What is the effect, if any, of an estimate given during the negotiation of a time and materials contract? The layman would expect the law to provide a straightforward, definitive answer. The opportunity to examine the situation and provide an answer was presented in *K.M. Young Ltd.* v. *Cosgrove* [1963] N.Z.L.R. 967. Regrettably no satisfactory answer was forthcoming.

The dispute arose out of a contract for landscaping a Wellington section. The home-builder agreed that the work should be done by a contractor hiring his equipment (including labour and supervision) at agreed hourly rates. Before entering into this agreement the owner had sought an estimate of his probable liability – a figure estimated by the contractor at £100 to £120. The final account for the time worked, at the agreed hourly rates, was £418.16.11d. The contractor claimed payment in full and the owner refused to pay more than a figure based on the estimate.

Persons in commercial practice will know how frequently such agreements, commonly called "time and materials contracts", are made to cover;

(a) household and building repairs and maintenance,

(b) construction works which are undertaken without the detailed plans, specifications, and schedules of quantities, which enable the work to be priced on any other basis,

(c) difficult or hazardous construction or repair work which implicitly invites such large provisions for contingencies that the owner will elect to bear his own financial risk.

The last case is usually covered by a full contract governing all forseeable problems. Contracts for the first two cases are seldom more precise than the contract in this case.

Denning, L.J. in the Court of Appeal judgment of *Davis Contractors Ltd.* v. *Fareham U.D.C.* [1955] 1.Q.B. 302, 308, said, "when an owner employs a builder to do work for a fixed sum his whole object is to secure himself against the unexpected difficulties which so often arise". Equally, in a time and materials contract the contractor would appear to be seeking the same security – the risk being left with the owner. Whether this object can be achieved if an estimate is given without qualification provides the basis for this note.

In the only reported New Zealand decision in point, *Daniell Ltd.* v. *Kebbell* [1919] G.L.R. 156, 160, Chapman, J. said that the defendant (owner), "received an estimate from a skilled person whose duty it was in the circumstances to give him a correct one or say it could not be done". This case, over the building of a house,

differed from the case under discussion in that the contract was held not to be on a "time and materials" basis and the contractor was held by his estimate, to have contracted at that figure. In *K.M. Young Ltd.* v. *Cosgrove* it was clear that the contract was a "time and materials" one and the only question was as to the effect of the estimate in such a contract.

The relationship between estimate and contract was outlined by Best C.J., in *Moneypenny* v. *Hartland* (1826) 2 Car. & P. 378, 172 E.R. 171: "It is said today that there is a difference between an estimate and a contract. I do not agree ... between honest men there is no difference at all. A man should not estimate a work at a price at which he would not contract; for if he does he deceives his employer."

Relying on *Moneypenny* v. *Hartland* (supra) and *Nocton* v. *Ashburton* [1914] A.C. 932 and distinguishing *Daniell Ltd.* v. *Kebbell* (supra) as indicated above, Hutchison J. found that no claim lay in contract but that the owner could sue in negligence for damages for a negligent statement. Thus damages in tort were held to be available for an innocent misrepresentation which induced the contract even though this representation was not considered a term of the contract. This decision, preceding as it did the House of Lords' decision in *Hedley Byrne & Co.* v. *Heller and Partners* [1964] A. C. 465, is remarkable. The authorities relied on by Hutchison J. related to negligent professional advice tendered by a consulting engineer and solicitor respectively, where the negligent party was employed in his professional capacity to give advice only. In *K.M. Young Ltd.* v. *Cosgrove* damages were awarded for what amounted to an innocent misrepresentation which induced a later contract.

