IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA724/2017
[2018] NZCA 597

BETWEEN	ROBERT NOE First Appellant
AND	ATRAP INCORPORATED Second Appellant
AND	RATZAPPER AUSTRALASIA LIMITED Respondent

Hearing: 25 October 2018

Court: Miller, Clifford and Gilbert JJ

Counsel: D J G Cox for Appellants
W A McCartney for Respondent

Judgment: 18 December 2018 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants are jointly and severally liable to pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Gilbert J)

[1] An arbitral award for a sum of money is made in a private arbitration between the appellants, the respondent and others. The award is made by default after the first appellant was debarred from defending the claim due to his persistent failure over a prolonged period to comply with his discovery obligations. The appellants

assert their legal advisors were solely responsible for this failure. As a result, they claim they were denied an opportunity to present their defence in breach of the rules of natural justice.

[2] The question on this appeal is whether it would be contrary to the public policy of New Zealand to enforce the award. Article 36(3) of sch 1 of the Arbitration Act 1996 (the Act) provides that an award is contrary to the public policy of New Zealand if a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award.

[3] The High Court found that even if it could be proved that responsibility for the default on discovery rested solely with the appellants' legal advisors, there was no breach of natural justice and it would not be contrary to public policy to enforce the award.[1]

[4] On appeal, the appellants repeat the arguments they made in the High Court.

[5] We start by briefly explaining the background to the dispute and the agreement to arbitrate. We then set out the arbitral process in some detail. This is necessary to assess the appellants' contention that through no fault of theirs they had no opportunity to present their defence to the claim and were therefore denied natural justice. We then summarise the key findings in both the award and the High Court judgment before addressing the submissions on appeal.

The dispute

[6] The first appellant, Mr Noe, was at all material times living in California. Mr Noe developed an electronic rat trap called the "Raticator". In about 2005, Mr Noe entered into an agreement with Mr Hinds, who lives in New Zealand, for Mr Hinds to distribute these traps in New Zealand and Australia. The traps were supplied by Agrizap Inc, a company controlled by Mr Noe and based in California.

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1 *Ratzapper Australasia Ltd v Noe* [2017] NZHC 2931, [2018] NZAR 1 [High Court judgment].

[7] Agrizap filed for voluntary bankruptcy under chapter 11 of the United States Bankruptcy Code in April 2010. In 2012, Mr Noe, Mr Hinds, the respondent (Mr Hinds' company Ratzapper Australasia Ltd), and a new company Mr Noe incorporated in the Cook Islands called Trapco Ltd reached agreement for the future production and distribution of the Raticator traps. The second appellant, Atrap Inc, was incorporated in California to take over distribution from Agrizap. Ratzapper obtained funding from the Bank of New Zealand to meet payments due to the Chinese-based manufacturers of the traps, including outstanding payments due by Agrizap. The traps would be shipped from China to Ratzapper in New Zealand or to Atrap in California. Ratzapper would be responsible for all payments due to the Chinese manufacturers and would invoice Atrap for those traps shipped to it.

[8] In late 2012 a disagreement over the handling of monies arose between Mr Noe and Mr Hinds. This led to Mr Hinds refusing to release a container of traps to Atrap until amounts claimed by Ratzapper were paid.

Arbitration agreement

[9] The impasse was resolved by a written agreement dated 8 February 2013 between Trapco, Ratzapper, Atrap, Mr Hinds and Mr Noe (the February 2013 settlement agreement). Mr Hinds agreed to the immediate release of the container and the parties committed to a process to resolve the underlying dispute.

[10] The parties agreed to take reasonable steps to reconcile all transactions on the bank accounts of Trapco, Ratzapper and Atrap, including by making full disclosure no later than 28 February 2013 of all documentation required to enable the accounting and reconciliation process to be completed. In the meantime, within five working days of release of the container, Mr Noe was to provide the monthly bank statements of Atrap for October and December 2012 together with a breakdown of cheque payments, a list of receivables and the stock on hand for those months. He also agreed to provide the monthly bank statements of Atrap for January 2013 within five working days of receipt of these from the bank. Mr Noe also agreed to travel to New Zealand on or before 15 March 2013 to progress the reconciliation process. The parties agreed to make any payments required following the reconciliation upon demand.

