IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-004879

BETWEEN	IRONSANDS INVESTMENTS LIMITED First Applicant
AND	CHEUNG KONG INFRASTRUCTURE HOLDINGS LIMITED Second Applicant
AND	TOWARD INDUSTRIES LIMITED First Respondent
AND	NEW ZEALAND STEEL LIMITED Second Respondent

Hearing: 2 February 2011

Appearances: J G Miles QC, F M R Cooke, M G Colson and F J Tregonning for Applicants
J E Hodder SC, J W J Graham and D S Alderslade for Respondents

Judgment: 8 July 2011 at 4:00 PM

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 8 July 2011 at 4:00 pm
pursuant to R 11.5 of the High Court Rules.

Registrar / Deputy Registrar
Date…….

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Introduction

[1] In August 2008 Cheung Kong Infrastructure Holdings Ltd and its subsidiary Ironsands Investments Ltd (together CKI) entered into an agreement to buy the shares in New Zealand Steel Mining Ltd, then owned by Toward Industries Ltd and, ultimately, by New Zealand Steel Ltd (together NZS). The agreement related to an iron mining operation situated on leasehold land at Taharoa, south of Hamilton. The contract required CKI to use all reasonable endeavours to obtain the consent of the Overseas Investment Office (OIO). However, the global financial crisis in late 2008 seriously affected the mine's business. When CKI learned of this, it advised the OIO that, following acquisition of the mine, it intended to close the operation. Predictably, consent was refused.

[2] NZS asserted that CKI had failed to use all reasonable endeavours to obtain OIO consent and CKI asserted breaches by NZS of its obligations in failing to advise CKI promptly of the adverse developments that were material to the business. The parties agreed to resolve the dispute by international arbitration before Alan Galbraith QC. In an interim award dated 30 April 2010 Mr Galbraith found that CKI had not used all reasonable endeavours to obtain OIO consent and that NZS had breached its obligations to CKI in relation to information provided to CKI about developments affecting the business.

[3] Following the interim award there was a further hearing to determine whether NZS had unequivocally elected specific performance. In a ruling dated 14 December 2010 Mr Galbraith found that NZS' initial indications of its desire for specific performance was not an unequivocal election and that it could cancel the agreement and seek damages.

[4] CKI has applied to set aside both the interim award and the ruling. In the preseent application NZS seeks an order striking out CKI's application. Under r 15.1 of the High Court Rules[1] a pleading may be struck out on specified grounds. The

[1] Applicable through r 1.6 to this application.

criteria for striking out is identified in *Attorney General v Prince*[2] (endorsed by the Supreme Court in *Couch v Attorney General*):[3]

> (a) Pleaded facts, whether or not admitted, are assumed to be true (except for pleaded allegations that are speculative and without foundation).
>
> (b) The cause of action or defence must be clearly untenable.
>
> (c) The jurisdiction is to be exercised sparingly and only in clear cases.
>
> (d) The jurisdiction is not excluded by the need to decide difficult questions of law or which might require extensive argument.
>
> (e) That the Court should be slow to strike out a claim in any developing area of the law.

[5] NZS asserts that none of the grounds relied on by CKI to set aside the award and ruling are tenable.

CKI's application to set aside interim award and ruling

[6] Under the Arbitration Act 1996 (the Act) there are limited grounds on which parties to an international arbitration can appeal to the High Court. Schedule 2 of the Arbitration Act did not apply to this arbitration and CKI's application is set aside the award is therefore limited to the grounds provide in Article 34. Article 34 provides that recourse to the High Court against an arbitral award may only be made in accordance with the provisions of that Article. Article 34(2)(b) and (6) relevantly provide that:

> (2) An arbitral award may be set aside by the High Court only if – …
>
> (b) The High Court finds that –
>
> (ii) The award is in conflict with the public policy of New Zealand …
>
> (6) For the avoidance of doubt, and without limiting the generality of paragraph (b)(2) it is hereby declared that an award is in conflict with the public policy of New Zealand if – …
>
> (b) A breach of the rules of natural justice occurred –

[2] *Attorney General v Prince* [1988] 1 NZLR 262 (CA) at 267.
[3] *Couch v Attorney General* [2008] 3 NZLR 725 (SC) at [33].

(i) During the arbitral proceedings; or

(ii) In connection with the making of the award.

[7] In its application to set aside the interim award and ruling CKI has asserted a conflict between the award and the public policy of New Zealand, prefaced, among other arguments, on a breach of the rules of natural justice. The specific grounds are that:

(a) The award is in conflict with the public policy of New Zealand for two reasons. First, it prioritises contractual obligations over the statutory obligation of honesty under the Overseas Investment Act 2005 and, in the circumstances of the case, the arbitrator should not have reached the conclusion he did regarding the genuineness of CKI's decision to close the mine;

(b) The arbitrator acted in breach of natural justice by making findings without probative evidence to support them;

(c) The finding that OIO consent would most likely have been obtained but for CKI's 6 December decision was a breach of natural justice;

(d) There was a breach of natural justice in the arbitrator's treatment by improper and/or unfair questioning of CKI's witness Mr Luk; and

(e) There was a breach of natural justice in the process adopted by the arbitrator in making his ruling regarding NZS' election of remedy.

[8] As was observed in *Gold Resource Developments (NZ) Ltd v Doug Hood Ltd*,[4] it is apparent that in passing the Act, Parliament intended to encourage the use of arbitration to resolve disputes between parties and to limit the High Court's involvement in reviewing and setting aside arbitral decisions. Delivering the judgment for the Court, Blanchard J said:

[4] *Gold & Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA) at [14].

> [51] There are of course arguments which can be made in favour of a wider scope for judicial review of arbitral awards for error of law …
>
> [52] But our Parliament, like those in the United Kingdom and Australia, has chosen to favour finality, certainty and party autonomy over these considerations. It intended to encourage arbitration as a dispute *resolution* mechanism. But by enacting a statute with the express purpose of redefining and clarifying the limits of judicial review of arbitral awards, Parliament has made clear its intention that parties should be made to accept the arbitral decision where they have chosen to submit their dispute to resolution in such a manner. It plainly intended as strict limitation on the involvement of the courts where this choice has been made.

[9] There has not yet been a comprehensive consideration by the Court of Appeal or Supreme Court of the threshold established by the words "in conflict with the public policy of New Zealand". In *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd*,[5] however, the Court of Appeal referred to four cases, all of which suggested a high threshold.[6] There was no analysis of them, nor consideration of their application to the Act, but it is implicit from the citation of these cases that the Court of Appeal favoured a high threshold.

[10] In one of the cases cited in *Amaltal*, *Deutsche Schachtbau-Und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Co*, Sir John Donaldson MR, speaking for the United Kingdom Court of Appeal, stated that:

> Considerations of public policy can never be exhaustively defined but they should be approached with extreme caution … It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.

