IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-1289
CIV-2011-404-2012
CIV-2011-404-6843
[2012] NZHC 1277

UNDER	the Arbitration Act 1996
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: 23-24 April 2012

Counsel: F Cooke QC, M Colson and F Tregonning for Applicants
J Hodder SC, D Alderslade and J Graham for Respondents

Judgment: 8 June 2012

RESERVED JUDGMENT OF ELLIS J

This judgment was delivered by me on 8 June 2012
At 4 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors: Bell Gully, PO Box 1291, Wellington 6140
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Counsel: FMR Cooke QC, PO Box 1530, Wellington 6140

[1] This judgment relates to further challenges brought by Cheung Kong Infrastructure Holdings Ltd and its subsidiary Ironsands Investments Ltd (together, "CKI") to two awards made by Alan Galbraith QC as a result of an international arbitration conducted by him during 2010 and 2011. Earlier challenges by CKI to Mr Galbraith's interim liability award and to ancillary rulings made by him were largely struck out by Courtney J on 8 July 2012.

[2] The arbitration related to a 2008 agreement by CKI to buy the shares in New Zealand Steel Mining Ltd, then owned by Toward Industries Ltd and, ultimately, by New Zealand Steel Ltd ("NZS"). The business operated by NZS involved an iron mining operation situated at Taharoa, south of Hamilton. The contract required CKI to use all reasonable endeavours to obtain the consent of the Overseas Investment Office (OIO) to the purchase. But as a result of the global financial crisis in late 2008, CKI decided it no longer wished to pursue the venture. On 8 December 2008 CKI advised the OIO that, once it had acquired the business, it would close the mining operation. OIO consent was consequently refused and settlement under the agreement necessarily did not occur.

[3] NZS then asserted that CKI had breached the contract by failing to use all reasonable endeavours to obtain OIO consent. The parties agreed to arbitrate the resulting dispute. By way of counterclaim, CKI alleged that NZS had failed to advise CKI timeously of adverse developments that were material to the business and that this failure was in breach of the vendor warranties contained in the contract, which relevantly provided that:

> 4.1 To the best of the knowledge and belief of the Vendor all material comprised within the Due Diligence Information ... is materially accurate and is not materially misleading in its context whether by omission or otherwise, having regard to the totality of those materials.
>
> ...
>
> 6.1 The Due Diligence Information contains accurate and complete particulars of all material commercial agreements to which the Company is a party and which relate to the Business.

[4] The parties agreed to a split trial. The liability hearing took place over some 22 days in February 2010. The quantum hearing took place over some nine days in late April and early May 2011.

[5] After the liability hearing and before the release of Mr Galbraith's interim award, NZS cancelled the agreement and sought damages. CKI then challenged its ability to do so and this led to two further decisions from Mr Galbraith known as the "election" ruling and the "cancellation" ruling. Mr Galbraith found for NZS in both instances. Those decisions do not require further consideration in this judgment.[1]

The impugned decisions

[6] In his interim liability award dated 30 April 2010 Mr Galbraith found that:

(a) CKI had not used all reasonable endeavours to obtain OIO consent.

(b) NZS breached its vendor warranties to CKI in relation to:

(i) The completeness and accuracy of the information it had provided to CKI in the course of the due diligence exercise; and

(ii) The timeliness of its communications to CKI regarding developments affecting the business.

[7] As regards the finding of CKI's liability, Mr Hodder SC submitted, and I accept, that Mr Galbraith did not consider that the business decision made by CKI and advised to the OIO was by and of itself unreasonable. Rather, he held that in the context of the terms of the particular contract at issue the "reasonable endeavours" obligation required CKI to take all reasonable steps to mitigate the negativity of that

[1] CKI did subsequently challenge Mr Galbraith's ruling on the "cancellation" issue but this was struck out by Courtney J. Although CKI also sought in one of the present proceedings (CIV 2011-404-001289) to bring a further challenge to the "cancellation" decision, that challenge was abandoned immediately prior to the hearing before me and is not addressed in this judgment.

decision in its communications with the OIO, and it had not done so. Thus at [265] and [266] of the liability award he said:

> ... in my view any applicant desirous of putting its best foot forward to obtain a consent which was otherwise forced to convey negative news would seek to mitigate that negativity in any reasonable way possible. Whether that would or would not ultimately be accepted by the OIO as mitigation, the attempt would be made by any determined applicant. While Mr Miles put the submission very eloquently, all reasonable endeavours, in my view, required something better than the 8 December letter.
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> The difficulty which faces CKI in respect to the closure decision is the difficulty I referred to earlier in the discussion of the legal test. An all reasonable endeavours obligation, does not, except in very particular circumstances, allow a party to prefer its own interests in acting in a way inimical to the contractual objective. It will be apparent from my discussion of the process and justifications for the CKI decision that it involved a choice made by CKI for what CKI perceived as its own commercial interest. Mr Logan and Mr Johnson justified the decision as being a decision which it was reasonable for CKI to make in its own interest. The choice may, had it not derailed the OIO consent process, have turned out to be a good or bad decision for CKI. That is irrelevant. What is important for present purposes is that it was a decision that was inevitably negative and likely fatal to the OIO application which CKI was in no way compelled to make. The Bell Gully letter of 28 November to the OIO had already signalled the possible cessation or significant reduction of production, redundancies and other cost cutting exercises "soon after" acquisition of the business. Despite that and, as Mr Gordon acknowledged, somewhat surprisingly the OIO was still prepared to recommend consent.
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> ...

[8] And later, at [271] and [272] he said:

> The reasons put forward by CKI to justify its 6 December decision were all reasons arising from changes in market conditions which, in CKI's judgment, affected the value to it of the business. The effect of CKI's 6 December decision was to significantly elevate the vendor's risk of OIO consent being refused to a near certainty. In a real sense CKI made a decision which it believed increased or preserved value for it but which almost inevitably was destructive of value for the vendor. In my view that choice was inconsistent with the agreed distribution of benefits, risks and obligations under the contract. Accordingly CKI could make that decision but it then had to pay for the difference to the contracted for distribution of risks and benefits under the Agreement.
>
> In short the 6 December decision was objectively negative and likely fatal to the successful achievement of the OIO consent and could not be justified as falling within the reasonableness qualification of the all endeavours obligation. ...

[9] As I have said, following Mr Galbraith's determination that NZS was entitled to cancel the contract and to pursue damages, there was a separate remedies hearing. The damages sought by NZS related to:

(a) The loss suffered as a consequence of the difference between the agreed purchase price (approximately $250 million) and the value of the business following the global financial crisis;[2]

(b) Losses NZS said it had incurred in attempting to resell the business after CKI's repudiation of the contract.

[10] CKI sought to set off any damages payable to NZS against the damages it sought on its counterclaim in relation to the breaches of the vendor warranties referred to above.

[11] Further discovery was provided by NZS to CKI in relation to the losses that it claimed to have suffered.

