IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2023-404-002246
[2023] NZHC 2974

	UNDER	the Arbitration Act 1996 and Part 19 of the High Court Rules 2016
	BETWEEN	RAU PAENGA LIMITED Applicant
	AND	CPB CONTRACTORS PTY LIMITED Respondent

Hearing:	18 October 2023
Appearances:	A R Galbraith KC, J K Stewart, G J de Lisle and J K Wilson for Plaintiff S W P Foote KC, J K Goodall KC and J A Clark for Defendant
Judgment:	24 October 2023
Reissued:	25 October 2023

JUDGMENT OF VENNING J
Re: Application for interim relief

This judgment was delivered by me on 24 October 2023 at 4.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date..........

Solicitors:	MinterEllisonRuddWatts, Auckland Lindsay & Francis, Auckland
Counsel:	A R Galbraith KC/J K Wilson, Auckland S W P Foote KC/J K Goodall KC, Auckland

[1] Rau Paenga Limited (RPL) seeks orders restraining the respondent, CPB Contractors Pty Limited (CPB), from, in reliance on default notices issued to the Engineer (Engineer) to the Contract on 4 September 2023:

(a) requiring the Engineer to suspend the contract work under cl 14.3.3 of the Contract; and

(b) terminating the Contract under cl 14.3.3

until further order of the Court or arbitral tribunal.[1]

[2] CPB opposes the application.

Background

[3] On 28 March 2019 RPL, a Crown owned enterprise, engaged CPB to construct the Parakiore Recreation and Sports Centre for a price of $220 million.[2] The due date for completion was 28 October 2021. The Contract is based on NZS 3910:2013 standard form with modifications as agreed.

[4] The project has suffered significant delays and increased costs. The contractual due date for completion was revised to 6 January 2022 factoring in 40 days extension of time awarded to CPB under the Contract. CPB has sought further extensions of time which have been declined by the Engineer. Although CPB has claimed $297 million to date, the certified costs to date are presently limited to approximately $203 million. CPB's revised programme, dated 1 September 2023, forecasts a completion date in June 2025. CPB considers the actual total cost of the project will be $696 million.

[5] The parties ultimately blame each other for various breaches of obligations resulting in the delay and increased costs. Resolution of a number of CPB's claims through the contractual dispute resolution process is ongoing.

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1 In its originating application RPL sought further orders but at the outset of the hearing Mr Galbraith KC confirmed the relief sought was restricted to the above.

2 The figures are approximate.

[6] CPB proposes to suspend or terminate the Contract. On 4 September 2023 CPB issued three default notices:

(a) Parakiore Recreation and Sport Centre: Default notice – IFC (Issued for Construction) and Engineer's Conduct (the IFC and Engineer's Conduct Default Notice);

(b) Parakiore Recreation and Sport Centre: Default notice – Ground Conditions (Ground Conditions Default Notice); and

(c) Parakiore Recreation and Sport Centre: Default notice – Aggregate (Aggregate Default Notice).

[7] The notices were issued in reliance on cl 14.3.1(f) of the Contract which enables the contractor, CPB, to notify the Engineer of the principal, RPL's default in the event it is:

> Persistently, flagrantly, or wilfully neglecting to carry out its obligations under the Contract, …

[8] By the notices CPB requires RPL compensation for RPL's defaults and demands:

(a) damages of $49 million for cost overruns to 31 July 2023;

(b) damages of $139 million being unpaid estimated liabilities to subcontractors to 31 July 2023;

(c) that RPL agree to adjust the Contract price and pay CPB a further amount of damages of $265 million;

(d) that RPL grant it an extension of time of 868 working days to 26 May 2025; and

(e) that RPL withdraw its purported default notice dated 1 September 2023.

[9] In the event the defaults are not remedied within 10 working days of the giving of the notices (and CPB says they cannot be), under cl 14.3.3 CPB may require the Engineer to suspend the Contract under cl 6.7 of the Contract. CPB would also be entitled to terminate the Contract.

[10] On 29 September 2023 RPL requested a formal decision from the Engineer under cl 13.2.4 of the Contract. The decision sought was:

(a) that the default notices were not valid default notices under cl 14.3.1;

(b) CPB's ability to require the Engineer to suspend the contract works under cl 14.3.3 had not been triggered;

(c) RPL has not persistently, flagrantly, or wilfully neglected to carry out its obligations under the Contract and therefore CPB is not entitled to rely on the default notices; and

(d) CPB is not entitled to cancel the Contract under ss 36 or 37 of the Contracts and Commercial Law Act 2017 (CCLA).

[11] RPL applies for the interim measures to maintain the status quo pending the determination of the dispute. It contemplates that once the Engineer's decision is made the unsuccessful party will take the matter to mediation or, more likely, arbitration.[3]

[12] CPB has provided an undertaking not to issue any notice requiring the suspension of the contract works or termination of the Contract or otherwise cancelling the Contract under ss 36 or 37 of the CCLA before delivery of this judgment.

[13] RPL's application is supported by a number of substantive affidavits (including affidavits in reply) from John O'Hagan, RPL's CEO; Nigel Cox, Council officer; Donald Young, project director; Peter Marshall, the architect; Jeremy Harris, consultant; David Whittaker, structural engineer; Ann Williams, an engineering

[3] The Engineer's decision is required to be made within 20 working days: cl 13.2.4.

geologist; Richard Young, Geotech engineer; Mark Revis, an independent quantity surveyor; and Oscar Richardson-Read, a law clerk employed by RPL's solicitors.

[14] CPB has responded with affidavits from Paul Corbett, the general manager of CPB New Zealand, (including a supplementary affidavit) and Peter Pether, a lawyer for CPB.

Jurisdiction

[15] One matter the parties agree on is the issue of jurisdiction. Pursuant to s 6 of the Arbitration Act 1996 (the Act) Schedule 1 to the Act governs any arbitration between RPL and CPB arising under the Contract as the arbitration would take place in New Zealand.

