IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2011-404-008091
CIV 2012-404-000321
[2012] NZHC 1761

UNDER	the Arbitration Act 1996
IN THE MATTER OF	an Arbitration Award dated 1 November 2011
BETWEEN	THOMAS RAINER LIPP AND KAREN WENDY LIPP Plaintiffs
AND	STEPHEN JOHN CHANEY AND EDITH MARGUARITE CHANEY Defendants

Hearing: 18 June 2012

Appearances: D C S Morris for the plaintiffs
A Gilchrist for the defendants

Judgment: 20 July 2012

JUDGMENT OF GILBERT J

This judgment was delivered by me on 20 July 2012 at 10.00 am pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date:

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Introduction

[1] The plaintiffs appeal from, and apply to set aside, an arbitral award relating to the use of a driveway. The arbitrator found that the defendants were estopped from denying that the plaintiffs were entitled to use the driveway.

Background

[2] Mr McConnel and Ms Malcolm-Smith (the vendors) previously owned a house on 928 square metres of land with access from Bell Road, Remuera. In late 1989 they decided to cross-lease the site to enable the construction of a second house to the rear of the property. The rear section was to be accessed by the creation of a second driveway connecting to Crocus Place, which runs off Bell Road.

[3] On 15 December 1989 the vendors arranged for the deposit of a plan of Flat 1, being the existing house. The upper section of the proposed new driveway was shown on this plan as "common area". On 13 February 1990 the vendors registered a lease of Flat 1 to themselves and a composite title was issued on the same day. Despite the reference to "common area" on the deposited plan, the lease conferred no rights on the lessee to use this area.

[4] In January 1990 the vendors sold to the Lipps an undivided half share in the fee simple estate subject to the lease of Flat 1. The transfer was registered on 8 March 1990. Shortly thereafter, the Chaneys purchased the other undivided half share of the fee simple estate and the lessees' interest under the lease of Flat 1.

[5] The Lipps proceeded to build a house on the rear section and in the process constructed, at their cost, a new driveway off Crocus Place. A plan of their house, Flat 2, was deposited on 18 January 1991. This plan, which was prepared by the Lipps' surveyor, also showed the upper section of the driveway adjacent to the Chaneys' house as "common area".

[6] It was not until some seven years later, on 21 April 1998, that the cross-lease for the Lipps' property, Flat 2, was prepared and registered. A composite title for

Flat 2 was issued that day. The Lipps' lease, which was prepared by their solicitor, permitted them to use Flat 2, the "restricted area" marked "C", being the area surrounding Flat 2, and the "common area", being the upper section of the driveway adjacent to the Chaneys' house, Flat 1. The Lipps' solicitor procured execution of this lease by the Chaneys, having assured them that the common area could be used by the owners of both flats.

[7] The Chaneys continued to obtain vehicular access to their property from the original driveway connecting to Bell Road. The Lipps used the new driveway accessed from Crocus Place. The present dispute arose as a result of the Chaneys' decision in 2005 to carry out various modifications to their house, including the construction of a basement garage which they intended to access from the upper section of the Crocus Place driveway. They believed that they were entitled to use this part of the driveway which was shown on the flat plans for both houses as "common area".

[8] The Chaneys engaged an architect to prepare plans for their proposed modifications. The initial plans were completed in May 2006 and showed the basement double garage leading off the Crocus Place driveway. The Lipps became aware, no later than 11 November 2006, of the Chaney's intention to build this garage. They wrote on that date to the Chaneys regarding the drawings prepared for the resource consent which identified the basement garage.

[9] The Lipps filed a written submission objecting to the Chaneys' resource consent application on 10 December 2007. Their concern regarding the garage centred on their perception that, having regard to the positioning of garage, the lower part of the driveway, which formed part of their flat, would be required by the Chaneys for turning manoeuvres. Mr Lipp sought to demonstrate this with a photograph of the driveway on which he had marked the boundary between the "common area" section of the driveway running alongside the Chaneys' house and the lower section which he marked as "exclusive".

[10] The resource consent application was heard by hearing commissioners on 14 April 2008. They recommended that the parties meet with their planning

consultants to see whether resolution could be achieved. Nothing was resolved at this meeting which took place on 8 May 2008 but the Chaneys' planning consultant, Andrew Wilkinson, recalled that the Lipps expressed the view that the driveway was for their exclusive use. Mr Lipp also maintained that reverse manoeuvring would not remain within the "common area" section of the driveway.

[11] The resource consent was granted despite the Lipps' opposition. A building consent was also subsequently granted in December 2009.

[12] Building works commenced on or about 18 May 2010. On 12 July 2010 the Lipps' solicitors wrote to the Chaneys alleging that they had no right to use any part of the driveway. This prompted the Chaneys to instruct their own lawyer. He wrote on 30 July 2010 asserting that the Chaneys were entitled to use the common area and formally sought consent for the works pursuant to the relevant provision in their cross-lease. The Lipps responded through their solicitors on 30 August 2010 advising they would not consent to the use of the driveway for vehicular access to the garage and asserting that the Lipps had the sole right to use the entire driveway.

The arbitration

[13] The parties agreed to submit their dispute to arbitration by Dr Donald McMorland, a renowned expert on land law. He recorded in his interim award that the arbitration had proceeded, by agreement of the parties, in what he described as a "somewhat unorthodox" way. No arbitration agreement was completed at the commencement of the process. The arbitration agreement, which was not signed until 9 June 2011, records in the recitals that "disputes have arisen between the parties as to access to part of their cross-lease Titles" and that "the parties have agreed to submit that dispute to arbitration". The agreement recorded that a statement of claim and statement of defence had already been filed and that "the precise issues arising between the parties will be defined in their pleadings".

