IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2001-404-1974

BETWEEN	CARTER HOLT HARVEY LIMITED Plaintiff
AND	GENESIS POWER LIMITED First Defendant
AND	ROLLS-ROYCE NEW ZEALAND LIMITED Second Defendant

Hearing: 19 October 2005

Appearances: D M Salmon and J P Cundy for Plaintiff
D A R Williams QC and S W B Foote for First Defendant
B W F Brown QC and D A Welsh for Second Defendant

Judgment: 22 February 2006

RESERVED JUDGMENT (NO 2) OF RANDERSON J

This judgment was delivered by me on 22 February 2006
at 12 noon, pursuant to r 540(4) of the High Court Rules

Registrar/Deputy Registrar

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Introduction

[1] After my judgment delivered on 6 November 2002, the second defendant Rolls-Royce appealed. This resulted in a judgment delivered by the Court of Appeal on 23 June 2004 dismissing the plaintiff's third cause of action against Rolls-Royce.

[2] Since then amended pleadings have been filed but there remain some interlocutory applications set down for hearing before me on 26-28 April 2006. One of those applications is by Rolls-Royce seeking directions in relation to an intended application for stay of an arbitration commenced by the first defendant Genesis against Rolls-Royce. The plaintiff Carter Holt is not a party to the arbitration.

[3] This decision deals with two preliminary issues relating to the stay application:

a) Whether, as Rolls-Royce contends, the stay application may be brought as an interlocutory application within the current proceeding or whether, as Genesis contends, the application must be brought separately by an originating application under r 458D of the High Court Rules.

b) Whether this court has jurisdiction to grant a stay of the arbitration. Genesis contends that there is no such jurisdiction by reason of Article 5 of the First Schedule of the Arbitration Act 1996 which forbids interventions by this Court in certain circumstances.

[4] Counsel are agreed that if it is determined this Court has jurisdiction to stay the arbitration, then the application for stay should be determined on its merits at the hearing on 26-28 April.

Background

[5] To briefly recap, two principal contracts are involved in this proceeding relating to the construction and operation of a co-generation plant for Carter Holt at its Kinleith Mill. The first of these contracts (the co-generation contract) is between Carter Holt, the predecessor of Genesis, and Kinleith Co-Generation Limited. The second (the turnkey contract) is between the predecessor of Genesis and Rolls-Royce. The co-generation contract does not contain an arbitration clause but the turnkey contract does.

[6] In this proceeding, Carter Holt alleges the co-generation plant has suffered from very substantial defects. It sues Genesis in contract alleging breach of the co-generation contract. It sues Rolls-Royce in negligence, the scope of its claim having now been limited by the Court of Appeal's decision. Both Genesis and Rolls-Royce deny liability to Carter Holt. As well, Rolls-Royce has counter-claimed against Carter Holt alleging that if there were any defects, they arose wholly or in part from Carter Holt's operation of the plant. Significantly, neither Genesis nor Rolls-Royce has yet issued any cross-notice against the other in this proceeding.

[7] On 5 January 2004, Genesis issued to Rolls-Royce a notice to arbitrate under the turnkey contract. The Rt Hon J S Henry QC was appointed sole arbitrator. A draft statement of claim in the arbitration proceedings dated 20 December 2004 shows that Genesis essentially claims for breach of contract alleging a failure by Rolls-Royce to design, install or construct a plant in accordance with the terms of the turnkey contract and specifications. In a second cause of action, Genesis claims from Rolls-Royce contribution or indemnity in respect of any damages or costs awarded against it in the High Court proceedings.

[8] It is common ground that Genesis commenced the arbitration proceedings after receipt of a requirement issued to it by Carter Holt under clause 10.2.2 of the co-generation contract. The reasons for this requirement have not been fully explained but Genesis maintains that the arbitration route is the only way in which it may recover from Rolls-Royce. That follows, Genesis submitted, from the

provisions of Article 8 of the First Schedule of the Arbitration Act. Genesis submitted that if it had issued a cross-notice to Rolls-Royce in this proceeding or had issued separate court proceedings against Rolls-Royce then, in the absence of consent from Rolls-Royce, this court would have been obliged to stay the court proceedings pending arbitration. Why Rolls-Royce has not consented to any such cross-notice or separate proceeding going ahead in this Court was not explained.

