IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-378
[2020] NZHC 918

BETWEEN	ELECTRIX LIMITED Plaintiff
AND	THE FLETCHER CONSTRUCTION COMPANY LIMITED Defendant

Hearing: 7 to 31 October 2019 (except 15, 25, 30 October 2019)

Appearances: K M Quinn and S C I Jeffs for the plaintiff
K W Fulton and M N Rathod for the defendant

Judgment: 6 May 2020

JUDGMENT NO 2 OF PALMER J

The judgment was delivered by me on Wednesday 6 May 2020 at 11.00am.
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Counsel/Solicitors:
K M Quinn, Barrister, Auckland
K W Fulton, Barrister, Auckland
Burton Partners, Auckland
Craig Griffin Lord, Auckland

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Summary

[1] Large construction projects benefit from a head contractor and electrical subcontractor concluding a contract and formulating the detailed design for electrical works before undertaking them. That did not happen in the Christchurch Justice and Emergency Services Precinct project. In October 2014, the Fletcher Construction Company Ltd confirmed Electrix Ltd as its preferred electrical sub-contractor. Fletcher Construction requested and Electrix provided electrical services work. Fletcher Construction paid Electrix $21.6 million (GST excl) for the work, on the basis of successive letters of intent. But the parties never managed to agree formally on a contract and never completed the detailed design of the electrical works. The electrical works suffered from poor management, delays, disruption and constant time pressure. Now, Electrix sues Fletcher Construction for some $7 million plus interest. Fletcher Construction counterclaims, saying it paid Electrix some $7 million too much, whether there was a contract or not. The proceeding was the subject of a four-week trial in October 2019.

[2] I find there was no contract between Electrix and Fletcher Construction. The parties did not intend to be immediately bound by essential terms at any point. They expected they would be able to reach agreement on a contract, but they never did. Yet Electrix provided the electrical works services requested by Fletcher Construction. Fletcher Construction must pay the reasonable cost of the services, the "amount deserved" or "quantum meruit". The New Zealand law of non-contractual quantum meruit is not exclusively tethered to the doctrine of unjust enrichment. Its objectives are not confined only to dispossessing those unjustly enriched but can extend to providing redress for those who have been unjustly impoverished. The market value of the services that could have been used to undertake the works is relevant. But the reasonable cost of the services actually provided is the better starting point, reflecting the market value of the particular inputs used in the provision of those services at the relevant time and in the relevant circumstances. I rely primarily on the evidence of Electrix's expert witness, Mrs Catherine Williams. I find Fletcher Construction must pay Electrix $7,473,207 (GST excl) plus simple interest of five per cent per annum.

What happened?

The initial stages of the Christchurch Justice Precinct project

[3] After the Canterbury earthquakes in 2010 and 2011, the government decided to construct a new building in Christchurch to house justice and emergency services: the Christchurch Justice and Emergency Services Precinct building. It was the largest multi-agency government co-location project in New Zealand. It involved five different levels, with different floor plans. It was the first major building to be built and opened in Christchurch after the earthquakes. The Ministry of Justice, a department of the Crown, was the principal for the government.

[4] The evidence of Mr Jeff Wilson, Fletcher Construction's Senior Building Services Manager, is that Fletcher Construction originally sought to agree on a price of $18.3 million for the electrical package but the Ministry would not agree. Fletcher Construction and the Ministry agreed on $15,967,000 plus GST as the Guaranteed Maximum Price (GMP) for the electrical works. On 1 August 2014, the Ministry of Justice executed the Head Contract for Fletcher Construction to design and build the Precinct project with an overall GMP of almost $240 million and a practical completion date of 15 December 2016.

