IN THE COURT OF APPEAL OF NEW ZEALAND

CA130/2014
[2015] NZCA 290

BETWEEN	KYBURN INVESTMENTS LIMITED Appellant
AND	BECA CORPORATE HOLDINGS LIMITED Respondent

Hearing:	9 March 2015 (further submissions received 10 June 2015)
Court:	White, Fogarty and Dobson JJ
Counsel:	M P Reed QC and P A Morten for Appellant D J Neutze for Respondent
Judgment:	9 July 2015 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay to the respondent costs for a standard appeal on a band A basis with usual disbursements.

REASONS OF THE COURT

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Introduction

[1] The appellant, Kyburn Investments Ltd (Kyburn), appeals against the decision of the High Court dismissing its application to set aside a rent review arbitration in respect of Aorangi House, a multi-storey building it owned in Wellington and leased to the respondent, Beca Corporate Holdings Ltd (Beca), as principal tenant.[1]

[2] In the High Court Kyburn claimed that the award should be set aside under art 34 of the First Schedule of the Arbitration Act 1996 (the Act) because the arbitrator, Mr Peter O'Brien, had acted in breach of the rules of natural justice in:

(a) inspecting the premises with one of Beca's witnesses (a Mr Kerr) prior to the arbitration; and

(b) failing to disclose his prior relationship with one of Beca's expert witnesses (a Mr Veale) and his firm (Telfer Young).

[3] Simon France J rejected both grounds.[2] The Judge also dismissed challenges by Kyburn under art 13(3) of the Act to decisions of the arbitrator not to withdraw for alleged lack of qualification and impartiality.[3]

[4] As there is no right of appeal to this Court against the Judge's decisions under

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1 *Kyburn Investments Ltd v Beca Corporate Holdings Ltd* [2014] NZHC 249, [2014] NZAR 311 [High Court decision].
2 At [50] and [74].
3 At [21], [50] and [69].

art 13(3), this appeal is limited to the Judge's decision under art 34 in respect of which there is a right of appeal.[4]

[5] While there was understandably some overlap in the High Court judgment and in the submissions between the grounds for the art 34 application and the art 13(3) challenges, we limit our consideration of the issues on appeal to those raised in the art 34 application.

Arbitrator's inspection of premises with Beca witness

Factual background

[6] The relevant factual background to this issue is described fully in the High Court judgment.[5] As there is no real dispute as to what occurred, we are able to summarise the background relatively briefly.

[7] In January 2012 the parties, acting under the terms of their lease, appointed Mr O'Brien, an experienced Wellington valuer, as arbitrator for their rent review dispute.

[8] Prior to arbitration hearings in June and July 2012, Mr O'Brien, in accordance with his established practice, arranged with the lawyers for the parties to inspect the premises.

[9] It was anticipated that for this purpose Beca's counsel would give Mr O'Brien the name and contact details of Beca's on-site representative. For some unexplained reason, however, this did not occur and instead Mr O'Brien made contact with Beca's regional manager, Mr Kerr, who showed him round the premises on 18 June 2012.

[10] Prior to the inspection, Mr Kerr's statement of evidence had been filed with Mr O'Brien. The statement, provided in rebuttal to Kyburn's valuation evidence, was generally disparaging of Aorangi House.

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4 Judicature Act 1908, s 66.

5 High Court decision, above n 1, at [1], [22]–[31] and [42]–[49].

[11] There is no dispute that Mr O'Brien did not disclose at the subsequent arbitration hearings that he had inspected Aorangi House with Mr Kerr.

[12] When Kyburn's representative, Mr Aharoni, discovered by chance that Mr O'Brien had inspected the premises with Mr Kerr, steps were taken to challenge Mr O'Brien's impartiality.

[13] As a result of this challenge, both Mr Kerr and Mr O'Brien described the 18 June 2012 inspection of the premises: Mr Kerr in two affidavits, one filed in opposition to Kyburn's challenge to Mr O'Brien's impartiality under art 12 and the other in the High Court challenge under art 13(3); and Mr O'Brien in his determination rejecting Kyburn's challenge on 5 October 2012. Mr Kerr was not cross-examined on his affidavits.

