IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2020-404-000572
[2020] NZHC 1942

BETWEEN	THE FLETCHER CONSTRUCTION COMPANY LIMITED Applicant
AND	SPOTLESS FACILITY SERVICES (NZ) LIMITED Respondent

Hearing: 19 June 2020

Appearances: A M Callinan and D A Rowe for the Applicant
S C Price, J K Stewart & R A Donald for the Respondent

Judgment: 5 August 2020

JUDGMENT OF VAN BOHEMEN J

This judgment was delivered by me on 05 August 2020 at 12noon
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors/Counsel:
Simpson Grierson, Auckland
MinterEllisonRuddWatts, Auckland

Introduction

[1] The applicant, The Fletcher Construction Company Ltd (Fletcher), seeks a declaration that notices by the respondent, Spotless Facility Services NZ Ltd (Spotless), of its intention to suspend its contract works and then suspending its contact works in the latter stages of the construction of the Commercial Bay development in downtown Auckland were invalid and of no effect.

[2] The central issue in dispute is whether a payment schedule issued by Fletcher to Spotless in January 2020 in response to a payment claim by Spotless for work performed by Spotless was valid in terms of the Construction Contracts Act 2002 (the Act). If the payment schedule was valid, Spotless's suspension notices were invalid. Conversely, if the payment schedule was invalid, Spotless's suspension notices were valid.

[3] Both Fletcher and Spotless argue the validity of the payment schedule on a holistic basis – the whole of the payment schedule is either valid or invalid. Neither argues that the payment schedule could be partially valid and partially invalid.

Relevant background

[4] Precinct Properties Ltd (Precinct) has been building the Commercial Bay office tower and retail precinct in the Auckland central business district which was nearing completion in the early months of 2020 prior to the arrival of the coronavirus pandemic in New Zealand. Fletcher is the head contractor with Precinct for the construction of the development. Spotless, which trades in New Zealand as AE Smith, is a subsidiary of the Australian Downer Group. Fletcher has a subcontract with Spotless for the provision of mechanical services required for the heating and cooling of the buildings, which includes ensuring fresh air intake, air quality and ventilation.

[5] Fletcher says Spotless is a critical subcontractor for the completion of the development and that its work is closely inter-related to work by other subcontractors and finishing trades, in particular Black Interiors Ltd (Black) and Alaska Construction & Interiors Ltd (Alaska). Black and Alaska have worked in close proximity to

Spotless in the tower, which is a key component of the development, and their fit-out work is related to the work by Spotless.

[6] On 24 January 2020, Spotless issued Fletcher Payment Claim No 44 (Claim 44) seeking payment of $2,067,715.86 plus GST. This was the 44th payment claim submitted by Spotless on the project to that date. Prior to Claim 44, Spotless had issued and had been paid out on payment claims totalling $47,808,205.80.

[7] On 21 February 2020, within the period required by the subcontract between Fletcher and Spotless, Fletcher issued Payment Schedule 44 (Schedule 44) in response to Claim 44. Schedule 44 stated that Spotless owed Fletcher $4,058,703.65 plus GST. As a consequence, Fletcher made no payment to Spotless in relation to Claim 44.

[8] The difference between Claim 44 and Schedule 44 was that Schedule 44 contained deductions totalling $6,126,419.59 against amounts claimed in Claim 44. In particular, Fletchers:

(a) Certified $542,964.10 less than the amount claimed of $851,660.09 for works under the original subcontract between Fletcher and Spotless;

(b) Certified $752,396.88 less than the amount claimed of $2,067,715.86 for works under agreed variations to the original subcontract; and

(c) Asserted that Spotless owed Fletcher $4,831,058.61 by way of contra charges for costs incurred by Fletcher as a result of failures by Spotless to comply with its subcontract with Fletcher.

[9] The amounts claimed by way of contra charges included delay claims Fletcher had received from Black and Alaska and which Fletcher says were caused by Spotless, and liquidated damages Fletcher says it is liable to pay Precinct under the head contract because of Spotless's actions.

[10] By letter dated 26 February 2020, Spotless informed Fletcher that it considered Claim 44 to be invalid and reserved its rights to pursue the amount claimed in Claim

44 as a debt due. The letter did not state why Spotless considered Claim 44 to be invalid.

[11] By letter dated 1 March 2020, Fletcher asked Spotless why it considered Claim 44 to be invalid and set out Fletcher's views on some of its arrangements with Spotless.

[12] By letter dated 18 March 2020, Spotless served notice, in accordance with s 23(2)(b) of the Act, of its intention to suspend work under its subcontract with Fletcher. The notice stated that the grounds of suspension were that Fletcher had failed to issue a valid payment schedule within the time required by the subcontract and had failed to pay the claimed amount.

[13] Fletcher says when Spotless issued its notice of intention to suspend work, the Commercial Bay project was nearing completion and the retail complex was only days away from being opened to the public.

[14] An exchange of letters took place on 19 and 20 March 2020 between solicitors acting for Fletcher and Spotless. The letter from the solicitors acting for Spotless stated that Spotless considered Schedule 44 to be invalid because it did not meet clause 3(d) of the subcontract and s 21(3) of the Act and said that, where a scheduled amount was less than a claimed amount, Fletcher had not indicated for each of the claimed amounts:

(a) The manner in which Fletcher had calculated the scheduled amount; and/or

(b) Fletcher's reasons for the difference between the scheduled amount and claimed amount or for withholding payment.

[15] Further action on the dispute was forestalled by the Government's announcement on 23 March 2020 that on 25 March 2020 New Zealand would move to Level 4 lockdown under the Covid-19 emergency measures. Under Level 4, all construction work other than essential maintenance was required to halt.

[16] Following the Government's announcement that the country would move to Level 3 under the Covid-19 emergency measures, Fletcher liaised with Spotless about remobilising for work.

[17] On 14 April 2020, Spotless served notice on Fletcher that it was suspending work under the subcontract with Fletcher on the grounds that Schedule 44 was invalid.

[18] On 16 April 2020, Fletcher applied ex parte for an injunction requiring Spotless to lift its suspension of works. The application was heard by Peters J on 17 April 2020. Spotless was served on a Pickwick basis and filed evidence and made submissions, albeit under considerable time pressure.

