IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2012-485-2735
[2013] NZHC 5

UNDER	the Arbitration Act 1996
BETWEEN	ASPEC CONSTRUCTION WELLINGTON LIMITED Plaintiff
AND	DELTA DEVELOPMENTS LIMITED Defendant

Hearing: 1 March 2013

Counsel: M J Leggat for Plaintiff
F E Geiringer for Defendant

Judgment: 7 March 2013

In accordance with r 11.5 I direct that the delivery time of this judgment is 4.15pm on the 7th day of March 2013.

RESERVED JUDGMENT OF MACKENZIE J

Procedural background

[1] By an originating application filed on 21 December 2012, the plaintiff (Aspec) sought enforcement of an arbitration award by entry as a judgment. The award sought to be enforced comprised an interim award dated 24 October 2012 and a final award dated 14 December 2012.

[2] By an interlocutory application filed on 24 January 2013, the defendant (Delta) sought refusal of that enforcement, and the setting aside of the award, on the grounds that the conduct of the arbitration breached the principles of natural justice.

[3] The case was listed in the Judge's Chambers list for call on Monday, 25 February 2013. At that call, Mr Leggat for Aspec sought an order on his application. Mr Geiringer for Delta submitted that a one day interlocutory hearing would be required for his application and he proposed timetable directions towards a hearing.

[4] I advised counsel that I could make time available for hearing later in the week. I adjourned the case until 10 am on Friday, 1 March 2013. In adjourning the matter for argument on that basis, it was clear to me that Delta's application would be determinative. I had in mind that it was an interlocutory application, which should be heard in chambers under r 7.34 of the High Court Rules, and therefore could be heard as I proposed.

[5] In considering the point further before the hearing, I realised that though Delta's application was in form an interlocutory application, in accordance with r 19.6, r 26.27(4) required the application to be treated as if it were an originating application under Part 19 and disposed of in accordance with that Part. That would ordinarily require a hearing in court, not in chambers.

[6] I raised the point with counsel at the commencement of the hearing. Following an exchange with counsel on the point, both counsel confirmed their agreement to the matter proceeding at that hearing. I conducted the hearing in court, not chambers, and both applications were dealt with at that hearing, as originating applications.

[7] Both parties had filed evidence in support of, and in opposition to, the respective applications. Aspec's application to enter the award as a judgment was supported by an affidavit of Mr D R Wenden on 21 December 2012. Delta's application to set aside the award was supported by an affidavit of Mr A J Fawcet sworn on 23 January 2013. Aspec filed a notice of opposition to Delta's application. That was supported by a second affidavit of Mr Wenden sworn on 31 January 2013. All of those affidavits were properly before the court.

[8] Delta also sought to rely on an affidavit from Mr G M Cutfield, sworn and filed on 22 February 2013. Mr Leggat opposed the admission of the Cutfield affidavit, on the grounds that it was not in reply to Mr Wenden's affidavit in opposition but involved new material which should have been filed with Delta's application, and that it was out of time. After hearing from counsel I ruled that Mr Cutfield's affidavit should be admitted.

The law

[9] The legal principles to be applied are clear, and not in dispute. An award may be set aside, or enforcement of it may be refused, in two circumstances relevant to this case. First, if the party concerned proves that it was not given proper notice of the appointment of the arbitrator or of the proceedings or was otherwise unable to present its case.[1] Second, if the award is in conflict with, or its enforcement would be contrary to, the public policy of New Zealand.[2] An award is in conflict with, or contrary to, the public policy of New Zealand if a breach of natural justice occurred during the arbitral proceedings or in connection with the making of the award.[3]

[10] The principles to be applied in cases involving these grounds have recently been discussed by the Court of Appeal in *Hi-Gene Ltd v Swisher Hygiene Corp*.[4] The Court said:[5]

> Mr Gilchrist submitted that article 36(1)(a)(ii) afforded a discrete ground upon which the enforcement of the arbitral award might be resisted. While that is undoubtedly so, there is a substantial overlap between that ground and the natural justice/public policy ground, at least in the factual context of the present case. It would be contrary to the purposes of the Act to refuse to recognise or enforce an arbitral award in the absence of serious grounds to intervene. It would be anomalous if a different threshold were adopted for the ground in article 36(1)(a)(ii) than that for the public policy ground under article 36(1)(b)(ii) when both involve essentially an allegation of breach of natural justice through the refusal of the adjournment. We endorse the following statement in the *Laws of New Zealand Arbitration*:
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> > … each party must have a reasonable opportunity to be present throughout the hearing, together with advisers and witnesses. A

1 Arbitration Act 1996 sch 1, arts 34(2)(a) and 36(1)(a).
2 Articles 34(2)(b) and 36(1)(b).
3 Articles 34(6) and 36(3).
4 *Hi-Gene Ltd v Swisher Hygiene Franchise Corp* [2010] NZCA 359.
5 At [24]-[27].

