

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2009-404-001573

BETWEEN SWISHER HYGIENE FRANCHISE
CORPORATION
Plaintiff

AND HI-GENE LIMITED
Defendant

Hearing: 27 July 2009

Appearances: A C H Clemow and M M Maharaj for the Plaintiff
W G C Templeton for the Defendant

Judgment: 2 December 2009

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 2 December 2009 at 12.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Counsel: W G C Templeton P O Box 5444 Wellesley Street Auckland 1141 the
Defendant

Solicitors: Gaze Burt P O Box 91345 Victoria Street West Auckland 1142 for the Plaintiff
Foley and Hughes P O Box 6829 Wellesley Street Auckland 1141 for the
Defendant

[1] There are two applications before the Court for determination. Swisher Hygiene Franchise Corporation (“Swisher”) has applied for entry of an arbitral award as judgment against Hi-Gene Limited (“Hi-Gene”). In turn, Hi-Gene seeks an order refusing recognition and enforcement of the same arbitral award. Each application is opposed.

[2] As could be expected, the applications overlap each other. In relation to Swisher’s application to enter the arbitral award as a judgment, Hi-Gene bears the onus of proving entry should be refused. The burden of proof is the civil standard of balance of probabilities. Since Hi-Gene also bears the onus of proof on its own application, I propose to consider the arguments Hi-Gene makes for both applications at the same time. The answer to one will necessarily answer the other as well.

Facts

[3] Swisher is based in the United States of America. It operates and manages an international franchise cleaning system. In 1997, Swisher gave third parties the right to operate Swisher franchises in specified territories, including Australia and New Zealand. A company called Swisher International (Australia, New Zealand) Pty Limited became the master franchisee for Australia and New Zealand. It granted franchises to a number of persons in New Zealand and Australia, one of which was a company operated by a Kenneth Rayward. Later, Mr Rayward and a John Grant contacted Swisher and entered into discussions regarding the possibility of replacing Swisher International (Australia, New Zealand) Pty Limited as master franchisee for Australia and New Zealand. The discussions were successful and culminated in Mr Rayward and Mr Grant incorporating Hi-Gene in September 2006. Mr Rayward and Mr Grant were both directors and shareholders of Hi-Gene. Shortly thereafter, a master licence agreement between Swisher and Hi-Gene was signed. Swisher International (Australia, New Zealand) Pty Limited sold its assets to Hi-Gene, and Hi-Gene became the master franchisee in Australia and New Zealand.

[4] Some time after Hi-Gene assumed its role under the master licence agreement, there were problems between the parties. Swisher says that they were

due to Hi-Gene not paying Swisher money owing to it under the master licence agreement. Hi-Gene complained that Swisher was not performing its obligations under the master licence agreement. Various unsuccessful attempts were made to resolve the problems. Finally, Swisher served a notice of default on Hi-Gene in October 2007. The notice of default required payment within 14 days of AUD \$11,119.58; AUD \$13,816.59; USD \$80,500; and NZD \$1,687.50.

[5] After the notices of default were served, lawyers became involved and there was correspondence between Hi-Gene's lawyers and Swisher. In November 2007, there was an exchange of correspondence in an attempt to negotiate a settlement. No settlement eventuated. In a letter dated 30 November 2007, Hi-Gene's lawyer wrote to Swisher's lawyers in New Zealand, Gaze Burt, refusing an offer to settle and alleging that the master licence agreement required the parties to mediate a solution. In December 2007, Swisher's lawyers responded, disagreeing that mediation was mandatory in circumstances where there had been attempts to resolve the parties' dispute through negotiation. Swisher then decided to engage its rights to commence arbitral proceedings.

[6] For the purposes of the present applications, the relevant parts of the master licence agreement are clause xiv "Arbitration" and clause xv "Governing Law". Clause xiv provided that any dispute or difference between the parties concerning the agreement, or any matter in any way connected with or arising out of the agreement, if not resolved by negotiation or mediation, was to be referred to binding arbitration of two arbitrators, one to be appointed by each party, or to an umpire to be appointed by the arbitrators. The clause went on to provide:

The arbitration must be conducted in a venue specified by the party that is the recipient of the notice of arbitration and will be conducted under the then-current laws governing arbitration in the place in which the arbitration is held. The prevailing party shall be able to recover its reasonable attorney's fees and other professional costs.

Clause xv, which set out the governing law for the master licence agreement, provided that the agreement was to be governed by the laws of New Zealand, and both parties consented to the jurisdiction and venue of the courts of New Zealand to enforce an arbitration award entered in the United States or New Zealand.

[7] A notice of commencement of arbitral proceedings dated 17 December 2007 was served on Hi-Gene's registered office and Hi-Gene's counsel, Mr Templeton, on 18 December 2007. In this notice, Swisher requested that Hi-Gene specify the venue for the arbitration and appoint one of the two arbitrators, pursuant to clause xiv of the master licence agreement. There was no immediate response to this notice and so, on 9 January 2008, Swisher's solicitors sent a copy of the notice of commencement of arbitral proceedings to Mr Rayward, who was one of Hi-Gene's two directors. The copy was sent by email, and requested that Mr Rayward nominate a venue for the arbitration. On 24 January 2008, Mr Rayward nominated Charlotte, North Carolina, United States of America, as the location for the arbitration. The nomination was by email, which Mr Rayward then signed and delivered to Gaze Burt.

[8] On 29 January 2008, Gaze Burt wrote to Mr Templeton advising him that Mr Rayward had nominated Charlotte, North Carolina, as the place of arbitration. On 1 February 2008, Mr Templeton replied to Gaze Burt's letter, disputing Mr Rayward's nomination. On 25 February 2008, Swisher formally nominated David Raines as one of the two arbitrators, and requested that within seven days, Hi-Gene nominate its own arbitrator, pursuant to clause xiv of the master licence agreement. Hi-Gene did not then, nor did it subsequently, appoint a second arbitrator.

[9] From the time that Swisher advised Mr Templeton of the arbitration's venue, it could fairly be said that Hi-Gene was not co-operative in progressing the arbitration to a hearing, whereas Swisher did all it could to expedite the arbitration's progress.

[10] On 21 July 2008, Swisher petitioned the North Carolina Superior Court Division of Mecklenburg County for orders appointing the required second arbitrator. Hi-Gene was formally served with the application to the North Carolina Court and, in response, filed an opposition to the application. Despite Hi-Gene's opposition, the application was successful and on 25 September 2008, the North Carolina Court appointed a second arbitrator. This meant the arbitration hearing could proceed.

