IN THE SUPREME COURT OF NEW ZEALAND SC 141/2014

[2015] NZSC Trans 11

BETWEEN **NGĀTI WĀHIAO**

Appellant

AND **NGĀTI HURUNGATERANGI**

NGĀTI TAEOTU ME NGĀTI TE KAHU O NGĀTI WHAKAUE

Respondents

SC 7/2015

BETWEEN **IOANE TEITIOTA**

Appellant

AND **THE CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT**

Respondent

Hearing: 1 April 2015

Coram: Elias CJ
William Young J
Glazebrook J
Arnold J
O'Regan J

Appearances: **WĀHIAO**
J E Hodder QC and F E Geiringer for the Applicant
D J Goddard QC and J P Kahukiwa and B D Huntley for the Respondents

TEITIOTA
M J Kidd for the Appellant
C A Griffin and M F Clark for the Respondent

APPLICATIONS FOR LEAVE TO APPEAL

MR HODDER QC:

May it please the Court, Hodder, with my learned friend Mr Geiringer for the applicant, Ngāti Wāhiao.

ELIAS CJ:

Thank you Mr Hodder, Mr Geiringer.

MR GODDARD QC:

May it please the Court, I appear with my learned friends, Mr Kahukiwa and Ms Huntley for the respondent.

ELIAS CJ:

Thank you, Mr Goddard, Mr Kahukiwa, Ms Huntley. There's another we're calling, Teitiota.

MR KIDD:

May it please Your Honours, Kidd's my name, I appear for the applicant, Mr Teitiota.

MS GRIFFIN:

May it please Your Honours, Ms Griffin for the respondent, appearing with Ms Clark.

ELIAS CJ:

Thank you, Ms Griffin, Ms Clark. That's what we're doing first, we're going to hear the two appeals together and then we'll hear the other case, which also concerns jurisdiction.

So, Mr Hodder.

MR HODDER QC:

Thank you, Ma'am.

To save writing, possibly reading, I have prepared some notes of what I wanted to cover at this point, partly because we're obviously responding to the submissions for the respondents at this point, and I wasn't proposing to traverse written submissions to any extent on the basis that that Court's had those for some time.

ELIAS CJ:

No, the Court's read the submissions, and we really do intend that this hearing will be short – I think our rules say some like 15 minutes each or something like that but…

MR HODDER QC:

In that case I think that will work.

ELIAS CJ:

We're after help, so we'll take what you give us, as long as it's reasonable.

MR HODDER QC:

All right then. As the Court appreciates, in this particular matter we are concerned, to some extent at least, with the interaction between this Court's Act, the Supreme Court Act 2003, and the Arbitration Act 1996, because the reason we're here is that, through a process that involves some quite separate legislation and long history, there was an arbitral process that gave rise to an award which the respondents in this Court sought leave to appeal to the High Court, that was refused, as was leave from that Court to go to the Court of Appeal. The matter then went to the Court of Appeal on an application for special leave, and the Court's judgment in that matter is the one that's in the original set of decisions at tab 1 where the Court, without reasons, granted special leave, directed leave for the hearing of the appeal in the High Court against the award appeal and ordered costs against the current applicant, and those matters were the subject of written submissions in the ordinary way until the Court's minute of last month. So that's what brings us here.

Turning to the notes, the basic proposition, which the Court appreciates from our written submissions on this jurisdictional point, is that that issue is resolved by straightforward reading of the Court's own empowering Act, most importantly section 7, and extracts from this Court's Act are in our bundle of authorities, which the Court has, and which I'll make some reference to the Act shortly.

As a sort of a preliminary proposition, but a leitmotif that runs through what I want to say, is my point at paragraph 2: we submit that the Court's entitled to have regard to a general legal policy, or what I call a "rule of law objective", that the laws in New Zealand be as understandable and accessible as it practicable, and if authority is needed for that then one can turn to chapter 3 of Lord Bingham's short book on the rule of law or, indeed, section 5 of the Law Commission Act 1985, and I don't imagine anybody is going to argue against that proposition but we say it is relevant, because what we're really talking about is the way in which one approaches this Court's jurisdictional provision in section 7, and so what we say in 3 is it would be regrettable if the Supreme Court Act 2003 could be approached on the basis of being understandable and accessible. And not just the lawyers, who are familiar with Lord

Halsbury's observations in 1891, which I for one was not until this matter came up, and we also note that the Court has reference to improving access to justice, we say that if straightforward interpretation of words in the Act helps that process – and indeed the point of section 7, and is flagged in section 3 of the Act, there is an explicit purpose to provide for the Court's jurisdiction, so looking much beyond section 7, we say, isn't particularly helpful.

Equally importantly – and this goes back to a lot of jurisprudence in the Court of Appeal that all members of this Court will be familiar with – this Court has control of its own docket, if we can use the American express, because of the leave provisions of sections –

ELIAS CJ:
Why would we?

MR HODDER QC:
– 12 and 13 – sorry?

ELIAS CJ:
"Docket" – why would we?

MR HODDER QC:
Why would you what?

ELIAS CJ:
Its caseload.

MR HODDER QC:
I'm happy with caseload, I just -

ELIAS CJ:
Yes.

MR HODDER QC:
– "docket" has perhaps crept into the legal jargon from North America. But the point about that is that if you, if the Court, if the final Court of Appeal, as we are relevantly concerned with here, is faced with appeals as of right, which it has no control of, than it has caseload or docket problems, and that was certainly a matter that informed the Court of Appeal's approach to these matters up until this Courts decisions *Siemer v*

Heron [2011] NZSC 133, [2012] 1 NZL 309, which is discussed in our written submissions. But in this Court that issue simply doesn't arise. The Court has the filter mechanism of the leave requirements of section 12 and 13 and, for interlocutory matters in particular, section 13(4) has specific provision for it. So we say that there's no need to strain in a way that, in this Court *Siemer* consider the Court of Appeal had strained in various ways earlier to try and deal with the impact of appeals as of right under section 66 of the Judicature Act 1908.

As we apprehend it – this is my paragraph 5 – the respondent's take a different approach. They say, "Look, there's an implicit bar on the right to bring an appeal, and we can deduce that by a careful reading of the Arbitration Act, particularly clause 5, not explicit but implicit, if you read it and take sort of a detailed interpretation exercise. And, secondly, they say there's principle of interpretation that comes from *Lane v Esdaile* [1891] AC 210, which defined certain decisions as unappealable, including leave decisions, and it's true that in the United Kingdom the English Courts have, they adhered to *Lane v Esdaile* reasonably consistently up to the present time.

ELIAS CJ:

What's your best authority on that, of the English authorities? Because looking at *Lane v Esdaile* this morning quite briefly, it's quite contingently expressed in parts, it's not hugely compelling reasoning and it, it may be right, but it's also against a very different background of appeal provisions and, in particular, against a different background of judicial review availability.

MR HODDER QC:

Yes.

ELIAS CJ:

And that's an area that I'm concerned about.

MR HODDER QC:

Well, that's the position that we will take and have taken in this process, that *Lane* is dealing with its own legislation, it's own particular time, and it simply can't be given much weight in the context of section 7, most relevantly we will say, and this is a point not made in our written submissions, because the essence of *Lane* is captured in the current section 7(b) so insofar as this Court's own statute says, you cannot appeal against a refusal of leave, that's all that *Lane v Esdaile* was actually

concerned about primarily. It was later expanded by the Court of Appeal in England to cover grants and refusals, but the initial reaction was to deal with that.

ELIAS CJ:

Well, in *Lane v Esdaile* they acknowledged that there has to be symmetry, so I think it was already in that decision.

MR HODDER QC:

It's true, there's reference in Lord Halsbury's speech to that.

ELIAS CJ:

Yes.

MR HODDER QC:

Although he was focused on the fact that they shouldn't be looking at it at all, because it hadn't got out of the gate and the gate was the lead provision which hadn't been opened. Grants would be different.

ELIAS CJ:

But the gate was the order or – I don't know what it was –

MR HODDER QC:

It was an order.

ELIAS CJ:

Yes.

MR HODDER QC:

But the gate would be the Court of Appeal decision on leave under that order.

ELIAS CJ:

Yes, but was that an order of the Court? Because if there was there was jurisdiction, and he seems to have said that it wasn't properly – so characterised.

MR HODDER QC:

Well, there were two lead provisions: one the fight of the Court of Appeal, which the Court of Appeal gave leave to come to the Court of Appeal, and the second was the House of Lords own leave provision, which is more like as of right –

ELIAS CJ:

Yes.

MR HODDER QC:

– and what the Court was doing, the House of Lords were doing, was reading down the as of right provision so it couldn't cover stuff that had escaped, or hadn't gone through the right gate in the Court of Appeal's leave provision.

ELIAS CJ:

So there's two points. One is the actual provision for appeals, but the other one was the authority of the Court to determine what cases it would take –

MR HODDER QC:

Yes.

ELIAS CJ:

– and is a policy decision that you say is still good and should be adhered to be this Court?

MR HODDER QC:

Well, we're saying that you can ignore *Lane v Esdaile* frankly, because section 7(b) takes it as far as it needs to be taken.

ELIAS CJ:

Yes. Well, let's start with section 7 then.

MR HODDER QC:

Very good. Well, can I just, if I can just take a moment to just to finish off on 5 and 6, because if 6 is our short response we say section 7(a), which has the language of makes provision to the effect, really is talking about various kinds of express meanings of language – of statutes which exclude appeals. And the second point is that the policy which *Lane v Esdaile* is fundamentally reflecting is expressly dealt with by section 7(b) and 13(4) of the Act. So if we do turn to the Act, which is, the extracts are in tab 8 of our bundle of authorities, in a sense if I may preface this by saying that section 7, as we apprehend it, has sort of three components. There's the main body of which, which has wide, inclusionary language, which I'll explain in a minute. It then has two specific exceptions. And our proposition is that the application for leave for the applicant in this appeal satisfied every element of that provision. The attack on the jurisdictional point now made by the respondents in this appeal says, well,

firstly there is an implicit provision that's caught by the section 7(a) exception and, secondly, they say, "Actually, if you're applying *Lane v Esdaile*, that broad language in the inclusionary phase has to be read down anyway," and we resist both of those propositions. And we do that because it, can be really, start with section 3, which I partly referred to. But section 3 explains the purpose of the Act, and of course, with risk of stating the obvious, it's a new Court of final appeal that we are here. Then reference to improving access to just in section 3(1)(a)(iii) and, as I mentioned earlier, 3(1)(b) expressly says that what the Act is doing is providing for the Court's jurisdiction, so we suggest that we find the Court's jurisdiction in this Act and not elsewhere.

Now in terms of the definitions, I'll just read briefly, "civil proceeding" is widely defined, "any proceeding that's not a criminal proceeding," I don't need to be concerned with the Bail Act 2000. "Decision" means, "A judgment, decree, order, direction or determination," again, very wide. "Interlocutory applications" are defined, in New Zealand Courts, are defined in a way that covers more than just the Court of Appeal. And then when we come through to section 7, I think in my notes I focus on section 8 first, because it's in exactly the same terms except for 8(c). So 8(c) says that coming to this Court you can't come on an interlocutory application, but then in a specific provision in clause 13(4) it deals with interlocutory application in the Court of Appeal. So interlocutory applications from the High Court, appeals are out under section 8(c). They are not out under section 7. They are covered, in fact, by the leave criteria of section 13(4).

So then coming back to section 7 itself, which is at the heart of all the matters that we say are relevant for the Court to consider, the language, the introductory language is broad. The Court can hear and determine an appeal by a party to a civil proceeding in the Court of Appeal against any decision made in the proceedings, and we say we tick all the boxes that's in that requirement. There was a civil proceeding. There has been a decision made. We do wish to repeal against that decision and the Court can hear and determine it subject always, of course, to the requirement for leave under sections 12 and 13.

Then there's the "unless" and the first unless is an enactment other than this Act that makes provision to the effect that there is no right of appeal. So if some Act says the decision of the Court of Appeal is final, that's straightforward. If the decision of the legislature is to say there shall be no appeal, then that is effective as well. But what we say doesn't help us is if we have to interpret each Act to find out whether through

more or less a subtle process of interpretation although it doesn't say that, actually is to be understood to be interpreted that way.

ELIAS CJ:

Why don't you start with the Act itself rather than with the – well particularly since section 7 and 8 require you to look at the terms of the right of appeal.

MR HODDER QC:

Are you talking about Arbitration Act Ma'am?

ELIAS CJ:

Well yes, I am really. In the other appeal it's the Immigration Act 2009. In this one it's the Arbitration – the provisions of clause 5, aren't they?

MR HODDER QC:

Yes, there is clause 5 of the Arbitration Act.

ELIAS CJ:

Yes.

