

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

**CIV-2011-419-1790
[2013] NZHC 576**

BETWEEN PHILLIPA MARY WATERS
 Plaintiff

AND PERRY FOUNDATION
 Defendant

CIV-2011-419-1791

BETWEEN VALERIE JOYCE HELM
 Plaintiff

AND PERRY FOUNDATION
 Defendant

Hearing: 12 February 2013

Counsel: CT Gudsell QC for defendant
 EJ Hudson for plaintiffs

Judgment: 25 March 2013

**JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application for stay of proceeding]**

This judgment was delivered by me on 25 March 2013 at 3:30pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

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Introduction

[1] The defendant in both proceedings is a charitable trust that operates a retirement village called Perrinpark at Te Kowhai on the outskirts of Hamilton City.

[2] The plaintiffs in both proceedings are acting in a representative capacity on behalf of two former Perrinpark residents, namely Mrs Jean Waters (now deceased) and Mrs Hilda Murray.

[3] The applications that I am required to resolve are, for all intents and purposes, identical for each proceeding.

[4] Following the filing and service of an appearance in which the defendant stated its objection to this Court's jurisdiction to hear and determine the proceedings, the defendant filed, pursuant to r 5.49(3), an application to the Court to dismiss both proceedings on that ground.

Background

[5] Mrs Waters and Mrs Murray both owned units at Perrinpark. The units are respectively referred to as being 21 and 32 Kingfisher Way respectively.

[6] Both plaintiffs occupied the sites on which their units were located. They had access to certain common areas pursuant to site agreements that they had entered into with the defendant. The site agreements contained dispute resolution clauses. They are identical in the case of each of the plaintiffs.

[7] Mrs Waters died in December 2008. Mrs Murray ceased occupancy of her unit in August 2010. The defendant sold both units, including the land, to third party purchasers. The sale was undertaken pursuant to the powers reserved to the defendant under clause 7 of the site agreements. There is no dispute as to the defendant's right to sell. The substantive dispute concerns an accounting for the proceeds of the sale of the two units.

[8] The agreements for sale and purchase covered the sale of both the units and the land on which the units were located. Neither plaintiff had taken up the opportunity to purchase the land on which their units were located. A number of other Perrinpark residents did take up that option.

[9] The plaintiffs claim to be entitled to the sale proceeds of both the unit and the land on which the unit is situated subject to certain specific deductions. The defendant's position is that the plaintiffs are entitled to the proceeds of sale of the unit in each case, being the value of the improvements and chattels specified in the agreements for sale and purchase, subject to specified deductions. The defendant's position is that the plaintiffs are not entitled to the proceeds of the sale of the freehold land component.

[10] The plaintiffs commenced these proceedings seeking declarations and orders regarding their entitlements to the sale proceeds, along with general damages. The issues in both proceedings are essentially identical.

The grounds in support of the applications

[11] The defendant relies on the terms of the site agreements. The defendant alleges that the dispute as to entitlement on sale is a dispute that is required to be dealt with in accordance with the dispute resolution procedure set out in clause 9.3 of the site agreements or, alternatively, under Part 4 of the Retirement Villages Act 2003. The defendant alleges that the commencement of proceedings by the plaintiffs seeking relief in the High Court is therefore an abuse of process and the proceedings should therefore be stayed or dismissed.

The grounds advanced in opposition to the applications

[12] The plaintiffs oppose the orders sought in the applications and say:

- (a) The Securities Act (Retirement Villages) Exemption Notice 1999 expired on 31 January 2008 thereby precluding a reference of this

dispute in accordance with the terms of clause 9.3 of the site agreements;

- (b) Clause 9.3 of the site agreements is, in terms of the Arbitration Act 1996, an arbitration agreement;
- (c) Clause 9.3 of the site agreements is, by virtue of the provisions of s 11 of the Arbitration Act 1996, unenforceable as the plaintiffs are, in terms of the Act, consumers and entered into the agreements other than in trade; and
- (d) The alternative basis for referring the disputes under clause 9.3, namely the reference to Part 4 of the Retirement Villages Act 2003 creates a permissive, as opposed to a mandatory, requirement to use the dispute resolution process. Because it is a permissive provision, it does not preclude proceedings being filed in the High Court to determine the issue.