[9] Rolls-Royce applied to the arbitrator for a stay of the arbitration on the grounds of abuse of process. Essentially, Rolls-Royce submitted that the institution by Genesis of the arbitration claim against Rolls-Royce was a duplication of the claim made by Carter Holt against Rolls-Royce in this Court.

[10] In a written decision issued on 16 March 2005, the arbitrator assumed jurisdiction to order a stay but declined to make such an order. He was not satisfied there was abuse of process arising through alleged duplication of the claims. In respect of the first cause of action, the arbitrator observed:

> As to re-litigating identical issues which may overlap, and it is difficult this far out to identify those which purely overlap, any potential problem can in my view be met by sensible management controls exercised at the appropriate time as and when questions of estoppel can also be determined.

[11] The arbitrator then added two further observations:

> First, depending on all the then existing circumstances I would see the High Court action as taking precedence on overlap issues. There will also be a need to bear in mind the extent to which the arbitral parties would be bound by any High Court findings. Second, the High Court has itself the reserve power to ensure its own process is not abused by the conduct of the arbitration, thus affording a measure of protection to Rolls-Royce if at some stage protection is needed.

[12] In respect of the second cause of action in the arbitration, the arbitrator noted the parties accepted that a hearing of the substance of the claim was premature and inappropriate until the claim by Carter Holt against Genesis had been determined in this Court.

[13] I need not go further into the arbitrator's reasoning at this stage because it is not relevant to the issues I have to determine at present.

First Issue – Whether the application for stay in this Court may be brought as an interlocutory application in the current proceeding or should be the subject of an originating application.

[14] For Genesis, Mr Williams QC submitted that any application for stay of the arbitration proceedings by Rolls-Royce is not an interlocutory application under the High Court Rules. Rule 3 defines an interlocutory application as an application made in accordance with r 237 or r 254. Any such application would be made under r 237 (written applications). Under r 234, the court may make any "interlocutory order" that is provided for in the rules or which may be made under r 9 (cases not provided for). Rule 3 defines an interlocutory order as meaning:

> (a) … an order or direction of the Court that:
>
> (i) is made or given for the purposes of a proceeding or an intended proceeding; and
>
> (ii) concerns a matter of procedure or grants some relief ancillary to that claimed in a pleading; …

[15] Mr Williams submitted that an application for stay of the arbitration proceedings did not affect the process, procedure or rights of the parties in respect of the various claims in this Court. He submitted that, as a matter of logic, the two sets of proceedings were completely separate. He also submitted that any stay would not be made or given for the purposes of this proceeding but would only affect the arbitration proceedings. Mr Williams also submitted that a stay would not amount to the granting of relief ancillary to the relief claimed by any party in this proceeding.

[16] I have no difficulty in rejecting these submissions. It is evident that the stay application would be based on an alleged abuse of process arising from the concurrent consideration by the Court and the arbitrator of the same or similar issues of fact or law. If an order for stay of the arbitration were made it would clearly be for the purposes of the proceeding in this Court since it would be made for the purpose of avoiding an abuse of process arising from the risk of conflicting findings of law or fact, oppression, or for more pragmatic reasons of economy or efficiency. There could be no doubt that if such an order were made, it would concern a matter of procedure and would amount to the granting of some relief ancillary to that

claimed in the pleadings filed in this Court. Any order for stay would clearly fall within the definition of interlocutory order in r 3.

[17] Mr Williams referred to various decisions (given prior to the passage of the Arbitration Act 1996 UK) in support of his submission that any application for stay should be brought as an originating application. These authorities are: *Compagnie Nouvelle France Navigation SA v Compagnie Navale Afrique du Nord (The 'Oranie' and The 'Tunisie')* [1966] 1 Lloyd's Rep 477 (CA), *Northern Regional Health Authority v Derek Crouch Construction Co Limited* [1984] 2 All ER 175 (CA) and *University of Reading v Miller Construction Ltd* (1994) 52 ConLR 31 (QBD).

