IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-1323
[2017] NZHC 2931

IN THE MATTER	of the Arbitration Act 1996
UNDER	Part 19 High Court Rules
BETWEEN	RATZAPPER AUSTRALASIA LIMITED Plaintiff
AND	ROBERT NOE First Defendant
	ATRAP INC Second Defendant

Hearing:	2 November 2017 Further submissions 17 and 24 November 2017
Appearances:	W McCartney for the Plaintiff G M Illingworth QC and S Round for the First Defendant
Judgment:	28 November 2017

JUDGMENT OF MUIR J

This judgment was delivered by me on Tuesday 28 November 2017 at 4.00 pm
Pursuant to Rule 11.5 of the High court Rules.

Registrar/Deputy Registrar

Date:……

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Introduction

[1] In these proceedings the plaintiff (Ratzapper) seeks enforcement of an arbitral award of the Hon Rodney Hansen CNZM QC under art 35 of the First Schedule of the Arbitration Act 1996 (the Act).[1] The first defendant opposes the application on the basis that to grant it would be contrary to the public policy of New Zealand and in particular would amount to a breach of natural justice (arts 36(1)(b)(ii) and 36(3)(b)(i) of the First Schedule).

[2] The first defendant (Mr Noe) was debarred from defending the proceedings on the basis of what the arbitrator identified as persistent and deliberate failures to provide adequate discovery. There can be no criticism of the arbitrator having done so on the material available to him. If anything he was indulgent in terms of the time allowed for compliance, and the order debarring Mr Noe was itself made after a hearing where counsel were present. However, Mr Noe says that there was such substantial default on the part of his counsel (and possibly instructing solicitors) in terms of provision to Ratzapper of discovered materials he had earlier made available, such an absence of communication between counsel and Mr Noe in terms of the peril Mr Noe faced, and such inadequacy of information (or misinformation) in exchanges between counsel and arbitrator, that he was in substance not heard and/or the arbitrator proceeded on a mistaken view of the facts. He says that to recognise the award would therefore be a breach of natural justice or otherwise contrary to public policy.

[3] There is no evidence before me from the counsel or instructing solicitors concerned. Were I of the view that Mr Noe's argument was potentially available then I would call on such parties as officers of the Court to provide affidavits in response. I have decided, however, that such argument is not available, that in the context of a private law dispute Mr Noe is bound by the so-called "surrogacy" principle and that his remedy is against his former legal advisors. Because such advisors have not been

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1 *Ratzapper Australasia Ltd v Noe* Hon Rodney Hansen QC, 7 June 2017.

heard, I make no findings against them and have elected to anonymise this judgment. The position that I set out hereafter is based exclusively on Mr Noe's account.

Background

[4] At a time which is not identified in the award Mr Noe developed an electronic device for the eradication of rats known as the "Raticator". In about 2005 he and Mr Hinds, whose company is Ratzapper, agreed to the distribution of the devices in New Zealand. The parties agreed to the incorporation of another company, the second defendant Atrap Inc (Atrap), in California and for funding of the planned expansion to be obtained from the Bank of New Zealand (BNZ).

[5] In late 2012 a disagreement arose when Mr Noe says he discovered unauthorised expenditure on examining the BNZ statements for Ratzapper.

[6] As a result he refused to pay for a consignment of traps which the plaintiff had shipped to California. Mr Hinds refused to release the container. Ultimately release was permitted against an agreement by the parties to undertake a reconciliation of accounts. A process was established with the parties further agreeing that any dispute or difference would be determined by arbitration under the provisions of the Act.

[7] Ultimately the Hon Rodney Hansen was appointed as arbitrator on the application of Ratzapper. Ratzapper claimed to be owed the sum of US$275,213. In his statement of defence Mr Noe admitted Atraps' liability for the sum of US$273,857.50 and the award records that the claimants[2] were prepared to accept Mr Noe's figure and waive their claim to the balance. The arbitrator accordingly awarded that amount against Atrap together with interest totalling US$56,797.30.

[8] The claim against Mr Noe for the same sum proceeded on two alternative grounds, the second of which was upheld by the arbitrator. In essence such ground was that, having obtained the release of the container, Mr Noe was in persistent and flagrant breach of his obligations under the agreement by which such release was effected. Relevantly the arbitrator held:[3]

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2 The arbitral proceeding included Mr Hinds as a claimant.

