IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-1246
[2012] NZHC 3257

	BETWEEN	COGNITION EDUCATION LIMITED Plaintiff
	AND	ZURICH AUSTRALIAN INSURANCE LIMITED T/A ZURICH NEW ZEALAND Defendant

Hearing: 27 November 2012

Counsel: M G Ring QC and P R Rzepecky for Plaintiff
A R Galbraith QC and M J Francis for Defendant

Judgment: 5 December 2012

RULING OF ASSOCIATE JUDGE BELL

This ruling was delivered by me on ***5 December 2012*** *at* ***12:30pm***
pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

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Introduction

[1] This decision is on a procedural point. The plaintiff has applied for summary judgment. The defendant has filed an appearance under r 5.49 objecting to the jurisdiction of the court on the ground that there is a dispute which must be referred to arbitration. The ability to apply to the court to obtain summary judgment and the right to require a dispute to be referred to arbitration are incompatible. The parties are apart on how the inconsistency is to be resolved.

[2] The plaintiff argues for priority for the right to apply for summary judgment. It says that if it can make out a case for summary judgment, then there is no dispute to be referred to arbitration. Its summary judgment application should be heard at the same time as the defendant's objection to this court hearing the case. On the other hand, the defendant says that if there are matters between the plaintiff and the defendant which are capable of being disputed, then the matter should go to arbitration, even if it should be found in the arbitration that the defendant does not have an arguable defence. Its objection to the jurisdiction should be decided before the summary judgment application.

[3] The plaintiff has sued the defendant under a contract frustration insurance policy. The defendant has declined the plaintiff's claim. The policy contains a submission to arbitration:

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

[4] For this ruling I am not required to consider the merits of the plaintiff's claim under the policy or of the defendant's rejection.

[5] Summary judgment is granted under r 12.2(1) of the High Court Rules:

12.2 Judgment when there is no defence or when no cause of action can succeed

(1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action.

[6] The Court of Appeal's decision in *Jowada Holdings Ltd v Cullen Investments Ltd*[1] summarises the approach taken on plaintiffs' applications for summary judgment.[2]

> [28] In order to obtain summary judgment under Rule 136 of the High Court Rules a plaintiff must satisfy the Court that the defendant has no defence to its claim. In essence, the Court must be persuaded that on the material before the Court the plaintiff has established the necessary facts and legal basis for its claim and that there is no reasonably arguable defence available to the defendant. Once the plaintiff has established a prima facie case, if the defence raises questions of fact, on which the Court's decision may turn, summary judgment will usually be inappropriate. That is particularly so if resolution of such matters depends on the assessment by the Court of credibility or reliability of witnesses. On the other hand, where despite the differences on certain factual matters the lack of a tenable defence is plain on the material before the Court, to the extent that the Court is sure on the point, summary judgment will in general be entered. That will be the case even if legal arguments must be ruled on to reach the decision. Once the Court has been satisfied there is no defence Rule 136 confers a discretion to refuse summary judgment. The general purpose of the Rules however is the just, speedy, and unexpensive determination of proceedings, and if there are no circumstances suggesting summary judgment might cause injustice, the application will invariably be granted. All these principles emerge from well known decisions of the Court including *Pemberton v Chappell* [1987] NZLR 1, 3-4, 5; *National Bank of New Zealand Ltd v Loomes* (1989) 2 PRNZ 211, 214; and *Sudfeldt v UDC Finance Ltd* (1987) 1 PRNZ 205, 209.
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> [29] This present appeal is concerned with a contract based claim in circumstances where both parties seek to rely on evidence of circumstances said to form part of the relevant context in which the contract is to be interpreted. Their evidence is in conflict. That, however, does not preclude the Court from giving summary judgment in a contract claim if it is satisfied that resolution of the factual matters in dispute is not necessary to provide the Court with such contextual background as is necessary to resolve the claim. This is simply an application of the principle that where, despite differences on factual matters, the lack of a tenable defence to a cause of action is plain on the material before the Court, and the Court is sure on that point, summary judgment will normally be

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1 *Jowada Holdings Ltd v Cullen Investments Ltd* CA248/01, 5 June 2003.

2 At [28]-[30].

> entered. In such circumstances there is no reason why a contract should not be interpreted and applied in summary judgment proceedings: *Pemberton v Chappell* at pp 4 and 8 CA; *Haines v Carter* [2001] 2 NZLR 167, para 128 CA.
>
> [30] Once the Court has been satisfied that there is no defence Rule 136 confers on it a discretion to refuse summary judgment which is of a residual kind. While the types of cases in which the discretion will be exercised to refuse judgment cannot be exhaustively defined, the most common instance is where there would be an unfairness in proceeding immediately to judgment, for example if the defendant were unable to get in touch in the time available with a material witness who it was reasonably thought might be able to provide it with material for a defence: *Bank für Gemeinwirtschaft v City of London Garages Ltd* [1971] 1 All ER 541, 548 (CA). In that case Cairns LJ also said that harsh or unconscionable behaviour of the plaintiff might require a matter to proceed to trial so that any judgment obtained was in the full light of publicity. Generally, however, where the ground relied on in seeking summary judgment goes to the substance of the litigation, the interests of justice would not permit refusal of judgment unless they provided a basis for it to be refused at the substantive hearing: *Inner City Properties Ltd v Mercury Energy Ltd* (1990) 13 PRNZ 73 (CA). It should not be thought that a plaintiff who has shown that there is no arguable defence will be denied judgment except in rare circumstances.

