

## Payment Claims & Payment Schedules Revisited

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The High Court has considered further issues relating to the validity of payment claims and payment schedules in its recent judgment: *NCB 2000 Ltd v Hurlstone Earth Moving Ltd* (AK CIV 2010-404-00809 23 June 2011).

NCB engaged Hurlstone to undertake earthworks and drainage for a commercial development in East Tamaki. Its agreement with Hurlstone was recorded by letter which provided for progress payments on a fortnightly basis and incorporated the general conditions of NZS 3910:2003. In 2009 Hurlstone issued payment claims to NCB. NCB disputed the final two payment claims made in August and October. NCB asserted it had overpaid Hurlstone in sum of \$34,393. The parties were unable to resolve the dispute.

Hurlstone issued a payment claim to NCB under the Construction Contracts Act on 27 October 2010. It sought payment of \$121,061 for the period from May to October 2009, including variations. NCB responded by way of letter dated 12 November 2010. The letter referred to the Construction Contracts Act and under the heading "Payment Schedule" set out the works charged and the variations approved. NCB itemised the payments it had made and claimed there was an overpayment of \$26,950.

Hurlstone issued a statutory demand dated 30 November 2010. It claimed NCB's letter dated 12 November 2010 was not a valid payment schedule and NCB was liable for the claimed amount pursuant to section 22 of the Construction Contracts Act. NCB applied to the High Court to set aside the statutory demand.

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The Court first considered whether Hurlstone's payment claim was valid. Wylie J rejected arguments the payment claim was invalid for alleged non-compliance with formalities as to form, timing and service required by NZS 3910: 2003. He held the payment claim was properly constituted and served in terms of the Construction Contracts Act and that was sufficient. Wylie J also dismissed an objection that the payment claim included amounts from earlier payment claims, stating there was nothing in the Act to prevent such an approach.

The Court then considered whether NCB's letter dated 12 November 2010 constituted a valid payment schedule in terms of section 21 of the Act. Although the letter did not specifically refer to the payment claim, the Court decided an overly technical approach should not be taken. It was sufficient that the letter identified the property which was the subject of the claim. The letter did not set out the reasons for the difference between the scheduled amount and the amount claimed, however the Court concluded NCB was entitled to rely on its earlier response to the payment claims issued in August and October 2009 which did provide reasons.

The issue of whether amended payment claims/schedules can be provided in respect of the same claim and whether payment claims/schedules can incorporate extraneous documents are matters that are frequently argued in adjudications under the Construction Contracts Act, so NCB v Hurlstone judgment will be of assistance to adjudicators.

This judgment continues the approach of the Courts to examine the substance of payment claims/schedules rather than the technical form, consistent with the Court of Appeal decision in *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177 (CA). The outer limits of this principle will no doubt be the subject of further decisions.

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