MR HODDER QC:

So perhaps it's that, I can skip through – what I've said on the notes is simply to go through and explain why we say the first part is entitled to it, and indeed the whole provision is entitled to a plain meaning approach, and from that we go particularly to the decision in *Siemer,* which we have referred to in our paragraph 11. It is also referred to in our written submissions. But reading down the statute there for the jurisdiction of the Court of Appeal is not appropriate, the words should mean what they say. And so, so far as the first part, before, unless in section 7 is concerned, we say the words mean what they say, you don't need to have regard to *Lane v Esdaile,* and in that *Siemer* decision which the majority of the Court considered that the previous attempts by the Court of Appeal to read down section 66 were erroneous and shouldn't have been undertaken, a whole lot of jurisprudence, including strands of *Lane v Esdaile,* were disapproved. Also recognition that decision that inconsistencies may exist but if they are, they are for Parliament or the rules, new rules of Court to determine and sort out. We say that that gives a very clear signal and is entirely consistent with what I said earlier about making this Act the source of jurisdiction and approaching it on a simple words mean what they say process.

I then dealt with the rest of that page of my notes just handed up, we agree with *Lane v Esdaile* and there's not perhaps much else that I need to say. The main concern that I apprehend in *Lane v Esdaile* is to say the Court shouldn't be engaged in something if the gate hasn't been opened to it and if it had to deal with appeals on leave then it would have to deal with it, and that wasn't appropriate and again it was trying to control its caseload and unnecessary appeals because it didn't have the section 12 type provision.

So – and as I say if I can then just turn us to –

ELIAS CJ:
So it's of limited help as background against which we consider the specific provisions in this case.

MR HODDER QC:
Yes, well I would go further and say that it explains section 7(b) but the logic of *Lane v Esdaile* is what you find in section 7(b), that you can, this Court is entitled to hear appeals subject to leave unless in paragraph 7(b) says its refusal to give leave or special leave to deal with the Court of Appeal or if you ask the question why then the concerns in *Lane v Esdaile* explain that, but it's limited to refusals. It clearly isn't talking about grants and our case is about the grant of leave and special leave by the Court of Appeal.

Now just on that point. If on the *Lane v Esdaile* point, and I probably don't need to say much more, if it were the case that that any questions about leave were taken care of because they didn't fall in the general language of section 7 before you get to "unless", then section 7(b) would be redundant, and we say that would be an odd interpretation to finish up with, and that takes me, really, to the bottom of page 2 of these notes. Over the page, just for completeness, I'm not sure how far the Court wants to get into this, but for completeness – and there are copies available but I wasn't proposing to give them to the Court now if they wanted them, but the Registrar has them – it was distinguished by the Privy Council in *Campbell*, in a special leave refusal case after discussing the fact that it was fairly firmly entrenched in the English civil jurisdiction, it is a thread in some of the decisions in the Court of Appeal up until about 2010 and it was indirectly referred to by this Court in the *Howard v Accident Compensation Corporation* [2013] NZCA 617 decision by reference to *McCafferty v Accident Compensation Corporation* [2010] NZAR 320 (CA), which in turn refers to *Lane*, and in that decision, again, which can be made available after the hearing if

that's convenient, then the Court said there were three reasons why an appeal isn't going to work here. Two of them are statutory and one of them was reference to *McCafferty*, which in part incorporates *Lane*. So our submission is, that doesn't take us very much further because the matter could be and in effect was decided on statutory provisions as we suggest applies here.

So moving on to section 7(a) more specifically, the reason that I contend for express rather than implicit provisions is set out in paragraphs 18, 19 and 20. We note that the *Concise Oxford* defines "effect" and "to the effect" as meaning so one could read section 7(a) as an enactment which means that there is no right of appeal. The clearest way to do that is to say so, which is some examples in paragraph 20. The former section 65 of the Judicature Act says the decision is final. This Court commented on that in *Nation v Nation* (2005) 17 PRNZ 568 (SC) and the legislation subsequently abolished that. All the decisions find it conclusive, and that was the old employment contracts provision considered by the Privy Council in *De Morgan v Director-General of Social Welfare* [1997] 3 NZLR 385 (PC), or it can say the decision of the Court of Appeal on any appeal application for leave is final, and that's what is said in the Accident Compensation Act 2001 which features in *Khan v Accident Compensation Corporation* [2009] NZCA 260, cited by the respondents and in their bundle, or no appeal shall lie, which is the language of the High Court Rules about the commercial list, which is in the *Siemer Holdings case*, also cited by our friends, or the decision will simply be subject to another appeal, which is perhaps more interesting because that is in the Arbitration Act, and those two provisions I've referred to in the last bullet point at 20 are challenges to jurisdiction or challenges to the confidence of the arbitrator where it says, "The High Court shall determine these matters and the decision shall be subject to no appeal."

So those are variations on the theme that there is no right of appeal. And we say that when the legislator says "makes provision to the effect", it's capturing that range of language. It's not inviting a more abstruse exercise and interpretation to try to find it. And if it's silent on the point, then the general rule prevails, which is the initial part of section 7 of the 2003 Act, and that also is consistent with the general policy of access to this Court, which was one of the reasons that is mentioned in the purpose provision section 3. So if we go to section 5 of the Arbitration Act which is under our tab 9 then cause 5 is the last couple pages of that extract. This is in schedule 2 which is, as it were, the model law found in schedule 1. Schedule 1 says that Courts don't get involved where this schedule governs. Schedule 2 is not covered by that provision. It's covered by its own terms which are unique to New Zealand and

include such matters as appeals on questions of law and the matter that troubled this Court a while back, questions of costs as they rise in relation to the questions of law some years back. So the original drafting, as it were, for New Zealand as opposed to being an adoption of model law provisions, so international harmony issues are not raised as the same as schedule 1 issues might be.

So paragraph 24, these notes, the wider context of the Arbitration Act is we have – if I can put it not in any kind of derogatory way – a parallel universe which the Courts recognise as being a valid way of determining disputes, and within its own boundaries it's meant to be respected which is, in fact, the reason why we're seeking leave to appeal in this matter itself, because we say the Court of Appeal has not recognised those boundaries correctly. But once you get into the appellant process, the ordinary Courts and the ordinary jurisdiction is what then governs the matter subject to what is expressed in this Act. In effect, what has happened here is that because the Judicature Act route isn't available to get to the Court of Appeal, the Arbitration Act clause 5 gets you to the Court of Appeal. What happens then is then determined by this Court's Act, the 2003 Act. That takes us back to section 7(3).

ARNOLD J:
What does subclause (6) of clause 5 say? You haven't got it here but I note it's referred to in the respondent's submissions.

GLAZEBROOK J:
It should be on the next page.

ARNOLD J:
It's not on mine.

ELIAS CJ:
It is on mine. I'll pass it along. Are you in the right bundle? It's the smaller bundle.

ARNOLD J:
Maybe I'm in the wrong bundle.

MR HODDER QC:
Tab 9.

ARNOLD J:

I don't seem to have another one. While I've interrupted you, I'll ask you something else. You noted that section 3 of the Supreme Court Act talks about access to justice, but when you look at section 7, it seems slightly odd that it should preclude a right of appeal where access to the Court is denied because leave is refused, but allow a right of appeal where access to the Courts is granted. It just seems slightly counterintuitive to me. I know your argument is that's what the words say, but what might the underlying policy be?

MR HODDER QC:

Well, as I said it does go back to the original approach that you find in *Lane* where the Court was concerned that if you've got a box drawn around people and you can't get out without going through the leave gate, then arguing about whether the gate's being properly used or not gets you into an appeal. The Court then, dealing with the appeal against the leave decision, to give leave refusal, has got to go inside the paddock to argue about what's inside the paddock, but the gate's never been opened and that is somehow illogical. I think what underpins *Lane* –

ELIAS CJ:

As you acknowledged, the Lord Chancellor accepted that there had to be some symmetry. It seemed to follow as a necessary consequence that you must have a right to appeal when leave has been granted.

MR HODDER QC:

But in the preceding paragraph where he says something to the effect that the Court has to engage in this matter in any event, and it doesn't – it says this is the same page.

ELIAS CJ:

If the intermediate Court could enter and must enter into that question, then the Court which is the ultimate Court of Appeal must do so also. That's your point about once you're in the system it's just the Supreme Court Act that determines whether we have jurisdiction.

MR HODDER QC:

Yes, it is. If the intermediate Court must enter into that question, the merits of whether there's a good appeal, then the Court which is the ultimate Court of Appeal must do also and that's what I understand to be really the fundamental objection here, that the Court can't engage with this appeal without going into it.

WILLIAM YOUNG J:

Can I just stop you on this point? Do you say that there can be an appeal against a decision to grant special leave made by the Court of Appeal to the Court of Appeal?

GLAZEBROOK J:

But that it would be very unlikely to be granted, is that the submission?

MR HODDER QC:

That's correct. It's going to be similar to the case where the Court gets beyond the jurisdiction point in our own case, unless there's something special that has some broader effect that you're just not going to get there on something that's interlocutory like that, but yes, the combination of section 7 and section 13(4) gives complete control over those sorts of appeals. I don't think I really have a particularly satisfying answer to Justice Arnold's question. It's somewhat curious that that particular provision attracted no attention in the travaux préparatoires or in the Parliamentary debates or anywhere else that I can find and the best explanation I can give for it appears to be that it had to reflect the core point that I extract from *Lane*. Now, in the written submissions we also say that you're talking about the Courts below are not unanimous, so you may also invoke the – you already had two Courts saying the same thing on this point.

ELIAS CJ:

Then why don't you have a fallback position, which is to say that section 7 – if we're concerned about the symmetry argument, why isn't your fallback position that section 7(b) is confined to the second tier leave, not the entry point in the High Court?

MR HODDER QC:

I haven't actually ascertained that I needed to, really.

ELIAS CJ:

Well, you're taking a very literal approach to the statute and up against that literalism is the lack of symmetry that is being pointed out to you.

MR HODDER QC:

I understand that. But in this case we'd say there really is no getting around the language of section 7(b). If there was any legislative intent to be found that it was to cover all decisions on special leave appeals, you simply couldn't find that language

here and so it is a plain form language of a kind this Court was considering in *Siemer*.

GLAZEBROOK J:

Yes, although on a plain reading this isn't a refusal or it's not a grant of special leave or leave to appeal to the Court of Appeal. It's a grant of leave to appeal to the High Court.

MR HODDER QC:

It's both, Ma'am.

GLAZEBROOK J:

No. I would have thought that there's an argument about symmetry in respect of the grant of special leave to appeal and there was some confusion, I think, in the submissions pointed to by Mr Goddard as to whether there was a challenge to this special leave in the first place and I must say I didn't go into it enough to understand whether that was the point but it probably doesn't matter to your client because either special leave shouldn't have been granted to argue the leave question to the High Court or leave shouldn't have been granted. It might be you say that's the same thing. I think there was some confusion as to actually what was being appealed against and how it worked in the decisions of the Courts themselves, to be honest, and I can quite understand it having tried to grapple with those provisions.

MR HODDER QC:

All I can say is that the notice of appeal is a notice of appeal against the judgement which includes each of the decisions. Each of those items – the Court of Appeal grants special leave to get to the Court of Appeal and then the leave to go to the High Court but the High Court have refused. Then the remission back of identifying questions of law and each of those four items is the subject of our applications for leave to appeal.

ELIAS CJ:

This is like one of those eternal mirrors, isn't it, though?

MR HODDER QC:

If the Court of Appeal had stopped at the point where it granted special leave and didn't determine the next stage, we would still say we had a right of appeal against that. We would expect that to be turfed out probably on grounds that there was

nothing else to it, because they hadn't actually wrestled with whether there were questions of law or not.

WILLIAM YOUNG J:

What do you say to the proposition that the hand of the draughtsman faltered? That the proposal was to be incorporated in the leave provisions but the situation wasn't thought through and there were some gaps?

MR HODDER QC:

I'm not sure I can do much more than speculate on that. In the end I think we're left with the words, then there's a clear implication when one does sort of express a unanimous argument, if it's dealt expressly with refusals, and we're not talking about a refusal, then it has no application we say and –

WILLIAM YOUNG J:

I was really thinking here more, leaving aside – well –

ELIAS CJ:

We've got both in front of us.

WILLIAM YOUNG J:

Yes, a, there's a gap as to, well you say not a gap because it's covered by the general words, but they're not specifically addressed is, grants them leave, and secondly, not specifically addressed possibly because no one ever thought of it, the position of decisions by the Court of Appeal to grant leave to appeal to the High Court, which I think is an unusual jurisdictional process.

MR HODDER QC:

Well –

ELIAS CJ:

Can you say that again sorry?

WILLIAM YOUNG J:

Well a Court would normally grant leave to appeal to itself or to a High Court.

MR HODDER QC:

Yes.

WILLIAM YOUNG J:
It won't normally be empowered to grant leave to appeal to a lower Court.

ELIAS CJ:
Mmm.

MR HODDER QC:
That's effectively what clause 5 of the Arbitration Act specifically says.

ELIAS CJ:
Yes.

WILLIAM YOUNG J:
I know, so what I'm saying is clause 5 of the Arbitration Act and the provisions in the Immigration Act are unusual.