[11] This statement makes it clear that, although the scope of the words are wide, the threshold is, nevertheless, high. That approach has been followed in the UK in *Cuflet Chartering v Carousel Shipping Co Ltd*.[7] The same approach hs been taken by this Court. In *Downer Connect Ltd v Pothole People Ltd*[8] Randerson J regarded the *Amaltal* decision as endorsing a high threshold and preferred that approach to the

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[5] *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614 (CA).
[6] *Parsons and Whitmore Overseas Co Inc v Société Géneralé de L'industri du Papier (Rakta)* 508 F.2d 969 (2nd Cir 1974); *Deutsche Schachtbau-Und v Xaslal Khaimah National Oil Co* [1988] 2 All ER 833; *Boardwalk Regency Corp v Maalouf* (1992) 60R (3d) 737 and *Soleimany v Soleimany* [1999] QB 785.
[7] *Cuflet Chartering v Carousel Shipping Co Ltd* [2001] 1 All ER (Comm) 398.
[8] *Downer Connect Ltd v Pothole People Ltd* HC Christchurch CIV-2003-409-2878, 19 May 2004.

lower threshold indicated by the Supreme Court of India in *Oil and Natural Gas Corporation v SAW Pipes Ltd*.[9] In *Downer-Hill Joint Venture v Government of Fiji* a Full Court of this Court considered that the decision in *Amaltal* indicated that the words "public policy":[10]

> [R]equire that some fundamental principle of law and justice be engaged. There must be some element of illegality or enforcement of the award must involve clear injury to the public good or abuse of the integrity of the Court's processes and powers.

[12] I therefore proceed on the basis that, to show a conflict with public policy for the purposes of Article 34(2)(b), CKI would have to show some element of illegality or that the enforcement of the award would be clearly injurious to the public good or wholly offensive to the ordinary, reasonable and fully informed member of the public.

[13] There is, however, a further issue regarding the threshold under Article 34(6)(b). Mr Hodder submitted that a similarly high threshold as that required under Article 34(2)(b) must be met where a breach of natural justice is asserted as the basis for an application to set aside an arbitral award as for a conflict with substantive law. This issue relates specifically to CKI's assertion of breaches of natural justice.

[14] In making this submission Mr Hodder traced the legislative history of Article 34(6) which, he submitted, showed that the "doubt" that the provision was intended to avoid related to serious procedural injustice. The history of the Model Law showed that Article 34 was intended to respond to conflicts in both substantive and procedural law, with the UNCITRAL report on the Model Law commenting that:[11]

> It was understood that the term "public policy" which was used in the 1958 New York Convention and many other Treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording "the award is in conflict with the public policy of this State" was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at.

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[9] 2003 SC 2629.
[10] *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 (HC) at [76].
[11] Holtzmann & Newhouse *A Guide to the UNICTRAL Model Law: Legislative History and Commentary* (Kluwer, The Hague, 1994) at 1002.

[15] Likewise, the Law Commission's 1991 Arbitration Report explained the reasons for adding Article 34(6):[12]

> 404. We have hesitated before including the reference to "the rules of natural justice" in Article 34(6)(b) for two reasons. First, the principal rules of natural justice, an impartial decision maker and a proper opportunity to be heard, are clearly embodied in Articles 12, 18 and 24. Second, the thrust of the Model Law and of the draft Act, involves a reduction in judicial involvement in arbitral proceedings, and an expansive approach to judicial review by New Zealand courts will contradict that thrust. Nevertheless, we have concluded that the Australian provision should be as follows:
>
> > The significance of natural justice in arbitral proceedings can be emphasised; and many recent decisions of New Zealand courts show that our judges are sensitive of their relatively limited role in arbitration.

[16] Mr Hodder submitted further that the limits of Article 34(6) are highlighted by the 2007 enactment of cl 5(10) of Schedule 2, which limits the scope for appeals on questions of law by, amongst other things, excluding questions as to whether the award was supported by any or any sufficient or substantial evidence. Mr Hodder submitted that if an argument as to a lack of evidence to support a factual finding cannot amount to a question of law under cl 5, which specifically extends the right to appeal on a question of law, then Article 34(6) could not be construed to include as a breach of natural justice the same asserted error.

[17] Mr Miles did not accept this construction of Article 34(6) nor Mr Hodder's interpretation of the legislative history. He submitted that on a plain wording of the Act any breach of natural justice amounts to a conflict with the public policy of New Zealand and that the legislative history actually supported an expansive approach to breaches of natural justice in the context of arbitral awards and public policy. In Mr Miles' submission, the exclusion of arbitral error from the error of law category in clause 5(10) reinforces the need for such issues to come within the scope of Article 34.

[18] The Court of Appeal's reference to Article 34(6) in *Amaltal* is not clear:[13]

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[12] Law Commission Arbitration (NZLC R20, 1991).
[13] At [42].

> Paragraph (6) declares that two particular things are in conflict with that public policy: if the making of the award was induced or affected by fraud or corruption or if a breach of the rules of natural justice has occurred during the arbitral proceedings or in connection with the making of the award. These may well be occurrences of such seriousness that they would be regarded as in conflict with public policy of a state, in this instance New Zealand, under the Model Law and also under the New York convention from which the grounds for setting aside the Model Law were taken.

[19] I consider that the clear and unambiguous meaning of Article 34(6) is that a breach of natural justice, in itself, constitutes a conflict with the public policy of New Zealand for the purposes of Article 34(2). There is certainly no authority on the point; observations by Fogarty J in *Gust Farm Partnership v Greenleaf Joint Venture* suggest a preference for the interpretation advanced by Mr Hodder.[14] However, with respect to the Learned Judge I am not convinced that this construction can be justified against the plain words of the statute. In any event, it is unclear as to what the eventual basis for the Judge's decision was in that case. I note that the commentators on the Arbitration Act (Green & Hunt on Arbitration Law and Practice) suggest a similar approach, concluding that, while some breaches of the rules of natural justice will fall within the statutory grounds, not every breach will result in a finding that the award is in conflict with the public policy of New Zealand.[15] However, there is no authority cited for that proposition.

[20] It would, of course, be very unsatisfactory if the effect of Article 34(6) inevitably resulted in arbitral awards being set aside for what might, in the relevant context, be quite minor breaches of natural justice or breaches that have no effect on the eventual outcome. However, in practical terms this is unlikely to happen because of the Court's discretion under Article 34 to set aside an award. It is unlikely that the Court would exercise its discretion to set aside an arbitral award where the relevant breach of natural justice is minor and could have had no bearing on the outcome.

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[14] *Gust Farm Partnership v Greenleaf Joint Venture* (2005) 2 NZCCLR 573 at [36].
[15] Green and Hunt on Arbitration Law and Practice at 34.02.

Does the interim award conflict with New Zealand public policy by preferring private contractual obligations over the obligation of honesty under the Overseas Investment Act 2005?

Circumstances leading to the refusal of OIO consent

[21] The primary issue in the arbitration was whether CKI had breached its contractual obligation to use all reasonable endeavours to obtain OIO consent. Determination of this issue required the arbitrator to consider the factual background that led up to the OIO refusing its consent. I have relied on Mr Galbraith's analysis of the factual background in recording the facts relevant to the issue before me.

[22] By 2008 NZS was supplying ironsand to three Chinese steelmills and one Japanese mill. The largest Chinese mill, Chengde, took 50% of the amount exported. At that time NZS leased a single vessel and that lease was to expire in December 2009. With iron ore prices rising and a decision needed regarding a replacement vessel, NZS began a review of the future operation of the Taharoa mine. The options included expanding the mine's production and acquiring two vessels. This option was referred to as the "Taharoa 2010" project. Another option was to sell the mine. During 2008 both options were under consideration, though from an early stage it was obvious that advancing these two options in parallel would cause difficulties. Chengde made it clear early on that a sale of the mine (other than to itself) could jeopardise future contracts. There were also reasons for concern about the stability of some of the other customers.

