IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2023-404-001805
[2023] NZHC 2638

BETWEEN	FOUNDATION VILLAGE LIMITED and GENERUS FOUNDATION LIMITED (together trading as the FOUNDATION VILLAGE PARTNERSHIP) Plaintiffs
AND	GROWING SPACES LIMITED Defendant

Hearing: 14 September 2023

Appearances: K M Quinn & A C S Lemmon for the Plaintiffs
S C I Jeffs & G D Simms for the Defendant

Judgment: 21 September 2023

JUDGMENT OF TAHANA J
(Application for interim injunction)

This judgment was delivered by me on 21 September 2023 at 2.00pm
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors/Counsel:
Wynn Williams, Auckland
K M Quinn, Barrister, Auckland
Minter Ellison Rudd Watts, Auckland

Introduction

[1] The plaintiffs have engaged Kalmar Construction Ltd (Kalmar) to build apartments for a retirement village in Parnell (the Project). Kalmar has engaged the defendant (Growing Spaces Ltd) as a subcontractor to provide landscaping for the Project. The defendant has purchased materials for the Project which are located at its premises and a third party's premises (the Offsite Materials).

[2] The plaintiffs apply for an injunction restraining the defendant from dealing with the Offsite Materials and requiring the defendant to allow the plaintiffs to collect the Offsite Materials from the defendant's premises. The plaintiffs rely on an agreement entered into in April 2023 between Kalmar, the plaintiffs and the defendant in relation to the Offsite Materials (the Agreement) which they say entitles them to access the defendant's premises to collect the Offsite Materials. The Agreement includes an arbitration clause.

[3] The defendant says the Court does not have jurisdiction to grant the orders sought by reason of the Arbitration Act 1996 (the Act). I therefore need to determine whether the Court has jurisdiction and if so, whether to grant the orders.

Background

[4] In mid-April 2023, the defendant, Kalmar and the plaintiffs entered into the Agreement. The Agreement includes a schedule of materials with a list of items with a total value of $334,254.78.

[5] The plaintiffs' quantity surveyor inspected the Offsite Materials and certified their value at $314,649.04.

[6] The relevant provisions of the Agreement provide that:

> **Background**
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> …
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> C The Contractor has requested the Principal to make payment under the Main Contract for certain Materials that are off-Site and that are to be supplied by the Subcontractor, as permitted under the Main Contract.

A more detailed description of the Materials is given in the Schedule to this Agreement.

D It is a precondition to any such payment under the Main Contract that the Contractor and the Subcontractor enter into this Agreement.

E In consideration of the Principal agreeing to make payment for the Materials to the Contractor under the Main Contract, and the Contractor agreeing to make payment for the Materials to the Subcontractor under the Subcontract, the Principal, the Contractor and the Subcontractor have agreed to enter into this Agreement.

…

2. Requirements in respect of Materials

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2.2 Access

The Subcontractor grants to the Principal (and/or its nominees) free and unencumbered access to any premises where any Materials are located to:

(a) inspect the Materials;

(b) satisfy the Principal that the Subcontractor is in compliance with its obligations under this Agreement, including clause 2.1; and/or

(c) take possession of the Materials, and/or remove the Materials from the premises, at any time after ownership in the Materials has transferred to the Principal pursuant to 5.1(a).

The Subcontractor and the Contractor each agree to take all steps and do all things required to ensure that the Principal obtains access to the premises in accordance with the provisions of this Agreement.

2.3 Transportation of Materials

(a) The Subcontractor will, if required to do so by the Principal, at any time after ownership in the Materials has transferred to the Principal pursuant to 5.1(a) arrange for the Materials to be transported to the Site. Transportation (including, loading, unloading and freight) will be at no cost to the Principal.

(b) Neither the Subcontractor nor the Contractor will permit, allow or cause the Materials to be taken away from the Subcontractor's premises, except for the purpose of being transported to the Site.

…

4. Contractor to pay the Subcontractor

The Contractor warrants to each of the Principal and the Subcontractor that it will make payment for the Materials to the Subcontractor pursuant to the Subcontract.