[11] The agreement was to be governed by New Zealand law with exclusive jurisdiction conferred on the New Zealand courts. The parties agreed that any dispute would be determined by arbitration under the provisions of the Act with sch 2 applying.

[12] Mr Hinds and Ratzapper complied with the agreement by releasing the container. However, they claimed that Mr Noe did not take any steps to progress the accounting and reconciliation, did not disclose the documentation required and did not travel to New Zealand for the purposes of the reconciliation. Mr Hinds and Ratzapper therefore sought to invoke arbitration in June 2014. Mr Noe initially refused to agree to the appointment of an arbitrator necessitating an application to the High Court in September 2014. An order appointing the Hon Rodney Hansen CNZM QC as arbitrator was eventually made by consent on 25 November 2014.

The arbitration

The claim

[13] Four claims were pleaded in an amended claim dated 24 July 2015. However, we need only describe the sole claim that eventually succeeded. Ratzapper claimed that a full accounting and reconciliation process would have shown that Atrap was indebted to it in the sum of USD 258,399 for traps supplied between April and December 2012. Further payments were made by Ratzapper between May and December 2012 to satisfy Agrizap debts and by way of loan to Atrap together totalling USD 100,000 of which USD 83,186 had been repaid leaving a balance outstanding of USD 16,814. The total amount owing was therefore claimed to be USD 275,213.

[14] Ratzapper claimed that if Mr Noe and Atrap had complied with their obligations under the February 2013 settlement agreement, the total amount outstanding would have been paid by Atrap because it was then solvent and trading profitably. However, as a result of the breach, there was no realistic prospect of recovery from Atrap because Mr Noe transferred the trading operation and assets of Atrap to a new company he incorporated on 30 October 2014 called A Trap USA Inc.

Discovery orders and non-compliance

[15] On 25 August 2015, the arbitrator made an order requiring Mr Noe to provide by 30 September 2015 an affidavit listing various financial records of Trapco and Atrap including financial statements, general ledgers, bank statements, sales invoices and receipts, purchase invoices and receipts and stock records. This order was confined to those categories of documents that were not opposed by Mr Morgan QC who was then acting for Mr Noe.

[16] On 18 September 2015, the arbitrator declined Mr Noe's application to limit disclosure of financial records to the period from incorporation to 28 February 2013. The arbitrator found that it was necessary to inquire into the financial position of Atrap after this date in order to determine Ratzapper's claim that recovery was no longer possible from Atrap due to Mr Noe's breach of the agreement and the consequent delay.

[17] Mr Noe did not comply with the discovery order. In February 2016, more than four months after the due date for completion of discovery, Mr Noe supplied two Dropbox links to various documents and some other materials. Mr McCartney, who has acted throughout for the claimants, explained in detail in a letter dated 3 March 2016 why this discovery was woefully deficient, describing it as "piecemeal, haphazard and nowhere near complete". No documents had been supplied in most of the specified categories. There were no financial statements, no general ledgers, no bank statements, no sales invoices after December 2012 (despite the arbitrator's ruling that discovery was not to be limited to the period up to 28 February 2013), no receipts, no purchase invoices and no stock records. Instead of the required discovery, Mr Noe provided a vast number of irrelevant emails and incomplete and unhelpful lists of transactions. Mr McCartney noted that some of this information had been extracted from Atrap's electronic accounting database and called for a full electronic copy of this database to be provided. Mr McCartney concluded his letter by saying he intended to ask the arbitrator for a hearing to enforce the discovery orders. Mr Morgan immediately forwarded a copy of this letter to Mr Noe.

[18] Randall Cohen, Mr Noe's American attorney, wrote to Mr Morgan on 9 March 2016 saying that he was reviewing the discovery with Mr Noe and would respond in the near future. Christopher Dolin, the chief operating officer of A Trap USA, sent an email to Mr Cohen, copied to Mr Noe, on 22 March 2016 listing the discovery provided to date. Mr Dolin concluded his email by saying:

> Furthermore, and confidentially — I have been able to extract all Quickbooks data from 6/1/2012 through 3/31/2013, and we could supply a full quickbooks file if you think that is advisable. This was clearly requested in McCartney's letter, dated 3/3/2016, item 9. It is possible that providing that information would eliminate the objections to "partial discovery" if we provide it. Please advise your thoughts on this.

