IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV 2009-419-000232

UNDER	the Arbtration Act 1996
IN THE MATTER OF	an Application for an order that recognition and enforcement of an Arbitration Award be refused
BETWEEN	COROMANDEL LAND TRUST LIMITED Applicant
AND	MILKT INVESTMENTS LIMITED Respondent

Hearing: 7 April 2009

Appearances: P O'Sullivan for Applicant
P J Dawson for Respondent

Judgment: 28 May 2009 at 4:00pm

(RESERVED) JUDGMENT OF ANDREWS J

This judgment is delivered by me on 28 May 2009 at 4:30 ~~am~~/pm pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

Solicitors:
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Tompkins Wake, PO Box 258, Hamilton 3240 *fax 07 839-4855*

Introduction

[1] Coromandel Land Trust Limited (Coromandel) (as owner) and MilkT Investments Limited (MilkT) (as sharemilker) were parties to a sharemilking agreement entered into on 12 March 2005 (the sharemilking agreement). As a result of a dispute between the parties the sharemilking agreement was cancelled and the dispute referred to arbitration. Mr Ranald S Gordon was appointed Arbitrator.

[2] The arbitration hearing was scheduled to commence on 17 November 2008. Coromandel sought an adjournment until January 2009, but the Arbitrator granted an adjournment until 8 December 2008, only. The arbitration hearing proceeded on 8-11 December 2008, and on 15 January 2009 the Arbitrator released his award, in favour of MilkT.

[3] MilkT has applied to enter the award as a judgment, pursuant to Art 35 of the First Schedule to the Arbitration Act 1996 (the Arbitration Act). In response, Coromandel has applied for an order that recognition or enforcement of the award be refused, pursuant to Art 36. Coromandel's application rests, in essence, on the Arbitrator's decision that the arbitration hearing was to proceed on 8 December 2008.

Background

[4] The sharemilking agreement was for three years, from 1 June 2005 to 31 May 2008. It contained provisions for dealing with disputes. Clause 43 provided for a conciliation procedure and clause 44 provided for arbitration. Both clauses anticipated that disputes would be resolved promptly, and time limits were set.

[5] For example, under clause 43 if a party had a dispute with the other party particulars of the dispute were to be given "promptly" to the other party, and the parties were to "promptly meet together" to try to resolve the dispute. If the dispute were not resolved within ten working days the dispute would be referred to conciliation. Then, if the dispute were not resolved by conciliation, it would be submitted to arbitration.

[6] Clause 44 provided that the parties "will proceed to arbitration" within 20 working days of notice being given.

[7] The Arbitrator's jurisdiction was challenged by Coromandel, and on 14 July 2008 the Arbitrator ruled that he had jurisdiction to enter into the arbitration. On 5 August 2008 the Arbitrator set a timetable which provided for the filing and service of the claim, reply and counterclaim, briefs of evidence, and lists of documents, with the final documents (MilkT's reply briefs) to be filed and served by 18 October 2008. A hearing was provisionally scheduled for Tuesday 18 November 2008, with a preliminary meeting on 17 November.

[8] By 20 October 2008, MilkT's evidence and lists of documents had been filed and served, but Coromandel's evidence and lists of documents had not.

[9] While this timetable was running, MilkT applied to the District Court for a mandatory interim injunction to require Coromandel to pay $81,930.98 (the total of milk payments paid to Coromandel by Fonterra and withheld by Coromandel) into Coromandel's solicitors' trust account. That application was heard on 13 September 2008 and granted in the reserved judgment of Judge M Harland, delivered on 31 October 2008[1] (the District Court judgment).

[10] Following delivery of that judgment Coromandel applied for an adjournment of the arbitration hearing, on the grounds that it could not apply funds both to meeting the injunction order, and to conducting the arbitration. The Arbitrator convened a telephone conference on 10 November 2008 to hear submissions on the adjournment application.