[16] Article 9(1) of Schedule 1 gives this Court jurisdiction to hear applications for interim measures and to grant interim measures before or during arbitral proceedings. Article 9(2) confirms this Court has the same powers as an arbitral tribunal to grant interim measures under arts 17–17B of Schedule 1 to the Act.

[17] An interim measure includes requiring a party to:

> (a) maintain or restore the status quo pending the determination of the dispute: …

[18] The status quo in the present case is the continuation of the construction work under the Contract.

[19] Article 17B(1) confirms that to obtain such an interim measure in this case RPL must satisfy the Court that:

> (a) harm not adequately reparable by an award of damages is likely to result if the measure is not granted; and
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> (b) the harm substantially outweighs the harm that is likely to result to the respondent if the measure is granted; and
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> (c) there is a reasonable possibility that [RPL] will succeed on the merits of the claim.

[20] Although RPL also refers to reliance on the inherent jurisdiction of the Court in its application, Mr Galbraith KC confirmed RPL did not pursue that aspect of the application.

The parties' positions

[21] RPL submits that the Court's intervention is needed to facilitate and complement the arbitration process which both parties had agreed to follow.

[22] Mr Galbraith submitted that the Court's intervention and grant of the interim relief sought would protect that agreed process. The orders sought would preserve the status quo pending the resolution of the dispute by arbitration in accordance with the process the parties had agreed to under the Contract.

[23] Mr Galbraith emphasised that if the interim measures were not granted, CPB would be able to require the Engineer to suspend the Contract and would be in a strong position to negotiate new terms if CPB was to remain as a contractor to the project. RPL would be placed in a very difficult position and would effectively be forced to accept CPB's terms if it was to avoid CPB terminating the Contract.

[24] CPB argues that the parties ought to be left to the contractual bargain they concluded pursuant to which either party can terminate if it considers it has the right to do so.

[25] Mr Foote KC submitted that the Court's decision on this application will effectively be final. If the interim measures orders sought are granted, CPB will be forced to continue with the Contract and, on the basis of Mr Pether's evidence, the arbitration will not be concluded for two to three years. The project would effectively be completed by that time. CPB would be required to complete the project before the present dispute would be resolved. On the other hand, if the interim measures are not granted, then the Contract will be terminated and, if ultimately RPL succeeds at arbitration and establishes that CPB was not entitled to terminate, CPB will be able to pay whatever damages are required.

[26] Mr Foote noted that CPB has provided RPL two performance bonds to secure its performance totalling, in aggregate, $11 million. RPL has recourse to the bank bonds on a pay now, argue later basis. Further, in December 2022 RPL made payments in advance to CPB of approximately $25 million on terms which permit RPL to demand repayment within five working days. As security for those advance payments CPB has provided additional bonding for $25 million.

[27] In addition CPB's parent company, CIMIC Pty Limited, (CIMIC) has provided a parent company guarantee as a principal debtor, pursuant to which, in the event of wrongful suspension or termination, RPL may seek to recover any amounts found to be owing by CPB to RPL under the Contract. Mr Foote emphasised the substance of CIMIC.

[28] Further, Mr Foote noted that the Contract provided in cl 14.2 for an orderly hand over in the event of a termination.

[29] Finally, Mr Foote submitted that the relationship between the parties had entirely broken down which was apparent from the evidence filed by the parties in relation to this matter and the tone of the correspondence. In colourful terms, and by reference to a decision of Kós P, Mr Foote submitted this was a case where Humpty Dumpty could not be put back together again.[4] CPB should be entitled to suspend or terminate the Contract.

The context

[30] Mr Foote submitted there was good reason why courts have been, and should be, reluctant to grant mandatory injunctions requiring specific performance of contracts. He referred to the case of *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*.[5] In that case Argyll leased a large shopping unit in a shopping centre. The lease contained covenants requiring the premises to be used as a supermarket and to be kept open for retail trade during the usual hours of business.

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4 *Forest Holdings (NZ) Ltd v Sheung* [2021] NZCA 608 at [35].

5 *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1997] 3 All ER 297 (HL). CPB also relies on statements of principle from *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67 which was quite a different case.

With approximately 20 years left to run in the lease Argyll gave notice of its intention to close the supermarket which had made a substantial loss the previous year. Co-operative Insurance sought an order for specific performance of the covenants in the lease and/or damages. In the House of Lords Lord Hoffman cited with approval the following passage from a decision of Lord Goddard CJ in 1955:[6]

> 'No authority has been quoted to show that an injunction will be granted enjoining a person to carry on a business, nor can I think that one ever would be, certainly not where the business is a losing concern.'

[31] In the *Co-Operative Insurance* case Lord Hoffman went on to say in a passage referred to by Mr Foote:[7]

> From a wider perspective, it cannot be in the public interest for the courts to require someone to carry on business at a loss if there is any plausible alternative by which the other party can be given compensation. It is not only a waste of resources but yokes the parties together in a continuing hostile relationship. The order for specific performance prolongs the battle. If the defendant is ordered to run a business, its conduct becomes the subject of a flow of complaints, solicitors' letters and affidavits. This is wasteful for both parties and the legal system. An award of damages, on the other hand, brings the litigation to an end. The defendant pays damages, the forensic link between them is severed, they go their separate ways and the wounds of conflict can heal.

[32] Mr Foote also relied on the decision of Kós P in the Court of Appeal case of *Forest Holdings (NZ) Ltd v Sheung*.[8] In that case the Court had to interpret the obligations under a joint venture agreement between Forest Holdings, a third party, and Mr Sheung. Forest Holdings sought specific performance of Mr Sheung's obligations by means of an order for specific performance. The Court accepted that Mr Sheung had no reasonable defence to the claim that he was in default of his obligation to invest in the joint venture. However, the Court considered there were a number of difficulties in the way of the specific performance as an appropriate remedy. The remedy is equitable and discretionary and the normal remedy for default in making payment was damages. Ultimately in the course of the judgment Kós P noted:

> [35] Secondly, in any event, specific performance is patently an inappropriate remedy here. It would require Humpty Dumpty to be put

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6 *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*, above n 5, at 299, citing *A-G (ex rel Allen) v Colchester Corp* [1955] 2 All ER 124 at 128.