[19] On 21 April 2020, Peters J issued a results judgment ordering Spotless to lift its suspension of works and directing Fletcher, pending further order of the Court, to deposit $2,067,715.86, being the amount of Claim 44, with a stakeholder.[1] Peters J issued her reasons judgment on 30 April 2020.[2] In her results decision, Peters J noted that it was not necessary for her to determine whether Schedule 44, taken as a whole, was valid. However, she accepted that the validity of Schedule 44 and Spotless's right to suspend work were serious questions to be tried.[3] Peters J held that the balance of convenience lay in Fletcher's favour because there would be significant delay if Spotless did not resume work and that delay would have consequences for Precinct, Fletcher, and Spotless and also for other subcontractors and tenants.[4]

[20] Following Peters J's judgments, Fletcher paid the amount of Claim 44 to a stakeholder and Spotless resumed work on the Commercial Bay development. The retail complex was subsequently opened to the public.

[21] I was informed by counsel that if I hold that Schedule 44 was valid, the money held by the stakeholder will revert to Fletcher but if I hold that Schedule 44 was invalid, the money will be paid to Spotless. In either event, Fletcher and Spotless will

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1 *The Fletcher Construction Company Ltd v Spotless Facility Services (NZ) Ltd* [2020] NZHC 780.
2 *The Fletcher Construction Company Ltd v Spotless Facility Services (NZ) Ltd* [2020] NZHC 871.
3 At [33]-[34].
4 At [46].

each be free to pursue contractual and statutory remedies regarding the validity of the deductions made by Fletchers in Schedule 44.

Relevant provisions of the Act

[22] The parties agree that their dispute is governed by the Act and, in particular, s 21 which sets out the requirements of payment schedules.

[23] Section 3 of the Act states the purpose of the Act:

> **3 Purpose**
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> The purpose of this Act is to reform the law relating to construction contracts and, in particular,—
>
> (a) to facilitate regular and timely payments between the parties to a construction contract; and
>
> (b) to provide for the speedy resolution of disputes arising under a construction contract; and
>
> (c) to provide remedies for the recovery of payments under a construction contract.

[24] Part 2 of the Act, in particular, ss 20-24, sets out the requirements for payment claims and payment schedules and the consequences of not complying with those requirements.

[25] Section 20 sets out the requirements for a payment claim. Except in one respect, Fletcher accepts that Claim 44 complied with s 20. Fletcher's amended statement of claim dated 22 May 2020 alleged that Claim 44 was invalid because it was not in the most recently prescribed form as required by s 20(4)(b). At the hearing however, Ms Callinan, counsel for Fletcher, did not seriously pursue this claim which, I am satisfied, could not succeed. That would be a technical quibble that had no bearing on the substantive issues between the parties.

[26] Section 21 sets out the requirements if a payment schedule is issued in response to a payment claim:

> **21 Payment schedules**

(1) A payer may respond to a payment claim by providing a payment schedule to the payee.

(2) A payment schedule must—

(a) be in writing; and

(b) identify the payment claim to which it relates; and

(c) state 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.

[27] Section 19 provides that "scheduled amount" means:

> … an amount of a payment specified in a payment schedule that the payer proposes to pay by to the payee in response to a payment claim.

[28] Section 22 prescribes the liability of a payer to a payee if a payment claim is made:

> **22 Liability for paying claimed amount**
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> A payer becomes liable to pay the claimed amount on the due date for the payment to which the payment claim relates if—
>
> (a) a payee serves a payment claim on a payer; and
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> (b) the payer does not provide a payment schedule to the payee within—
>
> (i) the time required by the relevant construction contract; or
>
> (ii) if the contract does not provide for the matter, 20 working days after the payment claim is served.

[29] Section 23 sets out the consequences if no payment schedule is provided in response to a payment claim:

> **23 Consequences of not paying claimed amount where no payment schedule provided**

(1) The consequences specified in subsection (2) apply if the payer—

(a) becomes liable to pay the claimed amount to the payee under section 22 as a consequence of failing to provide a payment schedule to the payee within the time allowed by section 22(b); and

(b) fails to pay the whole, or any part, of the claimed amount on or before the due date for the payment to which the payment claim relates.

(2) The consequences are that the payee—

(a) may recover from the payer, as a debt due to the payee, in any court,—

(i) the unpaid portion of the claimed amount; and

(ii) the actual and reasonable costs of recovery awarded against the payer by that court; and

(b) may serve notice on the payer of the payee's intention to suspend the carrying out of construction work under the construction contract.

(3) A notice referred to in subsection (2)(b) must state—

(a) the ground or grounds on which the proposed suspension is based; and

(b) that the notice is given under this Act.

(4) In any proceedings for the recovery of a debt under this section, the court must not enter judgment in favour of the payee unless it is satisfied that the circumstances referred to in subsection (1) exist.

[30] Section 24A(1) provides that a person who carries out construction work under a construction contract has the right to suspend work under that contract if the claimed amount is not paid in full by the due date for payment and no payment schedule has been provided.

Position of Fletcher

[31] Ms Callinan says Fletcher accepts that one of the main purposes of the Act is to facilitate regular and timely payments to contractors and to require principals to contracts – in this case Fletcher – to respond to claims within a certain timeframe and in a certain form. However, she says the Act does not remove a payer's right to object

to and refuse to pay payment claims which it believes are unjustified or otherwise invalid, including the right to make deductions for contra-charges by way of set-off.

[32] Ms Callinan submits that Schedule 44 substantially complied with the requirements of s 21. It was provided in writing and on time. It provided, with respect to all 78 deductions made by Fletcher, a description of the item of work and indicated the variance amounts Fletcher proposed to pay. In addition, the entries for "the vast majority" of the deductions provided additional comments. Ms Callinan says the short form notations in Schedule 44 need to be considered contextually, taking into account the extensive knowledge the parties had of the project, the progress of the work, and potential disputes.

