IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

CIV 2015-443-003
[2015] NZHC 1988

	BETWEEN	BSC CONSTRUCTION LTD Plaintiff
	AND	CLARENCE WILLIAM WITHERS Defendant

Hearing: 22 April and 6 July 2015

Counsel: R Wilson for BSC Construction Ltd
S W Hughes QC and K R Pascoe for Mr Withers

Judgment: 21 August 2015

JUDGMENT OF HEATH J

This judgment was delivered by me on 21 August 2015 at 11.00am pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors;
Rod Gordon, New Plymouth
Nicholsons, New Plymouth
Counsel:
R Wilson, New Plymouth
S W Hughes QC, New Plymouth

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The issue

[1] Arbitration is a consensual method of resolving disputes. The parties choose their own "judge" and invite him or her, on terms that they agree, to determine their differences in a binding fashion.[1] The Arbitration Act 1996 (the Act) governs the arbitral process in New Zealand, with differing rules applying to domestic and international arbitrations. Procedural rules in respect of domestic arbitrations are set out in the First Schedule to the Act.

[2] The end product of an arbitration is a decision on the merits, known as an award. There are limited circumstances in which a Court may intervene when considering a challenge to an award.[2] They are an appeal (or application for leave to appeal),[3] an application to set aside an award[4] and opposition to an application to enforce the award.[5] One of the grounds on which both an award may be set aside and enforcement opposed is where the award is in conflict with the public policy of New Zealand, or enforcement would be contrary to public policy.[6] The Act makes it clear that the public policy ground will be established if "a breach of the rules of natural justice [has] occurred … during the arbitral proceedings".[7]

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1 See the Privy Council's decision in *Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd* (reported as an appendix to *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR (CA)) at 337–338, para 1.

2 Arbitration Act 1996, First Schedule, art 5. See also *Carr v Gallaway Cook Allan* [2014] 1 NZLR 792 (SC) at para [12] per McGrath J, for the majority.

3 Ibid, Second Schedule, cl 5. Clause 5 of the Second Schedule applies in this case, in the absence of any agreement to the contrary: see s 6(2)(b) of the Act.

4 Ibid, First Schedule, art 34(2).

5 Ibid, First Schedule, art 36(1).

6 Ibid, First Schedule, art 34(2)(b)(ii) and 36(1)(b)(ii).

7 Ibid, First Schedule, art 34(6)(b) and 36(3)(b).

[3] In this proceeding, the unsuccessful party in a domestic arbitration contends that an award should either be set aside or not enforced because the arbitrator acted contrary to the rules of natural justice. Because the parties chose procedural rules designed to achieve a speedy outcome, the scope of the requirement for the arbitrator to observe the rules of natural justice is in issue.

Background

[4] Mr Withers contracted with BSC Construction Ltd (BSC) to build an accommodation lodge at his property in Taranaki. They fell into dispute. Two major issues arose. The first concerned the terms of their contractual arrangements. The second was whether BSC had breached any obligations under it. BSC intended to bring a claim for payment of outstanding costs. Mr Withers, as well as defending that claim, intended to counterclaim for damages for breach of contract. The answers to those questions would determine whether Mr Withers owed any money to BSC.

[5] BSC and Mr Withers agreed to submit their dispute to arbitration. They approached a private dispute resolution company, Building Disputes Tribunal (NZ) Ltd (the Appointor), to nominate an arbitral tribunal. Mr John Green (the Arbitrator) was appointed to fulfil that role.

[6] No written arbitration agreement was signed by the parties. When the parties agreed to refer their disputes to arbitration, email correspondence passed between the lawyers for each. Those emails, exchanged between 28 July 2014 and 3 September 2014, constitute the written record of their agreement. The parties adopted a standard form arbitration agreement developed by the Appointor. That document is called "Agreement to Arbitrate and Rules for Expedited Commercial Arbitration on the Documents" (the Expedited Arbitration Rules). I find that the Expedited Arbitration Rules contain the terms on which the parties agreed to arbitrate.

[7] Both Mr Withers and BSC wanted to obtain a prompt resolution of their dispute. Each was aware that the Expedited Arbitration Rules expressly excluded the

ability to cross-examine witnesses, and to make oral submissions.[8] The Expedited Arbitration Rules required the arbitrator to make an award within 45 working days of the date on which acceptance of his appointment was communicated to the parties (the acceptance date).[9]

[8] The Arbitrator found that Mr Withers owed a total sum of $93,898.11 to BSC, and was liable to contribute a further sum of $20,000 to the Arbitrator's fees.[10] BSC applied to this Court to enforce the award.[11] Mr Withers opposes that application. Separately, he has applied to set aside or appeal against the Awards.[12] Those applications are also opposed.

[9] The cross-applications came before me on 22 April 2015. It became apparent that the evidence filed was inadequate to address the fundamental concern raised by Mr Withers, namely that the Arbitrator was in breach of his duty to comply with the rules of natural justice.[13] I raised with counsel a number of deficiencies in the evidence before the Court.

