IN THE SUPREME COURT OF NEW ZEALAND SC 58/2013

[2013] NZSC Trans 19

BETWEEN **ZURICH AUSTRALIAN INSURANCE LIMITED TRADING AS ZURICH NEW ZEALAND**

Appellant

AND **COGNITION EDUCATION LIMITED**

Respondent

Hearing: 9 October 2013

Court: Elias CJ
McGrath J
William Young J
Glazebrook J
Arnold J

Appearances: A R Galbraith QC and M J Francis for the Appellants
M G Ring QC and P Rzepecky for the Respondent

CIVIL APPEAL

MR GALBRAITH QC:

If the Court pleases. I appear with Matthew Francis for the appellant.

ELIAS CJ:

Thank you Mr Galbraith, Mr Francis.

MR RING QC:

May it please Your Honours, I appear with Phillip Rzepecky for the respondents.

ELIAS CJ:

Thank you Mr Ring, Mr Rzepecky. Yes Mr Galbraith?

MR GALBRAITH QC:

Thank you Your Honour. As the Court will know the issue here is whether the test for a mandatory stay under section – article 8 of the first schedule of the Arbitration Act 1996 is the inverse of the test to be applied on the summary judgment application. The matter in the Courts below has tended to focus primarily on the, on interpreting the Law Commission's report in 1991 which was the precursor to the passage of the Act in 1996. It seems to me more appropriate if one starts with the Act and it's, of course, appropriate to look at external materials and the Law Commission report will have to be looked at, but it seems, as I say, to me at least, in the traditional view if one looks at the statute first and then looks at any external materials.

But before – perhaps I should just identify in the material, and I'm sure the Court has identified it, where article 8 is to be found. It's in our authorities under tab 1, volume 1 of the authorities, it's got the Act – appellant's authorities volume 1. So tab 1 has got the sections of the Act. Tab 2 has schedule 1 in which one finds article 8 and Article 8 on page 21 as the Court will see simply says when, "A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall," it's a mandatory provision, "If a party so requests not later," and there's a time in here, "not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred."

The nub of the issue which has been litigated so far, been before two Courts, is whether those words, "There is not in fact any dispute between the parties with regard to the matters agreed to be referred," encapsulates, or brings into the statute the summary judgment test or whether it's a lower test of is there a dispute or not a dispute.

ELIAS CJ:

Why do you describe it in terms of a test? I mean I know it's referred to throughout but is that really helpful?

MR GALBRAITH QC:

No it's been – well, I think I do agree with Your Honour, I'm not sure it is helpful, the words are the words and the enquiry should simply be as to whether there is, in fact, any dispute between the parties but that's –

ELIAS CJ:

That's a matter of interpretation?

MR GALBRAITH QC:

It's a matter of interpretation, yes, Your Honour. But it has been applied – it's been, in the cases in New Zealand, been used as a test.

ELIAS CJ:

I think we lapse into that terminology much too quickly.

MR GALBRAITH QC:

Yes.

ELIAS CJ:

And since I've interrupted you, can you just tell me, because I don't – I do understand the device that's been used to get this matter on, in front of the Appellate Courts, but I'm still left a little concerned about what we're dealing with. What are you seeking if you succeed here, the matter goes back so that both the stay application and the summary judgment are determined, is that right?

MR GALBRAITH QC:

That's what would happen. The question would be what order they're determined in though because if we were successful then the stay application would be determined before the summary judgment application or if we're not successful vice versa.

ELIAS CJ:

So we're simply being asked to direct as to the order?

MR GALBRAITH QC:

Effectively that's, in practical terms that's correct but –

ELIAS CJ:

Because I'm just a little worried about whether we – in the way the matter is being argued, we're in fact going to be ending up determining the stay application.

MR GALBRAITH QC:

Ah, I think it'll be a consequence of what the Court decides, well, perhaps it won't be a consequence –

ELIAS CJ:

Perhaps it isn't, perhaps it isn't.

MR GALBRAITH QC:

No.

ELIAS CJ:

But you're simply seeking from us a determination that the Judge was wrong to direct they both be heard together?

MR GALBRAITH QC:

Yes and also wrong if the result of that is that the summary judgment gets determined first, which is the practice generally at the moment.

ELIAS CJ:

Ah.

MR GALBRAITH QC:

But it did come up, in a slightly odd way, as the Court will have seen.

ELIAS CJ:

Thank you.

MR GALBRAITH QC:

If I could, before plunging into trying to interpret Article 8, just spend a little bit of time on context at the time of the 1996 Act was brought into account. If the Court wouldn't mind just going to paragraph 23 of our submissions, and if I can just say something which I'm afraid the realisation came to me rather belatedly, that in fact these words which have been the nub of the issue before the Courts below, the words, "That there

is not in fact any dispute between the parties," didn't come in in the first time in the 1996 Act, they're in fact to be found in the 1933 Act which you find in our authorities volume 2, behind tab 18 as an annexure to the Law Commission's report.

ELIAS CJ:
Sorry, what –

MR GALBRAITH QC:
Sorry, it's Appellant's authorities, volume 2, tab 18 and then the pages are numbered at the foot of the page, 249 and you will see there on 249, section 3 of the 1933 The Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act is effectively, it's not quite the same because the time limitation didn't come in, but you will see at the foot there that it says, "Notwithstanding anything in the principal Act, if any party to a submission made in pursuance to an agreement to which the said protocol applies," so it's international arbitrations, "Commences any legal proceedings in respect of any matter agreed to be referred, any party to such legal proceedings may at any time apply to the Court to stay the proceedings, and that Court or a Judge, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties," so there is that same phrase, "With regard to the matter agreed to be referred, shall make an order staying the proceedings."

So, again it was mandatory. But those words were there and you will see below that the compare, compare the Arbitration Act, naturally it's hard to read there but it's actually 1930 section 4(2) (U.K.)

The position was that as we'll look at it in a moment, there were a couple of international protocols on international arbitrations and when the UK passed its 1930 Act, it added to those protocols by including those same words that we now have in the 1996 Act. There is not, in fact, any dispute between the parties and –

WILLIAM YOUNG J:
So were those not in the protocols?

MR GALBRAITH QC:
They weren't in the protocols, Your Honour, and they were picked up. That 1930 Act in the UK was obviously picked up in New Zealand in 1933 in that wording. I

suppose the one obvious point that one can make about that it certainly wasn't regarded as being inverse summary judgment test, if I can use that shorthand, Your Honour, at that stage, because of course summary judgment wasn't even a spark in the eye of the beholder at that time.

WILLIAM YOUNG J:
Well was there not summary – when did summary judgment come in, in the UK?

MR GALBRAITH QC:
In the UK, order 14, I'm not quite sure, Your Honour.

WILLIAM YOUNG J:
Yes.

MR GALBRAITH QC:
I was going to look at the white book but I got rained out this morning. When one reads the – what's said in the

WILLIAM YOUNG J:
I think order 14 would've been in force in 1930.

MR GALBRAITH QC:
What I was going to say, Your Honour, is if one looks at the McKinnon, the extracts from the McKinnon Committee in the UK, it doesn't refer to specifically to order 14 at that stage, but certainly the later committee law one did but the crux, you will see as we go through the –

McGRATH J:
So when was the McKinnon Committee again?

MR GALBRAITH QC:
Can I come back to that, Your Honour? We'll find out in one of the judgments, but we can have a look at –

ELIAS CJ:
Mr Galbraith, just looking at the difference in wording between these provisions and leaving aside null and void and conditions have changed.

MR GALBRAITH QC:
Yes.

ELIAS CJ:
It is a difference in emphasis, because section 3 of the 1933 Act requires the Court to stay the proceedings unless it is satisfied that one of those conditions –

MR GALBRAITH QC:
Yes.

ELIAS CJ:
– of ineligibility applies whereas section – article 8 requires the Court to find –

MR GALBRAITH QC:
Yes.

ELIAS CJ:
Or leaves open that it can find.

MR GALBRAITH QC:
Yes, well, article 8 certainly contemplates that the Court can have an enquiry into whether it's null and void and operative or incapable to being formed on it, in fact any dispute the question is how far that enquiry might go.

ELIAS CJ:
Yes, yes.

MR GALBRAITH QC:
But Your Honour is quite right.

ELIAS CJ:
Well section 3 is a default, a provision whereas article 8 isn't?

MR GALBRAITH QC:
Yes, I think that's fair.

ELIAS CJ:

Well, it's default if you don't find –

MR GALBRAITH QC:

Yes. So those words were there in 1933. They went out in 1982 and you find that back in volume 1 of our authorities behind tab 4, sorry, tab 5 and so in 1982 behind tab 5 you'll see section 4, "Power of the Court to stay Court proceedings effect of the matter subject to an arbitration agreement and you'll see, sorry, perhaps going back to the previous page, the long title, "An Act to implement an international convention, the recognition and enforcement for arbitral awards." The New York convention is 1958 and this Act was passed, as you will, across on the second page at the top, "Convention means the convention on the recognition and enforcement of Foreign Arbitral Awards adopted in New York, 10 June 1958." So, at section 4, says Court proceedings in respect of the matter subject to an arbitration agreement, if any parties in an arbitration agreement to which a section applies, commencing legal proceedings in respect of any matter in dispute between the parties."

So, that's a different wording to the wording that you find previously which referred to matters referred. Any matter in dispute between the parties which the parties have agreed to refer to arbitration pursuant to that arbitration agreement. Any party to those proceedings may at any time apply to the Court to stay those proceedings and the Court shall, unless the arbitration agreement is null and void, inoperative or incapable of being performed to make an order staying proceedings. So, again slightly different. It doesn't talk about fine, it doesn't talk about satisfied. It simply says, "Shall stay those proceedings unless the agreement is null and void, et cetera."

So that was the New Zealand statute law that applied to international arbitrations. The domestic arbitrations were still under the 1908 Act would you find one tab back behind tab 4 in that volume and on the second page that we've set out there, section 5, again the wording entirely different, "If any party to a submission or person claiming under him commence any legal proceedings, in respect of any matter agreed to be referred, any party to such proceedings may at any time before filing a statement of defence or taking other steps apply to the Court to stay the proceedings and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was at the time when the proceedings were commenced and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying

the proceeding." So, it's an entirely different proposition under section 5 of the 1908 Act in respect to domestic arbitrations.

The other two, perhaps contextual matters to –

ELIAS CJ:
What are you seeking to draw from that, if anything?

MR GALBRAITH QC:
It's – well, when we come to look at the Law Commission's report, it will be my respectful submission that one has to have in mind the context in which the Law Commission were making certain observations about what they were recommending going forward and one of the things which I'll be saying is that they didn't suggest that what they were recommending going forward was changing the international arbitration regime. That is, in my respectful submission, quite clear when one goes to the report, but we'll come to that.

The other two contextual matters at this time were two decisions of the New Zealand Court of Appeal. *Royal Oak Mall Ltd v Savory Holdings Limited* CA 106/89, 2 November 1989, which was a decision in relation to a domestic arbitration which you find in our volume of authorities at volume 1 at tab 8, I think it is. I'll just check. Yes, tab 8 of volume 1 of our first bundle of authorities, and this is a decision which has been much relied upon subsequently in relation to the meaning of dispute, which is one of the words, of course, or a keyword in the phrase which is in issue here.

Royal Oak Mall Ltd v Savory Holdings Limited was a case about building work and a certificate that had been given by either the architects or the engineers saying a certain amount of money was due and was being disputed and the question was whether there should be a stay and the matter sent off to arbitration. His Honour Justice Casey gave the judgment of the Court in respect to it and you'll see if one goes across to page 8 that the – he's referring there to the judgment below where the Judge had had regard to the 1989 edition of Mustill & Boyd and the discussion of hopeless defence, it's in the argument, obviously had been that given that there was a certificate of a sum due that there was no proper defence to that and therefore it shouldn't be sent off to arbitration and of course we're under section 5 of the 1908 Act where it's all discretionary.

His Honour in the Court of Appeal refers to that passage in Mustill & Boyd that the Judge below had referred to at the top of page 8 and then goes on to discuss some of the cases that were referred to in Mustill & Boyd at the time and you'll see about two thirds of the way down page 8 he refers to the *Sethia Liners Ltd v State Trading Corporation of India Ltd* [1986] 1 WLR 1398 (CA) case and across the page, on page 9, referring to *Ellis Mechanical Services Ltd v Wates Construction Ltd* [1978] 1 Lloyd's Rep 33, (1978) 2 BLR 57. Now those were all cases decided in a short-ish period of time in England in respect to, or founded largely on the additional words that existed in their 1930 Act, that we picked up in the 1933 Act, but the move from the 1982 Act for international arbitrations never had been in the 1908 Act for domestic arbitrations and so these cases and that approach, which at the time was being adopted in England temporarily, in respect to interpreting those additional words, really had nothing to do with the issue which was before the Court of Appeal here, or the words before the Court of Appeal which don't, of course, section 5 doesn't refer to dispute at all, it's not a word that appears in section 5.

Section 5 is a very broad discretion to decide whether or not it's appropriate for a matter to go off into arbitration. So His Honour picked up those, the commentary in Mustill & Boyd which really was founded on a different statutory scheme and that's not for a moment to say that the conclusion in this case is incorrect. I entirely accept the appropriateness of the judgment but page 9 and the first full paragraph there is really a paragraph which has been picked up and relied upon subsequently in relation to the interpretation of the additional terminology which is included in Article 8. You can see what His Honour said there, "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 contractors who opposed arbitration has the onus of satisfying the Court there is no arguable defence to his claim."

Now shortly after that, under tab 9, if the Court wouldn't mind just going to tab 9, the New Zealand Court of Appeal considered the position in respect to international arbitrations in the 1982 Act and again it was a judgment of Justice Casey on behalf of the Court. The facts of the case are not of any particular significance but on page 133 of the judgment His Honour picked up the same theme that he'd been speaking

about in *Royal Oak* and you'll see towards the top of page 133, about line 7, under the heading, "The Arbitration Act," he refers there to the 1982 Act, quite appropriately of course. Notes that it's there to implement an international convention. Notes at about line 33 that, "The English Arbitration Act of 1975 was passed to give effect to the convention," and notes there that that Act had included these additional words which had been in our '33 Act, were not in our '82 Act, "That there is not in fact any dispute between the parties with regard to the matter agreed to be referred." You see he sets it out about lines 38 and 39. So he then goes on to 41 to say, "It will therefore be seen that our Act follows the language of Article 11.3 in limiting the Court's power to exclude arbitration, whereas the English Act extends it to cases where there is not in fact any dispute. Under section 5 of our Arbitration Act, which relates to domestic arbitrations, the Court has an even wider discretion and may make an order staying the proceedings," and he sets that out. With respect he's quite correct in what he says there and that really was the short answer to the *Royal Oak* position.

He says in 50, "It has long been the position that a mere refusal to pay an amount that is indisputably due will not constitute a dispute entitling the defaulting party to an arbitration," refers to old authority, and then refers to *Ellis* again, which was the case he referred to previously, and about, on the following column, around about line 11, again refers to the 1989 addition of Mustill & Boyd and sets out an extract from there, and then you see about line 20 it refers to the authors, that's Mustill & Boyd citing, and he refers to two 1997 cases and a 1986 decision, *Sethia Liners* which he'd referred to previously in Royal Court.

What this Court will find is that what happened in England was that those words had been around since 1930 originally and around about 1977 the Courts started with this bright idea that those words implied an inverse summary judgment test, that seems to be when it first arose. It had a flowering as an idea for a brief period. There were contrary decisions in England and in fact by the time, by 1990 as we will come to in the submissions, there was very trenchant criticism of that approach, particularly in a case called *Hayter v Nelson and Home Insurance Co* [1990] 2 Lloyd's Rep 265 by Justice Saville who later became Lord Justice Saville and chaired an arbitration commission subsequently. And so the English position which adopted, probably generally one would say, it seems what Mustill & Boyd suggest, generally had adopted this approach that the test was inverse summary judgment test, was well on the way by 1990 but unfortunately not recognised in either Royal Court or here,

because the focus seems to have been on what Mustill & Boyd as a text in 1989 said and of course what Mustill & Boyd were saying in 1989, a text would have been whatever was in the Courts in perhaps 1988, computerisation and internet not being quite the same advantages that we have now. So that's fine, His Honour referred to that.

Then goes on to say that, "Whatever that approach might be, in England in respect to that terminology, the 1982 New Zealand Act doesn't allow for it."

WILLIAM YOUNG J:
Can you just pause there?

MR GALBRAITH QC:
Yes Sir.

WILLIAM YOUNG J:
What edition of Mustill & Boyd is the Judge citing from?

MR GALBRAITH QC:
1989 Sir.

WILLIAM YOUNG J:
1989, okay.

MR GALBRAITH QC:
You'll see that about line 13.

WILLIAM YOUNG J:
So that anticipates *Hayter*, this passage?

MR GALBRAITH QC:
Well no, what Mustill & Boyd actually said was, look what the Courts are doing is completely illogical and wrong, but we think that it is so entrenched now with this line of authority, that it isn't going to change. In fact, it changed, very quickly after 1989 edition came out.

WILLIAM YOUNG J:

I am just reading the passage that Justice Casey cited from.

MR GALBRAITH QC:
Yes.

WILLIAM YOUNG J:
Because that's very much, that's in part, the reasoning of Mr Justice Saville.

