IN THE COURT OF APPEAL OF NEW ZEALAND

CA867/2012
[2013] NZCA 180

BETWEEN	ZURICH AUSTRALIAN INSURANCE LIMITED T/A ZURICH NEW ZEALAND Applicant
AND	COGNITION EDUCATION LIMITED Respondent

Hearing:	20 February 2013
Court:	Stevens, French and R Young JJ
Counsel:	A R Galbraith QC and M J Francis for Applicant M G Ring QC for Respondent
Judgment:	29 May 2013 at 10.00 am

JUDGMENT OF THE COURT

A **The application for review is dismissed.**

B **The applicant must pay the respondent's costs for a standard appeal on a band A basis plus usual disbursements.**

REASONS OF THE COURT

(Given by French J)

Table of Contents

Introduction

[1] Article 8(1) of the First Schedule to the Arbitration Act 1996 regulates what is to happen when a defendant seeks a stay of court proceedings on the grounds that the parties had agreed to submit the dispute to arbitration.

[2] Article 8(1) states:

> **8 Arbitration agreement and substantive claim before court**
>
> (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.

[3] Under art 8(1), a stay is mandatory unless the court finds that the agreement is null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

[4] This appeal concerns the correct meaning to be attributed to the concluding phrase: "that there is not in fact any dispute between the parties with regard to the matters agreed to be referred".

[5] The weight of New Zealand authority favours the view that in determining whether there is in fact a dispute for the purposes of art 8(1), the court must assess whether the party seeking arbitration has an arguable defence to the claim which has been filed in court. If there is no arguable defence, then there is no dispute within the meaning of art 8(1) and summary judgment may be entered for the claimant. On the other hand, if the court is satisfied there is an arguable defence, a stay of the court proceeding will be granted and a referral to arbitration ordered.

[6] This was the approach endorsed by Associate Judge Bell in the decision of the High Court under review.[1]

[7] The applicant, Zurich Australian Insurance Limited (Zurich), urges us to reject that approach. It contends that the application of a "no arguable defence" test is a "judicial engraft" derived from a "fleeting" mistake made by English judges, a mistake which has since been corrected in England and which should now be corrected in New Zealand because it is contrary to principle, policy and international practice. Zurich accepts that the court should not find a dispute to exist simply on the subjective say-so of one party, but contends that the court's enquiry under art 8(1) is properly limited to determining the genuineness or bona fides of the alleged dispute. That is to say, the court should simply determine whether the defendant really believes what he or she is saying and is not merely looking for an expedient to avoid or postpone liability. In Zurich's submission, once the existence of a genuine dispute is established, the matter must be referred to arbitration. The court should not go further and engage in any merits assessment of the defence.[2] That task is the proper reserve of the arbitral body. A stay must therefore be granted even if the defence put forward in apparent good faith is unsustainable.

[8] For the reasons that follow, we do not accept Zurich's argument. We have concluded that the argument is really an argument as to what the New Zealand Parliament should have enacted, as opposed to what it did enact. Correctly interpreted, art 8(1) means that Zurich is only entitled to a stay and a referral to arbitration if it has an arguable defence.

Background

[9] The respondent, Cognition Education Limited (Cognition), is insured under a contract frustration insurance policy issued by Zurich. Cognition made a claim under the policy. Zurich declined to indemnify Cognition, prompting Cognition to issue proceedings in the High Court seeking summary judgment.

---

1 *Cognition Education Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* [2012] NZHC 3257. That the Judge chose to call his decision a ruling is immaterial for the purposes of Zurich's rights of review.

2 Except presumably in so far as that bears on good faith.

[10] Zurich filed an appearance objecting to jurisdiction. It also applied for a stay of the proceeding in reliance on an arbitration clause in the policy. The clause read:

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

[11] Zurich contended that the High Court could not adjudicate on the summary judgment application because the parties had agreed to submit all disputes to arbitration, including the subject matter of the summary judgment application. It also argued that the Court should hear the stay application first and that only if the stay application failed should the summary judgment proceeding be scheduled for hearing.

[12] For its part, Cognition argued there was no dispute to submit to arbitration because Zurich did not have an arguable defence to its claim. Cognition further contended that leaving aside issues about the onus of proof, the tests for summary judgment and stay were essentially the same, namely whether Zurich had an arguable defence to Cognition's claim. Logic and practicality dictated the applications should be heard together.

[13] The parties sought a ruling from the High Court as to the process which should be followed.

[14] In a detailed and fully reasoned decision, Associate Judge Bell agreed with the position taken by Cognition. The Associate Judge held that the test applicable to the summary judgment application was the inverse of the applicable test for a stay under art 8(1). Both rules required the same judicial inquiry, namely whether Zurich had an arguable defence. It followed that the two matters should be heard together and the Associate Judge so ordered. He directed the Registrar to allocate a half day fixture to hear both applications.