[5] When the Head Contract was executed, the Ministry's contractors, including for design, were transferred, or "novated", to Fletcher Construction. The Head Contract provided for that to occur once the detailed design for the Precinct building was 50 per cent developed. The novation stated "the design/coordination process is not complete and is subject to further development to meet the client brief and the construction contract".[1] In an internal email on 11 August 2014, Mr Wilson considered the electrical design was "not in synch with the Clients brief", the electrical drawings were only 10 per cent developed and the actual detailed design for the electrical works only 20 per cent developed.[2]

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1 Core Bundle of Documents (CBD) 671/Electronic Bundle of Documents (EBD) 5/FCC.34.4.
2 EBD6/FCC.34.5; Notes Of Evidence (NOE) 690/16-19.

The Request for Proposal process

[6] On 28 August 2014, Fletcher Construction issued a Request for Proposal (RFP) for the electrical services package.[3] The basis for the RFP was that the documents issued for pricing were "deemed" to have been developed to 50 per cent of the detailed design. It anticipated a 12-week period of Early Contractor Involvement (ECI) that would allow the GMP to be converted to a fixed price lump sum. In a private tender published on 3 September 2014, Fletcher Construction noted the requirement that the successful tenderer enter into a formal subcontract with Fletcher Construction based on Fletcher Construction's standard subcontract agreement.[4]

[7] On 10 September 2014, Fletcher Construction issued a further notice to the tenderers, enclosing information stating the electrical design was "essentially at 50 per cent detailed design".[5] Opus International Consultants Ltd (Opus) was preparing the detailed design for the electrical works, with Beca. On 12 September 2014 a tender addendum from Fletcher Construction provided the construction programme.[6] Under cross-examination, Mr Wilson at first gave evidence that Fletcher Construction covered in the mid-bid meeting with tenderers that the detailed design was only at 10 per cent level. However, he withdrew that when referred to the existence of a transcript of an audio-recording of that meeting.[7]

[8] Electrix was owned by French international company Vinci Energies SA. On 3 October 2014, Electrix submitted its proposal at a price of $16,866,182.99, valid for 30 days. It outlined a proposed scope and price, identified $950,000 of non-exhaustive potential savings through value engineering and indicated the standard FCC terms and conditions were not expected to be an issue.[8] Electrix understood two other compliant bids were received by Fletcher Construction.

[9] On 21 October 2014, Fletcher Construction confirmed Electrix as its preferred contractor for the electrical services on the Precinct project.[9] As detailed later in the

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3 EBD12/FCC.28.1.
4 EBD14/ELX14.
5 EBD0019/FCC.34.43, Exhibit 1 "GMP Clarification - CJESP" ELX.57959.
6 EBD20/ELX.29.
7 EBD5210/FCC.16.1; NOE 693/26-28.
8 EBD36/ELX167.
9 EBD64/ELX.216; EBD63/FCC.28.2.

judgment, the letter (dated 20 October 2014) envisaged the parties would negotiate a full and formal contract. In the meantime, the letter said it should be accepted as authority to proceed with engagement. This was the first Letter of Intent (LOI). Fletcher Construction sent Electrix its subcontract terms and conditions the same day.[10] On 21 February 2015, Fletcher Construction sent Electrix a copy of its Head Contract. Both parties considered a "value engineering" process would likely get the cost below the proposal price.

Electrical design work

[10] On 23 October 2014, two days after confirming Electrix as its preferred contractor, Fletcher Construction told Electrix the Ministry was rejecting the detailed design proposals for the electrical works. On 29 October 2014, the Ministry of Justice formally advised Opus of that. Electrix assisted Opus and Beca in revisiting the electrical design.

[11] The electrical design work did not go well. Fletcher Construction became frustrated with Beca, considering it was trying to persist with the rejected detailed design. On 11 December 2014, Mr Wilson asked Mr Andrew Werrett of Electrix whether Electrix would be prepared to develop the electrical design.[11] Electrix was not. Minutes of a meeting in February 2015 noted there had been more than 800 design changes since the novation.[12] On 24 May 2015, Fletcher Construction asked Electrix again to take on a formal design role.[13] Electrix considered, but rejected, doing so.[14] In July 2015, Fletcher Construction finally terminated Beca's involvement with the Precinct project.[15] Opus and Electrix continued work on the "new electrical design".[16]