MR GALBRAITH QC:
Yes, it is. Yes, it is. Well that was Mustill & Boyd's preferred view but they were saying, well that's not the way the Courts have gone, we don't think it's going to change. We think that's got in grafted and turned out it hadn't. But in any case, in relation to our 1982 Act, you will see what His Honour says, from about line 32 onwards. "With respect we are unable to agree with this conclusion. The language of section 4 of the 1982 Act is quite clear." It refers to Mustill & Boyd that the added words in the English Act do not appear in any of your convention. "The clear inference from this," notes at about line 42, "The Courts had no power to investigate the reality of the dispute prior to 1930," then set out, I think the passage Your Honour was just referring to from Mustill & Boyd and then the next page, about line 10. It says, "We find this reasoning and compelling especially in the case where the parties have expressly excluded lawyers." The discussion about the Court pre-empting the arbitrator's jurisdiction, goes a long way to dispel any suggestion that retains an implied power to rule on whether there is a genuine dispute. We were able to hold there were such powers to ignore the mandatory terms of section 4(1) of our Act which are quite unambiguous. There may be a case for intervention if the parties seeking arbitration is acting in bad faith and thereby abusing the Court's process by applying for a stay, but there is no suggestion of that here. Resort to arbitration in respect of a mere refusal to pay an amount indisputably due could amount to such an abuse," and that's been the law in England for a long time and we'll have a look at a case called *Ellerine v Klinger* [1982] 1 WLR 1375 –

ARNOLD J:
So does that contemplate on the stay application. Can these cases be a refusal to pay an amount in dispute of the due, acting in bad faith and so on. There will be some sort of inquiry, affidavits, all that sort of thing?

MR GALBRAITH QC:

If that was raised, Sir, yes, there would have to be.

ARNOLD J:
All right, and in those circumstances there wouldn't be any particular objection to a summary judgment following straight away?

MR GALBRAITH QC:
Not if the stay wasn't granted, no, Sir.

ARNOLD J:
Right, so the real issue here is the sort of double reverse side of the same coin argument.

MR GALBRAITH QC:
Yes, well because they say it's reserve side of the same coin, because then it's possible to say, look, it doesn't matter, which one goes first.

ARNOLD J:
That's right.

MR GALBRAITH QC:
Because if you answer it one way, whichever way you answer it is the answer in the sense.

ARNOLD J:
That's right, and really, does it really bite practically on these issues of interpretation of the contract?

MR GALBRAITH QC:
Yes, yes, I mean that's absolutely correct, Sir, that's the real problem, particularly with international arbitrations where the reason for an arbitration revision can often be that there is a choice of expert panel to, in effect, decide what the obligations of the parties are.

ARNOLD J:
Yes.

MR GALBRAITH QC:

And the problem is, if in fact, it is subject to summary judgment in a New Zealand Court, that isn't what the parties wanted for presumably good reason because they both agreed to that. Instead, because our summary judgment processes now and no criticism to the sense of what we do, go a long way now in interpreting contracts. Unless there's some effectively some factual issue that is in dispute that may affect the interpretation, you really carved out of international arbitrations which is where this does most bite, you've carved out the ability of international parties to have arbitration on interpretation issues that don't involved disputed issue of fact.

ARNOLD J:

Well, Associate Judge Bell though said, well, his remedy for that problem was it seems the discretion. He, I think said, well, in a case like that you would exercise your discretion not to deal with it in a summary judgment application because it's not suitable for it and I take it you are not happy with that?

MR GALBRAITH QC:

Well, the problem about that, that's a discretion of course, so it either gets exercised one way or the other and if it gets exercised one way or the other there's nothing one can do about it, because effectively you can't deal from exercising the other discretion –

WILLIAM YOUNG J:

I think you can actually.

MR GALBRAITH QC:

Well, you can, Your Honour, but you then face that question about the test, of course, well, I shouldn't use that word test but...

WILLIAM YOUNG J:

I mean, can I just, so I understand it, I mean there's two lines or two well perhaps more lines of activity going on and if you just look at what these two Court of Appeal cases say and ignore the post-1990 developments in the UK, you would get the impression that these words, the added words, unless there is not in fact a dispute, are quite significant?

MR GALBRAITH QC:

Yes, well, yes.

WILLIAM YOUNG J:

Well I think it would, I mean I just wanted – I mean I'm not sort of pushing you on it, but I just want to – there isn't really an argument about that and part of the problem I guess is the rather unusual history our arbitration Act that is a private members Bill, five years in the gestation, not modified to take into account developments if there is a trial law between its development and otherwise.

MR GALBRAITH QC:

Yes.

WILLIAM YOUNG J:

So it doesn't have the usual, I suppose, supervision that an official Bill would've had, officially sponsor Bill would've had.

MR GALBRAITH QC:

I do want to take the Court to the Parliamentary process briefly, just to illustrate that, but, yes, Your Honour is quite correct and it is fair to say, I mean those words must mean something because they've been added so one obviously has to accept that.

ELIAS CJ:

Before you get into the Parliamentary history, just two questions, one is do I understand then that your argument is that this is a matter of degree, your answer to Justice Arnold?

MR GALBRAITH QC:

It's – I'm always a bit worried about agreeing, Your Honour –

ELIAS CJ:

Yes, well, that's why I'm wondering.

MR GALBRAITH QC:

Excuse me, hesitating –

ELIAS CJ:

Well, how would you –

MR GALBRAITH QC:

Well, I have a rather purest view of it which is a little bit different from what's in our written submissions –

ELIAS CJ:

But it's not in your submissions, the purest view.

MR GALBRAITH QC:

No, no, no, no, I accept that. My purest view is that it's – provided it's bona fide or put it the other way around, if it's not bona fide, which –

ELIAS CJ:

If it's not an abuse –

MR GALBRAITH QC:

If it's not an abuse and you can argue or you can – let's put it that way. Where does a sum which is one might say in disputably due because of its certification or whatever else and no, nothing put up is a challenge to that other than we want to go to arbitration, then you can either classify that as an abuse or you can classify it as being there's nothing in dispute, in fact in dispute and that's what Lord Justice Templeman as he then was said in a case called *Ellerine* in the UK and that's my purest view on it. Our submissions perhaps have a slightly less purer view of –

ELIAS CJ:

Well, if you're not pure though, you do end up as a matter of degree –

MR GALBRAITH QC:

You do end up, yes, yes.

ELIAS CJ:

And you do end up on a slippery slope and I'm trying to find out how you'd express it, whether you would still stick to the – I think one of the cases you just took us to did talk about abuse, didn't it?

MR GALBRAITH QC:

Yes, it did, well *Baltimar Aps v Nalder & Biddle* [1994] 3 NZLR 129 (CA) does.

ELIAS CJ:

But it's just on a sort of a sniff test rather than on a scope or jurisdiction test, which is what I take to be the purest view.

MR GALBRAITH QC:

Yes, well you see Royal Courts is pretty much like that, when one really looks at it, because there was a certificate of an amount due, I think the – I think there's – Justice Smellie in the Court but I think it's my memory, he talks about sort of a shadowy lack of substance to any defence to it, well, I've every sympathy with the Judge saying, well, there's in fact no dispute there or no genuine dispute there. I think that's – with the greatest respect, entirely appropriate, but when one starts getting into and this is the question of degree that Your Honours asked me, when one starts getting into, well, let's have a look at it and let's get a feel about it, then my purest side starts rebelling at that because that's exactly what the parties have decided and agreed and contracted to go off into arbitration.

WILLIAM YOUNG J:

But except that the statute does appear to contemplate that there may be a judicial override.

MR GALBRAITH QC:

Well, it does in all of those, so it's null and void, inoperable and all of those phrases.

WILLIAM YOUNG J:

But null and void, inoperative, there's a contractual failure, but unless there is a fact not – unless there is not a disputed fact, must be a judicial override because it wouldn't apply unless there is enough of a dispute to warrant arbitration, because it wouldn't be necessary.

MR GALBRAITH QC:

Well, that's of course one of the arguments about what does dispute mean.

WILLIAM YOUNG J:

Yes.

MR GALBRAITH QC:

Because of course if there's not a dispute then there shouldn't be an arbitration, full stop.

ELIAS CJ:

Well, my two questions, further questions, I did have one further, but it was on this, I don't understand why you don't make an argument, sort of an ejusdem generis argument, which would be in answer to what Justice Young has just put to you that it is a validity point and if –

MR GALBRAITH QC:

Yes.

ELIAS CJ:

– and if it's a contractual failure, as he said, point that it's not within the scope of what has been – what it has been agreed to be said to arbitration.

MR GALBRAITH QC:

And Your Honour, when one looks, when we come and I know I'm delaying coming to the Law Commission report, there's more than –

ELIAS CJ:

Well I'd rather start very closely with the statute.

MR GALBRAITH QC:

Yes, okay –

ELIAS CJ:

Which is why I'm taking you to this.

MR GALBRAITH QC:

But in the Law Commission report in fact there is support for exactly what Your Honour has just said that the Law Commission report actually says, "A dispute is something that people can agree to resolve," so it's provided there's something that people can agree to resolve then you're in a dispute and there is also potentially the argument that it is no dispute, then in fact the arbitration agreement is null and void or inapplicable, the sort of –

GLAZEBROOK J:

But doesn't the first part of clause 8 presuppose there is actually something that comes under the arbitration clause?

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

So it's relatively difficult, isn't it, to say that something comes within the arbitration clause and those words are put in to say that if it doesn't come within the arbitration clause that you can't arbitrate, because that would just be an interpretation of the arbitration clause itself.

MR GALBRAITH QC:

Yes, it will take you around in a circle.

GLAZEBROOK J:

Well, so they must mean something, and you would concede that the something is manifestly not a –

MR GALBRAITH QC:

Bona fide –

GLAZEBROOK J:

– dispute, whatever they said in Mustill, the manifestly – manifestly not bona fide as I think.

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

So the manifestly gives an objective view to see whether it was in fact bona fide, so it's not a subjective –

MR GALBRAITH QC:

But the Court still has the power to, has to decide that, is it bona fide, is it not bona fide, the Court certainly can determine that.

WILLIAM YOUNG J:

But I mean both sides have got a problem, both arguments have got a problem because the dispute can't really mean the same. Disputes only appears in a sort of subsidiary way in article 8 because it appears in fourth line, 123. In the fourth line.

GLAZEBROOK J:

No it does assume that –

WILLIAM YOUNG J:

Yes but on the whole an arbitration agreement only provides for arbitration in relation to disputes.

MR GALBRAITH QC:

Yes, yes. And very often that term is used, sometimes it is not, but usually it is used.

WILLIAM YOUNG J:

So it's hard to see how dispute can mean the same thing in the arbitration agreement as it means in the added words because that's just –

MR GALBRAITH QC:

No because if you had no bona fide dispute, then the arbitration clause shouldn't apply.

WILLIAM YOUNG J:

Yes absolutely but that would apply irrespective of whether the added words were there.

MR GALBRAITH QC:

Yes but you –

GLAZEBROOK J

But the arbitrator might have to decide that rather than the Court, and the added words gives the power to the Court, rather than the arbitrator decide that.

WILLIAM YOUNG J:

But without the added words, would the Court have power to say there is no genuine dispute here. Because I thought that was conceded.

MR GALBRAITH QC:

Well probably – as I say there is some suggestions that if there is no dispute, then the arbitration clauses could be described as null and void.

WILLIAM YOUNG J:

No, it's not null and void. It just doesn't apply.

MR GALBRAITH QC:

All I am saying is that there is some suggestion of that Your Honour.

WILLIAM YOUNG J:

But I thought on the English approach you favoured, that the view was and a non bona fide dispute, an insubstantial dispute, could be rejected without the added words. In other words, could be addressed by the Court because it wasn't –

MR GALBRAITH QC:

No, only – well it depends, Your Honour. Certainly a bona fide dispute or a non bona fide dispute can be rejected by the Court. But that's always –

WILLIAM YOUNG J:

A non bona fide dispute is still a dispute.

MR GALBRAITH QC:

Well I think the way that the Courts have dealt with that, always is that it is an abuse and therefore they can deal with abuse.

WILLIAM YOUNG J:

But so can the arbitrator.

MR GALBRAITH QC:

So can the arbitrator now, but don't forget, for a long time that the law was that the arbitrator couldn't decide on the arbitrator's own jurisdiction. In fact it was a 1996 Act which brought in the provision which said it could. So what you had before this was it had to go off to the Court, on any jurisdictional issue.

GLAZEBROOK J:
Yes.

WILLIAM YOUNG J:
But just, say there's no dispute about jurisdiction. The claimant simply says, this is a spurious defence, there's not a skerrick of merit in it but I will go to arbitration because it's quicker. Arbitrator says, not a skerrick of merit, award for the claimant. No one would say that that award was invalid because there wasn't a dispute.

MR GALBRAITH QC:
No I agree with Your Honour. I don't think anybody would say that.

GLAZEBROOK J
Well only since the 1996 Act though because otherwise the arbitrator would have been deciding on jurisdiction, surely.

WILLIAM YOUNG J:
Well I bet there wasn't a case before the 1996 Act, where –

MR GALBRAITH QC:
Oh there were.

WILLIAM YOUNG J:
Sorry, where a respondent in the circumstances I have postulated was later able to say, "I'm not going to pay out on the award because my defence was so spurious that the award is invalid."

ELIAS CJ:
But doesn't that actually – that argument actually assist you because if it is accepted that it would be a nonsense to say you don't have jurisdiction because you have decided that you didn't succeed, then it is not a jurisdictional question. It is a merits question.

MR GALBRAITH QC:
Well that is really what Justice Saville said in *Hayte*r really that if you take this other view, then what you are saying that the arbitrator and that would say you cannot be

right, it has got to mean the same thing, in both contexts but what we would say is that these added words, because for example, the Law Commission said well they don't change the basis for stay, don't add anything to the basis for stay, simply recognising the old traditional law, that if it is not bona fide, then it is an abuse, in effect. Now obviously, my learned friends and I have different views on this.

ELIAS CJ:

The other question, the last question I had was that I am not sure why people are concentrating on the word dispute. In article 8, the first reference to dispute is the dispute before the Court.

GLAZEBROOK J:

No it's the substance, the first statement on the substance of the dispute.

ELIAS CJ:

But it is before the Court isn't it.

GLAZEBROOK J:

But as the dispute has to be subject to the arbitration agreement, I would have thought –

ELIAS CJ:

Oh I understand that. But why isn't it the phrase that we are concentrating on. "A dispute between the parties with regard to the matters agreed to be referred," which again points you in the direction of jurisdiction, one would have thought.

MR GALBRAITH QC:

With respect I agree with that and that is the whole point of the international arbitration regime under the New York Convention that provided there is a dispute, and international dispute, then that is a matter to be determined by the Arbitrator, subject to the fact that as Your Honour quite rightly says, when one looks at those other categories, and null and void and operative and capable of being performed, we are talking about whether there is in fact jurisdiction, because there is, in fact, an arbitration agreement which applies in particular circumstances.

WILLIAM YOUNG J:

Can I just make, I mean, this is quite a difficult point, but I want to understand the position clearly. I suppose my preliminary, it's only if there is a dispute that there can be an arbitration.

MR GALBRAITH QC:
Yes.

WILLIAM YOUNG J:
So if "dispute" in the added words encompasses merely what would otherwise be subject to arbitration, they add nothing to the cause.

MR GALBRAITH QC:
Well what – well look at see what the Law Commission says.

WILLIAM YOUNG J:
I am really inviting your comment on that because I want to understand whether you accept whether your proposition is that we should construe article 8 as if those words weren't there.

MR GALBRAITH QC:
No I don't think, no, you can't construe it as if those words aren't there, because they are there.

WILLIAM YOUNG J:
So what do you say they add to the original model version.

MR GALBRAITH QC:
Well they add the fact of bona fide for example.

WILLIAM YOUNG J:
Do they? But what –

MR GALBRAITH QC:
Well that wouldn't come under null and void and operative and capable of being performed.

WILLIAM YOUNG J:

No but a non bona fide dispute can still be arbitrated.

MR GALBRAITH QC:
Yes.

WILLIAM YOUNG J:
So what does it add to it?

MR GALBRAITH QC:
Well because it gives the Court power to not grant a stay in those circumstances.

WILLIAM YOUNG J:
But –

MR GALBRAITH QC:
Sorry, it gives the Court power to grant a stay in those circumstances, sorry I put it the wrong way round.

WILLIAM YOUNG J:
Sorry, I don't understand this. Because a non bona fide dispute can be arbitrated, we agreed with that?

MR GALBRAITH QC:
Yes.

WILLIAM YOUNG J:
So if dispute in the added words, means merely what "dispute" means in the arbitration submission, they would add nothing because we know, even without the added words, that because without the added words, you can have an arbitration.

MR GALBRAITH QC:
But this only arises, it only arises –

WILLIAM YOUNG J:
Or sorry –

MR GALBRAITH QC:

If one of the parties to the arbitration comes along to Court and says , “I want to stay.” I mean this is not a free floating jurisdiction the Court has to intervene, it’s only if one of the parties comes along and says, “I’m not going before the arbitrator, despite the fact that there may be a dispute, I’m not going before the arbitrator because I don’t believe that this is a genuine dispute.”

WILLIAM YOUNG J:

But I thought that part of Mr Justice Saville’s approach was that it does mean the same so that if the reverse side of the coin approach was right, you could never arbitrate a non bona fide dispute.

MR GALBRAITH QC:

If you took the – yes, that’s what he did suggest, yes.

WILLIAM YOUNG J:

But that can’t be right can it. Because you must be able to arbitrate a non bona fide dispute if you want to.

