IN THE SUPREME COURT OF NEW ZEALAND SC 26/2005

IN THE MATTER of an Application for Leave to Appeal

BETWEEN **CASATA LIMITED**

Appellant

AND **GENERAL DISTRIBUTORS LIMITED**

Respondents

Hearing 5 July 2005

Coram Tipping J
McGrath J

Counsel J E Hodder and SJ Fairbrother for appellant
R Raymond and RA Morgan for respondent

APPLICATION FOR LEAVE TO APPEAL

Hodder If the Court pleases I appear with my learned friend Miss Fairbrother for the applicant appellant.

Tipping J Thank you Mr Hodder, Miss Fairbrother.

Raymond If it pleases Your Honours I appear before the respondent together with Miss Morgan.

Tipping J Thank you Mr Raymond, Miss Morgan. Mr Hodder, we've not had the benefit of written submissions from you. No doubt that I take it was because you thought the point was so plain that it didn't need elaboration, am I right in that assumption?

Hodder That sounds a little over-confident and I wish to disclaim that Your Honours but we thought that the argument was one of statutory interpretation and was set out sufficiently in the application in itself

that we would be simply repeating ourselves if we had written submissions to say the same thing pretty much again.

Tipping J I see, well now what I would be most grateful and so would Justice McGrath, if you would be good enough just to confirm one thing and then tell us whether there's anything more. We rather thought that your proposed ground of appeal for the purposes of the rule which requires the order to specify the approved grounds can be taken from para.2 of your Grounds of Proposed Appeal in the application document and can it be framed this way whether the decision of the Court of Appeal was wrong in concluding that party/party costs should not lie where they fell following the award. Is that the essence of it? Underneath that point of course are a number of other points but is that what you wish us to approve for the purposes of the rule?

Hodder I think that's correct Your Honour and anything else below that is reasoning to get to the proposition.

Tipping J Yes, now is there anything else that you want considered as a specific ground of appeal beyond converting the introductory words of 2 into a ground whether…etc? Just so that we know when we listen to you, and so that Mr Raymond knows.

Hodder No Your Honour all that we are challenging is that aspect of the Court of Appeal decision, so if that aspect is found to be wrong then the referral back of that particular matter is gone, that's all we seek and the questions of costs will follow in the ordinary course in this Court.

Tipping J Well that's excellent and so we can note the proposed ground as being whether the Court of Appeal was wrong in concluding that party/party costs should not lie where they fell following the award.

Hodder One's always reluctant to accept propositions on the hoof Your Honour but that sounds right to me.

Tipping J Well on the hoof you see is part of the problem, but we're working on the hoof because we don't really have a sharply articulated ground or grounds of appeal.

Hodder Oh, so we think that the grounds are those specified in 1 and particularise in 2 but exactly the level of the particularisation the Court wants is a matter I think we're still learning. It may be said that 1 propositions of law which subscribe to the overall proposition which is in 2.

Tipping J Well as long as we have it clear that your client at least is satisfied that its essential point and its ammunition is sufficiently ventilated via ground coached as I've suggested.

Hodder Yes Your Honour.

Tipping J Good, right, we'll move on thank you.

Hodder Now Your Honours this Court will have a range of matters, many of them of widespread possibly constitutional importance. This is a narrow but important point of statutory interpretation involving the Arbitration Act. The essence of the appeal is that the Court's decision, that is the Court of Appeal's decision undermines the coherence of the explicit cost regime in the 1996 Act. In particular we would not be here seeking leave if the Court of Appeal had not effectively written clause 6(1)(a) out of the Act and then suggested the Act needs amendment. That's why we say it's a matter of general importance and not just a matter where our client feels it has been hard-done by on the particular topic of costs. The background as set out in the Court of Appeal's judgments and in my learned friend's submissions as the Court I suspect will be aware this is a ground review dispute, the lease itself was silent on the question of party/party costs, that point was at some debate at some stages now accepted the lessee made a settlement offer prior to the hearing, there were no pleadings and there was no request at the hearing for costs to be reserved.

Tipping J There was no formal submission to arbitration.

Hodder There was a letter which is set out in the Court of Appeal's decision in para.8, that was a submission for arbitration. It may become relevant in the argument today, I won't speak for the lessee but the lessor did not seek costs at the end of the hearing because for a long time as Justice McGrath himself may recall from his own practice, there was at least an understanding in Wellington CBD ground rental that costs were not awarded by other traders, in particular Mr Bornholdt, who did a huge number of those awards, took the view that nobody knew what a ground lease was until the arbitrator declared what it was in terms of a rental and therefore it wasn't a matter for costs to be awarded, that was a practice.

