IN THE SUPREME COURT OF NEW ZEALAND

SC CIV 26/2005

IN THE MATTER	of a Civil Appeal
BETWEEN	**CASATA LIMITED**
	Appellant
AND	**GENERAL DISTRIBUTORS LIMITED**
	Respondent

Hearing 5 October 2005

Coram Elias CJ
Keith J
Blanchard J
Tipping J
McGrath J

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

CIVIL APPEAL

10.00 am

Hodder May it please the Court I appear with my learned friend Ms Fairbrother for the appellant.

Elias CJ Thank you Mr Hodder

Raymond May it please the Court, my name is Raymond and I appear with my learned friend Mr Scragg for the respondent.

Elias CJ Thank you Mr Raymond, Mr Scragg. Yes Mr Hodder.

Hodder Thank you Ma'am. In response to a Minute from the Court last week we submitted yesterday a supplementary submission and some associated material which I assume the Court has received those?

Elias CJ I'm the only one who didn't receive it because I was out of the office for most of yesterday but I understand what's in it, it's been communicated to me and thank you for that indication. You're not going to take the suggestion proffered to you by Justice Tipping, is that the position.

Hodder In essence we don't feel able to say that that should be part of our case, no ma'am.

Elias CJ Yes, that's fine, yes thank you.

Hodder Recognising with regret that it's against our interests to say so.

Elias CJ Yes.

Tipping J You're not going to abandon all reference to the clause I imagine Mr Hodder.

Hodder Not at all, no your honour. I will touch on that matter at the end of what I propose to say by way of introduction to this matter. I anticipate this may be one of the narrower issues that this Court will be troubled with but it does rest on some fundamental points regarding the arbitration of disputes and the interpretation of statutes which is why the matter is here. And if I may be forgiven for stating some truisms in relation to some of those things, arbitration is a valuable process for the resolution of disputes. It is distinct from litigation in the sense that the tribunal has a limited role and, importantly, a limited life. It is only there, that is the actual tribunal is only there to determine the particular dispute and axiomatically it cant determine things that aren't in dispute. So what is the dispute? Ordinarily the dispute is going to be defined by the parties in the agreement which creates the basis for the arbitration. Or in the pleadings. Or in the way the case is presented at a hearing. As mentioned, the tribunal has no power to go beyond the dispute as defined and so that founds the lessor's essential submission that there is no obligationn in the law for an arbitral tribunal to enquire if the parties have themselves fully defined the dispute. They either have or they haven't by their own conduct up to the point where the arbitration proceeding is concluded. And this appeal in our submission has rested on a proposition that insofar as it goes beyond that, the Court of Appeal judgment's in error.

Those are obviously submitted as generalities and what I would like to do is to demonstrate if I may that the arbitration act itself lends explicit support to each of the things I've identified in there and I trust that members of the Court have received the bundle which included a loose copy of the Act and it may be convenient to take you through that.

Elias CJ Yes, thank you that's very convenient.

Hodder So if I can just as it were do a quick tour of the Act to emphasise some of the points that in my submission are relevant to the context in which this appeal is to be considered. And recognising this is only once over likely but one starts of course with s.5 which recognises it is encouraged the use of arbitration as an agreed method of resolving commercial and other disputes. Moving from any suggestion that's some kind of inferior cousin and to base consistency around the use of the model law. One of the features of course of arbitration is that you don't have to be an experienced and respected lawyer to be a determiner of the dispute. And the fact that this Act is meant to be used by lay personnel rather than those trained in practising the law is, we say, significant in the way that one approaches an Act such as this. Section 6 has the opt in-opt out regime in relation to the first and second schedules and so the effect of 6(2)(b) is in the ordinary course the provisions of the second schedule will apply to a domestic arbitration. And there's no doubt that that is the case here. That is to say that the second schedule was meant to apply and there were no explicit exclusions from it for these purposes.

Section 10 on the eligibility of disputes raises a point which I touched on earlier, that is to say arbitration's are concerned with disputes. It is any dispute which is to be determined by arbitration. And likewise s.12 talks about the powers that there are to determine disputes and this is under the heading, and provides a general jurisdiction that the tribunal can award remedy or relief that could have been awarded if the dispute had been the subject of civil proceedings in that Court.

The rest of the Act possibly doesn't need mention at this stage for my present purposes. The first schedule is of course the model law with a very minor number of amendments and most of that is not touched on at this stage or doesn't need to be touched on at this stage. But if we can go to article 21 on page 2698 of the reprinted statute pages. It is there the commencement provisions are framed in terms of a particular dispute. And likewise in relation to the elaboration of that, article 23 contemplates there will be statements of claim and defence within a period of time agreed or unless the parties have otherwise have required and then article 23(2), there's provision for amending or supplementing the claim or defence during the course of the arbitral proceedings. And for our argument, I should interpolate that we accept that had there been a request for costs made before the proceedings had commenced, that would have fallen into making a dispute on that point.

Tipping J You say before they've commenced. Do you accept.

Hodder Before, I'm sorry that's a slip Your Honour, before they terminated.

Tipping J Terminated, yes.

Hodder Yes. Moving onto article 28. The rules applicable to the substance of dispute. Again the reference to deciding the dispute in accordance with the rules of law chosen by the parties. For our purposes, it's the contact and the ordinary law reflected of course in article 28(4). And then that takes us perhaps a little more directly relevantly to some of those provisions touching on this appeal. If I can just notice in passing that article 31(4) contains, sorry, article 31(5) provides unless the agreement otherwise provides or the award otherwise directs, the sum directed to be paid by an award shall carry interest. So there's an explicit provision about interest. There's no equivalent provision about costs. And we will say that has some significance when one is reading the statute as a whole.

And then, importantly, 32, the arbitral proceedings are terminated by the final award. The other parts are not relevant to present purposes. The significance of termination then becomes clear from 32(3). The mandate of the tribunal terminates with the termination of the proceedings. Which goes back to my point about an arbitral tribunal having a limited purpose and a limited life. It's life effectively expires with its award made under 31 that prescribed for its termination under 32. Importantly 32(3) says, subject to the provisions of articles 33 and 34, now 34 has no application here, but we need obviously to turn attention to 33 itself. And the only part of 33 that need take our time in our submission is 33(3) which says, unless otherwise agreed, a party with notice may request within 30 days of receipt of the award the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. And the essence of the case for the appellant is that there was here no claim presented in the arbitral proceedings or indeed omitted from the award which covers the question of costs. The point is almost as narrow as that. And we say that when one looks at what is a claim presented, one goes back and looks at what the dispute is and what is the dispute is what's defined by the parties themselves during the course of the arbitration proceedings. So the basic proposition then is that an arbitration proceeding will come to an end with a final award subject only to there being something left out which was a claim presented and not dealt with under 33(3). If there is no such claim, and we say there wasn't, and the High Court agreed at the first instance on this point, then that's an end of the matter.

Tipping J This award, or the first one, was published as I read it, as a final award.

Hodder Yes sir.

Tipping J There was nothing to suggest that it was other than a final award.

Hodder Yes.

Tipping J Is that fair?

Hodder Absolutely Your Honour. I don't understand it's been contested that on its face it's a final award. The argument then goes on to whether there's some kind of implication of reservation but on its face there's no such indication.

Blanchard J Is it your argument that the claim for costs had to be made before that publication.

Hodder Yes Your Honour.

Blanchard J So you could have had a hearing with nothing said about costs. Someone had to put their hand up before the award was published.

Hodder Ideally before the hearing finished.

Blanchard J Yes.

Hodder There is perhaps an argument and a grey area after the hearing finished and before the award came out. But certainly when the award comes out, article 32 tells us that's the end of the tribunal's existence effectively if there's nothing reserved.

Now in terms of costs the parties had, as the Court's aware, 2.3.6 of the lease itself which I'll come to a little later. But in terms of the Arbitration Act itself the second section applies because there was no opting out and takes us into clause 6. And we say that clause 6 fits in perfectly well with the structure I've outlined arising out of articles 31, 32 and 33. And says, unless the parties agree otherwise, then the costs and expenses of an arbitration which are defined expansively, shall be as fixed and allocated by the arbitral tribunal in its award under article 31 or an additional award under 33(3) or, in the absence of either a 31 award or a 33 award, then each party shall be responsible for the legal and other expenses of that party because costs lie where they fall. And we say that's precisely what has happened here. There is no agreement in relation to party/party costs. There is no award under 31. There is no supplementary award under 33(3). Ergo 6.1(b) applies. And again, the argument is a relatively narrow one but that is the essence of it.

Tipping J The implication in 6.1(a) apropos of an article 33 additional award must I imagine clearly be that it is an additional award lawfully made.

Hodder Yes. Yes it must be right. And would contemplate what would be an entirely orthodox situation and so in commercial arbitration, what

everybody says to the tribunal during the hearing, and by the way, costs should be reserved, logically because we'd all know where we are after the decision comes out as to who won and how much by. And sensible costs submissions can be made then. In those circumstances we would have no difficulty with the proposition that 33(3) applies subject to the time limit issue and there's no difficulty. But that is not this case. And it may not be the situation in other cases which is why the case in our submission has some general importance.

Now the argument that we're advancing depends very much on the Act being self-contained. So our general proposition is that the Act is a new landscape. And it isn't sufficient or appropriate to say by reference to some other jurisdictions in some other fields that perhaps there's an implication that costs are always reserved irrespective of whether that's mentioned or not. The point that the Act is a new landscape and is to be read as a self-contained matter and by lay users of it as well as by legal users of it, is the reason for our inclusion of the Lesotho Decision of the House of Lords recently (**Lesotho Highlands Development Authority v Impregilo SpA** [2005] UKHL 43 (30.6.05)) there where Lord Steyn refers to the fact that this is a very radical departure from the previous British regime and in his speech he quotes a number of matters which go to that point which we rely on for as it were a contextual aspect of this particular appeal.

Elias CJ Is it necessary for you to go as far as this. Because on your argument it's simply, you just simply apply 6.1(d).

Hodder I understand.

Elias CJ And so that's not, that's nothing to do with whether the Act is self-contained. It's just giving effect to a legislative provision.

Hodder Yes ma'am I understand the argument against me to be that you can and should go beyond what the words of the Act say and look what the old law said or what the law says in the resource management or town planning area or some such.

Elias CJ Yes.

Hodder I'm merely meeting that argument. For my purposes we stop, we are fully within the statute.

Elias CJ Yes.

Tipping J Mm, mm.