MR HODDER QC:
I think that's what we said. I'm not sure I have a complete enough grasp of the full range of appellate provisions but that's probably fair.

ELIAS CJ:
I wonder whether they're unusual because they're, in both cases I think I'm right, coupled with exclusion of judicial review.

GLAZEBROOK J:
Immigration Act does have judicial review –

O'REGAN J:
But it also requires the same leave.

GLAZEBROOK J:
Yes, same leave provisions though.

O'REGAN J:
It doesn't exclude it.

ELIAS CJ:

No but I – all right but it –

GLAZEBROOK J:

It's restricted.

ELIAS CJ:

It's restricted, yes.

MR HODDER QC:

Well I confess I'm not in a position to help Your Honour in immigration matters.

ELIAS CJ:

No.

MR HODDER QC:

Certainly judicial review isn't what we'd expect to find in the arbitral context just because of the progressive nature of it. But in the first stage –

ELIAS CJ:

Well but it's excluded, isn't it, by the I haven't got the full Act –

MR HODDER QC:

Judicial involvement is excluded generally under one of the provisions of schedule 1.

ELIAS CJ:

Yes. But before the Act, that is the way, isn't it, that we used to proceed. I remember a few where you reviewed for error of law on the face of the award.

MR HODDER QC:

There were various names but they effectively amounted to appeals.

ELIAS CJ:

No. judicial review is different from appeal but I think the background is significant, it's not the same background as in 1895. Anyway, I don't think it's against you –

MR HODDER QC:

Very well.

ELIAS CJ:

– the thing that I'm toying with. It might be something I need to put to Mr Goddard.

MR HODDER QC:

Well I'm happy to leave 1891 or 1895, the century before last. For our purposes we say you don't need to go beyond section 7 and what you have in section 7 in the body of it is a very wide language about what is a decision, which clearly covers a grant of leave, without – unless one again takes an extraordinarily strange reading of it, then the question arises –

ELIAS CJ:

Which means that *Smith* and *Esdaile* is of diminished force because that was really the coat hanger they used in that case.

MR HODDER QC:

Yes. We say that it would be quite, quite a satisfactory result if it was banished from New Zealand jurisprudence but that may not be necessary for the Court's present purposes.

ELIAS CJ:

Well today you say that Mr Hodder.

MR HODDER QC:

Yes well I'm at every point in these submissions and in my friend's submissions they will be, well he would say that question behind all of them, we understand that.

On the last page of my notes in relation to those things, in addition to saying there's nothing particularly explicit about this in clause 5 of the Arbitration Act, we think we are entitled to point out the contrast, as in begin at 25 with what the Act does when it does want to exclude the involvement of any Court, including this one, when it plainly says the High Court decides those questions about whether there's a proper challenge to the arbitrator who has been appointed or a proper challenge on the basis of jurisdiction for the arbitration, and the decision of the High Court shall be subject to no appeal. Now we say that plainly falls in the section 7(a), as clear as you need it to be, and that's the kind of provision that section 7(a) is about. But taking the silence about such matters in clause 5 we say goes too far to be justifiable.

Now we can't say there aren't some inconsistencies. At 26 we note there was a contrast with clause 5(5) at the lower level but the fact is that the matter is still controlled effectively by the accommodation of section 7 and section 13(4) without having to come to the full Court on the substantive point unless it's got some justification. But again we go back to *Siemer* and say in *Siemer* this Court recognised there were going to be some inconsistencies left by taking the plain words approach but they shouldn't drive the interpretation of that jurisdictional provision. And there's also the point that the Court of Appeal does something on these lines. It has an inherent precedential dimension and it can't be controlled unless this Court is in a position to correct it if need be.

There is also the point made by the respondents that, well this point will be picked up if you just go back to the High Court and have a full hearing there on the original application for leave to appeal, but in our submission it won't. The Court of Appeal has already determined that there are questions of law and sent them to the High Court. We're saying there aren't questions of law, the whole problem is that the Court of Appeal has allowed itself to be persuaded to manufacture questions of law out of what are questions of fact and discretion. That issue is not going to get addressed in the way the Court of Appeal has sent it back to the High Court, even if it does come back up again in some form thereafter.

That takes us to the conclusion and it –

ELIAS CJ:

They can be addressed. You are not contending that somehow you are not going to get an opportunity to challenge that indication?

MR HODDER QC:

Well in our submissions it is not going to be particularly helpful or realistic to go through the High Court appeal on whether these are, what the answers are to these questions of law, and then come back sometime later to argue whether they're questions of law at all. You won't get out of the High Court.

WILLIAM YOUNG J:

Isn't it, can't the High Court determine they're not questions of law? Isn't that open to the High Court on those questions?

MR HODDER QC:

The –

ELIAS CJ:

Where's the terms of the –

MR HODDER QC:

In the decisions bundle we handed up.

GLAZEBROOK J:

It's slightly unhelpful even, there was no reasoning from the Court of Appeal in terms of why they were questions of law.

WILLIAM YOUNG J:

Are they actually saying they are questions of law? I know they sort of do in para A that questions of law, did the panel err in law. Well the answer may be no, it didn't, they're only errors of fact.

MR HODDER QC:

The effect of granting a special leave, and granting leave, I think we're granting special leave, so it's very difficult in our respectful submission for the High Court to say they aren't questions of law.

GLAZEBROOK J:

Well you would say there isn't any jurisdiction unless they're questions of law so by granting leave they have to have accepted they were questions of law, is that the argument?

MR HODDER QC:

That's how I apprehend it's going to work. These are the questions of law. The argument is whether they're correct or not.

ELIAS CJ:

Sorry, can I just find –

GLAZEBROOK J:

I've lost it too.

ELIAS CJ:

Is it this one. Someone helpfully arranged my materials and it's impossible to find.

MR HODDER QC:

It's the bundle headed, "Decision to which the appeal relates."

ELIAS CJ:

Yes.

MR HODDER QC:

And it's at tab 1.

ELIAS CJ:

Tab 1.

ARNOLD J:

Certainly paragraph C treats them as identified questions of law. That's about all of it.

WILLIAM YOUNG J:

But they are sort of questions of law because did the panel err in law seems to me to leave it open to the conclusion that yes they may have erred but it wasn't in law.

MR HODDER QC:

Well that's an optimistic view which I hadn't taken so far but –

WILLIAM YOUNG J:

Well it's the view I would have taken I think I mean this is following a leave hearing which, you know, usually for leave judgments, but this is an unusual context I accept there are no reasons why leave is granted, one would have –

MR HODDER QC:

They're against the context of the –

WILLIAM YOUNG J:

I agree it's an unusual context.

MR HODDER QC:

Well, I certainly, well, it would be the context of *Gold and Resource Developments (NZ) Limited v Doug Hood Limited* [2000] 3 NZLR 318 (CA), I don't want to stray into our substantive submissions, but the whole point about that thrust is that in this area in particular it's actually very hard to get out the gate because of the threshold set in *Doug Hood* and it's even higher, the special leave stage, or should be. And yet here it is the Court of Appeal has given a clear message saying –

ELIAS CJ:

Why is it high? If you, and I'm warming again to *Lane v Esdaile*, because that indicates that this is just to get rid of things that aren't, that are obviously not arguable. Why do you say it's a substantial verdict?

MR HODDER QC:

The general special leave stage, as I understand it, there's a higher test than there is just to get leave in the first instance. You've already been turned down once by the High Court. It's not a simple appeal.

ELIAS CJ:

Well they might be wrong. It's an appeal so, oh well. That's not before us but I'm just not sure –

GLAZEBROOK J:

But even if it's not a higher standard you're argument is that it can only be on questions of law and so therefore there ought to have at least been a determination, possibly accompanied by reasons, as to why these were questions of law, although the – what's said against you is that that mightn't be quite the right time that leave to decide that.

MR HODDER QC:

We accept there's a practice when leave is granted not to say anything too much because it then gets in the way of the Court that has to go back and deal with the –

ELIAS CJ:

I think they changed the High Court Rules was provoked by a judgment of mine at first instance in which I thought I gave quite effective reasons, and perhaps too much so for the appellant.

WILLIAM YOUNG J:

Can you explain to me why is, for instance, question B(1)(a) not a question of law? "Did the panel err in law in failing to make findings, supported by reasons as to who the beneficial owners of the lands at issue were pre-1893?" Isn't that a question of law? It may not be the question, whether it's failings to make such findings is in fact a question of law might well be debateable. But I can't see how that pre-empts the issue.

ELIAS CJ:

And also failure to give reasons –

WILLIAM YOUNG J:

Yes.

ELIAS CJ:

– might be wrapped up in that too, yes.

WILLIAM YOUNG J:

But I can't see how that pre-empts the question whether it's a question of law? Sorry, whether the failure's a question of law. The way it's expressed is a question of law.

MR HODDER QC:

Well, that goes back to the governing – I'm sorry to say this, I'm not trying to sidestep the question – but one has to go back to our submissions on the leave application, because it goes back to what the criteria were set out in the deed that governed the arbitration, and we deal with that in our written submissions on the lead application, around pages 8 and 9.

O'REGAN J:

But also there has been a finding of the High Court here that it wasn't a question of law, and now the Court of Appeal's given leave, which must mean it thought the High Court was wrong.

ELIAS CJ:

Well, it may mean that it didn't think it capable of peremptory determination at the lead stage.

MR HODDER QC:

But the –

O'REGAN J:

Yes, it's pretty difficult if it goes back to the same High Court Judge for her to say, "Well, what I said the first time was right and the Court of appeal was wrong."

MR HODDER QC:

That's why I thought that Justice Young's approach was more optimistic than I am at the moment. But in terms of –

ELIAS CJ:

Well, she gets an opportunity of course to give reasons.

O'REGAN J:

Well, she did give reasons.

ELIAS CJ:

She did give reasons.

O'REGAN J:

And the Court of Appeal obviously thought they were wrong.

GLAZEBROOK J:

Quite relatively extensive ones, yes.

MR HODDER QC:

In terms of Your Honour's last point, about thresholds and whether you were doing a filter. The filter is deliberately high, which is the concern here, that's what our main leave submissions are about. We say there's, it's inevitable that there's been serious departure from *Doug Hood.*

ELIAS CJ:

What authority – is that a *Hood* decision that you're relying on?

MR HODDER QC:

Doug Hood.

ELIAS CJ:

Yes.

MR HODDER QC:

Yes, it's, well, it's the governing – up to this point it's been the governing decision on what criteria you use for leave decisions from arbitral awards, and it effectively picks up the Nema principles from House of Lords, going back earlier. But to – well, I'm not going into those submissions.

ELIAS CJ:

But it's not – yes, all right.

MR HODDER QC:

I mean, I'd quite like to go to those submissions, but that's not what we're here for, as I understand it.

ELIAS CJ:

No, and I have to acknowledge I haven't read them, so.

MR HODDER QC:

Well, yes, all right. So really can I take my leave at this point by simply pointing out that I had not heard of *Lane v Esdaile* before this matter arose. Now that may not be a test of anything, although I have asked a couple of other people who hadn't heard of it either, and if that's the case and no jurisdiction issue was raised when the respondents replied to our initial submissions, it does suggest it's a reasonably subtle points, and if it's that subtle then it probably isn't, we say, correct.

ELIAS CJ:

Well, the problem is –

WILLIAM YOUNG J:

It has been made – sorry.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

It has been made in a number of Court of Appeal judgments, as you've mentioned, the ACC case for instance, that you mentioned, *McCafferty.*

MR HODDER QC:

Yes, well, I think it's the only one I can find that is post-*Siemer.*

WILLIAM YOUNG J:

Oh, that's pre-*Siemer* actually, isn't it?

MR HODDER QC:

Well, *McCafferty* is pre-*Siemer*, but this Court's reference to it in *Howard* is post-*Siemer.*

WILLIAM YOUNG J:

All right, okay, thank you.

MR HODDER QC:

That's why I've mentioned it because, to the extent it goes against maybe you should know about it, but that sort of – but we distinguish on the grounds that there are also statutory grounds relied on for the decision in, of this Court and *Howard*, and to that extent it doesn't take us very much further, we say.

Unless there are any other questions, at this stage, that was what I proposed to say.

ELIAS CJ:

Thank you, Mr Hodder.

Yes, Mr Goddard, we'll finish this appeal and then get on to the other.

MR GODDARD QC:

I'll begin by just addressing the question of what the appeal is about – the application for leave, I should say. My learned friend's quite right, his application for leave to appeal refers both to the grant of special leave to appeal to the Court of Appeal under clause 5(6), and the Court of Appeal's decision to grant leave to appeal from the arbitral award to the High Court. But the submissions on leave only address the decision of the Court of Appeal to grant leave to appeal to the High Court and say that that is where the issue of general public importance arises, it's the *Doug Hood test* and whether that is in any way eroded. So, as I understood what was in fact being contended for in the submissions on leave, it's really a challenge to the grant of leave, and that's what I have focused on.

