IN THE SUPREME COURT OF NEW ZEALAND

SC 26/2005
[2006] NZSC 8

	BETWEEN	CASATA LIMITED Appellant
	AND	GENERAL DISTRIBUTORS LIMITED Respondent

Hearing: 5 October 2005

Court: Elias CJ, Keith, Blanchard, Tipping and McGrath JJ

Counsel: J E Hodder and S J Fairbrother for Appellant
R W Raymond and J K Scragg for Respondent

Judgment: 15 March 2006

JUDGMENT OF THE COURT

A. The appeal is dismissed.

B. The orders made by the Court of Appeal and High Court insofar as they concern the award of costs made by the arbitral tribunal on 28 April 2003 are vacated.

C. The Court makes:

(a) a declaration that the award on costs made by the arbitral tribunal on 28 April 2003 was validly made as an additional award under article 33(3) of the First Schedule to the Arbitration Act 1996; and

(b) an order reinstating that award.

D. All questions of costs in all Courts are reserved, to be determined if necessary following written submissions.

REASONS

ELIAS CJ

The appeal

[1] Does an arbitral tribunal have power to award party and party costs in an additional award when no party has claimed such costs before delivery of an apparently final award? That is the question raised by the appeal. The answer to it turns on the meaning of and intersection between two provisions in the Arbitration Act 1996: art 33 of the First Schedule; and cl 6 of the Second Schedule.

[2] The Arbitration Act 1996 was enacted to implement the UNCITRAL[1] Model Law. Article 33 of the First Schedule follows the Model Law. It combines and modifies solutions earlier adopted in New Zealand domestic legislation to ameliorate the rigour of the common law, by permitting an arbitral tribunal to correct omissions and slips without necessitating court invalidation of the award. Article 33(3) authorises the arbitral tribunal on the request of a party within 30 days of the date of an award to make an additional award "as to claims presented in the arbitral proceedings but omitted from the award".

[3] The Model Law did not seek standardisation of costs regimes, leaving them to domestic law. Clause 6 of the Second Schedule is a domestic supplement to the Model Law. It generally follows earlier New Zealand legislation and has parallels in other common law jurisdictions. It empowers an arbitral tribunal to award costs unless the parties agree otherwise. Similar provisions in earlier Arbitration Acts have been interpreted to impose a duty on the arbitral tribunal to determine costs where the parties have not agreed otherwise. Clause 6(1)(b) is however new. It

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1 United Nations Commission on International Trade Law.

provides that "in the absence of an award or additional award fixing and allocating the costs and expenses of the arbitration," each party is responsible for its own costs and half the costs and expenses of the arbitration. Does this provision, which operates in default of a determination by the arbitral tribunal, remove the arbitral tribunal's former obligation to determine costs? If it does, a party cannot use art 33 to request an additional award because there will be no omission from an apparently final award which does not deal with costs.

[4] I am of the view that cl 6 puts costs in issue in all arbitrations conducted under the Arbitration Act 1996 unless the parties agree otherwise. Costs are "claims presented in the arbitral proceedings" by operation of statute. If determination of costs is omitted from an award, a party can invoke art 33 to require costs to be dealt with in an additional award. I am unable to agree that this is to deprive the default position provided by cl 6(1)(b) of effect. In my view the default position that party and party costs lie where they fall is not reached until the ability to request an additional award under art 33 lapses 30 days after delivery of an award that omits to deal with costs. If cl 6 requires the parties themselves to raise costs distinctly during the course of the arbitration in order to make them "claims presented in the arbitral proceedings" for the purposes of art 33, it would re-introduce technical traps which were overcome by legislation and case law long ago. I do not consider that to be the effect of the 1996 Act.

[5] I have had the opportunity to read the reasons of the other members of the Court in draft. With that advantage, I do not have to rehearse much of the general background. I have been assisted in particular by the description of the history of the legislation set out in the reasons of McGrath J and by his analysis of cl 6, with which I am in substantial agreement.

Background

[6] The arbitration the subject of the appeal was to establish rent payable under a lease. By the terms of the lease the parties agreed as to the basis for sharing the costs of the arbitration between them. But the agreement was silent on the question of party and party costs. There was no claim for party and party costs in the submission

to arbitration and no issue as to such costs was raised by either party during the course of the hearing. The award itself did not deal with them. General Distributors Limited, as the successful party in the arbitration, then sought costs and obtained an additional award of $95,000 against Casata Limited. In making the additional award, the arbitral tribunal expressly relied upon art 33 of the First Schedule to the Arbitration Act 1996, although it also said that costs had been impliedly reserved. Both parties appealed to the High Court against aspects of both awards. Casata was successful in having the second award set aside as made without jurisdiction, on the basis that the arbitration had come to an end with the first award since costs had not been reserved.[2] Ellen France J remitted the first award and any question of parties' costs on the second award to the arbitrators for further consideration. In a second judgment dealing with an application for recall by Casata, Ellen France J confirmed her earlier decision and clarified that in reconsidering costs under the first award the arbitral tribunal was to consider both the tribunal costs and party and party costs. In remitting the question of party and party costs,[3] Ellen France J acted on the view that the arbitral tribunal was empowered by the lease agreement to award party and party costs.

[7] Casata appealed to the Court of Appeal against the decision of the High Court remitting the question of costs to the arbitral tribunal. General Distributors did not appeal against the High Court determination setting aside the additional award. It was apparently content to have the matter reconsidered by the arbitral tribunal. In the Court of Appeal, it was common ground that the High Court had been in error in the view that the power to award party and party costs arose from the lease agreement. Rather, the only power to award party and party costs was accepted to be that contained in cl 6(1)(a) of the Second Schedule to the Arbitration Act 1996. Despite the fact that it did not accept the reasoning in the High Court, the Court of Appeal considered the arbitral tribunal had made an error of law in failing to reserve costs under cl 6(1)(a) in its first award.[4] In accordance with the views of the majority judges, Glazebrook and Hammond JJ, it remitted costs for further

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2 *General Distributors Ltd v Casata Ltd* HC WN CIV-2002-485-883 23 December 2003.
3 *General Distributors Ltd v Casata Ltd* HC WN CIV-2002-485-883 7 April 2004.
4 [2005] 3 NZLR 156.

consideration by the arbitral tribunal. The third member of the Court, Chambers J, would have re-instated the arbitral tribunal's additional award.

[8] Glazebrook and Hammond JJ held that the arbitral tribunal had not turned its mind to party and party costs in circumstances where one party had "a legitimate claim for costs that could not realistically have been pursued before the award was finalised."[5] In such circumstances the failure to reserve the question of costs in the first award constituted error of law. Glazebrook and Hammond JJ thought cl 6(2)(b) (which prevents pre-award disclosure to the arbitral tribunal of offers to settle) made it impractical for issues of costs to be dealt with before an award. They did not accept that the default provision as to costs under cl 6(1)(b) applied automatically and was decisive, as had been argued by Casata. Glazebrook and Hammond JJ expressed doubts as to whether the High Court had been right to set aside the additional award, but thought the absence of an appeal on the point prevented that route being taken by them. The third member of the Court, Chambers J, took the view that the additional award should not have been set aside and that party and party costs should not have been remitted to the arbitral tribunal. He would have quashed the decision of the High Court on this point, leaving the additional award confirmed. In that approach, he relied upon Rule 19 of the Court of Appeal (Civil) Rules 1997 which permits the Court of Appeal to correct errors in the High Court, whether or not the subject of distinct appeal.

[9] Casata appeals further to this Court, with leave. It points out, correctly, that there is no error of law simply in a failure to deal with costs unless the arbitral tribunal is obliged to determine costs. It maintains that the alternative provided by cl 6(1)(b) is a default provision which is inconsistent with any duty upon the tribunal to exercise the power conferred upon it by cl 6(1)(a). It submits that the approach adopted by the Court of Appeal deprives cl 6(1)(b) of effect. If costs are not dealt with in the award under cl 6(1)(a) then under cl 6(1)(b) they lie where they fall and there is no scope for any duty to determine costs and no error of law justifying court intervention. General Distributors supports the approach of Glazebrook and

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5 At [98].

Hammond JJ in the Court of Appeal but argues in the alternative that Chambers J was right to reinstate the second award. It contends that the arbitral tribunal in its first award should have reserved party and party costs, notwithstanding the alternative provided by cl 6(1)(b). Its failure to do so is said to be an error of law justifying remittal of the award for further consideration of costs.

Additional awards under article 33

[10] There was no power at common law for an arbitrator to make an additional award or to amend an award. Unless an award was expressed to be interim, an arbitrator became *functus officio* on delivery of the award determining the submission.[6] The only way to reopen the award to deal with a matter which had not been determined, such as costs, was by court order on the basis that the award was bad for incompleteness. Eventually, legislation corrected the deficiency of the common law. Arbitrators were first given power by statute to correct slips or errors.[7] Then s 14(2) of the Arbitration Amendment Act 1938[8] permitted a party to apply to the arbitrator for costs within 14 days of the publication of an award (or such further time as the Court might allow) where no provision was made for costs in the award. The section required the arbitrator, upon such application, to amend the award, "after hearing any party who may desire to be heard," "by adding thereto such directions as he may think proper with respect to the payment of the costs of the reference." Section 14(2) of the Arbitration Amendment Act 1938 was repealed, with the principal 1908 Act, by the Arbitration Act 1996. No direct equivalent provision replaces s 14(2). But a more ample general provision for correction of error or omission was enacted in art 33 of the First Schedule to the Arbitration Act 1996.

[11] Article 33 was derived by the Model Law draftsmen from the UNICTRAL Arbitration Rules 1976. It was adopted to rectify the perceived inconvenience where

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6 *Fidelitas Shipping Co. Ltd v V/O Exportchleb* [1966] 1 QB 630, 644 per Diplock LJ.

7 In New Zealand, s 9 of the Arbitration Act 1890 first gave arbitrators the power (maintained in s 8 of the Arbitration Act 1908)

> to correct in an award any clerical mistake or error arising from any accidental slip or omission.

8 Derived from s 12 of the Arbitration Act 1938 (UK).

national legal systems held to the strict view that an incomplete award was invalid and that the arbitrator was *functus officio* after its delivery.[9] Article 33 provides:

> **33 Correction and interpretation of award; additional award—**
>
> (1) Within 30 days of receipt of the award, unless another period of time has been agreed upon by the parties,—
>
> (a) A party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature:
>
> (b) If so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.
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> If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request. The interpretation shall form part of the award.
>
> (2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) on its own initiative within 30 days of the date of the award.
>
> (3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within 30 days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within 60 days.
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> (4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation, or an additional award under paragraphs (1) or (3).
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> (5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

[12] As already indicated, New Zealand had moved on from the strict approach art 33 was designed to overcome through the enactment of a power to correct accidental omissions under s 8 and through a procedure contained in s 14 of the 1938 Amendment Act to achieve correction where costs had not been addressed in an award. But the adoption of art 33 provided a general mechanism for a party to

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[9] "Report of the Secretary General: revised draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules) (addendum): commentary on the draft UNCITRAL Arbitration Rules" (A/CN.9/112/Add.1) 12 December 1975, reprinted in (1976) 7 *Yearbook of the United Nations Commission on International Trade Law* ("UNCITRAL Yearbook") 166, 180; Dore *Arbitration and Conciliation Under the UNCITRAL Rules: A Textual Analysis* (1986) 174.

compel completion of an award for omission or to achieve correction of error. It was therefore unnecessary to maintain a distinct system for compelling determination of costs where they are "claims presented in the arbitral proceedings." Whether there was an omission able to be rectified by recourse to art 33 turns on whether cl 6(1)(a) imposes an obligation on the arbitral tribunal to determine costs, in the absence of other agreement by the parties. If it does, claims for costs are "presented in the arbitral proceedings" by operation of statute. In that event, it is unnecessary to contend, as General Distributors does, that the arbitral tribunal erred in law in not reserving costs and in not delivering an interim award in the first instance. The arbitral tribunal can be compelled to proceed to determination of costs by additional award under art 33. Only if it fails to act on a request under art 33 will it be necessary to seek relief through the courts.

