IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2019-485-585
[2020] NZHC 2409

IN THE MATTER	of article 5 of Schedule 2 of the Arbitration Act 1996 and Part 26 of the High Court Rules 2016
BETWEEN	ALUSI LIMITED First Applicant
	OPENYD LIMITED Second Applicant
	RUDAYNA IBRAHIM, ABDULAH ABDULQADIR and OMAR JASSIM Third Applicants
AND	G J LAWRENCE DENTAL LIMITED First Respondent
	GARY JOHN LAWRENCE and JASON PETER SILK and DIANE SHERYL LAWRENCE and JASON PETER SILK Second Respondents

Hearing:	22 July 2020
Counsel:	C J Griggs and C M Kenworthy for Applicants R C Laurenson for Respondents
Judgment:	16 September 2020

JUDGMENT OF ELLIS J

Table of Contents

[1] The applicants seek leave to appeal my judgment of 9 April 2020, in which I rejected their application for leave to appeal against an interim arbitral award made by the Hon Paul Heath QC in 2019.[1] They also seek to have part of that award set aside on the grounds that a breach of natural justice occurred in connection with the making of the award.[2]

[2] The nature of the natural justice challenge makes it regrettably necessary to go into considerable factual detail. Some of the detail repeats that in my earlier judgment, but some are new. My understanding of the facts and issues has (to some extent) increased after the hearing of the present applications.[3]

BACKGROUND

[3] The proceedings derive from a longstanding and fractious dispute between three dentistry practices operating out of the Raumati Dental Centre. The parties to the dispute are the individual dentists themselves, companies incorporated by each of them, and other associated entities. In this judgment I will refer collectively to the three groups involved as:

(a) **Alusi** (Alusi Ltd, Dr Ibrahim, and interests associated with her—the present applicants);

(b) **Lawrence Dental** (G J Lawrence Dental Ltd, Dr Lawrence, and interests associated with him—the present respondents); and

(c) **Creative** (Creative Dentistry Limited and Dr Al-sabak—not parties to the present arbitration or proceedings, but historically involved in the dispute).

---

1 *Alusi Ltd v G J Lawrence Dental Ltd* [2020] NZHC 739.

2 As recorded in footnote 3 of my earlier judgment, a direction had earlier been made by consent that the hearing of the natural justice challenge should await the determination of the appeal.

3 As also noted in my earlier judgment, the way in which the Award was structured and the application for leave to appeal was presented required me to distil the relevant chronology for myself.

[4] The relationship between the three dentists was governed by a Deed of Association that was executed in 2012 (the Deed). A management company known as Openyd was the lessee of the premises from which the three practices operated. The three dentists were, until recently, equal shareholders in Openyd. Both the Deed and Openyd's Constitution confer pre-emptive rights on the parties/shareholders in terms of any sale of their respective business. Where the Deed and the Constitution conflict, Mr Heath has found—and it is not now challenged—that the Deed is to prevail. And although it is clear that the Deed has now been terminated, it remained in force at all times material to this judgment.

The disputes between Creative, Alusi, and Lawrence Dental

[5] In 2016, Dr Lawrence signalled his intention to retire from practice. As I understand it, there was initially some possibility of Alusi buying his practice for $400,000. But the prospect of Alusi thereby obtaining a controlling interest in Openyd concerned Dr Al-sabak. At some point Dr Al-sabak decided that he, too, wished to retire from practice. So issues arose about how each party's pre-emptive rights under the Deed and Constitution were to operate in the event of one or more of the practices being sold.

The Email Agreement

[6] At a relatively early stage there was a mediation between all three groups. An agreement was reached that was set out in an email dated 15 March 2017 (the Email Agreement):

> 1. Alusi Limited [Dr Ibrahim] and [Lawrence Dental] shall sign the agreement for Sale and Purchase drafted at the meeting.
>
> 2. That Creative Dentistry Ltd [Dr Al-sabak] will provide financial records to [Dr Ibrahim] with respect to his practice by 5pm, Friday 17 March 2017.
>
> 3. That [Dr Al-sabak] may now market his practice for sale to third parties [not party to the Deed of Association].
>
> 4. [Dr Al-Sabak] shall prior to accepting any offer for his practice offer his practice to [Dr Ibrahim] on the same terms.

5. [Dr Ibrahim] shall have three working days to make an offer on the same terms failing which [Dr Al-sabak] may sell his practice to that third party on the terms recorded in the original offer.

6. Subject to 5 above, in consideration for the above, [Dr Ibrahim] shall waive any right of pre emption pursuant to the Deed of Association and the constitution of Openyd Limited and consent to such sale.

7. In the interim [Dr Ibrahim] and [Dr Al-sabak] shall negotiate in good faith regarding the sale of [Dr Al-sabak's] practice to [Dr Ibrahim].

8. [Dr Al-sabak] shall give further consideration to consenting to the sale of [Lawrence Dental] practice to Alusi Limited and shall confirm his position by 5pm Monday 20th March 2017.

9. [Dr Al-sabak's] consent to the sale of [Lawrence Dental] to Alusi Limited shall be deemed to be given if he enters into an unconditional contract for the sale of his practice.

[7] The signed sale and purchase agreement referred to in cl 1 (the Lawrence ASP) was attached to the email. The settlement date specified in it was 1 June 2017.

[8] It seems clear that the Email Agreement was intended to modify the parties' pre-emptive rights, at least for a time. More particularly:

(a) Dr Ibrahim would waive her pre-emptive rights in relation to any sale of Creative to a third party, provided she had been given three working days to make an offer for the practice on the same terms;

(b) Dr Al-sabak would be deemed to consent to the sale of Lawrence Dental to Alusi, if he entered into an unconditional sale of his own practice; and

(c) it is implicit that, if the Lawrence ASP became unconditional (by virtue of Dr Al-sabak's actual or deemed consent) then Lawrence Dental's consent to any sale of Creative—either to Alusi or to a third party—was not required (or would be deemed).

Negotiations for sale of Creative

[9] On the day after the mediated agreement there was a meeting between Dr Al-sabak and Dr Ibrahim's son, Mr Abdulqadir, to negotiate the sale of Creative's

practice to Alusi. But later that day, Creative sent an email to Alusi (and Lawrence Dental), advising that:

> … [Dr Al-sabak] has met with [Mr Abdulqadir] today, and [Mr Abdulqadir] has stated that a purchase by his mother cannot proceed at the moment. [Dr Al-sabak] will urgently pursue a sale to a third party. We will review all matters on Monday and will be in touch then.

