IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2002 485 210
CIV 2003 485 876

IN THE MATTER OF	the Arbitration Act 1996
AND IN THE MATTER OF	an application to set aside an arbitral award
BETWEEN	DOWNER-HILL JOINT VENTURE, A JOINT VENTURE BETWEEN DOWNER CONSTRUCTION (NEW ZEALAND) LIMITED OF NEW ZEALAND AND JS HILL & ASSOCIATES LIMITED OF FIJI Applicant
AND	THE GOVERNMENT OF FIJI (THROUGH THE ATTORNEY-GENERAL OF THE REPUBLIC OF FIJI) Respondent

Hearing:	20, 21 October 2003
Coram:	Wild J Durie J
Appearances:	D A R Williams QC and S S Williams for the Applicant K Johnston and A Hazelton for the Respondent
Judgment:	24 August 2004

JUDGMENT OF THE COURT

Introduction

[1] The respondent applies to strike out the applicant's application to set aside an arbitral award. The applicant's application was filed on 12 December 2002, but subsequently was amended twice. The respondent's strike out application was filed on 29 January 2003.

[2] We will revert to the procedural background. At the outset we note that the parties agreed that the strike out application should be heard first, no doubt because, if successful, there would be no need to deal with the application to set aside the award. In a judgment delivered on 3 June 2003, Master Gendall accepted a submission by counsel for the applicant:

> ... that the strike out application itself raised in the main discrete jurisdictional issues of principle and would not embark upon evidentiary considerations.

[3] On that basis, the strike out application was given a two day hearing before a Full Court, because this is the first time this Court has heard an application under Article 34 of the First Schedule to the Arbitration Act 1996 to set aside an arbitral award.

[4] We will refer to the applicant as "Downer" and to the respondent as "Fiji". Unless otherwise stated, all sections and articles referred to are in the Arbitration Act 1996, which we will refer to simply as "the Act".

The arbitration

[5] On 16 April 1996 the parties entered into a contract to upgrade to a two lane bituminous sealed highway the gravel road running between Narabuka and Dreketi on the island of Vanua Levu in Fiji.

[6] Contract work commenced on 12 April 1996. The 639 day contractual construction period thus had a completion date of 6 February 1998. The contract price was F$19,649,676 VAT inclusive. During the course of the contract, the engineer extended time for completion to 22 May 1998. The price, as adjusted under the contract, was increased to F$21,684,508. The contract works ultimately were not completed until 8 July 1999.

[7] Downer subsequently claimed a total, including interest, of F$22,756,730 for an additional 603 days extension of time and additional contractual payments. Fiji made a relatively small counterclaim.

[8] The contract made detailed provision for dispute resolution. Through the offices of the Paris based International Chamber of Commerce ("ICC"), and under the supervision of the International Court of Arbitration, an arbitral panel was established. The Chair was Sir Ian Barker QC, formerly a Judge of this Court and currently a Judge of the Fijian Court of Appeal. The other two members were Mr Anthony Parsons, a New Zealand engineer, and Mr Andrew White QC of the English Bar. The arbitration was governed by the ICC Rules of Arbitration and the New Zealand Arbitration Act 1996. The terms of reference to arbitration provided that the law of the contract, Fijian law, would be the substantive law.

[9] Sir Ian Barker was involved in settling the terms of reference to arbitration, and in disposing of interlocutory matters including the form of the pleadings, discovery and inspection, particulars of the claims, the exchange of evidence and the way in which the hearing would be conducted. Sir Ian had five conferences with counsel between August 2001 and June 2002.

[10] The hearing took place in Wellington over 11 days in July 2002. It followed the conventional form: detailed opening and closing submissions on the facts and the law, witnesses examined in chief, cross-examined and re-examined with a verbatim transcript of the evidence. Opening submissions and statements of evidence in chief (all of which had been exchanged in advance) were taken as read, to save time.

[11] The following statistics give an indication of the scope of the arbitration hearing:

a) Downer's statement of claim: 72 pages with 342 paragraphs and 25 appendices occupying a further 78 pages.

b) Downer's discovery: comprised 365 lever arch files and 28 boxes of documents; Fiji's discovery 103 such files.

c) Downer's evidence: 12 witnesses, including six experts, several from overseas. Their statements of evidence extended to over 500 pages.

d) Fiji's evidence: six witnesses, including one expert. This evidence extended to over 700 pages.

e) The transcript of evidence (primarily cross-examination) ran to 912 pages.

[12] The Tribunal gave an interim award on 5 September 2002. This dealt with the substantive claims and the defences to them. It occupied some 168 pages. It awarded Downer F$77,376, dismissed Fiji's counterclaim, and reserved costs.

[13] The Tribunal's final award of 5 March 2003 dealt with costs and interest. The award of costs to Fiji, as against those claimed, was:

Claimed	**Awarded**
NZD1,154,735	NZD659,788
£49,385	£25,441
F$21,242	F$4,974
USD200,000	USD200,000

[14] The overall net result was that Downer owed Fiji approximately F$1.1 million. When we heard the matter, that sum remained outstanding.

[15] Downer's application seeks to set aside the interim, substantive award of the arbitral tribunal. The final award will stand or fall with the interim one.

Procedural history

[16] Downer applied by originating application on 12 December 2002 to set aside the interim award of 5 September 2002. The application was under Article 34 of the First Schedule of the Act.

[17] On 29 January 2003 Fiji applied to strike out Downer's 12 December 2002 application to set aside the award, on the ground that the setting aside application disclosed no reasonable cause of action and/or was otherwise an abuse of the Court's process.

[18] By notice dated 4 February 2003 Downer requested further particulars of Fiji's strike out application. Those were provided on 20 February 2003, on which date Fiji also applied for directions as to the hearing of its strike out application. On 10 March Durie J directed that the strike out application be heard by a Full Court, two hearing days to be allowed. Durie J gave that direction partly because of "the novelty of the case in terms of New Zealand law".

[19] On 6 March 2003 Downer filed an amended application to set aside, which added additional grounds. Downer's ability to rely on those additional grounds is in issue, and we will need to revert to them.

[20] On 19 March 2003 Fiji filed an amended strike out application. This added to the existing grounds the ground that Downer was time-barred from raising the additional grounds on which it now sought to set aside the award.

[21] Fiji subsequently sought a direction that the time-barred grounds on which it sought to strike out Downer's application be determined as a preliminary point. Master Gendall ruled against that on 3 June 2003. He was not satisfied that that course would save time and therefore expense for the parties and the Court. The Master stated:

> [26] The issues which the Court will confront on the substantive strike out application need to be determined in my view as a whole.

[22] A few days later, on 9 June 2003, Downer filed a second amended originating application to set aside the arbitral award. On 22 July 2003 Fiji filed a second amended strike out application raising the same limitation points and "no reasonable cause of action" ground, but in relation to Downer's latest application. That is the application we are dealing with.