[11] Following the appointment of a second arbitrator, Swisher acted to progress the arbitration. On 29 September 2008 (US time), Swisher's attorney in the United States, Jarred Gardner, sent an email to the arbitrators, which was copied to Mr Templeton. Attached to the email were: the Master Licence Agreement, the notice of default, the notice of commencement of arbitral proceedings, Hi-Gene's election of Charlotte, North Carolina, as the venue for the arbitration and the Court order appointing the second arbitrator. The email set out full contact details for the arbitrators and for Mr Templeton. The email also suggested a telephone conference to establish timeframes and to discuss rules and procedures for moving forward with the arbitration. Anyone who received this email would have realised that Swisher wanted to move forward expeditiously; Swisher was seeking to arrange a preliminary conference by telephone to achieve its aim, and everyone now had full contact details for each other.

[12] Mr Gardner emailed everyone again on Friday, 17 October 2008 (US time) indicating Swisher's enthusiasm for making progress. He volunteered to take the lead in scheduling a telephone conference.

[13] Then, on Monday, 27 October 2008 (US time), Mr Gardner emailed the two arbitrators and Mr Templeton proposing two optional dates and times for a telephone conference to advance the arbitration. Optional dates and times were recorded in the email for both the United States and New Zealand time and date zones. This removed any possibility of the New Zealanders becoming confused about the proposed times and dates by the differences in time and date zones of each country.

[14] The arbitrators advised Mr Gardner by email that Thursday, 30 October 2008 at 4.30 pm (US time) was a suitable date for a telephone conference. Mr Gardner then emailed the arbitrators tentatively confirming the date and time, as well as copying the email to Mr Templeton. The email stated:

Unless Mr Templeton has a conflict, we are set for Thursday at 4.30 pm (in New Zealand Friday at 9.30 am) I haven't yet heard from Mr Templeton (but it's still very early morning in New Zealand).

[15] In fact, Mr Gardner did not hear from Mr Templeton. The telephone conference proceeded on Thursday, 30 October 2008 (US time) without the attendance of either Mr Templeton or anyone else for Hi-Gene.

[16] At the conference a view was reached on the appropriate hearing dates for the arbitration. It was set down for hearing on 28 to 30 January 2009 (US time). Following the telephone conference, the arbitrators issued a report titled "Report Of Preliminary Hearing And Scheduling Order". On 30 October 2008, a copy of this report was faxed to Mr Templeton. The report recorded the time and date of the telephone conference, who was present, and that Mr Templeton (for Hi-Gene) had been notified of the preliminary hearing. The report went on to detail the date, time and place for the arbitration, and required the parties to submit a pre-hearing brief, limited to 10 pages double-spaced, by 21 January 2008. The report also required counsel to notify the arbitrators by a specified process if any discovery issues arose.

[17] It was only after the receipt of the arbitrators' report and, therefore, notice of the scheduled hearing dates that Mr Templeton acted. On 14 November 2008, Mr Templeton wrote to Mr Gardner advising that he had received the report. He went on to say that his instructions were that Hi-Gene did not find the scheduled hearing dates for the arbitration suitable, as neither Mr Templeton nor Hi-Gene's director, Mr Grant, were available. Mr Templeton referred to being engaged elsewhere, namely preparing for a High Court trial due to start on 2 February 2009. Hi-Gene suggested that the arbitration hearing be postponed until mid to late March 2009 and sought to have the scheduled dates adjourned. Although by then Mr Templeton would have been in receipt of Mr Gardner's earlier email with the contact details of the arbitrators, Mr Templeton chose to communicate the adjournment request only to Mr Gardner.

[18] On Friday, 14 November 2008 (US time), at his own initiative and not as a result of a request from Mr Templeton, Mr Gardner emailed the arbitrators attaching a copy of Mr Templeton's letter requesting an adjournment to a hearing date in mid to late March 2009. In his email to the arbitrators, Mr Gardner noted that Mr Templeton had not explained his absence at the telephone conference on 30 October 2008 at which the hearing dates were set. Mr Gardner outlined

Swisher's position, which was opposed to an adjournment. The case Mr Gardner made against an adjournment was that: Swisher opposed a lengthy delay of the scheduled hearing; Hi-Gene had been given ample opportunity to participate in the scheduling conference, or to propose a different time but it had not done so; instead it had ignored the process altogether. Swisher accused Hi-Gene of adopting delaying tactics and sought to have the hearing take place as scheduled. Mr Gardner then addressed Mr Templeton in the email and requested him to send correspondence directly to the arbitrators, with a copy to Mr Gardner. Mr Templeton did not respond to the comments Mr Gardner had made in his email.

[19] There was no response from the arbitrators. At this time they had not been the subject of a direct request for an adjournment. They had received Mr Templeton's request which was made to Mr Gardner, and they knew Mr Gardner's view on the request. But they had not been formally requested to rule on an adjournment application.

[20] Neither Mr Gardner nor Mr Templeton made any direct enquiry of the arbitrators about how they viewed Hi-Gene's adjournment request. Nothing happened until 21 January 2009 (US time) when Mr Gardner emailed Swisher's pre-arbitration brief to the arbitrators and Mr Templeton. This triggered a response from the arbitrators. On 22 January 2009 (US time), one of the arbitrators sent an email to Mr Gardner and Mr Templeton attaching a "Notice Of Hearing And Posting Of Deposit". The hearing dates were as originally set. To be sure that Mr Templeton received this notice, Mr Gardner also took it upon himself to send a copy of the notice to Mr Templeton by email, fax and post.

[21] On Thursday, 22 January 2009 (NZ time), Mr Templeton communicated directly with the arbitrators for the first time. He sent an email that reiterated Hi-Gene's reasons for wanting an adjournment and for the hearing to proceed in mid or late March 2009. The email was not copied to Mr Gardner. He received it as a result of one of the arbitrators forwarding it to him.

[22] Mr Gardner responded to Mr Templeton's email on Friday, 23 January 2009 (US time). The email was sent to the arbitrators and copied to Mr Templeton. The

email set out a strong case for refusing an adjournment. The email began with a complaint regarding Mr Templeton's failure to copy his correspondence to the arbitrators to Mr Gardner. It set out the various steps Mr Gardner had taken to provide Mr Templeton with relevant information. It referred to omissions on Mr Templeton's part to respond in kind. It accused Mr Templeton and Hi-Gene of attempting to delay the arbitration hearing. The arbitrators were reminded of Mr Templeton's failure to attend the telephone conference on 30 October 2008 and the failure to offer an explanation for the failure to attend that conference. Mr Gardner referred to four emails from him relating to the arbitration between 29 September and 27 October, each of which had been sent to Mr Templeton. In response, the only communication Mr Gardner had received from Mr Templeton was his letter of 14 November 2008 advising the set hearing dates were not suitable. That had been followed by the email sent to the arbitrators on 22 January 2009 on the same point, which they, in turn, had forwarded to Mr Gardner. Mr Gardner drew attention to the fact that his objection to Mr Templeton's request for an adjournment in November 2008 had been copied to Mr Templeton, and that this had invoked no response. In his email, Mr Gardner went on to say that Hi-Gene had been given adequate notice of the hearing dates. Swisher was prepared to proceed on 28 January 2009; Swisher had escrowed the \$19,800 payment for the arbitrators' fees, half of which should have been, but was not, borne by Hi-Gene, in accordance with the arbitrators' scheduling directions; Swisher had submitted a pre-arbitration brief; and, finally, one of Swisher's witnesses had re-arranged international travel in order to be able to attend the hearing. The email set out compelling grounds of complaint regarding Hi-Gene's dilatory conduct in relation to the arbitration's progress. The email was copied to Mr Templeton, who did not respond to it.