[10] On 20 March (the deadline imposed by the Email Agreement), Creative wrote again to the others, stating:

> [Dr Al-sabak/Creative Dentistry] is expecting a third party offer for [his/its] practice, but this has not come to hand yet. For the moment he is not prepared to waive his rights under the deed of association, and he reserves his rights under the deed. It is regretted that the mediation/meeting did not result in an outcome that would enable all parties to move on, but we remain hopeful that this can be achieved.

[11] A few days later, Creative sent a further email, advising:

> [Dr Al-sabak] has now accepted an offer for his practice. It is subject to a 30 day due dil. He will not waive his rights until the deal goes unconditional.

[12] The proposed purchaser was a Dr Singh.

[13] By 31 March, the time for Dr Al-sabak's express consent to the Lawrence ASP had passed, and Creative had not sold its practice to a third party (so there was no deemed consent either). Nevertheless, Alusi wrote to Lawrence Dental, asserting that the Lawrence ASP was unconditional and tendering the deposit in the form of a bank cheque for $47,500. Receipt of the cheque was acknowledged by Lawrence Dental shortly after, adding:

> At present we will not be banking the cheque or providing a receipt. We are obtaining further instructions from our client, and will revert in due course.

[14] Upon learning of Alusi's position, Creative gave notice of a dispute to be referred to arbitration under cl 20 of the Deed, namely that cl 15 of the Deed had not been complied with in relation to the Lawrence ASP. Alusi continued to assert that the Lawrence ASP had become unconditional and that consent to the sale by Dr Al-sabak was not required.

The first arbitration

[15] Mr Matthew Sherwood-King was appointed as arbitrator. Two preliminary issues were referred to him:

(a) the interpretation and operation of cl 15 of the Deed and the Constitution;[4] and

(b) the effect and enforceability of the Lawrence ASP.

[16] Alusi's focus was on maintaining that the Lawrence ASP was unconditional. As Mr Heath later observed,[5] Alusi's position at this time was that "the 15 March 2017 email [agreement] is of no moment."

[17] On 25 August, Mr Sherwood-King issued an award in which he relevantly found—contrary to Alusi's claim—that the Lawrence ASP was "unenforceable" and of "no effect".

Creative's attempt to sell to a third party

[18] On 28 August, Creative emailed both Alusi and Lawrence Dental, asking whether they were prepared to waive their pre-emptive rights under the Deed and the Constitution in relation to Dr Al-sabak's proposed sale of his practice to Dr Singh.

[19] On 29 August:

(a) Lawrence Dental returned the deposit cheque to Alusi, advising that "for the avoidance of doubt" it was cancelling the Lawrence ASP "on the grounds of unenforceability";

(b) Lawrence Dental wrote to Creative, acknowledging receipt of the 28 August email and advising that it "reserves its position in all

---

4 Related issues of waiver were also initially raised but later withdrawn.

5 At [66] of the interim award.

respects on the purported notice" and that Dr Lawrence would be out of New Zealand from 30 August until 23 September 2017;

(c) Alusi wrote to Creative, advising that the Email Agreement remained operative and that, before any offer of sale to Dr Singh, Dr Al-sabak was obliged to make an identical offer to Dr Ibrahim.[6]

[20] On 4 September, Creative's solicitor responded to Lawrence Dental and Alusi:

> I thought I had heard the last of the 15 March email, and I now regard it as irrelevant, defunct, and not now contractually binding, if it ever was.
>
> It was written in relation to a totally different situation to that which now exists.
>
> Further the email does not say anything about Lawrence waiving his rights under the [Deed] and [Constitution]. The provisions of those documents must be followed.
>
> The arbitration confirmed that.
>
> We are following them, and have offered the practice to both the other dentists as per clause 15. It is now up to the other 2 dentists to indicate whether they wish to buy.
>
> Please reply within 7 days and copy [Dr Al-sabak] with your reply.

[21] On 6 September, Alusi issued proceedings against Creative in the High Court, seeking an injunction to stop the sale of Creative's practice to a third party. Lawrence Dental sought to be joined to the proceeding in order to protect its position in relation to any issue about the resurrection of the Lawrence ASP. Joinder was opposed by Alusi.

---

[6] Apart from the relevant timeframes, Dr Al-sabak's obligation vis-à-vis Dr Ibrahim was in fact the same under the Email Agreement as it was under the Deed and the Constitution. The critical difference was that under the Email Agreement, Dr Al-sabak was not also required to make the same offer to Lawrence Dental. Whether the pre-existing requirement under the Deed and Constitution continued to apply is less clear.

The proposed sale of Creative to Alusi

[22] On or about 14 September, Alusi and Creative agreed, in principle, to a sale of Creative to Alusi.[7]

[23] On Monday 25 September, Dr Al-sabak emailed his solicitor stating that:

> Gary [Lawrence] has indicated that he has no interest to purchase my business and he will be content to waive his rights under the DOA for Alusi to buy mine.
>
> He needs his counsel Mr Richard Laurenson to confirm his position but Mr Laurenson is not available until Wednesday.
>
> Can you please include in the sale and purchase agreement the shares in Creative Dentistry with settlement 1 November 2017.

[24] But on Thursday 28 September, Lawrence Dental wrote a letter advising:

> 2. If Creative wishes now to progress a sale of its practice to Alusi:
>
> 2.1 Lawrence reserves its position in all respects on the basis of which this sale proceeds. Specifically, Lawrence does not accept the sale can be pursuant to the provisions of the 15 March 2017 email.
>
> …

[25] The letter also advised that, subject to sighting the sale contract, Lawrence Dental would favourably consider consenting to the sale, but only on certain conditions, some of which involved amending the Deed and Openyd's Constitution. Those conditions were largely designed to protect Lawrence Dental's position following the sale—particularly in relation to the future control of Openyd and joint decision-making more generally. In the interim award,[8] Mr Heath also recorded that Lawrence Dental advised that it "at this present time does not wish to purchase" Creative.[9]

---

7 This date comes from a memorandum later filed in the High Court on Alusi's behalf and discussed further below.

8 At [107].

9 It is unclear to me whether this advice was contained in the 28 September letter or was conveyed separately.

[26] Alusi did not accept Lawrence Dental's conditions and has never accepted that Lawrence Dental had any pre-emptive rights to exercise. It did not, however, take any steps to reactivate the Lawrence ASP.