7 At 305.

8 *Forest Holdings (NZ) Ltd v Sheung*, above n 4.

> together again. Mr Sheung has gone to ground, overseas. He may be taken to be an unwilling joint venturer. Yet specific performance here would require reconstruction of this stalled joint venture, with Mr Sheung becoming co-shareholder (and director) of Pristine Timber, and with decisions under the joint venture requiring the support of both Forest Holdings and Pristine Timber. Mr Sheung's role would not be wholly passive, and we are disinclined to speculate, as Mr Bond asked us to, about his truculence turning to enthusiasm when his money has been handed over. It is a reasonably settled principle that specific performance will not be granted where the consequence is to require the continued conduct of a business. This is a case where continuing participation and supervision would be required. As a recipe for a bad omelette, it could barely be beaten.

[33] Mr Foote also referred to and relied on the *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* case, and particularly the following passage from the opinion of Lord Mustill:[9]

> I do not consider that the English court would be justified in granting the very far-reaching relief which the appellants claim. It is true that mandatory interlocutory relief may be granted even where it substantially overlaps the final relief claimed in the action; and I also accept that it is possible for the court at the pre-trial stage of a dispute arising under a construction contract to order the defendant to continue with performance of the works. But the court should approach the making of such an order with the utmost caution, and should be prepared to act only when the balance of advantage plainly favours the grant of relief.

[34] As Mr Foote noted, that case also involved a substantial construction contract. Channel Tunnel employed the defendants Balfour Beatty, a consortium of English and French companies to build the Channel Tunnel and construct a cooling system. A clause of the contract provided for the initial reference of disputes or differences to a panel of experts and provided for final settlement by arbitration in Brussels.

[35] A dispute arose as to the amounts payable in respect of the cooling system. Balfour Beatty threatened to suspend that work alleging Channel Tunnel was in breach of contract. Channel Tunnel issued a writ seeking an injunction to restrain Balfour Beatty from suspending the work. The Court of Appeal had granted a stay of Channel Tunnel's proceeding, holding that a party to an arbitration agreement was not entitled to disregard the arbitration procedure and bring an action merely because a preliminary step is not taken; that the Court had no power to grant injunctive relief under the relevant provision of the Arbitration Act, and whether or not there was such

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9 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 (HL) at 367.

jurisdiction under the Supreme Court Act it should not, as a matter of judicial restraint, be exercised where there was an agreement to submit a dispute to arbitration abroad. On appeal, the House of Lords confirmed the Court had jurisdiction to stay the action. But that, while there was no reason in principle why an order for a mandatory stay of an action could not be combined with an injunction to secure interim relief, since the grant of the injunction claimed would largely pre-empt any decision ultimately to be made by the panel or the arbitrators it was not appropriate in the circumstances to grant relief.

[36] There is, with respect, obvious good reason not to require a business to carry on operating at a loss for the reasons explained in the cases of *Co-operative Insurance Society Ltd* and *A-G (ex rel Allen)*. However, while the principles are sound, they are not directly applicable to the present case. Relevantly, in *Co-operative Insurance Society Ltd*, Lord Hoffman did note that there is a need to distinguish between orders which require a defendant to carry on an activity, such as running a business over a more or less extended period of time, and orders which require a defendant to achieve a result and observed:[10]

> Even if the achievement of the result is a complicated matter which will take some time, the court, if called upon to rule, only has to examine the finished work and say whether it complies with the order.

And noted that the:[11]

> [distinction] between orders to carry on activities and to achieve results explains why the courts have in appropriate circumstances ordered specific performance of building contracts and repairing covenants.

[37] Further, Lord Hoffman noted a principal reason why orders may not be made requiring the continuation of a business is the imprecise nature of such an order, given that enforcement of the order could be by way of contempt proceedings.

[38] As a building contract, the present case is distinguishable from the *Co-operative Insurance Ltd* case and falls into the category of cases noted by Lord Hoffman where the courts will, in appropriate circumstances, order specific

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10 *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*, above n 5, at 303.
11 At 303.

performance or grant interim relief. Next, the form of orders sought do not suffer from the same imprecision contemplated by Lord Hoffman in that case.

[39] In *Forest Holdings (NZ) Ltd* the Court was minded not to order specific performance because specific performance is discretionary and the most efficient course for the plaintiff was to cancel the contract and to sue Mr Sheung for damages, including consequential losses. Again, the case is readily distinguishable from the present on its facts. Mr Sheung's primary obligation under the joint venture was to provide funding. CPB's obligations in the present one are quite different. Kós P's colourful observations are of little assistance in the very different circumstances of this case.

[40] While the *Channel Tunnel Group* case involved a major construction contract, the ultimate decision of the House of Lords turned on the specific provisions of the contract before it, the provisions of the English Arbitration and Supreme Court Acts and that the seat of the arbitration was in Brussels. Again, the facts are important. The contractor had threatened to suspend the works. Channel Tunnel sought an injunction to prevent them doing so. The contractor responded with a cross application to stay Channel Tunnel's proceedings for injunction on the basis they were brought in breach of the method the parties had agreed to, in order to resolve disputes (namely arbitration in Brussels). Ultimately the House of Lords accepted the contractor's position. The House of Lords accepted that it was appropriate to stay Channel Tunnel's proceedings as they were brought in breach of the parties' agreed method of resolving disputes. In other words, the House of Lords confirmed that the parties should follow the arbitral process provided for in their contract for the resolution of disputes. In the present case, while RPL seeks orders preventing CPB from ultimately suspending or otherwise terminating the Contract, it does so on the basis that the orders are sought to ensure the parties follow the dispute resolution process in the Contract. Relevantly for present purposes Lord Mustill noted:[12]

> The purpose of interim measures of protection, … is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is what such measures

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12 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*, above n 9, at 365.

> aim to do, there is nothing in them contrary to the spirit of international arbitration.