Grounds advanced in Downer's second amended application to set aside the arbitral award

[23] Downer seeks to set aside the award on a number of grounds. We summarise these as follows:

a) *Paragraph 1:* In breach of Article 28(4), the Tribunal failed to decide the dispute in accordance with the contract, in that it failed to apply or misapplied or misconstrued the terms of the contract in a number of respects. Those are set out in sub-paragraphs (a)-(e).

b) *Paragraph 2*: The award is contrary to the public policy of New Zealand in that:

   i) The Tribunal breached Article 28(4) in the manner alleged in ground a) above.

   ii) The award contains serious and fundamental errors in a number of respects, which are set out in sub-paragraphs (a)-(g).

c) *Paragraph 3*: The Tribunal exceeded its jurisdiction and/or the award contains decisions, detailed in sub-paragraphs (a)-(f), on matters beyond the scope of the arbitration agreement.

d) *Paragraph 4*: The award is contrary to the public policy of New Zealand in that a breach of the rules of natural justice occurred in connection with the making of the award in one or more of several respects. Those are detailed in sub-paragraphs (a)-(n). Of those:

   i) Subparagraphs (a)-(k) are findings allegedly unsupported by evidence and/or unreasonable or against a substantial preponderance of evidence.

   ii) Subparagraph (l) alleges a failure to determine one of Downer's claims.

   iii) Subparagraphs (m) and (n) allege that the Tribunal proceeded on the particular issues in a way that Downer did not foresee, could not reasonably have foreseen, and which deprived it of the opportunity to persuade the Tribunal to a different result.

Strike out application

[24] The two grounds in Fiji's second amended strike out application are that Downer's second amended application to set aside the award:

a) Discloses no reasonable cause of action and/or is otherwise an abuse of the process of the Court.

b) Is in part time barred because some of the grounds in it were not raised within three months of the receipt of the substantive award sought to be set aside, as is required by clause 34(3) of the First Schedule to the Act, namely the grounds set out in paragraphs 1 (a)-(e), 2 (a)-(f) and 4 (m)-(n).

[25] The nub of Fiji's first ground is that the Court has no jurisdiction to grant relief in relation to the grounds relied upon by Downer, as:

a) They raise points of law, and Downer is not entitled to an appeal on points of law. The parties had not agreed to incorporate in their reference to arbitration clause 5 of the Second Schedule to the Act, thus excluding any right of appeal on questions of law.

b) Although particular factual findings by the Tribunal are challenged as incorrect, that cannot amount to a breach of the rules of natural justice rendering the award contrary to New Zealand public policy.

[26] As mentioned, the second strike out ground alleges that some of the grounds in Downer's application to set aside are time barred. If or insofar as that is so, it will be unnecessary to determine whether those grounds disclose a reasonable cause of action. The second strike out ground thus logically precedes the first, and we therefore turn now to deal with that.

The limitation issue: are some of the grounds in Downer's application to set aside time-barred?

Introduction

[27] As mentioned, Downer's application to set aside the arbitral award is made under Article 34 as it must be, since that is the only provision permitting Court intervention in the arbitration.

[28] Relevantly, Article 34 provides:

> **34 Application for setting aside as exclusive recourse against arbitral award—**
>
> (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).
>
> (2) An arbitral award may be set aside by the High Court only if
>
> (a) The party making the application furnishes proof that -
>
> ...
>
> (iii) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> ...
>
> (b) The High Court finds that –
>
> ...
>
> (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

...

(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.

[29] The limitation issue turns on Article 34(3). The substantive award was made on 5 September, and received by Downer on 29 September 2002. The three month limitation period thus expired on 23 December 2002. Downer's first application to set aside was filed on 12 December 2002, within the limitation period. Its two amended applications of 6 March and 9 June 2003 were outside the period.

[30] Thus, the issue is whether or not the amendments Downer made in its two amended applications can stand, notwithstanding that they were made after the expiry of the three month limitation period.

[31] We refer to "limitation period", since that is the way we view it. In *Opotiki Packing & Coolstore Ltd v Opotiki Fruitgrowers Co-operative Ltd (in receivership)* [2003] 1 NZLR 205 at 220 the Court of Appeal referred to "the three month time limit" and observed:

> [19] ... The whole scheme of the rules is to restrict Court review of arbitration awards both with respect to grounds and time.

The opposing submissions

[32] Downer's submissions began with several procedural/pleading or introductory points. First, Downer accepted that there is a need for expedition and finality if arbitration is to be encouraged under s5(a) of the Act.

[33] Secondly, Downer pointed out that Article 34 contains no requirements as to the form of an application for setting aside, nor does it restrict subsequent amendments to that application. It noted that applications under Article 34 and appeals on points of law under clause 5 of the Second Schedule are treated differently, procedurally. The former come within Part IVA of the High Court Rules, which neither proscribes nor restricts amendment of the application, nor require the leave of the Court for amendment. By contrast, appeals on questions of law must be commenced by originating application under the new Part XVII of the High Court Rules. The prescribed form requires specification of the questions of law and the grounds of the application. Rule 881 provides that those grounds may subsequently be amended only by leave of the Court. Downer submitted that the absence of similar provision relating to Article 34 applications suggests that Parliament did not want technical pleading points concerning amendment to limit the Court's important supervisory role under Article 34.

[34] Thirdly, if r187 of the High Court Rules applies to Downer's application, then Downer pointed out that r187 entitles it to amend its pleading (i.e. its application to set aside; an originating application falls within the definition of a "pleading": *Group Rentals NZ Ltd v Pramb Wong Enterprises Ltd* [1995] 1 NZLR 763 at 767) as of right prior to the setting down of the proceeding. Its application to set aside the award has not been set down. Even if the operative proceeding for r187 purposes is Fiji's strike out application, Downer last amended on 9 June 2003, three days before it was notified on 12 June that the strike out application had been set down for hearing.

[35] Fourthly, Downer submitted that the purpose of the three-month limit is to raise a "red flag" about the validity of the award. That was required because there may otherwise be an obligation to carry out the award forthwith (Downer referred to

Article 28(6) of the ICC Rules) and the successful party may proceed to enforce it under Article 36(2). Downer submitted that the Court must carefully scrutinise the award to ensure it is of a standard to justify enforcement, and pointed to the desirability of all relevant contentions as to possible defects in the award being addressed and determined before the red flag is lowered. Downer submitted that some delay in the determination of a timely setting aside application is permissible. It pointed to s29 of the Limitation Act (see the Fourth Schedule to the Arbitration Act) as demonstrating that limitation issues are not to be over-emphasised.