[14] While there were some discrepancies in the description of the inspection, there is no dispute that Mr Kerr showed Mr O'Brien around the building. It appears that the actual inspection was relatively short (about 10 minutes visiting four floors). Both stated that Mr Kerr had said nothing of significance to Mr O'Brien.

[15] Mr O'Brien stated (in his determination):

> I explained to Mr Kerr what parts of the premises I wanted to see and I asked him to show and explain to me those parts of the fit out that were installed by the Landlord and to differentiate those parts of the fit out that had been undertaken by the Tenant at its cost. The inspection was typical in that Mr Kerr answered my questions as to fit out, showed me through several floors, including the sub-let floors, the bike locker and showers and the car parks. The only aspect of the premises I did not ask to see, but was shown to me by Mr Kerr related to the seismic strengthening of the structure.

[16] In the High Court art 13(3) challenge there was also conflicting evidence from Kyburn's lawyer and valuer, on the one hand, and Beca's valuer, on the other, about arbitrator valuer's inspection expectations and practices.

[17] On 15 October 2012 Mr O'Brien released his interim award fixing the current market rent and his costs, but reserving to the parties the right to apply for costs.

High Court decision

[18] After referring to the relevant evidence, Simon France J concluded:[6]

> There can be no doubt that it was an error on the part of the arbitrator to inspect the building in the presence of the person who was effectively [Beca's] representative in the proceedings, who was to be a witness on disputed matters, and who had already filed a brief.

[19] The Judge then addressed Kyburn's argument under art 12(2) that Mr O'Brien's contact with Mr Kerr went beyond an appearance of bias and suggested actual bias. After referring to authorities cited by the parties,[7] the Judge rejected the argument for reasons based on the need for the arbitrator to obtain access to the premises and the evidence of Mr Kerr and the arbitrator that "nothing of significance" had been said.[8]

[20] The Judge concluded:[9]

> Against a background where the parties had agreed their jointly appointed arbitrator would contact the tenant to be shown through the building, and given the arbitrator simply sought any available person to perform the task and that nothing of significance occurred during the visit, I conclude the fair minded lay observer would not in any way consider that what occurred creates any apprehension that the arbitrator would not be impartial. That being so, the art 12(2) challenge was rightly dismissed by the arbitrator. It also follows that none of the grounds provided in art 34 for setting aside an award have been made out.

Kyburn's submissions

[21] For Kyburn, Mr Reed QC submitted that the High Court decision was erroneous because the Judge had not considered separately the application to set aside the arbitral award under art 34 on the ground that the arbitrator was in breach of the rules of natural justice in inspecting the premises with a representative of one party only. In particular, the Judge had not considered:

(a) the provisions of arts 18 and 24 which required the arbitrator to treat the parties equally, to give both parties notice of any property

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6 High Court decision, above n 1, at [32].
7 At [34]–[41].
8 At [42]–[47].
9 At [50].

inspection, and to communicate statements by one party to the other; or

(b) the exercise of the discretion conferred on the Court under art 34.

[22] Mr Reed submitted strongly, particularly in reliance on the decision in *Norbrook Laboratories Ltd v A Tank*,[10] that the arbitrator was guilty of misconduct in making contact with one party and that this was sufficient without more to justify the Court exercising its discretion to set aside the award in this case.

[23] In response to our request for further submissions on the issue whether there was an onus on an applicant for an order setting aside an award under art 34 to show that the breach of natural justice was material or the outcome would have been different but for the breach, it was submitted for Kyburn that to impose such an onus would be an unjustified gloss on the Act. Reliance was placed on the history of the legislation and relevant authorities.

Beca's submissions

[24] For Beca, Mr Neutze submitted that the Judge had not erred because:

(a) allegations of procedural unfairness in respect of the arbitrator's inspection of the premises with Mr Kerr did not add anything useful to the bias test which is a limb of natural justice invoked by art 34;

(b) it was relevant that the parties had chosen a valuer as arbitrator because he would be expected to inspect the premises;

(c) in the circumstances of this case the arbitrator's inspection in the presence of a Beca witness did not breach the rules of natural justice: the inspection occurred with the agreement of the parties; nothing material to the issues in the arbitration was discussed; and the inspection lasted only a short time; and

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[10] *Norbrook Laboratories Ltd v A Tank* [2006] EWHC 1055 (Comm).