Second, turning to the effect of the Court of Appeal decision granting leave to appeal, I must say that, in my submission, I think it is best read in the sense in which Your Honour Justice Young read it, which is that certain – and there was some discussion with the Court about the terms of the questions at the hearing, and I was sent away to write them down more coherently than I had before the hearing and in a way which reflected the exchange with the Court, and that is why they are framed as, "Did the panel err in law in," and, as I understand those, it leaves open the possibility for the High Court Judge to say, "There may be an error of the kind that Mr Goddard is arguing for, but it wouldn't be an error or law, it would be an error in factual findings, and we don't have any ability to hear such an appeal." So I think that is the right way to understand the grant of leave. But I am not sure that's really central to the question before this Court, which is of necessity more general, it is a question about this Court's jurisdiction to entertain an appeal from a decision granting leave to appeal from an arbitral award to the High Court. And I think, as a matter of principle, one would have to come up with the same answer, whether that leave was granted in the High Court or whether it was granted in the Court of Appeal. It would be odd if the answer were different, depending on where leave to appeal from the arbitrator to the High Court had been given, I think that's a very important part of the analytical framework: could there be a leapfrog appeal, in an exception case, or could there be an appeal through the hierarchy in the normal way and, as I'll show in a moment, it's quite clear that the legislation precludes any possibility of a grant of leave by the High Court coming up to this Court. So, what my friend is contending for is that you can challenge a decision of that kind where it's made for the first time in the Court of Appeal but not where it's made for the first time in the High Court, and that's odd, and I'll show why that follows necessarily from the Arbitration Act.

Second, it's obviously the case that this question of jurisdiction on which the Court called for submissions turns on section 7 of the Supreme Court Act. It's not suggested that the grant or refusal of leave to appeal is not a decision made in a proceeding, so the arguments that were – there were a couple of strands of reasoning in *Lane v Esdaile*, as Your Honour the Chief Justice pointed out. One of those was an argument about whether a grant of leave or a refusal of leave was a judgment or order, and it was said, no, it's an administrative decision of some kind. Well, we've got the language "decision" here, it's clearly broad enough to encompass a decision of this kind. So we have to move on to the two exclusions: (a), "An enactment other than this Act, makes provision to the effect that there's no right of appeal or, (b), the decision's a refusal to give leave or special leave to appeal to the Court of Appeal. The language of (a) is not – and, in my submission, deliberately not

– confined to express provisions that there is no right of appeal. I'll hand up through Madam Registrar two things which I think may be helpful. The first is some further extracts from the Arbitration Act, which I want to go to in a moment, and the second is a decision of the High Court of Australia in relation to the provision governing appeals to the Court of Appeal of Victoria, and that was a provision which provided for "rights of appeal against decisions or determinations", broad phrase, unless expressly provided otherwise in an enactment. And what the High Court said is that a leave regime is not an express provision otherwise, so they discussed that and basically said it's not applicable in this context, and I thought the Court should have that and I'll come back to one other aspect of that decision in a moment.

ELIAS CJ:

A narrowing of the ability to appeal is not a provision excluding appeals.

MR GODDARD QC:

It's not. The principle that's implicit in a leave regime is an exclusion of other rights of appeal is an implication.

ELIAS CJ:

Well, it's more than that, isn't it? From what you're saying, they're saying it's not a provision which excludes appeals.

MR GODDARD QC:

Expressly. That was quite important to the Court's reasoning, although there were some broader access to justice principles that were discussed there. Actually, let me touch on that now because there's a certain peculiarity in an access to justice argument being advanced to suggest that there should be a right of appeal to this Court against the grant of leave below. What has happened, of course, is that the Court of Appeal has said, "Yes, you will have access to a Court to test whether the arbitral panel erred in law in the manner you suggest." It seems to me that the access to justice of both parties is enhanced – at the least fully respected – by that decision and that what one would expect in the normal course is that that right of appeal that's been granted to the High Court will now be exercised. The High Court will decide whether any error of law within the scope of the leave reserved has been demonstrated. There may be appeals subject to the leave filters in the Arbitration Act to the Court of Appeal and there's no doubt but that on the substantive decision on the Court of Appeal there can be an application for leave to appeal to this Court on whether the question is a question of law and on the substantive answer to it, so the

opportunity to argue all of those matters is fully respected by what has happened here, and to suggest that it's necessary to be able to challenge the grant of leave in this Court is effectively to seek a pre-emptive bite at a cherry that will be available to be bitten in the ordinary course after the Courts below have heard the case, after they've given reasoned decisions in a way which is much more satisfactory.

GLAZEBROOK J:

It is slightly odd, though, if – and I quite understand the submission in respect of a grant of leave normally, but if leave can only be granted if it is a question of law, it's slightly odd to say, well, we don't know whether it is a question of law but we'll grant leave anyway and then at the end of it, it might be that it's not a question of law because that's why you have a gateway, is to stop this sort of endless challenge. That's the policy of the Arbitration Act, very, very limited rights and very much confined to a question of law.

MR GODDARD QC:

And that's why in response to the encouragement – I'd say gentle encouragement but I'm not sure if it was all that gentle – from the Court of Appeal, the questions were framed in the way they are, which is did the arbitral panel err in law in doing X? What I needed to satisfy the Court of was that there was a serious argument, a bona fide argument that there were errors of law of this kind, and the Court said, "Okay. We will ask the question was there an error of law in the following respects, and the Courts below will now determine whether that's right." And in my submission, when you look at the purpose which this serves, which is a filter to discourage appeals on pure questions of fact, to discourage meritless appeals –

GLAZEBROOK J:

Well, it's to exclude them. It's not to discourage them. It's to actually exclude them if they're questions of fact.

MR GODDARD QC:

Yes, but it is a preliminary filter.

ARNOLD J:

Yes, but this was a decision on appeal. This was the Court of Appeal undertaking an appeal against Justice Duffy's decision that there was no question of law, and they basically said she was wrong. So aren't they saying she was wrong to find there was no question of law and we think there is one?

MR GODDARD QC:

She was wrong to say that there was no good faith argument that there was an error of law in these respects.

O'REGAN J:

They haven't said that because they haven't given any reasons.

MR GODDARD QC:

No, and they've done that consistent with the –

O'REGAN J:

Well, I don't think it is consistent because this was an appeal. They have to give reasons to decide an appeal. This was an appeal against her refusal to grant leave. Now, the outcome of the appeal was that leave was given, but the decision was a decision on appeal, wasn't it?

MR GODDARD QC:

Yes. I don't want to use my limited time to enter too much into that fray.

ELIAS CJ:

That's the practice of not giving reasons if you grant leave, so that you don't pre-empt the decision-maker. I mean, I have huge doubts about the correctness of that but it's now in the High Court Rules.

MR GODDARD QC:

It's a long-standing practice and it's a practice this Court follows when it grants leave.

GLAZEBROOK J:

But also I don't know that we would say we don't know whether these are questions of law and they should – and if there's only a question of law, say an Employment Court, I don't think this Court would say, "Well, we have no idea whether there are questions of law but we think we'll send it back for somebody to decide whether there are."

MR GODDARD QC:

So the analogy is not perfect, but what I was going to say was that that practice has been reinforced by the High Court Rules at 20.16 and what I apprehend the Court of

Appeal was doing was doing its best to respect the spirit of that and to refrain from giving reasons, which would cut across the hearing in the High Court.

ELIAS CJ:

There is the fact – it is the case that ascertaining whether there is a question of law is sometimes easy and able to be determined on the limited argument available in these sort of matters and sometimes it just is not because it may amount to all the judicial review grounds.

MR GODDARD QC:

Some of which are raised by the application here.

GLAZEBROOK J:

Although some of the judicial review grounds, from memory, was physically excluded under the Arbitral Act, like no facts upon which you can give, I think, is explicitly excluded, isn't it, as not being a question of law?

MR GODDARD QC:

That's the one that's excluded, but taking into account relevant matters, failing to consider relevant considerations, and in particular – and that's central here – asking yourself the wrong question.

ELIAS CJ:

And also, as Mr Hodder said, this is not the pure part of the Act. This is the New Zealand domestic provision.

MR GODDARD QC:

That's what I wanted to come to next, because obviously what section 7(a) does is send us off to look at the Act pursuant to which the matter has arisen and asks, well, does it make provision to the effect that there's no right of appeal against the decision, and it occurred to me as I was preparing for this that the extent of the extracts of the Arbitration Act before the Court left out a very important part. My friend's extract under tab 9 includes clause 5 of the second schedule, and of course what that clause begins by saying is notwithstanding anything in articles 5 or 34 of schedule 1. It's a carve-out from the exclusion of judicial intervention in schedule 1 and it's explicitly identified in the Law Commission's report on arbitration, for example, as an exception to the general exclusion of judicial involvement. One of the two additional pieces of paper that I've just inflicted on the Court is a further extract

from the Arbitration Act, and if I take the Court to – schedule 1 in particular, some extracts from that. If we go first to clause 5 of schedule 1, clause 5 provides in matters governed by this schedule, "No Court shall intervene except where so provided in the schedule," so it even expresses prohibition on intervention and it is a matter governed by the schedule because if we turn over to the next page – left out some irrelevant intervening provisions – we get to chapter 7, recourse against award and one, recourse to a Court against an arbiter award may be made only by an application for setting aside in accordance with paragraphs 2 and 3," and there is an application to set aside in this case as well as the application for leave to appeal. But, basically, this says you can only apply to set aside in accordance with 2 and 3, and that's the backdrop against which we turn to the second schedule, because this is a domestic arbitration, and clause 5 of that schedule, and what we see is, "Notwithstanding anything in articles 5 or 34, a party may appeal to the High Court on any question of law arising out of an award in three situations: prior agreement, consent after the award or, (c), with the leave of the High Court." So there's this limited exception to the prohibition to curial intervention where leave is granted by the High Court to appeal to the High Court on a question of law arising out of an award. The High Court in this case declined to grant leave, and that took us down to subclause (5), which provides, "With the leave of the High Court, any party may appeal to the Court of Appeal from any refusal of the High Court to grant leave or from any determination of the High Court of a substantive appeal under this clause." So just pausing there, it's important to note that if the High Court grants leave to appeal to the Court of Appeal, there is no provision for a right of appeal. You cannot appeal to the Court of Appeal against a decision by the High Court to grant leave, and that's not surprising, because what the High Court has said is, "Yes, we'll hear this appeal –

ELIAS CJ:

Well, effectively the Court of Appeal is exercising the jurisdiction of the High Court to –

MR GODDARD QC:

No, no, Your Honour.

WILLIAM YOUNG J:

Well, if the High Court had granted leave to appeal –

ELIAS CJ:

Yes, ah, yes, yes.

WILLIAM YOUNG J:

– against the outcome of the Court, there's no right to appeal against the High Court judgment.

ELIAS CJ:

Yes.

MR GODDARD QC:

So if the High Court, if I had managed to persuade the High Court Judge to grant leave to appeal, the applicants in this Court could not have appealed –

ELIAS CJ:

Yes.

MR GODDARD QC:

– to the Court of Appeal, and that means that that issue could never have reached this Court via the Court of Appeal, and could they have sought to do a leapfrog appeal? It seems to me that this is a –

WILLIAM YOUNG J:

No, well, they can't, because it would be a decision to, it would be within the exclusion in section 8(b).

MR GODDARD QC:

Yes.

GLAZEBROOK J:

No, because that was a grant, not a refusal. The argument is that's a grant and not a refusal.

MR GODDARD QC:

Oh, that's because it's not a refusal, it's a grant.

WILLIAM YOUNG J:

Oh, I see, I'm sorry, okay, sorry, yes.

MR GODDARD QC:

So it's not within the exclusion. So it wouldn't expressly be within the exclusion, but it seems to me that it's a clear example of provision to the effect that there should be no right of appeal. It would be really odd to suggest that the way these two Acts worked together is that where the High Court grants leave to appeal to it from an arbitral award, you cannot appeal to the Court of Appeal, but there is an ability to come straight to this Court.

GLAZEBROOK J:

Well, your argument would be, it would have to be explicitly however in the Arbitration Act because otherwise clause 5 of schedule 1 would apply, which excludes –

MR GODDARD QC:

Yes.

GLAZEBROOK J:

– Court intervention.

MR GODDARD QC:

Well, I say it's both explicit in clause 5 of schedule 1 and –

GLAZEBROOK J:

Yes, so it's own – but, no, but what you'd say it was only if it's explicitly provided in schedule 2 could you have any right and, as it's not, that's the end of the matter, because you go back to clause 5 of schedule 1, is that…

MR GODDARD QC:

Exactly right. Although even if clause 5 of schedule 1 wasn't in there, it seems to me that –

GLAZEBROOK J:

Well, I know you'd argue it was implicit anyway.

MR GODDARD QC:

– it's implicit, it's just obvious from the scheme of –

ELIAS CJ:

Well, I think that's less – I think it's more arguable that you wouldn't be right on that. But because of the exclusion of Court intervention, except in the particular circumstances provided for in clause 5, if you don't come within clause 5, the Arbitration Act takes away of your appeal right anyway.

MR GODDARD QC:

That, in my submission, is right, Your Honour.