[18] In each of these cases, a separate summons was issued seeking an injunction to restrain the opposite party from proceeding with arbitration. Whatever the position may be in England, I accept Mr Brown QC's submission for Rolls-Royce that the originating application procedure under r 458D is not suitable for an application for stay of the kind sought in the present case. The application does not relate to any of the specific matters described in r 458D(1)(a) to (da). It could only come within subparagraph (e):

> Any other proceeding that the Court, in the interests of justice, permits to be commenced by the filing of an originating application.

[19] Although r 458D now applies to a wide range of applications, it is not generally suited to the making of an application for stay of an arbitration where a court proceeding already exists. Any order for stay would almost inevitably be made on the basis that it could be reviewed from time to time in the light of changing circumstances. That is much better suited to an interlocutory application in the existing proceeding than the originating application procedure which generally applies to a discrete application which is made and then finally determined. In any event, I do not regard it as being in the interests of justice to require Rolls-Royce to commence a separate originating application when a perfectly suitable vehicle exists in the current proceeding. Mr Williams was unable to advance any convincing reason for the adoption of the originating application procedure and I am satisfied there is none.

Second Issue – Does this Court have jurisdiction to stay the arbitration proceedings?

[20] Counsel sought the opportunity to make further submissions on this issue and, at the hearing on 19 October 2005, I made timetable orders for the filing of written submissions. These have now been received, the last arriving on 9 December last.

[21] In an interesting and detailed submission, Mr Williams advanced argument in support of the proposition that this Court's inherent jurisdiction to order a stay of arbitration proceedings is no longer available since the passage of the Arbitration Act 1996. At the core of counsel's argument is Article 5 of the First Schedule of the Act which provides:

> **5 Extent of court intervention—**
>
> In matters governed by this Schedule, no court shall intervene except where so provided in this Schedule.

[22] Mr Williams referred to Article 8 of the First Schedule which, he submitted, governed the situation where parallel proceedings exist both in a court and before an arbitral tribunal. Article 8 provides:

> **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.
>
> 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.

[23] Mr Williams submitted that since this situation was governed by the provisions of the First Schedule, the Court had no power to intervene by virtue of Article 5. This outcome was said to be an intended consequence of the adoption by New Zealand in domestic legislation of the model law originating from the United Nations Commission on International Trade Law (UNCITRAL). Mr Williams

submitted that the model law effected fundamental reform of the law relating to arbitration and reflected an intention on the part of States adopting the model law to encourage the use of arbitration and to limit the scope of judicial review or other intervention in the arbitral process.

[24] It is necessary to consider first the nature of the Court's jurisdiction to stay prior to the introduction of the 1996 Act and then the effect of the Act (if any) on that jurisdiction.

The nature of the Court's jurisdiction to order a stay of arbitral proceedings prior to the Arbitration Act 1996

[25] Mr Williams conceded that, prior to the introduction of the 1996 Act, this Court had jurisdiction to order a stay of arbitral proceedings where it was in the interests of justice to do so. However he submitted it was a power rarely exercised.

[26] It is not in dispute that the High Court does not have a general supervisory power over the conduct of arbitrations in addition to its statutory powers: *Bremer Vulkan v South India Shipping Corporation Ltd* [1981] AC 909, 979 and *Channel Tunnel Group Ltd & Ors v Balfour Beatty Construction Ltd & Ors* [1993] AC 334, 364. And, in general, an arbitrator is not subject to judicial review since the source of the arbitrator's power is contractual rather than statutory: *R v Take-Over Panel, ex parte Datafin PLC* [1987] 1 QB 815, 847 and *Kenneth Williams & Co Ltd v Martelli* [1980] 2 NZLR 596, 605-606.

[27] But the courts have long recognised the existence of inherent jurisdiction to order the stay of arbitral proceedings where there are co-extensive or overlapping proceedings in the court and before an arbitral tribunal. The authorities were summarised by Judge Humphrey Lloyd QC, sitting in the Queen's Bench Division, in *University of Reading v Miller Construction Limited & Ors* (above) at 41-45.