[23] CKI submitted its final bid in early August 2008. A few days later Chengde wrote to NZS indicating its interest in purchasing the shares in NZSM. It also expressed concern at the prospect of price rises resulting from the sale process and said that it "… could not justify continuing our support for the long term purchase from NZSM of its product until such time as the outcome of the sale process is known". This information was not disclosed to CKI.

[24] CKI and NZS reached a final agreement on 26 August 2008 and CKI filed its application with the OIO in early September in which it stated that it:

> … is committed to the expansion of the Taharoa ironsands business undertaken by NZSM, which will necessarily result in further employment and significant capital expenditure by the Applicant …

[25] The OIO sought additional information, advising that:

> As a general comment on the s 17(2) factors we note that the application seeks to claim a benefit under every subsection. This is fine in theory. However, in order for our office to be able to assess an Applicant's claims we require sufficient detail and reasoning for the claimed benefits. It is not enough to simply state that the Applicant believes a benefit will accrue or that the Applicant supports a certain view. We need to know what exactly the Applicant will do, how the action will lead to the benefit, the extent of the benefit, in what time frame the benefit will accrue, and so on.

[26] Before CKI could respond to that request there was, unbeknownst to CKI, a development on the NZS side. Chengde, for reasons connected with the global financial crisis, proposed cancelling two of the remaining full voyages scheduled for that year. NZS immediately identified as a concern whether to advise CKI of this development or not. It had not done so, however, by 27 October 2008 when CKI responded to the OIO advising that, in the absence of warranties regarding the Taharoa 2010 project:

> [W]hile the applicant confirms that it is concerned for development of the mining operations in the long term and intends to investigate expansion plans for the Taharoa operation the applicant is not in a position nor is it appropriate for the applicant to commit to any projections or aspects of the future business expansion either as set out in the Taharoa 2010 project or as a result of its own review process. It will operate the business post-acquisition in accordance with its own commercial considerations and can make no further representations at this time.

[27] By the end of October 2008 NZS had recognised that it would have to advise CKI of the difficulties with Chengde. That had not been done, however, by 3 November 2008 when CKI's solicitor telephoned the OIO to enquire as to progress with CKI's application. Having discussed the lack of specific benefits to New Zealand from granting consent, the advice given by the OIO representative that day was that there was "a very real danger of consent definitely being declined".

[28] A few days later NZS advised CKI of the problems with Chengde. CKI's response was to advise that it would not be possible for it to make commitments regarding the future expansion of the business. This was acknowledged by NZS

both then and at the arbitration hearing as being an entirely reasonable decision. CKI's solicitor advised the OIO of that position in a telephone call on 17 November 2008. Notwithstanding that advice, and rather unexpectedly, the OIO wrote on 18 November 2008 indicating that, subject to clarification of the beneficial ownership of CKI and minor issues relating to environmental protection, it was likely that the OIO would still regard the application favourably. I note the arbitrator's comment that this did not reflect any change of position by the OIO in respect of the benefit factors required to be considered but rather reliance on the key investor factors under registration 18 of the Overseas Investment Regulations 2005.

[29] By early December 2008 CKI had reached a decision internally to close the Taharoa mine following the purchase until market conditions improved. It advised the OIO of that decision on 8 December 2008:

> [T]he Applicant considers the best business option for it is to preserve the Ironsands reserves until such time that the market conditions improve. It will be necessary to cease mining operations and lay off staff…

[30] On 17 December 2008 the Ministers of Land Information and Finance declined CKI's application for consent under the Official Information Act 2005.

The award

[31] The arbitrator found that CKI's 6 December 2008 decision to close the mine was the "decisive negative factor" in the OIO declining consent.[16] He held, further, that the decision was a business choice that was inconsistent with the agreed distribution of benefits, risks and obligations under the contract.[17] Those factual findings, coupled with the arbitrator's conclusion as to what was required to satisfy the all reasonable endeavours obligation led to his conclusion that CKI had failed to use all reasonable endeavours to obtain OIO consent:

> 206. In performing that contractual obligation CKI does also have a statutory obligation of honesty in respect to the information which it provides to the OIO. However, it is not possible to use the obligation to tell the truth to the OIO to negate the obligation to use reasonable endeavours. Unless *"on its true construction"* an exception can be identified, CKI is obliged to use all reasonable

[16] Award at [221] and [258].
[17] Award at [271].

> endeavours. If, for example, it determined not to do so because it no longer thought the transaction was desirable or preferred another transaction then it will be obliged to be truthful to the OIO which may result in consent being refused. However CKI would still be in breach of its reasonable endeavours obligation, unless excused by the reasonableness qualification …
>
> 207. The difference with the *Rackham* and *Cowther* [relied on by CKI] situations is that the duty to the shareholders qualified the contractual obligations. In the present case the duty to be honest is independent of the contractual obligations. The contractual obligation may or may not have been performed even though the duty owed to the OIO has been. If the contractual obligation has not been performed, as was noted in *Mana v Fleming*, it is an actionable breach irrespective of the outcome of the application. However the duty to be honest may mean that the breach becomes factually causative of the non-fulfilment of the condition and therefore provides the link to the quantification of a damages claim.
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> 208. The relevance of the obligation to be honest to the OIO is not that this in any way negates the performance of the endeavours obligation but it will be one of the considerations, along with the other requirements of the Act, as to whether the endeavours obligation has in fact been performed. By that I mean that a party having an obligation to use all reasonable endeavours to obtain OIO consent necessarily must consider its actions or inactions in the context of what is required to obtain such consent. As it is requred to be honest with the OIO it must therefore consider the implications of that obligation in its decision making. That means that whatever decisions it does make relevant to the factors and criteria to be considered by the OIO have to be considered in the context of those decisions then being advised to the OIO and the effect that that advice will likely have on the fulfilment of the present conditions. What a party in that position needs to decide, if it does not want to breach its endeavours obligation, is whether its decision or action constitutes a reasonable performance of the endeavours obligation in the circumstances. To put it another way if a decision or action is likely to be negative to the fulfilment of the consent condition can that be justified as coming within the reasonableness qualification of the positive endeavours obligation? The existence of an honesty obligation to the OIO says nothing about the answer to that question.

Is it reasonably arguable that these findings breached New Zealand public policy?

[32] It was common ground that CKI was obliged to be honest with the OIO about its intentions following the purchase of the mine. Applications for OIO consent are required by s 23(1)(d) of the Overseas Investment Act 2005 to be supported by a statutory declaration verifying that the information in the application is true and correct. Section 28 makes it a condition of any consent that the information

provided in support of an application is correct when provided and s 46 makes it an offence to make any false or misleading statement to the OIO.

[33] Nor is there argument about the nature of the all reasonable endeavours obligation, which the arbitrator summarised at [213]:

> Subject to my repeated theme that context is everything, if there is a general proposition that can be drawn from all the authorities which I have read it is that *where there is an obligation to use endeavours to achieve an identified objective then positive action must be taken and action inimical to achieving that objective will be a breach of the reasonableness qualification. The extent of the action required to be taken is always subject to that qualification of reasonableness, the scope of which will depend on the context*. However it would require singular wording and context for the qualification to so negate the primary obligation as to convert it into an option.
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> (emphasis added)

[34] For CKI, Mr Miles QC acknowledged that the arbitrator had correctly identified that the reasonable endeavours obligation was ultimately defined by its context and that the context in this case involved the Overseas Investment Act 2005 and Regulations. However, he argued that the arbitrator's findings did not reflect that approach and, instead, had the effect of requiring CKI to act in a way that was contrary to its obligations under the Overseas Investment Act.

