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JUDGMENT OF ASHER J : High Court. New Zealand. Auckland Registry. 25th May 2006.

Introduction

[1] Marsden Villas Limited ("Marsden Villas") and Wooding Construction Limited ("blooding Construction") are parties to a Construction Contract for the building of 30 apartments in Paihia ("the Contract"). The Contract has taken far longer to complete than anticipated and there are disputes between the parties.

[2] The claims and counterclaims give rise to two questions. What, if any, valid claims has Wooding Construction against Marsden Villas, and has it lawfully suspended work? The issues fall to be determined under the Construction Contracts Act 2002 ("the Act"). That Act sets out a new procedural regime for payments between a principal and a contractor, the consequences of non-payment, and the adjudication of disputes during the course of a Construction Contract. The Court is not asked to determine any substantive issues between the parties, such as who is responsible for the delays. This is not the province of the Act. Rather, the issues before the Court turn on the extent to which the parties have followed and complied with the provisions of the Act, and the consequences of that compliance or noncompliance.

Background

[3] Marsden Villas entered into a Construction Contract with Wooding Construction on 16 October 2003. The Contract sum was $7,269,631.60 exclusive of GST. The Project was known as "Samuel Marsden Villas". It involved the construction of 30 apartments of various sizes. The documents that constituted part of the Contract included the New Zealand standard form of contract for 1988, the General Conditions of Contract NZS 3910: 1998. The Construction Contracts Act is included in the list of agreed Contract documents.

[4] The engineer to the Contract was Mr Vaughan Brannigan of Brannigan Project Management Limited. As such, he had the usual dual role of engineer under the Contract, and expert adviser to and representative of the principal.

[5] Wooding Construction, as the Contract has gone over time, has submitted various extension of time claims to Marsden Villas. These claims have been disputed by Marsden Villas and have been the subject of an adjudication process, which will be referred to later in this judgment. This case turns primarily on progress claim number 29. This claim was dated 27 February 2006 Wooding Construction claimed a payment of $2,909,706.59 under this claim. In the alternative, given the various challenges to the validity of this claim, Wooding Construction claimed under an earlier progress claim, number 26. The amount owing under that claim is $1,651,988.80.

[6] On 30 March 2006 Wooding Construction gave notice to Marsden Villas of its intention to suspend work, relying on the Act. This was on the basis that the $2,909,706.59 owing under payment claim number 29 was overdue. The notice provided for payment within five working days, failing which work would be suspended.

[7] On 7 April 2006 Wooding Construction gave notice that it had suspended construction work from that date, and all work has ceased. Wooding Construction also issued an alternative suspension notice, relying on non-payment of payment claim number 26. It is in those circumstances that this dispute has come to this Court for urgent determination.

The issues

[8] The Act sets out certain processes for compliance or non-compliance which give rise to certain consequences. The issues of how much, if anything, is due, and the validity of the suspension, turn on the extent to which the parties have complied with the procedures set out in the Act. I consider that the three issues are those generally identified by Mr Hurd for Wooding Construction as follows:

a) Has Wooding Construction served a valid payment claim in terms of the Act? Wooding Construction claims it has. Marsden Villas claims it has not.
b) If Wooding Construction has served a valid payment claim, has Marsden Villas served its responding payment schedule within time? Marsden Villas claims that it has. Wooding Construction claims that it has not.
c) Was Wooding Construction entitled to suspend work? Wooding Construction contends that it was. Marsden Villas contends that it was not.

Purpose of the Construction Contracts Act 2002

[9] All three of the issues raised turn, at least in part, on an interpretation of the relevant provisions of the Act. Both parties in their submissions rely on the purpose of the legislation. The purpose of the Act is set out in s 3 which reads:

> *3 Purpose*
> *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.*

[10] The Law Commission Paper which led to the legislation, Protecting Construction Contractors stated that the Act was "... to have as its purpose the ensuring of prompt cashflow to contractors ..." (p 11).

[11] A little earlier in the report it was put more graphically: *The basic intention is that instead of the cashflow being held up for weeks, months and years, pending a final solution, a decision, described as being "quick and dirty" will be given to resolve the cashflow situation, leaving a final determination of financial rights and obligations to be arrived at later.*

[12] In ***Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd*** [1974] AC 689, 716 the House of Lords quoted Lord Denning in the Court below: *[t]here must be `cashflow' in the building trade. It is the very lifeblood of the enterprise.*

This was quoted with approval by the New Zealand Court of Appeal in ***George Developments Ltd v Canam Construction Ltd*** [2006] 1 NZLR 177 at [41].

[13] In ***Gilbert-Ash*** the House of Lords allowed the appeal against Lord Denning's decision. Lord Reid commented at p 699 that in a range of judgments the English Court of Appeal had come near to laying down a general rule that not only in cases between an employer and contractor, but also in cases between contractor and sub-contractor, sums due under an architect's certificate must be paid at once without waiting for determination of claims for set-off. This line of authority was disapproved by the House of Lords, at least as it related to contractor and sub-contractor.

[14] The effect of the New Zealand Construction Contracts Act 2002 was to strongly confirm that such a regime which protected and encouraged cashflows was right for cases between the principal and contractor. The intention was to improve the head contractor's ability to obtain payment, by setting up a quick and mandatory payment process. In enacting such legislation, the Legislature set aside the long established conservative contractual approach to construction contracts which emphasised freedom of contract. The history of these cases is described in Hon. R Smellie CNZM QC, Progress Payments and Adjudication, paras 1 - 15. The Act has "*emphatically vindicat[ed] Lord Denning's approach*" (Smellie, para 31.)

[15] Consistent with the Law Commission Paper, the General Policy Statement which was set out at the beginning of the Explanatory Note accompanying the Bill reads as follows:

This Bill is intended to facilitate prompt and regular payments within the construction industry.

[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.

[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.

[18] In this case Wooding Construction is asserting that exactly this has happened; Marsden Villas has failed to serve its response document, the payment schedule, within the required time and is therefore bound to pay the payment claimed despite the fact that it strongly contests it. Wooding Construction submits the position is that the claim must be paid and the substantive issues can be argued later. Marsden Villas strongly contests this. The determination of the dispute will decide who bears the interim burden, at least in part, of the cost resulting from the delay in completing the job.

[19] The three broad issues that are to be determined in this case derive from Wooding Construction's wish to establish that it has served a valid payment claim, that Marsden Villas has failed to respond within the required time and in the required way, and that therefore Marsden Villas is obliged to make the interim payment. The focus of Marsden Villas is to establish the opposite propositions; that the payment claim made by Wooding Construction did not invoke the provisions of the Act, that if it did invoke the provisions of the Act, that Marsden Villas' response was adequate, and that in any event in the circumstances Wooding Construction was not entitled to suspend work.

First issue - Has Wooding Construction served a valid payment claim, in serving claim number 29?