[12] In his quantum award dated 29 July 2011 Mr Galbraith held that:

(a) There had been no drop in the value of NZS's business at the relevant date and so damages were not payable by CKI to NZS in that respect;

(b) NZS was entitled to damages for its expenses in relation to its attempt to mitigate the losses it had incurred as a result of CKI's repudiation. Those expenses comprised consultants' fees of AU$250,000 and legal fees of NZ$243,272.69 that were incurred in the course of NZS's attempts to resell the business;

(c) CKI was not entitled to damages on its counterclaim, essentially because they were precluded by cl 12.14 of the contract.[3]

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2 The precise point upon which that value was to be ascertained was a matter in issue at the arbitration.

3 Clause 12.14 is set out and discussed at [90] and following below.

CKI's past and present challenges to the arbitral decisions

[13] After the release of the interim liability award, but prior to the decision on quantum, CKI filed proceedings in this Court seeking to have both the liability award and the cancellation ruling set aside. As I have said, NZS's application to have those proceedings struck out was largely successful.[4] Courtney J's decision has been appealed by CKI but the appeal has not yet been set down (no doubt partly in anticipation of a further appeal from this judgment).

[14] Following the release of the quantum award CKI filed fresh applications in which it relevantly sought:

(a) To have the liability award set aside on the grounds that it had been induced by "(equitable) fraud and corruption (of process)". The central factual allegation underlying that claim is that documents which (CKI says) were relevant to the liability hearing were not discovered by NZS until the quantum stage, ie after the release of the interim award;

(b) To have the quantum award set aside on the grounds that:

(i) Mr Galbraith's assessment of NZS' resale costs was made in the absence of probative evidence on the issue;

(ii) His finding that cl 12.14 meant that CKI was not entitled to offset the resale damages award against its counterclaim for breach of warranty, was made in breach of natural justice because CKI was not given an opportunity to make submissions on that issue and no reasons were given for the finding.

[4] My understanding is that that part of the challenge that was left extant following Courtney J's decision has now become irrelevant.

[15] NZS has again applied to strike out each of the applications on the grounds that they have no tenable prospect of success.

Applicable strike out principles

[16] The principles relevant to the exercise of the Court's jurisdiction to strike out a pleading under r 15.1 of the High Court Rules are well known.[5] Thus:

(a) Pleaded facts 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 and the jurisdiction is thus to be exercised sparingly;

(c) The jurisdiction is not excluded by the need to decide difficult questions of law or questions that might require extensive argument, but the Court should be slow to strike out a claim in any developing area of the law.[6]

[17] Whether or not these principles should strictly be applied in the context of an application to set aside an arbitral award was the subject of submissions by Mr Hodder SC for NZS. He said, in particular, that where the proceedings sought to be struck out concerned an attack on a reasoned decision issued by a body acting judicially, then the Court did not have to accept at face value allegations the truth of which could be tested against the record. Thus he said (for example) that the Court would be entitled to test an allegation about whether there was an evidentiary basis for a finding contained in an award against what was said in the award itself. I have no difficulty in accepting that proposition, for the reasons given by the Full Court in *Downer-Hill Joint Venture v Government of Fiji* at [87] - [89].[7]

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5 These principles are equally applicable to an originating application by virtue of r 1.6.

6 See *Attorney General v Prince* [1998] 1 NZLR 262 (CA) at 267, endorsed by the Supreme Court in *Couch v Attorney General* [2008] NZSC 45; [2008] 3 NZLR 725 at [33].

7 *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 (HC).

[18] There is, however, a further point that seems to me to have a bearing on the applicability of the orthodox strike out principles to the present case. In *Shannon v Shannon* the Court of Appeal expressly considered the burden that is placed, in a strike out context, on a plaintiff who seeks the setting aside of a judgment on the grounds of fraud.[8] The Court noted in particular that the traditional strike out principles (namely the requirement that the Court treat the allegations in the statement of claim as true) did not apply. In doing so it referred to the High Court's decision in *Paper Reclaim Ltd v Aotearoa International* where Randerson J had said:[9]

> [14] Where a fraud proceeding of this kind is brought, the court is being asked to entertain a collateral attack on a solemn and considered judgment of this court outside the ordinary processes of appeal. There is an obligation on the plaintiff to produce some probative evidence to support its claim when the defendant applies to strike out. There is support for that proposition when one considers the obligations on an unsuccessful party who moves for a new trial. If that course had been followed, Paper Reclaim would have had to put its cards on the table and produce the new evidence it relied on in admissible form. It would have had the onus of establishing that the new evidence was such as to justify a new trial.
>
> [15] In a proceeding such as this, I consider it is appropriate on a strike-out application for the plaintiff to produce some probative evidence to support its allegations and to explain how and when the new material came to light. Otherwise, the ordinary processes of the court by way of appeal could be subverted by the simple expedient of making allegations in the statement of claim without any factual foundation of any kind. Plainly, that could amount to an abuse of process.

[19] The Court of Appeal in *Shannon* then concluded:[10]

> ... As can be seen from the cases discussed above, in order to survive a strike-out application where the action is to set aside a judgment on the basis of fraud, the onus is on the party alleging fraud to show that the case is not frivolous or vexatious or an abuse of process. *The plaintiff is required to put sufficient new evidence before the Court to show that the case has a reasonable prospect of success* and, in the case of perjury, that the new evidence would be decisive, if established by proof.
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> (emphasis added)

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8 *Shannon v Shannon* (2005) 17 PRNZ 587 (CA).

9 *Paper Reclaim Ltd v Aotearoa International* HC Auckland CIV-2004-404-4728, 6 December 2004.

10 *Shannon* at [127].

[20] I can see no reason to differentiate between cases where fraud is alleged as a basis for setting aside a judgment of the Court and a case where fraud is alleged as the basis for setting aside an arbitral award.[11] Thus insofar as CKI's challenge to the liability award is concerned, it may be significant that CKI has taken no steps to put evidence before the Court to show that its claim has a reasonable prospect of success. It might, for example, be expected that some or all of the documents alleged to have been withheld would be in evidence, but they are not. At the very least this deficiency seems to me to entitle the Court to interrogate with some robustness CKI's assertions that those documents were relevant to the liability issue. That is a matter I address further at [36] and [37] below.

The Arbitration Act 1996

[21] Before turning to the applications to strike out themselves, it is necessary to set out and consider the relevant provisions of the Arbitration Act 1996 (the Act).

[22] Section 5 of the Act sets out its purposes. They are:

> (a) To encourage the use of arbitration as an agreed method of resolving commercial and other disputes; and
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> (b) To promote international consistency of arbitral regimes based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on the 21st day of June 1985; and
>
> (c) To promote consistency between the international and domestic arbitral regimes in New Zealand; and
>
> (d) To redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards;
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> (e) To facilitate the recognition and enforcement of arbitration agreements and arbitral awards; and

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[11] As to which see further the discussion between [38] and [51] below. Although (as I also record below) CKI modified its position at the hearing before me and did not seek to maintain that there had been actual dishonesty on the part of NZS, the significance of mounting a "fraud and corruption" attack on an award which is otherwise unappealable (and in respect of which the ordinary time limits governing applications to set aside have expired) seems to me to give rise to the same concerns that underlie the dicta in *Paper Reclaim* and *Shannon*.