ELIAS CJ:

Well it depends what you mean by bona fide doesn’t it. I mean if it is as far as being an abuse.

MR GALBRAITH QC:

That’s right.

ELIAS CJ:

It may be one thing, then it does go to jurisdiction and also it is what the Court is meant to prevent.

MR GALBRAITH QC:

That’s what I was inarticulately trying to say.

WILLIAM YOUNG J:

Say a claimant wants the speed of the arbitration process, because it is better, does the defendant say my dispute is so spurious that you can’t go to arbitration, you have to go to summary judgement.

MR GALBRAITH QC:

But –

GLAZEBROOK J:
It's only when proceedings are before the Court that this comes into play.

WILLIAM YOUNG J:
But this is – I am dealing with the idea that a spurious dispute can't be arbitrated.

ELIAS CJ:
Well what do you mean by spurious?

MR GALBRAITH QC:
But a spurious dispute, anything can be arbitrated if nobody objects to it, I mean with great respect, that's what's going to happen.

WILLIAM YOUNG J:
Yes, well I understand.

MR GALBRAITH QC:
So it's only if somebody, if somebody tries to bring something before the Court that article 8 even starts to have an effect, and then it's for the Court to decide whether there's a dispute, in fact, or in fact a dispute or not, or if it's an abuse then one would expect the Court not to grant the stay.

WILLIAM YOUNG J:
But why can't the Court decide that without the words?

MR GALBRAITH QC:
Well, the Court may be able to and that's, as I say, the Law Commission said that this wasn't changing the basis for stay, this wasn't adding additional grounds, so I wouldn't disagree with Your Honour but if there was an abuse that perhaps a Court could otherwise intervene.

Can I just, I'm probably getting myself out of order here, but it's – but it's on – it's relevant I think to what we've been talking about. If one goes back before tab 1 which is the sections of the Act and just see how important section, or the scope of section 8, because you'll see there that and in my respectful submission is this does

support the argument that it's a jurisdictional issue. Where are we? If you look at section 6 of the Act which is on page 5, you'll see what it says there is that if the place of arbitration is, it would be in New Zealand, then the provisions of schedule 1 and provisions of schedule 2 if any applies, now schedule 1 is where article 8 is and that's the – schedule 1 is the one which applies to all arbitrations, international or domestic. Schedule 2 is the elective provisions, elective in respect of international or some of them are elective in respect of domestic, so in any event, article 8 applies if the place of arbitration is, it would be in New Zealand.

If we then go down to 7, if the place of arbitration is not in New Zealand, articles 8, 9, 35, 36 of schedule 1 apply in respect of the arbitration. Article 8 applies if you've got an international arbitration going to be held in Singapore wherever it is and then section 8, only articles 8 and 9 apply if it still hasn't been agreed or determined where the arbitration is going to take place. That, with respect, seems to me to emphasise the fact that this is aiming at fundamental jurisdictional issues, so even if you've got an arbitration going to happen in Singapore, that if the agreement is null and void, inoperative, incapable of being performed or there's an abuse, that it should be able to be restrained under article 8 if need be, but if one thinks of the opposite of that, the parties have agreed to say in expert determination on the terms of their contract, to be heard in Singapore under English law, and because one of the parties happens to be in New Zealand, somebody brings summary judgment proceedings that one then looks at article 8 and these added words and says, well, even though there's a genuine dispute, we think our, it used to be masters when the 1996 Act was passed, a master in New Zealand can determine the interpretation of this contract and that's what should be done.

WILLIAM YOUNG J:
Might that not turn on whether proper the contract is?

MR GALBRAITH QC:
No, because if you're saying that the contract is going to be stayed it's this law which would apply, that's what section 8 says.

WILLIAM YOUNG J:
But would the New Zealand Courts apply –

MR GALBRAITH QC:

Well, you're not applying the law of the – of the arbitration then, you're applying the law of the forum in respect to –

WILLIAM YOUNG J:
All right, well, I wonder, is there any authority on that, because I would've thought that perhaps you would defer to the proper law of the contract submission of the arbitration submission.

MR GALBRAITH QC:
Well, what you're saying is that for example if you take null and void, you're saying that the arbitration provision is null and void. It doesn't apply, so the proper law of the arbitration revision, if they've elected for arbitration, English law doesn't apply.

WILLIAM YOUNG J:
Isn't there an interesting line of cases and private international law as to how – what's the proper law of a contract said to be null and void?

MR GALBRAITH QC:
You're right –

WILLIAM YOUNG J:
Are we on an issue here which doesn't have much value?

MR GALBRAITH QC:
Yes, no, Your Honour is quite right, I was looking again at it the other day, but there is an interesting line of case about what is the proper law of a contract and what happens if – how does the proper law fit in with a choice of law provision, et cetera. But if one thinks of the logic of it here, well, forget about it being English law, it just says it's an arbitration between European entity, New Zealand entity, delivery of product in Australia, it's an example I've got at the moment, to be arbitrated in Singapore with expert determination et cetera and one says because one of the parties is present in New Zealand that they can bring summary judgment proceedings interpreting the, the cap liability in the, in the contract. Not disputing facts at all, just, just the interpretation of cap liability. Would've been determined before a master in New Zealand in 1996, now an Associate Judge. That's a surprising outcome for an international arbitration. And it has other consequences which, which we could talk about.

Now this has become, it has become – there's been a recent High Court decision. It has become a bit of a sore point for a number of reasons, including because international trade is, is somewhat more sophisticated than and more substantial than it use to be, but it's also become a bit of an issue in New Zealand because of the Christchurch earthquake and reinsurance contracts. Reinsurers inevitably will have in their contracts overseas arbitration provisions because reinsurers, as the Court will well understand, reinsure all around the world and the last thing they want to be is dragged into every jurisdiction in the world about a dispute about a reinsurance contract, and so Justice MacKenzie had to deal with this in a, in a recent case which my learned friend was, was involved in, *New Zealand Local Government Insurance Corporation Ltd v R+V Versicherung AG* HC Christchurch CIV-2012-409-2259, 9 April 2013, and he had all the difficulties of having to decide whether or not summary judgment was appropriate or not on issues relating to interpretation of contract, and he decided it wasn't appropriate, but he had to dance around the problem of not being able to actually say what he thought the answer was he would otherwise pre-empt what the arbitrator might decide what the answer was.

So you, you see in, in this judgment him pretty clearly, reading between the lines, having some pretty clear views as to what it did mean, but, but being unable to express that other than to say that it was arguable. Now that's the sort of problem which, which then arises and that obviously creates cost, it creates delay, it – perhaps just while I'm on this theme, if one thinks of the downsides of the parties having to go through summary judgment before they go off to arbitration, it breaches the confidentiality, which one has in, in arbitrations of course. It, it also is something which a party effectively gets penalised for because under international arbitrations there are of course international conventions recognising international arbitration awards. They are much, in my respectful submission, much wider than the provisions that recognise judgments of a New Zealand domestic Court. So if you force a party into summary judgment arbitration then the result of that may not be as enforceable offshore in many countries as against an international arbitration.

ELIAS CJ:

But hang on, what is the summary judgment that's in issue here? Surely it's...

MR GALBRAITH:

Oh, the one in issue here, Your Honour, that's, that's not an issue.

ELIAS CJ:

No.

MR GALBRAITH:

I'm speaking more, more generally.

ELIAS CJ:

When – you're talking about the substantive –

MR GALBRAITH:

Yes.

ELIAS CJ:

– determination?

MR GALBRAITH:

Yes. Well, well I'm, I'm really speaking about the sort of arbitrations that, international arbitrations that I was talking about before. It's not an issue which – it's, it's an issue which binds particularly in relation to international arbitration more so than domestic arbitration.

In any event I've probably strayed a fair way from where we were.

WILLIAM YOUNG J:

Can I just pause? The – I do – clause 8 is a very difficult clause. The option the Court has when it, sorry, the requirement for a Court which stays proceedings must be at the same time to refer the parties to arbitration, which is what the section says. Under the arbitration agreement, almost invariably one would think, and given also section 10, it could only refer what was a dispute, what it considered to be a dispute. So if there's not a dispute it couldn't grant a stay.

MR GALBRAITH:

Well it, it will be bound – well it, it comes back, Sir, to the words of, of article 8, in fact any disputed...

WILLIAM YOUNG J:

No, no, but leaving aside those words, even without those words it could not grant a stay unless there is a dispute to refer to arbitration.

MR GALBRAITH:
I'm not sure that I agree with Your Honour.

WILLIAM YOUNG J:
Well what would it otherwise refer to arbitration?

MR GALBRAITH:
Because, because this is where, because that would be the challenge. I mean if, if it doesn't, if the challenge doesn't satisfy the words that we're discussing then the challenge, there, there must be a dispute,

WILLIAM YOUNG J:
Well what I'm trying to postulate is article 8 without the added words.

MR GALBRAITH:
Oh but we – yes, but unfortunately we have got the added words Sir.

WILLIAM YOUNG J:
I – yes, no. Then I want to see what the added words might add to it.

MR GALBRAITH:
Well...

WILLIAM YOUNG J:
Treat article 8 without the added words. The Court could not –

MR GALBRAITH:
All right. Well we'll...

WILLIAM YOUNG J:
– grant a stay –

MR GALBRAITH:
All right. Well then you come along –

WILLIAM YOUNG J:

– unless there – sorry, just pause there. It could not grant a stay unless satisfied that there was a dispute to refer to arbitration.

MR GALBRAITH:

Okay. Right. Well, my purist view on the, on the law is that the Court could only not grant a stay in those circumstances if there was an abuse, and it may be that if there's an indisputable amount that, well, Lord Justice Templeman referred to in *Ellerine*. That may be an abuse and therefore the Court won't grant a stay. But otherwise it can't get into having a discussion or investigation as to whether or not there's a dispute.

ELIAS CJ:

Well there might –

GLAZEBROOK J:

What's an abuse?

WILLIAM YOUNG J:

But – sorry, section 10 makes it clear that it's only a dispute that can be referred to – that's contemplated by the legislation.

MR GALBRAITH:

Yes.

WILLIAM YOUNG J:

So if there isn't a dispute – do you not agree that if the Court is of the view that there's no dispute it cannot, without the added words, refer –

MR GALBRAITH:

Well...

WILLIAM YOUNG J:

– the case to arbitration?

MR GALBRAITH:

Shall we look and see?

WILLIAM YOUNG J:

Well what's happened to the English case where –

ELIAS CJ:

It's only granted a stay.

WILLIAM YOUNG J:

– article 8 doesn't have the exact words? What sorry?

ELIAS CJ:

The Court isn't referring. The Court's just granting a stay.

WILLIAM YOUNG J:

No, no.

GLAZEBROOK J:

No, well that was my point about, "What's an abuse?" It's an abuse of what? Because that's what I don't understand. Because it's not an abuse, it's not an abuse of the Court to even put something that's – I mean, where's the abuse there? I mean it may be that the arbitrator can't look at it if it's not a dispute, but until you've looked at it you don't know whether there's a dispute or not, do you?

MR GALBRAITH:

That's right. And, and unless somebody challenges it – I mean if both parties cheerfully go off to arbitration, well that's it. There's a dispute because that's why they're turning up before the arbitrator. It's only ever going to –

WILLIAM YOUNG J:

But so what I'm really postulating is what would happen without the added words? And because the stay operates at the same time as a referral to arbitration.

MR GALBRAITH:

Well, as I said before –

WILLIAM YOUNG J:

The corollary of which might be that you can only grant a stay if there's a dispute.

MR GALBRAITH:
Well it depends what you mean by dispute obviously.

WILLIAM YOUNG J:
Well I agree.

MR GALBRAITH:
To state the obvious.

WILLIAM YOUNG J:
Yes. It's just what I'm trying to drive at is I don't think "dispute" in the added words can be read as confined to the dispute which would confer, which could be arbitrated.

ELIAS CJ:
But there may be, surely, a – I might be misunderstanding this, but there may be a dispute which is subject to the jurisdiction of the Court but is not a dispute with regard to the matters agreed to be referred to arbitration.

MR GALBRAITH:
Well that could be possible.

ELIAS CJ:
If you had, for example, a debt and people weren't paying but the arbitration agreement was only in relation to the quality of what had been supplied or something.

MR GALBRAITH:
Well, yes, Your Honour's quite right, and that, in fact, the, the latest, I think it's, I don't know if it's Auckland district or New Zealand district commercial leases, what it does with its arbitration provision, it excludes from the arbitration provision non-payment of rent and, and something else, I forget what it is, so that that's exactly the point that, that Your Honour's making. So there could be a dispute about rent but it's excluded from the arbitration provision so therefore it's not a dispute giving rise to, that can be referred to arbitration.

ELIAS CJ:

Which is why I think –

GLAZEBROOK J:

That doesn't come within the first part of clause 8(1) then because it's not the subject of an arbitration agreement –

MR GALBRAITH:

That's right.

GLAZEBROOK J:

– so you don't need the added words for that.

MR GALBRAITH:

No.

GLAZEBROOK J:

It just doesn't come within it.

ELIAS CJ:

Well, that is though however a matter which is the subject of an arbitration agreement. It may be a wider reference.

MR GALBRAITH QC:

But if you didn't have the added word which is the point that His Honour Justice Young is putting to me, I mean that would still be –

GLAZEBROOK J:

Well you couldn't refer something to arbitration that wasn't subject of an arbitration agreement.

MR GALBRAITH QC:

No.

GLAZEBROOK J:

So you couldn't grant a stay under 8. It's just –

MR GALBRAITH QC:

Yes, I suppose.

GLAZEBROOK J:

There's no way that you could say, well, I'll grant a stay under 8 and I'll send the rental dispute off to arbitration when it's not the subject of an arbitration agreement.

MR GALBRAITH QC:

No.

GLAZEBROOK J:

It just doesn't make any sense at all.

MR GALBRAITH QC:

No, but you may come –

GLAZEBROOK J:

Because the parties haven't agreed that it's a subject of that arbitration agreement.

MR GALBRAITH QC:

That's right, but you may well come to Court though if somebody tries it.

GLAZEBROOK J:

It may come to Court but it's nothing to do with article 8.

MR GALBRAITH QC:

Yes, no, no, I agree with that, I agree with that.

GLAZEBROOK J:

And if somebody tries to make that agreement like that, the answer to that is, well, we didn't agree to arbitrate that, so...

MR GALBRAITH QC:

Yes, but it's – that's where section 10, I mean –

GLAZEBROOK J:

Well, section 10 is the same thing, isn't it?

MR GALBRAITH QC:
Yes.

WILLIAM YOUNG J:
It's possible that it's just a legislative muck up that the draftsman's hand has faulted here.

MR GALBRAITH QC:
That's possible, that's possible.

ELIAS CJ:
Maybe belt and braces.

GLAZEBROOK J:
Well I would still suggest that a dispute that isn't genuine is still a dispute. I mean we have a lot of non-genuine disputes that people believe in passionately that come through the Court, if you wanted to use that terminology.

ARNOLD J:
I had assumed that you would regard the added words as covering those cases that Associate Judge Bell deals with 44 where he gives the five examples covering the first three, so no more than a mere, broad or mere assertion of a dispute, the liquidated debt and the situation where there's a clear admission –

MR GALBRAITH QC:
Yes.

ARNOLD J:
And really you can't – I had assumed your argument would be all those words do, is allow the Court to deal with those sorts of situations, even accepting that they may in some instances anyway, have had the power to do so without the words but it makes it clear that that is what they can do. And summary judgement would be entirely appropriate in all those cases.

MR GALBRAITH QC:

Yes. Well that's right, any judgment would be appropriate in any of those cases, default judgment or any other form of judgment.

WILLIAM YOUNG J:
But would you say that in those cases, so are you accepting that in the cases that Judge Bell postulated, it would be possible for the Court to decline a say and to deal with summary judgement.

MR GALBRAITH QC:
In those cases, yes.

GLAZEBROOK J:
But that is manifestly not a bona fide dispute, you'd say i.e. objectively isn't a dispute, is that the submission?

MR GALBRAITH QC:
Yes.

GLAZEBROOK J:
I'm picking up the Mustill –

WILLIAM YOUNG J:
Is that because of the added words?

MR GALBRAITH QC:
The added words make it clearer, that's what I would say.

WILLIAM YOUNG J:
Because would that be the position Judge Bell's postulated case, has been the position that the UK Courts would reach, without the added words.

MR GALBRAITH QC:
In my view, yes. Well there is, look, there is still some; for example, one case there, take this as an example. *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1997] 1 WLR 713 whatever it is called, the decision of the House of Lords, was a case where about bills of exchanges and somebody wanted to run a set off argument in arbitration and Lord Wilberforce said, no dispute. He didn't use the word dispute I

don't think, but he said, you can't do that because the law is clear, you can't apply set off in a bills of exchange situation. Well I mean, some of the English Courts suggested that is going too far in allowing the Court to intervene on that basis but that seems to me, something where there isn't a bona fide dispute because that is the law, you just can't run that.

WILLIAM YOUNG J:
So if you say it is a belt and braces?

MR GALBRAITH QC:
I say it makes it clearer, yes, Sir.

ELIAS CJ:
It may, I tended to think that it was belt and braces but it may also be highly desirable given the power of the arbitrator to determine his own jurisdiction.

MR GALBRAITH QC:
Which is in the same -

ELIAS CJ:
What is the provision that indicates that in the '96 Act because otherwise it could be said if the arbitrator has jurisdiction to determine his own jurisdiction, that that is a dispute which is to be determined in the arbitration.