[15] The Associate Judge's decision was limited to whether the two applications should be heard separately or together. He was not required to consider the merits of Cognition's claim, nor the merits of Zurich's stay application. That inquiry was to be undertaken at the hearing, which has not yet been held pending the outcome of this review.

[16] Before turning to the substantive arguments, it is necessary for us to record how this case came before us by way of review.

Jurisdiction issue

[17] Zurich initially filed an appeal against the Associate Judge's decision and a hearing was held in this Court on 20 February 2013.

[18] Under s 26P of the Judicature Act 1908, this Court may only hear appeals against the decisions of associate judges if those decisions were made in court rather than in chambers. Decisions made in chambers must be reviewed by a High Court judge. The distinction between court and chambers does not depend on physical location but rather on the nature of the jurisdiction being exercised. The powers of an associate judge found in s 26I of the Judicature Act comprise the court jurisdiction exercised by associate judges, while the powers that comprise the chambers jurisdiction are found in s 26J.

[19] Rule 7.34 of the High Court Rules specifies that all interlocutory applications must be heard in chambers unless a judge directs otherwise. A stay application is an interlocutory application and because Associate Judge Bell made no direction otherwise, Zurich's application for a stay fell within that rule.

[20] Applications for summary judgment are also interlocutory applications. However, by virtue of r 7.36 of the High Court Rules and s 26I(1)(a) of the Judicature Act, summary judgments are an exception to r 7.34 and must be heard in open court. Section 26I(1)(a) states that an associate judge may exercise all the jurisdiction and powers of the High Court "in relation" to any application for summary judgment.

[21] At the hearing before us, counsel assumed (as did we) that the Court had jurisdiction to entertain an appeal. However, on further reflection after the hearing, we reached a provisional view that the decision of the Associate Judge was made in chambers and that therefore we lacked jurisdiction to hear the appeal. We invited counsel to make submissions on this point.

[22] Counsel then filed a joint memorandum. They submitted that the Court did have jurisdiction to hear the appeal because the issues dealt with in the Associate Judge's ruling were in fact the first issues the Associate Judge would have been required to deal with at the substantive hearing of the two applications. In counsel's submission, if the issues had been dealt with in that way, they would have formed part of the substantive judgment on those applications and so would have been (only) appealable direct to this Court.

[23] The parties cannot of course give the Court jurisdiction by consent. Regrettably, we were not persuaded that we did have jurisdiction to hear the appeal. The only direction given by the Associate Judge in relation to the summary judgment application was that it should be heard together with the stay application. In our view, that was an insufficient connection to bring the case within s 26I(1)(a) or r 7.36. The decision was primarily concerned with the stay application. All the substantive legal content of the decision relates to the appropriate test to be applied for the stay. Our conclusion was that the decision was made in chambers and that accordingly the correct means of challenging that decision was by way of review.

[24] In order to regularise the proceeding, at our suggestion counsel filed an application in the High Court for a review, coupled with an application to transfer the review application to this Court. Consent orders were made accordingly.[3] Counsel have also confirmed that the hearing held before us on 20 February 2013 is to be regarded as the hearing of the review.

[25] This is not the first case in which the niceties of the distinction between chambers and court have caused unfortunate and unnecessary procedural difficulties.

---

[3] *Cognition Education Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* HC New Zealand CIV-2012-404-1246, 1 May 2013.

It is hoped that proposed reforms to the Judicature Act will bring some clarity to the issue.

Zurich's case on review

[26] Mr Galbraith QC submitted that the requirement of an arguable defence is a judicial gloss on art 8(1), the chief objections to which are:

(a) It is not warranted by the wording of the provision, which is expressed in mandatory terms.

(b) It is derived from flawed English case law which has since been debunked.

(c) It is illogical. The fact that one party is indisputably wrong and the other indisputably right cannot mean that there was never any dispute in existence between them. A person is still disputing something even if he or she is horribly wrong. Put another way, the consequence of a successful summary judgment argument is not that there was no dispute, but that the forum of one party's choosing has been persuaded that it is a dispute to which the other party has no arguable defence.

(d) It requires giving a different meaning to the word "dispute" as it appears in art 8(1) than in other provisions of the Act, where it has its ordinary meaning.

(e) It is contrary to international practice.

(f) It is contrary to the main purposes of the Arbitration Act, which are party autonomy, reduced judicial involvement in the arbitral process and conformity with international arbitration law.

(g) By inserting an arbitration clause into the contract, the parties chose arbitration as the means of settling their differences. That choice should be respected and they should be held to their bargain.