3 At [26].

> In circumstances in which the parties intended a full and final accounting to take place and payment made accordingly, it seems to me that Mr Noe's breach has caused substantial and material loss to Ratzapper. An immediate right to recover a debt payable on demand from a solvent company was lost to be replaced by a greatly diminished prospect of recovery. It is loss of a kind that would have been in contemplation of the parties when the agreement was made; indeed, aside from effecting the release of the container, the primary purpose of the agreement was to enable a full accounting to take place. The claimants have shown on a balance of probabilities that Ratzapper's loss would not have occurred if Mr Noe had honoured his side of the bargain.

[9] The reference also included a second claim against Mr Noe for financing costs paid by Ratzapper for which it was alleged Mr Noe had agreed to be personally responsible. Such allegation was denied by Mr Noe. The arbitrator found that such an agreement existed but said that it was not a matter to which the reference to arbitration applied and that any claims by Ratzapper were therefore required to be addressed in a Court of general jurisdiction.

[10] As indicated, the arbitrator had earlier made orders debarring Mr Noe from defending the claim. A brief procedural history follows.

1. On 25 August 2015 the arbitrator made orders that Mr Noe provide a sworn list of documents in various categories which was further clarified by a ruling dated 18 September 2015. At the time Mr Noe was represented by counsel other than that of whom criticism is now made. The order was not adequately complied with and on 13 April 2016 Ratzapper applied for further orders either that the arbitrator be permitted to draw an adverse inference in respect of allegations contained in one of the paragraphs of his amended points of claim, or alternatively that Mr Noe be debarred and the claim set down for formal proof. Shortly thereafter Mr Noe engaged new instructing solicitors and counsel.

3. When the matter next came before the arbitrator on 27 July 2016, such newly instructed counsel advised that he was still to receive the relevant files and required time to consider the plaintiff's April application. The arbitrator directed that the respondents' notice of opposition and any supporting affidavits were to be filed by 24 August

and that there would be a further telephone conference on 31 August 2016.

4. On 2 August 2016 the plaintiff filed an amended application. The relief sought remained the same however.

5. At the telephone conference on 31 August 2016, counsel for Mr Noe stated that no opposition had been filed because the respondents were not opposed to discovery as sought and that "Mr Noe has been working with his attorney in the United States to assemble the documents and collate them in a form suitable for discovery purposes". Counsel sought a further 20 working days to do so. The arbitrator accordingly made orders for supplementary discovery to be provided by 28 September 2016. His Minute records that counsel for Mr Noe advised that he expected discovery to be in a form which would made the documents "readily accessible" and that they would be collated into categories and uploaded into a series of folders which would be saved in a "drop box". Accordingly, the arbitrator fixed a further telephone conference for 18 October 2016.

6. At the conference on 18 October, counsel for Mr Noe explained that the discovery process had "taken longer than expected". However, he said, in terms recorded in the arbitrator's Minute that "Mr Noe is now in New Zealand. [Counsel] expects to meet with him this week and is confident that discovery will be completed by no later than 5 pm on 25 October 2016". Notwithstanding the further delay, the arbitrator was satisfied that an extension of time should be granted and therefore amended the order made on 31 August 2016 to provide for compliance no later than 5 pm on 25 October 2016. Although he indicated that he considered it premature to make any order premised on non-compliance, he said that he would give consideration to making such an order in the event discovery was not given by the amended date. He set the matter down for a further telephone conference on 26 October 2016.

7. The arbitrator's Minute of 26 October 2016 records that the previous day, counsel for Mr Noe had sent counsel for the plaintiff a drop-box "which organises documents in folders which align with the categories of documents for which discovery has been sought" but that counsel accepted "there has not been full compliance with the order including the provision of the electronic accounting database". The Minute further records that counsel advised that it will be available in two – three days and that he expected to upload further files on Friday 28 October. Counsel for the plaintiff in turn sought the orders contained in his amended application. The arbitrator ordered that the plaintiff file by 11 November 2016 proof of default in discovery by way of an affidavit and memorandum in support of the application. He provided for a timetable for Mr Noe to file any evidence and submissions in response. He set the application down for hearing on 30 November 2016 indicating that if there was compliance with the discovery order in the interim, counsel could file memoranda seeking alternative directions.

