IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2012-470-000114
[2012] NZHC 1463

	BETWEEN	M S MUDGWAY AND L A MUDGWAY Plaintiffs
	AND	D M ROBERTS LIMITED Defendant

Hearing: 22 May 2012

Appearances: Mr M Fisher for Respondent/Plaintiffs
Mr D Simpson for Applicant/Defendant

Judgment: 29 June 2012

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

This judgment was delivered by me on
***29.06.12 at 4 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Counsel:
Mr M Fisher, Erskine Chambers, Auckland – mj.fisher@erskinechambers.co.nz
Mr D M Simpson, Simpson Aspen Law, Tauranga – davids@salaw.co.nz

[1] The plaintiffs filed an application for summary judgment seeking orders that the defendant specifically perform the terms of a lease agreement under which the plaintiffs were assignees, the lease commencing 1 January 1985. The plaintiffs took proceedings for summary judgment because of a dispute that arose at the end of last year when attempts were made by the plaintiffs to assign their interest under the memorandum of lease to a person called Mr Pryor. When the defendant (the lessor) was asked to provide consent it agreed to do so but on terms which were unacceptable to the plaintiffs. The conditions attached to the granting of consent will be further discussed below.

[2] The plaintiffs brought the application because the proposed conditions attached to the grant of the lessor's consent were not acceptable to Mr Pryor who had entered into an agreement to acquire from the plaintiffs their interest under the lease. Since the proceedings were commenced events have overtaken the plaintiffs. Mr Pryor, being no longer prepared to wait for the issue to be resolved by the Court, cancelled the agreement under which he was to acquire the plaintiffs' interest.

[3] The plaintiffs sought in the alternative a declaration that the conditions that the lessor sought to impose were unjustified. In detail, the plaintiffs' claim that the lessor was attempting to impose conditions on the assignment which the lessor/defendant had no right having regard to the terms of the lease.

[4] The plaintiffs have sought leave to amend their application to make some changes to the forms of the declarations. The substance of the orders sought though remain the same. The plaintiffs do not seek the specific performance orders that were originally part of the application.

[5] The background to the proceeding is that Mr D M Roberts who owned land in the Kaimai area conceived of a scheme to transfer land which he owned to a trust being some 2.5 hectares of rural land for the purposes of providing a recreational centre for pupils attending Tauranga Boys' College. A lease was entered into in March 1985. The lease was for 999 years.

[6] However circumstances changed and it no longer fitted with the requirements of the parties for the trust. But the lessor was still desirous of the lease continuing in existence. It was decided that the lease should be assigned to Tauranga Boys' College Board of Trustees. That Board was willing to accept an assignment of the original lease from the trustees of the original trust that was envisaged would be the lessee. As part of the assignment arrangements, which were entered into on 23 February 1999, there was some modification of the terms of the lease which I will refer to later in this judgment.

[7] When Mr Roberts first developed his idea of making part of his property in question available for outdoor activities he applied to the Tauranga County Council, the then territorial authority, and on 16 March 1978 the parcel of land that he proposed to put aside was approved as to the creation of a new lot which was to:

> (b)e used for the purposes of a private camping ground for college students under the jurisdiction of [the Tauranga Boys'' College] for educational and recreational purposes.

[8] In 1998 an application for resource consent was made. The consent was to enable the property to be used as well as an educational/outdoor experience centre for Tauranga College pupils (to provide accommodation as a tourist lodge). The consent application was made on the basis that the new tourist lodge type activity would not entirely displace the college use of the property although the two uses would not occur concurrently. The then applicants (one of whom was the plaintiff, Mark Shane Mudgway, his brother being the other), said in their proposal that:

> The applicants seek consent to establish and operate tourist accommodation from an existing lodge. The lodge is currently used by Tauranga Boys' College for accommodation as part of its education programme
>
> ...
>
> The proposed activity would provide for accommodation both for groups and for individuals up to a maximum of 28 people and accommodation for 2 staff
>
> ...
>
> No additional buildings are proposed however internal alterations will be necessary to provide accommodation choices. One of the two existing dormitories will be converted to four, two person bedrooms. **A third existing building will provide the staff quarters**

...

