IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2024-404-2221
[2025] NZHC 479

BETWEEN	ACANTHUS LIMITED Plaintiff
AND	WATERCARE SERVICES LIMITED Defendant

Hearing: 5 December 2024

Appearances: M J Tingey and J C Muggeridge for Plaintiff
W M Irving and E R Gatenby for Defendant

Judgment: 12 March 2025

JUDGMENT OF O'GORMAN J

This judgment was delivered by me on 12 March 2025 at 4 pm
pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Solicitors/Counsel:
Tompkins Wake, Auckland
M J Tingey, Auckland
Russell McVeagh, Auckland

[1] This is a hearing to determine two applications about whether a dispute must be resolved by arbitration, or alternatively whether the substantive High Court proceedings may continue.

[2] The plaintiff, Acanthus Ltd (Acanthus), is a property developer. The defendant, Watercare Services Ltd (Watercare), is a Council-controlled organisation responsible for Auckland's water and wastewater network.

[3] The parties have entered into various agreements under which Watercare agreed to provide wastewater services to a subdivision development at Red Hills Road, Massey. The first agreement entered into in 2018 (the 2018 Agreement) had a clause providing for disputes to be referred to arbitration. Subsequent agreements between the parties for the same project had different dispute resolution terms.

[4] Disputes have now arisen between the parties about the project, and Acanthus has commenced the substantive proceedings in the High Court. Watercare applied for a stay on the basis that the disputes are subject to a binding arbitration agreement and need to be resolved using that method. Watercare filed a notice of appearance objecting to the jurisdiction of the Court for the same reason.

[5] Acanthus has opposed the stay application and has applied for orders seeking to set aside the protest to jurisdiction.

Factual background

[6] On 30 November 2018, the parties entered into the 2018 Agreement. Pursuant to that agreement, Watercare agreed to provide wastewater services to Acanthus's proposed subdivision of Lot 2 DP 6627 (Land). This required the construction of the "Redhills Wastewater Network" comprising the Redhills pump station and a connecting pipeline to Acanthus's development. Part of the pipeline would cross a neighbour's property, including a 225 mm "Connecting Gravity Wastewater Pipeline"[1] (CGWP) that was to be constructed by Acanthus.

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[1] Later in the development, a near equivalent of the Connecting Gravity Wastewater Pipeline was contemplated and termed the Local Network Section. The balance of the Redhills Wastewater Network was later termed the Transmission Section.

[7] Watercare was required to use reasonable endeavours to "obtain the necessary written consent of the Neighbouring Owner pursuant to section 181(3) of the Local Government Act 2002" by 31 July 2019. There was a target date of 31 March 2020 for the CGWP to be commissioned, to coincide with the completion of the Redhills Wastewater Network and the connection of the wastewater network to the Acanthus subdivision.

[8] The pipeline was not built by the time the first titles (stage 1) of Acanthus's development were due to be issued. On 11 March 2021, Watercare and Acanthus entered into an agreement for the provision of temporary wastewater servicing. By agreements dated 9 February 2022 and 18 September 2023, this arrangement was subsequently extended to further stages of the development. The temporary wastewater services are provided by way of tankering, so the parties refer to these agreements as the "Tankering Agreements". Such services and agreements were contemplated as an "Interim Solution" under the 2018 Agreement.

[9] On 9 February 2022, Acanthus and Watercare entered into an infrastructure funding agreement (2022 Infrastructure Agreement) for the design and delivery of the Local Network Section of the pipeline, using a slightly different path compared with the CGWP in the 2018 Agreement. The agreement was conditional on Watercare obtaining the consent of the neighbouring owner. Once that condition was satisfied, the agreement required Acanthus to pay an invoice for an "Interim Contribution", then required Watercare to use reasonable endeavours to obtain all necessary resource or building consents, to develop a design for the works (in consultation with Acanthus) and to procure a works contract estimate. It then gave Acanthus 30 working days from the "Design Completion Date" to elect whether to undertake those works itself using its own contractor, or to ask Watercare to undertake the works. The same trigger required the parties to negotiate in good faith the terms of an agreement for delivery of the works.

[10] By 19 May 2023, Acanthus wrote to Watercare requesting an urgent settlement meeting to discuss Acanthus's disputes under its contracts with Watercare relating to the connection of its subdivision to the Redhills Wastewater Network. It stated that the letter comprises notice "under relevant disputes provisions within the contracts",

listing the four contracts in Part C of the letter. It gave particulars of alleged breaches (including failing to use reasonable endeavours to obtain the consent of the neighbouring owner); it quantified damages; and it requested without prejudice settlement discussions to proceed in two stages. This led to further exchanges between the parties from May to June 2023, followed by the parties entering into the 2023 Tankering Agreement (which addressed some of the concerns raised by Acanthus about wastewater for stages 5 and 6 of the subdivision). A letter dated 7 June 2023 from Acanthus noted that some of the disputes raised in the 19 May 2023 letter (alleged breaches of the reasonable endeavours obligations in the 2018 Agreement and consequent disputed liability for invoicing under the Tankering Agreements) had not been addressed in the correspondence, and that Watercare's response to those aspects was expected by 16 June 2023. However, based on the hearing bundles, the parties do not seem to have corresponded any further on those issues until August 2024.

[11] On 15 August 2024, new lawyers acting for Acanthus wrote to Watercare providing a draft statement of claim detailing two causes of action for breach of contract. Acanthus said it was willing to meet to discuss a resolution, failing which the claim would be filed in the High Court by 5 pm on 29 August 2024.

[12] On 26 August 2024, a second letter from Acanthus to Watercare recorded objections to statements made by Watercare quoted in a New Zealand Herald article.

[13] On 28 August 2024, Watercare responded refuting the claims, saying it had responded last year to Acanthus's previous solicitor and barrister. Watercare said its position "has not changed since then" — the claims were "doomed to fail" as having no realistic factual or legal basis. Watercare said it had used reasonable endeavours to obtain consent, but ultimately the pipeline alignment in the 2018 Agreement proved impossible, so a new pipeline alignment was provided for in the 2022 Infrastructure Agreement, with Watercare agreeing to use reasonable endeavours to secure consent by a conditional date of 29 April 2022. Watercare said the temporary wastewater solutions were expressly contemplated, and the rights and obligations under them (including liability to pay invoices) were "independent and separate to any obligations contained in both the 2018 Agreement and the 2022 Agreement". Watercare did not

refer to any alternative dispute resolution requirements, nor did it suggest any good faith discussions.

[14] On 30 August 2024, Acanthus filed the substantive proceeding.

[15] On 16 September 2024, Watercare wrote to Acanthus seeking agreement that the claim be referred to arbitration in accordance with cl 11 of the 2018 Agreement, with the parties agreeing to skip the pre-arbitration steps required by that clause (negotiation and mediation). Acanthus declined that proposal and the parties filed their respective interlocutory applications in this proceeding.

[16] Subsequently, after further correspondence between the parties, on 22 November 2024, Watercare and Acanthus attended a "without prejudice" meeting together. Watercare asserts that the meeting was in performance of the process obligations to negotiate in cl 11.1 of the 2018 Agreement. This characterisation is disputed by Acanthus on the grounds that good faith negotiations had commenced much earlier, it had sought to appoint a mediator in relation to the dispute under the 2018 Agreement, and only agreed to attend the 22 November 2024 meeting without prejudice to its position in this proceeding. No resolution was reached, but Acanthus says the status was that discussions were ongoing, with Watercare providing further information.

[17] Then, on 29 November 2024, Watercare wrote to Acanthus stating that it was unilaterally terminating the discussions under cl 11.1 and it provided a "notice of intention to commence arbitration" under cl 11.4.

[18] In doing so, Acanthus says that Watercare has made it clear that it will not take part in mediation despite three valid notices issued by Acanthus; and did not comply with its obligation to discuss the dispute under the 2018 Agreement in good faith. As a consequence, on 3 December 2024, Acanthus wrote to Watercare saying that it was electing to cancel the arbitration agreement, but not the remainder of the 2018 Agreement.

[19] On 4 December 2024, Acanthus filed and served an application to disclose the above "without prejudice" correspondence, and to obtain orders that it had validly cancelled the agreement to arbitrate, for breach of the requirements relating to good faith discussions, mediation, and the pre-conditions to arbitration.