> (f) To give effect to the obligations of the Government of New Zealand under the Protocol on Arbitration Clauses (1923), the Convention on the Execution of Foreign Arbitral Awards (1927), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the English texts of which are set out in Schedule 3).

[23] Rules that are of general application to arbitrations that take place in New Zealand are contained in Sch 1.[12] I refer to those parts of that Schedule that assume particular importance in this case, in the paragraphs that follow.

[24] Article 5 of the First Schedule states that:

> In matters governed by this schedule, no court shall intervene except where so provided in this schedule.

[25] Article 18 provides that

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

[26] Article 19(1) makes it clear that, subject to the remainder of Sch 1, the parties are free to agree on the procedure to be followed by the Tribunal. But art 19(2) states that:

> Failing such agreement, the arbitral tribunal may, subject to the provisions of this schedule, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality, and weight of any evidence.

[27] In terms of any supervisory role to be played by the Courts in arbitral matters, art 34 relevantly provides that:

> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3).
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> (2) An arbitral award may be set aside by the High Court only if – …
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> ...
>
> (b) The High Court finds that –
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> ...

[12] Arbitration Act 1996 s 6(1)(a).

(ii) The award is in conflict with the public policy of New Zealand …

...

(3) An application for setting aside may not be made after 3 months have elapsed from the date on which the party making that application had received the award ... This paragraph does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.

...

(6) For the avoidance of doubt, and without limiting the generality of paragraph 2(b)(ii) it is hereby declared that an award is in conflict with the public policy of New Zealand if – …

(a) The making of the award was induced or affected by fraud or corruption; or

(b) A breach of the rules of natural justice occurred –

(i) During the arbitral proceedings; or

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

[28] Optional rules applying to arbitrations are contained in the second schedule. By virtue of s 6 of the Act the provisions of Sch 2 apply in an international arbitration only if the parties agree. But cl 5 of Sch 2 states that:

(1) Notwithstanding anything in articles 5 or 34 of Schedule 1, any party may appeal to the High Court on any question of law arising out of an award -

(a) If the parties have so agreed before the making of that award; or

(b) With the consent of every other party given after the making of that award; or

(c) With the leave of the High Court.

[29] In the present case, it is not in dispute that there was no agreement that cl 5 would apply and thus that no appeal on a question of law is available to CKI. Rather, CKI's ability to have the Court interfere with the awards is limited to the grounds set out in art 34, set out above. Nonetheless for reasons that will later become evident it is relevant also to note that cl 5 of Sch 2 was amended in 2007 expressly to confine the ambit of any appeal on a question of law. Thus sub-cl 10 now provides that:

> For the purposes of this clause, **question of law**—
>
> ...
>
> (b) does not include any question as to whether—
>
> (i) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; and
>
> (ii) the arbitral tribunal drew the correct factual inferences from the relevant primary facts.

[30] It is against this statutory background that I now turn to the tenability of the specific applications made by CKI.

Liability award (CIV-2011-404-002012)

[31] As I have said, the central factual allegation underlying CKI's application to set aside the liability award is that NZS "failed" to discover documents that were relevant to that award, and that this failure means that the award was induced or affected by "(equitable) fraud or corruption (of process)".

[32] Mr Cooke QC said that the documents concerned were relevant to liability because they went to the issue of the reasonableness of CKI's endeavours to obtain OIO consent. In particular, he said that the documents showed that NZS had in March 2009 (ie after the failure by CKI to settle) decided to advise the New Zealand Government (in the context of its resale endeavours) that it would shut the business down if it could not sell it.

[33] CKI made a further (written) submission that other non-disclosed documents show that NZS knew from mid-2009 (ie after the failure by CKI to settle) that its business was worth more than $250 million and therefore that it had suffered no loss from CKI's failure to settle. That submission was not specifically addressed orally by Mr Cooke.

[34] CKI's written submissions also contended that the Court could draw an inference that the documents concerned were deliberately (and therefore dishonestly) withheld by NZS. Such an inference was supported, it was said, from the arbitrator's

factual findings about NZS's lack of candour during the due diligence phase. (As I have said, these views formed the basis for Mr Galbraith's finding that NZS had breached its vendor warranties.)

[35] Mr Cooke did not, however, seek to press that point in his oral submissions. No doubt in light of the requirements that an allegation of dishonesty:

(a) should be clearly pleaded;

(b) should not be made lightly; and

(c) should have a clear factual foundation -

he preferred to put CKI's case on the basis that material non-disclosure which is "unexplained" suffices to qualify for the art 34 "fraud and corruption" exception.[13]

[36] As I have said, it is not in dispute that the documents with which CKI are concerned were not disclosed until after the liability hearing. It necessarily must also be accepted that the non-disclosure is, strictly speaking, "unexplained", at this stage. But, for the reasons given at [17] to [20] above, I do not consider that I am required to accept uncritically CKI's allegation that the documents at issue were relevant to the liability hearing or to the outcome of that hearing. In my view there is an inference to be drawn from the material before the Court that the documents were not disclosed by NZS at the liability stage because they were not regarded as relevant to that issue.[14] Even putting to one side any presumption that counsel have complied with their obligations in that respect, there is, I think, further support for such an inference in that -

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[13] The proposition that "unexplained" failure to disclose might warrant setting aside a judgment is derived from a passage in the High Court of Australia's decision in *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 (HCA) which is discussed further at [65] to [69] below.

[14] I acknowledge that CKI argued prior to the liability hearing that such documents should be discovered (as I understand it an application for particular discovery was made in that respect). And I acknowledge that because the content of the reasonable endeavours obligation was then still at large, it might have been arguable that the documents were broadly relevant to whether or not the obligation had been met. But in light of Mr Galbraith's approach to the reasonable endeavours issue it seems to me that there is little, if any, scope for CKI to take that position now.

(a) it is difficult to see how documents about decisions taken by NZS after the event could pertain to the reasonableness of CKI's endeavours, in light of the contents of Mr Galbraith's award. Documents that record NZS's own plans for the business *after* CKI's failure to settle could have no bearing on whether CKI's earlier actions breached its reasonable endeavours obligation. NZS was not subject to such an obligation. More importantly, however (and as I have noted above) Mr Galbraith made it clear that the question of breach did not turn on whether CKI's resolution to close the operation was an objectively reasonable business decision. Rather, CKI's breach arose by virtue of the fact that its conduct prior to settlement had shifted the distribution of risk under the contract**.** The fact that NZS may (subsequently) have developed similar plans to close the operation is immaterial to that finding;

(b) it is also difficult to see how documents that are said to show that NZS knew that it had suffered no loss could have had any bearing on the liability hearing, which was not concerned with quantifying NZS's losses. NZS's claim for losses was, in any event, not limited to the loss in value of its business and, indeed, succeeded in its claim for damages for losses incurred on the attempted re-sale.