[41] The same point was made in *Sensation Yachts Ltd v Darby Maritime Ltd* by Baragwanath J:[13]

> [22] In short, the purpose of interim measures is to complement and facilitate the arbitration, not to forestall or to substitute for it. The Court's role is ancillary, to be exercised only to the extent that it is not possible or practicable for the arbitrator to deal with the issue.

[42] In the present case interim relief is sought from this Court to preserve the position to enable the parties to follow the dispute resolution procedure under the Contract. Resort to the Court is necessary because it is obviously not open for an arbitrator to deal with the issue as one has not been appointed as yet and the contractual process provides first for a decision from the Engineer.

Is there a reasonable possibility RPL will succeed on the merits of the claim?

[43] Against that background, it is convenient to first address the requirement that RPL must satisfy the Court there is a reasonable possibility it will succeed on the merits of its claim. The Courts generally consider this issue first when addressing the application of art 17B, consistent with the consideration of the requirement for a seriously arguable case to support an interim injunction.

[44] Mr Goodall KC argued this aspect of the case for CPB. At the outset he confirmed that CPB acknowledges RPL has an arguable case that it may succeed on its claim (as, in his submission, does CPB). However, he focused on the merits of RPL's challenge to the notices of default because RPL relies on the apparent lack of merit to support its argument that the arbitration process will readily resolve the present issue between the parties.

[45] The notices were issued relying on three principal grounds. First, the IFC and Engineer's default notice alleges that RPL failed to provide IFC revisions of the tender drawings within 20 working days of the date of Contract or for any reasonable period thereafter. It also alleges that RPL failed to ensure the Engineer acts independently,

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[13] *Sensation Yachts Ltd v Darby Maritime Ltd* HC Auckland CIV-2005-404-1908, 16 May 2005.

fairly and impartially. Next, the Ground Conditions default notice alleges that RPL has failed to provide all material information relevant to physical conditions on the site and has failed to ensure that information requested by CPB is provided. Finally, in its third default notice CPB alleges that the aggregate and cumulative effect of RPL's conduct described in each of the first two notices has resulted in a substantially increased burden of performance upon CPB or amounts to a misrepresentation which was impliedly essential to CPB, or which has substantially increased CPB's burden of performance.

[46] Mr Goodall noted that the Contract was a build only agreement, with RPL assuming overall responsibility for project design. He argued that RPL has failed in its obligations to provide IFC versions of the tender documents within 20 working days of the Contract being executed. The drawings were critical to CPB being able to meet its obligations under the Contract. In his affidavit, Mr Corbett refers to a report from Timothy Hoare as to the requirements for such IFC drawings. Mr Hoare also identifies what in his opinion, amount to errors and omissions in the IFC documentation.

[47] The first default notice also contains CPB’s allegation that RPL has failed to ensure that the Engineer to the Contract has acted independently, fairly and impartially. Mr Corbett says that, for example, the Engineer refused to consider CPB's entitlement to a variation for additional grouting work.

[48] In its second default notice CPB relies on the ground conditions, or at least a warranty as to the ground conditions, and says that RPL failed to disclose relevant reports. It says RPL is in breach of cls 5.1.6 and 6.1.1 of the Contract.

[49] In its third default notice, CPB argues that the aggregate and cumulative effect has increased CPB’s burden of performance so that the defaults also amount to repudiation by RPL entitling CPB to cancel the Contract in accordance with the provisions of the CCLA.

[50] Mr Goodall referred to the provisions of the Contract, particularly cl 14.2.1(f), which provides that in the event of default by the contractor the principal could only

terminate the Contract once the Engineer had certified in writing that the contractor had abandoned the Contract or was otherwise persistently, flagrantly or wilfully neglecting to carry out its obligations under the Contract. He noted there was no such equivalent requirement for an Engineer's certificate under cl 14.3.1 and submitted there was nothing in the Contract, including in cl 14.3.3, purporting to suspend the right of suspension or termination pending an arbitration.

[51] Finally, Mr Goodall submitted CPB is entitled to cancel the Contract on the basis that there have been breaches of essential terms by RPL including the IFC design requirements, Ground Conditions and the need for an independent Engineer which are all essential to the Contract. He submitted the effect of the breaches is to substantially alter the benefit and burden of the Contract for CPB.

[52] Mr. Galbraith submitted that RPL had a strong case for success on the merits. Even on their face the default notices issued by CPB were defective. The purpose of a default notice under cl 14.3 of the Contract is to identify a default and to inform the defaulting party as to what actions can be taken to remedy the default. The present default notices do not achieve that purpose. All the default notices note that the defaults cannot be remedied "simply by performance". Mr Galbraith made the point that the demand for moneys to remedy the default includes demands for moneys that have not been certified under the Contract and are said to be owing to subcontractors but who have not yet been paid.

[53] Further, RPL takes the point that a number of defaults have been the subject of binding adjudication determinations. For example, on 19 February 2021 Royden Hindle determined there was no material difference between the physical conditions encountered at the site and the conditions described in the baseline site conditions. On 4 March 2022 John Green determined, inter alia, the Contract did not require the IFC drawings to meet any particular standard. RPL also takes the point that most of the alleged defaults are progressing through the contract dispute resolution process at present.

Analysis – reasonable possibility of success

[54] I consider CPB's argument that it has an absolute right under the Contract to give notice under cl 14.3 of the Contract and then subsequently to suspend or terminate the Contract, whether lawfully or not, with the issue of lawfulness being resolved after the rights have been asserted and the mutual obligations under the Contract concluded, is flawed.