Legal principles — stay in favour of arbitration

[20] The applicant for a stay (and the party protesting jurisdiction) bears the onus of establishing that the Court does not have jurisdiction to determine the proceeding.[2]

[21] If the Court dismisses the stay application (in part or in full), thereby accepting that the Court has jurisdiction to hear and determine the proceeding, then the corresponding protest to jurisdiction must be set aside.[3]

[22] The effect of sch 1, art 8(1) of the Arbitration Act 1996 is that a stay must be granted (and the parties referred to arbitration) if:[4]

(a) there is an arbitration agreement;

(b) the matter in this proceeding is subject to the arbitration agreement;

(c) the arbitration agreement is not null and void;

(d) the arbitration agreement is not inoperative;

(e) the arbitration agreement is not incapable of being performed; and

(f) there is a genuine dispute.

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2 *Huang v Huang* [2021] NZHC 2902 at [46]; aff'd [2024] NZCA 5, [2024] 2 NZLR 376.

3 A stay is effectively determined under r 5.49(6)(a) of the High Court Rules 2016. See *Pokeno Village Holdings Ltd v Pokeno Nine Ltd* [2019] NZHC 2358, (2019) 25 PRNZ 68 at [24]; *Openyd Ltd v Lawrence* [2019] NZHC 46, [2019] NZAR 451 at [46]; and *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804 at [25].

4 *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [52]. Section 6(1)(a) of the Arbitration Act 1996 provides that sch 1 applies given the place of arbitration is, or would be, in New Zealand.

[23] If the criteria are met and the request for the stay is made before the party submits its first statement on the substance of the dispute, then the granting of a stay is mandatory and not a matter of discretion.[5]

Nature of the Court's enquiry

[24] In general, the Court applies a prima facie review where there appears to be a valid arbitration agreement that applies to the dispute, so the issue of jurisdiction can be referred to the arbitral tribunal.[6]

[25] Acanthus says that a full review is required in the present circumstances, for two reasons:

(a) the matter cannot be referred as no arbitral tribunal has been appointed; and

(b) a full review is required because the delay in getting to a decision by an arbitral tribunal (assuming one were to be appointed) would have significant negative effects on the development's residents.

[26] In making this decision, I have carefully reviewed the evidence before me, assessed against a draft amended statement of claim, perhaps more in the nature of a "full review". This judgment sets out my conclusions on the issues, but I acknowledge that the arbitral tribunal may also need to make an assessment based on the claims as they evolve, and potentially on evidence that may be more extensive.

[27] I do not accept that the two factors relied on by Acanthus change the usual nature of the Court's enquiry:

(a) the matter can be referred to by an arbitral tribunal if the stay is granted; and

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5 At [52]. See also *Tamihere v Mediaworks Radio Ltd* [2014] NZHC 2082, [2014] NZAR 1113 at [18].

6 *Tavendale & Partners Ltd v Dineen* [2022] NZHC 1530 at [39], citing *Tamihere v Mediaworks Radio Ltd*, above n 5, at [20].

(b) while it is important to achieve finality on these issues as quickly as possible, this is not an application for interim relief,[7] and an arbitrator can also determine matters quickly and efficiently.

Issues for determination

[28] The key issues for determination of the two interlocutory applications are as follows:

(a) Is there an arbitration agreement, and (if so) what is its scope?

(b) Is the subject matter of this proceeding subject to the arbitration agreement?

(c) Is the arbitration agreement inoperative or incapable of being performed, because of:

(i) unfulfilled pre-conditions;

(ii) breach; and/or

(iii) cancellation?

(d) If relevant, should the Court exercise any residual discretion to stay the proceedings?

Is there an arbitration agreement?

[29] Section 2 of the Arbitration Act defines "arbitration agreement" as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".

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7 Arbitration Act, sch 1, art 9.

[30] Schedule 1, art 7(1) of the Arbitration Act states that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Schedule 1, art 16(1) provides that, for the purpose of deciding jurisdiction, an arbitration clause in a contract is a separate, independent agreement, which survives even if the primary contract is found to be null and void.[8]

[31] There are five written agreements between the parties:

(a) Agreement for the provision of wastewater services at 33–37 Red Hills Road dated 30 November 2018 (the 2018 Agreement).

(b) Agreement for the provision of temporary wastewater servicing at 33−37 Red Hills Road dated 11 March 2021 (the 2021 Tankering Agreement).

(c) Infrastructure funding agreement for the design and delivery of the Local Network Section of a pipeline to be built on the neighbouring property dated 9 February 2022 (the 2022 Infrastructure Agreement).

(d) Stage 2 and 3 agreement for the provision of temporary wastewater servicing at 33–37 Red Hills Road dated 9 February 2022 (the 2022 Tankering Agreement).

(e) Stage 5 and 6 agreement for the provision of temporary wastewater servicing at 33–37 Red Hills Road dated 18 September 2023 (the 2023 Tankering Agreement).

[32] The 2018 Agreement is the only one that has an agreement to arbitrate. The other agreements have different dispute resolution terms, raising the issue of how those discrepancies should be reconciled.

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8 See *Carr v Gallaway Cook Allan* [2014] NZSC 75, [2014] 1 NZLR 792 at [43].

2018 Agreement

[33] The 2018 Agreement provided for "Works" to be done, being works to install the CGWP as more particularly shown and described on the plans attached as sch 1. Under cl 6.1, the agreed objective was that the CGWP be completed by the target date of 31 March 2020, which was to coincide with the commissioning of the Redhills Wastewater Network (so the two could be connected). In consideration for Acanthus undertaking the Works, Watercare agreed to provide wastewater services to the property, subject to the terms of the 2018 Agreement. Once completed, cl 5.6 provided for the CGWP to be vested in Watercare.

[34] One of the issues to be addressed before the Works could be undertaken was obtaining the written consent of the neighbouring owner. The intended date for obtaining that approval was 31 July 2019. Clause 4.2 of the agreement provided:

> Watercare shall use reasonable endeavours to obtain the necessary written consent of the Neighbouring Owner pursuant to section 181(3) of the Local Government Act 2002 to the Works. Acanthus will assist where possible to obtain this written consent.

[35] Clause 6.2 of the 2018 Agreement contemplated unforeseen delays, in which case an Interim Solution of tankering would be required:

> The parties agree that should there be any unforeseen delays in the construction of both the Redhills Wastewater Network and the Connecting Gravity Wastewater Pipeline, or the procurement of the Neighbouring Owner's consent relating to the Connecting Gravity Wastewater Pipeline, then:
>
> (a) subject to compliance with clause 7, Acanthus may, as an interim measure, install sufficient wastewater storage tanks capable of enabling Watercare to truck away the wastewater (Interim Solution); and
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> (b) subject to:
>
> (i) construction of the Interim Solution in accordance with clause 7.1;
>
> (ii) compliance with any ordinary subdivision requirements;
>
> (iii) agreement being reached in accordance with clause 8.2(b); and
>
> (iv) the bond being provided in accordance with clause 9,

the necessary approvals will be granted by Watercare to enable the Certificate for each relevant stage of the development (up to the full 420 household units Acanthus intends to develop) to be issued.

[36] Clause 8 contained consultation obligations in the event such an Interim Solution was needed.

[37] Clause 11 of the 2018 Agreement provides as follows:

> **11 Dispute Resolution**
>
> 11.1 In the event that any dispute, difference or question arises between the parties out of or in connection with this agreement or its formation ("Dispute"), the parties shall enter into discussions in good faith with a view to resolving the Dispute amicably as soon as practicable. Either party may terminate these discussions at any time.
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> 11.2 If any Dispute has not been resolved within 15 Working Days of the commencement of discussions pursuant to clause 11.1, either party may give written notice of its intention to refer the Dispute to mediation.
>
> 11.3 If a request to mediate is made then the parties shall endeavour to agree on a mediator and shall submit the matter in dispute to the mediator. The mediator shall discuss the matter with the parties (separately or jointly in the discretion of the mediator) and endeavour to resolve it by their agreement. All discussions in the mediation shall be without prejudice and shall not be referred to in any later proceedings. The parties shall bear their own costs in the mediation and shall each pay half of the costs of the mediator.
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> 11.4 If:
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> (a) the Dispute has not been resolved by the discussions of the parties pursuant to clause 11.1: or
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> (b) the parties have agreed upon mediation but have been unable within 10 Working Days of such agreement to agree upon a mediator; or
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> (c) no agreement has been reached in mediation within one month of the service of the notice of mediation, or within such further time as the parties may agree;
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> then the Dispute may be referred to arbitration upon the service of a notice of intention to commence arbitration which shall be governed by the Arbitration Act 1996 except to the extent modified by this agreement.