[27] The sale of Creative to Alusi formally settled on 1 November 2017. The day before, a share transfer form had been signed on behalf of both companies. The sale and purchase agreement provided:

> The sale of the business includes the sale of 25 shares in Openyd Limited.
>
> This agreement is conditional on the vendor obtaining the approval of the other shareholders in Openyd Limited to the transfer of shares to the purchaser and any other requirements relating to the transfer of such shares within 20 working days of the date of this agreement.

[28] On the same day—and notwithstanding that clause—a resolution was purportedly passed by the board of Openyd, whereby "the directors" resolved to accept the transfer of Creative's 25 shares to Alusi, and to update the share register and companies' office register accordingly. The resolution recorded:

> The directors are satisfied that the pre-emptive provisions in para 15 of the companies [sic] constitution have been complied with, or waived, as applicable.

[29] Dr Ibrahim and Dr Al-sabak signed the resolution. After receiving legal advice that it would be preferable for Dr Lawrence to sign it as well, the resolution was sent to Dr Lawrence. Anticipating (correctly) that Dr Lawrence would refuse to sign, Creative's solicitors suggested that any difficulty could be overcome by Dr Al-Sabak signing a declaration that he was holding Creative's shares in trust for Alusi, supported by a perpetual proxy in favour of Alusi for voting at shareholder meetings. Alusi's solicitors agreed to that suggestion, and Dr Al-sabak executed an irrevocable power of attorney to that effect.

[30] Lawrence Dental continued to assert its pre-emptive rights and to say that it would agree to the share transfer, but only on terms that protected its position. Later, Lawrence Dental gave notice under the Deed of its desire to retire from the Association. Lawrence Dental acknowledged Alusi's pre-emptive rights and advised that the sale price was $550,000 (plus GST, if any).

[31] Alusi responded that the notice was invalid because of "an unconditional concluded agreement" for the sale of Lawrence Dental to Alusi for $400,000. This apparently referred to an agreement Alusi says was reached in 2016, before the Lawrence ASP. Lawrence Dental denied the existence of any such agreement.

Mr Upton's memorandum

[32] As a result of the sale agreed between Alusi and Creative, Alusi discontinued its High Court proceeding. Whether the sale was governed by the Email Agreement or the Deed and the Constitution was therefore not determined by those proceedings. The existence and source of Lawrence Dental's pre-emptive rights also remained at large.

[33] The question of costs in the proceedings also remained unresolved and the subject of dispute. It was in this context that, on 13 December 2017, senior counsel for Alusi, Mr Upton QC, filed a memorandum in this Court, in which he addressed the claims for costs made against Alusi by both Creative and Lawrence Dental. He advised that the agreement between Creative and Alusi had been reached within seven days of the proceedings being filed, on or about 14 September 2017. As regards the Email Agreement and the Lawrence ASP, he said:

> 5. … Alusi submits that the email agreement of 15 March 2017 continued to have relevance in the context of any sale by Creative to a third party, irrespective of what happened to the Lawrence/Alusi contract. The two were not linked or conditional in some way, contrary to what appears to be suggested by Creative. …

[34] Later in that same memorandum—and in response to the claim for costs by Lawrence Dental as a non-party—Mr Upton said:[10]

> 13. [Lawrence Dental's] concern … was that if Creative achieved a sale, Alusi could then invoke paragraph 9 of the email agreement as a deemed consent to the agreement between Lawrence and Alusi dated (it appears) 15 March 2017, referred to at paragraph 1 of the email agreement, and "thus resurrect the sale in that paragraph 1". In response, four points are made:
>
> (a) The arbitrator in his award dated 25 August 2017 had already held that earlier agreement to be unenforceable;

[10] Emphasis added.

(b) As noted earlier, Lawrence's solicitors wrote to the solicitors for Alusi on 29 August 2017 and said that as far as Lawrence was concerned the contract was at an end and that for the avoidance of any doubt Lawrence cancelled the contract on the grounds of unenforceability. Without explaining why, the Lawrence submissions … state that "both these matters could be wholly arguable". Alusi does not agree. *By the time Creative and Alusi entered into their contract on 14 September 2017 (in fact well before then), the earlier Lawrence/Alusi contract (referred to in paragraph 1 of the email agreement) was dead and buried, and could not be revived*;

…

(d) Finally, even if consent were deemed in terms of paragraph 9 of the email agreement, that does not address the underlying issue of whether there was an extant and enforceable contract of sale (as between Lawrence and Alusi) to which the consent could attach. *By the time that Creative and Alusi entered into their contract for the sale and purchase of Creative's dental practice (14 September 2017), there was no extant contract of sale and purchase in existence as between Lawrence and Alusi* for reasons already explained.

[35] Simon France J later ordered Alusi to pay costs to both Creative and Lawrence Dental, noting (in the latter regard):[11]

> [18] I consider the application for joinder was valid, and not only for the immediate concern held by Creative, *namely the potential revival of the agreement between Alusi and Lawrence. The purpose underlying Alusi's reliance on the mediation agreement was to thereby shut out Lawrence of its rights under the foundation documents.* In the absence of the plaintiff providing assurances that made Lawrence's involvement unnecessary, the application for joinder was a valid and necessary step.

Removal of Dr Lawrence and cancellation of the Deed

[36] Alusi has since purported to use its (effective) controlling interest in Openyd to side-line Dr Lawrence. Dr Lawrence has, for example, since been removed as a Director of Openyd and Mr Abdulqadir has been appointed in his stead.[12]

[37] Relations between Lawrence Dental and Alusi continued to deteriorate. Lawrence Dental eventually gave notice that it was cancelling the Deed.

---

11 Emphasis added.

12 In the interim award Mr Heath found that—were it not for his conclusion on the pre-emptive rights issue—Alusi's exercise of its voting rights was lawful.

The second arbitration

[38] The ongoing dispute between Alusi and Lawrence Dental was then referred to arbitration, at Alusi's behest.[13] The arbitrator, Mr Heath, identified six preliminary questions (PQs), the answers to which, he thought, would go some considerable way to resolving the dispute. It is those PQs that are addressed in his interim award.

[39] Relevant for present purposes is the third PQ, which relates to Lawrence Dental's pre-emptive rights as at 1 November 2017. The question was:

> In the event that Lawrence Dental and Alusi were each to remain the owner of a practice under the 2012 Deed, has Lawrence Dental at any time waived or forfeited its pre-emptive rights under the Constitution of Openyd, or its rights and protections under the 2012 Deed?

[40] In a footnote to this question, Mr Heath said: "This question incorporates all issues relating to the status and effect of the 15 March 2017 'agreement'".