ELIAS CJ:

Yes.

MR GODDARD QC:

And the House of Lords in the *Geogas SA v Trammo Gas Limited* [1993] 1 Lloyd's Rep 215 (CA) case, which I've included in my bundle and I'll come to that in a moment if I have time, which applies the approach in *Lane v Esdaile* – I hesitate to describe it as a principle and it's obviously not a rule of law, it's just an approach to interpretation in a particular case, and it's a line of reasoning which other Courts have found compelling in other statutory frameworks – but what their Lordships said in *Geogas* which is, in my submission, directly applicable in New Zealand, is that the principle of restraint in judicial involvement and only, and limiting judicial involvement to that expressly provided for, is not relevant only at that first hop from arbitrator to High Court, but continues to be relevant throughout the hierarchy, and that's why you see ongoing leave provisions and why in the absence of explicit provision for an appeal of some kind you should interpret the statute as intending to exclude it.

ELIAS CJ:

And what's your answer to the gateway argument that Mr Hodder puts forward, which is that, yes, there's restriction on getting within the Court system but once you're within it there's an appeal right under the Supreme Court Act?

MR GODDARD QC:

And the answer is that that's inconsistent with the scheme of this provision and – well, two answers. First, it's explicitly not the position here because of clause 5 of schedule 1, which says Courts only do things where the Act so provides –

ELIAS CJ:

Well, except you're in the Court system. I mean, for the Courts you're really looking at the entry-level.

MR GODDARD QC:

Yes. So, two things, the general principle in *Geogas* that restraint is still an important part of the regime in relation to arbitrations. But also if I just finish going through the scheme of clause 5 I think Your Honour will see that it's clear from the way this works that that doesn't work that way, and the first reason why it doesn't work that way is the point I've just made, that a grant of leave to appeal by the High Court isn't subject to the ordinary rules, it's quite clear that you can't get to the Court of Appeal from that, so the ordinary rules within the Court system don't apply.

ELIAS CJ:

So I'd say not -

MR GODDARD QC:

Where the High Court grants leave to appeal –

ELIAS CJ:

Yes.

MR GODDARD QC:

– the ordinary rules don't apply. Inconsistent with my friend's suggestion, you can't just appeal as of right from a grant of leave by the High Court to the Court of Appeal.

ELIAS CJ:

Why do you say that? That's based on...?

MR GODDARD QC:

That's what I said a moment ago. It's the relationship between clause 5 of schedule 1 and clause 5 of, 5 of schedule 2, which contemplates appeals from a refusal by the High Court to grant leave but not from the grant of leave by the High Court. It's deliberately –

ELIAS CJ:

But this is a carve-out for Court intervention. Once you've got a grant of leave, you're in the Court system, what's the policy in this legislation which prevents an appeal?

MR GODDARD QC:

So, firstly –

ELIAS CJ:

Because this provision, clause 5, is not, there's no policy of finality in this, because it does provide for going to Court of Appeal, so…

MR GODDARD QC:

So I say, first, that the text strongly points in that direction in the way it –

ELIAS CJ:

Why, but why, what the policy?

MR GODDARD QC:

But, second – so we've got to look at two things, text and purpose/policy. Text strongly points against saying that once you're in with a grant of leave, the normal rules apply, and I'll come back to why that's the case –

ELIAS CJ:

Well, once you're in the Supreme Court Act applies.

MR GODDARD QC:

I think it's helpful to work up from the bottom. So, and I think that that example of a grant of leave by the High Court and the inability to go the Court of Appeal and that and asking can it really follow from the interaction of the Supreme Court Act and this Act that you can still come direct to this Court? The answer must be, no, that would be absurd, in my submission. And the policy is that once leave has been granted there is no good reason for superior Courts to conduct a preliminary hearing into the desirability into the grant of leave, because all the issues that could be argued on that can be argued following the hearing below –

ELIAS CJ:

That's a section 13 argument too.

MR GODDARD QC:

And that's how I presented it initially in my submissions, of course.

ELIAS CJ:

Yes.

MR GODDARD QC:

I approached this on the basis that there were compelling discretionary reasons to decline leave here because it could all be sorted out later, and that although 13(4) doesn't, I think, apply in terms, because it's not an interlocutory decision as defined in this Act, the same principle applies by analogy, and this Court has said that in a number of other contexts, but –

GLAZEBROOK J:

Can I just – you are conceding, and I put that absolutely explicitly, that arguments as to whether these are questions of law can be put to and determined by the High Court?

MR GODDARD QC:

Yes.

GLAZEBROOK J:

Thank you.

MR GODDARD QC:

And –

ELIAS CJ:

Well, then answer me on the policy –

MR GODDARD QC:

Yes…

ELIAS CJ:

Because, particularly if there's a section 13 and particularly given the role of this Court as the final Court, with some overview of how the Courts below are approaching their functions, and given the breadth of general jurisdiction, what's the policy in not, once a leave has been granted, in not, subject to section 13 being satisfied, being able to take the appeal?

MR GODDARD QC:

The process of granting leave or determining an application for leave is intended to be a very concise and swift process. There are specific provisions in the Rules about how short the argument should be. There are specific provisions in the Rules

prohibiting the giving of reasons where leave is granted, and that means that it is inherent in the nature of such a decision that it will be unsuitable for consideration by an appellant Court. Again we come back to my core example of the High Court granting leave to appeal for the actual award. The High Court has been told not to give reasons but in the High Court Rules it must not, so what you have is a grant of leave. There is going to be a hearing in the High Court. All of those questions, is it a question of law, did the arbitral panel err, and can then come with the benefit of a reasoned decision from the High Court to the Court of Appeal. But when it – there is absolutely no practical purpose to be served in going at that stage to the Court of Appeal.

ELIAS CJ:

Suppose it's an obvious error. Suppose that nobody could possibly think on the basis that's been put up that there is a question of law.

MR GODDARD QC:

Then that's what the High Court will say when it hears the appeal and –

ELIAS CJ:

No, but why should this Court – what's the policy in preventing this Court subject to section 13 intervening to put the thing back on the rails?

MR GODDARD QC:

It is preferable, given the interest in minimising judicial involvement, to stop debating the question of leave, have the substantive hearing, and have the substantive decision come back up through the Courts subject to the leave filters that apply at each stage, so it's a pragmatic choice about what's sensible.

ELIAS CJ:

If the pragmatic choice was not taken to prevent the Court of Appeal looking at the matter and if, given the leave provisions to this Court, why is not the sensible thing not to say never which is always a bad precept for a particularly final appeal Court but to say you're into the system now. We can entertain this if there is particular reason to do so?

MR GODDARD QC:

The answer is that first of all the Court was right to suggest to my learned friend earlier that this particular structure is relatively unusual, but second what it reflects in this Act –

ELIAS CJ:

It's becoming more usual, which is really why we're concerned.

MR GODDARD QC:

There are a limited number of situations in which Parliament has said "never" and what we're concerned here to do is simply to identify whether this is one of those, and it is open to Parliament to say consistent with the objective of minimising or limiting judicial intervention, we think that rather than have an argument about whether to have an argument percolating up through the system, as soon as any Court authorised to do so has said yes, the argument should happen, then you have that argument and it's that judgment which percolates up.

WILLIAM YOUNG J:

So it's another case about a case?

MR GODDARD QC:

Yes. That's reflected in the 13(4) principle, although that's a discretion. It sets a deliberately higher threshold than the general leave threshold for interlocutories. What this is saying is this is a notch up again because of the special factors that apply in the Arbitration Act. We are not going to have a case about whether to have a case. If the High Court or the Court of Appeal says we're going to have a case, then the policy is get on with it, have it, let that come up through the system. That appears from 5(5) and then I do want to go over the page, at least for those Members of the Court who have the page, to 5(6). If the High Court refuses to grant leave to appeal under subclause (5), so that's to appeal to the Court of Appeal, the Court of Appeal may grant special leave to appeal and again I just want to pause to note what is implicit in this, which is that there is no right of appeal to the Court of Appeal against the High Court decision.

WILLIAM YOUNG J:

Do you mean a High Court decision granting leave?

MR GODDARD QC:

No, refusing leave here. Refusing leave.

WILLIAM YOUNG J:

But the High Court refuses leave to appeal, which is to appeal to the Court of Appeal.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

But it's an appeal from the refusal of the High Court to grant it?

MR GODDARD QC:

Well, it's an application to the Court of Appeal for special leave to appeal, so it proceeds on the basis that there's no right of appeal against the decision to refuse leave to go to the Court of Appeal.

O'REGAN J:

But once leave is given, once the Court of Appeal gives special leave –

GLAZEBROOK J:

Or the High Court gives leave.

O'REGAN J:

It's then engaged in dealing with an appeal against a High Court decision and in this case it sort of jumped a step because it gave special leave to appeal to the Court of Appeal and then in order to get to the point where it said, "We give leave to appeal to the High Court," they had to say, "We allow the appeal against Justice Duffy's decision not to give leave to appeal."

ELIAS CJ:

They should simply have said, "We grant special leave to" –

GLAZEBROOK J:

No, they were just confused. They give special leave to appeal and then they should just have allowed the appeal against Justice Duffy's original judgment. It actually is wrong, I think, in the Court of Appeal's decision, it appears.

ELIAS CJ:

But the leave to appeal referred to is the leave to appeal to the High Court.

MR GODDARD QC:

No, Your Honour.

O'REGAN J:

It's leave to appeal to the Court of Appeal from the High Court's refusal to grant leave.

MR GODDARD QC:

It refuses to grant leave to appeal under subclause (5). Subclause (5) is leave to appeal to the Court of Appeal.

GLAZEBROOK J:

What happened is the High Court refused leave. It then refused leave to appeal against its decision to refuse leave. The Court of Appeal then had to give special leave to allow …

MR GODDARD QC:

I was following a English silk who went to a conference who said, "Gentlemen" – which it was in that meeting – "this is head-breakingly difficult stuff," and I heard his voice as I tried to puzzle this out. It causes some pain, but it is quite clear, I think, that Your Honour Justice Glazebrook is right that there was a step in the formal orders to be made which was skipped, and I think my learned friend Mr Geiringer and I turned up at the Court of Appeal unsure just how far the Court wanted to go on that day and when I said I had apprehended that we were here to deal with the application for special leave one of the Judges said, "This is a one-stop shop, Mr Goddard, and we're not going to have two bites at this," and it all happened on the day and we dealt with it, and this was the outcome.

WILLIAM YOUNG J:

Doesn't that mean that Mr Hodder's appeal is really against a decision of the Court of Appeal granting or allowing an appeal against a decision of the High Court, which is just a run of the mill decision that are appealable to this Court?

MR GODDARD QC:

And deciding to grant leave to appeal from …

WILLIAM YOUNG J:

That's just the consequential order of allowing an appeal against the High Court decision to refuse something. By definition, that means that you then turn that into a decision to grant something. But it's still a decision against the Court of Appeal's decision on appeal from the High Court. That's what it is. It's an appeal.

MR GODDARD QC:

It's an appeal from the decision declining leave to appeal from the arbitral panel to the High Court and as a result and inherently in granting that leave Your Honour is exactly right but the question still is, is that a decision of a kind that the Arbitration Act makes provision should not be subject to further appeals, and that's, in my submission, follows from …

WILLIAM YOUNG J:

If it was a substantive appeal from the High Court decision actually dealing with it, you would accept that was an appeal.

MR GODDARD QC:

Absolutely.

WILLIAM YOUNG J:

Why not this one? It's a decision on appeal from the High Court.

MR GODDARD QC:

Because there is an asymmetric approach to what can go further that we see in 5(5), for example. What you can take further to the Court of Appeal is refusals of leave and any determination of the High Court on the appeal. So grants of leave by the High Court are treated differently for the policy reasons that I touched on earlier, not having cases about cases, and in my submission the position is the same where the Court of Appeal in the course of allowing an appeal from the High Court grants leave and –

ELIAS CJ:

Do you say the grant of leave is under clause 5(5)? Is that a determination under the clause? Is that what you're saying?

MR GODDARD QC:

No. When the Court of Appeal granted leave to appeal from the arbitral panel to the High Court, it was acting under 5(1)(c)(ii) standing in the shoes of the High Court.

GLAZEBROOK J:

No, it was appealing under 5(5), actually allowing an appeal against the refusal to grant leave and obviously taking into account those factors.