[28] The leading decision is that of the English Court of Appeal in *Doleman & Sons v Ossett Corporation* [1912] 3 KB 257. Moulton LJ drew attention at 268-269 to the undesirability of a race between the court and a private tribunal dealing with

the same subject matter. Farwell LJ held at 273-274 that the plaintiffs could not be deprived of their right to have recourse to the court unless the court made an order to that effect under s 4 of the then Arbitration Act (UK).

[29] A similar power existed under s 5 of our Arbitration Act 1908. Under that provision, the court had statutory power to stay court proceedings pending an arbitration. The jurisdiction was discretionary and depended on a range of factors discussed in Brooker's *Arbitration Law and Practice* at paragraph D13-01 to D13.07. Section 5 does not expressly address the court's jurisdiction to stay arbitration proceedings but in *Doleman*, Farwell LJ stated with reference to the equivalent provision in the United Kingdom (at 273):

> It is impossible to suppose that the Court, on refusing an application to stay, and deciding that the action must go on, means to allow the arbitration to go on also with the result that the decision first obtained will prevail, or that one or other proceeding will be an idle waste of time and money.

[30] Farwell LJ continued (at 274):

> It appears to me impossible to allow more than one proceeding to continue without landing the Court and the parties in inextricable difficulties.

[31] Many years later, the English Court of Appeal endorsed the continuing application of the principles established in *Doleman*: see *Lloyd v Wright* [1983] QB 1065, 1073 and *Northern Regional Health Authority v Derek Crouch Construction Ltd* [1984] QB 644, 673 per Sir John Donaldson MR.

[32] In *Lloyd v Wright* it was also made clear however that, unless and until the court intervenes, there may be concurrent proceedings arising out of the same contracts by way of a court proceeding and an arbitration. It is also well established that the court's power to restrain the continuance of an arbitration will only be exercised sparingly: *Compagnie Nouvelle France Navigation SA v Compagnie Navale Afrique du Nord (The 'Oranie' and The 'Tunisie')* (above) per McNair J (at 482), and on appeal, per Sellers LJ (at 487):

> The guiding principles are: (1) that the stay must not cause injustice to the claimant in the arbitration, and (2) that the applicant for a stay must satisfy the Court that continuance of the arbitration would be oppressive or

> vexatious to him or an abuse of the process of the Court: in short, that it would be unjust.

[33] The principles applicable in New Zealand prior to the Arbitration Act 1996 may be summarised as follows:

a) Unless and until the court intervened, there was no impediment to concurrent proceedings arising out of the same contract by way of court proceeding and arbitration.

b) The court had power to stay the court proceedings pending arbitration under s 5 Arbitration Act 1908. But if a stay were declined, the court nevertheless had power to restrain the arbitration from proceeding pending the outcome of the litigation.

c) The power to stay an arbitration was exercised sparingly and only where injustice would arise. An applicant for a stay was required to satisfy the court that continuance of the arbitration would be oppressive or vexatious or would otherwise constitute an abuse of the process of the court.

d) The rationale for the existence of this jurisdiction included the avoidance of duplication as well as the risk of conflicting decisions of fact and law with the obvious potential to lead to what Farwell LJ described in *Doleman* as "inextricable difficulties" for the court and the parties.

Does the passage of the 1996 Act remove or limit the jurisdiction to stay previously enjoyed by the Court?

[34] The general background to the passage of the 1996 Act is discussed by Heath J in *Pathak v Tourism Transport Limited* [2002] 3 NZLR 681 at [21] to [25]. Relevantly for present purposes, the purposes of the Act as defined by s 5 include:

a) To encourage the use of arbitration as an agreed method of resolving commercial and other disputes;

b) To promote international consistency of arbitral regimes based on the UNCITRAL model; and

c) To redefine and clarify the limits of judicial review of the arbitral process of arbitral awards.