[7] The significance of this summary is that it shows that in a summary judgment application the court may analyse facts and law to find whether the lack of an arguable defence is plain. In some cases, such an inquiry may be extensive.

[8] The Arbitration Act 1996 governs the extent of the court's interference in arbitration. As the place of arbitration in this case is in New Zealand, the first schedule of the Act applies.[3] Article 5 of the first schedule says:

> In matters governed by this Schedule, no court shall intervene except where so provided in this Schedule.

[9] Article 8 says:[4]

> **8 Arbitration agreement and substantive claim before court**
>
> (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void,

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3 Arbitration Act 1996, s 6(1)(b).

4 Arbitration Act 1996, Schedule 1 Art 8.

> inoperative, or incapable of being performed, *or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred*.
>
> (2) Where proceedings referred to in paragraph (1) have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.
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> [Emphasis added]

[10] The argument has focused on the italicised words. Under s 5(b), one of the purposes of the Act is to promote international consistency of the arbitral régimes based on the Model Law of International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985. The first schedule of the Arbitration Act 1996 largely corresponds with the provisions of the Model Law. However, Article 8 of the Model Law does not contain the italicised words. In this judgment, these are "the added words".

The plaintiff's case

[11] The plaintiff supports its argument by tracing the history of the added words. In the United Kingdom, the Arbitration Clauses (Protocol) Act 1924 was enacted to implement the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards and the League of Nations Protocol of 24 September 1923. Section 1 provided for mandatory stay of court proceedings in favour of arbitration, except where the agreement was null and void, inoperative or incapable of being performed.[5] The MacKinnon Committee on the Law of Arbitration,[6] reported on the operation of this provision:

> Our attention has been called to a point that arises under the Arbitration Clauses (Protocol) Act 1924. Section 1 of that Act, in relation to a submission to which the Protocol applies, deprives the English court of any discretion as regards the granting a stay of an action. It is said that cases have already not infrequently arisen where, (e.g.) a writ has been issued claiming the price of goods sold and delivered. The defendant has applied to stay the action on the grounds that the contract of sale contained an arbitration clause, without being able or condescending, to indicate any reason why he should not pay for the goods, or the existence of any dispute to be decided by arbitration. It seems absurd that in such a case the English

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5 The same test as under Article 8 of the Model Law.

6 *The Law of Arbitration*, the MacKinnon Committee (Cmd.2817) at [43].

> court must stay the action, and we suggest that the Act might at any rate provide that the court shall stay the action if satisfied that there is a real dispute to be determined by arbitration. Nor would such a provision appear to be inconsistent with protocol.

[12] Following that report, the added words were inserted into the 1924 Act by the Arbitration (Foreign Awards) Act 1930, s 8. Later, the added words also appeared in s 1 of the Arbitration Act 1975 (UK):

> **1 Staying Court proceedings where a party proves an arbitration agreement:**
>
> (1) If any party to an arbitration agreement to which this section applies ... commences any legal proceedings in any court against any other party to the agreement ... in respect of any matter agreed to be referred, any party to the proceedings may ... apply to the court to stay the proceedings; and the Court, unless satisfied that ... there is not in fact any dispute between the parties with regard to the matter agreed to be referred, should make an order staying the proceedings. ...

[13] Under those provisions the English courts established that when a defendant responded to a summary judgment application by applying for a stay on the grounds of an arbitration agreement, the summary judgment application and the stay application were heard together. If the court found that the defendant did not have any defence to the application for summary judgment, the stay application would be dismissed and the summary judgment application would be granted. On the other hand, if the plaintiff could not succeed in the summary judgment application, the proceeding would be stayed for the dispute to be decided by arbitration. The stay application was the inverse of the summary judgment application. The court applied the same test to both applications. This came to be known as the "reverse side of the same coin" approach. Cases illustrating this are: *Ellis Mechanical Services Ltd v Wates Construction Ltd*,[7] *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH*,[8] *The Fuohsan Maru*,[9] *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd*,[10] and *S L Sethia Liners Ltd v State Trading Corporation of India Ltd*.[11] The added words were applied to a claim to which a defendant had no arguable defence. Such a claim

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7 *Ellis Mechanical Services Ltd v Wates Construction Ltd* [1978] 1 Lloyd's Rep 33 (CA) (a case under s 4 of the Arbitration Act 1950, which provided for a discretionary stay).

8 *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 1 WLR 713 (HL).

9 *The Fuohsan Maru* [1978] 2 All ER 254 (CA).

10 *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd'sRep 357 (CA) at 362 [per Goff LJ].

11 *S L Sethia Liners Ltd v State Trading Corporation of India Ltd* [19985] 1 WLR 13989 (CA).

was held not to give rise to a dispute. So "dispute" was equated with "anything disputable" rather than "anything disputed".