[10] Having had an opportunity to consider their respective positions, the parties agreed to an adjournment of the applications. The adjournment was granted on terms that required Mr Withers to pay the balance of the amount ordered under the awards into the trust account of his solicitors. The money was to remain on interest bearing deposit in the joint names of the parties pending agreement to the contrary, or further order of this Court. Leave to provide an affidavit dealing with the natural justice point was reserved.[14]

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8 Generally, see paras [22]–[27] below.

9 See para [23] below.

10 This was the end result of a series of four documents issued by the Arbitrator between 8 December 2014 and 18 February 2015; namely, a Partial Award (dated 8 December 2014) a Memorandum in respect of the Partial Award (dated 18 December 2014), a Final Award (dated 12 February 2015) and A Correction to the Final Award (dated 18 February 2015). Unless the context otherwise requires, I use the term "Award" to describe these documents in a compendious manner.

11 Arbitration Act 1996, First Schedule, art 35.

12 Ibid, arts 34, 35 and 36, and Second Schedule, cl 5. An application to stay was included in the original application but was not pursued before me.

13 Ibid, First Schedule arts 18, 34(2)(b)(ii) and 36(1)(b)(ii) and (3)(b).

14 *BSC Construction Ltd v Withers* (Minute No 2) HC New Plymouth CIV-2015-443-003, 22 April 2015.

[11] An affidavit from a solicitor, Ms Sargeson, who had carriage of the arbitral proceeding on behalf of Mr Withers has now been filed. The hearing resumed on 6 July 2015, at the conclusion of which I reserved my judgment.

The legal framework

[12] When the Arbitration Act 1908 was repealed and replaced in 1996, the Act re-stated the purposes of arbitration as follows:

> **5 Purposes of Act**
>
> The purposes of this Act are—
>
> (a) to encourage the use of arbitration as an agreed method of resolving commercial and other disputes; and
>
> (b) to promote international consistency of arbitral regimes based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985; and
>
> (c) to promote consistency between the international and domestic arbitral regimes in New Zealand; and
>
> (d) to redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards; and
>
> (e) to facilitate the recognition and enforcement of arbitration agreements and arbitral awards; and
>
> (f) to give effect to the obligations of the Government of New Zealand under the Protocol on Arbitration Clauses (1923), the Convention on the Execution of Foreign Arbitral Awards (1927), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the English texts of which are set out in Schedule 3).

[13] Four principles underpin the Act. They reflect the nature of the arbitral process and explain the nature of the relationship between the arbitral tribunal and the Court. They are:[15]

(a) Party autonomy

(b) Equality of treatment

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[15] Explained in more detail in *Pathak v Tourism Transport Ltd* [2002] 3 NZLR 681 (HC), at para [24]. See also Williams & Kawharu on Arbitration (LexisNexis 2011) at para 2.4.

(c) Reduced court involvement in the arbitral process

(d) Increased powers for the arbitral tribunal.

[14] Equality of treatment is fundamental to any judicial process. In common parlance, it requires a "level playing field". Party autonomy allows disputants to agree rules of engagement that are tailored to their needs; "the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings".[16] Although arbitration is a process by which a dispute is determined according to enforceable standards of natural justice, the *scope* of an arbitrator's obligation to comply with those rules will be informed by the procedures adopted by the parties.[17] The scope of the obligation assumes the greatest importance because it is not open to the parties to exclude curial review.[18]

[15] In accordance with the principle that the Court should not intervene too readily in arbitral disputes, it does not, when considering a natural justice point, start from an assumption that the full rigour of the rules will be applied. Rather, the Court will determine what was required of the arbitrator to comply with the rules of natural justice, in light of the parties' agreement. A "robust and realistic approach" should be taken to give effect to the intentions of the parties, particularly in a commercial arbitration.[19]

[16] The concept of "natural justice" has its origins in common law systems. The equal treatment rule, set out in art 18 of the First Schedule to the Act, embraces the core ideas of a right to have a dispute determined by an impartial tribunal, and to be given an opportunity to present a case. Article 18 states:

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

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16 Arbitration Act 1996, First Schedule, art 19(1). See also arts 23 and 24.

17 *Methanex Motonui Ltd v Spellman* [2004] 1 NZLR 95 (HC) at para [50], upheld on appeal in *Methanex Motonui Ltd v Spellman* [2004] 3 NZLR 454 (CA). See also, Williams & Kawharu on Arbitration (LexisNexis 2011) at para 17.6.

18 *Methanex Motonui Ltd v Spellman* [2004] 3 NZLR 454 (CA) at para [116].

19 Ibid, at paras [133]–[135].

[17] Even if there were a breach of the rules of natural justice of a type justifying a refusal to enforce an award or an order setting it aside, there remains a residual discretion not to grant relief.[20] *Kyburn Investments Ltd v Beca Corporate Holdings Ltd*[21] is an illustration of a situation in which an award was not set aside, even though a breach of the rules of natural justice was found to have occurred.