[11] Although senior counsel (Mr M Casey QC) had been instructed by Coromandel at the beginning of the arbitration process, he advised the Arbitrator prior to the 10 November telephone conference that he no longer had instructions. Mr Casey did not participate in the telephone conference. Mr Burt, director of Coromandel, participated on behalf of Coromandel.

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[1] *MilkT Investments Ltd v Coromandel Land Trust Ltd* DC Thames CIV 2008-075-134, 31 October 2008.

[12] Counsel for MilkT strenuously opposed an adjournment, noting that while MilkT had complied with the pre-hearing timetable Coromandel had not, that Coromandel had thwarted the conciliation process to the extent that 18 months had elapsed since the dispute arose, and that the arbitration should proceed as timetabled.

[13] Mr Burt responded that it had been MilkT's choice to apply added pressure by the injunction proceedings, that Coromandel was now attempting to comply with the injunction order, and that an arbitration hearing on 18 November would prejudice that compliance. Mr Burt also submitted that Coromandel would be considerably prejudiced were it to be required to conduct the arbitration without legal representation and complete documentation. He submitted that the arbitration hearing should be adjourned until after Christmas 2008.

[14] The Arbitrator ruled against Mr Burt's request for adjournment to after Christmas 2008. In his Minutes of the telephone conference the Arbitrator said:

> - I am not prepared to allow this arbitration to be delayed post-Christmas as submitted for by Mr Burt and will hear this matter prior to Christmas.
>
> - I have set a provisional date of 8 December.
>
> - The sole reason for postponing the hearing from 17 November until 8 December is because of the quantification issue relating to the claim, for which Counsel acting for [Coromandel] indicated he not had enough time to fully prepare the defence and counterclaim and was relying on some information from Mr Burt.
>
> - To further delay this matter taking into account the time that has elapsed would be inappropriate, because the prescriptive provisions of the share milking agreement were not followed, the matter has now dragged on for close to a year and a half, and questions have also been raised allegedly about the solvency of the company.
>
> - Protestations from Mr Burt about now not being able to complete the filing of evidence and having legal representation are not accepted.
>
> - Both Counsel had agreed on the timetabling and [Coromandel's] Counsel had indicated filing was imminent.

[15] The matter of adjournment was raised again in a telephone conference on 28 November 2008. Mr Burt again sought an adjournment until January or February 2009, saying that Coromandel could not engage legal representation, brief witnesses, and conduct the hearing on 8 December, because of a lack of funds. He again said

that Coromandel would be unfairly prejudiced, and denied natural justice, if it was not legally represented at the hearing.

[16] The Arbitrator confirmed his decision that the arbitration would commence on 8 December. He noted in his Minutes of the conference that he was well aware of his obligations as to natural justice in the event that MilkT was represented and Coromandel was not represented at the hearing, to ensure that those obligations were complied with, and the power imbalance respected.

[17] Mr Burt again sought an adjournment on 5 December 2008, citing lack of counsel, the inability to present witnesses, and difficulties with obtaining documentation from Coromandel's previous counsel, who had exercised a lien. The Arbitrator again refused to adjourn the hearing.

[18] The arbitration hearing began on 8 December 2008. Mr Burt was accompanied by a support person, Mr Allan Wallbank.

[19] The first day was taken up with further argument as to whether the arbitration should proceed. Mr Burt repeated his earlier submissions.

[20] In his formal record of the arbitration proceeding the Arbitrator noted that Mr Burt was "adamant" that the arbitration should be delayed for three months, that Coromandel would be severely disadvantaged without legal representation as there were some complex legal issues involved in its statement of defence and counter-claim, and that there would be a breach of natural justice and "equality of treatment provisions" if the hearing proceeded that day. He also noted Mr Burt's submission that Coromandel had not unduly or deliberately delayed proceedings, and would be happy for the arbitration to proceed if a three-month adjournment could be agreed, in respect of which Coromandel would, "cover [MilkT's] interim costs of the delay".