8. The arbitrator's ruling in respect of the application debarring Mr Noe is dated 6 December 2016. It records the procedural history and counsel for Mr Noe's submission that such an order would be a disproportionate response based on the fact that there had been partial compliance with discovery requirements and the default was not in refusing to comply but in failing to do so in a timely manner. The arbitrator concluded that there had been a "persistent, flagrant and deliberate failure" to comply with his orders, that many of the folders provided were empty and that the all-important electronic database, general ledger and financial statements were missing entirely. He made an order debarring Mr Noe from defending the claim.

[11] In a lengthy affidavit Mr Noe says that on 26 July 2016 his COO, a Mr Dolin, wrote to counsel with a summary of all the discovery items that had been previously provided and indicating that it would be possible to "send a snapshot of our Quickbooks Accounting File … if needed". He said that Mr Dolin was authorised to

respond to any request for any additional information. Mr Noe deposes no response was received to this email until the end of October 2016. Although that may be literally true in the sense that the specific email was apparently not responded to until that time, Mr Noe cannot, in terms of the further chronology I now refer to, say that discovery issues were not raised with him by his counsel until that time.

[12] In respect of the conference on 27 July 2016, Mr Noe acknowledges receiving a copy of the arbitrator's Minute. He likewise received a copy of the arbitrator's Minute of 31 August 2016. To that end he was advised that he had 20 working days in which to comply with the discovery order and that the matter would next be before the arbitrator on 18 October 2016. Although acknowledging receipt of the Minute, Mr Noe claims he was not advised of the dates. I regard that as disingenuous.

[13] Mr Noe next refers to a memorandum filed by plaintiff's counsel on 29 September 2016 in which Mr McCartney said that there had been non-compliance with the orders of 31 August 2016 and pressed his client's application to debar. Mr Noe says that he was not provided with a copy of this memorandum.

[14] In relation to the conference on 18 October 2016, he says that his counsel did not advise him of this event (an allegation which I similarly do not accept because the date was referred to in the arbitrator's own Minute of 31 August) and that his counsel did not seek his instructions. He says that when his counsel advised the arbitrator that discovery was taking longer than anticipated and that he expected to meet with Mr Noe, this was all without instruction and although Mr Noe arrived in New Zealand on 6 October 2016 from the United States, his counsel never arranged to meet with him. He says that he was never provided with a copy of the arbitrator's Minute of 18 October and he was not therefore aware of the extension for compliance to 25 October. He further says that, unbeknown to him, on 26 October his counsel emailed plaintiff's counsel saying that he had uploaded the discovery documents and although there were still "gaps" these could be "filled (I am told) by the end of the week". Mr Noe says that having now examined what was sent by his counsel on 26 October he has established that the majority of the drop-box folders did not contain any documentation at all.

[15] In relation to the conference on 26 October 2016 he says his counsel did not either seek instructions about the conference or report on its outcome. He says that at 9.40 am on 26 October (presumably immediately after the telephone conference at 9.00) his counsel finally responded to Mr Dolin's email of 26 July 2016 thanking him for material which he said he would:

> … review … with Bob to identify any gaps in the material. We do need to provide a full copy of the accounting file you mention. Are you able to quickly upload that into a Dropbox file you can share with me?

Mr Noe says he never received any call from his counsel to discuss gaps in the material so nothing further was done at that time.

[16] In relation to the orders debarring him which were made on 6 December 2016 he says that he was not advised of these until 23 December. He says that his counsel erroneously told him that he would be able to apply to have the debarring lifted as soon as the defaults were remedied.

[17] As indicated, no affidavit has been filed by Mr Noe's former counsel or solicitors, with the result it would not be appropriate to make findings against them. Aspects of some of the advice given to the arbitrator and apparent failure to provide, in a timely way, some of the arbitrator's Minutes to Mr Noe are a cause for concern but, having at least received the Minute dated 31 August, Mr Noe cannot reasonably deny that he was aware there were outstanding discovery requirements. Why he did not more proactively engage with his counsel during this period is not explained. In one email from counsel to Mr Noe dated 14 September 2016, counsel stated that:

> … we need to talk about how best to progress the discovery within the time we have remaining. We've got until the 28th of September, and so need to address what is required pretty smartly. I don't want to waste this opportunity to get the case firmly and squarely back on track for you. It's the best opportunity you have.

[18] The email invited a telephone discussion within the next two hours. It is not apparent whether this occurred.

