

**Judgment 68/2005**

**States of Guernsey v. Miller & Baird  
(C.I.) Limited - Court of Appeal (Civil  
366) – 15 December, 2005**

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**Arbitration (Guernsey) Laws 1982 to 1986 – Appeal by the States from dismissal by Royal Court of application for stay of proceedings – allegation by respondent/plaintiff that the States had no defence to the action – summary judgment application pending – whether judicial discretion properly exercised – leave to appeal granted, appeal allowed and action stayed. (See Judgments 51, 57 and 59 of 2005.)**

**IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY**

The 15<sup>th</sup> day of December, 2005 before Kenneth Stuart Rokison Esq., QC, presiding, Peter David Smith Esq., QC and Dame Heather Steel, DBE

THE STATES OF GUERNSEY

(‘The Defendant’)

v

MILLER & BAIRD (C.I.) Limited

(‘The Contractor’)

In the matter of the Application by the Defendant for leave to appeal from the decision of the Royal Court given on 26<sup>th</sup> September, 2005;

THE COURT, having heard Advocates F. J. Raffray for the Defendant and J. P. Greenfield for the Contractor thereon, this day GAVE JUDGMENT in the terms attached hereto and: -

1. GRANTED leave to appeal;
2. ALLOWED the appeal;
3. ORDERED that the action be stayed pursuant to section 4 of the Arbitration (Guernsey) Law, 1982; and
4. AWARDED costs to the Defendant, on the standard recoverable basis, both in this Court and in the Royal Court.

K. H. TOUGH  
Registrar of the Court of Appeal

**OFFICIAL TRANSCRIPT**

smon/StatesvM&B15.12.05(Final)

**THURSDAY 15<sup>th</sup> DECEMBER 2005**

**COURT OF APPEAL**

Before

**Dame Heather Steel, DBE**  
**Kenneth Rokison, Esq., QC**  
**Peter Smith, Esq., QC**

**STATES OF GUERNSEY v. MILLER & BAIRD (C.I.) LTD.**  
**(Civil Appeal No. 366)**

ROKISON, JA:

1. This matter comes before the Court by way of an application for leave to appeal and an appeal from a judgment of the Royal Court, given by the Lieutenant Bailiff, Mr. Hancox, on 26<sup>th</sup> September 2005, whereby he declined to grant the Defendant's application for a stay of proceedings pursuant to Section 4 of the Arbitration (Guernsey) Laws, 1982 and 1986, reserving the issue of costs. The parties were asked to prepare for the hearing of the application for leave and the substantive appeal so that the Court might consider both together.
2. It may be that the Lieutenant Bailiff's reservation of the issue of costs followed from his decision not to grant a stay "*at this stage*", on the ground that the Plaintiff was entitled "*at the very least*" to have its application for summary judgment under Rule 17 of the Royal Court Civil Rules 1989 (the Guernsey equivalent of Order 14 of the Rules of the Supreme Court) heard.
3. The case arises out of a contract concluded in April 2003 and finalised by written Conditions of Contract entered into by the parties on or about 23<sup>rd</sup> March 2004, whereby the Plaintiff, Miller & Baird (C.I.) Limited (to whom I shall refer as "the Contractor") undertook to design and build for the States of Guernsey a marina in the harbour of St. Sampson's.
4. By further agreement in writing dated 2<sup>nd</sup> April 2004, part of the works (being the then outstanding works in respect of the design, supply and fitting of pontoons) was excluded from the contract.
5. The contract was awarded to the Contractor as a result of competitive tender in the total sum of £3,561,793.94, subsequently revised to £3,235,890.03 and later increased to £3,391,506.00.
6. The contract incorporated the Standard Conditions of Contract of the Institution of Civil Engineers 5<sup>th</sup> Edition (the "ICE Conditions").
7. In accordance with the usual practice with building and construction contracts, and the detailed provisions of Clause 60 of the ICE Conditions, regular payments were made to the Contractor against certificates issued by the Engineer, Mr. Graeme Falla.

8. By Certificate No. 31, dated 26<sup>th</sup> April 2005, issued and signed by the Engineer's Representative, Mr. Jeremy Mew, it was certified that a net amount of £45,123.55 was due in respect of work completed up to 19<sup>th</sup> April 2005.
9. In accordance with Clause 60(2) of the Conditions, payments so certified were payable within 28 days of the relevant certificate.
10. However, the Defendant as "Employer" under the contract has failed and refused to pay this sum on the ground that it has a counter claim for liquidated damages for delay in the amount of £204,492.14 which it is entitled to raise by way of defence of contractual set off.
11. The contractual provisions relating to "Liquidated Damages and Limitation of Damages for Delayed Completion" are complex. They are set out in Clause 47 of the ICE Conditions, and include the following:

*"47.(1)(b) If the Contractor should fail to complete the whole of the Works within the prescribed time or any extension thereof granted under Clause 44 the Contractor shall pay to the Employer for such default the sum stated in column 1 aforesaid for every week or day as the case may be which shall elapse between the date on which the prescribed time or any extension thereof expired and the date of completion of the whole of the Works...*

*... (4) If the Engineer shall under Clause 44(3) or (4) have determined and certified any extension of time to which he considers the Contractor entitled or shall have notified the Employer and the Contractor that he is of the opinion that the Contractor is not entitled to any or any further extension of time the Employer may deduct and retain from any sum otherwise payable by the Employer to the Contractor hereunder the amount which in the event that the Engineer's said opinion should not be subsequently revised would be the amount of the liquidated damages payable by the Contractor under this Clause."*

12. Under the heading "Commencement Time and Delays", Clause 44 provides as follows:-

*"44.(1) Should any variation ordered under Clause 51(1) or increased quantities referred to in Clause 51(3) or any other cause of delay referred to in these Conditions or exceptional adverse weather conditions or other special circumstances of any kind whatsoever which may occur be such as fairly to entitle the Contractor to an extension of time for the completion of the Works or (where different periods for completion of different Sections are provided for in the Appendix to the Form of Tender) of the relevant Section the Contractor shall within 28 days after the cause of the delay has arisen or as soon thereafter as is reasonable in all the circumstances deliver to the Engineer full and detailed particulars of any claim to extension of time to which he may consider himself entitled in order that such claim may be investigated at the time.*

*(2) The Engineer shall upon receipt of such particulars or if he thinks fit in the absence of any such claim consider all the circumstances known to him at that time and make an assessment of the extension of time (if any) to which he considers the Contractor entitled for the completion of the Works or relevant Section and shall by notice in writing to the Contractor grant such extension of time for completion. In the event that the Contractor shall have made a claim for an extension of time but the Engineer considers the Contractor not entitled thereto the Engineer shall so inform the Contractor.*

*(3) The Engineer shall at or as soon as possible after the due date or extended date for completion (and whether or not the Contractor shall have made any claim for an extension of time) consider all the circumstances known to him at that time and take action similar to that provided for in sub-clause (2) of this Clause. Should the Engineer consider that the Contractor is not entitled to an extension of time he shall so notify the Employer and the Contractor.*

*(4) The Engineer shall upon the issue of the Certificates of Completion of the Works or of the relevant Section review all the circumstances of the kind referred to in sub-clause (1) of this Clause and shall finally determine and certify to the Contractor the overall extension of time (if any) to which he considers the Contractor entitled in respect of the Works or any relevant Section. No such final review of the circumstances shall result in a decrease of any extension of time already granted by the Engineer pursuant to sub-clauses (2) or (3) of this Clause.”*

13. The judgment in the Court below considers in some detail the progress of the Works, claims for extensions of time, and interim extensions granted by the Engineer. It is not necessary for the purposes of this judgment to carry out the exercise in the same detail.
14. In summary, work commenced on 9<sup>th</sup> June 2003, the duration of the contract specified in the tender was 34 weeks (revised to 36 weeks) and a total of 7 weeks by way of interim extension was granted by the Engineer, leading to an extended contractual completion date of 5<sup>th</sup> April 2004.
15. It is common ground that the extended date for completion was substantially exceeded. According to the affidavit of Mr. Lewis, the Deputy Chief Officer of the Public Services Department of the Defendant, as at the date of Certificate No. 31, the performance of the contract was 54 weeks and 2 days late.
16. The Court was told that, during the period of delay, the Contractor not only completed the contract Works but carried out extra work pursuant to the Engineer's instructions, and the Contractor submitted a number of further claims for extensions of time to the Engineer to which the latter did not respond.
17. By letter dated 27<sup>th</sup> April 2005, the Engineer communicated his refusal to grant the Contractor any further extensions of time and advised the Chief Officer of the Defendant's right under Clause 47(4) to claim liquidated damages and to deduct these from sums otherwise due to the Contractor.
18. The respective positions of the parties were then crystallised – the Contractor claiming the sum of £45,123.55 and the Defendant claiming the balance of liquidated and alleged ascertained damages after giving credit for that sum.
19. The Contractor commenced these proceedings on 15<sup>th</sup> July 2005, claiming payment of £45,123.55 together with interest pursuant to Clause 60(6) of the ICE Conditions.
20. On 29<sup>th</sup> July 2005 the Defendant filed an application to stay the proceedings pursuant to Section 4 of the Arbitration (Guernsey) Laws, 1982 and 1986, on the ground that, by Clause 66 of the ICE Conditions, the parties had agreed that all disputes and differences of any kind whatever arising between the Employer and the Contractor should be referred in writing to and be settled by the Engineer with a right given to either party, if dissatisfied with the decision of the Engineer, to refer the dispute to the arbitration of a person to be agreed upon by the parties or failing agreement to a person appointed by the President for the time being of the Institution of Civil Engineers.
21. On 1<sup>st</sup> August 2005, the Contractor filed an application for summary judgment under Rule 17 of the Royal Court Civil Rules, on the ground that the Defendant had no defence to its claim.
22. It appears from the judgment of the Lieutenant Bailiff that there was consideration at a very early stage of whether the applications should come before the Court in the order in which they had been filed, or whether the Rule 17 application should be heard first (on the basis that if there were, on analysis, no arguable defence, there was no dispute to be referred to arbitration) or whether the two applications should be brought on and heard together.