[18] In *Kyburn*, the Court of Appeal was faced with an application that an award be set aside on the grounds that an arbitrator had acted in breach of the rules of natural justice by inspecting premises with one of the witnesses to be called by a party in the absence of the other side, and failing to disclose a prior relationship with one of the expert witnesses, and the firm of which he was a member. Challenges were made in the context of a rent review arbitration involving a commercial building in Wellington which was leased to Beca by Kyburn.[22] The challenges to the award were rejected in the High Court.[23]

[19] In determining the natural justice point, the Court of Appeal had regard to the nature of a rent review arbitration and the need, in that type of case, for an arbitrator to use his or her own expertise in determining a dispute of that type. The Court took the view that inspection of the premises by an arbitrator who has been appointed as a valuer by the parties was "an important part of the arbitral process".[24]

[20] The Court of Appeal observed that advance notice of an inspection was required by art 24(2) of the First Schedule to the Act. Further, art 24(3) requires information made available to the arbitrator during an inspection to be communicated to the other party. Those requirements, the Court held, reflected "the obligation under art 18 to treat the parties equally".[25] The Court of Appeal had no difficulty in concluding that an arbitrator's inspection of the premises with someone

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20 Both art 34 and art 36 of the First Schedule to the Act contemplate that the Court "may" make an order.

21 *Kyburn Investments Ltd v Beca Corporate Holdings Ltd* [2015] NZCA 290.

22 Ibid, at paras [1] and [2].

23 *Kyburn Investments Ltd v Beca Corporate Holdings Ltd* [2014] NZAR 311 (Simon France J).

24 *Kyburn Investments Ltd v Beca Corporate Holdings Ltd* [2015] NZCA 290 at para [35].

25 Ibid, at para [35].

allied to one party in the absence of the other constituted a breach of the rules of natural justice for the purpose of the setting aside provisions of the Act.[26]

[21] However, the Court of Appeal took the view that the award should not be set aside. To reach that result, the Court of Appeal exercised the residual discretion reposed by art 34 of the First Schedule to the Act. The Court said:[27]

> [42] The discretion enables the court to evaluate the nature and impact of the particular breach in deciding whether the award should be set aside. The policy of encouraging arbitral finality will dissuade a court from exercising the discretion when the breach is relatively immaterial or was not likely to have affected the outcome. Similarly, an award may not be set aside when the costs and delays involved are disproportionate to the amount in dispute.
>
> [43] On the other hand, where the breach is significant and might have affected the outcome courts are inclined to set aside the award. In some cases, the significance of the breach may be so great that the setting aside of the award will be practically automatic, regardless of the effect on the outcome of the award. Examples include *TNT Bulkships Ltd*, where the arbitrator had circumvented the legal procedures that were agreed to be applied to the arbitration. The Judge found this to be a substantial and complete misunderstanding by the arbitrator of his role in the arbitration, as opposed to a casual breach or occasional error which may not have necessitated court intervention.
>
> …

The arbitral process

(a) The Expedited Arbitration Rules

[22] The Expedited Arbitration Rules were developed by the Appointor to provide a mechanism by which parties to commercial contracts could achieve prompt resolution of their disputes. In order to achieve that goal, some of the procedural protections that are typically included in an arbitration agreement were either modified or removed.

[23] The Expedited Arbitration Rules contain statements of both "Purpose" and "Overriding Objective". The purpose is "to ensure that the arbitration is conducted fairly, promptly and cost effectively and in a manner that is proportionate to the

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26 Ibid, at paras [36]–[40].

27 The case cited in para [43] of the Court of Appeal's decision is *TNT Bulkships Ltd v Interstate Constructions Pty Ltd* [1987] NTSC 75 at para 107. The Court drew support for that approach from Williams and Kawharu on Arbitration (LexisNexis 2011) at para 17.2.

amounts in dispute and the complexity of the issues involved".[28] The "Overriding Objective" of the Expedited Arbitration Rules is "to enable the Arbitrator to produce a Final Award including a determination as to costs" within 45 working days from the date on which acceptance of the arbitrator's appointment is communicated to the parties.[29]

[24] To achieve that objective, the parties agreed that:

(a) Points of Claim would be delivered by BSC to the Arbitrator and Mr Withers on or before the fifth working day from the acceptance date. The Points of Claim were to include any sworn witness statements relied upon by the claimant, copies of all documents on which the claimant relied and submissions on relevant factual and legal issues.[30]

(b) Points of Defence and Counterclaim were to be delivered by Mr Withers, on or before the fifteenth working day from the acceptance date, and were to include sworn witness statements, copies of relevant documents and submissions on facts and legal issues.[31]

(c) Points of Defence to any Counterclaim were to be delivered on or before the twenty-fifth working day from the acceptance date and were to be restricted "to points arising from the Respondent's defence and counterclaim if any". BSC was barred from introducing any new points of claim.[32]

(d) BSC's reply was to include sworn witness statements, supporting documents relied on as evidence and submissions on relevant facts and legal points.[33]

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28 Expedited Arbitration Rules, cl 1.1.
29 Ibid, cl 1.2.
30 Ibid, cl 8.1 and 8.2.
31 Ibid, cl 9.1 and 9.2.
32 Ibid, cl 10.1.
33 Ibid, cl 10.1 and 10.2.