McGrath J You say that that's why costs weren't sought by others?

Hodder That's why, no that's why the lessor, well that's why I didn't ask for costs to be reserved.

McGrath J Yes, but you're not taking it on yourself to suggest that's why the lessee seek costs.

Hodder Mr Raymond can speak on that, I'm not suggesting that. It's relevant to the proposition that I come to where the Court of Appeal's reasoning comes up. So the first award was undoubtedly a good result for the lessee and not such a good result for the lessor. We don't dispute that. It fixed the Tribunal's own costs and allocated those equally having made reference to a clause in the lease which talked about what is accepted to be the Tribunal's own costs and it was silent on the

question of party/party costs, so the lessee objected and that led to the making of a second award where the Tribunal awarded $95,000 party/party costs in favour of the lessee and then on the second award it split 75-25 in favour of the lessee. It didn't do anything about the costs of the Tribunal on the first award and all that's in the Court of Appeal judgment at para.26. So when we got to the High Court Her Honour Ellen France J set aside the second award and remitted the cost of the first award back to the Tribunal. It did not in that judgment articulate any specific error of law.

Tipping J When you say she remitted the costs of the first award back to the Tribunal does that mean she remitted the arbitrator's costs issue or the costs more general?

Hodder Well she remitted the, no she asked the Tribunal effectively to consider the question of costs which they had purported to do in the second award but do it again as part of the first award.

Tipping J I see, thank you.

Hodder In her recall judgment there was an application for recall to try and find out what the error of law was, the indication was that the error of law with the Tribunal did not realise that the lease clause covered party/party costs. That's discussed in the Court of Appeal's judgment, paras.37 and 93. And then she remitted the costs of the second award which had been set aside back to the Tribunal. The Court of Appeal then directed the costs to the second award to be remitted to the High Court, we have no problem with that, but then said the Tribunal's failure to consider party/party costs in its first award was an error of law and therefore affirmed the High Court's, the, yes the High Court's referral back to the Tribunal of the party/party costs associated with the first award.

Tipping J But that was a different error of law from that which merged from Justice Ellen France.

Hodder Correct. The Court of Appeal's reasoning is set out in really almost one page on the judgment which carries, which focuses around para.97. Paras.97 to 99 are the paragraphs that are really engaged primarily on this application for leave. The Court of Appeal said that costs are an integral part of the arbitration. Eight lines down to para.97 also suggested if arguably it was an implied claim presented in any arbitration, it says that at para.101. Importantly it then goes on to say that because there had been a settlement claim presented and clause 6(2)(b) prohibits that being made known to the Tribunal before the award is made, costs could not realistically have been pursued before the award was made and that's the essence of the middle of para.98 of the judgment. It then goes on to say at para.105, they haven't found the issue easy and suggest that it might deserve some legislative clarification.

Tipping J When Their Honours said that they could not realistically have been pursued before the award was finalised surely it couldn't have been pursued at all. All you can do presumably is to ask the Tribunal to reserve costs.

Hodder What could have happened and we would say should have happened was that in the circumstances that my learned friend was in he would have said something like the Tribunal should be aware that there has been correspondence on the question of costs and therefore the question of costs should be reserved, including the final allocation of the Tribunal's own costs, that way the Tribunal would have got its award out and been paid but there could have been a reallocation afterwards.

Tipping J Well it would in form then technically have been an interim award wouldn't it?

Hodder Yes and I would have had no problem with that if it had been, but it wasn't in form it was a final award.

McGrath J Given the prohibition on what the Tribunal can be told there's some difficulty in the lessee saying much at all to the Tribunal. I mean if the lessee had said to the Tribunal well because there's been correspondence in this matter we want you to reserve costs, isn't that sort of signalling to the Tribunal that there's been an offer which is not permitted as I read clause 6.

Hodder What we would seek to persuade in detail of course if we were granted is to say that that's not exactly what 6(2)(b) is prohibiting, it's prohibiting making known the fact that a particular party has made a particular offer to settle if you're simply saying there has been correspondence there can be no objection to that. Certainly the Tribunal was entitled to get some modicum of reasoning as to why it might want to reserve costs.

Tipping J Is it suggested that the presence of 6(2)(b) prevents someone from asking or a joint request to reserve costs, surely that can't be right.

Hodder That's what para.98 says.

Tipping J Well I'm not sure that it quite does but that's why I raised the point. I mean it would be ridiculous wouldn't it to suggest that the parties because of 6(2)(b) can't say to the arbitrators look we agree that costs should be reserved, I mean that's absolutely standard drill.