[41] Later in the award, Mr Heath goes on to explain:

> [59] On 1 November 2017, Alusi settled an agreement for sale and purchase of Creative Dentistry's business, including the shares in Openyd. The question is whether those shares were acquired in breach of pre-emptive rights conferred either by clause 15 of the 2012 Deed or clause 15 of the Constitution.

[42] Mr Heath began the relevant part of his analysis by considering what—if anything—Mr Sherwood-King had determined in terms of the Lawrence ASP and the Email Agreement. He observed that, while one of the issues before Mr Sherwood-King was "the effect and enforceability of the contract dated 15 March 2017", Mr Sherwood-King had made it clear that by the word "contract" he had meant the Lawrence ASP, not the Email Agreement. Ultimately, Mr Heath agreed with Alusi's submission that all Mr Sherwood-King had done was hold that the Lawrence ASP was unenforceable at the time of the first arbitration because Dr Al-sabak's consent to the sale had not, at that point, been forthcoming. Mr Heath effectively found that the first arbitrator had left open the possibility that Dr Al-sabak

---

[13] Lawrence Dental had previously filed proceedings in the High Court but Alusi filed a successful protest to jurisdiction based on the arbitration clause.

might, in future, consent and so the Lawrence ASP might, in future, become unconditional.

[43] Mr Heath therefore proceeded on the basis that both the Lawrence ASP and the Email Agreement *potentially* remained on foot, as at 1 November 2017. The question was first, whether as a matter of law they did so and, if so, whether they constituted an unequivocal waiver of rights by Lawrence Dental. That the continued validity of *both* agreements was engaged by this issue is made clear at [75] of the award, where Mr Heath said:

> The competing contentions on the pre-emptive rights issue involve *a close analysis of the 15 March 2017 email agreement, the Lawrence Dental/Alusi agreement* and the correspondence and conduct that followed.

[44] In my view, it is quite clear from the terms of the rest of the award that Mr Heath regarded the Email Agreement and the Lawrence ASP as inextricably linked for the purposes of the waiver issue. For example, at [94] he said:

> Undoubtedly, as from 5.55pm on 15 March 2017, the email evidenced a binding legal agreement among the three parties. *The 15 March 2017 email must be read in conjunction with the Lawrence Dental/Alusi agreement*, to which reference is made in clause 1. …

[45] And while at [109] the arbitrator refers only to whether "the 15 March 2017 email agreement amounted to a waiver that remained in place at the time the Creative Dentistry/Alusi agreement was settled on 1 November 2017", he immediately goes on to say at [110]:[14]

> There are two distinct aspects involved in the waiver analysis:
>
> (a) The first is *whether the 15 March 2017 email agreement* ***and*** *the Lawrence Dental/Alusi agreement had been cancelled* before 1 November 2017.
>
> (b) The second is whether, sometime before 1 November 2017, a reasonable time had passed within which Alusi could trigger the constructive consent by settling a purchase of Creative Dentistry's practice and shares in Openyd.

---

[14] Emphasis added.

[46] And the fact that the arbitrator sometimes conflates the two agreements can be seen in [113], where he seems to refer to them interchangeably:[15]

> … As things stand at present, *the Lawrence Dental/Alusi agreement* has been cancelled; the argument is only as to the date on which that occurred. Notwithstanding advice from its senior counsel in High Court proceedings that the *15 March 2017 email agreement* had been of no effect for some months, Alusi contends that it remained on foot, as at 1 November 2017, for the sole purpose of demonstrating that Lawrence Dental waived rights of pre-emption set out in the 2012 Deed and/or the Constitution.

[47] Alusi's position on the cancellation issue was that the Lawrence ASP had been wrongfully repudiated by Lawrence Dental on 29 August 2017 and that this repudiation had not been accepted by Alusi before the 1 November settlement with Creative. (It may be observed that the only conceivable way that this argument could advance Alusi's position was if it meant that the Email Agreement must also remain on foot. If Alusi's position was that the Email Agreement had independent life, then it would have been unnecessary to assert the continued validity of the Lawrence ASP. One thing that is clear is that Alusi did *not* wish to purchase the Lawrence Dental practice pursuant to the Lawrence ASP.)

[48] Mr Heath agreed with the first half of Alusi's argument (the repudiation point). He concluded at [117] that:

> … Lawrence Dental, by its solicitors' letter of 29 August 2017, did wrongfully repudiate the Lawrence Dental/Alusi agreement. On my interpretation of the arbitrator's award, he was doing no more than to hold that the Lawrence Dental/Alusi agreement was unenforceable as at the date of his award, 25 August 2017. As previously indicated, the arbitrator's finding was made in the context of an argument advanced by Alusi that the Lawrence Dental/Alusi agreement was unconditional. …

[49] But the second question was "whether, by words or conduct, Alusi accepted the repudiation and thereby cancelled the Lawrence Dental/Alusi agreement" before 1 November 2017. Again, it is implicit in Alusi's position on this issue that the reactivation of Lawrence Dental's pre-emptive rights under the Deed could only occur if the Lawrence ASP—and the Email Agreement—did not remain on foot on 1 November. And again, there was no suggestion that the Email Agreement might have independent life.

---

15 Emphasis added.

[50] Mr Heath acknowledged that any decision to cancel needed to be clearly notified and that there was no evidence of any cancellation being directly communicated by the Alusi interests to the Lawrence Dental interests before 1 November. But, as explained in my earlier judgment, he referred to the decision in *Chatfield v Jones*[16] and held that Mr Upton's December memorandum constituted *retrospective* notice of cancellation. He said:[17]

> [126] Based on senior counsel's statements to the Court when making submissions for Alusi in opposition to the costs applications, *I am satisfied that Alusi accepted Lawrence Dental's repudiation of the 15 March 2017 email agreement on or about 14 September 2017*. As a result, *that agreement* was cancelled from that time, and neither party had, as at 1 November 2017, any obligation to perform it further.

[51] This is the passage of the Award that forms the focus of Alusi's natural justice complaint; I return to it shortly.

[52] In the next paragraph of the award, Mr Heath explained that, in case he was wrong on the *Chatfield* point, he would also consider the alternative possibility (referred to at [110] of the Award, set out at [45] above) that "the 15 March 2017 email agreement" had expired by 1 November 2017, due to the effluxion of time.[18] More specifically the question was whether Alusi had taken reasonable steps within a reasonable time to fulfil the condition precedent to the Lawrence Dental ASP, namely to purchase Creative in terms of the Email Agreement.