MR GODDARD QC:

It steps into the High Court's shoes so it allowed an appeal and exercised the High Court's powers, and that is my point, that if the High Court had done this, the matter couldn't go further. It makes no sense to suggest that if the Court of Appeal standing in the High Court's shoes presented it in my response to the application but the Court has invited me to make submissions on this. My learned friend says if it was that clear it would have been identified as a ground for opposing. I did fail, I think, to pay sufficient attention to the scheme of this Act and to the fact that 7(a) talks about "makes provision to the effect". It's not just express exclusions of rights of appeal that are relevant, but also exclusions that are apparent from the text and purpose of another statutory schemes of appeals. What has very clearly a scheme which preclude appeal from a grant of leave by the High Court and which also assumes that there is no externally-conferred right of appeal from a decision of the High Court refusing leave to go to the Court of Appeal, but that rather the special regime in 5(6) governs the ability to go from a High Court refusal to the Court of Appeal. So you've got a carefully-structured non-standard set of appeal rights and that responds to my learned friend Mr Hodder's submission that we're just applying the ordinary rules once we get into the Court system with a grant. That, in my submission, is not the scheme of the Arbitration Act, particularly when you look at the combined effect of clause 5 of schedule 1 and clause 5 of schedule 2. I want to go to *Geogas* because that is a decision of the House of Lords on a very similar leave framework. It's about a grant and it's the reasoning in that which, in my submission, is the most compelling and helpful English authority rather than the *Lane* original decision.

ELIAS CJ:

All right. We'll take the 15 minute break.

COURT ADJOURNS 11.33 AM

COURT RESUMES: 11.52 AM

MR GODDARD QC:

Your Honour, I'm going to see how much I can cram into the advertised five minutes.

Can I begin by taking the Court to my bundle of authorities in relation to the jurisdiction issue, it's the one that has *Lane v Esdaile* in it, and I'm not going to go to that, I want to go to the *Goegas* decision under tab 5. That was a case in which there had been an arbitration, one party obtained leave to appeal to the High Court and the appeal was allowed and the award was set aside. That appears from the speech of Lord Jauncey at page 777, line G, and all of Their Lordships agreed with the speech, so that's the decision of Their Lordships.

The question then arose whether the unsuccessful in the party in the High Court could appeal to the Court of Appeal. The provision governing such appeals is at the foot of page 777 or section 17 of the 1979 Act then in force in the UK. "No appeal shall lie the Court of Appeal from a decision of the High Court on an appeal under the section unless, A, the High Court or the Court of Appeal gives leave and, B, it's certified by the High Court that the question of law to which its decision relates either as one of general public important or as one which for some other special reason should be considered by the Court of Appeal." What happened in the High Court was that the High Court Judge certified two questions for the purposes of paragraph B but declined leave, and an application was then made – this is over at the top of 778 – to the Court of Appeal for leave, and the Court of Appeal, by a majority, granted the application, so they granted leave to appeal to the Court of Appeal and refused leave to appeal to the House of Lords from their grant of leave to appeal to the Court of Appeal. Then we see, halfway between lines B and C, that that owners of the vessel in question sought leave to appeal –

ELIAS CJ:
This is after having determined the matter –

MR GODDARD QC:
Yes.

ELIAS CJ:
– and granted leave, determined the matter and refused to –

WILLIAM YOUNG J:
No.

ELIAS CJ:

No?

WILLIAM YOUNG J:

They just granted leave to appeal, didn't they?

MR GODDARD QC:

Yes, they granted leave to appeal –

ELIAS CJ:

Oh, I see, and then…

MR GODDARD QC:

– to the Court of Appeal –

ELIAS CJ:

Yes, I see.

MR GODDARD QC:

But determination had not yet happened. So it was an attempt to have a case about a case, it's an attempt to have an argument about whether the Court of Appeal should have granted leave to entertain the appeal. They were doing it in two bites, unlike our case.

ELIAS CJ:

Yes.

MR GODDARD QC:

And so this is an attempt to appeal from bite one –

ELIAS CJ:

Yes.

MR GODDARD QC:

– the grant of leave under 17(a).

ELIAS CJ:

Well, bite two, because the High Court Judge had not granted leave. Anyway, sorry.

MR GODDARD QC:

Yes, Your Honour's exactly right. Bite two at step one.

ELIAS CJ:

Yes.

MR GODDARD QC:

Which is exactly why it's head-breakingly difficult stuff. So there was then an attempt by the successful party in the High Court to appeal to the House of Lords against the Court of Appeal's grant of leave to appeal to that Court, and the argument was that the wrong principles had been applied. And there had been a disagreement in fact in the Court of Appeal about the principles to be applied at that stage, we see that in 778, in letter B. And that was opposed, counsel who were obviously more awake than I was, when I received this application for leave to appeal on the grounds, as Lord Jauncey puts it, in Scottish terminology, that the petition for leave was incompetent, as the House had no jurisdiction to entertain the appeal. And counsel were asked to address that competence issue at the outset of the hearing and then, as we see at lines D through E, there's reference to *Lane v Esdaile* and later decisions, an argument that those cases were confined to appeals from decisions refusing leave and didn't apply to appeals from decisions granting it. And then the jurisdiction of the House of Lords to hear appeals is set out, the same 1876 Act that was being considered by *Lane v Esdaile* and then passages are set out from *Lane* and they're the most helpful passages. Over on page 779, just above letter G, Their Lordships say, "Two points emerge from these speeches, namely, one, that an exercise of a discretion to grant or refuse leave to appeal is not such an order as it contemplated in section 3 of the 1876 Act," so that's using that concept of a judgment order as a hook, and –

ELIAS CJ:

Sorry, where are you?

MR GODDARD QC:

Sorry, I'm on 779, at the paragraph beginning just above letter G.

ELIAS CJ:

Yes. Thank you.

MR GODDARD QC:

"Two points emerge from these speeches…" And the second point, we see, was that, "No distinction falls to be drawn between an order refusing and an order granting leave to appeal," then a reference to *Lane v Esdaile* followed and re-housing of the Working Classes Act 1890, Justice Kirby in the decision I gave the Court, *Roy Morgan*, has something to say about the flavour of the era conveyed by the title of the case. But what the Court of Appeal said in that case is quite helpful as, it seems to me, it captures the principle nicely, beginning at the foot of 779 and over to 780, "I am on principle and on consideration of the authorities that have been cited prepared to lay down the proposition that wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive and without appeal, unless an appeal from it is expressly given. So this is a different approach, actually, to *Lane v Esdaile,* although it purports to follow it. It's saying that it is implicit, inherent in a leave regime, that the decision on leave is to be final and conclusive and not subject to further appeals, unless there's express provision for a further appeal or for someone else to be able to grant leave. And His Lordship goes on, "What was said in *Lane v Esdaile* supports the view I'm taking, but" and this is really recognising it's a different approach, "the very nature of the thing really concludes the question, for if where a legal authority has power to decide whether leave to appeal shall be given or refused there can be an appeal from that decision, the result is an absurdity and a provision is made of no effect." There are some further passages that are set out from that decision, then just at letter E there's a discussion of another decision of the House of Lords in *Re Poh* [1983] 1 WLR 2, and then picking up above letter G, "My Lords, although these cases were concerned with appeals from refusals of leave, in all but in *Re Poh* grants and refusals of leave were referred to as though they were subject to the same considerations. It was the decision itself of the relevant Court rather than the nature of the decision which determined finality. This approach is, in my view, entirely logical, and I can see no justification for drawing a distinction between a decision refusing leave and one granting it. Section 1 of the Act of 1979 contemplates the judicial review of arbitration awards shall take place only in limited circumstances. An appeal lies to the High Court of a point of law but only with consent of all parties to the reference or with the leave of the Court, which is not to be given unless certain specified circumstances are considered to exist. No Court lies to the Court of Appeal unless the High Court or Court of Appeal gives leave. The legislative intention of limited review would be rendered nugatory if appeals were to lie to the Court of Appeal against a decision of a Judge refusing or granting leave to appeal an award to the High Court and if an appeal were to lie against a decision of

the Court of Appeal to refuse or grant leave to appeal from the High Court to itself under section 1(7). To allow a situation would be to produce the absurdity referred to by Lord Escher in the 1892 decision. My Lords have no doubt this is a case in which the rule stated by Lord Escher applies. The appeal must be dismissed. So that, although purporting to follow *Lane* really approaches it on a different analytical footing and asks what is inherent in a carefully calibrated leave regime of this kind and says what's inherent in it is that what is provided for is all there is, and *Henry Boot* is an even more recent decision, it's under tab 6 of the Court of Appeal, applying that line of reasoning under the Arbitration Act 1996. We've had a slightly different leave regime and I suggested to the Court before the adjournment that it was *Geogas* that set the same philosophy that restricts going from the arbitrators to the Court also applies to steps within the process. I was wrong. It was *Henry Boot* that I was remembering and the passage I had in mind is on page 396 of the report just under letter D where Lord Justice Waller, with whom the other Members of the Court agreed, said, "I also reject Mr Black's submissions that once matters are in Court the philosophy applicable to arbitration somehow has no further application. Parties who agree to have their disputes arbitrated should have finality as speedily as possible and with as little expense as possible, see generally section 1(a) of the Arbitration Act 1996, limitation on the rights of appeal is consistent with that philosophy," and so it goes on.

Now, I'm not suggesting for a moment that cases like Lane or even Geogas establish some rule of law that precludes appeals, but in my submission what they do is spell out very helpfully and in a logical way what is inherent in a system of limited appeals by leave. In particular *Geogas* and *Henry Boot* do that very helpfully, and it's the logic of that approach that's been picked up by the Court of Appeal of New Zealand in a number of cases, including *Siemer Holdings* which is under tab 3 of my bundle, I won't go to that, and under tab 4, *Khan v Accident Compensation Corporation* [2009], a decision of the Court of Appeal, which concluded Your Honour Justice Arnold, a decision delivered, the judgment of the Court delivered by Justice Ellen France, and that was a case about a refusal of leave to appeal. The Court said at paragraph 21 on page 733, Justice Venning at 25 said he found the reasoning of the House of Lords in *Lane v Esdaile* compelling, we agree, even if Mr Khan is right that *McCafferty* and *Elliston* are not binding because of different sets of provisions, the logic of the approach in *Lane v Esdaile* is irresistible, no general right of appeal to this Court against decisions of the High Court refusing leave to appeal, the Accident Compensation provides specific rights of appeal and requires leave or special leave.

The statutory language should be clear if different approaches are to be followed such as the present, and 22 is helpful, I think.

Finally, as Mr Barnett also submits, on the approach contended for by Mr Khan there's a potential for a multiplicity of appeals. For example, if leave had been granted, on that approach the Corporation presumably would have a right of appeal against that decision. That result would seem absurd. So the very scenario that my learned friend Mr Hodder contends for here has been described by the Court of Appeal as absurd, because what you'd have is a parallel hearing running in the absence of a stay to hear the appeal, in our case, before the High Court and in this Court to argue about whether that should be happening at all and that is not consistent with the philosophy of the legislation.

So, in conclusion, the question is whether the Arbitration Act makes provision to the effect that there should not be a right of appeal to this Court from a decision of the Court of Appeal granting leave to appeal from a decision of an arbitral tribunal to the High Court. The answer is that there is express provision limiting judicial intervention in arbitration matters in clause (5) of schedule 1 to the Arbitration Act, and then carefully calibrated exceptions to that, including in respect of appeals in clause (5) of schedule 2 in respect of domestic arbitrations. It is absolutely clear in my submission that if in the High Court my learned friend Mr Geiringer had been less persuasive and I had been more persuasive and the High Court Judge had granted leave, no question about the appropriateness of the decision to grant leave could have reached the Court of Appeal or could have reached this Court. There is just no provision for that and it's quite clear that it was not intended that it should happen. The fact that the Court of Appeal has granted that leave does not meant that any different principle applies and rather the logic of the statutory regime and sensible use of the superior Court's time all point to an approach in which we now go back to the High Court, get on with the appeal, and if there is any continuing difference between the parties after that hearing, then a decision on the substantive issues can, if leave is granted, come to the Court of Appeal, and if further leave is granted to this Court that's the right way to do it and it's the way which is consistent with the statutory scheme.

That was a long five minutes. Unless there's anything else I can assist the Court with.

ELIAS CJ:

Thank you for that, Mr Goddard.

Mr Hodder, a short two or three minutes, if necessary.

MR HODDER QC:
If it please the Court, I think there are five points I wanted to cover which I think are probably within the scope of reply.

The first is just putting ourselves back in the Arbitration Act framework. It is important, in our submission, that one realises that article 5 of schedule 1 says that, "In matters governed by this schedule no Court shall intervene except where so provided in the schedule," that's schedule 1, and article 34, which is the standard points where one sees limited scope for further intervention, is also within schedule 1. What clause 5, as opposed to article 5, what clause 5 of schedule 2 does is make it clear that that doesn't constrain what's going on in schedule 2, notwithstanding the articles 5 or 34, just so there's no doubt about that, it then goes on to specify what relates to appeals to the High Court on any question of law. So it's common ground, as I understand it, for this Court, although it's not mentioned in clause 5, has a role on arbitral appeals, if not then we've been operating under some major misassumption. What we're talking about is what role the Court has. So it's not sufficient to say, well, the Supreme Court's not mentioned in clause 5 of the second schedule, that's not the answer, because nobody suggesting that if we have a decision on the merits it goes from the High Court to the Court of Appeal, you can't then come to this Court, in fact I'm sure there've been appeals and the Court already has on that basis, and quite properly so. We we're talking about what kinds of decisions in this area of arbitral appeals this Court has to deal with, and we say the answer is in section 7, on its relatively plain language. So then when we come to section 7, my learned friend says, "Well, actually there's this terrible asymmetry here. But if this was in the High Court he couldn't get there." But again, the asymmetry is recognised and provided for in this Court's Act. If the High Court makes a decision on the grant or refusal of leave, it's an interlocutory decision in the High Court and it's precluded from coming here by section 8(c) –

WILLIAM YOUNG J:
No, it's not.