[14] At the time the evidence was heard on 13 and 14 June 2011, the pleadings comprised points of claim filed by the Lipps, and the Chaneys' response, both prepared in February 2011. The Lipps claimed that the Chaneys had breached their

lease by carrying out the works. They sought a ruling that they were entitled to exclusive use of the Crocus Place driveway and an order directing the parties to sign all necessary documentation including an amended plan for Flat 2 deleting the reference to common area.

[15] In their response, the Chaneys asserted that both parties had acted since 1998 in reliance on the common area shown on the plans as being common to both of them and, further, that the Lipps had acquiesced in the building work since May 2010. In these circumstances they claimed that the Lipps were estopped from preventing the building work from being completed. In the alternative, the Chaneys sought relief under the Contractual Mistakes Act 1977 directing that their cross-lease be varied so as to permit their use of the common area.

[16] The evidence was heard on 13 and 14 June 2011 based on these pleadings. The arbitrator sought clarification of the matters in dispute at the commencement of the hearing and raised the matter of detailed pleadings as anticipated by the arbitration agreement. He was assured that counsel clearly understood what was in issue and the hearing proceeded on that basis.

[17] The formal pleadings referred to in the arbitration agreement, being the statement of claim and statement of defence, were not filed until 1 July and 15 July 2011 respectively, after the evidence had all been heard. The Lipps then pleaded three causes of action. The first was essentially a repetition of the claim they had advanced in their points of claim, namely that the building works were in breach of the lease. However, they added to this cause of action a further claim that the Chaneys had changed the footprint of their house over time in breach of their lease. They sought a declaration to this effect, an order requiring the Chaneys to cease building work and unquantified damages for the breaches.

[18] The Lipps added two new causes of action, the first seeking relief by way of rectification and the second seeking relief under the Contractual Mistakes Act. The relief sought in each case was an order rectifying the Lipps' cross-lease by removing the words "common area" from the lease and the plan of Flat 2.

[19] The Chaneys filed a statement of defence and counterclaim in response. They admitted that they had made minor changes to the footprint of their house over time but denied that the arbitrator had jurisdiction to determine any claim arising out of this in the present arbitration. They repeated their estoppel defence but this was now based on an allegation that the Lipps knew of the building work from May 2010 and had acquiesced in it. The Chaneys pleaded two counterclaims, the first for misrepresentation inducing their execution of the Lipps' cross-lease, and the second for relief under the Contractual Mistakes Act.

[20] It was agreed that the dispute as to the arbitrator's jurisdiction to determine the issue relating to the changed footprint of the Chaney's house and the damages claim advanced by the Lipps should be resolved by the arbitrator as part of his interim award. This award would also deal with all other issues, apart from costs. Both parties made submissions on the jurisdictional issue.

The award

[21] The arbitrator issued his interim award on 1 November 2011. He found that the Chaneys' lease did not grant them any rights to use the driveway but that the Lipps' lease fulfilled the intention to provide for common use of the upper section of the driveway. He therefore found that the leases were in conflict. He then addressed how to resolve this conflict at [21] of his award:

> This conflict cannot be resolved simply by reference to the deposited plans and the leases. There is clearly a conflict between them. First a cause of action has to be established giving jurisdiction to act, and secondly a remedy has to be sought based on that jurisdiction. Counsel have argued various causes of action, but in my view that which most clearly resolves the dispute is estoppel.

[22] The arbitrator identified the elements of estoppel as being a clear and unambiguous representation or promise by one party to the other, reasonable reliance on the representation and detriment such that it would be unconscionable to allow the party making the representation to retreat from it. He found that these elements were all satisfied on the evidence.

[23] The arbitrator found that the deposit of the plan for Flat 2, which was prepared by the Lipps' surveyor showing the common area, amounted to a representation by the Lipps that the upper section of the driveway was to be a common driveway. He found that this representation was reinforced in 1998 when the Lipps' solicitor prepared the lease for Flat 2 referring to this part of the land as "common area" and then assuring the Chaneys that it could be used by the owners of both flats.

[24] The arbitrator found that the Chaneys' belief was reasonably held and was reasonably relied on over the 20 year period that the Chaneys had occupied their property and, specifically, in applying for resource and building consents and commencing the building work, including the construction of the garage. The arbitrator found that this reliance continued until the Lipps' solicitors' letter of 30 August 2010, which made it clear that the Lipps disputed the Chaneys' right to common use of the driveway. The arbitrator discounted the reliance up to 2005 as being insufficient to found an estoppel. However, from that time until 30 August 2010, he considered that the Chaneys detrimentally relied on the Lipps' representation in engaging professionals to prepare plans for the garage, in seeking resource and building consents, and in carrying out the works from May 2010.

[25] The arbitrator considered that he was entitled to grant relief in relation to the estoppel on either an expectation or reliance basis. The arbitrator noted that a substantial sum would have been spent by the Chaneys on the project from its inception in 2006 to 30 August 2010. In all of the circumstances he considered that an expectation remedy should be given because the Chaneys would not have undertaken the work necessary to construct the garage if they had not reasonably believed, based on the Lipps' representations, that they had the right to use the common area.

[26] The arbitrator dismissed all other claims and counterclaims including those seeking rectification, relief under the Contractual Mistakes Act and relief under the Contractual Remedies Act 1979.

[27] The arbitrator ordered that a new plan for Flat 1 be deposited and a new cross-lease be registered to give effect to the Chaneys' right to use the upper section of the driveway in common with the Lipps. He ordered the Lipps to meet the cost of implementing this.

[28] These formal orders were followed by a further paragraph in the relief section of the award as follows:

> There is evidence before me that the footprint of the Chaneys' house may have been altered since the original plan was deposited. If the footprint of either house has been altered since the deposit of the previous plan, that alteration should be embodied in the new plan. New leases of both flats would then be required.