The obligation to determine costs under clause 6

[13] The meaning of cl 6(1)(a) must be seen in the context of the scheme provided by the whole of cl 6, which by s 6 of the Act applies to all arbitrations where not excluded by agreement of the parties. Clause 6 provides:

> **6 Costs and expenses of an arbitration—**
>
> (1) Unless the parties agree otherwise,—
>
> > (a) The costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal, and any other expenses related to the arbitration shall be as fixed and allocated by the arbitral tribunal in its award under article 31 of the Schedule 1, or any additional award under article 33(3) of the Schedule 1; or
> >
> > (b) In the absence of an award or additional award fixing and allocating the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.
>
> (2) Unless the parties agree otherwise, the parties shall be taken as having agreed that,—
>
> > (a) If a party makes an offer to another party to settle the dispute or part of the dispute and the offer is not accepted and the award of the arbitral tribunal is no more favourable to the other party than was

> the offer, the arbitral tribunal, in fixing and allocating the costs and expenses of the arbitration, may take the fact of the offer into account in awarding costs and expenses in respect of the period from the making of the offer to the making of the award; and
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> (b) The fact that an offer to settle has been made shall not be communicated to the arbitral tribunal until it has made a final determination of all aspects of the dispute other than the fixing and allocation of costs and expenses.
>
> (3) Where an award or additional award made by an arbitral tribunal fixes or allocates the costs and expenses of the arbitration, or both, the High Court may, on the application of a party, if satisfied that the amount or the allocation of those costs and expenses is unreasonable in all the circumstances, make an order varying their amount or allocation, or both. The arbitral tribunal is entitled to appear and be heard on any application under this subclause.
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> (4) Where—
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> (a) An arbitral tribunal refuses to deliver its award before the payment of its fees and expenses; and
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> (b) An application has been made under subclause (3),—
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> the High Court may order the arbitral tribunal to release the award on such conditions as the Court sees fit.
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> (5) An application may not be made under subclause (3) after 3 months have elapsed from the date on which the party making the application received any award or additional award fixing and allocating the costs and expenses of the arbitration.
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> (6) There shall be no appeal from any decision of the High Court under this clause.

[14] A power to award costs even where no issue as to costs is contained in the submission to arbitration has existed in New Zealand legislation since the Arbitration Acts of 1890 and 1908, themselves patterned on the Arbitration Act 1890 (UK). These Acts provided that "the costs of the reference and award shall be in the discretion of the arbitrators or umpire, who … may award costs to be paid as between solicitor and client."[10] Lord Esher in *In re An Arbitration between Williams and Stepney*[11] considered that the policy of the reform as to costs, which was enacted in the Arbitration Act 1889 (UK) was: [12]

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10 See cl 9 of the Second Schedule to the Arbitration Act 1908, which is in identical terms to the 1890 Act.

11 [1891] 2 QB 257.

12 At 260.

> to do away with the old rule under which, if a submission says nothing as to costs, the successful party would have to submit to something very like injustice in not being able to obtain costs.

[15] As McGrath J describes, it was subsequently held in *In re An Arbitration between Becker, Shillan and Company, and Barry Brothers*[13] that an award in which costs were not determined was bad because incomplete. The failure to comply with what the Court there considered was an obligation to determine costs imposed by the legislation meant that the award was bad because not final, as had been long held by the Court of Exchequer where awards did not dispose of all matters in a submission.[14] Baron Parke explained, in a case where costs were submitted to the discretion of the arbitrators: [15]

> We do not think the award can be made good on the ground that this matter is left to the discretion of the arbitrator, in the sense that he may award upon this question or not as he thinks fit. We think it clear that it was intended that he should exercise his discretion on the question of the costs, not whether he would award upon that question or not at his option or discretion.

[16] Similarly, where the power to determine costs is conferred by statute, it is not fulfilled by the arbitral tribunal exercising it or not at its option. The reasoning in *Williams and Stepney* and *Becker Shillan* applies equally to a failure to make a determination of costs under cl 6(1)(a) of the Arbitration Act 1996. It cannot matter that the 1996 legislation no longer deems the Second Schedule to be part of the submission but instead, more directly, provides that the provisions of the Second Schedule "apply in respect of the arbitration."[16] On this view, the determination of costs remains an obligation imposed upon the arbitral tribunal by cl 6(1)(a) in any arbitration where the parties have not agreed otherwise. This long-standing authority that legislation equivalent to cl 6(1)(a) imposes a duty to fix and allocate costs in my view is consistent with the scheme of cl 6, considered as a whole.

[17] Clause 6(1) is not expressed to empower the arbitral tribunal itself to omit a determination of costs from the award, choosing in that way to leave costs as they

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13 [1921] 1 KB 391.

14 *Richardson v Worsley* (1850) 5 Ex. 613; 155 ER 268; *Williams v Wilson* (1853) 9 Ex. 90; 156 ER 38.

15 (1853) 9 Ex. 90, 99.

16 Section 6(1).

fall. It is true that the language of cl 6(1)(a) does not explicitly require the arbitral tribunal to determine costs and provides what is to happen if costs are not eventually determined. But I consider that the requirement that "the costs and expenses … shall be as fixed and allocated by the arbitral tribunal in its award under article 31 of the Schedule 1, or an additional award under article 33(3) of the Schedule 1" is language consistent with obligation, enforceable by a party invoking art 33(3) if necessary. Whether that is the meaning of the provision turns on the proper meaning of cl 6(1)(b), which is expressed to be alternative to it. That is the more formidable argument against any duty to determine and I address it shortly. For present purposes however it is enough to note that the language of cl 6(1)(a) itself is not inconsistent with the authorities that established, in relation to comparable powers, that whether or not they were exercised was not a matter of option for the arbitral tribunal.

[18] Clause 6(2) provides that offers to settle will be relevant to the determination of costs and when they are to be communicated. Such offers may be as important in determining that no party and party costs should be allocated (leaving such costs to lie as they fall) as in determining that the costs of one party should be borne in whole or part by another. The existence of cl 6(2) suggests that either outcome requires advertent consideration by the arbitral tribunal of relevant settlement offers, unless the parties agree to some other regime for costs under cl 6(1)(a). It, too, is consistent with an obligation to determine costs.

[19] The provision of rights of appeal under cl 6(3), where the costs as fixed and allocated are unreasonable, would be seriously deficient if it were competent for an arbitral tribunal to avoid a determination that the parties should bear their own costs, leaving such result to be achieved by cl 6(1)(b). That would deprive a party of the opportunity to appeal because appeal under cl 6(3) is available only "where an award or additional award … fixes or allocates the costs and expenses of the arbitration, or both …". The availability of appeal would depend on the view that the particular arbitral tribunal took of its role. In cases where the arbitral tribunal decided that costs were to lie as they fell, the opportunity for appeal would exist. In cases where the award was silent as to costs in the award, the same result would be achieved by the default provision, but appeal would be precluded. Such unevenness in

application cannot have been intended. The importance of costs in arbitration is recognised in the provision of a legislative regime empowering the arbitral tribunal to determine costs, irrespective of their inclusion in the submission to arbitration. As Lord Esher noted, the legislative reform overcame a perceived injustice in the common law. The general principle is that costs follow the event, in arbitration as in litigation. If leaving each party to bear its own costs is unreasonable in the circumstances, there is no evident reason why appeal should not be available. Such result is avoided if cl 6 is properly to be construed to impose a duty to fix and allocate costs, unless the parties agree otherwise.

[20] I do not think that the enactment of cl 6(1)(b) suggests a different interpretation or prompts reconsideration of the authorities discussed by McGrath J. Clause 6 of the Second Schedule to the Act supplements the Model Law. The Model Law did not attempt standardisation in the treatment of costs, leaving costs to be regulated by domestic law, as McGrath J describes. Clause 6 generally follows earlier New Zealand legislation and has parallels in other common law jurisdictions. But cl 6(1)(b), which provides that costs lie as they fall if not allocated in an award, is a new provision in New Zealand and was first enacted in the 1996 Act. No equivalent provision is found in the arbitration legislation of Australia and the United Kingdom. It appears to have been taken by the Law Commission from a Canadian model.[17] Clause 6(1)(b) enacts, in express alternative to cl 6(1)(a), that "[i]n the absence of an award or additional award fixing and allocating the costs and expenses of the arbitration," each party is responsible for its own costs and for an equal share of the fees and expenses of the arbitral tribunal.

[21] It is key to the appellant's argument that, once an award is delivered, the outcome under cl 6(1)(b) attaches immediately, unless costs have been raised directly by the parties either in the submission or in the course of the hearing.

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[17] New Zealand Law Commission *Arbitration* (NZLC R20 1991) at para 436. Clause 6(1)(b) is apparently based on cl 54(5) of the Uniform Law Conference of Canada draft Uniform Arbitration Act 1990 ("the ULCC draft"), since enacted in six Canadian provinces: s 53(5) Arbitration Act 1991 (Alta); s 54(4) Arbitration Act 1991 (Ont); s 54(4) Arbitration Act 1992 (Sask); s 54(5) Arbitration Act 1992 (N.B.); s 53(5) Arbitration Act 1997 (Man); s 56(5) Commercial Arbitration Act 1989 (N.S.).

Because of the automatic and immediate default provided by cl 6(1)(b) it is said that the arbitral panel can be under no duty to exercise the power conferred by cl 6(1)(a). Unless the award is deficient in some other way, the arbitration is at an end under art 32.

[22] I do not think that is the inevitable result of the residual outcome provided for by cl 6(1)(b). Clause 6(1)(a) enables the issue of costs to be raised in the course of the arbitration by any party. It empowers the arbitral tribunal to deal with costs even where they are not an agreed issue. It is accepted that where costs have been raised during the course of the arbitration by a party and the award is silent as to costs, the default position is not immediately reached because there will be an omission from the award, which can be corrected at the option of a party by additional award under art 33. There seems no good reason why the same opportunity for correction should not be available under the legislative scheme at the option of a party if an arbitral tribunal has failed to exercise the power to award costs under cl 6(1)(a). A distinction between the two cases, with the default position reached immediately only where the parties have not themselves distinctly raised costs, would be to re-introduce for those cases the unfairness of the common law which was overcome by the legislation from which cl 6(1)(a) is derived. Such result is avoided if cl 6(1)(a), consistently with authority, imposes an obligation on the arbitral tribunal so that a claim for costs is always presented in an arbitration by operation of statute, unless the parties agree otherwise. On this interpretation, the default result is not reached until the opportunity for correction has passed. The default result provided for under cl 6(1)(b) would not therefore attach until the expiry of 30 days without request from either party to remedy the omission by an additional award. It is wrong to characterise such outcome as depriving cl 6(1)(b) of effect. It takes effect after expiry of the opportunity provided to the parties by the statute to request an additional award. Only thereafter do costs lie where they fall.

[23] McGrath J has pointed out that the Canadian model from which the Law Commission drew cl 6(1)(b) empowered any party to seek a further award as to

costs within 30 days if the arbitral tribunal had not dealt with costs in its award.[18] That result I think is achieved in the New Zealand legislation also, through application of art 33. The obligation imposed upon the arbitral tribunal by cl 6(1)(a) is not lifted if the alternative outcome provided by cl 6(1)(b) is reached on expiry of the 30 day opportunity; it is overtaken. Clause 6(1) describes alternative possible outcomes, but cl 6(1)(b) is residual. Clause 6(1) makes it clear that an award which fails to deal with costs is not incomplete once cl 6(1)(b) attaches. But the existence of cl 6(1)(b) does not absolve the arbitral tribunal of the duty to fix and allocate costs and it does not affect the obligation on the arbitral tribunal to complete the award if required to do so by one of the parties within the time permitted by art 33.

[24] The legislation in effect in New Zealand before enactment of the Arbitration Act 1996 provided a limited opportunity for costs to be raised for the first time after an award. There is nothing in the legislative history of the new Act to indicate any intention to depart from the pre-existing position that costs are always in issue where not excluded by agreement of the parties and that the arbitrator has an obligation to fix and determine them, even if they have not been raised as an issue before publication of an award. There is no indication in the legislative history that cl 6(1)(b) was intended to achieve the radical change of preventing costs being addressed after publication of an award disposing of the substantive issues submitted to determination in the arbitration. Such result would be quite different from the position in jurisdictions with similar legal traditions to ours such as Australia, the United Kingdom and Canada.

[25] Australia maintains an equivalent costs regime to that which applied in New Zealand under the Arbitration Amendment Act 1938. A party can apply for directions on costs within 14 days of receiving an award which does not deal with costs.[19] In Canada, six Provinces have enacted legislation derived from the ULCC's draft Uniform Arbitration Act which was the model for cl 6(1)(b). All provide that costs will lie as they fall if not determined by the arbitral tribunal. But the default position is not reached until the time for requesting an additional award, set at

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[18] Clause 54(4) of the ULCC draft.

[19] Section 27(4) International Arbitration Act 1974 (Cth).