MR GALBRAITH QC:
Yes it is article 16, Your Honour, behind your tab 2. "The arbitral tribunal may rule on its own jurisdiction including any objections with respect to the existence or validity of the arbitration agreement."

ELIAS CJ:
So this would make – so article 8 would make it clear that a party can go to the Court and say, "You determine that", rather than let, require us to go to arbitration to have it determined?

MR GALBRAITH:
Yes, because you'll, you'll see there that – I mean the arbitral tribunal can determine null and void, for example, but so can the Court under article 8.

WILLIAM YOUNG J:

When, say, before the ’96 Act an arbitrator couldn't determine jurisdiction? In fact arbitrators by simply issuing an award would determine jurisdiction provisionally wouldn't they? It simply means they couldn't determine jurisdiction conclusively. It would be subject to review for...

MR GALBRAITH:

That’s true. That’s true. But if, if a jurisdiction issue came up what used to happen was that you’d toddle off, excuse me, you’d bring stay proceedings or something like that in Court saying there’s a jurisdictional issue and, and the arbitrator can't determine it.

WILLIAM YOUNG J:

But the arbitrator was perfectly entitled to say, “I have jurisdiction –

MR GALBRAITH:

Yes, yes.

WILLIAM YOUNG J:

– and I’m going to proceed until someone tells me not to.”

MR GALBRAITH:

Yes. Yes.

WILLIAM YOUNG J:

So in that sense could determine jurisdiction on a provisional basis.

MR GALBRAITH:

Yes. Yes. Quite right.

ELIAS CJ:

And article 8, it occurs to me, is also quite limited in the sense that you have to, if you’re wanting the Court to intervene you have to do it as soon as you file your first document in the Court. Don't you?

WILLIAM YOUNG J:

No, if you want the arbitration to be invoked.

ELIAS CJ:

Yes. If you want the – is it the other way round is it?

WILLIAM YOUNG J:

The person who wants the –

ELIAS CJ:

Yes, sorry, it's the one who wants the stay. Yes.

MR GALBRAITH:

And there've been cases about, about that, determining that.

While we're still with the Act, because I have some preference for, for that, the other part of interpreting the Act of course is looking at the, the text in light of the purpose. The Arbitration Act does have a purpose section and that's section 5, which you find behind tab 1. And you'll see the purpose of the Act set out there: "to encourage the use of arbitration", "to promote international consistency", which is a matter I'll come back to based on the Model Law, "to promote consistency between the international and domestic arbitral regimes", "to redefine and clarify the limits of judicial review", "facilitate the recognition and enforcement of arbitration agreements" and to give effect to those two earlier protocols, the '23 and the '27 protocol and the 1958 (New York) Convention. So it, it has, the Act does have express purposes set out there and that, in my respectful submission, is that it should be the starting point when one's looking for interpreting text in the light of the purposes. I'm not saying one can't look at external matters but when it's set out in the Act they must be, those must be powerful.

GLAZEBROOK J:

Although one of the difficulties is if you have express words that aren't included in most conventions the argument would then have to be, well you interpret even those added words within the spirit of that. But it's not quite as strong as interpreting words that haven't been added, is it?

MR GALBRAITH:

No, I agree with that. But you're, and you'll also see, Your Honour, section 3, which says that in, "Further provision relating to interpretation", "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." So again heavy emphasis on the, on the Model Law.

McGRATH J:
When we, when the Act speaks of a purpose of giving effect to the obligations, that can be done in different ways into, even to different degrees, can't it?

MR GALBRAITH:
Yes. No, I accept that. That's, that's – Your Honour.

McGRATH J:
Chicago Convention as to how, the order in which aeroplanes fly, things like that. Things of that absolute. But in other matters it seems there is some flexibility. It looks as though at least this provision is according, these extra words were according some flexibility –

MR GALBRAITH:
Well –

McGRATH J:
– aren't they, in what Parliament's doing?

MR GALBRAITH:
Well that's what, what will be interesting when, when one, when we go back to the Law Commission report, but in just finishing with the Parliamentary materials, and I'm sorry this is additional material which, which wasn't before the Court but I have given it to the registrar. I'm not sure whether the Court has it.

McGRATH J:
Hansard.

GLAZEBROOK J:
So Parliamentary debates?

MR GALBRAITH:

Yes. That's right. Now, really the point of this is that there's absolutely nothing in here that suggests that we weren't applying the Model Law in relation to stay. And when we look at the Model Law you'll see that it's, it's in the terms of a mandatory stay and, and Parliament certainly wasn't told that we were, we were doing anything different in, in relation to stay. Perhaps the, the one which is most useful is the Government Administration Committee report because this, this Bill was originally going to go off to one of the other committees, I forget which one it was, and then it got sent to the Government Administration Committee, and taking up the point His Honour Justice Young made, this really was the only, say, informed advice Parliament received on the, on the Bill. And stay is – well, sorry, perhaps going back to the front of it, you'll see on the first page there's a commentary. The recommendation that the Bill be passed with the amendments which are shown. It sets out some of the, the history that had gone with the, originally was going to the Justice and Law Reform Committee. That got rescinded and it got sent to the Government Administration Committee with some submissions. They got 14 submissions and had a private discussion with Sir Kenneth Keith and the Right Honourable Justice McKay. But you see under purpose, similar to –

ELIAS CJ:

Sorry, I'm lost.

MR GALBRAITH:

I'm sorry. First page of it. You'll see there's a heading, "Purpose".

ELIAS CJ:

Is this the first of the two documents?

MR GALBRAITH:

Yes. I'm sorry Your Honour.

See the purpose, "This Bill aims to facilitate the use of arbitration in New Zealand by providing clear and modern law on arbitration, limiting the scope of litigation about arbitration, promoting confidence in New Zealand as a place for international arbitrations through the adoption of the UNCITRAL Model Law." Now, with great respect, you're not going to encourage much confidence for international arbitrations

in New Zealand if the interpretation of the founding contracts is going to go off summary judgment processes, and that certainly is the view which I know the New Zealand Arbitration Institute has.

ELIAS CJ:
Sorry, I'm still lost.

MR GALBRAITH:
I'm sorry.

ELIAS CJ:
It's this document is it?

MR GALBRAITH:
Yes, that one Your Honour, just across the page.

ELIAS CJ:
And what page?

MR GALBRAITH:
First page. And you'll see under, "Purpose", Your Honour, towards the foot there, those four purposes. The third purpose, about promoting confidence as a place for international arbitration is – well that's what Parliament was being told, that was the purpose of this. If we go over to page vii at the top, page 262 is the numerical. This is dealing with the first schedule and you'll see this paragraph, third paragraph down, "Stay of proceedings". "One submission suggests the absolute requirement that a request for a stay of proceedings be made not later than the first statement of substance are necessarily inflexible. Such a statement may need to be addressed within tight timeframes." Discusses that. "A key objective of that law in the Bill is to provide certainty about the relationship between arbitrations and the Courts. We feel that by the time a defendant submits a statement on the merits they should be in a position to be clear about their preferred choice of forum." Risk and – so it's all the discussion about changing the, the time –

WILLIAM YOUNG J:
Is there a list of the submitters?

MR GALBRAITH:

No. Hang on. I said that very boldly. No.

WILLIAM YOUNG J:

Because although the members of the committee might not have been expected, might not be able – well, because the members of the committee would not have appreciated the lines of activity that New Zealand cases, the English cases, the coming in and the taking out of the added words, they wouldn't have appreciated the significance –

MR GALBRAITH:

No.

WILLIAM YOUNG J:

– of the wording of article 8. On the other hand, those involved in the arbitration industry presumably would've.

MR GALBRAITH:

Presumably. Yes. But you're quite right. I'm sure they wouldn't. I'm sure the Government Administration Committee wouldn't have had the faintest idea and, without taking through the Hansard, I can promise you that there's nothing said in, in Hansard about the change to article 8 of the additional words or the change to our international arbitration regime. So the fact of it was that Parliament, what Parliament got was the, the words of the, the Bill, which we've looked at, a purpose provision, which we've looked at, which they enacted –

WILLIAM YOUNG J:

And they knew the Bill was based on the Law Commission's report?

MR GALBRAITH:

They would've known –

WILLIAM YOUNG J:

Well they say it.

MR GALBRAITH:

Yes, yes. No, they, they would've known that. But nobody – well, put it this way: unless somebody went off and did their homework –

WILLIAM YOUNG J:
They wouldn't have known.

MR GALBRAITH:
– they wouldn't have had the faintest idea.

McGRATH J:
So you're really – I mean I can certainly understand a submission that when you've got something there in a select committee report, that's powerful context. But it doesn't mean that other earlier contexts, such as a Law Commission report, are less than powerful.

MR GALBRAITH QC:
No, it doesn't mean that they necessarily are less than powerful.

WILLIAM YOUNG J:
Surely it's just neutral that Hansard doesn't say anything about an issue of this kind.

MR GALBRAITH QC:
Well I think what one can fairly say is that when one is looking at what Parliament enacted, it enacted it, on the information which it had, which was the bill, the purpose statement which it enacted. It must have believed in the purpose statement that enacted, it had the government administration committee saying, "This was going to encourage international arbitrations in New Zealand." Those are considerations that one can take into account in interpreting the words that Parliament actually asked.

WILLIAM YOUNG J:
Yes, that's right.

MR GALBRAITH QC:
Now I am not saying one doesn't look at – shouldn't look at what the Law Commission said.

GLAZEBROOK J:

Well is the submission that if they were departing in a major degree from the model, it would have then drawn to their attention, one would have expected.

MR GALBRAITH QC:

Yes, because when one reads the limited amount of information they were given, and when one looks at the bill itself and the purpose statement and you look at section 3 as well as the purpose statement, I think any parliamentarian would generally have been entitled to think we are enacting something that is consistent with the Model Law, unless we're told to the contrary and they were told to the contrary in respect of one or two things. So probably we come back now to have a look at the Law Commission report and that is to be found in our volume 2, behind tab 18. Her Honour, the Chief Justice was in fact the signatory author to the preliminary report and we do have that here if Her Honour has any affection for it. But the preliminary report, as you would expect, raises possibilities and opens the issue for debate.

GLAZEBROOK J:

Did it specifically, sorry I haven't looked back at that. Did it specifically deal with anything on this, on stays?

MR GALBRAITH QC:

Can I just check that?

ELIAS CJ:

It probably followed the model –

MR GALBRAITH QC:

Yes it did.

ELIAS CJ:

So it probably didn't have the – it was Mr Hodder who was responsible for it.

GLAZEBROOK J:

That is probably right, as you say.

MR GALBRAITH QC:

I am sorry, no the preliminary report is not here, we have got it here if you do want it.

ELIAS CJ:

Perhaps you can just check that point, whether it did just follow the model.

MR GALBRAITH QC:

We will check that.

ELIAS CJ:

I am pretty sure it did.

MR GALBRAITH QC:

You will see in this report that if one goes across to – I am sorry, at the beginning of the report, it starts off with a few pages with roman numerals at the bottom of it. And you will simply see, in (ix) is the letter which sends this off to the Minister from now, Sir Kenneth Keith. In the second paragraph you will see, "The Commission recommends a new legislative frame work largely based on the model or an international commercial arbitrations UNCITRAL and includes adaptions and elaborations on the Model Law designed to make it more suitable for domestic arbitration. The parties to international arbitrations can agree to apply those adaptions and elaborations to their arbitration." That is the schedule 2 that is being talked about there. And then it goes on, across to where the pages start being numbered, number 1, "Introduction to the Draft Arbitration Act. In this report the Law Commission recommends that largely based on the international commercial arbitration Model Law, modifications" that was talked about before. Paragraph – it is a large report, so as you might expect there is a lot in it. And the thrust of the report was to adopt the UNCITRAL or the model for both domestic and international arbitrations but to have this schedule 2, which had provisions which might apply to domestic arbitrations and which could be chosen to apply to international arbitrations but did not necessarily.

Paragraph 78 on page 80, perhaps just worth looking at. You will see there, it is really summing up –

GLAZEBROOK J:

It is page 80.

MR GALBRAITH QC:

Page 80, paragraph 78. This is really summing up the general discussion which had taken place before that. It says here, "The Law Commission has had little hesitation recommending UNCITRAL Model Law should apply to international commercial arbitration in New Zealand." It refers to the background to that, generally applicable. "Such development harmonising international trading laws can only assist a nation that is economic dependant international traders as is New Zealand. Impossible to overlook the fact that those other countries have already adopted the Model Law."

ELIAS CJ:
Sorry what is the submission you are making for this?

MR GALBRAITH QC:
Oh sorry.

ELIAS CJ:
I know it's context.

MR GALBRAITH QC:
Yes it is only context, Your Honour. It's only the context of the Commission and goes on the next few paragraphs as to why it is adopting the UNCITRAL model, the Model Law, as the model. More specifically if one goes across to –

ELIAS CJ:
Sorry is it in support of the submission that a narrow interpretation of the additional words is required?

MR GALBRAITH QC:
Yes, well put the other way round, Your Honour. That when they added these additional words they didn't mean to break the model.

ELIAS CJ:
Think they were departing, yes exactly.

MR GALBRAITH QC:
If one just goes across to page 101, you will see there a discussion of the multilateral treaties to which New Zealand is a party in relation to international arbitrations and I won't dwell on that but just the paragraphs through 118 through to 125. 125 just a

little bit of significance because you will see there it is talking about the binding force of arbitration agreements and talks about the 1923 and the 1958 convention, "Requiring contracting parties to recognise the validity of arbitration agreements." That recognition has for some time been implicit in the statutory law of arbitration, that will continue in the proposed new statute. The recognition is not, for instance, made expressly in the provisions of the 33 and 82 Acts, giving effect to the Geneva and New York treaties." Rather in the earlier statutes and the proposed one, it is given specific content, and expressed support in the statutory provisions to the operation arbitral process especially those providing for the stay of Court proceedings which are brought in respect of matters which fall within the arbitral obligation and for the recognition and enforcement of arbitral awards." So it is emphasising that importance and then you will see at paragraph 126, it turns to the discussion of stay of Court proceedings. "Even if the arbitration agreement is binding in law, its effect could be nullified if a party to the agreement were able to bring Court proceedings and the Court were able or even required to decide the dispute which, the parties agreed, was to be arbitrated. The 1923 protocol requires tribunals (courts), of the Contracting States on being seized of a dispute... to refer to the parties, on the application of either of them, to the decision of the arbitrators... The 1958 Convention imposes the same obligation. We shall see that the territorial scope... differs... Although the Model Law is slightly more elaborate (by requiring the request to be made before the requesting party files the first substantive pleading) it is to the same effect (article 8). That extra requirement is a sensible application of the principle of waiver. If a party which could have applied to require a matter to be referred to arbitration fails to do that and participates in the national Court process, it can properly be held to that election." Then goes on, 127, to talk about some of the controls on that.

WILLIAM YOUNG J:
Can I just ask a question?

MR GALBRAITH QC:
Yes, Sir.

WILLIAM YOUNG J:
Are the references in this report, do they correspond to the Act of provisions as an Act within the Arbitration Act?

MR GALBRAITH QC:

As far as article 8, yes they do. Well at least the ones which are relevant to our discussions, yes. You will see, effectively, they go on at 127, to talk about the '23 protocol and the '58 convention on Model Law etc and the middle of that paragraph 127, they say, "There is no reference if the Court finds the agreement is null and void, inoperable and capable of being formed. The latter formed appear indistinguishable from the 1923 one and the New Zealand/United Kingdom legislation did not make distinct provision in respect of the stay provisions on the '23 protocol once legislation, to give effect to the '58 convention, was enacted. Accordingly we conclude that article 8 of the Model Law will give effect to the New Zealand law to the 1923 and '58 Treaty provisions requiring the stay of Court proceedings and placing them in that requirement." So what they are concerned about here, are we being consistent with our international obligations, that is what they are being concerned about here. And then they go on in 128 to say, "As discussed in the commentary to article 8, we propose an elaboration of the grounds for refusing a stay but there is not, in fact, any dispute between the parties with regard to the matters agreed to be referred. This edition makes explicit in article 8, what has already been stated in article 7 when read with section 4." I'll come back to that in a mo but –

GLAZEBROOK J:

You're going to tell us what those were, because they're not the same –

MR GALBRAITH:

Yes.

GLAZEBROOK J:

– clearly, as at the moment.

WILLIAM YOUNG J:

I don't think they can be the same is my answer to the question.

GLAZEBROOK J:

No, they're definitely not.

MR GALBRAITH:

I'll just have to check that in a moment. "It emphasises the value of summary judgment processes in the Court when there is not a real dispute between

the parties, and, for instance, debtors might be trying to use arbitration simply to delay meeting their debts. That elaboration does not, in our view, widen the power of the Courts to refuse a stay and allow the Court proceedings to continue notwithstanding an agreement to arbitrate." Now where we find that, sorry, is – this report has annexed to it the proposed Bill and so you find article 7 on page 164.

GLAZEBROOK J:
Of the definition section it was. So it was a definition of "arbitration agreement".

MR GALBRAITH:
I'm just trying to find section 4. Section 4 is on, it's again a definition section, page 128.

WILLIAM YOUNG J:
It's really a question that arbitration agreements apply to disputes. That's what...

MR GALBRAITH:
Yes. Yes. That's, that's what it is. So what –

ELIAS CJ:
Sorry, it's really a question...