[33] Ms Callinan argues that the level of detail that Spotless says is required by s 21 goes beyond the requirement in s 21(3) to "indicate" the reasons for deductions and the manner of calculation for the "bottom line" scheduled amount Fletcher proposed to pay. She also says Spotless's approach is tantamount to requiring Fletcher to set out the substantive grounds for its deductions, when the purpose of the payment claim/payment schedule process is to sidestep the immediate engagement on substantive issues.

[34] Ms Callinan also submits that if Spotless wished to challenge Fletcher substantively because it did not agree with Fletcher's assessment in Schedule 44, the proper course was to bring an adjudication under the Act or court proceedings under the subcontract. She says Spotless questioned the validity of Schedule 44 in order to suspend its works and gain commercial leverage against Fletcher in the final weeks of the project.

[35] In support of its application, Fletcher relies on two of four affidavits sworn by Judy Pollard, a Commercial Director for Fletcher on the Commercial Bay project,[5] an affidavit sworn by Cresilda Cross, a senior quantity surveyor who was employed by Fletcher in the early months of 2020 and who prepared Schedule 44, and an affidavit sworn by Peter Degerholm, a registered quantity surveyor with 45 years' experience.

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5 Ms Pollard's second and third affidavits were sworn in support of Fletcher's application for an injunction.

[36] In her first affidavit, Ms Pollard describes the project and the contractual arrangements between Precinct and Fletcher and between Fletcher and Spotless and discusses the nature of the various entries in Schedule 44, events leading to the issuing of the Spotless notices of suspension and provides copies of the relevant documents. In her fourth affidavit, Ms Pollard discusses the lump sum nature of the base subcontract, how that is broken down into agreed sums for specific items of work, and how claims are assessed as a proportion of the work completed. She comments on the way the deductions in Schedule 44 were documented and complaints made by Spotless in that regard in the affidavits it filed.

[37] Ms Cross explains the process she followed when preparing payment schedules in response to payment claims from Spotless. She says this usually included a site walk with a Spotless representative to inspect and agree, if possible, the extent of Spotless's competed works as a percentage of the base contract value. She says Bruce Paterson was the Spotless representative who had accompanied her on the site walks following receipt of payment claims prior to Claim 44. However, because Mr Paterson had left Spotless in January 2020, the site walk in relation to Claim 44 was undertaken by Peter Cahill. She says that was Mr Cahill's first site walk.

[38] In his affidavit, Mr Degerholm gives his opinion on the payment claim/payment schedule process and, in particular, the level of detail required for a payment schedule by reference to the Act and industry practice.

Position of Spotless

[39] Mr Price, counsel for Spotless, says Schedule 44 does not meet or substantially comply with the requirements of s 21(3) of the Act and is thus invalid. He says the Schedule's shortcomings cannot be described as technical quibbles nor mere matters that do not affect technical compliance.

[40] Mr Price says there are omissions of the reasons for some items, an omission of the calculations for some items and insufficient information to indicate the reasons and calculations for other items. Mr Price acknowledges that, while Spotless has taken issue with various deductions from its claims under the base subcontact and the

variations, Spotless's focus is on the large contra charges Fletcher made for the first time and, Spotless says, without prior notification.

[41] Mr Price says Fletcher's evidence seeks to rectify the omissions in Schedule 44 by relying on matters that are not contained in the Schedule and this demonstrates the Schedule does not meet the test in s 21 of the Act. He says the level of evidence on which Fletcher seeks to rely cuts across the purpose of facilitating cash flow pursuant to a straightforward payment claim and payment schedule process.

[42] As discussed below, Spotless objects to Mr Degerholm's affidavit and says it should be ruled inadmissible. To the extent that evidence of industry practice is admitted, Mr Price says poor industry practice does not affect the requirements of the Act.

[43] In support of its opposition to Fletcher's application, Spotless relies on two affidavits from Peter Schnell, the General Manager of Spotless, as well as affidavits from Mr Paterson, who was project manager for Spotless on the Commercial Bay project from August 2016 to January 2020, Gary Nicholson, who is a quantity surveyor employed by Spotless, and Simon Barnes, an independent registered quantity surveyor.

[44] Mr Schnell's first affidavit describes and provides tables of alleged deficiencies with Schedule 44 and responds to some of the statements in Ms Pollard's first affidavit. Among other criticisms, Mr Schnell says it was entirely unclear to him how some of the contra charges were calculated or why they were being applied. He also says there was insufficient detail in the entries for liquidated damages for Spotless to understand the basis of these claims.

[45] In his second affidavit, Mr Schnell says that Mr Cahill, who no longer works for Spotless and is based in Australia, could not recall any discussion of the variation costs or the contra charges during his site walk with Ms Cross in January. Mr Schnell also says other Spotless team members working on the Commercial Bay project had confirmed that Fletcher did not raise any concerns about Claim 44 before it issued Schedule 44. He says, in particular, that Spotless was not aware that Fletcher would

be making multi million dollar contra charges before Schedule 44 was received, and that Schedule 44 was the first time that Spotless became aware of those charges.

[46] Mr Paterson disputes Ms Cross's evidence that it was common practice for site walks to be carried out after Spotless had submitted a payment claim. He also says that if there was no description in the "Comments" column of a payment schedule when a deduction was made he would not understand the reason for the deduction.

[47] Mr Nicholson takes issue with Ms Pollard's assertions that the calculation of deductions made in Schedule 44 can be quickly ascertained from the Schedule. He also disagrees with Ms Pollard's assertion that the deductions for delays caused to other subcontractors had been discussed with Spotless in some detail and also says that he was not able to understand those claims based on the documents Ms Pollard refers to, or why Fletcher considered Spotless was responsible for delays suffered by Black and Alaska.

[48] Mr Barnes says that, on the basis the assumption he was instructed to make, his experience is that the majority of the industry do not comply with the requirements of s 21 of the Act. The assumption Mr Barnes was instructed to make was that, in order to meet the requirements of s 21, payers are required to provide side calculations and reasons on a line by line basis for each item where a payer schedules a lesser amount than that claimed or makes a deduction.