[23] The arbitrators considered the communication from Swisher and Hi-Gene and determined on 23 January 2009 (US time) that the hearing would commence as scheduled on Wednesday, 28 January 2009 (at 10.00 am US time). That decision was notified to counsel for the parties on 23 January 2009. The hearing did proceed at that time without Hi-Gene or its counsel being in attendance.

[24] The result of the arbitration hearing proceeding unopposed was that the arbitrators made an award, dated 6 February 2009, finding Hi-Gene liable to Swisher

for actual damages in the sum of US \$454,206. In addition, Hi-Gene was liable to Swisher for reasonable attorney's fees, costs and professional expenses in the amount of US \$50,952.61. A further sum of US \$9,900 was awarded, representing the cost of the arbitration and arbitrators' fees. This award was made because Swisher, in order to secure the arbitration, had deposited the full amount of the arbitrators' fees into a solicitor's trust account, thereby paying the one-half of that amount that, under the terms of the master licence agreement's arbitration clause, should have been met by Hi-Gene. An order was also made, pursuant to s 41 of the Fair Trading Act 1986, directing Hi-Gene, as well as its officers, directors, shareholders, employees or agents not to engage in any actions inconsistent with the terms of the master licence agreement.

[25] Paragraphs 1 to 28 of the award cover the procedural history of the arbitration and set out in detail the events leading to and the factual basis for the arbitrators' refusal to adjourn the hearing. Against this background, Hi-Gene now contends that this Court should refuse to recognise and enforce the award.

Law

[26] The grounds for refusing to recognise and enforce an arbitral award are narrow. Rule 35 of the First Schedule to the Arbitration Act 1996 sets out the requirements for recognition and enforcement of an arbitral award. Provided the party seeking to have the award recognised and enforced complies with the Act's requirements, r 35(1) requires a court to recognise the arbitral award as binding and, on application in writing to a court, the arbitral award must be enforced by entry as a judgment in terms of the award, or by action, subject to the provisions of rr 35 and 36.

[27] Rule 36 sets out the specific limited grounds for refusing recognition or enforcement of an arbitral award. Recognition or enforcement may only be refused if the conditions set out in r 36 are met. The rule provides:

36 Grounds for refusing recognition or enforcement

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

- (a) At the request of the party against whom it is invoked, if that party furnishes to the court where recognition or enforcement is sought proof that—
- (i) A party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of the country where the award was made; or
 - (ii) The party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case; or
 - (iii) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or
 - (iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - (v) The award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
- (b) If the court finds that—
- (i) The subject-matter of the dispute is not capable of settlement by arbitration under the law of New Zealand; or
 - (ii) The recognition or enforcement of the award would be contrary to the public policy of New Zealand.
- (2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v), the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.
- (3) For the avoidance of doubt, and without limiting the generality of paragraph (1)(b)(ii), it is hereby declared that an award is contrary to the public policy of New Zealand if—

- (a) The making of the award was induced or affected by fraud or corruption; or
- (b) A breach of the rules of natural justice occurred—
 - (i) During the arbitral proceedings, or
 - (ii) In connection with the making of the award.

[28] In its notices of application and of opposition, Hi-Gene relied on the same four grounds for its application and its opposition to Swisher’s application. They were:

- a) The agreement between the parties was subject to New Zealand law;
- b) Hi-Gene did not agree to the arbitration taking place in the United States of America
- c) Hi-Gene was unable to present its case; and
- d) Recognition and enforcement of the award would be contrary to the rules of natural justice.

As the argument developed, at the hearing it became clear that the focus of Hi-Gene’s case was on the third and fourth grounds (marked by (c) and (d)). The two other grounds were alluded to, but the arguments were not fully developed. For this reason I propose to focus on the last two grounds. For completeness, I will also deal with the first two grounds to the extent that they may still be relevant.

Was Hi-Gene unable to present its case?

[29] Hi-Gene argues that the arbitrators were wrong to not grant Hi-Gene the adjournment it sought and that their error has resulted in Hi-Gene being unable to present its case. I do not agree. As the party wanting an adjournment, it was incumbent on Hi-Gene to take the necessary steps to obtain an adjournment and to do so promptly. Furthermore, if the arbitrators were being unreasonable about an adjournment, Hi-Gene should have enquired into the procedures available in the United States of America to protect Hi-Gene’s position. Since the venue for the

arbitration was North Carolina, United States of America, it was the procedural law of that state of that country which governed the arbitration (see clause xiv in [6]).

[30] Hi-Gene was in the position of needing an adjournment because it had not attended the preliminary conference at which the scheduling for the arbitral hearing was to be done. Before the preliminary conference was scheduled optional, proposed times and dates for this conference were notified to Hi-Gene. It could have chosen one of the proposed times and dates or suggested alternatives if either of the proposed options was unsuitable for Hi-Gene. Instead it did nothing.

[31] Hi-Gene has not explained why it did not participate in the preliminary conference. There is a suggestion in Hi-Gene's arguments to this Court that at the time of the preliminary conference, Hi-Gene had not yet decided to submit to the jurisdiction of the arbitration and was still wanting to challenge the choice of venue as being unauthorised by Hi-Gene. If Hi-Gene wanted to preserve its right to challenge the jurisdiction of the arbitration, it is understandable that it would not want to take any step that could be construed as submitting to the arbitration. But if this were the case, Hi-Gene then had to pursue its challenge to jurisdiction.

[32] One of the grounds on which Hi-Gene had opposed the appointment of a second arbitrator was that North Carolina had no jurisdiction, as the choice of that venue was not authorised by Hi-Gene. The order appointing the second arbitrator was made on 25 September 2008 by Swisher. Once Hi-Gene knew of this order, it needed to decide whether to appeal the order or submit to the arbitration. There was ample time between the end of September 2008 and the end of October 2008, when the preliminary conference was held, for Hi-Gene to make up its mind about what its next step would be.