[36] Downer drew all these points together by submitting that pleading/procedural points should not be permitted unduly to restrict the Court's Article 34 powers, because of the importance of those powers particularly where, as in this case, a party to an arbitration submits that the award is in conflict with the public policy of New Zealand, i.e. relies on Article 34(2)(b)(ii). Downer argued that, in terms of Article 34, it matters not that the arbitration was a New Zealand-based international arbitration rather than a domestic one, indeed s5(c) provides that a purpose of the Act is:

> ... to promote consistency between the international and domestic arbitral regimes in New Zealand.

[37] In short, providing the application to set aside on the basis of Article 34(2)(b)(ii) was made within three months, there should be no problem with amendments to the application.

[38] We are not much convinced by these points, which run somewhat contrary to the Court of Appeal's observation in *Opotiki Packing* (cited in paragraph [31] above). In any case, these points are peripheral to the basis upon which the amendments in issue are challenged, which is that they were filed after the expiry of the limitation period specified in the Act.

[39] The substance of Downer's submissions is that under r187 of the High Court Rules, Downer was entitled, up until such time as its originating application was set down for hearing, to amend its pleading without first seeking the leave of the Court. This is correct: Part XVII of the High Court Rules, and thus the requirement for

leave to amend under r881, does not apply to Article 34 applications. By virtue of r458D(1)(xxiii), such applications are dealt with as ordinary originating applications under Part IVA. Rule 187 therefore entitled Downer to amend its pleading up to the date of setting down.

[40] However, r187(3)(a) entitles an applicant to introduce a fresh cause of action only if it is not statute-barred. Downer accepted that it could not add a new cause of action after the expiry of the statutory time limit. The real issue in this case is whether the amendments to Downer's pleadings, all of which were made outside the statutory time limit, constituted a fresh cause of action. If the answer to that question is yes, the amendments will be statute-barred. It does not assist Downer to establish that leave was not required to amend, if the causes of action contained in the amendments were time-barred.

[41] The law as to what constitutes a fresh cause of action is well established and the parties were agreed as to the test. I adopt Mr Johnston's formulation:

> ... The essence of the test is whether the alleged new cause of action/ground is merely a re-configuration of the existing factual and/or legal pleadings, or whether it introduces new factual and/or legal components to the case which were not in the existing pleading and which are sufficiently significant that the case which the applicant advances, and the case which the respondent must answer, is a different one.

[42] Mr Johnston primarily relied upon the leading case of *Chilcott v Goss* [1995] 1 NZLR 263 (CA), which recognises that whether alterations of law and/or fact constitute something essentially different – a new case – involves questions of degree, and thus requires a careful assessment in each case.

[43] Although it is not expressly referred to in his formulation of what constitutes a fresh cause of action, Mr Johnston accepted that the element of prejudice to the respondent is relevant. He submitted that merely having to meet a claim which is out of time can constitute prejudice: *Coastal Tankers Ltd v Southport New Zealand Ltd* (1999) 13 PRNZ 638, 646.

[44] The parties disagreed as to whether Downer's time-barred amendments constituted a fresh cause(s) of action. Downer essentially argued that its

amendments merely enlarged and/or amplified the original basic ground for setting aside. Fiji submitted the amendments were fresh causes. This disagreement is at the heart of the limitation issue.

[45] Fiji's case is as follows. Downer's original application was under Article 34(2)(b)(ii) and was directed at 11 specific factual findings and one alleged failure to consider and/or decide a particular issue. Those grounds are repeated under grounds 4(a)-(l) of Downer's second amended originating application and accordingly no limitation issue arises in respect of them.

[46] Equally, no issue is taken with paragraph 2(ii)(a). This paragraph claims that the award is contrary to the public policy of New Zealand because it contains and is affected by serious and fundamental errors because each of the factual findings in sub-paragraphs 4(a)-(k) was a finding which was not supported by any evidence and/or was unreasonable or against the substantial preponderance of the evidence. Fiji accepts that this simply reconfigures the original pleading.

[47] The contested new grounds pleaded in the second amended application to set aside fall into two categories. The first category consists of new pleadings which attack new paragraphs in the award, but on statutory bases which were pleaded in the original pleading. Paragraphs 4(m)-(n) allege that the award is contrary to public policy because breaches of natural justice occurred because of the way in which the Tribunal formulated and disposed of the issues identified in those two sub-paragraphs. These are breach of natural justice allegations based on Article 34(2)(b)(ii), as explained by Article 34(6). Similarly, under paragraph 2(ii)(a)-(g) Downer alleges that the award is contrary to public policy because it contains and is affected by serious and fundamental errors because of the way in which the Tribunal formulated and disposed of each of the issues identified in those sub-paragraphs. These allegations could only come within Article 34(2)(b)(ii): they do not allege excesses of jurisdiction.

[48] The second category consists of new pleadings which attack paragraphs of the award which were not attacked in the original application, and does so on statutory bases which were not originally pleaded. These are:

a) Paragraph 1(a)-(e) which claims that the award is liable to be set aside because the arbitral procedure was not in accordance with the First Schedule, in that the arbitral tribunal breached the mandatory requirement in Article 28(4) by failing to decide the dispute in accordance with the terms of the contract. It is alleged that the tribunal failed to apply, misapplied or misconstrued the terms of the contract by incorrectly formulating or dealing with the issues identified in sub-paragraphs (a)-(e). This pleading does not identify precise grounds by reference to Article 34.

b) Paragraph 2(i) states that the award is in conflict with the public policy of New Zealand because the Tribunal breached Article 28(4) by failing to decide the dispute in accordance with the contract because it failed to apply, misapplied or misconstrued the terms of the contract by incorrectly formulating or dealing with the issues identified in sub-paragraphs 1(a)-(e). While based on Article 34(2)(b)(ii) this pleading introduces Article 28(4).

c) Paragraph 3(a)-(f) alleges that the Tribunal exceeded its jurisdiction and/or the award contains matters beyond the scope of the arbitration agreement and/or the submission to arbitration and/or the terms of reference because of the way in which the Tribunal formulated and disposed of each of the issues identified in those sub-paragraphs. This pleading is based on Article 34(2)(a)(iii), which was not previously pleaded or in issue.

[49] To summarise, Fiji submitted that paragraphs 1(a)-(e), 2(i), 2(ii)(b)-(g), 3(a)-(f) and 4(m)-(n) of Downer's second amended application attack entirely new aspects of the award or rely on entirely new grounds, or both, and must be struck out as being time-barred. Returning to *Chilcott*, Fiji submitted that it was scarcely possible to imagine a clearer example of an attempt to introduce wholly new causes of action or grounds after the expiry of a limitation period. Fiji submitted that, if amendments such as this were permitted, then there will be virtually no circumstances in which an applicant will be prevented by the three month time bar

from amending the grounds on which it seeks to set aside an arbitral award. Mr Johnston characterised as "an eristic device", Downer's attempt to categorise the introduction of these new grounds as "particulars".