[53] On that issue, Mr Heath concluded that this condition precedent had not been fulfilled in a timely way. He said:

> [131] Relatively strict timetables were fixed for steps to be taken to implement the 15 March 2017 email agreement. If Dr Al-sabak were to give express consent, that had to be done no later than 5.00pm on 20 March 2017. Settlement of the Lawrence Dental/Alusi agreement, if it were to proceed, was to take effect on 1 June 2017. Although time was lost while the arbitral process was undertaken (concluding with an award on 25 August 2017), the time between 1 June 2017 and 25 August 2017 should, in my view, be taken into account in determining whether Alusi took reasonable steps within a reasonable time to fulfil the condition precedent. Alusi had, in the period between 15 March 2017 and 25 August 2017, treated the Lawrence

---

16 *Chatfield v Jones* [1990] 3 NZLR 285 (CA).
17 Emphasis added.
18 Referred to at [110] of the award, set out at [45] above.

> Dental/Alusi agreement as unconditional. Accordingly, no steps were taken until after 25 August to fulfil the condition.
>
> [132] While I infer, in Alusi's favour, that the commencement of its negotiations with Creative Dentistry was intended to meet the condition precedent, by the time those parties agreed terms, on or about 4 September 2017, I consider a reasonable time had passed for fulfilment. I reach that conclusion on the basis of the parties' expectations that resolution would follow swiftly from the 15 March 2017 email agreement. Dr Ibrahim's interests have no one but themselves to blame for not attempting to fulfil the condition earlier; I repeat that some three to four months were lost while Alusi persisted with a weak argument that contended that the Lawrence Dental/Alusi agreement was unconditional.

[54] So the short point is that, either way, Alusi did not succeed.

BREACH OF NATURAL JUSTICE IN CONNECTION WITH THE MAKING OF THE AWARD

[55] As noted earlier, the application for setting aside relates to the finding referred to at [50] above: that Mr Upton's memorandum constituted retrospective notice of Alusi's cancellation of the Email Agreement. Alusi says that the arbitrator's conclusion—based on the memorandum—that the *Email Agreement* was "dead and buried" (as opposed to just the Lawrence ASP) came as a complete surprise and was a proposition that Alusi had no opportunity to address. And given that this was the primary basis on which the arbitrator found against Alusi on PQ3, the prejudice (Alusi says) is obvious.

[56] It is worth emphasising at the outset that Alusi's position in this respect is squarely based on the fact that Mr Upton had only said in his memorandum that the *Lawrence ASP* was "dead and buried". He did not refer to the Email Agreement—other than to maintain (at an earlier point) that it was distinct from the Lawrence ASP.

Relevant law

[57] The High Court may set aside an arbitral award under art 34(2)(b)(ii) of Schedule 1 of the Arbitration Act 1996 (the Act) if the award conflicts with the public policy of New Zealand. Article 34(6)(b)(ii) makes it clear that an award will conflict

with public policy if a breach of the rules of natural justice occurred in connection with the making of the award.[19]

[58] In *Trustees of Rotoaira Forest Trust v Attorney-General*, Fisher J considered how the principles of natural justice should apply in an arbitral context.[20] After setting out the principles espoused in a leading English text on arbitration, the Judge held:[21]

> In addition the arbitrator must confine himself to the material put before him by the parties unless the contrary is agreed: *Hamill v Wellington Diocesan Board of Trustees* [1927] GLR 197 at p 201; *Garland and Lyn Jones Ltd v Winwood* [1957] NZLR 334 at p 336. This extends to the arbitrator's own opinions, ideas and knowledge where either party might otherwise be taken by surprise to that party's prejudice. If the arbitrator unexpectedly decides the case on a point which he has invented himself, he creates surprise and deprives the parties of their right to address full argument to the case which they have to answer …

[59] Later, he said:[22]

> … The key elements are surprise and potential prejudice: … Of the two, surprise is the more important. Once it is shown that the fact or idea introduced by the decision maker had not been reasonably foreseeable, it will be a very short step indeed to the possibility that a party was procedurally prejudiced. Thus it was pointed out in *Mahon v Air New Zealand Ltd* … that natural justice requires that a party:
>
> > "… should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, might have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result."

[60] Even where an award is made in breach of the principles of natural justice, however, the Court retains a discretion as to setting aside. In *Kyburn Investments Ltd v Beca Corporate Holdings Ltd,* the Court of Appeal held that:[23]

> [42] The policy of encouraging arbitral finality will dissuade a court from exercising the discretion when the breach is relatively immaterial or was not likely to have affected the outcome. Similarly, an award may not be set aside

---

19 Alusi submits, and I accept, that the Court has discretion to set aside only the part of the award affected by the breach of natural justice. That is what Alusi seeks here.

20 *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452.

21 At 460.

22 At 461–462.

23 *Kyburn Investments Ltd v Beca Corporate Holdings Ltd* [2015] 3 NZLR 644 (CA).

> when the costs and delays involved are disproportionate to the amount in dispute.
>
> [43] On the other hand, where the breach is significant and might have affected the outcome courts are inclined to set aside the award. In some cases, the significance of the breach may be so great that the setting aside of the award will be practically automatic, regardless of the effect on the outcome of the award.

Analysis

[61] To assess whether there has been a breach of natural justice here, it is necessary to say a little more about how Mr Upton's memorandum came to be before the arbitrator. That can be worked out by perusing the parties' written submissions to the arbitrator in relation to the pre-emptive rights issue.[24]

Alusi's position at arbitration

[62] As is evident from the award, Alusi's position was that the Lawrence ASP was a conditional contract that was only found to be unenforceable at the time of the first arbitration because "the relevant condition, namely actual or deemed consent by Creative under paragraphs 8 or 9 of [the Email Agreement] had not at that time been fulfilled." Alusi contended that the condition was later satisfied by the sale of Creative's practice to Alusi on 1 November 2017, and so Lawrence Dental's consent to the sale was either deemed or not required.

[63] Under the heading "Repudiation of agreement between Lawrence Dental and Alusi", Alusi submitted that Lawrence Dental's 29 August "cancellation" email was a wrongful repudiation of the Lawrence ASP that was not accepted by Alusi until 13 December 2017, when Mr Upton filed his memorandum in the High Court.[25]

[64] This part of the submissions concludes by summarising Alusi's view of the legal position as at 1 November, including that the parties continued to be bound by

---

24 Both sets of submissions bear the same date, so it is not clear whether one responds to the other or whether they were each filed independently, at the same time.