MR GALBRAITH:
Of, of – that the arbitration agreement does apply to a dispute. So that's how it's defined.

ELIAS CJ:
Right.

MR GALBRAITH:
So 128, what they're saying there is, is that we're, we're adding some words. The elaboration doesn't, in our view, widen the power of the Courts to refuse a stay and it simply applies where there is not a real dispute between the parties and, and they use this instance of delaying meeting their debts, which is the, the issue we talked about before.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.54 AM

MR GALBRAITH QC:
We have checked the preliminary paper Your Honour and yes there are just over two pages on this issue so we will hand that up. There are pages, the commentary is at pages 23, 22 of the preliminary paper and there is a discussion about the potential scope of stay, what may be the better approach. I hope I am not misinterpreting what is in there, as saying that the – perhaps the floated suggestion, it wasn't in any sense definitive. The floating suggestion was it should be narrow, the scope of the Court's ability to interfere and the questions raised, whether it should be the same for domestic or international and it is suggested that it should be.

WILLIAM YOUNG J:
So those are pages 22 and 23 at the preliminary paper?

MR GALBRAITH QC:
20 to 22 Sir.

GLAZEBROOK J:
20 to 22, thank you.

MR GALBRAITH QC:
Going back to – we just looked at 128. If we go across to, I am sorry this is very methodic, across to page 123 of the 1991 report, paragraph 182. This is a page which discusses the scheme of the draft Act and explains what has been done. In paragraph 182 you will see it starts off saying, "Changes by way of deletion to the model will be shown as deletions from the text etc." And then the last two sentences, in 182. "So far as possible the language of schedule 1 has been kept intact so that by adopting, rather than adapting the Model Law, the New Zealand law governing arbitration will be harmonised to the greatest possible extent with the international model. We should be able to draw on the growing international experience of the Model Law." And then if we go –

GLAZEBROOK J:
I'm sorry, I was marking something else, I missed –

MR GALBRAITH QC:

Sorry, paragraph 182 Your Honour, there's two sentences.

GLAZEBROOK J:
Thank you, sorry.

MR GALBRAITH QC:
So they're talking about adopting rather than adapting the Model Law. And then there's – just picking up one or two of the matters which the Court has raised, if we go across to page 136 and paragraph 227, you'll see there the Commission picking up that point that His Honour Justice Young was putting to me. They're discussing there the arbitrability of disputes, that's what this is about, and part of the discussion is about well should there be some express limitation, for example, family disputes or public interests should be –

WILLIAM YOUNG J:
What sort of dispute is not arbitrable?

MR GALBRAITH QC:
You'll see, for example Sir, at the foot of page 137 –

WILLIAM YOUNG J:
Oh I see. Right.

MR GALBRAITH QC:
Those sort of things may not be but in fact – but what they say in 227, paragraph 227 Your Honour you'll see is, "Second, the question of arbitrability could arise when the Court is asked under article 8 to stay a legal proceeding and refer the parties to arbitration. It is a ground for refusing a stay that the Court finds that the agreement is null and void, inoperative or incapable of being performed. There appears to be general agreement that an agreement to arbitrate a non-arbitrable dispute is 'normally' null and void," which was the point I was making before, that the Commission took – or that is a view that is out there, perhaps put it that way. "But the question whether this involves the application of the forum law and non-arbitrability or some other law was left unresolved by the Model Law," and they refer to an article by Holtzmann and Neuhaus. So they have this discussion then across the page, on page 138 at paragraph 231, having discussed –

GLAZEBROOK J:
That's because of the nature of the dispute being non-arbitrable, isn't it –

MR GALBRAITH QC:
Yes.

GLAZEBROOK J:
– rather than the not coming within the clause, is that –

MR GALBRAITH QC:
Yes. And you'll see in 221 they are talking about, "In essence the approach to arbitrability favoured by the Law Commission, and reflected in section 8, is that, as a matter of New Zealand law, any dispute which can be settled between the parties by direct agreement should be able to be determined by arbitration. Neither form of agreement-based result will be valid where the agreement is contrary to public policy or any other enactment provides that such a dispute may not be submitted to arbitration." So they're saying is, as long as it's something that parties can agree upon then under New Zealand law it should be arbitrable. And then if the Court wouldn't mind going to 154, and this is of significance, paragraph 278. This is, these two pages where they deal with the articles in schedule 1 and so they say this commentary they say in paragraph 276 focuses on the modifications to the text of the Model Law which we recommend and then you see in 278 – so in 277 they describe some changes which are just to make things, a language gender neutral et cetera, et cetera. Then in 278 they say the last of those categories, that's where there are substantive modifications, are the most important, or is the most important. "We believe that these modifications are appropriate for international and domestic arbitrations and that they are," and note the next word, "entirely consistent with the spirit and the structure of the Model Law." Now the Model Law quite clearly has mandatory stay in – and then they say it's helpful to note at the outset, and it's the third one, article 8, "Express reference to absence of dispute as a ground for refusing to stay Court proceedings." And so that is said to be entirely – well what they're intending is to be entirely consistent with the spirit and the structure of the Model Law."

And then when we go across to the discussion about article 8 which starts on page 166 and this is where this summary judgment view has come from, you'll see that they've set out article 8, they've underlined the changes which they are

recommending and so there is some word changes and then this clause – or that there is not in fact any dispute, et cetera, is being added. They then go on in paragraph 308 to say, "The proposed addition at the end of article 8(1) may be explained by a passage in the Mustill Committee report which they," perhaps I'll read it, "Section 1 of the Arbitration Act 1975 has a ground for refusing a stay which is not expressed in the New York Convention, namely 'that there is not in fact." et cetera. "This is of great value in disposing of applications for a stay by a defendant who has no arguable defence," and they refer to an article.

The phrase makes explicit, in this provision, the element of "dispute" which is already expressed and included in article 7(1) when read with section 4. In other words, that's the dispute which gives rise to the arbitration agreement. The same reasoning underlies the recommendation in the Alberta report that a Court be in power to refuse to stay in action if the case is a proper one for a default or a summary judgment.

Now, perhaps just pausing there for a moment. The element of dispute which is included in 7(1) and section 4 as we looked at, are of course just definitions of what's in an arbitration agreement and so you're talking about dispute there in the – in a sense in the jurisdictional sense of, is there something in dispute which of course they in the arbitrability section have said, "Well, something is in dispute if it's something that parties can agree on." So, while there is reference to the Mustill Committee referring to summary judgment we are, in my respectful submission, a million miles away from summary judgment if it's in the context of the definition of, in article 7(1) and section 4.

Then they go on in 309 –

ELIAS CJ:
Sorry, what do you mean by that?

MR GALBRAITH QC:
Well, all that that's raising, Your Honour, in those definitions, is whether there is a dispute of a nature of something which parties can agree on. It doesn't raise any question about real defences, summary judgment defences or anything such as that.

ELIAS CJ:
We don't have this 1990 arbitration article –

MR GALBRAITH QC:
No, we don't, Your Honour, I'm sorry.

ELIAS CJ:
That's all right.

McGRATH J:
It seems to me if the passages you took us through before morning tea, that in paragraph 128 seems to me to be one that really has to be read with 308 and 309.

MR GALBRAITH QC:
Yes, yes, in my respectful submission.

McGRATH J:
And it does refer to there being no real dispute.

MR GALBRAITH QC:
Yes.

McGRATH J:
And that we're now talking about no arguable defence, but is it fair to say that's the concept that's being brought aboard here?

MR GALBRAITH QC:
Well, it's no real dispute, Your Honour, in the sense that it's not expanding the scope of grounds for refusing a stay, because that's what they also expressly say and it has got to be adopting the Model Law and entirely consistent with the, what's the wording?

McGRATH J:
I suppose what the real, the idea of a real dispute to me, Mr Galbraith, is bringing aboard the notion, not of jurisdiction but of the substance or rather lack of substance of the dispute.

MR GALBRAITH QC:
I would say only in the genuine this context, Your Honour.

McGRATH J:

Well, if you go back to 128, it – it cites debtors using arbitration simply to delay meeting their debts only as an example.

MR GALBRAITH QC:

Yes, yes.

McGRATH J:

That is no real dispute between the parties and for instance debtors can't meet their obligations, so it can't be just that. The canopy has to be widened.

MR GALBRAITH QC:

Well, in my respectful submission it's only as wide as the words allow and it certainly isn't saying so that the stay should be refused where we can interpret the terms of the contract. That's, I mean, it's a million miles away from a debtor refusing to – trying to avoid paying a debt which is due by resort to arbitration.

WILLIAM YOUNG J:

Mr Galbraith, do you know when the jurisdiction of Courts on summary judgment was held to apply to determination of reasonably arguably points of law?

MR GALBRAITH QC:

Yes, it was well before this, Sir.

WILLIAM YOUNG J:

So, it was well before this?

MR GALBRAITH QC:

Yes, well, is it '87 was – I think *Chappell* was '87 where –

WILLIAM YOUNG J:

Chappell v Pembers.

MR GALBRAITH QC:

Yes, *Chappell v Pemberton*, I think that was 1987, Sir. That pretty much established that. I'm not saying the practice hasn't developed in practice beyond that. They

certainly recognised that and there's no mention of – I mean there's just no reference to that at all.

WILLIAM YOUNG J:
But it would've been of some assistance to you if that came later?

MR GALBRAITH QC:
Yes, but it didn't, Sir. It came earlier.

WILLIAM YOUNG J:
It didn't, right.

MR GALBRAITH QC:
But there's no hint beyond, as His Honour says, the reference to a debtor trying to avoid paying a debt by simply going off to arbitration, continuing off to arbitration, which is the same example which is given in some English cases too, but that is regarded as not a proper dispute because the debt is the debt.

WILLIAM YOUNG J:
But the last sentence in 309 gives you a little bit of assistance.

MR GALBRAITH QC:
Yes, yes.

WILLIAM YOUNG J:
But it's sort of non-committal. It's saying, "Well, yes, it may be that a dispute that's not of substance can't be submitted to arbitration, but we're going to do this anyway."

MR GALBRAITH QC:
Yes, I mean that's why 74, it is something of a belts and braces approach because having said what they say in 308, they then say in 309, "We received these suggestions about the ethicacy of," sorry, the summary judgments not be lost where there is no defence, we agree. Although, it may be argued that if there is no dispute and there is no matter which is a subject in the arbitration agreement in the meaning underlined article 8(1), that's the point Your Honour was making before, it seems useful to spell out that the absence of any dispute is a ground for refusing a stay.

WILLIAM YOUNG J:

Language shifts rather awkwardly doesn't it, any real dispute, not arguable defence, default or summary judgment, efficiency of summary judgment procedure and then absence of any defence.

MR GALBRAITH QC:

Yes, and then the words which are included in article 8, of course that were added, are the ones not in fact any dispute between the parties. Now, if it meant an arguable defence or summary judgments, they could've done what the Alberta legislative did with its domestic arbitration, not its international arbitration, they included the words "default" or "summary judgment," so I mean Your Honour is quite right, there's all sorts of words there, but the words which were introduced were those words at the end of article 8.

There's no recognition here and one would expect, I would say, with respect, the Law Commission, if they had recognised that they were – are now changing the ground rules for international arbitrations, which had been ground rules in New Zealand, both by statute and by international obligation since 1923, that they would've noted that because it has implications and one would have thought they would have expressed a view on the implications and decided if that's what they intended, that those implications were not so serious that the summary judgment heard or should be put into play and of course if they intended that, they could easily express those words in article 8 but they didn't.

WILLIAM YOUNG J:

Perhaps an implication that they anticipate that if a case is suitable for summary judgment it won't give a stay, they may not appreciate the scope of summary judgment.

MR GALBRAITH QC:

They may not have, but it certainly is a very different position to that which existed both in New Zealand law, New Zealand statutory law for international arbitrations and in relation to New Zealand's international obligations, prior to this, and when you've got them saying back in paragraph 278 that where they are making these changes they're entirely consistent with the spirit and structure of the Model Law. I mean it simply isn't if this introduces summary judgments tests and that is – I mean if you did it in perspective, you should be in jail.

WILLIAM YOUNG J:

Unless there may be – you discussed Judge Bell's middle way?

MR GALBRAITH QC:

No, we don't in the written submissions and my submission in respect of that, Your Honour, is that this is not a matter for discretion and when one looks at the international law which we do just refer to briefly, the *Architectural Digest* and what happens internationally, it's recognised that Courts internationally respect the Model Law and narrowly interpret grounds for stay.

GLAZEBROOK J:

Well, you could nevertheless do that under discretion, because you could say that the – that the discretion to refuse summary judgment, which is a generalised discretion, has to be exercised consistently with international law and therefore would be exercised consistently with Model Law. The preferable would be to –

MR GALBRAITH QC:

Yes, you could.

GLAZEBROOK J:

– interpret those words narrowly, but it is a possibility that you've got to have the same effect.

MR GALBRAITH QC:

Yes, no, no, I agree. It is a possibility, but it then means that you end up with – for the Associate Judge argument about international law and how it should be applied and the whole idea, of course, of having an arbitration clause is you don't end up before a Judge having to explain all those things, so...

WILLIAM YOUNG J:

But if you did, the result might be tailored towards whether it's a case where there's just a general arbitration clause where the arbitration was dealt with effectively as though it's in the Court proceedings or a case where the arbitration clause contemplates expert arbitration, absence of lawyers or something that's remarkably different from a Court process.

MR GALBRAITH QC:

Well those were – if there was a discretion, Your Honour, those would be factors. Those aren't the factors which are set out in article 8, of course, unless –

WILLIAM YOUNG J:

No.

MR GALBRAITH QC:

So, perhaps just to draw attention to the paragraph in our submissions, paragraph 33 just refers to the 2012 *Digest* of case law on the Model Law. We set out an extract but the *Digest* is contained in our authorities. I won't dwell on it at the moment, but what you'll see in the extract and it goes on to discuss other situations in the *Digest* because of course you can have situations where there may be disputes in which only one or two of the – have to be at least two, two of the parties are subject to an arbitration division and others who are dragged into the dispute are not and the question is how is that dealt with? But, in the simple case of all the parties being subject to an arbitration provision, you'll see what they comment on there that, "Several cases stand for the proposition that a referral application may further be dismissed and the ground that there exists no dispute," and this requirement is interpreted narrowly as Courts tend to require proof that the party seeking a referral order has unequivocally admitted the claim," which is the Templeman approach, "a demonstration of no substantial or arguable defence to the claim has been put forward will not suffice," and then there are authorities which are cited in the *Digest*.

If I can just deal very quickly and I won't dwell on it, with –

WILLIAM YOUNG J:

When there's force to be determined, is it determined in the context of the stay application or the default or summary judgment application in other jurisdictions?

MR GALBRAITH QC:

Sorry, the –

WILLIAM YOUNG J:

I'm looking at para 14(3), your 33.

MR GALBRAITH QC:

That's in terms of stay applications, Your Honour. Just dealing very quickly with what we've said about the UK position, paragraph 35.2 on page 12, we've set out, as I said before, what happened was that this bright idea turned up in about 1977 in England and you had in 1990 Lord Parker in the *Home & Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd* [1990] 1 WLR 153 case we referred to there. This was a case where there was a discretion.

It wasn't an arbitration where there was a mandatory stay. It was a case where there was as discretion, but the extract we've set out is a longer extract in the judgment, is really sounding the warning against Courts not granting stays and sending commercial arbitrations – sorry, and dealing with commercial arbitrations themselves when the parties have chosen the path of arbitration and you'll see there he's saying in cases where there's an arbitration clause, more necessarily a full-scale argument should not be permitted, et cetera, they've agreed on their chosen Tribunal and title, prima facie over the dispute decided without a Tribunal will be frequently – intervention of the Courts. It goes on to say it's particularly important in commercial arbitration, but as I say he's talking there about a case where there is a discretion and the position then may be different but sounding a warning.

On 35.3 we take up what Justice Saville said in *Hayter* and as I understand it the Court has already looked at *Hayter* so I wont' take you to that, but as the Court is aware Justice Saville really did – I was going to say, he rejected the approach which had been growing and taken in respect to applying the summary judgment test. He subsequently became the chair of a committee which reviewed the Arbitration Act in England and unsurprisingly recommended that these words be deleted from the Act and the phraseology used in the report of the committee, were that they were confusing and unnecessary and they were deleted in England, 1996 from the Act but in my respectful submission, when one reads the cases, the cases were not all dependent upon these additional words, there was an ongoing dispute, well using the same word, there was an ongoing issue about what does dispute actually involve. And so you have the *Nova* case I mentioned before about Bills of Exchange and set-off as against Lord Justice Templeman in *Ellerine* looking at a much more practical and down to earth situation of the sort of non payment of debt.

We have referred in 36 and again I won't take you to, to what Lord Mustill said in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1997] 1 All ER 664**.** He refers with approval to both Lord Parker's judgment and also Justice Saville's

judgment in *Hayter.* And then, as I said, those words were taken out of the English Act in June 1996, I think. We enacted our Act in September 1996. There were subsequent cases and the respondent's case book does contain a case which the Court may find of some assistance. It is behind tab 3 in the respondent's case book which is a small case book. The case of *Halki Shipping Corporation v Sopex Oils Limited* [1998] 2 All ER 23 (CA). There was, it's a majority, two to one majority in the Court of Appeal. There is a lengthy judgment by Lord Justice Hirst who sees things more the respondent's way and there are judgments by Lord Justice Henry and Lord Justice Swinton Thomas who sees things more the way that we can tend for. All of the judgments review the English law in some detail. My respectful submission is that Lord Justice Swinton Thomas's judgment is possibly the most successful review of the English law. They did determine, because they were stuck if I can use this phrase, in a difficult position because there were conflicting authorities in England, they did place weight at the end of the day on the fact that these words had been repealed in the English legislation, so that was one of the grounds of the majority Judges' finding or determining that dispute, didn't allow for an investigation of the facts. But when one reads the judgments, I think it is pretty clear what their view was, as to what was the correct approach to interpreting the word "dispute."