[20] This progress payment claim was dated 27 February 2005. It was for the amount of $2,909,706.59. It was sent by Wooding Construction to Mr Brannigan as the agent for Marsden Villas, as had all previous progress payment claims. Mr Brannigan responded on 15 March 2006 setting out his progress payment valuation for $162,314.68. Attached to his letter was a formal payment certificate. The covering letter stated that the payment certificate comprised all or part of a "payment schedule" under the Construction Contracts Act 2002.

[21] Mr Keene, on behalf of Marsden Villas, has submitted that payment claim number 29 is not a valid claim under the Act, and therefore could not have given rise to an obligation on the principal's part to pay or respond with a payment schedule, or a right on the contractor's part to suspend. He has raised a number of objections to the validity of the claim.

Submission that progress claim number 29 is not a progress payment for the appropriate statutory period

[22] Progress claim number 29 is dated 27 February 2006. It was delivered at 10:22 am on that day. 27 and 28 February 2006 were both working days, and therefore the claim was not for a period of "not less than one month". The claim therefore is not a claim for work carried out for a period of over a calendar month. The period is shorter than one month.

[23] Section 14 of the Act states that the parties are free to agree on progress payment provisions in their construction contact. This Contract does provide for progress payment claims. Section 15 provides that the default provisions of the Act only apply if the parties to a construction contact fail to agree on a mechanism for determining any of the matters that are referred to in s 14. The first question then is whether the Contract provisions or the provisions of the Act apply to the progress payment claims. Mr Keene submits that the Act applies. Mr Hurd submits that the Contract applies.

[24] Clause 12 of this Contract specifically deals with the contractor's claims. The clause states the periods for which claims can be made, what the claims will show, and how many progress payments will be made. The interval between payments is implicitly provided for also in clause 12.1.1, which states that:

Unless otherwise provided in the Contract Documents such claims shall be submitted in respect of work carried out during periods of not less than one Month.

[25] Clause 12, then, sets out the mechanism for determining progress payments as defined by s 14 of the Act. The issue is considered in G Bayley and T Kennedy Grant A Guide to the Construction Contracts Act at pp *57* - 58. It is stated:

Section 14(b) of the Act provides that the parties to a construction contract are free to agree the date when each of those payments becomes due. The due date for payment is contained in many standard contracts in New Zealand, eg NZS 390: 1988 S12.2.

[26] In ***Canam*** the contract involved was NZS 3915: 2000 which pre-dated the Act and used similar terminology to NZS 3910: 1988 in relation to clause 12. It appears that the Court in ***Canam*** assumed that the times for payment were those set out in the Contract rather than the default provisions in the Act. The approach of the Court of Appeal appears to have been that the specific provisions of the Contract were to be read with the relevant provisions of the Act. The Court of Appeal observed at para [5]:

The combined effect of the specific provisions of the contracts and the Act was that a mechanism existed for periodic claims to be made which had to be responded to in a timely manner.

[27] I am satisfied that the default provisions in the Act do not apply here. The progress payments provisions that are relevant are those in the Contract itself. These provisions are part of the standard form of Contract. That standard form pre-dated the coming into force of the Act. Thus, the terminology is different from that in the Act. However, the Contract was signed by experienced parties six months after the Act came into force. It must be assumed that the parties were aware of the Act, and would have expected the Contract's provisions to be read with the Act. There is no attempt in the Contract to provide for the Act rather than the contract provisions to apply. I therefore approach the issue of how the calculation should be done on the basis that the Contract applies rather than the default provisions.

[28] Clause 12.1.1 states that the contractor may submit claims for payment under the Contract to the engineer, and that otherwise provided such claims:

... shall be submitted in respect of work carried out during periods of not less than one Month.

[29] The plain words of clause 12 provide that claims will be submitted for work carried out for periods of not less than one month. The word "month" is defined in the Contract as a calendar month. It is not defined in the Act. However, it could be expected that the month referred to would be a calendar month.

[30] However, as submitted by Mr Hurd, to interpret the Contract as imposing an invariable requirement for progress payment claims to be for at least one full calendar month does not appear to make business sense. For example, it could be expected that progress payment calculations for December would normally be carried out and issued prior to the end of the calendar month, as the Contract provides for work to cease from 24 December through to the end of the month. It would be surprising in those circumstances for a contractor to be expected to wait until the middle of the holiday period, after the conclusion of December, to lodge its payment claim for that month. It was the uncontradicted evidence for Wooding Construction that it was common practice within the industry for payment claims to be made within a day or two of the end of the month, as a matter of administrative convenience. I note that the practice of sending out progress payment claims before the end of the month has not been complained about or indeed raised by the engineer in respect of earlier claims 1, 25 and 26. Indeed, it was not raised in relation to payment claim number 29 until after the work was suspended.

[31] The most likely interpretation of clause 12.1.1 is that claims should be issued on a calendar monthly basis, rather than on some shorter basis such as weekly or spasmodically without reference to any particular period. I do not interpret the clause as imposing any mandatory requirement that claims can issue only after the end of a calendar month.

[32] Even if clause 12.1.1 does require claims to be for a period of at least one month, I do not consider that a claim for a shorter period is an invalid claim under the Act. The purpose of Subpart 2 of the Act is to allow the parties to reach their own agreement, and failing such agreement to set up a default provision for the making of claims (and provision for the due date of payment at s 18, which will be dealt with later in this judgment). Its purpose is not to set up any form of mandatory procedure. It is to set up the mechanism for calculating progress claims. The mandatory procedure comes in the next Subpart of the Act, relating to the procedure for making and responding to payment claims. A failure to calculate a month's instalment over a whole calendar month period does not invalidate the payment claim itself. The payment claims may contain all sorts of errors. The structure of the Act is to give the principal the opportunity to respond to those errors by providing a payment schedule within the mandatory time.

[33] Although the judgment in ***Canam*** did not deal with this issue specifically, the Court in that case did consider other alleged faults in a payment claim. ***Canam*** stated, following Windeyer J in ***Hawkins Construction (Australia) Pty Ltd v Mac's Industrial Pipework Pty Ltd*** (2001) 163 FLR 18, at [43]: *... technical quibbles should not be allowed to vitiate a payment claim that substantively complies with the requirements of the Act ...*

The Court of Appeal confirmed that such an approach is "critical" to the interpretation of the Act.

[34] There is no obvious reason why the Legislature should have made it mandatory that progress payment claims be for certain specified periods, or indeed that they must comply with whatever periods are specified in the Construction Contract. Such a requirement would be technical and oppressive, and is contrary to the purpose of the Act of ensuring prompt cashflows. This particular complaint is in the nature of a "quibble". There is no suggestion that there is any substantive problem caused for a principal as a consequence of the period of the claim being for less than that stipulated in the Contract. There is nothing in the Act to indicate that a failure to observe the Contract in calculating a progress payment is fatal to a claim. For these reasons I do not consider that this objection is valid. I will be referring later in this judgment to the severe and immediate consequences suffered by a principal who fails to serve a payment schedule in time. The question arises whether what is good for the goose is good for the gander. The answer is that the Act's purpose is to facilitate prompt and regular payments, and that while a very strict position is taken as to payment time limits, such a strict and literal approach is not required in respect of matters of form.

