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

**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CIV-2017-404-002165**
**[2017] NZHC 2589**

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| BETWEEN | CLARK ROAD DEVELOPMENTS LIMITED<br>Applicant |
| AND | GRANDE MEADOW DEVELOPMENTS LIMITED<br>First Respondent |
| | NEW ZEALAND GENERAL REAL ESTATE LIMITED<br>Second Respondent |
| | KINGSTONE PROPERTY LIMITED<br>Third Respondent |
| | CLARK ROAD LANDOWNERS GROUP (ICSA No 1) LIMITED<br>Fourth Respondent |
| | CLARK ROAD LANDOWNERS GROUP (ICSA No 13) LIMITED<br>Fifth Respondent |
| | CLARK ROAD LANDOWNERS GROUP (ICSA No 8) LIMITED<br>Sixth Respondent |

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| Hearing: | 19 October 2017 |
| Counsel: | KF Gould for Plaintiff<br>JD McBride for First, Second and Third Defendants |
| Judgment: | 24 October 2017 |

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**JUDGMENT OF DOWNS J**

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*This judgment was delivered by me on Tuesday, 24 October 2017 at 4 pm pursuant to r 11.5 of the High Court Rules.*
*Registrar/Deputy Registrar*

**The case**

[1] Clark Road Developments Ltd (Clark Road) seeks an interim mandatory injunction requiring the first, second and third defendants to pay it almost $3 million. The sum is said to be payable by virtue of a development cooperation agreement (the DCA) between Clark Road and the defendants. Under the DCA, disputes must be resolved by arbitration, save for "urgent interlocutory relief". The defendants contend the application is a claim for damages masquerading as one for urgent interlocutory relief.

[2] I heard the application as Duty Judge.

**Background**

[3] Clark Road is a property development company. So too the first, second and third defendants. All four companies are subdividing land at Hobsonville Point into residential sections. On 5 August 2015 the development companies entered the DCA. The purpose of the agreement is "to provide a structure and procedure to enable the owners to undertake the design, construction and commissioning of infrastructure which will enable further subdivision and development of each Owner's land".

[4] Under the DCA, the parties must enter various infrastructure cost sharing agreements. These are defined in the DCA as separate but collateral agreements between the relevant owners in relation to the design and installation of specific infrastructure. Each infrastructure cost sharing agreement is to provide for incorporation of a separate company for the purpose of representing the owners who are party to the particular agreement.

[5] The fourth defendant is a company formed in respect of "Wastewater infrastructure". The fifth defendant is a company formed in respect of "Midgley Road infrastructure". The sixth defendant is the central co-ordinating entity formed for the purpose of facilitating infrastructure construction. These defendants took no role in the application.

[6] The parties commenced negotiations in November 2015 with a view to drafting and executing the various infrastructure cost sharing agreements. While draft agreements have been produced, none has been signed. Substantial work has, however, been completed in respect of three aspects of infrastructure: wastewater, stormwater and Midgley Road. But contractual arrangements in relation to these works have given rise to disharmony.

[7] It was anticipated the companies incorporated to oversee these works would contract with construction companies, who in turn would complete them. However, on 27 April 2016 Clark Road independently contracted with Rohit Civil & Infrastructure Ltd to complete these works. According to Clark Road, Auckland Council requirements made it impracticable for the works to be undertaken by the infrastructure cost sharing companies. The defendants became and remain concerned at Clark Road's assertion the works must be carried out through a construction contract with Clark Road's contractor. In July 2016 the first and second defendants issued a notice of dispute. Negotiations followed.

[8] On 10 April 2017 the first and second defendants issued a notice of mediation. Clark Road says as a result of the mediation, the first, second and third defendants agreed to pay it the sum it seeks by this application. The defendants refute this; they say there was no such agreement.[1]

[9] On 13 July 2017 Stellar Projects Ltd, the supervising engineer under the DCA, certified the sum sought by Clark Road. It sent the certificate to the first, second and third defendants. On 10 August 2017 the engineer engaged by the defendants certified the costs as "fair and reasonable".

**The claim**

[10] Clark Road contends the first to third defendants have breached the DCA by unreasonably and arbitrarily delaying the execution of the cost sharing agreements.

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[1] Under the DCA mediation is to be without prejudice—"no documents brought into existence for the purpose of the mediation process will be called into evidence in any subsequent litigation by any party".