The court's jurisdiction to stay or dismiss proceedings

[13] Counsel were in agreement that:

- (a) The High Court has authority to order that a proceeding be stayed or dismissed when satisfied that the parties have agreed to an alternative means for resolving their dispute;¹
- (b) The relevant procedural rule on which the order is made is now r 15.1 of the High Court Rules;
- (c) Before the courts order a stay of proceeding the court must be satisfied that the parties have contractually bound themselves to an alternative means of resolving their dispute and the process for doing

¹ *Fisher & Paykel Financial Services Ltd v Credit Management Services Ltd* HC Auckland CIV-2006-404-6646, 16 May 2008, Rodney Hansen J; *Exapl Ltd v Pact Group (NZ) Ltd* HC Auckland CIV-2011-404-5919, 12 December 2011, Duffy J.

so is sufficiently certain. If that is so, the court will keep the parties to the bargain on the basis that to allow otherwise would be to permit an abuse of process of the court.²

Clause 9.3 of the site agreements

[14] Clause 9 of the site agreements is headed *Disputes*. Clauses 9.1 and 9.2 of the site agreements provide for the establishment of a disputes committee to mediate and decide upon disputes between residents, or between the defendant and a resident.

[15] Clause 9.3 is the clause relied upon by the defendants in these applications. Clause 9.3 provides:

NOTWITHSTANDING the provisions of paragraphs 9.1 and 9.2 any complaint or dispute between the Foundation [the defendant] and the Grantee [the plaintiffs] in relation to this Site Agreement shall be referred to the determination of an independent person appointed by the scheme supervisor in terms of the Securities Act (Retirement Villages) Exemption Notice 1999 whose decision in respect of that complaint of dispute shall be binding on the Foundation and the Grantee.

[16] It is acknowledged that the disputes that are the subject these proceedings fall within the scope of clause 9.3. They are a dispute between the defendant and the plaintiffs in respect of the site agreement in each case.

[17] The exemption notice exempts retirement villages from a number of the provisions of the Securities Act 1978, but subject to certain conditions. The site agreements between the plaintiffs and the defendant were securities that were issued under the exemption notice. One of the conditions that excludes a number of the provisions of the Securities Act 1978 in respect of retirement villages, is a condition that requires the establishment of a procedure for the determination of complaints or disputes by an organisation or an individual.

[18] Clause 6 of the exemption notice provides an exemption from s 37(2) of the Securities Act 1978. That deals with void irregular allotments. Clause 6(2)(c) provides that:

² *Braid Motors Ltd v Scott* [2001] 15 PRNZ 508 (HC) at [33]; *Exapl*, above n 1.

(2) The exemption is subject to the conditions that–

...

(c) That–

- (i) The specified issuer has established and undertakes to maintain a procedure that involves the determination by the New Zealand Retirement Villages Association or the Insurance and Savings Ombudsman or an independent person appointed by the scheme supervisor of any complaint or dispute between the specified issuer and a security holder or the liable entity and a security holder in relation to the specified security; and
- (ii) The specified issuer and the liable entity are bound by the decision of that Association, Ombudsman, or independent person in respect of that complaint or dispute;

[19] Clause 7 of the exemption notice provides an exemption from s 37A(1)(c) of the Securities Act 1978 which deals again with voidable irregular allotments. Clause 7(2)(a) provides:

(2) The exemption is subject to the conditions–

(a) That–

- (i) The specified issuer has established and undertakes to maintain a procedure that involves the determination by the New Zealand Retirement Villages Association or the Insurance and Savings Ombudsman or an independent person appointed by the scheme supervisor of any complaint or dispute between the specified issuer and a security holder or the liable entity and a security holder in relation to the specified security; and
- (ii) The specified issuer and the liable entity are bound by the decision of that Association, Ombudsman, or independent person in respect of that complaint or dispute; and
- (iii) The deed of supervision contains the provisions set out in Schedule 1;

[20] Clauses 2(h) and (i) of Schedule 1 of the Exemption Notice provide as follows:

2 Duties and liabilities of specified issuer

The specified issuer must–

...

- (h) Establish and maintain a procedure that involves the determination by the New Zealand Retirement Villages Association or the Insurance and Savings Ombudsman or an independent person appointed by the scheme supervisor of any complaint or dispute between the specified issuer and a security holder or the liable entity and a security holder in relation to the specified security; and
- (i) Be bound by the determination of that Association, Ombudsman, or independent person in respect of any such complaint or dispute.

[21] The exemption notice clauses to which reference has been made require that the defendant had to place a procedure for determination of complaints or disputes in any site agreement that it proposed to be executed by people in the position of the plaintiffs, and itself.