[14] In New Zealand the question came before the Court of Appeal in *Royal Oak Mall Ltd v Savory Holdings Ltd*.[12] That was a case under s 5 of the Arbitration Act 1908, under which the court had a discretion to order a stay if the court was satisfied that there was no sufficient reason why the matter should not be referred to arbitration. The court referred to Mustill and Boyd: *Commercial Arbitration*[13] and the dicta of Kerr LJ in *S L Sethia Liners Ltd v State Trading Corporation of India Ltd* as to the reverse side of the same coin test and said:[14]

> These comments clearly point to the logic of applying the same threshold test in summary judgment proceedings to an application for stay in determining whether there is a "dispute" in circumstances such as the present, where the contractor can rely on a prima facie entitlement under the architect's certificate. The employer seeking arbitration must be able to point to some material demonstrating that there is a real issue to be decided. The contractor who opposes arbitration has the onus of satisfying the court there is no arguable defence to his claim...

[15] Other cases under s 5 of the Arbitration Act 1908 following the approach in *Royal Oak Mall Ltd* are *Reilly v Fletcher* and *Auckland City Council v Auckland Tepid Baths Ltd (No.1)*.[15]

[16] In 1991 the Law Commission issued its report on arbitration.[16] It proposed a draft Arbitration Bill based on the Model Law. It adopted article 8 of the Model Law, but inserted the added words taken from s 1 of the Arbitration Act 1975 (UK). It gave its reasons:

> 308. The proposed addition at the end of article 8(1) may be explained by a passage in the Mustill Committee Report:
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> > Section 1 of the Arbitration Act 1975 is a ground for refusing a stay which is not expressed in the New York Convention, namely "that there is not in fact any dispute between the

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

13 Michael Mustill and Stewart Boyd: *Commercial Arbitration* (2nd ed, LexisNexis, London, 1989).

14 *Royal Oak Mall Ltd v Savory Holdings Ltd* CA/106/89, 2 November 1989 at 9.

15 *Reilly v Fletcher* HC Nelson CP17/95, 5 March 1996, Master Venning; *Auckland City Council v Auckland Tepid Baths Ltd (No.1)* HC Auckland HC78/96 and HC96/96, 10 February 1997 at 6-7, Hugh Williams J.

16 Law Commission *Arbitration* (NZLC R20, 1991).

> parties with regard to the matter agreed to be referred". This is of great value in disposing of applications for a stay by a defendant who has no arguable defence. ((1990) 6 Arbitration International 53).
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> The phrase makes explicit in this provision the element of "dispute" which is already expressly included in article 7(1) when read with s 4. The same reasoning underlies the recommendation in the Alberta ILRR Report[17] that a court may be empowered to refuse an action if "the case is a proper one for a default or a summary judgment".
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> 309. In the course of our consultative activity, we received a number of suggestions that the efficiency of the summary judgment procedure as it has developed into the High Court Rules should not be lost by reason of any implication that a dispute where there is no defence must be arbitrated under an arbitration agreement. We agree. Although it may be argued that if there is no dispute, then there is no "matter which is the subject of an arbitration agreement" within the meaning of article 8(1), it seems useful to spell out that the absence of any dispute is a ground for refusing a stay.

[17] The plaintiff says that the Law Commission clearly intended that if a plaintiff could establish that it is entitled to summary judgment, an arbitration agreement and an application for stay under article 8 ought not to stand in its way.

[18] The Arbitration Act 1996 was enacted with the added words inserted in article 8. In the plaintiff's submission, Parliament obviously adopted the recommendation of the Law Commission and intended that summary judgment should be granted, notwithstanding an arbitration agreement between the parties. The plaintiff also submits that the preponderance of cases under the 1996 Act follow that approach. It cites these cases as supporting it: *Fletcher Construction New Zealand Ltd v Kiwi Co-Operative Dairies Ltd; Natural Gas Corporation of New Zealand Ltd v Bay of Plenty Electricity; Contact Energy Ltd v Natural Gas Corporation of New Zealand Ltd; Yawata Ltd v Powell; Rawnsley v Ruck; Rappongi Excursions Ltd v Denny's Inc; Pathak v Tourism Transport Ltd; Reddy Dig Contractors Ltd v Connetics Ltd; Rayonier MDF New Zealand Ltd v Metso*

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[17] The reference is to the Alberta Institute of Law Research and Reform 1988 report on Arbitration Law. Its recommendation was enacted in Alberta and followed in Manitoba, New Brunswick, Nova Scotia, Ontario and Saskatchewan. See Arbitration Act 1987, RSM 1987 c A-120, s 7(2); Arbitration Act SNB 1992, c A-10.1, s 7(2); Commercial Arbitration Act SNS 1999, c 5, s 9(2); Arbitration Act SO 1991, c 17, s 7(2); The Arbitration Act 1992, c A-24.1, s 8(2).

Panelboard Ltd; Lawson v Hartshorn; Station Properties Ltd (In Rec) v Paget; and *Mudgway v D M Roberts Ltd*.[18]

[19] It notes, in particular, the decision of the Court of Appeal in *Contact Energy Ltd v Natural Gas Corporation of New Zealand Ltd*:[19]

> It is common ground that this submission to arbitration does not preclude the entry of summary judgment if that is appropriate. In other words, if there is no arguable defence to the claim, NGCNZ is not entitled to insist upon a stay of proceedings – see Arbitration Act 1996 Article 8 First Schedule.