[55] The notices are provided for and issued under cl 14.3 of the Contract. As relevant the clause provides:

> **14.3 Default by the Principal**
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> 14.3.1 In the event of the Principal:
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> (a) Failing to execute the Contract Agreement under 2.6 or the Principal's Bond under 3.2 where required by the Contract;
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> (b) Failing to pay the Contractor the amount due under any Payment Schedule;
>
> (c) Obstructing the issue of any Payment Schedule or any certificate;
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> (d) Becoming bankrupt or going into liquidation or having a receiver or statutory manager appointed and the assignee, liquidator, receiver, or statutory manager as the case may be failing within 10 Working Days to make arrangements satisfactory to the Contractor for continued payment of amounts due under the Contract;
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> (e) Abandoning the Contract; or
>
> (f) Persistently, flagrantly, or wilfully neglecting to carry out its obligations under the Contract, the Contractor may notify the Engineer of the default.
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> …
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> 14.3.3 If the Principal's default is not remedied within 10 Working Days after the giving of such notice under 14.3.1 or 14.3.2, the Contractor may require the Engineer to suspend the progress of the whole of the Contract Works under 6.7. Following such suspension the Contractor shall be entitled without prejudice to any other rights and remedies to terminate the Contract by giving notice in writing to the Principal.

[56] Clause 6.7 provides that:

6.7 Suspension of work

6.7.1 The Principal may, from time to time for any reason, through the Engineer suspend the whole or a part of the Contract Works for such time as the Principal may think fit. The Contractor will comply with any such suspension.

6.7.2 During the suspension the Contractor shall properly secure and protect the Contract Works against damage and leave the Site in a safe and tidy condition.

6.7.3 Unless the suspension is due to default on the part of the Contractor, or any of its Personnel, the suspension shall be treated as a Variation.

6.7.4 If the suspension remains in effect for more than 3 Months, the Contractor may request the Engineer in writing to permit the suspended work to be continued. If the Engineer does not grant permission to continue within 1 Month of receipt of the request, then the Contractor shall be entitled to treat the suspension as a Variation deleting the uncompleted portion of the suspended work from the Contract, or where the suspension affects the whole of the Contract Works as an abandonment of the Contract by the Principal. This 6.7.4 will not apply where the suspension is due to default on the part of the Contractor or any of its Personnel.

6.7.5 Notwithstanding the above, the Principal and the Contractor may by agreement in writing suspend the Contract Works for any period, and the provisions of 6.7.2, 6.7.3, and 6.7.4 shall apply unless expressly excluded.

[57] Clause 14.3.1 sets out the conditions required to support or justify the issue of a notice under cl 14.3.3 which may lead to suspension or termination of the Contract. The bar is deliberately set high to support the issue of a notice(s) which may lead to the suspension and termination of the Contract. The interpretation of the words used in cl 14.3.1(f), which requires the defaults to be persistent, flagrant or amounting to wilful neglect of the principal's obligations under a Contract, is informed by their context. The preceding provisions of cl 14.3.1 which set out the circumstances which would support the issue of a default notice having that effect confirm the nature of the default required. The defaults are extreme. For example, the failure to execute the Contract or to pay an amount due under the payment schedule, becoming bankrupt or going into liquidation, or abandoning the Contract, are all examples of extreme default.

[58] Clearly, there could readily be a dispute between the parties whether the requirement for the issue of a notice under cl 14.3.1(f) has been met. The scheme of the Contract is that where there are disputes between the parties, subject to a limited number of exceptions, (which do not apply in this case), the dispute is to be dealt with under clause 13 of the Contract:

> **13 DISPUTES**
>
> **13.1 General**
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> …
>
> 13.1.2 Every dispute or difference concerning the Contract which is not precluded by a provision of this Contract, including 12.4,12.6, or 13.1.1 shall be dealt with under the following provisions of this Section.
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> …
>
> **13.2 Engineer's review**
>
> 13.2.1 Every dispute or difference under 13.1.2 shall be referred to the Engineer not later than 1 Month after the provision of the Final Payment Schedule under 12.5.1, 12.5.3, or 12.5.4 or more than 1 Month after the date on which any relevant Adjudicator's Determination is given to the parties, whichever is the later. The Engineer shall give his or her decision in writing. Except in the case of a decision under 13.2.4 the Engineer may correct or modify his or her decision by a subsequent decision in writing.
>
> 13.2.2 The Engineer or the Principal or the Contractor may, before or after the Engineer has given a decision (other than a decision under 13 2.4), ask for a meeting, and in such case the Engineer and a representative of the Contractor shall meet as soon as practicable and endeavour to resolve the dispute amicably.
>
> 13.2.3 The Engineer and the Contractor may, with the consent of the Principal, jointly submit the dispute or any question arising in connection with it to an agreed expert, with a request to make a recommendation to assist them to resolve the matter. The Principal and the Contractor shall each pay one half of the costs of the agreed expert.
>
> 13.2.4 Unless the dispute or any question arising in connection with it has been referred under 13.2.3 and is awaiting a recommendation from the agreed expert, the Engineer may, at any time, in respect of any dispute or difference under 13.2.1 give a decision (in this Section called 'a formal decision') which states expressly that it is given under this subclause 13.2.4. The Engineer shall give a formal decision on the

> matter within 20 Working Days of receiving notice in writing from the Principal or the Contractor requiring him or her to give a formal decision and expressly referring to this subclause 13.2.4. Upon making a formal decision the Engineer shall forthwith send copies of it to both the Principal and the Contractor. The Engineer's formal decision shall, subject to 13.3 and 13.4 or any Adjudication proceedings, be final and binding.

[59] So, RPL is entitled to challenge the right of CPB to issue the default notices and to have that challenge determined under the provisions of the Contract, which in the first instance is by reference to the Engineer for a formal decision under cl 13.2, and, if either party is dissatisfied with the Engineer's decision under cl 13.2.4, by reference to arbitration.

[60] While, as Mr Goodall pointed out, the provision, cl 14.2.1(f), entitling the principal to terminate for persistent, flagrant or wilful neglect of their contractual obligations by the contractor is different in that the Engineer must certify such default before the notice may issue, I do not consider that to be material. In either situation (where the issue is not conceded) a ruling by the Engineer will be required. In the case of alleged default by the Principal under cl 14.3.1 after the notice has been issued by the contractor following reference under cl 13.1.2 as in this case, and, in the case of default by the contractor, after the matter has been raised with the Engineer (again likely to be under cl 13.1.2 absent concession of the default by the contractor). In either case the Engineer will be required to rule on the issue, and each party will have a right under the contract to take that decision to arbitration.