[12] Mr Wilson agreed, under cross-examination, that Fletcher Construction was under severe pressure, including because of apparent lack of control of completion of

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10 EBD64/ELX216, EBD73/ELX225.
11 EBD103/ELX.796.
12 Brief of Evidence of Andrew Werrett, 8 October 2019 [Werrett Brief], at [94]; EBD173/ELX.1263.
13 EBD0284/ELX 02065.
14 Brief of Peter Harris, 10 October 2019 [Harris Brief], at [77], Reply Brief of Andrew Werrett, 8 October 2019 [Werrett Reply], at [27].
15 Harris Brief at [87]; Brief of Daniel Kenna, 14 October 2019 [Kenna Brief], at [42]-[45]; EBD0397/ELX.03038.
16 EBD395/FCC.26.0432.

the design.[17] In an internal email on 21 July 2015, Mr Wilson said he still did not have an electrical design and "the legal ramifications of failure to get this design sorted in the next 6 weeks is a potential catastrophic financial blowout and missed handover".[18] In December 2015 Mr Wilson ordered the design model be frozen, but it continued to be released with updates each month.[19] On 22 April 2016, Mr Wilson's superior in Fletcher Construction, Ms Gemma Collins, said in an email that she had "NO Confidence in Jeff or Opus to know if we have a complete design."[20] And in another internal email that day, Ms Collins said "[o]ur design management practice is totally unacceptable".[21] These emails are evidence of concerns at a senior level in Fletcher Construction at the time that there were design problems with the project. Mr Wilson's evidence is that her criticisms were unfair.[22] But he agreed that "in the cold light of day", a fair general summary of Mr Werrett's account in September 2016 was that Electrix was being substantially held up by approvals from Fletcher Construction or Opus.[23]

[13] I accept the evidence of Electrix's witnesses that the detailed design of the Precinct's electrical works was never completed. Fletcher Construction argued that various drawings for electrical works constituted design. But the evidence is that drawings known as "detailed design", which I accept would be standard in large construction projects, were not completed.[24] Installation took place before detailed design drawings were completed.[25] This meant that the scope of the electrical works continued to change throughout the project.[26]

Project management

[14] There were other problems with the management of the project too. I consider the evidence of Mr Werrett, Mr Peter Harris and Mr Shane Anketell for Electrix on

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17 NOE 721/8-11.
18 EBD402/FCC.26.462.
19 Werrett Brief at [174]; EBD559/ELX.06741
20 EBD843/FCC.26.1726.
21 EBD0844/FCC.26.1728.
22 NOE 742/5-7.
23 NOE 754/15-22.
24 Kenna Brief at [58]; Brief of Shane Anketell, 14 October 2019 [Anketell Brief], at [26], NOE 296/5-13.
25 NOE 200/26-30.
26 Harris Brief at [127].

these issues is consistent and reliable. I do not find Fletcher Construction's witnesses to be as reliable or as familiar with the issues. Mr Simon Chambers was the overall Senior Project Manager until August 2017. He points to construction programmes issued by Fletcher Construction across the whole project but he is less familiar with the electrical works. His evidence is the project was late because a number of contractors did not understand the building but he acknowledges design was another factor.[27] Mr Mike Tweeddale only came into the project at the end of August 2017 when relationships were frayed. His evidence does not sufficiently counteract that of Electrix's witnesses.

[15] Mr Werrett's evidence, which I consider honest and reliable, is that Fletcher Construction wanted to reduce its costs but also wanted Electrix "to remain in a constant state of acceleration to reach an unrealistic practical date".[28] He says that Mr Wilson insisted on unsuccessful and "incredibly expensive" electrical systems such as infloor trunking and Apex modular wiring, and made other bad decisions.[29] Mr Werrett says "the whole process was a shambles".[30]

[16] Mr Harris, Electrix's project manager for the Precinct Project and in charge of the project for much of the time. His evidence also impresses me as being honest and reliable. His evidence is that there were issues with the number of works being undertaken in close proximity, without proper sequencing or coordination and sometimes without due care.[31] For example, ceilings and walls were closed up and painted without regard to whether the services had been installed within them.[32] There was a "massive" amount of rework with areas constantly being changed, re-developed, and re-wired, with wiring being pulled out and put back on a regular basis.[33]