[37] Although for these reasons I do, indeed, view with some scepticism the contention that the non-disclosed documents were relevant to the liability issue at all, I think the preferable course is to determine the strike out by dealing with the consequences of alleged non-disclosure on their legal merits. The issue is, therefore, whether innocent, negligent or "unexplained" non-disclosure of documents that are (assumed to be) relevant to the liability award gives rise to a tenable claim that that award was induced or affected by fraud or corruption. That is the issue to which I now turn.

Law: setting aside judgments on the grounds of fraud

[38] A useful starting point is that fraud is one of the rare established exceptions to the principle of finality of judgments. The importance in policy terms of the finality principle dictates that "stringent requirements" must be met before a judgment can be set aside. The seminal exposition of the competing interests remains that of Lord Wilberforce in *The Ampthill Peerage* where he said:[15]

> English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes. The principle ... is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. *The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty, and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so; these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth ..., and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally be extended*. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved.
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> (emphasis added)

[39] The issue confronting the House of Lords in *The Ampthill Peerage* was whether a declaration of legitimacy could later be set aside for fraud or collusion. In considering the content of the fraud threshold in that context, Lord Wilberforce said:[16]

> What is fraud for this purpose? Learned counsel for John Russell without venturing on a definition suggested that some kind of equitable fraud, or lack of frankness, was all that is meant, but I cannot accept so anaemic an ingredient. In relation to judgments, and this case is surely a fortiori or at least analogous, it is clear that only fraud in a strict legal sense will do.

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[15] *The Ampthill Peerage* [1977] AC 547 at 569; [1976] 2 WLR 777; [1976] 2 All ER 411.
[16] At 571.

> There must be conscious and deliberate dishonesty, and the declaration must be obtained by it. ... Nothing less can be expected in the present case.

[40] This statement has recently been applied in New Zealand in *Redcliffe Forestry Venture Ltd v Commissioner of Inland Revenue.*[17] There, Venning J was concerned with the breadth of the concept of fraud in the context of an application to have an earlier judgment set aside. Counsel for the plaintiff had submitted that it remained conclusively to be determined in this country whether the type of fraud required is of the common law type (fraud "in the strict legal sense") or whether conduct that fell within a wider concept of fraud (incorporating, for example, equitable or constructive fraud) could meet the threshold.

[41] Venning J said that the proposition that equitable fraud sufficed was not supported by the relevant authorities and referred in particular to the *Ampthill Peerage* case. Then he said:

> [32] ... So in the United Kingdom, fraud in a strict legal sense is required as the basis for a proceeding to set aside a judgment on the ground it was obtained by fraud.
>
> [33] In New Zealand also, fraud in a legal sense is required. In *Shannon* Potter J adopted the common law definition of fraud from *Derry v Peek* namely a false statement made knowingly or without belief in its truth, or recklessly, careless as to whether it be true or false was required. That approach was expressly noted and approved without adverse comment by the Court of Appeal in *Shannon*.
>
> (footnotes omitted)

[42] I respectfully agree.

Law: setting aside arbitral awards on the grounds of fraud

[43] As I understand it, the New Zealand Courts have yet to consider the ambit of the "fraud or corruption" exception contained in art 34(6) of the Arbitration Act.

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[17] *Redcliffe Forestry Venture Ltd v Commissioner of Inland Revenue* [2011] 1 NZLR 336 (HC). The decision was subsequently overturned on another point by the Court of Appeal: *Redcliffe Forestry Venture Ltd v Commissioner of Inland Revenue* [2011] NZCA 638; (2011) 25 NZTC 20-100. Leave to appeal granted in *Redcliffe Forestry Venture Ltd v Commissioner of Inland Revenue* [2012] NZSC 10; (2012) 25 NZTC 20-109.

[44] Just as Lord Wilberforce could see no material difference between an application to set aside a declaration of legitimacy and an application to set aside a judgment, I find it difficult to see why the "fraud" threshold for setting aside should be different where it is an arbitral award rather than a judgment of the Court that is at issue. Parliament could not have made the importance of finality more clear than it has in the Arbitration Act 1996. One of the Act's express objects (s 5(a)) is encouraging the use of arbitration to *resolve* disputes. The presumptive finality of an award is further emphasised by the limits to curial intervention signalled in art 5 of Sch 1. Those limits are made manifest in the statutory restrictions on appeal rights and in the narrow compass of art 34.

[45] The view that the fraud threshold should be the same for judgments and for arbitral awards is strengthened by the line of English decisions relied on by Mr Hodder. In those decisions the Courts have adopted the *Ampthill Peerage* in the arbitral context.

[46] Before turning to consider those cases in more detail, it is relevant to note by way of background that, like the New Zealand Act of the same vintage, the Arbitration Act 1996 (UK) is based on the Model Law, although the precise way in which it has given effect to it differs in matters of detail. The English Courts have said that the 1996 Act should, in general, be interpreted without reference to the pre-existing arbitration law and have accepted that the Act was intended to, and did, effect a radical change in terms of the relationship between the courts and arbitral proceedings.[18]

[47] The English equivalent of art 34 is s 68 of the UK Act, which relevantly provides:

> (1) A party to arbitral proceedings may ... apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
>
> ...

[18] See for example *Lesotho Development v Impregilo SpA* [2006] 1 AC 221(HC) at [26]; *Elektrim SA v Vivendi Universal SA* [2007] 1 Lloyds Rep 693 (HC) at [75].

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

[emphasis added]

[48] In considering the ambit of curial intervention under the UK Act, the English Courts have compared s 68 with the breadth of its predecessor, s 22(1) of the Arbitration Act 1950 (UK). Section 22(1) was materially identical to s 11(1) of the New Zealand Arbitration Act 1908 which provided:

> In all cases of reference to arbitration the Court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.

[49] Thus in *Elektrim SA v Vivendi Universal SA* Aikens J said:[19]

> In my view it is important to recall ... that under the Arbitration Act 1950 (and its predecessors going back to the 1889 Act), the court had frequently

[19] *Elektrim* at [76].

