SUPREME COURT OF QUEENSLAND

CITATION:	*Qline Interiors P/L v Jezer Construction Group P/L & Ors* [2002] QSC 088
PARTIES:	**QLINE INTERIORS PTY LTD** ACN 076 840 518 (plaintiff) **v** **JEZER CONSTRUCTION GROUP PTY LTD** ACN 054 548 319 (first defendant) **MAGNAMAIN INVESTMENTS PTY LTD** ACN 074 822 521 (second defendant) **PETER GRAHAM SCHMITH** (third defendant) **DORIS NGIE-LIK TING** (fourth defendant) **MICHAEL MAI-MAN CHOI** (fifth defendant)
FILE NO:	S8251 of 2001
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	26 March 2002
DELIVERED AT:	Brisbane
HEARING DATE:	23, 24, 25, 29, 30, 31 January 2002
JUDGE:	Muir J
ORDER:	**Judgment for the plaintiff against the first defendant.** **Judgment for the second defendant against the plaintiff, together with the costs of and incidental to the action to be assessed.**
CATCHWORDS:	BUILDING AND ENGINEERING CONTRACTS – Subcontractor's charges – breach – damages – rescission Claim for charge in respect of progress claims – where contract terminated for wrongful repudiation – whether claims in "a form satisfactory" – whether rights have been unconditionally acquired – where allegations of forgery – construction and scope of operation of Subcontractors' Charges Act 1974. *Subcontractors' Charges Act* 1974

National Australia Bank Ltd v Garcia (1995) 36 NSWLR 577
Balog v Crestani (1975) 132 CLR 289
White Industries (Qld) Pty Ltd (1999) 7 BCL 200
Groutco (Australia) Pty Ltd v Thiess Contractors Pty Ltd [1985] 1 Qd R 238
Milgun Pty Ltd v Austco Pty Ltd and the State of Queensland [1988] 1 Qd R 670
Riteway Constructions Pty Ltd v Baulderstone Hornibrook [1998] 2 Qd R 218
Henry Walker Eltin Contracting Pty Ltd v Mostia Constructions Pty Ltd [2001] QSC 89
James Hardie Building Systems Pty Ltd v Epoca Constructions Pty Ltd (1999) 15 BCL 199
Riteway Constructions Pty Ltd v Baulderstone Hornibrook Pty Ltd [1998] 2 Qd R 218 at 220
Stadhard v Lee (1863) 3 B & S. 364
Parsons v Sexton (1847) 16 LJCP 181
Smith v Sadler (1880) 6 Vict LR 5.
John Grant and Sons Ltd v Trocadero Building and Investment Co Ltd (1938) 60 CLR 1
McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457
Stern v J A Redpath and Sons Limited (1950) NZLR 50
Taupo Totara Timber Co Ltd v Smith and Egden (1910) 30 NZLR 77
Ball v Scott Timber Co Ltd (192) NZLR 570
J T Craig Limited v Gillman Packaging Limited (1962) NZLR 201.
Wade v New South Wales Rutile Mining Co Pty Ltd (1970) 121 CLR 177
Walter Construction Group Ltd v J & L Schmider Investments Pty Ltd (2001) BC 200102628

COUNSEL: P J Dunning for the plaintiff
R J Anderson for the first, third, fourth and fifth defendants
P J Roney for the second defendant

SOLICITORS: Tucker and Cowen for the plaintiff
Conomos Lawyers for the first, third, fourth and fifth defendants
Gadens Lawyers for the second defendant

The plaintiff's claims

[1] The plaintiff, which carries on the business of plasterer, entered into a subcontract on 31 May 2001 ("the subcontract") with the first defendant under which it agreed, as subcontractor, to perform work and to supply materials at, and to, a building ("the building") being constructed at 8 Douglas Street, Kirra. On or about 27 July 2000, the first defendant, as builder, had entered into a contract ("the head contract") with the second defendant, under which the first defendant agreed to

construct the building. The plaintiff performed work under the subcontract between 31 May 2001 and 16 July 2001 when the first defendant purported to terminate the subcontract by a letter of that date from it to the plaintiff. By a letter from its then solicitors to the first defendant dated 18 July 2001, the plaintiff purported to terminate the subcontract by accepting its wrongful repudiation by the first defendant.

[2] The plaintiff submitted the following progress claims to the first defendant in respect of work done and materials supplied by it under the subcontract –

Date of Progress Claim	**Amount $**
14 June 2001	38,669.40
29 June 2001	74,760.40
16 July 2001	163,270.80
26 July 2001	23,201.00
	299,901.60

Payments from the first defendant in respect of those claims totalling $62,029.60 were received leaving an alleged unpaid balance of $237,872.

[3] On 20 July 2001, the plaintiff gave to the second defendant a notice of intention to claim a charge pursuant to the *Subcontractor's Charges A*ct 1974 ("the Act") in respect of each progress claim. The total sum claimed was $237,872. The amount claimed in respect of the first and second progress claims respectively was $7,731.90 and $43,668.30, being in each case the amount of the progress claim less the payment received. The amount claimed in respect of the third and fourth progress claims was the amount of each progress claim. Also on that date, the plaintiff gave the first defendant four corresponding notices of claim of charge being given.

[4] The plaintiff claims against the first defendant $237, 872 under the subcontract and alternatively pursuant to the Act. In the further alternative it claims against the first defendant $319,324.70 damages for breach of contract.

[5] The plaintiff claims the same amount against the second defendant pursuant to the Act.

[6] There are also claims made by the plaintiff against the third, fourth and fifth defendants as guarantors of the obligations of the first defendant under the subcontract. At the commencement of the trial, the question of the liability of those defendants under the subject guarantee was ordered to be the subject of separate determination. The trial, however, proceeded on the basis that all defendants would be bound by the findings of fact made in the reasons for judgment.

The defences and counterclaim of the first defendant

[7] The first defendant makes the following allegations in defence of the plaintiff's claims.

(a) The subcontract was altered in a great many respects by the plaintiff after execution by the first defendant without the latter's knowledge or consent. In the premises, the subcontract is in the form of the document signed by the first defendant. Alternatively, the plaintiff is

estopped from denying that the terms of the subcontract are those contained in the document in the form in which it existed when signed on behalf of the first defendant.

(b) The plaintiff was not entitled to payment in respect of its progress claims as it failed to quantify the claims in the manner required by clause 22(a) of the subcontract and, in consequence, had no entitlement under clause 27(d) to make the claims. Furthermore, the value of the work performed by the plaintiff was approximately $70,000 and thus far less than the amount claimed.

[8] The first defendant also counterclaims against the plaintiff for damages for breach of contract. It alleges that the plaintiff "persistently delayed in the completion of the works in that -

"i. It failed to have a sufficient number of employees at the Kirra site to carry out the work necessary to complete the work in accordance with the first defendant's program.

ii. It persistently refused to carry out works on the basis that it required further instruction which was not necessary in order for it to continue working.

iii. It did not carry out the works regularly or diligently and would not have been able to complete the works by the date for completion.

iv. [It] Caused the other fit out trades delays in that they were unable to commence or continue with their work until the plaintiff completed the works."

[9] Because of the delay occasioned by the plaintiff, it is contended that the plaintiff is liable to the first defendant for liquidated damages pursuant to clause 2 of the subcontract in the sum of $184,000 calculated on the basis of 46 days' delay between 31 May 2001 and 16 July 2001 at the rate of $4,000 a day.

[10] Alternatively, the first defendant alleges that:

(a) there was an implied term of the subcontract that the plaintiff would carry out and complete the works within a reasonable time.

(b) the plaintiff was in breach of that term and the first defendant suffered loss and damage through being liable to the second defendant to pay liquidated damages of $4,000 a day for 46 working days between 31 May 2001 and 16 July 2001.