Hodder Well as I read the Court's judgment it says in para.98 that creates a real problem as a major practical difficulty, the kind that you want to suggest doesn't exist.

Tipping J Well it could not realistically have been pursued, surely that doesn't mean that they couldn't ask for them to be reserved.

Hodder But in the next sentence "where a settlement offer has been made, there is a major practical difficulty in requiring a party to ask the arbitrators to reserve costs." That's the point that we say is wrong and wish to contend that on the appeal. So there were two points in this appeal.

Tipping J Sorry I hadn't noticed that next sentence Mr Hodder I have to confess.

Hodder There were two points in the majority's reasoning on this point that we really challenge and the first is that some of the costs are implicit in every arbitration and we say that reads out of existence clause 6(1)(a). The second proposition of 6(1)(b) makes it practically difficult to seek costs to be reserved and we say that's wrong too.

McGrath J I certainly understand that point. My earlier query was in you suggesting it was legitimate to ask that costs be reserved because there has been correspondence between the parties. At a certain point you're getting into the "nudge nudge wink wink" situation with arbitrators aren't you, it was just a question of whether that particular formulation was getting close there or not. But I understand the point you make in relation to any request or even frankly unilateral requests for costs to be reserved, you're saying that's neutral.

Hodder Yes. I figure I was anticipating what would happen is you stand up and say to the Tribunal we'd like to have costs reserved and the Tribunal says 'why', and again you're trying not to breach clause 6(2)(B) so you say there's been some correspondence so will you please reserve costs including allocation.

Tipping J You'd have to have a pretty dumb set of arbitrators to ask why, wouldn't you? Does this sort of thing go on in Wellington Mr Hodder?

Hodder Not often I hope Your Honour. Can I turn then briefly to the Arbitration Act? The point that we want to contend on the substantive appeal and we signal in the leave application is that the Court of Appeal has imported old jurisprudence into a new Act and created problems that don't need to be there and which this Court should sort out. So we will be contending in some detail that the Arbitration Act is a comprehensive reform, it's an essentially self-contained statement of the law, quite radically different from the 1908 Act and that the emphasis is on the ability of a parties collectively to agree on the provisions that govern their arbitration so that they contract out of what are otherwise default provisions and that's where it becomes important in the context of clause 6 indeed the whole Act you can contract out of the whole of schedule 2 if you are doing a domestic arbitration. And we say that what the Arbitration Act 1996 is trying to do is to create a system for determining claims that are presented and that emerges from

articles 31 and 33 of the First Schedule, article 31 explains what the form and contents of the award should be; 33 provides for corrections and additional awards including in 33(3) the ability to make a further award, an additional award where claims have been presented in the arbiter proceeding but omitted from the award.

Tipping J So is the nub of it Mr Hodder that the claim for costs must be presented and the simple existence of 6(1)(a) doesn't amount to a presentation?

Hodder Quite the reverse. Section 6(1)(a) has no meaning if you imply a cost claim in every arbitration.

Tipping J Well I'm not sure, but you're saying it has to be presented and you can't invoke 6(1)(a) as if that was a sort of standard presentation that stands unless it's expressly agreed otherwise.

Hodder Well 6(1)(a) is the default provision I'm focusing on Your Honour. It says that unless there has been an award then there will be an equal share of the fees and expenses and each party costs lie where they fall. But if in every case costs are assumed or implied to be an issue and costs follow the event, costs will never lie where they fall, almost never lie where they fall.

Tipping J I think we're on the same wavelength.

Hodder So the Court of Appeal says basically either they should have taken into account in the award without being told or it was a claim presented implicitly and could be under 33(3). Those are the two lines of reasoning in there, and we say in either case there's no room for costs to lie where they fall because the Court also points out that the result is going to influence costs and therefore they've largely written 6(1)(a) insofar as it deals with costs as they fall out of the Act. So that explicit context where there is a default provision in 6, unless the parties otherwise agree, and there's no suggestion they did here, then the provisions are in terms of 6(1)(a) and 6(1)(b), particularly where they accept their own responsibilities. Those distinguish any other authorities; there is no other authority on the 6(1) of the Second Schedule at the appellant level beyond this case. That touches the issue.

Tipping J So the only way out of this for Mr Raymond's client is to ask for costs to be reserved?

Hodder Correct. Once costs have been reserved then we would accept the claim as being presented, but if they're not in the pleading list, they're not asked for at any stage before the hearing concludes and the orders made, then the Tribunal's entitled to make a final award that doesn't deal with party/party costs and clause 6(1)(b) will have the position it costs might they fall.