[33] Once Hi-Gene changed its stance and was prepared to participate in the arbitration, it then needed to act quickly to ensure that what steps had been taken to progress the arbitration to a hearing did not disadvantage Hi-Gene. From this moment on, Hi-Gene could have been expected to explain to the arbitral panel Hi-Gene's earlier absence on the ground it did not want to take any action that could be seen as submitting to the jurisdiction of the arbitration. Full reasons setting out why

the allocated hearing dates were unsuitable also needed to be given. Hi-Gene could then have sought to have the hearing postponed to a time that was suitable for Hi-Gene, as well as for Swisher. At the relevant time, this explanation and reasoning was never advanced. Consequently, what might have sensibly explained Hi-Gene's absence at the preliminary conference was never made known to the arbitral panel.

[34] Hi-Gene should have been aware that a failure to attend a scheduling conference could result in a hearing date that was not suitable for Hi-Gene. This became apparent to it when it received the arbitral panel's report setting out the schedule for the arbitration hearing. Hi-Gene's response was to write to Mr Gardner. Having failed to attend the preliminary conference, Hi-Gene needed to make contact with the arbitral panel. Once it had decided it would participate in the arbitration, it should have taken steps to contact the arbitral panel directly to inform it of the change of stance on Hi-Gene's part and of the need for a new hearing date. But this did not occur. Hi-Gene did not pursue the appropriate steps to obtain an adjournment when it should have done; instead it adopted a course which was unhelpful to it.

[35] With hearing dates scheduled for the end of January 2009, Hi-Gene needed to move promptly if it was to have any chance of securing an adjournment on the ground the dates were unsuitable for it. Although the arbitrators' report with the scheduled dates for the hearing was released on 30 October 2008 (US time), the first step Hi-Gene took to obtain an adjournment was on 14 November 2009 when Hi-Gene raised the question of an adjournment by writing directly to Mr Gardner. Whilst it is customary to check with the opposing party's counsel as to its attitude to an adjournment, the approach to take when seeking an adjournment is to apply directly to the decision-making tribunal. Since no direct request for an adjournment was addressed to the arbitral panel, the members of the panel were entitled to treat the communications Mr Gardner sent to them as information received and no more.

[36] Moreover, it is only due to the actions of Mr Gardner that the arbitral panel was informed of Hi-Gene's request for an adjournment. Mr Gardner was under no obligation to send Hi-Gene's letter addressed to him on to the arbitral panel. That the arbitral panel even knew of the adjournment request in November was solely due

to Mr Gardner. That Mr Gardner on behalf of Swisher should indicate to the arbitral panel that Swisher opposed any adjournment was entirely to be expected, given the steps he had taken earlier on to progress the arbitration to an early hearing. Mr Gardner very properly copied this communication to Mr Templeton, who would therefore have known that any request made to the arbitral panel for an adjournment would be opposed. The arbitral panel would have been aware that Hi-Gene wanted an adjournment, that Swisher did not, and that Hi-Gene knew of Swisher's attitude. Since no application for an adjournment was made to the arbitral panel directly, it was entitled to leave matters as they were.

[37] The letter requesting an adjournment did not set out a reasonable explanation to support this request. The letter said nothing about any change of position on Hi-Gene's part regarding the jurisdictional issue. All that the letter said was that Mr Templeton was unavailable because he had to prepare for a High Court hearing in New Zealand, and that Mr Grant also could not be available. Other than a reference to Mr Grant having made prior arrangements for personal reasons, his unavailability was not further explained. There was, for example, no explanation that Mr Grant was a necessary witness who could not for reasons beyond his control be present at the scheduled hearing date. There was no explanation to inform the arbitral panel that Hi-Gene needed to have Mr Templeton as its counsel at the arbitration hearing and that he could not find anyone else to replace him in the High Court matter that required him to be in New Zealand in late January 2009. With such little information being advanced, it is understandable that the arbitral panel saw no reason to intervene and of its own initiative communicate with Hi-Gene.

[38] Hi-Gene did not communicate directly with the arbitral panel until 22 January 2009. By then, the hearing was due to commence in six days time. Once Hi-Gene communicated directly with the arbitral panel, they responded directly to Hi-Gene.

[39] Hi-Gene's direct request to the arbitral panel said no more about why an adjournment was needed than did the 14 November 2008 letter to Mr Gardner. In addition, the letter contained comments that were implicitly critical of what had occurred to date. Given Hi-Gene's failure to engage with the arbitral panel until this

letter, it was perhaps unwise to cast aspersions on Mr Gardner's conduct (which were unfounded), as well as to suggest that the arbitral panel were overriding Hi-Gene's rights and displaying partiality to Swisher. With the hearing due to commence in six days time, Hi-Gene needed to do better than that to persuade the arbitral panel that the interests of justice lay in adjourning the hearing.

[40] By that stage, Hi-Gene needed to identify to the arbitral panel clearly the problems it had in proceeding on the scheduled hearing date, it needed to present an outline of the case it wanted to make, and why it could not do so at the scheduled time.

[41] Hi-Gene appears to have taken no further steps to protect its position, after sending the letter of 14 November 2008 to Mr Gardner. Since Hi-Gene had not received a positive response to that letter, it could not reasonably expect that the scheduled hearing dates would be postponed. In such circumstances, it is hard to see why Hi-Gene did not take positive steps to protect itself from finding it was obliged to proceed with the hearing as scheduled. For example, it could have engaged counsel in North Carolina or from elsewhere in the United States of America to seek a further preliminary conference for the very purpose of arguing for an adjournment and for new hearing dates to be allocated. If the arbitral panel had refused to hold any further conferences and to consider an adjournment application that was made as soon as Hi-Gene knew of the unsuitable hearing dates and with full explanations being given for why those dates were unsuitable, this Court may have taken a different view of what occurred and its impact on Hi-Gene's ability to be present at the arbitration hearing. But what has happened here is nothing like that. I consider that the outcome Hi-Gene now complains about is due to Hi-Gene's inertia and failure to act positively to protect itself from hearing dates that did not suit it. It cannot be said, therefore, that Hi-Gene was unable to present its case to the arbitral panel. Hi-Gene had every opportunity to participate in the arbitral process from the outset, once Mr Gardner set about arranging a preliminary conference. It follows that the third ground of Hi-Gene's notice of application and notice of opposition to Swisher's application is not established.

[42] Hi-Gene also argued that Swisher's filing of its pre-arbitration brief on 21 January 2009 (US time) left Hi-Gene with insufficient time to respond. However, it is clear from the evidence that Hi-Gene was never going to appear at the hearing on 28 January 2009. Consequently, any difficulty and procedural unfairness which may have flowed from the pre-arbitration brief being filed so close to the hearing date was hypothetical. Secondly, the date was set at the scheduling telephone conference in November 2008. Had Hi-Gene attended that conference, it could have sought earlier disclosure of Swisher's case. Once Hi-Gene decided it would participate in the arbitration (which was in early November 2008), it should have reviewed the timetable and procedural steps the arbitrators had directed. Where any direction adversely affected Hi-Gene's ability to present its case, this should have been taken up with the arbitral panel promptly. The occasions which Hi-Gene relies on as grounds it was unable to present its case are really instances of Hi-Gene failing to take the steps that were open to it to take. Hi-Gene is responsible for the resulting detrimental impact its omissions had on the outcome of the arbitral proceedings.