The default position

[35] If the Contract does not govern the period to which a payment claim relates, and the default provision in s 17 does indeed apply, Mr Keene submits that the payment claim does not comply with s 17. I have found that the Contract does apply, but will now consider the consequences if the Act applies.

[36] Sections 15 - 18 set out default provisions for progress payments in the absence of express terms. Section 17 reads as follows:

17 Amount of progress payment

(1) The amount of a progress payment must be calculated by reference to

(a) the relevant period for that payment; and

(b) the value of the construction work carried out, or to be carried out, during that period; and

(c) any relevant provisions in the construction contract (including, without limitation, provisions relating to the retention of money or liquidated damages).

(2) For the purposes of subsection (1)(a), the relevant period for a progress payment under a construction contract is-

(a) the period commencing on the day of the month on which construction work was first carried out under the contract and ending on the last day of that month (the first period); and
(b) each month after the first period.
(3) For the purposes of subsection (1)(b), the value of construction work must be calculated with regard to
(a) the contract price for the work; and
(b) any other rates or prices set out in the contract; and
(c) any variation to the construction work authorised under the contract; and
(d) if any work is defective, the estimated cost of rectifying the defect.
(4) If the contract does not expressly provide for the matters referred to in subsection (3)(a) and (b), the value of construction work must be calculated with regard to
(a) the reasonable value of the work; and
(b) the reasonable value of any variation to the construction work authorised under the contract; and
(c) if any work is defective, the estimated cost of rectifying the defect.

[37] Mr Keene, in arguing that s 17 applies and creates a mandatory requirement which has not been met, relies on s 17(2) of the Act. This provides that a progress payment "must be calculated" by reference to the work carried out or to be carried out during the relevant period, which must be a calendar month.

[38] However, s 17 does not appear to set out a mandatory requirement that the period be exactly one calendar month for each progress payment, or no less than one calendar month. Rather, it appears to envisage that a claim may properly be made before the end of the calendar month period, in that at s 17(1)(b) it is provided that it may relate to work "to be carried out". The definition of `period' appears to be broader and less specific in the Act than that in the Contract itself. While the progress payment must be calculated by reference to the relevant period for the payment, and while that should be monthly after the first period, there appears to be enough leeway in the words to allow a progress payment to be given before the end of a calendar month, and for a period that does not extend for duration of a calendar month. I do not consider the progress claim to offend against s 17.

[39] Claims must be calculated with reference to calendar monthly periods, which was done in this case. They do not have to rigidly apply to every working day in a one-month period.

[40] In any event, for the reasons that I have already given, the progress payment provisions in the Act do not set up a technical and mandatory pre-requisite to valid payment claims, requiring that they effectively be for progress payment periods of a calendar month. That is not the purpose of this Part of the Act. The purpose is rather to establish a basis upon which progress payments are to be calculated, so that there is a clear and exact amount for an exact period, for a clear and relevant value and with reference to any relevant provisions set out in a payment claim. There will then be a claim, and the principal will then be in a position to properly respond. If a principal does not agree with the way in which a progress payment is calculated in a progress claim, it may protest to this in a responding payment schedule. That is the appropriate remedy. There is no reason for the Court to interpret s 17 as setting up a gateway through which a valid claim must pass. I bear in mind the substantive compliance approach, referred to earlier in this judgment.

[41] The word "must" is used in s 17(3). However, 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.

[42] Further, under s 20 there are certain requirements that claims must meet to be payment claims under the Act. Section 20(1) states that a payee "may" serve a payment claim on the payer for each progress payment, either at the end of the relevant period that is specified in or determined by the contract or, if the Contract does not so provide, at the end of the monthly period specified in s 17(2). It is to be noted that the word used is "may" rather than the word "must" used in s 20(2). This is a further indication that the period of the claim is not mandatory.

[43] For these reasons I am satisfied that payment claim number 29 is not invalid because of any error in respect of the period being less than one month. While I consider that clause 12.0 of the Contract governs the matter, the same conclusion is reached if the Act applies.

The site meeting agreement

[44] In the second argument for invalidity of the progress claim, it is submitted for Marsden Villas that the Contract was varied, so that extension of time claims would not be made until after the completion of works. Marsden Villas argues that as a consequence all the extension of time claims which make up the current claims which are in dispute are invalid and must be deferred.

[45] The submission is based on the evidence of Mr Brannigan. He asserted that in a site meeting, which took place in May 2004 before the commencement of the Contract, the point was formally agreed. It is asserted that Mr Halton for Wooding Construction specifically accepted that he would not seek payments for extension of time claims until the end of the Contract, the consideration being that Mr Brannigan would not seek to deduct any money on behalf of Marsden Villas for liquidated damages until that time. Mr Brannigan and Mr Wooding were not called for crossexamination.

[46] The site meeting Minutes for 13 May 2004 recorded: *KH and VB agreed that Extension of Time payment or deduction would be made at the completion of the contract.*

[47] Mr Halton in his affidavit in reply did not deny receiving the site Minute, but asserted that the arrangement was casual and did not involve the "giving away" of any rights to obtain payment for extensions of time if the progress of the Project was significantly delayed. Such a change would have seriously prejudiced his company in the event of serious delays.

[48] Clause 2.7.3 of the Contract provides:

> *2.7.3 The General Conditions shall not be varied or modified except by the Special Conditions, or by express provision in any correspondence which has been identified as a contract document.*

[49] The alleged variation does not meet the requirements of clause 2.7.3. It is not expressed to create a special condition, and the site Minutes for 13 May 2004 are not identified as a Contract document. Even the words of the Minute itself do not purport to record a variation of Contract. The words indicate a "one-off' agreement, presumably relating to the single progress claim that is the subject of the preceding record in the Minutes. The clause refers to "extension of time payment" in the singular rather than in the plural. These words do not indicate a significant variation of the Contract.

[50] In deciding whether the parties were agreeing to vary the Contract, the Court is able to consider their conduct after the alleged variation. The question is not one of interpretation, but the resolution of the matter of fact: ***McLaren v Waikato Regional Council*** [1993] 1 NZLR 710, 731, ***National Bank v Murland*** [1991] 3 NZLR 86 at 93, ***Mears v Safecar Security Ltd*** [1983] QB 54, 77 per Stephenson LJ. Commonsense would indicate that if there was a variation on this important issue it could be expected to be reflected in the actions of the parties.