[61] Next, I consider there is some force in Mr Galbraith's submission that even on their face the default notices are arguably deficient. Clause 14.3 contemplates defaults that are capable of being remedied. That is why 10 working days is provided for under cl 14.3.3. But the default notices state that RPL's defaults cannot be remedied simply by performance. They demand sums of money. But the sums demanded have not been certified as payable under the Contract, and, in the case of the payments to be made to sub-contractors may not have been paid by CPB to the sub-contractors. Further, some at least of the issues raised have either been the subject of previous rulings or are working their way through the dispute process.

[62] As to the specific matters referred to concerning the IFC and Engineer's Conduct and the Ground Conditions default notice, the evidence establishes they are at the least, very much contestable. For example, in response to the complaint in the first default notice regarding the IFC drawings, RPL refers to the evidence of Mr Harris, an experienced construction industry consultant, and Mr Whittaker, a structural engineer. They are two independent experts, who say there is no industry or objective standard for IFC drawings and disagree with Mr Horare's conclusions. Their expert evidence is that the design material provided met a reasonable standard in line with industry norms. Further, in relation to the complaint regarding the engineer, both Mr Young and Mr Harris again challenge Mr Corbett's opinion. Their evidence supports an argument that RPL has ensured and continues to ensure the Engineer fulfils his obligations under the Contract. On the issue of the Ground Conditions, RPL says that the reports in issue were prepared for another party and for a separate contract. To the extent they were relevant they were relied on in subsequent reports prepared by Tonkin & Taylor in 2018. Those reports were included in the baseline site conditions. Further, the documents played a central role in a Ground Conditions' claim that was the subject of an arbitration hearing earlier this year and on which an award is expected.

[63] As Mr Goodall effectively acknowledged, the above matters cannot be resolved by this Court on this application, but there is at the least a good argument in RPL's favour that the Engineer (and any subsequent arbitrator) will find that CPB is not entitled to rely on cl 14.3.1(f) to suspend or terminate the contract.

[64] The final matter is the suggestion by CPB that it is entitled to cancel the Contract under the CCLA. I accept the force of RPL's submission that the fact it takes a different view of the parties' obligations under the Contract is not itself sufficient to support an argument that CPB is entitled to cancel under s 36 of the CCLA. The bar for repudiation is a high one. As the Supreme Court observed in *Kumar v Station Properties Ltd (in liq and in rec)*:[14]

> [63] On this point, it is necessary to return to the fundamental question under s 7(2), namely, whether an inference can reasonably be drawn in the circumstances that the relevant party no longer intends to perform its obligations under the contract. This fact-based assessment must be made against the background that the threshold is a high one and that disputes about

[14] *Kumar v Station Properties Ltd (in liq and in rec)* [2015] NZSC 34.

> the meaning of contracts or the nature of the obligations they impose are commonplace. The mere fact that a party vigorously espouses a view of a contract's meaning that is ultimately shown or accepted to have been wrong does not mean that the party is thereby manifesting an intention not to perform its obligations under the contract. If it is clear that the party accepts that it is bound by the contract, whatever meaning it is ultimately determined to have, the party should not be held to have repudiated the contract. By contrast, if a party persistently refuses to perform unless the other party accepts additional onerous terms inconsistent with the contract or on the mistaken view that there was never an enforceable contract, the party may well be found to have repudiated the contract. In such circumstances, the stance adopted amounts to a refusal to accept any obligation to complete the contract in accordance with its terms.

[65] It is difficult for CPB to argue RPL has clearly evinced an intention not to perform its obligations when RPL has confirmed the process and seeks to maintain the Contract.

[66] As for cancellation under s 37 of the CCLA, CPB relies on the same defaults to support cancellation arguing that RPL has either misrepresented the position or has breached essential terms of the Contract. For the reasons given above, while that matter cannot be determined in these proceedings there is a good argument in RPL's favour that CPB is not entitled to cancel. I also note, as to representations, the Contract includes an entire agreement clause. It is arguable that the clause would be held to be fair and reasonable between the parties in the circumstances of this case.[15] I do not consider is necessary to consider the further argument advanced by RPL, that as the alleged defaults are matters of which CPB has full knowledge it has, by its conduct, affirmed the Contract.

[67] In summary, and as was effectively conceded by CPB, there is a reasonable possibility that RPL will succeed on the merits of the matter it has referred to the Engineer and that may ultimately be the subject of Arbitration.

Whether the harm is not adequately reparable by an award of damages

[68] Mr Galbraith addressed the harm under this consideration and the issue of whether that harm substantially outweighed the harm likely to result to CPB if the interim relief is granted together. While there is an overlap in relation to the harm

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15 CCLA, s 50.

under both issues, art 17B(1) requires the Court to be satisfied on both issues, so I deal with each consideration in turn.

[69] Mr Foote's principal argument under this head was that, in the event it was ultimately found CPB was not entitled to suspend or terminate the Contract, then RPL would be awarded damages and CPB would be able to pay any such damages, noting the bonds and the parent guarantee by CIMIC. Any harm to RPL could be addressed by the award of damages.

[70] The starting point is to identify the harm to RPL if the interim orders are not granted. Mr Galbraith highlighted the very difficult position RPL would be placed in if the Contract was suspended. Suspension would inevitably lead to uncertainty as to completion of the project and a substantial increase in the cost of the project. CPB could also use the suspension to re-negotiate the terms of the Contract which RPL would find very difficult to resist as it would have limited bargaining power to resist CPB's demands. The alternative would be termination by CPB. Conceivably, subject to the point noted below, namely the ability to quantify damages, the bare economic consequences could be met by an award of damages but the harm of suspension or termination encompasses more than just economic loss to RPL.