11.5 The arbitration shall be by a single arbitrator. If the parties cannot agree upon an arbitrator within 10 Working Days of service of the notice of intention to commence arbitration either party may request the president of the Arbitrators Institute of New Zealand Inc. to appoint a sole arbitrator. Either party may request the appointment of an assessor to sit with the arbitrator but any such assessor shall have an advisory role only and shall not have the authority to make a binding decision. If the parties cannot agree upon an assessor in a reasonable time then the arbitrator may appoint an assessor.

11.6 Each party must continue to perform its obligations under this agreement as far as possible as if no Dispute had arisen pending the final resolution of any Dispute.

2021, 2022 and 2023 Tankering Agreements

[38] Given delays under the 2018 Agreement, Interim Solutions were negotiated (as contemplated by cls 6 and 8), leading to each of the Tankering Agreements. The purpose of the 2021 Tankering Agreement is explained in its background recitals:

A The Developer is developing the Land, which is owned by the Developer, and pursuant to the Original Agreement has asked Watercare to provide Temporary Wastewater Services and Permanent Wastewater Services to the Development.

B Watercare is a council controlled organisation as defined by the Local Government Act 2002 and is an Auckland water organisation as defined by section 4(1) of the Local Government (Auckland Council) Act 2009. Watercare is responsible for the supply of potable water and for the collection, treatment and disposal of wastewater.

C It is intended that the Permanent Wastewater Network will ultimately provide Permanent Wastewater Services to the Development being undertaken on the Land.

D In the meantime, the Developer intends to construct the Temporary Wastewater Solution in two stages, which will be owned by the Developer, to enable Watercare to provide Temporary Wastewater Services for up to 195 residential lots within the Initial Stages, and the Developer has agreed to lease it to Watercare at a rental of $1 per annum on the terms contained within the Lease.

E Watercare has agreed to operate the Temporary Wastewater Solution and, subject to the terms of this agreement, provide Temporary Wastewater Services to the customers connected to the Temporary Wastewater Solution until the time that the Permanent Wastewater Network is in operation.

F The Developer will be responsible for the cost of Watercare providing the Temporary Wastewater Services to the customers connected to the Temporary Wastewater Solution on the terms in this agreement.

[39] Clause 9 of the 2021 Tankering Agreement contains the following terms:

> **9 DISPUTE RESOLUTION**
>
> 9.1 If a dispute in relation to this agreement arises between Watercare and the Developer:
>
> (a) the party initiating the dispute shall provide full written particulars of the dispute to the other party; and
>
> (b) the parties shall promptly meet and, in good faith, try to resolve the dispute using informal dispute resolution techniques, which may include negotiation, mediation, independent expert appraisal, or any other dispute resolution technique that may be agreed between the parties.

[40] Clause 15.1 contained confidentiality obligations, including as to the existence and contents of the Tankering Agreement, except to the extent: (a) required by law; (b) necessary to obtain the benefit of, or carry out obligations under the agreement; and (c) that information is or becomes available in the public domain without a breach by a party of its confidentiality obligations. Clause 15.2 provided notice and consultation obligations before making any disclosure or announcement. Clause 15.3 contained another exception, for disclosure to potential purchasers of the land and their advisers.

[41] Clause 17 contained an entire agreement clause:

> **17 ENTIRE AGREEMENT**
>
> 17.1 This agreement constitutes the entire agreement of the parties relating to the subject matter of this agreement and supersedes all prior discussions, negotiations, representations, warranties, understandings and agreements between the parties relating to this agreement.

[42] The 2022 and 2023 Tankering Agreements are in equivalent terms, containing the same dispute resolution, confidentiality and entire agreement clauses as the 2021 Tankering Agreement.

2022 Infrastructure Agreement

[43] The purpose of the 2022 Infrastructure Agreement is explained in its background recitals:

A The Landowner is the registered owner of the Land and the Developer is the registered owner of the Adjoining Land.

B Watercare is an Auckland water organisation as defined by section 4(1) of the Local Government (Auckland Council) Act 2009, being responsible for the supply of potable water and for the collection, treatment and disposal of wastewater.

C The Developer has begun developing its Adjoining Land, intends to continue to develop it, and has asked Watercare to provide permanent wastewater services to it.

D To enable it to provide such wastewater services to the Adjoining Land, Watercare has identified the need for the Pipeline.

E Watercare has accepted that it shall be responsible for the delivery of Transmission Section of the Pipeline and the parties wish to enter in this agreement to set out terms upon which the Local Network Section of the Pipeline shall be designed and delivered.

F This agreement is in relation to the design and delivery of Local Network Section of the Pipeline only, with the agreement's only application to the Transmission Section of the Pipeline being the provision of access to Watercare for its construction.

[44] A condition in cl 2 addressed the requirement of obtaining consent from the landowner, Redhills Green Limited, by a conditional date of 29 April 2022:

2.1 This agreement is conditional on Watercare obtaining the written consent of the Landowner (on terms acceptable to Watercare, acting reasonably) to the Works.

2.2 Watercare shall use reasonable endeavours to satisfy the Condition as soon as reasonably practicable and no later than the Conditional Date.

2.3 If Watercare is unable to give written notice to the Developer satisfying the Condition by the Conditional Date, either party may, before the Condition is satisfied, terminate this agreement by giving written notice to the other party.

[45] Clause 9.2 of the 2022 Infrastructure Agreement contains a detailed provision about how the parties would, in good faith, use reasonable endeavours to negotiate the terms of an agreement (to be prepared by Watercare's solicitor) for the delivery of the Works. In the event of failure to reach agreement, cl 9.4 provides for a right of termination, subject to obligations in the event of dispute to provide full written particulars within a specified 20 working day period, leading to an obligation before terminating the agreement to:

> … meet and, in good faith, try to resolve the dispute using informal dispute resolution techniques, which may include negotiation, mediation, independent expert appraisal, or any other dispute resolution technique that may be agreed between the parties.

[46] Otherwise, the 2022 Infrastructure Agreement does not have any broader dispute resolution clause.

[47] The 2022 Infrastructure Agreement contains an entire agreement clause as follows:

> 15.1 This agreement constitutes the entire agreement of the parties relating to the subject matter of this agreement and supersedes all prior discussions, negotiations, representations, warranties, understandings and agreements between the parties relating to this agreement.

Analysis

[48] Clause 11.4 of the 2018 Agreement contains an agreement to arbitrate a "Dispute", which is defined in cl 11.1 as "any dispute, difference or question [that] arises between the parties out of or in connection with this agreement or its formation".

[49] New Zealand courts adopt a liberal approach to the interpretation of consensual arbitration agreements, and have endorsed Lord Hoffmann's starting point as set out in *Fiona Trust & Holding Corp v Privalov* (often referred to as the *Fiona Trust* presumption):[9]

> In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.

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9 *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] 4 All ER 951 at [13]. Approved in *HWD NZ Investment Co Ltd v Body Corporate 392418* [2022] NZHC 3472 at [46]; *McKenzie v Mortimer* [2020] NZHC 17, (2020) 20 NZCPR 704 at [87]; *Tamihere v Mediaworks Radio Ltd*, above n 5, at [21]–[22]; and *Lusty v Magill* [2018] NZHC 3006, [2019] NZAR 1 at [41].

[50] In doing so, courts strive to give effect to the intention of parties to submit disputes to arbitration.[10]

[51] However, in a multi-contract situation with two or more differently expressed choices of jurisdiction, the presumption is not necessarily appropriate.[11] The question is entirely one of construction, but the following guidance has been distilled from the cases:[12]

(a) Where the parties' overall contractual arrangements contain two competing jurisdiction clauses, the starting point is that a jurisdiction clause in one contract was probably not intended to capture disputes more naturally seen as arising under a related contract.

(b) A broad, purposive and commercially-minded approach is to be followed.

