**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV-2011-412-000417**
**[2012] NZHC 1537**

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| UNDER | the Arbitration Act 1996 |
| IN THE MATTER OF | an appeal from a partial award dated 9 May 2011 |
| BETWEEN | EWAN ROBERT CARR<br>First Plaintiff |
| AND | BROOKSIDE FARM TRUST LIMITED<br>Second Plaintiff |
| AND | GALLAWAY COOK ALLAN<br>Defendant |

Hearing: 13-14 March 2012

Counsel: J G Miles QC and P J Dale for the Plaintiffs
M G Ring QC and A V Foote for the Defendant

Judgment: 28 June 2012

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## RESERVED JUDGMENT OF ELLIS J

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This judgment was delivered by me on 28 June 2012
at 12.30 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors: GCA Lawyers, PO Box 3241, Christchurch
Duncan Cotterill, PO Box 5, Christchurch
Counsel: J G Miles QC, PO Box 4338, Auckland 1140
M Ring QC, PO Box 1055221, Auckland
P J Dale, PO Box 130, Auckland 1140

[1] This judgment deals with various applications and cross-applications made by the plaintiffs (the Carr interests) and the defendants (Gallaways) in relation to an interim arbitral award issued by Dr Robert Fisher QC on 9 May 2011. In essence:

(a) the Carr interests seek to have that award set aside or to appeal from it; and

(b) Gallaways seek to have those applications/appeals dismissed, stayed or struck out.

**Background**

[2] By agreement dated 28 September 2010, Dr Robert Fisher QC was appointed sole arbitrator to determine a claim for some $12 million made by the Carr interests against Gallaways for professional negligence. The Carr interests hold Gallaways responsible for the cancellation of an agreement they had to purchase a group of farming and hotel assets in the Maniatoto Basin in Otago from a Mr Rodney Humphries and associated entities (the Humphries interests). This agreement is referred to in Dr Fisher's award as the Amended Settlement Agreement or ASA and I shall adopt the same abbreviation in this judgment.

[3] At the time of entry into the arbitration agreement, the cancellation of the ASA had already been the subject of separate litigation between the Carr and the Humphries' interests.[1] Insofar as the *lis* between the parties to that litigation was concerned, both the High Court and the Court of Appeal found in favour of the Humphries' interests and, more particularly, held that Mr Humphries was entitled to cancel the ASA because settlement had not occurred by the time stipulated in the ASA (namely by 4 pm on 31 May 2007) time being of the essence.

[4] In the course of that litigation both the High Court and the Court of Appeal made observations which suggested that Gallaways (or, more particularly, Mr Grant)

[1] *Frost v Carr* HC Dunedin CIV-2007-412-507, 29 February 2008; *Carr v Frost* [2008] NZCA 391.

had been largely responsible for the failure to settle on time. A claim by the Carr interests against Gallaways therefore came into prospect.

[5] On 10 September 2009, the solicitors acting for the Carr interests (GCA) wrote to the solicitors acting for Gallaways (Duncan Cotterill) about progressing such a claim. The relevant portions of the letter stated:

> 3. The primary considerations in our view are:
>
> (i) The need to proceed as quickly as possible. That is because Mr Carr has not only suffered very significant losses, but those losses continue to accrue.
>
> (ii) The on-going litigation with the Humphries interests, as well as the claims against Mr Carr by creditors, and which would have been avoided had settlement been completed.
>
> 4. In addition there are good reasons for not wishing to have the litigation between our respective clients resolved in open court. ...
>
> 5. While the position of the Carr interests is that all of the losses which can be landed at the door of Gallaway Cook Allan, Mr Carr has no interest in making matters any more difficult than is necessary, nor providing any encouragement to the Humphries interests. ...
>
> 6. Our instructions are one way or the other to commence proceedings. A draft statement of claim has been prepared and can be filed within the next seven days. Before we do so, however, we invite you to consider and address the following issues:
>
> (i) The possibility of an arbitration. Counsel has already signalled that the Honourable Robert Fisher QC would be acceptable to the plaintiffs' interests as an arbitrator provided we are able to agree upon the terms, and in particular that it proceed as expeditiously as possible.

[6] Duncan Cotterill responded on 15 September 2009. The letter relevantly said:

> 2. We do not propose to comment on the views expressed in that letter in relation to causation and loss, Gallaway Cook Allan's position has been made clear in previous correspondence and all issues, including negligence, causation and loss will be very much at issue in any claim against Gallaway Cook Allan by Mr Carr and his interests.
>
> 3. With respect to your proposals in relation to the resolution of the intimated proceedings against Gallaway Cook Allan, our client may, subject to a satisfactory arbitration agreement, consent to the issues between our respective clients being dealt with by way of arbitration

rather than by the High Court. The arbitration agreement would need to provide (inter alia) the following:

3.1 The arbitration venue being Auckland;

3.2 The procedure be determined in accordance with High Court Rules:

3.3 The parties to have the same rights of appeal as if the arbitration had been dealt with by the High Court.

[7] GCA responded on 17 September 2009::

3. We note your proposal in relation to the arbitration. We have no difficulty with points 3.2 and 3.3, or the appointment of Robert Fisher QC as arbitrator.