[29] The Lipps are dissatisfied with the result and have applied to set aside the award on two bases. First, they rely on Article 34(2)(a)(iii) of Schedule 1 of the Arbitration Act 1996 ("the Act") and contend that the award deals with a dispute not contemplated by, or falling within, the terms of the submission to arbitration. Second, they rely on Article 34(2)(b)(ii) and contend that that award is in conflict with the public policy of New Zealand. The Lipps have also applied to appeal the award pursuant to Article 5(1)(a) of Schedule 2 of the Act on a question of law, the parties having reserved their right to do so. The Lipps claim that the arbitrator erred in law in finding that the elements of estoppel were established on the evidence and in granting the relief he directed.

The appeal

[30] The Lipps claim that the arbitrator made the following errors of law:

(a) failing to recognise that the onus of proving the affirmative defence of equitable estoppel rested with the Chaneys;

(b) finding that there was a clear and unequivocal representation by the Lipps that the upper section of the driveway was available for common use by the owners of both properties;

(c) finding that the Lipps acquiesced in the building work;

(d) finding that there was an onus on the Lipps to inform the Chaneys of the correct position;

(e) failing to take into account Mr Wilkinson's evidence regarding the statements made by the Lipps at the May 2008 meeting;

(f) finding that the Chaneys relied on the representation;

(g) finding that such reliance was reasonable in the circumstances;

(h) finding that the Chaneys and the Lipps were jointly responsible for the maintenance of the driveway;

(i) finding, if he did, that the Chaneys derived rights of use other than pursuant to their lease. This question was framed in this way because the Lipps are unsure whether this is what the arbitrator was saying in the relevant paragraph of his award;

(j) finding that the Chaneys would suffer detriment if their belief or expectation based on the representation was departed from;

(k) finding that it would be unconscionable for the Lipps to depart from their representation;

(l) granting relief beyond what was necessary to remedy the detriment and directing that any changes to the footprint of Flat 1 are to be reflected in the new plan;

(m) declining to order rectification of the Lipps' flat plan and lease by deleting reference to the common area; and

(n) finding that he had no jurisdiction to determine other alleged breaches by the Chaneys of their lease;

[31] Mr and Mrs Lipp seek an order quashing the orders granting relief to the Chaneys. They seek an order for rectification of their flat plan and cross-lease by deleting the references to "common area" and an order for "specific performance" requiring the Chaneys to sign new documents rectified in this manner.

Legal principles

[32] As noted, the parties agreed to preserve their rights to appeal on questions of law. A question of law for the purposes of the Arbitration Act 1996 is defined in Article 5(10) of Schedule 2 of the Act as follows:

> For the purposes of this clause, question of law –
>
> (a) includes an error of law that involves an incorrect interpretation of the applicable law (whether or not the error appears on the record of the decision); but
>
> (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.

[33] Questions of fact cannot be appealed and the Court will be vigilant in ensuring that appeals on questions of fact, dressed up as questions of law, are not entertained. There are strong public policy reasons why parties should be required to accept an arbitral decision where they have chosen this form of dispute resolution. There are strict limits on the legitimate involvement of the courts where arbitration is chosen.

[34] In some cases it may be difficult to distinguish between questions of fact and questions of law. If the legal conclusion of the arbitrator is unsupportable based on the facts found, this may amount to an error of law, even if the arbitrator has correctly identified the relevant legal principles.

[35] The Court has a discretion whether or not to interfere with an award, even if an error of law is established. This is made clear by Article 5(4) of Schedule 2 of the Act, which provides that the Court *may* confirm, vary or set aside the award; or remit

the award for further consideration by the arbitrator. The Court will not interfere if the error of law is immaterial and is unlikely to remit an award where it appears that the same outcome is likely to be confirmed by the arbitrator.

Discussion

[36] There is no suggestion that the arbitrator made any error of law in identifying the legal elements of equitable estoppel. Rather, the complaint is that he found that these elements were established on the evidence. I now examine each of the alleged errors of law to see whether they are truly questions of law, whether they are substantiated and, if so, whether they are material.

Onus of proof

[37] The first alleged error of law is that the arbitrator failed to recognise that the Chaneys bore the onus of proving their affirmative defence of equitable estoppel. The Chaneys provided evidence to support their equitable estoppel defence. The arbitrator did not expressly address the onus of proof but he regarded the evidence adduced by the Chaneys as sufficient to establish all of the required elements of estoppel. In so doing, he implicitly found that the Chaneys had satisfied the onus on them of establishing the elements of equitable estoppel. The Lipps claim that such evidence was not sufficient in law to satisfy these elements but that is a separate issue. In my view, there is no basis for the Lipps' claim that the arbitrator failed to recognise that the Chaneys carried the onus of proof on the equitable estoppel issue.

Representation

[38] The arbitrator found that the plan for Flat 2, which was prepared by the Lipps' surveyor, Carl Stougie, was a representation by the Lipps that the upper part of the driveway was to be a common driveway. He found that this representation was reinforced some seven years later, in 1998, when the Lipps arranged for the lease of Flat 2 to be drawn and executed. This lease, which was prepared by the Lipps' solicitor, Mr Holland, referred to the upper section of the driveway as common area. Mr Holland advised the Chaneys when they signed the lease that this

part of the driveway could be used by the owners of both flats. The arbitrator found that this was a further representation by the Lipps as to the common area status of the driveway. The arbitrator concluded at [31] of his award:

> I find that the plan and the circumstances surrounding the execution of the lease by the Chaneys, as well as the execution of the lease by the Lipps themselves, constituted a clear and unambiguous representation by the Lipps that the driveway was a common area available for use by the Chaneys as well as themselves.

[39] Mr Morris, for the Lipps, submitted that these circumstances do not amount to an unequivocal representation as a matter of law. He submitted that the leases and the flat plans were in conflict and that in these circumstances there was "no unequivocality".