(h) One of the main reasons parties agree to go to arbitration is so that they can have the benefit of an adjudicator with specialist knowledge or experience. Such arbitrators are likely to be better placed than judges to assess the merits of any dispute. This is particularly apposite in cases involving the interpretation of a commercial contract or trade practice with which an arbitrator, unlike a judge, is likely to be familiar. It is wrong to deprive a defendant of the benefit of that specialist insight arising from the choice of arbitration.

(i) The New Zealand courts' approach to summary judgment often involves an extensive analysis of facts and law. Subjecting a dispute to the summary judgment procedures and associated appeal rights can result in cases becoming bogged down in lengthy and protracted court hearings, thereby defeating the whole purpose of arbitration, which is to provide a timely and cost effective means of dispute resolution.

(j) In a global economy, the requirement of an arguable defence in New Zealand is both a trap and a disincentive for overseas parties to enter into commercial contracts with New Zealand parties.

The history of art 8(1)

[27] In order to consider the arguments raised by Mr Galbraith, it is necessary for us first to trace the history of art 8(1) and the relevant case law in some detail, before returning to issues of statutory interpretation and policy.

[28] The phrase "unless ... there is not in fact any dispute between the parties with regard to the matters agreed to be referred" (the added words) did not appear in New Zealand arbitration legislation until 1996.

[29] However, prior to 1996 the added words did appear in arbitration legislation in the United Kingdom as the result of a recommendation made in the 1920s by the Mackinnon Committee.[4] The Mackinnon Committee was concerned to prevent what

[4] Mackinnon Committee *Report of the Committee on the Law of Arbitration* (CMD2817, 1927).

it saw as the "absurd" situation of stays being granted on account of arbitration clauses despite defendants being unable to indicate the existence of a dispute or any reason why they should not meet a claim.[5] It recommended that the relevant United Kingdom legislation be amended so as to provide that the court should only stay the action "if satisfied there is a real dispute to be determined by arbitration".[6]

[30] Following the report, the relevant stay provisions of the Arbitration Clauses (Protocol) Act 1924 (UK) were amended by adding a ground for refusing a stay where the court was satisfied that "there [was] not in fact any dispute between the parties with the matter agreed to be referred". The added words (which did not appear in the foundation international Conventions underpinning the legislation)[7] were retained in subsequent iterations, namely the Arbitration Act 1950 (UK) and the Arbitration Act 1975 (UK).

[31] Mr Galbraith contended that the mischief identified by the Mackinnon report was non-genuine disputes contrived in bad faith and constituting an abuse of process, rather than genuine albeit unarguable defences.

[32] However, that was not the interpretation adopted by the English courts.[8] Relying on the added words, the English courts developed a doctrine that when a defendant responded to a summary judgment application by applying for a stay on the grounds of an arbitration agreement, the summary judgment and the stay applications were heard together and determined by the same test. If the court found that the defendant did not have any defence to the application for summary judgment, the stay application would be dismissed and the summary judgment application would be granted. On the other hand, if the plaintiff could not succeed in the summary judgment application, the proceeding would be stayed for the dispute to

---

5 At [43].

6 At [43].

7 Protocol on Arbitration Clauses (opened for signature 24 September 1932, entered into force 28 July 1924); United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 38 (opened for signature 10 June 1958, entered into force 7 June 1959).

8 See *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 1 WLR 713 (HL); *S L Sethia Liners Ltd v State Trading Corporation of India Ltd* [1985] 1 WLR 1398 (CA); *Associated Bulk Carriers Ltd v Koch Shipping Inc, The Fuohsan Maru* [1978] 2 All ER 254 (CA); *A/S Gunnstein & Co K/S v Jensen Krebs and Nielson, The Alfa Nord* [1977] 2 Lloyd's Rep 434 (CA).

be decided by arbitration. This came to be known as the "reverse side of the coin" approach.

[33] Under this approach, the word "dispute" as it appeared in the added words was effectively equated with "anything disputable" rather than "anything disputed". Or, as one text put it, a distinction was drawn between a dispute and a worthwhile dispute.[9] A claim which was indisputable because there was no arguable defence did not create a dispute. The approach also meant that where parties chose arbitration for their dispute resolution, their choice was effectively restricted to referring only those disputes that could not be resolved by the courts' summary judgment procedures.

[34] It appears that some English commentators and judges questioned the logic of the interpretation and its policy justification, based as it was on the perception that arbitrations were slow and causative of delay. However, writing in 1989, the authors of the English text *The Law and Practice of Commercial Arbitration in England* stated that whatever the merits of the reverse side of the coin approach, it was "quite clearly established" law.[10] The textbook described English courts as "habitually" hearing the two applications together and taking for granted "that the success of one application determines the fate of the other".[11]

[35] In New Zealand, the modern line of authority on which Associate Judge Bell relied is conventionally regarded as having commenced with the decision of this Court in *Royal Oak Mall Ltd v Savory Holdings Ltd*, decided in 1989.[12] In *Royal Oak*, the Court cited the comments mentioned above from Mustill and Boyd with unequivocal approval and talked about the logic of applying the same threshold test to a stay application as to a summary judgment application.