[51] There was nothing in the parties' conduct to indicate that they regarded the Contract as varied on this point. Extension of time claims were included in progress payment claims through to March 2006, and were dealt with without the alleged variation being raised. Indeed, the point was not raised in the adjudication that took place early this year. Mr Brannigan's correspondence through to March 2006 indicated an acceptance that extension of time claims could be included in progress payment claims.

[52] Mr Brannigan in his reply affidavit suggested that he processed the extension of time claims because the variation related to actual payments or deductions, rather than to whether extensions were to be granted. However, the distinction appears to be a fine one, and lacking in commercial reality. It would have been expected that there would have been some qualification expressed by Mr Brannigan in his correspondence about the extension of time claims if this was his intention.

[53] I do not consider that the variation can be seen as part of a more general agreement involving the deduction of liquidated damages, as submitted by Mr Keene. There is no satisfactory evidence of such a mutual arrangement. Moreover, liquidated damages would not arise until after the due date for completion of the Contract (as properly extended). Extension of time claims would obviously be made far earlier than that and, from the point of view of the contractor's cashflow, would need to be dealt with as they arose. There is no logic to this alleged "consideration". I can see no reason why the Contractor would have agreed to postpone extension of time claims to the end of the Contract.

[54] For these reasons I do not consider that there was a variation of the Contract, whereby extension of time claims would be left to the actual completion of the Contract. Wooding Construction was in a position to make extension of time claims as they arose.

The inclusion of matters determined by the engineer

[55] The progress payment claim number 29 included sums which had been in Mr Brannigan's earlier certificates and which he had rejected. As a third ground for submitting that the claims were invalid, Mr Keene submitted that once the engineer had given a ruling, any challenge to it under the Contract had to be by a notice under that Contract. That would have to be determined then in accordance with the dispute resolution provisions of the Contract. It could not be "regurgitated" in later claims.

[56] This was a similar argument to that run in Canam. The Court of Appeal ruled at para [44]: *We do not accept the appellant's contention that a contractor could never represent a previously declined or ignored claim even if it wished to resubmit the claim or support it with further information. As noted by the Associate Judge ... there is nothing in the Act that restricted payment claims in this way.*

Mr Keene submitted that this statement by the Court of Appeal was obiter dicta and invited me not to apply it. I do not accept that submission. This statement was, in my view, part of the basic and essential reasoning of the Court of Appeal.

[57] Certainly it would not be commercially sensible for a contractor making a monthly claim to be precluded from including previous outstanding claims.

Providing the claimed amounts for different periods are properly itemised according to when those amounts were incurred, a cumulative claim presents no difficulty to the recipient of the claim, as the Court of Appeal pointed out in ***Canam*** at para [45]. Further, a contractor who does not understand a claim is able to seek clarification by using the framework contained in the Act (***Canam:*** para [46]). The Court of Appeal observed that the inclusion of claims for work in prior periods appears to be common practice in the building industry (para [47]). Indeed, the Court of Appeal went on to state specifically, at para [53]: "*We are persuaded that the provisions of the Act and the contract did not prevent the use of a cumulative-style claim.*"

[58] As the Court of Appeal pointed out at para [54], s 19 defines "claimed amount" as "an amount of progress payment specified in a payment claim that the payee claims to be due for construction work carried out." Such a definition does not limit the claimed amount to work solely carried out in the period stated on the claim. In this case, of course, the Contract applies. Clause 12.1.1 provides that claims shall be submitted in respect of work carried out during periods of not less than one month. These words do not limit the amount of any claim to the work carried out in most recent month. Nor do the words of clause 12.1.2, which set out what the contractor's claims shall show.

[59] The Court of Appeal in ***Canam*** concluded at para [56]: *We reject the suggestion that the Act and its protective processes are to be interpreted in a restrictive and confining manner*.

[60] The approach urged by Marsden Villas is a confining and restrictive approach. It is not supported by the words of the Contract or the words of the Act. There does not appear to be any policy reason that can be called into play to support it. It is contrary to the ratio and reasoning of ***Canam***. I do not consider that the fact that the claim included earlier amounts claimed by Wooding Construction and rejected by the engineer invalidated the claim as a progress claim under the Act.

The inclusion of matters in the progress payment claims allegedly determined by the adjudicator

[61] Mr Keene developed his submission concerning the contents of the progress payment claims further. He submitted that the claims were flawed not only because they included earlier claims already rejected by the engineer but, further, because they included claims that had been considered and rejected by the adjudicator at an earlier adjudication. Mr David Carden had been appointed an adjudicator under the Act on 8 November 2005. The claim that he was required to consider related to a balance of progress claim number 22, an extension of time claim of 175 working days with costs, and a further extension of time claim for 127 working days with costs. The substantial content of the adjudication claim related to the extension of time claims up to that time.

[62] The Act creates a specific adjudication process in Part 3. There is a right to refer disputes to arbitration. The adjudication process is said not to prevent the parties from submitting the dispute to another dispute resolution process, which can even be concurrent (s 26(1)) and nothing in the adjudication process can effect any civil proceedings under a Construction Contract: s 27(1). The adjudicator under s 48 must determine whether or not any of the parties to the adjudication are liable to make a payment under the Contract, and any questions in dispute about the rights and obligations of the parties under the Contract. It is stated at s 58(2) that an adjudicator's determination about the parties' rights and obligations under the construction contract is not enforceable. A determination under s 48(l)(a) concerning liability to make a payment is, however, enforceable. Decisions of the adjudicator are reviewable under the Act. The purpose of this part of the Act appears to set up a quick fire arbitration process, which will avoid delay and present a quick result, without precluding the parties from later or even contemporaneously adjudicating the issues in a more leisurely way.

[63] Mr Keene submitted that the effect of these sections was to "give force" to the adjudicator's determination on the extension of time claims. He submitted that large portions of the progress claim number 29 that are before this Court were effectively determined by the adjudicator. He submitted that those old claims were now re-submitted in progress claim number 29 as though the entire adjudication process had never happened.

[64] It is necessary first to consider whether the adjudicator did in fact determine the extension of time claims that are the subject of much of the contested material in the progress claims. It is clear that the adjudicator did not determine the extension of time claims that constitute the outstanding claims that are repeated in progress claim number 29. His summary records that there is insufficient evidence before him for him to determine the extension of time claim to 29 August 2005. He states *"That claim will require processing and other dispute resolution process"*. In relation to the further extension of time claim for the further 127 days, he declined that claim for the same reasons, save for an agreed extension of time of 62 working days.

[65] The position is, therefore, that none of the claims that are the subject of the ongoing progress claims have in fact been declined by the adjudicator. Rather, he has declined to determine them. The adjudicator's decisions therefore do not change the position in any way. The extension of time claims were declined by the engineer, and have not been dealt with by the adjudicator.