[19] Despite knowing of the major deficiencies in his discovery, Mr Noe did not provide discovery of the accounting database or any of the other required documents prior to the arbitrator debarring Mr Noe from defending the claim over eight months later, on 6 December 2016.

[20] At a conference convened on 5 April 2016, counsel for Ratzapper advised the arbitrator of his intention to apply for an order debarring Mr Noe from defending the claim. Timetable directions were made requiring any notice of opposition to be filed prior to 27 April 2016, when Mr Morgan was due to go overseas.

[21] Mr Morgan wrote to Mr Noe on 12 April 2016 saying that he did not wish to become involved in the intended application debarring Mr Noe from defending the claim. He recommended that Mr Noe comply with his discovery obligations immediately to obviate the need for this application. However, by the time this letter was written, Mr Noe had already, on 10 April 2016, instructed new counsel, Mr Colthart, and solicitors, Keegan Alexander, to act for him.

[22] On 13 April 2016, Ratzapper and Mr Hinds applied for an order that Mr Noe be debarred from defending the claim if he failed, within 10 working days of the order being made, to comply with the discovery order made by the arbitrator on 25 August 2015.

[23] This application was discussed at a conference with the arbitrator on 27 July 2016. Mr Noe must have known about this conference because he wrote to

Mr Colthart with reference to it on 25 July 2016 saying he would reassemble and re-send the documents that had already been provided on discovery and discuss with Mr Dolin how to overcome the deficiencies complained of by the claimants' solicitors. The following day, Mr Dolin sent Mr Colthart the summary he had prepared on 22 March 2016 setting out the documents previously discovered. No new documents were sent with this email, which was copied to Mr Noe.

[24] Mr Colthart attended the conference with the arbitrator on 27 July 2016. In view of the change in Mr Noe's legal representation, and because Ratzapper wished to file an amended application, the time for filing any notice of opposition to the debarring application and supporting affidavits was extended to 24 August 2016. A further conference was scheduled for 31 August 2016. Mr Colthart reported to Mr Noe following this conference.

[25] On 27 July 2016, Keegan Alexander wrote to Mr Noe setting out the terms of their engagement. This recorded:

> [T]he primary issue in the case at present is the adequacy or otherwise of the discovery furnished by you and your companies in this proceeding. That is a matter that will require urgent attention in the next month if a formal application by the claimants is to be avoided.

[26] Ratzapper filed its amended application on 2 August 2016. The only change was to seek discovery of Atrap's electronic accounting database. The application for an order debarring Mr Noe from defending the claim if he did not comply within 10 working days was unaltered.

[27] At the conference on 31 August 2016, Mr Colthart advised the arbitrator there was no opposition to the discovery sought and Mr Noe was working with his United States attorney to assemble the documents. Counsel advised that a further 20 working days was needed to complete the task. The arbitrator accordingly directed that discovery be completed by 28 September 2016 and a further conference be scheduled for 18 October 2016 to review compliance and consider any consequential orders. Mr Colthart forwarded a copy of the arbitrator's minute recording these matters to Mr Noe on 2 September 2016 noting "[w]e have another 4 weeks to complete discovery."

[28] Twelve days later, on 14 September 2016, Mr Colthart wrote again to Mr Noe saying:

> … 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.

[29] On 29 September 2016, Mr McCartney advised the arbitrator that Mr Noe had not complied, the extended deadline had passed and accordingly he sought an order debarring Mr Noe from defending the claim in terms of the amended application dated 2 August 2016.

[30] At the next conference on 18 October 2016, Mr Colthart advised that the discovery process was taking longer than expected but Mr Noe was now in New Zealand and Mr Colthart was confident that discovery would be completed no later than 25 October 2016. The arbitrator extended time for compliance accordingly and scheduled a further telephone conference for 9 am on 26 October 2016.

[31] On the morning of 26 October 2016, immediately prior to the commencement of the conference, Mr Colthart sent an email to Mr McCartney saying:

> Just a heads up. I have uploaded the discovery documents I have to files in Dropbox, and will forward a link to you shortly. There are gaps, which I'm not happy about, which can be filled (I'm told) by the end of this week.