30 days, has expired.[20] In the United Kingdom, the equivalent provision to cl 6(1)(a) is s 61(1) of the Arbitration Act 1996. Section 61(1) empowers the arbitral tribunal to determine costs by award (which includes an additional award or amendment to an award). In default of such determination, any party can apply to the Court under s 63(4) for costs to be determined. The coercive backstop provided by the court in default of determination indicates that the arbitral tribunal is obliged to determine costs in the absence of any agreement to the contrary. (That result also is achieved if s 61(1) is interpreted in accordance with Becker Shillan, as at least one commentator believes is the case.)[21] If that is right, the default determination by the court would not appear to preclude application under s 57 (equivalent to the New Zealand art 33) for an additional award before it is necessary to have recourse to court determination. On that view, the English default provision would be equivalent to the New Zealand default position, as I think it to be. The default of court determination (as in the UK) or no order for costs (as in New Zealand) would attach only when the opportunity for correction provided by s 57 (in the UK) or art 33 (in New Zealand) has passed. But whether or not there is symmetry between the UK and New Zealand in obtaining an additional award notwithstanding the default provided for costs in the absence of a determination (as I am inclined to think is the position), it is clear that in the UK (as well as in Canada and Australia) a party can have costs considered and determined after publication of an award whether or not they have been previously claimed in the course of the arbitration. It is not evident what policy might prompt New Zealand deviation from this course. No such result is compelled by the adoption of the UNCITRAL Model Law. Costs are more conveniently claimed and determined, in arbitration as in litigation, after determination of the substantive dispute between the parties. I am of the view that cl 6 and art 33 provide that opportunity in arbitrations.

Conclusion

[26] The Arbitration Act 1996 puts the question of costs in issue in any arbitration where the parties have not agreed otherwise and requires the arbitral tribunal to

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20 See eg s 53(4) Arbitration Act 1991 (Alta); s 54(3) Arbitration Act 1991 (Ont).

21 Merkin *Arbitration Law* 'The Award of Costs' looseleaf LLP London 1991 at [18.75].

determine them. If it omits to do so, a party can require the arbitral tribunal to deal with costs by additional award under art 33(3). I would dismiss the appeal but set aside the orders made by the Court of Appeal. Since I am of the view that the arbitral tribunal was entitled to make the additional award and that Chambers J was right in the approach he took in the Court of Appeal, I would reinstate the additional award.

KEITH J

[27] Did the arbitrators have the power, once they had made their award fixing the rent, to go on and make a further award, as they did, fixing party and party costs? I agree with the Chief Justice and McGrath J that they did have that power and accordingly I would dismiss the appeal.

[28] Because my reasons differ in emphasis from those given by the Chief Justice and McGrath J I write separately. I gratefully accept their and Tipping J's summaries of the facts, the judgments below and the submissions made to us.

[29] One fact to be emphasised is that the parties, in particular the lessee, the respondent before us, in whose favour the costs order was made, did not at any time ask the arbitrators to make a costs order – not in the lease itself, nor in their arbitration agreement, nor in submissions made to the arbitrators in the course of the process; nor did the arbitrators in their award fixing the rent expressly reserve costs for later determination. On its face it was a final award.

[30] Two arguments, supporting the power to make the additional award, were accepted in the Court of Appeal. Chambers J put the matter in absolute terms:

> [134] … A claim for costs had been presented, from the moment the parties agreed that this would be an arbitration under the Arbitration Act 1996 and did not contract out of cl 6 of the Second Schedule of that Act.

[31] Hammond and Glazebrook JJ did not appear to accept that the arbitrators had a power and a duty to consider costs in all cases:

> [97] In this case, the arbitral tribunal failed even to consider the question of party/party costs. In our view, failure to consider costs *can amount* to an error of law and, *in some circumstances*, whether or not there was an explicit request by counsel to consider costs or to reserve the question of costs. There is no doubt in our view that the costs associated with an arbitration are an integral part of that arbitration. Costs necessarily fall to be dealt with, however, once the arbitral tribunal has come to its decision.
>
> …
>
> [101] … *It is arguable* that costs will, unless explicitly excluded, be a claim presented in the arbitral proceedings and thus, if not dealt with in an award, a proper subject for an additional award under art 33(3) of the First Schedule. (Emphasis added)

[32] The issue is to be determined under the Arbitration Act 1996, which provides a wide ranging, even comprehensive, statement of the law of arbitration, based in large measure on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law and endorsed by the General Assembly of the United Nations in 1985. The Act is essentially that proposed by the Law Commission in its report *Arbitration* (1991). Given both that international source (supplemented by others) and the much wider scope of the new single Act as compared with the patchwork of legislation and common law it replaced, I do not find helpful the earlier British and New Zealand statutes and cases interpreting them. The position taken by the Courts towards the great codifications of commercial law of a century or more ago wisely directs us primarily to the wording of the new measure rather than "… roaming over a vast number of authorities in order to discover what the law was …".[22] It is consistent with that approach and modern approaches to interpretation to have regard as well to the immediate drafting histories of the Model Law and the New Zealand Act. Those histories, as will appear, are instructive in this case.

[33] The Model Law, with minor modifications, applies to all arbitrations held in New Zealand.[23] One basic proposition stated in that law is that an award, subject to certain qualifications, is final and binding.[24]

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22 *Bank of England v Vagliano Brothers* [1891] AC 107, 145 (Lord Herschell); see also Lord Halsbury LC at 120.

23 It is set out, with the modifications, in the First Schedule to the 1996 Act. For the application provision see s 6.

24 Articles 31, 32, 33 and 35.

[34] The qualification invoked by the lessee in this case is that the matter of costs was before the arbitrators, that they did not address it in their first award, and that they were able, indeed obliged, to make a costs order when the lessee requested one. They had that power under art 33(3) of the Model Law as incorporated in the First Schedule to the Act:

> Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within 30 days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within 60 days.

The drafting history of this provision and its predecessor in the UNCITRAL Arbitration Rules of 1976 make it plain that it was designed to avoid the consequence, found generally in national legal systems and in a European Convention of 1966, that an omission made the whole award invalid.[25]

[35] Article 33(3), says the lessee supported by the Court of Appeal, is to be read with cl 6 of the Second Schedule. That schedule applies to domestic arbitration, such as the present, unless the parties agree otherwise which in this case they did not. Clause 6(1) states the basic power of the arbitrators in respect of the costs and expenses of an arbitration:

> (1) Unless the parties agree otherwise,—
>
> > (a) The costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal, and any other expenses related to the arbitration shall be as fixed and allocated by the arbitral tribunal in its award under article 31 of the Schedule 1, or any additional award under article 33(3) of the Schedule 1; or
> >
> > (b) In the absence of an award or additional award fixing and allocating the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.

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[25] The parallel provision of the 1976 Rules (designed for optional use in *ad hoc* arbitration) is art 37. For its history see the 1974 "Report of the Secretary-General: preliminary draft set of Arbitration Rules" in (1975) 6 *UNCITRAL Yearbook* 163, 179, draft art 30 and commentary; for the views expressed in 1975 in the Commission see 43, paras 210-212; the 1975 "Report of the Secretary-General" (1976) 7 *UNCITRAL Yearbook* 157, 166 and 180-181, draft art 32 and commentary; and the 1976 Report of the Commission 9, 80 and 26-27, art 37. The drafters of art 33 of the Model Law essentially reproduced art 37.

[36] The lease did make provision for the fees and expenses of the tribunal and the arbitrators acted under that provision in the first award. As already noted, it made no provision in respect of the parties' costs.

[37] Clause 6(2) deals with the *Calderbank* situation and was relevant in this case since the lessee had made a settlement offer:

> (2) Unless the parties agree otherwise, the parties shall be taken as having agreed that,—
>
> > (a) If a party makes an offer to another party to settle the dispute or part of the dispute and the offer is not accepted and the award of the arbitral tribunal is no more favourable to the other party than was the offer, the arbitral tribunal, in fixing and allocating the costs and expenses of the arbitration, may take the fact of the offer into account in awarding costs and expenses in respect of the period from the making of the offer to the making of the award; and
> >
> > (b) The fact that an offer to settle has been made shall not be communicated to the arbitral tribunal until it has made a final determination of all aspects of the dispute other than the fixing and allocation of costs and expenses.

[38] In terms of this provision the arbitrators were informed of the lessee's offer before they had made their costs award. They said this about their power to make a costs order after they had made the rent award:

> On the matter of the tribunal's ability to hear an application for costs, we consider it is implicit in the award and clause 6 of the Arbitration Act 1996 that the issue of costs has been reserved and that an additional award can be made under article 33(3) of [the First Schedule to] the Arbitration Act 1996.

[39] Under subcl (3) of cl 6 parties may apply to the High Court to vary the amount or the allocation of costs and expenses fixed in an award on the ground of unreasonableness.

[40] The Model Law contains no provision on costs; a working group responsible for preparing parts of it recorded that "[t]here was wide support for the view that questions concerning the fees and costs of arbitration were not an appropriate matter to be dealt with in the model law." States were left free to provide for court control over fees and costs, for example by allowing readjustment of utterly unreasonable

fees.[26] That freedom means that the limits placed by the Model Law on court intervention, a matter emphasised by the purpose provision of s 5(d) of the Act, does not apply to the matter of costs. The statement of the limit appears in art 5:

> 5. **Extent of court intervention** – *In matters governed by this Schedule*, no court shall intervene except where so provided in this Schedule. (Emphasis added)

[41] The Analytical Commentary to the draft Model Law (to which s 3 of the Act facilitates reference) makes it explicit that the provision does not exclude court intervention in any matter not regulated by the law. Among the examples it lists are "the fees and other costs".[27]

[42] That is to say, the matter of costs is essentially dealt with under particular New Zealand provisions distinct from the uniform provisions of the Model Law which have now become the law of many major trading nations. It also follows that any interpretation we may give to the particular provisions appears to have no broader significance for the consistent operation of the Model Law, a matter emphasised by s 5(b) of the Act.

[43] I return to the wording of art 33(3) and in particular to the expression "claims presented in the arbitral proceedings but omitted from the award". Was the matter of costs a "claim presented in the … proceedings" and accordingly within the scope of the power conferred on the arbitrators?

[44] The word "claim' is used in at least two senses in the Model Law as it is incorporated into the law of New Zealand. In art 23, headed Statements of claim and defence, it is confined to the claimant's case and then just to one aspect of it:

> **…** the claimant shall state the facts supporting the claim, the points at issue and the relief or remedy sought … .

[45] The respondent is to state "the defence" in respect of those particulars. Either party may amend or supplement the claim or defence during the course of the

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[26] (1982) 13 *UNCITRAL Yearbook* 300, para 99 of the "Report of the Working Group on International Contract Practices".

[27] (1985) 16 *UNCITRAL Yearbook* 112 para 5, reproduced in Law Commission, *Arbitration* para 322.

proceedings.[28] By contrast, in art 33(3), certainly when it is read with cl 6(1)(b) of the Second Schedule, "claims" has a wider meaning; it includes a claim by the respondent and the applicant in respect of costs and, for the applicant, possibly other matters as well, such as interest on the award, a matter provided for in art 31(5) of the First Schedule (a provision added to the Model Law by the New Zealand Statute) and s 12 of the Act.[29] The parties are of course in agreement that costs could be a "claim" in terms of art 33(3) when read with cl 6(1)(a) – at least when one or other or both of them have put them in issue. Matters of remedy and relief are part of "claims" when it has that wider meaning.

[46] Are costs part of the claims under art 33(3) when the parties have not put them in issue? My affirmative answer building on that wider reading of art 33(3) next turns to s 12 of the Act. Mr Hodder for the appellant lessor mentioned that provision at the outset of his oral argument along with a related passage from the Law Commission report which proposed the draft statute which, as already mentioned, became the 1996 Act with some changes. Section 12 provides:

> (1) An arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that an arbitral tribunal—
>
> > (a) May award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court:
> >
> > (b) May award interest on the whole or any part of any sum which—
> >
> > > (i) Is awarded to any party, for the whole or any part of the period up to the date of the award; or
> > >
> > > (ii) Is in issue in the arbitral proceedings but is paid before the date of the award, for the whole or any part of the period up to the date of payment.
>
> (2) Nothing in this section affects the application of section 10 or article 34(2)(b) or article 36(1)(b) of the Schedule 1.

[47] The provisions referred to in subs (2) restate the public policy and arbitrability limits on arbitration.

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[28] For similarly confined use of "claim" and "defence" see articles 25(a) and (b) and 32(2)(a).

[29] For the Law Commission's reasons see *Arbitration* paras 260 and 389-390.