...

5. The single most important issue however is that of timing. Mr Carr recognises that Gallaway Cook Allan will derive a considerable benefit from the confidentiality of an arbitration process, and given the contents of paragraphs 3.2 and 3.3, it is giving little away in terms of procedure. Again however, Mr Carr accepts that those suggestions are not unreasonable but only if we can work towards an early hearing.

[8] Due to the commitments of senior counsel and the length of time estimated to be required for the hearing, matters did not progress as quickly as first anticipated. A draft statement of claim was sent by Mr Dale to Mr Ring QC on 19 February 2010. On 4 March 2010, Duncan Cotterill wrote to GCA and recorded (in response to a query that had been raised previously) that their insurers, QBE, might be prepared to pay the arbitrator's fees on an interim basis on a number of conditions, including that:

3.2 The arbitration is conducted on the terms previously proposed, namely the venue is Auckland and the High Court Rules and other legislation governing the procedures and rights of appeal for both parties apply as if the proceeding was being determined in the High Court.

[9] On 17 March 2010, GCA advised that Mr Carr agreed to proceed with the arbitration on the terms set out in Duncan Cotterill's letter, subject to further agreement on the written terms of the arbitration, and to the understanding that the arbitration would take place in the last quarter of the year.

[10] On 14 May 2010, Mr Moss from GCA emailed Duncan Cotterill and said:

> A further issue in respect of the right of appeal came to my attention when reviewing the standard arbitration agreement of Mr Fisher QC. My understanding is that respective counsel agreed that all rights of repeal (sic) would be retained, which was noted to Mr Fisher QC in the recent issues conference.
>
> In the arbitration agreement of Mr Fisher QC, there is a provision in which parties can opt to retain the rights of appeal under Schedule 2 of the Arbitration Act. When one looks at Schedule 2 of the Arbitration Act, it refers to rights of appeal to the High Court and onwards. Mr Dale and myself are of the opinion that rights of appeal to the Court of Appeal and further if required should be retained but that the step to the High Court is not required. It seems unnecessary given it is Mr Fisher QC that is acting in the role at first instance.
>
> If you agree with this, I will draft the appropriate clause in the draft agreement and forward to you.

[11] A draft arbitration agreement was then provided to Duncan Cotterill by GCA. It contained the following draft provisions:

> 1.1 The dispute is submitted to the award and decision of the Honourable Robert Fisher QC as arbitrator whose award shall be final and binding on the parties.
>
> 1.2 The parties undertake to carry out any award without delay subject only to such rights as they may possess under articles 33 and 34 of the First Schedule to the Arbitration Act 1996 (judicial review) and clause 5 of the Second Schedule (appeals subject to leave) but amended to reflect that the parties' right of judicial review and/or appeal against the award of the Honourable Robert Fisher QC lie directly with the Court of Appeal in the first instance (and with leave), the Supreme Court (rather than with the High Court).

[12] It appears that there were then discussions between GCA and Duncan Cotterill about whether, as a matter of law, the agreement could provide for an appeal directly to the Court of Appeal. Eventually it was concluded that it could not. On 29 June 2010, Mr Moss wrote to Ms Foote at Duncan Cotterill confirming that this was his and Mr Ring's view, and asking her to amend the draft accordingly. A red-lined amended draft was sent by Duncan Cotterill to GCA on 30 June 2010. The amended cl 1.2 provided:

> The parties undertake to carry out any award without delay subject only to such rights as they may possess under Articles 33 and 34 of the First Schedule to the Arbitration Act 1996 (judicial review), and clause 5 of the

> Second Schedule (appeals subject to leave) but amended so as to apply to "*questions of law and fact*" (emphasis added).

[13] The italicisation, the inverted commas and "(emphasis added)" were all included in the amended draft itself.

[14] A final version was sent by Duncan Cotterill to GCA on 29 July 2011 and the agreement was ultimately signed on 28 September 2011. The italicisation, inverted commas and parenthesised words remained in the executed version.

[15] In the arbitration that followed, the Carr interests contended that it was negligent delay on the part of Gallaways that had given the Humphries interests the right to cancel.

[16] In Dr Fisher's partial award (being an award as to liability) dated 9 May 2011 he held that while Gallaways had been negligent in many respects, that negligence was ultimately not causative of the Carr interests' loss. More particularly, the counter-factual causation exercise conducted by Dr Fisher led him to conclude that, even without Mr Grant's negligence, settlement could not have occurred until 4.07 pm on 31 May.

[17] Thus, from the perspective of the Carr interests, seven minutes lay between them and a successful claim for $12 million. Their immediate instinct was to exercise the appeal rights that had been agreed and which had been expressed in cl 1.2 of the arbitration agreement.

**The Carr interests' applications and Gallaways' counter-applications**

[18] An application to set aside and an appeal was duly filed. The notice of appeal alleged numerous "errors of fact and law" on the part of the arbitrator. Because the critical issue was, however, one of causation it is probably fair to say that no obvious, discrete, legal error was evident on the pleading. The principal focus of the proposed appeal was inevitably on issues of fact.