> held that it had power to remit an award in cases where fresh evidence came to light after the award, if the new evidence *might have affected the decision* of the arbitrator, if it had been adduced at the hearing. The 1996 Act gives the court no such power. This omission is clearly intended to mark a deliberate change in the court's role and approach in relation to "fresh evidence" that comes to light after an award has been made.
>
> (footnotes omitted)

[50] Although the New Zealand Courts have not specifically had to consider the significance of the changes wrought by the 1996 Act in a "fresh evidence" context, they have nonetheless acknowledged the clear intention in the Act to limit the scope for intervention by the Courts. Thus in *Gold Resource Developments (NZ) Ltd v Doug Hood Ltd*, Blanchard J (for the Court) said:[20]

> 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 …
>
> 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.[21]

[51] The reference by the Court of Appeal here to the similarities between the New Zealand, Australian and English approaches is necessarily important when considering the significance of the English cases to which Mr Hodder referred me. Those decisions not only concern the ambit of the s 68 "fraud" exception in general terms but also its specific application in circumstances where further evidence has been discovered after an award had been issued.[22]

[52] In *Elektrim*, Aekins J accepted earlier dicta that it would be unwise to attempt to define the limits of the terms "obtained by fraud" or "procured contrary to public

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[20] *Gold & Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA) at [51] and [52].

[21] The limitations referred to have, for example, also led to the Courts taking a narrow approach to the meaning of "contrary to public policy", a point discussed later in this judgment.

[22] *Profilati Italia SRL v Paine Webber Incident* [2001] 2 Lloyds Rep 715 (QB); *Protech Projects Construction (Pty) Ltd v Al-Kharafi & Sons* [2005] 2 Lloyds Rep 779 (QB); *Thyssen Canada Ltd v Mariana Maritime SA* [2005] 1 Lloyds Rep 640 (QB); *Elektrim SA v Vivendi Universal SA* [2007] 1 Lloyds Rep 693.

policy" but nonetheless took a strict approach to the construction of those words. Thus at [81] he said:

> In my view the strict approach to the construction of the words "*obtained by fraud*" that I have adopted must also be applied in relation to the disclosure of documents in an arbitration. If a party to the arbitration is ordered to produce a document (or a class of documents) that is relevant to the arbitration and the party, through its directors, its employees or its lawyers, in the knowledge that the document exists, and decides deliberately to conceal it, with the intention of inducing the tribunal and the other side into the belief that the document does not exist, then that must be a "*fraud*" for the purposes of section 68(2)(g). However, because an allegation of fraud is being asserted, the accuser will have to demonstrate its case to a higher standard of proof.
>
> But an award will only be "*obtained by fraud*" if the party which has deliberately concealed the document has, as a consequence of that concealment, obtained an award in its favour. ....
>
> If there has been a failure to disclose a document as a result of either negligence, or an error of judgment, concerning the interpretation of an order for production or the scope of the obligation to search for a document following an order of the tribunal, that is not "*fraud*" for the purposes of the paragraph. In this regard I respectfully agree with the comments of Moore-Bick J in the *Profilati case* at paragraph 19 although those comments were made in relation to the words "*procured contrary to public policy*" in the section.
>
> ...
>
> Moore-Bick J ... concluded that, in the context of disclosure, documents had to be deliberately withheld to the knowledge of a party to the arbitration (or its solicitors), before it could be said that the award had been procured contrary to public policy. He said that normally it would have to be shown that there had been some "*reprehensible or unconscionable conduct*" by the party concerned, that had contributed in a substantial way to obtaining an award in that party's favour: see para 17.
>
> I respectfully agree with that analysis. Thus, at least in the context of allegations of perjury and deliberate concealment of relevant documents, the phrase "*an award procured contrary to public policy*" goes no wider than the phrase "*an award obtained by fraud*" for the purposes of section 68(2)(g).

[53] Although Mr Cooke valiantly attempted to submit that the New Zealand Courts were (or should be) more ready than their English counterparts to intervene in arbitral matters, I cannot agree. The Court of Appeal's recognition of the parity of approach as between the English and New Zealand legislation has already been noted. There is no obvious justification for adopting a more liberal attitude and indeed to do so would, in my view defeat, one of the fundamental and express

objects of the 1996 Act, which is to promote international consistency in arbitral regimes, based on the Model Law.

[54] Accordingly I consider that the concept of "fraud" as it is used in art 34(6) connotes fraud in the strict legal sense. Thus actual dishonesty is in my view required.[23]

[55] Before leaving the subject of the meaning of fraud in art 34(6), I record that Mr Hodder also made the point that the alleged non-disclosure of relevant documents in the face of a discovery order could not in any event amount to equitable fraud as that term is understood. He said that the concept of equitable fraud requires the breach of a duty owed in equity, which is inapt where the obligation concerned relates to discovery. I agree with that submission. The focus on breach of equitable duties is apparent even in the authority relied upon by CKI: *Nocton v Ashburton*.[24] Accordingly, even if equitable fraud sufficed for the purposes of art 34(6) (which in my view it does not), the breach alleged here would not qualify.

Corruption (of process)

[56] It can be observed that s 68 of the Arbitration Act 1996 (UK) does not contain any reference to "corruption" and (thus) the English cases referred to above do not discuss that concept or its content. Nor is the argument recorded in the immediately preceding paragraph concerned with that issue. No doubt for those reasons Mr Cooke sought separately and more forcefully to rely on the "corruption" aspect of the art 34(6)(a) exception. His submission was, as I have said, that this phrase was wide enough to encompass the concept of "corruption of process".

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[23] Whether or not actual dishonesty might incorporate the notion of wilful blindness is not a matter I need to consider in this judgment.

[24] *Nocton v Ashburton* [1914]

[57] In fairness to Mr Cooke, this submission was not devoid of at least tentative authority. In particular the learned authors of *Green & Hunt on Arbitration Law and Practice* have opined that:[25]

> The use of the word "corruption", as it appears in art 34(6), leaves it open to be interpreted to include corruption by the act of a person or corruption of process. In the instance of a document not being discovered, it may be argued that a failure to disclose a relevant document which could alter the outcome of the award has resulted in corruption of the process.

[58] In my view, however, "corruption of process" cannot suffice for art 34(6) purposes, for the reasons that follow.

[59] The *Shorter Oxford Dictionary* relevantly defines "corruption" as the "perversion of a person's integrity in the performance of (esp. official or public) duty or work by bribery etc".[26]

[60] That definition is significant, firstly, because it involves the perversion of personal (rather than procedural) integrity. The appearance of the words "corrupts", "corruptly" or "corruption" in other places in the New Zealand statute book, where they are routinely associated with the notion of some form of undue influence being placed upon a Judge or other official, lends support for these views. There is, of course, no hint of any such allegation being levelled at Mr Galbraith in the present case.

[61] Secondly, although it does not seem to me that such a definition of "corruption" requires that *dishonest* means have been employed to render the relevant official or decision-maker "corrupt", the means employed must, I think, involve impropriety or moral wrongness. That is inherent in the idea of "perversion". Thus corruption may be the result of bribery, or of threats, coercion, blackmail or other forms of undue influence. Again, no such allegations of this sort are made here.

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[25] Green and Hunt *Green and Hunt on Arbitration Law and Practice* (Brookers, Wellington, 2006) at ARSch1. 34.14.