(c) Where the jurisdiction clauses are part of a series of agreements they should be interpreted in the light of the transaction as a whole, taking into account the overall scheme of the agreements and reading sentences and phrases in the context of that overall scheme.

(d) It is recognised that sensible business people are unlikely to intend that similar claims should be the subject of inconsistent jurisdiction clauses.

(e) The starting presumption will therefore be that competing jurisdiction clauses are to be interpreted on the basis that each deals exclusively with its own subject matter and they are not overlapping, provided the language and surrounding circumstances so allow.

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10 *Lusty v Magill*, above n 9, at [33]; *Marnell Corrao Associates Inc v Sensation Yachts Ltd* (2000) 15 PRNZ 608 (HC) at [61]; *McKenzie v Mortimer*, above n 9, at [86]; and *SRG Global Remediation Services (NZ) Ltd v Body Corporate 197281* [2022] NZCA 518 at [124].

11 *AmTrust Europe Ltd v Trust Risk Group SpA* [2016] 1 All ER (Comm) 325 at [50]; *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 All ER (Comm) 237 at 250–251; *Deutsche Bank AG v Sebastian Holdings Inc (No 2)* [2011] 2 All ER (Comm) 245 at [42] and [49]; and *Monde Petroleum SA v WesternZagros Ltd* [2015] EWHC 67 (Comm), [2015] 1 Lloyd's Rep 330 at [35]−[36].

12 *BNP Paribas SA v Trattamento Rifiuti Metropolitani SpA* [2019] EWCA Civ 768, [2020] 1 All ER 762 at [68].

(f) The language and surrounding circumstances may, however, make it clear that a dispute falls within the ambit of both clauses. In that event the result may be that either clause can apply rather than one clause to the exclusion of the other.

[52] In *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd*, it was common ground that expressions such as "arising out of or in connection with" are very broad.[13] The Court took the view that where a hard and fast division of claims between wholly different agreements is elusive, it may be necessary to assess which contract is closer and more specifically invoked in the claim, as opposed to more distantly or collaterally involved.[14]

[53] Taking into account the construction principles referred to in [51] above, in my view the dispute resolution clauses in the 2018 Agreement and the Tankering Agreements are inconsistent, and were intended to deal exclusively with their own subject matter, with only the 2018 Agreement mandating arbitration:

(a) The agreements are all interrelated to some extent, given the common subject matter. The 2018 Agreement expressly contemplates, and has procedural obligations for the negotiation of, the Tankering Agreements as Interim Solutions. However, any substantive obligations under such an Interim Solution are provided for under a different contractual document, separated in time and purpose. The express dispute resolution clauses in the Tankering Agreements contain an obligation to meet and try to resolve the dispute in good faith, but each party has freedom as to their preferred "informal dispute resolution techniques", such that agreement must be reached by the parties on that. A freedom to agree (or disagree) is inconsistent with the compulsory nature of arbitration as a method of dispute resolution. Referring to "informal dispute resolution" techniques, but then not mandating any dispute

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13 In *Eastern Pacific Chartering Inc v Pola Maritime Ltd* [2021] EWHC 1707 (Comm), [2021] 1 WLR 5475 at [36]–[37]: the phrase was recognised as referring to a wider class of claims than just those regarding the rights and obligations under the contract itself. See also *Hodgetts v Stephens* HC Whangarei M98/92, 6 September 1993 at 7.

14 *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd,* above n 11, at 251.

determination process, ordinarily leaves the parties with their normal rights of access to courts to resolve their disputes.

(b) I do not accept that an objective reading of the dispute resolution clauses in the Tankering Agreements fairly implies an intention to incorporate the 2018 Agreement dispute resolution clause but only replace the pre-arbitration steps, particularly when this would be inconsistent with the entire agreement clause. The dispute resolution clause is quite different from the more structured and compulsory multi-tiered dispute resolution clause in the 2018 Agreement culminating in arbitration. While the presumption is that sensible people would negotiate consistent dispute resolution obligations for related contracts, the parties have chosen not to do so in this case, despite other clauses expressly referring back to the "Original Agreement". During the hearing, counsel for Watercare suggested this might have been an oversight or error. If so, then in my view introducing binding obligations of arbitration inconsistent with the express provisions would require rectification going beyond mere interpretation.[15] No factual basis has been laid for that.

(c) Post-contractual conduct can be relevant in some cases for interpretation purposes.[16] In this case, I do not place any particular weight on the approach taken by the parties after disputes arose, partly because the correspondence for the respective parties is contradictory to the legal submissions made in this proceeding. In particular, in the 19 May 2023 letter on behalf of Acanthus, a single notice was given "under relevant disputes provisions within the contracts". In the 28 August 2024 letter on behalf of Watercare, rights and obligations arising under the Tankering Agreements were described as "independent and separate" from the 2018 Agreement. My interpretation is more consistent with the latter position.

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15 See *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [78] and [80].

16 At [40].

(d) However, that is not the end of the matter because a dispute may still fall within the ambit of both clauses, which I analyse further below in assessing whether the subject matter is within scope.

[54] I reach a similar conclusion comparing the dispute resolution clauses in the 2018 Agreement and 2022 Infrastructure Agreement. These have inconsistent dispute resolution clauses that were intended to deal exclusively with their own subject matter, with arbitration not being mandated by the 2022 Infrastructure Agreement:

(a) As expressly stated in Recital F, the 2022 Infrastructure Agreement is in relation to the design and delivery of the Local Network Section of the Pipeline only.

(b) The entire agreement clause indicates that it is intended to supersede the 2018 Agreement (the Original Agreement) to the extent of its subject matter.

(c) Clause 1.1(o) refers to the Original Agreement. Clause 2.4 provides:

> Upon termination of this agreement pursuant to **clause 2.3**, neither party shall have any recourse against the other except for any prior breach of the agreement that has not been remedied and, notwithstanding anything in the Original Agreement, Watercare shall be under no further obligation to obtain the written consent of the Landowner to the Works.

(d) Clauses 9.2(a)(iii) and 9.5 refer to Watercare's ongoing responsibility for the delivery of the transmission section of the pipeline. In cl 9.6, Watercare's right is expressed to survive termination of the agreement (other than under cl 2.3).

(e) Clause 9 of the 2022 Infrastructure Agreement contains detailed dispute resolution provisions that are quite different from the multi-tiered dispute resolution clause in the 2018 Agreement culminating in arbitration. There is provision for the parties to meet and try to resolve the dispute in good faith, but each party has freedom as to their preferred "informal dispute resolution" technique. Again, a freedom to

agree (or disagree) is inconsistent with the compulsory nature of arbitration as a method of dispute resolution. Referring to "informal dispute resolution techniques", but then not mandating any dispute determination process, ordinarily leaves the parties with their normal rights of access to courts to resolve their disputes.

(f) I have considered whether an objective reading fairly implies an intention to incorporate the 2018 Agreement dispute resolution clause for any disputes not covered by cl 9, but I see no contextual indication that was intended, and this would be inconsistent with the entire agreement clause.

(g) It is a separate question whether the pleaded disputes fall within the ambit of both clauses, which I address as a question of scope.

Pleaded claims

[55] Before analysing whether the intended subject matter of the substantive proceeding is within the scope of the arbitration clause in the 2018 Agreement, it is necessary to outline what is claimed. In doing so, I have been provided with the plaintiff's intended amendments to the statement of claim, in which the plaintiff proposes to remove many references to alleged breaches of the 2018 Agreement.

[56] There are seven causes of action:

(a) **First cause of action — Breach of contract**: This alleges that Watercare breached obligations in the 2021 Tankering Agreement (including as extended by the 2022 Tankering Agreement and 2023 Tankering Agreement) and/or the 2022 Infrastructure Agreement in respect of (among other things) its steps to obtain the unqualified consent of the neighbouring owner, and its delays in commencing construction of the pipeline and connecting and managing Temporary Wastewater Systems. The alleged breaches also refer to committing and failing to remedy the "Pre-Tankering Breaches", which (earlier on in the pleadings) are defined as breaches of the 2018 Agreement to use

reasonable endeavours to facilitate construction of the CGWP. The last substantive pleading under the first cause of action alleges that if Watercare had met its contractual obligations, the Temporary Wastewater Systems would not have been required, and the entire subdivision (including stages 5 and 6 of the development) would have been serviced by a permanent wastewater system.

