IN THE COURT OF APPEAL OF NEW ZEALAND

CA171/03

BETWEEN	METHANEX MOTUNUI LTD & METHANEX WAITARA VALLEY LTD First And Second Appellants
AND	JOSEPH SPELLMAN First Respondent
AND	HER MAJESTY'S ATTORNEY GENERAL IN AND FOR NEW ZEALAND Second Respondent
AND	TODD PETROLEUM MINING CO LIMITED Third Respondent
AND	SHELL PETROLEUM MINING CO LIMITED Fourth Respondent
AND	ENERGY EXPLORATION NEW ZEALAND LIMITED Fifth Respondent
AND	ENERGY PETROLEUM INVESTMENTS LIMITED Sixth Respondent
AND	MAUI DEVELOPMENT LIMITED Seventh Respondent
AND	NATURAL GAS CORPORATION Eighth Respondent
AND	CONTACT ENERGY LIMITED Ninth Respondent

Hearing: 23-24 February 2004

Coram: McGrath J
William Young J
O'Regan J

Appearances: J W Turner, L A O'Gorman and M Kilday for First and Second Appellants
W M Wilson QC for First Respondent
J S Kós, C J Mathieson and J K Goodall for Second Respondent
M G Colson for Third to Seventh Respondents
N MacFarlane for Eighth Respondent
T Sissons and H Wallwork for Ninth Respondent

Judgment: 17 June 2004

JUDGMENT OF THE COURT

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Introduction

[1] This is an appeal from a judgment of Fisher J (reported at [2004] 1 NZLR 95) in which he granted applications made by the second to ninth respondents to strike out the claims brought by the appellants (to which we refer collectively as "Methanex") against the first to ninth respondents.

[2] The claim arose from an arbitration process conducted by the first respondent, Mr Spellman, to determine the economic recoverable reserves ("ERR") of the Maui gas field. Methanex claimed that it was a party to that arbitration and sought review of the arbitrator's decision, on the basis that the arbitrator had conducted the arbitration in a manner which was contrary to the rules of natural justice. Fisher J found that Methanex had established an arguable case that it had party status, but that it had not established an arguable case that it was entitled to review on the basis of breach of the rules of natural justice.

[3] Methanex has appealed to this Court against that decision. The second to ninth respondents have cross-appealed against Fisher J's finding on the party issue. The first respondent, Mr Spellman, was represented by in this Court by Mr Wilson QC who, on the first respondent's behalf, abided the decision of the Court.

Background

[4] We set out the background to the dispute, in similar terms to the judgment of Fisher J, as no issue was taken with his summary.

Maui Gas Contract

[5] The Maui Gas Contract was entered into in 1973. The third to sixth respondents now comprise the selling party under that contract (we will refer to them here collectively as "Seller") and the seventh respondent, Maui Development

Limited ("MDL") is a services company for Seller. Under the Maui Gas Contract, Seller sells to the Crown gas extracted from the Maui gas field. The Crown's entitlement to purchase gas under the Maui Contract can be adjusted according to the level of ERR, and Article 6 of the Maui Gas Contract provides for redetermination of the ERR from time to time.

Downstream gas users

[6] The Crown has entered into a number of contracts to sell Maui gas which it has purchased under the Maui Gas Contract. The buyers under those contracts are eighth respondent, Natural Gas Corporation of New Zealand Limited ("NGC"), the ninth respondent, Contact Energy Limited ("Contact"), and Methanex. Methanex, NGC and Contact are referred to in the pleadings as "downstream gas users" or "DGUs" and we will use the same terminology.

[7] Under the contracts between the Crown and the individual DGUs ("DGU agreements"), all of the Crown's entitlement to gas from the Maui Gas Contract is on-sold to the DGUs. Each DGU's entitlement is expressed as a percentage of the Crown's entitlement under the Maui Gas Contract. The approximate percentages of the Crown's entitlement sold to each DGU is as follows:

Contact	42.8%
NGC	27.5%
Methanex	29.7%.

[8] The DGU agreements are drafted to provide entitlements to the DGUs which mirror as closely as possible the Crown's entitlements under the Maui Gas Contract, bearing in mind that there are a number of DGUs and, therefore, DGU agreements.

Redetermination of ERR

[9] Because of the alignment of the entitlements of the DGUs to gas under their

DGU agreements with the Crown to the Crown's entitlements under the Maui Gas Contract, any redetermination of ERR under the Maui Gas Contract affects the entitlement of each DGU under its DGU agreement. The DGU agreements mirror as far as possible the Crown's entitlements and liabilities under the Maui Gas Contract, and this was an explicit intention of the DGU agreements.

[10] Methanex operates two methanol producing plants in New Zealand; one at Motunui and one at Waitara. Methanex requires supplies of gas under its DGU agreement with the Crown for the purposes of the operation of those plants. It cannot obtain sufficient gas from other sources and, even if it could, the current market price of gas is higher than the price fixed by its DGU agreement. Both of these factors mean that Methanex has a real interest in the outcome of any ERR redetermination, and an incentive to ensure that the ERR is determined at the highest possible level. On the other hand, Seller has a corresponding incentive to minimise the ERR.

[11] Article 6 of the Maui Gas Contract provides that Seller and the Crown will meet at intervals of not less than two years to make a redetermination of ERR. Either party can trigger this process if there is not agreement. Provision is made for Seller to provide to the Crown such data and information as is necessary for the Crown to re-assess the ERR and Seller's own assessment of ERR. ERR can then be determined by agreement or, in the absence of agreement, by reference to an independent expert under Article 16. Article 16 provides for a process of expert determination but under Article 16.1(g) the parties may agree that the expert determination be undertaken by an arbitration under (now) the Arbitration Act 1996 ("the Act").

[12] Each of the DGU agreements contains provisions regulating the roles of the DGUs and the Crown in the event of a redetermination of ERR. We will refer to the DGU agreement for Methanex Motunui Limited, but we were told all DGU agreements are the same in all material respects. Clause 6.8 deals with the situation where the redetermination of ERR is referred to expert determination. That clause provides for the Crown and the DGUs to negotiate a hearing agreement dealing with the manner in which the expert determination process will be undertaken, and also

provides that the participation of the Crown and the DGUs in the redetermination process will be undertaken strictly in accordance with that hearing agreement. The Crown, in its capacity as Buyer under the Maui Gas Contract, will present arguments determined between the Crown and the DGUs before the hearing, and neither the Crown, in its own capacity, nor any DGU will otherwise intervene in such a hearing. We note in passing that the documents often refer to the Crown as "Buyer" and, where appropriate, we will do the same.

[13] Seller triggered the redetermination of ERR under the Maui Gas Contract in December 2001 and this in turn triggered the rights of the DGUs under the DGU agreements. There was then a dispute between Seller, the Crown, and the DGUs, over the adequacy of the data and information provided by Seller and other procedural issues. Methanex commenced proceedings in the Wellington High Court against the second to ninth respondents, alleging failure to disclose sufficient information on the part of Seller and procedural failings on the part of the Crown. We will refer to these proceedings as the Wellington proceedings.

[14] Under cl 16.1.2(c), the DGU is entitled to require an assignment of the Crown's rights in relation to any proceedings brought by the Crown against Seller under the Maui Gas Contract in certain circumstances. Methanex had claimed that it was entitled to exercise this right and that was also an issue in the Wellington proceedings.

Settlement Agreement

[15] On 20 June 2002 the Wellington proceedings were settled. The terms of the settlement were recorded in an agreement between Methanex and the second to ninth respondents dated 20 June 2002 ("the Settlement Agreement"). Under the Settlement Agreement the parties agreed to a process for the conduct of the independent expert's determination of the ERR under the Maui Gas Contract. The key aspects of the Settlement Agreement for present purposes are summarised below.

[16] Clause 1 provided for the selection of the expert who would undertake the determination of the ERR ("the Independent Expert") from one of three named consultancies, including the first respondent's firm. Ultimately the first respondent was selected in accordance with that clause.

[17] Clause 2 provided for the provision of information by Seller. It allowed the Independent Expert to require Seller to provide more information than it had already provided to the Crown, and Seller agreed to comply with any such requirement by the Independent Expert.

[18] Clause 5 provided for the process to be followed in connection with the expert determination of ERR. The material parts of that clause provided as follows.

> 5 The Crown, Methanex, NGC and Contact are to seek to agree a Hearing Agreement by 5pm on 12 July 2002. The Hearing Agreement may contain any provision to which all of those persons agree, whether or not provided for in clause 6.8.1 of Contact's agreement with the Crown (and equivalent provisions of other agreements). If by that time they have not agreed to, and executed, a Hearing Agreement then, immediately after 5pm on 12 July 2002, a Hearing Agreement will come into effect between them on the following terms:
>
> 5.1 The Independent Expert process is to be conducted as an arbitration under the Arbitration Act 1996, on the following agreed basis:
>
> 5.1.1 The Independent Expert is to determine the timetable and procedure for the arbitration (including, for example, whether to hold an oral hearing, to redetermine Economic Recoverable Reserves 'on the papers' or to adopt other procedures) but subject always to the rest of this paragraph 5.1. Buyer's counsel will tender any submission that any of the Buyer, Methanex, NGC or Contact wishes to make regarding process.
>
> 5.1.2 The Independent Expert's determination of Economic Recoverable Reserves is to proceed in 2 phases, namely:
>
> (a) whether the data and information made available by Seller to Buyer before the date of the Independent Expert's appointment is all the data and information that may reasonably be required to assess the Economic Recoverable Reserves ('phase (a)'). If the Independent Expert decides that further data and information is reasonably required, the Independent Expert is promptly to request it under paragraph 2; and
>
> (b) the determination of Economic Recoverable Reserves.

…

5.1.4 Subject to paragraph 5.2, the experts referred to in that paragraph may make submissions to the Independent Expert in each of the phases referred to in paragraph 5.1.2.

5.1.5 The timetable for the Independent Expert process is to be, or to be determined by the Independent Expert, as follows:

(a) Seller is to provide the Independent Expert with all the data and information which Seller has provided to Buyer in connection with the current redetermination of Economic Recoverable Reserves as soon as practicable after the date of the Independent Expert's appointment as such ('date of appointment'), being the data and information provided by Seller to Buyer from and including the 1998/1999 data pack and up to the date of appointment.

(b) The parties expect that the Independent Expert will make its decision in respect of the issue to be considered in phase (a) of paragraph 5.1.2 ('phase (a)') within 30 days of the date of appointment.

(c) The parties are respectively to make their submissions to the Independent Expert in connection with phase (a) within 7 days of the date of appointment.