And, failed to pay the sums certified as fair and reasonable. Clark Road identifies the following clauses in the DCA:

> 2.2 To help achieve the above objectives described in clause 2.1 above each Owner covenants in favour of all other Owners to cooperate for the purpose of obtaining installation and commissioning of the infrastructure, such cooperation to include by way of example and not limitation;
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> …
>
> (b) Performing promptly and completely that party's obligation under an ICSA;
>
> …
>
> (f) Engaging in the negotiating, drafting and execution of each ICSA to which that Owner is a party in good faith, reasonably and promptly.
>
> 2.3 The Owners must enter into separate ICSA's for each item of infrastructure from which those Owners' developments benefit as determined and as required by the Company [being the sixth defendant]. …

[11] Clark Road claims against the first defendant for $1,444,959.25; against the second defendant for $1,072,847.21; and against the third defendant for $422,132.75. GST is also sought.

**Analysis**

[12] The application must fail for four reasons, three of which are interrelated.

[13] First, the relief sought is incompatible with interim relief as provided for by the Arbitration Act 1996. To elaborate, the DCA requires the parties to submit disputes in connection with the DCA to arbitration, which is to be "conducted in accordance with the Arbitration Act 1996".[2] Clause 9.5 of the DCA provides:

> An owner may not issue legal proceedings (other than for urgent interlocutory relief) in respect of any Dispute.

[14] Mr Gould submitted cl 9.5 was "free-standing", so this Court's jurisdiction to grant interim relief was untrammelled by the Arbitration Act. I disagree.

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2 DCA, cl 9.43.

[15] Section 6(1) of the Arbitration Act provides if the place of arbitration is, or would be, in New Zealand, Schedule 1 of that Act applies. Article 5 of that Schedule says, "In matters governed by this Schedule, no court shall intervene except where so provided in this Schedule". Chapter 4A of the Schedule provides for interim measures as set out in Article 17–17B. Article 17 defines an interim measure as a temporary measure (whether or not in the form of an award) by which a party is required, at any time before an award is made in relation to a dispute, to do all or any of the following:

> (a) maintain or restore the status quo pending the determination of the dispute:
>
> (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings:
>
> (c) provide a means of preserving assets out of which a subsequent award may be satisfied:
>
> (d) preserve evidence that may be relevant and material to the resolution of the dispute:
>
> (e) give security for costs

[16] Article 17B identifies conditions for the grant of an interim measure:

> (1) If an interim measure of a kind described in subparagraph (a), (b), or (c) of the definition of that term in article 17 is requested, the applicant must satisfy the arbitral tribunal that—
>
> > (a) harm not adequately reparable by an award of damages is likely to result if the measure is not granted; and
> >
> > (b) the harm substantially outweighs the harm that is likely to result to the respondent if the measure is granted; and
> >
> > (c) there is a reasonable possibility that the applicant will succeed on the merits of the claim.
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> (2) If an interim measure of a kind described in subparagraph (d) of the definition of that term in article 17 is requested, the applicant must satisfy the arbitral tribunal of the matters specified in paragraph (1)(a) to (c), but only to the extent that the arbitral tribunal considers appropriate.
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> (3) If an interim measure of a kind described in subparagraph (e) of the definition of that term in article 17 is requested, the applicant must satisfy the arbitral tribunal that the applicant will be able to pay the

costs of the respondent if the applicant is unsuccessful on the merits of the claim.

(4) A determination by the arbitral tribunal on the matter specified in paragraph (1)(c) does not affect its discretion to make any subsequent determination.

[17] It follows cl 9.5 of the DCA must be read as confining "urgent interlocutory relief" to interim measures as defined by and provided for Schedule 1 of the Arbitration Act. This Court's jurisdiction is qualified accordingly. None of this is unorthodox, as to which see *Carr v Allan*[3] and *Safe Kids in Daily Supervision Ltd v McNeill*.[4]

[18] This being so, the relief sought by Clark Road is incompatible with the Act because Article 17B (of Schedule 1 to the Act) requires the Arbitral Tribunal, or this Court, to, among other things, be satisfied the harm "is not adequately reparable by an award of damages". However, what is sought in this case is an award of damages: the sum allegedly owing under the DCA.

[19] Second, the application is brought on the basis the first to third defendants have no arguable defence to the action. As Mr Gould observes, even the defendants' engineer has certified the works have been completed, and the underlying sums fair and reasonable. However, the Supreme Court has held providing a dispute exists referable to arbitration, summary judgment is unavailable to a party otherwise governed by arbitration as a dispute resolution mechanism.[5] It would be odd if Clark Road could achieve by way of interim measure relief otherwise available only through summary judgment when, as observed, summary judgment is unavailable in this context.

[20] Moreover, it is clear a dispute exists in this case referable to arbitration, for, since at least July 2016, the first and second defendants have contested Clark Road's decision to complete developments independently of cost sharing agreement companies, hence exposing the defendants to risk and cost over which they have little if any control. Negotiations have followed. And failed.

