IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2017-404-247

BETWEEN	BODY CORPORATE 200012 Applicant
AND	NAYLOR LOVE CONSTRUCTION LIMITED Respondent

Hearing:	26 April 2017
Appearances:	T J Rainey and U B Keller for the Applicant C J Booth and M L Broad for the Respondent
Minute:	26 April 2017

MINUTE OF MUIR J

Counsel/Solicitors:
T J Rainey, Rainey Law, Auckland
U B Keller, Rainey Law, Auckland
C J Booth, Kensington Swan, Auckland
M L Broad, Kensington Swan, Auckland

[1] The matter before me today is an originating application for orders appointing an arbitrator under the Arbitration Act 1996 (the Act). The background to the application reflects the unfortunate inter-relationship of the First Schedule Article 11 and the Second Schedule Article 1 of the Act. These issues have been the subject of much judicial comment in previous cases.

[2] This is yet another case in which, after initial disagreement between the parties (but in my view before a final deadlock had been reached) one party (the respondent) has issued a notice under the Second Schedule Article 1(4) with the hope of securing appointment of its nominee (Mr Walton) on a default basis. The Body Corporate considered that reasonable efforts to reach an agreement had not been exhausted and that such notice was therefore premature and in itself constituted a default under the Second Schedule Article 1. It therefore issued its own notice of default seeking the appointment of its nominee (The Honourable Rodney Hansen CNZM QC). Because the first notice was for 14 days and the second for seven a classic competition between notices ensued.

[3] I am not required to deliver a judgment and it is therefore unnecessary for me to express my own views in relation to these issues apart from the fact that, within the context of legislation which is designed as best as possible to facilitate agreement between the parties, it is in my view bordering on repugnant that genuine disputes should be resolved by unilateral notices. If I had been required to, I may have been inclined to depart from the approach adopted by Hansen J in the *Hitex*[1] decision, particularly given that the Body Corporate applied to this Court under the First Schedule Article 11 before expiration of the respondent's notice.

[4] Thankfully, however, following the expression of certain provisional views by me, the parties have resolved their differences. They have agreed that the arbitration of their respective disputes (there being disputes on both sides) is to be undertaken by a third nominee, demonstrably qualified to deal with the matters in dispute, Mr Tomas Kennedy-Grant QC. They have further agreed that the costs on

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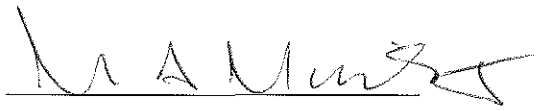
1 *Hitex Plastering Ltd v Santa Barbara Homes Ltd* [2002] 3 NZLR 695.

the originating application for orders appointing arbitrator be costs in the arbitration and ultimately dealt with by the arbitrator in his award.

[5] I commend the parties for their approach which is clearly in the interests of their respective clients. Absent the agreement reached today, I could readily have foreseen a situation where even if I accepted the respondent's submission that I follow *Hitex*, there were competing arbitrations and, in such context, competing challenges to jurisdiction and appeals to this Court under the First Schedule Article 16, none of which would have served such interests. Good sense has, however, ultimately prevailed. I congratulate the parties on their settlement.

[6] The applicant shall within seven days file a discontinuance, the costs implications in relation to which are as reflected in [4] above.



Muir J