

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

**CIV 2009 409 000034**

BETWEEN CUBE BUILDINGS SOLUTIONS  
LIMITED  
Plaintiff

AND THOMAS FREDERICK MAZLIN KING  
AND JUDITH RUTH KING  
Defendants

Hearing: 21 May 2009

Appearances: J Costigan for Plaintiff  
S Caradus for Defendants

Judgment: 17 December 2009 at 11.30am

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**JUDGMENT OF ASSOCIATE JUDGE OSBORNE**

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## **Introduction**

[1] The Kings are dairy farmers and directors of a company which owns farmland near Wakanui. Cube agreed to build an 80 bale rotary dairy shed on the property. The Kings and Cube signed a construction contract dated 19 March 2008.

[2] The contract price was \$959,200.00, plus GST and was expressly subject to the terms of the contract. The contract price was to be paid by six progress payments at agreed percentages and times. The contract made provision for payment claims and referred in that regard to the requirements of the Construction Contracts Act

2002. The contract contained other detailed terms and conditions some of which I will return to when discussing the issues in this proceeding.

[3] In this judgment references to particular payment claims will be to “PCx”.

[4] It is common ground that the parties cannot contract out of the Act: s12.

### **Summary judgment principles**

[5] The starting point for a plaintiff’s summary judgment application is r 12.2 High Court Rules, which requires that the plaintiff satisfy the Court that the defendant has no defence to any cause of action in the statement of claim or to a particular cause of action.

[6] I summarise the general principles which I adopt in relation to the application:

- (a) The onus is on the plaintiff seeking summary judgment to show that there is no arguable defence. The Court must be left without any real doubt or uncertainty on the matter.
- (b) The Court will not hesitate to decide questions of law where appropriate.
- (c) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.
- (d) In determining whether there is a genuine and relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements, or inherently improbable.

(e) In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of a tenable defence is plain on the material before the Court.

(f) Once the Court is satisfied that there is no defence, the Court retains a discretion to refuse summary judgment but does so in the context of the general purpose of the High Court Rules which provide for the just, speedy and inexpensive determination of proceedings.

### **The plaintiff's claim - outline**

[7] Cube sues the Kings for \$333,556.98. That sum comprises the balance of PC5 (\$162,685.00); the total King rotary payment claim (\$17,885.35); the total PC6 (\$107,910.00); and the final variations payment claim (\$45,076.63).

[8] Cube asserts that each payment claim was made in accordance with the Act and that the Kings, having not issued valid payment claims in accordance with the provisions of the Act, must pay the sums claimed.

[9] It is common ground that if the payment claims were validly issued and the Kings did not provide a complying payment schedule to Cube within twenty working days after service of the payment claim, then the Kings became liable to pay the claimed amount: ss22(b) and 23(1)(a) of the Act.

### **The issues- outline**

#### *Issues with Cube's payment claims*

[10] The Kings oppose the summary judgment application at a number of levels:

- (a) Payment claims – the Kings asserted generally in their notice of opposition that the payment claims were invalid in terms of the Act. When it came to submissions that assertion largely fell away and it was replaced with submissions to the following effect:
- PC5 was served on a later date than claimed by Cube. The Kings’ payment schedule was therefore on time.
  - The Kings’ rotary payment claim was served on a later date than that claimed by Cube. The Kings’ response was therefore on time.
  - PC6 (for the final 10% of the contract price) was not payable in terms of the contract until notification of issue of the Code of Compliance Certificate or the Kings’ earlier unauthorised use or occupation of the site which had not occurred when the claim was made.
  - The final payment claim related to variations which had not been agreed to either orally or in writing.
- (b) Variations – the Kings say that apart from the addition of a concrete pad they agreed to no variations in terms of the contract.

*Issues with Kings’ payment schedules*

[11] Cube asserts that the Kings had no arguable defence because Cube’s payment claims were not responded to effectively under the Act.

[12] Cube asserts that the Kings’ payment schedules were invalid either by reason of their timing or their content or both. The particular issues in relation to each payment claim are:

- (a) PC5 and rotary payment claim – was the payment schedule in time and did the content of the payment schedule comply with the requirements of the Act?
- (b) PC6 – (as it is common ground that a Code of Compliance Certificate had not been issued) - is Cube able to show that the Kings have no arguable defence to the assertion that the Kings had previously used or occupied the site of works other than in accordance with cl 18.1 of the contract and did the contents of the payment schedule meet the requirements of the Act?
- (c) Final variation payment claim – did the payment schedule meet the requirements of the Act?

#### *Cross-claims by Kings against Cube*

[13] The Kings asserted in their notice of opposition that Cube had breached its contractual obligations in a number of respects (failing to begin or complete construction of items on time; not obtaining planning approval for alterations; not obtaining a Code of Compliance Certificate; and not completing an item in terms of the contract and relevant legislation). Mr Caradus, for the Kings, accepted at the hearing that s79 of the Act prevented the Court from giving effect to any claims by the Kings for damages or interest. He submitted that the Kings may still rely upon the other valid deduction calculations in the payment schedule and that the inclusion of set-offs did not invalidate the payment schedule.

#### *Arbitration*

[14] The Kings asserted in their notice of opposition that the contract contained a mandatory arbitration clause in relation to all disputes. However, Mr Caradus did not elaborate on this ground of opposition in his submissions.

## **Payment claims and payment schedules – the over-arching principles**

[15] A particular purpose of the Act is “to facilitate regular and timely payments between the parties to a construction contract”: s3(a) of the Act. The Courts’ analysis of particular transactions must be undertaken with that purpose in mind: see *George Developments Ltd v Canam Construction Limited* [2006] 1 NZLR 177 (CA) at [41].

[16] The Act recognises the importance of cash flow to contractors with an acceptance of “quick and dirty” interim solutions leaving a final determination of financial rights and obligations to be arrived at subsequently: see *Marsden Villas Limited v Wooding Construction Limited* [2007] 1 NZLR 807 at [10] – [12].