[43] I have not found helpful the authorities Hi-Gene relied upon to support its argument that it was unable to present its case. First, whether or not a refusal to adjourn a judicial hearing can amount to denying a party an opportunity to present its case is fact specific. The outcomes in the authorities Hi-Gene relies on were determined by the facts of those cases. None of the cases are on all fours with the present.

[44] In *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452, Fisher J stated that specific departures apart, as a matter of general principle, the procedure adopted for an arbitral proceeding should include:

- a) each party being given an opportunity to test and rebut its opponent's case;
- b) to be present at a hearing of which there is reasonable notice;

- c) to have the opportunity to be present throughout the hearing;
- d) each party being given a reasonable opportunity to present evidence and argument in support of its own case, to test its opponent's case in cross-examination and to rebut adverse evidence and argument.

[45] I accept this statement to state correctly the general principles to be applied to an arbitral proceeding. What I have concluded in this case is that Hi-Gene had the appropriate opportunities available to it, but it did not choose to avail itself of them. It is Hi-Gene's conduct, rather than that of the arbitral panel, that has caused it to miss the opportunities attendant on presenting its case to the arbitral panel.

[46] In *Coromandel Land Trust v MilkT Investments Limited* HC HAM CIV 2009-419-232 28 May 2009 Andrews J, the Court refused to recognise or enforce an arbitral award because in that case the arbitrator refused to adjourn the hearing, which was set down for 17 November 2008, until the following year and, instead, without consulting the parties, fixed a new date of 8 December 2008. Hence, the party seeking to postpone the hearing date of 17 November 2008 was partially successful but then found itself faced with a new hearing date that was also not suitable. It wanted legal representation but was unable to obtain such representation for the hearing date of 8 December 2008. Also it had difficulty with its witnesses appearing on that date. However, it was able to provide the arbitrator with a fully reasoned explanation for why the adjournment was required. It was the presentation of this explanation, coupled with the arbitrator having unilaterally rescheduled the original 17 November 2008 hearing date for another date, that caused Andrews J to refuse to recognise or enforce the arbitral award. Those facts are very different from those in the present case.

[47] In *Sharma v Paramount Services Limited* HC AK M1544-IM/99 9 February 2000 Laurenson J, the Court set aside an arbitral award on the ground the arbitrator was in breach of natural justice when he refused an adjournment. However, in that case the lawyer acting for one of the parties withdrew his services "at the last minute" (see [39] of the judgment). That party did not appear at the arbitration

hearing. The arbitrator refused an adjournment when he was aware that one party was not going to appear and was now also unrepresented. This circumstance is different from the present. Hi-Gene's lawyer did not become unavailable at the last minute. Hi-Gene had known since early November 2008 that its lawyer could not attend the scheduled hearing. Hi-Gene did not contact the arbitral panel directly and seek an adjournment until 22 January 2009, with the hearing then scheduled to commence on 28 January 2009. Furthermore, having known of the difficulty its lawyer had in attending the hearing since early November 2008, Hi-Gene has failed to advance any excuse as to why in the intervening period between early November 2008 and 22 January 2009 it took no steps to obtain alternative counsel. I consider that Hi-Gene's position is distinguishable from that of the party seeking an adjournment in *Sharma*.

[48] The principle that a party's conduct can disentitle it from complaining about not having an opportunity to present its case was applied in *Hill v Wellington Transport District Licensing Authority* [1984] 2 NZLR 314. In that case, Mr Hill sought judicial review of the Wellington Transport District Licensing Authority's decision on the ground he had not been present at the Authority's inquiry. However, he had known of the inquiry and chosen not to attend or participate in it in any way. Although the Authority decided to revoke the taxi licence Mr Hill operated on behalf of his mother in his absence, this, in the circumstances, was not a breach of his right to be heard. For reasons different from those in *Hill*, Hi-Gene also chose not to attend the arbitral hearing in late January 2009. I consider that, as in *Hill*, the failure to attend the hearing in January 2009 is Hi-Gene's responsibility and so it cannot now complain that the hearing proceeded without it being present.

[49] Decisions on whether or not to grant an adjournment are discretionary decisions. They involve a balancing exercise between the rights and interests of the party seeking the adjournment and that of the opposing party. Some of what the Court of Appeal said in *West v Martin and Anor* [2001] NZAR 49 in relation to adjournments granted by this Court under the High Court Rules is apposite to arbitral hearings as well. Except for the public interest in the efficient administration of justice, which is not a relevant factor for consideration in arbitral proceedings, I

consider the factors identified in *Martin* have the same force and offer helpful guidance when applied in the arbitral context. At [16] the Court of Appeal said:

The court is required to conduct a balancing exercise, with the ultimate issue being the need to do justice as between the parties. An adjournment will only be granted for good reason. The reasonableness of the attitude of the party seeking the adjournment is a relevant factor, as is the public interest in the efficient administration of justice, although the latter is subservient to the proper determination of the proceeding. The late unavailability of counsel may, in certain circumstances, provide a proper ground for adjournment.

And also at [18], in relation to the rights of audience of the unsuccessful applicant for an adjournment, the Court of Appeal said:

... in conducting the required balancing exercise with regard to justice between the parties ... it is important to emphasise that the requirements of natural justice are just as applicable to the ... [opposing party] as they are to the ... [applicant]; particularly the ... [opposing party's] right not to have proceedings drawn out unnecessarily.

[50] When I consider what has occurred in terms of the approach in *Martin*, I am of the view that there was no late unavailability of Hi-Gene's counsel. Hi-Gene did not put forward a reasonable explanation for wanting an adjournment. Hi-Gene's overall attitude was not reasonable; it had failed to attend the telephone conference at which the hearing dates were scheduled, and it did not directly apply to the arbitral panel for an adjournment until some six days before the hearing was due to commence. Swisher opposed the adjournment and made it clear to the arbitral panel that Hi-Gene had not acted to progress the arbitration. Hi-Gene's failure to appoint a second arbitrator, which caused Swisher to have to apply to the Court in North Carolina to appoint a second arbitrator, as well as Hi-Gene's failure to pay its share of the deposit for the arbitral panel's fees, would have given the impression that Swisher was doing all it could to progress the arbitration and Hi-Gene was not. Both parties had agreed under the master licence agreement to arbitrate any dispute between them. Swisher was, therefore, entitled not to have the progress of the arbitration drawn out unnecessarily by Hi-Gene.

Recognition and enforcement of award contrary to natural justice?

[51] The fourth ground relied upon by Hi-Gene is that the recognition and enforcement of the arbitral award would be contrary to the rules of natural justice.