[17] Mr Anketell was the Construction Manager for Electrix, on site, from June 2016 to February 2018. His evidence is clear and compelling and not materially disturbed under cross-examination or by other evidence. His evidence is:

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27 NOE 814/21-24.
28 Werrett Brief at [228].
29 Werrett Reply at [8] and [30].
30 Werrett Brief at [301].
31 Harris Brief at [256].
32 Reply Brief of Peter Harris, 10 October 2019 [Harris Reply] at [15].
33 NOE 205/27-30.

(a) He normally expects to work to long-term milestones set 3-12 months ahead, with a detailed plan for the weeks or months ahead, based on detailed drawings.[34] That did not happen here.

(b) He identifies three main problems with the project: the lack of a final detailed design for electrical services; Fletcher Construction's mismanagement of the project; and Mr Wilson turning off the layers for electrical containment in the Building Information Model software. This software was to be used to choreograph spatial clashes between the work of different sub-contractors.[35] When Ms Collins learnt it had been turned off, she said in an internal email that doing so was "ludicrous" and asked how they had produced the electrical drawings.[36] This is evidence of concern at a senior level in Fletcher Construction that turning off the electrical containment might cause problems.

(c) Electrix "routinely" had to install, uninstall and reinstall materials as a consequence of problems in sequencing with other subcontractors.[37] A "massive amount", "at least 20 per cent of the installation" was reworked by Electrix.[38]

(d) Installation in a crowded ceiling space, necessary because of the delays occasioned by the lack of a detailed design, had a "huge" impact on productivity – due to a need to wait until work faces became available.[39] It also meant they could not work logically through the buildings and levels because Fletcher Construction demanded they attend to work faces as soon as they were available.[40]

(e) Fletcher Construction required Electrix to present finished-looking rooms and areas for Ministry inspection when it was not logical to do

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34 Anketell Brief at [16]-[17].
35 At [26]-[29]; NOE 324/1-5; NOE 327/24-29.
36 Exhibit F, Email from Gemma Collins (Fletcher Construction) to Jason Howden (Warren and Mahoney), 19 May 2016; FCC.26.2192.
37 Anketell Brief at [31].
38 NOE 306/33-307/4.
39 Anketell Brief at [32].
40 At [38].

according to those works at that time.[41] Although the rooms looked finished, Electrix and other subcontractors had to go back and sort them out afterwards. On occasion, Fletcher Construction overrode Electrix's objections that it was unsafe to liven a room when it was to be inspected.[42] To do this, he would pull men from other crews and swarm an area to complete it as quickly and safely as possible.[43]

(f) Mr Anketell ran through a number of specific problems, such as the need to strip out power installation, retest and replace it, each of the five times there was a flood in courtroom 2C.[44]

(g) It was "an extremely, highly pressurised, chaotic environment like none I've ever experienced before".[45] He confirmed his estimate, recorded in May 2018, that "everything took 30 per cent longer" across the whole project.[46]

[18] Mr Anketell's evidence on those points is consistent with my findings about the lack of design, the contemporaneous documentation and evidence from other Electrix witnesses. It is not undermined by Mr Anketell's evidence that Fletcher Construction did not produce Issued for Construction (IFC) drawings.[47] IFC drawings were issued, some apparently by Mr Daniel Kenna at Mr Wilson's request because Mr Wilson was busy;[48] but they were not based on a detailed design so they were not the usual sort of IFC drawings.[49] Mr Anketell's evidence on the above points about the electrical works is also not undermined by his lack of awareness of the MES500 specifications.[50] And Mr Kenna's evidence was that Mr Wilson from Fletcher Construction directed him to ignore the specifications in any case.[51] Neither is Mr

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41 At [40].
42 At [43].
43 At [44].
44 At [50].
45 NOE 333/30-31.
46 NOE 342/22-30.
47 NOE 334/25-29.
48 NOE 294/18-20.
49 EBD517/ELX.5909.
50 NOE 313/17-35.
51 NOE 271/1 – 272/24; Kenna Brief at [57].