[36] Mr Galbraith, however, challenged the authoritativeness of *Royal Oak* for present purposes on a number of grounds:

---

9 MJ Mustill and CS Boyd *The Law and Practice of Commercial Arbitration in England* (2nd ed, Butterworths, London, 1989) at 124.

10 Ibid.

11 At 124.

12 *Royal Oak Mall Ltd v Savory Holdings Ltd* CA106/89, 2 November 1989.

- The Court's apparent endorsement of the reverse side of the coin approach was unnecessary, because on the facts there was no evidence of any real issue or dispute in existence, only a shadowy indication of one.

- The statutory provision at issue in *Royal Oak* (s 5 Arbitration Act 1908) was worded differently to art 8(1) and did not contain the added words.

- *Royal Oak* was undermined by a later 1994 decision, *Baltimar Aps Ltd v Nalder & Biddle Ltd* in which this Court held that for the purposes of international arbitration agreements governed by the Arbitration (Foreign Agreement and Awards) Act 1982, the court had no power to enquire into whether or not there was a real dispute.[13] The wording of the stay provision in *Baltimar* was more akin to art 8(1) than to s 5 of the Arbitration Act 1908, which was the clause under consideration in *Royal Oak*. Further, the Court in *Baltimar* accepted that there were strong logical arguments for the view that a bona fide if unsubstantial defence ought to be ruled upon by an arbitrator, not the court.

- The Court in *Royal Oak* failed to recognise that the English courts were beginning to express reservations about the way in which the added words were being interpreted and the appropriateness of the reverse side of the coin approach.

[37] It is correct that the Court in *Baltimar* took a different approach than *Royal Oak* in relation to foreign arbitration agreements. However, the Court did not in any way suggest that *Royal Oak* was wrong. On the contrary, the *Baltimar* decision expressly refers to *Royal Oak* as being the case "where this Court adopted the English practice of inquiring into the reality of the defence on applications for stay and summary judgment".[14]

---

13 *Baltimar Aps Ltd v Nalder & Biddle Ltd* [1994] 3 NZLR 129 (CA).
14 At 135.

[38] Further, as the Court in *Baltimar* makes plain, the reason for the different approach it took was because of differences in the wording of the relevant statutory provisions in question.[15] The provision at issue in *Baltimar* was a mandatory provision. It stated that the court "shall" make an order staying the proceeding unless the arbitration agreement is null and void, inoperative or incapable of being performed. The Court concluded that those words meant that in the absence of any of the three specified disqualifying conditions, the court had no discretion to exclude arbitration. Significantly, the Court contrasted that wording with the English equivalent, expressly noting that the English legislation extended the court's power to exclude arbitration to cases where there is not in fact any dispute. The Court went on to say that in the case of domestic arbitrations in New Zealand, the court had an even wider discretion than in England because s 5 of the Arbitration Act empowered the court to make an order staying proceedings if satisfied there is no sufficient reason why the matter should not be referred to arbitration. As mentioned, s 5 was the provision at issue in *Royal Oak*.

[39] We acknowledge that there are comments in *Baltimar* critical of the English approach, especially in cases where the parties have expressly excluded lawyers. However, the Court emphasised that its comments applied only to international arbitration agreements governed by the 1982 Act and that "the discretion given to the Court to order a stay in domestic arbitrations [allowed] a different approach".[16]

[40] Two important points emerge from *Baltimar*. First, the Court regarded the added words as extending the court's power to exclude arbitration and secondly, it confirmed that *Royal Oak* was good authority for the application of the reverse side of the coin approach in domestic arbitrations. The Court in *Baltimar* did not expressly say that the same result would have been reached in *Royal Oak* had s 5 of the New Zealand Arbitration Act contained the added words (as opposed to a general discretion), but it is a reasonable implication from its discussion of English authorities that it considered that would be the effect of the added words.

---

15 At 135.
16 At 135.

[41] As mentioned, *Royal Oak* was decided under the Arbitration Act 1908. That Act was repealed in 1996 and replaced by the current Arbitration Act. Whereas the 1908 Act was largely modelled on English arbitration procedures, the 1996 Act is based on an international model developed by the United Nations Commission on International Trade Law (UNCITRAL) (the Model Law).

[42] The wording of art 8(1) is almost identical to the wording of art 8(1) of the Model Law, with the notable exception of the added words.