[48] Article 28 of the Model Law directs the arbitrators on the rules of law applicable to the substance of the dispute, but the Law Commission, in the passage recalled by Mr Hodder, records "consistent suggestions" in the submissions made to it that at least for domestic arbitrators there was a need for a greater elaboration of the powers of arbitral tribunals.[30] It makes a related remark in its commentary on art 28[31] and makes this comment on art 31:

> 389 The British Columbia legislation adopting the Model Law has provisions dealing with the arbitral tribunal's power to award interest and costs. *We believe that, if not the subject of agreement between the parties, interest and costs will be issues in the dispute and thus properly dealt with in an award (or an additional award: see article 33(3)).* (Emphasis added)

[49] The Commission's major relevant comment is on its proposed s 10 which with a significant change, mentioned later, became s 12:

> 252 The spelling out of the powers of an arbitrator in s 10 reflects the reservations of the Law Commission about relying entirely on the proposition that, where New Zealand law is applicable to the substance of a dispute, it is an implied term of the arbitration agreement that the
>
> > arbitrator is to have authority to give the claimant such relief as would be available to him in a court of law having jurisdiction with respect to the subject matter.
>
> That approach was accepted by the majority of the High Court of Australia, in *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206, 246, the majority relying on a passage in *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240, CA, and certain United States decisions.

[50] The Commission then mentioned the doubts that had been expressed about that approach and continued: [32]

> 255 To avoid any possible doubt about the powers of the arbitral tribunal where the parties have, in general terms, agreed to submit disputes between them to arbitration, the Law Commission proposes the inclusion of a specific provision in the draft Act. Rather than list specific implied powers of an arbitral tribunal – an approach which is problematic in ensuring that the list is complete, both at the time of its enactment and as later statutes bearing on the powers of the High Court are enacted – the Commission has preferred a

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30 *Arbitration*, para 84.

31 *Arbitration*, para 382.

32 The Commission, in addition to conferring the general remedial power, did of course list some specific powers (which might otherwise have been implied), including the power to award interest in article 31(5) and the costs and other powers in schedule 2.

> more general statement on the lines of the proposition quoted in para 252 above.

[51] The Law Commission plainly considered that costs fell within "any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court". No one could doubt that.[33]

[52] To return to the words of s 12, the "arbitration agreement … is deemed to provide that an arbitral tribunal" may order costs, unless the parties have agreed otherwise. They have not. After the initial award in the present case, that matter remained before the arbitrators within the terms of art 33(3) when read with s 12 as well as and with the costs power expressly conferred by cl 6(1)(a). They did not err in exercising that power in the present case. The force of the argument based on s 12 is strengthened by a difference between the Law Commission's proposal and s 12 as enacted. The Law Commission's draft began quite differently. It read:

> (1) Without prejudice to the application of article 28 of Schedule 1, an arbitral tribunal, in deciding the dispute that is the subject of the arbitral proceedings**,**
>
> (a) …

(The remainder of the draft was enacted in s 12.)

[53] The significant change is of course that the original proposal did not deem the power to be part of the arbitration agreement. But under s 12 as actually enacted the arbitrators in this case had costs before them as part of the arbitration agreement. Mr Hodder, for the lessor appellant, submits that this interpretation in effect reads cl 6(1)(b) out of the law. For the reasons given by the Chief Justice and McGrath J I do not agree: it will operate if the parties do not seek a costs order or if the arbitrators, when requested to make an order, decide not to depart from that default position.

[54] It is for the foregoing reasons that I conclude that the arbitrators had the

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[33] See eg s 51G of the Judicature Act 1908 and RR 46-53 of the High Court Rules. For the Commission, costs were in issue even if not expressly claimed.

power to make an additional award relating to the parties' costs. Although the issue is not technically before us I would also say that arbitrators are obliged to exercise that power if the parties or one of them asks for an order. Prudence and the terms of cl 6(2) would indicate that they should reserve the question until after they give their substantive decision, in the absence of course of any agreement to the contrary by the parties.

BLANCHARD AND TIPPING JJ

(Given by Tipping J)

Introduction

[55] This appeal concerns costs as between party and party in the context of a rental arbitration. McGrath J has fully described the relevant background in the reasons he will give. We will therefore confine ourselves to a relatively brief sketch of the circumstances giving rise to the appeal. The appellant, Casata Limited, is the lessor and the respondent, General Distributors Limited, is the ground lessee of premises in Johnsonville. The lease, executed on 1 May 1996, created a 20 year term commencing on 17 January 1993. The parties were unable to settle the rental for the five year period from 17 January 1998 to 16 January 2003. The matter was submitted to arbitration pursuant to the provisions of cl 2.3 of the lease. The task of the arbitrators was to determine the current market rent but on the basis of a ratchet clause providing that the rent for the period in question was not to be less than it had been for the previous period. Clause 2.3.6 of the lease, which is the only clause dealing with the costs and expenses of the arbitration, provides:

> 2.3.6 All costs of the determination by the valuers or the umpire of the current market rent shall be borne equally by the Lessor and the Lessee unless it shall be decided by the valuers or the umpire that because of some impropriety or lack of co-operation or unreasonablenss on the part of one of the parties that such party shall bear the whole or some fraction of the costs in excess of one half.

[56] In a letter from the parties through their solicitors to the arbitrators dated 13 May 2002, the parties informed the arbitrators that they were agreed that the arbitration was to be conducted in accordance with the Arbitration Act 1996. The arbitrators published their award on 11 September 2002. We will call this the first award. In it they said nothing about costs as between party and party. The lessee was the successful party in the arbitration. The rent was fixed at less than it had been in the previous period and so the ratchet clause applied.

[57] Following the publication of the first award the lessee requested the arbitrators to deal with the subject of party and party costs. They did so in an additional award of 28 April 2003 in which they took the rather dubious view that they had reserved costs in their first award. If that is what they had done, their first award would not have been final and they would not have needed to invoke art 33(3),[34] on the basis of there being an omission from the first award. The additional award, which we will call the second award, directed the lessor to pay to the lessee for its costs of the proceedings the sum of $95,000.00 (plus GST). The lessor contended that the arbitrators had no power to make the second award and that there had been no reviewable omission in respect of costs from the first award. Ellen France J accepted those propositions in the High Court. The Court of Appeal took a different view[35] and from that determination the lessor was given leave to appeal to this Court.[36]

[58] The essence of the lessor's argument, as advanced by Mr Hodder, was that, because the subject of costs as between party and party had not been put in issue by the submission to arbitration, nor in any submission made during the course of the arbitral proceedings, the arbitrators made no reviewable error when they did not mention the matter in their first award. Furthermore, there was in these circumstances no omission from that award justifying the making of the second award as an additional award pursuant to art 33.

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34 of the Articles, set out in the First Schedule to the Act and to be discussed in more detail below.
35 [2005] 3 NZLR 156.
36 [2005] NZSC 43.

[59] The essence of Mr Raymond's submission for the lessee was that the arbitrators had a duty to reserve costs and their failure to do so constituted reviewable error in the first award and justified the making of the second award. The question to be resolved relates therefore to the powers and duties of an arbitral tribunal when the question of party and party costs is not explicitly put in issue prior to the publication of the award.

[60] In order to consider the competing arguments, it is necessary to examine a number of aspects of the Act against the background of the fact that cl 2.3.6 of the lease did not refer the subject of party and party costs to the determination of the arbitrators, nor was there any submission of that issue to the arbitral tribunal during the course of the arbitral proceedings. It is convenient to refer to all relevant aspects of the Act at this point and then to relate them to the issues and the rival contentions of the parties.

The legislation

[61] Section 2 of the Act defines the expression "arbitration agreement" as meaning 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. The present significance of this definition lies in its reference to "all or certain disputes". The jurisdiction of the arbitrators derives from the arbitration agreement read with all relevant provisions of the Act. Arbitration is a consensual process by means of which existing or future disputes between the parties are resolved by the appointed arbitrators.

[62] It is of the essence of the contractual underpinning of arbitration that the arbitral tribunal has the power to resolve only those disputes which the parties have submitted to it for determination. This approach is reinforced by art 34 of the articles earlier mentioned. These articles, as set out in the First Schedule, apply to all arbitrations of the present kind, as is clear from s 6(1) of the Act. Article 34(2) provides that an arbitral award may be set aside by the High Court only in certain

limited circumstances. One of these (paragraph (a)(iii)) is when the party making the application furnishes proof that:

> The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside[.]

[63] The arbitral process as envisaged by the Act is therefore concerned with, and confined to, disputes which fall within the terms or scope of the submission to arbitration. The submission to arbitration as referred to in the rules is broadly the same concept as that comprehended by the defined term "arbitration agreement".

[64] It is appropriate next to set out articles 31, 32 and 33:

> **31 Form and contents of award—**
>
> (1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.
>
> (2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.
>
> (3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.
>
> (4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) shall be delivered to each party.
>
> (5) Unless the arbitration agreement otherwise provides, or the award otherwise directs, a sum directed to be paid by an award shall carry interest as from the date of the award and at the same rate as a judgment debt.
>
> **32 Termination of proceedings—**
>
> (1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2).
>
> (2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when—
>
> > (a) The claimant withdraws the claim, unless the respondent objects thereto and the arbitral tribunal recognises a legitimate

interest on the respondent's part in obtaining a final settlement of the dispute:

(b) The parties agree on the termination of the proceedings:

(c) The arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

(4) Unless otherwise agreed by the parties, the death of a party does not terminate the arbitral proceedings or the authority of the arbitral tribunal.

(5) Paragraph (4) does not affect any rule of law or enactment under which the death of a person extinguishes a cause of action.

33 Correction and interpretation of award; additional award—

(1) Within 30 days of receipt of the award, unless another period of time has been agreed upon by the parties,—

(a) A party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature:

(b) If so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) on its own initiative within 30 days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within 30 days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within 60 days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation, or an additional award under paragraphs (1) or (3).

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

[65] The word "award" in art 31 includes, by definition, an interim, interlocutory or partial award. The first award published by the arbitrators in the present case did not purport to be anything other than a final award. In other words, there was no

suggestion that it was of an interim, interlocutory or partial nature. The first award was both in form and in substance a final award within the meaning of art 32. It therefore terminated the arbitral proceedings. This means that the arbitrators could not themselves re-open the proceedings unless art 33(3) applied and they were thereby empowered to deliver what that article calls an additional award. Whether art 33(3) applied depended on whether there was a claim presented in the arbitral proceedings which was omitted from the first award. In the present case the issue is whether the lessee presented a claim for party and party costs before the arbitral proceedings terminated. This question is essentially the same as the question whether the issue of party and party costs was properly made a matter of dispute between the parties prior to the publication of the first award.

[66] We move now to examine the rules set out in cl 6 of the Second Schedule to the Act. They deal with the subject of the costs and expenses of an arbitration and are applicable by dint of s 6(2)(b). Clause 6 provides:

> **6 Costs and expenses of an arbitration—**
>
> (1) Unless the parties agree otherwise,—
>
> > (a) The costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal, and any other expenses related to the arbitration shall be as fixed and allocated by the arbitral tribunal in its award under article 31 of the Schedule 1, or any additional award under article 33(3) of the Schedule 1; or
> >
> > (b) In the absence of an award or additional award fixing and allocating the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.
>
> (2) Unless the parties agree otherwise, the parties shall be taken as having agreed that,—
>
> > (a) If a party makes an offer to another party to settle the dispute or part of the dispute and the offer is not accepted and the award of the arbitral tribunal is no more favourable to the other party than was the offer, the arbitral tribunal, in fixing and allocating the costs and expenses of the arbitration, may take the fact of the offer into account in awarding costs and expenses in respect of the period from the making of the offer to the making of the award; and
> >
> > (b) The fact that an offer to settle has been made shall not be communicated to the arbitral tribunal until it has made a final

determination of all aspects of the dispute other than the fixing and allocation of costs and expenses.

(3) Where an award or additional award made by an arbitral tribunal fixes or allocates the costs and expenses of the arbitration, or both, the High Court may, on the application of a party, if satisfied that the amount or the allocation of those costs and expenses is unreasonable in all the circumstances, make an order varying their amount or allocation, or both. The arbitral tribunal is entitled to appear and be heard on any application under this subclause.

(4) Where—

(a) An arbitral tribunal refuses to deliver its award before the payment of its fees and expenses; and

(b) An application has been made under subclause (3),—

the High Court may order the arbitral tribunal to release the award on such conditions as the Court sees fit.

(5) An application may not be made under subclause (3) after 3 months have elapsed from the date on which the party making the application received any award or additional award fixing and allocating the costs and expenses of the arbitration.

(6) There shall be no appeal from any decision of the High Court under this clause.

Discussion

[67] It is cl 6(1) which is of principal relevance, albeit cl 6(2) does have significance as will become apparent. Clause 6(1), like cl 6(2), applies unless the parties agree otherwise. It is common ground that the parties did not agree otherwise. Counsel accepted that cl 2.3.6 of the lease did not constitute such an agreement, it being silent on the subject of party and party costs. It is of course that very silence which prevents the clause from being regarded as a submission of any dispute on that subject to the arbitrators.