25 It is then submitted that what Mr Upton said in the memorandum was wrong in law and appears to have been predicated on the assumption that the 29 August email had had the effect of cancelling the Lawrence ASP. But after discussion about the relevant law as to when a cancellation takes effect, Alusi accepted that the Upton memorandum was an effective communication of Alusi's acceptance of the repudiation at the time it was served on Lawrence Dental—*after* 1 November, on 13 December 2017.

the Email Agreement and that the Lawrence ASP was also still binding on the parties to it. So, in terms of the waiver issue, Alusi submitted:

> … [the Email Agreement] is a complete answer to any claim that Lawrence Dental's pre-emptive rights under clause 15 of the constitution were not respected. The shareholders agreed upon a process for the disposal of the relevant practices, including their shares, and they were at liberty to do so, even if that might be inconsistent with the strict terms of the constitution. Lawrence Dental is bound by that agreement.

Lawrence Dental's position at arbitration

[65] In the submissions made for Lawrence Dental, counsel said:

> 14.8 The Alusi interests acknowledge that the sale [of] Lawrence Dental to Alusi was at an end "well before" 14 September 2017. This was contained in Mr Upton QC's submission dated 13 December 2017 to the High Court in the 2017 injunction proceedings …
>
> 14.9 If understood correctly, Alusi seeks to keep the [Lawrence ASP] alive beyond 1 November 2017; it apparently being the contention that Lawrence Dental's earlier "repudiation" … was not accepted until Mr Upton's submission of 13 December 2017. But his submission acknowledges the agreement was at an end before 14 September 2017. *It is further understood that Alusi wants the [Lawrence ASP] alive as at 1 November 2017 to avoid the suggestion that the alleged implied consent of Lawrence Dental under the [Email Agreement] to the Creative/Alusi sale lapsed at the point the [Lawrence ASP] died*. As above, consent was never given by Lawrence Dental but in any event the [Lawrence ASP] was well dead by 1 November 2017.

[66] The submissions then immediately go on to refute the proposition that the sale of Creative to Alusi was pursuant to the Email Agreement, noting that at the time of the 2017 injunction proceedings Lawrence Dental's concern was that Alusi was trying to revive the Lawrence ASP and was "not aware of any suggestion of having given implied consent".

The link between the Lawrence ASP and the Email Agreement

[67] It is clear from Alusi's submissions to the arbitrator that its position was that both the Lawrence ASP *and* the Email Agreement remained on foot as at 1 November 2017.

[68] Notwithstanding the submissions made by Mr Upton (before Simon France J) and by Mr Griggs (before me) to the contrary, it is implicit in Alusi's position at the arbitration that the Lawrence ASP and the Email Agreement are inextricably linked. It is clear that the only reason Alusi cared about the currency of the Lawrence ASP was to avoid any suggestion that, because the Lawrence ASP was terminated, Lawrence Dental's implied consent to the Creative/Alusi sale by virtue of the Email Agreement had also lapsed.[26] And as a matter of law and logic, that must be so; as far as Lawrence Dental was concerned, the Lawrence ASP and the Email Agreement are undoubtedly a "package" in that sense. The idea that Lawrence Dental would have agreed to waive its pre-emptive rights without a firm agreement for the sale of its own practice makes no sense. It was, no doubt, for this reason that the focus of argument before the arbitrator was largely on the Lawrence ASP.

[69] If the Lawrence ASP was spent by 1 November, then so too was the Email Agreement. Although not expressly made clear in the Award, that was also plainly the arbitrator's view. As noted earlier, the Lawrence ASP and the Email Agreement are referred to either together, or interchangeably, throughout the award. When read in light of the analysis and discussion that precedes paras [126] and [127], it seems quite plain that the reference to the "email agreement" was intended to include the Lawrence ASP. Indeed, the discussion immediately preceding those two paragraphs focuses entirely on the issues of whether the Lawrence ASP (not the Email Agreement) had been repudiated and cancelled.

[70] In my view this is a complete answer to the alleged breach of natural justice. The issue before the arbitrator was whether Lawrence Dental had at any time waived or forfeited its pre-emptive rights under the Constitution or the Deed. The principal basis on which waiver was argued related to the combined effect of the Lawrence ASP and the Email Agreement. The main impediment to that argument was Mr Upton's concession that the Lawrence ASP was "dead and buried" well before 1 November. Alusi knew that: it addressed the point fully in their submissions.

---

[26] I reiterate that there is no suggestion that Alusi wished then, or wishes now, to purchase the Lawrence Dental practice pursuant to the Laurence ASP. It seeks, rather, to maintain that it had reached a binding agreement with Lawrence Dental to purchase at a lower price, in 2016.

[71] I acknowledge that Alusi may have been surprised by the reference to the Email Agreement rather than the Lawrence ASP in paras [126] and [127]. And I acknowledge that Alusi did not separately address the possibility of the Email Agreement continuing to have force even if the Lawrence ASP was at an end. But that was, no doubt, because:

(a) Alusi's clear position was that the Lawrence ASP was *not* at an end; and

(b) there is no tenable legal argument that the Email Agreement could survive the cancellation of the Lawrence ASP.[27]

[72] For all the above reasons, I do not regard the "surprise" as either material or potentially prejudicial; there has been no breach of natural justice here.

[73] In case I am wrong about that, I also record that I would not have exercised my discretion in Alusi's favour in any event. That is because, in light of the arbitrator's alternative finding that the Lawrence ASP had expired due to the effluxion of time, any breach would make no difference to the result.

[74] The application to set aside this part of the award on the natural justice ground is declined.

LEAVE TO APPEAL

[75] In my earlier judgment, I declined Alusi's application for leave to appeal on 11 questions of law said by Alusi to arise from the award. It is important to bear in mind that those questions of law are not the same as the six PQs identified and answered by Mr Heath. Rather, as explained in my judgment, the questions of law were said to arise out of his answers to the PQs.

[76] Alusi now seeks leave to appeal my decision to refuse leave to appeal in relation to five of the questions of law that it had identified.

---

27 As to which see [94] below.

Relevant law

[77] Clause 5(5) of sch 2 to the Act provides that:

> With the leave of the High Court, any party may appeal to the Court of Appeal from any refusal of the High Court to grant leave or from any determination of the High Court under this clause.

[78] If the High Court refuses to grant leave to appeal under subcl (5), the Court of Appeal may grant special leave to appeal.

[79] The approach when considering an application for leave to appeal (from a refusal to grant leave to appeal) under cl 5(5) of sch 2 to the Act was confirmed by the Court of Appeal in *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd*:[28]

(a) The appeal must raise some question of law capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of a further appeal.