[43] The 1996 Act had its genesis in a 1991 New Zealand Law Commission Report.[17] This 1991 Report recommended the insertion of the added words to art 8(1). The Commission's reasons for that recommendation were contained in the following two paragraphs of the Report:[18]

> 308 The proposed addition at the end of article 8(1) may be explained by a passage in the Mustill Committee report:
>
> > Section 1 of the Arbitration Act 1975 has a ground for refusing a stay which is not expressed in the New York Convention, namely "that there is not in fact any dispute between the parties with regard to the matter agreed to be referred". This is of great value in disposing of applications for a stay by a defendant who has no arguable defence. ((1990) 6 Arbitration International at 53)
>
> The phrase makes explicit in this provision the element of "dispute" which is already expressly included in article 7(1) when read with s 4. The same reasoning underlies the recommendation in the Alberta ILRR report that a court be empowered to refuse to stay an action if "the case is a proper one for a default or summary judgment".
>
> 309 In the course of our consultative activity, we received a number of suggestions that the efficiency of the summary judgment procedure as it has developed under the High Court Rules should not be lost by reason of any implication that a dispute where there is no defence must be arbitrated under an arbitration agreement. We agree. Although it may be argued that if there is no dispute, then there is no "matter which is the subject of an arbitration agreement" within the meaning of article 8(1), it seems useful to spell out that the absence of any dispute is a ground for refusing a stay.

---

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

18 See also [128].

[44] Mr Galbraith submitted that because [309] uses the word "useful" and talks about the absence of *any* dispute, it would be wrong to regard the Law Commission as necessarily endorsing the "arguable defence" interpretation of the added words. He further argued if that was what the Law Commission intended, then it was wholly inconsistent with the general thrust and driving purpose of the 1991 Report, which was to harmonise domestic and international arbitration law. In Mr Galbraith's submission, had the Commission intended to depart from the Model Law, it would surely have said so.

[45] We agree that read in isolation some aspects of [309] are ambiguous and capable of being read in the way suggested by Mr Galbraith. However, in our view, the preceding paragraph puts the matter beyond all doubt. In particular, the references in [308] to the reports of the Mustill Committee and the Alberta Institute of Law Research and Reform make it clear that the Law Commission saw the added words as importing the summary judgment "arguable defence" test and that this was the desired effect. The Mustill Committee Report was a 1990 English Report on the Model Law. The 1998 Report of the Alberta Institute of Law Research and Reform was concerned with proposals for a new Alberta Arbitration Act patterned on the Model Law. Both overseas reports recommended the use of the summary judgment test.

[46] The New Zealand Law Commission's 1991 Report included a draft statute recommended by the Commission. Article 8(1) of the draft contained the added words. While it took some five years for legislation to be finally enacted, the wording of art 8(1) did not change from the time of the Commission's draft.

[47] The Arbitration Act 1996 was enacted by the New Zealand Parliament in September 1996.

[48] In June 1996, the United Kingdom Parliament also enacted new arbitration legislation, namely the Arbitration Act 1996 (UK). Significantly, the relevant provision governing stay of court proceedings omitted the added words. Mr Galbraith suggested that by 1996 the reverse side of the coin approach had already been debunked by the English courts and the removal of the added words in

the English legislation was accordingly designed to put the matter beyond all doubt, rather than effect any substantive change in the law.

[49] Thus, so the argument runs, the *insertion* of the added words by the New Zealand Parliament in 1996 should similarly be regarded as having no substantive effect.

[50] We are not persuaded of the logic of that argument. Nor in any event do we agree with Mr Galbraith's analysis of the pre-1996 English cases.

[51] It is certainly correct that several English decisions had expressed misgivings about the reverse side of the coin approach and adopted a narrower interpretation of the added words. Of these decisions, the most notable is that of Saville J in *Hayter v Nelson and Home Insurance Co.*[19]

[52] However, in our view it is incorrect to say that the added words had come to be regarded by the English courts as surplusage. At best, there was a divergence of opinion, the weight of authority arguably still favouring the reverse side of the coin approach.[20] Further, even in *Hayter v Nelson*, Saville J accepted that the phrase "not in fact any dispute" meant there was not in fact anything disputable. The test he propounded was that before a stay could be withheld, it must be "readily and immediately demonstrable" that the respondent had "no good grounds at all" for disputing the claim.[21] That is a lower threshold then the summary judgment test of no arguable defence, but it is a higher threshold than the test of lack of good faith advocated by Mr Galbraith.

[53] The significance of the added words and their subsequent removal in England in 1996 has been considered by the English Court of Appeal in *Halki Shipping Corp v Sopex Oils Ltd*. In that case, Henry LJ held that Parliament's insertion of the added words in 1930 had "radically altered" the legal position by imposing "a

---

19 *Hayter v Nelson and Home Insurance Co* [1990] 2 Lloyd's Rep 265 (QB).