[20] There are only four cases which have not followed this general approach: *Todd Energy Ltd v Kiwi Power (1995) Ltd*, *Alstom New Zealand Ltd v Contact Energy Ltd*, *Body Corporate 344862 v E-Gas Ltd* and *Gawith v Lawson*.[20]

[21] The Law Commission reviewed the matter in its report "*Improving the Arbitration Act 1996*".[21] It referred to *Todd Energy Ltd v Kiwi Power* and said:

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

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18 *Fletcher Construction New Zealand and South Pacific Ltd v Kiwi Co-Operative Dairies Ltd* HC New Plymouth CP7/98, 27 May 1998; *Natural Gas Corporation of New Zealand Ltd v Bay of Plenty Electricity* HC Wellington CP179/99, 20 October 1999*; Contact Energy Ltd v Natural Gas Corporation of New Zealand Ltd* CA65/00 18 July 2000; *Yawata Ltd v Powell* HC Wellington AP142/00, 4 October 2000, Penlington J*; Rawnsley v Ruck* HC Auckland AP159/00, 20 February 2011, John Hansen J*; Rappongi Excursions Ltd v Denny's Inc* HC Nelson CP20/01, 24 April 2002, Master Venning*; Pathak v Tourism Transport Ltd* [2002] 3 NZLR 681 (HC)*; Reddy Dig Contractors Ltd v Connetics Ltd* HC Wellington CP147/02, 12 February 2003, Master Gendall; *; Rayonier MDF New Zealand Ltd v Metso Panelboard Ltd* HC Auckland CP256/02, 27 May 2003, Master Faire; *Lawson v Hartshorn* HC Christchurch, CIV-2007-409-3055, 8 May 2008, Associate Judge Christiansen*; Station Properties Ltd (In Rec) v Paget* HC Auckland CIV-2009-404-664, 22 December 2009 Associate Judge Sargisson; and *Mudgway v D M Roberts Ltd* [2012] NZHC 1463.

19 *Contact Energy Ltd v Natural Gas Corporation of New Zealand Ltd* CA65/00 at [22].

20 *Todd Energy Ltd v Kiwi Power (1995) Ltd* HC Wellington CP46/01, 29 October 2001, Master Thomson; *Alstom New Zealand Ltd v Contact Energy Ltd* HC Wellington CP160/01, 12 November 2001, Master Thomson; *Body Corporate 344862 v E-Gas Ltd* HC Wellington CIV-2007-485-2168, 23 September 2008, Dobson J; and *Gawith v Lawson* HC Masterton CIV-2010-435-253, 4 May 2011, Associate Judge Gendall.

21 Law Commission *Improving the Arbitration Act 1996* (NZLC R83, 2003) at [247].

[22] The Arbitration Amendment Act 2007 was enacted, without any amendment to article 8.

[23] Building on that history, the plaintiff says that the reverse side of the same coin is the accepted approach. The added words mean that a plaintiff who can make out a case for summary judgment should not be deprived of a judgment by a stay application under article 8. The test for stay under article 8 is the same as the test for summary judgment, not a lower threshold test of a bona fide dispute. It acknowledges that this approach is a departure from the Model Law, but says that Parliament is entitled to enact an arbitration régime that is moulded to local needs. There are practical advantages in retaining the summary judgment procedure. It cites the decisions of the Court of Appeal in *Royal Oak Mall*, *Baltimer Aps Ltd v Nalder and Biddle Ltd*[22] and *Contact Energy* as supporting that approach. It points to the greater number of cases which have applied it. Cases going the other way, as requiring a lower test for a stay application, are very much the minority. There has been no case where the court has refused to hear a summary judgment application and a stay application together, either consecutively or simultaneously.

The defendant's case

[24] The defendant's objection to the court hearing the summary judgment application goes to the court's jurisdiction. To that end, it filed an appearance objecting to jurisdiction under r 5.49.[23] Under *Advanced Cardiovascular Systems Inc v Universal Specialties Ltd*,[24] the court must decide jurisdiction questions before it can consider the merits of a summary judgment application. Any application for stay under Article 8 should be determined ahead of any summary judgment application.

[25] As to the meaning and application of the added words, the defendant relies on text, the purpose of the Arbitration Act 1996, English case law (especially *Hayter*

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22 *Baltimer Aps Ltd v Nalder and Biddle Ltd* [1994] 3 NZLR 129 (CA).

23 In *Redcliffe Forestry Venture Ltd v Commissioner of Inland Revenue* [2011] NZCA 638, the Court of Appeal confirmed that an objection to the court's jurisdiction based on the operation of a contractual term, may give good grounds for an appearance under r 5.49 – see [46] and [52]. See also *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94 at [25].

24 *Advanced Cardiovascular Systems Inc v Universal Specialties Ltd* [1997] NZLR 186 (CA).

v Nelson and Home Insurance Co[25]) and those New Zealand decisions such as *Todd Energy Ltd v Kiwi Power (1995) Ltd*[26] which follow *Hayter v Nelson and Home Insurance Co*.

[26] As to text, "dispute" in its ordinary meaning encompasses any genuine bona fide dispute, regardless of the merits. So "dispute" in the added words means any genuine bona fide dispute, even if it is later found that one side does not have an arguable defence to the claims of the other. Where there is a relevant arbitration agreement, any genuine bona fide dispute should be referred to arbitration in accordance with the parties' contractual choice. It is for the parties' chosen forum to decide the merits of the dispute. The added words in article 8 do not stand in the way of their contractual choice applying when there is a genuine dispute.