[19] After the notice of appeal had been filed, however, counsel for Gallaways raised the issue of whether, notwithstanding the clear terms of the arbitral agreement, there was no right of appeal on questions of fact. That is because curial intervention in arbitral matters is expressly and tightly circumscribed by the Arbitration Act 1996 (the Act).

[20] In particular, art 5 of Sch 1 of the Act stipulates that:

> In matters governed by this Schedule, no court shall intervene except where so provided in this Schedule.

[21] Art 34 of Sch 1 provides:

> **34 Application for setting aside as exclusive recourse against arbitral award**
>
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3).
>
> (2) An arbitral award may be set aside by the High Court only if -
>
> (a) The party making the application furnishes proof that -
>
> (i) A party to the arbitration agreement was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication on that question, under the law of New Zealand; or
>
> (ii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case; or
>
> (iii) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> (iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Schedule from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Schedule; or

(b) The High Court finds that -

(i) The subject-matter of the dispute is not capable of settlement by arbitration under the law of New Zealand, or

(ii) The award is in conflict with the public policy of New Zealand.

(3) An application for setting aside may not be made after 3 months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal. This paragraph does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.

...

(6) For the avoidance of doubt, and without limiting the generality of paragraph 2(b)(ii) it is hereby declared that an award is in conflict with the public policy of New Zealand if – …

(a) The making of the award was induced or affected by fraud or corruption; or

(b) A breach of the rules of natural justice occurred –

(i) During the arbitral proceedings; or

(ii) In connection with the making of the award.

[22] And cl 5 of Sch 2 provides that:

**5 Appeals on questions of law -**

(1) Notwithstanding anything in articles 5 or 34 of Schedule 1, any party may appeal to the High Court on any question of law arising out of an award -

(a) If the parties have so agreed before the making of that award; or

(b) With the consent of every other party given after the making of that award; or

(c) With the leave of the High Court.

[23] The ambit of any "question of law" is expressly and relevantly limited by cl 5(10) which provides:

For the purposes of this clause, **question of law**—

...

(b) does not include any question as to whether—

(i) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; and

(ii) the arbitral tribunal drew the correct factual inferences from the relevant primary facts.

[24] On 18 August 2011 (a few days within the three month limitation period stipulated in art 34(3)) the Carr interests filed an amended appeal combined with an application for setting aside the award.[2] More particularly they sought:

(a) to have the (interim) award set aside on the grounds that "it was not valid under the law to which the parties have subjected it or otherwise under the law of New Zealand" because the parties had agreed to arbitrate on the express basis that there would be a right of factual appeal, which was contrary to statute;

(b) alternative relief pursuant to the Contractual Mistakes Act 1977 (CMA) on the basis that the agreement had been entered into under a common mistake of law;

(c) to estop Gallaways from asserting that the Court had no jurisdiction to entertain a factual appeal;

(d) leave (if necessary) to bring an appeal on the grounds that the Arbitrator "erred in fact and in law" in numerous specified respects.

[25] As a result of Gallaways' position that the claim for relief under the CMA matter could not be commenced by way of originating application, a separate statement of claim was subsequently filed in that respect.

[26] Gallaways filed documents reflecting its position that:

(a) the application for setting aside and the estoppel claim should be dismissed, stayed or struck out;

[2] The three month limitation period contained in a 34(3) also applies to appeals by virtue of cl 5(8) of Sch 2.

(b) leave was required to appeal on a question of law and leave should be denied (because the questions identified related to factual matters);

(c) summary judgment should be entered in favour of Gallaways in relation to the CMA claim.

**Issues**

[27] Because of the procedural course taken by the proceedings, it became apparent to Gallaways prior to the hearing before me that the Carr interests were likely to advance other Art 34 grounds for setting aside which, Gallaways said, had not been pleaded at all and now could not be pleaded because of the three month limitation period. Those matters were therefore included in the issues that were agreed by the parties to require determination by me. Those issues were helpfully summarised by counsel for Gallaways in a schedule to their submissions, as follows:

> **A GROUNDS FOR SETTING ASIDE THE AWARD**
>
> **1. Invalidity**
>
> *Was the arbitration agreement invalid under New Zealand law, because of the inclusion in it of the right of appeal on questions of fact?*
>
> (If so, and if the words, "*and fact"* cannot be severed, Gallaways accepts that the award should be set aside pursuant to Schedule 1, art 34(2)(a)(i)).
>
> **2. Public policy**
>
> *(a) Is the plaintiffs' ground to set aside the award as contrary to public policy pleaded; and, if so, time-barred?*
>
> *(b) Was the arbitration agreement, and/or the award, contrary to public policy, because of the inclusion in the arbitration agreement of the right of appeal on questions of fact?*
>
> (If so, Gallaways accepts that the award should be set aside pursuant to s.10 and/or Schedule 1, art 34(2)(b)(ii)).
>
> **3. Arbitral procedure**
>
> *(a) Is the plaintiffs' ground to set aside the award because the arbitral procedure was not in accordance with the arbitration agreement pleaded; and, if so, time-barred?*

*(b) Was the arbitral procedure in accordance with the arbitration agreement, even though the plaintiffs cannot bring an appeal based on questions of fact?*

(If so, Gallaways accepts that the award should be set aside pursuant to Schedule 1, art 34(2)(a)(iv)).