During the periods when being used by the school, the facility will not be operated for tourist accommodation although the two staff will remain resident on the site.

[emphasis added]

[9] Amongst other things the application then filed said:

The applicants intend to operate the facility for accommodation by appointment only. The concept of the lodge providing a "bush retreat" does not fit with the facility providing for passing trade.

[10] The resource application contemplated that staff would reside on the property. That proposal was approved as part of a wider application which the applicants had filed.

[11] It seems likely that the reason why the additional use of the property as a tourist lodge was added was in order to generate some revenue to meet the costs of the facility.

[12] On 3 May 1999 the Tauranga Boys' College board of trustees executed a sub-lease to the Mudgway brothers for four years. The sub-lease contained an option for the sublessee to take an assignment of the balance of the term of the lease. That option was in fact taken up.

[13] The exercise by the Mudgway brothers of the option changed the quality of the benefaction which the defendant had intended. From that point private individuals with more or less permanent rights to occupy the property were in possession of it.

[14] It is necessary to say something additional about the assignment from the trustees of the proposed trust to the Tauranga Boys' College board of trustees on 23 February 1999. The deed included clause 4 which should be set out in full.

4. The demised land shall only be used for any or all of the following purposes:

(a) As an outdoor education facility;

(b) As a facility for educating people in matters pertaining to forest and flora, animal and bird life and the enjoyment of the natural facilities available in the vicinity of the demised land;

(c) The promotion of knowledge of and interest in the forest, land, streams, bush and geology and geography of the Kaimai Ranges and the area of the Western Bay of Plenty and other educational activities by means of camps, study trips, lectures, publications and other forms of instruction;

(d) The establishment and operation of a tourist lodge but only if such use is carried out in compliance with the conditions and requirements for the time being of the local authority having jurisdiction over the demised land.

[15] It was for the purposes of subclause "(d)" that an amended resource consent had been obtained.

[16] The deed contained the usual provision for written consent of the lessor being needed for an assignment provided that the lessor shall not unreasonably or arbitrarily withhold its consents but on any assignment:

5(a) The annual rental shall be increased to a figure more appropriate for a profit-making tenant.

[17] Clause 11 was also important and it read as follows:

11. The Lessee will comply with all Statutes Ordinances, Regulations, Bylaws, Requisitions and notices affecting or relating to the demised premises or the use thereof and with all requirements which may be made or notices or orders which may be given any authority whatsoever having jurisdiction or authority over or in respect of the demised premises and will indemnify and keep indemnified the Lessor from and against all actions, suits, claims, demands, fines, penalties and payments arising out of or relating to such Statutes Ordinances, Regulations, Bylaws, Requisitions and Notices and any alterations or additions of a structural nature to buildings drains or standatory appliances on the demised land required by any duly constituted authority shall be the sole responsibility and liability of the Lessee and in particular the Lessee shall comply with the Camping Ground Regulations 1936 or any enactment in substitution thereof and shall make the regulatory provisions for fire fighting purposes.

[18] I interpolate it to say that in my opinion clause 11 imposed upon the lessee the obligation to comply with all conditions contained in the resource consents. Therefore if there were ever to be an assignment (as there turned out to be) of the

lessee's interest, it would require the assignee, too, to comply with the conditions of the resource consents.

[19] In 2004 an application was made to amend the terms of the consent to increase the number of persons who could be accommodated to a maximum of 40. The territorial authority consented to the proposal the same year. In the reasons for the decision which the territorial authority gave for its amended decision it said:

> The application for a variation proposes that the maximum number of persons the lodge can accommodate be increased from 28 plus two staff to 40 plus two staff.

[20] As time went by Mr Roberts and his company began to develop anxieties that the original objects for which the property was settled might no longer be realised. Mr Roberts, understandably, became concerned that private individuals might be able to treat the property as the equivalent of a "lifestyle block".

[21] In 2011, the plaintiffs took steps to sell their interest in the property and at this point it would seem that Mr Roberts' concerns increased because of the nature of the marketing campaign which was launched on the plaintiffs' behalf. The "marketing" publicity which the real estate agents prepared on their behalf emphasised the suitability of the premises for events such as team building, family reunions and birthday parties.