[50] Downer, by contrast, submitted that its amended application merely provided further examples or details of its original cause of action. The gist of the Article 34 cause of action is to call upon the Court to consider whether certain minimum standards have been met in arbitral proceedings. If they have it will be appropriate to allow the executive power of the state to be utilised to enforce the award. If not, the award should be set aside. A variety of grounds listed in Article 34 may be advanced in support of this cause of action. The amended pleadings are of essentially the same character and essence as the original pleading. They simply serve to clarify the grounds under which the Court should intervene under Article 34.

[51] Further Downer argued that, even if the matter is approached by looking at the specific allegations made in the original application and comparing those to the allegations in the subsequent amended applications, a similar result is reached. The grounds of the originating application of 12 December 2002 were that breaches of natural justice had occurred so as to make the award in conflict with the public policy of New Zealand. Sub-paragraphs (m) and (n) have been added (under what is now paragraph 4). They remain under the same heading of the award: findings contrary to the public policy of New Zealand because of breaches of natural justice.

[52] Paragraph 2(ii)(a)-(g) is new, but merely provides further examples of the basic allegation that the award was contrary to public policy. This paragraph also alleged further grounds under Article 34, namely that the award contained and was affected by serious and fundamental errors in a number of respects, including the very same respects that had been pleaded in the December application (2(ii)(a)). There were added six further particular allegations (2(ii)(b)-(g)). These same six were included under a new paragraph 3, headed "Excess of Jurisdiction". Downer's point is that even though paragraph 3 is a new heading, the new particulars under that heading were included in paragraph 2 under the original allegation that the award was contrary to the public policy of New Zealand.

[53] Paragraph 1 is an allegation that the procedure was not in accordance with the First Schedule because it was in breach of Article 28(4). The five allegations under paragraph 1 had previously been included in the first amended originating application under the allegation of excess of jurisdiction (and contrary to public policy under paragraph 2). The same particulars are now also included in the second amended application under paragraph 2(i) where it was pleaded that the award was contrary to the public policy of New Zealand because the Tribunal had acted in breach of Article 28(4).

[54] The general point is that even if the matter is approached on the basis of defined particulars, the connecting thread with all allegations is that because of them the award is contrary to the public policy of New Zealand. The applicant submits that this has always been and remains the basic allegation.

[55] Furthermore, Downer argued that the amendments to its application did not involve or raise new questions of fact.

Decision

[56] We uphold Fiji's argument. Notwithstanding Downer's detailed attempts to persuade us that each of its two successive amended applications to set aside is substantially the same as the original one, we are simply not able to accept that.

[57] First, the amended applications challenge entirely new parts of the award. Whereas only 11 specific findings were originally challenged as unsupported by the evidence, now some 22 are. (Reference to numerous paragraphs of the award in relation to a single point makes it difficult to be precise as to the number.) Secondly, the bases for challenge are widened. Originally the sole allegation, with one exception, was that the Tribunal had made findings unsupported by the evidence. The exception was one alleged failure to decide a particular issue. Now fundamental error in formulating and disposing of issues and excesses of jurisdiction are alleged. The two amended applications bear little resemblance to the original one in terms of both the breadth (those parts of the award which are challenged) and depth (the bases for challenge) of Downer's attack.

[58] Secondly, standing back and comparing the applications on a more general level we ask ourselves: are these essentially the same claims? We were constrained to answer "No, they are not. The amended claims, particularly the second amended claim, are substantially different claims from the original one".

[59] We compared the claims on both a detailed and more general level, conscious that deciding whether the amended claims raise new causes of action is a matter of degree, requiring a careful assessment of the three applications in question.

[60] Downer argued that the Court should be more lenient in its approach to the pleading and amendment of the application under Article 34(2)(b)(ii) because of the nature of the jurisdiction being invoked. Downer's point is that the jurisdiction is a supervisory one involving a compliance check (our phrase) of arbitral awards by the Court to ensure that they are not in conflict with the public policy of New Zealand, and can properly be entered as judgments of the Court.

[61] We acknowledge this point, although it conflates Article 34 (and perhaps also Article 36) on the one hand, and Article 35 on the other. We think there is force in the distinction drawn between the two jurisdictions by Mr Williams in his article *Arbitration and Dispute Resolution* [2004] NZ Law Review 87 at 108. But, accepting Downer's point, we cannot see that it argues in favour of a more liberal approach to amendment of an Article 34 application. We say more about the approach to "public policy" in the next part of this judgment. For the moment, suffice it to say that any conflict(s) with the public policy of New Zealand in an arbitral award should be immediately or at least fairly rapidly apparent. Any conflict(s) is unlikely to be subtle. Certainly, three months to detect and plead any such conflict(s) seems to us to be more than adequate, even in the case of a lengthy or complex award.

[62] Secondly, the recognised benefits of arbitration include speed, economy, choice of forum, anonymity and finality. Parties can limit their rights of appeal (as the present parties did), although they cannot contract out of Article 34. Consistent with this is the Court of Appeal's statement in *Opotiki Packing* that the whole tenor of the rules is to restrict Court review of arbitration awards both with respect to

grounds and time. To permit, beyond the three month limitation period, amendment that essentially introduces new areas and grounds of challenge would defeat the benefits of arbitration and the dual restrictions the Court of Appeal referred to in *Opotiki Packing*.

[63] For all those reasons, we rule that the grounds of challenge set out in paragraphs 1(a)-(e), 2(i), 2(ii)(b)-(g), 3(a)-(f) and 4(m)-(n) of Downer's second amended application to set aside the arbitral award are time-barred, and we strike them out.

The substantive issue: does Downer's application to set aside the award disclose a reasonable cause of action?

[64] We turn back now to the first ground in Fiji's application to strike out Downer's application to set aside the arbitral award:

> That (Downer's) second amended originating application discloses no reasonable cause of action and/or is otherwise an abuse of the process of the Court.

[65] We need deal only with paragraphs 2(ii)(a) and 4(a)-(l). Paragraphs 4(a)-(k) allege the award is contrary to the public policy of New Zealand because a breach or breaches of the rules of natural justice occurred in connection with the making of the award in that each of 11 specific findings of the Tribunal in its award "was a finding which was not supported by any evidence and/or was unreasonable or against a substantial preponderance of the evidence".

[66] Paragraph 2(ii)(a) alleges that the award was contrary to the public policy of New Zealand in that it contains or is affected by serious and fundamental errors, those being the same 11 specific findings allegedly unsupported by the evidence.

[67] Paragraph 4(l) alleges:

> The Tribunal failed to consider and/or decide the claim referred to in the second dot point of paragraph 19.3 of the award.

[68] Downer argued that the parties could not contract out of Article 34. That submission confronted a point raised by Fiji, based on Article 28.6 of the ICC Rules of Arbitration, which provides:

> Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as any waiver can validly be made.