Tipping J The argument being there's no error of law because clause 6 as a whole contemplates the absence of any reference to it as being a permissible approach. I follow, thank you.

Hodder That then takes me to para.3 of the leave application the leave criteria. The position we advance here is that there is an explicit comprehensive and practical costs regime when one reads articles 31 and 33 and clause 6 together but the Court of Appeal has effectively undermined it for its coherence which is why the Court of Appeal indicates in para.105 'perhaps the statute should be looked at again'. Our proposition is that the statute should be looked at again. That we say gets you to the general position at para.3.2 because generally in terms of commercial activity arbitrations are sort of a legislatively endorsed approach to decision-making that where there are disputes, and this issue will arise in various ways at various times, it goes substantially beyond the particular interest in this case and accordingly our submission is that it's a matter appropriate for this Court to hear on full appeal, so we apprehend that we need to show that that case is arguable and we apprehendedly need to show that this case goes beyond the particular interest of the parties. Here we submit that the statutory interpretation point is of general application and therefore this Court would be enhancing the interest of justice to hear the appeal. Those are our submissions Your Honours.

Tipping J Yes, thank you. Mr Hodder is clause 6 an indigenous provision or does it derive from the international source material.

Hodder No it's indigenous Your Honour. Schedule 1 contains the model law which is adopted virtually verbatim. Schedule 2 was meant to try and bring in some provisions recognising some of the practices in arbitration law in New Zealand that could usefully be put in there.

Tipping J Thank you Mr Hodder. Mr Raymond.

Raymond Your Honours, the respondents' position is that when considering the leave criteria that no question of cost as formulated by my learned friend could ever fall for determination in this Court as being a matter of general importance or general commercial significance. This cost issue has been determined by the Arbitrators' Court initially, the High Court and then the Court of Appeal.

Tipping J I'm sorry, are you taking ground as high as that, that it can never be a matter of general importance?

Raymond Well, on the facts of this case and generally I would refer to what the President of the Court of Appeal said in **Wellington City Council and Norwich Union** which I've got in my submissions that they're traditionally not encouraged and there must be a true principle or true injustice must emerge. In my submission there is no true principle, it's at para.29 of my submission Sir. No true principle and the injustice in

fact favours the respondent who was the successful party if the appellant was to succeed in having leave granted for the appeal to proceed and that is because clearly the respondent was the successful party at the arbitration, and still my friend is trying to deny that successful party what in my submission is its legitimate claim to costs. The question of why costs may have not been reserved at the relevant time in my submission isn't the true focus of the inquiry because the authorities make it clear that even if counsel have omitted to seek a reservation of costs for whatever reason, and there may be several, that does not necessarily really mean that the Tribunal or the arbitrators may not have committed an error of law in failing to reserve costs. In my submission what Their Honours Glazebrook and Hammond said in their decision is correct. I think it's at 97 where they say 'in every arbitration there is no doubt in our view that the costs associated with an arbitration are an integral part of that arbitration and it will always fall to be determined, and whether counsel will expressly say leave should be reserved to determine costs or not is immaterial to whether or not they in fact should reserve costs themselves'. At the time the provisions of clause 6(2)(b) of course were playing on counsel's mind. It's a strict prohibition and shall not raise the question of what amounts to a Calderbank offer at that time. And further it wouldn't have.

Tipping J Just before you move on from that the passage which rather struck me from para.98 that I discussed with Mr Hodder "major practical difficulty in requiring a party to ask the arbitrators before the award to reserve costs". It seems with great respect to Their Honours to be somewhat overstating it.

Raymond It might be overstating it; it presents a difficulty in my submission. We're dealing with three arbitrators, they're not judicial officers, we had one from Auckland and two valuers from Christchurch, a third arbitrator.

Tipping J Isn't that statement if it stands a matter of very considerable public importance? I mean if that's a sort of warn-off about asking people to reserve costs in this sort of scenario I would have thought that could raise all sorts of difficulties. Maybe not, if you're right that you don't have to ask them to be reserved but when one is looking at the whole scenario of how important is this particular question, a statement like that from the Court of Appeal prime facie could be a little worrying.

Raymond Well under clause 6(2)(b) it shall not alert the Tribunal to the fact that an offer has been made.

Tipping J But there are hundreds of reasons why you might want to reserve costs if not because you want to find out what the answer is before you make your submissions.

