacy of the summary judgment procedure is in issue. Clearly the Commission, in 1991, made its recommendation after receiving submissions which led it to believe that the "added words" were necessary. We are not prepared to reject that view without undertaking further public consultation. It is a matter which submitters will be at liberty to raise with a select committee if a Bill is introduced into the House of Representatives to give effect to recommendations made in this report.

In the event, no change was made to art 8(1).

[34] The question of the scope of the added words, in particular whether they mean that a stay can be granted only where an applicant can show it has an arguable defence sufficient to withstand an application for summary judgment or whether it is sufficient simply that it is acting bona fide in disputing the claim and its defence is not one that can immediately and obviously be dismissed as untenable, has been the subject of differing views in the High Court.[51] In *Fletcher Construction New Zealand & South Pacific Ltd v Kiwi Co-Operative Dairies Ltd*,

---

47 For a discussion of the New York Convention and other relevant treaties, see David AR Williams QC and Amokura Kawharu *Williams and Kawharu on Arbitration* (LexisNexis, Wellington, 2011) at ch 26.

48 Law Commission *Improving the Arbitration Act 1996* (NZLC PP46, 2001).

49 Law Commission *Improving the Arbitration Act 1996* (NZLC R83, 2003) at ch 18.

50 *Todd Energy Ltd v Kiwi Power (1995) Ltd* HC Wellington CP46/01, 29 October 2001 at [34].

51 See Williams and Kawharu, above n 47, at [4.13.5].

Master Kennedy-Grant was satisfied, in light of the legislative history, that the test was whether the party disputing liability had an arguable defence, which the Court was able to examine in the context of a summary judgment application.[52] Examples of cases where a similar view was taken are *Yawata Ltd v Powell*,[53] *Rayonier MDF New Zealand Ltd v Metso Panelboard Ltd*,[54] *Pathak v Tourism Transport Ltd*[55] and *Mudgway v D M Roberts Ltd*.[56] In *Contact Energy Ltd v Natural Gas Corporation of New Zealand Ltd*, it was common ground between the parties that this was the correct position and the Court of Appeal proceeded on that basis.[57]

[35] Although Master Thompson initially adopted the broader arguable defence approach to the meaning of the added words,[58] in *Todd Energy* and in *Alstom New Zealand Ltd v Contact Energy Ltd* he considered that the narrower abuse of process interpretation should be adopted.[59] In *Todd Energy*, the Master discussed the legislative history of art 8, referred to Master Kennedy-Grant's decision in *Fletcher Construction* and explained why he thought the narrower approach should be taken to the added words. The Master saw risks of excessive judicial intervention in the arbitral process and duplication of effort if the added words meant that the summary judgment test of "no arguable defence" were to be applied.[60] Dobson J took a similar view in *Body Corporate 344862 v E-Gas Ltd*.[61] In *Gawith v Lawson*, Associate Judge Gendall, having outlined the authorities, noted his preference for Master Thompson's approach but said that the outcome in the case before him would be the same whichever test was adopted because the proceedings were not appropriate for summary judgment.[62]

---

52 *Fletcher Construction New Zealand & South Pacific Ltd v Kiwi Co-Operative Dairies Ltd* HC New Plymouth CP7/98, 27 May 1998 at [4.07].

53 *Yawata Ltd v Powell* HC Wellington AP142/00, 4 October 2000, at [52] and [67].

54 *Rayonier MDF New Zealand Ltd v Metso Panelboard Ltd* HC Auckland CIV-2002-404-1747, 27 May 2003 at [30] and [33].

55 *Pathak v Tourism Transport Ltd* [2002] 3 NZLR 681 (HC) at [28].

56 *Mudgway v D M Roberts Ltd* [2012] NZHC 1463 at [55]–[57].

57 *Contact Energy Ltd v Natural Gas Corporation of New Zealand Ltd*, above n 14, at [22].

58 See *Natural Gas Corporation of New Zealand Ltd v Bay of Plenty Electricity Ltd* HC Wellington CP179/99, 22 December 1999 at 11.

59 *Alstom New Zealand Ltd v Contact Energy Ltd* HC Wellington CP160/01, 12 November 2001.