(b) Upon a second appeal, the Court of Appeal is not engaged in the general correction of error. Its primary function is then to clarify the law and to determine whether it has been properly construed and applied by the Court below.

(c) Not every alleged error of law is of such importance either generally or to the parties as to justify further pursuit of litigation.

Discussion

[80] Alusi seeks leave to appeal against my refusal of leave to appeal in relation to questions 1, 2, 3, 5 and 6. Those questions and my reasons for declining leave to appeal are, of course, set out in detail in my earlier judgment. For clarity, however, it is necessary to summarise them again.

---

[28] *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd* [2007] NZCA 355, [2008] 2 NZLR 591 (CA) at [33].

Question 1

[81] Question 1 sought to ask whether the cancellation of the Lawrence ASP took effect prior to the communication of that cancellation by Mr Upton QC, despite s 41 of the Contract and Commercial Law Act 2017. I accepted that this raised a question of law that was capable of bona fide and serious argument—namely the application (or the continued application) of the Court of Appeal's decision in *Chatfield v Jones*. But I declined leave to appeal on the ground of an "underlying factual point", which I described as follows:

> [87] The arbitrator found that Alusi's senior counsel has previously advised this Court (in the context of seeking to further Alusi's position on costs) that, from Alusi's perspective, the email agreement was at an end by 14 September 2017 at the latest. As the arbitrator said, it must be assumed that this advice was based on instructions from Alusi. It therefore seems quite wrong in principle that Alusi should now be permitted to found an appeal based on a position which is diametrically opposed to that. In my view, that point of principle—together with the other general matters discussed at the end of this judgment—overwhelms any legal merit in the argument now sought to be advanced.

[82] Alusi's present submissions on this issue were squarely predicated on its position that the relevant factual finding by the arbitrator was made in breach of natural justice and should be set aside.[29] I have just rejected that contention, so the foundation for the application for leave on this question falls away. I do not consider it further.

Question 2

[83] Question 2 sought to ask "whether Lawrence Dental's status as a party to the email agreement and/or the Lawrence ASP meant that—in the context of Alusi's purchase of Creative—it had waived its pre-emptive rights". Although on its face it was difficult to discern how this question differed in substance from question 1, in my earlier judgment I said:

> [90] As I understand it, Alusi now seeks to argue that:

---

[29] I do not accept Alusi's submission that my refusal to grant leave to appeal on the finding of fact that Alusi alleged was made in breach of natural justice—without first hearing and determining the application to set aside on that ground—was, itself, a breach of natural justice. As footnoted earlier, it was agreed between the parties that the leave issues should be determined first.

(a) the Lawrence ASP included a "representation" by Dr Lawrence that he was retiring from practice;

(b) Alusi relied on the Lawrence ASP and the representation when purchasing Creative; and

(c) the Lawrence ASP and the representation were inconsistent with an intention by Lawrence Dental to retain its pre-emptive rights and gives rise to a promissory estoppel.

[84] And my reasons for refusing leave on this question were:

> [91] The first and fundamental point is that any question of promissory estoppel was not raised during the arbitration, was not considered by the arbitrator, and therefore does not arise out of the award. But in any event, the argument would also seem to fail at the same hurdle as question one: any purported reliance by Alusi (as at 1 November 2017) is belied by its lawyer's subsequent statements to this Court.

[85] Alusi now submits that my first reason here (promissory estoppel not being raised) was contrary to the evidence that was before me. In that regard, I was referred to paragraphs 98 and 99 of Alusi's submissions to the arbitrator in respect of the PQs.

[86] I do not agree. Paragraphs 98 and 99 relevantly read as follows:

> 98. However, what Dr Lawrence's protest overlooked was the fact that, to the extent that the 2012 Deed is a shareholders' agreement, so is the [Email Agreement]. Furthermore, the [Email Agreement] is a shareholders' agreement subsequent to the 2012 Deed. Under the [Email agreement] ... , once Creative sold its practice to Alusi on 1 November 2017, there was a binding and enforceable contract for the sale of Lawrence Dental's practice to Alusi [(the Lawrence ASP)], including its Openyd shares, and so Lawrence Dental was no longer entitled to operate its practice at Raumati Dental Centre under the 2012 Deed. This was frustrated by Lawrence Dental's repudiation of the Lawrence ASP.
>
> 99. Alusi relied on Lawrence Dental's promise in the [Email Agreement] in purchasing Creative. These circumstances raise a promissory estoppel against Lawrence Dental asserting rights as a shareholder in Openyd and party to the 2012 Deed in January 2018, contrary to its promise to sell those shares and its practice to Alusi, which came into force on 1 November 2017.

[87] But when those paragraphs are read in the context of the submissions as a whole, it is quite clear that these submissions were not made in response to PQ3 (the waiver of pre-emptive rights question) but in response to PQ4, which:

(a) was predicated on a prior finding by the arbitrator that there had been a waiver of pre-emptive rights under PQ3—which there was not; and

(b) was concerned with whether Alusi had "lawfully exercised voting rights in Openyd derived from the shares held by Creative Dentistry".

[88] So I do not accept that there was any error in my previous finding that the question of promissory estoppel was not raised in relation to the pre-emptive rights issues, with which PQ3 was concerned.

[89] But even if I have somehow misunderstood Alusi's submissions to the arbitrator on this point, there are further points that count against the tenability of its argument on question 2 here:

(a) First, the Email Agreement was (as Alusi still seeks to maintain) a contract between the parties, at least for so long as it remained in force. To suggest that it could also give rise to a promissory estoppel—let alone one that lasted beyond the expiry of the agreement itself—seems to me to be a novel proposition.

(b) Secondly, the only promise made by Lawrence Dental in the Email Agreement was to sign the Lawrence ASP, which it did.

(c) Thirdly, any reliance by Alusi on the continued effect of either the Lawrence ASP or the Email Agreement when it purchased Creative (1 November) would not have been reasonable, given that both Lawrence Dental *and* Creative were denying that either remained operative.

[90] In my view, the proposed appeal in relation to my refusal to grant leave on Alusi's question 2 raises no question of law capable of bona fide and serious argument.

Question 3

[91] Question 3 sought to ask whether the Email Agreement was a conditional contract.

[92] In my earlier judgment, I recorded that I did not understand the import of this question, but I refused leave to appeal on that question on the ground that it was moot as a result of my conclusion on question 1.[30]

[93] As a result of the more recent hearing, however, I better understand Alusi's position in relation to question 3. It is that:

(a) the Lawrence ASP was conditional on obtaining Dr Al-sabak's actual or deemed consent under the Email Agreement, within a reasonable time;[31] but

(b) the Email Agreement *itself* was not conditional in that way and so continues in force; and

(c) for that reason, the arbitrator's conflation of the Lawrence ASP and the Email Agreement cannot be justified.