[32] Mr Colthart sent a Dropbox link to Mr McCartney a short time later and said additional files would be added over the next few days. Christopher Jones, a chartered accountant retained by Ratzapper, examined the documents in the Dropbox and stated in an affidavit that most of the folders were empty and there were no new documents beyond those provided in February 2016. Mr Jones concluded his affidavit by saying:

> In short, we are no further ahead than when I made my first affidavit on 13 April 2016. Many documents that should have been provided have not been provided at all. In particular, the most important accounting documents, being the electronic database, the general ledger and the financial statements, are missing entirely. Those accounting records that have been provided are incomplete and/or mis-described. While some of the material shows part of

> the picture, it is insufficient to establish the whole financial position of Atrap at any particular time.

[33] At the conference that morning, Mr Colthart advised the arbitrator that he expected the outstanding discovery including the electronic accounting database would be available within two to three days. While recognising the possibility of compliance, the arbitrator made directions for the hearing of Ratzapper's application to debar Mr Noe from defending the claim. A half-day hearing was scheduled for 30 November 2016.

[34] Immediately following the conference on 26 October 2016, Mr Colthart sent an email to Mr Dolin, copied to Mr Noe, asking him to send the full electronic copy of the accounting file for Atrap "quickly". Despite this urgent request, the electronic file was not sent until 17 January 2017, more than a month after Mr Noe had been debarred from defending the claim due to his persistent failure to comply with the discovery order.

Mr Noe debarred from defending

[35] Ratzapper filed and served its evidence of Mr Noe's default and its submissions in support of the application on 11 November 2016. Nothing was filed in response.

[36] The hearing proceeded as scheduled on 30 November 2016. Mr Colthart submitted that an order debarring Mr Noe from defending the claim would be a disproportionate response given Mr Noe had not refused to comply with the order, he had partially complied with it and his only default was in failing to do so in a timely manner. The arbitrator rejected this submission because the evidence demonstrated that no real attempt had been made to remedy the deficiencies in discovery. As already noted, many of the folders provided were empty and the electronic database, general ledger and financial statements were missing entirely. The arbitrator observed that Mr Noe had not taken the opportunity to explain the deficiencies and had been on notice that a refusal to comply would have the consequence that he would be debarred from defending the claim. In the absence of any explanation, the arbitrator considered the only available inference was that the default was "persistent, flagrant and

deliberate". The arbitrator accordingly made an order on 6 December 2016 debarring Mr Noe from defending the claim.

[37] Mr Noe says he was not told about this hearing or the outcome of it until 23 December 2016 when Mr Colthart sent him a copy of the arbitrator's ruling and a brief report on the hearing. Mr Colthart suggested that the order could be "lifted" if the defaults were remedied. He again asked Mr Noe to send the electronic accounting file. A Dropbox link to this file was sent by Mr Dolin to Mr Colthart on 17 January 2017.

[38] On 4 May 2017, Mr McCartney applied for a formal proof hearing. Mr Colthart sent a copy of this application to Mr Noe the following day. Mr Noe responded saying:

> … we sent to you all of the accounting information many months ago that they had requested. I am surprised that they are still continuing with this debarring process. After fulfilling our obligation in discovery I thought you had taken steps to assure that there was no further debarring of us in this arbitration. I imagined that you had reached a stipulation with opposing counsel. Please let's talk on Monday.

[39] Mr Colthart advised the arbitrator on 22 May 2017 that he was instructed to oppose the application for a formal proof hearing. The arbitrator responded that he would hear from him by telephone at the commencement of the hearing but was unclear what purpose would be served by this given Mr Noe had been debarred from defending the claim. In those circumstances, Mr Colthart did not attend.

The principal award

[40] The formal proof hearing took place on 22 May 2017. In his award dated 7 June 2017, the arbitrator said he was satisfied that if Mr Noe had honoured his obligations under the February 2013 settlement agreement, Atrap would have been able to meet its obligations to pay Ratzapper USD 273,857.50, the amount found to be due. The arbitrator found that as a result of Mr Noe's default and the transfer of Atrap's business to A Trap USA in October 2014, Ratzapper was left with a "greatly diminished" prospect of recovery from Atrap. The arbitrator accordingly found Atrap and Mr Noe liable to pay Ratzapper the sum of USD 273,857.50.