60 *Todd Energy*, above n 50, at [34].

61 *Body Corporate 344862 v E-Gas Ltd* HC Wellington CIV-2007-485-2168, 23 September 2008 at [69]–[70].

62 *Gawith v Lawson* HC Masterton CIV-2010-435-253, 4 May 2011 at [8].

Our evaluation

[36] While it may be that, viewed in isolation, the added words are capable of bearing either of the meanings contended for by the parties, as the Court of Appeal appears to have accepted,[63] we think the more natural meaning is the narrow meaning. If it is clear that the defendant is not acting bona fide in asserting that there is a dispute, or it is immediately demonstrable that there is nothing disputable at issue, there is not in reality any "dispute" to refer to arbitration. In these circumstances, a stay could properly be refused and summary judgment would be available. By contrast, in other situations falling within the broad test (that is, the "no arguable defence" test applied on summary judgment), there will be what can properly be described as "disputes" even though they are ultimately capable of being determined by a summary process.

[37] To explain, it has been well established in New Zealand since *Pemberton v Chappell* that a court can properly determine questions of law on a summary judgment application,[64] and that this includes issues of contractual interpretation. The Court of Appeal has accepted that such a determination may be made even though the question of law is difficult and requires argument (including reference to authority). In *International Ore & Fertilizer Corp v East Coast Fertiliser Co Ltd*, a case under the old bill writ procedure, Cooke P, by analogy with the summary judgment procedure which had just been introduced in New Zealand, said that where the facts were adequately ascertained and the Court could be confident that the point at issue turned on pure questions of law or interpretation, it should be prepared "to determine, on adequate argument, even difficult legal questions".[65] Similarly, in *Jowada Holdings Ltd v Cullen Investments Ltd*, McGrath J, delivering the judgment of the Court of Appeal, said that a court should be prepared to grant summary judgment "even if legal arguments must be ruled on to reach the decision".[66]

[38] The fact that one party's view on such a question is held to be incorrect does not mean that there was no legitimate "dispute" on the point. Cooke P's reference to

---

63 See *Zurich* (CA), above n 12, at [68].
64 *Pemberton v Chappell*, above n 14, especially at 4 per Somers J.
65 *International Ore & Fertilizer Corp v East Coast Fertiliser Co Ltd* [1987] 1 NZLR 9 (CA) at 16.
66 *Jowada Holdings Ltd v Cullen Investments Ltd*, above n 14, at [28].

"adequate argument" and McGrath J's reference to ruling on legal arguments indicate that their Honours considered that the point at issue would be contestable, albeit that it was ultimately capable of determination by the court following a summary process. In cases of this type, there is a real "dispute" even though a court may ultimately be prepared to grant summary judgment in relation to it. In principle, such a dispute should be referred to arbitration, given the parties' agreement to utilise the arbitral process and the 1996 Act's purposes of facilitating the enforcement of arbitration agreements and limiting the opportunities for intervention by the courts.

[39] We agree, then, with the distinction which Lord Mustill drew in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* between a situation in which the defendant disputes the claim on grounds that the plaintiff is very likely to overcome and a situation in which the defendant is not really raising a dispute at all.[67] We consider that the added words address the latter situation but do not include the former, even though it may well be possible to obtain summary judgment in cases falling within the former category. The added words act so as to filter out cases where the defendant is obviously simply playing for time – the bald assertion of a dispute is not enough to justify the granting of a stay where it is immediately demonstrable that there is, in reality, no dispute.

[40] There are two other factors which we consider support the interpretation we favour.[68] First, it will be recalled that art 8 applies not only where the place of arbitration is New Zealand but also where it is outside New Zealand, so that the added words apply to a wide range of arbitrations. Accordingly, New Zealand's international obligations are engaged, particularly those contained in the New York Convention. The narrow interpretation of the added words is consistent with those obligations. Promoting consistency with international arbitral regimes based on the Model Law is a stated purpose of the 1996 Act,[69] as is giving effect to

---

67 See above at [22].

68 The interpretation given to the added words may also be relevant to the court's role in relation to determining the scope of an arbitration agreement under art 8(1). This is important because under art 16(1) of sch 1, an arbitral tribunal is empowered to rule on its own jurisdiction. See the discussion in David Williams "Arbitration and Dispute Resolution" [2002] NZ L Rev 49 at 65–66 and Amokura Kawharu "Arbitral Jurisdiction" (2008) 23 NZULR 238 at 243.