[40] The arbitrator recognised that the Chaneys' lease conferred no rights in relation to any part of the driveway despite the reference to "common area" on the plan of Flat 1. He found that the Chaneys' lease did not align with the Lipps' lease in this respect. However, the estoppel issue is not dependent on the parties' rights under the leases. The question is whether, notwithstanding the terms of the Chaneys' lease, the Lipps made a clear and unequivocal representation that the upper section of the driveway was available for use by the owners of both flats as common area. The position represented by the Lipps through their surveyor, Mr Stougie, and through their solicitor, Mr Holland, was quite clear and unequivocal. The upper section of the driveway was shown as a common area on the plan for Flat 2 and in the Lipps' lease. Mr Holland was quite clear in his advice to Mr and Mrs Chaney that they could use it as common area. I can see no error of law in the arbitrator's conclusion that these representations, binding the Lipps, were clear and unequivocal.

Reasonable reliance

[41] The arbitrator found that it was reasonable for the Chaneys to rely on their belief and expectation that the driveway was a common area in pursuing their plans to construct a garage underneath their house. He found that the Lipps were well aware of the Chaneys' plans to construct the garage at least as early as 11 November 2006 when they wrote to the Chaneys regarding the plans produced for

the resource consent application. These showed the proposed new garage. He noted that the Lipps did not then assert that the Chaneys had no right to use the driveway. He found that the Lipps did not make this claim until their solicitors wrote to the Chaneys' solicitor on 30 August 2010. The arbitrator concluded at [41] of his award:

> I therefore find that both over the 20 years that the parties have lived as neighbours and cross-lessees, and over the period up to receipt of the letter of 30 August 2010, the Chaneys reasonably relied upon the belief that the driveway is common use property.

[42] The Lipps make a number of criticisms of this part of the award. They submit that the arbitrator failed to take into account:

(a) That the Chaneys' lease conferred no usage rights over the driveway.

(b) Mr Chaney's evidence that he sought legal advice at the time of purchase.

(c) Mr Wilkinson's evidence that the use of the common driveway was raised by the Lipps as an issue throughout the resource consent process and his further evidence that the Lipps stated at the 8 May 2008 meeting of the Lipps, the Chaneys and their respective planning consultants that they considered that the driveway was for their exclusive use.

(d) The letter from the Lipps' solicitor dated 12 July 2010 which asserted that the Lipps had the exclusive right to use the driveway.

[43] The arbitrator did not overlook the Chaneys' rights under their lease. He accepted the Lipps' submission that this lease conferred no usage rights over the driveway. There was no evidence as to the legal advice received by the Chaneys when they purchased the property. In any event, the arbitrator found as a fact that the Chaneys relied on the representations made by the Lipps. I cannot see any error of law in points (a) and (b) above.

[44] The arbitrator does not refer to Mr Wilkinson's evidence in his award. Mr Wilkinson was called as a witness by the Chaneys and I understand that his evidence was not challenged.[1] The arbitrator appears to have overlooked this evidence and the letter from the Lipps' solicitor dated 12 July 2010 in which the Lipps asserted sole rights to use the driveway. However, these are not errors of law. If they are errors at all, they are errors of fact and cannot be challenged on appeal. The parties are bound by the facts found by the arbitrator, whether or not his findings are flawed.

Incorrect interpretation of maintenance obligation in the Chaneys' lease

[45] The arbitrator considered that the maintenance provision in clause 33 of the Chaneys' lease was "a little odd". He noted that "the Lessors" were to be wholly responsible for the maintenance of the driveway. He considered that the term "Lessors" was relevantly defined in clause 30 as:

> including and binding the persons executing these presents as Lessors (McConnel and Malcolm-Smith) 'and all the Lessors for the time being under these presents… and if more than one jointly and severally'.

The arbitrator concluded:

> At the present time the lessors are both the Lipps and the Chaneys as the co-owners of the fee simple.

[46] I agree with Mr Morris that the arbitrator appears to have overlooked clause 31 of the Chaneys' lease which provides:

> In the following clauses of this lease:
>
> (a) the expression "the relevant area" shall mean those parts of the said land as are shown marked "B" and "Common Area" on Deposited Plan 135392; and
>
> (b) the expression "the Lessors" shall mean (to the exclusion of any other person or persons), such of the registered proprietors of any estate in fee simple in the said land as are not registered proprietors of an estate in leasehold in any flat or dwelling erected on the said land.

[1] There is no transcript of the evidence and I am accordingly unable to verify this.

[47] Clause 32 of the lease provided for the completion by such "Lessors" of a dwelling on the "relevant area". The "Lessors" for the purposes of this provision are the Lipps because, although they were registered proprietors of an undivided half share of the land from 8 March 1990, they were not the registered proprietors of any leasehold interest in any flat or dwelling until their composite title issued on 21 April 1998. They were the ones who were going to construct a dwelling on the "relevant area".

[48] Clause 33 relevantly provides:

> THAT on substantial completion by the Lessors of the dwelling unit the Lessee shall at the cost in all things of the Lessors and when so requested by the Lessors join in and execute as a Co-Lessor a Lease of the dwelling unit for a term corresponding with the unexpired period of this Lease, which Lease shall contain a restrictive covenant in the same form as clause 18A above in respect of the relevant area exclusive of the dwelling unit and shall provide that the Lessors shall be wholly responsible for the completion and maintenance of any driveway on the Common Area…

[49] "Lessors" in this clause is defined in clause 31, not clause 30, and refers to the Lipps. They were to execute the Lease of their dwelling "as a Co-Lessor". This lease was to provide that they would be wholly responsible for the completion and maintenance of the driveway, including that part of it constructed on the "Common Area".