Anketell's evidence answered by Mr Chambers' evidence of Fletcher Construction's planning process and meetings. That process did not yield the desired results.

[19] Fletcher Construction was under constant time pressure significantly driven by the deadlines to which it had agreed with the Ministry of Justice. From the earliest stages of the project in 2014, Mr Wilson was driving work reasonably hard and not obviously efficiently. Mr Kenna's evidence was that Mr Wilson insisted on regular meetings but there was no complete stream of instructions and often no record of what was to be done or whose responsibility it was, leading to confusion.[52] At a general level, an email by Ms Collins on 7 April 2016 is evidence there were concerns at a senior level within Fletcher Construction about project management:[53]

> We have not done a good job of managing the electrical situation to date, and thus I don't see how that is going to change (if using our existing services/commercial personnel) when it comes to micro managing the ordering of electrical equipment.

[20] In an internal email on 10 February 2016, Mr Wilson expressed serious concerns about how the project was tracking, saying "20 months work in 12 months is a massive impact" and indicating they were at risk for a massive claim by many subcontractors.[54] He indicated in a follow-up email to Ms Collins that he was being supported by Electrix. Under cross-examination, Mr Wilson said everyone would have accepted from early 2016 that this was a "troubled project".[55] From late 2016, Fletcher Construction demanded increased labour be on site, even though Electrix did not consider it effective.[56] Fletcher Construction requested that Electrix engage Commec as a subcontractor even though Mr Harris thought their labour rate was too high.[57] As Mr Harris said, "there was very little forward planning on the Project" which "was really just progressing on a week-to-week basis".[58] He also said "there was no cohesive or systematic approach to completion. We were being directed to complete works in a random way".[59]

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52 Kenna Brief at [47].
53 EBD791/FCC.26.1432.
54 EBD647/FCC.26.1054.
55 NOE 737/1-4.
56 Werrett Brief at [201]; Harris Brief at [158], [208] and [211]; Brief of Robert Ferris, 11 October 2019, [Ferris Brief] at [9], [14], and [16].
57 Harris Brief at [207]-[208].
58 At [184].
59 At [248].

[21] From 3 February 2017, Fletcher Construction was very aware it was paying the Ministry significant liquidated damages per day, as evident in Mr Fahey's email to Mr Ferris of Electrix on 24 February 2017:[60]

> Fletcher's position is currently dire we are being charged [significant daily liquidated damages] since 3rd February this project is impacting on the share price and balance sheet and boy its getting some serious attention. It needs drastic measures and it needs them now, I am really dependent on you getting the boys here sorted and using Aotea in an emergency is not a problem.

[22] Difficulties continued even once the project was (partially) handed over to the Ministry in October 2017. Electrix and its subcontractors had to work outside of normal hours in order not to interfere with the operations of the Ministry and tenants on site.[61]

[23] No doubt some problems were also caused by Electrix, as Mr Anketell fairly acknowledged.[62] It would be surprising if they were not. But I do not consider there is sufficient evidence that Electrix caused difficulties or inefficiencies greater than what would usually be expected on a large commercial project.[63] The specific problems identified by Mr Chambers and Mr Tweeddale that were of any significance were explained by Electrix's witnesses, particularly by Mr Harris and Mr Anketell.[64]

Letters of Intent, payments and negotiations

[24] On 20 January 2015, Electrix issued its first payment claim, in response to the first LOI issued 21 October 2014.[65] Fletcher Construction paid it, with a 10 per cent retention.[66] On 20 March 2015, Fletcher Construction issued Electrix with a second LOI.[67] It provided Electrix with "authority to proceed" to engage designers, subcontractors and suppliers up to a value of $2.5 million. It noted "the final contract value is currently forecast to be circa $14m".