Admissibility of Mr Degerholm's evidence

[49] Mr Price says Spotless objects to Mr Degerholm's affidavit because it contains irrelevant material, material in the nature of a submission, opinion which is not substantially helpful and is outside Mr Degerholm's expertise, and comment which amounts to advocacy and opinion for which reasons are not provided. Ms Callinan submits that Mr Degerholm is an independent expert whose evidence is substantially helpful, and she takes issue with each of the grounds advanced by Mr Price for excluding Mr Degerholm's evidence.

[50] It was agreed at the hearing that I would deal with Mr Price's objections in my substantive decision.

[51] Section 25(1) of the Evidence Act 2006 provides that an opinion by an expert is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding. However, as Katz J said in *Auckland Waterfront Development Agency Ltd v Mobil Oil New Zealand Ltd*,[6] Courts are generally reluctant to admit expert opinion evidence on legal issues, which are usually addressed through the submissions of counsel, particularly in view of the requirement in s 25 that the evidence must be "likely" to provide "substantial help" to the Court.

[52] I agree there are aspects of Mr Degerholm's affidavit brief that are not likely to be substantially helpful to the Court. Whatever Mr Degerholm's experience in the consultations that led to the drafting of the Act, it is for the Court to decide, with the assistance of submissions from counsel, how the Act should be interpreted, having regard to the language of the Act and, if appropriate, the legislative history. Accordingly, I rule that paragraphs 12-30 and 47-50 of Mr Degerholm's affidavit are inadmissible and exclude them from consideration.

[53] I also consider that Mr Degerholm's opinion on the interpretation of Schedule 44 and on Mr Schnell's evidence about the Schedule is not unlikely to be substantially helpful. Mr Degerholm is not an expert in the preparation of payment claims by Spotless or payment claims by Fletcher. How he considers Schedule 44 should be interpreted is essentially irrelevant. In the context of this dispute, which is focused on the interpretation and application of s 21 of the Act, the interpretation of Schedule 44 is also essentially a legal question and is addressed in the submissions of counsel. Accordingly, I rule that paragraphs 61-93 of Mr Degerholm's affidavit are inadmissible and exclude them from consideration.

[54] I do not accept, however, that Mr Degerholm does not have relevant expertise in industry practice just because he has not practised recently as a quantity surveyor or that evidence of industry practice is not relevant to the issues before the Court. While, as Mr Price says, the interpretation of Schedule 44 is fundamentally an issue

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6 *Auckland Waterfront Development Agency Ltd v Mobil Oil New Zealand Ltd* [2013] NZHC 2160 at [20]-[22].

of legal interpretation, I consider it is appropriate to have regard to the practice of those who work with the legislation every day when deciding whether a particular payment schedule meets the requirement of substantial compliance, bearing in mind that the Court of Appeal has held that a pragmatic, common sense and contextual approach should be adopted when assessing whether a purported payment claim and, by extension, a purported payment schedule, complies with the Act.[7] For these reasons, I rule the rest of Mr Degerholm's affidavit to be admissible.

Analysis

[55] As stated by Asher J in *Marsden Villas Ltd v Wooding Construction Ltd*, in a passage that has been approved by the Court of Appeal on a number of occasions:[8]

> [16] The Act sets up a procedure whereby requests for payment are to be provided by contractors in a certain form. They must be responded to by the principal within a certain timeframe and in a certain form, failing which the amount claimed by the contractor will become due for payment and can be enforced in the Courts as a debt. At that point, if the principal has failed to provide the response within the necessary time frame, the payment claimed must be made. The substantive issues relating to the payment can still be argued at a later point and adjustments made later if it is shown that there was a set-off or other basis for reducing the contractor's claim. When there is a failure to pay the Act gives the contractor the right to give notice of intention to suspend work, and then if no payment is made, to suspend work. There is also a procedure set up for the adjudication of disputes.
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> [17] The Act therefore has a focus on a payment procedure, the results that arise from the observance or non-observance of those procedures, and the quick resolution of disputes. The processes that it sets up are designed to side-step immediate engagement on the substantive issues such as set-off for poor workmanship which were in the past so often used as tools for unscrupulous principals and head contractors to delay payments. As far as the principal is concerned, the regime set up is "sudden death". Should the principal not follow the correct procedure, it can be obliged to pay in the interim what is claimed, whatever the merits. In that way if a principal does not act in accordance with the quick procedures of the Act, that principal, rather than the contractor and sub-contractors, will have to bear the consequences of delay in terms of cashflow.

[56] These paragraphs confirm that the primary focus is on ensuring that payees are paid what they claim unless the payer complies with the requirements of s 21. The

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7 *C. J. Parker Construction Ltd (in liq) v Ketan & Ors* [2017] NZCA 3, at [25].

8 *Marsden Villas Ltd v Wooding Construction Ltd* [2007] 1 NZLR 807. Cited in, for example, *SOL Trustees Ltd v Giles Civil Ltd* [2014] NZCA 539, [2015] 2 NZLR 482 at [24], and *C.J. Parker Construction Ltd v Ketan*, above n 7 at [16].

purpose is to ensure that principal contractors cannot starve subcontractors of the cash flow they need to keep their business going by delay or by advancing unclear or imprecise reasons for delaying payment. As Harrison J said in *Metalcraft Industries Ltd v Christie*:[9]

> The specific purpose of the payment schedule is to give the contractor full and unequivocal notice of all areas of difference or dispute to enable it to properly assess its future options.

[57] No doubt, it is for that reason that s 21(3) requires that if a payer proposes to pay less than an amount in a payment claim, the payer must "indicate":

(a) How it calculated the scheduled amount it proposes to pay;

(b) The reason it is paying an amount different from that in the payment claim; and

(c) If the reason for the difference is because the payer is withholding payment on any basis, the reasons for the withholding.

[58] As Matthews AJ said in *Seating Systems Ltd v Kidson Construction Ltd*:[10]

> [28] … The three requirements for a payment schedule set out in s 21(3) … are directed at creating a clear position which may lead to the payee accepting the payment in full settlement (because it accepts the calculation and the reasons for it) or to the payee determining that the issues must be referred to a dispute resolution process. This part of a payment schedule is therefore of considerable importance.