## **Payment claims – the statutory requirements**

[17] Section 20 of the Act allows the contractor to serve payment claims for progress payments in accordance with the terms of the contract.

[18] Section 20(2) of the Act sets out the requirements of a payment claim:

### **Payment claims**

...

- (2) A payment claim must—
- (a) be in writing; and
  - (b) contain sufficient details to identify the construction contract to which the progress payment relates; and
  - (c) identify the construction work and the relevant period to which the progress payment relates; and
  - (d) indicate a claimed amount and the due date for payment; and
  - (e) indicate the manner in which the payee calculated the claimed amount; and
  - (f) state that it is made under this Act.

[19] It was common ground between the parties that a payment claim which fails to comply with the Act will be ineffective – a payer is obliged to respond only to “a payment claim” which is by definition a claim referred to in s20 of the Act.

### **This contract’s provisions for progress payments**

[20] The contract in this case provided for six progress payments as follows:

<b>80 Bale shed</b>
5% of the Contract Price paid as a non-refundable deposit upon signature of this Contract
10% of the Contract Price paid 1 month before the advised start date of construction.
20% of the Contract Price paid 30 days following the start of construction.
20% of the Contract Price paid 60 days following the start of construction
35% of the Contract Price paid 90 days following the start of construction.
10% of the Contract Price paid on notification of issue of code compliance certificate.

### **Payment claim 5**

#### *PC5 – the parties’ contentions*

[21] The Kings’ ground of opposition in relation to PC5 stated simply that “the payment claims issued by the Applicant [Cube] are invalid pursuant to the Construction Contracts Act 2002”.

[22] For the Kings, Mr Caradus’s written submissions focussed on the asserted validity of the Kings’ payment schedules. In his oral submissions, however, Mr Caradus pursued in relation to each payment claim issues of validity or invalidity.

[23] For PC5, Mr Caradus raised two issues:

- (a) In terms of s20(2)(c) PC5 does not identify the construction work to which the progress payment relates – Mr Caradus submitted that there was no “scope” of work to which a response could be made.



- (b) There was no indication in PC5, as required by s20(2)(d), of the due date for payment.

*PC5 – identification of the construction work to which the progress claim relates*

[24] PC5 identified the Cube job to which the progress claim related as “KING Tom and Judy” being the reference which Cube had used for tax invoices and progress claims from the commencement of the contract. Given that this was the single contract between the parties the identification of the job is clear.

[25] The thrust of Mr Caradus’s attack on PC5 in this regard was that the payment claim does not identify particular work to which PC5 relates. PC5 does not attempt to ascribe the claim to particular work. To the extent PC5 contains a narrative it provides this:

Original Contract Sum	\$959,200.00	
Contract Sum at last Claim	\$959,200.00	
Less Contingency	0.00	959,200.00
Claim		959,200.00
Less Work to be Completed	95,920.00	863,280.00
Total Retention	0.00	863,280.00
Less Previous Claims	527,560.00	335,720.00
<u>Plus Retention Due</u>	<u>0.00</u>	<u>335,720.00</u>
Total this claim	335,720.00 Plus GST at 12.50	41,965.00 Total including GST 377,687.00

[26] In other words, there is within PC5 no particular work ascribed to the claim – rather the claim is for 35% of the contract price, which represents the payment agreed to be made under the construction contract – 90 days following the start of construction.

[27] The regime under the contract does not provide for payments proportionate to the work completed to a particular date. Rather it provides for payments to be made at given points as percentages of the contract price. In these circumstances it would be a misnomer to say in a payment claim that the progress payment relates to any particular construction work. The claim comes about not because particular work has been done but because a date has arrived when the contract requires a percentage of the contract price to be paid.

[28] In these circumstances, it is sufficient that the construction work as a whole has been identified (the position is of course different in relation to claims for variations, to which I will return – there the payment claim, in the terminology of s20(1)(c) can be truly said to relate to particular construction work).

[29] I do not find PC5 to be ineffective by reason of a breach of s20(2)(c) – for the reasons I have stated PC5 adequately identifies the construction work to which it relates.

*PC5 - failure to state a due date*

[30] PC5 contains towards the top right corner the notation “Date: 22/09/2008”. Above it is stated – “The Claim is payable on 30/09/08”. I did not understand Mr Caradus to suggest that a payment claim which states that the claim is payable on a given date does not indicate the “due date for payment” to use the precise terminology of s20(2)(d). Any reading of the payment claim would indicate the “payable” is intended to be synonymous with “due”.

[31] Mr Caradus, in his oral submissions, commented on the absence of any indication within the PC5 of the time for issuing a payment schedule.

[32] There is no legal consequence to the point raised by Mr Caradus. The legislation required Cube to indicate in the payment claim the due date for payment. Cube did so. The legislation does not require Cube to then inform the Kings of the statutory requirements (whether as to timing or otherwise) of a payment schedule.

The payment claim states, in compliance with the legislation, that it is made under the Construction Contracts Act 2002. The scheme of the Act then leaves it to the payer to inform itself as to its rights and obligations under that Act.

[33] I therefore find that PC5 was not ineffective by reason of any failure to identify either the due date for payment (required and done) or the due date for any payment schedule (not required).

*Effectiveness of PC5*

[34] I therefore find that PC5 was an effective payment claim.

*PC5 – service of the payment claim*

[35] In its statement of claim, Cube alleges that it served PC5 on the Kings by post on 22 September 2008. The main evidence given for Cube was that of Ruth Margaret Hodges, a director of Cube. She produced PC5 and the other claims made. PC5 is dated 22 September 2008. Ms Hodges says that it was served on the defendants by post on 22 September 2008 and addressed to the defendants in the same manner as each of PC1 – 4. The Kings made full payment of each of those earlier payment claims in a timely manner.

[36] The Kings' response on this point was through Mr King. He says that PC5 (although dated 22 September 2008) was not received by the Kings until 9 October 2008. He says that the Kings then paid \$215,000.00 which they accepted from that claim, the payment being made on 13 October 2008. He gave evidence in relation to the earlier claims of a similar pattern of receipt of claims within a week of receipt.