[26] *Shorter Oxford Dictionary* (Oxford University Press, Oxford, 2002)

[62] In any event, as far as I am aware, the concept of "corruption of process" is not one that is known to New Zealand law. Certainly counsel were unable to enlighten me in this regard. It therefore seems unlikely that the New Zealand Parliament would have had such a concept in mind when enacting art 34(6).[27]

[63] And lastly, a narrow interpretation is consistent with the fact that the otherwise strict time limit for applying to set an award aside in art 34(3) does not apply to the "fraud or corruption" ground. That underscores the exceptional nature of the ground. And if the word "corruption" admitted a meaning that included mere deficiency of process (as Mr Cooke submitted), then those wishing to apply to have an award set aside for breach of natural justice could avoid the statutory time limit for doing so by simply clothing the application as a "corruption of process" claim.[28]

Setting aside for material non-disclosure

[64] As well as relying on the "corruption of process" argument (which I reject for the reasons just given), Mr Cooke also took me to a number of authorities from both New Zealand and Australia which indicate that the Courts have been willing to set aside both judgments and arbitral awards where there has been inadvertent, negligent or "unexplained" non-disclosure. In particular he referred me to *Commonwealth Bank of Australia v Quade*;[29] *City House Properties Ltd v J C & C P Fergusson Ltd*[30] and *MacKenzie v Stacey*.[31]

[65] *Quade* was concerned with an application for setting aside a judgment in circumstances where there had been "a significant failure by the successful party to comply with an order for the discovery of relevant documents". As a consequence, the unsuccessful party had only become aware of those documents, said to be material, after trial. The issue with which the Court was concerned was what the

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[27] To the extent that the term exists at all it as a term of legal art it would seem to derive from the concept of "due process" in United States jurisprudence where it is more or less synonymous with natural justice. To the extent "corruption of" is the opposite of "due" process, I merely observe that breach of natural justice is a separate (but expressly time limited) ground for setting aside under art 34.

[28] Mr Hodder's submitted that this was, indeed, what CKI were seeking to do in the present application.

[29] Supra, note 13.

[30] *City House Properties Ltd v J C & C P Fergusson Ltd* [1999] 1 NZLR 170 (CA).

[31] *MacKenzie v Stacey* (1999) 5 NZELC 96,002 (CA).

threshold for setting aside was and in particular the extent to which the applicant needed to be able to show that the documents would have made a difference to the outcome of the proceedings.

[66] In holding that the burden was not as high as in "ordinary" cases where relevant documents come to light after trial, the Court said that cases such as the one before it:[32]

> ... cannot properly be seen as mere cases of "fresh evidence". Nor can a case where the material constituting the fresh evidence was unknown to the unsuccessful party by reason of misconduct on the part of the successful party, such as an admitted failure to comply with the requirements of the trial court's order for discovery of documents. True it is that a case of failure by a party to comply fully with such an order can be distinguished from one in which the trial has miscarried by reason of error or fault on the part of the tribunal itself or a case where the verdict can be seen to have been procured by fraud or perjury. *On the other hand, a case of failure to comply with a discovery order could, particularly where the failure was deliberate or remains unexplained, come within the category of "cases of malpractice", and be a stronger case than the category of "cases of surprise",* which were both expressly exempted from the above statement of what we have referred to as the "general" rule.

[67] This was the passage particularly relied on by Mr Cooke and was the origin of the allegation of "unexplained" non-disclosure. But the difficulty it presents for CKI is twofold.

[68] First, if what the Court in *Quade* is saying is that deliberate non-disclosure is akin to dishonesty ("malpractice"), and that an inference of dishonesty can be drawn from non-disclosure that is unexplained, then that is not the allegation CKI is making here. I have already recorded above that Mr Cooke was, very properly, careful to resile from the suggestion that the alleged non-disclosure by NZS was deliberate or dishonest.

[69] If, on the other hand, the Court's use of the word "malpractice" contemplates a "half-way house" whereby a deliberate or unexplained failure to comply with discovery obligations lies somewhere between dishonesty and honesty innocence on the moral spectrum, then that would not, in my view, qualify in terms of art 34(6)(a).

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[32] *Quade* at [5].

For the reasons I have already given, that provision requires nothing less than actual dishonesty in order to be engaged.

[70] As for the two New Zealand decisions relied on by Mr Cooke, both concerned arbitrations prior to the enactment of the 1996 Act. Neither is concerned with dishonest non-disclosure or fraud. Rather, they are concerned more generally with situations where relevant fresh evidence has come to light after the delivery of a decision. As in *Quade*, the focus of the decisions is on the extent to which the Court must be satisfied that the documents concerned would have made a difference to the outcome in order to set aside.

[71] I accept that in the New Zealand cases the Courts were prepared to contemplate setting aside an award where relevant documents had subsequently come to light, even though they had not been dishonestly withheld. Whether or not they do so will depend on the demands of justice in the individual case which, in turn, depends on a range of competing considerations including the materiality of the documents concerned and the reasons for their non-disclosure. But the "interests" or "demands" of justice have no bearing on the proper content of the words "fraud or corruption" in art 34(6).

[72] It may be arguable that, based on these and other similar cases, an arbitral award is liable to be set aside under art 34(2) for being contrary to the public policy of New Zealand in some wider sense if it was made without the benefit of highly pertinent documents that have only been discovered after the event. If it could be said that the demands of justice required an award to be set aside, then it could be argued that, by definition, that award is contrary to public policy. No doubt much would turn on the circumstances of the individual case and, as I have said, the reasons the documents were not before the Tribunal and their likely effect on the outcome.

[73] But my acceptance that such an argument may in principle be open also does not assist CKI. The time for mounting any such broader "public policy" based challenge in the present case is well past. The art 34(3) exception to the three month

time limit is confined to cases of fraud or corruption. And, for the reasons I have given, there is no tenable claim of fraud or corruption here.

[74] It follows from the above that I consider that the application to set aside the liability award has no prospect of success and should be struck out. I merely record that the doubts I have earlier expressed about the materiality of the documents at issue in this case serve to fortify the conclusions I have reached in that respect.

Quantum award (CIV-2011-404-006843)

[75] As I have said, this application by CKI relates to those parts of the Quantum award that deals with NZS's claim for damages to compensate it for legal and consultants' costs incurred in attempting to resell the business after CKI's failure to settle. CKI wishes to have those parts of the Award struck out on the ground that they were arrived at in breach of natural justice, and therefore contrary to the public policy of New Zealand in terms of art 34(6)(b). This application, which was made within the three month time limit, is advanced on the grounds that:

(a) Mr Galbraith's assessment of the losses suffered by NZS in attempting to sell its business was "not based on probative evidence" and was thus in breach of natural justice;

(b) Mr Galbraith's finding that any damages payable on CKI's counterclaim for breach of the vendor warranties could not be offset against the award of damages for the attempted re-sale was made in breach of natural justice.