And at Lord Justice Swinton Thomas's judgment, you will find that there is a lengthy extract starting on page 51 of the report, from Lord Justice Templeman's judgment in *Ellerine v Klinger* that I have mentioned several times. And that was a case in 1982, or reported in 1982, which was a similar sort of case about where a debt was owed and there was an attempt to go to arbitration. And Lord Justice Templeman concluded that that was a dispute and so it should be arbitrated and you will see this on page 52, across the page, of a very lengthy extract where he is talking about that situation and he concludes, towards (e) that, "It seems to me that section 1(1) is not limited either in content or in subject matter, that if letters are written by the plaintiff making some request or some demand and the defendant does not reply, then there is a dispute. It is not necessary, for a dispute to arise, that the defendant should write back and say, 'I don't agree.' If, on analysis, what the plaintiff is asking or demanding, involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the arbitration agreement, then the applicant is entitled to insist on arbitration instead of litigation."

And Lord Justice Swinton Thomas goes on to look at the cases that supports that – deals with the *Nova* case and says, "Well that doesn't negate, that approach." He

refers to *Nova* at the foot of 52 and across on 53, explains the basis for *Nova*. Then goes and looks at cases such as *Ellis Mechanical* which was a case of course you will recall that Justice Casey looked at in *Royal Oak* and in *Baltimar* and points out that *Ellis Mechanical* was a case where the Court actually had a discretion, it wasn't a mandatory situation. Refers at the foot of page 55 to a number of cases which take the Templeman approach, if I can put it that way, and across on page 56, you will see it says, at (d), "In my view, following those cases, Mr Waller's submission is correct, and in the words of Lord Justice Templeman in *Ellerine v Klinger* there is a dispute once money is claimed unless and until the defendants admit that the sum is due and payable."

So in my respectful submission, the position, irrespective of the fact that these words were taken out of the Act in 1996, the better position in England was that a dispute, provided a dispute is such that parties don't agree, it is therefore arbitrable and where it is a mandatory stay, such a stay should be granted.

As I said before the break, I don't intend to go through the New Zealand cases, there is a schedule attached to our submissions. While it has turned into a bit of a head count, the fact of it is, that most of the cases, the position has been assumed, there has been a handful where it has been discussed and considered. Perhaps the *Fletcher* case – just find the schedule, the *Fletcher Construction New Zealand v The South Pacific Co-operative Dairies Ltd* HC New Plymouth CP7/98, 27 May 1998 case, the decision of Master Kennedy Grant is not actually where it starts but is probably the best explanation of how things got to where they were on the summary judgment front and then of course Master Thomson et cetera on the front that the appellants here support.

In my respectful submission, if the Court comes to the view that the words in article 8 should be interpreted in the way that we contend for, it is not a concern that there are a number of decisions out there, where a different view has been taken. Nobody's rights are going to be affected a different view now taken, because those cases have been litigated and determined and all over. So it doesn't change, it is not going to change anything, except going forward. Unless the Court has any questions. Thank you very much

ELIAS CJ:
Yes Mr Ring.

MR RING QC:

Yours Honours I have a summary of my oral submissions captured on a couple of pieces of paper. Yours Honours the fundamental proposition here, if I can just provide some sort of introduction to what is on those two pieces of paper is that the appellant Zurich says that cognition is not allowed to go to the Court and apply for summary judgment and so it is saying that the terms of the contract between the parties, somehow prevent cognition from doing that. The one place you haven't been taken to in the course of submissions, of course, is that contract and that's in the light of the way the submissions have unfolded this morning, whereas I would've left that more towards the end. I think I might elevate it to an earlier stage, but to put the two pieces of paper into their context, what we say, Your Honours is that this appeal can be determined by answering a minimum of the first three questions and a maximum of all eight. If you go to where I started these submissions and you go to the contract between the parties, I can even improve that position by saying this appeal can be resolved by actually only answering one question and that is the question that I first posed, are we allowed to do what we're trying to do?

The overarching issue here, in terms of principle, is Parliament's intention in enacting article 8 and whether in fact good banner and different, Parliament intended that a party in cognition's position would be entitled to invoke the Court's summary judgment jurisdiction. It's not whether this would be a good idea. That's a policy matter we say on which Parliament has received advice from successive law commissioners and has spoken. But if I can start by going to the –

ELIAS CJ:

Sorry, before you get to that, can I just ask you, because it bothers me, you're putting it on the basis of invoking the summary judgment jurisdiction, but in fact you're invoking the jurisdiction of the Court more generally, because summary judgment is just a procedural mechanism for dealing with the Court's jurisdiction in a summary way, so what is it that you say makes the summary nature of this application, severable from the underlying claim that you're making to the Court?

MR RING QC:

Well, the reason I'm focusing on the summary judgment jurisdiction is because that's where the Law Commission has expressly spoken in the context of article 8 and in particular of the context of the additional words and spoken twice and the Parliament

has responded on both occasions by adopting what the Law Commission has recommended, so while I entirely accept Your Honour's proposition that we are talking about the wider invoking of the Court's jurisdiction, it is in this case, in the context of summary judgment.

ELIAS CJ:
But would you say that someone in your position couldn't invoke the jurisdiction of the Court, generally it can only do so if it can apply for summary judgment?

MR RING QC:
In the – in terms of the policy issue, yes, that is correct. The reason I'm qualifying it is because when it comes to looking at what these parties have agreed, the position might be different, so yes, in general, what I am saying is that the effective article 8 is confined to the Court's summary judgment jurisdiction because essentially we say that real dispute or dispute in fact, which is part of the additional words of article 8, that equates with whether or not there is an arguable defence.

ELIAS CJ:
But summary judgment is discretionary.

MR RING QC:
Yes.

ELIAS CJ:
So what happens if the Court decides in its discretion that it's not an appropriate case for summary judgment, you'd say then the stay must be granted?

MR RING QC:
Well, yes, because otherwise the parties would be in limbo.

ELIAS CJ:
Yes, thank you.

WILLIAM YOUNG J:
Reverse side of the coin?

MR RING QC:

Yes.

ELIAS CJ:
Yes.

MR RING QC:
Yes, so with that introduction, if I may, can I take you to the actual insurance contract? It's the last document in the casebook, case on appeal, and we're at page 154. Before we ever get to any question of arbitration, we have at 8.5 two subparagraphs headed, "Choice of Law." The first paragraph that the policy will be issues in relation to the policy construction interpretation meaning will be determined in accordance with New Zealand law and we say, of course, that that means whatever New Zealand law says about article 8 as well.

The second, and it's (b) that I want to particularly focus on at this initial stage, in the event of any dispute arising under this policy, including but not limited to construction, forget validity for the moment, and/or performance, and/or interpretation, the insured will submit to the exclusive jurisdiction of any competent Court in New Zealand. There is no issue between the party, I'm sure, Your Honours, Your Honours that the summary judgment jurisdiction, the summary judgment that has been applied for, throws up issues of performance and interpretation. Only issues of performance and interpretation. So, one thing we can say for sure –

ELIAS CJ:
What else – what would not be within that?

MR RING QC:
Well, good question. I haven't exercised my mind as to what wouldn't be, because I was just perfectly happy with what was.

GLAZEBROOK J:
But how does that relate to 8.6(b)?

MR RING QC:
Well, that's the next question, that –

GLAZEBROOK J:

And this hasn't –

WILLIAM YOUNG J:
It's the insured, not the insurer. It's the insured, not the insurer.

MR RING QC:
Yes, well, it can't mean, Your Honour, that the insurer is entitled to choose whether to apply to the Court or not, but the insured can't.

GLAZEBROOK J:
Well, no, but it says any dispute, controversy or claim is finally settled by arbitration, so 8.5(b) can't mean that it's not finally settled by arbitration, can it, or what do you say it means?

MR RING QC:
Well you could ask the same question the other way around and say, well –

GLAZEBROOK J:
But this isn't a – we're not interpreting the contract here, are we?

MR RING QC:
No, we're not.

GLAZEBROOK J:
And we've never been asked to.

MR RING QC:
No, the only point that I'm making here is that where my learned friend has said on a number of occasions that what the parties bargained for here was that arbitration would be the only place that any dispute over interpretation or performance would be dealt with. I'm pointing to 8.5(b) and saying that can't be right.

ELIAS CJ:
Well, why is it necessary to go to summary judgment rather than deal with this matter on the stay application? Or, I mean on the stay, invoking the stay?

MR RING QC:

Well, I'm not quite sure of Your Honour's point.

ELIAS CJ:

Well, I'm just wondering why the parties haven't just gone ahead and had the substantive issue of whether the Court has to grant a stay determined in which these clauses will presumably assume some prominence?

MR RING QC:

Well –

ELIAS CJ:

This is harking back to my original question about what are we doing here on a direction?

MR RING QC:

Yes, I sensed that that's where we might be going.

ELIAS CJ:

Yes.

MR RING QC:

Well, procedurally what happened was that Zurich applied for – sorry, that Cognition applied for summary judgment and then that was met by the application for stay and then the issue arose as to which one would be heart first or whether they would both be heard together. We said the following the practice of the last 25 years, it would be the hearing of them both together –

ELIAS CJ:

Why does it matter?

MR RING QC:

Whether they're heard both together or separately?

ELIAS CJ:

Well, why does it matter that summary judgment is not heard until the stay has been determined?

MR RING QC:

Well, only the convenience and efficiency, if you're dealing with the same issue of an arguable case except from the flip sides of the same coin, then why have two hearings? Why not have one hearing which totally resolves the procedural position?

ELIAS CJ:

Well, I can see that an argument based on these clauses are interpreted, would be a much more confined hearing than the issues that are joined on your summary judgment application, that's why.

MR RING QC:

Yes, well, the interpretation issue in relation to 8.5(a)(b) and 8.6(a) has only been addressed in the context of the – to date, in the context of the policy arguments where my learned friends have said, "You're trying to do something that you've agreed you wouldn't do, ie, you are trying to invoke the jurisdiction of the Court when you agreed you would only go to arbitration on these things," and what we've been saying in response to that is, "It's not unfair on you to go to the Court on summary judgment because one, you accepted in New Zealand law, so you took section 8 in the way the Courts have been interpreting it for the last 25 years, so you know what you bought into when you said, 'I'll accept New Zealand law." And second, that, we haven't agreed that we'll only go to arbitration in relation to disputes on construction and performance and interpretation. In fact, the contract says that the Courts will have exclusive jurisdiction, so as far as we're concerned we're not doing anything that we haven't agreed we're entitled to do.

ELIAS CJ:

Is there any authority? Because Mr Galbraith only referred to practice, is there any authority that says, I suppose apart from the ones we've been referred to, which says that summary judgment and stay will be heard at the same time?

MR RING QC:

Well, when you say authority, there's all of the cases in the table to my submissions are all cases in which they have been heard at the same time, every single one of them.

ELIAS CJ:

But is there any authority that says that is the correct way to proceed? I'm just querying your argument that everyone has known that this is New Zealand law.

MR RING QC:

Well, every case in there has had at least one passage which has said that. In some cases, such as the *Fletcher* case my learned friend referred you to, there has been an analysis attached to it. In some cases there hasn't been an analysis and it's been stated without any sort of elaboration. In some cases it's been expressed as being agreed. So, it's been at those varying levels. Even Master Thomson in the high watermark of his opposition in the *Todd Energy Limited v Kiwi Power (1995) Limited* HC Wellington, CP46/01, 29 October 2001 case, which is the counterbalance to the *Fletcher* case and is the one that is then critiqued in the 2003 Law Commission report, he did hear them both together, not only did he hear them both together, he didn't disagree with the analysis that we are supporting. What he said was that the Law Commission made a serious error in recommending what it did and the Parliament made a mistake in enacting it. So, even at the extreme edges of opposition, there has been acceptance that Parliament's intention was the position that we are advancing as a matter of policy.

So, the point that I just wanted to make initially Your Honour is I'm not necessarily here to blaze a pioneering trail for the rest of the profession or to hold the fort for the last 25 years for everybody's benefit. All I care about is cognition and if I can get to where we want to go, which is summary judgment and stay is heard both at the same time in the High Court, because I have got it in my contract, and nobody else has, I am quite happy with that result and so –

WILLIAM YOUNG J:

Just pause in there. Even in the *Hayter* case, the summary judgment and stay were dealt with at the same time, simultaneously. There can't really be an objection to that. What there might be an objection to is whether, and it is where Mr Justice Saville took a line, whether it is open in the summary judgment proceedings, to argue a substantive and debatable issue of law.

MR RING QC:

Well what drove the procedure that has got us here is actually the opposition of Zurich to hearing them both at the same time. And that's the main objection that I have, that they should. We say they should be heard at the same time because that

is the efficient way of doing it. Whether different tests are going to be applied at that stage, I am less concerned about.

WILLIAM YOUNG J:
Well –

MR RING QC:
What I am concerned about is, the potential for two hearings. One a stay hearing which says, "No they don't get a stay." And then I have to argue the summary judgment and both of those –

GLAZEBROOK J:
Well here you have had more hearings by not just saying, "Well okay, let's here the stay and then see how we will go and I will make my 85 point whatever argument and 86 and see how I go."

MR RING QC:
Well yes, I mean, as it has turned out, that is right. But we weren't to know that and what we were trying to avoid, obviously unsuccessfully, was multiple hearings but I suppose we are the victims of our own success, Your Honour. We won in the High Court and then we were dragged to the Court of Appeal, we won there and again, that's why we are here. Yes, it was open at any time for the other side to say, well let's accept the position that the High Court has said and let's get on with it.

GLAZEBROOK J:
Well surely it was more important for the insured to get on with it, because the insurer probably doesn't care if it has to wait to pay out, if indeed it has to pay out.

MR RING QC:
Well it wasn't seen that way Your Honour. And it would have been difficult for the insurer, having won in the High Court, to then turn round and ask the High Court to do the very thing that it succeeded in persuading the High Court, shouldn't be the way it is done. I think that would have been a difficult ask for us.

GLAZEBROOK J:
It was a comment.

MR RING QC:

I am sorry Your Honour, I thought I was responding to something that might appear in the judgment.

GLAZEBROOK J:

It didn't have – no, no, it is just that it always seems those short cuts never turn out to be short cuts, so it just proves the rule, that all the experience and practice that short cuts are never are.

MR RING QC:

If only we all had the wisdom of hindsight.

ARNOLD J:

Mr Ring I just incidentally noticed that you referred to 8.5(a) and (b) and 6.5 refers to any action by the insured having to be brought within a time frame, which is an odd way of describing arbitration isn't it. Use the words, "action."

MR RING QC:

Yes it is and normally you would associate that with Court proceedings, correct.

ARNOLD J:

Anyway.

MR RING QC:

So Your Honours, that then takes me to the summary of our submissions and we say that the first key question for Your Honours to decide is in 1991, did the Law Commission recommend, including the additional words which were then in the UK statute, and I think there is any dispute as to the answer to that, being yes.

Second question, or second sub-question associated with that. That the Law Commission do that with the intention of ensuring that an application for summary judgement and an application for stay would be governed by the same test, namely whether the defendant had an arguable defence to the plaintiff's claim. And we say that the answer to that has to be yes based on paragraphs 308 and 309 of the Law Commission report. That report is obviously volume 2, tab 18, it's page 167, is the relevant part of the report, and as we set out in our submissions, there is obviously no doubt that the Law Commission's comments in relation to the reasons

for putting in the additional words were directed to the summary judgment procedure because that is the absolute total content of paragraphs 308 and 309.

So, what were they saying about it and again as we said in our submissions there are only three fundamental propositions. Did they envisage the additional words, would facilitate the use of a summary judgment procedure, impede the use of a summary judgment procedure or have no, or no negligible effect on the use of the summary judgment procedure and the answer to that can only be that it's the first proposition that they thought the additional words would facilitate the use of a summary judgment procedure and that that is unequivocally encapsulated in the first half a dozen lines of paragraph 309.

So when they say, "We received a number of suggestions that the efficiency of the summary judgment procedure as it's developed under the High Court Rules should not be lost by reason of an implication that a dispute where there is no defence must be arbitrated under an arbitration agreement we agree," they must've been talking about the implication that a dispute where there is no arguable defence must be arbitrated under an arbitration agreement.

So, for those reasons, we say that the Law Commission was clearly equating no arguable defence, a case which is a proper one for summary judgment and the absence of any dispute or any real dispute and indeed that is the way all of the cases which have done the analysis, that's the conclusion they have all reached about that and then of course there are the cases where law commissioners have been on the bench and true enough, without any stated analysis and even in cases where there has been agreement between the parties, the proposition has nonetheless been stated in the same terms as we are submitting here and one of those examples I would've perhaps said the best example of that, with respect, is the *Contact Energy Limited v Natural Gas Corporation of New Zealand* CA65/00, 18 July 2000 case that Your Honour Justice Young issued the judgment on in which Justice Blanchard was also a member of that Court and was also a law commissioner in 1991 and it's exactly the proposition that we are advancing here.