[37] Ms Hodges did not file any reply evidence.

[38] In submissions Ms Costigan for Cube emphasised that on the Cube copies of each payment claim there is a handwritten endorsement as to "sent" and "paid". In

the case of PC5 the endorsement as to “sent” is as at the date of the payment claim, namely 22 September 2008. The handwritten endorsement as to “paid” refers to “\$215,00.00 13/10/08”.

[39] Ms Costigan also invited the Court to infer from an inspection of the rotary shed inspection carried out for the Kings by an engineer on 8 October 2008 that service of PC5 “must have occurred before 9 October 2008, when Mr King claims to have received it...”. The suggestion is that the probable reason for the Kings sending an engineer to inspect the rotary shed had been receipt of a payment claim.

[40] The Court cannot determine in this summary judgment context either when the payment claim was sent or when it was received. One real possibility is that there was a delay in the postal system. But two other possibilities, or combinations of possibilities exist:- either the Kings have the wrong date of receipt or Ms Hodges has the wrong date of sending. Both parties can refer to previous practices which give some support their evidence. Somewhat surprisingly, there is no evidence from the plaintiff as to who made the handwritten notes on the Cube copy of each payment claim but even had there been such evidence the Court would still not have been able to in a summary judgment context to say that the evidence of either party was unarguable. Similarly, the Court is unable in a summary judgment context to draw the inference urged by Ms Costigan as to why the Kings’ engineer went to the property on 8 October 2008.

### **The payment schedule in response to PC5**

#### *Timing of the PC5 payment schedule*

[41] If PC5 was served as late as 8 or 9 October 2008, then the payment schedule sent by the Kings on 5 November 2008 was at the very least arguably within time. The contract did not expressly provide for the period within which the Kings had to provide a payment schedule in response to a payment claim. Section 22(b)(ii) of the

Act therefore means that the Kings had twenty working days after the payment claim is served to provide their payment schedule.

[42] Depending on whether the date of service is the date of posting or of receipt (actual or assumed), the argument open to the Kings is that they had until either 5 or 6 November 2008 to provide a payment schedule to Cube.

[43] The evidence is that the Kings' solicitors (Rhodes & Co.) provided the Kings' payment schedule (in response to PC5) to both Cube's solicitors, Goodman Steven Tavendale & Reid (by mail and facsimile by letter dated 5 November 2008) and to Cube (by letter dated 5 November 2008). The addressing of the correspondence to Goodman Steven arose from the fact that on 30 October 2008 that firm had on behalf of Cube written to the Kings in relation to the payment claim. The Goodman Steven letter had asserted that because neither full payment nor a payment schedule had been received by 30 October 2008, the Kings were liable for the full amount of the payment claim.

[44] In these circumstances, it is arguable for the Kings that they had, by having their solicitors send the payment schedule on 5 November 2008, complied with the twenty working days requirement.

[45] For completeness, I record that the Court is not required to rule on an assumption initially contained in Cube's case, to the effect that the Kings had only seven days after service of a payment claim in which to provide a payment schedule. It seems clear from the affidavit of Ms Hodges in support of the application for summary judgment (prepared with the assistance of Cube's solicitors) that Cube believed that a seven day time limit existed. This view appeared to flow from the proposition that where a construction contract provides a date for payment, the parties must be taken to have agreed that if that date is less than twenty working days after the payment claim then the date for payment also becomes the date for delivery of the payment schedule. The decision in *Westnorth Labour Hire Limited v S B Properties Limited* HC Auckland CIV-2006-404-1858, 19 December 2006 Rodney Hansen J is authority for the contrary proposition, namely that the date for delivery

of a payment schedule (by default) can be later than the date on which the payment is due. Even without Ms Costigan's concession I would have applied the *Westnorth* decision.

[46] Having regard to the timing of the delivery of the PC5 payment schedule, it is also unnecessary that the Court determine an issue as to exactly when a payment claim is "served". The *Cube* case is that when the payment claim is sent by ordinary mail service is complete upon the posting of the claim. For the Kings Mr Caradus submits that service by post is complete only when the post is received by the defendants. Mr Caradus draws an analogy with the Construction Contracts Regulations 2003. Regulation 9(2) recognises a facsimile as having been served or given (in the absence of proof to the contrary) through a record of facsimile transmission to the fax machine of the recipient. Similarly, reg 9(3) recognises e-mail or other electronic communication as having been served or given (in the absence of proof to the contrary) at the time the e-mail enters the recipient's information system. Accordingly, the Regulations for faxes and e-mails recognise that proof of receipt by the recipient is crucial and that the assumptions which flow from fax and e-mail records may be rebutted (i.e. by evidence that the communications were not in fact received). Within the Act, s80 deals with service of notices. Section 80(c) provides that a notice is sufficiently served if it is posted in a letter addressed to the recipient at the recipient's place of residence or business in New Zealand (as done in this case). What s80 does not expressly define is when the recipient is to be treated as having been served – on day of posting or day of assumed receipt or day of actual receipt? I refrain from making a ruling on exactly when service took place in this case as the payment schedule was arguably delivered within twenty working days on any scenario.

*Payment schedules – requirements of s21(2) and (3) of the Act*

[47] The requirements of a payment schedule are set out in s21(2) and (3) of the Act in the following terms:

**Payment schedules**

...

- (2) A payment schedule must—
  - (a) be in writing; and
  - (b) identify the payment claim to which it relates; and
  - (c) indicate a scheduled amount.
- (3) If the scheduled amount is less than the claimed amount, the payment schedule must indicate—
  - (a) the manner in which the payer calculated the scheduled amount; and
  - (b) the payer's reason or reasons for the difference between the scheduled amount and the claimed amount; and
  - (c) in a case where the difference is because the payer is withholding payment on any basis, the payer's reason or reasons for withholding payment.