5. Title and Security interests

5.1 Title in the Materials

The Subcontractor acknowledges and agrees that ownership of the Materials will immediately transfer to the Principal upon the earlier of:

(a) when the Materials have been delivered to the Site; or

(b) when the Principal has paid the Contractor for the Materials under the Main Contract.

5.2 Security interests

The Subcontractor will:

(a) ensure that, as at and from the point that ownership in the Materials transfers to the Principal pursuant to 5.1(a) and until the date of the applicable certificate of Practical Completion under the Main Contract, those Materials will be free of any Security Interest whatsoever (except any Permitted Security Interest);

(b) not claim that is has, and will not make any registration in respect of, any Security Interest in the Materials; and

(c) procure that its Personnel do not claim that they have, or make any registration in respect of, any Security Interest in the Materials.

…

7. Miscellaneous

…

7.8 Governing law and disputes

(a) This Agreement is governed by and will be construed in accordance with the laws of New Zealand. Any dispute arising out of this Agreement is to be referred to arbitration before a sole arbitrator. If, within 15 Working Days of notice of dispute, the parties to the dispute cannot agree on a single arbitrator, any party to the dispute may request the President for the time being of the Arbitrators' and Mediators' Institute of New Zealand to appoint an arbitrator.

(b) Nothing in clause 7.8 will prejudice the right of any party to institute proceedings to seek urgent interlocutory or injunctive relief.

[7] On 27 April 2023 the plaintiffs paid Kalmar for its March claim, which included the claim for the Offsite Materials. The payment schedule records $314,649.04 for the Offsite Materials.

[8] On 29 May 2023 Kalmar terminated the subcontract with the defendant.

[9] On 30 May 2023 Kalmar sought access to the Offsite Materials on behalf of the plaintiffs.

[10] On 11 July 2023 the defendant permitted some of the Offsite Materials to be uplifted and removed to the construction site.

[11] The defendant says Kalmar has not paid it for the Offsite Materials.

[12] The defendant has provided an undertaking that it will not deal with the Offsite Materials within its control pending an order of the Court, order by the arbitrator, or agreement between the parties.

Hearing

[13] At the hearing, the plaintiffs updated the relief sought to limit it to items numbered 1 to 9 in the Offsite Material March 2023 Claim which set out the Offsite Materials held at the defendant's premises and at other sites.

[14] After the hearing, I granted leave to file further submissions addressing the issue of jurisdiction. Further submissions were filed on 18 September 2023.

[15] Mr Locke, a director of the defendant, filed an updating affidavit dated 18 September 2023 indicating that the Offsite Materials identified in item 9 are not within the defendant's control and the defendant is unaware of whether they are still located at the third party's site. The defendant is aware that the plaintiffs have been dealing directly with the third party in relation to materials held by the third party.

Jurisdiction

[16] The key issue is whether the Court has jurisdiction to grant the relief sought by reason of cl 7.8(b) and the provisions of the Act. Arbitrations in New Zealand are governed by the Act. If the place of arbitration is in New Zealand, the provisions of Schedule 1 of the Act apply.[1]

[17] Article 5 of Schedule 1 provides that, "In matters governed by this schedule, no court shall intervene except where so provided in this schedule."[2]

[18] Article 9(2) of Schedule 1 provides that the High Court has the same powers as an arbitral tribunal to grant an interim measure under art 17A. Article 17 defines interim measure as follows:[3]

> **interim measure** means 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:
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> (a) maintain or restore the status quo pending the determination of the dispute:
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> (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:
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> (c) provide a means of preserving assets out of which a subsequent award may be satisfied:
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> (d) preserve evidence that may be relevant and material to the resolution of the dispute:
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> (e) give security for costs

[19] The plaintiffs argue that the relief sought is not governed by Schedule 1 because it does not fall within the definition of "interim measure" provided in art 17 and therefore the Court retains jurisdiction to grant the relief sought.

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1 Arbitration Act 1996, s 6(1)(a).
2 Arbitration Act 1996.
3 Arbitration Act 1996, sch 1.

[20] The issue is whether Schedule 1 governs the topic of injunctive relief such that the Court's jurisdiction is limited to what is prescribed in Schedule 1 or whether the Court retains the power to grant injunctive relief that is not prescribed by Schedule 1.