[19] Clearly, therefore, at some stages at least there were active attempts by counsel to engage on the discovery point. By the same token however, on Mr Noe's evidence

he was never aware of the extent to which his defence was imperilled by failure to resolve these issues.

Basis of decision and arguments of parties

[20] I proceed to consider the case on the assumption (without deciding the issue) that counsel was in breach of his fiduciary duty on account of misrepresentations made to both Mr Noe and/or the arbitrator about the discovery process and the orders made. As a result, the arbitrator formed a view as to deliberate and flagrant non-compliance with his orders of which he may have been dissuaded if such breaches had not occurred. The central issue on such assumption is whether the consequences of the (assumed) breaches or default of counsel are to be visited on Mr Noe.

[21] Mr Illingworth QC says they should not and the Court should decline to recognise the award because it was obtained in circumstances contrary to public policy in New Zealand. He says that art 36(3) of the First Schedule specifically recognises a breach of natural justice during the arbitral proceedings as an example of the public policy considerations which are engaged and that this reflects a longstanding requirement in private as well as in public law that such rules be observed.

[22] He says that although the paradigm case of breach of natural justice involves a failing by the tribunal, the concept is wide enough to capture cases where the tribunal has been led into error through default of counsel.

[23] He says further that even if I were not to find a breach of natural justice arising out of counsel's conduct, I may nevertheless conclude it is contrary to public policy to enforce the award by analogy, for example, with the innominate ground recognised in relation to judicial review.

[24] For the plaintiff Mr McCartney says that whatever the precise limits of the surrogacy principle in public law, in a private law context (and more especially so where the underlying claim is simply for damages) a party debarred from defending as the result of (assumed) breach or default by his counsel cannot resist enforcement of an award under arts 36(1)(b)(ii) or 36(3)(b).

Discussion

[25] Article 35 of the First Schedule to the Act provides for a number of procedural prerequisites for recognition and enforcement by entry as a judgment of an arbitral award. It is accepted that such prerequisites are established in the present case. Only therefore if there are grounds for refusing recognition or enforcement under art 36 is it appropriate to decline the plaintiff's application. Such grounds are exclusive – recognition or enforcement may be refused "only" if one of the grounds in art 36(1)(a) or (b) are made out.

[26] Mr Noe relies on art 36(1)(b)(ii) in terms:

> the recognition or enforcement of the award would be contrary to the public policy of New Zealand.

[27] The public policy ground in art 36(1)(b)(ii) mirrors one of the available grounds in art 34 for the Court setting aside an award. Again the article defines the exclusive grounds on which this can occur, including if the Court finds that:[4]

> the award is in conflict with the public policy of New Zealand.

[28] New Zealand authority on the construction of this provision indicates that it is to be interpreted narrowly. In *Amaltal Corp Ltd v Maruha (NZ) Corp Ltd*, the Court of Appeal endorsed the following statements from overseas jurisdictions:[5]

> … although considerations of public policy could never be exhaustively defined, it had to be shown that there was some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that it would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.
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> …
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> Another way in which the matter has been expressed has been to say that the enforcement of an award will be contrary to public policy where the integrity of the Court's processes and powers will thereby be abused … An award whose confirmation can be seen to damage the integrity of the Court system will not be enforced.[6]

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4 Arbitration Act 1996, sch 1, cl 34(2)(b)(ii).

5 *Amaltal Corp Ltd v Maruha (NZ) Corp Ltd* [2004] 2 NZLR 614 (CA) at [44] and [46].

6 See also *Profilati Italia SrL v Painewebber Inc* [2001] 1 Lloyd's Rep 715 (QB) at [16]–[17] where a test of "reprehensible or unconscionable conduct" was posited.

[29] In *Downer-Hill Joint Venture v Government of Fiji* a Full Court of the High Court subsequently held:[7]

> Although the Court's discussion in *Amaltal* is tentative and limited, we think we read it as favouring a narrower, rather than wide, view of the compass of the words "public policy". That is consistent with *Deutsche Schachtbau* in which the English Court of Appeal (also at p 316) stated that public policy arguments "should be approached with extreme caution", and referred to an observation of Burroughs J long ago in *Richardson v Mellish* (1824) 2 Bing 229 at p 252 "It is never argued at all, except when other points fail" … The Court of Appeal's judgment in *Amaltal* indicates that the words "public policy" require that some fundamental principle of law and justice be engaged. There must be some element of illegality, or enforcement of the award must involve clear injury to the public good or abuse of the integrity of the Court's processes and powers.