(d) even if there had been a technical breach, the Court would not have exercised its discretion under art 34 to set aside the award.

[25] In response to our request for further submissions on the onus issue, it was submitted for Beca that there is an onus on an applicant for setting aside to show the breach was material or affected the outcome.

The statutory provisions

[26] As the submissions for the parties recognise, the crucial statutory provision is art 34 the relevant parts of which provide:

> **34 Application for setting aside as exclusive recourse against arbitral award**
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> (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—
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> …
>
> (b) the High Court finds that—
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> ...
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> (ii) the award is in conflict with the public policy of New Zealand.
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> (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 or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal. 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.
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> …
>
> (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—
>
> …
>
> (b) a breach of the rules of natural justice occurred—
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> (i) during the arbitral proceedings; or

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

[27] It is clear from this provision that recourse to the court is limited and, in the circumstances of the present case, requires:

(a) proof of a breach of the rules of natural justice; and

(b) the exercise of a discretion by the court.

[28] In interpreting and applying these requirements, it is also important to bear in mind the following factors:

(a) the Act is largely based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and approved by the General Assembly on 11 December 1985;[11]

(b) the purposes of the Act include encouragement of the use of arbitration as an agreed method of resolving commercial and other disputes and the redefinition and clarification of the limits of judicial review of the arbitral process and of arbitral awards;[12]

(c) it is no longer helpful to consider the approach in cases decided under earlier legislation;[13] and

(d) while the discretion in art 34 is of a wide and apparently unfettered nature, it must be exercised in accordance with the purposes and policy of the Act which emphasise the finality of arbitral awards and reduce the scope for curial intervention in accordance with the intentions of parties to arbitrations.[14]

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11 Sections 3, 5(b) and sch 1.

12 Section 5(a) and (d).

13 *Casata Ltd v General Distributors Ltd* [2006] NZSC 8, [2006] 2 NZLR 721 at [32]; *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2006] 1 AC 221 at [19].

14 *Carr v Gallaway Cook Allan* [2014] NZSC 75, [2014] 1 NZLR 792 at [66].

[29] When a breach of the rules of natural justice is alleged, other provisions may also be relevant.[15] Here Kyburn relies on arts 18 and 24(2) and (3).

[30] Article 18 provides:

> **18 Equal treatment of parties**
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> The parties shall be treated with equality and each party shall be given a full opportunity of presenting that party's case.

[31] Article 24(2) and (3) provides:

> **24 Hearings and written proceedings**
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> …
>
> (2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property, or documents.
>
> (3) All statements, documents, or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also, any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.
>
> …

A breach of the rules of natural justice?

[32] The specific issue in this case is whether the arbitrator was in breach of the rules of natural justice when he inspected the premises with a witness for one of the parties. This issue must be considered in the context of the rules of natural justice applicable to a rent review arbitration.

[33] In general terms the rules of natural justice require a decision maker to act impartially and to give parties a fair hearing.[16] In the arbitral context these common law obligations are reflected in the general terms of art 18 and the specific terms of art 24(2) and (3).[17]

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15 For example, art 26(2). See generally David Williams and Amokura Kawharu (ed) *Williams and Kawharu on Arbitration* (LexisNexis, Wellington, 2011) at [17.6.1]–[17.6.9].

16 Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thompson Reuters, Wellington, 2014) at [25.4]–[25.5]; and Graham Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at [13.01].

17 Williams and Kawharu, above n 15, at [17.6.1]–[17.6.9].

[34] In the context of a rent review arbitration parties who appoint a valuer as their arbitrator will expect the arbitrator to inspect the premises. Subject to the terms of the lease, a rent review arbitration requires the valuer to determine the rent for the premises which willing but not anxious parties would agree on.[18] To make this determination an arbitrator who is a valuer will wish to inspect the premises in order to better understand and evaluate the expert valuation evidence the parties are going to adduce.