> party should be provided with sufficient time for their case to be properly prepared for the hearing. Efforts should be made to take into account the availability of the parties or important witnesses. However, this does not imply that a party has an absolute right to be consulted in every aspect pertaining to the hearing. The matter is subject to discretion of the arbitral tribunal. *The Court will intervene only in cases of positive abuse. If a party elects not to attend a hearing after receiving proper notice, the proceedings may properly proceed in the party's absence.*
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> (Emphasis added and footnotes deleted.)

This passage essentially adopts similar observations made by the learned editors of *The Law and Practice of Commercial Arbitration in England*.

The adoption of a high threshold has been said to be appropriate for all the grounds under article 36(1). As Redfern & Hunter explain:

> … the intention of the New York Convention and of the Model Law is that the grounds for refusing recognition and enforcement of arbitral awards should be applied restrictively. As a noted commentator on the Convention has stated:
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> As far as the grounds for refusal for enforcement of the Award as enumerated in Article V are concerned, it means that they have to be construed narrowly.

The Convention's intention to remove obstacles to enforcement of arbitral awards and to apply a narrow construction (or high threshold) to all grounds for refusing enforcement is confirmed in *Parsons Whittemore Overseas Co v Société Générale de L'industrie du Papier,* a decision cited by this Court in *Amaltal*.

The issue

[11] As Mr Geiringer submits, the only issue in this case is whether, in the circumstances, the refusal of an extension of time for the filing of Delta's evidence prevented Delta from having a reasonable opportunity to present its case.

The course of the arbitration

[12] It is necessary to describe in some detail the procedural course of the arbitration. The arbitration arose out of a dispute under a construction contract between Delta as the developer of the project and Aspec as contractor. Aspec requested an Engineer's Review of the final payment schedule issued in response to Aspec's final payment claim. Aspec was dissatisfied with the outcome of the

Engineer's Review. It served on Delta a notice requiring arbitration dated 10 August 2011.

[13] Steps taken to obtain an appointment of an arbitrator by agreement of the parties were not successful and on 29 February 2012 Aspec applied to this Court for the appointment of Mr P Degerholm as arbitrator. Mr Degerholm is a Fellow of the Arbitrators and Mediators' Institute of New Zealand Inc and of the New Zealand Institute of Quantity Surveyors Inc and a member of the Society of Construction Law New Zealand. Delta took no steps on that application and an order appointing Mr Degerholm was made on 2 April 2012.

[14] Mr Degerholm has set out in his interim award dated 24 October 2012 the steps which he then took. He sought to arrange a preliminary meeting for 14 May. That meeting could not proceed on that day because of a lack of response from Delta. Mr Withnall, barrister, responded on 24 May confirming that he had been instructed by Delta. The preliminary meeting was held on 6 June. It was attended by Mr Leggat and Mr Wenden for Aspec and by Mr Withnall for Delta.

[15] At that preliminary meeting the parties agreed upon a timetable which was recorded in the arbitrator's record of the preliminary meeting in these terms:

Date	**Action**	**Responsibility**
By 20 Jun	File statement of claim, pleadings and bundle of documents	Claimant
By 18 Jul	File statement of response, pleadings and any additional documents not in claimant bundle	Respondent
By 1 Aug	File witness statements and expert witness briefs	Claimant
By 22 Aug	File witness statements and expert witness briefs	Respondent
24 Aug	Procedures conference at 10am to confirm final arrangements for hearing, held at 20 Daly St	All
By 27 Aug	File statement in reply (if any)	Claimant
3-4 Sep	Hearing to be held at 20 Daly St	All
10-11 Sep	*Backup date for hearing*	*All*
End Oct	Target date for interim award	Arbitrator

Date	Action	Responsibility
TBA	Costs submissions followed	Parties
TBA	Final award	Arbitrator

[16] The fixing of a hearing date and a back up date for hearing reflected a need for Mr Withnall to check his availability. When he did so, the arbitrator, on 12 June, confirmed the later date of 10-11 September.