(d) The parties expect that the Independent Expert will complete the redetermination of the Economic Recoverable Reserves, and deliver its award as provided in paragraph 5.1.10, within 120 days of the date of appointment.

(e) The parties are respectively to make any submissions to the Independent Expert in connection with the timetable and procedure of the Independent Expert process (in so far as not provided for in this paragraph 5.1) within 7 days after the Independent Expert calls for them.

(f) Promptly after making a decision in connection with phase (a), the Independent Expert is (subject to paragraph (d) above and paragraph 5.5) to determine the timetable and procedure for the remainder of the Independent Expert process – the redetermination of the Economic Recoverable Reserves. In particular:

(i) there is to be a reasonable opportunity to make submissions, including in response to any issues raised by the Independent Expert, but

(ii) no more than 21 days is to be allowed for the preparation and delivery to the Independent Expert of submissions, including substantive submissions, from the date the Independent Expert calls for them;

(iii) no more than 14 days (commencing the day of the end

of the relevant submission period) is to be allowed for the preparation and delivery to the Independent Expert of submissions in reply; and

(iv) no more than 7 days (from the date it is provided) is to be allowed for submissions on the draft decision referred to in paragraph 5.1.10.

(g) Seller and, subject to this paragraph 5.1 and paragraph 5.4, Buyer may participate in any hearing or meeting before the Independent Expert and have like rights to present submissions and, subject to paragraph 5.1.9, cross–examine.

(h) The parties to the Independent Expert process are Buyer and Seller and, without limiting paragraph 5.6, Methanex, Contact and NGC have no right to have their own legal representatives participate in a hearing or meeting before the Independent Expert.

5.1.6 The Independent Expert is entitled to use its own expertise and judgment in redetermining the Economic Recoverable Reserves as long as it hears or takes into account the expert's submissions referred to in paragraph 5.1.4 (provided in accordance with paragraph 5.2) and has regard to the data and information supplied by Seller to Buyer prior to the date of the Independent Expert's appointment and such other data and information as the Independent Expert requires and receives under paragraph 2.

…

5.1.10 The Independent Expert's decision is to include the number of PJs at which the Independent Expert determines the Economic Recoverable Reserves, the allocation of those reserves between reservoirs and brief reasons for the determination and allocation. Before finalising and releasing that decision the Independent Expert is to provide the parties with an up–to–date draft of that decision, and paragraph 5.1.5(f)(iv) is to apply.

5.2 The experts appointed by Methanex, NGC and Contact respectively for the purposes, among others, of assessing the Economic Recoverable Reserves may make submissions to the Independent Expert, as expert witnesses called by Buyer. Those submissions are to be made in writing and, if the Independent Expert requires, in person, are to be provided to the other parties to this agreement at the same time as they are provided to the Independent Expert and are to include any supporting data and information, models and associated software and must be made according to the timetable decided by, and procedure chosen by, the Independent Expert as provided in paragraph 5.1. At an oral hearing the experts appointed by Methanex, NGC and Contact respectively to make oral submissions may not include their respective legal advisors nor exceed 3 in number.

. . .

5.4 Buyer's counsel is to take a neutral stance in relation to the respective views of the experts appointed by Methanex, NGC and Contact and is not to advocate for any particular position either on the part of Buyer or of Methanex, NGC or Contact (or any of them) and:

5.4.1 Buyer's counsel is to present any submissions on process referred to in paragraph 5.5.1;

5.4.2 Without limiting paragraph 5.1.9 if the Independent Expert requests cross–examination on any particular point or issue, Buyer's counsel is to conduct that cross–examination by asking the questions given to him or her for the purpose by each of Methanex, NGC and Contact.

…

5.6 Clauses 6.8.1. – 6.8.7 of Contract's agreement with the Crown (and the equivalent provisions in Methanex's and NGC's agreements with the Crown) are not to apply. Clause 6.8.8 (and the equivalent provisions) do apply on the basis that the arguments referred to in the second sentence of clause 6.8.8 are those referred to in paragraph 5.4 above.

[19] Clause 6 provided:

6 Seller and Buyer agree that the Independent Expert process is to be conducted as an arbitration under the Arbitration Act 1996 on the basis set out in paragraph 5.1. Buyer and Seller agree that there shall be no appeal against any decision of the Independent Expert except if the decision was induced or affected by fraud or corruption. None of the Seller, Buyer, Contact, Methanex and NGC will otherwise challenge the number of PJ at which the Economic Recoverable Reserves are quantified.

[20] Clause 10 provided:

10 CP 106/02 [the Wellington proceedings] is dismissed by consent order. Methanex agrees not to advance any claim on the same or similar grounds. Methanex is not to seek any Court order, whether by way of appeal or review or otherwise, that would have the effect of delaying the Independent Expert process, except as permitted by the second sentence of paragraph 6. Costs will lie where they fall as at the date of dismissal subject to Methanex paying the costs awarded on the interim injunction application.

[21] Mr Spellman was appointed as Independent Expert and an Auckland lawyer was appointed as Buyer's counsel under cl 5.3 of the Settlement Agreement. The letter appointing Mr Spellman ("the Appointment Letter") was on the letterhead of MDL and was signed on behalf of Seller and the Crown, as well as by Mr Spellman. Paragraphs 3-6 of the letter said:

3. There is a distinction between the parties to the arbitration and the parties to the Settlement Agreement.

4. The parties to the arbitration are the parties who presently hold the rights and obligations under the Maui Gas Contract. They are:

   (a) "Seller": Todd Petroleum Mining Company Limited, Shell (Petroleum Mining) Company Limited, Shell Exploration NZ Limited and Energy Petroleum Investments Limited; and

   (b) "Buyer": Her Majesty the Queen in right of New Zealand (also called "the Crown").

5. The parties to the Settlement Agreement are Seller, Seller's agent (Maui Development Limited), Buyer and Buyer's downstream gas purchasers:

   (a) Methanex Motunui Limited and Methanex Waitara Valley Limited:

   (b) Natural Gas Corporation of New Zealand Limited:

   (c) Contact Energy Limited.

6. This letter, the Settlement Agreement and the relevant provisions of the Arbitration Act 1996 (NZ) comprise the arbitration agreement between the parties to the arbitration.

[22] In view of the clear terms of cl 6 of the Settlement Agreement, there is no doubt that the Independent Expert was required to undertake an arbitration process, not an expert determination. We will refer to the process as "the ERR arbitration".

ERR arbitration process

[23] The ERR arbitration process was conducted through written submissions, supplemented by electronic data and models. The participants were required to provide and exchange submissions by set deadlines, and to file submissions in reply within 14 days thereafter. Those of Methanex, including submissions from its expert adviser, were provided to the Crown's counsel who passed them on to the Independent Expert in accordance with the Settlement Agreement. The Crown did not appoint any expert to act on its behalf in the redetermination process and made no technical submissions of its own concerning the ERR. Indeed no legal counsel made representations to the Independent Expert as to the determination of the ERR.

[24] The process proceeded in the two phases provided for in cl 5.1, with phase (a) dealing with the adequacy of data supplied by Seller. The Independent Expert issued a ruling on 9 September 2002 requiring Seller to provide further information. In that ruling, he foreshadowed the possibility that he would generate his own interpretations and models in determining the ERR, noting:

> The Independent Expert will use its technical capabilities, expertise and judgment in determining its estimate of Economic Recoverable Reserves. In this process, the Independent Expert may generate independent interpretations and models on any and all aspects of the Maui Field technical dataset, using software determined by the Independent Expert to be appropriate for the application. The Independent Expert will, at all times during this process, take into account the submissions and will have regard for the data and information supplied by the Seller and Buyer during the course of the Independent Expert proceedings.

[25] The Independent Expert determined that he did not need to hold an oral hearing in relation to phase (b). Submissions were made by Seller and the DGUs (acting through the Crown). The submissions included reservoir simulation models, on which the other parties then had an opportunity to comment. The importance of these models is described in an affidavit by Mr Watson, the commercial manager for Methanex:

> 3.3 Modelling involves mapping the field structure, estimating the rock and fluid properties and creating a complex digital computer model of the reservoir over time. The computer-based reservoir simulation models, which are often referred to as dynamic models, are run over the life of the field from the start of production to the present day to investigate how well the models are able to replicate past performance, as characterised by matters including historical production rates. Once a reservoir simulation model has achieved an appropriately accurate history match, there can be some confidence in the model's ability to forecast how a field, such as the Maui gas field, will perform in the future. This can then be used as the basis for the estimation of ERR.

[26] Because it was the best guide to future performance, the Independent Expert's selection or creation of a model was crucial to the ERR redetermination.

[27] After he had received submissions in reply on phase (b), the Independent Expert requested further information from Seller on 17 October 2002. This further information was provided by Seller and was passed on to Methanex by Buyer. Methanex then requested that counsel for Buyer forward to the Independent Expert a letter from Methanex asking for the opportunity to make additional submissions on

that further data. Counsel for Buyer did not do this (on instructions from the Crown) but did inform the Independent Expert of Methanex's request. The Independent Expert said he did not consider it necessary to request additional submissions. Methanex requested the Independent Expert to reconsider that decision but he declined to do so.

[28] The Independent Expert released his draft ERR determination for comment on 13 December 2002. He sought submissions on the draft by 20 December 2002. In the draft determination he indicated that he had generated the foreshadowed interpretations and models on technical and economic aspects of the ERR redetermination.

[29] On 18 December 2002, Methanex wrote to Buyer's counsel advising that the ERR draft determination did not, in its view, provide adequate reasons, and requesting production of the Independent Expert's reservoir model. This letter was forwarded to the Independent Expert. He responded on 19 December 2002 to the effect that its production would be outside the terms of the Settlement Agreement and that he could not provide the reservoir simulation model without the agreement of the other parties, which was not forthcoming.

[30] On 20 December 2002, Methanex provided a submission in reply to the Independent Expert's draft determination. In that submission it repeated its complaints about the failure to provide the Independent Expert's model for comment, asserting that by not disclosing the model the Independent Expert was in breach of his obligations under the Arbitration Act and the Settlement Agreement.

[31] On 6 February 2003, the Independent Expert delivered his final decision on the determination of the ERR and submitted it to the participants including Methanex. It was not materially different from the draft determination issued earlier, though it did address some issues raised by Methanex and others in relation to the draft determination. The Independent Expert confirmed that he had relied upon his own reservoir simulation model and various interpretations he had drawn from it in reaching his ERR determination. Of the overall process he said:

> 3.1 OVERALL PROCESS
>
> In accordance with Paragraph 5.1.1 of the Settlement Agreement, "*The Independent Expert is to determine the timetable and procedure for the arbitration.*" The IE determined that the proper performance of its function was best achieved with an independent analysis of the raw data, while at the same time considering the submissions and data provided by all parties. The parties had several opportunities to make submissions throughout the project: Phase A Submissions, Phase B Submissions, Submissions in Reply of Phase B Submissions, and Submissions on the Draft Decision. The number of submissions, the number of items in the submissions and the complexity of the items raised by the parties significantly increased the complexity of the evaluation process. The IE considered all of the submissions in relation to the raw data and found several critical items of uncertainty that required investigation. The IE determined a method to adjust the models submitted in order to address the areas of interpretation differences. Because several of the items are interrelated, the IE proceeded with an independent analysis to test the various parties' positions while at the same time creating the necessary procedures to estimate ERR.