**4. Estoppel/Recognition or enforcement**

*(a) Because the defendant requested the inclusion in the arbitration agreement of the right of appeal on questions of fact, is it estopped from:*

*(i) Opposing the plaintiffs' application to set aside the award on the grounds set out in paras 1-3 above?*

*(ii) Applying to have the award recognised or enforced?*

*(iii) Opposing an application by the plaintiff for an order refusing to recognise or enforce the award?*

*(b) Because of the inclusion in the arbitration agreement of the right of appeal on questions of fact, should the court refuse to recognise or enforce the award on the ground that:*

*(i) The arbitration agreement was invalid under New Zealand law, pursuant to Schedule 1, art 36(1)(a)(i))?*

*(ii) The arbitral procedure was not in accordance with the arbitration agreement, pursuant to Schedule 1, art 36(1)(a)(iv))?*

**5. Contractual Mistakes Act 1977**

*Do the plaintiffs have an arguable case under the CMA that the award:*

*(a) Can be aside?*

*(b) Should be set aside because of a common mistake satisfying s 6(1)(b) that the arbitration agreement contained a valid right of appeal on questions of fact?*

**B. APPEAL**

**6. Leave**

*(a) If the award is not set aside, do the plaintiffs require leave to appeal against the award?*

*(b) If the plaintiffs require leave to appeal against the award, should they be granted leave?*

**7. Questions of Law**

*If there should be an appeal hearing, what are the questions of law that should be reserved for determination at this hearing?*

[28] These issues form a convenient structure for the remainder of this judgment.

**Invalidity**

[29] As indicated in the summary of issues, Mr Miles QC and Mr Ring were in agreement that the inclusion in the agreement of a clause that is contrary to the Act necessarily gives rise to the possibility that the entire contract is void or invalid. Whether or not that is so depends on whether the offending clause can be severed from the rest of the agreement. For example in *Kearney v Whitehaven Colliery Co* Lopes LJ said:[3]

> The law is clear that where the consideration for a promise or promises contained in the contract is unlawful, the whole agreement is void. The reason is that it is impossible to discriminate between the weight to be given to different parts of the consideration, and therefore you cannot sever the legal from the illegal part. But where there is no illegality in the consideration, and some of the provisions are legal and others illegal, the illegality of those which are bad does not communicate itself to, or contaminate, those which are good, unless they are inseparable from and dependent upon one another.

[30] It was thus accepted by both parties that either the agreement could be saved by severing the words "and fact" from cl 1.2 or it must fail in its entirety. There, however, the agreement (and any simplicity) ends. As Lord Denning MR said in *Kingsway Investments Ltd v Kent CC*: [4]

> This question of severance has vexed the law for centuries ...

[31] The leading Commonwealth decision concerning severance appears to be *Carney v Herbert*.[5] That case involved an agreement for the sale of shares in a company where payment was to be secured by the defendants' guarantee and provision of mortgages over the property of a subsidiary company. The plaintiffs subsequently took action to enforce the guarantee. The provision of the mortgages was illegal under the NSW Companies legislation. The defendants argued that the agreement as a whole was illegal and could not be enforced.

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[3] *Kearney v Whitehaven Colliery Co* [1893] 1 QB 700 at 713.
[4] *Kingsway Investments Ltd v Kent CC* [1969] 2 QB 332 at 354.
[5] *Carney v Herbert* [1985] AC 301.

[32] The Judicial Committee referred (inter alia) with approval to the Australian decision in *McFarlane v Daniell*, a restraint of trade case.[6] In their Lordships words:[7]

> Jordan CJ said, at p. 345:
>
> > "When valid promises supported by legal consideration are associated with, but separate in form from, invalid promises, the test of whether they are severable is whether they are in substance so connected with the others as to form an indivisible whole which cannot be taken to pieces without altering its nature … If the elimination of the invalid promises changes the extent only but not the kind of contract, the valid promises are severable … If the substantial promises were all illegal or void, merely ancillary promises would be inseverable."
>
> He added later, at p. 346:
>
> > "The exact scope and limits of the doctrine that a legal promise associated with, but severable from, an illegal promise is capable of enforcement, are not clear. It can hardly be imagined that a Court would enforce a promise, however inherently valid and however severable, if contained in a contract one of the terms of which provided for assassination."
>
> Their Lordships agree with both observations. There are therefore two matters to be considered where a contract contains an illegal term: first, whether as a matter of construction the lawful part of the contract can be severed from the unlawful part, thus enabling the plaintiff to sue on a promise unaffected by any illegality; second, whether, despite severability, there is a bar to enforceability arising out of the nature of the illegality.

[33] In the case before it, the Privy Council held that the clause relating to the provision of the mortgages, although illegal and void, was ancillary to the overall transaction and thus severable.

[34] In the present case there is no issue as to the second aspect of the dicta just quoted; no question of any bar to enforceability as a result of the nature of the illegality arises.