[22] At the end of 2011 the plaintiffs sought consent to an assignment as part of the proposed sale to Mr Pryor. When the plaintiffs sought consent for assignment to Mr Pryor on the 22 December 2011 the solicitors then acting for the defendant responded in the following terms:

> ...
>
> We refer you to the attached application for consent to the establishment of the tourist accommodation which clearly states that it provides for accommodation for two staff.
>
> The addition of the 2 bedrooms by your client was in breach of clause 4 of the lease and occurred without our clients' knowledge. Clause 4 of the lease states "the demised land shall only be used for" the purposes set out at (a) to (d) inclusive. This does not include use as residential accommodation.

> Our client agrees the dwelling on the property is a permitted activity but this is contrary to the terms of the resource consent and the lease which take precedence.
>
> Our client will not agree to the dwelling being used for residential accommodation and our client does not consent to the transfer to the new lessee without an acknowledgement from the new lessee that they will not be using the dwelling as residential accommodation.

[23] However the form of the consent conditions which were ultimately put forward by the defendant were somewhat different from what was set out in the letter of December 2011 from which I have quoted at paragraph [22] above. The conditions which the defendant's solicitor drafted and forwarded to the plaintiffs' solicitors contained the following statement of the basis upon which it would consent to the assignment:

> The assignee agrees with the assignor to perform all the provisions of the resource consent dated 8 November 2004 and any variations thereto from the date of the assignment.
>
> Any residential dwelling on the property is subsidiary to the lodge and may only be used as a residential dwelling for a maximum of two persons (and dependent children) in conjunction with the function and the management of the lodge.

[24] But the nub of the letter of 22 December is the claim that the defendant will not agree to the dwelling on the premises being used for residential accommodation. It is necessary to say something additional about the facts in order to understand that contention.

[25] The problem with the phraseology in the letter of 22 December 2011 is that "residential accommodation" is a term of imprecise ambit. Two examples will illustrate the point. If an assignee on acquiring the property began living on the property and at the same time stopped permitting trampers and others to use the lodge as a base for outdoor education etc and also ceased to operate it as a tourist lodge, then the character of the use of the land would in substance be that of a private residence. It is probably that type of contingency that the defendant's solicitors were attempting to proscribe.

[26] However, if the terms of the lease and the resource consents when read together are reasonably construed, they authorise staff working at the complex to

actually live there. I note that under the earlier dispensation under which the property was managed, the staff were not required to vacate when the property was being used by Tauranga Boys' College pupils and of course they would be required to be there when it was functioning as a tourist lodge. What the position would be on when the staff members had time off is unclear but it may be that as happens with some accommodation establishments, particularly those in remote areas, the reasonable expectation is that the staff member will live on the premises full-time. Whether full or part-time accommodation is contemplated by the consent probably does not matter. The important point though is that a blanket restriction on "residential accommodation" would prevent even staff members residing at the property.

[27] When considering what was permitted by the terms of the lease, it is necessary to have regard to the obligations in the lease that the lessee comply with the resource consents and so the two have to be considered in conjunction with each other. As matters stand, the defendant has not been able to suggest a basis for proscribing residence at the property by employees. To that extent the denial of a right of "residential accommodation" would not be in accordance with the terms of the lease. Indeed, the defendant does not appear to have appreciated that the formulation which the solicitor used in the letter goes the distance that I consider that it does.

The principles governing consent to assignment of leases

[28] Both parties agreed that the decision in *Corunna Bay Holdings Ltd v Rovert Gracie Dean Ltd* is relevant to their enquiry.[1]

> [19] This review of the authorities leads us to the conclusion that when the lessor sought to make the assignee liable to a greater extent than it would have been at law, and declined to consent unless this outcome was achieved, the lessor was unreasonably withholding its consent. The lessee's right to assign was thereby rendered less valuable. The lessor was not entitled to impose that detriment on the lessee without a contractual right to do so. If such contractual right had existed, the lessee's right to assign would have been less valuable from the outset, rather than as a consequence of the lessor's unilateral stipulation.