So, did the Law Commission make the recommendation? The answer has got to be yes. Did Parliament adopt the recommendation by enacting the Arbitration Act 1996, schedule 1, article 8(1) with the additional words? We say the answer to that has got to be yes, obviously, and did they do it with the intention of an application for

summary judgment and an application for stay would be governed by the same test namely whether the defendant has an arguable defence to the plaintiff's claim? We say that must be answered yes. There is no contrary evidence to that and indeed some of the materials which you have been shown today, which haven't been used previously also assist that proposition and I refer particularly to the Government Advisory Committee report. There's no question that the committee was alive to the Law Commission report, because it's expressly referred to at page 257 under the heading "UN Model Law." Not only that as you can see at 256, the committee had submissions in private from the Honourable Sir Kenneth Keith and the right Honourable Justice McKay and of course Sir Kenneth Keith was the law commissioner for the 1991 report. He was, I think, head of the Law Commission at that stage and it was his letter in which the report was enclosed and sent to the Government.

McGRATH J:
Is, when you say he was the law commissioner for that report, are you going any further than your elaboration?

MR RING QC:
No, I'm not sure who actually wrote that –

ELIAS CJ:
Mr Hodder.

MR RING QC:
Mr Hodder, yes.

ELIAS CJ:
Well, yes, I think he'd left the Commission, very disappointed that it hadn't been picked up and then I think it was then followed through eventually in the 1991 report.

What's the submission, however, you're making, that this is just – this is the head counting thing, is it?

MR RING QC:
Well, I think it's a little more than head counting at this point.

WILLIAM YOUNG J:
Well you could say, of course that Zurich signed up to an arbitration agreement here presumably knowing that they might wind up facing summary judgment proceedings.

MR RING QC:
But that's – exactly, that's my point about 8.5(a).

ELIAS CJ:
Well you did in fact say that.

MR RING QC:
Yes, yes, I do exactly say that. Now, my point with Sir Kenneth Keith is that he's one step closer here because not only was he the – on the Law Commission or headed the Law Commission at the time of the 1991 report and presumably had knowledge of its contents and support its contents, but he then appeared before the Commission in 1996, I'm sorry, appeared before the Committee in 1996, immediately before the Bill is enacted and presumably said the same things because there's nothing in here which says, notwithstanding what the Commission has recommended, we're not going to do it or we suggest you don't do it or we have some concerns about what the Commission recommended in this respect or anything like that. It's the silence, it's the continuity of Sir Kenneth Keith, I'd like to say that with respect to His Honour. It's the continuity of his presence and the absence of anything to suggest that there is any concern about the 1991 Law Commission recommendations which of course has suggested the additional words and the absence of anything in Hansard takes the matter no further.

On the totality of the available supporting material, given what the Law Commission recommendation, the additional words then be enacted, exactly as the Law Commission recommended them, one has to assume that Parliament was adopting the recommendations and adopting the reasons for them, so if you accept the reasons for them was to maintain the efficiency of the summary judgment procedure and to equate real dispute with arguable defence, then it must be taken that that's what Parliament intended as well.

ARNOLD J:
What do you say about the proposition then that on a summary judgment you can deal with these interpretation issues and so on and if one thinks about a, you know, a

gas, an oil and gas contract, you know, if it's got a long time to run with an arbitration provision, providing for the qualified, people who are qualified in particular ways and so on, to deal with the arbitration, how does the Court respond to that?

MR RING QC:

Well, I'm not suggesting that there should be a principle coming out of this Court that summary judgments will be successful, but all we're talking about is the ability to apply and have your case heard. Once you're in the jurisdiction of the High Court and you're having your case heard, then you are subject to all of the restrictions that summary judgment provides, including the residual discretion.

ARNOLD J:

And so you would accept that as part of the residual discretion, the Court should turn its mind to the question, whether the, given the nature of this dispute, it is one that is better resolved by an arbitrator than by a Judge?

MR RING QC:

Yes Your Honour, it is always dangerous in my experience, to suggest that there is anything a Court cannot do. And I wouldn't want to suggest any fetter to the discretion at this stage. I am happy to take my chances in the High Court.

ARNOLD J:

Can I just interrupt? I don't think that is the right – isn't the real issue here party autonomy and the circumstances in which the Court will intervene. If the parties have said, "We want our disputes to be determined by an arbitrator and we want that arbitrator, or those arbitrators to have particular qualifications," shouldn't the Court be very hesitant to say, "Well actually we will deal with it. You don't need people with those qualifications?"

MR RING QC:

Well if that was the carte blanche position, then you might as well not have the opportunity to take a case with no arguable defence, to a summary judgement at all.

WILLIAM YOUNG J:

Well it is a question of degree isn't it?

MR RING QC:

I agree it is a question of degree and it hasn't been put before today, at least and I don't think it has even been put today, that there are some cases which can go to summary judgment under article 8 and some cases which can't. It has been put on an all or nothing basis.

WILLIAM YOUNG J:

Well I don't think that is right. Looking at the Court of Appeal, English Court of Appeal case, where Lord Justice Parker gave the lead judgment, that proceeded really on the basis of the principles applicable to summary judgment. It doesn't turn on the arbitration submission being a knock out blow. It really looks like a sort of different view to that taken in New Zealand, that you can deal with substantive and difficult legal issues on summary judgment. It is however a fact, obviously, that if the parties agreed to a particular process of dealing with disputes of a particular kind, that would be likely a good reason for not engaging in a sophisticated legal interpretation issue, particularly one that could be informed by the facts.

MR RING QC:

I am quite happy –

WILLIAM YOUNG J:

And I think that is probably what Justice Arnold is putting to you.

MR RING QC:

Yes well I am quite happy to accept the proposition that in determining the summary judgment application, so we have got to summary judgment and we are hearing them both at the same time. That in hearing the summary judgment application and making a decision on it, the Court is entitled to exercise a discretion based on what the particular terms of the arbitration agreement are, as well as what the context of the arbitration is. I am happy to accept that all of those things are open to be considered as part of the discretion. I mean in this case, of course, we would – we might be in a stronger position on that discretion because of the terms of clause 8.5(b) which says that the Courts have expressive jurisdiction. In some other case you might not have that benefit and you might get a different result.

GLAZEBROOK J:

Well what about just a mere wish to go to arbitration and for all the reasons that one might wish to go to arbitration with no special skill involved at all, just a reason to go to arbitration; confidentiality, quickness, control, enforceability, the considerations that Mr Galbraith was indicating?

MR RING QC:
Well I am happy to accept that they are all part of factors to be properly considered in the discretion, as well.

ELIAS CJ:
But isn't –

MR RING QC:
It is presumably –

WILLIAM YOUNG J:
But you are talking about the discretion to grant summary judgment or withhold summary judgment?

MR RING QC:
Yes.

WILLIAM YOUNG J:
And then depending on that, then the answer to the stay application, answers itself.

ELIAS CJ:
There is, well you have said, that if you are not able to get summary judgment, you are off to arbitration. Is that accurate?

MR RING QC:
Well if you haven't – if you can't get summary judgment, then the stay becomes relevant.

ELIAS CJ:
Yes.

MR RING QC:

In a case like ours, where you have got that clause 8.5(b), which says that the Courts have exclusive jurisdiction, there might be an argument not open to a party without that clause in it, that says, "We can actually continue in the Courts." We haven't got to that stage yet and that is not something that is before this Court to determine.

ELIAS CJ:
Well, where would you argue that? In what proceeding, in the stay application?

MR RING QC:
It would be part of the stay, yes.

ELIAS CJ:
It is just that, I mean, doesn't it, it just seems that there is a sense of unreality about this litigation because when I look at the notice of opposition, to summary judgment which is not before us, it seems that putting it, in caged terms, it doesn't immediately look as if some of these issues are going to be suitable for summary determination. So what are we doing with this, perhaps we shouldn't turn our minds to that.

MR RING QC:
It is probably a little premature for me to be arguing the summary judgment here.

ELIAS CJ:
Exactly.

MR RING QC:
But it is suffice to say, Your Honours, we are still dealing with questions of interpretation, and performance and on the undisputed facts, certainly now that we have got all the affidavits in, we still think that there is a clear path for summary judgment.

McGRATH J:
When you talk about performance, that's performance of the contract.

MR RING QC:
Yes.

McGRATH J:

That's with the party, the party that is not here. Is that right?

MR RING QC:
No that's performance, performance of the insurance policy.

ELIAS CJ:
The reasonableness of the settlement and that is like that.

COURT ADJOURNS: 1.02 PM
COURT RESUMES: 2.17 PM

MR RING QC:
Your Honours, before luncheon adjournment I dealt with questions 1 and 2, what did the Law Commission recommend and did Parliament adopt that recommendation. I now turn to question 3. Is the proper interpretation of article 8, article 1 that first a stay is mandatory unless the Court finds that there is in fact no dispute and we say, of course, that must be the case because that just picks up the words of article 8 itself.

Second, that a hearing with affidavit evidence and legal argument may be required to enable the Court to make this finding and we say, yes, that's implicit or explicit in the words "finds" and third, that there will be in fact no dispute and so the defendant is not entitled to assist on a stay if it has no arguable defence to the plaintiff's claim and we say, yes, that the absence of any dispute is synonymous where there be no arguable defence and/or synonymous with there being a proper case for summary judgment and it's the same judicial gloss as has already been applied to rule 12.2(1) for summary judgment where it says, "No defence," it means no arguable defence and all we ask is that Your Honours adopt what Your Honour Justice Young has already said in the *Contact Energy* case which is in our supplementary bundle at tab 2 at paragraph 22.

The 30 April 1997 agreement, which is the one obviously relevant in that case, contains a submission to arbitration. 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 assist upon a stay of the proceedings, see the Arbitration Act, article 8. And we say, Your Honours, that if you follow the answers to those three questions on page 1,

Parliament's intention is unmistakably evident and there is no need to go any further in order to resolve the issue that is relevant in this appeal. But if it is thought necessary to go any further, we say the next two points just totally put the nail in the coffin.

In 2003, did the Law Commission endorse the 1991 Law Commission's recommendation in question 1? And we say the answer to that is yes, unequivocally yes. Did it recommend that no amendment to article 8 not be done, notwithstanding the criticisms by Master Thomson in 2001 in the *Todd Energy* case and again we say the answer to that is obviously unequivocally yes and since you haven't been taken to that, perhaps I can take you to it now, albeit briefly, it's in the second booklet, appellant's authorities, under tab 19, chapter 18 of the report, headed the added words of article 8 of the first schedule and Your Honours will see from paragraph 242 that the sole purpose of this chapter was to address the very question that Your Honours are being asked to address in this appeal.

And having repeated what the Law Commission said in 1991, having identified the decision of Master Thomson having been decided in the meantime, that took the contrary view identifying Master Thomson's reasons that in his opinion the Law Commission in 1991 have made a serious error and Parliament had made a mistake in agreeing with it, the Law Commission said at page 112, paragraph 247, "We are not prepared to revisit this issue. The ethicacy of the summary judgment procedure is an 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 would be at liberty to raise with a select committee if the Bill is introduced into the House of Representatives, to give effect to recommendations made in this report.

So, there's absolutely no question that the author of this report, which is now Justice Heath, and the law commissioners of the time, believe that the 1991 Law Commission recommendations were to the effect of summary judgment that we are submitting and in the meantime there had been the judicial experience of that interpretation being consistently applied in a number of cases. Again, sometimes with judicial analysis, sometimes with just judicial statement and at other times where the parties had accepted it as being common ground.

So, again that background and against all of those factors, the Law Commission said, "No, we're not prepared to recommend a change. We think the added words are doing the job that we intended and that Parliament intended." So, question number 5, did Parliament accepted the 2003 Law Commission's recommendation, by enacting the Arbitration Amendment Act in 2007 without making any amendment to article 8 and obviously the answer to that is yes, because –

WILLIAM YOUNG J:
What's the authority for the significance that should be attached to that?

MR RING QC:
To the –

WILLIAM YOUNG J:
Fact that the Arbitration Act was amended without making any amendment?

MR RING QC:
Well, it's a matter of inference that Parliament has confirmed its intention, Your Honour.

WILLIAM YOUNG J:
Is there any sort of Parliamentary material indicating affirmation of the 2003 Commission Report?

MR RING QC:
Not that I'm aware of.

McGRATH J:
The 2007 amendment just simply had nothing to do with article 8, is that the position?

MR RING QC:
Well, that's right, that's right, but the lead up to it is of course this is a Law Commission report on improving the Arbitration Act 1996. It's not just confined to this issue. It's confined to a whole bunch of issues which found their way into recommendations for amendment of the Act which Parliament then adopted.

McGRATH J:

Yes, I suppose though that since the Act didn't actually address the particular article concerned, it's not really orthodox statutory interpretation to say the matter's been reaffirmed, had the provision been re-enacted, but then of course, your argument is we should stop question 3, as I understand it.

MR RING QC:
Well indeed, but I think I must get some support from the fact that the Law Commission says, "We don't recommend a change but submitters are free to come to Parliament and suggest a change."

WILLIAM YOUNG J:
Just pausing there. Does the 2007 Act adopt recommendations made by the Commission?

MR RING QC:
Yes, it does, yes, extensive recommendations. As I am indicating, Your Honour, if you look at the beginning of tab 19 and you look through the index, the contents of this report – I've only taken you to chapter 18 and if you just look down the index you can see recommendation, recommendation, recommendation.

So the inference that I invite Your Honours to draw is that either no submitters came along as envisaged by the Law Commission and tried to suggest to the select committee that there should be some change or that they did, but –

WILLIAM YOUNG J:
Are you permitted to do that? Are you permitted if a Bill says, "We want to propose the changes to (a), (b) and (c)," can submitters come along and say, "Well, you really need another Bill and make changes to (f), (g) and (h)."

MR RING QC:
Well, all I'm working off, Your Honours, is paragraph 247, the Law Commission said it's a matter which submitters will be at liberty to raise with a select committee if a Bill is introduced.

ELIAS CJ:

Mr Ring, at most, surely, you can say Parliament might've had the opportunity to do something about this if it wanted to and it hasn't. You can't really take it further than that, it's a huge point but –

MR RING QC:
No, I'm not taking it any further than that, but –

ELIAS CJ:
And it's only if it's necessary to get into that detail on statutory – the legislative history, really.

MR RING QC:
Yes, I mean the proposition that – the way I'll put it to Your Honours perhaps is this, that if Parliament had thought that the Court's had misinterpreted – if Parliament in 2007 had thought that the Courts had misinterpreted what Parliament in 1996 had meant by article 8, they had an opportunity to address it and didn't and the fact that the Law Commission specifically raised the issue and effectively put it before Parliament is an added factor in that. But I don't say it goes any further than that.

So we would say, well, again you don't need to go any further, that's the end of the story, but if you do, then looking at it from the judicial perspective, is the Court of Appeal's judgment in 1989 in *Royal Oak Mall Ltd v Savory Holdings Limited* authority for the proposition that the proper interpretation of the additional words is as set out in paragraph 3 above and the answer to that, we say, is obviously yes, because that was the English position in the Court of Appeal, accepted it from New Zealand even though the words weren't in there at that stage.

And question 7, since 1989, has the overwhelming majority of Judges, masters, Associate Judges confronted with this issue adopt and apply the test? And we say the answer to that is yes. Including former commissioners Blanchard J and Heath J responsible for both those reports and again, as an indication, that what Parliament had – what they saw as Parliament having intended, having been the authors of the recommendations leading to Parliament enacting, they have endorsed from the judicial perspective.

GLAZEBROOK J:

Was that endorsed in situations where the interpretation of contracts was in force or where it wasn't accepted by the parties because Contact Energy was accepted by the parties, as I understand.

MR RING QC:

Yes the Justice Heath one is also in the supplementary booklet, it is tab 5, it is the *Pathak & Anor v Tourism Transport Ltd [*2002] 3 NZLR 681 (HC).

GLAZEBROOK J:

Because that was really saying it's too late isn't it, in actual fact, the decision, because they had accepted interim relief and got further down the track isn't it?

MR RING QC:

In *Pathak?*

GLAZEBROOK J:

In *Pathak*?.

MR RING QC:

Well I'm just relying on the statement of general principle, that is referred to in paragraph 28 at page 688 in which His Honour was talking about it from an interpretation point of view and simply says, "That those additional words were inserted to maintain the integrity and efficiency of the summary judgment procedure used in this Court and the District Court for cases in which there was no arguable defence."

ELIAS CJ:

Well the next sentence doesn't sound enormously enthusiastic. "The acknowledgement of Master Thomson's view"

MR RING QC:

Well you have got to bear in mind, of course, Justice Heath is the actual author – the actual writer of the 2003 report.

ELIAS CJ:

Well –

MR RING QC:

So he has analysed Master Thomson's and says, "We are not prepared to revisit the issue."

GLAZEBROOK J:

But that, it didn't matter for this case did it, because wasn't this case saying, "Well once you have accepted interim relief, you are too far into it and even under the Model Law, you are stuck with the Court proceedings." It is a waiver argument.

MR RING QC:

Yes it is. I am not suggesting that that was an integral part of the judicial reasoning, I am just saying, here is Justice Heath saying from the Bench exactly the same as what Justice Heath was saying, in authoring the 2003 report.

GLAZEBROOK J:

Oh right, so it is nothing more.