[21] The Arbitrator recorded his ruling at 20.3 of his Minutes of the arbitration preliminary meeting as follows:

My ruling and direction:

- Having heard and considered submissions for the claimant and respondent the hearing will proceed as scheduled.

- 18 months has now elapsed since the termination of the contract and the matter needs resolution.

- I am satisfied on the basis of the evidence and the documentation before me that there has been inordinate delay on the part of [Coromandel] and [its] advisors in the conciliation/resolution process.

- I am satisfied that with the timing of the year relative to the farming calendar that there would be further prejudice to [MilkT] in delaying the hearing a further 3 months as requested by [Coromandel].

- No guarantees as to [Coromandel's] financial stability or liquidity being able to fund the District Court order and legal representation/witness costs were tabled by the respondent in support of the requested adjournment.

- [Coromandel] seems to be relying on the premise that it is [MilkT] who is responsible for [its] impecunious situation in respect of the inability to fund legal and witness costs.

- In fact I note that the milk cheque approximating $81,000 appropriated to [Coromandel's] bank account rather than being lodged as disputed funds into [Coromandel's] solicitors trust account as per the relevant provision of the share milking agreement [clause 32.6] in fact has positively added to [Coromandel’s] cash flow.

- [Coromandel] to comply with the District Court order to secure the funds states that [it] is having severe difficulty raising the appropriate funds. It therefore follows that if funds cannot be raised to secure the appropriated milk cheque (the property of [MilkT]) I cannot have too much confidence with the raising of additional funds to cover off the costs of legal representation and witness costs.

For that reason I am of the opinion that the required test as per Art 25 of [Schedule 1] of the Arbitration Act 1996 relating to the obligations of [Coromandel] to file documentation and appear at the hearing do not meet the test of “without sufficient cause”.

[Coromandel] in my view has had sufficient time to defend the claim and prepare a counter-claim, was reluctantly granted an adjournment to arrange legal representation and cannot hide behind the shield of the funding issue in respect of a milk cheque (the property of the sharemilker) when the provisions of the share milking agreement relating to disputes were not followed.

The claim that legal issues justified the appropriation away from the dispute resolution provisions of the agreement is in my opinion vacuous as the dispute provisions are there to deal with exactly that situation.

> To suggest that the action of [MilkT] in seeking protection for those funds until the dispute has been resolved has detrimentally affected [Coromandel] defending the claim and prosecuting a counter-claim lacks credibility.
>
> I record that my comments above are for the purposes only of determining the "*without sufficient cause*" issue in directing whether the hearing should proceed. I have heard no evidence regarding the substantive issues and have formed no view as to the relative merits of the case regarding claim/counter-claim in respect of the withheld milk cheque.
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> The hearing will proceed as scheduled on the 9th December.

[22] In his ruling, the Arbitrator referred to Art 25 of the First Schedule to the Arbitration Act. As relevant to this proceeding, Art 25 provides:

> **25. Default of a party**
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> - Unless otherwise agreed by the parties, if, without showing sufficient cause, -
>
> ...
>
> (c) Any party fails to appear at a hearing or to produce documentary evidence, the Arbitral Tribunal may continue the proceedings and make the award on the evidence before it:
>
> **...**

[23] Following that ruling Mr Burt and Mr Wallbank left the hearing. The Arbitrator gave MilkT the opportunity to review its position as to whether the hearing should proceed. MilkT wished to proceed. The arbitration continued on 9 and 10 December 2008, with evidence being given on behalf of MilkT. Neither Mr Burt nor Mr Walbank attended.

[24] The Arbitrator undertook an inspection of the farm property on 11 December 2008. Mr Burt attended the inspection. Prior to the inspection Mr Burt handed the Arbitrator a file of documents relating to evidence he wanted to submit on behalf of Coromandel. Counsel for MilkT opposed the Arbitrator's receiving the documents, on the grounds that the hearing had concluded and there would, therefore, be no opportunity for the documents to be tested through Mr Burt, MilkT, or other witnesses. The Arbitrator agreed to accept the documents on the basis that they would be submitted to MilkT for a response.