[21] In *Carter Holt Harvey Ltd v Genesis Power Ltd (Carter Holt)* the High Court considered the application of art 5 and noted:[4]

> [46] In summary, while the Schedules to the Act are not intended to define exhaustively all the circumstances in which a Court may intervene in the arbitral process, the intention of Article 5 is:
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> a) To require those drafting State laws to specify the circumstances in which court control or involvement is envisaged in order to increase certainty; and
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> b) Where a particular topic or set of circumstances is governed by the Schedule, to exclude any general or residual powers given to the domestic court which are not specified in the Schedule.

[22] The Court then went on to determine that:[5]

> For a matter to be "governed" by the First Schedule one would expect something more than an implied power arising from a provision conferring general powers on an arbitral tribunal to conduct an arbitration in such manner as it considers appropriate. To "govern" a matter implies the existence in the First Schedule of a defined power to regulate and control a specified matter.

[23] In *Carter Holt,* the Court was concerned with the power to stay proceedings not the power to grant interim relief. The Court considered that the provisions of art 8 govern the court's power to stay where there are parallel court and arbitral proceedings. The Court noted that art 8 effected major changes to the pre-existing law. Previously, the court had a discretion to grant a stay where the dispute was subject to arbitration. In contrast, when art 8 is engaged, the court is obliged to grant a stay of the court proceedings except in the limited circumstances defined in art 8(1).

[24] The Court's reasoning indicates that if Schedule 1 has provisions governing the matter, the court's jurisdiction is limited to what is prescribed in Schedule 1.

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4 *Carter Holt Harvey Ltd v Genesis Power Ltd* HC Auckland CIV 2001-404-1974, 22 February 2006.

5 At [48].

[25] In *Clark Road Developments Ltd v Grande Meadow Developments Ltd (Clark Road),*[6] the Court considered that "urgent interlocutory relief" was governed by Schedule 1 and therefore the Court did not have jurisdiction to determine whether to grant an application for interlocutory relief that fell outside of the powers prescribed in Schedule 1. An interim mandatory injunction did not fall within the scope of the jurisdiction prescribed in Schedule 1. The arbitration clause must be read as confining "urgent interlocutory relief" to interim measures as defined in Schedule 1.[7]

[26] In reaching that conclusion, Downs J noted that the Supreme Court had held that, providing a dispute exists referable to arbitration, summary judgment is unavailable to a party otherwise governed by arbitration and reasoned that:[8]

> 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.

[27] The plaintiffs argue that *Clark Road* is incorrect and criticise the Court's "cursory treatment" of how the Act works, and of Schedule 1 in particular. The plaintiffs rely on *Carter Holt.*

[28] *Carter Holt* was not "squarely concerned" with the issue presently before this Court as the plaintiffs contend. The present concern is whether Schedule 1 governs the Court's power to grant interim relief. *Carter Holt* is helpful in that it explains the approach for determining whether a matter is governed by Schedule 1 but is not authority for rejecting the reasoning in *Clark Road*.

[29] Further, in *Carter Holt,* Schedule 1 did not apply to proceedings brought by Carter Holt because Carter Holt was not subject to any arbitration agreement. The arbitration agreement was between the defendants and therefore in proceedings brought by Carter Holt, art 8 was not engaged and the prohibition against court intervention in art 5 did not apply. The conclusion does not therefore support the plaintiffs' contention that this Court is not bound by Schedule 1 when considering the

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6 *Clark Road Developments Ltd v Grande Meadow Developments Ltd* [2017] NZHC 2589.
7 At [17].
8 At [19].

application for interim relief. Here, the parties to the proceeding are all subject to an arbitration agreement.

[30] I do not consider that *Carter Holt* provides any basis for rejecting the reasoning in *Clark Road* as the plaintiffs contend.

[31] Schedule 1 includes powers to regulate and control the granting of interim measures. The plaintiff has applied for interim relief by way of an interlocutory injunction under r 7.53 of the High Court Rules 2016.

[32] Injunctive relief is expressly referred to in art 9(3) when it refers to an application to the court for an "interim injunction" or "other interim order." The express reference to "interim injunction" supports arts 9 and 17 governing the topic of interim injunctions. That is the very nature of the application before this Court.

[33] The plaintiffs nevertheless argue that the nature of the relief sought is in effect permanent such that it is not governed by Schedule 1 and the Court retains jurisdiction to determine it.