[35] An inspection of the premises by a valuer arbitrator will therefore be an important part of the arbitral process. In terms of art 24(2) sufficient advance notice to the parties of the inspection will be required. In terms of art 24(3) any statement or information provided to the arbitrator by one party during the inspection must be communicated to the other party. These requirements reflect the obligation under art 18 to treat the parties equally.

[36] When these provisions are analysed in this way in this context, there is little doubt that the arbitrator in this case was in breach of the rules of natural justice when he inspected Aorangi House in the company of only Mr Kerr, a witness for one of the parties. While Kyburn had notice of the arbitrator's intention to inspect the premises, there is no evidence that Kyburn agreed to an inspection in the company of a Beca witness. Nor is there any evidence that an inspection of this nature is an accepted practice.

[37] In determining whether there was a breach of the rules of natural justice, it does not matter whether the inspection was long or short or whether anything of particular significance was said by Mr Kerr to the arbitrator. The fact remains that the inspection occurred without a representative of Kyburn and with Beca's representative, who had an opportunity to make statements to the arbitrator. That opportunity meant that there was a risk that adverse comments about the building may have been made by Mr Kerr. In these circumstances the arbitrator simply failed to treat the parties equally.

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[18] *Modick RC Ltd v Mahoney* [1992] 1 NZLR 150 (CA) at 155; and *Sextant Holdings Ltd v NZ Railways Corp* [1993] 2 NZ ConvC 191,556 at 191,560.

[38] The breach was exacerbated by the failure of the arbitrator to disclose that he had inspected the premises with Mr Kerr. This inevitably exposed the arbitral process to question.

[39] As Simon France J recognised,[19] judicial experience supports the view that considerable caution is required when conducting an inspection or view of this nature in order to ensure no unfairness, actual or perceived, arises.[20] It is well-established that a view should not be taken in the absence of the parties.[21]

[40] We therefore agree with Simon France J's conclusion that there was an error on the part of the arbitrator. In our view the error was a breach of the rules of natural justice in terms of art 34.

The exercise of the discretion

[41] A finding of a breach of the rules of natural justice does not mean that the arbitral award must be set aside. As already noted, the power of the court to set aside an award under art 34 is discretionary and will not be exercised automatically in every case.

[42] The discretion enables the court to evaluate the nature and impact of the particular breach in deciding whether the award should be set aside. The policy of encouraging arbitral finality will dissuade a court from exercising the discretion when the breach is relatively immaterial[22] or was not likely to have affected the outcome.[23] Similarly, an award may not be set aside when the costs and delays involved are disproportionate to the amount in dispute.[24]

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19 High Court decision, above n 1, at [33].

20 Evidence Act 2006, s 82.

21 Hodge Malek (ed) *Phipson on Evidence* (18th ed, Sweet & Maxwell, London, 2013) at [11-53]; Colin Tapper *Cross & Tapper on Evidence* (11th ed, Oxford University Press, New York, 2007) at 63; and John Dyson Heydon *Cross on Evidence* (8th ed, LexisNexis Butterworths, Chatswood, 2010) at [1290]–[1295].

22 *Sinke v Remarkable Residential Homes Ltd* HC Wellington CP274-98, 6 October 2000 at [24]; and *Caudwell v Gosling* HC Auckland CIV-2005-404-84, 9 May 2005 at [68].

23 *Downer Connect Ltd v Pot Hole People Ltd* HC Christchurch CIV-2003-409-2878, 19 May 2004 at [111]–[112]; *Asian Foods West City Ltd v West City Shopping Centre Ltd* HC Auckland CIV-2007-404-1215, 11 September 2007 at [31]; *D & M (Australia) Pty Ltd v Crouch Developments Pty Ltd* [2010] WASC 130 at [102]; and *Brunswick Bowling & Billiards Corp v Shanghai Zhonglu Industrial* [2009] HKCFI 94, [2011] 1 HKLRD 707 at [40]–[45].