[22] Clause 9.3 refers to a scheme supervisor. It is defined by clause 2 of the exemption notice as follows:

Scheme supervisor means a statutory supervisor or a trustee, as the case may be.

A statutory supervisor is defined by s 2 of the Securities Act 1978 as follows:

Statutory supervisor means a person appointed as a statutory supervisor in respect of participatory securities for the purposes of, and in accordance with, this Act:

[23] The exemption notice was extended on several occasions but ultimately expired on 31 January 2008. By that time, the Retirement Villages Act 2003 was in force.

[24] The appointment of the statutory supervisor was required by virtue of the provisions of the Securities Act 1978. The initial appointment was The New Zealand Guardian Trust Ltd by virtue of a deed of participation that is dated 17 January 2000. By a deed of supervision dated 12 November 2007, Covenant Trustee Company Ltd was appointed statutory supervisor. That appointment was made pursuant to the provisions of the Retirement Villages Act 2003.

[25] As already mentioned, the Securities Act (Retirement Villages) Exemption Notice 1999 exempted issuers of securities that confer rights to accommodation and services in respect of retirement villages from certain sections of the Securities Act 1978. The sections that were excluded include ss 37(2) and 37A(1)(c), so long as a scheme supervisor had established a binding dispute resolution procedure as between the issuer, in this case the defendant, and the security holder, in this case the plaintiffs.

[26] Mr Hudson's submission is that because the notice expired on 31 January 2008 no dispute can be referred in accordance with the terms of clause 9.3 as its procedural mechanisms rest on a legal authority that has been revoked. His submission is that at the time that this dispute arose, there was no scheme supervisor whose appointment had been made pursuant to the provisions of the Securities Act 1978.

[27] The above leads to the position that if clause 9.3 is unenforceable, the dispute resolution procedure that remains is that provided by clause 9.2. That procedure is permissive. It cannot preclude the parties from seeking relief from the High Court. The exemption notice defined *scheme supervisor* as "a statutory supervisor or trustee, as the case may be". Statutory supervisor is defined in the Securities Act 1978 as:

a person appointed as a statutory supervisor in respect of participatory securities for the purposes of, and in accordance with, this Act:

The appointment of a statutory supervisor is made in terms of s 33 of the Securities Act 1978.

[28] I have mentioned that the defendant, by the deed of participation dated 17 January 2000, appointed The New Zealand Guardian Trust Company Ltd as the statutory supervisor. That company remained the statutory supervisor until 12 November 2007. Covenant Security Company Ltd was then appointed pursuant to the provisions of the Retirement Villages Act 2003.

[29] Because of the expiry of the exemption notice, as well as the way the appointment of Covenant Security Company Ltd was effected, Mr Hudson submitted that Covenant Security Company Ltd is not the scheme supervisor referred to in clause 9.3 of the site agreement. He therefore submitted that no dispute can be referred in accordance with the terms of clause 9.3. That is because, he submitted, the procedural mechanisms rest on a legal authority that has been revoked.

[30] As counsel developed their submissions I inquired of them as to whether consideration had been given to s 17 of the Interpretation Act 1999. Both said they had not. They sought time to consider the position. They agreed that I should order the filing and service of further submissions on the matter and that I should then proceed to judgment without a further oral hearing. I have proceeded on that basis. Counsel's submissions have been filed in accordance with the agreed arrangements.

[31] Section 17 of the Interpretation Act 1999 provides:

Effect of repeal generally

- (1) The repeal of an enactment does not affect—
 - (a) The validity, invalidity, effect, or consequences of anything done or suffered:
 - (b) An existing right, interest, title, immunity, or duty:
 - (c) An existing status or capacity:
 - (d) An amendment made by the enactment to another enactment:
 - (e) The previous operation of the enactment or anything done or suffered under it.
- (2) The repeal of an enactment does not revive—
 - (a) An enactment that has been repealed or a rule of law that has been abolished:
 - (b) Any other thing that is not in force or existing at the time the repeal takes effect.

[32] Mr Hudson carried out a careful analysis as to whether the section applies to the exemption notice. That analysis is accepted by Mr Gudsell. In summary, as Mr Gudsell put it in his submissions:

- (a) The exemption notice is an “enactment”;
- (b) The expiration of the exemption notice was the “repeal” of an enactment;
- (c) The defendant’s duty to establish and maintain a procedure that involved the determination by an independent person appointed by the scheme supervisor of any complaint or dispute between the specified issuer and the security holder was an existing “duty” for the purposes of s 17(1)(b) of the Interpretation Act 1999; and
- (d) The duty was saved by s 17.