[35] Mr Miles submitted that the arbitrator's reasoning failed to take into account the consequence of his approach, which was to wrongly impose limitations on CKI's right to determine what it would do with the mine beyond the terms of the contract. He argued that CKI was entitled, contractually, to make a decision to close the mine and could only be required to put to the OIO its best case for consent within the parameters of the bargain the parties had struck. But the arbitrator's approach effectively rendered a decision to close the mine a breach of the all reasonable endeavours obligation unless it fell within the reasonableness qualification.

[36] I do not accept that this argument is tenable. The bargain that CKI struck did not give it unfettered rights in respect of the mine. Whilst there is no express contractual obligation on CKI to keep the mine operational, the all reasonable endeavours obligation clearly limited CKI's freedom. It is clear from the Court of

Appeal's statement in *Mana v Fleming* which dealt with a condition requiring the purchaser to "… do all things which may reasonably be necessary to enable the condition to be fulfilled …" that the all reasonable endeavours obligation did have the effect of limiting the decisions that CKI could make about the future of the mine:[18]

> [30] [T]he starting point in determining the meaning of Clause 8.7(2) in this context is the obligation to "do all things". It imposes an affirmative duty on the purchaser to act or take positive steps. They are the things "reasonable necessary" to enable fulfilment of the particular condition, where time is expressly of the essence, by its due date.
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> [31] We agree with Mr Bell for the trust that the use of the word "all" is important. It places a burden on purchasers to "do all things" which is commensurate with the benefit they acquire through inclusion of a special condition. As a consequence, the purchasers will be in breach if there is something which was reasonably necessary but which was not done even though other necessary things were done ...
>
> [32] The word "reasonably" introduced a qualitative or relative measure of what is necessary; its effect is to modify the obligation by reference to what is reasonable in the circumstances: see *Hospital Products Ltd v United Stated Surgical Corporation* (1984) 156 CLR41 at p92 per Mason J (discussing a "best endeavours" provision). The necessary things must be rational or in accord with reason, eliminating things which would be unreasonable to require to be done in the circumstances. The purchaser is not required to go beyond the bounds of reason. He or she is required to do all that can be reasonably done to achieve the contractual object but no more: *Hospital Products* at pp64-65 per Gibbs CJ.
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> [33] The word "reasonably" must import an objective standard, in performances to be measured by applying that standard to the relevant facts and circumstances. Adoption of an objective standard is consistent with principle. The Court is the arbiter of what is reasonably necessary in any case, viewed from the purchaser's perspective. Anything less than an objective standard would allow a subjective assessment according to the values of the party whose conduct is at issue. That would require the word "reasonably" of any meaning and convert the contract into an option to purchase …

[37] The arbitrator specifically rejected the suggestion that a party could prefer its commercial interests to the apparent exclusion of any constraint attaching to the endeavours obligation other than bad faith. In considering the scope for CKI to take account of its own commercial interests in deciding on a plan for the future of the mine the arbitrator also referred to other clauses in the agreement for sale and

[18] *Mana v Fleming* [2007] NZCA 324.

purchase which he regarded as relevant to an interpretation of the reasonableness qualification attaching to the reasonable endeavours obligation. Of relevance was the fact that there was no warranty or representation as to revenue or as to the accuracy of any forecast or projection with respect to the Taharoa 2010 project as part of the due diligence information. In addition, clause 12.16 precluded any right to cancel other than for failure to settle or a breach of warranty that had an Extraordinary Effect which the arbitrator assumed was intended as a reference to Extraordinary Event as defined in the agreement. That definition excluded changes generally affecting segments of the industry in which the business generally competed, changes to general economic conditions and changes to stock markets or financial markets in general.

[38] I agree with the arbitrator's view that:

> 217. Given those explicit exclusions applying even where a breach of warranty occurred it would be an unlikely interpretation of the reasonable endeavours obligation to effectively imply a qualification of reasonableness allowing CKI to prefer its commercial interests in respect of any of those matters specifically excluded from the definition of Extraordinary Events. To do so would allow CKI to avoid the contract by the side wind of the non-fulfilment of the consent obligation. This would effectively create an option for CKI. Neither the authorities or business commonsense would support that interpretation.
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> 218. That does not mean that a change in one of those specified circumstances as a matter of fact, not choice, might not prevent the achievement of the reasonable endeavours obligation, e.g. if an economic cataclysm closed all Chinese steel mills or ship borne trade between New Zealand and China was frustrated by an event beyond CKI's control. However where the event simply alters value, but not so as to imply "*ruin*", it does not, in my view, provide an option for CKI to claim a reasonableness qualification modifying its endeavours obligation.
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> 219. It is important to recognise that the interpretation which I favour does not prevent CKI in making a business choice responding to its later assessment of what it sees as the appropriate way in which to conduct the business. That decision may, because it has to be advised to the OIO, result in the OIO consent not being obtained. The question of liability is not answered by the fact of the OIO consent not being obtained but by the answer to the question has CKI used all reasonable endeavours or, as I put the alternative previously, can this businesss decision be seen within the reasonableness qualifier to the endeavours obligation. If it is not then CKI will face a damages claim (if not specific performance) which will broadly equate to the re-allocation of risk which CKI's

> decision is effecting. On the other hand if the decision comes within the reasonableness qualification then CKI will have performed its endeavours obligation.

[39] In accepting the all reasonable endeavours obligation it must be assumed that CKI realised it would have to take positive action towards obtaining consent and that action inimical to achieving that would be a breach, unless such action was reasonable. Inherent in that obligation was a limitation on plans for the mine that put OIO consent at risk.

[40] Nor do I accept Mr Miles' submission that the logical corollaries of the arbitrator's findings are that CKI should have deferred making its decision about the future of the business until after consent was given, even though it believed that it would close the mine as soon as it was acquired, and kept quiet about that belief until after consent was given. Mr Miles suggested that such an approach would fundamentally mislead the OIO, and that there was an obligation to inform the OIO of intended material changes to CKI's plans opposed to acquisition. The alternative consequence of the arbitrator's finding, in Mr Miles' submission, is that CKI should have communicated its decision to close the mine in a more positive way, i.e. it should have "gilded the lily".

[41] The essence of the arbitrator's reasoning, however, was that CKI's obligation of honesty to the OIO was unaffected by the contractual obligations. The arbitrator certainly did not find that CKI could have or should have sacrificed its obligation of honesty in order to comply with its all reasonable endeavours obligation. If the course selected represented all reasonable endeavours then it would not be liable whether or not consent was forthcoming. But whatever course was chosen, the statutory obligation had to be fulfilled. The point is that if the chosen course would result in consent not being obtained CKI could only satisfy its contractual obligations by ensuring that its chosen course fell within the reasonableness qualification.

[42] Subject to CKI's second argument, that the arbitrator made findings of fact without any probative evidence on which to base them, the factual findings at [221], [258], [261], [265], [271] and [278] regarding CKI's 6 December decision and 8

December letter cannot be challenged. It was for the arbitrator to determine whether, as a matter of fact, CKI had used all reasonable endeavours. The arbitrator carefully and correctly stated the relevant legal principles and applied them to the factual findings he made. I do not accept CKI's assertion that the result of those findings inevitably places CKI in a position where it is either unable to or penalised for complying with its statutory obligations under the Overseas Investment Act. I therefore do not regard CKI's position on this aspect of its application as reasonably arguable.