[17] The plaintiff's statement of claim and accompanying documentation was submitted on 20 June. On 19 July Mr Withnall served Delta's points of defence but said that he had not at that stage received the documents from his client. Following a request for clarification on that point from the arbitrator, Mr Withnall replied on 23 July that "in terms of article 23 the respondent does not have available for submission documents additional to those already submitted and/or referred to in the pleadings". Mr Degerholm replied to Mr Withnall, drawing to his attention the arbitrator's powers under art 25 to disallow any further submission and to continue the proceedings. He urged Delta to comply with the agreed programme.

[18] Mr Degerholm had received no response from Mr Withnall by the time he received a letter from Mr Leggat on 1 August raising three matters:

(a) seeking an extension of two days, to 3 August, for the filing of Aspec's witness statements, noting that the claimant anticipated a corresponding extension to the respondent's due date for serving its witness statements;

(b) objecting to the respondent being allowed to produce any documents to the arbitration that were not readily available to the claimant at the agreed due date; and

(c) requesting a depositions hearing for Mr Wenden, who would be overseas at the time of the hearing.

[19] Mr Degerholm confirmed the requested extension to 3 August and called an urgent telephone conference. Aspec's witness statements were served on 3 August and the telephone conference was held on 6 August. The arbitrator's memorandum of that telephone conference records the position as to the respondent's documents in these terms:

> Mr Leggat had objected to the Respondent's failure to provide additional documents despite the agreed timetable, and requested a ruling that the Respondent could not rely in the arbitration upon any documents not available to the Claimant as at 18 July.
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> Mr Withnall acknowledged that no documents had been filed, and was unable to state whether any [sic] it was the Respondent's intention to file any documents in addition to the Claimant's bundle. He was unable to explain why the Respondent had not provided any documents, or why a request for a further extended time had not been made other than to say that the consultant engaged to prepare the response had been replaced, and that the relevant documents [sic] it was unnecessary to make an exclusionary ruling at this point. Mr Leggat responded that the unavailability of a particular person was not sufficient cause for the Respondent not to engage, expressed concern that the late supply of documents could result in a need for further claimant submissions, and repeated his request for the ruling.
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> Having considered the parties' views I indicated that I shared Mr Leggat's concern that despite Mr Withnall's assurances the Respondent had not complied with agreed deadlines, but would be prepared to allow the Respondent to file any documents up to the adjusted date for the Respondent's witness statements and expert witness briefs (24 August). I agreed that a ruling in relation to the timely filing of documents was required, but not in the exclusionary nature that had been requested. I did however agree with Mr Leggat's further request that any such ruling is clear that any such documents must be filed "as soon as possible and in any event not later than 24 August". I was satisfied that this would allow the Respondent ample opportunity to submit any documents upon which it intends to rely, that the Claimant would not be disadvantaged as the timeline allowed an opportunity to reply, and that the hearing date would not be affected and undertook to rule accordingly.

[20] The earlier agreed timetable was revised to record, as "latest date for the Respondent to submit any additional documents on which it intends to rely", the date "by 24 August". The arbitrator issued a formal order for directions on 7 August 2012 confirming the outcome of the telephone conference. The relevant direction was in these terms:

> The Respondent shall comply with the Revised Timetable in respect of the filing of documents. Any and all documents upon which the Respondent proposes to rely shall be filed as soon as possible and in any event not later than 24 August 2012. Any documents filed after that date will be considered

only if I am satisfied that such documents were not available or could not reasonably have been provided earlier.

[21] At 4.34pm on 24 August Mr Withnall faxed to the arbitrator a letter which said:

> 1. On checking I have been advised that while progress has been made in preparing the Respondent's evidence, an extension of time for providing it has regrettably become unavoidable and is now sought.
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> 2. A considerable amount of work is required to prepare the Respondent's evidence in the first place, given the number of issues involved. Mr Steve Peck is the successor expert to the expert the Respondent had initially engaged to undertake the work required (Mr Nightingale). Mr Peck is accordingly relatively new to the issues.
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> 3. Compounding this I am told has been the unavailability of Mr Fawcet to assist and oversee matters by reason over the last 2 weeks of the hospitalisation of his infant son with pneumonia and shortly after that suffering a bout of tonsillitis. Mr Peck has been absent at times as well.
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> 4. Regrettably he is also absent this coming Monday. The extension is accordingly sought to the end of Thursday 30 August 2012.
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> 5. As in the case of the extension sought by the Applicant, the Respondent would not oppose an extension to restore the time which the Applicant would have otherwise had to provide any evidence in reply.