Hodder We read the statute, apply the statute and the appeal can be determined on that basis.

Elias CJ Yes.

Hodder The argument against me says you have to somehow or other take a somewhat more expansive view of your claim being presented than the words themselves suggest.

Elias CJ Yes.

Hodder So, insofar as the case for the lessee, the respondent.

McGrath J Are you coming back to Lesotho?

Hodder Yes I am Your Honour.

McGrath J Right.

Hodder Just to explain before I get there. Insofar as the case for the lessee says you can look at other authorities such as the **Fife** case dealt with under the Town Planning Act or something else dealt with under the Employment Act, we say it doesn't help. Likewise any references to the previous legislation either in the United Kingdom or in this country. We say it doesn't help.

McGrath J Mr Hodder can I put to you that that argument in relation to what Lord Steyn says in Lesotho is stronger when you're looking at the meaning of the provisions that adopt the model law than in relation to the provisions of the second schedule which is a domestic supplementation which the law commission report rather indicates was put in there to clarify certain matters. But the real point I want to make is that your interpretation argument is stronger in relation to the first … the second schedule.

Hodder I think I'd resist the point to some extent Your Honour. Partly I think the law commission report indicates that those supplementary provisions were put in at the request of I think it was in fact the Arbitrators' Institute to provide clarity for members of the Institute.

McGrath J Certainly submitters were asking for clarification on certain matters.

Hodder On the matters in the second schedule.

McGrath J And the names of some arbitrators were mentioned as having specifically indicated that.

Hodder Correct. And those were matters that are now dealt with in the second schedule so they come to that point as well. The other aspect of the response is that when one looks at some of the material that's collected by Lord Steyn in those paragraphs 17 to 19, the

point is partly based arounnd the idea that the Act has to be used by non-lawyers. And that's as true of the second schedule in our case as it is of the first schedule. And as I understand Lord Steyn's comments, they are directed to apt as a whole in the UK as well. Not just that part which is directly related to the model law.

McGrath J The impression I get and I may be quite wrong, is that NZ has gone further with its optional regime than Britain has, is that correct?

Hodder I'm reluctant to express any particular view at how far the British statute has gone, I haven't studied it in detail. As I understand it what the British version does is to take most of the principles and some of the language of the model law whereas what we have done is to take the whole of the model law and its own language and put it in the schedule which is effectively the centrepiece of the Act.

McGrath J But we've then supplemented that with our own language.

Hodder Yes we have.

McGrath J And it's ended up in the end with provisions that are in a New Zealand statute and we don't have to be worried in that regard about trampling on an international measure.

Hodder Whatever decision is made in this country and by this Court about the second schedule is not going to somehow clear the pitch for the interpretation of the model law anywhere else.

McGrath J Thank you.

Hodder I understand that point and accept it entirely. I think our point is directed at a different level, which is that the second schedule is an important part of the Act and the Act as a whole should be in a user-friendly form.

McGrath J Thank you.

Keith J It is, clause 6 is tied Mr Hodder isn't it to 31 and 33 as you told us earlier.

Hodder Directly Your Honour.

Keith J So that it is a supplement but it's a supplement being read with the provisions of the first schedule.

Hodder Correct. And if I can agree with the Court of Appeal judgments on the one point in this, that is that when they take a different view from I think it was Justice Fisher in the **Opotiki** case where he somehow thought there was a separate power beyond 31 and 33 to deal with costs. (**Opotiki Packing & Coolstorage Ltd v Opotiki**

Fruitgrowers Co-operative Ltd (In Receivership) [2003] 1 NZLR 205 (HC, CA).

Keith J Mm, mm.

Hodder The Court rejects that in the joint judgment and we say correctly for that very reason, there's a direct linkage back into those provisions.

Keith J I mean there is the general ethos of the legislation of giving greater weight to party autonomy as compared with judicial intervention isn't there.

Hodder Correct. The other side of that, if I may say so, is that party autonomy in a sense carries a degree of party responsibility which we say is relevant here.

Keith J Mm.

Hodder That if the parties are autonomous to choose their own provisions and define their own disputes they can't sit back, as happens in some of the town planning jurisprudence and say, well I didn't think about that but the Court can rescue me by way of some sort of appeal.

I perhaps don't need to spend more time on Lesotho in the light of that discussion. I just draw attention that there's discussion at various points there about the idea of user-friendly language and the use by non-lawyers of the legislation and we say that's entirely appropriate here. All that's consistent in my submission with what the Law Commission's report states as well.

So there are three aspects we say to the legislation in general terms. A. it's self-contained, B. it's lay user-friendly, and C. although I haven't really mentioned this, it has a format which can be described as agreement or default rules. That is to say that where the parties have an agreement about some aspect of the arbitration, in almost all situations apart from some core natural justice provisions, the parties' autonomy is entitled to make that govern. But if they don't there are a series of default rules which means you have a workable arbitration framework without having to write any agreement almost. And so those three elements we say define this Act and are to be borne in mind when interpreting any particular part of it.

So in our submission the Act is to be read that way. It's perhaps another truism to say it should be read as a whole, that is to say, it all should be understood to have some useful role to play and the Court will be aware from our written submissions that our criticism of both the joint judgment and Justice Chambers' judgment in the Court of Appeal is that it really writes 6(1)(b) out of existence. And

then somewhat, we say, unfairly, in the joint judgment case, then says perhaps Parliament should do some re-writing itself. So that's the kernel of that proposition.

Tipping J The writing out of existence would arise would it because if the implication that Justice Chambers in particular favoured applied in all arbitral contexts, it would always be an error of law to omit to deal with costs and therefore there would be no room for any default operation.

Hodder Correct. Every.

Tipping J Is that it in a nutshell.

Hodder Unless you made an award or an additional award, you would be in error and you'd never get to 6.1(b).

Tipping J Yes.

Hodder That's exactly the point we're making.

Tipping J Mm.

Hodder So the lessor's logic in relation to this will be plain. Firstly there's no prior agreement save as to 2.3.6 and the tribunal's own costs. Secondly there's no claim was presented either by way of the original agreement or by way of pleadings or by way of the case being presented before the tribunal itself. Therefore there was no basis for either an article 31 or a 33 award, therefore 6.1(b) should apply. And costs should lie where they fall.

That was the argument that we advanced unsuccessfully in the Courts below and that's the argument with apologies for repetition that we are advancing in this Court as well.

So the real issue as we apprehend it is perhaps as narrow as to say, what is meant by a claim being presented in terms of article 33(3) which we say underpins the whole structure of the Act because if there was no claim presented and there's no scope for 33 to apply, then in our submission there's no basis for any decision other than that costs should lie where they fall here.

Justice Chambers at paragraph 134 of the judgment asserts that a claim is presented in the sense of costs the moment that one opts in to, or rather one fails to opt out of, in this case, the second schedule. So as long as you have contrived to have clause 6 apply to you he says effectively, then there is a cost claim presented and all follows from that. The only point, but we say the effective point, in reply to His Honour is simply that if that is right then 6.1(b) is entirely redundant.

Other point is that we would rely in relation to the statutory construction are that the Act does not make express provision for costs in the way that it does for interest as I mentioned before in article 31(5) and nor does it deem there to be a cost dispute as part of the agreement. Clause 1 does that for example in relation to the appointment process.

Keith J I notice Mr Hodder that the 1938 Act did make an exclusive provision didn't it that said that the parties could within 2 weeks I think seek costs.

Hodder Yes, yes the 1908 and 1938 combined Acts have a quite different regime.

Keith J Mm, mm.

Hodder Which is why in our submission it's unhelpful.

Keith J Yes, mm.

Hodder So there's a general discretion under s.4 in the schedule provision under the 1908 Act and then the 1938 amendment was designed to deal with I think it was insurance company's habits of writing in a "you shall pay all the costs in any event" clause.

Keith J Right, right.

Hodder Which tended to discourage the insured from taking the point.

Keith J But it then gave a statutory right to the parties to seek costs after.

Hodder Out of time as it were.

Keith J The order was given.

Hodder Yes precisely. And there is nothing remotely like that in this legislation.

Keith J Yes, mm, right.

Tipping J The definition of arbitration agreement to which you haven't made express reference Mr Hodder, but I think it should be put on the table as consistent at least subject to further argument with your thesis because it talks about arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes. Now the whole thrust of this seems to me to build out of the submission that the prima face obligation is to put your disputes before the arbitrators. All of them.

Hodder Yes.

Tipping J However many you have. And if you haven't done it in the agreement, and clearly here this agreement, whatever else it, and I accept and appreciate what you've said about the contractual aspects of the clause, the clause itself clearly does not commit any question of party/party costs to the arbitrators in clear distinction to the commission of the arbitrator's own costs which of course are always alive.

Hodder Yes.

Tipping J So it seems to me with respect that maybe something that would be helpful for Mr Raymond to assist at least me on seems, it's the foundation if you like of the whole jurisdiction, the agreement.

Hodder I have glossed over the definition for which I apologise. I hadn't actually focused on the word "certain" particularly in thinking about this but the word certain is rather contradictory, the idea that somehow there can be an implied dispute lurking in there which nobody knows about until after the event.

McGrath J Mr Hodder before you go too far into your, there's no claim argument, can I just come back to clause 6 and suggest to you that one possible way of looking at clause 6 is as a provision that confers a discretion on arbitrators in fixing and allocating party and party costs but also carries with it a duty to keep that matter open until what is known of the rest of the final award is determined and so that the question of costs can be considered. And that if that, in other words, it's one of those discretion's that also carries with it a question of duty, it's a sort of concept that I think **Julius v Bishop of Oxford** or one of those old cases picks up. Now if that's so, it might well be that it's an error of law for arbitrators, in this in the first award, just simply to charge on and make a final award without keeping open costs at least until they know what the parties want to do about that and to hear the parties if they want to make submissions. Now I'm putting that to you not as a question of claim or anything of that kind because I am rather attracted by your argument on that basis, but really as a question of looking at the true meaning and nature of clause 6 itself.

Hodder I think the primary response to that Your Honour is that if one accepts that clause 6 feeds back into awards made under article 31 or 33, one cant escape the relevance of the claim presented part. Because it's the concept of the dispute the claim presented, the determination of those matters and into the awards whereas if I understood you right, the idea is that there's a rather ancoic (?) kind of an obligation lurking in there somewhere outside the question of

a claim being presented. That would be somewhat inconsistent with the importance that clause 6 places on linking back into 31 and 33.