(b) **Second cause of action — Breach of contract**: This alleges that Acanthus should not be liable for the Watercare tipping invoices (issued between June 2022 and June 2023) and the Watercare tankering and maintenance invoices (issued since 31 April 2024), on the basis that these have only been required because of Watercare's alleged breaches under the first cause of action. In addition and in the alternative, Acanthus disputes them on substantive grounds of unreasonableness and lack of information.

(c) **Third cause of action — Breach of statutory duty**: This alleges breaches of Watercare's statutory duties under the Local Government (Auckland Council) Act 2009[17] and the Local Government Act 2002.[18] The alleged breaches cross-refer back to those in the first cause of action (in other words, the alleged statutory duties to act were triggered by the negotiated contractual commitments).

(d) **Fourth cause of action — Equitable set-off:** This pleads that any liability Acanthus may have under the Watercare tipping invoices and the Watercare tankering and maintenance invoices should be set off against Watercare's liability under the other six causes of action.

(e) **Fifth cause of action — Breach of confidentiality under the Tankering Agreements:** This pleads that the Iszard Statements (certain disclosures made by Mark Iszard as quoted in a New Zealand Herald article dated 24 August 2024) amounted to a breach of contractual

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17 Including s 57(1)(a).
18 Including s 181.

obligations of confidence in the Tankering Agreements, for which Acanthus seeks unquantified losses and injunction orders against disclosure.

(f) **Sixth cause of action — Breach of Fair Trading Act:** Under this cause of action, Acanthus pleads that the Iszard Statements were false and/or misleading and deceptive, and seeks relief for unquantified losses.

(g) **Seventh cause of action — Defamation:** Under this cause of action, Acanthus pleads that the Iszard Statements were false and defamatory, seeking relief for unquantified losses.

Is the subject matter within scope?

[57] As I understand it, both parties accept that the 2018 Agreement continues in effect to the extent not superseded by the 2022 Infrastructure Agreement. In particular, the framework for negotiating Interim Solutions was relied on by Acanthus for negotiating the 2023 Tankering Agreement. In this hearing, Acanthus says the 2018 Agreement remains operative in relation to the connection to the Redhills Wastewater Network, but not the obligation to obtain the consent of the neighbouring owner or construct the Local Network Section.

[58] Acanthus submits that only one aspect of the substantive proceeding falls within the definition of "Dispute", namely the date by which Watercare should have constructed the Redhills Wastewater Network, which is only part of some causes of action. The rest either falls under the other four agreements or sits outside those agreements.

[59] I take a different view. Each of the seven causes of action contain, at their core, an assertion that there were breaches of the 2018 Agreement to use reasonable endeavours to obtain landowner consent and facilitate construction of the CGWP, and that those breaches remain actionable despite the 2022 Infrastructure Agreement. That forms the basis for the first to fourth causes of action and the argument that Acanthus should not be liable for the Watercare tipping invoices and the Watercare tankering

and maintenance invoices at all (that is, Interim Solutions should have been unnecessary) and/or that a right of set-off arises. The argument in the second cause of action challenging the invoices on substantive grounds of unreasonableness and lack of information is pursued in the alternative and is of only subsidiary significance.

[60] The fifth, sixth and seventh causes of action all relate to the Iszard Statements. For these claims, the core of the complaint is pleaded at para 59 of the draft amended claim, with (a) and (b) focused on the same issues described in [59] above. The allegations at sub-paras 59(d) and (e) of the draft amended claim also depend on interpretation and alleged breach of the 2018 Agreement. In my view, this is sufficient for the fifth to seventh causes of action to involve a "dispute, difference or question [that] arises between the parties out of or in connection with [the 2018 Agreement]". Even though other aspects (and the ultimate issue) might also fall within the ambit of the different dispute resolution provisions of the Tankering Agreements and the 2022 Infrastructure Agreement, the Court must give effect to the arbitration agreement in terms of sch 1, art 8(1).

[61] Section 10 of the Arbitration Act governs the permissible scope of disputes determined through an arbitration process as follows:

> **10 Arbitrability of disputes**
>
> (1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration.
>
> …

[62] The Arbitration Act creates a general preference in favour of the arbitrability of disputes, which, as a matter of New Zealand law, are capable of settlement by direct agreement between the parties.[19] In addition to contractual disputes, private disputes under the Fair Trading Act and defamation claims fall into that category. On the facts of this case, the alleged statutory duties of care depend on the 2018 Agreement as the

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[19] Law Commission *Arbitration* (NZLC R20, 1991) at [230]–[231]. In *Tamihere v MediaWorks Radio Ltd*, above n 5, the Court held that a defamation claim fell within the scope of a contractual arbitration clause, referencing *S Ltd v C Ltd* [2009] EWHC B23 (Comm) at [18].

trigger and are likewise capable of private settlement. As in *Tamihere v MediaWorks Radio Ltd*, I consider that the arbitration clause is wide enough to encompass claims of this nature (including the non-contractual claims), because of the pleaded issues that arise between the parties out of or in connection with the 2018 Agreement.

[63] In other words, for the fifth to seventh causes of action, the core issues arise more naturally within the wide scope of the arbitration clause in the 2018 Agreement, and it is not a situation where those causes of action can be cleanly severed into separate components, or that they more centrally fall within the exclusive scope of the Tankering Agreements or the 2022 Infrastructure Agreement.

Pre-conditions, breach and cancellation

Legal principles

[64] The authors in *Williams and Kawharu on Arbitration* refer to "the courtesy trap" of multi-tiered dispute resolution clauses,[20] where their reference to the amicable settlement of disputes may create enforceability issues and place arbitration out of reach.[21] In particular:[22]

> … specifying pre-arbitration conditions can often lead to uncertainty as to when arbitration can commence as it can be difficult to determine whether the preconditions to the arbitration have been satisfied, or whether they are even required to be satisfied. These difficulties have given rise to arguments that a failure to comply with particular preconditions renders the arbitration agreement invalid and unenforceable. Tribunals and courts are generally reluctant to reach this conclusion since, if an arbitration agreement ultimately fails, parties are likely to end up in court — the exact place they had hoped to avoid by agreeing to an alternative dispute resolution (ADR) procedure.

[65] Where there is a multi-tier dispute resolution clause that features arbitration, the steps prior to arbitration may amount to pre-conditions that form part of the arbitration agreement.[23] For a court to order compliance with pre-conditions, the

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20 David Williams and Amokura Kawharu *Williams and Kawharu on Arbitration* (2nd ed, LexisNexis, Wellington, 2017) at [8.7].

21 At [8.7.2], referencing Tibor Varady "The Courtesy Trap: Arbitration 'if no amicable settlement can be reached'" (1997) 14(4) J Int'l Arb 5 at 6; and Michael Pryles "Multi-Tiered Dispute Resolution Clauses" (2001) 18(2) J Int'l Arb 159 at 160.

22 At [8.8.3].

23 *On Line International Ltd v On Line Ltd* HC Christchurch CP2/00, 11 April 2000 at [18]–[23]; *Porter v Gullivers Travel Group Ltd* [2007] NZCA 345 at [34].

clause must generally contain a clear set of guidelines against which to measure the parties' compliance. When a contract requires the parties to negotiate, that is a contract to try to agree. While a substantive result is unenforceable, breach may arise from a failure to try, either at all, or according to any procedural requirements that are sufficiently express/certain.[24]

[66] In *Porter v Gullivers Travel Group Ltd*, a contract contained a dispute resolution clause providing for the parties to resolve the dispute by "negotiation in good faith" as a condition precedent to reference to an expert if the dispute were not resolved.[25] Both the High Court and the Court of Appeal held that such clauses were enforceable by a stay, if sufficiently certain in terms of the good faith requirements.

[67] However, a court may be reluctant to compel satisfaction of the pre-conditions where, for example, the other party is responsible for the default in compliance and is simply trying to frustrate the process in an attempt to avoid arbitration.[26]

[68] Conversely, when the party seeking to enforce the arbitration clause is the one that sought to obstruct and delay,[27] then this may ultimately preclude that party from taking advantage of its own wrong:

(a) In *Downing v Al Tameer Establishment*, the Court of Appeal (England and Wales) held that the defendant's conduct amounted to a repudiatory breach of the agreement to arbitrate. In those circumstances, commencement of court proceedings amounted to acceptance of the repudiation and an election to abandon the remedy of arbitration in favour of court proceedings.[28]

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24 *Wellington City Council v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 486 (CA) at [14]–[15].