This ground is within r 36(b)(ii). This sub rule provides that the Court can refuse to recognise and enforce an arbitral award if its recognition and enforcement would be contrary to the public policy of New Zealand. A breach of the rules of natural justice is one of the specified examples of something that would be contrary to public policy: see r 36(3)(b).

[52] I consider that all that has been said in relation to the third ground of review is relevant to and answers the fourth ground of review as well. The breach of natural justice on which Hi-Gene relies is procedural unfairness, flowing from the alleged failure to have a proper opportunity to present its case. However, for the reasons already advanced, I consider that Hi-Gene had every opportunity to present its case and the reason it did not do so is entirely due to the choices Hi-Gene made.

[53] Hi-Gene raised other issues in its submissions, which it sought to bring under the fourth ground of its application as being contrary to public policy. The issues fall under two heads, which correlate with the first and second grounds of appeal: first, an unauthorised choice of venue for the arbitration; and secondly, a wrongful application of New Zealand law by the arbitral panel.

Unauthorised choice of venue

[54] Clause xiv of the Master Licence Agreement gave the party who was in receipt of a notice to commence arbitral proceedings the choice of venue. Since potentially either party might have received such a notice, and since Swisher was based in the United States of America, it was always possible that this country might be the chosen venue.

[55] Swisher initiated the process under the Master Licence Agreement to commence arbitral proceedings: it served the requisite notice of commencement of arbitral proceedings. Hi-Gene's complaint is that it was not properly served with notice, and that Swisher had not pursued negotiation or mediation first, which Hi-Gene treats as a precondition to the commencement of arbitration.

Failure to Mediate

[56] Swisher contends that it attempted to negotiate a settlement and, when this was unsuccessful, it invoked the arbitration provisions of the Master Licence Agreement. Hi-Gene contends that Swisher was obliged to mediate. My reading of the Master Licence Agreement is that arbitration is seen as following either negotiation or mediation. There was evidence of some attempt at negotiation. I consider that under clause xiv, there should be some attempt at either negotiation or mediation, but once a party finds its efforts in that respect are unfruitful, it is free to resort to arbitration. The correspondence Swisher referred to me shows there was an attempt at negotiation. In any event, it is too late now for Hi-Gene to raise this as a barrier to the recognition and enforcement of the arbitration. For reasons set out later in this judgment (see [57] onwards), I have concluded that Hi-Gene has lost any rights it may have had to challenge the commencement of the arbitration process.

Commencement of arbitral proceedings

[57] The first notice of commencement of arbitral proceedings was served on Hi-Gene's registered office. The relevant Companies Office search record for Hi-Gene records the registered office as the company's address for service. Since Hi-Gene is a limited liability company, service by delivering documents to that address was the proper way to effect service on Hi-Gene:

387 Service of documents on companies in legal proceedings

- (1) A document, including a writ, summons, notice, or order, in any legal proceedings may be served on a company as follows:
 - (a) By delivery to a person named as a director of the company on the New Zealand register; or
 - (b) By delivery to an employee of the company at the company's head office or principal place of business; or
 - (c) By leaving it at the company's registered office or address for service; or
 - (d) By serving it in accordance with any directions as to service given by the court having jurisdiction in the proceedings; or

- (e) In accordance with an agreement made with the company[; or
 - (f) By serving it at an address for service given in accordance with the rules of the court having jurisdiction in the proceedings or by such means as a solicitor has, in accordance with those rules, stated that the solicitor will accept service.]
- (2) The methods of service specified in subsection (1) of this section are the only methods by which a document in legal proceedings may be served on a company in New Zealand.

As a matter of courtesy, Swisher also served the notice on Hi-Gene's counsel, Mr Templeton. In two ways, therefore, Hi-Gene had the means of knowing of the notice's arrival.

[58] Hi-Gene argued that the first notice was served "just before Christmas". I do not consider there can be any complaint regarding the timing of the service of the first notice. In the case of Hi-Gene, this was on 17 December 2008, and for Mr Templeton, on 18 December 2008. Whilst this is close to the New Zealand Christmas and summer holiday break, it is outside the period when businesses and professionals cease working. More importantly, s 2 of the Companies Act 1993 provides a definition of "working day", for the purpose of service of documents on companies. The summer holiday period, which is a period of time expressly defined as not falling within the definition of a "working day", is tightly confined to the period commencing with 25 December in any year and ending with 2 January in the following year. The first and second services of the notice of commencement of arbitral proceedings fall outside the excluded period.

[59] Under clause xiv of the Master Licence Agreement, once the notice of commencement of arbitral proceedings was served on Hi-Gene, the onus was then on Hi-Gene to determine the appropriate venue for the arbitration. Instead of choosing a venue, it did nothing.

[60] Swisher followed up on Hi-Gene's failure to nominate a venue by sending a second notice of commencement of arbitral proceedings to one of Hi-Gene's directors, Mr Rayward. He then chose the United States of America as the venue for the arbitration. He did so without the involvement of Mr Grant.

[61] The service of the second notice requires examination. Service of the second notice was achieved by an email sent to Mr Rayward, dated 9 January 2008, which said:

As you are a director of Hi-Gene ... we attach a notice of arbitration and our service agent's report. Kindly let us have your response to the notice on behalf of Hi-Gene ... including nomination of a venue for the arbitration as per clause 14 of the heads of agreement dated 1 November 2006 ...

[62] On 24 January 2008, Mr Rayward responded with an email saying:

With regard to your notice of the commencement of arbitral proceedings between Swisher International and Hi-Gene Limited, as a director of Hi-Gene Limited I advise that the location of the arbitration is to be held in Charlotte, North Carolina, USA.

The email was signed Ken Rayward, Director, Hi-Gene Limited.

[63] What is significant about both communications is that the notice of arbitration was directed to Mr Rayward as a director of Hi-Gene, rather than to Hi-Gene itself. Secondly, Mr Rayward responded by electing a venue in his role as a director of Hi-Gene. There is nothing in his email to suggest the decision on the location for the arbitration had been reached by Hi-Gene's board of directors.

[64] Section 18 of the Companies Act provides for when a company will be bound by the acts of one of its directors and when it will not. Section 18 (1)(b)(iii) sets out when a company may not assert that one of its registered directors has authority to bind the company, however, there is also the proviso in s 18(1) which precludes the section from taking effect when the party dealing with the director has knowledge or can be deemed to have knowledge of the director's lack of authority:

18 Dealings between company and other persons

(1) A company or a guarantor of an obligation of a company may not assert against a person dealing with the company or with a person who has acquired property, rights, or interests from the company that—

(a) This Act or the constitution of the company has not been complied with:

- (b) A person named as a director of the company in the most recent notice received by the Registrar under section 159 of this Act—
 - (i) Is not a director of a company; or
 - (ii) Has not been duly appointed; or
 - (iii) Does not have authority to exercise a power which a director of a company carrying on business of the kind carried on by the company customarily has authority to exercise:
- (c) A person held out by the company as a director, employee, or agent of the company—
 - (i) Has not been duly appointed; or
 - (ii) Does not have authority to exercise a power which a director, employee, or agent of a company carrying on business of the kind carried on by the company customarily has authority to exercise:
- (d) A person held out by the company as a director, employee, or agent of the company with authority to exercise a power which a director, employee, or agent of a company carrying on business of the kind carried on by the company does not customarily have authority to exercise, does not have authority to exercise that power:
- (e) A document issued on behalf of a company by a director, employee, or agent of the company with actual or usual authority to issue the document is not valid or not genuine—

unless the person has, or ought to have, by virtue of his or her position with or relationship to the company, knowledge of the matters referred to in any of paragraphs (a), (b), (c), (d), or (e), as the case may be, of this subsection.