69 Arbitration Act 1996, s 5(b).

New Zealand's obligations under the New York Convention.[70] Moreover, it is well established in New Zealand that if statutory provisions can be interpreted in a way that is consistent with New Zealand's international obligations, they should be so interpreted.[71]

[41] Article 8(1) of the Model Law is derived from art II(3) of the New York Convention. In his discussion of art II(3), Albert van den Berg notes that a court is not obliged to refer the parties to arbitration if there is no dispute between them.[72] He then says:[73]

> Some implementing Acts, however, explicitly list the condition that there be a dispute. Thus the English Arbitration Act of 1975 provides in Section 1(1): "… unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that *there is not in fact any dispute between the parties with regard to the matter agreed to be referred* …". (emphasis added) The same wording can be found in Section 3 of the India implementing Act of 1961.
>
> This explicit wording has some advantages in that it sets more clearly the condition that there be a dispute, although its omission would not have been fatal as the condition is self-evident. It should, however, not be readily assumed that a dispute does not exist.

It seems, then, that van den Berg considered that the added words should have the narrow meaning we favour when assessed against the background of the obligations imposed on contracting states by the New York Convention.

[42] Second, the interpretation is consistent with the purposes of the 1996 Act, in that it recognises the importance of party autonomy and limits the scope for curial intervention in the arbitral process. Often parties will decide to adopt arbitration to resolve disputes because they want to have the ability to choose an arbitral tribunal with expertise in the particular area. Accordingly, while issues of, for example, contractual interpretation may raise questions of law, the parties' decision to arbitrate may well reflect their desire to have such questions resolved by a tribunal that they are able to select as being appropriate to the task.

---

70 Section 5(f).

71 See, for example, *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24].

72 Albert van den Berg *The New York Arbitration Convention of 1958* (Kluwer Law International, 1981) at 146–148.

73 At 147.

[43] In the present case, Associate Judge Bell was conscious of the two points just discussed. As to the first point, the Associate Judge said that in the case of arbitrations to be conducted abroad, it may be possible for the court to utilise the High Court Rules governing the assumption of jurisdiction by the New Zealand courts to restrict the application of what he described as "New Zealand's summary judgment approach" to New Zealand residents and not apply it to foreigners.[74] In our view, however, this is an uncertain and somewhat roundabout solution, particularly when viewed against the background of the select committee's statement that a key objective of the 1996 Act was to "provide certainty about the relationship between arbitrations and the courts".[75]

[44] As to the second point, the Associate Judge said that an application for summary judgment should be granted only if the court was satisfied that there would be no benefit in requiring the parties to take the matter to arbitration. He said that it may be difficult to satisfy a court of this in respect of disputes in specialised areas such as share-milking, construction and valuation.[76] In these circumstances, a court could exercise its discretion to refuse summary judgment. The difficulty with this solution, however, is that it depends on the exercise of the court's discretion, which does not sit comfortably with the principles of party autonomy and limited judicial intervention that underlie the 1996 Act. Under art 8(1) and the relevant international instruments, the court is *obliged* to grant a stay unless one or other of the specified conditions is met.

[45] This brings us to the feature of the legislative background that carried decisive weight with the Court of Appeal, namely the observations of the Law Commission at [308]–[309] of its 1991 report[77] and at [247] of its subsequent 2003 report.[78]

[46] We accept that what the Commission says in its 1991 report is relevant to the interpretation issue before us because the Commission's recommendations as

---

74 *Zurich* (HC), above n 7, at [60].
75 Select Committee report, above n 43, at vii.
76 *Zurich* (HC), above n 7, at [54].
77 See above at [26].
78 See above at [33].

reflected in its draft Act were largely accepted by Parliament when the 1996 Act was enacted, as the extract from the Select Committee's report which we have cited at [29] above shows. The Commission's observations in its 2003 report are, however, not in the same category as they involve what is a subsequent expression of opinion about the effect of the added words.