[35] The radical nature of the reforms brought about by the adoption in domestic legislation of the model law has been noted at the highest levels. In *Lesotho Highlands Development Authority v Impregilo SpA and Ors* [2005] UKHL 43, Lord Steyn (delivering the leading judgment of the House) cited at [17] passages from the preface to the text edited by Lord Mustill and Stewart Boyd QC *Commercial Arbitration* (2001 companion volume to the 2nd edition) and from the speech of Lord Wilberforce during the second reading of the Arbitration Bill in the House of Lords in 1996. These observations drew attention to the "entirely new face" of English arbitration law; the emphasis on arbitration as a free-standing system, free to settle its own procedure and to develop its own substantive law; and "a new balancing" of the relationship between parties, advocates, arbitrators and courts.

[36] Importantly, Lord Steyn concluded at [26] that:

> A major purpose of the new Act was to reduce drastically the extent of intervention of Courts in the arbitral process.

[37] In support of that proposition His Lordship referred to the persistent criticism in the 1980s and 1990s about the excessive reach of the court's powers of intervention and quoted the following passage from the report of the Departmental Advisory Committee on Arbitration Law on the Arbitration Bill at [21]-[22]:

> … there is no doubt that our law has been subject to international criticism that the courts intervene more than they should in the arbitral process, thereby tending to frustrate the choice the parties have made to use arbitration rather than litigation as the means for resolving their disputes.
>
> Nowadays the courts are much less inclined to intervene in the arbitral process than used to be the case. The limitation on the right of appeal to the courts from awards brought into effect by the Arbitration Act 1979, and changing attitudes generally, have meant that the courts nowadays generally only intervene in order to support rather than displace the arbitral process. We are very much in favour of this modern approach …

[38] In New Zealand, Heath J noted in *Pathak* at [24] that "reduced curial involvement in arbitral process" was one of the four principles underpinning the new

Act. And in *Gold Resource Developments (NZ) Limited v Doug Hood Limited* [2000] 3 NZLR 318 the Court of Appeal observed at [52]:

> … Parliament has made clear its intention that parties should be made to accept the arbitral decision where they have chosen to submit their dispute to resolution in such manner. It plainly intended a strict limitation on the involvement of the Court where this choice has been made.

[39] It followed, in the decision before the Court of Appeal, that a broad approach to the exercise of the court's discretion to grant leave to appeal against an arbitral award under clause 5(2) of the Second Schedule to the 1996 Act, was inappropriate.

[40] The UNCITRAL model law was approved by the General Assembly of the United Nations on 11 December 1985. It has since been adopted by approximately 50 countries and incorporated into domestic legislation although not necessarily in precisely the same form as the model law. In the case of arbitrations in New Zealand, s 6(1) of the Act provides that the provisions of the First Schedule of the Act apply as well as those provisions of the Second Schedule which apply by virtue of s 6(2). In the present case, the provisions of the Second Schedule apply unless the parties agree otherwise. It is worth noting that, by s 12, an arbitration agreement is deemed to provide that an arbitral tribunal may award any remedy or relief that could have been ordered by the High Court in civil proceedings unless the parties agree otherwise. Section 16 of the Act gives power for rules to be made for the purposes of the Act for both the High Court and District Court. Rules 877 to 901 of the High Court Rules deal with appeals from arbitral tribunals and the entry of awards as judgments. They do not impact upon the issue of stay.

[41] Genesis accepted that the First Schedule of the 1996 Act does not purport to be a comprehensive code prescribing definitively the circumstances in which a court may intervene in the arbitral process. That must follow from the opening words of Article 5 "In matters governed by this Schedule …". The prohibition against intervention by the court does not apply in relation to matters not governed by the Schedule. The New Zealand Law Commission's report number 20 *Arbitration* (October 1991) records at [295] a non-exhaustive list, provided by the UNCITRAL Working Group and the UNCITRAL Secretariat of matters not governed by the model law. These include the capacity of the parties to conclude the arbitration

agreement, the impact of State immunity, the contractual or other relations between the parties and the arbitral tribunal, the fixing of fees and costs and security, the consolidation of arbitral proceedings, the competence of the arbitral tribunal to adapt contracts, the enforcement by courts of interim measures of protection ordered by the arbitral tribunal, and time limits on enforcement of arbitral awards.