*Payment schedules – “indication” requirements under s21(3) of the Act*

[48] Section 21(3) of the Act requires that a payment schedule must “indicate” the matters identified in s21(3)(a), (b) and (c). Parliament clearly made a deliberate choice to require the less distinct, more general, “indication” rather than the precise “specification” which could have been required. Some want of precision and particularity is permissible as long as the essence of the “reason” for withholding the payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication: see *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 (per Palmer J) at [78]; see also *Westnorth Labour Hire Ltd v S B Properties Limited* (above [45]) at [29].

[49] The Kings say that the PC5 payment schedule was valid. I attach to this judgment as Schedule “A” a copy of the PC5 payment schedule as sent on 5 November 2008.

*The content of the PC5 payment schedule – formula?*

[50] The payment schedule sent on 5 November 2008 met the requirements of s21(2)(a) and (b) in that it was in writing and it identified the payment claim dated 22 September 2008. The payment schedule also complied with s21(2)(c) in that it included a scheduled amount (being not merely “nil” but a refund of \$837,952.93 claimed to be due to the Kings). Ms Costigan submitted that the payment schedule in this case suffers for the same reasons as that in *West City Construction Ltd v Edney* (2005) 17 PRNZ 947 where a specific payment amount was not stated. She submitted that in this case, as in *West City*, a formula was provided. Contrary to her submissions, in this payment schedule, the Kings provided a figure.

*The content of the PC5 payment schedule – statement of total, not PC5, value.*

[51] The payment schedule stated the contract value claimed by Cube to date (\$863,280.00 which represented 90% of the contract price) rather than the claim on PC5 (\$377,685.00) representing 35%.

[52] I do not consider that anything turns on the fact that in the mathematics of the table the full contract value is stated rather than the PC5 claim. The payment schedule is expressly in response to PC5. It therefore complied with s21(2)(b) of the Act. The Act does not require the payer to go on to state the amount of the payment claim.

[53] It may be that Ms Costigan’s submission, rather than making a decisive legal point, was intended to highlight the fact that by stating the much higher figure (i.e. total contract value to date rather than the 35% progress claim) the Kings were beginning their payment schedule table with a much higher figure than was truly being claimed and the Kings were thereby softening the appearance of a scheduled calculation and amount which would otherwise appear extreme. I will return to this point.



*The content of the PC5 payment schedule - deductions for payment claims already paid in full*

[54] The Kings, in the PC5 payment schedule, purport to deduct nine sums, totalling \$212,387.19 plus GST, which represent amounts which the Kings had already paid to Cube pursuant to earlier invoices.

[55] Ms Costigan submits that these deductions cannot form part of a valid payment schedule as they do not confine themselves to the scope of PC5. They relate to the scope of earlier payment claims.

[56] In considering the manner in which the Kings responded to PC5, the Court must also take into account the content of PC5. While I have concluded that PC5 constitutes a valid payment claim, notwithstanding the fact that it does not itemise any particular work carried out in the claim period, the fact is that PC5 on its face does not relate to particular work. As I have discussed (above [27]), this flowed from the fact that the regime for progress payments under the contract is simply one of set percentages of the contract price being paid on particular dates. Cube was not required to prove proportionate progress on construction in order to gain (proportionate) payment. Because of that the payment claims (apart from the variation claims) do not relate to particular portions of the work. Against that background the Cube complaint that the PC5 payment schedule was not a response to the “scope” of PC5 might be considered an unfair criticism. When PC5 itself did not refer to particular work but was a claim for a payment of 35% of the total contract price, the Cube demand for relationship to scope begs the question as to what was within the scope.

*The PC5 payment schedule – set-off claims*

[57] The two final deductions scheduled by the Kings are as follows:

DEDUCT FOR COSTS OF FUNDING OVER PERIOD OF BREACH OF CONTRACT BY CUBE \$16,000,000.00 @ 8.75% PA FOR 3 MONTHS	350,000.00
DEDUCT FOR LOSS OF PROFIT OVER PERIOD	

OF BREACH OF CONTRACT BY CUBE CONSTRUCTION, BUDGETTED \$1,100,000.00 PA* 3 MONTHS	275,000.00
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[58] Ms Costigan correctly characterises these as set-off claims for alleged funding costs or loss of profit. Section 79 of the Act precludes a court from giving effect to any counterclaim, set-off or cross-demand unless it has been the subject of judgment or is not in fact disputed. The provision must equally mean that a counterclaim/set-off/cross-demand contained in a payment schedule cannot be upheld (unless it is the subject of a judgment or there is no factual dispute as to it).

[59] Mr Caradus in the circumstances did not strongly submit that the set-offs claimed in PC5 payment schedule should be given effect to. But his submission was that the fact that set-offs were included in the payment schedule does not invalidate the payment schedule. Mr Caradus relied upon *Marsden Villas Ltd v Wooding Construction Ltd*, and in particular the observation of Asher J at [41] where his Honour said in relation to calculation errors as to progress payments:

...it is clear that calculation errors do not invalidate the progress payment at all; rather, such errors are responded to by the principal in the payment schedule, who can then protest at flaws in the claim and set out its position as to the correct amount owing. If that is done, the principal avoids the interim obligation to pay.

[60] The submission of Mr Caradus was, by analogy, that errors within a payment schedule do not invalidate the payment schedule – the payee has the right to invoke the disputes and adjudication process to have the correct figures arrived at.

[61] I do not view the inclusion of the set-off claims of \$625,000.00 within this payment schedule as analogous to errors of calculation. They are substantive claims.

[62] For a different reason I do not view the claims for set-off as invalidating the payment schedule. The fact that s79 permits a court to give effect a counterclaim/set-off/cross-demand where there is not in fact any dispute between the parties in relation to that claim indicates that at least in some circumstances a counterclaim/set-off/cross-demand can be validly claimed within a payment

schedule. In the context of developing discussions or disputes between parties, it may well be that a payer does not know whether there is any dispute as to a set-off until the payer provides the payment schedule claiming the set-off. At that point it is open to the payee to accept or dispute the set-off claim. At the point the payment schedule is provided, it cannot be argued that the claiming of a counterclaim/set-off/cross-demand of itself invalidates the payment schedule.