McGrath J Don't we have to focus on clause 6 as a special provision that's included in the second schedule which is an addigenous measure explicitly conferring a discretion and to look at whether, given that it's being exercised judicially, that carries certain responsibilities with it.

Hodder I may be repeating myself somewhat Your Honour but we would say that there's nothing particularly different about the way one approaches the second schedule from anywhere else in the Act. It's all part of an overall scheme to apply and the presumption is that it will apply in all New Zealand arbitration's.

McGrath J Yes.

Hodder So it has no secondary status. It has the same status as the rest of the Act.

Tipping J I also wondered about that Mr Hodder. But what I ultimately came provisionally at least to the view was that the duty arises if you characterise this as in part a duty only if costs are put in dispute.

Hodder Well that I think Your Honour's putting my case in part. But the point that I'm making about there has to be a dispute before the jurisdiction's enlivened is really the central point that I would respond to Justice McGrath's point.

McGrath The content of any such dispute over costs is very different to what it was that got the particular matter to arbitration isn't it.

Hodder I think there may have to be a series of assumptions made about that which I'm not sure that I would necessarily accede to. If one goes back to the starting proposition that says you have two parties who have a dispute, then what they can do either before or after the event is they can create a jurisprudential phenomena, namely an arbitral tribunal with a limited purpose and limited life. And its limited purpose is to deal with the disputes that the parties want resolved. If they don't tell the tribunal what they want resolved in any form, our proposition is there can be no obligation on the tribunal to go seeking for it. Or even on Your Honour's point, to wait for it to be emerged at some late stage. In this case there were three opportunities for this, I'm using that in a broad sense, but in a case like this there would be at least three opportunities to put this point in issue. First, the original agreement and it's not in 2.3.6. Secondly the agreement to have the arbitration which is the Chapman Tripp letter which says it's under the 1996 Act, nothing about this. And thirdly in the absence of any pleadings, or probably

fourthly in the way the case was conducted before the arbitrators themselves.

McGrath J Yes.

Hodder To then say that there's an obligation on the tribunal which amounts to an error of law when it doesn't pick up the point, we say it expects too much.

McGrath J Well I suppose that what you say in terms of opportunities is absolutely correct insofar as matters that are subjects of claims in relation to the disputed concerns. But to me it seems that what we have to do is to focus on the true nature and meaning of clause 6 itself as a provision that clearly, although implicitly, confers a discretion on arbitrators to fix costs. Now given they're acting judicially, does it carry some element of duty with it? If so, we're outside the claim area and what is part of the dispute. We're into certain procedural matters and obligations arbitrators are given by statute if there is a duty.

Hodder No, I still resist the point that if they're going to make something under 31 or 33, which is what's contemplated under 6(1)(a), then there must be a claim presented and there must be something that's notified or explicit before you get that far.

McGrath J Well I think that perhaps, would it be fair to categorise your response as saying there can be no duty in respect of clause 6 at least even to keep open the matter until it's heard from the parties once the outcome of the dispute is known. There's no duty of that kind because it would be inconsistent with article 31 and article 33, in particular article 33.

Hodder Yes. Indeed. And if I can just add to that, it ties to my point that party autonomy carries with it a degree of party responsibility. It's not the tribunal responsibility; it's the party responsibility.

Keith J You're saying it's not.

McGrath J I understand your position, thank you.

Keith J It's not just a lack of duty, it's a lack of power isn't it, you're saying?

Hodder Yes, there is no.

Keith J They just have no power to decide the matter unless it's been brought to them.

Hodder Yes, there would be an excess of jurisdiction at that point.

Keith J Mm.

Hodder If they either failed to give their award or failed to refine the award or they went ahead and determined the costs on some basis when they weren't in issue.

Blanchard J Mr Hodder, I appreciate the force of your submission that the Act is self-contained and we don't look back. But I am a little curious about the provision that Justice Keith has mentioned which I'm not aware of requiring that under the 1908 Act costs claims be made within 14 days, if that was what I understood.

Keith J Yes.

Hodder If Your Honour has the supplementary bundle, the text is in there. The bundle we filed yesterday. The text of s.14 is under Tab 2. And His Honour was referring.

McGrath J Sorry, what Tab are we at?

Hodder Tab 2 of the supplementary bundle

McGrath J Thank you.

Hodder 14(2) is what's been referred to.

Blanchard J Yes, thank you. Do we know what the reason was for putting that in? Was it to create an ability to make a claim within 14 days or was it to limit the time in which a claim for costs could be made under the procedures in the 1908 Act?

Hodder The 1908 Act is remarkably concise on this. If one goes back to Tab 1 on the same volume, section 4 simply says there are provisions implied in the submissions unless a contrary … is presumed. And those implications are in the schedule which is at the back of the Act in the last page and within the second schedule clause 9 refers to the costs and the reference in award being in the discretion of the arbitrators or umpire. Now there's no time factor written into that which I think was Your Honour's question.

Blanchard J Mm.

Hodder In terms of the derivation of article.

Elias CJ I'm sorry, is clause 9 related to party and party costs?

Blanchard J Yes.

Elias CJ Yes, I see.

Hodder Yes, yes.

Keith J And that's the provision that was in issue in the **Becker, Shillan and Co** case isn't it? (**Re Becker, Shillan and Company and Barry Brothers** [1921] KB 391).

Hodder Yes, yes. Section 14 of the 1938 Amendment actually had a brief hearing in the Court of Appeal in the early 1990s in a case over the lease of the New Zealand Law Society's Building but that lease still carried with it one of those "costs will be paid in any event" provisions which had survived beyond the 1938 Act. And Sir Robin Cooke referred back to Hansard in relation to the point which, when I checked up, is really only concerned with 14(1). The concern was that insurance policy provision that said the insured will pay the costs of the arbitration in any event. And that was what this was trying to overcome. But the reason for 14(2) doesn't emerge from that particular part in Hansard.

McGrath J Mr Hodder, when dealing with the New Zealand legislation as you have, we're referring to a model that is based on the penultimate version of the British legislation, is that right?

Hodder Sorry, were you talking of the 1908 Act?

McGrath J Well, and coupled with the Amendment that you referred to.

Hodder The 1938, yes. Yes that's as it was before the 1950 British Act.

McGrath J Because I just noted that in *Mustle and Boyd*, in the main volume, that is the volume applicable before the 1996 United Kingdom Act was enacted, there's an observation that if the award does not deal with the costs of an award of reference it's incomplete and the Court will send it back. Which goes back to the **Becker Shillan** case that Sir Kenneth mentioned.

Hodder Yes, yes.

McGrath J Now, I suppose what I'm wondering is that that at least seemed to be the position in Britain prior to its new legislation. And although from what you've told us it wasn't the position in New Zealand, perhaps because we were adopting, we were still in the penultimate mode in relation to Britain.

Hodder I couldn't be so definitive about whether it was or wasn't the position in New Zealand. It may have been.

McGrath J It might have been.

Hodder For my argument it doesn't matter. But it's the very reason I've cited Lord Steyn to the Court.

McGrath J Yes.

Hodder That in a sense Lord Steyn is saying you can draw a line over or under the previous legislation and then move forward focusing on the statute as being paramount. And that's what our argument is based on.

McGrath J Thank you for indicating that. We might look further into that. Thank you.

Tipping J The significance of 14(2) in the '38 Act as against what we have now is perhaps that, viewing 14(2) as a kind of default provision, we now have a significantly different default regime.

Hodder Yes Your Honour. The topic is covered in a quite different way.

Tipping J Mm.

Hodder There's a sort of a relatively generous approach to out of time consideration of this topic under 14(2). That generosity doesn't exist in relation to clause 6. That's one of our points.

Keith J And the Law Commission commentary indicates, doesn't it, that in preparing clause 6 the '38 Act and so on were considered but not, effectively not followed.

Hodder Yes. One of the points that one can make in a sort of a "feel the weight, never mind the quality" approach is if one just notices how little there is of the 1908 and 1938 Act compared to how much there is of the 1996 legislation. That reinforces the point that I'm attempting to make about being self-contained and being comprehensive. And the idea that one goes looking elsewhere to try and find what the rules are is what we submit should be resisted in this case and for these provisions.

There is a suggestion in the submissions for the lessee that there is a role for 6(1)(b) where costs are considered and the tribunal decides that they should lie where they fall. But we say that that is not actually the role of 6(1)(b). At that point there has been a conscious decision. And when the award says costs should lie where they fall, it has actually determined it. So it's been dealt with under 6(1)(a), not 6(1)(b). There's still no role left for 6(1)(b).

McGrath J I'm not sure of that Mr Hodder. It means that, in applying in a case where it is to be applied clause 6(1)(a), arbitrators surely can simply decide that they will or will not make an order for costs conscious that there is a default provision which will apply if they don't make an order for costs. And that gives it a role, you may say it's not much of a role, but surely it's a role.

Hodder Well I understand that's the argument that can be made. But our proposition is that if the matter has been a claim presented, which this implies.

McGrath J Yes.

Hodder And they've considered it and then they don't make an award, they just leave it to the default provision, then something's gone amiss again. Once the matter is a claim that's been presented and the request is made that they deal with it, then even if they say that they are going to, as they probably would, have their own costs shared equally and that the costs otherwise would be borne by the parties, that is a determination of the costs issue by the tribunal. It doesn't need 6(1)(d). It's a conscious decision.

Tipping J It's (a) if it's put in dispute. It's (b) if it's not put in dispute.

Hodder That's our argument.

McGrath J Mm, mm.

Hodder Yes, yes. So the general submission is that the members of this tribunal, and any tribunal in a similar circumstance, acted perfectly properly in the first award insofar as they've dealt with costs in fixing their own costs which they were clearly entitled to do under 2(3)(6) and assuming, because they haven't been presented with it, that there was no issue as to party and party costs. And in our submission they should not be castigated for some kind of legal error having proceeded on that basis. The error, if there was any, was that of the lessee in not presenting a claim at the outset, at the time of the later agreement, in pleadings or in the presentation of the claim before the tribunal. In fact, in our submission, there was no error of Counsel or the party involved in that process either. Because, as is indicated in some of the materials we supplied in connection with the Minute, there was and there's a reason why this wasn't pursued by the lessor. There has been in Wellington ground lease matters something of a practice of not being awards of costs. The practice I suspect is under change now. But one of the reasons, or one of the interesting aspects of the awards which I supplied in the supplementary bundle, is that the pattern is very consistently that the awards are of half each of the arbitrators' own costs and with costs to lie where they fall elsewhere. In some cases costs are reserved and other cases there's an invitation for submissions. But there's no, none that we could find during that period, particularly the period when this lease was drawn up, where there was an actual award of costs against any party.