[11] In the further alternative, it is alleged that:

(a) it was an implied term of the subcontract and/or the plaintiff warranted by clause 10 that it would perform the works in a good and workmanlike manner;

(b) the plaintiff failed to do so in the respects particularised in paragraph 6 of the counterclaim and the first defendant suffered loss and damage in the sum of $8,510.70.

Defence of the second defendant

[12] The second defendant alleges that –

(a) the plaintiff's subcontract was a lump sum contract to perform the subject works for an amount of $781,200 and the plaintiff had no

entitlement to payment on production of the purported progress claims.

(b) The notices of claim of charge given to the second defendant by the plaintiff were not effective to create a charge over any moneys in the hands of the second defendant as no moneys were payable to the plaintiff under its subcontract at any relevant time.

(c) No moneys were due and payable from the second defendant to the first defendant in respect of works under the head contract at any material time and, as a result, no charge binding on the second defendant could come into existence.

(d) The allegations in paragraph (c) are particularised as follows –

a. The second defendant on or about 4 December 2001 lawfully terminated the head contract in reliance on its wrongful repudiation by the first defendant;

b. At the date of termination there were no moneys payable to the first defendant under the head contract, rather the second defendant had claims against the first defendant which exceeded any sum which might otherwise have been payable by the second defendant to the first defendant. Those moneys included the cost of rectifying defects in the work performed by the first defendant and moneys payable by way of liquidated damages pursuant to clause 35.6 of the head contract at the rate of $4,000 a day for the 95 days between 31 August 2001 to 4 December 2001.

The allegations of alteration of the subcontract and forgery

[13] Peter Graham Schmith, the sole director of the first defendant, gave this account of the circumstances in which the subcontract was signed in his evidence in chief. On 31 May 2001, he arranged to meet Paul Rahurahu and Richard Halstead, directors of the plaintiff, on a building site at Sovereign Islands with a view to signing the subcontract. The proposed subcontract was in a standard printed form used by the first defendant and had attached to it a letter dated 28 May 2001 from Mr Schmith to Mr Halstead. Changes to the subcontract were agreed and the document altered to reflect them. Mr Schmith and Mr Halstead initialled all such changes and signed the subcontract. The parties' signatures on the document were, at Mr Schmith's request, witnessed by a Mr O'Brien, an electrical engineering consultant, who was undertaking an electrical inspection at the building site. The only signed copy of the contract was taken away by Mr Rahurahu or Mr Halstead and was not seen again by Mr Schmith. He was not given a copy of the document. When he later saw a copy of the document, he noticed that alterations to clauses 1(c), 2, 3, 5, 7, 9(d), 10(g), 10(i), 12, 13, 15, 16, 17, 19, 22, 23, 24, 26, 28, 31 and 34 had been made and initials purporting to be his appeared against the amendments (other than the amendments to clauses 16, 22, 23 and 31). The initials were not placed there by him and the alterations were not on the document when it left his presence at the building site.

[14] I find that Exhibit 3, the original subcontract, (with the exception of two inconsequential notations) contains the alterations, initials and signatures which were on it immediately after being signed and initialled by Mr Halstead and Mr Schmith and then witnessed by Mr O'Brien.

[15] The evidence in support of this conclusion is overwhelming. Both Mr Halstead and Mr Rahurahu swore that the document was in the form of Exhibit 3 immediately after signing and I accept their evidence in this regard. Mr Schmith accepts that the initials in blue pen beside a number of the alterations were placed there by him. Two handwriting experts (whose evidence I found persuasive) compared those initials with the allegedly forged initials and each concluded that all such initials were written in the same hand.

[16] One of the experts, Mr Heath, compared Exhibit 3 with a copy of the subcontract (Exhibit 10) and concluded that, with two irrelevant exceptions, Exhibits 3 and 10 were produced from the same source document. Mr Peter Muller, a solicitor who advised the plaintiff in relation to the subcontract gave evidence that Exhibit 10 (which was a document disclosed by the first defendant) is a copy of the proposed subcontract in the form it was in before being taken from his office by Mr Halstead on the way to having it signed. With the exception of an alteration to clause 2(h) which was made at the Sovereign Island meeting, it contains the alterations which appear on Exhibit 3. Later, on the day of signing, Mr Halstead brought back a signed copy of the document and Mr Muller took a copy of it. Mr Muller swears that that document was in the form of Exhibit 3. I accept his evidence.

[17] In his oral evidence, Mr Schmith conceded that some of the alterations alleged to be fraudulent had in fact been made or were likely to have been made prior to the signing of the document at Sovereign Island. It was apparent to me that his evidence of the alterations to the document after signing was not based on actual recollection but on his assessment of what he would or would not have agreed to at the time. I gained the distinct impression that by the time he gave his oral evidence, Mr Schmith had concluded that there was no substance in his allegations of forgery and was embarrassed by them.

Termination of the subcontract

[18] The question of how and when the subcontract was terminated is relevant to most of the other issues raised on the pleadings. It is thus convenient to address it now.

[19] Clause 24 of the subcontract relevantly provides –

> "If the Subcontractor becomes bankrupt or goes into liquidation or if the Subcontractor shall make default in any of the following respects and such default is not remedied within seven (7) days of notice detailing the default and action required to remedy same viz.
>
> (a) if the Subcontractor suspends the work wholly or partly, before completion, or
>
> (b) …
>
> (c) if the Subcontractor commits any breach hereof
>
> …
>
> Then Jezzer may by notice in writing determine this contract."

[20] It is alleged in paragraph 19 of the defence of the first defendant that as at 16 July 2001 the plaintiff was in default under the terms of the subcontract in that –

> " **Particulars**
>
> i. The plaintiff had failed to provide a contract sum break-up and/or progress claim as required by clause 22(a) of the contract.

ii. The plaintiff had failed to provide to the plaintiff a copy of the plaintiff's current Enterprise Bargaining Agreement in accordance with clause 7(g) of the contract.

iii. The plaintiff had failed to provide information and supporting evidence for variations as requested by the first defendant in accordance with clause 2(f) of the contract.

iv. The plaintiff had failed to proceed with the works with due expedition as required by clause 2 of the contract."

[21] Those allegations, in substance, are the allegations contained in a letter of 16 July 2001 from the first defendant to the plaintiff by which the first defendant purported to terminate the subcontract pursuant to clause 24.

[22] Under clause 24 the subcontract could be terminated for default on the part of the plaintiff only if notice of the plaintiff's default and of the action required to remedy that default had been given to the plaintiff and if the plaintiff failed to remedy it within seven days of the notice.

[23] The letter of termination of 16 July asserts –

> "On the 9th July 2001 your company was provided the opportunity to remedy its lack of performance or withdraw from the project. You advised that performance would be improved."

[24] The first defendant contends that its letter of 9 July 2001 to the plaintiff constituted a notice in terms of clause 24. That letter states –

> "**PROJECT : KIRRA APARTMENTS**
> **SUBJECT : PAYMENT AND CONTRACT RELATED**
>
> We acknowledge receipt of your letter dated 7 July 2001 on the 9th July 2001.
>
> We also advise that we are still awaiting the receipt of your valuation schedule as requested on 3 July 2001 to enable us to assess your Progress Claim No 2. The information you have issued to date is inadequate for such purpose.
>
> We still maintain that based on our current assessment of the works undertaken to 30 June 2001 that your claim of 13.2% of your contract as completed is high. As indicated in our letter of 3 July 2001 we will however await the receipt of your valuation schedule prior to finalizing our assessment and this will naturally include for all works from commencement up to the 30th June 2001.
> …"

The letter then went on to discuss other matters.

[25] In its letter of 3 July to the plaintiff, the first defendant had requested that in order to enable it to "review and assess" the second and subsequent progress claims, the plaintiff provide a valuation schedule in the form of the document enclosed with the letter. The form envisaged that each claim would contain a detailed apportionment of the claim between some seven items of work and an apportionment of the total subcontract price between such items. The plaintiff objected to the provision of

such information on the basis that the latter apportionment involved the disclosure of price sensitive information. It responded in a facsimile of 4 July in which it provided some additional information and expressed the hope that that information "will give enough assistance to process our claim".