The arbitrator also awarded Ratzapper interest on the debt at the rate of five per cent per annum from 30 March 2013, being USD 56,797.30.

The costs award

[41] In a subsequent award dated 17 October 2017 the arbitrator ordered Mr Noe to pay costs totalling NZD 80,000.

Application to enforce the award

[42] On 30 June 2017, Ratzapper applied to the High Court for enforcement of the principal award as a judgment in reliance on art 35 of sch 1 of the Act. Atrap and Mr Noe opposed the application contending the award was invalid because Mr Noe had been denied an opportunity to be heard in breach of the principles of natural justice.

[43] On 8 September 2017, Mr Noe separately applied for an order for refusal of recognition and enforcement of the award. This application was made on the ground that recognition or enforcement of the award would be contrary to the public policy of New Zealand as expressed in s 27(1) of the New Zealand Bill of Rights Act 1990 which assures the right to the observance of the principles of natural justice by any tribunal.

[44] Mr Noe stated in a detailed supporting affidavit sworn on 19 October 2017 that Mr Colthart did not keep him informed about the progress of the arbitration and he was not told about the application to debar him from defending the claim or the arbitrator's subsequent order to that effect. Mr Noe said he arranged for Mr Dolin to provide discoverable documents to Mr Colthart on 26 July 2016 by sending Dropbox links. Mr Noe stated that Mr Colthart did not acknowledge receipt of this email until three months later, on 26 October 2016. This was the morning of the conference with the arbitrator when directions were made for the hearing of Ratzapper's application to debar Mr Noe from defending the claim because of his non-compliance. Mr Noe claimed he was not sent a copy of the arbitrator's minute of this conference, nor was he aware of it.

[45] Mr Noe further stated that he did not receive a copy of the claimants' submissions dated 11 November 2016 in support of their application to debar him from defending the claim. He said he was not aware of the hearing on 30 November 2016 which led to the order debarring him.

[46] In summary, Mr Noe stated that he was not advised that he was in jeopardy of being debarred from defending the claim. He accepted that this issue had been raised earlier in the arbitration process but claimed he was "never informed that this remained a live issue in the second half of 2016".

High Court judgment

[47] Muir J was not persuaded that enforcement of the award would be contrary to the public policy of New Zealand even if it could be established that the award was obtained through counsel error or default:[2]

> … 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.

[48] The Judge accordingly made an order enforcing the award by entering it as a judgment of the Court.[3]

[49] On 10 July 2018, Muir J entered judgment by consent enforcing the arbitrator's costs award.

Submissions

[50] Mr Cox, for the appellants, submits that Mr Noe should not have been ordered to provide discovery of Atrap's records because he had no control over those

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2 High Court judgment, above n 1, at [51].
3 At [54].

documents; Mr Hinds was the sole director of Atrap. Mr Cox says the discovery order was only made because of counsel's "abdication" of his role as Mr Noe's advocate.

[51] Mr Cox submits that Mr Noe had no knowledge of critical aspects of the procedural steps taken in the arbitration. He says Mr Noe understood that Mr Dolin supplied Mr Colthart with all required discovery documentation in his email dated 26 July 2016 and advised him the Quickbooks data file was readily available if needed. Mr Cox says Mr Noe was not aware of the amended application or that there would be a further conference with the arbitrator on 18 October 2016. Despite Mr Colthart advising the arbitrator that Mr Noe was in New Zealand and he expected to meet with him shortly, no such meeting took place. Mr Cox says Mr Colthart did not send Mr Noe a copy of the arbitrator's minute of 18 October 2016 extending the date for compliance to 25 October 2016. Mr Noe was also unaware of the orders made on 26 October 2016 to progress the application to have Mr Noe debarred from defending. Nor did Mr Noe receive the subsequent materials filed on 11 November 2016 in support of this application. Mr Noe was not told about the hearing on 30 November 2016 or the order debarring him until 23 December 2016.