[22] Mr Leggat responded to that request for an extension of time to 24 August by an email dated 27 August 2012. Aspec opposed the extension sought. Mr Leggat advised that, because of his other commitments, if the extension was granted and material was served which required a response, the hearing could not proceed on 10 September.

[23] On 28 August the arbitrator issued an order for directions in which he declined Delta's request for further time. He expressed his reasons in these terms:

> I had previously granted a significant extension to the respondent's time for response from 18 July to 24 August, over the claimant's objections. In allowing that further extension up to the date requested by the respondent I made it clear that no further extensions would be made subject to the proviso (item 2) that "Any documents filed after that date will be considered only if I am satisfied that such documents were not available or could not reasonably have been provided earlier".

> The respondent's stated reasons are Mr Fawcet's unavailability to assist and oversee during the 2 weeks prior to the request due to personal circumstances, and the amount of work involved for Mr Peck as the successor expert who has also been absent at times.
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> The claimant has objected on two bases: first that the respondent has had more than adequate time, and further extensions could indefinitely delay the proceedings and will result in a need to reschedule the hearing date; and second that due to its continued non-compliance the respondent's defence should be struck out and the respondent barred from defending the claimant's claim.
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> Having considered the parties' submissions I uphold the claimant's objection to the further request for additional time. However I am not prepared to take what I would regard as the extreme step of striking out the respondent's defence.
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> I had granted the respondent's earlier requests for extra time on the simple premise that the interests of natural justice require me to allow the respondent a reasonable opportunity to present its case. The respondent's concerns were known, and should have been notified, well ahead of the deadline that had been set in accordance with the respondent's own requests. That deadline contemplated the later submission of a document or documents, but was not stated or intended to be a provision for further extending time.
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> The request could not be addressed until after the deadline had passed as it was made by fax 30 minutes ahead of the deadline and without any supporting evidence. There was nothing to prevent a more timely request, or evidence to justify further consideration under my earlier direction. I am drawn to the conclusion that the respondent was not ready because it had not availed itself of the opportunity to present its response, and I am not prepared to defer the hearing without solid grounds. Further, I am satisfied that the respondent will not be deprived of its reasonable opportunity to present its case; the respondent must accept responsibility for failing to utilise the two opportunities that I have already allowed. I further note that the respondent will have a further opportunity to challenge the claimant's evidence in cross-examination.

[24] A brief pre-hearing conference was held in Mr Degerholm's office the following day, 29 August. Mr Withnall requested that the arbitrator record that his attendance did not compromise any rights that Delta may have arising from the arbitrator's directions, and the arrangements for hearing were confirmed subject only to that qualification. The conference also addressed the non-payment by Delta of its share of the arbitrator's fee security. The arbitrator issued a further order for directions on 3 September on that issue. The only further correspondence was a brief email from Mr Withnall advising that Mr Peck would be appearing and representing the respondent at the hearing.

[25] When the hearing started at 9.30 am on 10 September, Delta was represented by Mr Fawcet, accompanied by Mr Peck. Mr Fawcet objected to the hearing proceeding. He expressed the view that proceeding without allowing the respondent to submit evidence would amount to a denial of the respondent's right to natural justice. The arbitrator invited Aspec to consider postponing the hearing and called a brief adjournment to allow the parties to consider their respective positions. Upon resumption of the hearings Mr Fawcet maintained that the arbitrator should allow the respondent an opportunity to submit its evidence and should reschedule the hearing. Mr Leggat advised that Aspec wanted the hearing to proceed. The arbitrator then recorded the following in his award:

> 31. I indicated that I was not inclined to grant any significant extension of time in view of the events that had led to the hearing, but was open to consideration of the matter. I invited Mr Fawcet to indicate the nature of any extension he would require if I was to agree to the request. Following a further brief adjournment Mr Fawcet advised that the respondent had three files of documents which, as a result of my earlier ruling, it was not now allowed to present in evidence, and as a result he considered the hearing to be a "complete waste of time". He said it would take approximately four working days for Mr Peck to prepare the response, but Mr Peck's prior commitments meant that work would take about two weeks. In short, Mr Fawcet's response suggested that he regarded the matter as an inconvenience.
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> 32. I discussed the timetable implications with the parties and concluded that, after allowing time for claimant review of documents produced in evidence, the hearing was likely to be delayed by at least one month. I reminded Mr Fawcet that, despite the respondent's persistent failure to comply with the agreed timetable or my directions, I had preserved the hearing to allow the respondent ample opportunity to challenge each item of claim. I expressed concern that I could only take it from the respondent's attendance at the hearing with witness statements, but none of the documents exchanged so far signalled an intention to frustrate the hearing and further delay the proceedings.
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> 33. I also expressed concerned [sic] that the respondent was unrepresented by counsel, and asked Mr Fawcet whether he had taken that decision in consultation with counsel, why Mr Withnall did not attend and whether he remained as counsel. Mr Fawcet responded that Mr Withnall was still respondent counsel, and although he had a court appearance he could be contacted by cellphone if required.
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> 34. I invited Mr Fawcet to adjourn the hearing to collect the respondent's documents and any partly-prepared response documents from his office or from Mr Withnall, as the remaining time allocated for the hearing would still allow time to work through each item. I stated that it was my intention to ensure that the

> opportunity for cross-examination would not restrict the respondent from setting out its position and reasons, which would be very helpful to me in arriving at an informed decision on the available facts. Mr Fawcet repeated that in his opinion the hearing was a total waste of time, and declined to avail himself of that opportunity.
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> 35. Having consider the respondent's objection, the opportunities offered to the respondent, Mr Fawcet's evident lack of commitment to overcoming delays as a matter of urgency, his full knowledge of the consequences of past delays and my earlier directions, and the opportunities I have offered to overcome any perceived disadvantage at the hearing, I concluded that there was no natural justice issue or other compelling reason to justify delaying the hearing. Accordingly as this was not a matter of proceeding *ex parte*, merely that the respondent was unwilling to cooperate in the proceedings, I ruled that the hearing would continue.

[26] The hearing did proceed, and Aspec presented its case. Following the hearing, the arbitrator issued an interim award on 24 October 2012, dealing with the claim except for costs. He delivered a subsequent, final, award dealing with costs on 14 December 2012.

Delta's explanation for its inaction

[27] In his affidavit in support of the application to set aside the award, Mr Fawcet says:

> 16. Having received the plaintiff's statement of claim and evidence it was obvious to me that the defendant would need a significant amount of detailed expert evidence to refute the plaintiff's voluminous number of claims.
>
> 17. The task of preparing the defendant's evidence in response to the plaintiffs claim was given to Mr Keith Nightingale. Mr Nightingale was a qualified engineer employed by Globe Holdings Limited. I am a director of Globe Holdings Limited and that entity assisted the defendant in the preparation of its evidence.
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> 18. During the period that Mr Nightingale was supposed to be preparing the defendant's evidence, he accepted a job offer from a new employer, Arrow International. On or around 6 July 2012, Mr Nightingale reduced his hours to a part time basis and he ceased his employment with Globe Holdings Limited on 20 July 2012. In this period, Mr Nightingale had a number of other tasks to complete before his departure. He did not complete the defendant's evidence in response.

19. On 19 July 2012, the defendant served a statement of defence. However, it did not have prepared and was unable to serve any evidence.

20. On 1 August 2012, the plaintiff sought and received a two day extension of time for the serving of its witness statements.

21. On 6 August 2012, the arbitrator provided the defendant with an extension of time until 24 August 2012 to serve its documentary evidence.

22. The defendant engaged a new expert Mr Steve Peck, qualified quantity surveyor. Preparation of the defendant's evidence required Mr Peck and myself to meet to go through the issues in dispute and to go through the documents held by the defendant. It also required Mr Peck to complete one or more site visits. The defendant's documents were located in its Wellington office. Mr Peck was based in Wellington. The site and buildings were in Wellington.

23. During August, I was largely absent from work due to the illness of my infant son, for whom I am a primary caregiver. He was diagnosed with pneumonia and was hospitalised at Starship hospital, in Auckland, on 4 August 2012. Then, two weeks later he was diagnosed with tonsillitis, which required a second hospitalisation, again, at Starship hospital.