[26] Also on 4 July the first defendant, replying to an earlier written communication from the plaintiff concerning the information required in support of progress claims, stated –

> "Your current claim has been reviewed initially, but again we have requested further detail to enable assessment. We trust that this will be forthcoming."

The plaintiff then sent a facsimile on 4 July, stating –

> "We have provided all information and more as per our subcontract agreement regarding our progress claims. You have provided no information to us on why our claim has been rejected and now offer you this opportunity to provide your figures. We suggest a meeting with yourselves to overcome this problem."

[27] The breach principally relied on in submissions was the alleged failure on the part of the plaintiff to make its application for the second progress claim "in writing … in a form satisfactory to" the first defendant.

[28] In my view, the letter of 9 July, by itself or in conjunction with other communications, is not a notice of the type required by clause 24. Although such a notice need not take any particular form,[1] it should be recognisable as a notice which clearly identifies a default under the terms of the subcontract and which states what must be done to remedy that default. The object of such a provision is to acquaint a party with the existence of an alleged event of default and to afford that party the opportunity of remedying default by complying with the stipulations in the notice. It may also be thought that a purpose of the notice is to give the defaulting party warning of the existence of a state of affairs which might lead to termination of the contract of default is not remedied. Consequently, it would be inappropriate to infer the giving of due notice in the absence of a document or documents which plainly and unambiguously fulfilled the requirements of clause 24.[2]

[29] As the requisite notice was not given in respect of the acts or events of default relied on by the first defendant, the purported termination of 16 July 2001 was ineffective. On and after 16 July, the first defendant was plainly treating the subcontract as at an end. The plaintiff was required by the first defendant to leave the site and did so.

[30] In these circumstances, the plaintiff was entitled to accept the first defendant's unlawful repudiation of the subcontract and terminate it. It did that by letter from its then solicitors to the first defendant dated 18 July 2001.

The relevant provisions of the *Subcontractors' Charges Act* 1974

[31] The provisions of the Act relevant for present purposes are those now set out.

---

1 *Balog v Crestani* (1975) 132 CLR 289 at 296.

2 Cf *White Industries (Qld) Pty Ltd* (1999) 7 BCL 200.

[32] Section 5 entitles a subcontractor to a charge on moneys payable to the head contractor by the owner in order to secure the moneys payable to the subcontractor under its subcontract. Section 5 of Act relevantly provides –

> "**5.(1)** Where an employer contracts with a contractor for the performance of work upon or in respect of land or a building, or other structure or permanent improvement upon land or a chattel, every subcontractor of the contractor shall be entitled to a charge on the money payable to the contractor or a superior contractor under the contractor's, or superior contractor's, contract or subcontract.
> **(2)** The charge of a subcontractor shall secure payment in accordance with the subcontract of all money that is payable or is to become payable to the subcontractor for work done by the subcontractor under the subcontract.
> **(3)** The total amount recoverable under the charges of subcontractors shall not exceed the amount payable to the contractor or subcontractor under the contract or subcontract, as the case may be."

[33] No charge comes into existence unless notices are given in accordance with section 10 of the Act. That section relevantly provides –

> "Notice of claim of charge
> **10.(1)** A subcontractor who intends to claim a charge on money payable under the contract to the subcontractor's contractor or to a superior contractor—
> (a) shall give notice to the employer or superior contractor by whom the money is payable, specifying the amount and particulars of the claim certified as prescribed by a qualified person and stating that the subcontractor requires the employer or superior contractor, as the case may be, to take the necessary steps to see that it is paid or secured to the subcontractor; and
> (b) shall give notice of having made the claim to the contractor to whom the money is payable.
> (1A) The claim shall be in respect of—
>
> (a) money payable to the subcontractor at the date of the notice;
> (b) money to become payable to the subcontractor after the date of the notice for work done by the subcontractor prior to that date.
>
> **(2)** A notice of claim of charge may be given although the work is not completed or the time for payment of the money in respect of which the charge is claimed has not arrived, but where the work is completed shall be given within 3 months after such completion.
> **(3**) A notice of claim of charge in respect of retention money only may be given at any time while work under the contract is being performed but shall be given within 3 months after the expiration of the period of maintenance provided for by the contract and no later.
> **(4)** If notice is not given pursuant to this section, the charge shall not attach."

[34] It will be seen from subsection (1A) that the claim must be in respect of money payable to the subcontractor at the date of the notice or to become payable to the subcontractor after the date of the notice for work done prior to the notice.

[35] Sections 11 and 12 of the Act prescribe the consequences attendant on the giving of a notice of claim of charge pursuant to section 10. Those sections relevantly provide-

> **11.(1)** Where a notice of claim of charge is given pursuant to section 10, the person to whom it is given shall retain, until the court in which the claim is heard directs to whom and in what manner the same is to be paid, a sufficient part of the money that is or is to become payable by the person under the contract to satisfy the claim.
> **(2)** A person who fails to retain the amount that the person is required to retain shall be personally liable to pay to the subcontractor the amount of the claim not exceeding the amount that the person is required by this section to retain.
> **(3)** Where notice of having made the claim is given pursuant to section 10, the contractor to whom the money is payable, within 14 days after the notice is given—
>
> (a) shall give notice in the approved form that the contractor accepts liability to pay the amount claimed; or
> (b) shall give notice in the approved form that the contractor disputes the claim -
>
> in either case;
>
> (c) to the employer or superior contractor by whom the money is payable; and
> (d) to the subcontractor giving notice of claim of charge.
>
> **(4)** Where notice is given pursuant to subsection (3)(a), the employer or superior contractor by whom the money is payable shall pay to the subcontractor the amount the employer or superior contractor is required to retain.
> **(5)** An employer or superior contractor may, at any time after notice of claim of charge has been given to the employer or superior contractor, pay into court the amount that the employer or superior contractor is required to retain under this section.
> **…**
> **12.(1)** Where the person to whom notice of claim of charge has been given does not pay or make satisfactory arrangements for paying to the claimant the amount claimed, the subcontractor may recover the amount of the charge from the person by whom the money subject to the charge is payable.
> …"

Authorities on the operation of the Act

[36] In *Groutco (Australia) Pty Ltd v Thiess Contractors Pty Ltd*, [3] Campbell CJ, with whose reasons the other members of the Court agreed, said at 247-

> "The parts of the Act to which I have referred show that its object and purpose are to secure claims for payment of money due for work done calculated in accordance with the actual payment provisions of the subcontract. It is my opinion that the money payable (or to become payable) to a subcontractor 'in accordance with his contract' for work done by him under the subcontract are those moneys which the terms of the subcontract itself provide as being or becoming

[3] [1985] 1 Qd R 238.

> payable. … Although ss 5, 10, 11 and 12 do not refer to 'contract price', the definition in the Act of 'contract price' supports the construction that s. 5(2), **when it refers to moneys payable 'in accordance with the subcontract', is limited to the money payable in accordance with the payment terms of that subcontract relating to the work to be performed under it.** The reference to 'the debt secured by a charge', in s. 9 and to 'the right of a person to whom a debt is due and owing for work done' in s. 23 also support this view. I do not consider that the word 'debt' in these sections can be construed so as to include unliquidated damages for breach of contract: … The word 'debt' is a term that is not appropriate to describe claims for unliquidated damages for breach of contract but is appropriate to describe claims for sums fixed or certain." (emphasis supplied)

[37] In the above passage, his Honour, conventionally, sought to ascertain the meaning of words in section 5(2) of the Act by having regard to the meaning of the same words in other provisions and, in particular, in three sections which appeared to proceed on the assumption that charges created under the Act would secure debts.