[35] As to the construction of the arbitration agreement, however, Mr Miles for the Carr interests submitted that the terms of cl 1.2 itself, the context in which the agreement was made and the manifest intentions of the parties evidenced in their the

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[6] *McFarlane v Daniell* (1938) 38 SR (NSW) 337.
[7] *Carney* at 310 – 311.

pre-contractual correspondence all show that the parties would not have agreed to arbitrate at all had they not believed that they would have a right of appeal on a question of fact. He said that the ambit of the appeal right must be regarded as fundamental (a *sine qua non*) and meant that, notwithstanding that the agreement would still make sense without it, it could not be severed.

[36] By contrast Mr Ring said that the appeal rights were ancillary to the central agreement which, at its core, was simply an agreement to arbitrate the parties' dispute. He also relied on further dicta from *Carney* as authority for the proposition that the intentions of the parties as to the importance or otherwise of the term (the seriousness of the invalidity) were irrelevant to the severance question. The pertinent passage can be found towards the end of the judgment where their Lordships said:[8]

> There is one final point on this aspect of the case to which their Lordships wish to allude. It was argued by the defendant that on the true interpretation of the evidence the plaintiffs, at the time when the contract was made, required a mortgage on the property of Newbridge as an essential security for the payment of the purchase money, and that they would have declined to enter into the contract at all if they had been told that such a mortgage would not be forthcoming. Therefore, it is said, the mortgage is not severable from the remainder of the transaction, since severability must be judged at the moment when the contract is concluded according to the then intentions of the parties. There are observations by the Supreme Court of Victoria in *Brew v Whitlock (No 2)* ... which might be read as giving some support to this proposition. In the opinion of their Lordships there is no such principle applicable to the instant type of case. Furthermore, it is manifest in the *Mineral Water* case that at the date when the contract was made, had the point then arisen, the vendor company would have declined to conclude the contract without the benefit of the offending debenture, because it did in fact so decline during the trial. Nor in the *Firmin* case did the court ask itself the question whether at the date of the contract the ... vendors would have been content to conclude the contract without clause 22. Their Lordships do not accept the relevance of any such inquiry.

[37] On its face this passage would seem to present a difficult hurdle for the Carr interests to overcome. But the Privy Council had earlier noted that there are not set rules which will decide all severance cases and that "tests for deciding questions of

[8] At 316.

severability are not always satisfactory for cases of other kinds"[9]. And at the end of the *Carney* judgment, their Lordships said:[10]

> Subject to a caveat that it is undesirable, if not impossible, to lay down any principles which will cover all problems in this field, their Lordships venture to suggest that, as a general rule, where parties enter into a lawful contract of, for example, sale and purchase, and there is an ancillary provision which is illegal but exists for the exclusive benefit of the plaintiff, the court may and probably will, if the justice of the case so requires, and there is no public policy objection, permit the plaintiff if he so wishes to enforce the contract without the illegal provision.

[38] Not only does this statement reiterate that the test for severability must remain a flexible one, it also highlights an important difference between some of the cases in which severance has been ordered and some of those in which it has not.

[39] In *Carney*, the promise to secure the sale by the provision of the (illegal) mortgages was for the benefit of the plaintiffs. It was therefore not unjust that the plaintiffs, who were seeking severance in order to enforce the guarantee, were permitted to waive any reliance on the mortgages. On the basis of the passage I have quoted (at [37] above) it can be posited that the outcome might well have been different had the offending provision been for the benefit of the defendants.

[40] Just such a distinction was subsequently drawn by the High Court of Australia in *Humphries v Proprietors of "Surfers Palms North" Group Titles Plan 1955.*[11] There, McHugh J said:

> 35. *Carney* is distinguishable from the present case on the ground that the provision of the mortgage security in that case was for the exclusive benefit of the plaintiffs. The defendant was not prejudiced if the Agreement was enforced without the security being furnished...
>
> 36. *McFarlane* is also distinguishable.[12] Although the void restraint was part of the consideration for the payment of remuneration to the plaintiff in that case, the defendant had not alleged that the plaintiff had failed to comply with the restraint, void though it was. Jordan CJ said ((47) ibid. at 349.):

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[9] At 309.
[10] At 317.
[11] *Humphries v Proprietors of "Surfers Palms North" Group Titles Plan 1955* (1994) 179 CLR 597 (HCA).
[12] *McFarlane* being the case referred to with approval by the Privy Council in *Carney* (see [32] above).