Tipping J Mr Hodder, I don't want to sound difficult, but if, I don't think it's going to matter, but if this is of any consequence, on what basis does this stuff, material come before us?

Hodder I would have seen it as in the same category as unreported judgments probably.

Elias CJ Hardly.

Tipping J Well I don't think we need, personally don't think we need detain ourselves on it at all.

Hodder Well I don't want to.

Tipping J But if you think it's important I'd need to feel some comfort in how it can be relied on.

Hodder My primary reason for referring to it was to try and reinforce the proposition contained in the Minute as being a sensible implication in the circumstances of Wellington ground leases. But in the end I have, as the Court's aware, that doesn't get beyond there on my argument.

Tipping J No.

Hodder Beyond that, as I say, I'd simply make the point that it's isn't necessarily a criticism of.

Tipping J Apart from the standing of one of the learned arbitrators.

Blanchard J I was wondering about judicial notice.

Tipping J I would suggest it doesn't really take us anywhere.

Hodder Well I'm happy to take the Court's indication on that apart from adding that there were many distinguished arbitrators in that collection, not least the present company.

Now Your Honours, unless there was something you wanted to hear from me in relation to the supplementary submissions about the Minute, on which I don't really have much else to say, then I don't know I've really much else to say to the Court on the main point.

(Judges confer)

Elias CJ No, thank you Mr Hodder.

10.45 am

Elias CJ Yes Mr Raymond.

Raymond Thank you Your Honour. I take it from the brief discussion at the outset of my friend's submissions that I do not need to deal with the matter raised by His Honour Justice Tipping in the Minute.

Elias CJ No, that's right.

Raymond Suffice to say that I also consider the answer to the question to be no and concur with my friend's.

Keith J Not even on balance.

Raymond I wouldn't have had.

Tipping J On heavy balance. But you're not completely extricated from the need to consider what influence the clause might have in other respects.

Raymond No Sir, no.

Tipping J No.

Raymond If I was going to qualify it with a sort of an on-balance I would have said an emphatic no.

Keith J Yes, yes.

Raymond But in any event, I agree with a lot of what my friend has said about the background to the Act and so on. The respondent's position is on two bases. First that the Majority of the Court of Appeal was right to conclude that there was an error of law committed by the arbitrators in the first award for not reserving or dealing with costs at all. And I do not accept the submission of my friend that the other cases I referred to the Court of Appeal and which I wish to take Your Honours to have no relevance whatsoever simply because this is a self-contained piece of legislation. The second limb to our argument is that there is force in Justice Chambers' position, supported by the Majority in the Court of Appeal, who didn't need to determine the point because they'd already decided there was an error of law in that there was a claim presented for costs simply because of the submission to arbitration in terms of the 1996 Act.

Tipping J How could there be an error of law unless a claim had been either expressly or per-Chambers, Justice Chambers, implicitly?

Raymond Because fundamentally in every arbitration, as in litigation, costs are an issue between the parties. They are integral in my submission, as the Court of Appeal concluded, to every arbitration, to every matter brought for determination by arbitrators. They are dealt with at the end of the arbitration and costs, as in the Courts, follow the event as

in arbitration's. And it is the respondent's submission that clause 6(1)(b) does not operate to exclude an argument that there has been an error of law where the tribunal has not even turned its mind to the question of party, party costs. I'll come back Your Honour to support for the proposition that there is a claim for costs presented in any arbitration as there was in this one, not only by reference to clause 6(1)(a) but also clause 6(2) and in particular clause 6(2)(b). I'll come back to that.

Elias CJ Mr Raymond it would have to be implicit though wouldn't it? It's certainly not express in the submission.

Raymond It's not express, you mean in the arbitration agreement?

Elias CJ Yes in the arbitration agreement.

Raymond No it's not. And that is because the parties had agreed to arbitrate in accordance with the Arbitration Act 1996. Which contains by clause 6 of the second schedule a provision that the arbitrators shall deal with costs.

Elias CJ Oh I see.

Raymond So it was the reasonable anticipation of the parties that costs would be dealt with.

Tipping J I think by submission I think I was, and perhaps the Chief Justice was, referring to that clause in the.

Elias CJ Yes.

Tipping J Rather than the Chapman Tripp letter.

Elias CJ Yes, yes that is what I was referring to.

Raymond Referring to what Your Honour?

Tipping J The clause.

Elias CJ The clause.

Raymond The clause 2.3.6?

Elias CJ Yes.

Raymond That it should have dealt with party, party costs?

Elias CJ But it doesn't.

Raymond No it doesn't. And under, when that lease was drafted, the 1908 Act applied.

Elias CJ Yes.

Raymond The preceding clause 2.3.6, 2.3.4 says that the arbitration shall take place in accordance with the 1908 Act. Which expressly prohibits any agreement between the parties with reference to costs. That is at least one reason why it may not have been in 2.3.6.

Elias CJ Mm, yes.

Raymond The parties then agreed that instead of arbitrating in accordance with the 1908 Act they would arbitrate in accordance with the 1996 Act which provided, by clause 6 second schedule, that costs shall be determined by the arbitrators. And that is what the reasonable anticipation of the respondent was.

McGrath J Do we have a reference to that rule you've referred to that there can be no agreement for costs? I've read about it in the preliminary materials.

Raymond It's in my friend's supplementary bundle at Tab 2.

McGrath J Yes.

Raymond It's 14(1) of the Arbitration Amendment Act 1938.

McGrath J Thank you. Thanks very much.

Keith J But that wouldn't prevent, would it Mr Raymond, a provision that said the arbitrators are to award party and party costs?

Tipping J In their discretion.

Keith J Mm.

Tipping J This is an "in any event" embargo. It's not something which prevents you from committing the costs to the discretion of the arbitrator.

Keith J As, as.

Raymond No, yes, we say it was to be at the discretion of the arbitrators. They expressly set out in clause 2.3.6 of the lease.

Tipping J No, no, sorry.

Raymond I'm missing the point?

Tipping J You are. I'm looking at it in the light of your submission that the original submission in the lease was drafted against the 1908 Act.

Raymond Yes.

Tipping J Now you said that you couldn't say anything about party and party costs because you were prohibited from doing so.

Raymond Yes.

Tipping J Well with respect I think that's putting it too widely.

Keith J Mm.

Tipping J It restricts you from making an agreement of that kind. It doesn't restrict you from committing the question of costs to the arbitrators.

Keith J In the way that 2.3.4 does in part.

Tipping J Mm. This was to stop the old trick of insurance companies and others I think, as Mr Hodder said.

Raymond Yes.

Tipping J Of saying, you've got to pay your own costs even if you win in spades.

Raymond Yes.

Keith J And also, yes.

Raymond But in any event, with respect to clause 2.3.6, we say that there was express agreement as to how to deal with the arbitrators' costs and no agreement as to how to deal with party and party costs.

Keith J Mm, mm. But there could have been an agreement on the second matter.

Raymond There possibly could have been Sir, yes.

Keith J Well s.14 doesn't stop it as you've shown by 2.3.6.

Raymond Yes Sir. I accept that. There is support for the propositions advanced by the Majority in the Court of Appeal that this was an error of law not to deal with costs in the first instance. Reference was made to **Fife v Devonport Borough Council**. This was a decision of the High Court in 1990. I have a copy of the decision here but in essence it says that at the tribunal hearing in that case no reference was made to costs at all. In its decision the tribunal made no decision concerning costs and, following receipt of the decision,

Counsel sought costs. His Honour Justice Tompkins in that decision said that the tribunal's failure to reserve costs at all amounted to an error of law. The preservation of the tribunal's discretion to deal with costs should not depend on whether counsel at the hearing has made such a request and the matter was referred back to the tribunal.

And as I said earlier, we do not accept that simply because this is a dispute in the arbitration context with its own codified procedures, that such decisions are not relevant.

Tipping J Was that decision of Justice Tompkins influenced at all by the provisions of 14(2) that we've just been looking at?

Raymond Not that I recall Sir, no.

Tipping J Well if, under the old law at least, after 1938, if an arbitrator omits to deal with costs, the parties have an absolute right to seek costs within 14 days. So I don't quite understand how it could be an error of law to omit to deal with them. Because there's a way of dealing with that if you like.

Raymond This was a tribunal hearing.

Tipping J Oh.

Blanchard J What sort of tribunal?

Tipping J Oh sorry, sorry.

Blanchard J So that's a statutory body. It's not a private arrangement.

Tipping J Oh well that's quite different. I'm sorry, I thought it was an arbitration.

Keith J It would be useful to have it.

Raymond I have a copy of **Fife** and I've just arranged for my friend to prepare that. But it was a Planning Tribunal, it was the Planning Tribunal decision. It would be helpful if I take the Court through the relevant parts of that decision. I apologise for the poor quality of the decision, the photocopying of the decision which was.

(Decision handed up)

Tipping J You're not responsible for the quality of the decision Mr Raymond.

Raymond The quality of the photocopying of the decision. Page 27 outlines the background to this particular matter. It related to the appellants, who were lessees of a building in Devonport, taking steps in relation

to those premises. And there was an order requiring the appellants to cease painting, I think it was the outside of the building. The painting was completed but nevertheless they made an application to Council for planning consent and that application was refused. The appellants appealed. The hearing before the Tribunal was in July 1989. The Tribunal reserved its decision. On 23 August 1989 it delivered a lengthy decision in which it concluded that consent to the repainting was not required and so on. At the hearing before the Tribunal no reference was made to costs, nor was there a request by either Counsel that costs be reserved. In its decision the Tribunal made no decision concerning costs.

And if I could take the Court to page 29. And the third paragraph on page 29. But this is not an appeal against the exercise of the Tribunal's discretion. Rather it is an appeal against the Tribunal not exercising the discretion at all and not giving the appellants the right to be heard before it did so.

Elias CJ Just coming through this. Is this because it took the view that it was applying a policy it wouldn't award costs against public bodies, is that what, I'm just looking at what's on page 28.

Raymond I think that was part of the reason for the original decision. Then Justice Tompkins at page 29, about the fourth paragraph down, I'm satisfied that this does not involve a question of law within the meaning of s.162(1). This in my view is placed beyond doubt by the decision of Greig J in the **Petone** case. If, as he there held and with which I respectfully agree, the Tribunal is unable to consider any question of costs once its decision has been delivered, there must at least be grounds to contend that, depending on the circumstances of the particular case, the Tribunal ought to exercise that discretion in its decision or ought to reserve the issue of costs to preserve its jurisdiction to deal with it subsequently should the need arise.