(e) Neither party was entitled to amend or supplement its claim or defence beyond the end of the period within which relevant documents and submissions were to be delivered.[34]

[25] The parties agreed that there would be no opportunity to test the evidence of each deponent by cross-examination at an oral hearing.[35] Ordinarily, a factual finding will not be made against a deponent who has not been cross-examined on the relevant point. Exceptions to that general rule are limited. The applicable legal principles were stated by Lord Diplock, delivering the advice of the Privy Council in *Eng Me Yong v Letchumanan*:[36]

> … Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which deals with further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he "may think just" the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth. Since this is a matter upon which the opinions of individual judges may reasonably differ, an appellate court ought not to interfere with the judge's exercise of his discretion … unless the way in which he exercised it is shown to have been manifestly wrong. ….

[26] The contractual provisions governing delivery of Points of Claim, Defence and Counterclaim, together with sworn statements and documentary evidence, contemplated that Mr Withers would put his best case forward on his counterclaim in sworn statements filed in support, but would not have any opportunity to reply to sworn statements and supporting documents provided by BSC in response.[37] Those arrangements evidence an intention, on the part of both parties, to reduce procedural safeguards otherwise available to minimise the risk of incorrect factual findings. That was the price that they were prepared to pay to obtain a prompt resolution of their dispute.

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34 Ibid, cl 11.1.
35 Ibid, cl 12.1.
36 *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at 341.
37 See para [24](b)–(d) above.

[27] A number of the provisions contained in the Expedited Arbitration Rules evidence that approach:

(a) The determination of the questions in issue without a hearing is confirmed by cl 12.0:

> **12.0 Hearing**
>
> 12.1 *There will be no hearing for the presentation and testing of oral evidence or for oral submissions*. However, the Arbitrator may, at the Arbitrator's absolute discretion, convene a conference of the parties for the purpose of clarifying any aspects of the matters in dispute and/or the parties' submissions and/or the evidence submitted in accordance with the procedures set out herein.

(Emphasis added)

(b) Clause 14 of the Expedited Arbitration Rules deals with questions of procedure, including issues involving the rules of natural justice. It states:

> **14.0 Procedure**
>
> 14.1 *The Arbitrator shall have the widest discretion permitted by law to resolve the dispute in a just, speedy, and final manner in accordance with the stated Purpose and the Overriding Objective, these Rules, and the principles of natural justice. It is expressly acknowledged and accepted that what might otherwise constitute natural justice in another setting may by necessity be tempered in order that the time limits fixed herein are met and the stated Purpose and the Overriding Objective are achieved*.
>
> 14.2 The Arbitrator shall have the jurisdiction and power to make any rulings and give any directions that the Arbitrator thinks fit with regard to procedure at any time during the arbitration.
>
> 14.3 *There shall be no discovery and inspection of documents*. Each party shall provide copies of all documents relied upon in support of the claim, the defence and counterclaim, or the defence to the counterclaim, to the Arbitrator and the other party in accordance with clauses 8.2(d), 9.2(d), 9.3(d) and 10.2(d) herein.

14.4 The Arbitrator shall have the power to request the parties to provide copies of any documents that the Arbitrator may reasonably require and if a party fails to produce any document without adequate explanation, the Arbitrator may draw any inference from that failure that the Arbitrator thinks fit.

(Emphasis added)

(c) The present applications turn on questions of evidence. Clause 15.0 provides:

15.0 Evidence and Admissibility

15.1 *The Arbitration will proceed on the basis of written submissions and evidence which is provided to each other party and the Arbitrator in accordance with the procedures set out herein*.

15.2 *To ensure that each party is given a full opportunity to present its case, the Arbitrator may at the Arbitrator's absolute discretion receive and act upon any evidence submitted and representations made by the parties which the Arbitrator considers relevant to the matters in dispute whether or not the same would be legally admissible in a Court of law. The relevance and materiality of such evidence shall be a matter solely for the determination of the Arbitrator*.

15.3 If a statement or report is included in a party's submission, the relevant witness may be called by the Arbitrator to participate in a conference of the parties.

15.4 *The Arbitrator may request further relevant submissions, information, or other evidence from the parties, but must give the other parties an opportunity to comment on any such submissions, information, or other evidence*.

(Emphasis added)

(b) The pleadings and the evidence

[28] BSC delivered Points of Claim on 15 October 2014. Written evidence was given in support by the principal of that company, Mr Brent Stewart, through an affirmation made on 15 October 2015.

[29] On 17 October 2014, after receipt of BSC's Points of Claim, the Arbitrator gave further directions to specify the precise dates by which the Points of Defence and other pleadings and evidence were to be delivered.[38] He said:

> …
>
> The respondent may serve his Points of Defence and Counterclaim in terms of Rule 9.1 **on or before Thursday 30 October 2014.**
>
> The claimant may serve its Points of Defence to Counterclaim (if any) in terms of Rule 10.1 **on or before Thursday 13 November 2014.**
>
> The award will be published in terms of Rule 19.1 **on or before 11 December 2014.**
>
> (original emphasis)

[30] Mr Withers' Points of Defence and Counterclaim were provided on 30 October 2014. They were supported by an affidavit sworn by Mr Withers, on 3 November 2014.