[32] The Independent Expert then went on to discuss areas in which new reservoir models or adjustment models were created.

[33] The ERR determination by the Independent Expert was that the ERR was 3561.8 PJs, which meant that the remaining reserves of the Maui field as at 1 October 2002 were 405.1 PJs. Methanex says that this understated the actual ERR figure by 378 PJs which, given the remaining reserves, is very significant. We were told the commercial impact of the ERR determination on Methanex's businesses is extremely serious.

High Court proceedings

[34] Methanex then commenced new proceedings in the High Court at Auckland in which it contended that the Independent Expert's process had involved a denial of natural justice in three respects, which Fisher J summarised as follows:

> (a) Methanex was denied the opportunity to respond to the supplementary information and data provided by Seller to the Independent Expert on 25 October 2002;

(b) Methanex was denied the opportunity to respond to the reservoir simulation model and associated assumptions created and adopted by the Independent Expert for the purpose of his decision; and

(c) The Independent Expert failed to give adequate reasons for his award, and in particular failed to explain his reservoir simulation model and associated assumptions.

[35] Methanex sought orders under Articles 34(2) and 34(4) of the First Schedule to the Act remitting the award to the Independent Expert to recommence the arbitration, provide the model to it and allow it to make further submissions on the draft award prior to the issue of a fresh reasoned award.

[36] The second to ninth respondents applied to the High Court to strike out Methanex's proceedings, and were successful in that Court.

[37] The respondents contended in the High Court that Methanex did not have a tenable case because it was not a party to the arbitration and did not otherwise have standing to seek the relief which it sought in the High Court. In the alternative they argued that Methanex had contracted out of the right to review of the Independent Expert's process, and that, in any event, that process had not involved any denial of natural justice.

Judgment of Fisher J

[38] Fisher J undertook an extensive analysis of the relevant definitions and provisions of the Act. As to the criteria for determining whether a person was a party to an arbitration, he summarised the conclusions he reached in para [101] of his judgment as follows:

> [101] Without attempting any exhaustive formula, it seems to me to follow that for the purposes of the Arbitration Act, A will be a "party" to the arbitration of a dispute that has already arisen at least in circumstances where the following elements are satisfied:
>
> (a) A is party to a dispute, in the sense that A and at least one other person have expressed, and at the time of the submission to arbitration

> continue to maintain, conflicting views or positions the resolution of which would or may be of legal consequence. Alternatively A has an interest in a question which, left unresolved, might give rise to a dispute of that nature between A and at least one other person in the future. For the remainder of this summary "dispute" will be taken to include questions of that kind.
>
> (b) The dispute turns on the question whether one person (an actual or potential claimant) is entitled to rights which could be the subject of a legal remedy against another person (an actual or potential defendant) bearing in mind that A need not necessarily be the actual or potential claimant or the actual or potential defendant.
>
> (c) The resolution of the dispute would be of legal consequence.
>
> (d) There is an agreement submitting the dispute to arbitration. The dispute submitted must be the dispute between A and another individual but the subject-matter of the dispute may be the question whether some other actual or potential claimant is entitled to rights which could be the subject of a legal remedy against some other actual or potential defendant.
>
> (e) A and one or more of the other individuals with whom A has the dispute are parties to the agreement.
>
> (f) The agreement confers on A the express or implied right to participate in the arbitration process.
>
> (g) The agreement provides that any resultant award will be binding on A.

[39] Applying that analysis to the present case, Fisher J concluded that Methanex had established an arguable case that it was a party to the ERR determination for the purposes of the Act, and that it therefore had standing to bring the proceedings. He therefore declined to strike out the proceedings on that ground.

[40] The Judge then turned to consider the question as to whether Methanex had contracted out of its right to review for breach of natural justice under cls 6 and 10 of the Settlement Agreement. He found that Methanex had purported to do so. But he concluded on this issue that an attempt to exclude by contract any right to review for breach of natural justice must be regarded as incompatible with the intention of the parties to have their dispute determined by an arbitration, conducted under the Act. Accordingly, he concluded that Methanex was entitled to apply for review of the award.

[41] Fisher J then considered the contention by Methanex that the Independent Expert had breached the rules of natural justice in the conduct of his determination of

ERR. He concluded that the extent of the natural justice rights accorded to Methanex in relation to this arbitration was confined by the express terms of the Settlement Agreement to the minimum required to keep the ERR process as an arbitration under the Act rather than an expert determination and thus limited to those provided in Articles 18 and 24(3) of the First Schedule to the Act.

[42] Applying those Articles to the alleged breaches of natural justice pleaded by Methanex, Fisher J concluded that:

> (a) There was no arguable case that Methanex was denied an opportunity to respond to the supplementary information and data provided by Seller to the Independent Expert on 25 October 2002. Methanex did not take issue with that finding in this Court.
>
> (b) The Independent Expert had created his own reservoir model and populated it with his own estimates and factual assumptions. He did not expose every detail of his work for comment by the parties. However, in the absence of any allegation that the Independent Expert derived any of these details from an undisclosed expert report or evidentiary document, there was no arguable case that Methanex was denied a proper opportunity to respond to undisclosed expert reports or evidentiary documents received by the Independent Expert. Methanex strongly disputed that conclusion in this Court.
>
> (c) There was no arguable case that the Independent Expert breached the natural justice requirements of the Act in failing to give adequate reasons for his award. Fisher J found that the Independent Expert had given adequate reasons (26 pages plus extensive appendices) and was, in any event, required to provide only "brief reasons" under cl 5.1.10 of the Settlement Agreement. To the extent that the criticism of his reasons involved a criticism of his failure to include within his reasons disclosure of the reservoir simulation model and its assumptions, that was effectively a repetition of the second ground, which had already been rejected. Methanex did not contest the finding that the Independent Expert had given adequate reasons in this Court.

[43] His conclusion on this aspect of the case was that Methanex had not made out an arguable case. His reasons for these conclusions will be examined more closely in paras [120] – [128] of this judgment.

[44] Fisher J therefore concluded that the claim should be struck out.

Issues

[45] Methanex appealed against the whole of the judgment of Fisher J. The second to ninth respondents cross-appealed against Fisher J's finding on the party issue. It is convenient to deal with the cross-appeal issue first.

[46] The issues which require determination are:

(a) The issue raised by the cross-appeal, namely was Methanex a party to the ERR arbitration?

(b) If Methanex was not a party to the ERR arbitration, did it nevertheless have standing to challenge the award on natural justice grounds?

(c) Assuming Methanex does have standing to seek review, has it an arguable case based on its allegation of breach of the rules of natural justice?

[47] As a preliminary to considering point (c), this Court itself raised and addresses the question of whether it was possible to contract out of judicial review under Article 34 of the First Schedule to the Act.

[48] Although we have expressed the issues to be determined in unqualified terms, we record that this matter comes before the Court in the context of strike out proceedings. As has often been said in this Court, the Court should strike out a cause of action only if it is so clearly untenable that it cannot possibly succeed: *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262, 267.

Was Methanex a party to the ERR arbitration?

Introduction

[49] We will deal first with the issue which is raised by the cross-appeal filed by the second to ninth respondents which concerns the standing of Methanex to bring these proceedings. The cross-appeal challenges the finding of Fisher J that Methanex had a tenable case that it was a party to the ERR arbitration and that in consequence it had the standing to challenge the arbitration in the High Court.

[50] The starting point for this analysis is the relevant definitions in the Act. In s2 of the Act, "party" is defined as follows:

> "Party" means a party to an arbitration agreement, or, in any case where an arbitration agreement does not involve all of the parties to the arbitration agreement, means a party to the arbitration.

[51] The term "arbitration agreement" is also defined in the same section. That definition is:

> "Arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen (or which may arise) between them in respect of a defined legal relationship, whether contractual or not.

[52] The two definitions are interdependent and, as Fisher J noted, there is a degree of circularity about them. In order to determine who is a party, the reader needs to know what the arbitration agreement is. But to determine what the arbitration agreement is, the reader needs to know who the parties are.

[53] The first question which arises is what document constituted the arbitration agreement in this case. We agree with Fisher J that, although the ERR redetermination arises from the Maui Gas Contract, the arbitration agreement in this case was the Settlement Agreement. It was under that document that Seller and the Crown submitted to arbitration the questions of the ERR redetermination and the extent of information to be provided by Seller in accordance with that redetermination. If the Settlement Agreement had not been entered into, the ERR

redetermination would have been determined under the process outlined in the Maui Gas Contract, but the process required to be followed under the Settlement Agreement replaced the Maui Gas Contract process.

[54] We also agree with Fisher J that the Appointment Letter was not part of the arbitration agreement in this case, notwithstanding that the statement in paragraph 6 of the Appointment Letter can be read to the contrary. Rather, it was the product of an administrative action, which was a necessary consequence of the Settlement Agreement, in order to give effect to the parties' intentions to appoint an Independent Expert for the purposes of the conduct of ERR arbitration.

[55] The Settlement Agreement also replaced the procedures in place under the DGU agreements between the Crown and the individual DGUs as to the manner in which the Crown's participation in an ERR redetermination would be conducted so as to give recognition to the potential impact of the ERR redetermination on the entitlements of DGUs under the DGU agreements. In fact, cl 5.1 of the Settlement Agreement contemplated that the Crown and the DGUs would attempt to agree a hearing agreement. The remainder of cl 5 was a default position, which would apply in the event that no such hearing agreement was successfully negotiated. As it turned out, the default provisions in cl 5 were those which applied to the ERR arbitration.

[56] All the parties to this litigation were parties to the Settlement Agreement but, in order to be a party for the purposes of the Act, a person needs to be a party to an arbitration agreement as defined in the Act. That term is drafted broadly not only to include specific agreements between parties who are already in dispute to submit their disputes to arbitration, but also to describe agreements under which parties to a wider contractual arrangement agree that any future disputes between them will be submitted to arbitration, as and when they arise. Whether the dispute has already arisen, or is of a class which the parties recognise may arise in the future, it must be a dispute which is "between them" (ie. between the parties), and must be a dispute in respect of a defined legal relationship. That requires determination of what constitutes a dispute, what constitutes a defined legal relationship, and whether the dispute needs to be in respect of a defined legal relationship which involves all those

in dispute. Both in the High Court and in this Court there were starkly contrasting submissions from the parties on these points.