[66] It is also the case that even if the adjudicator had determined in a declaratory way a right to an extension of time claim, that would be a determination about the parties' rights and obligations under the Construction Contract rather than a determination of whether or not a party is liable to make the payment under the Contract. Only determinations that a party is liable to make a payment are enforceable under s 58(2). There are certainly no determinations by the adjudicator in relation to the extension of time claims that fall into the enforceable category.

[67] I do not consider that the submission of the extension of time claims at an earlier time to the adjudicator has resulted in any determination of those issues. Further, even if there had been some determination of the issues by the adjudicator, that determination does not preclude the party from pursuing its claims in a Court or by way of arbitration. Given the acceptance of cumulative claims by the Court of Appeal in ***Canam,*** it is difficult to see why a progress claim should be invalidated because a claim is included that has already been adjudicated. Res judicata would not apply. Such a claim could be rejected by the engineer in the principal's response by way of payment schedule. That is the appropriate response. There is no reason why including such earlier claims would make the progress claim void.

Conclusion as to progress payment claim

[68] I am not able to uphold the submissions that progress claim number 29 was invalid, or for some reason not a payment claim under the Act. I do not consider that the inclusion of previously rejected claims has affected its effectiveness as a claim.

[69] The obligatory requirements for payment claims are at s 20(2). The payment claim must be:

> *20 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.*

[70] These s 20 requirements do not relate to the substantive content of claims, which has been the focus of some of the submissions of Marsden Villas on the point, but rather on clarity of form, so the principal knows what the claim is and can respond to it. Those s 20 requirements were all met by Wooding Construction. Issues such as the period for which a claim is made and the cumulative nature of the claim do not involve any breach of s 20(2). There is no variation of the Contract in relation to the extension of time claims. For these reasons I hold that the payment claim number 29 was valid and effected under the Act.

The second issue - Did Marsden Villas serve its payment schedule on time?

[71] The core obligation imposed by the Act in relation to this dispute was that contained in Part 2, Subpart 3 of the Act. A principal must respond to a payment claim within the time prescribed by s 22 by providing a "payment schedule" to the contractor in terms of s 21. The severe consequences of not providing such a payment schedule, or failing to pay the claimed amount within the times prescribed, are set out in s 23(2):

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

[72] It was the failure of the principal to provide such a payment schedule in time which led to the appellant's dilemma in Canam. It is that same alleged failure which has led to these proceedings. As a consequence of the alleged failure by Marsden Villas to provide a payment schedule on time to Wooding Construction, Wooding Construction contends that there is now due to it the amount claimed in payment claim number 29, and further, that it was entitled to give notice of intention to suspend, and ultimately to suspend all work.

[73] Marsden Villas submits that its payment schedule was provided within time. There is agreement between the parties as to the relevant sequence of events. In particular it is agreed that:

a) Payment claim number 29 claiming $2,909,706.56 was received by facsimile by Mr Brannigan as the agent for Marsden Villas on 27 February 2006.
b) On 1 March 2006 Mr Brannigan received the original copy of progress claim number 29.
c) In response, payment schedule number 29 (dated 14 March 2006) stating an amount owing of $162,314.68 was sent by Mr Brannigan to Wooding Construction on 15 March 2006.
d) On 30 March 2006 Marsden Villas paid to Wooding Construction by bank credit the sum of $162,314.68.

[74] The critical question is whether the payment schedule response of Marsden Villas was within the prescribed period. That payment schedule certified that the amount owing was not $2,909,706.56, but rather the sum of $162,314.68. That latter sum was paid on 30 March 2006, within time. The $2,909,706.56 was not paid within the prescribed timeframe. Marsden Villas claims that it was not required to pay that amount, because it had served its payment schedule within time. It raises various arguments to support that position.

[75] Section 22(b) provides that the principal becomes liable to pay the claimed amount on the due date for the progress payment to which the payment claim relates, if the principal does not provide a payment schedule to the payee within:

(i) the time required by the relevant construction contracts; or
(ii) if the contract does not provide for the matter, 20 working days after the payment claim is served.

[76] It is common ground between the parties that the payment schedule provided in response to payment claim number 29 was provided within 20 working days after the payment claim was served. Thus, if the default period of 20 working days applies, then Wooding Construction is not in a position to claim the $2,909,707.56 and must concede the invalidity of its suspension.

Was the relevant time for the payment schedule the ten days in the Contract, or was it the twenty days provided for in the Act?

[77] It must first be determined whether the Contract provided for the provision of the payment schedule. It is common ground between the parties that NZS 3910: 1998 was drafted before the Act came into force. It is also to be

noted that in 1998, the Law Commission Report which led to its enactment had not been drafted or released. However, at the time of execution of the Contract on 16 October 2003 the Act had been in force for over six months. Clause 12.2.1 of the Contract provided:

> *12.2.1 Within 10 Working Days after the receipt of the Contractor's claim the Engineer shall issue a progress payment certificate for a sum comprising the value of the Contractor's claim amended as necessary under 12.3, less previous payments certified, and less any other deductions which are required by the terms of the contract or by law. The certificate shall show details of any amendments and deductions.*

[78] The timeframe for the response was therefore 10 days under the Contract. Unsurprisingly the phrase "payment schedule" is not used in the 1998 form of contract. Mr Keene points out that the draughtsman of the original NZS 3910: 1998 did not even know or contemplate the various protections and provisions of the Act which came into force four years later. There are different phrases used, such as "progress payment certificate" instead of "payment schedule". He submits that given the draconian consequences of the failure to meet the precise time deadlines under the Act, the Court should be slow to hold that the effect of clause 12.2.1 was to abridge the statutory response time from 20 working days to 10 days.

[79] However, the Act was in force when the Contract was entered into. It was referred to in correspondence between the parties when negotiating the Contract, and must be seen as part of its factual matrix. While different terminology is used between the Contract and the Act, the structure of there being a contractor's claim on a monthly basis and a substantive response within a set time limit is common to both the Contract and the Act. As Mr Hurd points out, the technical requirements for a payment schedule as defined in s 5 and as referred to in s 21 of identifying the payment claim to which it relates, and of indicating an amount accepted by the engineer, are similar to those set out in the Contract for a progress payment certificate.

[80] In ***Canam*** a similar contractual situation applied, with the Contract being a document drafted prior to the Act but entered into after the Act had come into force. In the High Court Associate, Judge Christiansen used the contractual provisions to calculate the time period for the payment schedule: see para [47]. The Court of Appeal proceeded on the basis that the combined effect of the specific provisions of the Contract and the Act was that a mechanism existed for periodic claims to be made which had to be responded to in a timely manner: see para [5].