[25] The inspection then took place, with both MilkT and Coromandel being asked to agenda items they wished the Arbitrator to view. The inspection took four hours.

[26] As noted earlier, the Arbitrator released his award on 15 January 2009. The Arbitrator dismissed all of Coromandel's counterclaims against MilkT. The Arbitrator found there was "no evidence" to support Coromandel's counterclaims under eight headings. In respect of Coromandel's counterclaims under the Fair Trading Act 1986 and the Contractual Remedies Act 1979, the Arbitrator found, on the evidence before him, that there was no breach. The Arbitrator allowed MilkT's claims against Coromandel to a total value of $584,899.37, as against a total claim of $945,824.

Coromandel's challenge to recognition or enforcement of the award

[27] Under Art 36(1)(b) and Art (3)(b) of the First Schedule to the Arbitration Act, recognition or enforcement of an award may be refused if a breach of natural justice has occurred during the arbitral proceedings. Coromandel argued that the Arbitrator had breached the rules of natural justice by:

a) Unilaterally, in the telephone conference on 10 November, rescheduling the commencement of the arbitration hearing from 17 November to 8 December, without consulting Coromandel as to the availability of witnesses;

b) Refusing Mr Burt's further request for adjournment on 5 December made on the grounds (amongst others) that certain of Coromandel's expert witnesses were not available on 8 December; and

c) Refusing Mr Burt's requests for adjournment on 10 November, 28 November, and 5 December, made on the grounds that Coromandel needed more time to prepare.

[28] On behalf of Coromandel, Mr O'Sullivan submitted that as a result of the alleged breaches of natural justice, Coromandel was denied a proper opportunity to be heard.

[29] On behalf of MilkT, Ms Dawson submitted that there was no breach of natural justice, that the Arbitrator rightly held that the arbitration should proceed, and that MilkT would have been prejudiced by any further delay in the arbitration hearing. Ms Dawson submitted that the Arbitrator's award should be entered as a judgment to "bring to an end numerous delay tactics employed by [Coromandel] to frustrate [MilkT's] legitimate, lawful and arbitrated claims since 4 May 2007 when the sharemilking agreement was cancelled."

[30] Further, Ms Dawson referred to Art 34 of the First Schedule to the Arbitration Act, which provides that recourse to a Court against an Arbitral award may be made only by way of an application to the court to set aside the award, which application must be made within three months from the receipt of the award. No such application had been made as at the date of hearing.

Requirements for a fair arbitration hearing

[31] The minimum requirements for a fair arbitration hearing (that is, one that complies with the rules of natural justice) are summarised by Mustill & Boyd in their text on arbitration as follows: [2]

> Where there is to be a full oral hearing, the following conditions must be observed –
>
> 1. Each party must have notice that the hearing is to take place.
>
> 2. Each party must have a reasonable opportunity to be present at the hearing, together with his advisers and witnesses.
>
> 3. Each party must have the opportunity to be present throughout the hearing.
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> 4. Each party must have a reasonable opportunity to present evidence and argument in support of his own case.

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[2] Mustill & Boyd *The Law and Practice of Commercial Arbitration in England* (2 ed, 1989) at 302.

> 5. Each party must have a reasonable opportunity to test his opponent's case by cross-examining his witnesses, presenting rebutting evidence and addressing oral argument.
>
> 6. The hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and argument.

[32] With respect to legal representation, Mustill & Boyd note, at 303, that the right to attend at the hearing belongs only to the parties to the arbitration. They further note that representation by lawyers is usual in "the more elaborate commercial arbitrations", but that there is no absolute right to legal representation.

[33] In the present case, Mr O'Sullivan submitted that Coromandel did not have a reasonable opportunity to be present at the hearing, together with its advisers and witnesses. His submission was, in essence, that the Arbitrator was in breach of the second "minimum requirement". He further submitted that as a result of the breaches, Coromandel was a denied a proper opportunity to be heard at the arbitration hearing, which was a breach of natural justice.