"Dispute"

[57] Fisher J determined that there would be a dispute between parties where they expressed and maintained, in relation to each other, conflicting views or positions, the resolution of which would have a legal consequence. The requirement that the matter be one having a legal consequence could be inferred from the fact that Article 35 of the First Schedule to the Act provides for enforcement of an arbitral award by entry of judgment in the High Court. We agree with those conclusions.

[58] Fisher J also found that the reference to disputes "which may arise" was broad enough to encompass not only disputes which had not existed at the time of the arbitration agreement but which had led to the parties taking conflicting views before the commencement of the arbitration, but also matters where no conflicting positions had been taken by the parties at all but both had wished to have the matter determined by arbitration. He said the ERR redetermination was such a situation because the parties had not expressed conflicting views on the amount of ERR at the time of the entry into of the Settlement Agreement. He gave as another example a rent review in a lease where neither the lessor nor the lessee had expressed a position on what their reviewed rent should be, but both wished to have the matter determined by an arbitration process. Although the wording of the Act does not explicitly include disputes in the latter category in the way that the Arbitration Act 1908 did (it provided for a submission to arbitration to include any agreement under which any question or matter is to be decided), we agree with Fisher J that the words "dispute which may arise" can include a question which has not currently been the subject of conflicting statements of position but which may give rise to a dispute if left unresolved.

[59] Accordingly we agree with Fisher J that there will be a "dispute" where two or more individuals express and maintain, in relation to each other, conflicting views or positions, the resolution of which will or may be of legal consequence, or where there are questions which may give rise to such a dispute if left unresolved.

"Defined legal relationship"

[60] In order to be a dispute for the purposes of the definition of arbitration agreement, the dispute must be in respect of a defined legal relationship, whether contractual or not. The term "defined legal relationship" is not defined in the Act. Fisher J found that the phrase "defined legal relationship" should be given a broad meaning because of the express inclusion of non-contractual relationships, and because s10 of the Act provides that any dispute which parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration, unless the arbitration agreement is contrary to public policy, or the dispute is not capable of determination by arbitration under any other law.

[61] He was supported in that view by the decision of Tamberlin J of the Federal Court of Australia in *Hi-Fert Pty Ltd v Kiukiang Marine Carriers Inc* (1997) 145 ALR 500. In that case Tamberlin J was asked to interpret a provision in Australian Commonwealth legislation which was in virtually identical terms to the definition of "arbitration agreement" in the Act. He referred to the expression "defined legal relationship, whether contractual or not" and said that a broad approach should be taken to the nature and extent of the relationship. In particular he found that the relationship between a party alleged to have breached its statutory obligations under ss51(a) and 52 of the Trade Practices Act 1974 (the equivalent of the New Zealand Fair Trading Act) and the victim of the alleged breach was a defined legal relationship. Fisher J found that in view of the enforceability provision in Article 35 of the First Schedule to the Act, to which we have referred earlier, a defined legal relationship was a relationship which gave rise to the possibility that one party was entitled to some form of legal remedy against the other.

[62] Again, we agree with the reasoning and conclusion of Fisher J on that point.

"Between them in respect of"

[63] Having determined the broad nature of the scope of the term "dispute" and the expression "defined legal relationship", it is then necessary to determine the

significance of the words linking those expressions. What the definition requires is that the dispute be "between them" and also that it be "in respect of" a defined legal relationship. Fisher J placed particular significance on the fact that the definition refers to "a" defined legal relationship and said that this contemplated the possibility that a dispute could be in relation to a defined legal relationship with which one of the parties submitting the dispute to arbitration was not involved. He drew support for that conclusion from the broad term "in respect of" used in the definition which has the broadest possible meaning.

[64] That led Fisher J to conclude that an agreement by A and C to submit to arbitration a dispute between A and C over B's liability to C constituted an arbitration agreement in terms of the Act. Similarly, an agreement by A and B to submit to arbitration a dispute between them over C's liability to D would also be an arbitration agreement.

[65] In this Court Mr Kós strongly contended that this finding by Fisher J was incorrect. He argued that the requirement that the dispute be in relation to a defined legal relationship should be interpreted as requiring that the dispute must have legal consequences which arise from a defined legal relationship. That meant that the parties to the arbitration agreement were only those parties who had submitted to arbitration a dispute which had legal consequences between them arising from a defined legal relationship involving the submitting parties. He said that this was consistent with the proposition that a submission to arbitration is an alternative to the litigation of the dispute in a court. He said that proposition was, in turn, consistent with the enforceability of an arbitral award in the High Court against the party which had submitted the dispute to arbitration. He said that would not be possible in circumstances where the submitting party was not itself involved with the defined legal relationship which underpinned the dispute.

[66] On the other hand, Mr Turner argued that all that was required was that there be a dispute which has legal consequences for the parties submitting it to arbitration, and there must be a defined legal relationship between at least some of the parties in dispute. In the context of the present case, that would mean that Methanex could be one of the parties submitting to arbitration issues which involved a dispute between

Seller, the Crown, Methanex (and others), underpinned by the defined legal relationship created by the Maui Gas Contract between Seller and the Crown, even though Methanex was not itself involved with that defined legal relationship. That would be because the dispute would have legal consequences for Methanex, even though it was not involved with the defined legal relationship, by virtue of the fact that Methanex's entitlement under its DGU agreements with the Crown would be affected by the outcome of the arbitration.

[67] Mr Turner said that as long as there was a sufficient nexus between the dispute arising from the defined legal relationship between the Crown and Seller to the legal consequences for Methanex of its difference of opinion with Seller about the level of ERR, then Methanex could be a party to the submission to arbitration of the dispute, notwithstanding the lack of any defined legal relationship between it and Seller.

[68] In our view the definition must be read as a whole. What is required is that there be a dispute in respect of a defined legal relationship and it is only the parties between whom that dispute has arisen or may arise who can submit the dispute to arbitration. This leads us to differ from Fisher J as to the extent of the definition. We believe that, in the context of the Act as a whole, a person is a party to an arbitration agreement only if that person is one of the persons who has submitted the dispute to arbitration and the arbitration is in respect of a defined legal relationship which involves that person.

[69] Mr Turner argued that this more restrictive interpretation would provide practical difficulties in situations where disputes arise with parties whose liabilities are guaranteed by a third party or where one of the parties to the dispute is indemnified or insured. He said that it was not uncommon in that situation for the guarantor, indemnifier or insurer to wish to enter into an arbitration with the person making the claim on the party who is primarily liable, even though the guarantor, indemnifier or insurer has no defined legal relationship with the claimant. Another example he gave was a situation where there is a dispute between a building owner and a head contractor, and in turn a consequential dispute between the head contractor and the subcontractor.

[70] In our view there is nothing in the interpretation of the scope of the definition of "party", which we have set out above, which prevents disputes of that kind being referred to arbitration if the parties wish to do so. In those situations there are two different defined legal relationships but there is no reason against the parties all agreeing that the disputes arising out of those defined legal relationships will be arbitrated as part of a single arbitration process, with all parties being bound by the outcome. The outcome of the arbitration will be an award which will determine the obligations of each party to the other party to the relevant defined legal relationship.

[71] Mr Turner also said that the outcome would be a practical difficulty for arbitrations involving multi-party defined legal relationships but we cannot see how that problem arises. If there is indeed a defined legal relationship to which many entities are party, then a dispute which involves all of them can be arbitrated and all will be bound by the outcome, because the dispute is between all parties and all are part of the defined legal relationship.

[72] The other requirements identified by Fisher J in determining whether a person is a party, as defined in the Act, are that the person must have entered into an arbitration agreement and the arbitration must involve that person. We agree that those requirements follow from the definition of "party". However, the focus in this case is on whether Methanex was a party to an "arbitration agreement" which means that the focus of the analysis is on the definition of "arbitration agreement", rather than the definition of party itself.

[73] The reference to parties involved in the arbitration is primarily aimed at situations where there is a multi-party contract which contains an arbitration clause designed to deal with future disputes which may arise in respect of a defined legal relationship involving all of the parties to that agreement. If a dispute arises which concerns only some of those parties, those who gain "party" status, for the purposes of the Act, in respect of that dispute will be only those who are involved in it, ie. those in respect of whom a dispute has arisen, and who are participating in the arbitration process which is designed to resolve it, thus binding themselves to the award made by the arbitrator.

Applying the law to the facts

[74] Having reached those conclusions on the law, we now apply them to the facts of the present case.

[75] The first question which requires determination is what disputes were actually referred for arbitration by the Independent Expert. Clause 5.1.2 of the Settlement Agreement makes it clear that the Independent Expert had to decide two separate matters, though they are described as two phases of the same matter in that clause. The first and primary matter was the determination of ERR. The Settlement Agreement effectively provided for an alternative to the process for the redetermination which would otherwise have taken place under the terms of the Maui Gas Contract. The second matter which the Independent Expert had to decide was whether the data and information which Seller had made available to the Crown before the date of the appointment of the Independent Expert was all the data and information that "may reasonably be required to assess the [ERR]". That wording mirrored the wording used in the relevant provision of the Maui Gas Contract, Article 6.1.1. Thus it was clear that the Independent Expert was being asked to determine the extent of Seller's obligations of disclosure under the Maui Gas Contract, and the question as to whether Seller had complied with that obligation.

[76] Mr Kós highlighted the fact that both of these disputes were disputes founded in the Maui Gas Contract. Thus, the defined legal relationship which underpinned the disputes was the Maui Gas Contract, to which only Seller and the Crown were parties. In particular he emphasised that Methanex was not a party to the Maui Gas Contract and was not in any defined legal relationship with Seller, which could be the foundation of a dispute between it and Seller, in relation to the issues which the Independent Expert had to determine.

[77] While Mr Turner's primary submission was that Methanex was a party whether or not there was a dispute between Methanex and Seller arising from a defined legal relationship which involved them both, he also argued that there was, in fact, a dispute between Methanex and Seller which was the subject of the Settlement Agreement, and therefore of the ERR arbitration. He pointed to the

pleadings in the Wellington proceedings, and the correspondence which preceded those proceedings, as illustrating the fact that Methanex was contesting the adequacy of disclosure by Seller, and also that Methanex was taking a different view from that of Seller in relation to the extent of the ERR (contrary to the finding of Fisher J that there was no such disagreement at the time of the signing of the Settlement Agreement).