> "if such a defence had been raised the plaintiff might have been able, for aught I know, to prove that he had complied with all the restraints imposed on him by the defendant, iniquitous though the defendant now contends them to be. There would be no reason why the plaintiff should not prove this if it became material."
>
> 37. *Goodinson*, however, is not readily distinguishable from the present case. It is an authority for the proposition that, if part of the consideration for the promise of a payment is void but not illegal, the promise is enforceable as long as the void consideration was not the main consideration for the promise. But if this proposition was applied generally, it might often lead to injustice. In many cases, without the void consideration, the defendant might not have entered into the agreement or promised to pay the amount of money in question. *It is not just that the defendant should have to perform a promise or promises which would not have been given but for the giving of the void consideration.*
>
> 38. In my opinion, in cases where a provision in a contract is void, is not for the exclusive benefit of the party seeking to enforce the contract, and is part of the consideration for an indivisible promise of the defendant, the proper test for determining whether the void provision is severable from the indivisible promise is that formulated by the Full Court of the Supreme Court of Victoria in *Brew v. Whitlock (No.2)* ... In that case, the Full Court said that ... "*once the conclusion is reached that the invalid promise is so material and important a provision in the whole bargain that there should be inferred an intention not to make a contract which would operate without it", the invalid promise should be treated as inseverable from the contract*.
>
> (citations omitted, emphasis added)

*Discussion*

[41] In the present case, it is Gallaways who seek to enforce the contract and, to that end, support severance. If the right of factual appeal was included in the agreement at the behest, and for the "benefit", of Gallaways, the cases discussed above might suggest that severance should now be permitted on the basis that it is open to Gallaways to waive reliance on the clause.

[42] But it is fair to say that an analysis that involves the traditional contractual terminology of "benefit" and "detriment" is not entirely apt in the present case. In this case the reality is that at the time the agreement was entered the factual appeal right was (objectively) of equal worth to both parties. Once the award was issued, the scales tipped entirely. The right was then only of value to the Carr interests. The

ultimate "benefit" bestowed by the right of factual appeal was contingent on the outcome of the arbitration.[13]

[43] In either event, however, it is clear that the offending part of clause 1.2 was not for the exclusive benefit of Gallaways and in my view Gallaways do not therefore have a right unilaterally to waive reliance on the right contained in it. It is therefore both permissible and necessary to consider the relative importance of the clause to the parties and whether it can (objectively) be inferred that they would not have entered into the contract without it. If they would not, then it becomes difficult to justify severance.

[44] I begin with cl 1.2 itself. In my view the clause contains express indications of its importance to the parties. The italicisation of the words "questions of law and fact" together with the bracketed reference to that "emphasis" being "added" indicate that they wished to highlight both the importance of the appeal rights and the way in which they differed from those contained in the Act. In that respect it also seems relevant that had the agreement been altogether silent on the question of appeal rights, Sch 2 cl 5 of the Act provides that the parties would still have been able to agree to an appeal on a question of law later, or to apply for leave to bring such an appeal. It was necessarily then the inclusion in the agreement of the factual appeal right that might objectively be seen as particularly critical.

[45] The importance of the appeal provision is further underscored by the circumstances in which the agreement was entered. The parties knew that liability in negligence generally, and the question of causation in particular, would involve a highly fact driven inquiry. And the critical comments made in the *Carr/Frost* judgments in the High Court and Court of Appeal about Mr Grant's role in the settlement process would have provided a particular focus for Gallaways.[14]

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[13] Although it is Gallaways who are now prepared to waive reliance on the clause that is merely because it is very much in their interests to do so. Had the arbitration gone seven minutes the other way they would no doubt be opposing severance.

[14] Neither Mr Grant nor Gallaways were a party to that litigation. The fact that the arbitration provided their first opportunity to address the relevant facts and evidence would arguably therefore have been of particular significance to them.

[46] And lastly, there is the pre-agreement correspondence between the lawyers for Gallaways and the lawyers for the Carr interests. To the extent that this correspondence can properly be taken into account it strongly supports the conclusions that I have already reached.[15] It clearly suggests that Gallaways, in particular, would not have agreed to arbitrate without the inclusion of a right of factual appeal.

[47] I accept that it would be a simple enough "blue pencil" exercise to excise the words "and fact" from cl 1.2. The agreement would make perfect sense without them. But, for the reasons I have given, I consider that the inclusion of those words formed a fundamental part of the exchange of promises between the parties. As I have said, that conclusion is borne out by the terms of the clause itself. The underlying factual matrix also supports it. While the agreement is, indeed, at its heart an agreement to arbitrate a dispute, it can also reasonably be inferred that there would have been no such agreement at all, had those words not been included.

[48] More fundamentally, it would, I think, be wrong in principle (and contrary to the thrust of the cases I have discussed) to order severance where that order would not only diminish, but would actively better, the contractual position of the party who seeks it. Justice does not obviously lie in permitting Gallaways to take advantage of a windfall illegality by ordering severance here.

[49] To the extent the view I have reached requires further fortification, I note that in *Crowell v Downey Community Hospital Foundation* the Californian Court of Appeal was faced with a similar issue.[16] That case also involved a provision in an arbitration agreement which was unenforceable because it provided for judicial review of the merits of the award. The Court held that the clause rendered the whole contract illegal and that it could not be severed. It said:

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[15] The various judgments in *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 (SC) suggest that it remains impermissible to take pre-contractual negotiations into account for the purposes of determining the parties' intentions as to the meaning of a contract. But in my view that is not the issue here; the meaning of cl 1.2 is clear on its face in this respect. Rather the question to be determined is the weight or importance placed by the parties on the inclusion of the clause, in the context of the particular exchange of promises that comprised the agreement as a whole.

[16] *Crowell v Downey Community Hospital Foundation* (2002) 95 Cal. App. 4th 730; 115 Cal Rptr 2d 810. In that case the issue of invalidity arose prior to the arbitration taking place, so the consequences of severance were not so severe.