23. Although the latest legislation in England, the Arbitration Act of 1996, has significantly altered the position on applications to stay court proceedings in favour of allowing arbitrations to proceed and take their course, it is nonetheless instructive to have some regard not only to the statements of principle in the English authorities, especially those considered under the 1950 and 1975 Arbitration Acts, which contain provisions which are essentially in the same terms as those in the Law currently in force in Guernsey, but also to judicial observations of judges experienced in these sorts of applications as to the convenient procedure.
24. In *Channel Tunnel Group Limited v. Balfour Beatty Construction Limited* [1993] A.C. 334, Lord Mustill considered the Report of the Committee on the Law of Arbitration which had been set up under the Chairmanship of MacKinnon J, in 1927, and in particular a passage which had stated:-
- “ ... the defendant has applied to stay the action on the ground that the contract of sale contains an arbitration clause, but without being able, or condescending, to indicate any reason why he should not pay for the goods or the existence of any dispute to be decided by arbitration. It seems absurd that in such a case the English court stayed the action, and we suggest that the Act might at any rate provide that the court should stay the action if satisfied that there is a real dispute to be determined by arbitration.”*
25. In the context of the English Arbitration Act 1975, and in particular the application of Section 1 of that Act, which applied only to “non-domestic” arbitrations and provided for a mandatory stay unless (inter alia) there was not in fact any dispute between the parties with regard to the matter agreed to be referred, Lord Mustill added:-
- “In recent times, this exception to the mandatory stay has been regarded as the opposite side of the coin to the jurisdiction of the court under R.S.C. Ord. 14 to give summary judgment to favour of the Plaintiff where the Defendant has no arguable defence. If the Plaintiff to an action which the Defendant has applied to stay can show that there is no defence to the claim, the court is enabled at one and the same time [my emphasis] to refuse the Defendant a stay and to give final judgment for the Plaintiff...”*
26. Although the observation was made in the context of the English 1975 Act, it is in my view equally apposite and instructive in relation to the exercise of the Court’s discretion under the current Guernsey legislation, especially where the ground, or at least a ground, of the Plaintiff’s resistance to a stay is that there is in reality no dispute and he is therefore entitled to summary judgment.
27. In *Morgan v. Ash & Foster*, a decision of Deputy Bailiff Carey (as he then was) on 25<sup>th</sup> August 1993, the learned Deputy Bailiff had indicated in a similar situation that he would have been inclined to deal with a summary judgment application first *“as if there was no defence to the Plaintiff’s claim then the question of staying the proceedings and referring the matter to arbitration did not arise...”* but he went on to observe that, at the outset of the hearing, the plaintiff had rightly agreed to the defendant’s application to consolidate the two proceedings.
28. Unfortunately, it appears that, in the present case, although, when the matter had previously come before the Court, the impression was gained that it had been tacitly understood that the applications were “inextricably woven” and should be heard together, the Lieutenant Bailiff acceded to Mr. Raffray’s contention that the stay application should be heard first, apparently, so we were told, on the basis that the Rule 17 application raised wider issues.
29. In paragraph 29 of the judgment, he *observed* *“It is one thing for an Applicant for a stay to demonstrate to the Court that there is a dispute or difference, and quite another to persuade the Court that it is one on which he is right.”* The relevance of this observation is not clear to me since, on a Rule 17 application, it is not for the Defendant to show that he is right: the burden is on a plaintiff to show that there is no arguable defence.