[78] We accept Mr Turner's submission that the stance taken by Methanex in the Wellington proceedings and in correspondence with the Crown and, through the Crown, Seller, indicated that Methanex was taking a different view to that of Seller on both of the issues which ultimately were the subject of the ERR arbitration, prior to the entry into of the Settlement Agreement. But the Settlement Agreement effected a settlement of the Wellington proceedings and, to the extent that those proceedings alleged there was a dispute between Methanex and Seller based on a defined legal relationship, that dispute was settled.

[79] It is clear that the Settlement Agreement envisaged that, instead of having the disputes concerning its rights determined by litigation, Methanex would abandon them. In exchange, the Crown and Seller would arbitrate as a dispute arising out of the Maui Gas Contract issues of importance to Methanex concerning the ERR. Methanex would have input into the arbitration, in accordance with a tightly defined procedure, in terms of which the Crown would put the case of Methanex to the Independent Expert as part of the Crown's case at the arbitration. Other DGUs were given the same rights to have their cases put to the Independent Expert by the Crown. This is the overall effect of cls 5.1.1 (right to make submissions channelled through the Crown), 5.2 (expert witnesses of Methanex and other DGUs to be witnesses called by the Crown at the arbitration), 5.1.5(h) (Crown and Seller alone to be parties to the process – Methanex to have no right of direct participation), and 6 (Seller and Crown agreement that process is to be conducted as an arbitration while Methanex agrees not to seek to challenge the award). The correct analysis of these provisions is that the settlement of the Wellington proceedings ended the disputes between Methanex and the Crown and between Methanex and Seller and the disputes referred to in cl 5.1.2 thereafter, by agreement, were disputes between Seller and the Crown alone.

[80] That is not to say that Methanex did not have a real interest in those disputes, which is why it negotiated its rights of participation in the process. But this process involved, in formal terms, the resolution of a contractual issue which arose between Seller and the Crown. In our view, therefore, the dispute which was referred to arbitration under the Settlement Agreement was a dispute between Seller and the Crown, arising from a defined legal relationship between Seller and Crown, namely the Maui Gas Contract.

[81] In the Wellington proceedings Methanex had also asserted certain rights against the Crown under the DGU agreement, including Methanex's rights to take an assignment of the Crown's position under the Maui Gas Contract for the purposes of the ERR redetermination. For the reasons given, this was also settled by the Settlement Agreement and to the extent that a dispute existed under the DGU agreement between the Crown and Methanex, that dispute was also settled by the Settlement Agreement and was no longer extant at the time of the ERR arbitration.

[82] We therefore conclude that the only parties to the Settlement Agreement who agreed to submit to arbitration disputes which had arisen between them in respect of a defined legal relationship were Seller and the Crown. The consequence of that is that although the DGUs were also parties to the Settlement Agreement, which was the document under which this submission to arbitration took place, only Seller and the Crown were parties to an "arbitration agreement" as defined in the Act. As such, only the Crown and Seller were "parties" in terms of the definition in s2 of that term. In our view, Methanex falls outside the definition of "party" in the circumstances of this case. We conclude that it has not established a tenable case that it was a party in this case, and therefore allow the cross-appeal.

[83] Our finding on the meaning of the term "arbitration agreement", and our consequent finding that Methanex is not a party to an arbitration agreement, means that it is not necessary for us to consider whether in this case Methanex was one of the parties "involved" in the arbitration. That issue has relevance only when there is a situation of a number of parties to an arbitration agreement but the arbitration involves only some of them.

[84] Our conclusion that Methanex is not a party is consistent with the intentions of the parties as expressed in the relevant contracts. In particular, cl 5.1.5(h) of the Settlement Agreement provided that only Seller and the Crown were parties to the ERR arbitration process, and that Methanex and the other DGUs had no right to have their own legal representatives participate in a hearing or meeting before the Independent Expert. The Appointment Letter also made this point.

[85] The Settlement Agreement and the Appointment Letter were consistent with the regime which would have applied under the terms of the Maui Gas Contract and the DGU agreements, which are drafted to reflect the commercial reality that the DGUs have a significant commercial interest in any ERR determination but that they are not parties to the Maui Gas Contract and therefore have no contractual rights as against Seller. The DGU agreements provide for a DGU to have input into the manner in which the ERR redetermination process is conducted under the Maui Gas Contract, by having input into the manner in which the Crown's case is presented. But it is clear that the regime established under the DGU agreements respects the separate nature of the Crown's obligations to Seller under the Maui Gas Contract, and its obligations to the DGUs under their respective DGU agreements. In our view, the Settlement Agreement reflects those underlying obligations.

Did Methanex nonetheless have standing?

[86] We now turn to the first issue raised in Methanex's appeal. Methanex contends that, even if it were not a party in terms of the Act, it nevertheless had standing to commence review proceedings under Article 34 of the First Schedule to the Act. It argues that Fisher J was wrong to reject that argument in the High Court.

[87] Article 34 deals with applications to the High Court to set aside an arbitral award. The relevant parts of the Article appear in the Appendix to this judgment. Given the terms of that Article, Methanex's application to set aside the Independent Expert's award proceeded on the basis that the award was in conflict with the public policy of New Zealand, in that a breach of the rules of natural justice had occurred.

[88] Mr Turner pointed out that the provisions which were applicable to Methanex's application were Articles 34(1) and 34(2)(b)(ii). Neither of those provisions refers to a "party". While we accept that the word "party" does not appear in those provisions, we are satisfied that they do not give the High Court jurisdiction to set aside an award unless a party had made application to the Court to set aside or enforce an award. In that respect we agree with Fisher J that the absence of the word "party" in those provisions is explicable by their grammatical structure. We also agree that to allow strangers to challenge an award to which they had not been a party in a contractual sense would be contrary to the consensual and private nature of arbitrations. As Fisher J said, there can be no basis for allowing a stranger to complain that an award is contrary to public policy if the parties to the arbitration which has led to the award do not do so.

[89] Mr Turner argued that Methanex was not a "stranger" to the award and in this case he said that the wording of Article 34(1) and 34(2)(b)(ii) could be contrasted with other parts of Article 34, where it was clear that an application needed to be made by a party. He referred particularly to Article 34(2)(a), which refers to "the party making the application". He said the absence of a reference to an application by a party in the provisions of Article 34 which applied in this case, meant that there was a distinction which allowed for applications to set aside to be made by persons other than parties. He said that in determining who such persons could be, the Court should draw an analogy with the principles of judicial review, and allow any person who has a reasonably arguable claim that some private right has been affected, or that it has suffered special damage, to have standing.

[90] We are unable to accept that submission. There is nothing in the scheme of the Act which calls for an analogy with public law principles. The reverse is the case. In particular it is notable that Articles 18 and 24 of the First Schedule to the Act, which set out the natural justice requirements for arbitrators, are couched in terms which make it clear that natural justice rights are given only to "parties" as defined. In addition, s17 provides for confidentiality of the arbitral award, unless the parties agree to the contrary. It is hard to reconcile that with some public law right of a non-party to have an award reviewed by the High Court on the basis that it is in conflict with public policy on natural justice grounds.

[91] In our view Fisher J was correct to find that Methanex had not established a tenable case that it had standing to challenge the award relating to the ERR arbitration if it were not a party. This ground of appeal therefore fails.

Assuming Methanex does have standing to seek review, has it an arguable case based on its allegation of breach of the rules of natural justice?

To what extent, if any, can review be excluded by contract?

[92] We note that the respondents did not seek to rely on cls 6 and 10 of the Settlement Agreement as an absolute answer in themselves to the proceedings by Methanex. But as a threshold and contextual issue we consider it necessary to address the question whether cls 6 and 10 of the Settlement Agreement would justify the striking out of the proceedings and, if not, the extent to which they are relevant.

[93] Prior to the enactment of the Act it was open to parties to an arbitration agreement to exclude review for error of law on the face of the award. The parties could do this by implication by submitting to arbitration a discrete question of law: see for instance *Attorney-General v Offshore Mining Co Ltd* [1983] NZLR 418. They could also do so explicitly and, subject to certain caveats, their right to do so would be recognised by the Courts: see *CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZLR 669. In that case this Court restrictively distinguished the English Court of Appeal decision, *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478.

[94] *Badger Chiyoda* concerned an arbitration between two substantial companies of equal bargaining power. This was a factor of significance in the approach which the Court took.

[95] The clause in question in *Badger Chiyoda* included a waiver by the parties of "their right to any form of appeal insofar as such waiver can validly be made". The Court construed the phrase "any form of appeal" as extending to the right to apply to have an award set aside for error of law on its face. However, it is clear that the Court did not see this clause as excluding rights of review on other grounds. This led Cooke P to comment at p679:

> … it is as well to recall that in the event this case has been concerned solely with the effect of an ouster or waiver clause on challenges to an award on the ground of error of law in the reasoning in the decision. Excess of the terms of reference, and misconduct, technical or otherwise, will remain open to challenge.

[96] As the case was concerned solely with the right to apply to have an award set aside for error of law, *Badger Chiyoda* was not express authority for the proposition that an ouster of review clause could exclude the right to resort to the Court for review on grounds of alleged misconduct involving, for instance, breach of the rules of natural justice.

[97] On the other hand, running through all the judgments delivered in *Badger Chiyoda* is a general respect for party autonomy. For instance, at p680 Cooke P observed:

> In general, however, it seems to me that modern public policy points strongly towards non-interference with arbitral decisions if the parties clearly intended them to be final. In all such cases non-interference should be the prima facie rule, with the onus falling on the party who seeks to displace it to show cogent reasons for doing so. The most likely example of such reasons is lack of true freedom of contract, as in the *Czarnikow* case, but ex cautela it would seem unwise to assert that no other reasons could ever suffice.

[98] These considerations would seem to us to be generally applicable to a clause purporting to exclude a right to seek to review an award for misconduct, save that in such cases the courts might have been more willing to depart from what Cooke P saw as the "prima facie rule".

[99] Sections 5 and 6 of the Act make it clear that the provisions in the Second Schedule can be excluded by contract but the provisions in the First Schedule cannot be so excluded. The text of the relevant parts of those sections is set out in the Appendix to this judgment.

[100] The provisions of the First Schedule which are relevant here are Articles 18, 24, 34 and 36. The material parts of those provisions also appear in the Appendix.

[101] Articles 34 and 36 of the First Schedule to the Act correspond broadly to the identically numbered articles in the United Nations Commission on International

Trade (UNCITRAL) Model Law on International Commercial Arbitration. However, Articles 34(6)(b) and 36(3)(b) (which declare that an award is contrary to the public policy of New Zealand if a breach of natural justice occurred) are add-ons and implement recommendations of the New Zealand Law Commission (see *Arbitration* NZLC R20, 1991).