And then in the final paragraph on 29. Thirdly I do not consider that it is an answer to these considerations to contend, as did Counsel for the respondent, that the responsibility lies with Counsel for the appellants for nor formally asking at the hearing for costs to be reserved. It may be that had she done so but the Tribunal omitted to deal with the question of costs it could then consider an application made after the decision has been sealed and issued. But in my view the preservation of the Tribunal's discretion to deal with costs should not depend upon whether Counsel at the hearing makes such a request.

That decision in **Fife** was followed in a subsequent decision of the Employment Court, Justice Palmer, in **Ashburton Veterinary Clinic v McGowan**. And I have a copy of that decision also. But essentially it applies **Fife**. It was an Employment Tribunal decision

where there was a failure to reserve costs or determine costs at all. Costs were then sought at the conclusion of the Employment Tribunal hearing. The Employment Tribunal considered itself functus officio and did not award costs. On appeal Judge Palmer, applying **Fife**, said that Counsel had not sought costs but justly, well it was justly entitled to anticipate that costs would be reserved. And His Honour Judge Palmer said the justly correct course which should be adopted is for the Tribunal to reserve costs in its decision. And a failure to do so is an appealable error of law.

The third case I wish to refer the Court to is a more recent decision of His Honour Justice Young in **National Investment Trust v Christchurch City Council and Christchurch International Airport Limited** [2001] NZRMA 289, (2000) 7 ELRNZ 17. And that decision is.

Elias CJ So the Employment Court decision, do we have a citation for that in your submissions?

Blanchard J Yes we do.

Raymond Yes, it's referred to in my submissions Ma'am.

Tipping J Did Judge Palmer add anything or did he just simply follow **Fife**?

Blanchard J Just a few adverbs.

Tipping J A few adverbs.

Raymond A few adverbs, possibly yes. Paragraph 3.17 Ma'am is the full reference for the **Ashburton** case.

Elias CJ Paragraph?

Raymond Paragraph 3.17 of my written submissions.

Elias CJ Thank you. Yes I see.

Raymond In the **National Investment** case v Christchurch City Council, again the Employment Court did not reserve costs. The Court held that it was not functus and that there was a reasonable expectation that costs would be dealt with by the parties. And I have at paragraph 3.18 of my written submissions the reference from the decision, paragraph 31. Issues as to costs are not ideal candidates for an appeal confined to points of law. However, where a successful party has a reasonable expectation by reason of the practice of the Tribunal concerned or the general law to an award of costs, a failure to articulate convincing reasons for not awarding costs may well amount to an error of law. In this respect the arbitration jurisprudence is relevant at least by way of analogy. And he refers

there to a case of **Everglade Maritime** and a German company whose name I'm not even going to begin to try and pronounce.

McGrath J That case didn't seem to me to be particularly useful.

Raymond No it doesn't Sir unless you go beneath it and look at the cases which are referred to in **Everglade**.

McGrath J Look at the cases that are referred to rather than that case itself, which I must confess I didn't do.

Raymond Yes indeed. No, and initially I didn't either. But I have recently. And the relevant cases in **Everglade** are referred to in the dissenting judgment in fact of Sir Thomas Bingham.

McGrath J Yes.

Raymond But the point where he was making reference to those cases isn't relevant to the reasons for his dissenting judgment and indeed the Majority also refer to the same cases. I have a copy of **Everglade**, it might be.

McGrath J You've indicated that what we should be looking at are the cases cited by Lord Bingham in his judgment in **Everglade** rather than looking at his particular dissenting judgment in that case?

Raymond Yes Sir. There was three cases.

McGrath J That's enough for me.

Elias CJ Well no, for myself I'd like to know how you're relying on them and what they say in the course of this oral argument.

Raymond Ma'am, there was three cases. Two of the House of Lords and one of the Court of Appeal.

Elias CJ Well first perhaps you could just tell us the propositions you're relying on arising from those cases.

Raymond The three cases make clear that in England at that stage there was no appeal on a question of costs without leave. But there would be an appeal allowed.

Elias CJ An appeal from what?

Raymond A decision where no costs had been awarded.

Elias CJ Well was it in a general jurisdiction, was it in a?

Raymond In the arbitration context.

Elias CJ I'm sorry, yes.

Raymond There would be no appeal allowed on a question of costs as of right. You could obtain special leave but the three decisions.

Keith J If the matter was claimed? If costs were claimed?

Raymond If they weren't dealt with judicially or at all.

Keith J But where they'd been claimed or not?

Raymond Ah, I don't know if the decisions go that far as to say whether there is an express claim for them or not. What the decisions do say is that if they are not dealt with or if the discretion in respect of costs is not exercised judicially, then notwithstanding the prohibition in the legislation about appealing against costs, you could appeal if they haven't been dealt with at all.

Blanchard J Is this because there was a legal duty to deal with costs?

Raymond Yes.

Blanchard J But how do you reconcile that in the context we're dealing with the default provisions?

Keith J Mm, it's under the **Becker** legislation is it? The 1908 and 1938 provisions in our statute, in our old statute.

Raymond Yes it would have been. Where there was, in that case which I intend to go through, there was, you know as I understand it, the argument went and the decision was to the effect that when you agree to arbitrate in accordance with that Act, there was a requirement that costs would be dealt with in accordance with the schedule to that Act.

Keith J So that there was a power there and that could be invoked afterwards under s.14(2) or the equivalent.

Raymond Yes.

Tipping J You see Justice Young has actually been quite careful in the way he's expressed this in the **National Investment** case. He says, reasonable expectation by reason of the practice of the tribunal concerned, well that can't assist here, or the general law, taking you slap back to the point Justice Blanchard just made.

Keith J And the general law here is s.147 is it, the provision that is cited by Justice Tompkins, or at least it was under the earlier planning legislation.

Tipping J In **Fife**.

Keith J Yes and **Fife**. That's the old Town and Country Planning Act I guess isn't it?

Raymond Yes.

Keith J So there is, there is a free-standing power there to award costs isn't there? And as my brother Tipping was just indicating, that's a very different provision from the provision in clause 6.

Raymond Well I would submit Sir that under Clause 6 there is a specific requirement of the arbitrators to deal with costs unless the parties agree otherwise. They haven't agreed otherwise. That's common ground.

Blanchard J Well that's not what clause 6 says. It doesn't say, unless the parties agree otherwise the costs etc shall be fixed. It says, shall be as fixed.

Raymond Yes.

Blanchard J And then goes on to say what happens if there's no fixing. That's a vastly different situation from those in the cases to which you've been making reference where there's no default provision and quite understandably the Courts in question have said, well there's a duty then to do something about costs, to make a decision.

Raymond Well in my submission Sir 6(1)(a) confers on the arbitrators the requirement to exercise the discretion to deal with costs.

Blanchard J Well if it didn't have the word "as" before the word "fixed" you'd have to be right I think.

Raymond Well they must at least in my submission turn their minds to it before clause 6(1)(b) applies.

Blanchard J Yes.

Raymond And that was the point taken by the Majority in the Court of Appeal.

Keith J But they've got to do it under article 31 or 33(3) don't they?

Raymond Yes and it was that failure.

Keith J They haven't done it under 31.

Raymond No.

Keith J And 33(3) requires an omission.

Raymond It was their failure to deal with it under the main award, 31.

Keith J Mm, so you say that was an omission?

Raymond Yes.

Keith J Which means that you're saying there is a general duty to address the matter?

Raymond Yes, yes. And 6(1).

Elias CJ Derived from clause 6?

Raymond Yes.

Tipping J I just don't understand this proposition that the arbitrators must turn their minds to the subject before the default clause applies. If they turn their minds to it, they're either going to do something or they're going to expressly not do something. And there won't be a default.

Raymond Well clause 6(1)(a) has three elements Sir. First they must consider their own costs. They must consider party, party costs. And any other expenses relating to the arbitration.

Tipping J I don't know. I think you're, with respect, in that proposition begging the ultimate question which is, do they have a duty if costs are not put expressly or impliedly in dispute? That's the question. The duty isn't a free-wheeling one. The argument against you is that any question of duty only arises if the costs are put in dispute. I think that's a fair way of putting it.

Raymond Well in the.

Tipping J You can't just assume that they're in dispute in all events. It's an assumption isn't it, that? It's Justice Chambers, it's not the other two, it's Justice Chambers that seems to me to be the only way you can get home, that costs are necessarily in dispute in all cases governed by this forum.

Raymond The Majority said that it was at least arguable. They didn't need to go on and determine the point.

Tipping J Well fair enough. They say it's arguable. I don't think you can get home unless you can say that costs are always in dispute.

Raymond Well the Majority of the Court of Appeal say that there was, that costs are integral to any arbitration and that they always fall to be

determined at the end of the arbitration. And that is my primary position also.

Tipping J However you express it, isn't the ultimate question whether, well I suppose there are two questions, whether they have to be in dispute impliedly or expressly. But ultimately it must come back to that. Because if they're not in dispute the arbitrators aren't making an error of law in omitting to deal with them. Because they only deal with matters in dispute.

Raymond Well in my submission costs are always up for determination, in other words, in dispute. And there's support for that in clause 6 itself if I can refer you to 6.

Tipping J Well I think that's your best point.

Raymond 6(2)(b).

Tipping J That costs are always in dispute. That's putting it as tersely as it could be put.

Raymond Yes, well, and it's another way.

McGrath J Is that your point, just I want to be clear on this, because. Or is it your point that regardless of whether they're part of a claim, there is a duty to address the question of costs?

Raymond Yes.

McGrath J That appears in clause 6, the New Zealand provision.

Raymond Yes.

McGrath J Anyway.

Raymond Yes, yes. And it's fundamental to any arbitration, any dispute resolution procedure that costs are to be determined and we say in this case it should have been reserved.

Elias CJ Mr, oh sorry.

Raymond I was going to go on Ma'am to refer you to clause 6(2)(b).

Elias CJ Before you do that.

Raymond Yes Ma'am.

Elias CJ I would have thought that there were three positions that you can contend or that could be contended for here. The first is that there must be expressly or impliedly a dispute put in issue by the parties.

Raymond Yes.