Fiji did not pursue that point, and we think rightly so. We agree with the observations made by Fisher J in *Methanex Motunui Ltd v Spellman & Ors* CL3/03 HC Auckland, 18 August 2003, particularly in paragraphs [44] and [45]. Thus, Fiji did not contest that Downer was entitled to bring its application to set aside under Article 34, if it came within the scope of that Article.

[69] Downer contended for a wide interpretation of the words "the public policy of New Zealand" as they appear in Article 34(2)(b)(ii). Mr Williams QC supported this by reference to a number of decisions from New Zealand and abroad. The first was *Kimberley Construction Ltd v Mermaid Holdings Ltd*, M474-IM03, HC Auckland, 10 July 2003. That was an application to enter an arbitral award as a judgment, opposed (successfully) on the ground that the award had been satisfied by a settlement agreement. It was submitted by the party seeking to enter the award as a judgment that the public policy ground in Article 36(1)(b)(ii) could not be invoked. That permits enforcement of an award to be refused if:

> The recognition or enforcement of the award would be contrary to the public policy of New Zealand.

[70] Dealing with this submission Rodney Hansen J observed:

> [23] There has been reluctance to confine public policy even in cases involving the more limited enquiry required by an application to set aside an award. In *Cuflet Chartering v Carousel Shipping Co Ltd* [2001] 1 All ER (Comm) 398, Moore-Bick J considered the power in the Arbitration Act 1996 (UK) to set aside an award as procured contrary to public policy. After quoting the passage from the *Deutsche Schachtbau* case referred to in *Amaltal v Maruha* he went on to say at 403:
>
> > 'Public policy is capable of covering a wide variety of matters and it is neither necessary nor desirable in this case to attempt to define the circumstances in which [the relevant provision] is capable of being invoked.'

[71] Next, there were two cases from Canada. The first was *Navigation Sonamar Inc. v Algoma Steamships Ltd*, a judgment from Quebec delivered on 16 April 1987 by Charles Gonthiers CJ. We were not provided with the report, but Mr Williams told us that the Judge adopted a line of Canadian authorities to the effect that awards that are "patently unreasonable" or which constitute an "insult to the law" could be set aside under Article 34(2)(b)(ii). The Court there accepted the applicant's invocation of the concept of "patently unreasonable error" as a basis for challenge under the public policy ground in Article 34. The second case is *Attorney-General of Canada v Myers Inc.* [2004] FC38, a decision of the Canadian Federal Court. In the course of his judgment Kelen J said this:

> [55] ... "Public policy" does not refer to the political position or an international position of Canada but refers to "fundamental notions and principles of justice". Such a principle includes that a tribunal not exceed its jurisdiction in the course of an inquiry, and that such a "jurisdictional error" can be a decision which is "patently unreasonable", such as a complete disregard of the law so that the decision constitutes an abuse of authority amounting to a flagrant injustice. ...

[72] Mr Williams then referred to an account in the ICCA (2000) XXV Yearbook Commercial Arbitration 548-549 of the decision of the Zimbabwe Supreme Court in the *Zimbabwe Electricity Supply Authority* case. The yearbook records the Supreme Court as taking the view that "where an award was based on so fundamental an error, as in this case, that it constituted a palpable inequity that was so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it".

[73] From Asia, Mr Williams then drew from a judgment of the Supreme Court of India in *Oil & Natural Gas Corporation Ltd v SAW Pipes Ltd* JT 2003 (4) SC 171. There, the Court stated:

> 28. ... It would be clear that the phrase 'public policy of India' is not required to be given a narrower meaning. As stated earlier, the said term is susceptible of narrower or wider meaning depending upon the object and purpose of the legislation ... In our view, wider meaning is required to be given so as to prevent frustration of legislation and justice.

[74] Finally, Mr Williams came back on-shore with a reference to the judgment of Priestley J in *Steedman v Stan Ash Builders Ltd* HC Auckland M.865-IM01, 18 July 2002. The Judge there held that an arbitrator's reasoning process which "sails close to unreasonableness" can constitute an error of law.

[75] Since the hearing last October the Court of Appeal has delivered its judgment in *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* (CA11/03 11 March 2004). We afforded the parties the opportunity to make any additional submission they wished dealing with *Amaltal*, and both did. The Court of Appeal disagreed with the trial Judge, Harrison J, that appeal on a point of law under clause 5 in the Second Schedule and an application to set aside under Article 34 of the First Schedule were "mutually exclusive" courses. The Court could see no reason why errors of process by the arbitrator as well as errors of substantive law could not be raised on a clause 5 appeal, as well as upon an application to set aside under Article 34. The Court pointed to the obvious desirability of a party including all grounds within a single application.

[76] More importantly, the Court's judgment contained a discussion of the scope of "public policy" in Article 34, identifying the sources of the term and referring to three decisions dealing with its scope. One of those was by the Court of Appeal of Ontario, the other two were decisions of the English Court of Appeal. The New Zealand Court of Appeal did not need to, and did not, explore the scope of "public policy". Indeed, it made the point, to which we have referred, that the "considerations of public policy could never be exhaustively defined". The words are those of Sir John Donaldson MR in the English Court of Appeal's decision in *Deutsche Schactbau* [1990] 1 AC 295 at 316. Although the Court's discussion in *Amaltal* is tentative and limited, we think we read it as favouring a narrower, rather than wide, view of the compass of the words "public policy". That is consistent with *Deutsche Schactbau* in which the English Court of Appeal (also at p 316) stated that public policy arguments "should be approached with extreme caution", and referred to an observation of Burroughs J long ago in *Richardson v Mellish* (1824) 2 Bing 229, 252 "It is never argued at all, except when other points fail". We have not overlooked the point made by Mr Williams also at p 108 in his NZ Law Review article, that *Deutsche Schactbau* involved an application under Article 35 to enforce

an international award. The Court of Appeal's judgment in *Amalthal* indicates that the words "public policy" require 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.

[77] The *Amaltal* appeal was against Harrison J's dismissal of an application to set aside an arbitrator's award under Article 34(2)(b). An earlier application for leave to appeal on questions of law had already been dismissed. At first instance, Harrison J had held that the rule that a contractual penalty clause is unenforceable was not a matter of public policy within Article 34. He took the view that that rule was not a fundamental principle of law and justice. The Court of Appeal agreed. It held that the rule could not "properly be characterised as so fundamental as to constitute 'public policy' in the sense in which those words have been used in Article 34 or the sources from which that article was drawn". The appeal was accordingly dismissed.