Arbitrator's finding regarding genuineness of 6 December 2008 decision

[43] After concluding that CKI had failed to comply with its all reasonable endeavours obligation the arbitrator went on to consider whether the 6 December decision was genuine. In doing so, he recognised that his previous conclusion was sufficient to dispose of the question whether CKI had breached its all reasonable endeavours obligation, but considered that he should proceed because "this matter is unlikely to end here".[19] He concluded that he "was unable to come to a positive conclusion that CKI's decision was genuine".[20]

[44] CKI submits that the arbitrator's conclusion amounted to a finding that the arbitrator was not satisfied the decision was honestly made. This finding, Mr Miles argued, was inappropriate because NZS had previously disclaimed allegations of dishonesty and the finding impugned CKI's reputation; in these circumstances the finding amounted to a breach of natural justice sufficiently serious to justify intervention on the public policy ground of Article 34.

[45] The arbitrator commenced his consideration of this issue by identifying where the onus lay:

> 273. I earlier referred to the legal position that once a claimant has sufficiently raised the question of the performance of an endeavours obligation an evidentiary onus then arises to justify the manner of the exercise of the obligation. Ultimately the legal onus still remains on the claimant but the intermediate evidentiary onus is important.

[19] Award at [272].
[20] Award at [278].

After expressing concern at the fact that he had heard evidence from only one of the CKI senior executives the arbitrator went on:

> 277. In those circumstances I am left in the position that the Court of Appeal discussed in the Perry decision – *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731. This is a situation where the factual circumstances raised a serious question as to the genuineness of the 6 December decision. Given the absence of evidence from any of the senior members of the Working Team I am left to draw the inference that their evidence would not have assisted CKI's position. That leaves CKI resting on Mr Tsang's evidence in respect of an issue where it bears the intermediate evidentiary onus. Absent evidence from one of the ultimate decision makers on the Working Team I am unable to reach a positive conclusion that CKI's 6 December closure decision was genuine. It may have been, because despite my reservations about the process and substantive reasons business decisions are always debatable, but absent the support in evidence of a witness of the status relief on by Mr Logan I cannot reach that conclusion.
>
> 278. That does not dispose of the issue because the ultimate legal onus to establish lack of genuineness still rests on the claimants. I am reluctant to come to a conclusion about lack of subjective genuineness which would inevitably cast doubt on the motivations of other executives when that conclusion would rest to some extent on the failure to give evidence rather than the evidence itself. *It is not necessary that I reach a positive conclusion on this issue because I have already concluded that CKI's 6 December decision breached its all reasonable endeavours obligation. However, the failure of CKI to discharge the intermediate evidentiary onus is such that given the reservations I have about the 6 December decision I am, as I have said, unable to come to a positive conclusion that CKI's decision was genuine. The decision would therefore fail to satisfy even the test which CKI proposed.*
>
> (emphasis added)

[46] Mr Miles advanced three arguments in relation to the arbitrator's finding on this issue. First, the finding amounted to a finding of dishonesty against CKI which the arbitrator should not have made in light of NZS' earlier disavowal of any allegation of dishonesty by CKI. Secondly, the arbitrator wrongly proceeded on the basis that CKI bore the onus of establishing that its decision was genuine. Thirdly, the arbitrator wrongly considered CKI had failed to call key witnesses.

Should the arbitrator have considered the issue of genuineness?

[47] The arbitrator identified two issues in relation to CKI's alleged breach of the all reasonable endeavours obligation. One was whether the decision to close the

mine satisfied CKI's contractual obligation to use all reasonable endeavours to obtain the OIO consent. This was, of course, the primary issue in the arbitration and he dealt with it first. The second issue was whether the 6 December decision was genuine. The arbitrator identified the relevance of that issue as being twofold, namely that it was "an ingredient of the test proposed by CKI and an issue raised by the BS/NZS allegation of an avoidance strategy".[21]

[48] In argument Mr Miles' focused solely on the latter issue (the NZS allegation of an avoidance strategy). Whether that amounted to an allegation of dishonesty against CKI had been raised an early stage in the arbitration when NZS alleged in its original pleading that CKI had failed to comply with the all reasonable endeavours obligation either by acting deliberately pursuant to an "avoidance strategy" or by failing to meet its contractual obligations. CKI sought to strike out that pleading on the basis that it alleged motive or dishonesty which was irrelevant to an enquiry as to breach of contract. In refusing to strike out the pleading the arbitrator accepted that, at that stage of the proceeding, NZS was doing no more than identifying facts from which an adverse inference of motive might be drawn. But the proceeding was, clearly, at an early stage:[22]

> 10. The claimants' position is that at this stage of the proceedings, prior to discovery, the claimants are dependent upon inferences which they would allege can properly be drawn from the external facts which the claimants have pleaded. Accordingly the intent of the pleading is not to allege dishonesty but to identify what inferential allegations the claimants assert so that the respondents can be fully informed of the nature of the claimants' case …
>
> 12. As I discussed with counsel at the hearing, I do not see the "avoidance strategy" allegation as necessarily imputing dishonesty. In my view a contracting party can, in most circumstances, determine not to perform or breach a contract but, of course, subject to the risk of having to pay contractual damages. In my view the pleading does not necessarily imply dishonesty and accordingly does not fail as a vexatious allegation.
>
> 13. I do agree with the respondents' submission that motive is generally irrelevant to breach of contract. That was, as a generalisation, also accepted by counsel for the claimant. However, that does not mean that evidence of a determination to not pursue the application with vigour may not be relevant when objectively assessing whether or not reasonable endeavours have been undertaken …

[21] Award at [250(a)].
[22] Arbitrator's ruling on strike-out application, 13 July 2009.

> 14. Whether or not ultimately the allegation can be made out will depend on the evidence, including that obtained on discovery. It may be that at a later date, having seen discovery and perhaps the briefs of evidence, that the particular allegation may not be pursued by the claimants …
>
> 19. The claimants' position is that these are pleadings of fact from which it may be inferred, together with other alleged facts, that the respondents did not act reasonably. In isolation it may be difficult to draw any adverse inference for the matters pleaded at s 15(1)(g) that the claimants' point is that in the context of the other pleaded allegations these matters may support an adverse inference being drawn.

[49] NZS' pleading appears not to have been questioned again before the hearing.

[50] In its closing submissions NZS made the following written submission:

> 5.1 The claimants' case does not depend upon the "avoidance strategy" pleaded (ASC 15.4, 17), but the hearing has not removed the scope for inferring the existence of such strategy. The implementation of such strategy would of course be a blatant breach of the respondents' obligations …
>
> 5.2 The claimants contend that such a strategy can be inferred from the evidence available and the conduct of the respondents in connection with this obligation in particular, from:
>
> (a) The non-appearance of CKI decision makers as witnesses;
>
> (b) The extraordinary failure to discover plainly relevant and plainly non-privileged documents;
>
> (c) The reluctance of CKI to "fully inform" or "co-operate with" the claimants as required by the SPA;
>
> (d) The ill-considered and unreasonable nature of the closedown decision;
>
> (e) The attempt to antagonise and/or disturb the landowner by unjustifiably denigrating the claimants.

[51] NZS' disavowal of an allegation of dishonesty at the early stage at which the issue was raised cannot mean that it was committed to that position for the duration of the proceeding. It is apparent from its closing submissions that it considered that the evidence did provide a sufficient basis for inviting the inference that the decision was not genuine. Although, as the arbitrator himself acknowledged, it was unnecessary to make a finding on the issue of genuineness, it could not be said that

the issue was not live nor that the arbitrator was wrong in proceeding to make a finding in respect of it.