[76] The leading New Zealand case concerning natural justice in the arbitration context remains the decision of this Court in *Rotoaira Forest Trust v Attorney-General*.[33] There, Fisher J thoroughly canvassed relevant authorities both from New

[33] *Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452 (HC). Although the arbitration with which Fisher J was there concerned was not governed by the 1996 Act, he expressly noted (at 459) that art 18 reflected the pre-existing law.

Zealand and overseas. Ultimately, the principles he extracted from those decisions were:[34]

(a) Arbitrators must observe the requirements of natural justice and treat each party equally.

(b) The detailed demands of natural justice in a given case turn on a proper construction of the particular agreement to arbitrate, the nature of the dispute, and any inferences properly to be drawn from the appointment of arbitrators known to have special expertise.

(c) As a minimum each party must be given a full opportunity to present its case.

(d) In the absence of express or implied provisions to the contrary, it will also be necessary that each party be given an opportunity to understand, test and rebut its opponent's case; that there be a hearing of which there is reasonable notice; that the parties and their advisers have the opportunity to be present throughout the hearing; and that each party be given reasonable opportunity to present evidence and argument in support of its own case, test its opponent's case in cross-examination, and rebut adverse evidence and argument.

(e) In the absence of express or implied agreement to contrary, the arbitrator will normally be precluded from taking into account evidence or argument extraneous to the hearing without giving the parties further notice and the opportunity to respond.

(f) The last principle extends to the arbitrator's own opinions and ideas if these were not reasonably foreseeable as potential corollaries of those opinions and ideas which were expressly traversed during the hearing.

(g) On the other hand, an arbitrator is not bound to slavishly adopt the position advocated by one party or the other It will usually be no cause for surprise that arbitrators make their own assessments of evidentiary weight and credibility, pick and choose between different aspects of an expert's evidence, reshuffle the way in which different concepts have been combined, make their own value judgments between the extremes presented, and exercise reasonable latitude in drawing their own conclusions from the material presented.

(h) Nor is an arbitrator under any general obligation to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he finally commits himself.

(i) It follows from these principles that when it comes to ideas rather than facts, the overriding task for the plaintiff is to show that a reasonable litigant in his shoes would not have foreseen the possibility of reasoning of the type revealed in the award, and further that with adequate notice it might have been possible to persuade the arbitrator to a different result

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[34] At 463.

(j) Once it is shown that there was significant surprise it will usually be reasonable to assume procedural prejudice in the absence of indications to the contrary.

[77] It is against those principles that each of CKI's two complaints about the quantum award now fall to be addressed.

No probative evidence?

[78] This is what Mr Galbraith said about the issue of damages arising from the attempted re-sale:[35]

> Additionally to the principal damages claim NZS claimed for expenses of NZ$243,272.69 and A$250,000 for Chapman Tripp legal fees and Merrill Lynch consultancy costs incurred in the unsuccessful March-November 2009 sale process. CKI opposed any award of these sums on the basis, first, that as the ASAP had not been cancelled no question of mitigation arose and so these expenses were simply voluntarily incurred by BlueScope/NZS and, secondly, that insufficient evidence of the detail of these expenses had been provided.
>
> CKI are correct that no mitigation obligation of NZS had arisen as at 2009. However, the question in my view is not whether a mitigation obligation existed but rather whether these expenses can be regarded as a consequence of CKI's breach. In my view they are. If CKI had not breached obviously these expenses would not have been incurred. ...
>
> It is evident that NZS would have incurred costs in the 2009 sale process. While it would have been preferable for more detailed evidence to have been provided I am prepared to accept the NZS assessment as appropriate and accordingly I order payment of those costs ... by CKI to NZS.

[79] In my view CKI's challenge to this aspect of the Award must be struck out as untenable, for two reasons.

[80] First, art 19(2) of Sch 1 of the 1996 Act makes it clear that it is a matter for the arbitrator to determine the weight to be given any evidence. As noted by the Court of Appeal in the *Gold Resources* decision, art 19(2) reflects the proposition that an arbitrator is "master of the facts".[36]

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[35] Quantum Award at 181 – 183.
[36] *Gold Resources* at [55]

[81] As the award makes clear, in the present case there was evidence before the arbitrator about the losses that had been incurred by NZS as a result of its resale efforts. That evidence took the form of the Chapman Tripp and Merrill Lynch invoices that were produced by Mr Charge of NZS. Mr Charge accepted that he had no personal knowledge of the work which underlay those invoices. Mr Galbraith expressly recorded CKI's contention that this evidence was insufficient, but he did not agree. I accept Mr Hodder's submission that the weight he chose to give the evidence was matter for him and cannot now be second-guessed.

[82] Even if it could be said that Mr Galbraith's finding of loss was not supported by the evidence, I do not consider that this could amount to a breach of natural justice in this case.

[83] The leading authority for the proposition that making factual findings without a proper evidential underpinning can contravene the principles of natural justice is the Judicial Committee's decision in *Re Erebus.*[37] There, Lord Diplock said:[38]

> The rules of natural justice that are germane to this appeal can, in their Lordships' view, be reduced to those two that were referred to by the Court of Appeal in England in *R v Deputy Industrial Injuries Commissioner, ex parte Moore* ..., which was dealing with the exercise of an investigative jurisdiction, though one of a different kind from that which was being undertaken by the Judge inquiring into the Mt Erebus disaster. The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value in the sense described below. ...
>
> 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 the 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.
>
> (citations omitted)

[84] As the *Rotoaira* principles make clear (in particular principle (b)) the requirements of natural justice may differ as between different arbitrations. That is merely a specific example of the orthodox wider principle that what natural justice demands will depend on all the circumstances. There is, therefore, no absolute rule

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[37] *Re Erebus* [1983] 1 NZLR 662 (PC).
[38] At 671.

that natural justice requires an arbitrator's findings to be based on probative evidence in the orthodox sense. As Fisher J observed, the agreement itself, the nature of the dispute and the qualifications of the arbitrator would all have a bearing on that issue.

[85] By the same token there may well, for example, be a material difference between an arbitral and an inquisitorial process of the kind at issue in *Erebus* and in *Moore*. Indeed it is arguable that, in *Erebus*, Lord Diplock was careful to make it clear that his remarks were directed to the principles of natural justice as they related to the exercise of an investigatory (or inquisitorial) jurisdiction. In cases of that kind the absence of a *lis*, and the absence of appeal rights, may well be highly material factors.

[86] And although there is an absence of appeal rights in the present case, that is a result of the agreement reached between the parties. The requirements of fairness as between parties to an arbitration who have chosen to limit their rights might well be different from (less stringent than) the requirements in relation to someone who is directly affected by an adverse finding made by a Commission of Inquiry, but has no right of appeal (as in *Erebus*). A more expansive approach to natural justice is more obviously justified in the latter case.

[87] Be that as it may, it also follows, in my view, that the demands of natural justice in the present arbitral context must also take into account Parliament's enactment of cl 5(10).[39] That is entirely consistent with the conceptual flexibility to which I have just referred.