The *Hedley Byrne* decision perhaps validates Hutchison J's. reasoning, but damages in negligence will probably not advance the injured party far. If the estimate has no contractual significance, the work done must surely be valued at the contract hourly rates and, if so, the buyer has received something equal in value to the charge made. The damage is, therefore, confined to "disappointed expectations" and a certain shortage of cash funds. But impecuniosity of a plaintiff is not a cause of damage: *Liesbosch Dredger* v. *Edison Steamship Co.* [1933] A.C. 449. The only other head of damage derives from the cost of pursuing an advised course of action in lieu of different courses of action originally open. This, however, involves much hypothetical calculation of probable costs which are unlikely to be easily or even fairly assessed. At the time of writing, further litigation was pending in this case because the parties had been unable to agree on any basis upon which to calculate the owner's damages.

In view of the difficulties created by the tort remedy given by Hutchison J., it is submitted that the *contractual* effect of the estimate should have been more carefully considered. It is submitted that, in general, an estimate given during the

negotiation of a "time and materials" contract becomes a term of that contract.

In order to assess the legal significance of the estimate it is necessary to consider the reasons for obtaining an estimate during the negotiation of a "time and materials" contract.

First, the estimate allows the buyer to determine whether the project is within his means, or is attractive compared with the alternative courses of action open to him.

Second, because the hourly hire rates of different plant items are not strictly comparable, (by reason of differing capacities and efficiencies) the estimate provides a measurement of the quality and efficiency of the services offered. Such measurement is implicit in the estimate of the number of hours which will be required for completing a predetermined task. In another respect the estimate is an assessment of the physical quantity of work to be done. However, in any comparison of alternative propositions the physical quantity is a constant factor so that no evaluation of it is necessary.

A contractor estimating £120 for work to be carried out by a machine hired at £3 per hour is making a representation that the efficiency of his machinery and supervision is such that the work can be completed in 40 hours. This representation, it may safely be surmised, will usually be an important inducement to enter into the contract. This was certainly true of the estimate in *K.M. Young Ltd.* v. *Cosgrove.*

However, assuming that the estimate is an innocent misrepresentation, and accepting that the remedy of rescission cannot avail where the work is complete, there can be no contractual remedy unless the estimate is a term of the contract. It is submitted that the estimate is a term of the contract as a representation of the quality or efficiency of each hour to be charged and therefore a factor in determining the ultimate price.

Hutchison J. argued (p. 969) that "a contractor is entitled to recover the fair and reasonable value of work done when the price ... has not been fixed by agreement. In this case it was fixed by agreement; it was to be the hourly rate; ... once that hourly rate was found to be a reasonable one, that fixes the contract price". With respect, it is submitted that the argument is circuitous. Reasoning from the duty to pay a reasonable price where no contract sum has been agreed the learned judge is, in effect, accepting as fair and reasonable the number of hours worked, without reference to the earlier estimate which impliedly provided for many less such hours.

If the hourly rate charged by the contractor is to be scrutinised to see whether it is reasonable, and the judgment suggests it can be, it cannot be considered reasonable without reference to the quality and quantity of work per hour which would make

it reasonable – surely calculable only by reference to the estimate. Even if, at this late stage, the contractor can prove that everything was fair and reasonable; that is both the hourly rate and the time taken for the quantity of work done, he can only do so by proving the inadequacy of his own estimate. But it was precisely upon this estimate that the owner was induced to enter the contract – this was the estimate which indicated that the course of action covered by it was the most economical in the circumstances.

There will, of course, be circumstances where parties could agree to treat an estimate as being of no real consequence. It is submitted, however, that when a course of action is based on the estimate provided, the fact that the contract could have been made complete without the estimate is not a circumstance which justifies exclusion of the estimate.

In assessing damages, the use of an "estimate" is less than a precise yardstick of measurement. Obviously, some margin below and above the estimate was within the contemplation of the parties when the term was used. Trade usage and common sense which now define with reasonable give and take contract clauses stipulating "first quality materials" and "good trade practice" would presumably not meet any difficulty in defining "estimate".

It may well be that the word "obligation" in the familiar "estimates free – no obligation" has a very restricted meaning – at least for the estimator.