[30] More recently, in *Hi-Gene Ltd v Swisher Hygiene Franchise Corp*, the Court of Appeal confirmed that:[8]

> Although the decision of this Court in *Amaltal* was made in the context of article 34 (which deals with an application to the Court for orders setting aside arbitral awards) the threshold for the public policy ground under article 36 is to be approached in a similar fashion.

[31] The Court further said:[9]

> It would be contrary to the purposes of the Act to refuse to recognise or enforce an arbitral award in the absence of serious grounds to intervene.
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> …
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> The adoption of a high threshold has been said to be appropriate for all the grounds under article 36(1). As Redfern & Hunter explain:
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> > … the intention of the New York Convention and of the Model Law is that the grounds for refusing recognition and enforcement of arbitral awards should be applied restrictively. As a noted commentator on the Convention has stated:
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> > > As far as the grounds for refusal for enforcement of the Award as enumerated in Article V are concerned, it means that they have to be construed narrowly.
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> (footnotes omitted)

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7 *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 (HC) at [76].
8 *Hi-Gene Ltd v Swisher Hygiene Franchise Corp* [2010] NZCA 359 at [23].
9 At [24] and [26].

[32] The approach adopted in these cases reflect the premium the courts have always placed on the speed, economy and finality of the arbitration process,[10] and the capacity for a liberal recognition of public policy objections to undermine this objective.

[33] However, art 36(3)(b) makes it clear that, for the avoidance of doubt, breach of the rules of natural justice either during the arbitral proceedings or in connection with the making of the award is to be regarded as giving rise to an award contrary to public policy. That is an unsurprising proposition because, at least insofar as the audi alteram partem rule is concerned, some of the earliest cases governed the conduct of arbitrations[11] and it has never been in doubt that adherence to the rules of natural justice is as much a principle of private law as it is of public. However, as I will discuss shortly there is debate in the public law context about the extent to which such principles apply to cases of counsel (as opposed to tribunal) error. Were I persuaded that the debate was equally relevant in the private law context (which, as I will explain, I am not),[12] then in my view the "high threshold" referred to in cases such as *Hi-Gene Ltd v Swisher Hygiene Franchise Corp* would in turn necessitate that I adopt the narrower approach set out in those authorities.

[34] Mr Illingworth refers to a line of authorities commencing with *R v Leyland Magistrates, ex parte Hawthorn*[13] in support of the proposition that a breach of natural justice can occur without fault on the part of the tribunal. In that case Lord Widgery CJ said:[14]

> There is no doubt that an application can be made by certiorari to set aside an order on the basis that the tribunal failed to observe the rules of natural justice. Certainly if it were the fault of the justices that this additional evidentiary information was not passed on, no difficulty would arise. But the problem, and one can put it in a sentence, is that certiorari in respect of breach of the rules of natural justice is primarily a remedy sought on account of an error of the tribunal, and here, of course, we are not concerned with an error of the tribunal: we are concerned with an error of the police prosecutors. Consequently, amongst the arguments to which we have listened an argument has been that this is not a certiorari case at all on any of the accepted grounds.

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10 As recognised in *Downer-Hill Joint Venture v Government of Fiji*, above n 7, at [62].
11 For example *Re Brook* (1864) 143 ER 1184.
12 At least not in respect of a claim such as that at issue in the arbitral proceedings.
13 *R v Leyland Magistrates, ex parte Hawthorn* [1979] 1 All ER 209 (QB).
14 At 210–211.

> We have given this careful thought over the short adjournment because it is a difficult case in that the consequences of the decision either way have their unattractive features. However, if fraud, collusion, perjury and such like matters not affecting the tribunal themselves justify an application for certiorari to quash the conviction, if all those matters are to have that effect, then we cannot say that the failure to the prosecutor which in this case has prevented the tribunal from giving the defendant a fair trial should not rank in the same category.
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> We have come to the conclusion that there was here a clear denial of natural justice. Fully recognising the fact that the blame falls on the prosecutor and not on the tribunal, we think that it is a matter which should result in the conviction being quashed. In my judgment, that is the result to which we should adhere.