[59] If that was all that had been said about s 21(3), Mr Price would have a strong foundation for basis for his position that a payment schedule must set out with some precision how a scheduled amount was calculated and the reasons for paying less than the amount claimed. However, Matthews AJ went on to say:[11]

> Nonetheless if the essence of the reasons for withholding payment is made known sufficiently to enable the payee to make a decision on whether or not

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9 *Metalcraft Industries Ltd v Christie* HC Whangarei CIV-2006-488-645, 15 February 2007, Harrison J at [15].

10 *Seating Systems Ltd v Kidson Construction Ltd* HC Nelson CIV-2012-442-000013, 30 August 2012, Matthews AJ.

11 Above n 10, at [28].

> to pursue a claim and to understand the nature of the case it will have to meet if the matter proceeds to adjudication, that is sufficient.

[60] In making that statement, Matthews AJ referred to observations made by the Supreme Court of New South Wales in *Multiplex Constructions Pty Ltd v Luikens* about s 14(3) of the equivalent New South Wales legislation[12] and, in particular, the significance of the use of "indicate" in the opening words of s 21(3). In *Multiplex*, Palmer J said, in a passage also noted in other New Zealand High Court decisions:[13]

> Section 14(3) of the Act, in requiring a respondent to "indicate" its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. The use of the word "indicate" rather than "state", "specify", or "set out", conveys an impression that some want of precision and particularity is permissible as long the essence of "the reason" for withholding 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.

[61] It is appropriate to record at this point that, having regard to the above passages and the Court of Appeal's direction in *C.J. Parker Construction* that a pragmatic, common sense and contextual approach should be adopted, I do not accept that the assumption upon which Mr Baker was instructed to proceed is correct. The Act does not direct that side calculations and reasons on a line by line basis for each item are required whenever a payer proposes to pay a lesser amount than that claimed by a payee. The requirement is to indicate the reason or reasons for the deduction. How that is done may vary according to the circumstances of the contract and the practice of the parties, provided the that reason or reasons are adequately indicated.

[62] Spotless says that the entries for 46 deductions made by Fletcher fail to provide the information required under the Act, although in his submissions, Mr Price focused on representative examples, particularly with regard to the deductions made from Spotless's claims under the base subcontract and the variations.

[63] It is convenient to consider the entries in the Schedule under the three sections of original contract works, variations and contra charges.

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12 Building and Construction Industry Security of Payment Act 1999 (NSW).

13 *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 at [78]; see also *N C B 2000 Ltd v Hurlstone Earth Moving Ltd* HC Auckland CIV-2010-404-008096, 22 June 2011, Wylie J; *Westnorth Labour Hire Ltd v S BV Properties Ltd* HC Auckland CIV-2006-404-001858, Rodney Hansen J.

Original contract works

[64] Spotless says 21 of the 320 entries in the base subcontract section of Schedule 44 do not meet the requirements of s 21(3) because, in one or more of the following respects, they:

(a) Do not indicate the manner in which the scheduled amounts were calculated;

(b) Do not provide sufficient information; or

(c) Provide no reasons at all.

No indication of method of calculation (14 items)

[65] It is apparent from Claim 44, and from Payment Schedules 42 and 43 which Fletcher issued in December 2019 and January 2020, that it has been both parties' practice to make claims and schedule payments based on an assessment of progress towards completion of each item of the contract works. As discussed by Ms Pollard, that progress was assessed as a percentage of the total amount agreed for each item, with each claim building on the percentage already paid under each item. In addition, Claim 44 specified the particular amount being claimed for each item based on Spotless's assessment of progress calculated as a percentage of the amount for each item.

[66] In Claim 44, Spotless claimed that 100 per cent of the works had been completed in 10 of the 14 items in respect of which it challenges Fletcher for not indicating how the scheduled amounts were calculated.[14] With respect to the other four items under this heading, Spotless claimed payment based on lesser percentages of 45, 50, 95 and 95 per cent.[15]

[67] In Schedule 44, Fletcher scheduled the dollar amounts it was paying under each item. Where the amount differed from that claimed, it stated the figure to be paid and

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[14] Items 20, 145, 196, 200, 244, 245, 246, 247, 251, 252.
[15] Items 7, 8, 201, 267.

the amount of variance from the sum claimed by Spotless. In some but not all of the entries, Fletcher also stated that it was paying lesser percentages than those claimed. In the entries under challenge, however, no separate percentages were stated. However, as Ms Callinan pointed out, the percentage being paid per item, as compared with that claimed by Spotless, could readily be determined, even if the assistance of a calculator may be required in some instances.

[68] For items where Fletcher scheduled lesser amounts based on deductions of five or 10 per cent from Spotless's claims based on 100 per cent completion,[16] those calculations are easily made, even without the assistance of a calculator. There is a greater challenge where, as in item 7, Fletcher scheduled a significantly lower amount than that claimed, which had the effect of clawing back part of the amount already scheduled under earlier payment schedules. Thus, under item 7 Spotless claimed 45 per cent of the contact works was payable and sought payment of $57,159.10 against a contract value for that item of $571,591.00 and previous payments of $200,056.85. In Schedule 44, Fletcher scheduled payment of $171,477.30, being a reduction of $28,579.55 from the amount scheduled under Payment Schedule 43, thereby resulting in the variance of -$85,738.60 noted in Schedule 44. From these figures, it can still be readily ascertained that Fletcher considered that only 30 per cent of the works under that item had been completed ($171,477.30/$571,591 x 100) = 30), even if the assistance of a calculator is required.

[69] The situation here is not equivalent to that in *Maxi Construction Management Ltd v Morton Rolls Ltd*[17] where the Scottish Court of Session held that a claim made under the Scottish construction contracts legislation failed to specify the basis on which certain items claimed had been calculated. First, the Scottish legislation required that a claim "specify" rather than "indicate" the basis of calculation. Secondly, the Court held that there was nothing in the claim even to indicate how the sums sought were based on the valuation required by the contract.[18] Here, the references to percentages in both Claim 44 and Schedule 44 gave a clear indication

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16 Items 20, 145, 200, 244.
17 *Maxi Construction Management Ltd v Morton Rolls Ltd* [2001] Scot CS 199 at [29].
18 At [28].

that deductions had been made by reference to the percentage of work completed under each item.