[31] BSC provided a Reply to Mr Withers' Points of Defence and a Defence to Counterclaim on 18 November 2014. Evidence, by affirmation and affidavit, was provided on 18 November 2014 from Mr Stewart, Mr Vernon Kay and Mr Corey Julian. No objection was taken to the provision of those documents outside of the times directed by the Arbitrator.[39] Although the documents comprised both a Reply to the Points of Defence and a Defence to the Counterclaim, the evidence provided by both Mr Kay and Mr Julian was responsive to the Counterclaim.[40] Indeed, given the nature of the substance of both Claim and Counterclaim, a degree of overlap in the evidence was inevitable.

[32] On 27 November 2014, Ms Sargeson (acting for Mr Withers) wrote to both Mr Wilson (counsel for BSC on the arbitration) and the Arbitrator in relation to a possible site visit and a further conference. So far as the reply evidence was concerned, Ms Sargeson wrote:

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38 See para [23] above.
39 See para [29] above.
40 See also, para [37] below.

…

> I refer to [Mr Wilson's] last bundle of documentation. Mr Withers has observed that with respect the Affidavit of Corey Julian he is simply an Employee of Emmetts Civil Construction Limited and the content is silent as to whether he has authority to give such evidence on behalf of the Company. If he has such authority Mr Withers would expect his evidence to be quite different.
>
> ….

[33] On 3 December 2014, BSC, through an email sent to the Arbitrator and copied to Ms Sargeson, renewed a request for a site visit. Mr Wilson indicated a telephone conference with himself and Ms Sargeson might be beneficial. In relation to the point raised about the affidavit from Mr Julian, he responded:

> …
>
> As regards the affidavit of Corey Julian I can advise that the affidavit was completed with the knowledge of the Company directors. A further affidavit addressing this point can be provided if considered necessary.
>
> ….

[34] The Arbitrator responded to both Mr Wilson and Ms Sargeson at 11.52am on 3 December 2014. He said:

> I would be available for a telephone conference any time this afternoon after 2.00pm.
>
> As a precursor to the discussion – I have now read all of the material submitted by the parties. I am not persuaded that a site visit will assist me to determine the matters in dispute (which are primarily questions of law) and a site visit will only add significant additional cost for the parties – I am happy to discuss of course.
>
> I would like to discuss the question of any cap as to liability on the part of the parties in this matter – both sides have referred to a $100K cap – there is in fact no 'cap' – the only purpose served by referencing an amount in dispute is to fix the security for the arbitrator's fee – ultimately however the actual cost will be based on time engaged and if the issues/claims/counterclaims are raised they need to be answered and there will be no difference in the cost of doing so whether or not the claim or counterclaim/affirmative defence is capped in any way – You may wish to discuss this point before we convene the telephone conference.
>
> I look forward to hearing from you.

[35] A telephone conference was held at about 4pm on 3 December 2014. The Arbitrator's record of it is contained in an email which he sent to Mr Wilson and Ms Sargeson at 5.31pm that day:

> Just a brief note following our telephone conference this afternoon to confirm:
>
> a. The arbitration is being conducted under the [Expedited] Arbitration Rules;
>
> b. At this stage it is not envisaged that a site visit or conference will be necessary – if that position should change as a result of my further deliberations I shall revert to you immediately;
>
> c. There is no cap on the amount that either side is claiming;
>
> d. I will publish a Partial Award next week that finally determines the substantive matters leaving the parties to either (a) agree costs, or (b) to make further submissions on costs to be dealt with in a Final Award.

[36] In her affidavit of 6 May 2015, Ms Sargeson referred to her handwritten notes of the telephone conference held on 3 December 2014. Mr Wilson was a party to that conversation. He accepts the accuracy of what Ms Sargeson has said about issues raised with the Arbitrator, but not recorded in his email of 3 December 2014.[41] Ms Sargeson deposes:

> 15. A conference call was scheduled for 3 December at 4.00pm and as is my practice, I had written myself some notes of matters that needed to be raised in that conference, a copy of these notes is annexed and marked "A". These included:
>
> > Mr Withers concerned re parameters of Arbitration Agreement that no right of reply to evidence submitted in second lot of documents filed by BSC, which should have been filed at outset.
>
> 16. When this matter was raised with Mr Green, I felt reassured by his response that should he consider that the affidavits filed raised any matters of credibility or upon which Mr Withers had not been given an opportunity to comment or left him with unanswered questions, he would contact us. I understood that if that happened then Mr Withers would be given a further opportunity to provide more evidence.
>
> 17. I recorded in my notes:
>
> > [The Arbitrator]

[41] See para [35] above.