25 *Porter v Gullivers Travel Group Ltd* HC Auckland CIV-2006-404-5280, 12 October 2006; aff'd, above n 23.

26 *Williams and Kawharu on Arbitration,* above n 20, at [8.8.4] and [8.9], referencing *Marnell Corrao Associates Inc v Sensation Yachts Ltd*, above n 10, and *B J Pye Sheetmetal 2009 Ltd v Forsman* [2012] NZHC 472.

27 See *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] AC 909; and *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854 in regards the implied mutual obligations not to obstruct or delay the arbitral process.

28 *Downing v Al Tameer Establishment* [2002] EWCA Civ 721, [2002] 2 All ER (Comm) 545.

(b) In *Jaffer v Jaffer*, the Court concluded that the Electoral Commission gave Mr Rashid extensions and due warning that the arbitration would not proceed unless he signed a declaration agreeing to be bound by the results and to refrain from public statements. In failing or refusing to do so, Mr Rashid himself terminated the arbitration process.[29] There was accordingly no non-compliance by the Electoral Commission in not proceeding with arbitration for Mr Rashid.

[69] In particular, under the Contract and Commercial Law Act 2017, a right of cancellation will arise:

(a) pursuant to s 36, where a party repudiates the contract by making it clear (by words or conduct) that it does not intend to perform or complete the performance of its obligations under the contract;[30] or

(b) pursuant to s 37, where a party breaches a term in the contract (or it is clear that it will breach a term) and —

(i) the parties have expressly or impliedly agreed that the performance of the term is essential to the cancelling party (s 37(2)(a)); or

(ii) the effect of the breach or anticipated breach of the contract is, or will be, to substantially reduce the benefit or increase the burden of the contract to the cancelling party or (in relation to the cancelling party) make the benefit or burden of the contract substantially different from that represented or contracted for (s 37(2)(b)).

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29 *Jaffer v Jaffer* [2024] EWHC 135 (Ch) at [350].

30 Stephen Blakeley (ed) *Green & Hunt on Arbitration Law & Practice* (online ed, Thomson Reuters) at [DA2.6.03].

[70] A conclusion that a party has repudiated a contract will not be reached lightly.[31] The repudiating party must have:[32]

> … made it clear (by words or conduct) that it did not intend to perform, or complete the performance of, its obligations under the contract, or indicated that it will only perform the contract in a way substantially inconsistent with its obligations and not in any other way.

[71] The Supreme Court observed in *Kumar*:[33]

> Repudiatory conduct may relate to the whole of the contract or to part of it … In the case of partial repudiation, however, the conduct must constitute a contractual breach that is sufficient to entitle the innocent party to cancel in terms of [s 37].

[72] In respect of s 37(2)(a), the Supreme Court in *Mana Property Trustee Ltd v James Developments Ltd* stated the test for essentiality:[34]

> …the preferable approach is to ask whether, unless the term in question was agreed at the time of contracting to be essential, the cancelling party would more probably than not have declined to enter into the contract. That question must be answered by an objective contractual appraisal which disregards what a party may unilaterally have said about its intention in that regard.

[73] The requirement of a substantial reduction in the benefit of the contract must be considered on the facts of the case having regard to the nature of the contract, its subject matter and to all the circumstances.[35]

[74] If the arbitration agreement is validly cancelled on either of the above statutory grounds, then the innocent party may issue court proceedings for resolution of the dispute, rather than proceeding with the arbitration. That is because the arbitration agreement would be inoperative.[36]

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31 *Kumar v Station Properties Ltd* [2015] NZSC 34, [2016] 1 NZLR 99 at [58].

32 *Jade Residential Ltd v Paul* [2020] NZCA 477 at [52].

33 *Kumar v Station Properties Ltd*, above n 31, at [57]. See also *Jade Residential Ltd v Paul*, above n 32, at [40]–[45].

34 *Mana Property Trustee Ltd v James Developments Ltd* [2010] NZSC 90, [2010] 3 NZLR 805 at [25].

35 *Stratton Properties Ltd v Construction Properties Ltd* [2023] NZHC 2666 at [31] citing *Jolly v Palmer* [1985] 1 NZLR 658 (HC) at 662; and *MacIndoe v Mainzeal Group Ltd* [1991] 3 NZLR 273 (CA) at 284–285.

36 Arbitration Act, sch 1, art 8(1). See *Savvy Vineyards 4334 Ltd v Weta Estate Ltd* [2017] NZHC 1111 at [39] in regards cancellation rendering an arbitration agreement inoperative. See also *Taupo Car Club Inc v TMP Ltd* [2020] NZHC 495 at [40] where the Court found that delay had not reached the point of repudiation such as to render the agreement to arbitrate inoperative.

Party submissions

[75] Acanthus argues that the word "may"[37] does not require a party to refer a dispute to arbitration but allows either party to require arbitration if the pre-conditions to appoint an arbitrator are met. If those pre-conditions are not met, then an arbitrator cannot be appointed and a court cannot grant a stay under art 8.

[76] Acanthus says that the 2018 Agreement imposes two pre-conditions:

(a) Under cl 11.1, the parties must enter into discussions in good faith with a view to resolving the relevant dispute amicably as soon as reasonably practicable.

(b) If the dispute is not resolved within 15 working days of the good faith discussions commencing, a party may give written notice of its intention to refer the relevant dispute to mediation. Clause 11.3 requires the parties to:

(i) endeavour to agree on a mediator; and

(ii) submit the matter in dispute to that mediator.

[77] The plaintiff argues that the temporal provisions in cl 11 anticipate that cls 11.1–11.3 will be complied with first, before any right to refer to arbitration arises.

[78] Acanthus says that it has satisfied its procedural obligations:

(a) It sought to negotiate in good faith by its letters dated 19 May 2023, 15 August 2024, 26 August 2024, and/or its letter dated 23 September 2024.

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[37] This argument is different from contending that "may" does not confer a right to elect an arbitration process that binds the other party: see *Anzen Ltd v Hermes One Ltd* [2016] UKPC 1, [2016] 1 WLR 4098 at [32]–[34]. See also *Miro Property Holdings Ltd v Fletcher Construction Company Ltd* HC Wellington, CIV-2010-485-2540, 31 May 2011 at [38] where the Court held that "may" means that once one party has decided to refer a dispute to arbitration, both are bound to that course, referencing *Sure Care Services Ltd v At Your Request Franchise Group Ltd* [2010] 3 NZLR 102 (HC) at [60].

(b) Acanthus gave written notice of its intention to refer the dispute to mediation in letters dated 4 October 2024, 18 October 2024, and 13 November 2024.

[79] It says Watercare breached the requirement to engage in discussions in good faith and only belatedly sought to remedy that situation by offering to meet on a without prejudice basis on 22 November 2024.

[80] Three cases are relevant for assessing whether Watercare might be precluded from enforcing the arbitration agreement if it has obstructed or delayed:

(a) In *The Law Connection Ltd v Roche*, the Court concluded that pre-conditions in an arbitration clause do need to be satisfied for there to be a contractual right to arbitration.[38] However, noted exceptions were: if one party is deliberately avoiding fulfilling their obligations to avoid arbitration;[39] or if the parties actually intended that the pre-condition would not apply.[40] The Court ordered a stay to commence the process envisioned by the arbitration agreement without delay, and then to proceed to arbitration if resolution was not reached. The plaintiff says that approach is inapplicable here because there is sufficient clarity about whether the pre-conditions have been satisfied.

(b) In *Taupo Car Club Inc v TMP Ltd*, the Court held that the arbitration agreement could still be enforced in circumstances where the parties had been negotiating with a view to trying to resolve the disputes, even if those attempts were "far from perfect".[41] The plaintiff distinguishes that case by saying here Watercare is the party in the wrong that unilaterally decided to skip the pre-conditions, so that conduct precludes it from enforcing the arbitration agreement.