30. In any event, the result of the Lieutenant Bailiff's decision as to the separation of the two applications was, as I understand it, that neither application was finally determined, since the decision was only to decline to order a stay "*at this stage*" (i.e. before the Rule 17 application had been heard) and to allow the Rule 17 application to proceed at a later date in order to see if there was any substance in the proposed defence. Presumably, it was envisaged that if the Rule 17 application were to be successful, the action would be at an end and no stay could be ordered; whereas if it were to fail, the application for a stay could be revived and reconsidered, or renewed.
31. I regard this as a rather unsatisfactory state of affairs, and confirm that the common practice in the English courts endorsed by Lord Mustill in the Channel Tunnel case should generally be followed, unless and until Guernsey law is brought into line with the English Arbitration Act of 1996, which has considerably reduced the circumstances in which a court may decline to grant a stay in the face of a valid and effective arbitration agreement, and in particular by removing the discretion of the court to refuse a stay if there is no real dispute.
32. Turning to the substance of the judgment, in its outline written submissions to the Royal Court, the Contractor had resisted the application for a stay on the grounds that the Defendant had no defence to the claim and therefore there was no matter which could properly be at issue between the parties which could justify either an alleged dispute being referred to arbitration or the matter proceedings to a full trial before the Royal Court.
33. The Lieutenant Bailiff considered a number of English authorities decided under the English 1950 and 1975 Acts. The current Guernsey Law, like the English statutes, draws a distinction between "domestic" and "non-domestic" arbitrations. In respect of the former, it gives the Court a discretion "*... the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement ... may make an order staying the proceedings.*" In respect of the latter, a stay is mandatory but conditional- "*... the Court, unless satisfied that the arbitration 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 matter to be referred, shall make an order staying the proceedings.*"
34. Although in respect of domestic arbitrations the Court is given a discretion, it was common ground before the Court below and before us that such a discretion must be exercised judicially and that prima facie a valid and effective arbitration agreement should be respected and enforced- the burden being on a plaintiff to show good reason for the court to exercise its discretion in favour of refusing a stay.
35. The discretionary power of the Court which, under the English 1950 Act and the Guernsey Arbitration Law, is applicable only in relation to domestic arbitrations, has been in similar form since the time of the Common Law Procedure Act, 1954.
36. As Lord Selbourne LC said in *Willesford v. Watson* (1873) 9 Ch. App. 473, at page 480:-

*"If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary courts, then since that Act of Parliament was passed, a prima facie duty is cast upon the Courts to act upon such agreement. The parties have made that agreement. They probably knew what were the reasons in favour of determining these questions by arbitration and what were the reasons against it, and they made it part of their mutual contract that these questions should be so determined. The Plaintiffs cannot, therefore, be now heard to complain, if that part of their contract is carried into effect."*
37. This passage from the judgment of Lord Selbourne has been cited in *Russell on Arbitration*, which was for many years the leading practitioners' textbook in this area of the law. It has also been cited in a number of modern cases, for example, by the Court of Appeal in *Ford v. Clarksons Holidays Limited* [1971] 1 WLR 1412, per Davies LJ, at page 1416, and in

Goodman v. Winchester & Alton Railway Plc [1985] 1 WLR 141 per Lawton, LJ, at page 147.

38. In Home and Overseas Insurance Co. Limited v. Mentor Insurance Co. (U.K.) Limited [1990] 1 WLR 153, the Court of Appeal considered an appeal from Hirst J, (as he then was) in a case in which the learned judge had before him an application by a defendant for a stay under Section 4 of the 1950 Act, and a cross-application by the plaintiff for summary judgment under Order 14.
39. Parker LJ, in the leading judgment, which with Lloyd and Balcombe LJs agreed, said, at pages 158-159:-

*“I shall shortly consider the authorities relating to the way in which the court should deal with Order 14 applications when countered by an application for a stay based on an arbitration clause. Before doing so, however, I venture to make some general observations on the question of Order 14 applications both when standing alone and when countered by a stay application. The purpose of Order 14 is to enable the plaintiff to obtain a quick judgment where there is plainly no defence to the claim. If the defendant’s only suggested defence is a point of law and the court can see at once that the point is misconceived the plaintiff is entitled to judgment. If at first sight the point appears to be arguable but with a relatively short argument can be shown to be plainly unsustainable the plaintiff is also entitled to judgment. But Order 14 proceedings should not in my view be allowed to become a means for obtaining, in effect, an immediate trial of an action, which will be the case if the court lends itself to determining on Order 14 applications points of law which may take hours or even days and the citation of many authorities before the court is in a position to arrive at a final decision.*

*In cases where there is an arbitration clause it is in my judgment the more necessary that full scale argument should not be permitted. The parties have agreed on their chosen tribunal and a defendant is entitled prima facie to have the dispute decided by that tribunal in the first instance, to be free from the intervention of the courts until it has been so decided and thereafter, if it is in his favour, to hold it unless the plaintiff obtains leave to appeal and successfully appeals.*

*In the case of a commercial arbitration the above remarks apply with even greater force, perhaps especially when the dispute turns upon construction, or the implication of terms or trade practice. Arbitrators and umpires in the same business or trade as the parties are certainly as well or better able than the court to judge what the parties must have meant or intended by the words or phrases they have used, to judge what the parties would at once have replied if an innocent bystander had asked what was to happen in a certain event not dealt with by the contract, and to know what are the practices in the trade. Not only is the defendant entitled to have the dispute decided in the first instance by such persons but the court should not in my view, save in the clearest of cases, decide the question without the benefit of their views.”*

40. Later, on page 159, the learned Lord Justice added:

*“If the point of law relied on by the defendant raises a serious question to be tried which calls for detailed argument and mature consideration the point is not suitable to be dealt with in Order 14 proceedings.”*

41. In that case, the Court upheld the decision of Hirst J in granting a stay. Interestingly, in the context of the present case, the point at issue in that case was whether payment by insurers to their insured was a condition precedent to their right to recover against reinsurers. It turned on what was essentially the true construction and application of the terms of the reinsurance contract, which was essentially a question of law, and which it was submitted on behalf of the plaintiffs seeking judgment was only susceptible of one construction.