[68] In a case where there is no contrary agreement, cl 6(1)(a) states that the costs and expenses of an arbitration, as defined, are to be as fixed and allocated by the arbitral tribunal. It is clear from the words "as fixed and allocated" that cl 6(1)(a) gives the arbitral tribunal in general terms a power to fix and allocate costs. The essential issues are whether that power was exercisable in present circumstances and whether there was a duty resting on the arbitrators to exercise the power. If so, they

could properly do so only by reserving costs in the first award. Whether the power was exercisable and a duty to exercise it arose depends on whether the subject of party and party costs was a matter of dispute between the parties and that dispute had been properly submitted to the adjudication of the arbitrators.

[69] We cannot accept Mr Raymond's contention that the subject of costs is always a matter of dispute and submission. We accept Mr Hodder's argument that if that were so the arbitral tribunal would always have a duty specifically to consider that subject and a failure to do so would always be an omission which would open the door to the additional award jurisdiction under art 33. Such a conclusion would be inconsistent with the default regime set out in cl 6(1)(b). That clause envisages the legitimate absence of an award (or an additional award) fixing and allocating the costs and expenses of the arbitration. The terms of the clause contemplate that the arbitrators may have no duty to make an award or additional award on the subject of party and party costs. If so, the default provisions will apply, leaving the parties bearing their own costs.

[70] While cl 6(1) envisages that the subject of costs may be dealt with in an additional award, that can only happen if the criteria for the making of an additional award, set out in art 33, are fulfilled. Unless they are fulfilled, the power to fix costs is confined to the award made under art 31 which, as noted earlier, may be interim, interlocutory or partial, as well as final. Acceptance of Mr Raymond's argument would mean that there could never be a legitimate "absence", as cl 6(1)(b) puts it, from a final award under art 31 of an award fixing and allocating party and party costs. Such a conclusion cannot be reconciled with the way cl 6(1)(b) is designed to operate.

[71] Clause 6(1) does not, in our view, empower or oblige the arbitral tribunal to fix and allocate party and party costs when there is no submission of that subject or any aspect of it to the determination of the arbitrators. To hold otherwise would render cl 6(1)(b) redundant. It would also cut across the whole scheme of the Act which is to require the parties to submit their dispute or disputes, actual or potential, to the arbitral process. The arbitral tribunal is correspondingly confined to disputes properly submitted. In this case the parties did not at any stage prior to the final

award, either orally or in writing, submit the subject of party and party costs to the arbitral tribunal for its determination. Hence the fact that the arbitrators did not deal with that subject in the first award did not constitute an error of law or an omission within the meaning of art 33. The subject of party and party costs was not a claim presented in the arbitral proceedings. There was therefore no basis in law for the High Court to review the first award in relation to any question of party and party costs, and no foundation in law for the making of the second award.

The views in the Court of Appeal

[72] We will now say why we cannot accept the contrary conclusions reached by the Judges of the Court of Appeal. First, we do not consider the cases on which Glazebrook and Hammond JJ relied are of assistance as they do not deal with circumstances having sufficient similarity to or analogy with the statutory regime to be found in the Act. Second, Glazebrook and Hammond JJ expressed the view[37] that where, as here, a settlement offer had been made there was "a major practical difficulty in requiring a party to ask the arbitrators, before the award is made, to reserve costs." The Judges continued:

> It would be impossible to tell the arbitrators why that submission was being made without breaching the obligation under cl 6(2)(b) that the tribunal must not be told that an offer to settle has been made until all other matters are determined. Asking the tribunal to reserve costs would thus not have been an appropriate course for the lessee to take in this case.

Their Honours then said they were "therefore" of the view that the tribunal's failure to consider party/party costs in its award of 11 September 2002 amounted to an error of law, justifying the remission back to the tribunal of that issue.

[73] We cannot accept this reasoning which was based on the terms of cl 6(2)(b). In our view a request by one or both parties to reserve costs without further elaboration would not infringe cl 6(2)(b). It is quite normal for costs to be reserved until the outcome of an arbitration is known, so that costs can be addressed with

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37 At [98].

knowledge of the result. A request for reservation of costs does not necessarily signal the existence of an offer to settle. Even if it did, the arbitrators would have no idea what the offer was, and, in any event, it would be a very unusual rental arbitration where no pre-arbitration offer had been made. Indeed in this case the provisions of the lease dealing with rental on renewals expressly contemplated, as is commonplace, the lessor specifying its proposed rent and, by implication, the lessee making a counter-proposal.

[74] We respectfully consider that the approach which Glazebrook and Hammond JJ took to the ultimate issues was substantially influenced by their view that there were difficulties in a request to reserve costs. The elimination of those difficulties removes the need to strain the statutory regime so as to overcome them. The arbitral tribunal did not err in law by failing to address the question of party and party costs when it had not been asked to do so.

[75] Chambers J was of the view that a claim for costs had been presented from the moment the parties agreed that theirs would be an arbitration under the Act and they did not contract out of cl 6 in the Second Schedule. In his view the second award was valid. It is implicit in what we have already written that we cannot accept that approach either. The simple fact that the Act applied does not mean that costs are ipso facto submitted to the determination of the arbitral tribunal. That, as we have said, would leave no room for the operation of cl 6(1)(b). Nor would it be consistent with the fundamental premise on which the Act is drafted, that the parties must submit to the tribunal all matters they wish the tribunal to deal with. The concept of a dispute being implicitly submitted is not consistent with the way the legislation is framed. In saying this we must not be thought to be suggesting a narrow approach to the compass of those disputes that are submitted.

The contrary views in this Court

[76] We have had the benefit of reading in advance the reasons of the Chief Justice, Keith and McGrath JJ. We find ourselves unable to accept them.

Their view, albeit for different reasons,[38] is that the regime established by the *Becker Shillan* case[39] has implicitly been carried forward into or implicitly still applies to the statutory environment created by the Arbitration Act 1996. *Becker Shillan* decided that in the statutory environment then existing the arbitral tribunal was obliged to exercise the discretion vested in it to deal with costs. In other words, there was a duty to exercise the power, irrespective of whether the tribunal had expressly been asked to do so; unless of course the parties were agreed otherwise.

[77] The key difference between the *Becker Shillan* environment and that prevailing under the 1996 Act is the absence of any default provision from the former. By default provision we mean a statutory direction as to what should happen if the arbitral tribunal legitimately omits to deal with the question of costs. That difference still existed after the coming into force of s 14(2) of the Amendment Act of 1938. The continuation of the *Becker Shillan* approach after that time does not, in our view, carry any weight in assessing the wholly different regime created by the 1996 Act. A perusal of the decision of Kerr J in *Mavani v Ralli Bros. Ltd*[40] does not persuade us otherwise.

[78] In the *Becker Shillan* situation, the arbitral tribunal errs in law by failing to exercise its discretion, even if not asked to do so. In the situation which prevails under the 1996 Act, the costs regime expressly contemplates and provides for situations when the arbitral tribunal may lawfully have omitted to deal with party and party costs. If that omission (or absence, as cl 6(1)(b) puts it) is unlawful, the remedy lies not in the default provision but elsewhere. The most obvious lawful omission by an arbitral tribunal to deal with costs occurs when the tribunal has no power to do so.

[79] With respect to the reasoning of the other members of the Court and in particular that of McGrath J, it seems to us that the 1996 regime is indeed couched on the basis of three possibilities; but they should be viewed in the following way.

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38 With respect to Keith J, we regard his reliance on s 12 of the Act as problematical. That section simply gives remedial powers to the arbitral tribunal in relation to issues which properly fall within its jurisdiction. The section does not confer jurisdiction, which must be found elsewhere. Nor does it create any duty to exercise the remedial powers conferred.

39 [1921] 1 KB 391.

40 [1973] 1 WLR 468, 471.

The first possibility is that the parties have dealt with costs by agreement, in which case the statutory provisions do not apply. The second possibility is that there is no such agreement and the parties, or at least one of them, asks the tribunal to deal with costs. A failure by the tribunal to do so is an omission for the purposes of art 33, and the tribunal can then make what the article calls an additional award. The third possibility is that the arbitral tribunal is justified in not dealing with costs because the parties have not asked it to do so. In that event, the default position provided for in cl 6(1)(b) applies. An analysis which has the tribunal empowered and under a duty to deal with costs, even if not asked to do so, leaves no room for the default position to operate in the mandatory way contemplated by cl 6(1)(b), and cannot therefore be correct.

[80] This approach is consistent with current English legislation and with the UNCITRAL Model Law on International Commercial Arbitration. Section 57(3)(b) of the Arbitration Act 1996 (UK) gives an arbitral tribunal power to make an additional award "in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award". It is self-evident from this formulation that costs may or may not be the subject of an express claim and it is only if they are, and have been overlooked, that, under the United Kingdom statute, there is power to make an additional award. Curiously the earlier common law position evidenced by *Becker Shillan* appears to have been partially retained in s 63(4) of the English Act, which does not sit easily with s 57.

[81] The Model Law was adopted by UNCITRAL on 21 June 1985 and by the General Assembly by Resolution 40/72 of 11 December 1985. It is now reflected in Schedule 1 to the New Zealand Arbitration Act 1996. The Model Law was based on the previously existing UNICTRAL arbitration rules 1976. A report of the Secretary-General, which gave an analytical commentary on a draft text of the Model Law, observed that art 33 was designed to give the tribunal power to make an additional award "as to any claim presented in the arbitral proceedings but omitted from the award (eg claimed interest was erroneously not awarded)".

[82] By clear analogy the intention as to costs must have been the same, ie there was to be power to make an additional award as to costs claimed but erroneously not

awarded. The necessary implication must be that, if costs are not claimed, they cannot be the subject of an additional award under the Model Law. A further necessary implication is that costs are not deemed always to be claimed. It was a deliberate policy choice not to make costs a mandatory part of the tribunal's role. Hence the interpretation which we would, in any event, have been minded to give to cl 6 of the Second Schedule to the Arbitration Act 1996 is fully consistent with international practice.

[83] We add that in Australia, in contrast to the position in the United Kingdom, s 27 of the International Arbitration Act 1974 (Cth) provides that, unless otherwise agreed, costs are in the discretion of the arbitral tribunal; and, if an award makes no provision for costs, a party may apply for directions on costs within 14 days after receiving the award. This is the same position as that adopted in s 14 of the Arbitration Amendment Act 1938 (NZ) and represents essentially the previous common law approach in terms of *Becker Shillan*. As we have indicated, we view the relevant provisions of our 1996 Act as representing a materially different regime. The position in Canada under their Uniform Arbitration Act, drafted in 1991 by the Uniform Law Conference of Canada, appears to be the same as that in Australia.

Conclusion

[84] It is clear in the present case that the parties expressly submitted a potential dispute about an aspect of costs to the arbitral tribunal by means of cl 2.3.6. The subject of party and party costs was not, as the parties acknowledged, within that submission. Indeed the express submission of one aspect of costs and not another tends to suggest that there was no wish that the arbitrators deal with that other aspect. It would nevertheless have been open to either party to submit that aspect to the determination of the arbitral tribunal at any time before publication of the first award.

[85] A request for the reservation of party and party costs would, in the circumstances, have been a sufficient submission. But nothing was said, either orally or in writing, about party and party costs until after the first award. At that point the arbitral proceedings had terminated in terms of art 32(1). There was no

basis for the operation of art 33. In the simplest of terms, this is because there was no claim presented as to costs. The arbitral tribunal had no duty, indeed no power to deal with costs in the absence of a claim presented. We cannot agree that under the regime established by the 1996 Act a claim for costs is deemed always to be presented. That would be the only way in which, in this case, art 33 could be satisfied. But if a claim for costs was deemed always to be presented, there would always be a duty on the arbitral tribunal expressly to deal with costs in the absence of agreement to the contrary.

[86] Clause 6(1)(b) must have been framed on the basis that there will be circumstances in which it will operate. A construction which makes it mandatory for the arbitral tribunal to deal expressly with costs, even if no claim for them is presented, and even simply by stating expressly that they should lie where they fall, leaves no circumstance in which the default regime created by cl 6(1)(b) can operate lawfully (ie without capacity for challenge).

[87] This is the point which the reasoning employed by the other members of the Court does not and cannot overcome. Their conclusion, for differing reasons, that there is always a duty on the arbitral tribunal to deal expressly with costs, involves reading into the legislation, contrary to its overall scheme, something which is neither expressly there nor which must be read in by clear and necessary implication.

[88] The phrase "shall be as fixed" in cl 6(1)(a) cannot properly, in its context, be read as "shall be fixed". Read consistently with cl 6(1)(b) the words used recognise that there can be circumstances in which the tribunal will appropriately not fix costs. This drafting, albeit awkward, reflects the power to fix costs if a claim for them is presented, but does not create any universal duty extending to circumstances where such a claim is not presented.