[63] Ms Costigan submitted that the payment schedule was also invalid by reason of the set-off claim for the further reason that cl 20.3(c) of the contract provided that Cube would not be liable for any indirect or consequential loss of any kind. But even assuming that both set-off claims in this case fall within that category, that fact does not of itself invalidate the payment schedule – rather, it provides Cube with a ground for defending or disputing the set-off claim.

[64] In addition to the financing and profit set-off claims, the payment schedule made a deduction for “John Howson costs” of \$25,777.78, relating to the temporary herring bone shed. Ms Costigan submitted that this claim was also in the nature of a set-off or counterclaim and was precluded from inclusion in a payment schedule. The same reasoning as applies to the financing and profit set-off claims applies to this matter – its inclusion does not of itself invalidate the payment schedule.

[65] A final item challenged by Ms Costigan was a deduction of \$7,412.22 for invoices from a drainage contractor, Burrell, for “relaying drains to effluent tank”. In his evidence Mr King explained that that payment had been deducted because the Kings had paid that amount (and others) directly to the contractors because of concerns that the contractors were not being paid by Cube. Again, the item is of a set-off nature and I regard it in the same way as those discussed immediately above.

*The PC5 payment schedule – is the schedule so extreme as to be invalid?*

[66] Having considered specific components of the PC5 payment schedule, I come to a catch-all submission made by Ms Costigan in relation to all payment schedules in this case. The submission was that they were “extreme” in the same sense that the

defendant's scheduled amount of nil was extreme in *Metalcraft Industries v Christie* HC Whangarei CIV-2006-488-645, 15 February 2007. Ms Costigan relied in particular upon the following passage in the judgment of Harrison J at [20]:

The direct consequence of the Judge's finding that the correspondence indicated a scheduled amount of nil was that Ms Christie was refusing to pay any or all of the contract price less a unilateral deduction offered by Metalcraft. She was asserting that nothing was owing despite the common ground that some work was carried out pursuant to the contract. Adoption of this position was extreme. That is why in September 2005 Ms Christie was under a strict onus to explain with some precision the basis for calculating that Metalcraft was not then entitled to any payment.

[67] I do not take it from that passage that the Court is suggesting that where there is an "extreme" position taken, asserting that there is no sum payable on a claim, that that of itself renders the payment schedule invalid. Rather, as his Honour indicates, it is then a matter of "explain[ing] with some precision" the basis of the calculation. His Honour went on to find that the payment schedule did not meet the requirements of the Act – it contained general and unspecified allegations of defective workmanship, unquantified claims, and amounts which could not be taken into account because they were set-off or counterclaim sums ruled out by s79 of the Act. (I have above at [62]) concluded that set-offs/counterclaims/cross-demands can be included within a payment schedule, and in that regard I respectfully depart from the set-off and counterclaim reference in *Metalcraft Industries v Christie*. On the facts, in that case, Ms Christie's payment schedule also failed for other reasons.

[68] There may be a residual basis upon which a court might treat a payment schedule as invalid, as an extension of Ms Costigan's "extreme payment schedule" submission. In *Metalcraft Industries v Christie*, at [16], Harrison J identified three courses available to Metalcraft on receipt of a payment schedule (referred to by his Honour, I believe, accidentally as "a valid payment schedule"). The three can be summarised as:

- (a) Acceptance of the reasons given for non-payment of the disputed amount and attendance to the remedy or abandonment of the disputed claim.

- (b) Acceptance of the document as a bona fide notice of dispute, with sufficient identification of grounds to refer the issue to adjudication under Part 3 of the Act.
- (c) Rejection of the letter as invalid or defective and reliance on it as an admission of a debt giving rise to a right to claim summary judgment.

[69] Implicitly, the reference in alternative (b) to “a bona fide dispute” suggests that alternative (c) may arise where the reasoning in the scheduled sum is found to have been put forward in bad faith. The extremity of the payer’s position in the payment schedule – such as where the payer asserts that nil is owing – might be taken as evidence of bad faith.

[70] I accept that there may be extreme cases where an inference of bad faith is irresistible having regard to the content of a particular payment schedule. I also accept that it would not have been Parliament’s intention in the Act to allow a payer to have treated as valid a payment schedule presented in bad faith.

[71] However, the Court must be cautious when it is acting in its summary jurisdiction, in coming to any conclusion that it is beyond argument that a payer acted in bad faith. An alternative explanation, especially where there is no suggestion that a particular payer has experience or intimate knowledge of the workings of the Construction Contracts Act, is that the payer has presented details of genuine grounds of dispute, containing items which should not strictly have been included, but without realising that those items should not have formed part of the payment schedule.

[72] So long as the payer’s payment schedule is a document setting out the payer’s genuine position, the contractor has its remedies through the prompt adjudication of disputes procedures under Part 3 of the Act.

[73] I remind myself in this case that the payment schedule to PC5 was the first payment schedule which the Kings presented in relation to this contract. Although

the set-off claims are substantial they are on their face limited to a three month calculation which appears rational. I cannot conclude in a summary judgment context that they are not genuine set-off claims. Similarly, although the Kings claimed for three sets of expenses which were referable to earlier payment claims which had been met in full, I cannot find in a summary judgment context that the Kings did not believe those claims were appropriate.

*The PC5 payment schedule – conclusion*

[74] It is arguable both that the Kings presented a valid payment schedule under s21 of the Act and that the schedule was provided in time under s22 of the Act. Accordingly, the Kings, not having become liable for paying the claimed amount under s22 of the Act, are entitled to pursue their grounds of defence (whether through the disputes adjudication procedure under the Act or as a defence to this civil proceeding brought by Cube).

**King rotary (variations) payment claim**

*Service of the King rotary payment claim*

[75] In its statement of claim, Cube alleges that it served the King rotary payment claim by facsimile and by post on 24 October 2008. The claim was in the form of a tax invoice of \$17,885.35 (including GST).