[81] If the provisions of clause 12 and the time limits in the Contract did not apply for the purposes of the Act then it would have been necessary for there to have been two responses to each payment claim, one for the Contract and one for the Act. There is no reference to two such processes in the Contract or the preceding correspondence. It is to be noted as part of the background to the Contract that the parties knew that the Act applied. Therefore, if they had intended there to be the provision of a separate payment schedule to the periodic claims, they would have provided for this in the Contract. They did not do so. I infer that they intended a single process, governed by clause 12.2.1. I interpret that clause in the Contract as providing for the time within which the principal must provide a payment schedule, despite the absence of a direct statement to that effect. I am further supported in that view by the conduct of the parties.

[82] As a matter of practice the parties proceeded on the basis that the engineer's response under clause 12.2.1 was the payment schedule response. I consider that this conduct, which appears to have applied to all progress payment certificates, is admissible as an aid to interpretation of the meaning of clause 12.2: ***New Zealand Diving Equipment Ltd v Canterbury Pipe Lines Ltd*** [1967] NZLR 961 (CA), 978, 980, 985, 986, ***Attorney-General v Dreux Holdings Ltd*** (1996) 7 TCLR 617 (CA), 627-628, ***Valentines Properties Ltd v Huntco Corporation Ltd*** [2000] 3 NZLR 16 (CA), at [19] (reversed on appeal but not on this point). It may not always be the case that the conduct of the parties after the Contract is a legitimate aid to construction and the issue has yet to be fully examined by the appellate courts. However, in this case where there are experienced commercial parties, their conduct immediately following the Contract and then throughout its implementation, in treating the response under clause 12.2.1 as also the payment schedule response under the Act, is as matter of logic a guide to the intended meaning of the Contract.

[83] When a progress payment certificate was presented to Marsden Villas, Wooding Construction in its covering letter stated:

> *In accordance with the terms and conditions of our contract and the provisions of the Construction Contracts Act 2002 we anticipate the issue of your corresponding payment schedule within 10 working days or receipt of this payment claim. Payment becomes due within 7 working days of the date of the payment schedule.*
>
> *In the payment certificates Mr Brannigan specifically stated in the covering letter that they comprised "all or part of the payment schedule under the Construction Contracts Act 2002".*

[84] The response on 14 March 2006 was not only expressed to be a payment schedule, but also expressed to be a "*payment certificate*" in the covering letter, and a "*progress certificate*" in the attachment to the letter. The layout is that of a progress payment certificate in terms of the Contract. There was never any attempt to send a separate document as a payment schedule. It is illogical for Marsden Villas to assert that their only response, which was to issue progress payment certificates under paragraph 12.2 of the Contract and to refer to the certificates also as being payment schedules, was not an acceptance that the provisions and timetable set out in clause 12 applied. As Mr Hurd submitted, Marsden Villas can not operate according to clause 12 for some purposes and not for others.

[85] The parties, by this unequivocal adoption of the provisions of clause 12 as governing the sending and response to the payment claim, have confirmed an interpretation that the Contract term applies and not the default term in the Act. That period was 10 working days and not the default period of 20 days.

When was the payment claim number 29 received?

[86] It is common ground that progress claim number 29 was received by Mr Brannigan by facsimile at 10:22 am on 27 February 2006. It is agreed that 10 working days from the date of receipt of the facsimile copy was 13 March 2006. It is common ground that the date of the service of the progress payment certificate number 29, which I find was the responding payment schedule in terms of s 22 of the Act, was 15 March 2006.

[87] I have found that the relevant time required by the Construction Contract for the service of the payment schedule was 10 days. This means that if progress claim number 29 was received by Mr Brannigan for the purposes of the Act on 27 February 2006, the payment schedule served on 15 March 2006 was two days out of time. If that is correct the amount claimable is the $2,909,706.56 now claimed by Wooding Construction, and not the $162,314.68 set out in Mr Brannigan's responding payment schedule. However Mr Keene contends that the receipt by facsimile on 27 February 2006 was not adequate service of the payment claim on Mr Brannigan, and that the 10 working days must run from the receipt of the original progress claim number 29 on 1 March 2006. If that is so, then the progress certificate and payment schedule response from Mr Brannigan, sent on 15 March 2006, was in time.

[88] The Contract does not contain any provision as to how documents are to be served. In any event, while the Contract may provide for the computation of time for service because this is expressly stated to be so in s 22(b), the way in which service of notices is to be carried out is expressly provided for in s 80 of the Act. Section 12 of the Act prohibits contracting out of the Act, so s 80 would have effect despite any provision to the contrary in any agreement or Contract. The payment schedule is a document required to be served under the Act, and must be served in accordance with the provisions of the Act.

[89] Section 80 contains provisions common to Acts of this type to the effect that it is sufficient service is the document is delivered to the person, or left at the person's usual or last known place of residence or business, or is posted in a letter addressed to that person. It also provides at s 80(d) that is it sufficient service if:

(d) the notice or document is sent in the prescribed manner (if any).

[90] The Construction Contracts Regulations 2003 provide in r 9 as follows:

9 Additional modes of service

(1) In addition to the modes of service specified in section 80 of the Act, any notice or any other document required to be served on, or given to, any person under the Act or these regulations is sufficiently served if

(a) it is sent by fax; or

(b) it is sent by email or other means of electronic communication and the requirements of regulation 10 are met.

(2) A notice or document sent by fax under subclause (1)(a) is, in the absence of proof to the contrary, served or given if the fax machine generated a record of the transmission of the notice or document to the fax machine of the recipient, and the date of the record is taken to be the date of receipt of that notice or document.

(3) A notice or document sent by email or other means of electronic communication under subclause (1)(b) is, in the absence of proof to the contrary, regarded as having been served or given,

(a) in the case of an addressee who has designated an information system for the purpose of receiving emails or other electronic communications, at the time the email or communication enters that information system; or

(b) in any other case, at the time the email or communication comes to the attention of the addressee.

(4) For the purposes of subclause (3), information system means a system for producing, sending, receiving, storing, displaying, or otherwise processing emails or other electronic communications.

[91] Service by facsimile is adequate service under r 9(2). It being common ground that a faxed document was sent on 27 February 2006, the question is whether there is "proof to the contrary" in terms of r 9(2) that it was served or given in compliance with the Regulation.

[92] Mr Keene submitted that the facsimile received by Mr Brannigan was illegible, at least in part. He submitted that if a document is not legibly transmitted in a way that it could be practically worked upon and responded to, and that is adequately proven, then in terms of r 9(2) the document has not been served or given as required.

[93] In ***West City Construction Ltd v Edney (High Court Auckland***, CIV 2005404-001066, 1 July 2005, Venning J) it was held that the service provisions of s 80 of the Act are not mandatory or exclusionary. If a document is served on a party in a different way and the evidence satisfies the Court that the document has come to the attention of the party, then that is sufficient proof of service (para [35]). The same practical approach must apply to r 9.