[38] The central issue for determination in *Groutco* was whether the words "a charge on the money payable to the contractor … under his contract" in s 5(1) of the Act include an amount that may be payable by way of damages for breach of contract.

[39] McPherson JA, after expressing agreement with the Chief Justices' reasons, in brief reasons of his own observed –

> "When in sections 9 and 23 that Act uses the expression 'debt' it does so in the prevailing sense of that term, as meaning a liquidated sum of money presently due, owing and payable by one person to another and one which, as s 5(2) adds, is so payable 'in accordance with' the subcontract. That excludes a claim for unliquidated damages for breach of contract, together, it may be thought, with a claim for liquidated damages recoverable only upon proof by the claimant of a breach of contract by the contractor."

[40] The above reasoning of Campbell CJ has been applied in later decisions.[4] For example, in *Milgun Pty Ltd v Austco Pty Ltd and the State of Queensland* [5] Dowsett J, in referring to *Groutco*, said -

> "In that case, the Full Court held that the charge provisions did not extend to protect a claim for damages for breach of contract. Given the meaning attributed to s 5(2) by all members the Court in *Groutco*, I must come to the conclusion that a claim for a quantum meruit would similarly be excluded from the protection of the charge."

[41] In *Riteway Constructions Pty Ltd v Baulderstone Hornibrook*,[6] Derrington J, referring to the wording of section 5(2) of the Act, said –

---

4 Including *Henry Walker Eltin Contracting Pty Ltd v Mostia Constructions Pty Ltd* [2001] QSC 89; *and James Hardie Building Systems Pty Ltd v Epoca Constructions Pty Ltd* (1999) 15 BCL 199 and *Walter Construction Group Ltd v J & L Schmider Investments Pty Ltd* (2001) BC 200102628.

5 [1988] 1 Qd R 670 at 672.

6 [1998] 2 Qd R 218 at 220.

> "This means that security is designed to enforce only sums payable or to become payable under the subcontract for work done under it, and this excludes, for example, damages that might be payable for its breach: *Groutco* …This is made clear by 5.5(2) where it says that the charge shall 'secure payment in accordance with the subcontract'. Accordingly, in order that the security apply, the payment must be provided for by the contract itself."

[42] I now turn to a consideration of whether there were valid charges created by the notices delivered by the plaintiff on 20 July 2001.

The second defendant's contention that there were no moneys payable or to become payable to the subcontractor for work done under the subcontract and that, in consequence, there could be no valid charge

[43] The commencing point of the second defendant's argument is that payment "in accordance with the subcontract" within the meaning of section 5(2) of the Act means moneys payable in conformity with the provisions of the subcontract. Before a charge can arise, it is contended, the right to payment relied on by the subcontractor must be provided for by the subcontract. In this regard, the plaintiff relies on *Groutco v Thiess Contractors*,[7] *Milgun Pty Ltd v Austco Pty Ltd & State of Queensland*[8]and *Riteway Constructions Pty Ltd v Baulderstone Hornibrook Pty Ltd*.[9] In particular, it is argued that progress claims which have yet to be determined do not come within the scope of section 5(2) as the Act operates only in respect of sums which have been ascertained or are capable of precise calculation.

[44] Clause 22 of the subcontract relevantly provides –

> "PAYMENTS
>
> (a) The Subcontractor shall make application in writing to Jezer for progress claim in a form satisfactory to Jezer every month on or before 15th of month or the day referred to in the Schedule ('Invoice Date') hereof. The payment term shall be 30 days from the Invoice Date. If the progress claim is received after the day agreed, unless Jezer agrees it otherwise, the claim will be assessed and paid by Jezer as the progress claim for the following month. The progress claim should include the following information: -
>
> [a list then followed]
>
> …
>
> (c) Upon the receipt of the progress claim Jezer shall assess the progress claim on the cost to complete basis. Off-site material, unless otherwise agreed, will not be approved for payment. The progress payment assessed by Jezer may be different from the progress claim lodged by the Subcontractor. Jezer shall issue a relevant Subcontractor Payment Form to the Subcontractor in respect of the assessment of the Works the subject of the Subcontractor's

---

7 [1985] 1 Qd R 238 at 247-8.
8 [1988] 2 Qd R 470 at 472.
9 [1998] 2 Qd R 218 at 220.

progress claim. W*ith 7 days of reciept (sic) of progress claim.*"

…

(u) If not paid within two (2) days of 15th + 30th of month Qline reserve the right to halt work and recover cost,s and time extensions."

[45] Although the plaintiff contended that the first and second progress claims should have been paid in full, it sought no redress under the terms of the subcontract in respect of the alleged under payment

[46] The third progress claim was served on 16 July. The first defendant wrote to the plaintiff on 16 July 2001, acknowledging receipt of the third progress claim on that day, stating, inter alia –

> "We inform that we are in disagreement with your claim that your company has completed $251,546 worth of work as at 14 July 2001. We assess your claim in conjunction with the Proprietor's Quantity Surveyors and revert back to you with our valuation."

Presumably the word "will" was intended to appear before "revert".

[47] The subcontract was terminated by the plaintiff before the first defendant communicated any assessment of the claim pursuant to clause 22(c). Under that clause the first defendant was required to make the assessment and issue a subcontractor payment form in respect of the assessment within seven days of receipt of the claim.

[48] Also, clause 22 and the first schedule required progress claims to be made by the 15th and last working day of each month. The claim, having been made on 16 July, was thus out of time but nothing, I think, turns on that for present purposes. Clause 22(a) requires a late progress claim to be treated as a claim for the following month.

[49] The first and second defendants submit that the plaintiff's rights in respect of the work the subject of that claim, upon termination, changed from a claim under the terms of the subcontract (assuming in favour of the plaintiff that there was such a claim) to a claim for damages for breach of contract.

[50] Before exploring that question it is convenient to address the first defendant's contention that no rights could have accrued to the plaintiff under clause 22 because the progress claims were not made "in a form satisfactory to" the first defendant as required by clause 22(a) as they lacked the information referred to in paragraphs 25 and 48 hereof.

[51] The plaintiff's response was to contend that the words "in a form satisfactory to Jezer" did not entitle the first defendant to demand the inclusion in any progress claim form of information in addition to that listed in clause 22(a). In my view, the construction favoured by the plaintiff is unduly restrictive. It would have the effect of limiting the meaning of "form" to "format". Where matters are required to be done by means of a form or in a particular form, the requirement is normally thought to encompass both format and substantive content. Clause 22(a) contains no specific mandatory requirements about the content of the form, the list of suggested contents being prefaced by the words "the progress claim *should* include the following information". That does not suggest that the list was intended to be a

comprehensive statement of all the information and matter to which the first defendant was entitled.

[52] A substantial part of the reason for giving the first defendant the right to require that progress claims be made in a progress claim form satisfactory to it may be thought to be to enable the first defendant to have included in the form such material as would enable it to process claims efficiently and accurately.

[53] In determining whether a progress claim was in a form satisfactory to it, the first defendant had a duty to act honestly or possibly, honestly and reasonably.[10] The plaintiff has not established that the first defendant breached any duty in this regard. Mr Rahurahu accepted in cross-examination that for the purpose of assessment of the progress claims it was reasonable to know the extent of the work done on each level in respect of steel framing, wall and ceiling linings, other linings and cornices. Furthermore, there was no evidence to the effect that the requirement the first defendant sought to impose was unheard of in the industry or even unusual.

[54] I find that the third and fourth progress claims were not in a form satisfactory to the first defendant. The consequence of that finding in relation to the third progress claim is that at no time prior to termination on 18 July 2001 did the first defendant have an obligation to make the assessment of that claim required under clause 22(c).[11] This point has no bearing in relation to the first and second progress claims as any deficiency in them was plainly waived by payment.

[55] I now return to a consideration of the consequences of termination of the subcontract.