[76] Ms Hodges in her affidavit repeats that the claim was served on the defendants by facsimile and by post on 24 October 2008.

[77] The Kings' evidence raised an issue as to service. Mr King himself did not in his evidence say anything as to the date of receipt of this invoice. The way in which the Kings first raised the service issue was in a letter sent by Rhodes & Co to Goodman Steven on 11 December 2008 in which it was stated that Mr King advised that the first time he saw the King rotary account was with the Goodman Steven

letter of 5 December 2008. Mr Caradus in his submissions referred to that correspondence which had been exhibited by Ms Hodges. Mr Caradus submitted that this correspondence made it arguable that the King rotary payment claim had not been served on 24 October 2008 as alleged by Cube. He noted that the 5 December 2008 Goodman Steven letter purported to enclose “a further copy” of the rotary variation invoice. There are at least three aspects of the documentary record with regard to the rotary variation claim which might raise an issue as to the timing of its service. First, whereas the Cube practice appears to have been to record “sent” alongside the date when invoices were sent, there is no such record on Cube’s exhibited copy of the rotary payment invoice. Secondly, the sending of “a further copy” of the invoice on 5 December 2008 might connote a degree of uncertainty as to whether the original been received. Thirdly, to the extent that Ms Hodges deposes that the invoice was both faxed and posted, it is an intriguing omission that she did not produce a copy of the facsimile transmission record when the Kings had raised the issue of alleged non-service as early as 11 December 2008. In itself that means that the sending by facsimile cannot be relied upon: reg 9 Construction Contracts Regulations 2003. The combined fact that no facsimile record was produced and that the Cube copy of the invoice does not have a notation as to when it was sent raises the arguable possibility that it was not sent on 24 October 2008 as claimed by Ms Hodges.

[78] In any event, neither the copy of the invoice (her exhibit “K”) which Ms Hodges says was sent on 24 October 2008 nor “the further copy” sent by Goodman Steven to Rhodes & Co., on 5 December 2008 (her exhibit “L”), carried the statement required by s20(2)(f) of the Act that the invoice represented a payment claim made under the Act. There is no reference to the Construction Contracts Act in the invoice. There are arguably conflicting authorities as to whether the failure to state that a claim is made under the Act is fatal (see. G Bayley and T Kennedy-Grant, *A Guide to the Construction Contracts Act*, 2<sup>nd</sup> Ed 2009 at p 193). The possibility that in a given case a court might properly conclude that an omission to comply with s20(2)(f) is not determinative has been recognised: see *Welsh v Gunac South Auckland Limited* HC Auckland CIV-2006-404-7877, 11 February 2008 Allan J.

This present summary judgment application is not an appropriate setting in which to determine whether in the light of all surrounding facts it is appropriate to treat as effective what is on the face of it a defective claim.

[79] In this summary judgment context the Kings have an arguable defence to a proceeding based on the rotary variation claim.

[80] I therefore do not need to deal with a further submission of Mr Caradus in relation to the King rotary payment claim, which was that a letter sent by Rhodes & Co to Goodman Steven on 16 December 2008 was sufficient to constitute a payment schedule. The letter sent on 16 December 2008 referred to the rotary variation invoice as “a rehash of a claim that has already been made” and suggested that it was already covered by the Kings’ previous payment schedule (that is the schedule to PC5). The letter went on to state that there would therefore not be another payment schedule. I doubt that the letter in question is sufficient to constitute a payment schedule but in view of my other findings in relation to the payment claim, I refrain from expressing a concluded view.

*King rotary payment claim – conclusion*

[81] It is arguable that the King rotary payment claim was not sent to the Kings on 24 October 2008 and that it was ineffective in any event.

**Payment Claim 6**

*PC6 - background*

[82] PC6 contained the sixth progress payment claimed under the contract provisions. The relevant provision provided for payment of “10% of the Contract Price on notification of issue of code compliance certificate”. It is common ground between the parties that a Code Compliance Certificate had not been issued when PC6 was served on 19 December 2008.



[83] The Kings responded to PC6 through their solicitors. To a letter posted by Rhodes & Co to Goodman Steven on 22 December 2008 the Kings attached their payment schedule 2 and a covering letter from their building consultant Mr Glennie. In the letter Mr Glennie noted that the final payment (which PC6 represented) was not due to Cube until code compliance had been obtained. In payment schedule 2, which was largely a reworked version of the Kings' first payment schedule, Mr Glennie added a line of explanation in the payment schedule which reads:

2	DEDUCT FINAL CLAIM AS CODE COMPLIANCE CERTIFICATE NOT ISSUED	\$95,920.00
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[84] Goodman Steven responded to Rhodes & Co's 23 December 2008 documents by letter dated 9 January 2009. That letter made no comment on Mr Glennie's statement that Code Compliance Certificate had not been obtained and that the final payment was therefore not due. The letter made other comments as to the contract and advised that Cube regarded the payment schedules as invalid under the Act and that Cube disputed any liability in respect of the payment schedules.

*PC6 – the parties' contentions*

[85] In its statement of claim, Cube made no reference to the contractual stipulation that the final progress payment was to be paid "on notification of issue of Code Compliance Certificate". In the statement of claim Cube refers simply to having served PC6 for an amount equal to 10% of the Contract Price "being the amount of the Contract Price that the Plaintiff and the Defendants agreed would become payable on the terms of the Construction Contract". The statement of claim does not allege why the sum claimed under PC6 was payable when the contractual stipulation as to "issue of Code Compliance Certificate" had not been achieved. Rather, Cube in the statement of claim went on to allege that the defendants did not provide a valid payment schedule to the plaintiff in relation to PC6 by the due date.

*PC6 – final claim through early occupation of the site?*

[86] In her affidavit in support of the application for summary judgment Ms Hodges deposed that:

On or about 4 December 2008 in breach of their obligations under the Construction Contract, the Defendants took occupation of the site on the Property.