24 *Hewitt v McKensey* [2003] NSWSC 1186 at [47] and [65].

[43] On the other hand, where the breach is significant and might have affected the outcome courts are inclined to set aside the award.[25] In some cases, the significance of the breach may be so great that the setting aside of the award will be practically automatic, regardless of the effect on the outcome of the award.[26] Examples include *TNT Bulkships Ltd*, where the arbitrator had circumvented the legal procedures that were agreed to be applied to the arbitration. The Judge found this to be a substantial and complete misunderstanding by the arbitrator of his role in the arbitration, as opposed to a casual breach or occasional error which may not have necessitated court intervention.[27]

[44] The approach of the High Court to the exercise of the discretion is conveniently summarised by *Williams and Kawharu on Arbitration*:[28]

> Use of the discretion enables the High Court to balance arbitral finality with the need to protect parties against seriously flawed arbitrations. To determine the consequence of an error, the court may take into account causation and materiality considerations. Thus, even if a ground for setting aside is present, the court may consider the magnitude of the defect and the extent to which it had or might have had an impact on the outcome of the dispute, and particularly whether the tribunal might have reached a different conclusion had it adopted the correct approach.

[45] As to whether there is an onus on a party complaining of a breach of natural justice to make out that its consequences are sufficiently material to warrant setting aside an award, we agree with the further submissions for Kyburn that the existence of such an onus is not supported by the history and policy of the legislation or case law. It is clear from the Model Law and the Law Commission report preceding the Act that it was intended to confer a wide discretion dependent on the nature of the breach and its impact rather than imposing an onus.[29]

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25 *Todd Petroleum Mining Co Ltd v Shell (Petroleum Mining) Co Ltd* HC Wellington CIV-2008-485-2816, 17 July 2009; *Shirley Sloan Pty Ltd v Merril Holdings Pty Ltd* [2000] WASC 99 at [28]–[36]; and *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39 (HKCFI) at 49.

26 *TNT Bulkships Ltd v Interstate Constructions Pty Ltd* [1987] NTSC 75 at [107]–[108]; *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763 at [68]–[69] and [131]; *Pacific China Holdings Ltd (in liq) v Grand Pacific Holdings Ltd* [2012] HKCA 200, [2012] 3 HKC 498 at [106].

27 *TNT Bulkships Ltd v Interstate Constructions Pty Ltd*, above n 26, at [107].

28 Williams and Kawharu, above n 15, at [17.2] (footnotes omitted).

29 Howard Holtzmann and Joseph Neuhaus *A guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law and Taxation Publishers, 1989) at 921–922; Law Commission *Arbitration* (NZLC 20, 1991) at [404]; and *Hewitt v McKensey*, above n 24, at [70].

[46] Cases in jurisdictions applying the Model Law do not support the existence of an onus. Instead the materiality of the breach and the possible effect on the outcome are treated as relevant factors.[30]

[47] We agree with the Hong Kong Court of First Instance and Court of Appeal in *Pacific China* to the extent that there is the ordinary onus or burden on the applicant to make out his or her case that the award should be set aside.[31] Contrary to the Hong Kong Courts, however, we would not elevate this to a legal requirement to show the outcome would be different had the breach not occurred.[32] No single factor is decisive or necessary for an award to be set aside. Sometimes, the breach will be sufficiently serious as to speak for itself. In other cases, the Court will need to consider the materiality of the breach and evaluate whether it was likely to have affected the outcome. Other factors may be relevant to the exercise of the discretion, such as the likely costs of holding a rehearing.