[56] In *McDonald v Dennys Lascelles Ltd*,[12] Dixon J explained the consequences of termination on existing contractual rights as follows –

> "When a party to a simple contract upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach."

---

10 *Stadhard v Lee* (1863) 3 B & S. 364; *Parsons v Sexton* (1847) 16 LJCP 181 and *Smith v Sadler* (1880) 6 Vict LR 5.

11 *John Grant and Sons Ltd v Trocadero Building and Investment Co Ltd* (1938) 60 CLR 1 at 18 and 29.

12 (1933) 48 CLR 457 at 476-477. For further discussion of the principle articulated by Dixon J, see *Hyundai Heavy Industries Co Ltd v Papadopoulos* (1980) 1 WLR 1129 at 1134-6 and 1141-1142.

[57] The consequences of termination were further explained in the joint judgment of Dixon and Evatt JJ in *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd* [13] –

> "In general the termination of an executory agreement out of the performance of which pecuniary demands may arise imports that, just as on the one side no further acts of performance can be required, so, on the other side, no liability can be brought into existence if it depends on a further act of performance. If the title to rights consists of vestitive facts which would result from the further execution of the contract but which have not been brought about before the agreement terminates, the rights cannot arise. But if all the facts have occurred which entitle one party to such a right as a debt, a distinct chose in action which for many purposes is conceived as possessing proprietary characteristics, the fact that the right to payment is future or is contingent upon some event, not involving further performance of the contract, does not prevent it maturing into an immediately enforceable obligation."

[58] It thus becomes necessary to consider the nature of the plaintiff's rights in respect of the four progress claims at the time of termination. The obligation on the first defendant upon receipt of a progress claim was to assess it on a "cost to complete basis". Having done this it was obliged to issue a subcontractor payment form in respect of the assessment.[14] The subcontractor was to "review and signify agreement to the … form" prior to payment being made.[15] In the event of a failure to agree, the plaintiff could avail itself of the dispute resolution provisions in clause 26.

[59] With reference to progress claim 3, assuming compliance with clause 22(a), the plaintiff's right to payment was dependent on the assessment required by clause 22(c) and on the matters dealt with by subclause 22(d). The amount payable in respect of the claim could not be known, at the earliest, until the assessment took place. That required further performance of the contract on the part of the first defendant. The plaintiff submits that its rights in respect of the progress claim are nevertheless accrued rights "which arise from the partial execution of the contract". It is further submitted that the Court can make a determination of what moneys are payable under clause 22.

[60] Prior to termination of the contract, the first defendant had an obligation to make the assessment of the third progress claim required by clause 23(c). For present purposes I will assume the due making of the claim. Orthodox contractual theory suggests that in the event of failure on its part to make the assessment, the plaintiff's remedy would be a claim for damages for breach of contract. There is authority, however, for the proposition that where payment under a contract is dependent on a determination by a party to the contract, or its agent, and the determination is not made or duly made through the fault of that party, the Court may proceed to decide, as a question of fact, the amount of the payment.

---

13 (1936) 54 CLR 361 at 379-80.

14 Clause 22 (c).

15 Clause 22 (d).

[61] *Hickman & Co v Roberts*[16] concerned a building contract under which payments to the builder were to be made on the certificate of the architect. The architect, having taken an erroneous view of his role, failed to issue a certificate. It was held that the proprietor was precluded from setting up as a defence to the action either that the issue of the certificate was a condition precedent to the bringing of the action or that the certificate was conclusive as to the amount of the claim. In the Court of Appeal it was ordered that the question of the amount due to the builder should be settled by an official referee. That course of action was approved on appeal to the House of Lords.

[62] In *Panamena Europea Navigacion (Compania Limitada) v Frederick Leyland & Co Ltd*,[17] a contract for the repair of a vessel provided that the ship owners would pay for the repairs upon "the ordinary commercial basis" after the issue of a certificate by the owner's surveyor that the work had been satisfactorily carried out. In breach of the shipowner's duty no certificate was issued. The contractor sued for a sum on account of work done to the vessel. It was held that, as the certificate was not issued through the default of the owner's surveyor, the contractor was absolved from the necessity of obtaining it and the contractor was entitled to recover the amount claimed in the action. This conclusion was arrived at by application of the principle which prevents a person from taking advantage of the non-fulfilment of a condition the performance of which has been hindered by himself and the related principle which "exonerates one of two contracting parties from the performance of a contract when the performance of it is prevented and rendered impossible by the wrongful act of the other contracting party".[18]

[63] In *Edwards v Aberayron Mutual Ship Insurance Society*[19], the plaintiff mortgagee of a ship insured with the defendant claimed under the policy of insurance for loss of the ship. The policy made it a condition precedent to the bringing of an action that the loss claimed by the insured should have been first decided upon by the directors of the defendant. The directors, without hearing from or giving the plaintiff an opportunity to be heard, resolved that the ship was not found to be lost by perils of the sea (the contingency relevantly insured against) and that the owners had no claim on the Society. Amphlett B concluded that the directors' determination had miscarried. His reasons for that conclusion emerge from the following passage from his reasons for judgment –[20]

> "But it is said that the determination of the directors having been made a condition precedent to bringing an action, a Court, at law at least, cannot interfere, as that would be making a new contract for the parties. I think there is a fallacy in this argument. Courts of Equity have no more power to make new contracts for parties than Courts of Law, and yet they would undoubtedly interfere when a contract is performed on one such and the mode agreed upon for ascertaining the amount to be paid by the other has failed in any way without the plaintiff's fault. Put the simple case, which is in principle the same as that we are considering: A. contracts to do work for B., the price to be determined by the engineer of B. The work is done,

---

16 [1913] AC 229.
17 [1947] AC 428.
18 per Lord Thankerton at 436.
19 (1876) 1 QBD 563.
20 At 580-581

> and before the price is determined the engineer, by some act of his own not necessarily fraudulent, becomes incapacitated to act as arbitrator. I cannot persuade myself that Courts of Law are powerless to prevent the gross injustice of B. having the benefit of the work, without compensation to A., except by the inconvenient and often ineffectual course of bringing an action for neglect of duty against the engineer and his employer. To give direct redress in such a case seems to me only another application of the well-known principle, that a man shall not take advantage of his own wrong, under which even precedent conditions, in their strictest sense, have been held to be discharged where performance was prevented by the defendant himself: see Comyns' Digest, Condition (L.6.); and the case of *Hotham v. East India Company* 1 T.R. 638. … here … I can see no reason why a Court of Law should not determine the matter themselves.
>
> For these reasons I think that the plaintiff can sustain his action; and there is no difficulty about the amount, as it is found in the case (paragraph 14) that the defendants now admit, contrary to what their directors had determined, a total loss of the vessel by perils of the sea."

Kelly CB and Brett J, the other members of the majority, arrived at the same result by a quite different route, concluding that the relevant provisions were intended to prevent the insured from maintaining any action in the courts in respect of a dispute arising on the policy and were thus invalid as contrary to public policy.

[64] The principle discussed in those cases was applied by the Court of Appeal in New Zealand in *Butcher v Port*,[21] a case involving the wrongly formed opinion of an insurer's representative where the holding by the insurer of a particular opinion was a precondition to the insurer's liability to make payment under a policy of insurance.

[65] In that case, Cooke J expressed the principle under consideration as follows–[22]

> "For present purposes a clause such as this is not materially distinguishable from one making the certificate of a party's engineer or other appointee a condition precedent to action. The principle that a party cannot insist on a condition if non-fulfilment is his own fault is basic in contract law: see for instance *New Zealand Shipping Co. Ltd. v. Société des Ateliers* (1919) A.C. 1, 6, per Lord Finlay L.C.
>
> In relation to certificate clauses and the like the principle has the effect of, first, disabling the party from setting up the absence of the stipulated approval and, secondly, leaving the issue to the determination of the Court. In England there is the highest authority for this in the decisions of the House of Lords in *Hickman & Co. v. Roberts* (1913) A.C. 229 and *Panamena Europea Navigacion (Compania Limitada) v. Frederick Leyland & Co. Ltd.* (1947) A.C. 428.