42. The Court of Appeal considered the merits of the dispute, but expressed no conclusion save that:

*“Given that there is, here, a serious defence, the defendants are... clearly entitled to have it decided by their chosen tribunal”.*

43. The above dictum of Parker LJ has been cited with approval and applied in a number of cases since.

44. Reference has already been made to the speech of Lord Mustill in the Channel Tunnel case. After the passage cited above, Lord Mustill added:

*“... I believe however that care should be taken not to confuse a situation in which the defendant disputes the claim on grounds which the plaintiff is very likely indeed to overcome with the situation in which the defendant is not really raising a dispute at all. It is unnecessary for present purposes to explore the question in depth, since in my opinion the position on the facts of the present case is quite clear, but I would endorse the powerful warnings against encroachment on the parties’ agreement to have their commercial differences decided by their chosen tribunals, and on the international policy exemplified in the English legislation that this consent should be honoured by the courts, given by Parker LJ in Home and Overseas Insurance Co Limited v. Mentor Insurance Co (UK) Limited and Saville J in Hayter v. Nelson [1990] 2 Lloyd’s Rep 265.”*

45. In the case of Hayter v. Nelson, Saville J (as he then was) delivered a typically concise but analytical judgment, in which he concluded that, under a contractual arbitration clause agreeing to refer to arbitration all “disputes or differences” between the parties, arbitrators enjoyed jurisdiction even if it were plain that the claim or the failure or refusal to satisfy the claim was entirely baseless.

46. But he concluded that, in the context of a non-domestic arbitration to which Section 1 of the 1975 Act applied, the words “...there is not in fact any dispute...” should be construed to mean: “... there is not in fact anything disputable...” and that when considering an application for summary judgment and a cross-application for a stay, only in the simplest and clearest cases i.e. where it was readily and immediately demonstrable that the respondent had no good grounds at all for disputing the claim should that party be deprived of his contractual right to arbitrate (see page 271 of the judgment).

47. At pages 268-269, the learned Judge made the following general comment:

*“...perhaps more importantly, it must not be forgotten that by their arbitration clause the parties have made an agreement that in place of the Courts, their disputes should be resolved by a private tribunal. Even assuming that this tribunal is likely to be slower or otherwise less efficient than the Courts, that bargain remains – and I know of no general principle of English Law to suggestion that because a bargain afterwards appears to provide a less satisfactory outcome to one party than would have been the case had it not been made or had it been made differently, that bargain can simply be put on one side and ignored...”*

*“...if the Courts are to decide whether or not a claim is disputable, they are doing precisely what the parties have agreed should be done by the private tribunal. An arbitrator’s very function is to decide whether or not there is a good defence to the claimant’s claims – in other words, whether or not the claim is in truth indisputable. Again, to my mind, whatever the position in the past, when the Courts tended to view arbitration clauses as tending to oust their jurisdiction, the modern view (in line with the basic principles of the English law of freedom of contract and indeed International Conventions) is that there is no good reason why the Courts should strive to take matters out of the hands of the tribunal into which the parties have by agreement undertaken to place them”.*

48. That was no doubt the passage which Lord Mustill had in mind in his comments in the Channel Tunnel case.
49. In the present case, in the Court below, the Lieutenant Bailiff cited another line of English cases, and in particular the judgment of Kerr LJ in *S.L. Sethia Liners Limited v. State Trading Corporation of India Ltd* [1986] 1 WLR 1398.
50. The matter came before the Court of Appeal on appeal from Staughton J (as he then was), who had apparently been persuaded, in a case involving an application for a stay under the 1975 Act and an application for summary judgment, to deal with the application for summary judgment first.
51. At page 1401, Kerr LJ said:

*“The submissions of both parties have proceeded on the basis that the summonses under Order 14 and section 1 [of the 1975 Act] are the reverse sides of the same coin, and we have been referred to Mustill & Boyd, Commercial Arbitration (1982), pp 90-92. Without expressing any concluded view on everything which is stated there, it seems to me that the position can be summarised as follows. If a point of law is raised on behalf of the defendants, which the court feels able to consider without reference to contested facts simply on the submissions of the parties, then it is now settled that in applications for summary judgment under Order 14 the court will do so in order to see whether there is any substance in the proposed defence. If it concludes that, although, arguable, the point is bad, then it will give judgment for the plaintiffs. This course will also be adopted where there is a counter-application for a stay of the action...”*

I observe that, as I have indicated, there was not, in fact, a counter application before the Court of Appeal in that case.