[48] Following this approach in the present case, we are satisfied that, while the arbitrator's breach of the rules of natural justice was significant, the risk that something was said by Mr Kerr to the arbitrator did not, in our judgment, have any material effect on the outcome of the rent review arbitration:

(a) the arbitral award correctly records the well-established legal principles the arbitrator intended to follow, including the need to focus on the best evidence of the current market rent derived from new open market leasing of other similar premises at the relevant time;

(b) following this approach, the arbitral award is based principally on the arbitrator's evaluation of the expert valuation evidence adduced by the

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30 *Sinke v Remarkable Residential Homes Ltd*, above n 22, at [24]; *Downer Connect Ltd v Pot Hole People Ltd*, above n 23, at [111]–[112]; *Caudwell v Gosling*, above n 22, at [68]; *Asian Foods West City Ltd v West City Shopping Centre Ltd*, above n 23, at [31]; *Todd Petroleum Mining Co Ltd v Shell (Petroleum Mining) Co Ltd*, above n 25, at [80]; *Shirley Sloan Pty Ltd v Merril Holdings Pty Ltd*, above n 25, at [28]–[36]; *Hewitt v McKensey*, above n 24, at [65]–[73]; *D & M (Australia) Pty Ltd v Crouch Developments Pty Ltd*, above n 23, at [101]–[104]; *Paklito Investment Ltd v Klockner East Asia Ltd*, above n 25, at 49; *Brunswick Bowling & Billiards Corporation v Shanghai Zhonglu Industrial*, above n 23, at [29]–[40] and [69]–[75].

31 *Pacific China Holdings Ltd (in liquidation) v Grand Pacific Holdings Ltd* [2011] HKCFI 424, [2011] 4 HKLRD 188 at [88].

32 Compare *Pacific China* (HKCFI), above n 31, at [89]–[102]; and *Pacific China Holdings Ltd (in liq) v Grand Pacific Holdings Ltd* (HKCA), above n 26, at [106].

parties, including Kyburn's valuers, and focussed on the matters not agreed between the valuers, including the influence on the rent of the building's 5 Green Star rating, the standard of the building, the influence of its seismic rating and the best evidence on which to base the review;

(c) in assessing the matters not agreed on, the arbitrator relied on the evidence of the valuers given in their statements and at the hearings when they were cross-examined;

(d) the award records that the arbitrator inspected the premises and the comparable evidence (other premises) prior to the hearing, but makes no other reference to the inspection or to any information provided by Mr Kerr during the inspection;

(e) matters relied on by Kyburn relating to an error by the arbitrator as to views from level 6 of the premises and the issue of paintwork had no impact on the outcome; and

(f) the award contains an otherwise accurate physical description of the premises.

[49] Significantly, there is no suggestion by Kyburn that the arbitrator's award discloses any error on his part as to the relevant legal principles, the focus on the best market evidence or his approach to the evaluation of the evidence from the valuers relating to the relevant issues. Kyburn's claim based on the arbitrator's error in inspecting the premises with Mr Kerr is essentially a collateral attack on an otherwise unexceptional rent review award.

[50] We do not accept Mr Reed's submission that the decision in *Norbrook Laboratories Ltd* should lead to a different conclusion. In *Norbrook* the arbitrator had breached the principle of equality of treatment on several occasions by unilaterally adopting a procedure to the advantage of one party, releasing that party from having to pay any proportion of his fees and seeking and receiving evidence in

secret and without disclosure to the parties.[33] Those breaches created a real possibility that the arbitrator was biased.[34] Mr O'Brien's breach of natural justice here is, in contrast, relatively immaterial.

[51] For these reasons we have concluded that this is not a case where the discretion to set aside the award under art 34 ought to have been exercised by the High Court or that Simon France J erred by not exercising it.

Arbitrator's prior relationship with Beca witness and his firm

Factual background

[52] The second ground of appeal relates to an undisclosed business relationship between Mr Veale, a Beca witness, and the arbitrator, which was discovered by Kyburn in about May 2013.

[53] Kyburn discovered that between 2004 and 2010 Mr O'Brien and his company O'Brien Property Consultancy Ltd had been engaged as an independent contractor to manage the Greater Wellington Regional Council's property portfolio. This role required Mr O'Brien to engage valuation firms to provide services. Between 2006 and 2010 Mr O'Brien retained two valuation firms, one of which was Telfer Young which was engaged to carry out 28 valuations. Mr Veale, a Telfer Young valuer, carried out the instructions on 16 of those occasions.

[54] There is no dispute that Mr O'Brien did not disclose this relationship with Telfer Young and Mr Veale prior to the Kyburn/Beca arbitration or at any time prior to the issue of his interim award on 15 October 2012.