---

21 (1985) 3 ANZ Insurance Cases 60-638.

22 At 78,927- 78,928.

[66] *Butcher v Port* and the decisions just referred to were considered and applied in *McArthur v Mercantile Mutual Life Assurance Co Ltd,* [23] also a decision concerning an insurer's opinion, the formation of which miscarried. The principle was applied also in *Edwards v The Hunter Co-op Dairy Co Ltd*[24] and *Wyllie v National Mutual Life Association of Australasia Ltd*.[25]

[67] Because of the limitations on the scope of subcontractors' claims in section 5(2) of the Act it is necessary here to determine whether the plaintiff's claim is to be categorised as a claim under clause 23 of the subcontract or as a claim for damages for breach of contract. The authorities just discussed suggest that the first defendant, by its wrongful termination, precluded itself from making an assessment under clause 22(c) and thereby lost the right to make the assessment. There was then, prior to the termination of the subcontract by it, vested in the plaintiff a right to have the amount payable determined by the Court. On this analysis, at the date the subcontract was terminated a right had accrued to the plaintiff under the subcontract the exercise of which required no further performance of any obligations of the first defendant under the subcontract but merely a determination by the Court. The plaintiff's claim, not being a claim for damages, and being a claim for payment under the subcontract, is one for "payment in accordance with the subcontract" and, to pick up the language of Campbell CJ in *Groutco*,[26] the moneys claimed are "moneys which the terms of the subcontract itself provide as being or becoming payable".

[68] The alternative view is that the contractual right was not to payment of a particular sum objectively ascertained but a right to have the first defendant make its assessment, albeit on a reasonable basis[27] and that the remedy of the plaintiff is not a claim for moneys owing under the subject clause of the contract, but a claim on a quantum meruit or claim for damages of breach of contract.

[69] The above authorities and *Beaufort Development Ltd v Gilbert-Ash Ltd* [28] lead me to conclude that this approach is too restrictive and that the earlier analysis is to be preferred. The conclusion is further assisted by the fact that courts have traditionally found that a contracting party or its agent required to make a determination under a provision such as clause 23(c) has an obligation to act reasonably.[29]

[70] For these reasons, were it not for its failure to claim in a form satisfactory to the first defendant, the plaintiff, arguably, would have a claim which would entitle it to claim a charge under the Act. I say "arguably" because in *Groutco,* McPherson J expressed the view that section 5(2) did not encompass "a claim for liquidated damages recoverable only upon proof by the claimant of a breach of contract by the contractor". Those observations were dicta and possibly expressed a more

---

23 [2001] QCA 317.
24 (1992) 7 ANZ Insurance Cases 61-113.
25 SC NSW 50094 of 96, 18 April 1997.
26 At 247.
27 *Stadhard v Lee* (1863) 3 B & S. 364; *Parsons v Sexton* (1847) 16 LJCP 181 and *Smith v Sadler* (1880) 6 Vict LR 5.
28 [1999] 1 AC 266.
29 *Stadhard v Lee* (1863) 3 B & S. 364; *Parsons v Sexton* (1847) 16 LJCP 181 and *Smith v Sadler* (1880) 6 Vict LR 5.

restrictive approach to the scope of section 5(2) than that expressed by Campbell CJ in his reasons.

[71] I have found that because the third progress claim was not in a form satisfactory to the first defendant there was no obligation on it to make an assessment under clause 22(c). That being the case, at the date of termination of the subcontract, the plaintiff had no accrued right for payment of the moneys the subject of the third progress claim which survived termination.

[72] The fourth progress made after termination and thus was not made under the contract. When made there was no contractual obligation on the first defendant to assess it and I do not accept that a claim in respect of that progress claim can be categorised as an accrued right which survives the termination of the subcontract.

[73] The plaintiff also has no claim under the subcontract in respect of progress claims 1 and 2. The amount assessed by the first defendant was paid. The plaintiff pursued no rights under the subcontract in respect of the disallowed amounts of its claims. Any claim that it has against the first defendant in this regard is thus also a claim for damages for breach of contract.

[74] These conclusions suffice to dispose of the plaintiff's claim against the second defendant. It is desirable, however, that I proceed to consider the second defendant's allegation that there are no moneys to which the charge can attach as no moneys are owing by the second defendant to the first defendant.

Whether there are or were at any material time moneys in the hands of the second defendant to which the charges could attach.

[75] By 20 July 2000 (the date of service of the statutory forms), 13 progress claims had been served by the first defendant on the second defendant. The thirteenth such claim was assessed by Ryder Hunt, the quantity surveyor appointed for that purpose, and certified on 11 July 2000. The amount so certified was paid on 13 July. Progress claim 14 was submitted on 16 July 2001 in respect of work completed as at 15 July. Ryder Hunt valued the work at $332,277 and that amount was paid on or about 31 July. Thereafter, further progress claims were submitted and paid but moneys were retained by the second defendant on account of the charges in the sense that the amount of the plaintiff's claim was deducted from the amount of the progress claim payment next after the date of the notices of claim of charge and remained unpaid.

[76] On 19 November 2001, the second defendant served on the first defendant a notice under clause 44 of the general conditions of the head contract alleging various breaches of contract on the part of the first defendant and requiring the first defendant to show cause in writing by 4 pm on Monday 26 November 2001 why the second defendant should not exercise the right to terminate the head contract pursuant to clause 44.4.

[77] The alleged breaches were –

(a) Failure to proceed with due expedition in breach of clause 33.1 of the head contract;

(b) Knowingly providing a statutory declaration pursuant to clause 43(b) of the head contract which was false in material respects, namely

that it declared that all subcontract claims due and payable had been paid when that was not the case;

(c) By reason of the matters referred to in paragraphs (a) and (b) the first defendant had not provided an adequately skilled, competent and fully trained organisation capable of performing the contract works in an efficient and responsible manner as required by clause 49(h) of the head contract.

[78] The first defendant wrote to the second defendant on 23 November 2001 acknowledging receipt of the notice to show cause and making assertions which included –

(a) An assertion that there was an agreement that the second defendant would effectively take over the works;

(b) A statement that the declaration issued on 13 October 2001 should not have been issued as the first defendant was no longer in control of the works and "not in a position to be able to declare anything in relation to the project". It was said that the certificate was issued "under duress to ensure payments were issued to the various subcontractors to avoid the works being closed".

[79] The letter bears a notation that it was not received until 2 December 2001. On 30 November 2001 the first defendant wrote to the second defendant giving notice that the first defendant had "withdrawn its building licence from the project". That letter also asserted that it had previously been agreed that the first defendant would alter its role from that of lump sum builder under to contract to that of construction management. No response to that letter is in evidence but Mr Murgia, a director of the second defendant, swears, and I accept, that there was no such agreement.

[80] In a notice dated 4 December 2001, the second defendant purported to terminate the contract on grounds that –

(a) The first defendant had failed to show cause as required by the notice of 19 November 2001;

(b) By withdrawing its building licence the first defendant was not able to perform any work under the contract and thereby evinced an intention not to be bound by it.

[81] Also on 4 December 2001, the second defendant wrote to the first defendant stating that it intended to "claim from you any damages which we suffer as a result of the termination of the contract".

[82] On 19 December 2001, Mr Larder, in a letter to the first defendant, certified that the first defendant was indebted to the second defendant in the sum of $376,000 by way of liquidated damages pursuant to clause 35.6 of the head contract. Mr Larder's company, Lardercon Pty Ltd, was the superintendent appointed under the head contract.