[50] I consider that the arbitrator erred in law in applying the standard interpretation provision defining "the Lessors" in clause 30 of the lease rather than the definition of "the Lessors" set out in clause 31 which applies to the following clauses of the lease, including clause 33. In so doing, he wrongly concluded that the Chaneys were jointly responsible for the maintenance of the driveway. However, I do not consider that this error is material to the arbitrator's reasoning or his conclusions. He found that the Chaneys had no right of use or enjoyment of the driveway under their lease. This was the critical finding on the interpretation of the lease. The arbitrator was undoubtedly correct in reaching that conclusion.

[51] The Lipps also challenged [69] of the award which reads as follows:

> The Lipps' argument based on this decision[2] is that the Chaneys, as owners of a share in the fee simple, cannot derive therefrom the right to the use of the driveway in common with the Lipps. I agree. The rights of the Chaneys with regard to the driveway must derive from the leases. I have fully discussed this above. Clause 11 of their own cross-lease expressly removes that right, and the Lipps' cross-lease expressly grants that right…

[52] The Lipps submitted that this finding was wrong if it meant that the Lipps' cross-lease expressly grants 'that right' to the Chaneys. That is not how I interpret what the arbitrator was saying. As I read the award, the arbitrator was not suggesting that the Chaneys obtained a right to use the driveway under the Lipps' lease. He found that the Chaneys derived their usage rights from their lease and that these did not extend to the driveway. I agree with this conclusion. In my view, there is nothing in the Lipps' criticism of [69] of the award.

Detriment

[53] The arbitrator addressed detriment in [45] of his award as follows:

> … the representee must have incurred detriment to raise the unconscionability required to support the estoppel. I doubt in this case that the reliance of a general nature over the period up to 2005 and the decision to carry out the construction works would in itself have supported an estoppel. Though use was made of the driveway, no detriment was incurred that would have made it unconscionable for the Lipps to have resiled from their representations. I have no evidence as to the steps that had to be taken by the Chaneys in the processes of obtaining their resource and building consents, but clearly plans and reports in support of the applications would need to have been obtained and professionals persons employed, and paid, in that process. The evidence shows that the Lipps were well aware that this was being done, and had been consulted to some degree in the process. Though the work was begun without the formal written consent of the Lipps, I have nevertheless found that it was begun with their knowledge and acquiescence. Though they may not have known the date it would start, they knew that it would start at some time and failed to warn the Chaneys that common use of the driveway was disputed. I find that this work and expenditure up to the Chaneys' receipt of the letter of 30 August 2010 is sufficient detriment to support an estoppel.

[2] *Briggs v Currie* (1994) 2 NZ ConvC 191,837 (HC).

[54] The Lipps complain that detriment was not pleaded by the Chaneys and was therefore not particularised or quantified in the pleadings or in the evidence. They say that there was no discovery or inspection of documents relevant to this issue.

[55] The Chaneys pleaded that the Lipps consented to the commencement and continuation of the building work and acquiesced in it. They raised estoppel as a defence in their response to the Lipps' points of claim and in the statement of defence subsequently filed. The Chaneys gave evidence as to the steps taken by them in the belief that they could access the proposed garage using the common area section of the driveway. The Lipps were well aware, from the pleadings and the evidence, that the Chaneys were relying on equitable estoppel. The Lipps could have insisted on more particular pleadings and further discovery if this was not adequate. They were content to proceed with the hearing based on the pleadings that had been filed and the informal discovery that had been given. In my view, the arbitrator did not exceed his jurisdiction or make any error of law in determining the estoppel defence and making findings on the elements of such a defence based on the evidence that was presented to him.

[56] Mr Morris submitted that the Lipps did not acquiesce in fact and that the arbitrator's factual finding to the contrary was wrong. I am not able to enquire into this because the arbitrator's findings of fact may not be challenged on appeal.

[57] Mr Morris also submitted that, as a matter of law, silence by the Lipps in this case was "entirely reasonable" in the context of a cross-lease relationship. He submitted that the Lipps were "entirely justified" in "doing nothing in any event as they should have been able to rely on the Chaneys not commencing work until they had the Lipps' consent".

[58] The submission disregards the arbitrator's express finding that the Lipps had made clear and unequivocal representations to the Chaneys that they could use the driveway and that the Chaneys had reasonably relied on these representations in formulating and implementing their plans to construct a basement garage. The arbitrator found that the Lipps remained silent and did not assert exclusive rights to the driveway knowing that the Chaneys were incurring expense from 2006 in

seeking resource and building consents for the garage and commencing the works in May 2010. The arbitrator found that the Chaneys did not need to seek the Lipps' formal consent to the works until after the resource and building consents had been obtained and that, to some extent, the Chaneys had collaborated with the Lipps during those processes. In these circumstances, by "doing nothing" and remaining silent until 30 August 2010, as the arbitrator found, the Lipps were estopped from resiling from their earlier representations that the Chaneys could use this part of the driveway. I can see no error of law in this analysis.

Unconscionability

[59] The arbitrator found that in all of the circumstances it would be unconscionable for the Lipps to depart from the representations he found they had made that the Chaneys could use the driveway. Mr Morris argued that this conclusion was not "legally available" because "no deliberate or intentional acts were made by [the Lipps], they did not draw any mistaken plans, they did not draft any leases or make any personal representations". That may be so, but the Lipps were bound by statements made on their behalf by the professionals they engaged. Mr Stougie drafted the plan for Flat 2 and Mr Holland drafted the Lipps' lease and advised the Chaneys that they were entitled to use the common area. The statements by Mr Stougie and Mr Holland were, in law, statements by the Lipps.

[60] Mr Morris submitted that the arbitrator's findings at [45] of his award, quoted at [53] above, disregarded Mr Wilkinson's evidence. He submitted that the "real position" was that the Chaneys "were going to start building their proposed garage no matter how hard [the Lipps] tried to talk them out of it". This is a challenge to the arbitrator's factual findings and cannot be considered in the context of this appeal.

[61] I am also unable to accept Mr Morris' further submission that the arbitrator erred in law in his interpretation of the legal meaning of unconscionability in this context or that he misapplied it to the facts as found.