[78] Fiji referred to two cases which also take a less expansive view of the scope of "public policy". We say "also", on the assumption that we have correctly interpreted the Court of Appeal's tentative thinking in *Amaltal*. The first case referred to by Fiji is *John Holland Pty Ltd (fka John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp. (Japan)* [2001] 2 SLR 262, a decision of the High Court of Singapore. In his judgment Choo Han Teck JC said:

> 20. ... I think that the legislature intended that it will require more than an error of law or fact (or both) to set aside an arbitration award. ...
>
> ...
>
> 25. Thirdly, Mr Hwang relied on art. 34(2)(b)(ii); the public policy provision. No particular policy has been identified, however, as having been embarrassed by the award. The contention that public policy covers situations in which there has been a 'fundamental irregularity in respect of the law' is, with respect, not very helpful. A fundamental irregularity in itself cannot render an award bad. A public policy must first be identified, and then it must be shown which part of the award conflicts with it. Mr Hwang's submission on this ground, therefore, also fails.

[79] The second case Fiji referred to is *Quintette Coal Ltd v Nippon Steel Corporation et al* (1990) 50 B.C.L.R. (2d) 207, a decision of the Court of Appeal of British Columbia. At p 217, Gibbs JA (Proudfoot JA concurring) said this:

> We are advised that this is the first case under the British Columbia Act in which a party to an international commercial arbitration seeks to set the award aside. It is important to parties to future such arbitrations and to the integrity of the process itself that the court express its views on the degree of deference to be accorded the decision of the arbitrators. The reasons advanced in the cases discussed above for restraint in the exercise of judicial review are highly persuasive. The "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" spoken of by Blackmun J are as compelling in this jurisdiction as they are in the United States or elsewhere. It is meet therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia. That is the standard to be followed in this case.

[80] To those cases can now be added *Downer Connect Ltd v Pot Hole People Ltd* (CIV 2003 409 2878, HC Christchurch, 19 May 2004), which involved an application to set aside the award in a domestic construction arbitration. Having referred to the Indian Supreme Court's decision in *SAW Pipes*, Randerson J said this:

> [136] I accept that the Supreme Court of India seems to have taken a somewhat broader view of what may constitute a conflict with public policy for the purposes of Article 34(2)(b)(ii). For myself, however, I would not have regarded any failure by the arbitrator to apply clause 2.2 of the head contract in the present case as even approaching the level required to establish a conflict with the public policy of New Zealand as that phrase is used in Article 34(2)(b)(ii). The enforcement of an award containing an error of that nature would certainly not shock the conscience. Nor would it suggest that the integrity of the courts' processes and powers would be abused should an award containing an error of that nature be upheld (assuming such an error were established).
>
> [137] The interpretation and application of contractual provisions is a routine task for an arbitrator involved in determining a contractual dispute. The cost-effectiveness issue was only one aspect of many to be considered by the arbitrator and, in any event, it did not contain any policy content which could possibly be regarded as bearing on the public policy of New Zealand. Nor could any failure of the arbitrator to apply such a provision have any material bearing on, or potential for conflict with, the public policy of New Zealand in the sense used in Article 34(2)(b)(ii).

[81] We respectfully endorse those remarks. In *Pot Hole* Randerson J also dealt with a submission by Downer that the arbitrator had made findings not supported by

evidence or which were contrary to the evidence. In dealing with that submission Randerson J said:

> [117] In view of my conclusions, it is unnecessary to consider in detail whether a challenge to factual findings (if that is what they were) is a permissible ground upon which to set aside an award under Article 34. It could only be so if the challenge could be brought under the umbrella of Article 34(2)(b)(ii) as being in conflict with the "public policy of New Zealand". It is of course well established that a finding must be based on some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding is not logically self-contradictory: *Mahon v Air New Zealand* [1984] 1 AC 808, 820-821 (PC) per Lord Diplock. But it is a much larger step to conclude that an error by an arbitrator in that respect is sufficient to render an award contrary to public policy.

[82] Then, after referring to the Court of Appeal's decision in *Amaltal*, and to its earlier judgment in *Gold Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318, 335 Randerson J continued:

> [119] In an era when the Arbitration Act encourages arbitration and respect for arbitral awards, a challenge to factual findings is most unlikely to succeed. In that respect, I respectfully endorse the remarks made by Heath J in *Attorney-General v Tozer* (High Court, Auckland, M.1528/02, 2 September 2003) when His Honour observed at paragraph [16] that it would be inappropriate to set aside all or part of an award if the real reason for complaint was that the party making the challenge was dissatisfied with a finding of fact. Heath J noted that where the parties had appointed a person in whom they placed confidence to determine their dispute, the principle is that questions of fact are for the arbitrator to determine.

[83] Again, we agree. The only procedural rule which could assist Downer's "no evidence" submission here is that in *Re Erebus Royal Commission, Mahon v Air New Zealand* [1983] NZLR 662 at 671, which requires only that a factual finding be based on some logically probative evidence. Provided there is such evidence, its assessment is entirely the province of the arbitrator: Article 19(2) in the First Schedule to the Act; *Sextant Holdings Ltd v New Zealand Railways Corporation* HC Wellington CP770/90, 14 May 1992 Neazor J.

[84] Even assuming that Downer could establish a breach of the *Erebus* ground of natural justice, the "public policy" requirement in Article 34 imposes a high threshold on Downer. The phrases "compelling reasons" and "a very strong case" are employed in the judgments of the Hong Kong Court of Appeal in *Hebei Import*

& Export Corporation v Polytek Engineering Co. Ltd [1999] 2 HKC 205 at 211 and 215. *Hebei* involved an application to set aside a foreign award. To warrant interference there must be the likelihood that, the identified procedural irregularity resulted in a "substantial miscarriage of justice": *Honeybun v Harris* [1995] 1 NZLR 64, 76. That entails the impugned finding being fundamental to the reasoning or outcome of the award. The Court of Appeal suggested in *Amalthal* (at para [47]) that the arbitrator's findings of fact should not be reopened unless it was "obvious" that what had occurred was contrary to public policy.

[85] Unlike both *Pot Hole* and *Tozer*, we are dealing with an application to strike out an application to set aside an award, not with the setting aside application itself. The parties disagreed sharply as to the proper approach on such a strike out application. Adopting conventional strike out principles, Downer submitted that its "no evidence" and "issue not decided" allegations must, for the purposes of the strike out application, be taken as capable of being established, with the consequence that the strike out application must be dismissed. Downer argues that those allegations can only be properly and adequately determined upon a consideration by the Court of all the evidence which the Tribunal had. Downer makes the point that Randerson J examined the evidence in detail before deciding the "no evidence" ground in *Pot Hole*. If Downer is correct, the consequence must be that Fiji's strike out application should be dismissed and Downer's application to set aside the award proceed to a full hearing.

[86] Fiji, on the other hand, submitted that the Court was entitled at least to look at the award (which Downer has placed before the Court) to see if the "no evidence" and "issue not decided" allegations are, on the face of the award, arguable, or are exposed as unfounded. Fiji submitted that we are not obliged to accept those allegations uncritically.