[34] The requirement that a party be given a reasonable opportunity to be present, with advisers and witnesses, was described by Fisher J in *Trustees of Rotoaira Forest Trust v Attorney-General*[3] as follows:

> In the absence of express or implied provisions [in the Arbitration agreement] to the contrary, it will also be necessary that each party be given an opportunity to understand, test and rebut its opponent's case; that there be a hearing of which there is reasonable notice; that the parties and their advisers have the opportunity to be present throughout the hearing; and that each party be given reasonable opportunity to present evidence and argument in support of its own case, test its opponent's case in cross-examination, and rebut adverse evidence and argument.

[35] There can be no doubt that Coromandel had a "reasonable opportunity" to be present, with its advisers and witnesses, for the hearing that was scheduled to begin on 18 November 2008. That hearing date was set well in advance, as was a timetable for the provision of documents and evidence in the period leading up to the hearing. In the absence of an application for adjournment being granted, Coromandel would have been expected to attend at the hearing, with its advisers and

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[3] *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452, at 463.

witnesses. If it did not attend, the arbitration hearing could have proceeded in its absence.

[36] However, as a result of the District Court judgment, Coromandel was in the position that funds were not available to both make the payment required by the judgment and conduct the arbitration. This was made clear in letters sent by fax by Coromandel's then counsel, Mr Casey, to the Arbitrator on 5 and 6 November 2008, copied to MilkT's solicitors, in which an adjournment was sought.

[37] In the letter of 5 November Mr Casey said:

> ... While the [District Court] order remains outstanding [Coromandel] is unable to apply funds to the conduct of this arbitration. It therefore cannot undertake to meet your costs or those of legal representatives and expert witnesses. ...
>
> The arbitration must therefore be adjourned to enable [Coromandel] to raise the funds needed to comply with the Court's order, and the further funds needed to cover the costs of the arbitration.

[38] In his letter of 6 November 2008 Mr Casey said:

> [MilkT's solicitors'] letter appears to accept that funds will need to be raised against [Coromandel's] assets, to cover both the payment ordered by the Court and the costs of the arbitration. That is what [Coromandel] is endeavouring to accomplish, but it is not achievable within the timeframe necessary to comply with the consent [sic] order and to enable the proper conduct of the arbitration scheduled to commence on 17 November 2008.
>
> ...
>
> It will be a matter of considerable prejudice to [Coromandel] if, as a result of its present financial constraints it cannot properly conduct the defence of the claim by [MilkT] and prosecute its own claim. There has so far been no assertion of prejudice on the part of [MilkT] and in the usual course the delay will be compensated by an award of interest if [MilkT's] claim is ultimately successful.

[39] By those letters, the Arbitrator was made aware that Coromandel needed time to raise funds to conduct the arbitration, that it was unrepresented until such time as funds were raised, and that it would be "considerably prejudiced" if it could not properly conduct its defence of MilkT's claim and prosecute its own claim.

[40] It is necessary to consider what occurred in this case, against the requirement that Coromandel be given a "reasonable opportunity" to be present at the arbitration, with its advisers and witnesses.

The Arbitrator's decision, at the 10 November telephone conference, to reschedule the arbitration hearing to 8 December

[41] Mr O'Sullivan submitted that the most significant breach of natural justice was in the telephone conference on 10 November, when the Arbitrator refused Coromandel's application to adjourn the hearing to "after Christmas" and set the hearing down for 8 December, without consulting the parties as to the suitability of that date. As he put it, the hearing date was "simply announced". To comply with natural justice, he submitted, the date ought to have been flagged to the parties, inviting consideration as to whether it was suitable. That did not occur. In the event, the date was not suitable to Coromandel's expert witnesses.