[1] *Corunna Bay Holdings Ltd v Robert Gracie Dean Ltd* [2002] 2 NZLR 186.

[29] Obviously the subject matter of the present case is different from that which was before the court in *Corunna Bay*, but I agree with counsel that the statement of principle in that case governs the circumstances of the dispute between the parties to this proceeding.

[30] The conditions which the lessor sought to attach to its consent to assignment must not impose a greater detriment upon the assignee than can be justified by the terms of the lease contract. In the context of this case, that means that the defendant is not entitled to impose any greater restriction on the use to which the lessees and their assignees had.

Should declarations be issued?

[31] The next issue to be considered is whether the Court ought to issue declarations. The first of the primary considerations that should be taken into account in making that decision is whether the defendant breached its contractual obligations by insisting on consent on the terms that it put forward. Secondly, if it was, would there be utility in now granting declarations, given that the Pryor transaction has now been lost.

[32] As to the first question it will be evident from the discussion earlier in this judgment, that on the proper construction of the lease against the background of the resource consent, the stipulations in the letter of 22 December 2011 concerning the basis upon which assignment will be consented to, were unjustified and were unreasonable. That is because in seeking to attach conditions to consent to the assignment that it did, the defendant was attempting to exercise a right that it did not have under the lease. Put shortly, the defendant did not have the right to insist upon an undertaking of kind set out in the letter dated 22 December 2011.

[33] As matters stand, there would be nothing to prevent the defendant from again insisting upon unjustified conditions being attached to the consent to assignment lease in future. If that were to occur, the plaintiffs could suffer loss. That circumstance may justify the issue of declarations which would prevent the

defendant in future from going beyond what conditions the lease entitles it to impose upon any consent to assignment. Of course, the issue of declarations would not necessarily result in the defendant acting in accordance with the lease and the resource consent were the plaintiffs to request consent to assignment in future. However, a declaration would at least make clear what the defendant is required to do.

[34] The form in which the plaintiffs sought declarations was as follows:

> 2.2 The declarations sought will be as follows:
>
> (a) "Under the terms of the Memorandum of Lease two staff members of the tourist lodge being operated on the demised land are entitled to reside there with their children";
>
> (b) "The defendant unreasonably and /or arbitrarily [withheld] its consent to a proposed assignment of the lease by the plaintiffs to R H Pryor or Nominee contrary to clause 5 of the Memorandum of Lease by making its consent conditional on:
>
> (i) the proposed assignee signing the acknowledgement sought in Sharp Tudhope's letter to Jones Howden dated 22 December 2011"; and/or
>
> (ii) the assignor and the proposed assignee agreeing to the variations to the lease set forth in the Fifth Schedule to a proposed Deed of Assignment of Lease (at exhibit "T" to the affidavit of D M Roberts sworn 15 March 2012[2].)
>
> (c) "The plaintiffs [were] entitled to assign their interest in the lease to R H Pryor or Nominee and such assignment, on terms that the assignee would sign a Deed of Covenant confirming that it would abide by the terms of the lease and of any resource consent relating to the property, would not have constituted a breach of the lease".

[35] The first issue that I consider is the form of the first paragraph of the plaintiffs' proposed conditions which are set out in paragraph [23] above. Mr Fisher for the plaintiffs contended that a condition on the form set out in that paragraph was objectionable because it was an attempt on the part of the defendant to "set in stone" for all time the provisions of the resource consent dated 8 November 2004. I do not accept that submission because immediately after the reference to 8 November 2004

[2] Unsigned Deed of Assignment at page 153 of Bundle.

there follow the words "and any variation thereof". Therefore had the plaintiffs been required to adhere to such a condition, there would not have been anything to prevent them, or any other person with the requisite interest in the property, from applying for varied resource consent conditions in regard to the property. Given that that is my conclusion, I will not comment further on the first paragraph and the balance of this judgment will be concerned with the second paragraph.

[36] The substantial issue is that covered by paragraph 2.2 (b) and (c) of the proposed declarations. Subject to the matters that are discussed in the following paragraphs of this section of the judgment, I would agree that the plaintiffs are entitled to declarations in the form which they now seek.

