ALTERNATIVE DISPUTE RESOLUTION

How do you start a relationship property arbitration?

BY **ROBERT FISHER QC**

In an earlier article I discussed the circumstances in which an arbitration might be the best way of resolving a dispute (*LawTalk* 930, July 2019, page 34). For those who opt for arbitration, two preliminary steps are required – one, an agreement to arbitrate, and two, choice of an arbitrator. This is true of all arbitrations. This article concentrates on relationship property as the example.

Step one: agreement to arbitrate

By far the most important step is the first, an agreement to arbitrate. In a relationship property context, the agreement is likely to come from one of three sources:

- An arbitration clause in a contracting out agreement.
- An arbitration clause in a compromise agreement.
- An arbitration submission agreement.

Arbitration clause in a contracting out agreement

Contracting out agreements are normally entered into early in a relationship when the atmosphere is cordial. The happy couple agree that, however unlikely, if they did separate they would like their property to be divided in a certain way. The result is recorded in a contracting out agreement under section 21 of the Property (Relationships) Act 1976 (PRA).

In the contracting out agreement a well-advised couple will go on to specify how a dispute is to be resolved if one ever arose. Usually they would rather resolve it quickly, informally, and in private. This can be achieved by including an arbitration clause along the following lines:

> "If any dispute arises between the parties in connection with this agreement, or the property of either or both of them, the dispute will be determined by arbitration."

The clause may go on to provide a formula for the appointment of an arbitrator, or invoke the rules of a named dispute resolution institution, but need not do so.

Compromise agreements

Compromise agreements under section 21A of the PRA resolve property disputes that have already arisen. The atmosphere in which they are negotiated will be very different from the one that prevails for contracting out agreements.

Once a couple has separated, the aim is to enter into a comprehensive settlement which leaves nothing further for discussion. Frequently, however, fresh arguments break out after the agreement is signed. There may be unforeseen tax consequences; the family accountant may face conflicting instructions over current accounts; debts may have been overlooked; the occupant of a house may refuse to cooperate over its agreed sale; or the agreement may fail to deal with chattels.

To cater for potential problems of that kind, some practitioners include an arbitration clause in the compromise agreement. The clause is usually along the following lines:

> "If any dispute arises in connection with the implementation of this agreement, or in connection with any property or debts of either or both of them not addressed by this agreement, the dispute will be determined by arbitration."

If such a clause is included, an arbitrator will usually be able to resolve post-agreement issues on the papers following email correspondence with the parties.

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Arbitration submission agreements

A third possibility is that the couple have an unresolved property dispute

without any prior agreement to arbitrate. In that situation they can enter into a fresh agreement referring the dispute to arbitration. The agreement takes the form of a compromise agreement under s 21A of the PRA. Instead of specifying the ultimate property rights of each party in the usual way the agreement submits that question to an arbitrator. The critical clause will be along the following lines:

> "All property and financial matters outstanding between the parties are submitted to arbitration."

An arbitration can spring from any one of those three forms of agreement. Whichever is chosen, such agreements must comply with the standard formalities imposed by section 21F of the PRA. However, it is not necessary to choose an arbitrator before the agreement is signed.

Step two: choose the arbitrator

Ideally the parties will be able to agree on the choice of arbitrator. If not, the principal options are:

- Discuss with the other party a mutually acceptable choice drawn from a list of qualified family law arbitrators maintained by the Arbitrators and Mediators Institute of NZ (AMINZ).
- Discuss with the other party the possibility of voluntarily delegating the choice of arbitrator to AMINZ.
- If there is already a binding agreement to arbitrate, request AMINZ to impose an appointment on a mandatory basis under articles 11(3)(b) and (4) to (8) of Schedule 1 to the Arbitration Act 1996. The request can be made unilaterally. AMINZ is the body appointed for this purpose pursuant to section 6A of that Act.
- Agree to have the dispute administered by one of the dispute resolution institutions available in New Zealand. Among other things the institution will take care of the choice of arbitrator. In an earlier article in this series I discussed the institutions which currently provide services of that kind.

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Once appointed, the arbitrator will be able to take control of the process. The next step will normally be a preliminary conference with the parties and their lawyers. In exceptional cases the dispute will be governed by a set of rules which make a preliminary conference unnecessary. ■

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