[42] In his Minutes of the telephone conference on 10 November the Arbitrator recorded that Mr Burt "strongly asserted" that an adjournment until "after Christmas" was required to allow him to raise funds, and that Mr Burt had said that "any hearing prior to Christmas will not allow him to present his case and have legal representation because of his inability to fund it".

[43] The Arbitrator recorded that the "sole reason" for postponing the arbitration hearing from 17 November was "the quantification issue" relating to the claim as to which, he noted, Mr Casey had indicated that he had not had sufficient time to fully prepare Coromandel's defence and counterclaim. The Arbitrator further recorded that it would be inappropriate to delay the arbitration, taking into account the time that had elapsed, because "prescriptive provisions" of the sharemilking agreement had not been followed, the matter had dragged on for close to a year and a half, and questions had been raised "allegedly about the solvency" of Coromandel. The Arbitrator expressly did not accept Mr Burt's "protestations ... about not being able to complete the filing of evidence and having legal representation" .

[44] At the conclusion of the Minutes, the Arbitrator, after directing that the arbitration hearing proceed on 8 December, recorded that the postponement was given to provide Coromandel the opportunity to complete the filing of the statement of defence and counterclaim, and to arrange legal representation. The Arbitrator also recorded that "in all the circumstances" he had taken the view that it was important to give Coromandel the opportunity to arrange legal representation.

[45] There is no indication in the Minutes that in the process of re-setting the hearing date for the arbitration to 8 December the Arbitrator made any inquiry of Mr Burt as to whether that date was convenient for him, counsel he wished to instruct, or witnesses to be called to give evidence for Coromandel. Accordingly, I accept Mr O'Sullivan's submission that the Arbitrator unilaterally rescheduled the arbitration hearing to 8 December, without consulting Mr Burt as to availability of witnesses at that time.

The Arbitrator's decision to confirm the 8 December arbitration hearing, following Mr Burt's further request on 5 November

[46] Mr O'Sullivan next referred to the Arbitrator's refusal of Coromandel's further request on 5 December (made by Mr Burt on its behalf) to adjourn the hearing. In his letter to the Arbitrator, Mr Burt said that he found himself "in an invidious situation" that he was "unable to obtain representation or any of the witnesses or do any proper preparation for this arbitration in the short period of time". He advised that he had tried to obtain independent legal counsel to assist him "from Hawke's Bay, Cambridge and Whangarei with no success". He also said that Mr Casey "has a lien over my paper work" and that his three named expert witnesses and two other witnesses were all unavailable "at this time".

[47] The lien was confirmed in an email dated 2 December 2008 from Mr Casey to the Arbitrator (in relation to the provision of Coromandel's documents for the arbitration) in which Mr Casey noted that Coromandel's lawyers had a lien over documents they held, so that Coromandel was unable to access them for the hearing. Two of the named witnesses confirmed, in affidavits filed in this proceeding, that

they were not available for the 8 December arbitration hearing, but would have been available at other times.

[48] The Arbitrator declined the application for adjournment in an email sent the same day. The email was not put before me but in his award at paragraph 3.22 the Arbitrator said only that his reply to Mr Burt's request was that "the hearing would proceed as scheduled ...".

[49] I accept Mr O'Sullivan's submission that this application for adjournment was on the grounds (amongst others) that Coromandel's expert witnesses were not available for the arbitration hearing, and that it was refused by the Arbitrator.

The Arbitrator's refusal of Mr Burt's requests for adjournment on the grounds that Coromandel needed more time to prepare for the arbitration hearing

[50] Finally, Mr O'Sullivan referred to the Arbitrator's refusal of a series of requests made by Mr Burt for the arbitration hearing to be adjourned. Those requests were made at the telephone conference on 10 November, at a further telephone conference on 28 November, and in Mr Burt's letter of 5 December. They were on the grounds that Mr Burt needed more time to prepare for the hearing.

[51] The applications for adjournment made on 10 November and 5 December have already been referred to. It is clear that the grounds on which the applications were made included that Mr Burt needed more time to prepare, and it is clear that they were refused by the Arbitrator.