[87] Strike out applications proceed on the assumption that the facts pleaded in the statement of claim are true: *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262, 267 (CA). The allegations in Downer's application that certain findings of fact lack an evidentiary basis are not assertions of fact. They are the legal basis upon which Downer seeks to have the award set aside. Whether the findings were

supported by evidence would be the central point at issue were Downer's application to go to a full hearing. To assume that those allegations were true, would defeat the object of the strike out jurisdiction.

[88] To succeed on its strike out application, Fiji must establish that Downer's causes of action are so clearly untenable that they cannot possibly succeed. The tenability of Downer's causes of action cannot be determined without an examination of the merits of the cause of action, albeit against a much lower threshold than would be applied at a substantive hearing. That can only be done by reference to the award itself, to see whether it discloses prima facie the existence or absence of evidence supporting the impugned findings. We therefore consider that we can and should look at the award. If that demonstrates that Downer's "no evidence" and "evidence not decided" allegations are arguable, then they should be argued upon Downer's application to set aside the award. If, on the other hand, a consideration of the award satisfies us that those allegations are without foundation, then Fiji is entitled to have Downer's application struck out.

[89] We find support for this approach in two decisions of the Court of Appeal relied upon by Fiji. The first is *Collier v Panckhurst* (CA136/97 6 September 1999), which held that a Court considering a strike out application is not required to assume the truth of the pleaded allegations if they are entirely speculative and without foundation. Implicit in that, is that the Court must be able to investigate whether there is a foundation for the pleaded allegations.

[90] The second decision is *Attorney-General v McVeagh* [1995] 1 NZLR 558. There, at p566, the Court recognised that there may be cases where an essential factual allegation is so demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further. We think that encompasses the situation here. For example, if a consideration of the award demonstrates that the Tribunal did deal with and decide the issue which Downer alleges was left undecided, then Downer's challenge should be ended now. Similarly, if a consideration of the award demonstrates that there was an evidentiary basis for the findings which Downer alleges were not supported by evidence then, again, the matter should stop now. To go any further would be pointless. The parties, in particular Fiji, should not be put to

the time and cost of a hearing of Downer's application to set aside, when it cannot succeed.

[91] In *Jennings v Bishop* HC Nelson CP26/97 2 March 1998, Master Venning struck out a proceeding alleging that an arbitrator had made findings of fact that varied from the evidence and from facts agreed by the parties. We note that, in the course of his decision, the Master referred to the award, comparing the facts found by the arbitrator with those agreed by the parties.

[92] We turn first to the 11 specific findings of fact in paragraphs 4(a)-(k) The findings in paragraphs 4(a)-(e) concern what is referred to in the award as "the base course claim". The finding in paragraph 4(a) relates to paragraph 12.28 of the award. Having read that, and also paragraphs 12.29 to 12.34.7, we are satisfied that the Tribunal made the impugned finding because Downer could not point to any evidence which established that Downer was required to comply with a different and varied (from specification) compaction requirement. In short, the Tribunal held that Downer failed to discharge the evidentiary onus of proving this claim.

[93] Grounds for (b)-(e) involve paragraphs 12.35.1 through 12.35.4 of the award, in which the Tribunal detailed "a separate but related reason why the pleaded claim on these bases should fail". Those reasons rest on evidence contained in paragraphs 11.7 to 11.47 of the award. Having read those parts of the award (which contain a lengthy review of the facts and evidence, or lack of it), we can find no foundation for Downer's allegation that the findings attacked in paragraphs 4(b)-(e) lack an evidentiary basis.

[94] Paragraphs 4(f)-(j) relate to what the award terms the "increase in earthworks quantities" claim. As invited by Fiji, we have read paragraphs 13.1 through 13.12 of the award. Having done so, we are again of the view that Downer cannot say that the Tribunal's findings in paragraphs 4(f)-(j) lack an evidentiary foundation. After detailing the claim in paragraphs 13.1-13.6, the Tribunal turned to the evidence. In paragraph 13.7 it said this:

> The evidence in support of this claim was extremely limited. During the course of closing submissions, the Tribunal invited the Claimant expressly to

> identify the passages in the evidence of the witnesses of fact that it relied upon in support of this claim. On 26 July 2002, the Tribunal was told by counsel for the Claimant that it relied solely upon the statement of Mr Jones (1) paras 245-252 inclusive and 257-258. Counsel expressly confirmed that no other passages in Mr Jones' statement were relied upon.

[95] The Tribunal then set out the relevant parts in Mr Jones' statement, commented on them and referred also to the expert evidence of Dr Hawkins, also relied upon by Downer. Having done that the Tribunal said this in paragraph 13.11:

> Having considered all of the evidence in relation to this claim, the Tribunal has reached the conclusion that the Claimant has failed to establish that it was the increase in earthworks quantities that caused the Claimant to have to undertake earthworks in the wet season of December 1997 to April 1998 or that it is entitled to a new enhanced rate or to any further extension of time. The Tribunal's reasons for reaching these conclusions are as follows:
>
> (and it then sets them out in the succeeding 11 sub-paragraphs).

[96] Paragraph 4(k) relates to paragraph 18.5 of the award. This is in that part of the award dealing with the Gravel Royalty Rate. That paragraph, set in its immediate context in the award, is as follows:

> 18.4 The amount of the claim is $83,892 VIP, being the difference between F$2.43 per m^3 and F$2.67 per m^3 adjusted, as the parties had agreed in respect of royalty payments, to account for the fact that the rate of F$2.67 per m^3 VIP originally discussed was on a solid cubic metre basis whereas the Contractor was actually going to be paying royalties on a loose measure basis.
>
> Mr O'Driscoll's evidence was that, had the Claimant not been advised that the rate was F$2.67 per m^3 VIP, it would not have used the rate of F$2.43 per m^3 in making up its tender price and would have used the rate of F$2.67 per m^3. The Tribunal treats this evidence with caution in the absence of any evidence from either Messrs. Pheloung or Osborne, who prepared the tender detail. Also, because Mr Jones' report referred to elsewhere in this award (Doc. 450) indicated that the tender had been prepared on the basis that the Claimant would source its aggregate etc. from an outside supplier and not from the river.
>
> 18.5 The Respondent's defence is simply, ie. That the rate of royalty payable on gravel taken from the Naua River was F$2.67 per m^3 VAT inclusive was correct because the amount payable was made up of i) a royalty of $2.41, and ii) an administration fee of 24 cents. The former did not attract VAT, the latter did with the result that the gross figure of $2.67 reflected the royalty rate, plus the NLTB administration fee plus VAT on that fee.

> 18.6 At best for the Claimant, the situation is one of a unilateral mistake about a question of law. There is no pleading based on mistake. The Tribunal understands that under Fiji law, which is the same as the English common law in this respect, there can be no claim for relief based on a mistake of law. There was no misrepresentation by the Engineer. There was a misrepresentation by the Claimant which could easily have obtained advice from a lawyer or accountant about the true situation.