[47] In relation to the Commission's observations at [308]–[309] of the 1991 report, while we accept that aspects of them may be read as supporting the broad interpretation of the added words, read as a whole, we consider they support the narrow interpretation. As we have said at [28] above, the Commission saw itself as making explicit what was implicit in art 7 of sch 1 when read with s 4 of the 1996 Act, namely that there must be a "dispute". The Commission goes on to say that it seemed useful "to spell out that the absence of any dispute is a ground for refusing a stay". This does not suggest that the Commission saw itself as adding to what was already inherent in art 8(1) of the Model Law. In short, then, the Commission appears to be expressing a similar view to that of van den Berg.[79]

[48] This is confirmed when account is taken of the Commission's discussion earlier in its report at [125]–[128].[80] There the Commission said that art 8 in sch 1 would give effect in New Zealand to the relevant treaty provisions (including those in the New York Convention) "requiring the stay of court proceedings and placing limits on that requirement".[81] The Commission said that the added words did no more than make explicit what was already implicit in the language of art 7 and the definition of "arbitration agreement" (in s 2 of the 1996 Act), namely that there must be a "dispute". It said the inclusion of the added words:[82]

> … emphasises the value of summary judgment processes in the court when there is not a real dispute between the parties and, for instance, debtors might be trying to use arbitration simply to delay meeting their debts.

The Commission did not see the added words as widening the court's power to refuse a stay and allow proceedings to continue.

---

79 See above at [41].
80 See above at [27].
81 The 1991 Report, above n 41, at [127].
82 At [128].

[49] While we accept that the Commission did recommend some departures from the Model Law, its articulation of the purpose behind the inclusion of the added words in these two extracts indicates that they were intended to capture the type of case that would fall within the narrow meaning rather than to invoke the summary judgment test of "no arguable defence". The Commission's comments at [308]–[309] do not go so far as to endorse the broad meaning of the added words: rather, the Commission was merely noting the utility of the summary judgment procedure where there is no actual dispute. As noted above, the added words seek to do no more than, in the Commission's words, to "spell out that the absence of any dispute is a ground for refusing a stay". Accordingly, we consider that the Commission, and Parliament in adopting the Commission's recommendations, did not intend the inclusion of the added words to be a departure from the approach required under art 8(1) of the Model Law.

[50] Finally, for the sake of completeness we should mention that Mr Ring supported the view of the Court of Appeal that the use of the word "finds" in the sentence "unless it finds … that there is not in fact any dispute between the parties …" was significant.[83] The point made by the Court of Appeal was that the word "finds" indicates that Parliament contemplated a judicial enquiry, which would normally involve affidavit evidence and legal submissions as to the consequences of uncontested facts. It was said that the words "not in fact any dispute" support this as they contemplate an objective test.

[51] However, as we see it, the words "finds" is just another word for "holds" and is consistent with either interpretation of the added words. The same applies to the fact that an objective test is contemplated. Consequently, we do not accept that the words identified point to the broader "no arguable defence" interpretation. Indeed, as we said at [37] above, we consider that the narrow meaning is the more natural meaning of the added words. This is reinforced when they are considered against the relevant background, specifically, the extracts from the Law Commission's 1991 report, which preceded the enactment of the 1996 Act; the Model Law and the 1996 Act's purpose of promoting consistency with it; New Zealand's obligations under the

---

[83] *Zurich* (CA), above n 12, at [67].

New York Convention and van den Berg's approach to the added words in that context; and the views expressed by judges such as Lord Mustill.

[52] In the result, then, we accept the appellant's contention that the narrow meaning should be given to the added words. Under art 8(1), a stay must be granted unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed or it is immediately demonstrable either that the defendant is not acting bona fide in asserting that there is a dispute or that there is, in reality, no dispute. It follows from this that an application for summary judgment and an application for a stay to permit an arbitration to take place are not different sides of the same coin. In principle, the stay application should be determined first and only if that is rejected should the application for summary judgment be considered.

Decision

[53] The appeal is allowed. As the parties have settled their dispute and the proceedings have been discontinued, we make no order for costs.

Solicitors:
DAC Beachcroft New Zealand Ltd, Auckland for Appellant
Legal People, Auckland for Respondent