[83] The original date for practical completion under the head contract was 30 March 2001. At a meeting on 14 May 2001, between Mr Murgia, Mr Schmith and Mr David Larder, it was agreed between Mr Murgia on behalf of the second defendant and Mr Schmith on behalf of the first defendant that the head contract be varied to substitute 31 August 2001 for 30 March 2001. That agreement was confirmed in a letter from Mr Larder dated 26 June 2001 to the solicitors for the first defendant,

copies of which were sent to Mr Schmith and Mr Murgia. Mr Larder stated that at the meeting on 14 May 2001 it was agreed between all parties that –

> "In consideration of the date for practical completion being revised and set at 31 August 2001, Jezer Constructions Pty Ltd would withdraw all claims against alleged delays initiated by the client, and also alleged claims for late payment. It was also agreed and understood that the revised date for practical completion will not be altered for any reason, other than client initiated variations".

[84] In a letter of 26 June 2001 to the first defendant, Mr Larder stated – "We remind you that the date for practical completion is 1 September 2001." Mr Larder gave evidence to the effect that after the meeting on 14 May, he assessed and approved an extension of one further day for completion.

[85] In paragraph 18 of his statement (Exhibit 27), Mr Larder gave evidence of the extent to which the works were incomplete on 7 January 2002. I accept his evidence in that regard. Works which remain to be done included –

(a) The landscaping;
(b) Completion of external rendering and painting;
(c) The tiling of the walkway;
(d) Construction of the rear drive to the site;
(e) Construction of the concrete ramp to the basement;
(f) Construction of the drop off area and pavement to the front of the building;
(g) Construction of roofs over the penthouse decks;
(h) Completion of internal painting, carpeting, lighting and tiling;
(i) The trimming and flashing of some windows;
(j) Construction of the decking around the pool and the tiling of the pool area.

[86] Mr Larder calculated the cost to complete the works as being in excess of $2,000,000 and I accept that the calculations are substantially correct.

[87] His evidence of the cost to complete derives support from the evidence of Mr Birt, a quantity surveyor. It is unnecessary for me to arrive at a precise conclusion as to the cost of such works. It suffices for present purposes that it exceed the total of any claims by the first defendant against the second defendant in relation to the contract and any other moneys which would have been payable by the second defendant to the first defendant under the contract had it remained on foot.

[88] It is probable that the second defendant has a substantial claim against the first defendant in relation to the cost of completing the works. I do not make any findings as to the amount of the claim as I am uncertain about whether the contract sum was increased from time to time as a result of variations.

[89] In addition to the cost to complete, the second defendant alleges that it has suffered other loss, including –

(a) Rental for purchasers whose units were not completed within the time required by contracts entered into between them and the second defendant at the rate of $550 per week;
(b) An additional fee payable to the second defendant's financier of $120,000; and

(c) Damages on account of defective works.

I find that the second defendant's damages in respect of defective works exceeds $150,000 and that it has good claims in respect of items (a) and (b) above.

[90] In cross-examination Mr Dunning, who appeared for the plaintiff, sought to shed doubt on the nature and extent of the second defendant's claims against the first defendant. He also attempted to cast doubt on the existence of the 14 May agreement alleged by the second defendant. That attempt did not succeed. Although the evidence to which I have referred raises some doubt about the true state of contractual arrangements between the first and second defendants, I find on the balance of probabilities that the first defendant was in breach of the head contract, that it repudiated it by, inter alia, being unable to continue to perform its obligations as builder and that it was duly terminated by the second defendant on 4 December 2001.

[91] I find also that the second defendant has a claim for liquidated damages under the head contract. Once that is taken into account, and regard is had to the second defendant's damages claims, no moneys are owing by the second defendant to the first defendant.

[92] In those circumstances, it is unnecessary for me to explore the merits of the other claims which the second defendant alleges it has against the first defendant.

[93] The claims which I have identified are able to be set off against the first defendant's claims under the head contract.[30] As a result of that set off, the second defendant's claims against the first defendant exceed any claims the latter may have against the former.

[94] The plaintiff argues that it has good charges under the Act binding on the second defendant, even though at a time after the charges attached the second defendant may have ceased to have an obligation to pay moneys to the first defendant under the head contract.

[95] The plaintiff's argument necessitates the conclusion that the charge which comes into existence upon the due giving of the notices required by section 10 of the Act attaches to the money then payable to the contractor by the employer and is unaffected by any subsequent decrease in the amount of money payable to the contractor by the employer.

[96] I cannot accept this argument. The charge created by section 5(1) is a charge "on the money payable to the contractor … under the … contract …". The total amount recoverable under the charges of all subcontractors cannot exceed the amount payable to the contractor under the contract.[31] It follows that the total amount recoverable under the charges of a particular subcontractor cannot exceed the amount payable to the contractor under the contract.

[97] If the plaintiff's argument is to be accepted, subsections (1) and (3) of section 5 must be read as if the words "at the time at which the charge comes into existence or attaches to moneys payable to the contractor" were added at the end of each provision. It is of some relevance that section 10(1A) does contain a time

---

30 Clause 42 of the head contract.

31 Sections 5(1) and (3).

stipulation of this nature by providing that a claim is in respect of money payable to the subcontractor **at the date of the notice.**

[98] Section 11(1) requires a person to whom a notice of claim of charge is given to retain "a sufficient part of the money that is **or is to become payable** by the person under the contract to satisfy the claim". (Emphasis supplied) This requirement indicates that the reference to "the money payable to the contractor" in sections 5(1) and (3) is a reference to the money payable from time to time, at least whilst the charge remains on foot.

[99] Section 11(1) though does not shed much, if any, light on whether section 5(2) refers to a running balance of account between the employer and the contractor or whether, as the plaintiff contends, once the charge attaches the amount charged cannot be reduced as the moneys owing by the contractor to the employer fall below the sum charged.

[100] The Act does not contemplate that a subcontractor creating a charge under the Act can recover money under section 11 or 12 only where the contract has been fully performed. That being the case, if the plaintiff's contention is not accepted, a subcontractor who gives the statutory notices at a time when sufficient moneys are payable by the contractor to the employer to satisfy its claim may have the claim defeated in whole or in part by a reduction in the amount payable by the employer to the subcontractor. But, there is nothing surprising or inequitable about that result. As previously noted, the amount payable by the employer to the contractor may increase and thus improve the subcontractor's security.

[101] The Act is expressed to be "an Act to make better provision for securing the payment of money payable to subcontractors and for other purposes". Sections 5 and 10 create a charge over money payable to the contractor by the employer in order to secure payment to the subcontractor of moneys payable or to become payable under the subcontract. Sections 11 and 12 provide the mechanism for enforcement of the charge: they do not extend the ambit of the charge. It is unlikely that the intention of the Act is to enlarge the obligations of the employer[32] and it should not be concluded that the employer's common law rights have been diminished in the absence of clear language to that effect.[33] In my view, the language of the Act does not compel the construction for which the plaintiff contends. The Act seeks to protect subcontractors by preventing payment by the employer to the contractor of moneys payable under the contract until a subcontractor's claims are satisfied. It does not operate by requiring an employer to whom notice of claim or charge has been given to create or set aside any particular fund or moneys. Taken in context and, indeed, given their natural meaning, the words "on the money payable to the contractor" in subsections (1) and (3) of section 5 refer to money payable from time to time. That was the conclusion arrived

---

[32] Compare the observation of Alpers J in *Farmers' Union Trading Co Ltd v A W Bryant* (1925) NZLR 390 at 392-3 approved by Campbell CJ in *Groutco (Australia) Pty Ltd v Thiess Contractors Pty Ltd* [1985] 1 Qd R 238 at 243-4.