20 This analysis is supported by the subsequent English Court of Appeal decision in *Halki Shipping Corp v Sopex Oils Ltd* [1998] 1 WLR 726 (CA). Compare Departmental Advisory Committee on Arbitration Law *Report on Arbitration Bill* (February 1996), and the comments of Master Thomson in *Todd Energy Ltd v Kiwi Power (1995) Ltd* HC Wellington CP46/01, 29 October 2001 at [48] with which we respectfully disagree.

21 At 271.

significant restriction" on the court's power to grant a stay.[22] He described the added words as "legally significant" and as being "the source of the Court's jurisdiction to grant summary judgment in cases where there was a dispute under the arbitration agreement, but enquiry by the Court … into whether or not there was anything disputable had shown that there was not".[23] The majority of the Court in *Halki* further held that the 1996 repeal of the added words was also of legal significance, its intention being to exclude the Court's summary jurisdiction based on what was in fact disputable. Henry LJ said he took the excision of the added words as showing Parliament did not consider that the safeguards against arbitral delay which summary judgment provides are today necessary in the public interest.

[54] The fact the New Zealand Parliament chose to insert the added words five months after the United Kingdom Parliament had chosen to remove them tends to suggest that, contrary to its United Kingdom counterpart, the New Zealand Parliament considered the safeguards were still useful. That had certainly been the view expressed to Parliament by the New Zealand Law Commission in 1991.

[55] Since the enactment of the 1996 Act in New Zealand, the preponderance of High Court authority has continued to follow the reverse side of the coin approach.[24] Further, although the issue has not been argued before this Court until now, this Court has in one post-1996 Arbitration Act decision accepted without demur an agreement by counsel that the reverse side of the coin approach applied.[25]

---

22 At 748–749.

23 At 749.

24 *Reilly v Fletcher* HC Nelson CP17/95, 5 March 1996 at 4; *Auckland City Council v Auckland Tepid Baths Ltd (No 1)* HC Auckland HC78/96, 10 February 1997 at 6–7; *Fletcher Construction New Zealand v Kiwi Co-operative Dairies Ltd* HC New Plymouth CP7/98, 27 May 1998 at [1.03] and [4.07]; *Natural Gas Corporation of New Zealand Ltd v Bay of Plenty Electricity Ltd* HC Wellington CP179/99, 22 December 1999 at 11; *Southern v Yang* HC Auckland CP168-IM99, 3 December 1999 at [3]; *Yawata Ltd v Powell* HC Wellington AP142/00, 4 October 2000 at [52], [67] and [76]; *Rawnsley v Ruck* HC Auckland AP159/00, 20 February 2001 at [10] and [23]; *Martin v Wills* HC Timaru CP11/01, 8 November 2001 at [14]; *Rappongi Excursions Ltd v Denny's Inc* HC Nelson CP20/01, 24 April 2001 at [27]; *Pathak v Tourism Transport Ltd* [2002] 3 NZLR 681 at [28]; *Reddy Dig Contractors Ltd v Connetics Ltd* HC Wellington CP147/02, 12 February 2003 at [71], [75] and [96]; *Rayonier MDF New Zealand Ltd v Metso Panelboard Ltd* HC Auckland CP256/02, 27 May 2003 at [24]–[30]; *BP Oil New Zealand Ltd v Inglis* HC Nelson CIV-2001-442-1996, 22 December 2004 at [14]; *Carter Holt Harvey Ltd v Genesis Power Ltd (No 2)* [2006] 3 NZLR 794 at [50]; *Lawson v Hartshorn* HC Christchurch CIV-2007-409-3055, 8 May 2008 at [21], [23] and [59]–[60]; *Station Properties Ltd (in rec) v Paget* HC Auckland CIV-2009-404-664, 22 December 2009 at [38(c)]; *Mudgway v DM Roberts Ltd* HC Tauranga CIV-2012-470-114, 29 June 2012 at [55]–[57].

25 *Contact Energy Ltd v Natural Gas Corporation of New Zealand Ltd* CA65/00, 18 July 2000 at [22] and [60].

[56] There have, however, been some dissenting voices.

[57] In *Todd Energy Ltd v Kiwi Power (1995) Ltd*, Master Thomson held that in dealing with any summary judgment application which was resisted by a stay application under art 8(1), the court should consider the stay application first and apply the *Hayter v Nelson* test.[26] Master Thomson also stated that the Law Commission had made "a serious error" when it had recommended including the added words in the new legislation.[27] He considered the added words had the potential to create problems, which he listed as follows:[28]

> (1) The necessity for the court in each case to determine what constitutes a dispute?
>
> (2) The approach the Court should take when faced with concurrent applications for summary judgments and stay.
>
> (3) The fact that if the Court hears the summary judgment application and refuses it then two hearings (at least) will result. That may well have occurred in *Royal Oak Mall Ltd*; it certainly had that result in *Fletcher Construction Ltd*. In such cases duplication of judicial resources and the extra time and costs will follow.
>
> (4) There is a real danger that if the summary judgment application fails and the dispute goes to arbitration, the arbitrator (often possessed of greater expert knowledge than the Court as to the nature of the dispute) will be handicapped in resolving it by findings made by the Judge which will be res judicata *Maclean v Stewart* (1997) 11 PRNZ 66.
>
> (5) To determine the summary judgment may take hours even days to hear (the English experience), and the Master's experience here.