[94] The facsimile copy received by Mr Brannigan on 27 February 2006 was produced to the Court. I note that although Mr Brannigan had previously expressed problems in receiving legible facsimile transmissions, this particular facsimile was received without complaint. Although Mr Brannigan's facsimile machine may not have

been of the best quality, the document received was legible on the print out that has been produced. Despite the fact that there is a slight blurring and lack of definition in the letters and figures, it can be easily read. For this reason I find that in terms of r 9 there was service by facsimile transmission on 27 February 2006, and that Marsden Villas has not proven to the contrary.

[95] Mr Hurd further submitted that even if the document were illegible, that illegibility was due to a failure of the engineer to install and maintain a facsimile machine that produced legible copies. He submitted that party to a Construction Contract could not frustrate service by operating a defective machine, or not supplying sufficient toner.

[96] Regulation 9(2) states that any document can be served by facsimile if the facsimile machine generated a record of the transmission of the notice or document to the facsimile machine of the recipient. If the document was sent by facsimile, and the recipient received a notice stating that it had been received, then the recipient would be aware that the document had been sent, even if that recipient was unable to read it. In such circumstances it would be expected that the recipient would take the initiative to obtain a legible copy. Thus, even if Mr Brannigan was not able to read all of the facsimile transmission he had received, he was nevertheless on notice that the document had been sent and he should have taken steps to obtain a good copy. In the circumstances, even if Mr Brannigan had received a facsimile that was not fully legible, the receipt of it and the generation of a record of its transmission on his facsimile machine, would have been sufficient to constitute service for the purposes of the Act. Any other conclusion would enable a recipient of a notice to take advantage of its own poor equipment or unwillingness to follow up messages. It would be a result contrary to the purpose of the Act, which is to remove technical or artificial barriers to the payment process.

[97] I am satisfied that Marsden Villas was served with the payment claim on 27 February 2006. This means that pursuant to s 22 of the Act Marsden Villas was required to provide a payment schedule to Wooding Construction by 13 March 2006. It did not do so. In terms of the Act, the consequences are severe.

Third issue - Was Wooding Construction entitled to suspend work?

[98] I have found that payment claim number 29 was valid, and that no payment schedule response was served in time. Marsden Villas has paid Wooding Construction on the basis of the payment schedule served out of time. That sum was $162,314.68. It has not paid the amount required of $2,909,706.59. In terms of s 23 of the Act, the consequence is that Marsden Villas became liable to pay that amount to Wooding Construction. The net amount owing is $2,747,391.91 including GST, taking into account the $162,314.68 received. In terms of s 23(2) Wooding Construction may recover the sum from Marsden Villas as a debt due together with costs.

[99] Marsden Villas did not appear to dispute its liability for the sum if it failed on its arguments as to the validity of the payment claim and the time of the payment schedule referred to earlier in this judgment. It did, however, submit that even if it were unsuccessful in its submissions on these points, the suspension notice issued by Wooding Construction was nevertheless invalid. Mr Keene submitted that a late but bona fide payment schedule provided during the five day notice of suspension period, but before the actual suspension of work, would be sufficient to terminate the right to suspend.

[100] It is necessary to consider the provisions relating to suspension. Section 23 which sets out the consequences of not paying the claimed amount when no payment schedule has been provided. Section 23(2) states:

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

[101] Section 72(1) provides:

> *72 Suspension of construction work*
>
> *(1) A party who carries out construction work under a construction contract (party A) has the right to suspend work under that contract if*
>
> *(a) any of the following circumstances applies:*
>
> *(i) a claimed amount is not paid in full by the due date for its payment and no payment schedule has been provided by the party who it is claimed is liable for the payment (party B):*
>
> *(ii) a scheduled amount is not paid in full by the due date for its payment even though a payment schedule given by party B indicates a scheduled amount that party B proposes to pay to party A:*
>
> *(iii) party B has not complied with an adjudicator's determination that party B must pay an amount to party A by a particular date; and*
>
> *(b) party A has served on party B a notice under section 23(2)(b) or section 24(2)(b) or section 59(2)(b), as the case may be; and*
>
> *(c) the amount mentioned in subsection (1)(a)(i) or subsection (1)(a)(ii) is not paid, or the determination mentioned in subsection (1)(a)(iii) is not complied with, within 5 working days after the date of that notice.*

[102] Mr Keene focused on the words in s 72(1)(a)(i) and submitted that before there is a right to suspend work it is necessary for both the claimed amount to not be paid, and for there to be no payment schedule provided. He submitted that it is not necessary for the purposes of this sub-section for the payment schedule to be delivered within the statutory minimum period. He submitted in effect that a principal has a second chance to provide a payment schedule which, while it will not necessarily avoid the obligation to pay the amount in the payment claim, will bring an end to the right to suspend. He emphasised, as he did in relation to other submissions, the very severe and potentially financially disastrous consequences that may flow from an inadvertent error to provide a payment schedule on time.

[103] The words of s 72(1) and the scheme of the Act do not support this submission. Section 72(1) requires as a pre-condition to suspension:

a) *a default in the paying the claimed amount or in providing the payment schedule processes set out earlier in the Act;*
b) *the service of a notice of intention to suspend;*
c) *non-payment of the amount owed within five working days of the date of the notice.*

[104] While s 72(1)(a)(i) in requiring the claimed amount not to be paid and that "no payment schedule has been provided" does not refer to the time stated in s 22(b) within which the payment schedule should have been provided, it must be assumed that the reference to "has been provided" is a reference back to ss 22 and 23. The word "provided" is used in s 22(b), in the heading of s 23 and in s 23(1)(a), all with reference to the time allowed in s 22(b). The use of the same word is an indication that it incorporates a reference back to those sections.

[105] The structure of s 72 does not make sense if the provision of a payment schedule partway through the five-day period can terminate the right to suspend. If that were so, s 72(1)(c) could be expected to specifically refer to the provision of a payment schedule, as an event cancelling the right to suspend work. It does not do so. It only refers to the amounts owed being paid as an event which will terminate the right to suspend.

[106] Mr Keene submitted that the clause "no payment schedule has been provided" could have no sensible meaning, unless it was intended to provide an opportunity to provide a payment schedule and avoid suspension. However, the clause has meaning in that it refers back to s 22. It will not be a basis for interim suspension if a claimed amount has not been paid in full and by the due date, but if a payment schedule has in fact been provided within the due payment schedule date. For the purposes of clarity the clause reiterates the fact that a payment schedule provided within the period will preclude suspension.

[107] The New Zealand legislation is based upon the Housing Grants, Construction and Regeneration Act 1996. Section 112 of that Act, which relates to the right to suspend performance for non-payment, is more specific. It states that the prerequisites are non-payment in full before the final of the claim demand and "... no effective notice to withhold payment has been given." The word "effective" relates back to the giving of a notice within the prescribed timeframe. It can be expected that the New Zealand section was intended to do the same.