> The parties to the contract here agreed to arbitration with judicial review of errors of law and fact. Without that provision, a different arbitration process results.

[50] Accordingly, and for all the above reasons I consider that the words "and fact" cannot be severed from cl 1.2 and that (as the parties have in that event agreed) the arbitration agreement as a whole is therefore not valid under New Zealand law.

[51] In terms of any residual discretion as to setting aside under Art 34, I do not discount the time, money and effort expended by both parties on the arbitration process to date. Those matters weigh heavily with me. But ultimately, in my view, unless setting aside is ordered Gallaways will reap the very substantial benefit of a mistake for which it was, at least in part, responsible. Without that mistake the arbitration would not, in my view, have taken place at all. Through no fault of the arbitrator, the arbitration misfired from the start.

[52] Because of the finding I have come to on validity, it is strictly unnecessary for me to express a conclusion on the other issues I have set out above. However in an attempt to facilitate what I perceive to be the almost inevitable appeal, I indicate my view on those matters below.

**Other grounds for setting aside: absence of pleading/time bar**

[53] The amended originating application to set aside the award dated 8 August 2011 was, in my view, squarely focused on the issue of the validity of the arbitration agreement. There was no reference in it to other Art 34 grounds and in particular there was no allegation that:

(a) the award was contrary to public policy and no grounds pleaded as a foundation for such an allegation: Art 34(2)(b)(ii);

(b) the arbitral procedure was not in accordance with the arbitration agreement: Art 34(2)(a)(iv);

[54] On this issue, I am in agreement with Mr Ring. These grounds were not pleaded; they cannot fairly be regarded as subsumed in the "invalidity" ground,

which focuses on the arbitration agreement, not the award or the arbitral process. The particular importance of finality under the Act necessarily suggests that time limits are to be strictly complied with. Fraud and corruption are the only exceptions.

**Other grounds for setting aside: merits**

[55] In case I am wrong about severance and wrong about the pleading and time bar points just discussed, I also record my agreement with Mr Ring that the inclusion in the arbitration agreement of an appeal right that is contrary to statute does not render the award "contrary to public policy" as those words are to be understood in the context of Art 34. The cases make it clear that that is a high threshold that invites focus on moral concepts such as reprehensibility, injury to the public good and abuse of the Court's processes.[17] Such matters are not engaged here. Moreover no tenable claim involving fraud and corruption or breach of natural justice arises on the present facts.[18]

[56] Insofar as the merits of a contention that the arbitral procedure was not in accordance with the arbitration agreement is concerned, it seems to me that:

(a) To the extent that the arbitral procedure is confined to the procedure at the hearing before Dr Fisher, the inclusion of an invalid right of appeal in the arbitration agreement has nothing to do with that procedure:

(b) To the extent that the arbitral procedure properly is seen as extending to encompass any process of appeal (which would tentatively be my preferred view) this ground for setting aside adds nothing to the validity ground discussed at length above.[19]

[17] See for example *Amatral Corporation Ltd v Maruha (NZ) Corp Ltd* [2004] 2 NZLR 614 (CA).
[18] Art 34(6) provides that where an award has been induced by fraud and corruption or where a breach of the rules of natural justice occurred either during the arbitral proceedings or in connection with the making of the award the award is deemed to be in conflict with the public policy of New Zealand.
[19] The appeal process cannot be in accordance with the arbitration agreement because that aspect of the agreement dealing with appeals is invalid.

[57] Accordingly any application to set aside on these grounds could not, in my judgment, succeed (or, could not succeed independently from the invalidity ground).

**Estoppel**

[58] There would also in my view be fundamental difficulties with an application of estoppel in the present case. In particular, it seems to me that the estoppel pleaded are at least implicitly predicated on the notion that the parties to an arbitration can confer, by consent, jurisdiction on this Court (here, a jurisdiction to recognise a right to appeal on a question of fact purportedly conferred by cl 1.2), contrary to the terms of the Act.[20] Such a notion is not in my view correct and in that respect I need only refer to the statement of the Court of Appeal in *Methanex Motunui Ltd v Spellman* at [105].[21]

[59] For completeness I record that I do not consider that the decision in *Attorney-General v Howard* suggests otherwise.[22] William Young J was there considering whether an order made without jurisdiction might be allowed to stand if the parties have relied on it. Here, the Carr interests would necessarily be inviting the Court to act in a substantive fashion, in the full knowledge that it had no jurisdiction to do so.

[60] And, as far as the orthodox requirements for an estoppel are concerned, I accept Mr Ring's submission that there was no relevant representation by Gallaways here. In seeking to have added into cl 1.2 the words "and fact" Gallaways (through their solicitors):

(a) were not expressly representing that those words would give rise to a legally effective right of appeal;

(b) were not impliedly representing anything more than their desire to have the amendment made.

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[20] The pleading attempts to focus on estopping an act of Gallaways, namely stopping them from "asserting that there is no jurisdiction to entertain an appeal against a finding of fact" but that necessarily implies that the Courd could (if Gallaways are stopped) entertain such an appeal.
[21] *Methanex Motunui Ltd v Spellman* [2004] 3 NZLR 454 (CA).
[22] *Attorney-General v Howard* [2011] 1 NZLR 58 (CA).