[94] This is, in effect, the "missing" but untenable argument to which I have referred at [71](b) above. In other words, this is how Alusi now seeks to argue that the Email Agreement could have remained on foot on 1 November 2017, even if the Lawrence ASP had, by that date, been cancelled. It is, however, answered by the points I have made earlier. It is inconceivable that Lawrence Dental could continue to be bound by the Email Agreement upon the expiry of the Lawrence ASP. From Lawrence Dental's perspective, the Email Agreement *was* conditional—on the currency of the Lawrence ASP. And that is why question 3 was, in reality, rendered moot by the answer to question 1.

---

30 At [94].

31 Alusi would, however, take issue with the arbitrator on what constituted a reasonable time. But because that is a question of fact (and not law), Alusi abandoned this point of appeal.

[95] My refusal to grant leave on question 3 raises no question of law capable of bona fide and serious argument.

Question 5

[96] Question 5 sought to ask whether, to the extent that any of Lawrence Dental's pre-emptive rights survived the Email Agreement and the Lawrence ASP, the letter written by its solicitors on 28 September 2017 constituted an effective waiver of those rights, such as to give rise to a promissory estoppel as to their subsequent exercise.

[97] In refusing leave in my earlier judgment, I dealt with this question in the following way:

> [97] The import of the 28 September letter was addressed by the arbitrator at [107] of the award, where he said:
>
> > The 28 September 2017 letter made it clear that Lawrence Dental did not accept that the Creative Dentistry/Alusi sale could proceed under the 15 March 2017 email agreement. It also advised the solicitors for both Alusi and Creative Dentistry that Lawrence Dental "*at this present time* does not wish to purchase" (my emphasis) Creative Dentistry's dental practice. I take this as a response to the offer set out in the … separate email of 4 September 2017 from the solicitors for Creative Dentistry. This indication is something on which Alusi relies to demonstrate that Lawrence Dental waived the pre-emptive rights conferred by clause 15 of the 2012 Deed and clause 15 of the Constitution. The way in which Lawrence Dental's position was expressed is consistent with a pattern of conduct whereby rights were generally reserved and options kept open for the future.
>
> [98] Putting to one side the point that the arbitrator did not address this issue in terms of promissory estoppel, I consider that the arbitrator's interpretation of the 28 September letter was not only a finding of fact, but one which was entirely open to him. Indeed, my own reading of the letter is that Lawrence Dental was, in fact, standing on its pre-emptive rights—not waiving them.

[98] Alusi now submits that in declining leave on the basis that the question related to a question of fact, I failed to focus on the legal effect of the 28 September letter. More particularly, Mr Griggs submitted that because Creative had offered its practice for sale on 28 August, the date of Lawrence Dental's letter (28 September) was the last date on which Lawrence Dental could exercise its pre-emptive rights under the

Deed.[32] As I now understand it, the argument is that—as a matter of law—it was not open to Lawrence Dental to either stand on or reserve those rights beyond the date of the letter.

[99] It is beyond argument that Alusi's primary position at the arbitration was that the Email Agreement and the Lawrence ASP remained in force and constituted the relevant waiver. But I acknowledge that in its submissions to the arbitrator, Alusi said:[33]

> Notwithstanding the effect of [the Email Agreement] on the operation of the 2012 Deed and Openyd's constitution, Lawrence Dental was in fact (wrongly) offered the right to purchase Creative's practice. *Lawrence Dental's decision not to purchase Creative's practice must constitute waiver of its pre-emptive rights under the 2012 Deed*. Clause 15 of the 2012 Deed provides "the right to purchase [the retiring party's interest in the association at the current market valuation at the time of purchase thereof to be determined by agreement …". As was indicated by [Lawrence Dental's solicitors] on 7 September 2017 … the "interest in the association" must include the retiring party's Openyd's shares. Lawrence Dental unequivocally declined to purchase Creative's "interest in the association" so the right under the 2012 Deed was waived.

[100] The submission recorded in this paragraph clearly invites focus on an alleged "decision" by Lawrence Dental not to purchase Creative's practice. As previously held by me, that is inherently a factual matter. The arbitrator simply disagreed with Alusi's contention that the 28 September letter conveyed such a decision. Alusi's submission to the arbitrator did not expressly or impliedly advance its present argument: that, on the day following that letter, it was no longer legally *open* to Lawrence Dental to reserve its position.[34] And if it was not an argument advanced before the arbitrator it is difficult to see how it could be a question of law arising out of the award.

[101] For completeness, however, I record that I would nevertheless be disinclined to accept that Alusi's new argument is tenable. The 28 September letter was written shortly after Alusi had issued proceedings asserting that the Email Agreement

---

32 Because cl 15 of the Deed provides: "… the right to purchase shall be exercised or declined by written notice within one calendar month from … the date of notification of the exercise of the right to purchase.

33 Emphasis added.

34 In that regard I note that the arbitrator's view (at [107]) was that the offer to sell Creative's practice was in fact made on 4 September, not 28 August.

remained in force. At the time the letter was written, Lawrence Dental's expectation would no doubt have been that the High Court would determine whether the Email Agreement or the pre-emptive rights under the Deed prevailed. The proposition that time continued to run under cl 15 of the Deed—despite the fact that Alusi had brought litigation disputing the application of cl 15 at all—is less than compelling.

[102] My refusal to grant leave on question 5 raises no question of law capable of bona fide and serious argument.

Question 6

[103] Question 6 merely asks whether, on the basis of answers to all or any of the preceding questions, Lawrence Dental is deemed by operation of law to have waived its pre-emptive rights in respect of Alusi's purchase of Creative. As noted in my earlier judgment, this is a "catch-all" question that adds nothing to the earlier ones, and so I do not consider the question of leave to appeal on that issue further.

CONCLUSION

[104] For the reasons given above:

(a) the application to have the award partially set aside on the grounds that a breach of natural justice occurred in connection with making it is declined; and

(b) leave to appeal my refusal to grant leave on questions 1, 2, 3, 5 and 6 is declined.

Costs

[105] It has not been suggested that costs should not follow the event in the normal way. Lawrence Dental is entitled to its 2B costs. I trust that they can be agreed without the need for judicial intervention.

Rebecca Ellis J

Solicitors:
Lawler & Co, Auckland for Plaintiffs
Gillespie Young Watson, Lower Hutt for Defendants