Relief

[62] The arbitrator considered that he had a discretion whether to make orders requiring correction of the plan and cross-lease for Flat 1 to conform to the common use of the driveway shown on the plan and provided for in the lease of Flat 2, or to order an enquiry as to the damages suffered by the Chaneys as a result of the Lipps' attempt to resile from their representations. He then said at [48]:

> I have decided in favour of the first of those choices. The Chaneys would not have undertaken the work on their house, certainly not in its present form by doing the work necessary to construct a garage underneath the rear of the house, if they had not believed, and relied upon the belief, that they had the legal right to use the driveway off Crocus Place. Mr Chaney says… that if they are unsuccessful in this arbitration they would convert the "garage area" into a rumpus room, so that the work would not be entirely wasted, but it remains that the work would not have been undertaken at all had they not relied on the belief that they had the right to use the driveway off Crocus Place. The rumpus room has the suggestion of the "best of a bad job". Also, though I have no figures, a substantial sum of money would have been spent on the project, from its inception in 2006 to 30 August 2010.

[63] Mr Morris submitted that the arbitrator erred in law because the available relief was limited to the cost of the work and expense incurred to 30 August 2010. He submitted that the arbitrator ought not to have ordered an alteration to the Chaneys' cross-lease because this would affect the value of the Lipps' and the Chaneys' legal interests "to an unknown value" such that no proper balancing exercise could be undertaken.

[64] The relief that ought to be awarded in an equitable estoppel claim is such relief as may be necessary to rectify the unconscionable conduct. This will usually be reliance-based relief, but it need not necessarily be so. The arbitrator made no error of law in considering that he was not limited to a reliance-based remedy and could award expectation-based relief if this was necessary to redress the unconscionable conduct adequately. He concluded, on the facts as he found them to be, that an expectation-based remedy was required and should be granted in this case. That was a conclusion that was open to him. In my view, subject to one issue which I deal with below, the arbitrator's conclusion as to the appropriate remedy discloses no error of law.

[65] Mr Morris made a jurisdictional challenge to the specific relief granted by the arbitrator but he took no issue with the fact that the Chaneys had raised estoppel as a defence, not as a counterclaim, and had not sought any specific relief based on equitable estoppel. This may be because, as the arbitrator noted, the arbitration had proceeded in a somewhat unorthodox and informal way by agreement of the parties. The "dispute" referred to arbitration was described broadly in the arbitration agreement as a dispute "as to access to part of their cross-lease Titles". That is the dispute the arbitrator determined.

[66] Further, despite the deficiencies in the pleadings, Mr Gilchrist, for the Chaneys, made detailed written submissions to the arbitrator addressing all aspects of his clients' case, including equitable estoppel and the remedies available for this. He submitted that the appropriate remedy for equitable estoppel was to grant the Chaneys access to the garage on the basis that this was required to avoid the detriment. The Lipps filed submissions in reply but did not raise any jurisdictional objection to the remedy sought by the Chaneys for equitable estoppel. In all of these circumstances, it is not surprising that no issue was raised before me concerning the fact that estoppel was pleaded only as a defence.

[67] However, Mr Morris did argue that the arbitrator had no jurisdiction to direct that alterations to the footprint of Flat 1 should be included in the new plan. I consider that this submission is well-founded.

[68] As noted, after the evidence was heard, the Lipps filed a statement of claim which raised, in [5] to [10], an alleged breach by the Chaneys of their cross-lease by making structural alterations to their house without the prior consent of the Lipps. In particular the Lipps alleged that the Chaneys had changed the footprint of their flat in breach of the relevant provision in the lease, which was in clause 10. They sought unspecified damages for these breaches. In their statement of defence, the Chaneys admitted that they had made changes to the footprint of their house but denied that the arbitrator had any jurisdiction to deal with this issue.

[69] The arbitrator queried whether he had jurisdiction to decide the issues raised in these paragraphs of the Lipps' statement of claim. He sought submissions from

the parties on this issue. Mr Gilchrist, for the Chaneys, submitted that the arbitrator had no jurisdiction to deal with this issue because it was not referred to in the points of claim and was not part of the case that the Chaneys had prepared to meet. The arbitrator accepted this submission. He stated at [86] of his award:

> I agree with Mr Gilchrist that it is too late now to make decisions about the alleged breaches of cl 10 and the remedies to be available therefor. I do not have adequate evidence before me to deal with these issues and cannot decide either liability or relief on the evidence available. Though the combination of cl 2 of the Arbitration Agreement signed by the parties and the Claimants' Statement of Claim appear to place the issues before me, given the manner of the conduct of this arbitration and the evidence adduced, I do not think it would be appropriate to proceed as though that had been the case from the inception. The result would be as though the Claimants had ambushed the Respondents into a situation where their liability was being decided without due notice of the claim against them. If these issues are to be referred to me, a fresh arbitration agreement leading to a separate arbitration will be necessary.

[70] The Lipps alleged in their notice of appeal that the arbitrator erred in finding that he had no jurisdiction to determine these breaches. This was sensibly not pursued by them in their submissions. I consider that the arbitrator was fully justified, for the reasons he gave, in concluding that he had no jurisdiction to determine the Lipps' claim that the Chaneys had breached their lease by modifying the footprint of their house without consent.

[71] Despite this ruling, with which I entirely agree, the arbitrator directed that any change to the footprint of the Chaneys' or the Lipps' house should be embodied in the new plan which he ordered was to be prepared and deposited. No such relief, legitimising changes made to the footprint of either house without consent, was sought by either of the parties. The arbitrator correctly ruled that he had no jurisdiction to consider whether the Chaneys had breached the lease by making changes to the footprint of their house without consent. The pleadings did not refer at all to any changes to the footprint of the Lipps' house and the arbitrator had no jurisdiction to rule on any such changes. The dispute referred to him in the arbitration agreement solely concerned access.