[27] The defendant refers to the primary principle under Article 5 that court intervention is not allowed, except where provided in the first schedule. Article 8 should be construed as an exception to that general principle. There is no basis for giving the added words a wide interpretation.

[28] Relevant statutory purposes are found in s 5 of the Act, especially (a) and (b):

> **5 Purposes of Act**
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> The purposes of this Act are—
>
> (a) To encourage the use of arbitration as an agreed method of resolving commercial and other disputes; and
>
> (b) To promote international consistency of arbitral regimes based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on the 21st day of June 1985; and...

[29] Arbitration as an agreed method of resolving disputes is not encouraged by allowing the courts to hear disputes under summary judgment applications. International consistency of arbitral régimes based on the Model Law is promoted if New Zealand applies its Arbitration Act based on the Model Law in the same way as

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25 *Hayter v Nelson and Home Insurance Ltd* [1990] 2 Lloyd's Rep 265.
26 Above n 20.

courts in other countries apply their legislation based on the Model Law. It refers to s 3:

> **3 Further provision relating to interpretation**
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> The material to which an arbitral tribunal or a court may refer in interpreting this Act includes the documents relating to the Model Law referred to in section 5(b) and originating from the United Nations Commission on International Trade Law, or its working group for the preparation of the Model Law.

[30] It refers to the UNCITRAL 2012 Digest of Case Law on the Model Law. Under article 5 the Digest says:

> Courts have consistently upheld article 5 (or enactments thereof) as a mandatory provision of the Model Law, confirming that it is the basic rule for determining whether court intervention was permissible under the Model Law in a particular case. Article 5 is interpreted by courts to illustrate the emphasis of the Model Law in favour of arbitration as article 5 may be invoked to exclude court involvement in any general or residual matters not expressly listed in the Model Law. Courts have echoed that, in all matters governed by the Model Law, court intervention would be appropriate only to the extent such intervention was expressly sanctioned by the Model Law itself.

[31] As to article 8, the Digest says:

> **May referral to arbitration be made on the ground that there is no dispute between the parties?**
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> Several cases stand for the proposition that a referral application may further be dismissed on the ground that there exists no dispute between the parties. This requirement is generally interpreted narrowly, as courts tend to require proof that the party seeking a referral order has unequivocally admitted the claim; a demonstration that no substantial or arguable defence to the claim has been put forward will not suffice.

[32] The defendant shows that English courts began to take a narrower view of the added words in s 1 of the Arbitration Act 1975. The most significant decision is *Hayter v Nelson and Home Insurance Co*.[27] There Saville J rejected the reverse sides of the same coin approach. His judgment includes the following:

> In my view, to treat the word "disputes" or the word "differences" in the context of an ordinary arbitration clause as bearing such a meaning leads not only to absurdity, but also involves giving those words a meaning which

[27] *Hayter v Nelson and Home Insurance Co* [1990] 2 Lloyd's Rep 265 at 268.

> (though doubtless one the words are capable of bearing) in context is difficult to support.
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> The proposition must be that if a claim is indisputable then it cannot form the subject of a "dispute" or "difference" within the meaning of an arbitration clause. If this is so, then it must follow that a claimant cannot refer an indisputable claim to arbitration under such a clause; and that an arbitrator purporting to make an award in favour of a claimant advancing an indisputable claim would have no jurisdiction to do so. It must further follow that a claim to which there is an indisputably good defence cannot be validly referred to arbitration since, on the same reasoning, there would again be no issue or difference referable to arbitration. To my mind such propositions have only to be stated to be rejected...
>
> In my judgment in this context, neither the word "disputes" nor the word "differences" is confined to cases where it cannot then and there be determined whether one party or the other is in the right. Two men may have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that that dispute did not in fact exist. Because one man can be said to be indisputably right and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them.

[33] Saville J rejected criticisms that arbitrations were necessarily slow processes. He emphasised the importance of holding parties to their agreement and that the courts should not usurp the functions of arbitrators.

[34] As to summary judgment cases, he quoted the judgment of Parker LJ in *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd*:[28]

> In cases where there is an arbitration clause it is in my judgment the more necessary that full-scale argument should not be permitted. The parties have agreed on their chosen tribunal and the defendant is entitled prima facie to have the dispute decided by that tribunal in the first instance, to be free from the intervention of the Courts until it has been decided and thereafter, if it is in his favour, to hold it unless the plaintiff obtains leave to appeal and successfully appeals.
>
> In the case of a commercial arbitration the above remarks apply with even greater force, perhaps especially when the dispute turns on construction, or the implication of terms or trade practice. Arbitrators and umpires in the same business or trade as the parties are certainly as well or better able than the court to judge what the parties must be taken to have meant or intended by the words or phrases that they have used, to judge what the parties at once have replied if an innocent bystander had asked what was to happen in a certain event not dealt with by the contract and to know what are the practices of the trade. Not only is the defendant entitled to have the dispute

[28] *Hayter* at 270.

> decided in the first instance by such persons, but the Court should not in my view, save in the clearest of cases, decide the question without the benefit of their views.[29]

[35] In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*,[30] Lord Mustill also noted the need for care in allowing summary judgment applications to run:

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

[36] The United Kingdom Parliament continued this trend by enacting the stay provision of the Arbitration Act 1996 (s 9) without the added words. In *Halki Shipping Corp v Sopex Oils Ltd*,[31] the English Court of Appeal recognised that the effect of the change in the legislation was to abolish the "reverse sides of the same coin" approach.