[89] We should add, however, that if we had been persuaded that a claim for costs should be deemed always to be presented for the purposes of art 33(3), we would have agreed that a failure by the arbitral tribunal to deal with costs would represent an omission which could be dealt with under art 33. But, for the reasons already given, we are of the view that art 33 cannot be invoked in this case. The first award

cannot be challenged as to costs, and the second (additional) award was not validly made. On that basis we would have allowed the appeal.

McGRATH J

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Background

[90] The appellant is lessor and the respondent lessee under a ground lease of land at Johnsonville on which the lessee has operated a supermarket since 1983. The present lease is for a term of twenty years from 17 January 1993. It has rights of renewal for further terms of twenty years, at the option of the lessee, which provide for a total potential period of occupancy of 100 years.

[91] The rental for the first five years was agreed by the parties and set at $397,624 p.a. (plus GST). The lease provided for reviews of rent at five yearly intervals. A ratchet clause applies in relation to the reviewed rent during the initial twenty year term of the lease.

[92] The parties were unable to reach agreement on the current market rent payable for the five year period commencing on 17 January 1998. As provided for in the lease, they submitted their dispute to arbitration, agreeing that the arbitration should be conducted under the Arbitration Act 1996 ("the 1996 Act").

[93] Prior to the hearing before the arbitral tribunal the lessee had offered to settle the dispute by paying a rental fixed at 7% of the agreed land value for the second

five year period. The offer was rejected by the lessor. At the hearing the lessor sought a rental fixed at 9% and the lessee one fixed at 6.5%.

[94] In an award made on 11 September 2002 (**"**the first award**"**) the arbitrators determined that the current market rental payable by the lessee for the second five year period of the lease term should be $352,250 p.a. (plus GST) representing 6.9% of the land value. As that figure was less than the contractually agreed rental payable for the first five year period, the ratchet clause in the lease applied so that the rental payable under the lease continued to be $397,624 p.a.

[95] Neither party made submissions concerning costs to the arbitral tribunal at its hearing. Nor had they notified an intention to claim costs. In its first award, in relation to costs, the tribunal referred to cl 2.3.6 of the lease which provides:

> All costs of the determination by the valuers or the umpire of the current market rent shall be borne equally by the Lessor and the Lessee unless it shall be decided by the valuers or the umpire that because of some impropriety or lack of co-operation or unreasonableness on the part of one of the parties that such party shall bear the whole or some fraction of the costs in excess of one half.

The arbitrators then said:

> From our observation of the conduct of the parties prior to and at the hearing, we could not discern any degree of *impropriety or lack of co-operation or unreasonableness*. Neither party has made submissions in this respect and we take this as both parties being satisfied at the reasonableness of the costs of the determination being borne equally. (emphasis original)

They then set the costs of the arbitrators and umpire at $82,632 (plus GST) and determined that the parties should each pay one half of those costs.

[96] The lessee applied to the arbitral tribunal for its costs, seeking total reimbursement of its legal and other expenses totalling $245,533.81 (inclusive of GST). The tribunal considered written submissions from both parties. The lessor submitted that the arbitrators at this point were *functus officio* and had no power to make a further award concerning costs of the parties. At this point the tribunal was informed of the earlier offer by the lessee to settle the dispute. In its second award, issued on 28 April 2003, the arbitrators took the view that they had earlier implicitly

reserved the question of party costs and were able to deal with them by making a further additional award under art 33(3) of the First Schedule to the 1996 Act. They determined that the lessor should pay $95,000 (plus GST) towards the lessee's fees and expenses in the arbitration and 75% of the fees and expenses of the tribunal in relation to the second award. They set these at a total sum of $18,675 (inclusive of GST).

High Court judgment

[97] The lessee appealed to the High Court, and the lessor cross-appealed. I can confine my discussion of the High Court judgment to what it decided on costs. The lessor challenged the second award and sought to have it set aside for lack of jurisdiction, or alternatively varied. In a judgment delivered on 23 December 2003 Ellen France J held that in dealing with costs the arbitrators had not reserved the question of party costs in the first award and that there was no basis, under the 1996 Act or the parties' arbitration agreement, for the arbitrators to make a second award. While cl 6(2)(b) of the Second Schedule to the 1996 Act had prevented the parties from informing the arbitrators of the earlier settlement offer, the Judge concluded that it had not prevented the parties from telling the arbitrators of the need to deal with costs at a later stage. In those circumstances there was no error in the first award, nor any outstanding claim which, not having been dealt with, would allow an additional award to be made under either art 33(1)(a) or art 33(3) of the First Schedule. It followed that the arbitrators had no jurisdiction to make the second award concerning costs, which the High Court accordingly set aside.

[98] The Judge then considered the lessee's appeal against the first award. She decided that the question of costs under that award should be remitted to the arbitrators, for their further consideration, along with the question of the parties' costs on the second award.

[99] The lessor then applied for recall of the High Court judgment, arguing that the Judge's decision to remit the first award to the arbitral tribunal should be revisited. Counsel submitted that the Judge, instead of remitting the question of costs back to the arbitrators, should simply have applied cl 6(1)(b) of the

Second Schedule which is a default provision in circumstances where there has been no award of costs. In confirming her earlier decision, Ellen France J said that if, as she considered, cl 2.3.6 of the lease covered all the costs, rather than just those of the arbitral tribunal, the arbitrators had failed to appreciate that was so and had proceeded in error. The error provided a proper basis for the Court to remit the question of costs for fresh consideration by the arbitrators, in light of the High Court judgment. That remained her view and the Judge therefore declined the lessor's application for recall.

Court of Appeal judgment

[100] The lessor appealed, with leave, against the High Court's judgment to the Court of Appeal. Again I confine my discussion of the Court of Appeal judgment[41] to what it decided concerning costs. The issue before the Court concerned whether, as the High Court had decided, the arbitrators had erred in making the first award and, if not, whether they were thereafter *functus officio* so that they had no jurisdiction to make the second award concerning costs.

[101] At the hearing of the appeal in the Court of Appeal both parties accepted that cl 2.3.6 of the lease did not cover the parties' costs. Glazebrook and Hammond JJ delivered a joint judgment and Chambers J a separate judgment. The Judges were unanimous in dismissing the appeal, differing in terms of the procedural route to that conclusion and the incidental orders required to give their views effect. The costs of an arbitration were seen by the majority as integral to the arbitral process and a matter that had to be dealt with by the arbitral tribunal. As well, under cl 6 of the Second Schedule to the 1996 Act, the power to allocate and fix costs had to be exercised in the award; there was no power to determine costs independently of the award process. This presented a problem of timing as costs could only be addressed once the arbitral tribunal had reached its decision on the dispute. Relevant factors that only then could be considered included the outcome of the arbitration and the fact that a settlement offer had been made.

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[41] Reported at [2005] 3 NZLR 156.

[102] The majority also decided that, as the arbitral tribunal had failed to address costs in its award, in circumstances where the parties could not realistically apply for costs prior to receiving it, the tribunal had erred in law. In those circumstances the existence of the default provision would not exclude a challenge to the award. The statutory prohibition on informing arbitrators that a settlement offer had been made was seen as supporting this analysis, as it precluded a party which had made a settlement offer from explaining to the arbitrators why it wished costs to be reserved. The problem of timing could not be overcome by the party asking that costs be reserved as that would improperly alert the tribunal to the fact that an offer had been made.

[103] Accordingly, the majority decided that in the present case there was an error of law in making the first award, which justified the remission of costs back to the arbitrators. It was not open for them to determine the costs in their second award as the Act did not permit that in the circumstances.

[104] Chambers J took a different approach. He accepted that the arbitrators could fix their own costs in the first award under cl 2.3.6 of the lease. They could not, however, in the absence of agreement by the parties, allocate those costs between parties at that stage, because the arbitrators were not then permitted to know whether there had been a settlement offer, which was a consideration relevant to their determination. Following delivery of their award in this case the arbitrators should have called for submissions on both their own and party costs. They would then have been entitled to make a costs determination in an additional award under art 33.

[105] Chambers J would accordingly have upheld the arbitrators' second award which had been made after submissions on party costs, but also required that they reconsider the allocation of their own costs under the first award after hearing submissions of the parties on that question.

[106] On 6 July 2005 leave was given to the lessor to appeal to this Court on the ground of whether the Court of Appeal was wrong in concluding that party/party costs should not lie where they fell following the award.

Nature of costs jurisdiction

[107] The purpose of empowering an arbitral tribunal to award costs to a party in relation to its legal and other expenses, is to enable the tribunal to vindicate the position the party has taken in the arbitration by compensating it for the expense it has incurred having regard to all relevant matters, which will generally include the outcome of the arbitration and the conduct of the parties during its course. A wide discretion as to costs is given under cl 6(1)(a), reflecting the area of personal appreciation in a decision on costs, but the power must be exercised judicially and in accordance with established principle.[42] In practice, the principle most commonly applied is that costs will follow the event, although the breadth of the discretion is such that it is also well established that an arbitrator may decide that it is inappropriate to make any order for costs because of the nature of a particular arbitration.

[108] The discretionary nature of awards of costs is to be contrasted with awards made on the substantive claims of parties to a dispute, which determinations are on assertions of their rights. This distinction suggests that Parliament did not intend that costs should be claimed as items of dispute referred to arbitration, and explains why Parliament provided separately for arbitral tribunals to have power to award costs, in the absence of agreement to the contrary.

[109] Under s 12(1)(a) of the 1996 Act arbitral tribunals have the same jurisdiction to award relief to parties that the High Court has in civil litigation. This includes the jurisdiction to award costs which is given to the High Court under s 51G Judicature Act 1908. Where it applies, cl 6 of the Second Schedule governs the basis for costs awards in an arbitration. The issue before this Court concerns the meaning of the statement in cl 6(1)(a) that "the costs and expenses of an arbitration, … shall be as fixed and allocated by the arbitral tribunal in its award or any additional award…". The difficulty of meaning arises because the provision does not expressly indicate when, during the process, the tribunal should consider costs. On the one hand, the natural point in an arbitration to decide on costs is immediately after the tribunal has

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42 *Angus Group Ltd v Lincoln Industries Ltd* [1990] 3 NZLR 82, 86 per Henry J.

determined the substantive issues in dispute which the parties have referred to arbitration. That is also the traditional time when costs have been addressed in New Zealand. On the other hand, the language of cl 6(1)(a), read literally, indicates that costs are to be determined as a component of the tribunal's award on the substantive dispute or an additional award in the very limited circumstances in which an additional award may be made.

[110] I have reached the conclusion that on the true meaning of cl 6(1)(a) of the Second Schedule an arbitral tribunal which is bound by that provision may not end its jurisdiction until after it has addressed the parties' costs in the arbitration. As the arbitrators' decision on the substantive issues in dispute will almost always be highly relevant to their determination on costs, the tribunal in general should first determine those issues in an interim award, reserving the final determination on costs until it has given the parties an opportunity to be heard. If a party seeks costs, the tribunal must determine that question, either making an award of costs or deciding not to do so. In the latter case, or if no party seeks costs, the statutory default provision in cl 6(1)(b) will apply. Later in this judgment I set out what can be done by way of an additional award if the arbitral tribunal has failed properly to address costs, before delivering a final award.[43]

[111] These conclusions follow from my analysis of the correct approach to ascertaining the meaning of provisions in the Second Schedule to the Act and then reading the relevant provisions in their statutory and parliamentary contexts. The remainder of these reasons set out the analysis which has led me to this conclusion.

Interpreting the Second Schedule

[112] The orthodox approach to statutory interpretation is to ascertain the meaning of a provision from the text, read in its context, and in light of the Act's purpose. Before undertaking that analysis however it is necessary to consider an argument advanced by counsel for the appellant concerning the approach that the Court should take to the interpretation of the 1996 Act. Mr Hodder supported a literal approach to

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[43] See paras [140] - [148] of these reasons.

ascertaining the meaning of cl 6 of the Second Schedule as part of a new statute, which had not been developed from earlier domestic arbitration legislation but from a recommended international model law concerning commercial arbitration, and which gives emphasis to party autonomy in the arbitral process and inclines against judicial intervention.

[113] In his oral submissions Mr Hodder referred extensively to dicta in the speech of Lord Steyn in *Lesotho Highlands Development Authority v Impreglio SpA and others*.[44] Lord Steyn said that one of the purposes of the Arbitration Act 1996 (UK) was to state the important principles of the law of arbitration "in a language sufficiently clear and free from technicalities to be readily comprehensible to the layman." Lay arbitrators, and international users of London arbitration, should be able to rely on the statutory language and "not have to be put to the trouble or expense of having regard to the pre-1996 Act law on issues where the provisions of the Act set out the law".[45] Mr Hodder argued that Lord Steyn's dicta supported his submission that a restrictive approach should be taken to the interpretation of the Second Schedule of the 1996 Act and in particular cl 6(1)(a).

