IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 3/2019
[2019] NZSC 33

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

Court:	William Young, O'Regan and Ellen France JJ
Counsel:	D J G Cox for Applicants W A McCartney for Respondent
Judgment:	27 March 2019

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants must pay the respondent costs of $2,500.

REASONS

Introduction

[1] The applicants seek leave to appeal against a decision of the Court of Appeal dismissing an application to set aside an arbitral award.[1]

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[1] *Noe v Ratzapper Australasia Ltd* [2018] NZCA 597 (Miller, Clifford and Gilbert JJ) [CA judgment].

Background

[2] The proposed appeal has its genesis in a dispute over whether the respondent, Ratzapper Australasia Ltd (Ratzapper), had been paid for electric rat traps supplied during 2012. Ratzapper claimed it was owed USD 275,213 for the traps by the applicants, Mr Noe and Atrap Ltd (Atrap). Although Mr Noe initially resisted, in August 2015 all parties consented to being bound by arbitration and Hon Rodney Hansen CNZM QC was appointed as arbitrator.

[3] The arbitrator ordered discovery be given for documents for the life of Atrap. Some four months late, in February 2016, Mr Noe provided some links to material for discovery. What was provided was described by the Court of Appeal as having "major deficiencies".[2]

[4] Mr Noe had still not complied with the discovery order, despite several extensions of time, on 6 December 2016. At that point, the arbitrator debarred Mr Noe from defending the claim for non-compliance with the discovery order. Mr Noe finally complied with the discovery order on 17 January 2017. On 7 June 2017 Ratzapper was awarded USD 273,857.50 and interest of USD 56,797.30.

[5] Ratzapper then applied to the High Court on 30 June 2017 for enforcement of the award, while on 8 September 2017, Mr Noe applied for an order refusing recognition and enforcement of the award.

[6] In the High Court, Muir J granted orders enforcing the 7 June 2017 award.[3] In doing so, the Judge rejected Mr Noe's claim that to grant the orders would be contrary to the public policy of New Zealand and, in particular, that enforcement would amount to a breach of natural justice. Mr Noe had relied in this respect on art 36(3) of sch 1 of the Arbitration Act 1996 which provides that an award is contrary to public policy of New Zealand if there was a breach of the rules of natural justice:

> (i) during the arbitral proceedings; or
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> (ii) in connection with the making of an award.

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2 At [19].

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

[7] Mr Noe appealed to the Court of Appeal again arguing that enforcement of the award would be contrary to public policy because there had been a breach of the rules of natural justice. The appeal was dismissed. The Court found Mr Noe had not shown a breach of natural justice. In any event, the Court saw no reason 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".[4] Finally, the Court saw no indication of a miscarriage of justice. There was no explanation from Mr Noe as to what his defence would have been and the claim against him appeared "unanswerable".[5]

The proposed appeal

[8] The applicants wish to argue, first, that the Court of Appeal was wrong to find that Mr Noe was "otherwise unable to present" his case in terms of art 36(1)(a)(ii) of the Arbitration Act due to his counsel's omissions. Article 36(1)(a)(ii) provides it is a ground for refusing enforcement of an award if the party against whom the award is invoked "was otherwise unable to present that party's case". Mr Noe says that if the Court had found he was "otherwise unable to present his case", the Court could have refused to recognise the award without being required to find that the award was contrary to public policy. Secondly, the applicants say both the Courts below failed to address the argument Mr Noe had been unable to present his defence.

[9] The submission is that the proposed appeal would accordingly raise important questions of law about the approach to the words "was otherwise unable to present that party's case" in art 36(1)(a)(ii) and about the inter-relationship of the grounds in art 36(1)(a)(ii) and art 36(1)(b)(ii) (the contrary to public policy ground).

Assessment

[10] The scope of the relevant articles in sch 1 to the Arbitration Act may be a matter of general or public importance or of general commercial significance that this Court may need to consider at some stage.[6] However, this is not an appropriate case to

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4 At [64].
5 At [66].
6 Senior Courts Act 2016, s 74(2).

address this. There is no dispute as to the propriety of the order debarring Mr Noe. Rather, the challenge has been directed to the extent to which Mr Noe is bound by steps taken by his legal representatives. There are, moreover, concurrent findings of fact against Mr Noe. Muir J noted Mr Noe acknowledged he had received a copy of the arbitrator's minute of 31 August 2016 and so could not "reasonably deny that he was aware there were outstanding discovery requirements".[7] The Court of Appeal was not persuaded Mr Noe "had no responsibility for the default on discovery which led to him being debarred from defending the claim".[8] Further, the Court considered the non-compliance was both "persistent and flagrant".[9]

[11] In these circumstances, the arguments that either Mr Noe was unable to present his case or that there was a breach of natural justice have insufficient prospect of success to justify the granting of leave for a second appeal. On the same basis, nor is there any risk a miscarriage of justice may have occurred, or may occur unless the appeal is heard.

Result

[12] The application for leave to appeal is accordingly dismissed. The applicants must pay the respondent costs of $2,500.

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

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7 HC judgment, above n 3, at [17]. See also at [12] as to awareness of advice as to the date by which the matter was next to be before the arbitrator.
8 CA judgment, above n 1, at [56].
9 At [63].