[35] In the subsequent English Court of Appeal decision in *R v Diggines, ex parte Rahmani*[15] a similar principle was applied in circumstances where an immigrant's solicitors had negligently failed to proceed with an appeal from a refusal of an application for an extension of stay. In granting judicial review of the dismissal of her appeal, the Court held that the applicant had, through no fault of her own, been denied an opportunity to be heard. Although the House of Lords upheld the decision on appeal it did so on different grounds and neither approved nor rejected the Court of Appeal's reasoning.[16]

[36] However in *Al-Mehdawi v Secretary of State for the Home Department* the House of Lords did consider *Rahmani* further and rejected the Court of Appeal's approach.[17] That case involved deportation proceedings where error on counsel's part meant an appeal by Mr Al-Mehdawi was dismissed in his absence. On an application for judicial review it was alleged that he had been denied a fair (or any) hearing. The House of Lords held that a party cannot complain of being denied a fair hearing where he has failed to make use of an opportunity to be heard through fault of his own advisors, even if his own conduct cannot be criticised. In two passages on which Mr McCartney substantially relies Lord Bridge referred to the private law position in the following terms:[18]

> But there are many familiar situations where one party to litigation will effectively lose the opportunity to have his case heard through the failure of his own legal advisers, but will be left with no remedy at all except against

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15 *R v Diggines, ex parte Rahmani* [1985] QB 1109 (CA).
16 *Rahmani v Diggines* [1986] AC 475 (HL).
17 *Al-Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876 (HL).
18 At 898.

> those legal advisers. I need only instance judgments signed in default, actions dismissed for want of a prosecution and claims which are not made within a fixed time limit which the tribunal has no power to extend. In each of these situations a litigant who wishes his case to be heard and who has fully instructed his solicitor to take the necessary steps *may never in fact be heard because of his solicitor's neglect and through no fault of his own. But in any of these cases it would surely be fanciful to say that there had been a breach of the audi alteram partem rule.*
>
> These considerations lead me to the conclusion that a party to a dispute who has lost the opportunity to have his case heard through the default of his own advisers to whom he has entrusted the conduct of the dispute on his behalf cannot complain that he has been the victim of procedural impropriety or that natural justice has been denied to him, *at all events when the subject matter of the dispute raises issues of private law between citizens.*
>
> (emphasis added)

[37] His Lordship then drew on such private law position to inform his assessment in the public law context, rejecting a submission that in cases involving a fundamental breach of legal advisors' obligations some different rule should apply:[19]

> … if once unfairness suffered by one party to a dispute in consequence of some failure by his own advisers in relation to the conduct of the relevant proceedings was admitted as a ground on which the High Court in the exercise of its supervisory jurisdiction over inferior tribunals could quash the relevant decision, I can discern no principle which could be invoked to distinguish between a "fundamental unfairness," which would justify the exercise of the jurisdiction, and a less than fundamental unfairness, which would not.

[38] As Mr Illingworth submits, however, some subsequent English cases have retreated from this approach. In *FP (Iran) v Secretary of State for the Home Department*,[20] for example, the Court of Appeal distinguished *Al-Mehdawi* on the facts: it noted that the result in *Al-Mehdawi* was that a foreign student whose visa had expired forfeited his entitlement to an appeal hearing because of his solicitors' errors, and further:[21]

> Not only did the case not concern the possibility of returning somebody to persecution, torture or death; it left to the Home Secretary, if he thought the application had merit, a power to invite an adjudicator to hear the applicant's evidence and report whether in his opinion it would have made a difference to the decision … Although Lord Bridge's opinion is carefully framed in terms of principle and not of pragmatism, the case before the House was far distant from the kind of case we are concerned with. These cases do not only involve

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19 At 901.

20 *FP (Iran) v Secretary of State for the Home Department* [2007] EWCA Civ 13.

21 At [43].

> asylum-seekers who are either making a first appeal or have lost their first appeal and are making a second endeavour to establish their claim: they include asylum-seekers who have won their initial appeal before an immigration judge and are seeking to hold the decision against the Home Secretary's appeal. For some of these, the exercise of the right to be heard may literally be a matter of life and death; for all of them save the bogus (and even they have to be identified by a judicially made decision) it is in a different league from the loss of a student's right to remain here. The remedial discretion which afforded Mr Al Mehdawi a fallback is absent from asylum law.