[61] For myself, I doubt whether a representation as to the law (or as to the legal effect of something) can ever found an estoppel. But I do not need to express a concluded view on that, for the reasons I have already given.

[62] I further record my agreement with Mr Ring's submission that:

(a) given that the Carr interests were themselves legally represented it is difficult to see how any reliance on such a representation would be regarded as reasonable;

(b) there was no meaningful detriment to the Carr interests as a result of any reliance on any representation because the detriment was contingent on the outcome of the arbitration.

**Contractual Mistakes Act 1977**

[63] Section 6(1) of the CMA relevantly provides:

> (1) A Court may in the course of any proceedings or on application made for the purpose grant relief under section 7 of this Act to any party to a contract—
>
> (a) If in entering into that contract—
>
> ...
>
> (ii) All the parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake; or
>
> (b) The mistake or mistakes, as the case may be, resulted at the time of the contract -
>
> (i) In a substantially unequal exchange of values; or
>
> (ii) In the conferment of a benefit, or in the imposition or inclusion of an obligation, which was, in all the circumstances, a benefit or obligation substantially disproportionate to the consideration therefor; and
>
> ...

[64] In terms of s 6(1)(a), there can be no doubt that both parties here were influenced in their respective decisions to enter the arbitration agreement by their

shared mistake as to their ability to contractually provide for appeals on questions of fact.

[65] Equally, however, it is clear that that mistake did not result in a substantially unequal exchange of benefits "at the time of the contract" as required by s 6(1)(b). As I have already indicated above, in my view the exchange at the time of the contract was of a mutual, albeit contingent, benefit. Although it was almost inevitable that the appeal right would ultimately be of greater value to one of the parties, that does not appear to me to cross the s 6(1)(b) threshold. On its plain wording, that provision does not permit the issue of value or benefit to be assessed retrospectively.

[66] In my view, therefore, the CMA claim made by the Carr interests would have no prospect of success.

**Leave to appeal**

[67] The issue of whether leave is required to appeal even on a question of law arises because of ambiguity in cl 1.2 and in particular the words:

> The parties undertake to carry out any award without delay subject only to ... clause 5 of the Second Schedule (appeals subject to leave) [but amended so as to apply to questions of law and fact]

[68] It is probably fair to say that the drafting here is somewhat opaque. An appeal with leave is only one of the options provided for in Sch 2 cl 5 (see [22] above) and so the bracketed words cannot be read as some kind of shorthand summary of the contents of cl 5. It is difficult to know what the point of including the bracketed words (appeals subject to leave) was, if it were not to indicate that an application for leave would be required.

[69] On the other hand, the bracketed words do not clearly state that any appeal may only be brought with leave and, indeed there would also be no point in including such a provision, given that cl 5 provides that an appeal may be brought with leave in any event.

[70] Given that the meaning of this part of the clause is not in my view clear, it is relevant that the correspondence between the parties that preceded its drafting does not refer to a leave requirement. On the contrary, it seems to me that both parties were clearly agreed that the appeal rights to be conferred were to be the same as those that would apply had the High Court determined the proceeding.

[71] On balance, therefore, I would be prepared to hold that, if the arbitration agreement is valid, cl 1.2 would not render leave a condition precedent for bringing an appeal (on a question of law). And if I was wrong in that (and cl 1.2, properly interpreted, was later found to require leave) I would grant leave, subject to the identification of one or more questions of law, strictly so-called.

[72] In light of my finding on the validity issue, however, I do not propose to try and identify in this judgment those aspects of the Carr interests' pleadings (if any) that qualify as issues of law. I have noted above that most seem to involve, at best, mixed questions of fact and law. I note that new questions could not now be formulated or added, due to the applicable statutory time limit. But in the event that my decision on the validity issue does not prevail, that issue will need to be referred back to this Court for determination.

**Conclusions**

[73] In formal terms, and in terms of the various applications that are before me, I make the following orders:

(a) The interim award dated 9 May 2011 is set aside on the grounds that the arbitration agreement is not valid under the law of New Zealand;

(b) The defendant's application for summary judgment on the plaintiff's claim under s 7 of the Contractual Mistakes Act 1977 is granted.

[74] Were I required to rule on the remaining applications and issues, my orders would be that:

(a) the plaintiffs have not pleaded an application to set aside the award on any other grounds and they are now time barred from doing so;

(b) to the extent that (contrary to (a)) other grounds can be said to have been pleaded by the plaintiffs the applications have no prospect of success and should be struck out;

(c) the plaintiffs' claim for estoppel is similarly not tenable and should be struck out;

(d) the plaintiffs do not require leave to appeal from the award on a question of law;

(e) to the extent that (contrary to (d)) leave is required it would be granted to the extent that any identifiable question of law has been pleaded.

[75] In the event, both parties have been partially successful, although the plaintiffs more so. Memoranda as to costs may be filed in the event that agreement cannot be reached.

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Rebecca Ellis J