[88] The effect of cl 5(10) is expressly to prohibit any appeal which raises the issue of whether the award or any part of it was supported by any evidence or any sufficient or substantial evidence. It would be decidedly odd if challenges of the sort expressly proscribed by that clause could still be mounted on the grounds that a breach of natural justice had occurred during the arbitral proceedings or in connection with the making of the award. Indeed cl 5(10) would be rendered otiose if such challenges were allowed.

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[39] See [29] below.

[89] So although there may previously have been other arguments of the sort I have touched on in favour of excluding an *Erebus*-type breach of natural justice as a ground for setting aside an arbitral award, cl 5(10) has in my view put the matter beyond doubt.

Surprise/no opportunity to be heard

[90] The arbitrator's finding that CKI was not entitled to set-off any damages for its breach of warranty counterclaim against the "re-sale" damages awarded to NZS was based on cl 12.14 of the sale and purchase agreement, which relevantly provided:

> Any monetary compensation received by the Purchaser as a result of any breach by the Vendor ... under this Agreement of any warranty or any breach of or claim under this Agreement ... is to be in reduction and refund of the Purchase Price.

[91] The relevant finding in the Award stated:[40]

> The determination that no award is made in respect to NZS's principal claim to damages in respect of loss of value obviously negates any entitlement to an award in respect to the counterclaim as any such award could only have effect as a deduction from the original transaction price – clause 12.14.
>
> ...
>
> There was a substantive submission from NZS that, as a matter of construction of clause 12 of the ASAP, that no award could be made in respect of any loss arising in relation to the particular undisclosed information. As I indicate during Closing Submissions I was not persuaded by this submission.
>
> ...
>
> The purpose of warranties is to allocate risk. A party is contractually entitled to rely on a warranty. A breach of warranty gives rise to damages, albeit that under clause 12.14 of the ASAP there is only an ability to deduct against the purchase price. I do not accept that clause 12 prevents that claim, award and deduction where, because of a breach the vendor elects not to enforce settlement but cancels and claims damages based on the contractual purchase price.
>
> Accordingly if there had been an award of damages in favour of NZS I would have allowed a deduction in the range of $10-$15 million in respect of this undisclosed information.

[40] Quantum Award at 184, 197, 199, 200 and 202.

...

Because of the absence of an award of damages for loss of value, no award is made to CKI in respect of the breaches of warranties.

[92] CKI submitted that the interpretation of cl 12.14 adopted by Mr Galbraith

(a) had not been raised by either party or addressed by them in submissions;

(b) was not raised by Mr Galbraith during the hearing;

(c) could not reasonably have been anticipated; and

(d) was unsupported by reasons.

[93] Again, however, I do not regard this claim as tenable.

[94] First (and as the passages I have quoted above make clear) there can be no doubt that cl 12.14 was "on the table" at the quantum hearing. More particularly, the pleadings show that (inter alia) cl 12.14 was pleaded by NZS as an affirmative defence to CKI's counterclaim.

[95] It is nonetheless not disputed that, during closing submissions, the focus was on NZS's argument that clause 12.14 meant that no damages on the counterclaim could be payable under any circumstances. This argument is recorded (and was rejected) by Mr Galbraith and I was also taken to the relevant parts of the transcript. This broader focus was a result of the fact that NZS's position was claiming damages which included not only the attempted re-sale costs, but the more significant losses that were said to have been represented by the difference between the $250 million sale price and the subsequent alleged decrease in value of NZS's business. Thus the question on which NZS was focussed was the effect that cl 12.14 might have on that (global) claim.

[96] That said, however, it must have been quite clear that NZS's claim for damages had two separate components and that it might therefore succeed on one

aspect and fail on the other. NZS had raised cl 12.14 as an affirmative defence to any off-setting claim by CKI and the application of that clause would plainly need to be considered in the event that the claims were split. Accordingly, and in terms of the first limb of the relevant *Rotoaira* principle (principle (i)), I consider that a reasonable litigant in CKI's shoes would have foreseen the possibility of Mr Galbraith considering and determining the effect of cl 12.14 on part of the damages claim only.

[97] I also record my view that, in terms of the second limb of *Rotoaira* principle (i), had CKI had express notice of Mr Galbraith's thinking in this respect it would not have been able to persuade him to come to a different result. That is because the import of cl 12.14 is not only (as Mr Galbraith said) "obvious" on the face of the provision itself but is also a matter of common sense.[41]

[98] As far as cl 12.14 itself is concerned, it unambiguously says that any monetary compensation payable to CKI as a result of any breach of warranty by NZS is to be by way of "reduction and refund of the purchase price". It inexorably follows that if no purchase price[42] has been paid or is payable, then there can be no such refund or reduction.

[99] In terms of common sense, it is easy to see that the purchase price agreed by CKI under the contract might well have been set too high if CKI was not in possession of certain material information about the business at the relevant time. And if the reason for the absence of material information was a breach by NZS of its vendor warranties, then it is not difficult to grasp that CKI should then be entitled to some compensation in the form of a reduction in the agreed price. But in this case, CKI repudiated the contract for reasons quite unrelated to any vendor non-disclosure. If, following cancellation by NZS, CKI had subsequently been required to pay damages that were tied to its failure to pay the purchase price (ie the difference between the purchase price and the value of the business) then logically those damages should be reduced to reflect any breach of warranty. That is because

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[41] In saying that I necessarily bear in mind Megarry J's admonition that "the path of the law is strewn with examples of open and shut cases which, somehow, were not ...": *John v Rees* [1970] Ch 345 at 402 quoted in *Rotoaira* at 462.

[42] Or no damages that are based on the purchase price.

non-disclosure meant that the purchase price agreed to by CKI (and the benchmark for a damages award based on loss of value) was too high.

[100] Here, however, the damages awarded to NZS had nothing to do with the purchase price or (it follows) the non-disclosure/breach of warranty. Even although NZS may have breached its warranties, therefore, CKI has in reality suffered no loss as a result. It follows that I cannot accept the submission that "[u]nder normal principles the value of CKI's counterclaim would reduce the amount recoverable under NZS's claim in the normal way". The issue was not one of set-off, but rather of whether any loss had been suffered.

[101] Lastly and in light of the straightforward nature of this analysis, it cannot fairly be said that Mr Galbraith failed to give reasons for his decision in this regard. While his reasons may have been succinctly expressed, they were quite clear. They are encapsulated in the last paragraph I have quoted at [90] above, where he said:

> Because of the absence of an award of damages for loss of value, no award is made to CKI in respect of the breaches of warranties.

Result

[102] CKI's applications to set aside the liability award (CIV 2011-404-002012) and to the quantum award (CIV 2011-404-006843) are not tenable and have no prospect of success. They are struck out accordingly.

[103] I also formally record that CKI's further challenge to the "cancellation" ruling (CIV 2011-404-002012) has been abandoned.

[104] NZS has been entirely successful and is entitled to costs in the usual way. If no agreement can be reached memoranda may be filed.

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Rebecca Ellis J