[33] *Wade v New South Wales Rutile Mining Co Pty Ltd* (1970) 121 CLR 177 at 182.

at by Pincus JA in *Goodacre v Romtra Pty Ltd.*[34] It is also consistent with the approach taken by Courts in New Zealand in respect of similar legislation.[35]

[102] Another argument advanced on behalf of the second defendant was to the effect that having regard to the terms of the head contract, moneys payable to the first defendant by way of progress claim payments were not "the money … payable to the contractor … under the contractor's … contract" within the meaning of section 5(2) of the Act. The argument was based on clause 42.1 of the head contract which relevantly provided –

> "The payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that the work has been executed satisfactorily but shall be a payment on account only, except as provided by clause 42.8."

Clause 42.8 deals with the issue of a final certificate certifying the balance owing after adjustments.

[103] It was submitted that –

> "The natural meaning of the expression 'on account only' is to make clear that there is no liability to pay, whether by way of debt or otherwise, simply a duty to provide a sum appropriately certified (that may include a sum required to be paid by the contractor to the principal) which is not an amount 'payable to the contractor' within the meaning of s 5(1) of the Act."

I accept that by virtue of clause 42.1 progress payments under the head contract are provisional only. However, it does not follow, necessarily, that progress payments are not "money payable to the contractor … under the contractor's … contract". In order for the second defendant's argument to succeed, it is necessary to give a restrictive meaning to such words in section 5(2) and section 11(1) and I doubt that the Act should be construed in this way. In view of the other conclusions I have reached in this matter, however, it is not necessary for me to resolve this question.

First defendant's counterclaim and claim of a set-off

[104] There is no evidence which I accept, that any delay in completion of the works relied on by the second defendant in its claim for liquidated damages against the first defendant was attributable in whole or in part to any breach of the subcontract by the plaintiff. I accept the evidence of Mr Rahurahu in this regard.

The first defendant's counterclaim for the costs of rectification

[105] The plaintiff counterclaimed for the cost of rectification works as follows –

Item	Description	Works	Cost to Rectify
1.	The plaintiff incorrectly located the shower walls of units 101, 201 and 301	Labour Materials	\$1,764.00 \$305.00
2.	The wall in Unit 305 was out of plumb by 25mm	Labour Materials	\$168.00 \$35.00
3.	The wall of the second bedroom of Unit	Labour	\$336.00

[34] [2000] 2 Qd R 494 at 496-7.

[35] *Stern v J A Redpath and Sons Limited* (1950) NZLR 50; *Taupo Totara Timber Co Ltd v Smith and Egden* (1910) 30 NZLR 77; *Ball v Scott Timber Co Ltd* (192) NZLR 570; *J T Craig Limited v Gillman Packaging Limited* (1962) NZLR 201.

	204 was out of plumb by 25mm	Materials	$79.00
4.	The bulkhead above the rear reception sliding door collapsed and had to be replaced	Labour	$84.00
5.	The laundry door openings to Units 101, 201, 301, 108, 208, 308 and 408 had to be adjusted as they were built incorrectly	Labour	$441.00
6.	181 interior doors had to be cut down due to incorrect framing to Levels 1, 2 and 3	Labour and materials	$4525.00
	GST		$773.70
	TOTAL		**$8,510.70**

[106] Mr Skinner, the plaintiff's site supervisor, accepted that items 2 and 3 may have needed rectification as a result of deficient work on the plaintiff's part. His evidence was that items 1 and 5 were the result of design defects. He was unaware of the matters the subject of items 4 and 6. I accept Mr Skinner's evidence (which in relation to item 5, is supported by that of Mr Rahurahu).

[107] I am not satisfied that the defects or problem revealed by item 6 is a matter for which the plaintiff is responsible. I accept Mr Rahurahu's evidence in that regard. Generally, I prefer his evidence and that of Messrs Halstead and Skinner to that of Mr Schmith and Mr Redford. The latter was a partisan and defensive witness.

[108] Mr Gregory, a plasterer employed by the subcontractor who replaced the plaintiff, gave evidence. I found him to be a credible witness but his evidence did not advance the plaintiff's case beyond confirming that the rectification work outlined above was done.

[109] He had no recollection of detail, not surprisingly, and said that some of the alleged rectification work was in fact work required to complete work left unfinished by the plaintiff. I have no means of knowing, on the basis of the evidence I accept, whether the bulkhead problem was truly a matter of defective work or whether it resulted form uncompleted work or a combination of the two.

[110] The first defendant has thus succeeded in establishing only items 2 and 3 totalling $287.

The plaintiff's damages claim for work performed

[111] The measure of damages for breach of contract is that which would place the plaintiff in the position it would have been in had the contract been performed.[36]

[112] If the contract had been performed by the first defendant, the plaintiff would have been paid the full subcontract price less the amount of progress claims received by it. In order to obtain the full subcontract price, however, it would have been put to whatever expense was necessary to complete the works. The measure of damage, more shortly stated, is the difference between the contract price less the cost of

[36] *Gates v The City Mutual Life Assurance Society Limited* (1986) 160 CLR 1 at 11-12.

executing the works and less, of course, any part payment.[37] If in consequence of the termination of the contract the contractor is able to perform other work, which it would not otherwise have been able to undertake, and make a profit, its loss will be reduced to that extent.[38]

[113] Mr Rahurahu, who initially costed the subject works on behalf of the plaintiff, did a detailed calculation of the total cost of the work to be performed under the subcontract. It revealed a total expected cost of $335,418. The total contract price, including variations, was $859,320, inclusive of GST. It was submitted that the plaintiff's damages were $319,324.70, being $859,320 less $237,872 (the outstanding progress claims) and $62,029 (the amount paid on account of progress claims). Mr Rahurahu's calculations were not challenged in cross-examination and I accept their accuracy. The evidence does not disclose that the plaintiff was able to make profits as a result of termination of the subcontract and accordingly, there will be no deduction from its damages claim in that regard.

[114] The calculation treats the outstanding progress claims as moneys due and payable. For the reasons advanced earlier, I do not accept that this is correct and I will hear further submissions on the quantification of the plaintiff's claim.

[115] In view of the above conclusions, it is unnecessary for me to express any concluded view on questions such as the value of the work done at the time of termination, the value of the work remaining to be done after termination or of the sums to which the plaintiff would have been entitled under progress claims 3 and 4, if duly assessed on a cost to complete basis. In case it should become relevant, I record that I found Mr Ford, a quantity surveyor, called on behalf of the plaintiff, a careful and competent witness and I accept his evidence. That evidence though cannot establish, at least in a direct way, the sums which would have been payable under the progress claims on a due assessment. Mr Ford's calculations were not made on the cost to complete basis required by clause 26(c).

[116] Mr Ford calculated that the value of the works done by the plaintiff, including materials supplied up to 16 July 2001, was as follows –

"Value of works done	$ 143,810.00
Sub-contract preliminaries	$ 22,477.00
Labour loading materials onto floors	$ 10,250.00
Materials supplied but unfixed	$ 56,581.00
TOTAL	$ 233,118.00"

[117] Mr Ford's conclusion is supported by the first defendant's own assessment.

[118] Mr Muller, who gave evidence on behalf of the second defendant, did his calculations on the basis that the subject works were 18% completed and that the subcontract value was $590,000 at that time the subject contract works were in fact 31% completed. Although I accept that Mr Muller is a credible witness, I find that his calculations were made on an erroneous basis.

---

37 *Foley Bros v McIlivee* (1918) 44 DLR 5 at 7. (P.C.).

38 *McGregor on Damages*, 15th ed para 1094.

Conclusion

[119] On the above findings, the plaintiff is entitled to judgment against the first defendant. The judgment will need to take into account the extent to which the first defendant has succeeded on its counterclaim.

[120] The second defendant is entitled to judgment against the plaintiff, together with the costs of and incidental to the action to be assessed.

[121] I will hear the parties, however, on the appropriate orders. There have been a number of interlocutory applications concerning notices purportedly given under the Act and the retention of moneys and it will probably be necessary for there to be separate consideration of those matters.