[102] The Second Schedule provides for appeals. This is pursuant to Article 5, the material part of which is also set out in the Appendix. Because the appeal provisions appear in the Second Schedule, the right to appeal can be excluded by agreement. So it is open to the parties to an arbitration agreement to exclude any right of appeal. On the other hand, it is not open to the parties to exclude Articles 18 and 24 which, at least broadly, might be thought to be a statement of the principles of natural justice.

[103] It can be argued that the Courts should not, at least in general, review arbitral awards where the parties have contractually excluded a right to apply for review.

[104] The parties to an arbitration agreement who stipulate against rights of appeal and review do not thereby seek to encourage arbitral errors of law or misconduct. Rather they seek to avoid the anticipated inconvenience and expense of post-award litigation. So it can be argued that excluding a power to review for breach of natural justice is not necessarily a derogation from Articles 18 and 24. In this context, it is sensible for lawyers and Judges to recognise that, for the commercial community, the "cure" provided by litigation (with associated delay, expense and uncertainty) may be worse than the disease (possible breaches of natural justice).

[105] Article 34 is expressed in exclusionary terms: it specifies the only grounds upon which a Court may interfere with an award in review proceedings. Accordingly, it is not open to the parties to a submission to arbitration to confer, by contract, a more extensive jurisdiction on the Court, for instance to review for factual error. On this (perhaps literal) approach, a contractual stipulation which further limits the grounds upon which review is available merely supplements Article 34 and does not derogate from it.

[106] Similar considerations apply to Article 36. This article imposes limitations on the right to enforce arbitral awards. A contractual provision further limiting the ability of a court to decline to enforce an award supplements rather than derogates from this article.

[107] We conclude later in this judgment that Methanex contracted to exclude review. There would be no unfairness in holding Methanex to that bargain. There can be no suggestion of inequality of bargaining position. Further, there were good commercial reasons for the exclusion of review – that is the anticipated inconvenience and expense of post-award litigation. The agreement by Methanex not to resort to the Court was plainly part of the quid pro quo for the rights that it obtained to participate (albeit in a limited way) in the arbitration. It is scarcely just for Methanex to have participated in the arbitration to the extent provided for in the agreement, and then to be permitted to seek (in defiance of what it agreed) to review the award which that arbitration produced.

[108] Despite the considerations referred to above, we have concluded that the law does not permit the parties to exclude review based on the grounds specified in Article 34.

[109] A reading of the *travaux préparatoires* associated with the UNCITRAL Model Law suggests that there was no contemplation that parties to arbitral proceedings could seek to limit further the rights of review contemplated by Article 34. Article 34(2)(b) and the corresponding provisions in Article 36(2)(b) are both taken, largely, from Article 5 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (commonly known as the New York Convention). Looking at the issue from a purely common law perspective, the UNCITRAL Model Law was finalised in 1985 at a time when the prevailing orthodoxy (based on *Czarnikow*) was that exclusion of curial review was not possible. These considerations suggest that *Badger Chiyoda* may not be the appropriate starting point for the present exercise.

[110] When the Law Commission recommended the enactment of what is now Article 34 it explained this at para 291 of its report on the basis that:

> The matters upon which an award may be challenged under article 34 must be taken to be fundamental to the procedure which the Model Law establishes.

[111] This perhaps serves to explain why the Law Commission recommended (and Parliament adopted) the apparently clumsy drafting technique employed in Article 34 of deeming an award affected by a breach of the rules of natural justice to be "contrary to the public policy of New Zealand". Clumsy or not, this drafting technique is consistent with the view that Parliament did not contemplate contractual exclusion of curial review for breaches of the rules of natural justice.

[112] The New Zealand decisions which have been decided in relation to the Act support the view that review pursuant to Article 34 for breach of natural justice is not able to be excluded by contract.

[113] In *Redcliffs Estates Ltd v Enberg* HC CHCH M150/99 LINX 22 July 1999, Panckhurst J, the plaintiff argued that an arbitral award should be set aside for breach of the natural justice provisions in Article 24(3). The defendants submitted that, pursuant to Article 4 of the First Schedule, the plaintiff had waived its right to rely on a failure to comply with Article 24(3). The Judge said (at p10):

> As I understood it counsel acknowledged that certain of the provisions of the Schedule were mandatory in nature, from which the parties could not "derogate". Moreover, I understood that the natural justice requirement enshrined in Article 24(3) was accepted to be in the mandatory category. I agree. As the Law Commission noted (Report 20: Arbitration, October 1991 at para 291) those requirements recognised as sufficient to warrant setting aside an award pursuant to Article 34 "must be taken to be fundamental to the procedure which the (First Schedule) establishes".
>
> Regardless, counsel submitted that waiver at common law was possible even in relation to the natural justice requirement that each party is entitled to know the case presented by the other. To what extent waiver at common law subsists, if at all, in the fact of Article 4, was not explored in argument. Nor, in the circumstances of this case, is it necessary to decide the point.

[114] On the facts of the case the Judge concluded that "even assuming Article 34 is not paramount and common law waiver was available", the plaintiff had not waived the right to rely on Article 24(3).

[115] In *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452 at 459 Fisher J said:

> Article 18 of the First Schedule to the Arbitration Act 1996 applies to all arbitrations pursuant to s6(1)(a). It provides that "The parties shall be treated with equality and each party shall be given a full opportunity of presenting that party's case." Although the present arbitration was heard before that Act came into force, art 18 reflects pre-existing common law but for the removal of contracting out. There is no question of contracting out in the present case… . The present arbitration agreement made provision for conventional procedures but it is not suggested that it contained any provisions particularly bearing upon the extent to which the arbitrators might be precluded from going outside the evidence and argument presented to them by the parties.

[116] Drawing the threads of all this together:

(a) *Badger Chiyoda* is not the appropriate starting point for determining whether the legislation contemplates contractual exclusion of curial review;

(b) The UNCITRAL material and the Law Commission's report provide no support for the view that contractual exclusion of curial review was contemplated;

(c) The drafting of Article 34 proceeds on the basis that a breach of the rules of natural justice associated with an arbitration (Article 34(6)(b)) has the consequence that the award "is contrary to the public policy of New Zealand" (Article 34(2)(b)(ii)) and it is not likely that the New Zealand Parliament would have countenanced a power to exclude review of such awards;

(d) On that basis we conclude that:

(i) A contractual provision purporting to exclude such review would derogate impermissibly from Articles 18 and 24 of the First Schedule; and:

(ii) Given Articles 18 and 24 of the First Schedule, it is appropriate to construe Article 34 as providing for a right to

seek curial review on the grounds identified in the article rather than a mere exclusion of any purported jurisdiction to review on broader grounds;

(e) Article 34 is itself part of the First Schedule and is therefore not capable of being excluded by contractual provision to the contrary;

(f) This approach is consistent with the drift of the New Zealand decisions on the Act.

[117] We conclude that Fisher J was right to decide that Methanex's purported agreement not to seek review of the Independent Expert's ERR determination was not effective to oust, in any absolute sense, any entitlement it otherwise had to commence and conduct these proceedings. However, this conclusion is based closely on the way in which the provisions of the First Schedule to the Act work as a whole. While it is not open to the parties to an arbitration to exclude the operation of Articles 18 and 24, the Courts will respect the parties' contractual intentions as to the process to be carried out by an arbitrator. So parties to an arbitration may, in our view, stipulate for a process which, while consistent with Articles 18 and 24, does not satisfy what would normally be the requirements of natural justice and the Courts ought to be prepared to give effect to such stipulations.

Background to Methanex's natural justice claim

[118] The primary issue raised by Methanex was whether the Independent Expert's obligations extended to providing Methanex with the reservoir simulation model, so as to allow Methanex to make submissions upon it and the assumptions which it incorporated. As the matter came before the High Court on a strike out application, it is unnecessary for us to address whether the duty was breached, assuming it existed.

[119] Methanex's position in the High Court and on appeal is that, though the Independent Expert was permitted to create the model, it should have been disclosed. It claims that without having access to the model, its expert adviser could not properly make submissions on the validity of the methods adopted and the results

presented in the draft determination, which were carried through to the final determination. The adviser was of the view that apparent discrepancies in the results indicated that there could well be fundamental errors in the Independent Expert's model.

High Court decision

[120] We have earlier summarised the relevant conclusions of Fisher J on this general aspect of the case (see paras [41] – [43] above). But it is now appropriate for us to examine more closely Fisher J's analysis of natural justice under Articles 18, 24 and 34 of the First Schedule to the Act. Fisher J accepted that the Independent Expert had generated independent models concerning many technical economic aspects of the reserves redetermination and in doing so had not disclosed for comment assumptions, interpretation parameters and methodology.

[121] Fisher J accepted that the Independent Expert had generated independent models concerning many technical economic aspects of the ERR redetermination and in so doing had not disclosed for comment assumptions, interpretation parameters and methodology.

[122] The Judge accepted that Article 34(6)(b) potentially covered the broader common law requirements of natural justice as well as those non-derogable rights specified in the Act. In general, what the common law obligations required would depend upon the proper construction of the arbitration agreement. In the circumstances, Fisher J concluded that any common law obligations requiring disclosure of the model had been excluded by the Settlement Agreement. Four features of the Settlement Agreement were seen as having this effect. First, the notion conveyed by the title "Independent Expert" was that he could "draw upon his expertise in an independent way". It conveyed the idea that he was an arbitrator for whom relative freedom of action was intended. Secondly, cl 5.1.6 expressly authorised the Independent Expert to use his expertise and judgment in making his determination (subject to considering the submissions of the participants' experts and material provided by the Seller). Thirdly, the Independent Expert was required to provide only brief reasons in the draft determination, concerning which

participants could make submissions. The Judge saw this as indicative of a limited entitlement to notice of the methodology, assumptions and reasoning of the Independent Expert. Fourthly, the Judge saw the provisions in the Settlement Agreement for the exclusion of rights to challenge the award as an important guide to the limited scope of natural justice rights of the participants in the arbitral process. The Court would give effect to the agreement insofar as it was consistent with the Act.

[123] That meant the obligations of the Independent Expert to comply with natural justice were limited to those expressly agreed along with the non-derogable rights provided in the Act. Fisher J accepted that under the Settlement Agreement Methanex was entitled to receive material provided to the Independent Expert by Seller as part of its case and also the submissions of other participants in the process. It was entitled to respond to this material and to issues raised by the Independent Expert. That included the right to respond to a draft determination of the ERR which was to include "brief reasons". These rights however did not go so far as to require disclosure of the reservoir model.