Elias CJ And then at the other extreme there's a duty always to consider costs. But it seems to me that article 6 is also consistent with an additional power on the arbitrators to make an award of costs even if the parties have said nothing about costs, as long as they don't expressly agree to exclude costs. But then you're faced with the, but that's not a duty to always consider costs. And the duty is inconsistent with the alternate provision, default provision provided by (b). To me that's the argument you have to meet.

Raymond Well Ma'am it's our submission that before (b) falls for consideration, the arbitrators have to have turned their mind to the provisions of (a) and exhausted the three elements. It may be.

Elias CJ That's not the way it's provided. Clause 6 simply permits the parties to take costs by agreement totally off the table. If they don't then there are two possibilities. They may be as fixed by the arbitrators and they have authority to do that even in the absence of any express agreement that they should consider costs or putting the matter in issue, or the default provision applies. That's the structure it seems to me of clause 6.

Raymond Yes Ma'am I hear what you're saying and I come back to the point that in my submission (b) only falls to operate once the arbitrators have turned their mind to (a) and if they don't on first principles it's an error of law that they haven't considered costs at all. And in terms of clause 6, it's an error because they're directed by the parties' agreement to arbitrate in terms of the 1996 Act to consider costs under 6(1)(a). The parties have agreed to arbitrate in accordance with the Act. They haven't agreed otherwise on costs and they shall be as fixed by the arbitrators.

Keith J So you're having to say there is a duty on the arbitrators in all cases to address the question of costs.

Raymond Yes and there's support from that in some of the materials I've put in the bundle of authorities for the respondent. In particular under Tab 3 I have the A*rbitration Law and Practice* (Phillip Green and Barbara Hunt) reference produced by Brookers. It refers to clause 6(2)(b) initially and the prohibition against informing the arbitral tribunal of any pre-arbitration offer. Then goes on at the second sentence.

Keith J Well that, I mean it's essential to leave it for a final award just results doesn't it from the fact that the arbitrators are not to know about the offer.

Raymond Yes.

Keith J At the time of the earlier award. Isn't that the meaning of the word "essential" there?

Raymond Yes.

Keith J It's just a timing point isn't it?

Raymond Well it's essential that in the final award costs are reserved, sorry in the award costs are reserved for a final award unless the parties say to the arbitrators, you're free to make a final decision without reserving costs, a final determination.

Keith J Well the circumstances that are contemplated though are the 6(2)(b) circumstances aren't they, which say that there has been.

Raymond Yes.

Keith J There has been an offer to settle and the tribunal's not to be told about that.

Raymond Yes.

Keith J So the essentiality is in terms of timing isn't it?

Raymond As I read it, it's essential that costs be reserved by the arbitrators unless they are told they're free to make a decision on costs, thereby indicating it was being done with pre-trial offers.

Keith J Mm.

Tipping J Where is this part in the commentary that you're referring to Mr Raymond, I'm sorry?

Raymond It's in the bundle of authorities for the respondent at Tab.

Tipping J Yes I've got the page but I can't find it on the page.

Raymond Tab 3 in the middle section, 2.6.16, costs to be decided as part of the substantive decision.

Keith J Or not to be decided.

Raymond Not to be decided as part of the substantive decision.

Keith J But it's hardly an elaborate discussion compared with this morning of clause 6 is it?

Raymond No.

Blanchard J I'm still struggling with the circumstances in which you say that 6(1)(b) would actually operate. You're saying that regardless of any claim being put forward it's always the duty of the arbitrators to fix costs. Now if you're right, there's no need for 6(1)(b) because there's a duty there.

Raymond 6(1)(b) may operate Sir if at least one of the cost components in 6(1)(a) wasn't dealt with. The arbitrators might say for example.

Blanchard J But that's a breach of 6(1)(a).

Raymond No because they would have turned their mind to it. The point is that they must.

Blanchard J Turned their mind to it?

Raymond To the issue of costs.

Blanchard J And said well we're not going to do anything about it.

Raymond No, in my submission Sir what it says is that the arbitrators are required to determine their own costs. They may say, because of the manner in which the hearing was conducted or a whole body of evidence was introduced which wasn't relevant to the matter which extended the hearing, there may be any manner of circumstances which would allow the arbitrators to say that in this case we consider that the arbitrators' costs will be split unequally given the way that the hearing was conducted by the parties. But in all other respects, or for example the stenographer's costs, are to be split unequally, but in other respects we make no further order as to costs. So clearly they have turned their mind to 6(1)(a) in terms of their own costs.

Blanchard J But that's effectively.

Raymond And then the default provision would then apply Sir with respect to the costs to the parties.

Blanchard J But you don't need a default provision if they've said we're not making any other order in relation to party costs. That is letting them lie where they fall.

Raymond Yes.

Blanchard J So you don't need 6(1)(b).

Tipping J That's the same as my difficulty I'm afraid. I don't see how you can have a duty to do it in all events and the default provision has any effect at all. If they've got a duty to turn their mind to it, they are going to inevitably rule on it.

Blanchard J And if they turn their mind to it but don't say anything, you've no indication at all. That wouldn't be satisfactory.

Elias CJ Or even if they turned their mind to it and said, we have turned our mind to it but give no reasons for not making an award, then you'd arguably have an error because you're entitled to a reasoned decision if they have a duty to consider costs. So when would the default provision arise? What's the need for it? Because you'd be entitled to a reasoned consideration of the issue of costs.

Raymond Well I come back to the point that in my submission, and I hear what Your Honours are saying, but under 6(1)(a) there is an understanding by the parties that costs shall be dealt with and that is the three elements of that provision.

Blanchard J Well that's not what it says. It doesn't directly say that costs shall be dealt with.

Raymond Shall be as fixed.

Elias CJ Mm.

Blanchard J Well if it said shall be fixed.

Elias CJ Shall be as fixed or the default because the "or" is very important.

Raymond Well if I could take you then to 6(2)(b) which supports my submission that costs are always to be determined as part of the dispute. And that says the fact that an offer to settle has been made shall not be communicated to the tribunal until it has made a final determination of all aspects of the dispute other than the fixing and allocation of costs.

Blanchard J That assumes doesn't it that there is a dispute over the fixing and allocation of costs?

Raymond Well in my submission it's saying that costs are always going to be part of the dispute. It supports my first proposition.

Blanchard J It's a very indirect way of saying it.

McGrath J Your point really Mr Raymond is, isn't it, that you can reason too much from the existence of a default provision in very standard terms which is there as a useful reference if the arbitrators want to let matters lie as they fall.

Raymond Yes.

McGrath J And that you can't draw huge conclusions as to the meaning of the earlier subclause, rule 6.

Raymond It did occur to me to say that Your Honour to be honest, but I wasn't so bold enough to say it to Justice Blanchard, that in my submission.

Elias CJ You have to be bold with Justice Blanchard Mr Raymond.

Raymond Perhaps I should have been.

Tipping J He needs it put pretty strongly Mr Raymond.

Raymond The 6(1)(b) is there but there is often provisions in legislation which appear to have no effect because of the steps taken by the parties.

Keith J Better be careful about the authors of the report.

Raymond The point I just made, if I could refer you to my written submissions.

Elias CJ Sorry.

Raymond If I could refer to my written submissions at 3.42 and 3.43 which support the Chambers approach that costs are always part of the dispute and are brought to the table for determination. The 3.42 is the point I have, sorry 3.43 is the point I have just made. The prohibition in disclosing the fact of an offer to settle has been made until after the tribunal has made a final determination of all aspects of the dispute as qualified by the words "other than" the fixing and allocation of costs and expenses. In my submission the plain reading of that provision is that the costs form part of the dispute. The final determination of all aspects of the dispute can be made other than costs. Costs are clearly included as part of the dispute requiring determination.

Tipping J Well that provision is drafted isn't it on the premise that costs are in dispute. I don't see how you can draw from it an inference or an implication that they are always in dispute.

Raymond Well I take the contrary interpretation Sir.

Tipping J Alright.

Raymond I think that that interpretation is open and there's force in the argument that clause 6(2)(b) says that all matters can be determined other than costs and that costs are therefore necessarily part of the dispute.

Keith J The more straightforward reading of this Mr Raymond is that it's simply a timing provision. That the arbitrators are not to be told about this offer until they've made their award on the main issues.

Raymond Yes.

Keith J And then in a supplementary award, if the issue is still at large, my brother Tipping's point, then they're to be told.

Raymond Well that leads I suppose.

Keith J Because it's a prohibition isn't it?

Raymond Yes.

Keith J The fact that an offer to settle has been made shall not be communicated.

Raymond Which goes too to the proposition that it is an error not to consider costs or hear from the parties about such matters as essentially **Calderbank** offer.

Blanchard J Clause 6(2)(a) only applies if the arbitral tribunal is fixing and allocating costs under clause (1)(a). So you come back to the original question of what is required under clause 6(1)(a).

Raymond Well my friend's interpretation of 6(1)(b) writes out of existence 6(2)(a) and 6(2)(b). Because 6(2)(a) is that the parties are taken as having agreed that you cannot disclose the existence of an offer and you've got to keep it from the arbitrators.

Blanchard J But the operative portion of 6(2)(a) is the arbitral tribunal in fixing and allocating the costs may take the fact of the offer into account.

Raymond Yes.

Blanchard J That's the operative portion of the clause.

Keith J And under (b) it's not to know of that offer until late in the process.

Tipping J And in fixing means if it has to fix or if it is fixing.

Blanchard J Mm.

Raymond It seems to me that the whole fact that there is an offer pre-arbitration in relation to settling the dispute, as there was here, on terms more favourable than the outcome goes right to the heart of the whole question as to why the arbitrators should reserve costs and deal with them. And it shouldn't matter, frankly, whether or not counsel have asked them to be reserved. And there's a number of

decisions have said that. There is a fundamental duty in my submission on the arbitrators at first instance to appreciate that costs after a week long hearing where there's complex economic evidence, complex valuation evidence, something like 7-8 witnesses, vast submissions, that costs are going to be an issue. And that was the case here. The parties had agreed to arbitrate in accordance with this Act which provides that costs will be determined by the arbitrators. It was in my submission a requirement for them in terms of the Majority decision in the Court of Appeal to consider costs. Costs are integral to any arbitral dispute. All of the decisions my friend has put forward in that supplementary bundle say that costs are reserved. Costs are to be reserved or submissions from parties.

Blanchard J Well there's a question whether we can receive that. But that wasn't actually my reading of it. There seemed to be some where that wasn't the case.