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38 *The Law Connection Ltd v Roche* [2013] NZHC 1742 at [38], referencing *Con Dev Construction Ltd v Financial Shelves No 49 Ltd* HC Christchurch CP179/97, 22 December 1997.
39 At [38], referencing *On Line International Ltd v On Line Ltd*, above n 23.
40 At [38], referencing *B J Pye Sheetmetal 2009 Ltd v Forsman*, above n 26.
41 *Taupo Car Club Inc v TMP Ltd*, above n 36.

(c) In *Tavendale & Partners Ltd v Dineen*, the defendant was still able to enforce an arbitration clause even though certain dispute resolution steps had not yet been completed.[42] The plaintiff points out that, in that case, it was the plaintiff wishing to pursue High Court proceedings that had failed to comply with the pre-conditions. In this case, the plaintiff says Watercare is the one in default and cannot take advantage of its own wrongs.

Analysis — legal framework

[81] I agree with Acanthus that a party can seek to enforce pre-conditions of a dispute resolution process before the parties may proceed with the final step for determination (by arbitration or by court, depending on what the clause provides). I also agree that the existence of pre-conditions culminating in an agreement to arbitrate does not necessarily preclude the filing of court proceedings as a matter of ouster.[43]

[82] However:[44]

> … it is inaccurate to speak of any right to commence proceedings in any more general sense. Whether or not such commencement is a breach of the arbitration agreement by the party instituting the proceedings will depend upon the circumstances. If satisfied that a breach is involved, as it usually will be, then the court will grant a stay. If not so satisfied, but the position is arguable, the court will grant a stay on the basis that the issue raised is not clear and that the arbitrator has the power to rule upon his [or her] own jurisdiction…

[83] Therefore, I disagree with Acanthus's assertion that a court cannot grant a stay under art 8 during any time pre-conditions remain to be satisfied. To the contrary, I agree with the analysis in *The Law Connection Ltd v Roche*, that pre-conditions in an arbitration clause do not need to be satisfied already for there to be an enforceable contractual right to arbitrate.[45]

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42 *Tavendale & Partners Ltd v Dineen*, above n 6; aff'd [2023] NZHC 157.
43 *Downing v Al Tameer Establishment,* above n 28, at [32], referring to *Scott v Avery* (1856) 5 HL Cas 811, [1843-60] All ER Rep 1.
44 At [32].
45 *The Law Connection Ltd v Roche,* above n 38.

[84] Rather, the effect of non-compliance with the pre-conditions comes down to an analysis of which party is in breach, and whether this has reached the point that the pre-conditions and/or agreement to arbitrate may no longer be enforced. Subject to the express terms, for the party wishing to commence court proceedings, this would generally require an accepted repudiation or valid cancellation of the agreement to arbitrate (as a secondary contract),[46] or perhaps an enforceable estoppel that the arbitration path has been abandoned. In my view, any breach short of that may give rise to damages but does not preclude ongoing enforcement of the contractual commitment to arbitrate. Otherwise, any non-substantial breach might have disproportionate consequences.

Analysis — application to facts

[85] In its letter dated 19 May 2023, Acanthus gave a detailed notice of its claims (which largely correspond to the first to fourth causes of action, plus other issues) and asked to negotiate in good faith, thereby triggering the obligations in cl 11.1.

[86] Watercare engaged in specific aspects of those issues, which culminated in the 2023 Tankering Agreement. Despite the Acanthus letter dated 7 June 2023 noting that the response on other aspects was still outstanding, there does not appear to have been any further correspondence on those issues until August 2024. Watercare's letter dated 28 August 2024 asserts that there has been a response in 2023 to Acanthus's previous solicitor and barrister. Whether that is the case or not (no further evidence is before me to analyse that, such as whether a response might have been verbal), in my view it was incumbent upon Acanthus to follow up if it wished to continuing pursuing a disputes process in accordance with cl 11. Reaching a point of cancelling an arbitration agreement for repudiation requires unequivocal behaviour.[47] By remaining silent (based on the correspondence before me), I find that Acanthus allowed those aspects of the disputes to fall dormant.

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46 *Downing v Al Tameer Establishment,* above n 28, at [25].
47 At [21].

[87] Therefore, I find that the 15 August 2024 letter from new lawyers acting for Acanthus effectively commenced the disputes process again for those issues. That letter was inconsistent with cl 11, because it threatened that High Court proceedings would be filed within 14 days (ending 29 August 2024), subject to Acanthus being willing to meet to discuss a resolution beforehand. That timing is inconsistent with cl 11.2 allowing 15 working days (until 6 September 2024) before a mediation notice can be issued. A party approaching a negotiation in good faith under cl 11.1 should not predetermine a shorter period for discussions (although that may be a reasonable assessment to make once the process is underway). It also implies a firm decision by Acanthus not to entertain mediation or arbitration, contrary to the obligations in cl 11.

[88] Acanthus's letter dated 26 August 2024 addressed the different subject matter of defamation/confidentiality breaches, which it contends fall outside the 2018 Agreement, so it did not offer good faith negotiations or mediation in terms of cl 11. It stated that the claims would be incorporated into the statement of claim to be issued in the High Court on 30 August 2024, unless "a satisfactory resolution is reached beforehand".

[89] In those circumstances, the key issue is assessing the significance of the 28 August 2024 response from Watercare. It did not take up any suggestion of meeting to discuss a resolution. However, as discussed above, this is tempered by the fact that Acanthus's suggestion of meeting before 29 August 2024 was not offered in the amicable good faith terms contemplated by cls 11.1 and 11.2. Watercare explained the reasons for its position that the claims were "doomed to fail" as having no realistic factual or legal basis. That implicitly suggested no practical purpose would be achieved by meeting in person (if their respective positions were so far apart). On my assessment, there is no factual basis for believing that this was not Watercare's genuine good faith position on the disputed issues.

[90] Clause 11.1 requires that the parties "shall enter into discussions in good faith", but I do not consider that necessarily requires face to face discussions.[48] Depending on the circumstances, discussing the issues in writing may suffice, or may be a suitable starting point for the parties to then determine appropriate next steps. If Acanthus had intended to enforce the cl 11 disputes process, then it should have responded to say that it nevertheless wanted a meeting in person under cl 11.1, or that it was terminating discussions (cl 11.1 contained a right to do so at any time). Sub-clause 11.4(a) then allows the dispute to be referred directly to arbitration by service of a notice (that is, without any mediation, unless the other party has already validly issued a notice to mediate under cl 11.2).

[91] I have considered whether the 28 August 2024 response from Watercare amounted to an abandonment of the arbitration right in cl 11 because it says any claim by Acanthus would be defended and does not say the Court lacks jurisdiction because of the arbitration clause. I do not consider that any abandonment of the arbitration right can fairly be implied. To amount to a binding election or estoppel, a representation must be clear and unequivocal.[49] Defending a claim in a wider sense can include protesting jurisdiction as a first step.

[92] Following Watercare's response dated 28 August 2024, and without any further correspondence under cl 11, Acanthus commenced the substantive High Court proceeding on 30 August 2024. I find this was a breach of its process obligations under cl 11.

[93] Since commencement of the proceeding, the solicitors for the respective parties have sought to reverse engineer their desired outcomes by navigating inconsistencies and issuing conflicting notices:

(a) During the without prejudice correspondence that followed, Acanthus subsequently purported to give written notices of its intention to refer the disputes to mediation in letters dated 4 October 2024, 18 October

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48 See *New Zealand Māori Council v Attorney-General* [2012] NZHC 3338 at [248], noting that an obligation of "consultation" does not necessarily require face to face discussions as a matter of law.

49 *Kempton Holdings Ltd v StraitNZ Freight Forwarding Ltd* [2023] NZHC 688 at [90] and [100].

2024 and 13 November 2024, while at the same time maintaining that the disputes fell outside the scope of the 2018 Agreement and that arbitration was not an available outcome. I find that none of these notices were issued properly under cl 11.2 (because Acanthus was already in breach of cl 11 by commencing the proceedings and it was denying that cl 11 applied).

(b) On 22 November 2024, Watercare and Acanthus attended a "without prejudice" meeting together, followed by Watercare issuing a letter on 29 November 2024 unilaterally terminating the discussions under cl 11.1 and giving a "notice of intention to commence arbitration" under cl 11.4.

(c) On 3 December 2024, Acanthus wrote to Watercare saying that the 29 November 2024 letter gave grounds for cancellation of the arbitration agreement (as a secondary contract), which it then purported to do.