[124] Methanex**,** however, also had non-derogable statutory procedural rights under Articles 18 and 24(3). Article 18 gave parties a full right to present their case. Article 24(3) gave rights to receive material in addition to that communicated to the arbitrator by other parties. It extended the right to expert reports or evidentiary documents from other sources. Article 24(3) provides:

> 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.

[125] The Judge held that the Independent Expert's model was neither an expert report nor an evidentiary document. An expert report was a statement of fact or opinion, prepared by a stranger to the arbitration, specifically addressing the dispute in question. The term did not cover content of general application such as general expert or academic resources concerning gas fields and economically recoverable reserves. Furthermore, the notion of an expert report connoted a report to the arbitrator prepared by a stranger to the arbitration. It therefore did not include

internal working documents prepared by the arbitrator or (by necessary implication) the arbitrator's staff.

[126] An "evidentiary document" on the other hand was concerned, at least primarily, with facts rather than opinions. The "evidentiary" element also denoted that the statement would be a source of information bearing on the issues in dispute or the credibility of a witness. The document might be either the report of a statement which makes assertions that may be used by the arbitrator as evidence of their truth, or be of evidential significance in itself as real evidence. The Judge suggested that the material was caught by Article 24(3) only if it was provided to the arbitrator by a third party, apparently because the use of the document as a "source of reported evidence" indicated that it covered evidence provided by a stranger to the arbitration. He also suggested that the term "evidentiary document" did not extend to:

> [145] …internally prepared documents resulting from the reasoning processes of the arbitrator, research, copies of published works of general application, or documented matters of which the arbitrator could properly take judicial notice without evidence.

[127] In reaching this conclusion, Fisher J put some weight on the legislative history of Article 24(3) of the First Schedule to the Act which in the original draft of the UNCITRAL Model Law had provided for communication to the parties of "any expert report *or other document*", the emphasised words later being changed to "or evidentiary document". And his overall conclusion was:

> [147] My conclusion is that arts 18 and 24(3) require notice of, and opportunity to respond to, material provided to the arbitrator if it is: (a) evidence and argument provided by other parties to the arbitration; (b) the report of an independent expert specific to the dispute in question; (c) a document which may be used as proof of the truth of human assertions made therein with respect to the facts in issue or the credibility of a witness; or (d) a document whose existence or nature represents a new source of information bearing upon the facts in issue or the credibility of a witness. Whether these categories extend to marginal cases may well be affected by the particular contractual intention of the parties to be determined in the particular case.

[128] By contrast, the following categories of information were excluded from Article 18 and 23 disclosure obligations:

(a) Information derived from material internally prepared as part of the arbitrator's reasoning process;

(b) Published research works of general application;

(c) Material of which judicial notice might be taken.

Common law obligations of natural justice

[129] We first consider whether the parties did exclude the wider common law principles of natural justice in this case.

[130] Counsel for Methanex contended that the Judge's approach to contractual exclusion of natural justice was wrong. Arbitrators were prima facie obligated to observe all the principles of natural justice unless absolved from doing so expressly or by implication. The Independent Expert was not expressly absolved in the Settlement Agreement. Nor could a term be implied on any of the established bases for implication. Mr Turner focussed primarily on the implication of a term by necessary implication from the express terms. He said that the Settlement Agreement emphasised the importance of all parties having access to models, and contained nothing to indicate any limitation of that basic right.

[131] Counsel for Contact, Mr Sissons, who argued this part of the case for the second to ninth respondents, supported the judgment under appeal. The applicability of common law natural justice requirements depended on the construction of the agreement. The parties were free to determine their own procedure, so long as it was fair, allowed each party to present its case and avoided prejudicial ambush or surprise. Counsel analysed the Settlement Agreement in terms similar to Fisher J, submitting that the parties agreed that the Independent Expert would undertake independent work but did not require disclosure of the details of that work.

[132] The modern approach to the implication of procedural rules into arbitration agreements is relatively well settled and in our view there was no significant difference between counsel's submissions on the point. The courts have adopted a

robust approach, acknowledging that the full rigour of court procedure need not be applied in commercial arbitration. As Diplock J said in *London Export Corporation Ltd v Jubilee Coffee Roasting Co Ltd* [1958] 1 WLR 271 at p279:

> Where an arbitration agreement is silent as to the procedure, what attitude should the court adopt in seeking to imply terms? Obviously it does not imply terms which tend or appear to tend to an unjust award; but the court, particularly in commercial arbitrations, does not now, as perhaps once courts did, start on the assumption that the parties, except as otherwise expressly agreed, intended to adopt in its full rigour the procedure which, on long experience, helped by natural conservatism, has commended itself as most appropriate to the courts of law themselves. Rather should the courts start with the presumption that, in confiding their disputes, not to the courts of law, but to an arbitral tribunal of their own choice, the parties intended to confer on that tribunal a discretion as to the procedure it should adopt to arrive at a just decision; and the court will not lightly assume a limitation on that discretion, unless the mode of exercising it tends, or appears to tend, to an unjust result.

[133] In implying terms in this context, the Court does not start from the assumption that natural justice requirements apply in full, and then consider whether a term diminishing them should be implied. The question is rather what procedures are necessarily implied, the agreement itself being silent. This will usually turn on the proper construction of the contract read in context.

[134] The courts will not**,** however, readily countenance an apparent breach of natural justice in the absence of clear indications in an arbitration agreement that the impugned procedure was contemplated. This is reflected in the frequent indications that the Courts will assume that natural justice requirements must be complied with in the absence of express or implied agreement to the contrary (e.g. *Gas and Fuel Corporation of Victoria v Wood Hall Ltd and Leonard Pipeline Contractors Ltd* [1978] VR 385, 394).

[135] In our view, this approach applies under the Act. In the absence of an express or implied modification of the ordinary requirements of natural justice in arbitration, the court will normally require that they be observed. But the intention of the parties must be seen as paramount. In commercial arbitration in particular the court should take a robust and realistic approach, seeking to give effect to the intentions of the parties in relation to procedure.

[136] Applying this approach to the facts of this case, it seems clear that very limited natural justice rights were accorded to the parties in respect of independent work undertaken by the Independent Expert. The Settlement Agreement implicitly recognises the power to undertake independent work in cl 5.1.6, which specifically authorises the Independent Expert to use his own expertise and judgment in determining the ERR, subject to certain conditions.

[137] Clause 5.1.6 contemplates the performance of independent work by the arbitrator. The power of the Independent Expert is not limited to deciding the case on the basis of the submissions of the parties, viewed in the light of his expertise and judgment. The obligation is only to have regard to those submissions. Implicitly, there is power for the Independent Expert's own estimates to be made, based on the data, having regard to the parties' submissions.

[138] Nor is there any express requirement in the agreement that such independent work be disclosed to the parties. Clause 5.1.5(f)(i) records that:

> There is a reasonable opportunity to make submissions, including in response to any issues raised by the Independent Expert.

[139] That clause does not in terms impose any obligation on the Independent Expert to disclose independent work. The question is therefore whether such an obligation is implied. The absence of any express provision in relation to a power granted expressly by the Settlement Agreement must, in a commercial context, count against such an implication. So too, as Fisher J recognised, does the requirement that the Independent Expert give only brief reasons (cl 5.1.10), which suggests that a full opportunity to consider and make submissions on methodology was not envisaged.

[140] These indications gain confirming force from the contractual exclusion of review in cls 6 and 10 of the agreement. Mr Turner submitted that those clauses did not exclude review. He argued that cl 6 did not apply because it referred only to an appeal (not review) and the proceeding was not a challenge to the amount of ERR determined by the Independent Expert. He said cl 10 did not apply because there would be no unavoidable delay resulting from these proceedings. We are not

persuaded by those arguments. We are satisfied that a contractual intention to exclude the type of challenge that Methanex makes in this proceeding is clear. We agree with Fisher J on this point, and with his reasons.

[141] It is true that the clauses purport to exclude appeal or review rather than the underlying natural justice obligations (and to that extent they are inconsistent with Article 34, which does not allow the exclusion of review on the basis of natural justice). Nonetheless, the clauses indicate a contractual intention that the right of review on the basis of breach of natural justice is to be as narrow as is possible. The Court should not defeat that intention by reading in implied procedural rights which are broader than those the parties actually agreed on. The exclusion of review indicates that the parties did not intend such implied rights to exist. To hold otherwise would be to adopt an unduly literal approach to the interpretation of the agreement. It would also be inconsistent with the purpose of the principles of natural justice in the arbitration context, which is to do justice between the parties rather than to insist on an absolute standard of fairness (see *London Export Corporation Ltd* at p279). The Settlement Agreement was negotiated by arms length commercial parties on legal advice. Its terms indicate that the parties would or should reasonably have contemplated that the Independent Expert would undertake independent work, and could have provided for rights in respect of that had they wished to.

[142] Accordingly we agree with Fisher J that any broader common law requirements of natural justice were excluded by the Settlement Agreement. It follows that the claim must be struck out insofar as it relied upon those principles.

Statutory obligations of natural justice

[143] We now consider whether Fisher J was correct to conclude that the mandatory natural justice requirements in Articles 18 and 24 did not require the disclosure of the model. The issue we must address is whether each limb of the phrase "expert report or evidentiary document", in its context in the Act and in light of the Act's legislative history, is to be read narrowly as indicated by the Judge. The effect of his approach is to extend the area in which natural justice obligations may be excluded by agreement between the parties. This can be said to be consistent with

party autonomy which is part of the context to be considered. On the other hand it is always open to parties to choose expert determination, outside of the statutory zone of arbitration, as a means for avoiding the requirements of natural justice.

[144] We turn first to consider the meaning of "expert report". It is clear that "expert report" does not include a report on matters of general application. This is indicated by the context and reinforced by the *travaux préparatoires* to the UNCITRAL Model Law, to which the Court is entitled to have regard in terms of s3 of the Act.

[145] We also agree with the Judge that the notion of an expert report is indicative of a statement of fact or opinion to the arbitrator from a stranger to the arbitration. This is indicated, as the Judge said, by the use of the word "report", and also by the notion of an "expert report" itself, which conveys the idea of the provision of expert evidence in Court proceedings. Therefore we accept that reports or documents prepared by an arbitrator or staff are not expert reports within Article 24(3).

[146] The more difficult issue in the appeal is the meaning of "evidentiary document". The first question here is whether a document produced by an arbitrator or staff is capable of amounting to an evidentiary document. The ordinary meaning of the words suggests that the inquiry should be concerned with the character of the content of a document rather than who was responsible for its preparation. As well, the common law rules of natural justice are premised on a recognition that an arbitrator may act in a manner that amounts to gathering evidence. As Dunn LJ observed in *Fox v P G Wellfair Ltd* [1981] 2 Lloyd's Rep 514, 528, discussing the common law position:

> an expert arbitrator should not in effect give evidence to himself without disclosing the evidence on which he relies to the parties.