Raymond Yes well in some cases Your Honour if the lessee had said the question of costs is reserved, in some cases arbitrators might say we've largely

reached our conclusion which has been going for two weeks now, one of us is based in Auckland, you're in Christchurch, we're sitting in Wellington, this is not a significant amount of money at stake, we don't want to reconvene for costs or hear submissions later, we're only going to get together once, we're all here together now, we want to hear submissions on costs now. And then you get into all sorts of difficulties by saying "sorry arbitrators, we can't deal with costs now", "why not" and you get into the difficult and dangerous territory of talking about offers that have been made.

McGrath J I can see that a dialogue could emerge that gets into the sensitive zone that I was debating with Mr Hodder but I don't immediately see myself that a request for counsel to reserve costs and an indication by counsel that because of various matters counsel's not at liberty to discuss, counsel doesn't want to get into a dialogue with arbitration on the matter, I mean I don't see any great problem with that, the real point I think that Mr Hodder made that and perhaps I will put it in my words was that surely a simple statement that counsel asks that costs be reserved is neutral on the questions that are concerned under clause 6(b).

Raymond That is possible. I'm submitting Your Honours that in some cases arbitrators will particularly in the sort of Tribunal that we were in may venture to and seek and enquire and expect results and then it does become a bit of a nudge and a bit of a wink as you said before, well I can't really get into that Sir.

McGrath J I understand the practical problems that can arise in particular with experienced arbitrators who are specialists in their field but not perhaps masters of arbitrarial procedure.

Raymond. No. And then there is the line of authorities which are referred to in my submissions whether counsel ask for costs to be reserved or not is immaterial, you can expect the arbitrators to reserve costs anyway, and that's what the Court of Appeal is really saying that they, it can amount to an error of law, that's what **Tompkins' J** said in **Fyfe**, that's what was said in the **Asburton Veterinary Clinic** case referred to in my submissions where counsel in that case had omitted to ask the Tribunal to reserve costs and I think it was **Palmer J** who in that case said you know that that is understandable in some cases, it doesn't mean that costs can just be overlooked by the learned arbitrators and I agree with the analysis of **Justice Chambers** in his judgment where he says, he provides an analysis of what was concluded in the arbitration, claims presented in the arbitration. His analysis is that because the parties had explicitly agreed in correspondence (that's the letter from Chapman Tripp) it's at para.119 "the position was varied by the 13 May 2002 agreement. The significant feature of that variation for current purposes was that the parties agreed that the arbitration was to be conducted in accordance with the Arbitration Act 1996 that meant that clause 6 of the Second Schedule of the Arbitration Act became

incorporated into the arbitration procedure. Clause 6 dealt with costs. It is set out in the appendix to the Court's reasons and therefore the agreed position became so far as all costs of the determination by the valuers etc are concerned, the guiding principles were the lease in clause 6(2) and 120(b) party/party costs would fall to be determined according to normal principles as supplemented by clause 6(2)(b) of the Second Schedule, and that is the majority also reached essentially the same analysis that in every arbitration costs are clearly a significant component of it. Parties to arbitrations can reasonably expect that they will be dealt with and Schedule 2 clause 6(1)(a) in my submission says that.

McGrath J The proposition is (b) essentially follows because the parties are agreed as to the limited scope of clause 2.3.6 which cover only the arbitrators' own costs, is that right?

Raymond Yes, 2.3.6 said that.

McGrath J And that's contrary to Justice Ellen France but in the Court of Appeal the parties have an agreed position on it.

Raymond Yes, essentially, yes. 2.3.6 dealt with only the arbitrator's costs unless there was impropriety and unreasonableness and so-on to split the award some other way. But in my submission clause 6(1)(a), which becomes incorporated in the agreement of the parties to submit to arbitration is an expectation that the arbitrators will deal with costs and in this case the Court of Appeal have simply said in my submission that a failure to reserve costs or deal with costs party/party costs at all and not hear from the parties amounts to an error of law in the circumstances of this case and that it's appropriate for that question to be referred back to the other arbitrators. In my submission that is the nub of it, that is in my submission that part of the Court of Appeal's decision doesn't raise the matter of general importance or general commercial significance. It is overstating the situation in my submission for my learned friend to submit that this decision somehow undermines the whole costs regime set out in the Arbitration Act. It does nothing of the sort. It simply says that these arbitrators failed to deal with costs at all. A successful party as a result has missed out on costs, it should be dealt with as part of the first award. That's the importance of this decision in my submission and has referred it back to the arbitrators, and my friend with respect is dressing up the issue to this phrase which he's used today and in his written notice of application that somehow the Court of Appeal has undermined the whole cost regime. In my submission that's just putting it far too highly when you actually read the decision.