[72] For these reasons, I do not consider that the arbitrator had jurisdiction to make orders requiring the parties to accept changes to the footprint of either house

by incorporating these changes in new flat plans and leases. I note that the arbitrator did not expressly make any formal order in this paragraph of his award and it may be that he intended that these directions would be advisory rather than directory and that they did not form part of his formal orders. However, to the extent that the direction in [74] does form part of the arbitrator's orders, it must be set aside on the basis that it was outside the scope of the submission to arbitration and therefore beyond his jurisdiction.

The application to set aside the award

[73] The Lipps have applied to set aside the award on the following grounds:

(a) The award deals with a dispute not contemplated by, and not falling within, the submission to arbitration. Two particulars are relied on. First, the Lipps argue that the finding of detriment fell outside the scope of the submission. This is a repetition of the same point advanced in support of their appeal. Second, the Lipps contend that the submission to arbitration was limited to a determination of the parties' rights under the terms of the cross-leases and did not extend to allow consideration of the equitable estoppel raised by the Chaneys.

(b) The award is in conflict with New Zealand public policy in that the award:

(i) takes away legal rights to land from the Lipps and gives those rights to the Chaneys in circumstances where the Chaneys had their own legal advice;

(ii) legitimises steps taken by the Chaneys in breach of the limitations on their rights under the lease;

(iii) contravenes the principle of indefeasibility; and

(iv) confers rights on the Chaneys in circumstances where the common law would not when there was no evidence or finding

of "diminished ability" on the part of the Chaneys or of the Lipps being in a "stronger contractual position".

(c) The award is in conflict with New Zealand public policy in that it breaches the rules of natural justice. In particular, the Lipps complain in their application that the arbitrator failed to take 15 matters into account and ought not to have taken into account four other matters.

[74] Mr Morris did not pursue the second ground of the Lipps' application listed as (b) above. He did, however, pursue the other two grounds.

First ground

[75] The first ground of the Lipps' application is made in reliance on Article 34(2)(a)(iii) of Schedule 1 of the Act which provides:

> An arbitral award may be set aside by the High Court only if –
>
> (a) The party making the application furnishes proof that –
>
> …
>
> (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.

[76] Mr Morris submitted that it was plain from [45] of the award, quoted in [53] above, that the arbitrator had no evidence of the steps the Chaneys had taken in the resource consent process but nevertheless granted relief based on detriment including those steps. More fundamentally, Mr Morris submitted that the pleadings did not claim detriment by undertaking the building work or in preparing plans and making the resource consent application. He repeated the same complaint advanced in support of the Lipps' appeal that the resource consent application and plans were not discovered.

[77] For the reasons I have already given, this ground of the application to set aside the award must be dismissed. The dispute contemplated by, and falling within, the terms of the submission to arbitration was a dispute about access. Equitable estoppel was raised by the Chaneys in their response to the points of claim and in their statement of defence and counterclaim. The Chaneys gave evidence to support their estoppel contention. This included evidence that they had retained Gaze Commercial to prepare plans and Mr Wilkinson to provide planning advice. They had also applied for resource and building consents and had undertaken building work. I cannot see how it can be seriously suggested that in dealing with equitable estoppel in his award, including all of its required elements based on this evidence, the arbitrator was dealing with a dispute not contemplated by, or falling within, the terms of the submission for arbitration. This ground of the Lipps' application must fail.

Second ground

[78] The sole remaining ground of the Lipps' application to set aside the award is founded on Article 34(2)(b)(ii) of Schedule 1 of the Act. Article 34 relevantly provides:

> (2) An arbitral award may be set aside by the High Court only if –
>
> …
>
> (b) The High Court finds that –
>
> …
>
> (ii) The award is in conflict with the public policy of New Zealand.
>
> …
>
> (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.

[79] Public policy of New Zealand in this context has a narrow meaning. The Court's role is limited to cases where the award, or the manner in which it was arrived at, offends "fundamental principles of law and justice" in the sense explained by the Court of Appeal in *Amaltal Corp Ltd v Maruha (NZ) Corp Ltd*[3]. Blanchard J, giving the judgment of the Court, reviewed the scope of "public policy" and it is useful to set this discussion out:

> [41] Paragraphs (1) to (4) of the Article 34 of the First Schedule to the Arbitration Act 1996 closely follow Article 34 of the Model Law. Upon the recommendation of the Law Commission, paras (5) and (6) were added. The first of these has no relevance in the present case. As paragraph (6) itself indicates, it was introduced for the avoidance of doubt and without any intention of limiting the generality of paragraph (2)(b)(ii) under which the High Court can in its discretion set aside an award if it is in conflict with the public policy of New Zealand.
>
> [42] Paragraph (6) declares that two particular things are in conflict with that public policy: if the making of the award was induced or affected by fraud or corruption or if a breach of the rules of natural justice has occurred during the arbitral proceedings or in connection with the making of the award. These may well be occurrences of such seriousness that they would be regarded as in conflict with public policy of a state, in this instance New Zealand, under the Model Law and also under the New York Convention from which the grounds for setting aside under the Model Law were taken.
>
> [43] A legislative history of Article 34 of the Model Law is to be found in Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* pp911 et seq. Interestingly, the *travaux preparatoires* reflect a concern of delegates that the expression might be restricted to substantive questions only. The United Nations Commission on International Trade Law therefore expressly stated, in its Report of 21 August 1985, that the wording "the award is in conflict with the public policy of this State: was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at. The report also stated (at para 297) the Commission's understanding of the term "public policy" as used in the New York Convention and many other treaties covered "fundamental principles of law and justice in substantive as well as procedural respects".
>
> [44] In the United States a "narrow reading" had been given to the public policy defence under the New York Convention by the Court of Appeals for the Second Circuit which said in *Parsons & Whittemore Overseas Co Incident v Sociéte Générale De L'Industrié Du Papier (RAKTA)* 508 F 2d 969 (1974) at 974 that enforcement of foreign arbitral awards might be denied on the basis of that defence only where enforcement "would violate the forum state's most basic notions of morality and justice".