[42] Section 3 of the Act permits an arbitral tribunal or a court to refer to certain extrinsic materials when interpreting the Act. These materials are stated to include the documents relating to the model law originating from UNCITRAL or its Working Group for the preparation of the model law. Holtzmann & Neuhaus have produced a work known as *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History & Commentary* (1994). This guide includes not only the commentaries of the authors but also the legislative history and the reports of UNCITRAL, its Secretariat and its Working Groups in respect of the model law. In the Seventh Secretariat note of 25 March 1985 (included at pages 228-229 of the guide) the Secretariat commented on the draft Article 5:

> 2. Although the provision, due to its categorical wording, may create the impression that court intervention is something negative and to be limited to the utmost, it does not itself take a stand on what is the proper role of courts. It merely requires that any instance of court involvement be listed in the model law. Its effect would, thus, be to exclude any general or residual powers given to the courts in a domestic system which are not listed in the model law. The resulting certainty of the parties and the arbitrators about the instances in which court supervision or assistance is to be expected seems beneficial to international commercial arbitration.

[43] In the same note the Secretariat also stated that:

> 4. Another important consideration in judging the impact of Article 5 is that the above necessity to list all instances of court involvement in the model law applies only to the "matters governed by this Law." The scope of Article 5 is, thus, narrower than the substantive scope of application of the model law, i.e. "international commercial arbitration" (Article 1), in that it is limited to those issues which are in fact regulated, whether expressly or impliedly, in the model law.
>
> 5. Article 5 would, therefore, not exclude court intervention in any matter not regulated in the model law.

[44] In the Commission's report of 21 August 1985 (included at pages 237-239 of the guide), it was stated in relation to an objection that it was not possible to know in many cases whether a matter was governed by the model law:

> 61. In response to that objection, it was pointed out that the problem was common to any *lex specialis* and, in fact, all texts for the unification of law. Since no such text was complete in every respect, what was not governed by it must be governed by the other rules of domestic law. Therefore, it was necessary, though admittedly often difficult, to determine the scope of coverage of the particular text. Yet, in the great majority of cases in which the question of court intervention became relevant, the answer could be found by using the normal rules of statutory interpretation, taking into account the principles underlying the text of the model law.

[45] The First Schedule of the Act is divided into eight chapters which broadly deal with the commencement, conduct and termination of arbitral proceedings and post-award matters. Specific powers are given to the High Court in a number of instances some of which apply prior to any award being made and others of which apply only post-award. Mr Williams submitted that, in terms of Article 5, the issue of stay or adjournment of arbitral proceedings was a matter governed by the First Schedule in that an arbitrator has power to grant either a stay or adjournment by virtue of Article 19(2) of the First Schedule. Relevantly, Article 19 provides:

> **19 Determination of rules of procedure**—
>
> (1) Subject to the provisions of this Schedule, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
>
> (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Schedule, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality, and weight of any evidence.

[46] In summary, while the Schedules to the Act are not intended to define exhaustively all the circumstances in which a Court may intervene in the arbitral process, the intention of Article 5 is:

a) To require those drafting State laws to specify the circumstances in which court control or involvement is envisaged in order to increase certainty; and

b) Where a particular topic or set of circumstances is governed by the Schedule, to exclude any general or residual powers given to the domestic court which are not specified in the Schedule.

[47] I accept Mr Williams' submission that unless the parties agree otherwise, an arbitrator has implied power to stay or adjourn arbitral proceedings where the interests of justice so require. The existence of such a power was recognised by Paterson J in *McConnell Dowell Constructors Limited v Pipeflow Technology Limited* HC AK M2029/98 25 March 1999 at 9 and in my view, such a power must follow from the authority conferred on the arbitral tribunal under Article 19(2) to "conduct the arbitration in such a manner as it considers appropriate".