[147] There is an underlying reality in the proposition that internal aspects of the arbitrator's reasoning process may incorporate new factual material which in its effect is akin to evidence. If introduced by a participant, the natural justice obligations identified clearly would require an opportunity to comment on such material.

[148] The legislative history of the Act, however, suggests that the ambiguity is to be resolved against the view that an evidentiary document can include the product of the arbitrator's own internal processes. UNCITRAL and its Working Group in their development of what became the UNCITRAL Model Law appear solely to have been concerned with requiring that an arbitral tribunal disclose documents produced by persons outside of the arbitration on which the arbitrator comes to rely. As indicated, in the original draft there was no reference to the term "evidentiary document" in what became Article 24(3) of the Model Law. Rather, the material which had to be disclosed by the Tribunal was expressed as:

> any expert report *or other document*, on which the arbitral tribunal may rely in making its decision…

[149] Concern was expressed by delegates over the potential breadth of the term "other document". The Secretariat recorded that the Soviet Union considered the requirement of disclosure of any "other document" on which reliance was placed as being too broad since it might be applied to documents such as publications of laws, judicial precedents and legal studies. It should refer only to documents of an evidentiary nature, ie "documentary evidence". ("Sixth Secretariat Note: Analytical Compilation of Government Comments" A/CN.9/263 (19 March 1985)).

[150] During discussion the delegate of the United States expressed concern that the term might be construed as requiring the results of arbitrators' library research to be communicated to parties before making an award. He said that the text should not preclude tribunals "from doing what they normally did in making decisions," instancing consulting statistics and dictionaries. He proposed deletion of the whole sentence, or at least the words "or other document". (A/CN.9/SR.324 (14 June 1985)).

[151] The Secretariat's response to these and other expressions of concern over the possible ambiguity was to say that "other document" meant "any written material of similar, ie evidentiary, nature (e.g. weather report or exchange rate listing of a given day)". ("Seventh Secretariat Note: Analytical Commentary on Draft Text" A/CN.9/264 (25 March 1985)).

[152] The Commission then reported that "it should be made clear that such documents as research material prepared or collected by the arbitral tribunal did not have to be communicated to the parties". ("Commission Report", A/40/17 (21 August 1985)).

[153] Although the Chairman did observe that the main principle was that the parties should be given the opportunity to study all documents on which the tribunal might rely in making its decision (A/CN.9/SR.324 (14 June 1985)), the passages referred to in the *travaux* and the Report indicate that "evidentiary document" was substituted for "other document" in Article 24(3) as a more narrowly focussed term, with the purpose of conveying that only certain kinds of additional documentary information that the tribunal might rely on had to be disclosed to the parties. That focus was not on what the tribunal might gather internally from its own processes. Nor was it on methods of analysis of evidence such as computer modelling. It was rather on material generated by third parties that came before arbitrators, which might be relied on in decision making. The legislative history suggests that the term "evidentiary document" in Article 24(3) was of no wider significance than that.

[154] Without exception all of the material referred to in the *travaux* as requiring disclosure was material created by strangers to the arbitration. That is reinforced by the express reference to there being a need to disclose research material prepared by the tribunal.

[155] This interpretation of Article 24(3) has the support of Professor Isaak Dore, who in his analysis of the UNCITRAL Rules has said:

> Article 24(3) of the model law provides that all documents, statements, and other information supplied to the tribunal must also be provided to the other party. This party is also entitled to receive any documents or expert reports on which the tribunal has relied in making its decision. The responsibility for communicating documents to other parties ultimately rests with the tribunal itself. The first of these requirements is derived from article 15(3) of the arbitration rules… The second requirement is derived from Art 27(3) of the arbitration rules… It should be noted however that neither the model law nor the arbitration rules require communication by the tribunal of documents and material prepared and collected by the tribunal itself. Thus only documents submitted by a party or outside expert need to be communicated to both sides.

> The purpose of the requirements under the two sets of rules is to ensure that the parties are informed, as soon as the tribunal is, of the contents of documents furnished to or relied on by the tribunal. This prevents the tribunal from making a decision to which one party lacks access, thus promoting the fundamental policies of equality, fairness, and full opportunity to present one's case that are enshrined in both the model law and the arbitration rules.
>
> (I I Dore, *Arbitration and Conciliation under the UNCITRAL Rules: A Textual Analysis* (1986) 166).

[156] This interpretation of "evidentiary document" also reflects the desirability of parties to arbitration agreements being able to determine the extent of the disclosure the tribunal determining a dispute between them should make of its reasoning and reasoning processes. What Methanex seeks, contrary to that principle, is to establish its right to be informed of an aspect of the internal processes of the arbitrator in advance of the determination, so as to have an opportunity of criticism. Consistent with party autonomy, a party should be able to agree that the arbitrator should not disclose the products of such internal arbitral processes.

[157] That is also consistent with the position in international practice prior to UNCITRAL. It seems clear that the underlying legal position allowed parties to reach agreement on the scope of an arbitrator's disclosure obligations in their agreement to arbitrate. Absent such agreement there is a general rule in international arbitration that evidence gathered personally by an arbitrator must be disclosed to parties for comment (*Chrome Resources SA (Switzerland) v Leopold Lazaris Ltd* Federal Court of Switzerland, 8 February 1978, *Yearbook of Commercial Arbitration* 1986, Vol XI, p538.) But it is equally clear that the underlying requirement may be excluded by agreement. Many legal systems allow for arbitrations based solely on the arbitrator's judgment on the primary evidence, for example by an inspector of goods in issue (R David, *Arbitration Law in International Trade* (1985); Redfern & Hunter, *Law and Practice of International Commercial Arbitration* (1986); *Fox v P G Wellfair* at p523 per Lord Denning MR).

[158] For these reasons we conclude that the Independent Expert's reservoir simulation model is not an evidentiary document under Article 24(3) and that the Act accordingly did not require its disclosure to the parties.

[159] It follows that material produced by the arbitrator, or his or her staff, is excluded from the scope of the term "evidentiary document", even if it records information gathered by the arbitrator that is in the nature of primary evidence. As there is no evidence that a third party was involved in the production of the reservoir simulation model, it follows that the Independent Expert was not required to disclose it by Article 24(3) of the First Schedule to the Act. Because of the result we have reached, it is unnecessary for us to consider in detail Fisher J's further discussion of the types of documents to which the term "evidentiary document" applies. We are, however, satisfied that it does not cover research works of general application, matters of which judicial notice could be taken, or legal precedents and articles used as part of the internal reasoning processes of the arbitrator.

[160] We note that, had we taken the view that material produced by an arbitrator could be an evidentiary document, we would have been minded to allow the appeal on this point (subject of course to Methanex establishing an arguable case as to standing). Our impression is that the assumptions underlying the Independent Expert's model were contestable and arguably incorporated significant elements analogous to primary facts concerning conditions in the reservoir. The model was arguably more than a mechanism for pure analysis of the evidence produced by the parties. As such, it would have been arguable that elements of it fell within the scope of the phrase "evidentiary document" understood in the light of its purpose and the legislative history so that the entire model should be disclosed.

Conclusion : natural justice

[161] For these reasons, and in general agreement with the High Court judgment, we conclude that the statement of claim did not disclose an arguable cause of action for breach of natural justice. The non-derogable requirements in Articles 18 and 24 do not cover the pleaded situation, and the broader common law requirements were excluded by agreement. It follows that we also agree that the proceeding should be struck out on this ground also.

Result

[162] The appeal is accordingly dismissed and the cross-appeal allowed with costs of $12,000 to the second respondent and of $5,000 to each of the third to seventh respondents (who will receive one set of costs), the eighth respondent, and the ninth respondent, in each case together with all reasonable disbursements including, if applicable, travelling and accommodation expenses to be determined if possible by agreement or failing agreement by the Registrar.

Solicitors:
Buddle Findlay, Auckland for First and Second Appellants
Izard Weston, Wellington for First Respondent
Crown Law Office, Wellington for Second Respondent
Bell Gully, Wellington for Third to Seventh Respondents
Chapman Tripp, Wellington for Eighth Respondent
Phillips Fox, Wellington for Ninth Respondent

APPENDIX

Relevant provisions of the Arbitration Act 1996

Section 5:

5 Purposes of Act

The purposes of this Act are—

…

(d) To redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards;

…

Section 6:

6 Rules applying to arbitrations in New Zealand

(1) If the place of arbitration is, or would be, in New Zealand,—

(a) The provisions of the Schedule 1; and

(b) Those provisions of the Schedule 2 (if any), which apply to that arbitration under subsection (2),—

apply in respect of the arbitration.

(2) A provision of the Schedule 2 applies—

(a) To an arbitration referred to in subsection (1) which—

(i) Is an international arbitration as defined in article 1(3) of the Schedule 1; or

(ii) Is covered by the provisions of the Protocol on Arbitration Clauses (1923); or the Convention on the Execution of Foreign Arbitral Awards (1927), or both,—

only if the parties so agree; and

(c) To every other arbitration referred to in subsection (1), unless the parties agree otherwise.

First Schedule, Article 18:

18 Equal treatment of parties

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

…

First Schedule, Article 24:

24 Hearings and written proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(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.

(4) At any hearing or any meeting of the arbitral tribunal of which notice is required to be given under paragraph (2), or in any proceedings conducted on the basis of documents or other materials, the parties may appear or act in person or may be represented by any other person of their choice.

…

First Schedule, Article 34:

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—

(i) A party to the arbitration agreement was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication on that question, under the law of New Zealand; or

(ii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case; or

(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

(iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Schedule from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Schedule; or

(b) The High Court finds that—

(i) The subject-matter of the dispute is not capable of settlement by arbitration under the law of New Zealand, or

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

…

(6) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii), it is hereby declared that an aware 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.

First Schedule, Article 36:

36 Grounds for refusing recognition or enforcement—

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only—

(a) At the request of the party against whom it is invoked, if that party furnishes to the court where recognition or enforcement is sought proof that—

(i) A party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of the country where the award was made; or

(ii) The party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case; or

(iii) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it 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, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

(iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) The award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) If the court finds that—

(i) The subject-matter of the dispute is not capable of settlement by arbitration under the law of New Zealand; or

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

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v), the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming

recognition or enforcement of the award, order the other party to provide appropriate security.

(3) For the avoidance of doubt, and without limiting the generality of paragraph (1)(b)(ii), it is hereby declared that an award is contrary to 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.

Second Schedule, Article 5

5 Appeals on questions of law

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

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

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

(c) With the leave of the High Court.

…