[58] Master Thomson reiterated these views in *Alstom New Zealand Ltd v Contact Energy Ltd*.[29]

[59] Both *Todd Energy* and *Alstom* were cited with approval by Dobson J in *Body Corporate 344862 v E-Gas Ltd*.[30] Dobson J stated that the approach advocated by Master Thomson appeared "well justified" having regard to the changes in the wording of the legislation since *Royal Oak* (replacement of a broadly worded

---

26 *Todd Energy Ltd v Kiwi Power (1995) Ltd*, above n 20.
27 At [34].
28 At [34].
29 *Alstom New Zealand Ltd v Contact Energy Ltd* HC Wellington CP160/01, 12 November 2001.
30 *Body Corporate 344862 v E-Gas Ltd* HC Wellington CIV-2007-485-2168, 23 September 2008.

discretion with a mandatory stay provision subject to a defined exception).[31] In the view of Dobson J, permitting potential bifurcation of a dispute by allowing arguments on summary judgment was inconsistent with the Model Law's principle of party autonomy. His suggested solution was that a stay should only be declined if the whole dispute was able to be resolved in summary judgment.

[60] The views expressed by Master Thomson have also found support in *Gawith v Lawson* and in two New Zealand texts.[32]

[61] However, in 2003 the New Zealand Law Commission undertook a comprehensive review of the Arbitration Act 1996. The resulting report refers specifically to the *Todd Energy* decision and the criticisms expressed by Master Thomson.[33] The Commission's response to the criticism was as follows:[34]

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

[62] Following the review, several provisions of the Arbitration Act 1996 were amended by the Arbitration Amendment Act 2007. There was no amendment to art 8(1).

Analysis

[63] Our task is of course to ascertain Parliament's intention having regard to the language used, the purpose of the legislation and any background legislative material, which in this case importantly includes the two Law Commission Reports.

---

31 At [66].

32 *Gawith v Lawson* HC Masterton CIV-2010-435-253, 4 May 2011 at [7]–[8]; AAP Willy *Arbitration* (Brookers, Wellington, 2010) at [4.9]; P Green and B Hunt *Green and Hunt on Arbitration Law and Practice* (looseleaf ed, Brookers). It should be noted that on the facts of these dissenting cases, the comments made were largely obiter.

33 Law Commission *Improving the Arbitration Act 1996* (NZLC R83, 2003) at [245].

34 At [247]. Mr Galbraith points out that the Law Commission has misquoted its own previous report in that the 1991 Report used the word "useful" rather than "unnecessary". However, in our view this does not detract from the weight to be placed on the 2003 Report.

[64] Mr Galbraith submitted that nothing in the express wording of art 8(1) militates in favour of the reverse side of the coin approach. The words "arguable defence" do not appear anywhere. They are pure judicial gloss. Mr Galbraith also referred us to ss 3 and 5 of the Arbitration Act. Section 3 provides that in interpreting the Act, the court may refer to documents relating to the Model Law. Section 5 sets out the purposes of the Act. These include encouraging the use of arbitration as an agreed method of resolving commercial and other disputes and promoting international consistency of arbitral regimes based on the Model Law. Mr Galbraith emphasised that the added words should be construed having regard to those purposes and not to the efficacy of the summary judgment procedure. The latter is not mentioned in s 5.

[65] The points made are valid ones, but in our view they are outweighed by the following considerations.

[66] Article 8(1) of the Model Law does not contain the added words. Article 8(1) of the New Zealand Arbitration Act does contain the added words. Therefore consistency with the Model Law was not intended to be absolute.[35]

[67] Further, the presumption is that Parliament does nothing in vain. The added words must have been intended to have some effect. They are not superfluous. Similarly, Parliament should not be taken to have intended an absurdity, which would follow if the word "dispute" as it appears in the added words was given its usual meaning. The parties have only agreed to refer disputes to arbitration and so if there was no dispute then there would be nothing to refer in the first place. In order to make sense of the word "dispute" as it appears in the added words, it must therefore be interpreted as having an expanded meaning. This is reinforced by the use of the word "finds" in art 8(1), which demonstrates that Parliament clearly envisaged a judicial inquiry or hearing. A hearing would, as Mr Ring QC points out, normally involve evidence and submissions. The stated purpose of the hearing is to enable the court to determine whether there is or is not in fact any dispute. The words "in fact" denote that the test is to be an objective one.