[34] In *Worldwide Holidays Ltd v Liu (Worldwide)*[9] the High Court considered whether the court retains inherent jurisdiction to grant injunctive relief falling outside of the definition of interim measures in art 17. Hinton J accepted that an application for a mandatory injunction did not fall within any of the paragraphs provided in the definition of interim measure in art 17. Hinton J noted that a permanent injunction was wider than the terms of art 17 and that while the relief would not be contrary to art 17, it would cut across it.[10]

[35] Hinton J considered the relief would arguably go a long way towards determining the substantive dispute between the parties and would cut across the undisputed arbitration agreement and jurisdiction of the arbitral tribunal to resolve the dispute. The court's inherent jurisdiction to grant a mandatory injunction is not

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9 *Worldwide Holidays Ltd v Liu* [2018] NZHC 3443.
10 At [54].

available in those circumstances as it "cannot ride roughshod over the Act and the arbitration agreement."[11]

[36] Hinton J also considered that where the form of relief, if granted, is such that the arbitral tribunal's jurisdiction would for all intents and purposes be largely nullified, then it clearly would not further the administration of justice to allow such relief. This is also consistent with Downs J's observation that a party should not seek to obtain by interim relief what is in effect summary judgment when the Supreme Court has acknowledged that there is no jurisdiction to grant summary judgment where a dispute is governed by an arbitration agreement.

[37] The analysis in *Worldwide* and *Clark Road* is also supported by the purpose of the Act as identified in extrinsic materials referred to in *Carter Holt*:[12]

> [42] … In the Seventh Secretariat note of 25 March 1985 (included at pages 228-229 of the guide) the Secretariat commented on the draft Article 5:
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> > 2. Although the provision, due to its categorical wording, may create the impression that court intervention is something negative and to be limited to the utmost, it does not itself take a stand on what is the proper role of courts. It merely requires that any instance of court involvement be listed in the model law. Its effect would, thus, be to exclude any general or residual powers given to the courts in a domestic system which are not listed in the model law. The resulting certainty of the parties and the arbitrators about the instances in which court supervision or assistance is to be expected seems beneficial to international commercial arbitration.
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> [43] In the same note the Secretariat also stated that:
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> > 4. Another important consideration in judging the impact of Article 5 is that the above necessity to list all instances of court involvement in the model law applies only to the "matters governed by this Law." The scope of Article 5 is, thus, narrower than the substantive scope of application of the model law, i.e. "international commercial arbitration" (Article 1), in that it is limited to those issues which are in fact regulated, whether expressly or impliedly, in the model law.
> >
> > 5. Article 5 would, therefore, not exclude court intervention in any matter not regulated in the model law.

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11 At [54].

12 *Carter Holt Harvey Ltd v Genesis Power Ltd* HC Auckland CIV 2001-404-1974, 22 February 2006.

[38] I consider, consistent with *Clark Road,* that the granting of an interim injunction is regulated by Schedule 1. The effect of Schedule 1 is to exclude any general or residual powers to grant injunctive relief given to the courts in a domestic system which are not listed in Schedule 1. It would be inconsistent with the purpose of the Act for the Court to rely on general or residual powers to grant injunctive relief that does not fall within art 17 and which ultimately nullifies the jurisdiction of the arbitrator. I am not satisfied that this conclusion is inconsistent with the Court's analysis of art 5 in *Carter Holt.*

[39] The defendant also refers to the decision in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*[13] which held that it was not appropriate to grant an injunction if that would pre-empt any decision ultimately to be made by the arbitrator. If the interim relief sought here was granted, it would resolve the plaintiffs' claim so would pre-empt the arbitrator's determination of the dispute.

[40] It is unnecessary for this Court to consider the merits of the application. I have no jurisdiction to do so, and the merits of the substantive dispute are irrelevant to the issue of jurisdiction.

Result

[41] The Court does not have jurisdiction to grant the orders sought by the plaintiffs.

[42] The application is therefore declined.

[43] The defendant is entitled to costs. If the parties are unable to agree, the defendant should file a memorandum by 6 October 2023 with the plaintiffs to reply by 13 October 2023.

Tahana J

[13] *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334.