> Can be confident if matter arises needs further input then definitely will be in touch and let know immediately if needed.
>
> • If as continued to work through – any questions whatsoever would come back quick written or teleconference no issue.
>
> 18. I took from that, that if the arbitrator was to accord any weight to the late affidavits then Mr Withers would be given an opportunity to respond.
>
> 19. I note that it was not suggested or argued on behalf of BSC during the conference that the affidavits filed on 18 November 2014 were in fact responsive but rather it was accepted (at least by implication) that they should have been part of the documentation initially filed by BSC.
>
> 20. Had I not received an assurance from the arbitrator, I would have insisted that Mr Withers be given an opportunity to file a further affidavit of his own and for any witness that he thought could respond to the contentions now made.

[37] Ms Sargeson referred to aspects of evidence from Mr Stewart, Mr Kay and Mr Julian on which she contends Mr Withers could have provided additional evidence.

(c) The awards

[38] Mr Withers' primary attack is on the Partial Award given on 8 December 2014 on questions of liability. The issue that he was asked to consider was whether, as BSC asserted, an oral agreement was entered into between Mr Stewart and Mr Withers whereby BSC agreed to provide labour and related services in the construction of the accommodation lodge or, as Mr Withers contended, the parties contracted on the basis of the Master Builders' Contract under which BSC was limited in the materials, equipment and subcontractor costs it was entitled to claim.

[39] After setting out relevant legal principles and discussing evidence given by both Mr Stewart and Mr Withers on the point, the Arbitrator concluded:

> [51] *Drawing the strands together, the difficulties for [Mr Withers] with its argument in this case are palpably obvious*.
>
> [52] *Taken overall, I found the evidence of Mr Stewart to be the much more satisfactory and plausible on balance. I am wholly unconvinced that the Master Builders Contract was ever concluded*.

In my judgment it represents nothing more than an offer on the part of BSC, and if Mr Withers' evidence is to be accepted, a counter-offer on his part (leaving aside the uncertainty of what it means) in respect of which there is no evidence that it was ever communicated to BSC and accepted by BSC.

[53] *Even if I were to accept Mr Withers' evidence, as a matter of law, I am driven to the ineluctable conclusion that the contract was never concluded*.

[54] *The insuperable hurdle for [Mr Withers] is that by inserting the additional provision at clause 7, [he] had added a new term which BSC had no opportunity of approving or rejecting*. It is impossible to determine when, if ever, an apparent mutual consent is to be found. *By Mr Withers' own evidence, he never "raised [the contract] with [Mr Stewart]" after he allegedly added, the additional provision and signed it in April 2011. It could not, in my judgment, be argued even hesitantly in this case that assent to the amended term added by Mr Withers could be inferred from the mere fact that BSC undertook work at the property*.

[55] To send the Master Builders Contract back some two years after it was originally provided by BSC, and seven months after BSC completed work at the property, is far too late. It is beyond argument in my view that BSC's offer lapsed because it was not accepted within a reasonable time, or by implication it was rejected on expiry of a reasonable time.

[56] The overwhelming impression I have is that the respondent wished to manage the construction of the Lodge and have the freedom and flexibility to undertake the construction of the Lodge by any means that he might choose without any ongoing obligation to engage BSC to undertake any of that work following completion of the erection of the precast panels. I do not find Mr Withers' evidence in relation to concluding the contract on the terms set out in the Master Builders Contract persuasive or convincing in the context of a commercial dealing by an experienced building contractor and businessman such as Mr Withers.

[57] *In the absence of a concluded written contract, I accept Mr Stewart's evidence, which was supported by Mr Kay, that the parties proceeded on the basis of a simple oral cost reimbursement* contract whereby BSC would provide labour at the agreed (reduced) rates of $45.00 and $35.00 per hour as required and requested by the respondent, provide services, including among other things, craneage, props for the panel and additional specialist labour as required from time to time, at cost, and that BSC would be paid $1.50 per kilometre for travel to and from the property (the **Contract**). *No other conclusion is tenable in my view*.

(Emphasis added)

[40] Having identified the basis on which the parties contracted with each other, the Arbitrator considered the value of the work undertaken. Although the Arbitrator

referred to Mr Kay's evidence as supporting that of Mr Stewart,[42] it is clear that the Arbitrator had earlier rejected Mr Withers' version of events.[43] I do not regard the fact that Mr Kay's evidence was consistent with Mr Stewart as being something that required the Arbitrator to provide Mr Withers with an opportunity to respond to it.[44]

[41] As far as the Counterclaim was concerned, the Arbitrator said:

> [88] On the available evidence I do not accept that BSC is in breach of contract or that otherwise the respondent is entitled to set-off or abatement in respect of the amount that I have found [Mr Withers] liable to pay BSC under the Contract. My reasons may be shortly stated.
>
> [89] There is simply no legal basis in the context of the charge-up/cost reimbursable Contract for [Mr Withers] to claim the cost of labour to complete the Lodge.
>
> [90] The claim is misconceived and even if [Mr Withers] were entitled to set-off on account of breach there are issues of mitigation, among other things, that would weigh heavily against the claim.
>
> [91] There is simply no legal basis in the context of the charge-up/cost reimbursable contract for [Mr Withers] to claim reimbursement or set-off in respect of the costs of employing additional specialist contractors including the concrete placers and concrete pumping contractors.
>
> [92] I am not persuaded that [Mr Withers'] claims of overcharging are made out on the evidence.
>
> [93] I am not persuaded that [Mr Withers'] allegations of defective works in respect of the foundations are made out on the evidence.