[52] Further, the issue of genuineness arose not only from the allegation of the "avoidance strategy" but also from CKI's own assertion that the genuineness of the decision was all that was required to satisfy the all reasonable endeavours obligation. CKI's argument on this issue was recorded in the award and rejected:

> 197. The obligation which CKI's final submission submits that CKI was obliged to meet is expressed as:
>
> … Whether it has acted in good faith (i.e. genuinely and honestly) and in what it reasonably believes to be its own interest (i.e. its corporate philosophy and its business priorities with an emphasis on the long-term holding and development of its business investments).
>
> 198. This submission follows the submission that there is a potential tension between the statutory obligation to be honest to the OIO and the reasonable endeavours obligation in respect to which it was submitted by CKI that a legal duty to speak honestly overrides a reasonable endeavours obligation …
>
> 199. In my view the CKI proposition goes too far and effectively would create an option subject only to a bad faith restriction. The proposition that a legal obligation to be honest per se overrides a reasonable endeavours obligation is, in my view, incorrect. The authorities relied on by CKI do not justify this submission. They are, instead, all examples of the interpretation of a particular obligation in the particular context.

[53] Having rejected CKI's submission regarding the test to be applied in determining a breach of the all reasonable endeavours obligation it was, again, unnecessary for the arbitrator to go on to make a finding regarding genuineness. However, once again, one could not criticise him for doing so in order to deal completely with CKI's submission.

[54] For these reasons I do not accept that it was unfair or improper for the arbitrator to consider this issue.

The onus of proving genuineness

[55] Mr Miles submitted that the arbitrator wrongly reversed the onus regarding proof that CKI's decision was genuine by concluding that the burden lay on CKI

rather than NZS. Mr Miles submitted that, in doing so, the arbitrator misinterpreted the decision in *Ithaca v Perry*.[23]

[56] I see no error in the arbitrator's approach to the proof regarding genuineness of the decision. On the basis of the test asserted by CKI itself an evidential onus would have lain on it to demonstrate the genuineness of the decision; it would not have been for NZS, having proven conduct that might amount to a breach of the all reasonable endeavours obligation, to then adduce evidence of CKI's good faith. Nor did the arbitrator's application of *Ithaca v Perry*, in itself, have the effect of imposing an onus on CKI that it did not otherwise bear. The arbitrator was entitled to consider the issue of genuineness. CKI had asserted that its 6 December decision was genuine and had adduced evidence to support that. The arbitrator's reference to *Ithaca v Perry* did no more than identify the reason that the evidence adduced by CKI was insufficient.

Arbitrator's finding regarding failure to call witnesses

[57] The arbitrator reviewed the evidence of both the factual and expert witnesses of both parties in considerable detail. In examining the issue of genuineness he expressed serious concern at the failure by CKI to call witnesses whom he regarded as important:

> 275. I have already noted that I have heard no evidence that any consideration was given at the meeting of 6 December to CKI's all reasonable endeavours obligation. I was told by Mr Luk that his focus was on ensuring that the CKI director making the necessary statutory declaration in support of the OIO application should not be exposed to any risk of a subsequent allegation of misleading the Commission. However, Mr Luk said nothing about consideration of the contractual obligation under the Agreement. Mr Luk was careful throughout not to present himself as a decision maker, albeit that he was a member of the Working Team. He explicitly presented himself as having a limited function of legal facilitator and advisor. I am therefore left with only Mr Tsang's evidence. Mr Tsang's focus was on operational not contractual issues.
>
> 276. It would be surprising if senior executives as experienced as those on the Working Team had not turned their minds at all to CKI's contractual endeavours obligation. It would be equally surprising if it had not occurred to any of the senior executives on the Working

[23] *Perry Corporation v Ithaca (Custodians) Ltd* [2004] 1 NZLR 731 (CA).

> Team that the closure decision would inevitably be negative for, and potentially fatal to, the OIO obligation. The likelihood was that the closure decision would never have to be implemented because the OIO consent would not be obtained …
>
> 277. In those circumstances I am left in the position that the Court of Appeal discussed in the *Perry* decision – *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731. This is the situation where the factual circumstances raise a serious question as to the genuineness of the 6 December decision. Given the absence of evidence of the senior members of the Working Team I am left to draw the inference that their evidence would not have assisted CKI's position. That leaves CKI resting on Mr Tsang's evidence in respect of an issues where it bears the evidentiary onus. Absent evidence from one of the ultimate decision makers on the Working Team I am unable to reach a positive conclusion that CKI's 6 December closure decision was genuine. It may have been, but because despite my reservations about the process and substantive reasons business decisions are always debatable, but absent the support in evidence of a witness of the status relief on by Mr Logan I cannot reach that conclusion.

[58] Mr Miles submitted that Mr Tsang and Mr Luk were the two key witnesses and both had been called. Mr Tsang was the executive who had the hands-on task of preparing CKI to take over the business and leader of the Taharoa business within CKI. Mr Luk (CKI's in-house lawyer) was responsible for ensuring that contractual conditions and regulatory requirements were satisfied. He was the person on whose instructions the communications with the OIO took place.

[59] It is, however, apparent from the evidence of Mr Tsang and Mr Luk referred to by the arbitrator that the role both witnesses played within the working team was an advisory one. In Mr Tsang's evidence recorded at [268] of the award he said:

> [T]he team is a team of people, I am the one who make the recommendations …

[60] He went on to refer to discussions the team had had but did not go on to discuss the actual decision that was made or who made it.

[61] One of the factors that clearly influenced the arbitrator's conclusion regarding the 6 December decision was the expert evidence called by NZS as to the unusualness of the CKI decision in terms of industry experience. Whilst recognising that the merits of the decision were open to debate and that the decision might be

regarded as good or bad in hindsight, expert evidence called by NZS showed that a decision to indefinitely shut down a mine of this type was not one that any expert witness had ever known to have been made save on a permanent basis when reserves became depleted or uneconomical to recover.[24]

[62] The arbitrator clearly also regarded it as significant that Mr Tsang (according to Mr Luk) had been "very panicked" by the adverse market news and Mr Tsang's own evidence that he had been "very angry" with NZS for not advising sooner about the Chengde threat to cancel the contract.

[63] The arbitrator felt that he did not have the advantage of hearing from a senior executive that may have been in a position to make decisions in a less reactive manner. It is perfectly clear from the evidence referred to in the award that the Working Team comprised personnel more senior than Mr Tsang and Mr Luk and, further that neither man was responsible for the ultimate decision but merely for making recommendations and proposals to the decision makers. I can see no basis for criticising the arbitrator's approach on this issue.

No logically probative evidence for findings

[64] CKI's second ground of challenge was that the arbitrator had made findings of fact that were not supported by probative evidence and were therefore in breach of natural justice. These findings were:

(a) That advice regarding the OIO processes and criteria was not taken in relation to the 6 December 2008 decision;

(b) That some of the restrictions placed on CKI's lawyer, Mr Gordon, were contrary to his personal inclinations and, impliedly, his advice; and

(c) That the 6 December 2008 decision was without any precedent example to which any of the expert witnesses could point.

[24] This finding is also subject to challenge on the separate ground that NZS' expert acknowledged in cross-examination that at least one example did exist.