The judgment went on: *“ ... If the contract between the parties contains an arbitration clause to which section 1 of the Act of 1975 applies, then the court is not thereby precluded from considering whether there is any arguable defence to the plaintiffs’ claim. If the court concludes that the plaintiffs are clearly right in law then it will still give judgment for the plaintiffs. In the same breath, as it were, it will then have decided that in reality there was not in fact any dispute between the parties. If the court is satisfied that the plaintiffs are clearly right in law, and that the defendants have no arguable defence, then it will not avail the defendants to have raised a point of law which the court can see is in fact bad. In those circumstances the defendants cannot be heard to say that there was a dispute to be referred to arbitration. But if the court concludes that the plaintiffs are not clearly entitled to judgment because the case raises problems which should be argued and considered fully, then it will give leave to defend, and it is therefore then bound to refer the matter to arbitration under section 1 of the Act of 1975.”*

52. With great respect to the judgment of Kerr LJ, there seems to me to be some confusion in this passage of what appears to have been extempore judgment. Although the learned Lord Justice indicated early in the passage which I have cited that, even where there is a valid and effective arbitration agreement and a counter application for a stay, the court will give judgment under Order 14 if it considers that a point of law raised by way of defence, although arguable, is bad; in the latter part of the passage he states that the Court is not precluded by the presence of an arbitration clause from considering whether there is any “arguable” defence, and only if it concludes that the plaintiff is “clearly right” in law will it give judgment for the plaintiff since in that case it will have decided that there was in reality no dispute. As expressed in the latter part of the passage, his judgment is not inconsistent with the later, reserved judgment of the Court of Appeal in *Home and Overseas v. Mentor*, to which reference has already been made.
53. Similarly, in the earlier case of *Ellis Mechanical Services Ltd v. Wates Construction Ltd* [1976] 2 BLR 57, to which the Lieutenant Bailiff also referred, the Court of Appeal, in

which the leading judgment was delivered by Lord Denning MR, had given judgment for such part of the claim of a plaintiff under a building subcontract containing an arbitration clause which it considered to be “*undisputably due*”.

54. However, in *Chatbrown Ltd v. Alfred McAlpine Construction (Southern) Ltd* [1986] 35 BLR 48, a Court of Appeal, again consisting of Kerr LJ but this time sitting with Swinton Thomas J, referred to Kerr LJ’s recent judgment in the *Sethia* case, and cited the earlier part of the passage which I have cited above. After referring to a number of other cases which did not involve arbitration clauses, Kerr LJ rejected the submission that there should be any difference in practice concerning “*arguability*” on applications for summary judgment depending on whether there is an arbitration clause or not. He went on to state, at page 54: “... *I can see no reason why the presence of an arbitration clause should make any difference*”.
55. In *The “John C. Helmsing”* [1990] 2 Lloyd’s Rep 290, the Court of Appeal allowed an appeal against a judgment of Potter J (as he then was) and made an order under Order 73 Rule 7 of the RSC for service out of the jurisdiction of an originating summons asking the court to appoint an arbitrator under Section 10 (3) of the 1950 Arbitration Act on the ground that the Plaintiffs had raised “*a disputable issue*” sufficient to justify the order.
56. Bingham LJ (as he then was) cited at length from the judgments of Kerr LJ in the *Sethia* case, Parker LJ in *Home and Overseas v. Mentor and Saville J* in *Hayter v. Nelson*, and what he described as “*this divergence of authorities*”. He declined to resolve that divergence in that case. But he assumed that the defendants were right to submit that the Court should only exercise its jurisdiction under Order 73 Rule 7 where the applicant showed a genuinely disputable issue on the merits.
57. That case came before the Court of Appeal in April 1990, and in December of the same year, His Honour Judge Peter Bowsher QC gave judgment in *RM Douglas Construction Ltd v. Bass Leisure Ltd* 53 BLR 119 – a case which did concern an application for summary judgment under Order 14 and an application for a stay under Section 4 of the 1950 Arbitration Act. The learned Judge discussed the above cases and what he described as the “*intellectual tension*” in the authorities, which he observed would in most cases be of theoretical rather than practical importance. He, like Bingham LJ, concluded that it was not necessary for him to form a view, but went on to state that, were it necessary to do so, it seemed that the view expressed by Saville J was more in keeping with the latest decisions of the Court of Appeal and should be followed in the case before him in relation to the application of Section 4 of the 1950 Act.
58. In the present case, the Lieutenant Bailiff formed and expressed the view that it was necessary to decide which line of authority he should follow. But it is not entirely clear to what decision he came.
59. Whilst this Court invariably pays high regard to decisions of the Court of Appeal in England, they are not technically binding upon it, and where there is, as there appears to be, a divergence of approach manifested in the English cases, this Court is free to choose which line of authority (if either) it should follow.
60. I would have no hesitation in preferring, as accurately reflecting the law to be applied in Guernsey, the judgment of Parker LJ in *Home and Overseas v. Mentor* and of Saville J in *Hayter v. Nelson* and the opinion of His Honour Judge Bowsher in *RM Douglas Construction Ltd v. Bass Leisure Ltd*.
61. I consider that these judgments reflect the guiding principles expressed by Lord Selbourne over 130 years ago, to the effect that agreements to refer disputes to arbitration should be respected and enforced by the Courts.