[39] The Court of Appeal therefore approached the question pragmatically, focusing on the severity of the consequences for the applicant. Lord Justice Sedley identified what he termed an "irretrievable and incompensable loss" on the part of the asylum seeker,[22] and in relation to application of the surrogacy principle concluded that:[23]

> … there is no general principle of law which fixes a party with the procedural errors of his or her representative.

[40] Lady Justice Arden referred to the observations of Bingham J in *Secretary of State for the Home Department v Thirukumar*[24] that asylum applications are of such moment that only the highest standards of fairness will suffice.[25] Significantly however (at least in the contest of Mr Noe's argument that the arbitrator proceeded on a mistake of fact that the defaults in discovery were "persistent, flagrant and deliberate"), she adopted the position in *E v Secretary of State for the Home Department*[26] that on an application for judicial review based on unfairness arising out of a mistake of fact, the mistake must not be the responsibility of the applicant or his representative.[27] Significantly also she stated:[28]

> As to the defaults of legal representatives, in the context of civil litigation, Peter Gibson LJ has expressed the view that, despite the overriding objective in the CPR (rule 1.1(1) of which provides that these rules "are a new procedural code with the overriding objective of enabling the court to deal with cases justly"), "in general, the action or inaction of a party's legal representatives must be treated under the Civil Procedure Rules as the action or inaction of the party himself." … But that view was expressed in the context of civil litigation where the court had to consider the interests of all parties in order to deal with the case justly. As demonstrated by the

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22 At [41].
23 At [46].
24 *Secretary of State for the Home Department v Thirukumar* [1989] Imm AR 402 at 414.
25 At [58].
26 *E v Secretary of State for the Home Department* [2004] 1 QB 1044.
27 At [68] and [70].
28 At [80].

> *Thirikumar* case and the *Haile* case, referred to above, the considerations arising in asylum cases are in certain respects different.

[41] Lady Justice Arden therefore expressly distinguished between the general position in civil litigation, where the surrogacy principle applies, and the position with respect to asylum cases.

[42] In New Zealand there is authority (likewise in the context of judicial review of asylum cases) following the approach in *FP (Iran)*. In *Isak v Refugee Status Appeals Authority* for example, counsel had failed to present relevant and available evidence in support of Mr Isak's asylum application.[29] As a result the Refugee Status Appeals Authority had dismissed his appeal. Asher J held that:[30]

> … it is a ground of review if there has been a breach of the rules of natural justice and unfairness, and that it is not necessary, at least in refugee cases such as these, to find that the Tribunal or government body was at fault.

[43] He further noted:[31]

> There must be a concern about using judicial review to quash a decision where there has been no unlawfulness, irrationality or procedural error, by or of the Authority. But I comfort myself with the observations of McGechan J in *Lal v Removal Review Authority* in quashing a decision of the Authority, although on somewhat different grounds…

[44] The decision in *Lal v Removal Review Authority* raised slightly different issues in that, in that case, the appeal document was so plainly incomplete and so obviously failed to address the necessary criterion that the Court considered the Authority should have informed the appellant accordingly.[32] In granting the application for review McGechan J therefore proceeded on broader grounds than simply error of counsel.

[45] The position is therefore that, at least in respect of applications for judicial review involving refugee/asylum cases, both English and New Zealand courts have been prepared to recognise some relaxation of the surrogacy principle established in *Al-Mehdawi* but the justification for doing so lies clearly in the concept of "irretrievable and incompensable loss" described in *FP (Iran).*

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29 *Isak v Refugee Status Appeals Authority* [2010] NZAR 535 (HC).
30 At [77].
31 At [78].
32 *Lal v Removal Review Authority* HC Wellington AP95/92, 10 March 1994.

[46] Such concept does not typically arise in a private law context. Certainly it does not arise in this case. As Mr McCartney points out, the claim against Mr Noe was no more nor less than a claim for damages based on breach of the agreement for release of the goods. To the extent Mr Noe can establish error or breach of duty on the part of his solicitors or counsel and the adequacy of his underlying defence to Ratzapper's claims (or possibly the loss of chance successfully to establish it), a civil remedy is available against his advisors.