[114] The passage in *Seabridge AB* cited by Lord Steyn acknowledges, however, that reference to cases decided prior to the 1996 United Kingdom Act may generally be necessary where the United Kingdom Act does not cover a point or where for some other reason such reference is necessary. That reservation is applicable to a case such as the present which is concerned with how the statutory provision concerning the arbitral tribunal's discretion as to costs is to be applied, on which point cl 6 of the Second Schedule to the 1996 Act is not explicit.

[115] Furthermore, while the New Zealand and United Kingdom statutes were both passed in 1996, and each emanates from the UNCITRAL Model Law, they include very different measures. They also each deal with arbitral practices that are significantly different in their nature and scope. London, of course, is a major centre

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44 [2005] 3 WLR 129; [2005] 3 All ER 789 (HL).

45 At [19]. The citations, approved by Lord Steyn, are from the judgment of Thomas J in *Seabridge AB v A C Orssleff's Eftf's A/s* [2000] 1 All ER (Comm) 415, 422.

for international arbitration. Lord Steyn's views of the appropriate approach to interpretation of the 1996 United Kingdom Act are clearly influenced by this context and are of limited application to the interpretation of the Second Schedule to the New Zealand Act, which reflects provisions generally thought appropriate to New Zealand conditions.[46]

[116] Party autonomy is a theme of the 1996 Act. Parties can opt out of the Second Schedule, and its provision concerning costs in particular. But this does not mean that the principle of party autonomy is of assistance in interpreting the provisions of the Second Schedule of the 1996 Act when they do apply. In that case the Court must proceed on the basis that the parties are content that the Act should be interpreted according to the meaning of the words used, rather than on any principle that looks to preserve maximum freedom for the parties. Nor can it realistically be said that the Second Schedule provisions are inconsistent with access to the Court for review of arbitrators' decisions. Indeed cl 6(3) confers an appeal to the High Court against an award of costs on the grounds that it is unreasonable.

[117] Accordingly, the meaning of the language of cl 6(1)(a) is to be ascertained according to orthodox principles of purposive interpretation rather than on a restrictive basis. In this instance assistance is derived first from the previous New Zealand statutory provisions concerning awards of costs in arbitrations, and how they were interpreted, and secondly from the parliamentary history of the particular provision to be interpreted in this appeal.

Statutory history

[118] The statutory history, and the way in which earlier statutory provisions concerning costs have been interpreted and applied, is part of the context in which the current legislative provisions concerning costs and expenses of an arbitration are to be considered. Prior to the enactment of the 1996 Act, the process of arbitration in New Zealand was governed by the Arbitration Act 1908, as amended. In relation to

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[46] See para [125] below.

costs, s 4 of the 1908 Act provided that the provisions of its Second Schedule were deemed to be included in a submission to arbitration unless the submission expressed a contrary intention. Clause 9 of the Second Schedule provided for the arbitral tribunal to have a discretion concerning costs:

> 9. The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what amount those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

[119] The source of s 4, and cl 9 of the Second Schedule, was s 2 of the Arbitration Act 1889 (UK) and para (i) of its First Schedule. Clause 9 was expressed in identical terms to para (i) of the 1889 Act's First Schedule, which was discussed and applied by the Divisional Court (Rowlatt and McCardie JJ) *In re An Arbitration between Becker, Shillan and Company and Barry Brothers*.[47] In his award an umpire had dismissed a claim and ordered that the claimants pay the arbitral tribunal's fees and expenses. The award was silent on the costs of the reference, that is the parties' costs. In separate judgments the members of the Divisional Court decided that, while costs were a matter of discretion under para (i) of the First Schedule, the true meaning of that provision was that arbitrators were bound to exercise their discretion on costs, otherwise they would have neglected to discharge a requirement of the Act. As Rowlatt J said of the statutory language conferring the discretion: [48]

> Now, that does not mean that it is in his discretion whether he will deal with them or not, but that he must deal with them by exercising his discretion upon them. If he chooses he can say that he leaves them to be borne by the parties that incur them and make no order that either party pays the costs of the other. But he must exercise his discretion upon them.

McCardie J agreed. Both Judges cited the judgment of the Court of Exchequer delivered by Parke B in *Williams v Wilson* which said:[49]

> We think it clear that it was intended that he should exercise his discretion on the question of the costs, not whether he would award upon that question or not at his option or discretion.

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47 [1921] 1 KB 391.
48 At 395.
49 (1853) 9 Ex. 90, 99.

[120] As the umpire in the *Becker, Shillan & Co* case was silent on the point the Divisional Court inferred that he had failed to address party costs, and the award was remitted for him to exercise his costs discretion on that aspect. Given that the New Zealand provision was expressed in a similar way, this judicial clarification of the statutory meaning and manner of application of language conferring a discretion to award costs on arbitrators can be said to have become part of New Zealand law of arbitration from the time that *Becker, Shillan & Co* was decided. The important effect was that arbitrators were subject to a duty not to deliver a final award until the parties had been given an opportunity to be heard on costs.

[121] In 1938 the New Zealand Parliament enacted a further provision concerning costs to apply where an award had made no provision for the costs of parties. Section 14(2) of the Arbitration Amendment Act 1938 provided:

> **14. Provision as to costs**-
>
> (1) …
>
> (2) If no provision is made by an award with respect to the costs of the reference, any party to the reference may within 14 days of the publication of the award, or such further time as the Court may direct, apply to the arbitrator for an order directing by and to whom such costs shall be paid, and thereupon the arbitrator shall, after hearing any party who may desire to be heard, amend his award by adding thereto such directions as he may think proper with respect to the payment of the costs of the reference.

The source of this provision was s 12(2) Arbitration Act 1934 (UK).

[122] The Divisional Court's decision was subsequently applied by Kerr J in *Mavani v Ralli Bros. Ltd.*[50] While it does not appear that s 12(2) of the United Kingdom Act was engaged, this decision does indicate the continuing application of the interpretation approach in *Becker, Shillan & Co* following the 1935 (and in New Zealand 1938) amendments.[51] Section 14(2) remained in force until the 1908 Act was repealed in 1996 by a new statute which set out a new legislative framework for arbitration. In short, under the 1908 Act, the provision conferring a discretion to award costs was interpreted as subjecting arbitrators to a

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50 [1973] 1 WLR 468, 475.

51 Cf. Mustill & Boyd *Commercial Arbitration* (2ed 1989) 401.

duty to allow the parties to be heard on costs before making an award that ended their jurisdiction.

Parliamentary history: Law Commission Report

[123] The report on *Arbitration* of the New Zealand Law Commission in 1991 ("*Arbitration*")[52] included a draft Arbitration Act, which Parliament substantially enacted as the Arbitration Act 1996. The 1996 Act is based on the Model Law on International Commercial Arbitration, which was the outcome of a project of the United Nations Commission on International Trade Law ("UNCITRAL") aimed at harmonising procedures for international arbitration and domestic arbitration laws. The Model Law was adopted in June 1985 by UNCITRAL and was endorsed later that year by the United Nations General Assembly.[53]

[124] The fees and costs of an arbitration were not addressed in the Model Law. As there was no provision for them in some national systems, the costs of an arbitration were not seen as "suitable for the partial harmonisation of the Model Law".[54] This is confirmed by the Report of the Working Group on International Contract Practices concerning the work of its third session. It states:[55]

> There was wide support for the view that questions concerning the fees and costs of arbitration were not an appropriate matter to be dealt with in the model law. This view left open the possibility for a State to provide for court control concerning fees and costs, and, for example, to allow readjustment of utterly unreasonable fees.

Accordingly, it was left to each State to provide for the costs of an arbitration, if it wished to do so, in its own way**.**

[125] The 1996 Act lays down rules applying to arbitrations in New Zealand in its First and Second Schedules. The provisions of the First Schedule are drawn from the UNCITRAL Model Law. Under the 1996 Act those rules can only be excluded by contract to the extent that they themselves stipulate. They do not, moreover,

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52 NZLC R20 (1991).
53 *Arbitration*, para 1.
54 Mustill & Boyd *Commercial Arbitration* (2001 Companion Volume) 14-15.
55 New York, 16-26 February 1982, reported at (1982) 13 *UNCITRAL Yearbook* 300.

provide a comprehensive regime for arbitration. The provisions of the Second Schedule were designed by the Law Commission to be supplementary, adding to or modifying the Model Law rules as the Commission considered appropriate for arbitration in New Zealand.[56] The rules in the Second Schedule can be excluded by agreement, reflecting their domestic genesis[57] and the Model Law's emphasis on party autonomy.

[126] In its report, the Law Commission said that it had drafted the Second Schedule provisions having regard to the latest version of the uniform arbitration statutes that were enacted in 1984, in most of the Australian states. It had also taken note of provisions found in domestic arbitration statutes, based on the UNCITRAL Model Law, which had been developed in other jurisdictions including Canada.[58] The Uniform Law Conference of Canada had prepared a draft Uniform Arbitration Act in 1990 ("the ULCC draft") to which the Law Commission was able to refer and which has since been substantially adopted in Canadian Provincial legislation.

[127] In relation to costs, the Law Commission said that it did not adopt any particular legislative model for the Second Schedule but it had drawn on s 54 of the ULCC draft in framing the provision in its draft Act concerning costs and expenses of the arbitration. That provision is now cl 6 of the Second Schedule to the 1996 Act and it is the only provision in the 1996 Act concerning costs. A number of its subclauses are based on s 54.[59] Later I explain how I derive assistance from them, and from the Law Commission report, in interpreting cl 6(1)(a).

Meaning of clause 6

[128] Clause 6 of the Second Schedule to the 1996 Act relevantly provides:

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56 *Arbitration*, para 412.
57 Section 6(1) and (2) of the 1996 Act; *Methanex Motunui Ltd v Spellman* [2004] 3 NZLR 454, at [99].
58 *Arbitration*, para 414.
59 *Arbitration*, para 436.

6 Costs and expenses of an arbitration—

(1) Unless the parties agree otherwise,—

(a) The costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal, and any other expenses related to the arbitration shall be as fixed and allocated by the arbitral tribunal in its award under article 31 of the Schedule 1, or any additional award under article 33(3) of the Schedule 1; or

(b) In the absence of an award or additional award fixing and allocating the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.

(2) Unless the parties agree otherwise, the parties shall be taken as having agreed that,—

(a) If a party makes an offer to another party to settle the dispute or part of the dispute and the offer is not accepted and the award of the arbitral tribunal is no more favourable to the other party than was the offer, the arbitral tribunal, in fixing and allocating the costs and expenses of the arbitration, may take the fact of the offer into account in awarding costs and expenses in respect of the period from the making of the offer to the making of the award; and

(b) The fact that an offer to settle has been made shall not be communicated to the arbitral tribunal until it has made a final determination of all aspects of the dispute other than the fixing and allocation of costs and expenses.

(3) Where an award or additional award made by an arbitral tribunal fixes or allocates the costs and expenses of the arbitration, or both, the High Court may, on the application of a party, if satisfied that the amount or the allocation of those costs and expenses is unreasonable in all the circumstances, make an order varying their amount or allocation, or both. The arbitral tribunal is entitled to appear and be heard on any application under this subclause.

…

(5) An application may not be made under subclause (3) after 3 months have elapsed from the date on which the party making the application received any award or additional award fixing and allocating the costs and expenses of the arbitration.

(6) There shall be no appeal from any decision of the High Court under this clause.

[129] The structure of cl 6(1) is that it stipulates three different rules concerning costs. The rule which applies in any particular situation is determined according to a

set sequence of priority. First, costs may be the subject of agreement by the parties at any stage. To the extent that is the case, the provisions of the agreement prevail. Secondly, in the absence of agreement, the arbitral tribunal has a power to fix and allocate costs in its award. Thirdly, if there is no such agreement, and no provision for costs is made in the award, each party is to bear its own costs and expenses in the arbitration along with an equal share of the arbitral tribunal's fees and expenses, and any other expenses in the arbitration.

[130] It is now common ground that the parties' agreement as to costs in cl 2.3.6 of the lease did not go beyond providing for the costs of the arbitrators and umpire; the agreement did not extend to the costs directly incurred by the parties. Those costs are, accordingly, not covered by application of the first rule. The central question in the appeal is whether they are covered by the second. Only if they are not will the third rule apply, which would require that the parties meet their own legal and other expenses.