[48] However, it does not follow from the existence of this implied power under Article 19(2) that the stay or adjournment of arbitral proceedings is a matter "governed" by the First Schedule for the purposes of Article 5. For a matter to be "governed" by the First Schedule one would expect something more than an implied power arising from a provision conferring general powers on an arbitral tribunal to conduct an arbitration in such manner as it considers appropriate. To "govern" a matter implies the existence in the First Schedule of a defined power to regulate and control a specified matter. The language of Article 19(2) falls well short of the degree of specificity and regulation required for it to be said that Article 19(2) "governs" the stay or adjournment of arbitral proceedings. As I later conclude, the much more specific provisions of Article 8 govern the matter of stay where there are parallel court and arbitral proceedings.

The effect of Article 8 of the First Schedule

[49] Article 8 effects major changes to the pre-existing law. Under s 5 Arbitration Act 1908, the court had a discretion to grant a stay of court proceedings where the matter in dispute was the subject of a submission to arbitration. In contrast, where Article 8 is engaged, the court is obliged to grant a stay of the court proceedings except in the limited circumstances defined in Article 8(1). Importantly, Article 8(2) recognises that where court proceedings have been brought, arbitral proceedings may be commenced or continued notwithstanding. This is an explicit statutory

recognition of the position established by previous case law, that there is no objection in principle to matters proceeding in parallel before both a court and an arbitral tribunal subject to any controls the court or arbitral tribunal is obliged or permitted to exercise. An award may even be made by the arbitral tribunal while the issue is pending before the court (but by implication, not after a decision has been made by the court on the same issue).

[50] As Mr Williams pointed out, a party faced with court proceedings and wishing to have the matter determined by any relevant arbitration agreement, has the ability to avoid the duplication of proceedings by making a request to the court under Article 8(1) not later than the time when the party submits its first statement on the substance of the dispute. In that case, the court is obliged to stay the court proceedings and refer the parties to arbitration unless it finds 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 (the latter enabling an application for summary judgment to proceed in the court).

[51] In the event of parallel proceedings continuing, both the court and the arbitral tribunal have the necessary powers to adjourn or stay their respective proceedings to avoid unnecessary duplication or other injustice.

[52] Mr Williams referred to several authorities from other jurisdictions as examples of the application of Article 5 in practice. It is only necessary for me to refer to two of these decisions. In *Mitsui Engineering and Ship Building Company Ltd v Easton Graham Rush & Or* (2004) SLR 14, the High Court of Singapore declined to grant an originating application for an injunction restraining an arbitrator from taking further steps in the arbitration, pending determination of a challenge to the arbitrator under Articles 12 and 13 and an application to set aside the award under Article 34 of the model law. It was held that Articles 13 and 34 governed the situation and since these did not provide for the issue of an injunction, Article 5 precluded any intervention by the Court. And, in *Vale do Rio Doce Navegaco SA & Ord v Shanghi Bao Steel Ocean Shipping Co Ltd & Or* [2000] 2 Lloyd's Rep 1, Thomas J concluded that the Court had no jurisdiction to determine whether there was a binding agreement to arbitrate since this was a matter regulated by Part 1 of

the equivalent English legislation. That was so, even though the English legislation is not expressed in the mandatory terms adopted in New Zealand. The equivalent section 1(c) of Part 1 of the English legislation provides:

> … In matters governed by this Part the court **should** not intervene except as provided by this Part. (emphasis added)

[53] Thomas J concluded that s 1(c) required the Court to approach the matter on the basis that it should not intervene except in the circumstances specified in the relevant part of the Act. Despite the absence of an absolute prohibition on intervention Thomas J considered it was clear "that the general intention was that the Court should usually not intervene outside the general circumstances specified in Part I of the Act": See [48] to [52].

[54] I accept Mr Williams' submission that where Article 8 is engaged, the effect of Article 5 is to restrict the jurisdiction of the court to the mandatory grant of a stay of the court proceedings (where a party so requests) and to refer the parties to arbitration unless the court finds that any one of the exceptional circumstances specified in Article 8(1) is established. I reach that conclusion because I am satisfied that the existence of parallel court and arbitral proceedings is a matter governed by the First Schedule. In that case, Article 5 prohibits the intervention of the court except where so provided in the Schedule. Although it does not say so explicitly, I am satisfied Article 5 was intended to mean that where the Court is permitted to intervene, it may only do so in the manner provided in the Schedule.