Tipping J How are you going to stop arbitrators if they are unversed in making costs determinations in Calderbank situations other than asking them to reserve them.

Raymond How are you going to stop the arbitrators from?

Tipping J You're saying that the arbitrators are generally charged with the question of costs set properly before them. If you are not allowed to ask them to reserve them or make it clear that they should be reserved how are you going to stop them teeing off on the basis of what they see as the proper costs solution without having the full picture?

Raymond Well as it happens after this arbitration and after the High Court decision before Court of Appeal decision the exact same parties had a second arbitration for the same property for the subsequent five years.

Tipping J I'm not very interested in this particular case. What I find particularly troubling, prime facie and it may well be able to be driven out of my head ultimately, but if the Court of Appeal are right on this about not mentioning this in case you might let the cat out of the bag, how are you going to stop the arbitrator or arbitrators and umpire whoever from simply thinking Oh well we haven't been asked to reserve cost, the parties must be content to allow us to fix them in the ordinary way, bang, and then it transpires that it's all on the wrong premise.

Raymond Because arbitrators under this Act should always reserve costs because they know about the provisions of clause 6(2)(b). They should.

Tipping J Well maybe they should but they need some help I would have thought, quite often.

Raymond Well the Arbitration Agreement which I was about to refer to which we had for the second arbitration expressly said costs are to be reserved and to be dealt with following the 1 August.

Tipping J Well that's fine if that happens but at the moment I would have thought there is some potential for real difficulty.

Raymond Well I don't see that Sir because clause 6(1)(b) says that they are to deal with costs. Clause 6(2)(b) in that one can expect that the arbitrators will read these provisions given that that's the Act they're working under and will be aware that offers to settle shall not be communicated to them until it has made a final determination of all aspects of the dispute other than the fixing and allocation of costs and expenses, so they will know there's a no-go zone.

Tipping J Doesn't the mess- up that has arisen in this case simply show that there is a major risk that things will go wrong if you can't expressly ask the arbitrators to reserve costs and remind them of it? What's the difference between putting it in the submission? The Court of Appeal seems to be saying that you can't even mention the subject.

Raymond The Court of Appeal in my submission is saying that it creates major practical difficulties in doing so for the reasons which I have said.

Tipping J For one I am not inclined to think that's very persuasive and for two I would have thought it could lead to serious difficulties because arbitrators will tee-off on a false premise, because you can't ask them to reserve them orally and it would seem implicitly in writing because that will let the cat out of the bag.

Raymond Well no you can ask them to reserve the costs in writing as part of an Arbitration Agreement.

Tipping J Well I'm not sure that necessarily follows.

Raymond You asked the arbitrators to deal with the question of costs following the making of the award and following submissions from the parties.

Tipping J Well if the Court of Appeal are right there's the risk that that would let the cat out of the bag too. I don't know Mr Raymond, it seems to me that this whole area is of general importance, particularly this question about whether you can mention it at all and I would have thought there was a sufficient link with the ultimate question which is whether they erred in law by reserving. It might justify a look.

Raymond Where would that line of inquiry take this Court Sir because the inevitable result would be possibly that because there wasn't a reservation of costs maybe it was an oversight by counsel, maybe it was because there was an expectation that they were always going to be dealt with. We have a successful party who is entitled to have costs dealt with. There is a line of authority and the Court of Appeal have confirmed that it can amount to an error of law if costs aren't reserved. The successful party in this case misses out on costs.

McGrath J The line of authority though is largely at first instance the High Court and in some cases the Employment Tribunal that you're referring to. As I understand the applicants' argument and you may say it's a very literal argument but it is basically that you have to ask for it during the course of the hearing prior to the award and that the scheme of the Arbitration Act is that you cannot do so later, now that's a very simple proposition. That is an argument that's based on the language of the Act and its limitations and I think that you haven't really addressed that but that I think is the answer that would be given to your proposition that surely we're entitled to our costs anyway. Procedurally the argument runs because you didn't ask for them in time.

Raymond Well that would in my submission create significant justice for the appellant if it is an oversight of counsel for asking for costs to be reserved.

Tipping J The fact that we might grant leave doesn't inevitably mean that you're going to lose.

Raymond No I appreciate that Sir.

McGrath J It might be an injustice but if it's an injustice it might be wrought by the Act. I mean the whole question of when an Act seems that on one point of view harsher and complete how far a Court can go beyond the language in some way looking at the scheme and purpose of the provisions to fill gaps as once put by the former President of the Court of Appeal, is quite an issue. It just seems to me that it is at the heart as I understand it of the argument that Mr Hodder's advancing. If I'm wrong on that I will be corrected.