62. Further, I give weight to the fact that the relevant passages in the judgments of Parker LJ and Saville J were referred to with approval by Lord Mustill in the Channel Tunnel case, and to Lord Mustill's reference in that context to "*the international policy exemplified in the English legislation.*"
63. Further, I note the reference in the judgment of Saville J to what he described as "*the modern view (in line with the English law of freedom of contract and International Conventions).*"
64. The judgment of Saville J and the observations of Lord Mustill were delivered 6 and 3 years respectively before the coming into force of the English 1996 Arbitration Act, which further reflected the modern climate of non-intervention by the Courts in the arbitral process.
65. I acknowledge, of course, that in construing and applying the Guernsey law of 1982 it is not permissible to have regard to the provisions of the English 1996 Act, which Guernsey has not yet adopted. I use the word "yet" because we were informed by counsel that, as recorded in a Billet d'État of 25<sup>th</sup> February 2004, the States Advisory and Finance Committee considered a proposal for a new Arbitration (Guernsey) Law put forward by the Guernsey members of the Channel Islands Branch of the Chartered Institute of Arbitrators, to reflect the changes introduced by the English 1996 Act, including that court intervention should be available to support arbitration but not to interfere with it and that, in relation to the staying of court proceedings where there is an arbitration agreement, there is no distinction to be drawn between domestic and non-domestic arbitration, and no discretion given to the Court to hold that there are sufficient grounds not to hold parties to their arbitration agreement.
66. The Committee concurred with the views expressed and proposed that legislation be enacted on the lines set out in the Report.
67. It seems to me that, in the exercise of a discretion in 2005, the Court is entitled to, and indeed should, pay regard to this modern trend or climate.
68. It was argued before this Court on behalf of the Contractor that the judgment of the Lieutenant Bailiff reflected a pure exercise of discretion by the Court below and that accordingly it was not open to this Court to interfere with that exercise of discretion and, in effect, to substitute its own.
69. This was essentially the reason given by the Lieutenant Bailiff for refusing leave to appeal.
70. I of course accept that an appellate court will not generally interfere with a discretion exercised by a court below. But, as has already been observed, a judicial discretion has to be exercised judicially, and if it can be demonstrated that the court below went wrong in law or exercised its discretion on the wrong basis, an appellate court can and indeed should intervene.
71. In this case, I have reached the conclusion that the Lieutenant Bailiff fell into error.
72. Although, as has been observed, the judgment is not crystal clear on the point, it would appear from his conclusion that he adopted and applied the Sethia/Chatbrown line of authority, in effect treating the pending summary judgment application (which was not before him) as being in all respects the opposite side of the same coin, so that ultimately the decision of the Court on the stay application would depend on whether or not the summary judgment application succeeded. Although the application which he did have before him was an application for a stay under Section 4 of the Guernsey Arbitration Law, he did not finally determine that application, but only declined to grant a stay "*at this stage*", contemplating the possibility of a renewed or fresh application on the same grounds at a later date.