[55] Mr Aharoni gave evidence in the High Court that if Kyburn had been aware of the relationship he would not have agreed to Mr O'Brien's appointment as arbitrator.

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33 *Norbrook Laboratories Ltd v A Tank*, above n 10, at [129], [138] and [142].
34 At [156].

High Court decision

[56] Simon France J rejected Kyburn's appeal under art 13(3) challenging the arbitrator's impartiality and Kyburn's application under art 34 for an order setting aside his award on the grounds that both were out of time.

[57] The art 13(3) appeal was out of time because the arbitrator, who had already issued his award, could do nothing about it after the event.[35]

[58] The art 34 application was out of time because it had not been made within the three month time limit prescribed by art 34(3) and could not be saved by treating this ground as an amendment to the earlier art 34 application relating to the arbitrator's inspection with Mr Kerr.[36] The new pleading concerning Mr Veale was a new cause of action and out of time.

Kyburn's submissions

[59] For Kyburn, Mr Morten submitted that the High Court Judge had erred because the amended application had not introduced a new cause of action. Both applications relied on breaches of established principles of natural justice and the same articles in sch 1 of the Act. The allegations relating to Mr Veale, although involving new facts, particularise those existing grounds, without introducing a new cause of action.

[60] In support of this submission, Mr Morten relied on the principles for determining whether amended pleadings raise a fresh cause of action set out in *McGechan on Procedure* and the authorities there cited.[37]

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35 High Court decision, above n 1, at [61]–[69].

36 At [70]–[74].

37 Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR7.77.04]; *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 at [61]; *Commerce Commission v Visy Board* [2012] NZCA 383 at [146]–[147]; and *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 (CA).

Beca's submissions

[61] For Beca, Mr Neutze submitted that the amended ground based on prior dealings between the arbitrator and a different witness (Mr Veale) was an attempt to introduce the equivalent of a new cause of action which was time barred.

A new cause of action?

[62] There is no dispute that unless the ground based on the arbitrator's prior relationship with Telfer Young and Mr Veale is able to be classified as an amendment to the existing ground based on the arbitrator's inspection with Mr Kerr rather than as a new cause of action it is was time barred by art 34(3).

[63] As Mr Morten recognised, the relevant principles are conveniently summarised by this Court in *Transpower New Zealand Ltd v Todd Energy Ltd* as follows:[38]

> (a) A cause of action is a factual situation the existence of which entitles one person to obtain a remedy against another.
>
> (b) Only material facts are taken into account and the selection of those facts is made at the highest level of abstraction.
>
> (c) The test of whether an amended pleading is "fresh" is whether it is something "essentially different". Whether there is such a change is a question of degree. The change in character could be brought about by alterations in matters of law, or of fact, or both.
>
> (d) A plaintiff will not be permitted, after the period of limitation has run, to set up a new case "varying so substantially" from the previous pleadings that it would involve investigation of factual or legal matters, or both, different from what have already been raised and of which no fair warning has been given.

[38] *Transpower New Zealand Ltd v Todd Energy Ltd*, above n 37, at [61].

[64] Applying these principles here, we have little doubt that the new ground was essentially different from the existing ground. As Simon France J pointed out, while both grounds alleged breaches of the rules of national justice, they were otherwise wholly different, involving "different times, different personnel, different actions and a different form of breach."[39] The differences are also highlighted by the fact that the new ground would involve further investigation of factual matters relating to the nature and extent of the prior relationship between the arbitrator, Telfer Young and Mr Veale, as well as an evaluation in that context of whether there was a breach of the rules of natural justice.

[65] We have therefore concluded that Simon France J did not err in respect of this ground.

Result

[66] Accordingly, the appeal is dismissed.

[67] As the parties were agreed that costs should follow the event, Kyburn must pay to Beca costs for a standard appeal on a band A basis with usual disbursements.

Solicitors:
Luke Cunningham Clere, Wellington for Appellant
Brookfields, Auckland for Respondent

[39] High Court decision, above n 1, at [73].