[3] *Amaltal Corp Ltd v Maruha (NZ) Corp Ltd* [2004] 2 NZLR 614 (CA).

> Likewise the English Court of Appeal, speaking through Sir John Donaldson MR in *Deutsche Schactbau* [1990] 1 AC 295 at 316, said that although considerations of public policy could never be exhaustively defined, it had to be shown that there was some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that it would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the power of the state are exercised.
>
> [45] A narrow construction has also found favour in the courts of Ontario where the Court of Appeal said in *Boardwalk Regency Corp v Maalouf* (1999) 6 OR (3d) 737 at 743 that the common ground of all expressed reasons for imposing the doctrine of public policy was "essential morality", cautioning however that it must be "more than the morality of some persons and must run through the fabric of society to the extent that it is not consonant with our system of justice and general moral outlook to countenance the conduct, no matter how legal it may have been where it occurred" (the award in the case being a foreign award).
>
> [46] Another way in which the matter has been expressed has been to say that the enforcement of an award will be contrary to public policy where the integrity of the court's processes and powers will thereby be abused: *Soleimany v Soleimany* at 800. An award whose confirmation can be seen to damage the integrity of the court system will not be enforced.

[80] Where, as in this case, the complaint can be raised as a question of law under Article 5, there is no need to make a separate application under Article 34 raising the same issue. Where the issue has been raised as a question of law under Article 5 and rejected, it will be an abuse of process for the party to raise the same issue again in a subsequent application to set aside the award under Article 34.[4]

[81] Article 5 in Schedule 2 of the Act was amended in October 2007 to make clear that a question of law, for the purposes of appeals on questions of law under the Act, does not include any question as to whether the award, or any part of it, was supported by any evidence or any sufficient or substantial evidence. Parliament cannot have intended that any such error in the factual findings of an arbitrator could nevertheless justify an application to set the award aside under Article 34 as being in conflict with the public policy of New Zealand.

[82] As noted above, the Lipps' application refers to 15 matters which they complain the arbitrator failed to take into account. Four of these matters were abandoned at the hearing. The Lipps also complain that the arbitrator took into account four matters that he ought not to have.

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[4] At [40].

[83] The matters which the Lipps maintain the arbitrator wrongly failed to take into account, are as follows:

(a) Mr Chaney's evidence that he relied on the certificate of title to the property at the time of purchase as to the status of the driveway;

(b) Documentary evidence showing that the Chaneys were represented by lawyers on the purchase and that they had sought legal advice regarding the certificate of title;

(c) Mr Wilkinson's evidence regarding Mr Lipps' advice at the May 2008 meeting that he considered that the driveway was for his exclusive use;

(d) The evidence that the driveway was formed and maintained solely by the Lipps;

(e) The evidence as to the purchase by the Chaneys of a strip of land to widen their Bell Road driveway;

(f) Evidence as to legal advice given to the Chaneys during the course of the dispute that they were entitled to use the driveway;

(g) Evidence that the Chaneys had not made any significant use of the driveway until the building work commenced in May 2010;

(h) Evidence of the Chaneys' business experience and their instruction of lawyers when they needed legal advice;

(i) Evidence that the Chaneys purchased their property after the Lipps had already purchased rights to the driveway;

(j) Mr Chaney's evidence that he received the Lipps' plan for their cross-lease from the council; and

(k) Legal and planning advice taken by the Chaneys after signing the Lipps' cross-lease and before commencing the planning and building work.

[84] The matters which the Lipps maintain the arbitrator wrongly took into account are as follows:

(a) The finding that the building work was detrimental to the Chaneys;

(b) The finding that the Chaneys were jointly obliged to maintain the driveway;

(c) Evidence of the Chaneys' usage of the driveway which was contrary to photographic evidence; and

(d) The plan for the Lipps' cross-lease title.

[85] These complaints are all complaints about the findings of fact made by the arbitrator. The Lipps seek to have the award set aside so that these factual matters can be considered afresh. This is not permissible. Complaints of this sort cannot be entertained by the Court for the reasons already stated.

[86] The Lipps chose to have their dispute determined by arbitration. They agreed to appoint one of New Zealand's leading experts in the field of land law as arbitrator. By choosing arbitration, they agreed to be bound by the outcome subject to the limited exceptions in which the Court may interfere with an award. Factual findings cannot be challenged. The Lipps are bound by the arbitrator's factual findings, irrespective of whether or not these are flawed.

[87] The Lipps' complaints fall well outside the limited scope of Article 34(2)(b)(ii). They do not come anywhere near establishing that the award violates fundamental principles of law and justice or that the enforcement of the award would be injurious to the public good or wholly offensive to an ordinary, reasonable and informed member of the public. For these reasons, this ground of the Lipps' application to set aside the award must also fail.

Result

[88] The application to set aside the award is dismissed.

[89] To the extent that [74] of the award, quoted in [28] above, forms one of the formal orders made by the arbitrator, it is set aside as being beyond his jurisdiction. In all other respects, the appeal against the award is dismissed.

[90] If the parties are unable to agree costs, any party seeking costs should file and serve submissions on or before 4.00 pm on 10 August 2012. Any submissions in response should be filed and served on or before 4.00 pm on 24 August 2012.

[91] Subsequent to the hearing, counsel filed memoranda requesting that they be given the opportunity to seek consequential relief following the release of the decision. I therefore reserve leave to both parties to make further submissions on any consequential orders that may be sought in view of this judgment. Such submissions should be filed and served in accordance with the timetable set out in [90] above.

M A Gilbert J