[37] In *Todd Energy Ltd v Kiwi Power (1995) Ltd*, Master Thomson drew on the approach of Saville J in *Hayter*. Dobson J expressed similar views in *Body Corporate 344862 v E-Gas Ltd*.

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29 *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd* [1989] 1 Lloyd's Rep 473.

30 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993[AC 334 (HL) at 356.

31 *Halki Shipping Corp v Sopex Oils Ltd* [1998] 2 All ER (CA).

[38] The defendant cites texts as supporting its approach: *Williams and Kawharu on Arbitration* and *Willy on Arbitration*.[32]

[39] *Royal Oak Mall Ltd v Savory Holdings Ltd* was a decision under s 5 of the Arbitration Act 1908. For the defendant, the court's decision to take the reverse sides of the same coin approach is understandable as an appropriate exercise of the discretion under s 5 of the 1908 Act, but it is not an authority on Article 8 of the First Schedule of the 1996 Act.

[40] In *Baltimar Aps Ltd v Nalder and Biddle Ltd*, the Court of Appeal referred to the approach it had taken in *Royal Oak Mall Ltd* for domestic arbitrations, a point the plaintiff had noted in its submissions. The defendant points out that *Baltimar Aps* was a decision under s 4 of the Arbitration (Foreign Agreements and Awards) Act 1982, which is effectively in the same terms as article 8 of the Model Law. Section 4 did not contain the added words. The Court of Appeal declined to follow the reverse sides of the same coin approach and adopted, with approval, criticism of that approach in Mustill and Boyd on *Commercial Arbitration*.[33] It said:

> We find this reasoning compelling, especially in this case where the parties have expressly excluded lawyers. The discussion about the Court pre-empting the arbitrators' jurisdiction goes a long way to dispel any suggestion that it retains an implied power to rule on whether there is a genuine dispute. Moreover, to hold there is such a power is to ignore the mandatory terms of s 4(1) of our Act, which are quite unambiguous. There may be case for the intervention of the parties seeking the arbitration in acting in bad faith and thereby abusing the court's process by applying for a stay, but there is no suggestion of that here. Resort to arbitration in respect of a mere refusal to pay an amount indisputably due could amount to such an abuse. ...

[41] The defendant says that the Law Commission's 1991 Report is not against its argument. It says that the purpose of the added words is simply to spell out that the absence of any dispute is a ground for refusing a stay.

[42] The defendant also points out that by 1996 English case law had moved against the reverse sides of the same coin approach. Parliament can be taken to have

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[32] David A R Williams and Amokura Kawharu *Williams and Kawharu on Arbitration* (LexisNexis, Wellington, 2011) at [4.13]; and Anthony Willy *Willy on Arbitration* (Brookers, Wellington, 2010) at [4.8].

[33] Above n 13.

known the law. In enacting article 8 with the added words, Parliament can be taken to have adopted the meaning applied in recent English cases, especially *Hayter*.

[43] It says that in the majority of the decisions under the Arbitration Act 1996, the point has not been argued and they are therefore not authorities against its argument.

[44] It agrees that the bald assertion of a dispute is not enough to trigger a stay under Article 8 but it submits that a bona fide dispute should be sufficient to trigger a stay. To illustrate how its test would apply, it says that summary judgment claims fall generally into one of five categories:

(1) The claim is admitted in prior communications so there is no dispute at all;

(2) The claim is contested but there is no more than a bald/mere assertion of a dispute;

(3) The claim is for a liquidated debt, with no issue as to fact or law to be determined;

(4) The claim is contested. Although there is no matter of fact in dispute, a real issue is raised as to the application of law (for example, interpretation of the application or implication of a contractual term); and

(5) The claim is contested and there is a real issue as to both fact and law.

[45] It accepts that in the first three classes an application for summary judgment would be appropriate and an application for stay would fail. For the fifth class, a stay should be ordered and a summary judgment application would fail. Those outcomes are no different from the plaintiff's approach. However, the parties are apart on the fourth class. The defendant says that in the fourth class a stay should be granted, even if summary judgment could otherwise be available. The matter of law in dispute should be determined in the forum the parties have agreed to.

Discussion

[46] The contest is between pragmatism and principle. The defendant's principled argument is that if parties have chosen a forum to resolve their disputes, they should be held to their agreement, even if it no longer suits their purposes. Its approach is a better fit with the Model Law. On the other hand, the plaintiff's case is based on the accepted efficiency of the summary judgment process.

[47] There is a sound basis for pragmatism. The advantages of allowing summary judgment applications, notwithstanding arbitration agreements, were recognised and put into law in the United Kingdom as far back as 1930. The Law Commission recognised those advantages in its 1991 report. Parliament enacted Article 8 in the terms proposed by the Law Commission. It must have adopted the Law Commission's reasons for the added words. I do not accept the defendant's argument that the Law Commission did not intend summary judgment applications to be run when there was an arbitration agreement, but no arguable defence to a claim. The added words were inserted into article 8 for a purpose. They did more than simply reproduce article 8 of the Model Law. They modify the way the Model Law operates. The history of cases since 1996 supports the pragmatic approach for pragmatic reasons. In most cases the courts have not had to decide the correctness of the approach because there is a general consensus that the approach works and does not need changing. In New Zealand that continuity of approach goes back to *Royal Oak Mall Ltd*. The approach is confirmed by the Law Commission's 1993 report not recommending any change and the absence of any relevant amendment in the Arbitration Amendment Act 2007.