[37] It was Mr Simpson's submission, if not in these exact words, that because there was no proposed assignment now awaiting consent, there would be no justification to issue declarations. In his view there is no need for declarations given that the Pryor transaction will no longer be proceeding. Further, a declaration concerning what happened in the past, that is in December 2011, was also of academic interest.

[38] I would observe though that there remains a latent issue which at some point is going to have to be confronted if, as seems apparent, the plaintiffs intend to sell their interest in the property

[39] Mr Fisher did not accept that the matter was academic. The parties are in dispute about what the lease entitles the lessor to require when approving an assignment and that while that issue may not be pressing one at the present time, the need for guidance will inevitably arise at some time in the future.

[40] The jurisdiction to grant declaratory judgments involves a substantial degree of discretion.[3] The following statement that appears in Halsbury's Laws of England provides useful guidance concerning the way in which that discretion is to be exercised:

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[3] *Peters v Davison* [1999] 2 NZLR 164 (CA).

> Declarations will not generally be granted if they relate to hypothetical or academic issues. Thus, for example, the courts have refused to grant a declaration in relation to the compatibility of legislation with European Union law where that legislation had already been repealed. The courts will not generally grant purely advisory declarations as to what the law is where there is no live issue to be resolved between the parties. Declarations will not be granted in relation to proceedings in Parliament. In addition, the general principles governing the refusal of relief in relation to claims for the prerogative remedies in judicial review apply to the grant of declarations when sought in public law matters.[4]

[41] The reasons why Courts are reluctant to embark upon this type of enquiry was stated in the case of *Gazley v Attorney-General*,[5] where the Court said that it was not the function of the Courts "to advise parties as to what would be their rights under a hypothetical state of facts". But the Court also said that if the applicant's rights were being subject to actual or threatened interference, the Court could entertain relief by way of declaration.[6] Lord Diplock's statements in *Gouriet v Union of Post Office Workers* also support this conclusion:

> … [F]or the court to have jurisdiction to declare any legal right it must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in the future conditionally on the happening of an event.
>
> … It is clearly established that [the plaintiff] need not [have a subsisting cause of action or a right to some other relief]. Relief in the form of a declaration of right is generally superfluous for a plaintiff who has a subsisting cause of action. It is when an infringement of the plaintiff's rights in the future is threatened or when, unaccompanied by threats, there is a dispute between parties as to what their respective rights will be if something happens in the future, that the jurisdiction to make declarations of right can be most usefully invoked. But the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else.[7]

[42] I do not read those remarks as being confined to the public law context of judicial review proceedings which brought the parties before the Court in *Gouriet.*

[43] The state of affairs which Lord Diplock referred to provides guidance in the present circumstances. Having regard to that authority and the others that I have made mention of, I can see no reason why declarations should be withheld on a

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[4] Halsbury Laws of England, 4th Edition, Vol 61, "Judicial Review", paragraph 719.
[5] *Gazley v Attorney-General* (1995) 8 PRNZ 313 (CA).
[6] Ibid, at 318–319.
[7] *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL) at 501.

discretionary basis. The matters which are the subject matter of the declarations are of real concern to the plaintiffs. There would be little point in the plaintiffs seeking to locate a buyer of their interest if implementation of any agreement would be blocked by the defendant insisting on conditions to the assignment which are not authorised by the terms of the lease.

[44] I conclude by briefly summarising the way in which I have used the issue of whether declarations in the form sought would be of no more than academic interest. It is correct that the declarations are framed in a way which seeks the Court's view about the legality of what occurred at the end of 2011. However, the risk in future if and when the issue of assignment arises again, is that the defendant will again decline to consent other than on the same basis that it justified its refusal in the case of the Pryor transaction. It will be inherent in a declaration about the legality of what occurred in the Pryor transaction that the Court would come to the same conclusion should circumstances comparable to those that occurred in the case of the Pryor transaction repeat themselves in the future.

Other matters

[45] As well as putting forward opposition to the declaration sought on substantial grounds, Mr Simpson advanced additional grounds which might be described as procedural grounds for declining the grant.