[33] Mr Gudsell further submitted that s 17(1)(a) and (e) of the Interpretation Act 1999 applied. He submitted that the site agreements between the plaintiffs and the defendant contractually incorporated in clause 9.3 the requirements of the exemption notice. In that respect, the site agreements are things already done under the exemption notice. Mr Gudsell submitted that just as an invalid contract cannot be validated by the repeal of an enactment, a valid contract cannot be invalidated by the repeal of an enactment.³ In particular, he submitted that that is clear from the wording of s 17(1)(a). He noted that at the date of the contracts, that is the site agreements, the exemption notice required the dispute resolution procedure provided under clause 9.3 of the site agreements. I accept those submissions as correct.

[34] He further submitted that s 17(1)(c) applies, with the result that the repeal of the exemption notice does not affect the existing status or capacity of the defendant, that is, it being exempt from the provisions of the Securities Act 1978. I accept that proposition as correct.

[35] The question that arises then is, whether or not there is a scheme supervisor in terms of s 9.3 who can appoint an independent person to determine the dispute.

³ *Brannigan v Brannigan* [1954] NZLR 858; *Todd v Parker* [1953] NZLR 39; *Innes v Piako County Council* [1924] NZLR 236 (CA).

[36] There are, of course, only two possibilities. The first is the original scheme supervisor, The New Zealand Guardian Trust Ltd. The second is Covenant Trustee Company Ltd.

[37] The New Zealand Guardian Trust Ltd was appointed pursuant to the deed of participation dated 17 January 2000. It was the scheme supervisor in terms of the Securities Act (Retirement Villages) Exemption Notice 1999. The deed of participation was required by the exemption notice.

[38] Covenant Trustee Company Ltd was appointed pursuant to the deed of supervision dated 12 November 2007 as statutory supervisor. That was a requirement of the Retirement Villages Act 2003. Between 1 May 2007 and 30 September 2011, s 38 of that Act provided as follows:

38 Operator must appoint statutory supervisor

- (1) The operator of a retirement village must appoint a statutory supervisor [who holds a licence under the Securities Trustees and Statutory Supervisors Act 2011 that covers the village], unless the operator has obtained an exemption under section 41.
- (2) The statutory supervisor must be appointed under a deed of supervision between the operator and the statutory supervisor, on the terms and conditions set out in that document.
- (3) A deed of supervision must contain all information and other matters or provisions that are required to be included in it by regulations made under this Act.
- (4) *Repealed.*

[39] The deed of supervision dated 12 November 2007 contains cl 29 which provided as follows:

This deed amends by way of replacement the Original Deed of Participation, provided that any term in the Original Deed of Participation which, in the opinion of the Statutory Supervisor, is materially more favourable to Residents shall be deemed to be incorporated in this Deed and shall prevail over the provisions of this Deed, but only in relation to the Residents of the Village(s) in occupation prior to the date of this Deed. The parties agree that all references to the Original Deed of Participation in any Security given by the Operator in favour of the Statutory Supervisor and securing the performance of the Operator's obligations under the Original Deed of Participation shall be deemed to include, and to secure the performance of the Operator's obligations under, this Deed.

The deed of supervision defines in cl 1.1 the original deed of participation dated 17 January 2000 as the deed of participation.

[40] Clause 29 makes it plain that the scheme supervisor appointed in terms of the exemption notice was replaced by the statutory supervisor in terms of the Retirement Villages Act 2003.

[41] The position is further reinforced by a provision in a document, a deed of retirement and accession to deed of participation. That was entered into between the defendant, The New Zealand Guardian Trust Company Ltd and Covenant Trustee Company Ltd. Clauses 3.1 and 3.2 provide:

- 3.1 In exercise of the powers vested in it by the Deed of Participation, the Perry Foundation hereby appoints Covenant to be a Statutory Supervisor of the Scheme in place of NZGT, Covenant being a person approved by the Registrar of Retirement Villages, to act as a Statutory Supervisor in accordance with section 37 of the Retirement Villages Act 2003.
- 3.2 With effect from the Transfer Date, Covenant accepts appointment as the Statutory Supervisor for the Scheme and agrees to carry out all the duties and responsibilities of the Statutory Supervisor under the Deed of Participation and the duties and responsibilities of a Statutory Supervisor as set out in the Retirement Villages Act 2003 and its regulations.