[65] When it comes to Mr Rayward choosing the venue of the arbitration, the first question, therefore, is: would a director of a company carrying on business of the kind carried on by Hi-Gene customarily have authority to make this choice? If the answer to this question is yes, the next question would be did Swisher know or should it have known that in fact Mr Rayward lacked the necessary authority to bind Hi-Gene?

[66] Farrar (ed) *Company and Securities Law in New Zealand* 2008 at p 143 notes that a director acting solely in that capacity (such as a non-executive director) may have no authority as a corporate agent. The author goes on to say that a director

acting solely in that capacity must act as part of a board to be able to bind the company. The author cites two decisions in support of this principle. They are: *Brick and Pipe Industries Ltd v Occidental Life Nominees Pty Ltd* [1992] 2 VR 278 at 303; and *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 205.

[67] In *Northside Developments Pty Ltd* the High Court of Australia referred to a secretary of a company having no actual or apparent authority to enter into commercial transactions upon his own decision, save for transactions of an administrative kind required for the day to day running of the company's affairs; and went on to make it clear that ordinary individual directors of a company were similarly restricted in their authority to act (at 205):

Nor does any ordinary, individual director of a company have any ostensible authority to bind the company. A managing director may have wide powers, actual or ostensible. In *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* it was held that a person who had assumed the powers of a managing director of a property company with the company's approval had apparent authority to engage architects on the company's behalf, this being within the ordinary ambit of the authority of a managing director of a company of that kind. And even ordinary directors may have quite significant functions entrusted to them by the company, although usually these are of a more or less formal nature, such as affixing the company's seal to documents which the company requires to be executed: see *Leonard's Carrying Company Ltd v Asiatic Petroleum Company*. But the position of a director does not carry with it any ostensible authority to act on behalf of the company. Directors can act only collectively as a board and the function of an individual director is to participate in decisions of the board. In the absence of some representation made by the company, a director has no ostensible authority to bind it.

[68] Mr Rayward's response to the notice of commencement of arbitral proceedings shows he was acting alone in his capacity as a director of Hi-Gene and not as communicating a decision of the board of directors of Hi-Gene. Swisher could not, therefore, have read this communication as coming from Hi-Gene.

[69] Whether the communication cloaked Mr Rayward with apparent authority to bind Hi-Gene turns on s 18(1). The choice of venue by Mr Rayward could only be binding on Hi-Gene if the action that Mr Rayward took could be described as within the authority of a director of a company carrying on the kind of business carried on customarily by Hi-Gene. But even if that were so, once it was shown Swisher knew

that Mr Rayward was not exercising any operational or management roles for Hi-Gene, this could of itself disqualify him from having apparent authority to bind Hi-Gene through the operation of the proviso to s 18(1).

[70] On 5 December 2007, Mr Rayward swore an affidavit in which he related how he and Mr Grant had come to be involved in the Swisher franchise business. He also made various critical comments about Mr Grant's conduct and intentions in relation to honouring Hi-Gene's obligations to Swisher. At paragraph 10 of his affidavit, Mr Rayward deposed that when Mr Grant realised that Mr Rayward would not co-operate with his objectives, Mr Grant "set about moving ... [Mr Rayward] sideways out of all operational and management roles of Hi-Gene". I was told at the hearing that this affidavit had been prepared by Gaze Burt. As Gaze Burt were Swisher's solicitors, and the contents of the affidavit seem to address the dispute that had developed between Hi-Gene and Swisher at the end of 2007, there are grounds for attributing the knowledge Gaze Burt had of the contents of this affidavit to Swisher. This would mean that as at 9 January 2008, Swisher knew Mr Rayward was not involved in the operational and management roles for Hi-Gene. If Mr Rayward had been an executive director, this role had ceased by December 2007. As an ordinary director, in terms of general legal principle, Mr Rayward would not have ostensible authority to bind Hi-Gene. There is nothing else to suggest that Hi-Gene had conducted itself in a way that it could be said to have held Mr Rayward out as having authority to bind it on the choice of venue.

[71] John Mullin, the Chief Operating Officer of Swisher in the United States, has sworn an affidavit in which he says that he instructed Swisher's solicitors, Gaze Burt, to serve Mr Rayward, as one of Hi-Gene's directors, a copy of the notice of commencement of arbitral proceedings. Mr Mullin says that he was aware that there were differences between Mr Grant and Mr Rayward, but he was at no time advised that Mr Rayward did not have authority to issue instructions or sign documents on behalf of the company. The difficulty with this statement is that under the master licence agreement, the dealings between the parties were governed by New Zealand law. Under New Zealand law, an ordinary director may not have authority to bind the company in the way which Mr Mullin believed could be done.

It was not for Hi-Gene to advise Mr Mullin that its ordinary non-executive directors did not have authority to issue instructions on behalf of the company in that way.

[72] Whether or not Mr Rayward could choose the venue on behalf of Hi-Gene might have been a key issue. If it could be shown that the decision on choice of venue was not within the authority of directors of companies carrying out the kind of business Hi-Gene customarily carried out, that would result in Mr Rayward's actions not binding Hi-Gene. In addition, since Mr Rayward had been removed from all management roles, and Swisher knew this, or could be deemed to have this knowledge as a result of its solicitors preparing Mr Rayward's affidavit, the proviso in s 18 of the Companies Act 1993 might have taken effect.

[73] Once Hi-Gene could establish that Mr Rayward came within the exceptions provided in s 18, choice of venue would be unauthorised and able to be impugned. If an impropriety in this stage of the arbitral proceedings could be shown, there was the possibility it would flow through and taint the outcome. This, in turn, would provide grounds for finding the award to be unenforceable. Under r 36(1)(b)(ii), there may be sound public policy reasons for not enforcing arbitral awards resulting from arbitral proceedings that have been improperly established. This may be so especially where the impropriety involves an unauthorised choice of venue which puts the company to the trouble of engaging in an arbitral hearing in a foreign jurisdiction. However, Hi-Gene has not acted in pursuit of this line of argument; instead, it acted in a way that has caused it to lose any rights it had to challenge the venue choice, and, therefore, everything that flowed from that choice.