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3 *Carr v Allan* [2014] NZSC 75, [2014] 1 NZLR 792.
4 *Safekids v McNeill* [2012] 1 NZLR 714.
5 *Zurich Australian Insurance Ltd t/a Zurich New Zealand v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383.

[21] Third, arbitration is the appropriate mechanism to obtain relief. It is, after all, the method of dispute resolution chosen by the parties. In the absence of circumstances calling for interim relief, this Court's intervention is undesirable.

[22] Fourth, even if the case is examined free from the prism of arbitration, interim mandatory injunctions for the payment of money are at best rare. And, require special circumstances. A lengthy extract from Fisher J's decision in *Telecom New Zealand Ltd v Clear Communications Ltd* deserves citation:[6]

> The particular form of mandatory injunction sought here is one which would require the defendant to pay regular sums of money pending a trial at which the defendant's liability to make the payments would be finally determined Counsel were unable to find in this or other jurisdictions any case in which such payments had been ordered. In the only located decision where the issue was addressed, *Soft-Tech International Pty Ltd 1, Ball (1990)* 3 PRNZ 683, such an injunction was refused, Eichelbaum CJ commenting (p 684):
>
> > "Mandatory injunctions are relatively uncommon, interim mandatory injunctions are rare indeed, and interim mandatory injunctions having the effect of a final order and involving the payment of a sum of money which normally would be described as a debt, in my experience are completely novel."
>
> I respectfully agree. I do not doubt the jurisdiction for such an order but it must be rare that it could be justified on the facts, given (i) other avenues for preserving the security of the plaintiffs ultimate judgment (principally charging orders and Mareva injunctions), (ii) the essentially fungible nature of money, (iii) the opportunity for most plaintiffs to borrow elsewhere pending judgment, and (iv) the jurisdiction to award interest under the relevant instrument or under s 87 of the Judicature Act 1908.

[23] Mr Gould submits this is one of those rare cases in which an interim mandatory injunction for the payment of money is appropriate:

(a) The parties have been in negotiation to settle the final form of the cost sharing agreements since November 2015.

(b) Clark Road has, through its own resources, undertaken infrastructure works for the benefit of the defendants in the combined sum of $2,939,939.01 (plus GST) without payment from them.

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6 *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* (1997) 6 NZBLC 102,325.

(c) It was allegedly agreed at the mediation on 15 May 2017 the first to third defendants would pay Clark Road before 5 pm, 19 May 2017.

(d) Despite the final form of the cost sharing agreements being forwarded to the first to third defendants' solicitors, there has been no reply and no further negotiation.

(e) The supervising engineer and defendants' own engineer have certified the amounts as payable.

(f) The first to third defendants' financial position has not been disclosed to the Court. Clark Road is worried about their ability to pay, and apprehends their own engineer has not been paid.

(g) The works are substantially complete.

(h) The reason advanced for non-payment—that relevant agreements have not been executed—is a matter in the control of the first to third defendants.

[24] With the exception of (f), these matters are more concerned with the ultimate merits rather than the balance of convenience. And authority is not in Clark Road's favour; counsel could identify only one case in which monetary payments were ordered by way of interim mandatory injunction: *Fidelity Life Assurance Company Ltd v Pilkington*.[7] There, an insurance company terminated an income protection policy on account of alleged fraud. Following interim application, the insurance company was ordered to continue making monthly payments on the basis the applicant faced financial ruin unless the payments were resumed.

[25] Here, the litigants are commercial parties who have contracted specifically to resolve disputes by mediation and arbitration. Moreover, and as Mr McBride observed, *Fidelity Life Assurance* involved an order reinstating otherwise *existing and ongoing* payments. The case is distinguishable.

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7 *Fidelity Life Assurance Company Ltd v Pilkington* [2010] NZCA 424.

**Conclusion**

[26] Clark Road seeks, under the guise of interim relief, what is essentially ultimate relief vis-à-vis the payment of money allegedly owing under contract. For the reasons above, I am not persuaded this is a rare case of the type contemplated by authority. And, the relief sought is also incompatible with the dispute resolution mechanism agreed by the parties.

[27] The application is declined.

[28] Mr McBride signalled application for indemnity costs on the basis the application was "misconceived". If costs beyond 2B are pursued, I shall receive memoranda of not more than five pages from:

(a) The first to third defendants by **Friday, 3 November 2017**;

(b) Clark Road by **Friday, 10 November 2017**.

**……..**

**Downs J**

Solicitors/Counsel:
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Burton Partners, Auckland.
KF Gould, Auckland.
JD McBride, Auckland.