[65] Mr Miles based his argument on the decision of the Privy Council in *Air New Zealand Ltd v Mahon*, in which Lord Diplock stated that:[25]

> The first rule [of natural justice] is that the person making the finding must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.
>
> The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make a finding must be based upon some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.

[66] The finding at [258] that is objected to is that advice from those who understood the OIO processes and criteria was not taken in relation to the 6 December decision. The arbitrator held that:

> 258. [W]hat impact could the closure decision be reasonably expected to have on the OIO application? In my view any objective assessment of the impact of the 6 December decision would have concluded that the impact could only be negative and would almost certainly result in the application being declined. It is irrelevant whether or not CKI recognised this because the test of reasonable endeavours is objective that I am confident that had the CKI Working Team taken advice of anybody who understood the sensitivities of the OIO processes and criteria they would have been told that the 6 December action would almost certainly be fatal to the application. Mr Gordon [CKI's lawyer] made it clear that he had no involvement in the 6 December decision. I have no doubt what his advice would have been had it been sought. It is relevant that his advice was not sought.

[67] CKI's criticism of this finding was that the arbitrator had wrongly conflated the question of whether the 6 December decision was made without considering the implications on the OIO consent process with the question whether or not legal advice had been given. Mr Miles submitted that there was no evidence that legal advice had not been given and, in fact, evidence existed to the contrary (Mr Gordon having confirmed that he was in discussions with his client over the weekend of 6 and 7 December). He also pointed out that the lack of any reference in the evidence

[25] *Air New Zealand Ltd v Mahon* [1983] NZLR 662 (PC).

to the nature of the advice given was explicable by the fact that any such advice would have been privileged.

[68] However, it was apparent from the arbitrator's consideration of Mr Gordon's evidence that his decision was not made on the basis that no legal advice had been given. It was made on the basis of Mr Gordon's acknowledgement that an experienced practitioner (which he was) would know that closing the operation would be unattractive to those influencing the OIO consent. The arbitrator was entitled to infer that if Mr Gordon gave advice it would have been to that effect.

[69] The second finding was that some of the restrictions placed on Mr Gordon were contrary to his personal inclinations and, impliedly, to his advice. At [262], having recorded the terms of Bell Gully's letter of 8 December 2008 advising of the intention to close the mine, the arbitrator said:

> 262. In fairness to Mr Gordon his evidence was, and this was apparent from other evidence, that the content and nature of his communications to third parties, including the OIO, both writtten and oral, were directed by and subject to the express instructions of CKI. My observation of Mr Gordon when giving evidence was that some of the restrictions placed upon him were contrary to his personal inclinations but he had acted conscientiously in carrying through his client's instructions.

[70] Mr Miles submitted that issues of privilege and client confidentiality meant that Mr Gordon could not, in evidence, have referred to the contents of his advice or his personal views about the wisdom of the restrictions placed on him and, in any event, such views would have been irrelevant to whether CKI had fulfilled his all reasonable endeavours obligation. He argued that the only apparent evidence to support the arbitrator's finding was the reference to Mr Gordon acting on instructions (which did not advance matters at all) and the arbitrator's observations of Mr Gordon. Neither constituted probative evidence.

[71] In response, Mr Hodder pointed out that at [262] the arbitrator had quite specifically identified "other evidence" as being the basis for his conclusion that Mr Gordon was being directed by express instructions of CKI (impliedly contrary to his personal views). I see nothing wrong with the arbitrator's record of his impression that Mr Gordon was attempting to conscientiously carry out his client's instructions,

even though they were contrary to his personal inclination. What Mr Gordon personally thought of CKI's decisions was, strictly, irrelevant to determination of the issue. However, this observation was relevant because it tied in with the arbitrator's earlier consideration of Mr Gordon's understanding of what the impact of this step would be on the OIO consent. Mr Hodder rightly points out that an arbitrator (like a judge) is not required to identify each piece of evidence that is relied on.

[72] The third factual finding under challenge on this ground is the finding at [238] that the decision to close the mine was without precedent example that any of the expert witnesses could point to. The arbitrator said:

> 238. Mr Dean's evidence was:
>
> > 15 In my experience, putting an iron ore mine on care and Maintenance is an action of last resort.
> >
> > 16 Iron ore is a low-value commodity and absorbing the closure and re-opening costs would be difficult. There may have been iron ore mines put on care and maintenance in the past but I am not aware of any. The only time I have seen iron ore mines closed was on a permanent basis because the resesrves became depleted or uneconomical to recover.
>
> This evidence confirms what I have already said that the CKI decision was unusual and without precedent example that any of the expert witnesses could point to.

[73] Mr Miles submitted that, in reaching this conclusion and relying on Mr Dean's evidence in doing so, the arbitrator either ignored or overlooked contradictory evidence given by Mr Dean himself about a Coolum Island iron ore mine closed by BHP and subsequently re-opened. Mr Miles submitted that, as a result, the arbitrator's finding at [235] that "I am confident from the lack of contrary evidence that it was an unsual decision" was without probative evidence or blatantly contradicted by evidence from the same witness.

[74] I did not have before me the transcript of Mr Dean's cross-examination. Accepting, however, Mr Miles' submission that Mr Dean made a concession of the kind he has identified I, nevertheless, do not accept that the arbitrator's finding could be viewed as being made without probative evidence or contradicted by the evidence. Even if Mr Dean had conceded an example of an iron ore mine closed and

subsequently re-opened, that would hardly preclude the finding that the arbitrator made. The arbitrator was entitled to reach a conclusion that the decision to close the mine was an unusual one on the basis of the whole of the evidence. The existence of a single precedent referred to by the witness in cross-examination would not detract from that conclusion. The conclusion that there was no precedent example may have been wrong in that it overlooked the instance acknowledged by Mr Dean in cross-examination. However, that comment was made after the conclusion at [235] which the arbitrator was entitled to make.

[75] I do not consider that any of these challenges show a reasonable argument that significant factual findings were made without probative evidence.

Finding regarding OIO consent

[76] The arbitrator found that OIO consent would most likely have been obtained had it not been for the 6 December decision and that this decision was the decisive negative factor in the refusal of consent.[26] There were other findings of similar effect.[27]

[77] CKI asserts three reasons that this finding amounted to a breach of natural justice. First, there was no probative evidence to support the findings. Secondly, it was a finding that should not have been made in circumstances where the arbitrator was aware that NZS was seeking damages based on the loss of opportunity to have obtained a valid consent from the OIO. Thirdly, the findings were a breach of Article 18 of Schedule 1, the requirement that CKI be given a full opportunity to present its case.

[78] It is not tenable to suggest that there was no probative evidence to support the finding. However, it is a finding that warranted caution because of NZS' final position regarding remedy. Throughout the hearing NZS' position was that, while reserving its right to seek damages in lieu of specific performance, its intention was to seek specific performance. However, the issue of remedy was not to be

[26] Award at [221].
[27] Award at [256]-[258], [260], [266]-[267] and [271]-[272].

determined at that stage; neither party adduced evidence on the issue and it was not addressed in submissions at the end of the hearing. In determining breach of the all reasonable endeavours obligation the arbitrator was, therefore, required only to find whether CKI did something that it should not have done or failed to do something that it should have done in relation to obtaining OIO consent. In that context the likelihood of consent being granted did not arise as a direct issue and it was unnecessary to explore the consequences of CKI's conduct.