Raymond Well it shifts with respect because I mean I understood and as it was opened by His Honour Justice Tipping, was the Court of Appeal wrong in essentially concluding that costs should not fall where they lie. Now the debate seems to be whether or not it's a matter of general importance. Whether or not counsel can or are able to reserve costs at the conclusion of arbitration.

Tipping J Well it's a sub point. Part of the reasoning for the Court of Appeal invoked this to me a rather startling proposition. It's in Mr Hodder's interest to have as high a level point as possible because as long as an argument he wants to run is fairly within it he's stuck with that point. He says that's his ground and he's content with it. Now if you can turn aside this particular argument on the basis it doesn't fairly come within the ground well that would be very satisfactory from your client's point of view but at the moment it seems to me that it's all bound up in this question of was it an error of law not to reserve costs. That's the ultimate crunch point. The Court of Appeal says it was. Part of their reasoning is that it was a no-go zone for counsel to ask for anything to be reserved.

Raymond Yes and perhaps you struck the nail on the head with respect Sir that it's only part of their reasoning. Paragraph 97 deals with a number of other issues, for example that costs associated with an arbitration are an integral part of every arbitration to be dealt with.

Tipping J Well we may well be able to say on full inquiry Mr Raymond that although they were completely wrong in what they said on reserve and costs, your client succeeds anyway. I don't know but it is a point that attracts me, attracts is not the right word, I don't mean it appeals to me but it seems to me to be the sort of general point albeit a subsidiary point under the main point that it is of some public importance, and if the Court of Appeal are saying you can't mutter the word 'reserve'.

Raymond Did they go that far Sir? They say at 98 "we note that where a settlement offer has been made there is a major practical difficulty in requiring a party to ask the arbitrators before the award is made to reserve its costs" and my submission is that depending on the circumstances it could create a major practical difficulty because you start straying into dangerous territory especially with non-qualified

arbitrators, and then they go on to say "it would be impossible to tell the arbitrators why that submission has been made without breaching the obligation under 6(2)(b)" because they for example may say well as I said before we want to deal with costs now thank you Mr Raymond, we don't want to reconvene on a $100,000 claim in two weeks time.

Tipping J Well all you can do then is to request that costs be reserved and if the arbitrators are silly enough not to take the hint then you've got a complete platform to intervene. I don't want to appear difficult and I sympathise with your client actually for having to face an argument that this is such a high level error that it's got to come to this Court but I would have thought that it is quite important generally as to whether arbitrators can or should reserve costs in these circumstances and their failing to do so is an error of law that can be addressed. It has general ramifications. Are you able to persuade us that Mr Hodder's proposition is so unarguable that we shouldn't give leave for that reason?

Raymond Well generally speaking we're dealing with a cost issue in this arbitration and I refer to the authorities that are in my submissions that there have been rare cases where costs issues will go.

McGrath J But there's the reservation in those authorities that's important in this case isn't it.

Raymond If a true question of principle.

McGrath J Yes.

Raymond Yes, well in my submission it's not a significant principle. I think that the Court of Appeal's decision and the ones before it about failing to reserve costs when there is a full expectation that they will be dealt with can amount to an error of law and in this case is and the proper place for it is to be referred back to is the Arbitration Tribunal. I see it in that narrow light and not just for convenience sake, that's what I think the decision is really saying that the parties expected costs, the agreement between the parties was that they would deal with costs pursuant to 6(1)(a). Costs are a part of every arbitration and whether counsel asked for costs to be reserved or not is immaterial and that in my submission must be right and in failing to deal with them at all amounts to, can amount to, and in this case did amount to an error of law justifying remittal back.

Tipping J Is there some assistance to be gained for your argument being quite specific in the fact that is it clause 6(1)(b), yes 6(1)(b) says "in the absence of an award or additional award" does that add forth to your argument in that it's made quite clear there that you don't necessarily have to deal with costs in the first award or the purportedly final award?

Raymond Correct Sir, you can deal with it in the second award as indeed we have just done in a subsequent arbitration. There was two awards, one with respect to the arbitration and one with respect to costs, where the successful party in that case got a significant award of costs because the costs were explicitly sought.

Tipping J And your argument, or your clients' argument I suppose was that you were entitled to seek and the arbitrators were entitled to deliver an additional award within the meaning of 6(1)(b) because implicitly you had asked the costs. Is that the nub of the reasoning?