MR HODDER QC:
In our submission it is.

WILLIAM YOUNG J:

If it grants, if it refuses –

GLAZEBROOK J:

No, AC, which stops interlocutory from the High Court coming here, absolute leave to.

MR HODDER QC:

Yes, section 8(c).

WILLIAM YOUNG J:

Oh, I see, sorry. But isn't it an originating application in the High Court?

MR HODDER QC:

You then get into the more detail, just going on an interlocutory application. For myself I would have assumed it was an interlocutory application and that it was covered by section 8(c), in the same way that what we're talking about is an interlocutory application that's covered by section 13(4) in terms of this Court. So the asymmetry, in our submission, comes from the terms of this Court's Act, we don't need to go any further. The clause 5 of the Arbitration Act tells nothing, has nothing about this Court's role. What does tell us about this Court's role is section 7, and saying, "Well, that can't work because of asymmetry," in our submission fails to recognise that that's all expressly dealt with by the combination of section 7 and section 8. The Court – sorry, the statute says clearly that at the High Court stage we cannot come to you on a leapfrog or any other basis on an interlocutory matter, but when we get to the Court of Appeal dealing with interlocutory matters we can come to you and you're going to deal with it under either section 7 – sorry, in terms of a grant you will deal with it under section 7 and section 13, and a refusal you don't have to deal with because it's dealt with by section 7(b), there's nothing particularly complicated about that in our respectful submission.

So the third point really comes to – well, it's going to become, I think, the dreaded rule in *Lane v Esdaile*. As my learned friend has mentioned to you and provided to you, the *Roy Morgan* case, and there is a concurring judgment by Justice Kirby that goes with the totality or majority judgment of everybody else. But there's some splendid Kirby prose, it starts at paragraph 46, which explains that the English approach should be abandoned in the Australasian, we would say Antipodean, context. "A tendency," he says at paragraph 46, "to judicial exposition legislation

over analysis of what the legislation actually provides," and in a sense – and this goes on through to paragraph 49, including some splendid swipes at *Lane v Esdaile* in paragraph 48. And so we say that that approach is consistent with what we have been contending for if one goes to the statute, not to some relatively antique judicial encrustation on somebody else's statute. Because all those cases do not have the scenario that we are concerned with, which is how does a Court, how does a new Court of final appeal, whatever you call a final appeal, given jurisdiction in terms of section 7, 8 and 9, deal with these matters as they come up? The Kirby case itself doesn't perhaps take us anywhere particularly, because it does – and I can't rely on it to the extent I'd obviously like to because says things like "express provision" and I recognise that's not what section 7(a) says – but we say that the general result that's been achieved is to a similar effect.

In terms of *Geogas,* again my learned friend refers to this for his proposition that it comes up with an approach to the arbitration regime and says, "All that is provided is all that there is," I think I'm quoting him accurately on that proposition. But when we go back to clause 5 it's not the case, because there's nothing about this Court, so it isn't the case that we look at clause 5, that's all there is. There is a role for this Court, what we're trying to do is find out whether there's a justification for distinguishing between substantive appeals and appeals, in this case, on interlocutory applications such as leave, and in our submission you don't get there.

And, finally, although my learned friend has conceded in response to Justice Glazebrook's inescapable question, "Are you conceding this proposition?" I have to say that doesn't give us huge comfort, and structurally it doesn't seem right either. There are two different propositions. One is, was the question asked correctly? And one is, is this a question of law? And what should be happening in the High Court is the question, was the question of law answered correctly, is the issue for the High Court, not whether it was a question of law in the first place. And the reason that we are here is because of that distinction, we say that it's important that the Court should be addressing that question because that question in fact logically precedes the other one and, as the High Court said twice, they weren't questions of law, it's now being asked to go back and say, "Well, there are questions of law, were they rightly decided or not?"

Now, there may be matters that the Court wants to ask me that I haven't touched on but, given that you've heard from us for quite some time now, unless you have any further questions I think that largely covers it.

ELIAS CJ:

Thank you, Mr Hodder.

MR HODDER QC:

And I think the timing was better, too. With Your Honour's leave.

ELIAS CJ:

Thank you.

MR HODDER QC:

Would it be of assistance to the Court if we were to stay during the hearing of the other matters or not?

ELIAS CJ:

Only if you wish to. If you want to leave, that's fine.

MR HODDER QC:

Thank you.

ELIAS CJ:

It's your call.

Yes, Mr Kidd. Mr Kidd, we've read your submissions of course and some of the more complicate points that arise in the context of the Arbitration Act provisions perhaps don't, and also the grant of leave, probably don't apply in your case.

MR KIDD:

Neither do I.

ELIAS CJ:

So you can take that into account –

MR KIDD:

Yes.

ELIAS CJ:

– that we have read your submissions and…

MR KIDD:

Well, thank you for that, Your Honour, I was hoping not to traverse that again.

ELIAS CJ:

Yes.

MR KIDD:

I've read the Crown's submissions and I agree that this is essentially leave to appeal under the section of the Immigration Act that has been dealt with in the High Court and Court of Appeal. At the beginning of our submissions we say that the Court has got inherent jurisdiction and, I would further add, after reading the Crown's submissions, that there are exception circumstances here.

GLAZEBROOK J:

But where do we get inherent jurisdiction? For it's a statutory Court, we only have the jurisdiction that's set out in the Supreme Court Act.

MR KIDD:

Yes, I appreciate that, and the Crown's submissions basically say that the legislation doesn't say that we don't, and they point to the supplementary order paper that it's apparently designed to finish these type of appeals at the Court of Appeal.

Your Honour, I wish to apologise because it occurred to me last night that the elephant in the room in this particular case is actually the children –

WILLIAM YOUNG J:

Well, look, it is a jurisdiction case, and we're arguing just jurisdiction.

MR KIDD:

Well, I'm arguing that this is exception circumstances because –

WILLIAM YOUNG J:

For the purposes of what?

MR KIDD:

For the purposes of the Court looking at the deportation of children, and –

GLAZEBROOK J:

But we only, this is only jurisdiction, we only have the jurisdiction in the Act –

MR KIDD:

Yes.

GLAZEBROOK J:

– so you have to point to something in the Act that give this jurisdiction.

MR KIDD:

Well, I, my point is that jurisdictions are not precluded and that it's in the interests of justice that this appeal is looked at in terms of the mistakes in the IPT decision, and the exclusion of the children by the IPT from consideration, even though they had not appealed, we're saying –

GLAZEBROOK J:

But that's the sort of –

O'REGAN J:

But you're assuming we've got jurisdiction to deal with the appeal. What we're asking is does the Court have any jurisdiction, that's the only point we're interested in hearing today. Not whether the application for leave is meritorious, that's a different issue.

ELIAS CJ:

Mr Kidd, if we are of the view that we have jurisdiction then we will of course go on to deal on the papers with the application for leave to appeal. But our preliminary concern is whether we can entertain this appeal at all, the application for leave to appeal. So if there's anything you want to develop in relation to the jurisdiction point, that's really the purpose of this hearing.

MR KIDD:

Well, just going to the Crown submissions, Your Honour, paragraph 10, page 3. There's a discussion there about matters of general and public importance and that this sits comfortably with the principles under section 13.

ELIAS CJ:

Well, that is what we would have to decide if we are satisfied we have jurisdiction to –

MR KIDD:

Yes.

ELIAS CJ:

– entertain the application for the leave to appeal. And we understand that those submissions that have been made –

MR KIDD:

Yes.

ELIAS CJ:

– on that application, it's the only point that we're asking to hear you on is this question of jurisdiction.

MR KIDD:

Well, in my submission so I develop two points toward the end relating to climate change, and also the definition of "refugee", and I submit that climate change is not only topical, it's a very important issue, given that Kiribati –

O'REGAN J:

But the fact it's an important issue doesn't give the Court power to deal with it if the statue doesn't give us jurisdiction.

MR KIDD:

Yes.

O'REGAN J:

That's what we need to know.

MR KIDD:

Well, my point is that the Court has inherent jurisdiction because of the importance of these issues, not only climate change but the IPT has developed a definition of "refugee" that is based on what is called the Hathaway test, and our submission is that this needs to be reviewed in the, because of the onset of climate that was not foreseen by the –

O'REGAN J:

Well, are you saying that even if the statute doesn't give the Court jurisdiction to hear an appeal, it can decide to hear it anyway?

MR KIDD:

Yes, because of the inherent –

O'REGAN J:

And where does it say that in the Supreme Court Act.

MR KIDD:

Well, doesn't exclude jurisdiction, and although this is –

O'REGAN J:

Well, yes, it does, yes it does.

ELIAS CJ:

Mr Kidd, I wonder if it would be better if we hear from counsel from the respondent and you can respond to the submissions she makes as to jurisdiction?

MR KIDD:

Certainly.

ELIAS CJ:

So the only question that we want to hear you on –

MS GRIFFIN:

Yes, Ma'am.

ELIAS CJ:

– is on the question of jurisdiction.

MS GRIFFIN:

Yes, I understand, Ma'am.

In light of the submissions this morning, I think it's certainly very important to focus on the Immigration Act here, as compared to the Arbitration Act. There are certainly some synergies in it, I can see why it's help for the Court to be looking at the two cases together. But the answer on one may not yield the same answer on another, in light of the differences in those two Acts, and so –

WILLIAM YOUNG J:

But both immigration cases raise the same issue, don't they?

MS GRIFFIN:

Yes, Sir, absolutely. So it may be that it assists Mr Dillon to respond to what I submit now, in the Guo proceeding later, and you may not need to hear further.

ELIAS CJ:

Well, we have a problem with the composition of the Court –

MS GRIFFIN:

I see.

ELIAS CJ:

– so that's why. But he can hear your submissions and he'll get a chance to responsible to them when we shed our inconvenient member.

MS GRIFFIN:

Yes, Ma'am, and I completely understand. It may mean that you don't need to hear from me more perhaps, for efficiency.

ELIAS CJ:

Yes, thank you.

MS GRIFFIN:

Now, in terms of the Immigration Act, it's perhaps easiest to first look at what I have submitted in my submissions about the Supreme Court's existing substantive jurisdiction, which is to hear appeals on questions of law from decisions of the Immigration and Protection Tribunal that have come through the hierarchy, similar to the Arbitration Act structure when you've got a substantive appeal decision. Now that jurisdiction of course is provided under section 246 of the Immigration Act, and if you look at the language of section 246 in the bundle I filed for this proceeding, for Teitiota, that's at tab 1 – beg your pardon, Ma'am, there are two bundles I filed, given we had two different Courts.

GLAZEBROOK J:

So 1 from 2015 in this – yes.

MS GRIFFIN:

That's correct, Ma'am.

ELIAS CJ:

In what tab?

MS GRIFFIN:

At tab 1, the Immigration Act provisions.

ELIAS CJ:

Yes.

MS GRIFFIN:

And if Your Honour just looks first at section 246 to see what here the Court of Appeal would be dealing with, and that there, "Relates to any party to an appeal," that's a substantive appeal, "under section 245 who is dissatisfied with any determination of the High Court in the proceedings as being erroneous in point of law may, with leave of that Court or, if the High Court refuses leave, with the leave of the Court of Appeal, appeal to the Court of Appeal." So it's seeking leave in the CA to hear a substantive appeal against a substantive High Court judgment on appeal that has been given under section 245. Now, that is the classic scenario which this Court would then become seized of under section 7 of the Act once, if the Court of Appeal or the High Court had granted leave to go to the Court of Appeal, rendered a substantive Court of Appeal decision on what the High Court had decided below, that this Court then under section 7 would clearly be able to consider leave to appeal from the Court of Appeal decision. And I say section 246 doesn't change any of that, even though it doesn't mention the S C.

ELIAS CJ:

Yes.

MS GRIFFIN:

And of course it refers to section 66 of the Judicature Act, which is about appeals as of right, through to the Court of Appeal, once, of course once you've gone through the leave hurdle. So that's the Court's substantive jurisdiction here, when you have a substantive decision to consider.