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60 EBD2051/ELX.30101.
61 NOE 773/1-9.
62 NOE 333/5-11.
63 NOE 123/25-27.
64 Brief of Simon Chambers, 24 October 2019, [Chambers Brief], at [22]-[23], [25]-[28], [41]-[44], [50]-[57]. Brief of Michael Tweeddale, 24 October 2019, [Tweeddale Brief], at [19]-[20], [42]-[43], [56]-[63], [68]-[72], [73]-[78], [80]-[91], [99]-[1-6]. Reply Brief of Shane Anketell, 14 October 2019 [Anketell Reply], at [7]-[18], [22]-[25], [32]-[38]; Harris Reply at [13]-[20].
65 EBD128/FCC.09.0001.
66 Werrett Brief at [100].
67 EBD180/FCC.28.3.

[25] Proceeding in this way, under the authority of LOIs, became the pattern by which Fletcher Construction authorised, and Electrix implemented, construction of the electrical works on the Precinct building. LOIs became the standard, and indeed the only, formal instrument used by Fletcher Construction and Electrix to regulate their relationship.

[26] Fletcher Construction was clearly concerned about both the price and the timetable of the Precinct project from the start. So was the Ministry. On 23 May 2016, they both executed a variation converting the contract price into a fixed-price lump-sum amount, creating new completion dates in January 2017 and providing for liquidated damages for late completion from 2 February 2017.[68] From 3 February 2017, under its head contract with the Ministry, Fletcher Construction was paying liquidated damages for late completion of the project, at a significant daily rate.

[27] Perhaps related to that, from March 2017 there was a concerted effort by Fletcher Construction and Electrix to negotiate a formal contract for the electrical works.[69] Drafts of agreements were exchanged. They appear to have come close to succeeding in May 2017. There is evidence that the negotiations were over a cost-plus contract.[70] The evidence of Mr Neville Cleveland, a consultant to Fletcher Construction, was that the negotiations went through various stages, of being about a lump-sum, cost-plus and verified costs.[71] But the negotiations unravelled and ultimately failed. Both parties agree those negotiations did not result in a contract.

[28] The evidence of Mr Harris and Mr Werrett from Electrix is that, in early 2017, Fletcher Construction told Electrix that it no longer needed to raise the ceiling of the LOIs, or issue new LOIs, because a cost-plus arrangement was in place.[72] But Mr Werrett also sent an email on 26 April 2017 denying a cost-plus arrangement had been formalised or agreed.[73]

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68 CBD1196.1.
69 Werrett Brief at [244]-[277].
70 EBD2869/ELX.38894; EBD2868/ELX.38918.
71 NOE 765/8-9.
72 Harris Brief at [14], Werrett Brief at [26].
73 EBD2621/ELX.36109.

[29] By late May 2017, tensions in the relationship had worsened, as might be expected. Fletcher Construction became more aggressive, withholding more of the payments requested by Electrix, even recording a negative payment as due from Electrix on 22 May 2017.[74] From late May 2017 until September 2017, Fletcher Construction's payment schedules stated "On account payment until contract negotiations advanced to resolution of contract method and cost substantiation".[75] But Electrix kept on making payment claims and Fletcher Construction still made payments. The last payment made, in November 2017, was a partial payment towards the October payment claim.

[30] Overall:

(a) Fletcher Construction issued nine LOIs, totalling $14,055,145, with the last being issued on 13 February 2017.[76]

(b) Electrix issued 42 payment claims over the life of the project, until the end of May 2018, totalling $28,892,016.10.[77]

(c) Fletcher Construction paid Electrix exactly $21.6 million overall.