24. My ability to travel away from Auckland was therefore severely restricted during that time. This inhibited my ability to progress work on the defendant's evidence that was taking place in Wellington.

Discussion

[28] It is first necessary to consider the position as it was when the arbitrator refused the requested extension of time for filing documents and evidence. The only explanation which the arbitrator had as to the reasons why that was considered necessary was Mr Withnall's fax, set out at [21]. That was received at the very end of the period for filing documents, which had already been extended. The importance of compliance had been clearly indicated by the arbitrator in his memorandum set out at [19]. Mr Withnall's fax did not give an adequate explanation of the steps which had been taken to comply, or why compliance had not been possible. It did not set out what progress had been made or what was still to be done, to enable the arbitrator to assess whether there was a realistic prospect of compliance if the extension sought was granted. The arbitrator had to bear in mind

Mr Leggat's submission that if the extension was granted the hearing date of 10 September would be in jeopardy.

[29] In the circumstances as the arbitrator understood them, I consider that the arbitrator's refusal of the extension sought, for the reasons given in his order for directions set out at [23], was appropriate. The arbitrator's decision did not wrongly deprive Delta of its ability to present its case. The arbitrator was not in breach of the rules of natural justice in proceeding with the hearing in the way described at [25].

[30] I must also consider whether there has been a breach of natural justice having regard to the circumstances as they now appear, in the light of the evidence now before the Court.

[31] Mr Fawcet's affidavit as set out at [27] is quite inadequate to explain or justify Delta's failure to comply with the timetable directions. Timetable directions had been agreed at the preliminary meeting, attended by counsel, on 6 June. Delta is apparently an experienced property developer. It was represented by experienced counsel. The extent of the work involved in preparing a statement of response and collating relevant documents must, in general terms, have been known when the timetable was agreed. Mr Fawcet in paragraph 16 gives no basis for suggesting the scope of the task was rendered significantly different from that which must have been expected when the plaintiff's statement of claim and documents were received. He does not give any other reason why the task could not be completed within the agreed time.

[32] Paragraphs 17 and 18 are completely inadequate to explain why the necessary work was not put in hand as soon as it was apparent that it would be needed. Mr Nightingale was an employee of a company in the group of companies of which Delta is a member. Mr Fawcet was a director of both companies. It might have been expected that Mr Nightingale would have been working on the preparation for the arbitration from at least the time of the preliminary meeting on 6 June. There is no explanation as to why he was not, or could not. There is no explanation as to the reason for his reduction of hours from 6 July, although the reason for that must have been known to Mr Fawcet in his capacity as a director of the company by which

Mr Nightingale was employed. It might be expected that approval of a reduction in Mr Nightingale's hours would have required his approval, or at least that he would have been consulted. His affidavit is silent on the reasons for the reduction, and why it was approved. It does not explain what if anything Mr Nightingale had done by then, or what he still had to do.

[33] Mr Fawcet's affidavit is also quite inadequate to explain why the evidence could not have been substantially prepared in the month between receipt of the plaintiff's claim on 20 June and Mr Nightingale's departure on 20 July. He was apparently working full time for the group until 6 July, over two weeks after the claim was received. There is no evidence that he did anything in that period. Mr Fawcet's statement that Mr Nightingale had a number of other tasks to complete before his departure is not a sufficient basis for a finding that Delta was unable to carry out the necessary work for reasons beyond its control. The evidence does not support the proposition that Delta was 'left in the lurch' by Mr Nightingale.

[34] There was over a month between Mr Nightingale's departure and 24 August. Mr Fawcet's evidence at paragraph 22 is insufficient to explain why, after Mr Peck's engagement, the work could not have been progressed. He does not say when Mr Peck was engaged. He does not say when he met with Mr Peck to go through the issues in dispute and the documents. There is no explanation of what remained to be done by Mr Peck when he was engaged, or why it could not reasonably be done in the time. I consider that the evidence indicates a cavalier disregard by Delta of the need to respond to Aspec's claim.

[35] As to paragraph 23, Mr Fawcet is entitled to sympathy for his son's illness. However, the information given is quite inadequate to make an assessment of the effect of that on the preparation for the arbitration.

[36] There is nothing in Mr Fawcet's affidavit to cause me to reach a different view from that taken by the arbitrator, namely that no breach of natural justice occurred in the refusal of the extension of time.