[42] It is on this aspect of the claim that the Arbitrator placed some reliance on evidence from Mr Kay. He said:

> [94] I accept the evidence of Mr Kay that [Mr Withers] used the surplus concrete from the floor slab in front of his shed which Mr Kay personally placed and finished at no charge to BSC or [Mr Withers]. In the circumstances there is no basis for holding BSC liable for the cost of removal of that concrete now.

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42 See para [57] of the Partial Award, set out at para [39] above.
43 See paras [51]–[54] of the Partial Award, set out at para [39] above.
44 See also, para [56] below.

The cross-applications

[43] In determining whether the Awards should be enforced, it is necessary to consider the specific grounds on which the various applications have been made by Mr Withers. I put the point in that way because art 35(1)(b) of the First Schedule to the Act makes it clear that unless there are grounds for refusing recognition or enforcement under art 36, or the award is set aside under art 34, the award "must be enforced by entry as a judgment in terms of the award". Compliance has been made with the formalities specified in art 35(2).

[44] Mr Withers' application, filed on 10 March 2015, expresses his challenge to the Final Award of 18 February 2015[45] compendiously, by reference to "appealing, staying and setting aside". Although the primary ground was stated as the "award is contrary to the rules of natural justice", the particulars that followed refer to findings of fact that the Arbitrator made. They do not particularise the type of breach alleged.

[45] The next two grounds on which the application is brought are:

> 2. On 17 December 2014 the solicitor for [Mr Withers] sought to address these issues, as the Arbitrator had published a Partial Award on 8 December 2014 but the Arbitrator declined to consider the matters raised further.
>
> 3. By allowing an award based in part on the matters raised in paragraph 2 supra the Arbitrator breached the rules of natural justice in that he failed to give [Mr Withers] a fair hearing.

[46] After the adjournment of the application,[46] Ms Hughes QC, for Mr Withers, applied to amend to bring the specific ground of challenge within the application.[47] However, she has responsibly accepted that an amendment of that type would be out of time because any application to set aside must be made within three months from the date on which the party receives the award. To the extent to which the application to amend raised a new ground of attack, it was out of time.[48] Accordingly, that application is dismissed.

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45 Although the reference is to only the Final Award, I have treated the application as including the Partial Award of 8 December 2014; see para [45] below.

46 See para [10] above.

47 The specific ground is that set out in paras 15–20 (inclusive) of Ms Sargeson's affidavit, set out at para [36] above.

48 Arbitration Act 1996, First Schedule, art 34(3).

[47] Ms Hughes acknowledged that the natural justice claim turned on whether I was satisfied that the specifics fell within the more general expression set out in the application.[49]

Analysis

[48] While it is clear that a process point, such as an allegation of a breach of the rules of natural justice, might give rise to a right of appeal under cl 5 of the Second Schedule to the Act,[50] the better approach in the present case is to deal with the issue substantively by reference to the competing applications to enforce or set aside the awards. For that reason only, I dismiss the application for leave to appeal.

[49] Article 18 of the First Schedule identifies two aspects of the rules of natural justice. The first is the need for each party to be treated in the same way. The second requires that they be given a "full opportunity" to present their respective cases. Those norms are consistent with the core elements of the common law concept of natural justice; the right to an impartial tribunal and the right to be heard.[51] Having regard to the fundamental nature of the obligation to comply with the rules of natural justice, I am satisfied that the way in which the original application was framed was sufficient to raise the complaint now advanced.

[50] There is nothing in the Expedited Arbitration Rules to suggest that the parties contemplated any inequality of treatment. Although they did not provide for a response from Mr Withers to any sworn statements submitted by BSC in response to his Counterclaim, that was no different from BSC's inability to reply to evidence given on Mr Withers' Defence. A symmetrical approach was taken to the evidence to be given in support of and in opposition to BSC's claim (on the one hand) and evidence in support of and in opposition to Mr Withers' Counterclaim (on the other).[52]

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49 See *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 (HC), at paras [40]–[42]. See also para [49] below.

50 *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614 (CA), at paras [38]–[40].

51 Generally, see *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452 (HC) at 463 and *Methanex Motonui Ltd v Spellman* [2004] 1 NZLR 95 (HC) at para [44] and [2004] 3 NZLR 454 (CA) at para [116].