[70] Given the practice of both Spotless and Fletcher of calculating payments as a percentage of the work under each item, it would have been readily apparent to anyone in Spotless who was familiar with the payment claim / payment schedule process that the amounts scheduled represented percentage deductions from the agreed amounts of the contract works, even if a calculator might be needed to ascertain the precise percentage specified in a few cases.

[71] For these reasons, I do not accept that the basis of the calculations of the amounts specified was not sufficiently indicated in Schedule 44.

Insufficient information (four items)

[72] Spotless says Fletcher failed to provide insufficient information (as distinct from providing no reasons at all) in three of the scheduled items. I do not agree.

[73] In two of the three items challenged,[19] Fletcher provided no update on a comment made in the December payment schedule that "5% of contact works" would be withheld until all relevant completion documentation had been submitted and signed off. In the third item,[20] Fletcher provided no update on a comment made in September 2019 in an earlier payment schedule that 75 per cent of the contract works had been certified because there remained multiple spaces that had not been completed, even though Fletcher certified payment of part of the $110,251.80 claimed by Spotless in Claim 44.

[74] In the first two cases, Fletcher continued to schedule total payments worth 95 per cent of the total amounts for those items, even though Spotless asserted in Claim 44 that they were 98 per cent complete in one case and 100 per cent complete in the other. While the December comments may not have been updated, the retention of these comments clearly conveyed Fletcher's position that it was not satisfied that the completion documentation had been submitted and signed off.

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19 Items 18, 19.
20 Item 24.

[75] As for the third item, a calculator check reveals that Fletcher certified payment of 90 per cent of the 100 per cent claimed by Spotless. The obvious inference is that Fletcher accepted that some but not all of the previously identified deficiency in performance had been rectified. While it would have been better for Fletcher to have updated the September 2019 comment, I am satisfied that the September 2019 comment still adequately indicated the reason for Fletcher scheduling a lesser sum than that claimed by Spotless.

Absence of any reasons (seven items)

[76] In one of seven items,[21] Fletcher stated in the Comments column of Schedule 44: "Jan 20 - 2% uncertified" and scheduled payment of 98 per cent of the total sum for that item of $496,133.00. In two other items,[22] Fletcher stated "Jan 20 – 5% uncertified" and scheduled payment of 95 per cent of the total amounts for those items. In another item,[23] Fletcher stated "Jan 20 - 95%" and scheduled payment of 95 per cent of the total amounts for that item. Where, as in two of these cases, the amounts deducted are small (less than $5,000.00 each), I accept that these entries would have been sufficient to indicate to Spotless that Fletcher considered that some minor finishing work was required for those items.

[77] I reach the same conclusion should on two other items[24] where Fletcher made no comment at all but scheduled payment of 95 per cent of the total amounts claimed for those items. While the failure to provide any reason is technically non-compliant, where, as here, the amounts deducted were small (again less than $5,000.00 each) a certification of 95 percent would sufficiently indicate to Spotless that Fletcher considered a small amount of finishing work was required.

[78] However, where the amount deducted is more significant – in one case, $22,050.35 – reaching the same conclusion is not so straightforward. In that situation, a five per cent deduction may indicate that something more than minor finishing work is required. For that reason, I consider that for figures above a certain threshold, for

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21 Item 280.
22 Items 286, 295.
23 Item 299.
24 Items 20, 196.

example, $20,000.00, simply noting a five per cent deduction does not sufficiently indicate the reasons for the deduction in terms of s 21(3) of the Act.

[79] There is also difficulty with the remaining item,[25] where Fletcher gave no reason for scheduling payment for 40 per cent of the total amount for that item, even though Spotless had claimed for 95 per cent of the work. The effect of Fletcher scheduling payment for 40 per cent of the work was to deny Spotless anything for that item in Claim 44 since Fletcher had scheduled 40 per cent in Payment Schedule 43. Even though the amount withheld is not large ($15,822.40) in the context of the subcontract, a complete absence of any reason for not paying Spotless anything is clearly not consistent with the requirement in s 23(3)(c) to state the reason for withholding payment.

[80] In summary, I consider that Fletcher did not meet the requirement of s 21(3) of the Act with respect to two items in the original contract works section of Schedule 44. However, the total amount deducted in those items was just under $37,900.00, which is 4 per cent of the total claimed by Spotless under the equivalent section of Claim 44. In those circumstances, I am satisfied that the Fletcher's failures with respect to those two items do not mean that Fletcher failed to comply substantially with s 21(3) in the original contract works section of Schedule 44.

Works under variations to base subcontract

[81] Spotless makes similar complaints about 16 items of the 219 items that make up this section of Schedule 44 to those it makes regarding the original contract works.

No indication of method of calculation (13 items)

[82] In four items under this heading,[26] Spotless sought payment on the basis that the works under those items were 95 per cent complete but Fletcher scheduled payments that amounted to 90 per cent of the value of the works. In three items,[27] Spotless sought payment on the basis that works were 100 per cent complete but

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25 Item 201.
26 Items 3, 7, 8, 72.
27 Items 12, 30, 31.

Fletcher scheduled payments that amounted to 95 per cent of the value of the works. In one item,[28] Spotless sought payment on the basis that work was 100 per cent complete but Fletcher scheduled a payment that amounted to 97 per cent of the value of the work. In another item,[29] Spotless sought payment on the basis that work was 90 per cent complete but Fletcher scheduled a payment that amounted to 87 per cent of the value of the work.

[83] Given the practice of both Spotless and Fletcher of calculating payments as a percentage of the work under each item, it would have been apparent to anyone in Spotless who was familiar with the payment claim / payment schedule process that the amounts scheduled represented percentage deductions from the agreed amounts of the works agreed in the variations, even if a calculator might be needed to confirm that the payments scheduled amounted to the percentages noted above of the value of each item. Accordingly, I do not accept that the basis of the calculations of the amounts specified for these items was not sufficiently indicated in Schedule 44.

[84] The remaining four items[30] are quite different. In three cases, Fletcher scheduled no payment for the items claimed. In the remaining case, Fletcher scheduled a payment that quite evidently amounted to 50 per cent of the amount claimed.