[47] This feature also distinguishes the very recent Court of Appeal decision in *Nicholas v Commissioner of Police* released approximately two weeks prior to the hearing of this case and to which I referred counsel by Minute dated 10 November.[33] That was a case involving an asset and profit forfeiture order against land which on appeal was argued to have such cultural, spiritual and whānau significance that a forfeiture order would create undue hardship in terms of s 56 of the Criminal Proceeds (Recovery) Act 2009.[34] Such argument had not been presented to the High Court, with prior counsel deposing that there was "nothing to suggest that I have ever advised Mr Nicholas that he was able to make an application for relief".

[48] In delivering the reasons of the Court, Williams J recognised a power to set aside a civil forfeiture order just like any other civil order if it was "irregularly obtained, made on a wrong principle, or inconsistent with the requirements of justice".[35] The case does not discuss the principle established in *Al-Mehdawi* and two of the three New Zealand cases referred to are not cases involving counsel error.[36] Significantly, the Court of Appeal identified that "[a] finding of inconsistency with the requirements of justice will not be lightly made"[37] and was clearly influenced by what it termed the "confiscatory" regime which applies under the Criminal Proceeds (Recovery) Act and the Courts' particular diligence "in the field of compulsory acquisition of private property".[38]

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33 *Nicholas v Commissioner of Police* [2017] NZCA 473.

34 Among other things the appellant alleged that his whenua (placenta) and those of his children were buried on the land.

35 At [39].

36 *James v Wellington City* [1972] NZLR 978 (CA) and *Terry v Gardiner and Knobloch* [1991] 3 NZLR 553 (CA).

37 At [39].

38 At [40].

[49] The Court concluded that a claim of undue hardship (and thus disproportionality of the forfeiture) should not be foreclosed on account of trial counsel error and remitted the matter for rehearing.

[50] I accept Mr McCartney's submission in relation to this case that, although the forfeiture regime is a civil one, the inevitable contest between state and individual invoked by the regime brings to mind many features of public law. I accept also his proposition that the context to the case (potentially irretrievable and incompensable loss of private property with strong hapu links) is essential to understanding its application.[39]

[51] In the present case the claim to an inconsistency with the requirements of justice is far less compelling. The case does not involve property which is in any sense unique, let alone with the additional significance alleged in *Nicholas*. Moreover the present case arises in the arbitration context where there is a high premium on finality and certainty and where failure to uphold the surrogacy principle would significantly impact on that objective by potentially exposing awards to minute examination of counsel performance. At least in cases such as the present, involving a monetary claim and where there is no suggestion of incompensable loss, it is not in my view contrary to the requirements of justice for the Court to recognise an arbitral award under art 35 despite arguable counsel error or breach in the process by which that award was reached. I do not in that context read the Court of Appeal's decision in *Nicholas* as fundamentally changing the private law position set out in *Al-Mehdawi* and confirmed in the extract from *FP (Iran)* referred to in [40] above. Had the Court of Appeal intended to do so, it would have inevitably engaged with that line of authority.

[52] Nor do I consider myself assisted by the decisions relating to the so called "innominate" ground of judicial review. In a recent decision with which I agree, Palmer J rejected a generic "something has gone wrong" interpretation of this ground of review, stating that the court ought to be able to identify with reasons why a

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[39] I note also that *Nicholas* concerned an appeal in which context there was an opportunity, with leave, to call further evidence. The Court considered such evidence appropriately admitted not only because of counsel's prior oversight but because of the confiscatory nature of the regime and the proposed hardship grounds. In the present case there is no jurisdiction to entertain an appeal and no jurisdiction to admit further evidence.

particular decision is unlawful.[40] He identified that the cases recognising the innominate ground can all be rationalised on the basis of conventional principle, such as substantive unfairness or cumulative impropriety. The simple point however is that, to the extent the ground exists at all as an independent basis for review, it is a principle of public law with no or very limited application in the present context.

[53] It follows that in my view it would not be a breach of natural justice "occurring during the arbitral proceedings" or otherwise be contrary to public policy to recognise the award on the facts he alleges. Mr Noe's remedy, if any, lies with his legal advisors.

Result

[54] I grant orders enforcing by entry as a judgment of this Court the Award of the Hon Rodney Hansen CNZM QC dated 7 June 2017.

[55] If any issue as to costs arises memoranda may be filed. I note that the plaintiff's application does not include any such claim.

Muir J

[40] *AI (Somalia) v Immigration and Protection Tribunal* [2016] NZAR 1471 at [38]–[46].