---

[35] Something the 1991 Law Commission Report in fact made clear.

[68] All of that is arguably consistent with a hearing limited to ascertaining the genuineness or good faith of the dispute as well as being consistent with an inquiry into whether the defendant has any arguable basis for disputing the plaintiff's claim.[36] However, in interpreting the added words, it is not possible to ignore the law as it stood prior to the enactment of the 1996 Act, nor the two Law Commission Reports.

[69] There can be no doubt that the 1991 Law Commission Report was the genesis for the added words. In our view, the Law Commission's recommendation was clearly intended to ensure that the existing New Zealand legal position and practice since the decision of *Royal Oak* would continue under the new statute.

[70] In order to overcome the argument that Parliament must have accepted the Law Commission's recommendation in subsequently enacting the added words, Mr Galbraith was driven to suggesting that Parliament may have understood the added words in some other way and so intended to achieve something different. We do not accept that submission which we consider unrealistic and unsupported by any background material.[37]

[71] Mr Galbraith also faces the further formidable obstacle that following a comprehensive review of the Arbitration Act, Parliament retained the added words in 2007. It did so knowing of the way in which the overwhelming weight of New Zealand court decisions had interpreted the added words, and it did so knowing of the criticism of the reverse side of the coin approach. In those circumstances, the retention of the added words must be taken to represent a deliberate policy choice on the part of the New Zealand Parliament. It is not for us to substitute a different policy.

---

[36] It is only arguable because it is possible under the Model Law a court would have the power to engage in such a good faith inquiry anyway (without the need for the added words). That in turn would militate against giving the added words an interpretation which would render them superfluous.

[37] Mr Galbraith sought to rely on an extract from Hansard which shows that when the then Arbitration Bill was introduced for its Third Reading, significant modifications from the Model Law were identified, but no mention was made of the added words. The inference he seeks to draw from the omission is in our view tenuous.

[72] It is worth noting in this context that the 2003 Law Commission review found that the Arbitration Act appeared to be working well and that the courts appeared to be applying the Act in accordance with its underlying themes, identified as being party autonomy, reduced judicial involvement in the arbitral process, consistency with laws in other jurisdictions and increased powers for the arbitral tribunal. This suggests that the reverse side of the coin approach is not as problematic as Zurich asserts.

[73] Claims that New Zealand is out of step with the rest of the world on this issue also appear to be overstated. In six Canadian provinces for example, a stay of proceedings may be refused if the matter in dispute is a "proper one for default or summary judgment",[38] while in two other Canadian provinces and in South Africa the Court is given a wide general discretion to refuse a stay similar to that found in the 1908 New Zealand Arbitration Act.[39]

[74] Arguments about party autonomy also work both ways. As Mr Ring pointed out, in this case the parties not only agreed on arbitration and the arbitration venue, they also agreed that New Zealand law would apply to the policy and that New Zealand courts would have exclusive jurisdiction. Thus it can be said that the parties themselves chose the law which was applied in the Associate Judge's decision.

[75] In many cases, it may also be unjust that a claimant should be forced into the expense of full scale arbitration if there is no arguable defence. The summary judgment process does offer a timely and efficient means of resolution. As for cases becoming bogged down by appeals, there is of course a right of appeal (or review) against a stay application anyway.

[76] All of that is not to say we consider Mr Galbraith's policy arguments are without merit. On the contrary, we consider that some of them do have merit. The point is that there are countervailing policy arguments and that Parliament has made its choice which we must uphold.

---

[38] Arbitration Act RSA 2000 c A-43, s 7; The Arbitration Act CCSM 1997 c A120, s 7; Arbitration Act SNB 1992 c A-10.1, s 7; Commercial Arbitration Act RSNS 1999 c 5, s 9; Arbitration Act SO 1991 c 17, s 7; Arbitration Act SS 1992 c A-24.1, s 8.

[39] Arbitration Act RSPEI 1988 c A-16, s 6; Arbitration Act RSNL 1990 c A-14, s 4; Arbitration Act No 42 of 1965 (South Africa), s 6.

[77] We conclude that for the purposes of art 8(1) there will in fact be no dispute if the defendant has no arguable basis for disputing the plaintiff's claim. The court is thus empowered as a result of the added words to refuse to stay a proceeding if the claim is a proper one for summary judgment.

Outcome

[78] The application for review is dismissed. We find that, by including the added words to art 8(1) of the First Schedule of the Arbitration Act 1996, Parliament intended that courts would apply the same arguable defence test to stay applications as is applied to summary judgment.

[79] The applicant must pay the respondent's costs for a standard appeal on a band A basis plus usual disbursements.

Solicitors:
DAC Beachcroft New Zealand, Auckland for Applicant
Legal People, Herne Bay for Respondent