Raymond Yes, and that was the initial argument and why we asked for an additional award in the first place. You haven't awarded costs please make a second award. They did make a second award. Her Honour Justice Ellen France set that aside in the High Court on the basis that there was no jurisdiction but remitted it back to the arbitrators. It wasn't cross-appealed because the result was the same because they were going to deal with costs in the first award and as Justice Chambers said in his dissenting judgment the same purpose was achieved. Costs were going to still be dealt with by the arbitrators whether a second award has passed a first award.

Tipping J But I have got have I Mr Raymond the precise thrust of your clients' position? We had put costs in issue implicitly, they didn't deal with them, we asked for an additional award, we were entitled to so ask and they were entitled to deliver one.

Raymond Yes and that's what happened. We got a second award which awarded $106,000.

Tipping J You needn't go on, you needn't go on, I just wanted to make quite clear that I had the essential drift.

Raymond Yes and then for various legal arguments which relate to Article 33(3) which is just above Schedule Two on the page I think you're looking at Sir, the second award was set aside because that says "unless agreed otherwise by the parties with notice to the other party the arbitral tribunal is to make an additional award as to claims presented in the arbitral tribunal and the argument my friend made in the High Court was the costs claim wasn't presented in the arbitral tribunal because no-one specifically asked for it. What Justice Chambers has said, and also the majority, is that in every arbitration costs are sought and therefore it was presented, it was a claim presented in the arbitration and it should have been dealt with and its failure to deal with it was an error of law.

McGrath J And by that reasoning he reaches the conclusion that article 33(3) does not exclude it, does not exclude an application for the additional award.

Raymond Yes.

Tipping J And that's where Mr Hodder's client seeks to join issue and say it's not implicit in every arbitration, that's the sort of high level issue that is said to raise a point of general and public importance.

Raymond. Yes

Tipping J And you have to say I think it does, it does. You have to say that it's so unarguable the other way that we shouldn't give leave. That's why I'm trying to steer you.

Raymond That's right I am saying that. Thank you for the steer. What I'm saying is that it must be right. In the first few moments I said that I endorsed the comments of the majority where they said at 97 "there is no doubt" and they put it that highly and it's one I subscribe to. There is no doubt in our view that the costs associated with an arbitration are an integral part of that arbitration. That to me is a strong phrase. No doubt and an integral part, and it's so obvious that it goes without saying, it's so obvious that under clause 6(1)(a) there was a legitimate expectation that costs would be dealt with and they go on to say traditionally costs follow the event and that it isn't a matter of general importance for that to be clarified. It's as clear as day that in arbitrations arbitrators deal with costs and I with respect didn't think and still don't that that is a matter of general importance or general commercial significance which should trouble this Court. The Court of Appeal has confirmed it, the High Court said as much in its decision when it made clear to the arbitrators on the decision for recall, it made clear that all costs should have been dealt with at first instance by the arbitrators, that's what Her Honour Justice France said in the High Court.

Tipping J Yes, well I think we understand entirely Mr Raymond what your clients' stance is, thank you, is there anything more you want to add?

Raymond No Sir not unless you have any particular questions.

Tipping J No thank you. Yes Mr Hodder, anything in reply?

Hodder Thank you Sir. Perhaps I could deal with the reference to Justice Chambers' partly dissenting judgment which really emphasises the first point we make, that is that if there is a writing-out in effect of clause 6(1)(b) of the Act, and obviously we have an arguable case if there is which we want to take further, can I invite Your Honours to look at clause 6(1)(b). It contemplates two scenarios. On the one hand there is an award or additional award in which case (b) doesn't apply, so that whatever it is that's been dealt with by an award or additional award, it also contemplates a situation where there is no award and it then goes on and says what happens and it says costs lie where they fall. If in every case it is implied as a claim presented that costs are sought then it must be dealt with an award or an additional award. There's no room

left for the situation of no award or additional award and at 33(3) says "an additional award as to the claim presented". If in every case it is implied there is a claim presented then in every case there must be an award or an additional award. There simply is no room left for the costs to lie where they fall and that part of the Act becomes redundant. No with respect to His Honour Justice Chambers, his judgment we say fell into error on that point and there's a flavour of that in the majority judgment, although their approach is a slightly different one on this particular point and say "it's nothing to do with claims presented it just should have been reserved" without particularly saying with respect quite why. That was the only point I wanted to make in way of a reply Your Honours.

Tipping J So you're saying in effect that if costs or if a request for costs, claim for costs is implied into every arbitration there's no room for the default provision ever to operate.

Hodder Correct.

Tipping J I understand the argument, thank you. Thank you Mr Hodder. The Court proposes to reserve its decision in this matter. We are grateful to counsel thank you.