[48] On another pragmatic note, it is not clear that adopting the defendant's approach would make much difference in result in most cases. In four of the five cases in [44] above, the result would be the same, whichever test is applied. The defendant says that its approach would be different in the fourth case, but even then, the court might still order a stay under the plaintiff's approach. In the four decided

cases the defendant cites as supporting its argument, it appears that in each case the judge would have ordered a stay, even if the plaintiff's test had been applied.[34]

[49] Again on a pragmatic note, there is convenience in applying the same test for summary judgment and for a stay. Further, the defendant's argument gives greater opportunity for abuse. The plaintiff's test as to dispute is objective – does the defendant have an arguable defence? But the defendant's test has subjective elements – is the defence being run in good faith regardless of the merits? If the court is not able to examine the merits of a dispute, it will be more difficult in a banco hearing to separate the genuine dispute from an asserted dispute being run solely as a stalling tactic.

[50] The defendant's case is really an argument for what the law should be, not what it is. That theme can also be found in the comments of Master Thomson in *Todd Energy Ltd* that the insertion of the added words in Article 8 is a mistake.[35] For this case, I am required to decide what the law is, not what it ought to be. Arguments as to what the law should be are more appropriate for an appellate court. In that regard, I note that there is an appeal to the Court of Appeal from Associate Judge Doogue's decision in *Mudgway v DM Roberts Ltd*.

[51] In *Hayter*, Saville J held that the reverse sides of the same coin argument led to claims for which there was no defence being excluded from arbitration agreements, as not being disputes.[36] With respect, I do not agree. Article 8(1) allows the court a concurrent jurisdiction. The court can decide matters that could otherwise be decided by an arbitrator. The court's jurisdiction arises only if a plaintiff can bring himself within the exceptions under Article 8(1). However, Article 8(2) recognises that an arbitration may be run parallel to court proceedings.

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[34] See *Todd Energy Ltd v Kiwi Power (1995) Ltd* at [61], *Alstom New Zealand Ltd v Contact Energy Ltd* at [26], *Body Corporate 344862 v E-Gas Ltd* at [97] and *Gawith v Lawson* at [8] and [24].

[35] *Todd Energy Ltd* at [34] and [47].

[36] See [33] above.

[52] I hold that under Article 8 the reverse sides of the same coin test is applied for summary judgment and stay applications. If that is thought to be illogical, then I invoke Justice Holmes:[37]

> The life of the law has not been logic; it has been experience...

[53] Having generally endorsed the "opposite sides of the same coin" approach, I refer to three matters that may affect the use of summary judgment applications in cases where parties have agreed to refer disputes to arbitration.

[54] First, when there is no arbitration agreement, the court gives a plaintiff summary judgment if the defendant has no arguable defence. The rationale is that no useful purpose would be served by following the normal procedures in an ordinary proceeding: interlocutory steps such as discovery and interrogatories, and a hearing with viva voce evidence and the opportunity for cross-examination. But when there is an arbitration agreement for disputes, the court hearing an application for summary judgment does not have to be satisfied that there would be no benefit in the case following the normal path of a proceeding in court. Instead the court can only give summary judgment if it is satisfied that there would be no benefit in requiring the parties to take the matter to arbitration. There may be cases where it may be more difficult to persuade the court that it would make no difference allowing the case to go to arbitration as opposed to a hearing in court. Cases where that consideration could arise are in arbitrations in specialised areas, for example, share-milking, construction and valuation. Even though those cases may throw up apparent questions of law, the court may recognise that a decision by an arbitrator with specialist industry knowledge may not be the same as one the court might give and would not grant summary judgment because of that uncertainty.

[55] Second, even when an application for summary judgment cannot be excluded under article 8, the court retains a discretion not to allow the application. There are two sources of the discretion: the inherent jurisdiction of the court and the discretion not to give judgment under r 12.2.

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[37] Oliver Wendell Holmes *The Common Law* (Little and Brown, Boston, 1881) at 1.

[56] In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*, Lord Mustill pointed out that the court has an inherent jurisdiction to apply a discretionary stay, in addition to the statutory mandatory power to stay:[38]

> First, as to the existence of the power to stay proceedings in a case which comes close to section 1 of the Act of 1975, and yet falls short either because of some special feature of the dispute-resolution clause, or because for some reason an agreement to arbitrate cannot immediately, or effectively, be applied to the dispute in question. It is true that no reported case to this effect was cited in argument, and in the only one which has subsequently come to light, namely *Etri Fans Ltd. v. N.M.B. (U.K.) Ltd* [1987] 1 W.L.R. 1110, the court whilst assuming the existence of the power did not in fact make an order. I am satisfied however that the undoubted power of the court to stay proceedings under the general jurisdiction, where an action is brought in breach of agreement to submit disputes to the adjudication of a foreign court, provides a decisive analogy. Indeed until 1944 it was believed that the power to stay in such a case derived from the arbitration statutes. This notion was repudiated in *Racecourse Betting Control Board v Secretary for Air* [1944] Ch. 114, but the analogy was nevertheless maintained. Thus, per MacKinnon L.J., at p. 126:
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> > "It is, I think, rather unfortunate that the power and duty of the court to stay the action [on the grounds of a foreign jurisdiction clause] was said to be under section 4 of the Arbitration Act 1889. In truth, that power and duty arose under a wider general principle, namely, that the court makes people abide by their contracts, and, therefore, will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them shall be otherwise determined."