[52] With respect to the 28 November telephone conference, the Arbitrator's Minutes record Mr Burt's submissions which note Coromandel's funding difficulties, Coromandel's consequent inability to obtain legal representation, present witnesses and brief witnesses, that Coromandel would be unfairly disadvantaged and denied natural justice if without legal representation and if unable to present witnesses, and that the hearing should be delayed until January or February in order to allow Coromandel further time to arrange representation .

[53] The Arbitrator refused the application and directed that the arbitration hearing should proceed on 8 December.

[54] I am satisfied that the requests for adjournment were made, as submitted by Mr O'Sullivan, and that they were refused by the Arbitrator.

Discussion: Was there a breach of natural justice?

[55] Mr O'Sullivan submitted that the breach of natural justice lay in the fact that the Arbitrator required the arbitration to proceed when Coromandel was not legally represented (as it wished to be), when witnesses who were to give evidence for Coromandel were not available, and when Coromandel required more time to be ready for the arbitration hearing. These matters are considered in turn.

Legal representation

[56] It can be seen from the Arbitrator's Minutes that he was made aware, on more than one occasion, that Coromandel wanted to obtain legal representation for the arbitration hearing. It is also evident that the Arbitrator records himself as having "taken the view" that Coromandel should be given the opportunity to obtain legal representation. Yet having granted an adjournment to 8 December, he refused further requests for adjournment so that Coromandel could obtain legal representation.

[57] The short period of time allowed for Coromandel to obtain legal representation may indicate a lack of understanding of what would be required in order for counsel to be instructed and for that counsel to prepare for a hearing. The Arbitrator's Minutes of the 28 November telephone conference illustrate this. Under the hearing "Clarifications from Arbitrator" he recorded:

> In view of the fact that this appears to be largely a farming arbitration, mostly surrounding technical and farm management issues as against complex issues, can [Mr Burt on behalf of Coromandel] present his own case adequately without the need for legal representation.
>
> Even though witnesses have not been briefed by counsel why can't the witnesses appear at the arbitration, give evidence and be available for cross-examination by counsel for [MilkT]?

[58] I cannot escape the conclusion that the Arbitrator decided, on 10 November, that the arbitration would proceed on 8 December. He was not to be deterred from that decision: the arbitration would proceed on 8 December, whether or not Coromandel had legal representation.

[59] In this case Coromandel's former counsel had raised legal issues earlier in the course of the arbitration, the Arbitrator was advised that there were complex legal and farming issues to be considered, Coromandel had previously been represented by counsel and wished to be represented at the hearing, and MilkT had been, and continued to be, represented by counsel. In those circumstances Coromandel was required to be given a reasonable opportunity to obtain legal representation. I am satisfied that the brief adjournment to 8 December did not afford Coromandel that opportunity, and that the Arbitrator's refusal to allow a longer adjournment was a breach of natural justice.

Witnesses not available

[60] I am also satisfied that the Arbitrator set the hearing date for the arbitration for 8 December without making any inquiry as to whether Coromandel's witnesses were available for the hearing. The Arbitrator maintained the hearing date notwithstanding repeated submissions from Mr Burt on behalf of Coromandel that witnesses were not available. I am satisfied that Coromandel was not afforded a reasonable opportunity to present its witnesses' evidence at the arbitration hearing, again amounting to a breach of natural justice.

Coromandel was not ready for hearing

[61] Mr O'Sullivan's argument on this point focused on the impact of the District Court judgment, under which Coromandel was ordered to pay withheld milk payments into its solicitors' trust account. Mr O'Sullivan submitted that Coromandel would have had no difficulty funding counsel and witnesses, had it not been for the "last minute" injunction sought by MilkT.