[42] The reference to Perry Foundation is a reference to the defendant. A reference to Covenant is a reference to Covenant Trustee Company Ltd. The reference to NZGT is a reference to The New Zealand Guardian Trust Company Ltd.

[43] Clause 3.2 provides therefore that Guardian Trust Company Ltd's duties and responsibilities under the deed of participation were assumed by Covenant Trustee Company Ltd. That includes the scheme supervisor's duty and obligation to appoint an independent person to determine the complaint or dispute in terms of cl 9.3.

[44] Mr Gudsell submitted that it is irrelevant that Covenant Trustee Company Ltd was not appointed under the Securities Act 1978, because cl 29 of the deed of supervision provides a clear link as to the status of Covenant Trustee Company Ltd, that is, the replacement for New Zealand Guardian Trust Company Ltd. That

position is confirmed by the Deed of Retirement and Accession to a Deed of Participation. I accept as correct that submission. I am satisfied that the scheme supervisor is clearly identified for the purposes of cl 9.3. I further accept Mr Gudsell's submission that cl 9.3 cannot be invalidated because there is no equivalent to cl 5.6(h) of the deed of participation in the deed of supervision. The deed of participation contained, at cl 5.6(h) the following:

5.6(h) Establish and maintain a procedure that involves the determination by the New Zealand Retirement Villages Association or the Insurance and Savings Ombudsman and or an independent person appointed by the scheme supervisor of any complaint or dispute between the specified issuer and a security holder or the liable entity and a security holder in relation to any specified security;

(i) Be bound by the determination of the Association Ombudsman or independent person in respect of such complaint or dispute.

[45] I accept Mr Gudsell's submission that there is no question or need to incorporate the terms of the deed of participation into the deed of supervision. It is simply a matter of interpreting cl 9.3 of the site agreement. The result is that cl 9.3 of the site agreement remains effective. Covenant Trustee Company Ltd as the replacement for the original scheme supervisor can appoint an independent person to resolve the dispute between the parties.

[46] Mr Gudsell submitted an alternative, namely, that cl 9.3 could be interpreted as requiring appointment by the scheme supervisor in place at the time the site agreements were entered into. In that way, he said, cl 9.3 would also remain effective.

[47] Counsel's submission raised a possibility of there being a frustrating event with the result that the provisions of cl 9.3 were not enforceable. I do not accept that submission. Here the parties agreed that the dispute that is the subject of this proceeding would be resolved in terms of cl 9.3. As I have found, the current statutory supervisor can appoint an independent person to resolve the dispute as provided for by the exemption notice. All that is required on the part of the scheme supervisor is the appointment of an independent person.

[48] I therefore rule against Mr Hudson's first ground in opposition.

[49] Mr Hudson advanced a second ground. He submitted that s 11 of the Arbitration Act 1996 has the effect that cl 9.3 of the site agreement is unenforceable against the plaintiffs.

[50] Section 11 of the Arbitration Act 1996 provides:

11 Consumer arbitration agreements

(1) Where—

- (a) A contract contains an arbitration agreement; and
- (b) A person enters into that contract as a consumer,—

the arbitration agreement is enforceable against the consumer only if—

- (c) the consumer, by separate written agreement entered into by the consumer and the other party to the contract after a dispute has arisen out of, or in relation to, that contract, certifies that, having read and understood the arbitration agreement, the consumer agrees to be bound by it; and
- (d) The separate written agreement referred to in paragraph (c) discloses, if it is the case, the fact that all or any of the provisions of Schedule 2 do not apply to the arbitration agreement.

(2) For the purposes of this section, a person enters into a contract as a consumer if—

(aa) that person is an individual; and

- (a) That person enters into the contract otherwise than in trade; and
- (b) The other party to the contract enters into that contract in trade.

(3) Subsection (1) applies to every contract containing an arbitration agreement entered into in New Zealand notwithstanding a provision in the contract to the effect that the contract is governed by a law other than New Zealand law.

(4) For the purposes of article 4 of Schedule 1, subsection (1) shall be treated as if it were a requirement of the arbitration agreement.

(5) Unless a party who is a consumer has, under article 4 of Schedule 1, waived the right to object to non-compliance with subsection (1), an arbitration agreement which is not enforceable by reason of non-compliance with subsection (1) shall be treated as inoperative for the purposes of article 8(1) of Schedule 1 and as not valid under the law of New Zealand for the purposes of articles 16(1), 34(2)(a)(i), and 36(1)(a)(i) of Schedule 1.