73. Although, on the application before him, the burden lay on the Contractor to show a good reason why the matter should not be referred to arbitration in accordance with the parties' agreement, the only justification upon which he ultimately relied was the fact that an application for summary judgment was pending, and that the Contractor should be given a chance to pursue that application. In my view, that is not of itself a valid reason.
74. The argument advanced on behalf of the Contractor was that a stay should be refused because there was not in fact any real dispute between the parties, since the defence raised was so plainly wrong that it could and should be determined there and then that the sum claimed by the Contractor was undisputably due. In these circumstances the Lieutenant Bailiff should have decided whether the Contractor had established to the satisfaction of the Court that this was the case.
75. Although expressing a view on the issues in the case – stating that he did not consider that any court would regard the period of a year and 2 weeks after the extended date for completion as constituting a reasonable time, or that the certificate had been issued "*as soon as possible*", and further expressing the view that this was a condition precedent to the issue of a certificate under Clause 44 (3) which was not complied with, he expressed no view as to whether he was satisfied that it was such a clear case that the court could see at once, or after a relatively short argument, that the defence raised by the Defendant was "*misconceived or plainly unsustainable*" (to adopt the words of Parker LJ) or even that the sum claimed by the Contractor was "*undisputably due*" (to adopt the words of Lord Denning MR).
76. Whilst one can appreciate the difficulties which the Lieutenant Bailiff faced, being required to determine the Defendant's stay application without having before him the application for summary judgment under Rule 17, I consider that in all the circumstances his erroneous approach entitles this Court to exercise its own discretion and in so doing finally to determine the stay application.
77. It is my view that the issues which are raised concerning the construction and application of Clauses 44 and 47 of the ICE Conditions are far from simple and straightforward. In particular, the questions (i) whether the delay of the Engineer in certifying, purportedly under Clause 44 (3), that the Contractor was entitled to no further extensions of time constituted a failure to fulfil a condition precedent so as to render it null and void or to preclude the Defendant as Employer from relying on it under Clause 47 (4); and (ii) if so, what the effect was on the obligation of the Contractor to pay liquidated damages for delay under Clause 47 (1) (b), and the prima facie obligation on the part of the Employer to pay the amount of any Certificate under Clause 60, give rise to potentially difficult issues which are particularly suited to be determined by an arbitrator appointed either by agreement or by the President of the Institution of Civil Engineers under Clause 66, who would be likely to be familiar with the practical application and operation of the ICE Conditions. Whilst, under the 1982 Arbitration Law, the decision of such arbitrator might be subject to appeal, any analysis, opinion or conclusion reached would undoubtedly be of value to the Court if it were called on to make a final determination. Further, as Mr. Greenfield's submission to this Court revealed, the Contractor's case on the merits relies to some extent on an investigation into the facts concerning the conduct of the Engineer and the Contractor between April 2004 and April 2005.
78. Mr. Greenfield did not persuade me that it is so clear that these issues must be resolved in the Contractor's favour that the Defendant should be denied its prima facie right to have the dispute referred to and determined by the tribunal chosen by the parties in their agreement.
79. There were three further matters which were raised and which can be dealt with quite shortly.
80. First, Mr Greenfield on behalf of the Contractor emphasised the delay which would inevitably result from the dispute being referred to arbitration.

81. It is sometimes said that arbitration as a method of dispute resolution suffers from the “shortcoming” that there is no procedure akin to Order 14 of the RSC (or Rule 17 of The Royal Court Civil Rules) whereby a claimant can obtain judgment without trial- no doubt because it is an overriding principle of arbitration that both parties must be given a full opportunity of presenting their case. But this shortcoming, if such it is, is sometimes compensated for in part by procedures such as those contained within Rule 19 of the ICE Arbitration Procedure which allows arbitrators to make provisional interim awards. These procedures may not go as far as equating with a summary judgment, but if the parties have agreed to refer their disputes to arbitration, then they should be bound by that agreement and the procedural consequences of which they must be deemed to have been aware when such agreement was made.
82. Second, towards the end of his judgment, the Lieutenant Bailiff referred to the decision of the Court of Appeal in *Croudace Ltd v. Lambeth Borough Council* (1986) which is unreported save in “The Times” of 31<sup>st</sup> May of that year, and in particular to the judgment of Balcombe LJ in which he endorsed the statement in *Mustill & Boyd* on “Commercial Arbitration” to the effect that, in the exercise of its discretion in relation to an application by a defendant for a stay, the court may take into account the defendant’s conduct.
83. In the final paragraph of his judgment, the Lieutenant Bailiff indicated that, in the exercise of his discretion in this case, he took into account the conduct of the Engineer “*on behalf of the Defendant*” in failing to issue the Certificate within a reasonable time, which had created uncertainty to the prejudice of the Contractor.
84. But this was not a case, like *Croudace*, where the delay complained of was delay on the part of the defendant council itself in failing to take steps to appoint an architect when its chief architect retired, which was alleged to constitute a breach of contract.
85. In this case, any delay was on the part of the Engineer, who, although an employee of the Defendant and appointed by it, was performing an independent function under Clause 44 in which it would have been improper for the Defendant to have interfered. If the Contractor wished for an earlier determination of its claims for extensions of time, it was for the Contractor to take whatever steps were appropriate to prod the Engineer into action.
86. Mr Greenfield, in the course of argument, accepted this important distinction and did not pursue the point further.
87. The third point to be mentioned is that it was said in the Court below that the Contractor was in financial difficulties, and asserted in the Contractor’s affidavit evidence that these financial difficulties were the result of the Engineer’s failure to certify timeously in accordance with Clause 44. But this point did not feature in the Lieutenant Bailiff’s judgment; it was not a matter upon which he relied in the exercise of his discretion; it was not the subject of a cross-notice; and was not relied upon in this Court.
88. On the contrary, Mr Greenfield submits in paragraphs 37 and 38 of his Skeleton Argument of 20<sup>th</sup> November, 2005 that the impecuniosity of the Contractor is “*irrelevant*”.
89. For all these reasons, I would give leave to appeal, allow the appeal, and order that the action be stayed pursuant to Section 4 of the Arbitration (Guernsey) Law, 1982.

I thank the Advocates on both sides for their considerable assistance.

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I, Suzanne Margaret O'Neill, hereby certify the foregoing to be a correct and complete extract, prepared to the best of my skill and ability from the tape-recording of the proceedings in this case.

..... Suzanne M. O'Neill  
Friday 27<sup>th</sup> January 2006