[52] In summary, Mr Cox submits there has been a breach of natural justice because, through no fault of Mr Noe's, he was deprived of the opportunity to present his defence. Mr Cox argues that where an aggrieved party is wholly innocent, it does not matter whether the breach of natural justice was caused by the Tribunal, the opposing party or the innocent party's own legal advisors. He relies on the decision of the Court of Appeal of England and Wales in *R v Diggines, ex parte Rahmani*.[4] Mr Cox submits this Court should follow the reasoning in that case despite it being overruled by the House of Lords in *Al-Mehdawi v Secretary of State for the Home Department*.[5]

[53] Mr Cox places particular reliance on the more recent decision of the Court of Appeal of England and Wales in *FP (Iran) v Secretary of State for the Home Department*.[6] In that case, an Iranian asylum-seeker, through no fault of hers, was unaware of the hearing before the Asylum and Immigration Tribunal (the Tribunal)

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4 *R v Diggines, ex parte Rahmani* [1985] QB 1109 (CA) at 1119.
5 *Al-Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876 (HL).
6 *FP (Iran) v Secretary of State for the Home Department* [2007] EWCA Civ 13.

and her appeal was heard and determined against her in her absence.[7] She did not know about the hearing because her solicitors had failed to inform the Tribunal of her new address.[8] Sedley LJ acknowledged that errors of representatives can sometimes be imputed to their clients.[9] He described this form of imputed fault as the "surrogacy principle".[10] However, he considered there was no general principle of law that fixes a party with the procedural errors of her representative and the surrogacy principle was not one of universal application.[11] In some refugee cases, the exercise of the right to be heard may literally be a matter of life and death.[12] Sedley LJ said it was therefore unsurprising that the surrogacy principle had not been uniformly adopted or applied.[13]

[54] Mr Cox says that this approach, sometimes followed in refugee cases, should be extended to private law disputes where the claimant would otherwise be left without a remedy. This would include parties not heard through no fault of theirs in arbitral proceedings under the Act where there is no right to seek a rehearing. Mr Cox argues that, as in the refugee cases, Mr Noe is facing "irretrievable and incompensable loss" because Ratzapper has sought to enforce the judgment by applying for a writ of sale over Mr Noe's unique and valuable property on the Coromandel Peninsula.

[55] Mr Cox mounts an alternative argument that art 36(1)(b) of sch 1 of the Act is expressed in sufficiently wide terms to enable the Court to intervene where to enforce the award would constitute a substantial wrong or miscarriage of justice. Mr Cox invites the Court to adopt an approach similar to the ground of review sometimes advanced in a public law context as the "innominate ground" or "the residual discretion". He says this ground has the potential to be applied "across the entire theatre of decision-making" and justifies the court's intervention where "something has gone seriously wrong in the decision-making process".

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7 At [1].
8 At [3].
9 At [32].
10 At [32].
11 At [46].
12 At [43].
13 At [44].

Discussion

[56] Mr Noe's evidence has not been tested on cross-examination, nor has there been any response to it from his former legal advisors. Like Muir J, we cannot make any findings as to whether Mr Noe's legal advisors have any responsibility for the default and it would be inappropriate to do so in view of Mr Noe's claim against them in other proceedings. However, even viewing Mr Noe's evidence in its most favourable light, we are not persuaded he had no responsibility for the default on discovery which led to him being debarred from defending the claim. For the reasons that follow, this fundamental factual premise underpinning Mr Noe's argument is not made out on his own evidence.

[57] We cannot accept Mr Cox's submission that it was only the result of counsel abdicating his responsibility that an order was made requiring Mr Noe to provide discovery of Altrap's documents. This submission is not tenable on the evidence.

[58] First, Mr Noe covenanted in the February 2013 settlement agreement to provide monthly bank statements for Atrap within five working days of release of the container by Mr Hinds to Atrap. It is not possible to reconcile this commitment with Mr Noe's claim that Mr Hinds was in control of Atrap, not him. Equally, it makes no sense that Mr Hinds would be seeking the release of the container as the controller of Atrap and at the same time refusing to release it on behalf of Ratzapper.

[59] Secondly, Mr Morgan consented to part, but not all, of the original discovery application. Mr Cox confirmed that no complaint is made by Mr Noe about Mr Morgan's conduct of the matter on his behalf. It can be safely assumed that he acted on Mr Noe's instructions in consenting to part of the application, which was entirely directed to discovery of documents of Atrap and Trapco.