Raymond Sorry, I might have put that too highly. Costs, I've got the note here now. Costs were reserved in three. They were agreed in one. They were not mentioned at all in one. Interestingly, in the case where they were not mentioned at all in one, it was the same arbitrator that dealt with this case. And they were to lie where they fall or equal in six but one with leave to go back to the arbitrators if there was any aspect of costs not determined.

Tipping J I wonder if I could just seek your help, and we're close to the adjournment so if you want to take time to think this through Mr Raymond that would be fine. The reference in 6(1)(a) to award or additional award means I think that one has to read 6(1)(a), indeed the whole regime, against the background of articles 31, 2 and 3. The concept of additional award implies that the first award hasn't dealt with costs and there is a limited power to deal with them by additional award if there's been a claim presented. Now doesn't that suggest, when one's looking at it as a whole, that there can be no breach of duty in the first award unless there has been a claim presented? And it all really comes down, as Mr Hodder was inclined to suggest, to whether a claim has been presented. It's not really a breach of duty if there's been a claim presented because there is a statutory mechanism within a certain time of dealing with the point. But looked at as a composite whole, when you read 6 with 33, it's only if there's a claim presented that there's anything wrong in inverted commas with them not dealing with it in their first award and thus they have the opportunity of dealing with it in the second. So my plea is perhaps that we shouldn't focus too microscopically on just the terms of 6. We've got to try and make this whole regime work in a sensible practical and straightforward way. If you've presented a claim, you can legitimately complain and ask them to fix it up if they haven't dealt with costs in their first award. But if you haven't presented a claim, default applies. I

mean that seems to me, thinking about this as the debate has proceeded, that we've got to try and see this as a composite whole, this whole structure. The second schedule is engrafted onto the first. But they're obviously designed to work as a composite whole.

Raymond Yes. I understand the point. Which is why my alternative submission is to adopt the reasoning of Chambers J.

Tipping J Yeah well that.

Raymond That it is a claim.

Tipping J That's I think your only escape from the way in which this whole structure has been set out.

Raymond That's in terms of the structure. I think that there's an alternative and primary argument that it will be an error not to consider costs at all.

Tipping J I understand that but I'm not.

Raymond Yes but moving from that, I adopt the reasoning of Chambers J supported, and by reference to authority, by the Majority.

Tipping J Yes.

Raymond That it will always be a claim presented which I say is supported by the provisions of 6(2)(a) and (b) also.

Tipping J Then you've got the difficulty that if it's always presented it will always be an error not to deal with it in the first award.

Raymond Yes.

Tipping J And therefore there is no room for the default provision to apply. But you might like to just, I mean I'm doing no more than bringing all the threads together.

Raymond Yes you are and that's, and I'm grateful to Your Honour but I come back to the fact that 6(1)(b) does have a place when the arbitrators only turn their minds perhaps to one of the three components of 6(1)(a).

Blanchard J And are in default.

Raymond Yes.

Tipping J Thereby.

Raymond Yes.

Elias CJ You might like to think further about that answer and we'll take the adjournment now thank you.

Court adjourns 11.31 am
Court resumes 11.50 am

Elias CJ Yes thank you.

Raymond Thank you Your Honour. There is a claim presented in terms of article 31 and 33 for two primary reasons. 1. Costs, as the Majority found, are integral to any arbitration and always fall to be considered. And it's an error not to. 2. It is always a claim presented, as with the Chambers approach, because the reference to arbitration in terms of the Arbitration Act 1996 incorporated a claim for costs by virtue of the inclusion of clause 6 of the second schedule. And for those two reasons, which are interrelated and support each other in my submission, the arbitrators were required to consider clause 6(1)(a) and exercise their discretion upon it, at least turn their minds to each of the three elements of it.

Elias CJ I'm sorry, I'm just trying to identify in my own mind to what extent your argument depends on the obligation you say is contained in article 6. You have an additional, general, necessary implication in any arbitration do you?

Raymond Yes.

Elias CJ And in addition you say article 6 contains an obligation?

Raymond Yes.

Elias CJ And you say that they integrate and support each other?

Raymond I think they do to an extent, yes.

Elias CJ Right, thank you.

McGrath J Mr Raymond, could I just ask you to repeat just in simply as the words you use it because when now I look at what I've got down it doesn't quite make sense, just exactly what your first proposition was.

Raymond Well I say that there is a claim presented in terms of articles 31 and 33.

McGrath J Yep, yep.

Raymond Picking up on Justice Tipping's point.

McGrath J Right.

Raymond For two reasons. The first is in essence what the Majority have said in the Court of Appeal. Costs are integral to any arbitration. And always fall to be considered by the arbitrators. And in that sense Sir are a claim presented. And secondly, the parties' agreement to arbitrate in terms of the 1996 Act.

McGrath J Yes I've got that thank you, that's fine thank you.

Raymond And there is support for that approach in another decision I want to take Your Honours to if my learned friend could hand it up. In the Court of Appeal decision there was reference by the Court of Appeal to a decision of **Sutherland Shire Council v Kirby**. There was a fleeting reference to that case, a decision of Justice Hardie of the Land Valuation Court of New South Wales. And that was a case where someone was trying to reopen an arbitration on the basis that costs hadn't been determined. And they wanted to reopen all matters so it was referred to in passing. But in the **Kirby** case they made reference to this decision of **Cole v Mossman Municipal Council** and the decision of His Honour Justice Sugarman. In that case there was a decision which was very brief, the decision of the Council of the Municipality of Mossman appealed from is disallowed and the subdivision application is approved and the award made. No reference to questions of costs at all. It was brought before His Honour Justice Sugarman and I want to start by taking you to page 32 second paragraph.

Section 5 of the Arbitration Act provides that a submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the second schedule to this Act so far as they are applicable to the references under the submission. Paragraph 1 in the second schedule states the costs of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to and by whom and in what manner those costs or any part thereof shall be paid.

Keith J This is a copy of the UK Act again.

Blanchard J Well this is, yes, this is the 1908 schedule.

Keith J Mm.

Raymond Yes. And two paragraphs down from that, or one paragraph beneath that. The result of the legislation therefore is that the question of costs dealt with in paragraph 1 of the second schedule to the Arbitration Act becomes one of the questions referred as a result of an appeal's being lodged to the board as arbitrators. The true ground then of the present application is that the award with the board made on the 18th of July is not final because it did not dispose

of all the matters referred to the board arbitrators which include the question of who should bear the costs of the arbitration. And then.

Keith J But so it's **Becker Shillan** again isn't it.

Raymond It is a reinforcement of **Becker Shillan**. And then Sir I bring it your attention (a) because it's a reinforcement of the principles of **Becker Shillan** and it's been applied in the New South Wales jurisdiction.

Keith J But under the old legislation.

Raymond Under the old Act. But it reinforces my submission Sir that it was a claim presented. And at paragraph, page 33 reference is made to the case of **Becker Shillan** and Ramet J is quoted there, which is the same passage which is in the respondent's bundle. And then the next paragraph is partly in response to my friend's submission. It is conceded that this necessity for exercising a discretion upon the question of costs was brought to the notice of the board by the terms of the submission to it. Of course my friend doesn't make that concession but nonetheless the point's there. Including in that submission the provisions of the second schedule to the Arbitration Act. So that it is no answer to this present application that the matter referred to was not brought to the notice of the board.

Keith J Well I mean that is just **Becker Shillan** again isn't it? And it does, the question for us is whether the 1996 Act is the same in this respect as the old legislation.

Raymond Yes. And in my submission it is Sir. Because clause 6 brings to the attention of these arbitrators that they are to determine costs.

Keith J Mm.

Raymond And then on 33, the second to last paragraph beginning, in a proper case. In a proper case it may be a matter of necessary implication, words which echoed in my mind following your Minute Justice Tipping.

Tipping J I'm sorry if I caused you some sleepless nights Mr Raymond.

Raymond Well you did actually Sir. Funny you should say that. From what is in fact said by arbitrators upon the face of their award, that the arbitrators have dealt exhaustively with the whole question of costs. That, I think, is all that can be taken to have been decided by the case of **Rose v Redfern** to which Mr Hope referred me. In that case Parke B said that it was natural inference, as His Lordship put it, from an order that the plaintiff pay the defendant's costs that the plaintiff of course was to bear his own costs.

(Laughter)

Raymond I was prepared to accept Sir that that was a necessary implication.

Tipping J Pretty heavy stuff.

Raymond In the present case nothing appears in the terms of the award from which any implication follows.

Tipping J No.

Raymond The award is merely silent. In **Re Becker Shillan**, after referring to the cases of **Richardson v Worsley** and **Williams v Wilson** said this: It seems to me that the principle of those cases must apply here unless Mr Buchanan can satisfy us that the umpire has dealt with the costs of the reference. In my view it would be most unsatisfactory to infer from his silence that he had dealt with them. It is clear that prima facie the successful respondents were entitled to get their costs. They had incurred great expenses and defeated a claim for 8,000 pounds. Can it be supposed that the umpire's entitled to deprive them of costs by mere silence as to costs? I cannot say that. In my view it is reasonably clear that the umpire has not here dealt at all with the question of the successful respondent's costs.

And in terms of a brief answer to my friend's proposition that there seemed to have been some trend towards costs falling where they lie, at the foot of paragraph 34. Matters of the type which are brought before the board for its decision are likely to vary in magnitude, importance and difficulty in the considerations which may govern the proper exercise of discretion in awarding or refusing to award payment of the whole or part of the costs incurred by one party or the other. Some involve important considerations of public interest or affect the appellant to the extent of considerable sums of money or turn upon difficult questions of principle and sometimes of law. Such cases may require skilled assistance for their proper presentation, require no inconsiderable expenditure and costs for their litigation and lead to nice questions of discretion as to how in the result the costs should be borne as between the parties. Others may be of less or small importance or difficulty in their subject matters and yet require careful consideration of how their costs, if any have been incurred, should be dealt with. If, as Mr Hope has informed me, one uniform rule is applied automatically and inflexibly to all such cases, I find it difficult to see how the existence of that practice helps to support an inference from the scheme of the award that the discretion conferred by the second schedule to the Arbitration Act was in fact exercised.

Keith J There's no argument here of that kind is there.

Tipping J No.

Keith J There's no argument of that kind here. Mr Hodder's saying there's no power, no duty and accordingly he's not arguing that there's been an implied exercise of the power which he denies exists.

Raymond No. No. The arbitrators in this case interestingly in their second award say that they considered that they had implicitly reserved costs in their first award.

Keith J Yeah, mm.

Raymond And hadn't dealt with it, hence their second award.