[79] However, the causative effect of CKI's breach of the all reasonable endeavours obligation became critical once NZS signalled its intention to elect damages rather than specific performance. Mr Miles argued that the finding was inappropriate because it pre-emptively purported to determine a key matter that should properly have been left for the damages hearing. Further, the finding was made without CKI appreciating the significance of the issue and, therefore, not adducing the evidence that it might otherwise have done. In response, Mr Hodder argued that there was no need to call witnesses from the OIO because all its correspondence was in evidence and, in any event, CKI could have done so had it wished.

[80] I consider it reasonably arguable that there was a breach of natural justice in the arbitrator's finding on this issue. Neither party had conducted the first hearing on the basis that the consequences of a breach by CKI was in issue at that stage. Once it was known that NZS would pursue a damages claim, it was clear that it would be a critical issue in the subsequent hearing. But CKI is now bound by a finding that it did not have an opportunity to address adequately. The fact that all the OIO correspondence was in evidence is not, in itself, sufficient to overcome the resultant prejudice. Nor, if it was not apparent that a finding would be made on this issue, is it any answer that CKI could have called OIO witnesses itself.

Improper/unfair questioning of Mr Luk

[81] CKI also asserts a breach of natural justice in relation to the arbitrator's questioning of Mr Luk, which is said to have been unfair. CKI claimed that the arbitrator's questioning had the character of cross-examination. Unfair or improper

questioning of a witness by an arbitrator can amount to a breach of natural justice. It may evidence bias or lead to a reasonable apprehension of bias or otherwise affect the fairness of the trial.

[82] CKI asserted that there was extensive questioning that took up six pages of the transcript. I was not, however, provided with a complete copy of the transcript; in its application CKI set out the specific questions that it was concerned about:

- T1209/1-2 "Not surprised at one stage and surprised at another stage, I need a straight answer Mr Luk."

- T1209/7 "…two completely different positions, don't look at your counsel I want an answer from you Mr Luk as to why you were surprised changed from those two dates."

- T1211/12 "Why didn't you say that to me when I asked you. We have spent ten minutes beating around the bush, why didn't you say that is the reason they turned you down, because that is the truth of it isn't it?"

[83] It is said that the arbitrator's questions were asked in a raised voice and that the unfair questioning made Mr Luk flustered. CKI asserts that, consequently, Mr Luk was effectively prevented from answering questions in a proper manner. As a result, the fairness of the hearing was compromised.

[84] The arbitrator himself acknowledged some unsatisfactory aspects of his exchanges with Mr Luk, observing at [263] of the award that:

> I did question Mr Luk about his expectations of the effect of the closure decision and the absence of any attempt in the 8 December letter to mitigate the negative impact by reference to the plans which Mr Tsang had to reinvigorate and expand the business. Unfortunately that exchange became rather more tense than it should have and Mr Miles submitted that I should place no weight upon it. Whatever the reasons for that tension I agree with Mr Miles that it is appropriate not to rely upon that exchange.

[85] CKI also complains that, that notwithstanding the arbitrator's statement that he would not place weight on the exchange he did, in fact, do so.

[86] Mr Luk was, of course, entitled to be treated fairly while being questioned to not be subjected to improper questioning. The excerpts relied in submissions do show a level of irritability by the arbitrator that might have caused Mr Luk discomfort. They might even be characterised as adversarial. However, without seeing the full transcript so as have a sense of the context in which the questions were being asked I cannot conclude, on the basis of the three specified questions (even with the arbitrator's acknowledgement at [263]) that the fairness of the hearing was affected. Nor is there any basis on which to conclude that the outcome of the hearing would have been any different had the arbitrator not allowed his irritability with the witness to have become apparent.

The process adopted regarding election of remedy

[87] Neither party made submissions at the end of the arbitration hearing regarding remedy. NZS' position throughout had been that it intended to seek specific performance, but reserved the option to elect damages in lieu. The arbitrator gave leave at the conclusion of the hearing for each party to file written submissions on remedy. NZS filed written submissions in which it sought an order for specific performance but on terms that included consultation by CKI with it regarding the application for OIO consent and supervision by an independent solicitor. CKI's response was acceptance that, if there had been a breach of the all reasonable endeavours obligation, specific performance was an appropriate remedy, but it resisted any suggestion that such an order should include terms as to consultation or supervision.

[88] NZS subsequently purported to withdraw its plea for specific performance and instead to elect a damages claim. CKI maintained that the claimants had unequivocally elected specific performance and could not now purport to cancel their contract and seek damages. There was a further hearing before the arbitrator who gave the ruling on election on 28 June 2010. The arbitrator concluded that, because NZS' memorandum electing specific performance contained a reservation of right to seek damages, there had been no unequivocal election and NZS was not precluded from changing its mind.

[89] The reservation of right stated that:

> 7. For the avoidance of doubt, the claimants continue to reserve their entitlement to (1) cancel the SPA and seek a remedy in damages, and/or (2) seek damages in relation to any delayed settlement.

[90] The arbitrator concluded that this clause did not amount to an unequivocal election for specific performance and, as a result, NZS was entitled to cancel the contract and seek damages instead.

[91] CKI asserts that the process adopted by the arbitrator in relation to whether he would order specific performance was a breach of natural justice occurring during the arbitral proceedings or in connection with the making of the award and the remedies ruling. In making this assertion CKI argued that:

(a) The arbitrator should have required NZS to elect its remedy during the oral hearing that finished on 12 March 2010;

(b) Alternatively that the arbitrator's direction that the parties file further submissions on remedy was in substance a direction requiring NZS to elect its remedy by 19 March 2010; and

(c) The arbitrator's indication in his interim award that, on the basis of the closing submissions on remedy, he would have awarded specific performance.[28] NZS' 19 March memorandum amounted to an election and the arbitrator should have made his ruling on remedy on the basis of that memorandum rather than allowing NZS to proceed on the basis of its subsequent memorandum in which it elected damages.

[92] CKI argued that it had been prejudiced by the process adopted by the arbitrator through the loss of an opportunity to remedy its breach of the all reasonable endeavours obligation by making a further application to the OIO and, the consequent opportunity to acquire the business in the event of a successful OIO application.

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[28] Award at [375].

[93] Alternatively, CKI asserts that the process adopted by the arbitrator was a breach of Article 18 which provides that:

> The parties shall be treated with equality and each party shall be given a full opportunity of presenting that party's case.

[94] It was undoubtedly the case that the arbitrator expected and intended NZS's memorandum filed on 19 March 2010 to represent an election as to remedy. The terms of that memorandum, however, made it clear that NZS had not made its election. The effect of clause 7 of the memorandum, which contained the reservation of right to seek damages, was a question of law for the arbitrator. It is not tenable to suggest that the arbitrator should have refused further submissions on the issue of remedy given that the position was still unequivocal as a result of the 19 March 2010 memorandum. Nor is it tenable to suggest that the parties were not treated equally. Both had the opportunity to make submissions on the point and to be heard on it.

[95] The determination of procedure was a matter for the arbitrator under Article 19. There is no basis on which to conclude that there was any breach of natural justice in the process he adopted in determining the question of NZS' election.

Result

[96] The only ground raised by CKI that is reasonably arguable under Article 34 is the arbitrator's finding regarding the causative effect of CKI's breach of the all reasonable endeavours obligation. I accordingly make an order striking out CKI's application to set aside the interim award and ruling except to the extent of that one ground.

[97] Parties may address the issue of costs by memoranda filed on behalf of NZS by 22 July 2011, CKI by 5 August 2011, with any reply by NZS by 12 August 2011.

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P Courtney J