[46] The defendant submitted that there has been misconduct on the part of the plaintiffs in not disclosing the full terms of the 1998 resource consent. But the plaintiffs did disclose to the Court the page from the 1998 application setting out what the proposal was in respect of including the reference to a maximum of 28 people and accommodation for two staff. I do not see anything sinister in their failure to produce to the Court the document in its entirety. The fact that the defendant considered that the document could only be read in its entirety is its view, as I recognise, but within certain limits, the parties to the proceeding have the right to adduce such evidence as they think relevant. That said, I agree that the Court obviously takes an adverse view of parties who appear to have attempted to conceal or failed to bring to the Court's attention evidence or circumstances which give rise to a risk that the Court will be misled. It is a matter of judgment where the line

should be drawn. In this case, in my judgment, the plaintiffs cannot be said to have offended against the principle which I have described.

[47] The defendant also opposes the grant of declarations on the ground that they are no longer required because the Pryor transaction is not going to proceed. As well, it takes the position that the plaintiffs withheld evidence which would have been relevant to the summary judgment application and that the Court in its discretion should decline to grant relief to them on that ground.

Stay of Proceedings - the Alternative Dispute Resolution Provision in Lease

[48] The defendant has filed an application for stay of the declaration proceedings on the ground that the lease contained an alternative dispute resolution provision and it is by that means that the parties ought to be attempting resolution of their present dispute. Clause 12 of the lease provides that all disputes and differences between the parties are to be referred to arbitration.

[49] Mr Simpson sought a stay of proceedings based upon Article 8 of the First Schedule which provides:

> **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.
>
> Where proceedings referred to in paragraph (1) have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

[50] The parties took different views about what needed to be established in order for the reference to arbitration to be invoked. Mr Simpson said that the only possible argument available to the plaintiffs was that there was no dispute between the parties. His position was that that was self-evidently wrong. Mr Fisher, on the other hand, relied upon the authority of *Royal Oak Mall Limited v Savory Holdings*

Limited.[8] In that case a summary judgment application was brought seeking judgment for a sum of money. The defendant sought a stay. The question was whether for the purposes of s 5 of the Arbitration Act 1908 there was a relevant dispute which ought to be referred to arbitration. The Court of Appeal decided that it was logical that the same test that was applicable to determining whether there was a defence for the purposes of summary judgment should be applied in these circumstances. The defendant had to point to material showing that there was a real issue needing to be decided.

[51] Mr Simpson, though, submitted that the *Royal Oak Mall Limited* authority had been overtaken by the enactment of the Arbitration Act 1996.

[52] While it is correct that that decision was based upon provisions of the Arbitration Act 1908, a compelling argument can be put forward that the test that is to apply is that set out in *Royal Oak Mall Limited.* There has however been some discussion of the test in the light of the enactment of the 1996 Act.

[53] In the judgment that he gave in *Pathak v Tourism Transport Limited*,[9] Heath J concluded that the significance of the reference to their being "no dispute" was as follows:

> [28] In approaching the interpretation of Article 8 I remind myself that the part of Article 8 with which I am concerned has been adopted *verbatim* from the Model Law. The only words which have been added to Article 8(1) are the concluding words "or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred" which were inserted to maintain the integrity and efficiency of the summary judgment procedure used in this Court and the District Court for cases in which there was no arguable defence.

[54] Dobson J noted in his judgment in *Body Corporate 344862 & Others v E-Gas Limited*[10] that there are differences between the 1908 Act and Article 8 of the First Schedule to the 1996 Act. Dobson J was of the view that the changes were such as to require a different approach. He said that the approach taken by Master

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8 *Royal Oak Mall Limited v Savory Holdings Limited*, CA 106/89, 2 November 1989.
9 *Pathak v Tourism Transport Limited* [2002] 3 NZLR 681.
10 *Body Corporate 344862 & Others v E-Gas Limited* HC Wellington, CIV 2007-485-2168, 23 September 2008.

Thompson in *Todd Energy Limited v Kiwi Power (1995) Limited*[11] to the effect that an application for stay should be determined before, not after, an application for summary judgment "appears well justified".