52 See paras [24] and [31] above.

[51] The parties, by their agreement, must be taken to have known:

(a) The Arbitrator would make decisions on questions of facts without cross-examination on the sworn statements.[53]

(b) The scope of obligations cast upon the Arbitrator to comply with the principles of "natural justice" had been "tempered" by their agreement.[54]

(c) There was no right to seek discovery of documents, in addition to those submitted with each party's sworn statements.[55]

(d) The Arbitrator could receive evidence whether or not it would be admissible in a Court of law; and the assessment of that evidence was solely for him to determine.[56]

(e) Only if the Arbitrator requested further submissions, information or evidence from the parties was he under an obligation to provide the other with an opportunity to comment on it before making his award.[57]

[52] The sworn statements by Mr Kay and Mr Julian were lodged with the Arbitrator in accordance with the procedure agreed between the parties.[58] In terms of the written agreement, Mr Withers must be taken to have known that he would not have an opportunity to reply to them. The affidavits from Messrs Kay and Julian were properly before the Arbitrator and his failure to provide an opportunity for Mr Withers to respond could only amount to a breach of the rules of natural justice if, for some reason outside of the arbitration agreement, he assumed an obligation to do so.

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53 Expedited Arbitration Rules, cl 12.1 and 15.1, set out at paras [27](a) and [27](c) above, respectively.
54 Ibid, cl 14.1, set out at para [27](b) above.
55 Ibid, cl 14.3, set out at para [27](b) above.
56 Ibid, cl 15.2, set out at para [27](c) above.
57 Ibid, cl 15.4, set out at para [27](c) above.
58 Ibid, cl 8.1, 8.2, 9.1, 9.2, 10.1, 10.2 and 11.1, set out at para [24] above.

[53] The evidence of Ms Sargeson suggests some discussion took place about the possibility that Mr Withers could respond to that evidence during the telephone conference held at 4.00pm on 3 December 2014. However, there is no mention of that in the Arbitrator's record of the conference which was circulated to counsel at 5.31pm on 3 December 2014.[59] Further, no objection was taken by Ms Sargeson to the absence of any record of such a discussion in that document.

[54] Ms Sargeson's recollection of the discussion with the Arbitrator on 3 December 2014 is supported by Mr Wilson, for BSC. For that reason, I have not sought any formal response from the Arbitrator about what was said. The salient points that Ms Sargeson says she raised were:

(a) She expressed concern on the part of Mr Withers about the "parameters of Arbitration Agreement that [gave] no right of reply to evidence submitted in the second lot of documents filed by BSC".[60]

(b) She felt "reassured" by the Arbitrator's response that "should he consider that the affidavits filed raised any matters of credibility or upon which Mr Withers had not been given an opportunity to comment or left him with unanswered questions, he would contact us".[61]

(c) She believed it was accepted ("at least by implication") that the documents submitted by BSC to which Mr Withers had not had the opportunity to respond should have been part of the documentation submitted in support of its claim rather than in response to the Counterclaim.[62]

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59 See paras [35] and [36] above.
60 See para 15 of Ms Sargeson's affidavit, set out at para [36] above.
61 See paras 16 and 17 of Ms Sargeson's affidavit, set out at para [36] above.
62 See para 19 of Ms Sargeson's affidavit, set out at para [36] above.

(d) Had she not received "an assurance from" the Arbitrator, she would have insisted on Mr Withers' being given an opportunity to provide evidence in response.[63]

[55] There are two references to Mr Kay's evidence in the Award. One, with which I have already dealt, was in the context of BSC's claim.[64] The other was a reference, in dealing with the counterclaim,[65] to the use of surplus concrete from the floor slab in front of his shed, which Mr Kay had personally placed and finished at no charge to BSC.[66] No reference is made to the evidence of Mr Julian in the Award. I am not satisfied that the Arbitrator placed any substantive reliance on evidence from either Mr Kay or Mr Julian on the primary claim brought by BSC.

[56] At best, from Mr Withers' perspective, the Arbitrator assumed an obligation (during the 3 December 2014 telephone conference) to invite further evidence from Mr Withers if he considered the evidence of Mr Kay or Mr Julian might be determinative of an important fact in issue.[67] I infer that he did not regard any of that evidence as coming within that category. There is nothing in his Award to suggest that he did.

[57] In those circumstances, there was no breach of the rules of natural justice by the Arbitrator. He gave both parties an opportunity to be fully heard (on the papers, as agreed between them) and made factual findings on evidence submitted in accordance with the arbitration agreement. On that basis, BSC's application to enforce the award must be granted and Mr Withers' application to set the awards aside must fail.

Result

[58] For those reasons:

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63 See para 20 of Ms Sargeson's affidavit, set out at para [36] above.
64 See para [40] above.
65 See para [41] above.
66 See para [94] of the Arbitrator's Award, set out at para [42] above.
67 See paras [32]–[35] above.

(a) The application to amend the applications to appeal or set aside the Award is dismissed.

(b) The application for leave to appeal is dismissed.

(c) The application to enforce the award is granted.

(d) The application to set aside the award is dismissed.

[59] Within five working days of the date of delivery of this judgment, the solicitors for Mr Withers shall pay to the solicitors for BSC the moneys held in their trust account in satisfaction of the award. Only if any further moneys are payable can enforcement action be taken to recover. Leave to apply is reserved should any difficulties arise.

[60] BSC has been successful on the present applications. Costs are awarded in its favour on a 2B basis, together with reasonable disbursements, both to be fixed by the Registrar.

[61] I thank counsel for their assistance.

P R Heath J

Delivered at 11.00am on 21 August 2015