Tipping J If that is the case it's extraordinarily odd, if they turned their mind to it, they didn't do it expressly. But we're not concerned with that.

Raymond Well they didn't turn their mind to it and they acknowledged that. They didn't turn their mind to party/party costs.

Tipping J But then to say that they'd done it implicitly. But never mind we're not, happily, required to.

Blanchard J What was it that they did implicitly?

Tipping J Yes quite.

Raymond No, they said it was implicit in their first award that there had been a reservation of costs.

Keith J Well that could be by reference to your two general propositions couldn't it.

Elias CJ Yes.

Keith J That as a matter of law, that's the case.

Raymond Yes.

Keith J And, well as it was under the old legislation because we've had no argument that **Becker Shillan** was wrong. Rather the argument is, isn't it, that the legislation is different now.

Raymond Yes but I'm.

Keith J Produces a different result.

Raymond I don't accept that it's different to that extent.

Keith J No, no. Well that's the issue.

Raymond Yes. There's a final passage I wish to refer you to at the foot of page 36. Finally it has been pointed out that Mr Hutley made no application to the board for costs and no express request to the board to exercise its discretion on the subject. It was not of course possible to do either after the event since the board's decision was not pronounced in open Court but was published to the parties by letter. That Mr Hutley did not ask for an order for costs does not seem to me to be material. He was apparently content to leave the matter in the board's discretion and both he and the respondent counsel were entitled to assume that the discretion which is one of the matters expressly submitted to the board by the Arbitration Act would be exercised by the board and the results stated in its award. And I adopt that passage as being a correct statement of the approach.

Tipping J Does your submission come down in the end Mr Raymond to the proposition that the arbitrators had a duty to reserve costs?

Raymond Yes.

Tipping J They couldn't do any more than reserve could they in the circumstances?

Raymond No.

Tipping J They had a duty to reserve costs.

Raymond Yes. And their failure to do so amounts to an error of law justifying a remittal back to the arbitrators. And in the alternative it was, on Justice Chambers' analysis with some support from the Majority, a claim presented.

Keith J Well it's also an omission isn't it in terms of 33(3)?

Raymond Yes.

Tipping J Mm. So in effect the Majority approach leads to the suggestion of a duty to reserve. The Justice Chambers approach leads to the proposition that there was a relevant omission.

Raymond That is a correct summation I think Sir, yes.

Keith J Because of the breach of the duty.

Tipping J It's all interconnected.

Raymond It is interconnected. Is there anything else I can assist with Court with?

Elias CJ Thank you Mr Raymond.

Raymond If I can just add one final point. If the respondent's case was to be successful and the matter was to be referred back to the arbitrators, then it would be helpful in my submission if there was clear directions from this Court as to what the arbitrators' task was to be.

Elias CJ Yes.

Raymond As per, in my submission, Justice Chambers' direction. Or alternatively if the Court considered that appropriate, at least leave for the parties to come back to this Court for directions if the parties cannot agree. Which, given the.

Tipping J That's probably the better one isn't it?

Raymond It is possibly the better.

Tipping J We have a duty to reserve it.

Raymond Well that's my second point.

Keith J And costs.

Raymond If there's one thing that I've learnt from this case, it's always going to be that I'm going to mention costs no matter what. And I do so now. I would ask that costs in this Court be reserved because there are matters relating to all costs issues and how they should be dealt with which are relevant to the fixing of costs on this appeal.

Tipping J That's in an in any event request is it?

Raymond It is an in any event request. In other words there's a bit of a 6(2)(b) flavour in the discussions that my friend and I have had before we came here which in my submission are relevant.

Elias CJ Yes, alright, thank you.

Raymond Thank you Your Honours.

12.06 pm

Elias CJ Yes Mr Hodder. I'm sorry Mr Hodder. First of all Mr Raymond, on that point of reserving the issue as to costs. In the first instance at least the Court might direct that Counsel file memoranda and then we'd consider whether to deal with it on the papers or whether it would be necessary to have a hearing.

Raymond Yes, yes I had anticipated the former.

Elias CJ Yes, thank you.

Raymond I doubt that it will be necessary to have a further hearing on the point.

Elias CJ Yes, thank you. Yes Mr Hodder. Do you want to be heard in reply?

Hodder There were perhaps three matters that I should touch on briefly in the light of the discussion. The **Fife** decision that Your Honours have been referred to. The primary submission is that it doesn't assist because it doesn't deal with any statutory context that's remotely similar to what we have under the Arbitration Act 1996. It is perhaps useful to put it in the context of the decision that it effectively applies. So if I could just ask Your Honours briefly to go back to the **National Investment** case which is at Tab 3 in my friend's bundle.

Elias CJ Tab 3?

McGrath J 2, Tab 2.

Elias CJ Oh Tab 2, thank you.

Hodder My apologies, it is Tab 2. This is the decision of Justice Young and, as His Honour Justice Tipping has said, what His Honour actually says is qualified. But for present purposes its relevance is that on page 293 of the report there's a lengthy extract from Justice Greig's decision in the previous **Petone Borough** case. And I simply wanted to draw attention to the last two paragraphs of that extract. The paragraph beginning with, The central issue and the paragraph beginning, The applicant submits. In his first paragraph Justice Greig says there was no inherent power to reopen the matter even on the question of costs which we say is analogous to what goes on here. And in the second paragraph he says, although no party had anticipated the result, the answer is that I doubt that a party during the course of its submissions at the hearing should expressly seek costs in the event that it's taken on a substantive appeal prevails. And then goes on to find that the jurisdiction was exhausted and there was no jurisdiction to hear or deal with the applicant's application for costs.

That was what His Honour found in the first of these cases. And the reasoning is somewhat analogous. That is the jurisdiction has ceased to exist. When one turns to the **Fife** case His Honour Justice Tompkins says he agrees with that. He doesn't in any sense disagree with it. He recites it briefly at page 28 of the **Fife** case. And then confirms it again in the paragraph just above the heading on page 29. And then goes on under the heading, comes to address the question of whether the tribunal should have reserved leave and finds it does so for three reasons. The first of those is entirely related to the facts of that particular case. There'd been something

caused by the respondent's error and says in those circumstances it should have been apparent to the tribunal that the tribunal's normal approach may not be applicable. That reason has no relevance here. The second is that the tribunal would have appreciated in not reserving the issue of costs deprived the appellants of the opportunity of raising the issue. That is the tribunal is taken to have understood the **Petone** decision's implications. We say that can have no relevance in an arbitral context where there's an ad hoc tribunal and it's contrary to the essence of the Arbitration Act as we have submitted it is. And then thirdly, there's the benevolent proposition that it doesn't matter if counsel doesn't ask for costs. No reasoning is given, it's just an assertion that that doesn't seem to be an answer to the general proposition. The proposition being at the end of that extract on page 30, the preservation of the tribunal's discretion to deal with costs should not depend upon whether counsel at the hearing makes such a request.

Now we say that, whatever force that reasoning had in that context, it simply doesn't apply in the context we're talking about which has the more structured sequence that emerges from the Act that I've described. That is, there is a dispute within a tribunal of limited jurisdiction which has to be defined by the parties. In those circumstances this more benevolent approach, if that's what it is, we say has no place in the analysis.

That was the first point. The second point goes to the role of 6(2), that is to say clause 6(2) of the second schedule. Now I took a note that my friend had said that I was writing out 6(2) of the Act in my submissions, which I understand to be a submission by way of retaliation but with respect of no force. There is obviously a role for 6(2). It is a Calderbank regime written into the Act which applies if and when the tribunal was properly considering the question of costs. So in terms of the jurisprudence, there's no difficulty. In terms of the practicalities, although the Court of Appeal seems to have, in the joint judgment, found it a great deal of its consideration, well a substantial part of not a very long consideration of this issue on the difficulties, my friend accepts in his written synopsis that the Court joint judgment overstates those issues and there are no practical difficulties in terms of simply advising a tribunal that there are clause 6 issues to be considered. And so the regime is perfectly workable and perfectly practicable. The question of timing hinges off the advice to the tribunal that there is a dispute. At that point the timing sequence that's required by 6(2) in the context of 6 as a whole is established.

The third point really relates to the question of costs being integral to any arbitration. Which is the sort of, as I understand it, advances a separate and stand alone point from the second point which I might describe as a Justice Chambers thesis. And in relation to that, with respect, there is no basis provided for the proposition that costs

are integral to any arbitration under this regime in the joint judgment. It just says that. But there's no reason why it should be in accordance with the structure of the Act. If the Act is correctly understood as being about the creation of a jurisdiction by reference to certain disputes, then the assertion that the costs are integral to any arbitration imports stuff from outside the Act and just makes the Act harder to use for those who are not familiar with the surrounding jurisprudence.

Beyond that the criticism that we advance in the written submissions of this point is that the matter is then left very indeterminate and so paragraph [97] of the joint judgment doesn't make it clear in what circumstances this gives rise to some error of law. It simply says costs can amount to an error of law and in some circumstances whether or not there was an explicit request to consider costs. Well none of us is any the wiser as to when. Whereas one would have hoped that the Act could be interpreted in a way that meant there was clarity on that point which is fairly basic.

Blanchard J Is there really a difference between the way the Majority and Justice Chambers, between what they were saying? Because in any arbitration there would be an arbitration agreement or what used to be called a submission. So to say on the one hand that it's integral to arbitration and on the other that you're taken to have sought costs when you make a submission really is the same thing I would have thought.

Hodder I'm assuming that it isn't because that's what the joint Majority says, that this is something separate from what Justice Chambers said. And I confess to have some difficulty in identifying the precise point of division.

Blanchard J Well I'm glad I'm not the only one.

Hodder What they're saying at the end of 103 is that that's a different approach from what it is that's suggested by Justice Chambers. But I confess to some difficulty in articulating what it is. I think the end result is that the Majority approach leaves some kind of discretion either to the tribunal or to the Court to decide whether there's a problem. Whereas Justice Chambers has the simplicity advantage in saying that in every case there is a claim that's deemed to be presented by virtue of the fact that you've opted in or failed to opt out of the second schedule of clause 6. And the response to that is, as we've indicated before, which comes back to the relevance if any that's left for the default provision.

May it please the Court those are the only matters I wanted to touch on by way of reply.

Elias CJ Yes, thank you. Alright. Thank you Counsel for your assistance. We'll reserve our decision in this matter.

Hodder As the Court pleases.

Raymond As the Court pleases.

Court adjourns 12.17 pm