[71] As Mr O'Hagan identified, any suspension or termination would inevitably shift the already delayed completion date even further back. A suspension of the Contract for any period could also lead to the project being under resourced if CPB moved its employees to other projects. Perhaps more relevantly, subcontractors and consultants may well take the view that the project is all becoming too difficult and accept engagement on alternative projects. Further, delay also risks the loss of key personnel within RPL itself and the Council to whom the project is ultimately going to be handed over. Suspension inevitably risks the loss of key personnel and loss of project knowledge.

[72] The position would be exacerbated if CPB ultimately terminated the Contract. That would result in significant disruption to the building process and dislocation of personnel. It is not an entire answer for CPB to submit, as Mr Foote did on its behalf, that the subcontractors could remain. A termination or even suspension would put

subcontractors and consultants, such as designers and engineers, under pressure. It could well lead to issues of solvency for some and would impact the continuity of work and warranties.

[73] The issue of the warranties under the Contract is a real issue. If the Contract is terminated RPL will have to engage an alternative contractor. The alternative contractor will not provide warranties for works they did not initially start. Where their works interface with CPB's works and CPB's contractors works there is significant potential for issues about warranties to arise. It is no answer to suggest RPL will have the subcontractor's warranties. Experience shows that from time to time subcontractors fail. Next, some components of the design are specialised (swimming pools and related services for example). Even if an alternative contractor was ultimately found and subcontractors retained or replaced, some of the facilities' assets may be subject to expired warranties.

[74] There is also the loss of reputation to RPL in relation to the project generally. While that is intangible, it is still real. It would be relevant to and affect the ability of RPL to engage alternative contractors in the event of termination.

[75] That leads to the further point regarding the ability to quantify RPL's loss. The costs associated with any suspension or termination will be difficult to calculate. Any damages claim will not be restricted to the increased price of the new Contract to finish the project. There will be other costs associated with the delay including wasted consultant and internal managerial costs, all of which will be difficult to calculate. By contrast, the issue of delay in completion is covered by the express contractual provisions at present.

[76] Having regard to the above, RPL satisfies the Court that if the interim measures sought are not granted, it is likely to sustain harm which cannot adequately be reparable by an award of damages.

[77] In addition, there is the issue of harm to third parties, as identified in the affidavit of Nigel Cox the Council's head of recreation, sport and events. Even the current delay in the opening of the facility has an impact on a number of sports. The

further delay associated with suspension or termination of the Contract with CPB will impact on the participants and spectators involved in sports such as swimming, water polo, diving, netball and basketball. In addition, the further delays associated would have cost implications for the Council which has been forced to maintain and keep open other facilities which it had intended to close. Finally, there have been events which would have been held at the facility which it has been necessary to cancel because of the existing delays. That situation will only be exacerbated by any suspension or termination of the Contract.

[78] Mr Foote referred to the decision of Asher J in *Safe Kids in Daily Supervision Ltd v McNeill* and submitted that the impact of harm on third parties cannot be taken into account under art 17B.[16] In that case Asher J said:

> [36] Given that the court's powers to grant interim relief are expressed to be identical to those of an arbitral tribunal, it would be surprising if the full range of considerations that apply to interim injunctions could be applied to a consideration of whether an interim measure should be granted. For instance, issues such as the public interest considered in *Finnigan v New Zealand Rugby Football Union Inc (No. 2)*, and the consequences to innocent third parties: *Dunedin Taxis (1965) Limited v Dunedin Airport Limited*, do not seem to be matters that would naturally fall within the ambit of an arbitral tribunal. An arbitral tribunal derives its jurisdiction from the contract between the parties. The Arbitration Act gives it ancillary powers. In exercising a discretion an arbitral tribunal would not usually regard itself as equipped to consider wider public interest and third party interest considerations. Third parties have no status before it. While an arbitral tribunal has the remedial powers of the High Court under s 12, it does not follow that an arbitral tribunal has the inherent jurisdiction of that court. At the very least, a court or arbitral tribunal will exercise considerable caution before going beyond the considerations specifically set out in article 17(B)(1). An arbitral tribunal will hesitate to consider the "overall justice" in such circumstances, and limit its considerations to those in article 17B(1).

[79] In *Prestige Motors Ltd v My Trustee Co (Nikolas and Petra) Ltd*, Gordon J also accepted that in the arbitration context it is less likely that third party considerations will be taken into account.[17]

[80] However, two points can be made. First, while noting that third parties have no status before the arbitral tribunal, Asher J did leave the position open by going on

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16 *Safe Kids in Daily Supervision Ltd v McNeill* [2012] 1 NZLR 714. See also *Outdoor Action & Adventure Ltd v The New Zealand Transport Agency* [2019] NZHC 123 where Duffy J followed *Safe Kids in Daily Supervision Ltd v McNeill*.

17 *Prestige Motors Ltd v My Trustee Co (Nikolas and Petra) Ltd* [2021] NZHC 237.

to conclude that at the very least a court or arbitral tribunal will exercise considerable caution before going beyond the considerations specifically set out. Neither Asher nor Gordon JJ said that harm to third parties may never be taken into account.

[81] Next, in *New Zealand Association of Credit Unions v Finzsoft Solutions (New Zealand) Ltd* Wylie J took into account the potential harm to various third parties with which the applicant traded.[18] He noted that unless relief was granted a number of "Mum and Dad" credit union customers would be unable to access their bank accounts via mobile apps over the Christmas period. As an aside I note the Judge also took into account adverse publicity to the applicant, equivalent to the reputational damage RPL refers to in the present case.

[82] I also note that art 17B does not expressly confine harm under (a) or (b) to harm suffered by the applicant, whereas in (b) harm to the respondent is expressly referred to. While the onus is on the applicant to satisfy the requirements regarding the impact of the harm, the harm is not apparently confined to that suffered by the applicant.

[83] Each case must be considered in its own context. The harm to the interests of the third parties in the present case relied on by RPL is harm to parties closely aligned with RPL. I consider it open to the Court to consider such harm, noting that harm under art 17B is not qualified by reference to harm to the applicant. That supports and confirms my conclusion noted above that the harm likely to result if the interim relief was not granted is not adequately reparable by damages.

Does the harm substantially outweigh that likely to result to CPB if the interim measures are granted?