[94] Despite the imperfect procedures and conduct by the parties, I find that Watercare's notice to arbitrate dated 22 November 2024 was valid and effective and did not give grounds for cancellation. Watercare is now entitled to seeking enforcement of the right to arbitrate, without being impeded by cl 11 pre-conditions for any further negotiation or mediation. My finding is based on the following:

(a) The obligation in cl 11.1 to "enter into" discussions in good faith with a view to amicably resolving a dispute is weak in terms of certainty and enforceable process obligations. In particular, it provides that "[e]ither party may terminate these discussions at any time", and it does not specify the nature of the discussions that must take place.

(b) As discussed above, I accept that the content of its 28 August 2024 letter was on the face of it Watercare's genuine good faith position on the disputed issues, and since then a further "without prejudice" meeting has been conducted on 22 November 2024 in which its position

will have been articulated. Even if information was still being provided post-meeting, cl 11.1 expressly allows a party to terminate the discussions at any time, after they have been "entered into" in good faith.

(c) Clause 11 provides a window for a party to move straight from good faith negotiations to arbitration, without first requiring mediation. They can validly do so under the terms of cl 11 by terminating good faith discussions before 15 working days from commencement, and then promptly issuing a notice to arbitrate in reliance on sub-cl 11.4(a).[50] In contrast, a notice to mediate cannot be issued until after the 15 working day period elapses. This drafting therefore does not indicate that mediation was essential to the parties, or that a failure to mediate would substantially reduce the benefit or increase the burden of the contract.

(d) The utility of the mediation entitlement is further diminished by sub-cls 11.4(b)–(c) allowing either party to move straight to arbitration if agreement is not reached on selecting a mediator within 10 working days, or if no agreement has been reached in mediation within one month of service of the notice of mediation. Given these provisions, the pre-conditions in cl 11 were not intended to last more than one month and 15 working days.

(e) As referred to above, I have found that Acanthus's letters dated 4 October 2024, 18 October 2024, and 13 November 2024 were not issued properly under cl 11.2, therefore they did not preclude Watercare from issuing the notice to arbitrate.

(f) In any event, sub-cls 11.4(b) and 11.4(c) both apply now. I appreciate that Acanthus alleges Watercare has been obstructive on those steps, but Acanthus is the party that on 15 August 2024 first threatened and then moved straight to filing court proceedings if negotiations failed, repudiating any right to mediation. Of course, the parties remain free

[50] The three scenarios in cl 11.4 are disjunctive.

to agree to mediate at any time. But it would be inconsistent and inequitable for Acanthus now to delay matters by seeking to enforce mediation against Watercare's wishes, especially when mediation is consensual by nature.

Discretion to stay?

[95] Watercare submits that even if some claims fall outside the scope of the arbitration agreement, the Court has a residual discretion to stay the entirety of the claim pending the issue of an arbitration award on the in-scope disputes, differences or questions. It submits this residual discretion should be applied where there is significant factual overlap, there is a risk of inconsistent findings between the different tribunals, and/or consideration of cost and efficiency favours the matters being heard in arbitration (either first or together). Watercare relies on the following authorities:

(a) In *Heli-Flight New Zealand v Massey University*, the Court stayed all causes of action (including two held to not have arisen in relation to the contract with the arbitration clause) because the parties would be required to incur two sets of costs if their disputes continued in different jurisdictions and there was a prospect of conflicting findings in separate forums.[51]

(b) In *Mayhew v Future Mobility Solutions Ltd*, the Court stayed the entire proceeding as a number of the causes of action had to go to arbitration and there was a significant overlap in the issues likely to arise in those causes of action and the issues that would arise in the other causes of action that were not to go to arbitration.[52] The Court found it demonstrative that the first 30 paras of the statement of claim were common to the causes of action and acknowledged that there was a

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51 *Heli-Flight New Zealand Ltd v Massey University* HC Auckland CIV-2005-404-4855, 30 November 2005 at [32] and [33]. See also *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-Operative Group Ltd* [2014] NZHC 1681 (albeit in circumstances where sch 1, art 8 of the Arbitration Act did not apply).

52 *Mayhew v Future Mobility Solutions Ltd* [2018] NZHC 3112 at [70]–[87]. It was then up to the plaintiffs to decide whether to take up the defendants' offer to arbitrate all of the issues in the proceeding.

prospect of inefficient and wasteful use of resources and effort if the issues were traversed in separate tribunals.

[96] To the extent the disputed issues also fall within the scope of the dispute resolution clauses of the Tankering Agreements and the 2022 Infrastructure Agreement, I accept that a stay of the entire proceedings is appropriate. This particularly applies to:

(a) the alternative argument under the second cause of action, disputing the invoices on substantive grounds of unreasonableness and lack of information; and

(b) the breach of confidentiality allegations in the fifth cause of action.

[97] For the second cause of action, the far more significant issue financially is whether the invoices are payable at all. If Acanthus is successful on its arguments that they are not, because of prior breaches of the 2018 Agreement, then the alternative arguments may not need to be determined. It would be more efficient to determine them in the arbitration along with the main issues in the second cause of action (this can be done by agreement), but otherwise it will be more efficient for any residual issues to be determined only after the outcome of the arbitration is known.

[98] Similarly, once the centrally disputed factual issues in the fifth cause of action are determined by arbitration, the determination of any residual questions of breach and damage (if any) will be relatively streamlined. It would be both inappropriate and inefficient for the Court to overstep the arbitrator's role in purporting to determine questions such as:

(a) whether Acanthus is liable to cover the costs of tankering, given the related question of whether the Temporary Wastewater System was required due to Watercare's alleged breaches pleaded in para 68 of the draft amended claim; and

(b) whether the statements were inconsistent with the actual terms of the 2018 Agreement, the 2022 Infrastructure Agreement and the Tankering Agreements.

Conclusions

[99] For the above reasons, my conclusions are summarised as follows:

(a) Only the 2018 Agreement contains an agreement to arbitrate. However, it has a wide scope, applying to "any dispute, difference or question [that] arises between the parties out of or in connection with [the 2018 Agreement]". The dispute resolution clauses in the Tankering Agreements and the 2022 Infrastructure Agreements are different in nature, because they permit court action if voluntary dispute resolution methods fail. Where a hard and fast division of claims between the different agreements is elusive, it may be necessary to assess which contract is closer and more specifically invoked in the claim, as opposed to more distantly or collaterally involved.

(b) The subject matter of all seven causes of action in the current draft amended claim falls within the scope of the agreement to arbitrate in cl 11 of the 2018 Agreement. At their core, they all involve disputes, difference and questions arising between the parties out of or in connection with 2018 Agreement. That is the contract with the closest connection.

(c) The arbitration agreement in the 2018 Agreement remains operative and capable of being performed. Watercare is not precluded from enforcing it, despite imperfections in the parties' compliance with the steps envisaged in cl 11. Watercare did not at any stage repudiate the right to arbitrate, nor does Acanthus have any right of cancellation for breach. To the contrary, Acanthus was in breach of cl 11 when it commenced the substantive proceedings. Since then, Watercare has issued a valid notice to arbitrate, and the pre-condition steps no longer apply.

(d) To the extent the disputed issues also fall within the scope of the dispute resolution clauses of the Tankering Agreements and the 2022 Infrastructure Agreement, I accept that a stay of the entire proceedings is appropriate.

[100] Accordingly, the criteria under sch 1, art 8(1) of the Arbitration Act are met and the grant of a stay is mandatory.

Result

[101] I grant Watercare's application for a stay of the entire proceedings on the basis that the disputes are subject to a binding arbitration agreement and need to be resolved using that method.

[102] If any issues in the substantive proceeding remain following the arbitration (such as if the arbitrator finds that aspects of the fifth to seventh causes of action are outside of the arbitrator's jurisdiction), then application may be made for the stay to be lifted at that point.

[103] It follows that I dismiss the application by Acanthus seeking to set aside the protest to jurisdiction.

[104] In the event parties cannot agree on the issue of costs, then Watercare may file its memorandum within 10 working days, and Acanthus may file its memorandum 10 working days later. I will determine costs on the papers. During the same time frames, the parties may raise any confidentiality concerns that would arise from the publication of this judgment.

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O'Gorman J