[87] It was subsequently explained to me at the hearing that Cube relied on the provisions of cl 18.3 of the contract which provided that all money payable to Cube on completing Cube's obligations under the contract (except retentions) was to be immediately due and payable if the Kings used or occupied the site and works otherwise in and accordance with cl 18.1 of the contract.

[88] In his evidence Mr King accepted that the Kings had taken possession of the rotary shed. Mr King asserted, however, that that was done in terms of cl 18.1(c) of the contract which permitted the Kings to use and occupy the site and works if Cube was in breach of any obligation under the contract and the Kings had given Cube at least seven days' notice in writing of their intention to use or occupy the site and works and had specified the breach. Mr King exhibited a letter dated 4 December 2008. Rhodes & Co in that letter notified Cube of the Kings' intention to use and occupy the site by reason of eight breaches of contractual obligations.

[89] In reply evidence, Cube produced an affidavit by Thomas Edward Dingle, a director of Cube. Mr Dingle had not initially given evidence in support of the application, although the absence of a Code Compliance Certificate clearly raised issues which had necessitated the Cube argument as to early occupation. In the reply affidavit Mr Dingle asserted that the defendants had taken possession of the site and had begun using the shed for milking on or before 4 December 2008. He produced e-mail communications from personnel in other organisations as to dates in December when equipment on the site was changed over and when milk began to be picked up.

[90] Given that the reply evidence from Mr Dingle raised matters not covered in the original evidence from Cube, the Kings' solicitors requested leave to file an

additional affidavit from Mr King responding to the “occupation and use” evidence. I granted leave as it was clearly appropriate that the Kings have the opportunity to respond to new allegations. Mr King deposed that he had not taken possession of the rotary dairy shed prior to the notice expiring and that he had been very deliberate in that. He produced a certificate in relation to the rotary dairy shed which AsureQuality had issued on 11 December 2008 when giving final approval of the facility on a site visit. Mr King refers to a confusion arising through the e-mails attached to Mr Dingle’s affidavit in that in anticipation of using the rotary dairy shed the milking silos had been moved by Fonterra from the herring-bone shed to the rotary dairy shed. He said that the milk had then been piped from the herring-bone shed to those vats while the seven day notice period ran to 11 December 2008.

[91] On this evidence, Cube has not satisfied the Court that the Kings have no tenable argument as to not occupying or using the site before 11 December 2009. The Kings therefore have a tenable argument that the money claimed under PC6 was not due when claimed (because there had definitely been no Code Compliance Certificate and the Kings had arguably entered into use and occupation of the site and works in accordance with cl 18.1 of the contract). Furthermore, once it is found that the Kings’ position on PC6 was bona fide any suggestion that the payment schedule should be ignored for raising a bad faith ground of defence falls away. The only ground advanced by Cube and left to consider is whether the second payment schedule was invalid for breach of the requirements of the Act.

*PC6 – requirements of s21 of the Act*

[92] Ms Costigan raised in relation to the PC6 payment schedule the same range of issues as she raised in relation to the PC5 payment schedule which I have discussed above.

[93] There is a further consideration which reinforces my conclusion in relation to the PC6 payment schedule. In addition to the statement of various recharge, variation and counterclaim calculations of the nature which appeared in the first

payment schedule, payment schedule 2 contains the clear indication that the final claim (made in PC6) is deducted in its entirety because “Code Compliance Certificate not issued”.

[94] Cube knew everything it needed to know, both in terms of the requirements of the Act and in terms of understanding the issue in a common-sense way, in order to make a decision whether or not to pursue the claim and to understand the nature of the case it would have to meet in an adjudication. This meets the approach outlined in *Multiplex Construction Pty Ltd v Luiken*. (above [48]).

#### *PC6 - conclusion*

[95] The Kings accordingly have an arguable case that the second payment schedule was valid and an arguable case that they did not become liable under s22 of the Act.

### **Final variations payment claim**

#### *Discussion*

[96] Cube issued a final variations claim on 22 December 2008 dealing with nine items of variation. The claim was for \$45,076.63 (including GST). The Kings provided their response the following day, attaching their payment schedule 3, together with another covering letter from Mr Glennie.

[97] While payment schedule 3 again reiterates deductions contained in payment schedule 2, it specifically deals with all the variations claimed in the final variations claim. It does it in this way:

#### **VARIATIONS**

**No Written Variation Orders From Tom King Sighted as required by Clause 15.2 Proof of Variation to Building Consent approval required before variations can be considered to ensure compliance with the Building Code.**

12 Cube VO No 013 – Extra concrete pad for snap cool	0.00
13 Cube VO No 014 – Extra concrete pad for generator slab	0.00
14 Cube VO No 015 – Addition of smoko room	0.00
15 Cube VO No 420 – Retaining wall	0.00
16 Cube VO No 500 – Additional exit area	0.00
17 Cube VO No 510 – Underpass Area	0.00
18 Cube VO No 520 – Refrigeration snap chilling	0.00
19 Cube VO No 530 – Material increases from Estimate, proof of Increases paid required	0.00

[98] In short, within the body of the payment schedule 3 there is a clear statement as to a schedule amount of nil for each variation claim with an explanation of the reason for the nil calculation. The schedule reference to cl 15.2 of the contract is to a provision which states:

Each order for a variation shall be in writing and shall state an agreed adjustment of the Contract Price.

[99] The covering letter from Mr Glennie dated 23 December 2008 reinforces the explanation as to the lack of contractually authorised variations or “verbally requested” variations. The further explanation is provided in the covering letter in relation to seven of the claimed variations that they appear to form part of the original contractual requirements and would therefore not be valid variations in any event.

[100] The responding letter from Goodman Steven to Rhodes & Co on 9 January 2009 did not tackle what payment schedule 3 had said in relation to the variation claims. As I have recorded, the letter instead alleged that all three payment schedules had been invalid.