[85] There can be no doubt about the manner in which Fletcher calculated the amounts scheduled for these four items. It rejected three claims outright; it accepted 50 per cent of the remaining claim. While, as discussed below, there may be issues about whether Schedule 44 satisfied other requirements of s 21(3) with respect to these items, I do not accept that they contravene s 21(3)(a) in failing to indicate the manner in which Fletcher calculated the scheduled amounts.

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28 Item 48.
29 Item 22.
30 Items 183, 190, 191, 197.

Insufficient information (nine items)

[86] In five items,[31] Fletcher scheduled payments that amounted to slightly lesser percentages than those represented in the amounts claimed by Spotless but provided no reasons for the deductions. Spotless should have known, based on the shared practice of claiming and scheduling payment as percentages of work completed that Fletcher considered that small amounts of work were required to complete those items. However, although the differences in the percentages scheduled to be paid as compared with those claimed by Spotless were small (between 3 and 5 per cent), the amounts withheld by Fletcher were substantial. They ranged from approximately $15,200.00 to $65,000.00 and totalled approximately $210,000.00.

[87] In other words, while the percentages were small, the value and, perhaps, the size of the works for which payments were not scheduled may have been significant. In such circumstances, there may have been a variety of reasons why Fletcher refused to schedule the claimed amounts. There may also be a question as to whether Fletcher's decisions to schedule slightly smaller percentages than those sought were arbitrary, which cannot be assessed in the absence of reasons. Accordingly, I am satisfied that the absence of reasons for those deductions means Fletcher has not complied with s 21(3) of the Act, at least with respect to those items.

[88] Of the remaining four items, Fletcher rejected two completely[32] and scheduled payments of 65 and 50 per cent of the amounts claimed under the other items.[33] In all four cases, Fletcher noted in the Comments column that the claims were under assessment. Two of the claims were for less than $5,000.00 each so are of marginal relevance. The other two claims, each for amounts under $16,000.00, were not discussed by Mr Price. On the face of the entries, the notation that the claims were under assessment indicated why Fletchers had not scheduled the amounts claimed. Whether that is sufficient information to comply with the requirements of s 21(3) is doubtful.

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31 Items 3, 7, 8, 22, 72.
32 Items 187, 197.
33 Items 79, 190.

[89] In responding to a payment claim, a payer is required by s 21(3) to indicate reasons why a lesser amount than that claimed is not being scheduled for payment. The assumption behind that requirement is that a payer must have a definite reason for declining payment. If a payer declines payment because it has not got around to completing its assessment of an item of works, even if the works have been performed, that would undercut the purpose of ensuring ensure cash flow to the payee. For that reason, I do not consider that simply noting that an item of works is under assessment is a reason for the purposes of s 21(3), particularly where a payer declines payment altogether. At a minimum, there should be some indication of the purpose of the assessment.

No information provided (five items)

[90] In three of the items disputed by Spotless,[34] Fletcher certified payment of 95 per cent of the 100 per cent claimed by Spotless and gave no reason for the deductions. Ms Pollard says it was self-evident that Fletcher considered that the works were incomplete. In all three cases, the amounts deducted were less than $10,000.00.

[91] In the other two cases,[35] Fletcher declined to schedule any of the amounts claimed. Spotless recorded in its entries for these items the serial number of Notices to Subcontractors (NTSC) from Fletcher to Spotless which are accessible on Fletcher's project document management system known as Aconex. Ms Pollard says the NTSCs, which are recorded in both Claim 44 and Schedule, set out previous communications between Fletcher and Spotless about disputed liability for this work. Whether cross references to other documents such as the NTSCs can satisfy the requirements of s 21(3) of the Act has a greater significance with respect to the contra claims discussed below. The amounts deducted from these claims were less than $5,000.00.

[92] For these reasons, I consider that Fletcher did not meet the requirements of s21(3)(b) and (c) in respect of the above items under this section of Schedule 44. While the amounts deducted under some items were small, in others, the amounts were significant. The total value of the amounts withheld was approximately $314,800.00

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34 Items 12, 30, 31.
35 Items 183, 191.

or 26 per cent of the $1,216,055.00 claimed by Spotless under this section of Claim 44. Given that percentage of value, I consider that Fletcher did not substantially comply with the requirements of s 21(3)(b) and (c) of the Act with respect to this section of Schedule 44.

The contra charges

[93] Spotless does not dispute Fletcher's right to make contra charges to offset the amount it claimed in Claim 44 and notes that Items 1 to 25 of the contra claims made in Schedule 44 were also included in Payment Schedules 42 and 43. With one exception, Spotless does not dispute the claims made under those items. The exception concerns the claim for cleaning charges,[36] where the amount charged has gone from $510.00 in Schedule 43 to $33,610.96 in Schedule 44, with no indication of how that sum was calculated. That, in itself, constitutes non-compliance with s 21(3(a), notwithstanding the comment recorded against that item that Spotless were continuously not cleaning up their work areas.

[94] However, Spotless's main concern is with the new charges, most of which relate to Fletcher's claim for costs Fletcher says it must pay Black and Alaska for delays caused by Spotless and to claims for liquidated damages.

Costs relating to Black and Alaska (12 items)

[95] Spotless disputes these charges, totalling $2,596,831.61, on two grounds: a failure to indicate the manner in which they were calculated and a failure to provide sufficient information to indicate the reasons for the deductions. The only information provided in the Comments column was the statement, "Refer to Aconex correspondence for breakdown of claim". No documents numbers were given to indicate which Aconex correspondence was being referred to. As Mr Schnell says in his first affidavit, this is in contrast to the many references to Aconex correspondence in the Base Subcontract and Variations sections of Schedule 44, where specific NTSC document numbers were provided.

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[36] Item 10.

[96] In her first affidavit, Ms Pollard says Fletcher had anticipated sending further information in relation to these deductions after sending Schedule 44 but did not do so because Fletcher was still working through their own assessment of the claims made by Black and Alaska. However, she also says Spotless knew Black and Alaska because Spotless had been working in close proximity with those subcontractors in the tower, and that it was clear from the item entries that they were claims for variations and extensions of time. In her fourth affidavit, Ms Pollard says Spotless was well informed about the delays that gave rise to these deductions through various NTSCs that related to these issues and which provided details of each delay and the fact the costs of the delay would be passed on to Spotless. She annexed copies of the NTSCs to the affidavit.