[108] It is also to be noted that the past tense is used in s 72(1)(a)(i). The requirement is that no payment schedule "has" been provided. That indicates a reference back to the timeframe provided for in s 22. It does not appear to be setting up a new five-day timeframe in which a payment schedule can be provided after the earlier time has expired. It is more likely that the present tense would have been used if that was the intention.

[109] If s 72(1) was interpreted as allowing a principal to avoid interim suspension by providing a payment schedule, it would lead to the anomalous position that the principal would be liable for the full amount of the debt owed in terms of s 23, but that debt would not be treated as owed for the purposes of suspension. It would mean that for the purposes of suspension there was no need to file a payment schedule within the timeframe set out in s 22, but rather there would be extra time provided, running from the date of any interim suspension notice.

[110] Such a conclusion would run contrary to the overall scheme of the Act, and its stated purpose. The Act was set up to protect contractors and to create a regime whereby principals can no longer delay and confuse the payment process.

[111] The non-provision of the payment schedule is one of the crucial hinges of the Act. The structure appears to be that there will be absolute and irreversible consequences resulting from the non-provision of such a payment schedule. This appears to be consistent with the purpose of the Act to facilitate regular and timely payments, and the approach of the Court of Appeal in ***Canam***. In ***Canam*** the focus was on the provision of the progress payment claim, rather than the provision of payment schedules. However, it appears to have been the assumption that the severe consequences of the non-provision of a payment schedule in time were absolute.

[112] Thus, I interpret the statement in s 72(1) (a) (i) that there is a right to suspend work where "no payment schedule has been provided" as meaning that the right arises when *"no payment schedule has been provided in accordance with s 22"*.

[113] The only way in which suspension can be avoided if an interim suspension notice has been properly served is by the payment of the claimed amount, or if a valid payment schedule has issued, payment of the validly scheduled amount, or if there has been an adjudication determination that an amount be paid, payment of that amount.

[114] There having been no payment of the claimed amount, or valid payment schedule issued, or payment of a validly scheduled amount, Wooding Construction was entitled to suspend works and did so in accordance with the Act on 30 March 2006.

Progress payment number 26

[115] This is the alternative fall back position of Wooding Construction. If payment claim number 29 is found to be invalid, then it relies on the earlier progress payment claim number 26. Progress claim number 26 was served prior to the adjudication (although the extension of time claims were considered later by the adjudicator).

[116] Progress payment claim number 26 related to the work for the period to 31 December 2005. It was served by facsimile on 22 December 2005 seeking a payment of $1,651,988.80. The original was received on 24 December 2005. The payment certificate and payment schedule was transmitted by facsimile by Mr Brannigan to Wooding Construction on 17 January 2006, certifying for the payment of $184,210.86.

[117] The definition section in the Contract at clause 1.2 excludes from "working days" any days falling within the period from Thursday 25 December 2003 to Friday 2 January 2004 inclusive. That definition does not apply, as the Court is dealing with the period two years later. It is necessary to go to the definition section of the General Conditions of Contract at clause 1.2. This states:

Working Day means a calendar day other than any Saturday, Sunday, public holiday or any day falling within the period from 24 December to 5 January both inclusive irrespective of the days on which work is actually carried out.

[118] There is a similar provision in the Act. For the reasons that I have already given, I do not consider the fact that the notice was sent before the end of the calendar month was fatal to its validity as a payment claim under the Act. The extension of time claims were not deferred by the variation of contract until the end of the Contract for reasons that I have already given. The claim did include amounts previously rejected by Mr Brannigan, but for the reasons I have already given, the progress payment claim is valid, even if it did reiterate the previously rejected claims. The claim was served before the adjudication, so that even if there were any determination of the extension of time claims in that adjudication, that cannot affect it.

[119] If there was a valid payment claim served on 22 December 2005, the latest date for issuing a payment certificate an payment schedule is in contention. Mr Keene has raised an argument specific to progress claim number 26, which does not apply to progress claim number 29. This submission revolves around the computation of the 10-day period over Christmas. Mr Keene submitted that the calculation of Wooding Construction as to the last day for receipt of the schedule being 16 January 2006 was wrong by one day and that the correct day was 17 January 2006. The payment schedule was sent on 17 January 2006.

[120] Under s 22(b)(i) computation of time must be calculated under the relevant Construction Contract if it applies. I have already found that the Contract in this case does apply. On this basis 10 clear working days (which would include Friday 23 December 2005 and then 10 days from and including 6 January 2006) would conclude on Wednesday 18 January 2006 (which I note is one day longer than the time submitted by Mr Keene, who proposed 17 January 2006 as the date for delivery). The payment schedule was sent on 17 January 2006 and was therefore sent in time. I find therefore that the payment schedule in relation to progress payment number 26 was forwarded within the required 10 working days.

[121] It follows from this finding that if Wooding Construction had not been able to rely on progress payment number 29, its claim in respect of progress payment number 26 would fail, as it is based on the non-receipt of the payment schedule in time. I find that payment schedule number 26 was served in time.

[122] The payment schedule in payment certificate number 26 certified for a payment of $184,210.86. That sum was paid within time by Marsden Villas to Wooding Construction on 1 February 2006. There are therefore no moneys owed under progress payment claim number 26. There was also no basis upon which to suspend work on the basis of the non-provision of a payment schedule in relation to progress claim number 26, or non-payment.

Conclusion

[123] The result of this case reflects the drastic consequences of a failure on the part of a principal to serve a timely payment schedule. The principal was in time in relation to progress payment number 26 and as a consequence is up to date on payments due on that claim and not at risk of suspension. It was, however, late in delivering its payment schedule in relation to progress payment claim number 29. That failure means it is liable to pay the full amount claimed by Wooding Construction, less the schedule amount that has been paid. That sum is $2,747,391.91. It also means that the suspension of work which is based upon the non-payment and the lack of provision of a payment schedule is valid and work will remain suspended until payment.

[124] I make the following orders:

a) I decline to order the declarations sought by Marsden Villas.
b) Judgment is entered for Wooding Construction for the sum of $2,747,391.91 including GST. The alternative claim by Wooding Construction for $1,467,777.94 including GST is dismissed.
c) I declare that the current suspension of the Contract works by Wooding Construction is lawful.

[125] There are matters of interest and costs still to be determined, and I reserve leave to the parties to make submissions on these and any other ancillary matters arising out of these orders. The defendant, as the party that is primarily successful, is to file submissions within 14 days. The plaintiff has 14 days in which to respond. The defendant then will have 7 days in which to reply. The parties may by memoranda seek alternative timetabling orders if required.

B Keene and M Colthart for Plaintiff instructed by Knight Coldicutt, Private Box 106-214 Auckland by (M Colthart)
DG Hurd and SD Galloway for Defendant instructed Hazelton Law, Solicitors, PO Box 5639, Wellington (SD Galloway)