[101] The Cube statement of claim repeated the allegation that the Kings had not provided a valid payment schedule to the final variations payment claim. Ms Hodges in her evidence in support of the application did not explain why she regarded payment schedule 3 as invalid. In paragraph 47 of her affidavit she simply asserted that the defendants did not “provide a valid payment schedule to the Plaintiff by the due date...”. Earlier she had explained both that the Kings had ordered variations to the contract on a number of occasions and that the final

variations claim related to “reasonable variations to the construction work that was ordered by the defendants”. She produced no evidence that the Kings as customer had made any written order for a variation, let alone one which stated an agreed adjustment of the contract price. Ms Hodges offered no explanation as to why a payment schedule which referred to the express contractual requirements for variations under cl 15.2 of the contract would be invalid.

### *Conclusion*

[102] In her submissions, Ms Costigan suggested that the final variations claim had issues of invalidity arising from the sort of defects which she had submitted invalidated the earlier payment schedules. For the reasons I have identified in relation to the earlier payment schedules, those criticisms still leave the Kings with a tenable case that payment schedule 3 was valid. In relation to the final variations claim, payment schedule 3 made it clear that apart from the variation recharges, variations and counterclaims which were being carried forward, the specific explanation for the rejection of each variation claim was that there had been no written variation order placed by the Kings. Cube knew that it had to deal with a dispute on that basis if it wished to succeed at adjudication

### **Result**

[103] The plaintiff has failed to discharge the onus upon it of establishing that the defendants do not have an arguable defence to the plaintiff’s claims. In particular, in relation to the facts of this case, the defendants have an arguable case in relation to the validity of each payment schedule.

[104] This is, I emphasise, a finding at summary judgment level. Following a trial with evidence, the plaintiff may establish that the Kings became liable to pay one or more of the payment claims by reason of the provisions of s22 of the Act.

[105] On the other hand, the Kings (without protesting the jurisdiction) referred in their notice of opposition to the mandatory arbitration clause in the contract. Clauses

22.1 – 22.4 deal briefly but comprehensively with reference to arbitration. If I am correct in the conclusion which I have reached that this case was not susceptible to summary judgment, then the parties need the opportunity to reflect on how the issues between them ought now to be determined.

[106] I adjourn the proceeding to a telephone conference at 9.30am 1 February 2010. Counsel are to confer before that date and to file preferably a joint memorandum dealing with any agreed requirements in relation to the future of this litigation. If there is no agreement, I will hear submissions as to the directions, if any, which I should make.

[107] I reserve costs.

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Solicitors  
Goodman Steven Tavendale Reid, Christchurch  
Rhodes & Co Christchurch

APPENDIX "A"

TURNKEY CONTRACT BETWEEN:  
THOMAS KING AND JUDITH KING AS PAYERS (KINGS)  
AND  
CUBE BUILDING SOLUTIONS LTD AS PAYEES (CUBE)  
FOR  
80 BALE ROTARY DAIRY SHED,  
WRIGHTS ROAD, WAKANUI, ASHBURTON

3rd November 2008

PAYMENT SCHEDULE IN RESPONSE TO PAYMENT CLAIM DATED 22/9/08 RECEIVED FROM CUBE 9/10/08  
PAYMENT SCHEDULE DUE DATE: 6TH NOVEMBER 2008

	<u>ADDITIONS</u>	<u>DEDUCTIONS</u>
CONTRACT VALUE CLAIMED TO DATE	863280.00	
<b>RECHARGES:</b>		
DEDUCT FOR FILL PROVIDED BY McCORMICK TRANSPORT		154.80
		120.00
		72.00
DEDUCT FOR ASHBURTON HIRE OF TRACTOR BUCKET & BLADE		1218.00
DEDUCT FOR C BURRELL CONSTRUCTION RELAYING DRAINS TO EFFLUENT TANK		5190.00
INVOICE 957164		2222.22
INVOICE 957168		
DEDUCT FOR KING FARMS EXCAVATOR TIME 132 HRS @ \$185		24420.00
<b>VARIATIONS:</b>		
ADDITIONAL COSTS FOR STONE TRAP & EFFLUENT POND	57485.00	
LESS WORK NOT COMPLETE ON EFFLUENT POND		2500.00
ADDITIONAL COSTS FOR GRAIN SILO PAD (adjusted for pipe and labour)	14334.94	
<b>COUNTERCLAIMS:</b>		
DEDUCT FOR COSTS OF TEMPORARY HERRINGBONE SHED:		25777.78
John Howson costs		
Cube Invoice 71:		
additional blocks to yard areas		1796.76
Plastering sand for rounded wall tops		67.10
Wloughby Engineering rails		6945.64
Concrete placing		347.25
Extra yard area concrete		11906.61
Placing		2858.82
Pumping concrete		869.79
Deduct progress payment claim from CUBE dated 5/9/08 for herringbone shed and associated works		160310.92
Deduct CUBE claim dated 5/9/08 for retaining wall to herringbone yards		27284.30
Deduct for costs of cutting concrete surface to prevent cows slipping-estimate		4000.00
DEDUCT FOR COSTS OF FUNDING OVER PERIOD OF BREACH OF CONTRACT BY CUBE \$16,000,000 @ 8.75% PA FOR 3 MONTHS		350000.00
DEDUCT FOR LOSS OF PROFIT OVER PERIOD OF BREACH OF CONTRACT BY CUBE CONSTRUCTION, BUDGETTED \$1,100,000 PA * 3 MONTHS		275000.00
	935099.94	903061.99
	-903061.99	
TOTAL DUE TO CUBE CONSTRUCTION ON THIS CONTRACT	32037.95	
LESS PAID TO DATE BY TOM & JUDITH KING FOR EFFLUENT VARIATION	-57485.00	
LESS PAID TO DATE BY TOM & JUDITH KING ON THIS CONTRACT	-719400.00	
	-744847.05	
GST	-93105.88	
TOTAL	-\$837,952.93	
<b>TOTAL REPAYABLE BY CUBE TO TOM &amp; JUDITH KING = \$837,952.93</b>		