Before we get to that point in the Immigration Act structure, we begin at section 245, and this is where the language of course is quite different, it's not a proceeding from the High Court, it's where, "Any party to an appeal to or matter before the Tribunal," a few lines down, "is dissatisfied with the determination of the Tribunal in the

proceedings as being erroneous in point of law, that party may, with leave of the High Court, if the High Court refuses leave with the leave of the Court of Appeal, appeal to the High Court." So, this is about a direct appeal to the High Court of the Tribunal's decision. If the High Court refuses leave the Court of Appeal does not consider the High Court's refusal of leave. The Court of Appeal's jurisdiction is also direct under section 245, and it will directly look at the Tribunal's decision as to whether or not it's erroneous in point of law and leave should be granted in light of the test in section 245(3). Now the Court of Appeal has done this now on several occasions and the one Crown appeal that has been brought is a decision in *Minister of Immigration v Jooste* [2014] NZCA 23 which His Honour Justice O'Regan sat on as well. That there noted the test is like their second appeal test to the Court of Appeal, that general public importance standard, and there the *Jooste* decision is in this bundle, I only just want to show you paragraph 1 to illustrate what I mean, at tab 10.

WILLIAM YOUNG J:
Which bundle?

MS GRIFFIN:
Beg your pardon, Sir, it's the bundle for this particular appeal, for Teitiota, dated 1 April 2015, in tab 10, and so this is in the Court of Appeal after the High Court had declined myself leave, so the same as my learned friend Mr Goddard, not so convincing in the High Court, then into the Court of Appeal. The Court of Appeal here at paragraph 1 says, "This is application under section 245(1) of the Immigration Act 2009 for leave to appeal to the High Court against a decision of the Immigration and Protection Tribunal, allowing the respondents' appeal against the deportation notice. So, very straightforward, not an appeal from the High Court's judgment, direct appeal there, through into the Court of Appeal. The unusual hook, as Your Honour Justice Young mentioned, of course, is that the Court of Appeal wasn't granting leave to itself, it's granting leave back down to the High Court. Now, from my research I have only found the Arbitration Act and the Immigration Act to be substantially similar in that regard, with that type of jurisdiction, given to the Court of Appeal, that is what creates the problem with section 7(b), for example how it's worded. But the reason I wanted to show you that was just to show the difference there in language between 246, that's dealing with the High Court's decision, compared to 245, which is right in there, in the Tribunal's decision, all the way through that appeal pathway when considering the question of leave. And that of

course has consequences when you overlay the Supreme Court Act onto that structure.

Now another point about section 245 and section 246, and that raises from a question from Your Honour Justice Arnold, is that it also, like the Arbitration Act, only refers to leave refusals, it doesn't say what happens if leave is granted. So both provisions talk about the party who has been refused leave having two chances effectively, one in the High Court and one in the Court of Appeal, to otherwise get leave. There is no wording whatsoever that deals with what happens to the party who's dissatisfied with the grant of leave. So, a similar problem. Now that, as the Crown certainly has, is effectively in my submission warned by that party that parties' natural justice rights or response or defence to that application is then dealt with in the substantive appeal to the High Court, once it's ultimately granted and the appeal rights that then flow from having a substantive appeal. The structure of the Act here hasn't, certainly not expressly, contemplated what that party can or cannot do, but the inference there is that 245 and 246 has very clearly dealt with leave refusals and how far they can go in the structure before it comes to end. So my submission would be the same as my friend, Mr Goddard, that the party that is successfully granted leave, the party that's dissatisfied with that grant of leave from that, can then only go to the substantive appeal. I would differ in the concession made with respect to the issue of a question of law, that that must be, that must be set by the Court that grants leave, that it must be a question of law invariably, and that that ought not to be something that the Court, on a substantive appeal, is then left to overturn. Now the Court of Appeal in *Jooste* dealt with those types of problems, and it might help to show Your Honours how the Court of Appeal dealt with that if there was an issue with the wording of a question.

WILLIAM YOUNG J:
But we haven't got that far yet.

MS GRIFFIN:
I understand, Sir, I can come back to that point.

WILLIAM YOUNG J:
I don't think you need to. I mean, the issue is whether there's jurisdiction, not if there is how it should be exercised.

MS GRIFFIN:

Yes, Sir. No, I understand.

So, back into section 245, and its connection then to the Supreme Court Act.

ELIAS CJ:

Well, is there more really to be said on this?

MS GRIFFIN:

In what sense, Ma'am?

ELIAS CJ:

I'm just wondering – oh, carry on. Yes, carry on.

MS GRIFFIN:

Thank you, Ma'am. The point here that I wanted to make is, if we look at the provisions of the Supreme Court Act and Immigration Act alongside, and I'm talking about both section 7 and section 8 and section 9 of the Supreme Court Act. So, starting with section 8, as we've heard this morning, section 8(b) is about leave refusals from the High Court, which clearly has occurred in this case. And, as came in questions from the bench this morning, that is quite a different scenario to where the Court exercises the exceptional circumstances exception to have a leapfrog appeal from a High Court decision to the Supreme Court under section 14, despite the fact that section 7(b) of the Act, once it's got to the Court of Appeal on a leave refusal, said, "No, no leave." Here, you don't have the substantive High Court judgment upon which to leapfrog, and if you were to allow that it would clash materially with what section 8(b) has said.

Now section 8(c) – that's the interlocutory application point that was raised just before – in my submission the application in the High Court is an interlocutory application, that is clear through the High Court Rules, which is in the respondent's bundle, the same bundle we've been looking at, at tab 4, and it's rule 20.3, and this rule says at 20.3, "(1) an application for leave to appeal in a case when an enactment provides an appeal to the Court against a decision may not be brought without leave, must be made to the decision-maker or, as the case requires, the Court," which is here, 245 is about making the application for leave to the High Court from the Immigration Protection Tribunal decision. And then at 7, subsection (7) or subparagraph (7), "An application under this rule must be made on notice to every party affected by the

proposed appeal and, if made to the Court, must be made by interlocutory application." Now all of the High Court applications that I've been involved in under section 245 have all been brought by interlocutory application.

ELIAS CJ:

I'm not sure that really the use and the rules would be determinative. It's the context in the Supreme Court Act that's determinative. But it doesn't seem to be greatly in dispute that it's interlocutory in that sense.

GLAZEBROOK J:

And there is a definition of interlocutory in the Supreme Court Act, which I think Mr Goddard's point was that it doesn't come within that definition –

ELIAS CJ:

Yes.

GLAZEBROOK J:

– and therefore probably while interlocutory in any sense is probably not interlocutory explicitly in terms of the Supreme Court Act.

WILLIAM YOUNG J:

In a way, it doesn't matter. If there was a decision by the High Court to refuse leave, then there can be no leapfrog appeal to this Court because it's refused leave to the High Court.

MS GRIFFIN:

Yes, Sir, so it's certainly 8(b).

WILLIAM YOUNG J:

Yes.

MS GRIFFIN:

So whichever, whether you want to look at it technically it's brought as an interlocutory in terms of its standard meaning or not.

WILLIAM YOUNG J:

Well, I'm not sure it is an interlocutory application, but I don't think it matters.

MS GRIFFIN:

My argument doesn't hinge on it being an 8(c) matter, I just raised that for the fact of the procedural mechanisms there in the High Court Rules. But certainly 8(b) does bite. And the reason why I raise 8(b) is that, ordinarily, because of the uniqueness of the way 245, and also the Arbitration Act provision, is crafted, you would ordinarily expect to see synergy with section 7(b) in the Supreme Court Act, that you're dealing with leave refusals, the High Court has looked at it first, and then the High Court may look at it again as to whether it could go up to the Court of Appeal, and then the Court of Appeal may exercise a special leave jurisdiction. And that would commonly then overlap with 7(b), those types of issues, and unless you had a substantive judgment below, which you wouldn't here, you would expect 7(b) would be the answer under the Supreme Court Act. Now because we have this disconnect, it's talking about appeals back through to the High Court, 7(b) doesn't expressly appeal to deal with this particular situation. However, in my submission, the policy intent behind, in light of the policies in the Immigration Act and also the Supreme Court Act is the same, because we're dealing with a second leave refusal, and that's why I say it's open to this Court to decline jurisdiction for that reason, it's still the two bites at the cherry on the question of leave when a party has been unsuccessful, it's just that here we have a rather unusual jurisdiction that sends it back to the High Court, and it is quite a convoluted jurisdiction in that regard, given the time it then would take to track back up through here on a substantive appeal.

WILLIAM YOUNG J:

Well, look, it's a quite simple point, isn't it? Sections 7 and 8 don't exclude an appeal from a decision refusing leave to appeal. On the other hand, it would be a pretty odd sort of appeal, and really we've got to grapple with that.

MS GRIFFIN:

Yes, Sir.

WILLIAM YOUNG J:

Isn't it as simple as that?

MS GRIFFIN:

Well, in some ways, Sir, yes, because the odds of an appeal was that you have effectively these two, two hand –

WILLIAM YOUNG J:

Yes, I know. But is it as simple as that? Because, I mean, I think we do grasp that.

GLAZEBROOK J:

Well, you say by implication –

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

– looking at those two together, it must have excluded jurisdiction in this case –

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

– that's the submission.

MS GRIFFIN:

I say that it's open to Your Honours to find that and to exercise, to say that is your jurisdiction, because you have to hear leave on the papers first in terms of your Act, on this sort of question, and then have an oral hearing on leave, for example. It's very awkward, in this type of structure. And that's why I say, reading back into the Immigration Act policy, which is clearly about streamlining appeals and when the Court gets involved, and on this point I note Your Honour Justice Elias's point in the beginning about perhaps there's a difference here in light of the restrictions on judicial review, compared to appeal. I would say that actually, no, there isn't a difference, because section 245 is in its original form when it was enacted, and when it was enacted in, came into force in 2010, the only restriction on review under section 249 was that the IPT had to consider the matter first, you couldn't leapfrog from a minister's decision to the High Court, there was no leave requirement, for example. So that shouldn't affect how you interpret 245 in itself, the restrictions on review.

ELIAS CJ:

Well, it might now though, because statutes are always speaking and they speak in a different contact. Buy anyway, I think we do –

MS GRIFFIN:

Yes, Ma'am.

ELIAS CJ:

– I think we do understand the point you're making, I'm just not sure that there's anything more to be developed in it, is…

MS GRIFFIN:

The only one other point I'd just make is just to draw one other distinction with the Arbitration Act, in light of that, is that when you look at the language of clause 5(5) of the Arbitration Act, and that is as Your Honour Justice O'Regan said in the beginning, that is there with leave of the High Court, any part may appeal to the Court of Appeal from any refusal of the High Court to grant leave. So when you –

WILLIAM YOUNG J:

I really think we understand that there is a difference between the Arbitration Act, which is an appeal against a refusal of leave –

MS GRIFFIN:

Yes, Sir.

WILLIAM YOUNG J:

– and this, which is a consideration as to whether there should be a grant of leave.

MS GRIFFIN:

Yes, Sir, from the direct IPT decision. That's the only point I want to emphasise, there's a difference when deciding whether one or the other or both perhaps grants jurisdiction.

And the only other final point, Your Honour, of course, is the statutory amendments currently going through, I only wanted to update you they have passed the committee of the whole stage and will progress to third reading now. They are prospective, of course, I accept that. Your Honours have, as far as I'm aware, four applications currently before this Court, three with respect to section 245, which is appeals, and one is, the only one you have which under 249, an appeal from a judicial review decision. So I thought it might be helpful for Your Honours to know what the groundwork is now.

ELIAS CJ:

Yes, thank you, Ms Griffin.

MS GRIFFIN:

Unless you have any further questions.

ELIAS CJ:

Thank you.

Mr Kidd, was there anything arising out of that that you wanted to be heard on?

MR KIDD:

Yes, just one matter, Your Honour.

Just section 13 of the Supreme Court Act, paragraph 4, "The Supreme Court must not give leave to appeal to it against an order made by the Court of Appeal on an interlocutory application," now our application, that was an interlocutory application, "unless it's satisfied it's in the interests of justice for the Supreme Court to hear and determine them," hear its appeal. Of course the point is, what is in the interest of justice?

WILLIAM YOUNG J:

I don't think it is actually. The section 13(4) is a carve-out from what would otherwise be open to an appeal.

MR KIDD:

Yes.

WILLIAM YOUNG J:

Now the only issue here that we're dealing with is whether there is jurisdiction for this Court to hear an appeal from the Court of Appeal decision not is issue, is whether we should grant leave if there is jurisdiction.

MR KIDD:

All right, well, I don't have anything further, I'll just submit…

ELIAS CJ:

We do have your submissions on the leave applicant which, if we're satisfied that we have jurisdiction we'll have to consider. Yes, thank you.

MR KIDD:

Yes. The only thing I wanted to add is what I said before about the aspect of the children, which was rejected by the Ca, and that's a matter of public interest. And Your Honour may be aware that attached to Mr Teitiota's application for fresh evidence is the immigration status branch decision in relation to the children denying it as of the 18th of November, and also the fifth panel on climate change, which was also attached for an application for fresh evidence, which basically paints a very dire picture for Pacific countries in general, due to ongoing rise in temperature and…

ELIAS CJ:

We understand the merits of the application that you're making, but at the moment we're just looking at this question of jurisdiction.

MR KIDD:

Yes.

ELIAS CJ:

I think you've helped us –

MR KIDD:

Thank you.

ELIAS CJ:

– as much probably as you can on that.

MR KIDD:

Thank you, Your Honour.

ELIAS CJ:

Thank you.