[74] Ultimately, what happened is that from November 2008, Hi-Gene participated in the arbitration process that led to the arbitral hearing. In his affidavit, Mr Grant says that he instructed Hi-Gene's counsel "to write on 14 November 2008 saying I would engage in the arbitration but that the hearing dates for the end of January were not suitable ...". In its submissions to this Court, Hi-Gene argues that its "non-acceptance" of any arbitration continued until 14 November 2008 and then any "engagement" was subject to the hearing being adjourned to mid March 2009. By conditionally agreeing to participate in the arbitration (albeit with different hearing dates) and by not taking legal action in the United States to stop the

arbitration from proceeding, Hi-Gene has lost its ability to raise arguments based on s 18(1)(b)(iii) that the decision on venue was made without Hi-Gene's authority and, consequently, neither it nor the consequent arbitral award is binding on Hi-Gene.

[75] Once Hi-Gene began saying it wanted the hearing in the United States adjourned to a time that better suited Hi-Gene, this meant Hi-Gene was submitting to the jurisdiction of the arbitration. Furthermore, the few communications Hi-Gene made regarding the adjournment did not raise lack of jurisdiction as an issue. Nor were the communications made on a basis that reserved Hi-Gene's rights to raise the argument about the venue choice being made without Hi-Gene's authority.

[76] Since Hi-Gene has not pursued the lack of authority as to choice of venue argument to its logical conclusion, Swisher has not had the opportunity to raise arguments on acquiescence or submission to jurisdiction. Swisher has opposed any suggestion that the decision on the choice of venue was unauthorised. But since neither party fully addressed the relevant issues relating to this argument, I do not propose to deal with it any further. As the argument was advanced to me by Hi-Gene, there are insufficient grounds to warrant me refusing to recognise or enforce the arbitral award under r 36(1)(b)(ii).

[77] The history of this case shows that from the outset, Hi-Gene has sat on its rights and when it has come to exercise those rights, the time for doing so has passed. First, Hi-Gene knew that Swisher had issued a default notice under the Master Licence Agreement. This should have put Hi-Gene and Mr Grant on notice of the likelihood of Swisher engaging the arbitration process under the Master Licence Agreement. Hi-Gene should have been alive to the possibility of being served with a notice of commencement of arbitral proceedings and to the need to ensure it was ready to exercise its rights under the Master Licence Agreement, when the time for doing so arose. Secondly, Hi-Gene could have avoided an arbitration venue not to its liking by responding to the notice of commencement of arbitral proceedings served on its registered office. At all material times up to 9 January 2008, when the second notice was served on Mr Rayward, Hi-Gene was free to nominate the venue of its choice. Once it learned that Mr Rayward had chosen North Carolina as the venue, Hi-Gene could have taken steps to challenge that choice

on the ground Mr Rayward lacked the necessary authority to make that decision. Once Hi-Gene decided it would abandon any challenge to the arbitration's jurisdiction and so it would participate in the arbitration, it should have moved quickly to ensure the hearing of the arbitration would take place at a time and date suitable for Hi-Gene. But instead of doing anything at the appropriate time, Hi-Gene failed to take steps to protect itself. Having conducted itself in this way, it would be contrary to public policy for Hi-Gene at this late stage to be able to revive any earlier legitimate grounds available to it to resist arbitration. Swisher should not be deprived of the fruits of the arbitral award in this way. The statements of purpose and policy of arbitral proceedings to be found in many of the leading decisions on arbitral proceedings emphasise that in passing the Arbitration Act 1996, Parliament intended to encourage the use of arbitration to resolve disputes between parties and to limit the Court's involvement in reviewing and setting aside arbitral decisions: see *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA); *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2003] 2 NZLR 92; and *Pathak v Tourism Transport Ltd* [2002] 3 NZLR 681. To permit persons who fail to exercise procedural rights at the appropriate time in an arbitral proceeding to later raise complaints in this Court about the procedural course of the arbitral proceeding would be contrary to the Act's intent.

Wrong application of New Zealand law

[78] There is no doubt that the applicable substantive law was that of New Zealand. Clause xv of the Master Licence Agreement expressly provides that the agreement was to be governed by the law of New Zealand. This is the law the arbitrators applied when determining the arbitral award.

[79] Hi-Gene now complains that the arbitral panel has applied New Zealand law wrongly and, furthermore, that they should have heard expert evidence on New Zealand law before making the award. *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 NZLR 289 at [53] makes it clear that when a judicial tribunal is applying foreign law, it is not bound to hear expert testimony on the application of that law. There will be circumstances, as was the case in *Dymocks*, where the state of the foreign law is such that the assistance of expert testimony on the application of

the foreign law is required. Hi-Gene contends that such was the case here. However, the difficulty Hi-Gene now faces is that “error of law” is not a ground for not recognising or enforcing a judgment. Since North Carolina was the venue for the arbitration, under clause xiv of the Master Licence Agreement the applicable procedural law is that of North Carolina. If the arbitral panel have wrongly applied New Zealand law, the proper remedy for Hi-Gene to pursue is to appeal the award, or to apply to have it set aside under the provisions of North Carolina law.

[80] In *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2003] 2 NZLR 92, Harrison J helpfully discussed the discrete routes of challenge to an arbitral award. He concluded that rights of appeal and application to have an arbitral award set aside were the way to challenge substantive errors of law, and that the public policy ground for refusing to recognise and enforce an arbitral award was limited to the method or process followed in the arbitration. He also concluded that the two discrete routes of challenge are mutually exclusive.

[81] Hi-Gene has not referred me to any aspect of North Carolina’s law that would show there were no appeal rights or rights to apply to have the award set aside. Had this been so, it may have been a ground for not recognising and enforcing the award under r 36(1)(b)(ii). But without Hi-Gene establishing that North Carolina’s law falls short in this way, I am not prepared to consider this issue any further. As a matter of general principle, an error of substantive law in an arbitral award will not establish a ground for non-recognition and non-enforcement under r 36(1)(b)(ii).

[82] Because I do not consider that error of law constitutes a basis for refusing to recognise and enforce a foreign arbitral award, the other arguments Hi-Gene has made about the measure of damages awarded and the award of costs being wrong in law are also of no consequence.

Result

[83] Hi-Gene has failed to make out the grounds of its application that the arbitral award should not be recognised and enforced. Hi-Gene has also failed to make out

the grounds in its opposition to Swisher's application to this Court to recognise and enforce the arbitral award as a judgment.

[84] It follows that Swisher is entitled to judgment on its application.

[85] As the successful party, Swisher is also entitled to costs. It has 15 working days from the date of this judgment to file a memorandum on costs. Hi-Gene has 15 working days from receipt of Swisher's memorandum to file its response.

Duffy J