[55] Mr Williams referred me to the views expressed by Professor Frederick Bachand in a paper entitled *The UNCITRAL Model Law's Take on Anti-Suit Injunctions* included in Gaillard, *Anti-Suit Injunctions in International Arbitration* (2005) at 87-112. Professor Bachand expressed the view that Article 5 ought to be construed broadly, so as to prohibit any form of judicial assistance and judicial control not provided for in the model law. Construed in that manner, Professor Bachand considered that, since anti-suit injunctions are a form of judicial intervention with arbitral tribunals that falls within the scope of Article 5, the conclusion must follow that the model law prohibits the issue of such injunctions whenever Article 5 is applicable.

[56] I prefer to base my conclusions on the text of the First Schedule, interpreted with the assistance of the materials earlier described. I accept Mr Brown's submission that the correct approach is to ask: Is the matter in question one of those governed by the First Schedule? If it is not, then the restriction on court intervention in Article 5 does not apply.

Is Article 8 engaged in the present case?

[57] Mr Williams accepted that Article 8 does not apply to this proceeding because Carter Holt's claims against Genesis and Rolls Royce are not subject to any arbitration agreement. The only submission to arbitration is contained in the turnkey contract between Genesis and Rolls Royce. Since there is no cross-claim raising issues about the respective rights and obligations of Genesis and Rolls Royce as between themselves, there is no "matter which is the subject of an arbitration agreement" before the court in terms of Article 8(1). As noted by Holtzmann and Neuhaus at 302:

> [Article 8(1)], which directs courts to refer parties to arbitration, is modelled on Article II(3) of the New York Convention. Thus, like that Convention, the action before the court must be "in" the same "matter" that is the subject of the arbitration agreement and not "merely related" to it or "involved" in it, as some proposed during the debate by the Commission.

[58] The mere fact there may be some connection between the court proceeding and the matter which is the subject of an arbitration agreement is not sufficient to engage Article 8(1). There must be a direct relationship between the matter before the court and the matter which is the subject of the arbitration agreement. Ordinarily, this is likely to arise where the relationship between the two is sufficiently close as to give rise to a material risk of conflicting decisions on fact or law.

[59] I accept Mr Brown's submission for Rolls Royce that Article 8 is not currently engaged in the present case. It must follow on my analysis of the Act that the prohibition against court intervention in Article 5 does not apply so as to exclude the power of the court to grant a stay of arbitral proceedings where it is appropriate to do so.

[60] But Mr Williams further submitted that, if the court lacked power to stay an arbitration where litigation and arbitral proceedings are clearly co-extensive, it would be wholly inconsistent for the court to have power to stay arbitral proceedings involving different parties in different causes of action. I do not accept that submission which, as I see it, is more appropriately directed to the question whether a court would exercise its discretion to intervene rather than whether the court has jurisdiction to do so.

[61] Except to the extent clearly limited by statute, this court has a wide discretion to prevent abuse of its own processes. It is possible to envisage a case where there is such a substantial degree of overlap of factual or legal issues that it would be inappropriate for both court and arbitral proceedings to proceed simultaneously even if the matters in the court proceeding were not the subject of an arbitration agreement in a way which would engage Article 8. While a court might well be reluctant to intervene in such circumstances, I would not wish to preclude the court's jurisdiction to do so in an appropriate case. I express no view as to whether the present case might fall into that category.

Conclusions

[62] In summary:

a) An application for stay of the arbitral proceedings may be brought as an interlocutory application within the current proceeding.

b) As the pleadings currently stand, this Court continues to have jurisdiction to grant an order staying the arbitral proceedings.

c) Whether a stay ought to be granted is a matter for future determination.

d) The costs of the applications determined in this judgment are reserved. If no agreement is reached, the issue of costs will be determined with the remaining matters to be heard on 26-28 April 2006.

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A P Randerson, J
Chief High Court Judge