[60] Thirdly, Mr Noe did provide limited discovery of Atrap's financial records and was able to direct that the full electronic financial database for Atrap be provided.

[61] Nor do we accept that Mr Noe can fairly claim to have no responsibility for the default on discovery. In terms of the February 2013 settlement agreement, Mr Noe committed to providing the relevant records no later than 28 February 2013. It was

his ongoing failure to do so that led to Mr Hinds invoking the arbitration agreement in June 2014 and the eventual appointment of the arbitrator by the High Court in November 2014. Mr Noe was well aware of the discovery order made by the arbitrator in August 2015 requiring Mr Noe's compliance by 30 September 2015. It is beyond argument that Mr Noe did not comply; indeed, he does not contend otherwise. Mr Noe received a copy of Mr McCartney's letter dated 3 March 2016 setting out in detail the gross deficiencies in the discovery that Mr Noe had provided in February 2016. Despite this and numerous reminders, Mr Noe never provided any further discovery until after he was debarred from defending the claim.

[62] Mr Noe's claim that he understood Mr Dolin had provided counsel with everything required on 26 July 2016 and offered to provide the electronic database does not withstand scrutiny. Mr Noe himself stated in an email to Mr Colthart on 25 July 2016 that he proposed to "reassemble the documents that have been provided and resend them to you so you have this background". Mr Dolin's email of 26 July 2016 did no more than that. He simply sent a copy of the email he had originally sent to Mr Cohen and Mr Noe on 22 March 2016 responding to the 3 March 2016 complaint about the "piecemeal, haphazard and nowhere near complete" discovery. Mr Dolin's 22 March 2016 email set out the discovery provided in February 2016 and noted "confidentially" that the objections to "partial discovery" could be eliminated if a full copy of the Quickbooks database was provided.

[63] Even if this had been a refugee case and the approach adopted in *FP (Iran)* was applicable, this would not avail Mr Noe because he cannot say he was not given an opportunity to defend the claim solely due to the fault of his legal advisors. The responsibility to provide discovery rested with him and his non-compliance appears on the evidence to have been both persistent and flagrant, as the arbitrator found.

[64] In any event, we can see no justification in a case such as the present for departing from the general rule that a party is bound by steps taken by a barrister or solicitor on their behalf acting within the scope of his or her retainer in litigation. To permit a departure from this rule in an arbitration context would seriously undermine the finality and enforceability of arbitral awards, contrary to the purposes

of the Act. As Muir J observed, it would mean that any unsuccessful party in an arbitration would be able to contest enforcement of the award by raising claims of counsel error. Further, unlike an asylum-seeker who may face torture or persecution if returned to their home country without a hearing, Mr Noe does have an effective remedy against his legal advisors if he can demonstrate he has suffered loss through negligence on their part.

[65] Mr Noe has failed to establish a breach of natural justice. Whether or not there is room for criticism of his legal advisors, it is clear Mr Noe was given ample opportunity to comply with the discovery order made against him in August 2015. His failure to comply persisted for over 12 months and appears from the evidence to have been deliberate. The arbitrator extended the deadline for compliance numerous times and was entitled to debar Mr Noe from defending the claim when he still did not comply.

[66] Even if it were the test, we see no indication of a miscarriage of justice. Mr Noe does not explain in either of his affidavits what his defence to the claim would have been. The claim that he breached his obligations under the February 2013 settlement agreement seems unanswerable. He has not disputed the debt claimed to be due by Atrap to Ratzapper. Nor does he say that Atrap was not able to pay this debt at the relevant time, in March 2013. Further, we note from the email sent by Mr Colthart to Mr Noe on 14 September 2016, which Mr Noe appended to his affidavit, that Mr Noe offered to pay NZD 500,000 to settle the claim in mid-2015. This is roughly equivalent to the amount of the arbitration award.

Conclusion

[67] Recognition or enforcement of the arbitral award may be refused only if the Court is satisfied that it would be contrary to the public policy of New Zealand to do so. Mr Noe's evidence falls well short of establishing this. The appeal must accordingly be dismissed.

Result

[68] The appeal is dismissed.

[69] The appellants are jointly and severally liable to pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Rennie Cox, Auckland for Appellants
Truman Wee & Associates, Hamilton for Respondent