[84] CPB's main point in relation to the harm is that if the interim orders are granted they will be, in effect, a final remedy and override the "contractual architecture" which CPB relies on to terminate.

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[18] *New Zealand Association of Credit Unions v Finzsoft Solutions (New Zealand) Ltd* [2019] NZHC 3198.

[85] CPB submits that the reputational issues and other matters of concern to RPL are insignificant by comparison.

[86] Mr Foote referred to the evidence of Mr Pether that any arbitration will not be concluded before the project is completed. Mr Pether is a partner in King and Wood Mallesons and legal advisor to CPB. Mr Pether says the current dispute between RPL and CPB is complex both in nature and in scope. He referred to the detailed processes the parties have already undertaken in an attempt to resolve other issues by mediation. Mr Pether referred to his experience in commercial construction arbitrations. He considers from that experience that, if run efficiently and with limited interlocutory applications, an arbitration involving a dispute about the termination of a construction contract will be substantial and complex and will require at least 18 to 24 months from the commencement until the end of the hearing and then a further three to six months until receipt of the award. He anticipates a number of interlocutory applications in the present case. He also notes the length of time taken to resolve the ground conditions arbitration.

[87] In short, in CPB's opinion, RPL's interim measure would become a final remedy as the project would be completed before the arbitration. CPB again relies on the *Channel Tunnel* case and the following passage from the decision of Lord Mustill:[19]

> If, on the other hand, an injunction is granted pending a final resolution of the dispute the completion of the [dispute procedure] is bound to take a considerable time; during which, we must assume, the work under the construction contract will be approaching a conclusion. … there is one hard fact which I believe to be conclusive, namely that the injunction claimed from the English court is the same as the injunction to be claimed from the [arbitral tribunal] except that the former is described as interlocutory or interim. In reality its interim character is largely illusory, for as it seems to me an injunction granted in November 1991, and a fortiori an injunction granted [today], would largely pre-empt the very decision of the [arbitral tribunal] whose support forms the raison d'etre of the injunction. By the time that the award of the [arbitral tribunal] is ultimately made, with the respondents having continued to work meanwhile it will be of very modest practical value except as the basis for a claim in damages by the respondents: …

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19 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*, above n 9, at 367.

[88] Mr Corbett makes the same point, that if CPB is restrained as RPL seeks, it will effectively be forced to complete the contract works in circumstances where it considers it has grounds to suspend and/or terminate the Contract. CPB will be required to remain at the site for at least another 19 months and fund the increased completion costs of the project. It will also need to fund the supply chain, including subcontractors through to completion. All of this will, in his evidence, take place against a background of a difficult and adversarial relationship. As a result, CPB will be exposed to financial liability for liquidated damages, will need to provide cashflow for the project, and may miss other business opportunities. He also refers to damage to the CPB's relationship with its subcontractors. CPB's reputation will also suffer.

[89] While I agree that Mr Galbraith's suggestion an arbitration on the issues raised in the default notices might be completed in a matter of weeks could be seen as unduly optimistic, I also consider Mr Pether's evidence as to the length of time to be unduly pessimistic. I also note that Mr Pether is not an independent expert. He is a lawyer to CPB.

[90] Although a number of matters are raised in the notices of default, under the Contract the Engineer must respond to those issues and deliver a decision within 20 working days. There is no reason to suggest the Engineer will not be able to comply with that requirement. Similarly, any challenge to the Engineer's decision by either party by way of arbitration process, can be expected to be focused by an appropriate arbitrator bearing in mind that this is ultimately a decision on whether the matters set out in the notices comply with the requirement under cl 14.3.1(f). As Mr Galbraith noted, it will be up to the arbitrator to control the process. The interim measures in the present case are to protect RPL's position and require continuation with the Contract pending the outcome of an arbitration process on the issue of whether the default notices are valid or not. That process should be able to be resolved within months.

[91] Further, the impact on CPB of the delay if the matter goes to arbitration must be considered in the context of the parties' agreement. CPB's right to terminate is not an unconditional right. Its right to suspend or terminate under the provisions of the Contract is dependent upon the conditions in cl 14.3.1(f) being met. RPL disputes that

those conditions have been met. The parties agreed that in the event of a dispute concerning the Contract (which must include such a dispute) the matter would be subject to the processes provided for in the Contract itself with matters being referred to the Engineer and then subsequently to arbitration. The parties must be taken to have accepted that such a process would take time before any arbitral decision would be available.

[92] While CPB relies on the above statement from Lord Mustill in the *Channel Tunnel* case, again the context of that case is important.[20] Relevantly, it was the contractor who successfully opposed the Channel Tunnel Group's application for an injunction because the contractor wanted the parties to follow the process they had agreed upon to resolve disputes, namely to refer the matter to a panel of experts and, if necessary, arbitration.

[93] Finally, even if, in this case the arbitration were to take so long that the project was completed the consequential damages to CPB will be principally economic and can be met by an award of damages. There is no suggestion RPL will not be able to pay any such award. The harm to RPL involves other issues additional to simple financial losses. Further, there is the issue of wider interest or third party interests that would be harmed in the present case.

[94] For the foregoing reasons, RPL satisfies the Court that the harm if the interim relief is not granted is substantially more than the harm that will be caused to CPB if the interim relief now sought is not granted.

[95] In the event that there are substantive delays in the arbitration process (not attributable to CPB's actions) then, as the orders subsist until further order of the Court, it would always be open for CPB to seek to revisit the matter.

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20 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*, above n 9.

Result

[96] For the above reasons the Court makes orders restraining the respondent, CPB from, in reliance on default notice issued to the Engineer to the Contract on 4 September 2023:

(a) requiring the Engineer to suspend the contract work under cl 14.3.3 of the Contract; and

(b) terminating the Contract under cl 14.3.3;

until further order of the Court or arbitral tribunal.

Costs

[97] RPL having succeeded is to have costs on the application on a 3B basis. I certify for two counsel. In the event the parties cannot agree on costs, costs can be dealt with by way of memorandum.

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Venning J