[37] Delta also places reliance on Mr Cutfield's affidavit. It does so in three ways. First, Mr Geiringer submits that his evidence demonstrates that the breach of natural justice, or inability to present its case, which Delta alleges, has had a material effect in that, had Delta presented evidence, the outcome of the arbitration is likely to have been different. Second, he submits that the affidavit provides an answer to Aspec's submission that Delta is indulging in delaying tactics. Third, he submits that it goes to the question of whether the opportunity which Delta had to present its case was reasonable.

[38] I deal with the last point first. Mr Geiringer's submission is that Mr Cutfield's affidavit demonstrates that the volume of material to be addressed was so great that Delta needed more time than was available, so that the refusal of the extension of time was unreasonable. I do not consider that it does demonstrate that point. Mr Cutfield has examined Delta's documentation sufficiently to be able to review and express an opinion on about 80 per cent of the disputed variations. He does not say when he was engaged. In the absence of evidence, I infer that it was after Aspec's application to register the award was filed, on 21 December 2012. His affidavit was sworn on 22 February 2013, a period of two months, including the holiday period. Mr Nightingale had a clear month, between service of Aspec's claim on 20 June and his leaving Delta on 20 July. There was a further month available to Delta between then and the due date of 24 August. The task required of Mr Nightingale was less than that undertaken by Mr Cutfield. What was required by the timetable was the collation of the relevant documents, not a full review of them. Also, Mr Nightingale and Mr Fawcet must have been familiar with the material from their involvement in the project, while Mr Cutfield was coming to it afresh. I consider that Mr Cutfield's evidence does not support Delta's assertion that the time allowed for the preparation of its statement of response and documents was insufficient.

[39] For these reasons, I also do not regard Mr Cutfield's affidavit as providing an answer to Aspec's assertion that the present application by Delta is a delaying tactic.

[40] The proposition that Mr Cutfield's affidavit demonstrates that the alleged breach of natural justice has had a material effect would become relevant only if I

had found that there was such a breach. For the reasons given, I am satisfied that there was not.

[41] The Court will not deprive a litigant, or a party to an arbitration, of a proper opportunity to present its case. Natural justice requires such an opportunity. The public policy of New Zealand requires that, as arts 34(6) and 36(3) of sch 1 of the Arbitration Act 1996 expressly recognise. Public policy also requires that arbitration agreements must be complied with by the parties, and the courts must assist in ensuring their compliance. That is clear from the passage cited at [10] from *Hi-Gene Ltd v Swisher Hygiene Franchise Corp*.[6] In this case I find that there has been no breach of the principles of natural justice, and that Delta's inability to present its case at the hearing is a direct result of its own failures to meet the obligations under the arbitration process which were imposed on it by the contract which it had made.

Result

[42] Delta's application to refuse entry of judgment and to set aside the awards is refused.

[43] Aspec's application to enter the award as a judgment is granted. There will be judgment as follows:

Claim ($330,639.78 plus GST)		$380,235.74
Interest (see 323-330 and Appendix 2 Interim Award)		
Interest to 24 October	114,024.39	
Interest 25 October – 1 March		
(127 days @ 219.29 per day)	27,849.83	
		141,874.22
Costs		
See para 12 Final Award		26,647.50
Arbitrator's Fees		
See paras 338-341 Interim Award, para 13		
Final Award and Wenden para 6 ($29,900 x ¾)		22,425.00
		$571,182.46

[6] *Hi-Gene Ltd v Swisher Hygiene Franchise Corp* , above n 4.

[44] Interest will accrue from 2 March 2013 until payment at the prescribed rate.

[45] Aspec is entitled to costs on both applications, and disbursements. Mr Leggat seeks increased costs on Delta's application. Mr Geiringer did not address costs in his submissions. I indicate a provisional view that Delta has contributed unnecessarily to the time and expense involved by pursuing an argument that lacks merit, so as to justify an increase. My provisional view is that costs should be awarded to Aspec on a 2B basis, increased by 50 per cent for the costs on Delta's application. For steps which were common to both applications, one set of costs, at the increased rate, would be payable. If the parties are unable to agree on costs in the light of that indication, memoranda may be submitted.

"A D MacKenzie J"

Solicitors: Michael Leggat, Barrister & Solicitor, Wellington, for Plaintiff
Felix Geiringer, Barrister, Wellington, for Defendant
(Instructing Solicitor: RTC Brandon, Brandons, Wellington)