

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

**CIV-2014-404-3082
[2014] NZHC 3037**

UNDER the Arbitration Act 1996
BETWEEN CAROLINE RUTH WHITE
Plaintiff
AND RICHARD MAIDEN
First Defendant
BODY CORPORATE 198570
Second Defendant

Hearing: 27 November 2014

Appearances: Plaintiff in person
JEM Lethbridge for Second Defendant

Judgment: 1 December 2014

JUDGMENT OF BREWER J

*This judgment was delivered by me on 1 December 2014 at 3:00 pm
pursuant to Rule 11.5 High Court Rules.*

Registrar/Deputy Registrar

Solicitors: Grove Darlow & Partners (Auckland) for Second Defendant

Copy to: Plaintiff in person

Introduction

[1] Miss White is a party to an arbitration scheduled to commence on 10 December 2014. At issue is the reasonableness of the levy assessment made in relation to work required to repair Miss White's unit at a complex in Grafton Road, Auckland.

[2] Miss White (who represents herself) objects to Mr Maiden being the arbitrator. She believes he has conflicts of interest and will likely be biased in favour of the Body Corporate. Miss White invokes the Court's jurisdiction under Schedule 1 of the Arbitration Act 1996 ("the Act") which reads:¹

If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) is not successful, the challenging party may request, within 30 days after having received notice of the decision rejecting the challenge, the High Court to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

[3] Miss White's grounds are as follows:

- (a) 10 years ago, Mr Maiden, a building surveyor, prepared reports for her on a property she owned. Miss White did not agree with the reports and did not rely on them. However, she did not communicate that either to Mr Maiden's employer or to Mr Maiden, and she paid the bill for the reports without comment.
- (b) Mr Maiden is a director of a company called Prendos New Zealand Ltd. In 2011, Prendos mistakenly began debt recovery action against Miss White and her partner, Mr Gray. Miss White telephoned the debt recovery company, explained the mistake, and that was the end of the matter.
- (c) Mr Maiden has had professional engagement with Mr Gray (who is not a party to the arbitration). Mr Gray is a licensed building practitioner. On one occasion, Mr Gray assisted a man for whom

¹ Arbitration Act 1996, sch 1, art 13(3).

Prendos did work. That man, as it turned out, did not pay Prendos for its work. Counsel for the Body Corporate allegedly made derogatory comments to Mr Maiden about Mr Gray and the man who did not pay his account with Prendos.

- (d) Mr Leishman, a principal of the company which provides secretarial services to the Body Corporate, is a key customer of Prendos. Mr Maiden, as a director of Prendos, has an obvious interest in keeping on-side with Mr Leishman.

[4] Miss White has complaints also about the procedure adopted to this point by Mr Maiden as arbitrator. In her submission, they are evidence of bias. I put them to one side. In my view, there is insufficient evidence to found the linkage for which Miss White contends. I have to look objectively at the relationship between Miss White and Mr Maiden to determine whether Mr Maiden should be removed as arbitrator.

The law

[5] Miss White has brought this challenge by way of notice of proceeding and statement of claim. She also filed a document intituled “interlocutory application to challenge arbitrator”. This latter document seeks the removal of Mr Maiden as arbitrator “due to a disqualifying conflict of interest and resultant (sic)”. The application is made “in reliance on s 13(3) Arbitration Act 1996 and the inherent jurisdiction of the High Court”. Miss White’s affidavit supports this application. I note that the statement of claim also seeks as substantive relief the removal of Mr Maiden as arbitrator.

[6] Rule 19.2 of the High Court Rules requires applications under the Arbitration Act 1996 (with minor exceptions not relevant here) to be brought by originating application. However, no procedural objection has been raised and there is an arbitration scheduled to commence shortly. The merits of Miss White’s challenge are clear and were argued before me. The interests of justice require a decision and so I will treat Miss White’s proceeding as though it were an originating application.

[7] The law is clear that once an arbitrator is appointed he or she cannot be removed from office merely because one of the parties complains of bias. As Heath J recognised, the test for bias is an objective one:²

... whether a fair minded and informed person in the position of the challenging party is likely to hold justifiable doubts as to the arbitrator's impartiality as a result of conduct of which complaint is made.

[8] The Supreme Court stated the test in similar terms.³ It added that it is not enough merely to identify some relationship. The party alleging bias must also articulate a logical connection between the identified relationship and the "feared deviation from the course of deciding [the case] on its merits".⁴

Discussion

[9] Mr Maiden's responses in correspondence to Miss White's challenge are to the effect that he has neither conflict of interest nor bias. He abides the decision of the Court.

[10] The Body Corporate, through Mr Leishman's affidavit, points out that Mr Maiden was nominated as arbitrator by an independent entity, the New Zealand Institute of Quantity Surveyors.

[11] On the evidence before me, Mr Maiden is an experienced and responsible professional. He has had previous dealings with both Miss White and Mr Leishman. But in neither case have they been negative dealings. His contact with Mr Gray seems immaterial. There is no evidence that raises a real possibility that he is either prejudiced against Miss White or beholden to Mr Leishman. He is a busy professional, prominent in his profession, whose services are sought by a range of companies.

² *Auckland Co-operative Taxi Society Ltd v Perfacci Ltd* HC Auckland CIV-2003-404-5495, 10 October 2003 at [32].

³ *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35.

⁴ At [20].

[12] I note also that the issue he has to decide is an empirical one. Credibility is not an issue. The issue is what is a reasonable amount to levy to pay for the building repairs to Miss White's unit.

[13] Therefore, I cannot see bias in the relationship (such as it is) between Mr Maiden and Miss White, on the one part, or Mr Maiden and Mr Leishman, on the other part. I do not see, objectively, that there is any risk of these relationships resulting in a "feared deviation" relevant to his task. Miss White did not articulate what the "feared deviation" is, but I infer it would be a tendency to impose a higher repair cost than reasonable. That is not a real possibility which would be entertained by a fair minded and informed person in Miss White's position.

Decision

[14] The application for the replacement of Mr Maiden as arbitrator is dismissed. I direct that this judgment disposes of the (technically) substantive proceeding also. The proceeding is at an end.

[15] The second defendant is entitled to costs. I award these on a 2B basis and they may be calculated by the Registrar.

Brewer J