[131] In order then to ascertain whether the second rule applies, the meaning of cl 6(1)(a) of the Second Schedule must be ascertained. Its statement that the costs and expenses of an arbitration "shall be as fixed and allocated by the arbitral tribunal in its award or any additional award…" clearly indicates that the tribunal has a power to award a party costs in relation to its legal and other expenses in the arbitration. What is less clear is what duties or constraints, if any, control the exercise of the statutory discretion to fix and allocate costs in an award or additional award made under the 1996 Act. This turns on the meaning of cl 6(1)(a), including how the Act envisages that this provision applies to the factual situation that has arisen in this case.

[132] Clause 6(1)(a) is part of the Second Schedule to the Act and, as already indicated, is a domestic modification of principles stated in the Model Law, which deliberately made no specific reference to costs. The Second Schedule applies where, as in this case, it is not excluded by agreement.[60] Because it is a domestic

[60] See para [125] and accompanying footnotes above.

provision, an important aspect of the context in which cl 6(1)(a) is to be read is the New Zealand statutory history of provisions for costs to be in the discretion of an arbitral tribunal.[61] Its relevance is reinforced by the intention of those who framed the Model Law that States should be left to deal with costs according to their own domestic traditions if they wished.

[133] From the time that the *Becker, Shillan & Co* case was decided by the Divisional Court, the full meaning of the statutory provision in the 1908 Act was clear; it conferred on New Zealand arbitrators a wide discretion to award costs, which, however, they were bound to exercise. An award that did not deal with costs was incomplete because the arbitral tribunal had an implicit duty to exercise the discretion before finally discharging its functions by delivery of its award. The effect of the decision was, as indicated, to allow the parties to be heard on costs once substantive issues were decided.[62] The *Becker, Shillan & Co* case was the leading authority for this approach to interpretation of the statute but, as the earlier discussion in these reasons indicates,[63] the interpretation it applied was a longstanding previous one in relation to equivalent provisions in arbitration agreements. As well, this interpretation of the 1908 Act provision continued to apply following the enactment of s 14 of the 1938 amendment. The statutory history accordingly indicates that Parliament's purpose, in framing in similar terms in the 1996 Act the rule that should next apply to costs if the parties had not reached agreement on them, was that the language conferring a wide discretion should be read and applied in the same manner as the equivalent provision in the previous Act.

[134] The Parliamentary history of the Second Schedule provisions concerning costs is also helpful in ascertaining their meaning. The appellant argued that the inclusion of cl 6(1)(b), as a residual provision concerning costs, supported its argument for confining the meaning of cl 6(1)(a) to a literal one. Mr Hodder submitted that applying the *Becker, Shillan & Co* line of interpretation to cl 6(1)(a) would "write out" cl 6(1)(b). I do not accept that submission. On the view I take of

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61 Discussed in paras [118] to [122] above.
62 See para [120] above.
63 At para [119].

cl 6(1)(b), the residual clause will apply whenever parties do not wish to be heard on costs or where, having heard the parties, the tribunal decides not to make an award.

[135] Two points drawn from the Parliamentary history further answer the argument. In the ULCC draft, the residual provision on which cl 6(1)(b) was modelled,[64] was one having limited potential application as that draft also provided for any party to seek a further award as to costs within 30 days if the arbitral tribunal had not dealt with costs in its award.[65] The residual provision would only apply if that were not done or the tribunal did not thereafter make an award. While in the drafting of cl 6 no express provision was included for applications for costs to be made following an award, it is contextually significant that the ULCC draft had not envisaged that its residual provision would restrict the scope of the discretion to award costs.

[136] The other and perhaps most important point is that in its commentary on its own draft provision, the Law Commission[66] did not indicate that it had in mind, when it included a residual subclause, a purpose of altering the longstanding basis on which an arbitral tribunal's discretion as to costs had been applied. It did not say that cl 6(1)(a) would have a more restrictive meaning than that which had been given to para 9 of the Second Schedule to the 1908 Act. The appellant's view of the restrictive effect of cl 6(1)(b) on cl 6(1)(a), if upheld, will effect a major change in the way costs must be sought in arbitrations, and create significant risks for parties if the new requirements are overlooked. If that was part of its purpose, it is surprising that the Law Commission did not make it clear in its report that a change of such scope was being proposed, especially as it did just that in the same part of its report by explaining its proposed policy change concerning pre-dispute costs.[67] The absence of any discussion of this point in the commentary indicates that the Law Commission did not consider it was proposing a significant change to the longstanding way in which costs have been sought in commercial arbitrations.

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64 Section 54(5) of the ULCC draft.
65 Section 54(4) of the ULCC draft.
66 *Arbitration*, paras 436-440.
67 *Arbitration*, para 436.

[137] It follows in my view that cl 6(1)(b), which states the third rule in priority concerning costs, should not be read as influencing the meaning of cl 6(1)(a). It simply serves as a residual provision, which the parties and arbitral tribunal will know applies if no application for costs in the arbitration, or no award of costs, is made.

[138] For these reasons, which turn on both the Parliamentary history of the 1996 Act and the general history of earlier arbitration legislation in New Zealand, I have concluded that the power of a tribunal to award costs under cl 6(1)(a) is coupled with a duty to decide whether to exercise that power. That was not done by the arbitral tribunal in this case before it issued the first award, which the tribunal clearly intended to be a final award**.**

[139] The next question is whether the arbitral tribunal's second award, which determined costs, provided a valid remedy for the tribunal's error.

Validity of second award

[140] As outlined earlier in these reasons,[68] after the first award was delivered, the lessee applied to the arbitral tribunal for its costs and, after hearing the parties, the tribunal proceeded to award it party costs in its second award. The tribunal took the view that it was able to make that award because it had implicitly reserved costs in the first award. On its face, however, the first award has all the appearances of being a final award which concludes the tribunal's jurisdiction in the dispute. Nor can I see any basis for saying that it is other than a final award.

[141] It is therefore necessary to consider whether there is a different jurisdictional basis for the tribunal's second award. Only if there is, will it have properly discharged its duty to address costs.

[142] Although the 1938 amendment to the 1908 Act conferred power on arbitral

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[68] At para [96].

tribunals to deal with applications for costs, following an award which made no provision for them, that provision was not repeated in the 1996 Act. Clause 6(1)(a) does however acknowledge that costs and expenses of an arbitration may be determined in an additional award made under art 33(3) as well as in an award made under art 31. Article 33(3) provides:

> (3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within 30 days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within 60 days.

[143] A literal reading of art 33(3), without regard to its context, suggests that, on its terms, the power to make an additional award is confined to dealing with claims presented in the proceedings which the arbitrators have omitted to address in their award; which would not cover costs. That narrow meaning however scarcely gives effect to the purpose of art 33(3) which, as Elias CJ and Keith J point out, was included in the Model Law to provide a mechanism for rectification which would avoid the consequence in some national systems of arbitration that an omission from an award might make it invalid for incompleteness.[69] To give art 33(3) a meaning which did not allow an additional award to be made on costs, where the arbitral tribunal, in breach of a duty, had omitted to address them, would not fulfil that purpose.

[144] I also agree with Elias CJ that the omission from the 1996 Act of a specific provision, such as that enacted in 1938, enabling a party to apply within 14 days for an amendment to an award by making costs orders, does not indicate that there is a legislative policy in the 1996 Act against such applications. While s 14 of the 1938 amendment was not re-enacted in 1996, cl 6(1)(a) of the Second Schedule plainly contemplates that in some instances, at least, costs awards will be made under art 33(3).

[145] In general the relative success of the parties is a highly relevant factor in determining costs, which usually will follow the event. As well, cl 6(2)(a) is

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[69] See reasons of Elias CJ at [11] and Keith J at [34].

premised on an expectation that questions of costs will generally be addressed by arbitrators following an award that has dealt with the substantive issues in the dispute. It provides that an arbitral tribunal may take into account in determining costs an offer by a party to settle the dispute which is not accepted but turns out to be more favourable to the offeree than the terms of the award. Clause 6(2)(b) actually prohibits communication to the tribunal of the fact that a settlement offer has been made until it has determined all aspects other than costs, although it would have been entirely proper for either party to ask that costs be reserved either without elaboration, or by reference to the need to know the outcome before making any application for or submissions on costs.

[146] These considerations suggest that, in the absence of any contrary agreement, Parliament had in mind that the parties need not be heard on costs during the hearing concerning the substantive dispute. Indeed to do so would give rise to tensions in relation to the duty imposed on the parties to withhold from the tribunal information concerning the fact that any settlement offer had been made. So read, the context provided by cl 6(2) would support an interpretation of cl 6(1)(a) which facilitated arbitral tribunals dealing with costs following an interim award on the substantive issues.

[147] It follows in my view that, reading art 33(3) in its context, its meaning requires that when an arbitral tribunal has failed to address costs before making its final award, despite having a duty to do so, the tribunal may be said to have omitted to deal with a particular issue in the proceeding which, while strictly not the subject of a claim presented in the proceeding, is sufficiently akin to it to allow the remedial provision in the Model Law for an additional award to be invoked. That meaning of the language of art 33(3) is open and giving the article purposive interpretation it is the true meaning. This is consistent with an observation by the Law Commission concerning costs**:**[70]

> We believe that, if not the subject of agreement between the parties, interest and costs will be issues in the dispute and thus properly dealt with in an award (or an additional award: see article 33(3)).

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[70] *Arbitration*, para 389.

If no steps are taken within the period allowed by art 33(3), then the default provision in cl 6(1)(b) applies.

[148] Only by giving that meaning to art 33(3) is the rectifying purpose of the provision fulfilled in relation to the power to award costs. Applying that approach in this case, I am satisfied that this Court should hold that the second award was made in accordance with art 33(3) and is valid.

Summary

[149] In accordance with s 12 of the 1996 Act, cl 6(1)(a) of its Second Schedule states a statutory rule concerning costs of an arbitration under which an arbitral tribunal has a discretionary power to award costs whenever, and to the extent that, the parties have not reached agreement on them. Taking all the indications of its meaning discussed in these reasons into account, I am satisfied that the meaning which best serves the purpose of cl 6(1)(a), and which best fits its context, is reached by applying the well established meaning of the equivalent provision in the 1908 Act that was originally attributed in the *Becker, Shillan & Co* case. On this approach the power to award costs in accordance with cl 6(1)(a) must be addressed by arbitrators, who are bound to give the parties an opportunity to be heard. The breadth of the statutory discretion lies only in how the power is exercised.

[150] Other common law jurisdictions which have enacted UNCITRAL based arbitration legislation, have chosen, in varying ways, to make express provision for parties to submit applications for costs to an arbitral tribunal on costs after it has determined the substantive issues in dispute in the arbitration.[71] This reinforces my conclusion that the absence of any express provision covering the point in the 1996 Act indicates continuing application of the established approach of arbitrators to exercising their discretion concerning costs under the 1908 Act.

[151] It follows that where cl 6(1)(a) applies, unless the parties have previously instructed the arbitral tribunal that it is free to determine costs**,** or that costs are not

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[71] See above paras [20] to [25] and footnotes 17-20 of the reasons of Elias CJ, and paras [80] to [83] of the reasons of Blanchard and Tipping JJ, for examples.

sought, the tribunal must reserve the final determination of costs in its award determining the substantive issues in dispute. In its interim award it may, of course, direct how the costs of the tribunal are to be met in the first instance, and the manner in which final submissions on costs are to be made by the parties. Once it has given the parties an opportunity to be heard on costs it may determine them in its final award.

[152] In ensuring that either party can take up the question of costs after the outcome of the arbitration is known, the meaning of cl 6(1)(a) that I favour fully accords with the principles of natural justice by promoting the fundamental policies of equality, fairness and full opportunity to present one's case that are a feature of the Model Law.[72] Only once the substantive issues in dispute are decided, full submissions, which include details of any offer of settlement that was more favourable to the offeree than the award, can be put to the tribunal, without inhibition, to be taken into account, as cl 6(2)(b) contemplates. Unless this approach is followed, the law will set a trap for unwary parties to arbitration, including overseas parties, who assume that long-standing practices concerning costs continue to apply and that they may safely and properly leave costs until they know of the terms of the award that determines the substantive dispute.

[153] Where this course is not followed, however, and an arbitral tribunal proceeds to deliver a final award without having heard from the parties on costs, it will have omitted to deal with an issue in the proceedings that is sufficiently akin to a claim presented in the arbitration for the rectifying provisions of art 33(3) to apply, so that an additional award determining costs may be sought and made on the basis stipulated in art 33(3). In substance that is what happened in this case in relation to the second award which in my opinion should be upheld and the consequential orders made that are set out at the commencement of this judgment.

Solicitors:
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Duncan Cotterill, Christchurch for Respondent

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[72] These policies are reflected in articles 18, 24 and 34(1), (2)(b)(ii) and (6) of the First Schedule to the 1996 Act.