[55] It is not clear to me that the changes in the objectives between the 1905 Act and Article 8 mean that a different approach is called for when the Court has to determine whether there is a "dispute". If the Court is going to determine that issue then it must adopt some standard that will enable it to determine whether or not there is a relevant dispute in existence. The Court of Appeal in the *Savory* case considered that the test was the same as that which the Court applies when determining whether a party has a defence under the summary judgment rules. The question of whether the 1996 legislation mandates greater autonomy for the parties to an arbitration dispute does not seem to me to throw any light on the question of whether equating the two tests should now be abandoned. It is undoubted that under the new legislation it remains the responsibility of the Court to enquire into whether or not there is a dispute. That threshold issue is not one which is to be dealt with by the arbitral body.

[56] The Court must obviously decide on some objective basis whether there is a dispute. The Court cannot find that a dispute exists for no other reason than that one of the parties asserts that to be the case. It is correct that the Act does not prescribe the test which the Court is to apply when deciding if there is a dispute or not.

[57] The summary judgment test requires an enquiry to see if the defendant has any defence; to ascertain if there is "a real question to be tried".[12] There is nothing inherently objectionable in adopting such a test for the purposes of a stay of proceedings. It does not set the standard too low which would result in insufficient weight been given to the policy that the parties to the contract should be able to determine their own mode of dispute resolution. It is a standard which is well known to the law. By adopting that standard the Court would pay proper regard to the existence of the summary judgment procedure. Finally, choosing an alternative

[11] *Todd Energy Limited v Kiwi Power (1995) Limited* HC Wellington CP46/01, 29 October 2001.
[12] *Krukzeiner v Hannover Finance Ltd* [2008] NZCA 187.

test would not be without difficulty. I therefore, respectfully agree with Heath J's conclusions in *Pathak* on this point.

[58] I next consider whether the plaintiffs have established that the defendant does not have a defence to the plaintiffs' application for a declaration.

[59] The case involves interpretation of a lease. That document is to be construed against the background of the resource consents. Having undertaken the process of construction, I am satisfied that the form of the declarations which are sought correctly reflect the contractual intention of the parties. The declaration makes it clear that the accommodation is provided for the purposes of the employees and their children. To that extent, the formulation proposed contains a built-in safeguard against the contingency of persons residing on the property for purposes which have no connection with the operation of the business of the tourist lodge. That is because of the reference to those residing on the property being present on the property as "staff members" of the business being carried on on the property. Residence is not available, therefore, to persons who do not qualify for the description of "staff members". The further words qualifying staff members as those "of the tourist lodge being operated on the demised land" provides an enforceable limitation which would prevent unpermitted residence on the property.

[60] The overall conclusion that I have come to is that the defendant has no defence to the plaintiffs' application for summary judgment seeking declarations. I therefore grant the declarations sought which are set out at paragraph [34] of this judgment.

[61] The parties should confer on the matter of costs. If they are unable to agree they should file and serve memoranda which are not to exceed six pages on each side not later than 14 days after the date of this judgment.

Postscript

[62] While one can have sympathy with Mr Roberts about this issue, in the end the decision of the Court can only be influenced by the legal agreements that his company, no doubt acting on advice, entered into. His public-spirited attempts at benefaction, though, cannot defeat such legitimate rights as the plaintiffs might have in assigning the property to someone who is prepared to purchase it from them.

[63] While it is not part of my reasons for judgment, it would appear that there are other ways in which the defendant can ensure that the prospect of the property being used as a 'lifestyle block" can be avoided. First, the lease requires adherence to the resource consent and if the property is being used in the way that does not substantially meet the requirements of a tourist lodge/educational facility, then those responsible will be in breach of the consent with the consequences that flow from such a conclusion. An assignee of the lease could be held to the requirements of clause 4 of the lease which restrict the uses of the property. Whether some of the other activities that the real estate agents publicity said were able to be carried on the property would in fact correspond with the restrictions on use, is a question for another day, possibly. There may well be difficulties in the path of a claim that the hire of the premises for birthday parties, to take one example, conforms to operation of the premises as a tourist lodge.

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J.P. Doogue
Associate Judge