ARNOLD J:

Can I just say, I feel a little nervous myself about that approach, that because a person who is now speaking in a judicial capacity was involved some way in the legislative process of the posse development of it, that announcements or judgments in relation to the particular subject, therefore have some kind of additional aura or authority about them. I mean what one does as a commissioner and one does in a particular environment and in a particular context, for judicial work is different. Anyway, it may just be me but I have to say I do feel uncomfortable with that line of argument.

MR RING QC:

Well the context in which I am putting it to Your Honours is just in case there is any doubt about what was really the recommendations of the 2003 Law Commission or the 1991 Law Commission. And so if you have, at the end of the chain as it were, Justice Heath saying in *Pathak* –

ELIAS CJ:

It is a very unconventional submission you have been addressing to us, I must say. It is a very personal submission.

MR RING QC:

Well, it wasn't intended to be Your Honours but I can see from Your Honours' comments what you are driving at. Well perhaps, let me just say, leaving aside the 2003 report in its – put that to one side and its authorship to one side. Justice Heath is one of the members of the judiciary who has interpreted article 8 in the same way as we say it should being interpreted. That's as far as I need to go.

GLAZEBROOK J:

Well, he's made a comment in a case that had nothing to do with that. So –

MR RING QC:

But the comment he's made is, he's made a comment about the proper interpretation of article 8 which is what we are addressing and yes, I agree the context is different, but nonetheless his interpretation is pertinent to the issue here and I – but I accept entirely the qualification that Your Honour is putting to me.

So, that leads us to the proposition that since 1996 the Courts have generally recognised this is Parliament's intention and they have adopted the practice of hearing both applications together and applied essentially the same arguable defence test to both and then the last point is the one I really started with, which is, is this conclusion contrary to the principle of party autonomy in the Arbitration Act and we say no, because parties chose New Zealand law and they could just as easily have chosen English law or some other law that had a different interpretation of article 8 and second, is it unfair or unanticipated by Zurich or contrary to what the parties had agreed? And we say no, because they both explicitly agreed, whatever else they agreed, they both explicitly agreed as well that the New Zealand Courts would have exclusive jurisdiction in respect of performance or interpretation of disputes, so we say, final conclusion, that by endorsing the decisions of the lower Courts, this Court will be giving Zurich exactly what it bargained for.

Unless I can help Your Honours with anything further, those are our submissions.

ELIAS CJ:

Thank you, sorry, I'm just thinking about that last submission. No, that's fine, thank you.

MR RING QC:

As Your Honours please.

ELIAS CJ:
Yes, Mr Galbraith.

MR GALBRAITH QC:
I'll just start by saying, if the purest approach which I referred to before was the approach which was applied then we wouldn't be in the predicament that we are in at the moment that the Court has discussed.

WILLIAM YOUNG J:
Can I just say, Mr Saville J didn't take approach, he accepted that there was scope for an argument as to whether there was dispute in fact which went beyond the purely jurisdiction.

MR GALBRAITH QC:
Yes, I think that's fair to say of what he said, but when one goes to *Halki*, for example, with the adoption, or the approval of what Lord Justice Templeman said in *Ellerine* I think we are back into the purest approach. Can I just explain why I say – why I say what I've just said? Because if one adopts a purest approach then what would happen in a case like this is that first of all, cognition wouldn't be trying to run a summary judgment because cognition would rationally recognise that all that Zurich would have to do is point to the fact that there was an arbitration clause and there were these issues of interpretation of the contract and performance of the contract and it would be a very rare case where you could run an argument that this was an abuse or this wasn't genuine or there was a certificate saying that there was a debt due, just wouldn't approach this sort of case, so we wouldn't get into this predicament or pickle that we're in at the moment, because if the international party and I'm concentrating on international arbitrations here really because I think that's where it most graphically illustrates that Law Commission couldn't sensibly have been recommending what people have seemed to interpret as recommending.

In those situations, all a party to an arbitration agreement would need to do on a stay application would simple be to point to those factors and unless the other side could show that there was, as I say, a lack of bona fide, or something, that would be the end of the penny section, and would all happen very, very quickly. Now, what you've got, once you start talking about the reverse side of summary judgment is that you've

got an incentive to a party on one side who's cheerfully contracted that they're going to have these issues determined by arbitration, to go off to the Courts on summary judgment, in other words, if the interpretation which we allege is correct, there's an incentive to go off to summary judgment because it suits them to avoid the arbitration obligations for whatever reasons that they decide. In doing that, if you have this reverse side of the coin, the other party, the party that wants to go to arbitration, therefore has to enter into an issue on the merits, because summary judgment does deal with merits, whether it's interpretation or whether it's factual, it's dealing with merits.

ELIAS CJ:

On your approach, and I know the cases have all arisen in the summary judgment context, but on your approach there would be no reason to confine the argument that's being run on summary judgment here to summary judgment.

MR GALBRAITH QC:

No, yes, you're quite so if there was no genuine –

ELIAS CJ:

It's sort of really irrelevant in the scheme of things, yes.

MR GALBRAITH QC:

Yes, and I'll come back to 308 and 309 in a moment, but the difficulty that one has and it's happened in this particular case is that there are now affidavits from here to somewhere in Africa filed in relation to how this contract should be interpreted with in the world of political event contracts et cetera, et cetera, and so that's what the party gets dragged into and it gets dragged into that on a summary judgment/stay hearing, which is all going to be run together because the test at the moment is said to be the same. If it loses or the other side it is on the summary judgment then there's a right of appeal, by right, which there wouldn't be in international arbitration. That would be the end of the – the determination would be the end of it. I agree it's pretty unlikely you'd get to the next stage of getting to the Supreme Court on an appeal, but in the past summary judgments have got to the Privy Council, so you have, where the parties have agreed to a process which is meant to be a one off international arbitration process with the rights to have interim awards, et cetera, you end up in a process where suddenly you've got appeals, which wasn't what the parties agreed to and you've got the risk of – you've go two steps up and then the second Court might

decide the summary judgment shouldn't have been granted and then you go off to arbitration, so you start all over again.

If that's what the Law Commission intended then so be it, but you would've thought that they might've mentioned that in their 308, 309 and with great respect, my respectful submission, I don't believe it's possible to reconcile what the Law Commission said in 308, having made the quote from the Mustill committee report their next sentence. Because what they say is the phrase makes explicit in this provision the element of dispute which is already expressly included in article 7(1) when read with section 4. Now those are the sections about defining what an arbitration agreement is.

So, is this meant to be interpreted that these words mean that you can't have an arbitration agreement, you haven't got an arbitration agreement if in fact there's no arguable defence to whatever the dispute is that's arisen.

WILLIAM YOUNG J:
I don't think that's the –

MR GALBRAITH QC:
But I agree it can't possibly correct but that's what this sentence –

McGRATH J:
Aren't they referring back to paragraph 128, where article 7 is again raised, read with section 4, there's not a real dispute between the parties.

MR GALBRAITH QC:
Yes.

McGRATH J:
Isn't it later just shorthand reference back to paragraph 128?

MR GALBRAITH QC:
Well, I would agree with Your Honour, but they're referring to article 7 and section 4 when you –

McGRATH J:

Which you took us to, which you took us to.

MR GALBRAITH QC:

Yes, and if you look at article 7, it – what it does, because it's on the previous page, 164, page 164, no, sorry, sorry, that's wrong.

GLAZEBROOK J:

Page 164.

MR GALBRAITH QC:

Yes, no –

GLAZEBROOK J:

And then section 4 was page 128, the definition.

MR GALBRAITH QC:

Sorry, that's right.

GLAZEBROOK J:

That's article 7, that's what you were looking for.

MR GALBRAITH QC:

That's right.

WILLIAM YOUNG J:

Is it not possible that the Commission in 1991 was not able to anticipate accurately the extent to which on the model language it would be open to a party resisting arbitration to say there's no dispute, this is a lay down was there and was wishing to make it clear that that dispute can and should be determined by summary judgment application if that's otherwise appropriate?

MR GALBRAITH QC:

Yes, I think that is correct, Your Honour, because you remember the reference to that issue could be dealt with under null and void and what you've got here is then saying at the end of 309, it's useful to spell out that the absence of any dispute is a ground for refusing a stay and then remember also what it said earlier on about this doesn't

expand the grounds for refusing a stay, so I agree with you, I think that's what was intended, simply to spell out what would otherwise be the law.

WILLIAM YOUNG J:
Well I think you misunderstood me.

MR GALBRAITH QC:
I'm sorry.

WILLIAM YOUNG J:
Might it be that the Commission thought, it at least possible, that on the Model Law provision, there would be some scope, perhaps some significant scope for a party resisting to arbitration to say, there is no dispute because our case is cast iron.

MR GALBRAITH QC:
Well that was a – no I did understand –

WILLIAM YOUNG J:
We have been focussing a bit on the other end, what did they mean by summary judgment and by making things clear. But it may be that they didn't fully understand or weren't able to anticipate fully the very restricted approach that would be taken to the Model Law in its original form.

MR GALBRAITH QC:
I don't think so and I can't think of anything in the report which suggests that because as I say, you have got, again the paragraphs 278 statement which says what they are doing here is entirely consistent with the spirit and structure of the Model Law. Now they well understood the Model Law, I mean, goodness gracious, it had been in principle since 1923, that you get mandatory stays in relation to international arbitration. It was our Act 1982, I mean, if the Law Commission didn't understand that, then this was all per incuriam, with great respect, what they were saying.

WILLIAM YOUNG J:
When you took us to the UNCITRAL cases about no dispute, were they decided by reference to language equivalent to our added words, or were they just decided on the basis of the existing, of the Model Law provision.

MR GALBRAITH QC:

I can't tell you that immediately. I don't know if we have got it in any of the material here, Sir, I am afraid.

GLAZEBROOK J:

That's when you are referring to, it was paragraph 33, the UNCITRAL Digest?

MR GALBRAITH QC:

Yes if we go to that, you will see that – oh actually it would be traceable.

GLAZEBROOK J:

Volume 2, tab 21 that has got something there.

McGRATH J:

Pages 48 and 49.

MR GALBRAITH QC:

Yes. I was looking at it last night.

GLAZEBROOK J:

Okay, 229.

MR GALBRAITH QC:

Certainly the discussion is in terms of, this is in answer to the question that Your Honour asked me. The discussions in relation to, of course, the model or article 8 so you will find that on page 33 and then it goes on to talk about case law on article 8.

WILLIAM YOUNG J:

It is para 43, page 48. It rather suggests just reading it that it is not necessarily by reference to added words.

McGRATH J:

Domestic law, yes.

GLAZEBROOK J

You would have to look at the 229 footnote cases.

McGRATH J:
There are quite a few of them

MR GALBRAITH QC:
My heart sank, so I can't answer that question Sir.

GLAZEBROOK J:
But then you would have to look at the 230 cases because it says, generally. Just no arguable defence is not enough.

MR GALBRAITH QC:
That's right and some of them are Hong Kong. Special minister for region of China, again I gave up.

But in my respectful submission it is difficult the actual wording, words of the Law Commission where they referred back to those definitions and then read into that, some summary judgment type restriction because those are definitions of what the arbitration agreement is so – and then as I said before, when one looks at the end of 309, it is really expressed in a way, well there is no harm in spelling this out and the inference is, well it was there already. And in my respectful submission, it was there already and if they were actually trying to change it, particularly in relation to international arbitrations, it would be extraordinary if they didn't express that.

So really those two paragraphs, which are the two paragraphs which the Courts have focussed on in the past, both in this proceeding and also in the 24 cases which my learned friend has referred to. Don't, I think when read in context with the other paragraphs I have taken Your Honours to, or even when carefully analysed, which they generally haven't been in the other cases, and by that I'm talking about the other New Zealand cases in relation to the summary judgment, don't in my respectful submission, support the idea that there's an opposite side of the coin approach to be taken to stay and that would drive a fairly significant bulldozer, if not cart and horse, through the spirit and principles of the Model Law.

And, can I just make that comment also in relation to what's said in the 2003 Law Commission Report. I mean the first submission I would make is it's very unusual to interpret what's in a statute retrospectively by a subsequent comment in a

report that is generally not an approach which one sees adopted, but the 2003 Law Commission Report in that paragraph which said, "We're not going to revisit this," said clearly it's what the Law Commission meant in 2001. With the greatest respect, I don't believe it is clear what the Law Commission meant in 2001, at least on the submissions that I have made and if one, as I say, reads that first sentence after the quote from the Mustill Committee Report reads the last sentence at 309 or reads it in the remainder of the context of the report, I don't, with respect, believe it's clear at all and so with the greatest respect to the Law Commission 2003 report, I don't – my respectful submission is –

GLAZEBROOK J:
Well, all it says is clearly it made its recommendations decide and the added words were necessary. It doesn't say what the added words meant.

MR GALBRAITH QC:
No.

GLAZEBROOK J:
So I mean clearly it did think the added words were necessary.

MR GALBRAITH QC:
Except that, when you read the last sentence of 309, it really is saying –

GLAZEBROOK J:
Well necessarily for the avoidance of doubt –

MR GALBRAITH QC:
Sure, fair enough.

GLAZEBROOK J:
It might be enough.

ELIAS CJ:
And they also don't they say we'd have to consult on this, which they haven't, don't they?

MR GALBRAITH QC:

No, no, they haven't.

WILLIAM YOUNG J:
Consult as to change –

MR GALBRAITH QC:
As to change –

ELIAS CJ:
Yes, to change, yes.

McGRATH J:
But the submissions they refer to receiving really were the submissions which related to the ethicacy of summary judgment, isn't that – that's what they're referring to?

MR GALBRAITH QC:
Yes, as I understand it, yes, as I understand it. And just finally and it's only a small point, in terms of party autonomy, I don't and I had this discussion with His Honour Young J before, I don't with respect believe that simply choosing another proper law for the contract or a law to be applied in the arbitration would get you around article 8 if it means what the Courts have been saying it means. I think to get out of article 8, you'd have to at the very least, adopt the exclusive jurisdiction of the Courts of some other jurisdiction which of course defeats the whole point of having an arbitration provision, because our Courts can always apply their procedural law and they have to apply English law but our procedures about summary judgment, if that's what our statute says, that's what our statute says.

ELIAS CJ:
Our Courts can only apply are procedural –

MR GALBRAITH QC:
Yes, that's right.

ELIAS CJ:
Yes, whereas they can apply foreign law if they have to.

MR GALBRAITH QC:

English – yes, they can, substantively.

ELIAS CJ:
Yes.

MR GALBRAITH QC:
Yes, so as I say choosing UK law wouldn't get you out of article 8. The only way to escape would be to actually choose a Court jurisdiction overseas and that defeats, as I say, the whole purpose of the exercise.

ARNOLD J:
Did you want to say anything about clause 8.5 in the policy, "Choice of Laws"?

MR GALBRAITH QC:
There's an interpretation issue there, Your Honour, I suppose, and that's something that should be determined by arbitration into the clause.

GLAZEBROOK J:
Well, it could be the Court –

ARNOLD J:
Well it does tend to affect some of the arguments you've made though, that might apply in other international arbitrations, because here the parties expressly quite explicitly to have said all of these matters are subject to the exclusive jurisdiction of a competent Court in New Zealand.

MR GALBRAITH QC:
Well, the insurer is obliged to submit to the jurisdiction.

ARNOLD J:
The insurer is?

MR GALBRAITH QC:
Yes.

ARNOLD J:
Yes, okay, so what is the insurer not obliged to?

MR GALBRAITH QC:

Not on the face of – and that's what I say, there's an interpretation issue Sir about 8.5(d) and 8.6, how do you fit those two together, so –

ARNOLD J:

What would you be saying, the insurer has an option?

MR GALBRAITH QC:

No, well, at the moment we're saying 8.6 –

WILLIAM YOUNG J:

Does this mean it might be a unilateral arbitration that the insurer is entitled to insist on Court proceedings but the insured must go to arbitration unless the insurer otherwise agrees?

MR GALBRAITH QC:

On the face of it, that's what it says.

WILLIAM YOUNG J:

Pretty weird.

MR GALBRAITH QC:

I'm not disagreeing, Your Honour. Unfortunately if I can just say this from the Bar at the moment and I'm sure my learned friend would say the same, having had to face a lot of insurance policies in the last – since the Christchurch earthquakes, they are invariably appallingly drafted, perhaps just leave it there because some will come before this Court no doubt in due course.

ELIAS CJ:

Is there also a – I just thought section 12, I had marked up, has a – is there any impediment to a summary jurisdiction being exercised by an arbitrator?

MR GALBRAITH QC:

No, there's a – it's actually specifically provided for in the Act. I'll just find it –

ELIAS CJ:

Don't worry.

MR GALBRAITH QC:

No, it's in there Your Honour in schedule 2. What they provide for are interim awards and that's the purpose of effectively giving summary decisions where there's – where are we?

ELIAS CJ:

It's not quite the same though, is it?

MR GALBRAITH QC:

I think it's regarded, here we are –

ELIAS CJ:

Summary's – I've made a note, section 12, had some – don't worry about it. It's just a loose thread.

MR GALBRAITH QC:

It's not –

ELIAS CJ:

Or a screw missing.

MR GALBRAITH QC:

It's in there and if you look at the arbitration commentaries and that, and in fact some of these cases, the UK cases recognise that it is possible under the arbitration process to give something equivalent to summary charge, I mean it's not the same, it's not the equivalent, because they recognise there is not the same justification that perhaps was seen by the McKinnon Committee way back in 1928 or whenever it was, 27, thank you.

ELIAS CJ:

Thank you counsel, we'll take time to consider our decision.

COURT ADJOURNS: 2.57 PM