- (6) Nothing in this section applies to—
- (a) a lease; or
 - (b) a contract of insurance to which section 8 of the Insurance Law Reform Act 1977 applies.

[51] Section 11 does not apply by its own definition to a contract that contains an arbitration agreement that is a lease, by the operation of s 11(6).

[52] This issue requires a determination of whether the right granted under the site agreement to the plaintiffs contains a right of exclusive possession. A right of exclusive possession is one of the prerequisites for a court to find that a lease, as opposed to licence, is in existence.⁴

[53] Counsel referred to the judgment of the Court of Appeal in *Fatac Ltd (in liq) v Commissioner of Inland Revenue*.⁵ The judgment of the Court was delivered by Fisher J. For the purposes of this case, the judgment contains a helpful summary of the distinctions between a tenancy and a licence in New Zealand, where the Court said:

Conclusions as to the tenancy/licence distinction in New Zealand

[66] Our conclusion is that in this country, as elsewhere, the fundamental distinction between a tenant and a licensee is that the former alone has the right to exclusive possession. For exclusive possession to be meaningful there must be a minimum finite term, whether fixed or periodic. Rent is an important indicator of an intention to be legally bound but its absence does not per se negate a tenancy.

[67] The terminology employed by the parties in describing their relationship will be immaterial unless it helps in deciding whether there is a right to exclusive possession. Restrictions upon the use to which the occupier may put the land are not inconsistent with exclusive possession. On the other hand there will be no tenancy where there is no intention to enter into a legally binding relationship or where a tenancy is precluded by statute.

[68] There will similarly be no tenancy where the occupier's right to possession may be terminated for reasons extraneous to the occupation of the land. Examples are occupation pursuant to an employment relationship, a purchaser in occupation, a mortgagee in possession, occupation pursuant to

⁴ Hinde Campbell & Twist *Principles of Real Property* (LexisNexis, Wellington, 2007) at [11.004].

⁵ *Fatac Ltd (in liq) v Commissioner of Inland Revenue* [2002] 3 NZLR 648 at [66]-[68].

the holding of an office, and exclusive occupation of an area that is small in proportion to the total area affected by the agreement. In cases of this kind questions of degree will be unavoidable but the answer is not to be found in the perceived intention of the parties as to the legal classification or dominant purpose of their transaction.

[54] Counsel also referred me to the Court of Appeal in *Waimiha Sawmilling Company Ltd (in liquidation) v Howe*.⁶ In that case, a contractual right to enter in order to remove millable timber was held to involve a mere licence.

[55] Mr Hudson submitted that because there were rights beyond those enjoyed by the occupation of the unit itself, the plaintiffs did not have exclusive possession and therefore their interest could not be classified as a lease. I do not accept that submission. The site agreement is clear in that it gives exclusive possession to each of the plaintiffs until expiry in respect of the relevant unit. There is provision for a payment, albeit an upfront payment. As the passage from *Fatac Ltd (in liq) v Commissioner of Inland Revenue* discloses, rent is an important indicator, but even its total absence is not per se sufficient to negative a tenancy.⁷ I put to counsel the analogy of commercial space rented in a high rise building where the tenant has exclusive rights of possession of the office, with entitlement to enter into common areas. Those arrangements are traditionally referred to as leases and, in reality, are analogous to the situation which is before the Court in these proceedings. I therefore conclude that the site agreements are agreements to lease the land, and are exempt from s 11 of the Arbitration Act 1996.

[56] This finding makes it unnecessary to determine whether the provision contained in the site agreements are an arbitration agreement at all.

Conclusion

[57] I conclude that the dispute resolution procedure set out in cl 9.3 of the site agreement applies. This then is a case where the parties have contractually bound themselves to an alternative means of resolving their dispute. That process is sufficiently certain. The parties should therefore be kept to the bargain. They should

⁶ *Waimiha Sawmilling Company Ltd (in liq) v Howe* [1920] NZLR 681 (CA).

⁷ *Fatac*, above n 5.

not be allowed to proceed with this proceeding as to do so would be an abuse of the process of the court.

Orders

[58] Accordingly I order that the two proceedings be stayed.

Costs

[59] Counsel were agreed that the appropriate category and band for this case is 2B. I order that the plaintiffs pay costs based on 2B together with disbursements as fixed by the Registrar.

JA Faire