[62] That submission echoed what Coromandel's former counsel had said in his letters to the Arbitrator on 5 and 6 November 2008. In his letter of 5 November, Mr Casey noted that the sum that was the subject of the injunction application represented part of MilkT's claim in the arbitration, and comprised payments made by Fonterra between April and August 2007, after the sharemilking agreement was terminated. The Judge had made no finding that the money was, in fact, due to MilkT, simply that it should be paid into the trust account pending resolution of the dispute between MilkT and Coromandel.

[63] In his letter of 6 November Mr Casey noted that the District Court Judge had accepted that the moneys paid by Fonterra had been absorbed by Coromandel and were no longer available. The Judge further acknowledged that funds would have to be raised by Coromandel. Mr Casey also said:

> It was the choice of [MilkT] to place added pressure (both financial and in terms of the court process) on [Coromandel] at a time when its attention and resources would otherwise have been applied to the arbitration.

[64] Mr O'Sullivan also referred in his submissions to Mr Casey's withdrawal as counsel in early November (being owed for outstanding fees) and the lien exercised by Coromandel's solicitors as further grounds on which the Arbitrator should have adjourned the hearing.

[65] Ms Dawson submitted that the Arbitrator rightly refused to adjourn the arbitration hearing on the "funding" ground. She pointed out that Coromandel's submission to the Arbitrator was that it could not *both* proceed with the arbitration *and* make the required payment, but in fact it did neither. Accordingly, she submitted, the "need for time to raise finds" was not grounds on which the Arbitrator should have adjourned the hearing.

[66] On this aspect of the attack on the Arbitrator's refusal to adjourn the arbitration hearing I accept Ms Dawson's submissions on behalf of MilkT. In particular, I do not accept the argument put by Coromandel both to the Arbitrator and to this Court that *because* MilkT had applied for and been granted the injunction, it had thereby caused Coromandel's financial difficulty and should, in effect, bear the consequences of a delayed arbitration.

[67] As the District Court Judge noted in her judgment, MilkT was entitled to make the application if it considered that to be necessary to protect its position until the substantive dispute over the milk payments was dealt with in the arbitration. There was nothing unreasonable about the application.

[68] I am not satisfied that Coromandel's funding difficulties were grounds on which the Arbitrator should have adjourned the arbitration hearing.

Should the Court refuse recognition or enforcement of the award?

[69] Article 36 of the First Schedule to the Arbitration Act allows recognition or enforcement of an award to be refused on only limited grounds. Pursuant to Art 36(1)(b)(ii) and 36(3)(b) a breach of the rules of natural justice occurring during the arbitral proceedings is grounds for refusing recognition or enforcement. I have found that breaches of natural justice occurred in the Arbitrator's unilaterally setting the hearing date for 8 December without making any inquiry as to whether Coromandel's witnesses were available on that date, and in his requiring the hearing to proceed when Coromandel was not represented by counsel and its witnesses were not available to attend. The Arbitrator's decisions on these two matters affected the fairness of the arbitration hearing.

[70] As noted earlier, Ms Dawson referred in her submissions to Art 34, which provides that recourse to a court against an arbitral award may be made only by an application for setting aside the award, and that an application for setting aside may not be made more than three months after the date on which the award is received. Ms Dawson noted that Coromandel had not applied to have the award set aside.

[71] However, the application before the Court is an application under Art 36 for an order that enforcement and recognition of the Arbitrator's award, made in response to MilkT's application under Art 35 to enter the award as a judgment. Art 34 does not apply to the present application, which is decided under Art 36 (although, it will be noted, the grounds on which recognition or enforcement may be refused are similar to those on which an award may be set aside).

Result

[72] Coromandel's application is granted and recognition or enforcement of the award is refused.

[73] I add that I have been advised by the Registry that, following the hearing of Coromandel's application that recognition or enforcement of the award be refused, Coromandel filed an application under Art 34 of the First Schedule to the Arbitration Act for an order that the award be set aside. That application appears to be dated 9 April 2009, but is date stamped by the Registry on 15 April 2009. The application would appear to be well out of time.

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Andrews J