

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 151/2021
[2022] NZSC 10**

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 AS TRUSTEES OF THE
G J LAWRENCE FAMILY TRUST AND
DIANE SHERYL LAWRENCE AND
JASON PETER SILK AS TRUSTEES OF
THE D S LAWRENCE FAMILY TRUST
TOGETHER TRADING AS THE
LAWRENCE FAMILY TRUSTS
Second Respondents**

Court: William Young, Glazebrook and O'Regan JJ

Counsel: C J Griggs and C M Kenworthy for Applicants
R C Laurenson for Respondents

Judgment: 22 February 2022

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

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

REASONS

[1] Three separate dental practices (owned by Alusi Ltd, G J Lawrence Dental Ltd and Creative Dentistry Ltd) shared premises and operating expenses (together the Dental Centre). Dr Ibrahim controlled Alusi, Dr Lawrence controlled Lawrence Dental and Dr Al-sabak controlled Creative. The Dental Centre was managed through a fourth company, Openyd Ltd, in which the three dental practice owning companies had equal interests. There was a Deed of Association which provided for rights of pre-emption should one of the dentists wish to sell their business and the Constitution of Openyd also provided for rights of pre-emption in relation to the sale of shares in Openyd.

[2] In 2016, Dr Lawrence indicated an intention to retire and sell his practice. This was the start of a prolonged dispute between the parties which, as far as we can see, no longer involves Creative but continues as between Alusi and Lawrence Dental.

[3] Primarily relevant for present purposes are an agreement of 15 March 2017 recorded in an email (the Email Agreement) and an associated agreement for sale and purchase under which Alusi was to acquire Lawrence Dental's business (the Lawrence ASP, together the Agreements). In the first phase of the dispute there was an arbitration which resulted in a finding that the Lawrence ASP was subject to the consent of Dr Al-sabak which had not been forthcoming, meaning that the Lawrence ASP was of "no effect" and was "not enforceable".

[4] On 1 November 2017, Creative formally sold¹ its business (and its shares in Openyd) to Alusi. This sale and steps subsequently taken by Alusi have given rise to further contention with a key issue being whether Lawrence Dental had waived its rights of pre-emption in respect of the sale. This turns on whether the Agreements remained in force as at 1 November 2017. If they did not, the basis for asserting waiver falls away. This and other issues were referred to another arbitration with the arbitrator

¹ Alusi Ltd and Creative Dentistry Ltd agreed in principle to the sale on or about 14 September 2017.

relevantly, for present purposes, concluding that the Email Agreement² was not in force and that waiver had not been established. He gave two reasons for this: first that the Email Agreement had been cancelled and secondly that it had in any event expired due to the effluxion of time.

[5] Alusi sought leave to appeal to the High Court against the award on a number of, what it claimed, were questions of law. This application was declined by Ellis J.³ She also declined an application for leave to appeal against her decision to the Court of Appeal.⁴ An application to the Court of Appeal for special leave to appeal was also declined by that Court (the first Court of Appeal judgment).⁵

[6] Separately, Alusi had applied to the High Court to set aside part of the award on the ground that the finding of cancellation had been made in breach of the rules of natural justice. This application was declined by Ellis J at the same time she dismissed the application for leave to appeal against her first judgment.⁶ An appeal to the Court of Appeal against that judgment on the natural justice issue was dismissed (the second Court of Appeal judgment).⁷

[7] Alusi now seeks leave to appeal against the second Court of Appeal judgment.

[8] The applicants' leave submissions advance the argument as to the alleged breach of the rules of natural justice primarily by challenging the legal substance of the arbitrator's conclusion that the Email Agreement had been cancelled prior to 1 November 2017. This is largely a re-run of an argument already rejected by Ellis J

² The arbitrator's conclusions were directed at the Email Agreement. However, Ellis J in the High Court found that the arbitrator "regarded the Email Agreement and the Lawrence ASP as inextricably linked for the purposes of the waiver issue": *Alusi Ltd v G J Lawrence Dental Ltd* [2020] NZHC 2409 [second HC judgment] at [44]. The Court of Appeal held that "both the arbitrator and the Judge were entitled to conclude that the Email Agreement and the Lawrence ASP were linked": *Alusi Ltd v G J Lawrence Dental Ltd* [2021] NZCA 557 (Cooper, Gilbert and Courtney JJ) [second CA judgment] at [67].

³ *Alusi Ltd v G J Lawrence Dental Ltd* [2020] NZHC 739 [first HC judgment]. Clause 5 of sch 2 of the Arbitration Act 1996 outlines the threshold for granting leave to appeal to the High Court.

⁴ Second HC judgment, above n 2. This application was made under sch 2 cl 5(5) in the Arbitration Act.

⁵ *Alusi Ltd v G J Lawrence Dental Ltd* [2021] NZCA 87 (Miller and Clifford JJ) [first CA judgment]. This application was made under sch 2 cl 5(6).

⁶ Second HC judgment, above n 2.

⁷ Second CA judgment, above n 2.

in relation to the attempt to challenge the award by way of appeal on questions of law.⁸ The applicants' submissions also claim that the second reason given by the arbitrator is legally unsound. The same argument (or one like it) was advanced in the application for leave to appeal to the High Court on questions of law. The basis upon which the current application for leave to appeal is advanced thus revisits issues that were resolved conclusively against the applicant by the judgments of Ellis J and the first Court of Appeal judgment.⁹ We note as well that attempts to challenge the cancellation conclusion in the second Court of Appeal judgment were rejected by that Court as being outside the scope of the appeal.¹⁰ Against this background, the present application was understandably described by counsel for the respondents as an abuse of process, a view which we endorse.

[9] The application is dismissed.

[10] The applicants must pay the respondents costs of \$2,500.

Solicitors:
Lawler & Co, Auckland for Applicants
Gillespie Young Watson, Lower Hutt for Respondents

⁸ First HC judgment, above n 3, at [88]; and second HC judgment, above n 2, at [82].

⁹ There is no right of appeal to the Supreme Court regarding a question of law arising from an arbitral award when the Court of Appeal refuses special leave to appeal under sch 2 cl 5(6) of the Arbitration Act: Senior Courts Act 2016, s 68(b).

¹⁰ Second CA judgment, above n 2, at [46] and [69].