[97] Mr Price says that because Spotless was not a party to Fletcher's contracts and communications with Black and Alaska, it had no way of understanding what the variations were about and says the generalised references to Aconex correspondence did not provide sufficient information to indicate the manner in which Fletcher had calculated the amounts or the reasons for the deductions. Mr Price says the Fletcher deductions are similar to the nil payments made in *Metalcraft*, where Harrison J held there was a strict onus on the party denying the claim to explain with some precision the basis of that position.[37]

[98] Mr Price says the Aconex correspondence annexed to Ms Pollard's fourth affidavit cannot be used to explain Schedule 44 which must satisfy the requirements of s 21 of the Act in its own terms. Ms Callinan submits that the correspondence and Mr Schnell's responses in his second affidavit show that Spotless does not deny knowing that delay charges would be passed on.

[99] Contractors and subcontractors will usually have a good understanding of how a project is tracking and of the consequences for them and for others of delays. However, whether or not Spotless knew that they would be faced with delay charges is essentially irrelevant. That knowledge does not alter the requirements of s 21(3) to indicate in a payment schedule the manner in which scheduled amounts, including

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[37] Above n-, at [20].

contra charges, are calculated and the reasons for those charges. Depending on the circumstances, references in a payments schedule to notices or other correspondence may be sufficient to indicate those matters if it clear that the payer and payee share a common understanding about the references. It is clear from both Claim 44 and Schedule 44 that Spotless and Fletcher shared such a common understanding with regard to the many references to specific NTSCs in the Variations section of the two documents.

[100] However, those references were to specific documents which both parties accepted set out matters relevant to the items in the Claim and Schedule. There was no common understanding with respect to the Black and Alaska charges. Whatever conversations Fletcher may have had with Spotless, when making for the first time charges that were so substantial that they completely offset Spotless's claim and created a sizeable negative balance, Fletcher had an obligation to indicate with some clarity how those charges arose and the basis upon which they were calculated. The generalised references to "Aconex correspondence" fall well short of that requirement.

[101] Ms Pollard's first affidavit illustrates the problem faced by Spotless. Ms Pollard's explanation for not providing Spotless with further information regarding the deductions even after sending Schedule 44 was that Fletcher were still making their own assessment of the Black and Alaska claims and were still in discussions with Black and Alaska. If Fletcher themselves were still working through the claims, how could Spotless know the basis on which Fletcher was deducting these large costs.

[102] I am also satisfied that even if Fletcher had identified in Schedule 44 the NTSCs that Ms Pollard annexed to her fourth affidavit, that would not have satisfied the requirements of s 21(3). Contrary to the notation in Schedule 44, those notices do not provide a breakdown of these claims. The notices simply record Fletcher's advice to Spotless that they would be passing on delay notices and costs received from the fitout contractors. The notices give no indication of the scale of the costs or of how they would be calculated.

[103] For these reasons, I am satisfied that all of the deductions made in Schedule 44 for costs relating to Black and Alaska failed to satisfy the requirements of s 21(3) of the Act.

Liquidated damages claims

[104] Fletcher makes two claims for liquidated damages in Schedule 44, one for $1,306,536.00 and the other for $746,592.00. Mr Price does not challenge the adequacy of the reasons given for the claims in the comments column or say that Fletcher failed to indicate the manner in which the charges have been calculated. Rather, he says there is no liquidated damages clause in Spotless's subcontract with Fletcher and that Spotless had reached agreement with Fletcher on a completion date so it was "objectively unclear" how Fletcher could be applying liquidated damages for work undertaken before that date.

[105] Ms Callinan says that Fletcher has a liability under its head contract with Precinct to pay liquidated damages for delays in meeting specified project deadlines and Spotless is deemed, in its subcontract with Fletcher, to have read and have full knowledge of the Head Contract. She also notes that Spotless has undertaken in its subcontract with Fletcher to indemnify Fletcher against all claims by Precinct arising out of any fault or delay by Spotless in carrying out its subcontract works – although that liability is subject to certain caps.

[106] It is apparent that the dispute between the parties on this item is not really about whether Fletcher's claim meets the requirements of s 21 of the Act but whether Fletcher has any right to make such a claim. That is not a matter that goes to the validity of the Schedule 44. For that reason, I accept that on the face of the entries, Fletcher has satisfied the requirements of s 21(3).

[107] Nonetheless, because the entries for the claims against Black and Alaska do not meet the requirements of the Act and because the value of those items is more than half the total amount claimed under the Contra Charges section of Schedule 44, it must follow that that section of Schedule 44 does not substantially comply with the Act.

Overall conclusion

[108] For the above reasons, I am satisfied that neither the Variations section or the Contra Charges section of Schedule 44 substantially comply with s 21(3) of the Act. The combined value of the items that do not comply is approximately $2,911,600.00 or over half of the total value claimed by Fletcher in Schedule 44. I am satisfied, therefore that, taken as a whole, Schedule 44 does not comply with s 21(3) of the Act and is invalid.

[109] It further follows that because Schedule 44 was invalid, no payment schedule was provided in response to Claim 44. Accordingly:

(a) Fletcher was liable to pay Spotless $2,067,715.86 plus GST as claimed in Claim 44, in accordance with s 22(a) of the Act;

(b) Because Fletcher did not pay that amount by the due date, Spotless was entitled:

(i) To serve notice on Fletcher of its intention to suspend the carrying out of work under its subcontract, in accordance with s 22(2)(b) of the Act; and

(ii) To suspend work in accordance with s 24A(1) of the Act.

[110] For these reasons, I dismiss Fletcher's application for a declaration that the notice by Spotless of its intention to suspend work and the notice by Spotless of suspension of work were invalid and of no effect.

Costs

[111] Spotless is entitled to costs on a 2B basis. If the parties are unable to agree costs, they may submit memoranda of no more than 4 pages each. Any memorandum by Spotless is to be filed and served by 25 August 2020. Any memorandum in reply

by Fletcher is be filed and served by 8 September 2020.

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G J van Bohemen J