[57] As far as I am aware, the only New Zealand case to refer to the discretion is *The Property People Ltd v Housing New Zealand*.[39] Salmon J cited English authority that in an area covered by detailed statutory provisions, the scope for exercise of the inherent jurisdiction will be limited. It is a residual discretion confined to dealing with cases not contemplated by the statute.

[58] As to the discretion not to grant summary judgment under r 12.2, even though the plaintiff has made out a case for summary judgment, the general trend of decisions is that the discretion will be rarely exercised. The extract from the Court of Appeal's decision in *Jowada* in [6] above illustrates the point. However, those general cases apply when the case would otherwise go to a defended hearing in court. When the alternative is an arbitration, there may be good reason to exercise

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38 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 (HL) at 352.

39 *The Property People Ltd v Housing New Zealand* (1999) 14 PRNZ (HC) at [25].

the discretion more liberally. For example, if a summary judgment application is going to determine only some of the matters in issue between the parties, it may be more efficient to have all matters heard by a single proceeding by arbitration. That was a point made by Dobson J in *Body Corporate 344862 v E-Gas Ltd*:[40]

> One rationalisation between these two approaches is that a stay should only be declined if the whole dispute is able to be resolved on summary judgment. Where, as here, parts only of a dispute could be resolved at the summary judgment stage, then the whole of the dispute should be resolved in the one forum and summary judgment on part of the claims as pursued by the party preferring litigation should be declined. The one forum to which the parties are committed by the contract, namely arbitration, should be seized of the whole dispute.

[59] While these discretions are said to be rarely applied, they may be useful in cases where a summary judgment application is clearly inappropriate, notwithstanding any assertion that any defence is unarguable.

[60] Third, international cases may be treated differently. This decision has considered domestic arbitrations. A New Zealand resident or business entering into an arbitration agreement can be taken to do so subject to New Zealand law. Under New Zealand law, specifically Article 8, an arbitration agreement will not necessarily apply to a dispute if there is no arguable defence to a claim. So New Zealand residents contract on the basis that the arbitration agreement may not apply in such cases. But that assumption cannot be made in the case of foreigners. Apparently some Canadian provinces and New Zealand may be the only jurisdictions to allow summary judgement applications, notwithstanding an arbitration agreement. Other countries do not. For example, Australian states have not adopted the added words.[41] A foreigner sued on a summary judgment application in a New Zealand court may object that he had agreed to submit any disputes to arbitration, not to being sued in a New Zealand court. He did not contract subject to New Zealand law. Article 8 is part of New Zealand's procedural law and under normal choice of law rules, a New Zealand court is required to apply it to any case before it as part of the lex fori. That will apply, even if the place of arbitration is overseas. Under s 7 of the Arbitration

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40 *Body Corporate 344862 v E-Gas Ltd* at [70].

41 See the Commercial Arbitration Act 2010 (NSW), s 8; Commercial Arbitration Act 2011 (Vic), s 8; Commercial Arbitration Act 2011 (SA) s 8; Commercial Arbitration Act 2012 (WA) s 8; Commercial Arbitration Act 2011 (Tas) s 8; Commercial Arbitration Act 1990 (Qld) s 53.

Act, article 8 applies with any necessary modifications to an arbitration abroad. The foreigner sued in a New Zealand court may point out that if sued in his own country, the court would stay the proceeding and would not allow the summary judgment application to continue. His objection may be considered when the court considers whether it should assume jurisdiction under the High Court Rules as to service abroad, that is, under rules 6.27 – 6.29. The objection may go to the questions whether New Zealand is the appropriate forum under r 6.28(5)(c) and whether other relevant circumstances support an assumption of jurisdiction under r 6.28(5)(d).[42] In that way, the exercise of the court's powers to assume jurisdiction over non-residents may restrict New Zealand's summary judgment approach to New Zealand residents, and not apply it to foreigners, thereby allowing consistency with the arbitration regimes of other countries.

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

Directions

[62] An agreement to submit differences to arbitration may be an appropriate reason for lodging an appearance objecting to jurisdiction under r 5.49.[43] As the defendant has filed an appearance under r 5.49, the court will need to decide whether the appearance is to be set aside. I direct the plaintiff, within 10 working days of this decision to file and serve an application to set aside the appearance under r 5.49(5). I direct the defendant to file and serve any opposition to that application within a further 10 working days.

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42 Similarly, once Part 2 of the Trans-Tasman Proceedings Act 2010 comes into force, it may be possible to raise the same matter in a stay application under s 24 when deciding whether an Australian court is more appropriate to decide article 8 issues.

43 Above n. 23.

[63] The Registrar is to allocate a fixture for a half-day hearing to hear both the application to set aside the appearance and the summary judgment application. The Registrar is to liaise with counsel when fixing the date of hearing.

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R M Bell
Associate Judge