[97] Those paragraphs sufficiently indicate the evidentiary and legal bases on which the Tribunal rejected Downer's claim in respect of royalty rate. We hold that Downer cannot maintain that the finding lacks an evidentiary basis.

[98] Paragraph 4(l) alleges that the Tribunal failed to consider and/or decide the claim referred to in the second dot point of paragraph 19.3 of the award. That reads:

> 19.3 ...
>
> - on 13 May 1999, the Engineer did issue a certificate of completion in respect of another part of the Works as at 5 November 1998, but this certificate should have been issued no later than 10 December 1998, and should have certified partial completion as at 31 October 1998 instead of 5 November 1998. In either event, the daily rate of liquidated damages should have been reduced earlier than it was.

[99] Fiji submitted that the Tribunal dismissed that point in paragraph 19.14 of the award in the following terms:

> 19.14 For all the above reasons, therefore, the Tribunal considers that this claim must also fail. The Claimant's third pleaded argument that the certificates of completion should have been issued with effect from dates other than their effective date should fail.

[100] Fiji says that "the above reasons" are those the Tribunal gave in paragraphs 19.13.1 through 19.13.4, based on the evidence set out in paragraphs 19.5 to 19.12.8 of the award. In those paragraphs the Tribunal reviews the chronology of events and the communications, particularly the contractual documents and the correspondence, passing between the parties.

[101] Having considered those parts of the award, we uphold Fiji's submission that the paragraph 4(l) claim was both considered and decided by the Tribunal. Thus, we find this allegation to be without foundation.

[102] Fiji did not contest the inclusion of paragraph 2(ii)(a) in Downer's second amended application, on the basis that it is simply a reformulation of the grounds set out in paragraphs 4(a)-(k). We agree. We also agree with Fiji that that reformulation adds nothing, and does not save paragraph 2(ii)(a) from the same fate as paragraphs 4(a)-(k).

[103] It will be apparent from the way in which we have dealt with paragraphs 4(a)-(k) that we have been satisfied that there was an evidentiary basis for the Tribunal's impugned factual findings. We accept Fiji's submission that the cases relevant to allegations of evidential inadequacy leading to a breach of natural justice suggest a high threshold. Those cases were traversed in some detail by Mr Johnston in his submissions for Fiji. They include *Rae v International Insurance Brokers* (CA258/95, 11 August 1997) (CA); *R v Deputy Industrial Injuries Commissioner* [1965] 1 KB 456; *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* [1983] NZLR 662 at 671 (PC) and *Burne v Young* (CP68/89 HC Wellington, 29 May 1991 Neazor J). We need only cite the following well known passage in the judgment in *R v Deputy Industrial Injuries Commissioner* of Diplock LJ at p 488D:

> ... The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue. The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his.

[104] To those cases can be added the judgment of Randerson J in *Pot Hole*, from which we have cited in paragraphs [81]-[82] above. Save that Randerson J was dealing with an application to set aside under Article 34, *Pot Hole* is directly in point.

[105] We accept Fiji's argument that the Court's role where evidentiary inadequacy is alleged is to ensure that there ***was*** evidence to support the impugned finding. Or, conversely, that the burden on the party alleging inadequacy is to establish that there

was ***no*** evidence. Downer has not discharged that onus. Mr Johnston concluded his oral submissions by referring us to the following part of Lord Mustill's opinion in *Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd* [2000] 3 NZLR 338 (PC) at 339:

> [1] Arbitration is a contractual method of resolving disputes. By their contract the parties agree to entrust the differences between them to the decision of an arbitrator or panel of arbitrators, to the exclusion of the Courts, and they bind themselves to accept that decision, once made, whether or not they think it right. In prospect, this method often seems attractive. In retrospect, this is not always so. Having agreed at the outset to take his disputes away from the Court the losing party may afterwards be tempted to think better of it, and ask the Court to interfere because the arbitrator has misunderstood the issues, believed an unconvincing witness, decided against the weight of the evidence, or otherwise arrived at a wrong conclusion. All developed systems of arbitration law have in principle set their face against accommodating such a change of mind. The parties have made a choice, and must abide by it. This general principle is, however, applied in different ways under different systems, according to the nature of the complainant.
>
> [2] Where the criticism is that the arbitrator has made an error of fact, it is an almost invariable rule that the Court will not interfere. Subject to the most limited exceptions, not relevant here, the findings of fact by the arbitrator are impregnable, however flawed they may appear. On occasion, losing parties find this hard to accept, or even understand. The present case is an example.
>
> [3] At the other extreme are complaints that the decision has been reached by methods which are unfair, contrary to natural justice, in breach of due process, or whatever other term is preferred. With very few exceptions all systems of law permit the injured party some means of recourse. They need not be explored, since there are no such allegations here.

[106] Mr Johnston suggested that Downer's application to set aside the award represented exactly the sort of "change of mind" Lord Mustill refers to. We suspect that submission is not far wide of the mark. Having agreed to arbitrate its very substantial claims, and having had them largely rejected by the arbitral tribunal following a lengthy hearing, Downer is essentially seeking to have the Court upset the result, so that it can re-run its claims. As Lord Mustill observes, the Courts have set their face against accommodating that.

Fiji's application to enter award as a judgment

[107] By application dated 19 September 2003, Fiji applied for an order that the final award of the arbitral Tribunal be entered as a judgment of this Court. In his

reply submissions for Fiji, Mr Johnston submitted that that application should be granted, if Fiji's strike out application was successful. We do not consider that Fiji's registration application was before us at the hearing, and accordingly decline to grant it at this stage. If necessary, Fiji can bring that application on for separate hearing without delay.

Result

[108] We hold that paragraphs 1(a)-(e), 2(i), 2(ii)(b)-(g), 3(a)-(f) and 4(m)-(n) of Downer's second amended application to set aside the award introduce fresh causes of action which are time-barred, and strike them out.

[109] The remaining paragraphs in Downer's second amended application to set aside the award are paragraphs 4(a)-(l) and 2(ii)(a). We hold that none of those paragraphs pleads a cause of action which is seriously arguable, because a consideration of the arbitral award demonstrates that there is no foundation for what is alleged. Accordingly, we strike out those paragraphs.

[110] Despite Fiji's somewhat belated invitation to do so, we decline to deal with Fiji's application to enter the award as a judgment of this Court. That application will require separate hearing, if necessary.

Costs

[111] Fiji is entitled to its costs of its strike out application. As we did not hear submissions as to costs, we reserve them. Our tentative view is that Fiji should have its costs on a 3B basis, with certification for second counsel. The parties may apply, failing agreement.

V. R. Laird J.

Duncan J

Judgment delivered at 1pm on 24 August 2004

Solicitors:

Kensington Swan, Wellington for the Applicant
Hazelton Law, Wellington for the Respondent