Final stages of the project

[31] In December 2017, the legal aspect of the relationship was handed over to lawyers. A letter of 7 December 2017 by Lane Neave, for Fletcher Construction, to Bankside Chambers, for Electrix, sought to conduct a costs review/substantiation of the sums claimed to that point by Electrix.[78]

[32] Understandably, tensions on site appear to have worsened as well. In October 2017 the project was handed over to the Ministry, which occupied parts of the site along with other tenants. But work on the Precinct project, including the electrical

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74 EBD2922/ELX.39407.
75 EBD4641/ELX.51253.
76 EBD1991/ELX.29415.
77 EBD5140/ELX.56930.
78 EBD 4899/ELX.AD137 at [12].

works, continued throughout 2018.[79] Electrix made its last payment claim in May 2018. Practical completion of the Precinct project overall was not achieved by Fletcher Construction until 22 February 2019.

[33] Electrix's board decided not to walk away from the project, despite the lack of a contract.[80] Mr Werrett's evidence is that he wanted to stop involvement with the project but the Electrix board decided to continue.[81] He said that Electrix stayed "[o]ut of loyalty and goodwill" and in the "hope that contract negotiations would come to a mutually acceptable conclusion".[82]

Trial

[34] The trial of this proceeding occurred over four weeks in October 2019.

[35] At the beginning of trial I heard an application by Electrix for particular discovery of agreements and payment schedules Fletcher Construction had with subcontractors other than Electrix. Mr Quinn submitted, for Electrix, that these documents would provide context for, and support the reasonableness of, Electrix's claim.[83] Mr Fulton, for Fletcher Construction, submitted the documents were irrelevant to the issues to be tried. However, Fletcher Construction was prepared to provide four sets of documents to Electrix on a confidential basis and on the basis of certain conditions regarding their use by witnesses. I considered that the delays and troubled nature of the project were already generally reflected in the evidence. I considered the additional documents sought were not likely to be relevant to the issues as I understood them, concerning the contract or lack of a contract, and the reasonableness of the costs of the electrical works. I declined the application.

[36] By consent, I made orders excluding some witnesses from hearing the testimony of others before they were called. The nine witnesses called for Electrix were:

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79 Werrett Brief at [337].
80 Ferris Brief at [32].
81 NOE 166/19-21.
82 NOE 166/18-23.
83 Memorandum of Counsel for the Plaintiff seeking an order for particular discovery, 3 October 2019, at [12].

(a) Mr Andrew Werrett, who helped to prepare Electrix's proposal in 2014 and was Electrix's project manager for the Precinct project from August 2017.

(b) Mr Peter Harris, Electrix's project manager for the Precinct Project from December 2014 to August 2017.

(c) Mr Robert Ferris, Electrix's Managing Director, who was a General Manager and a director between 2008 and 2018.

(d) Mr Timothy Harding, Electrix's Commercial Manager from January 2017.

(e) Mr Daniel Kenna, employed by Electrix to assist with technical review and design development of the electrical services from April 2015 to November 2016.

(f) Mrs Kylie Stanley, Electrix's administrator in Christchurch.

(g) Mr Shane Anketell, Electrix's Construction Manager for the project from June 2016 to February 2019 and then contracts manager.

(h) Mr Christopher Thompson, an expert Chartered Quantity Surveyor, based in Sydney.

(i) Mrs Catherine Williams, an expert claims consultant, based in Adelaide, who gave evidence by Audio-Visual Link (AVL).

[37] The eight witnesses called for Fletcher Construction were:

(a) Mr Jeff Wilson, Fletcher Construction's Building Services Manager for the Precinct project until May 2016.

(b) Mr Neville Cleveland, consultant to Fletcher Construction from March 2017 to May 2017, regarding negotiations with Electrix.

(c) Mr Simon Chambers, Fletcher Construction's Senior Project Manager on the project between March 2014 and August 2017.

(d) Mr Mike Tweeddale, consultant to Fletcher Construction who managed the electrical close out from August 2017 to May 2018.

(e) Ms Esther Wallace, a Fletcher Construction quantity surveyor (whose evidence was taken as read and who was not cross-examined).

(f) Mr Patrick Hanlon, an expert quantity surveyor based in Auckland.

(g) Mr David Quincey, an expert quantity surveyor based in Sydney.

[38] Mr Hanlon and Mr Thompson gave their evidence in a "hot tub" together. No not really, but that's what the practice is called where witnesses give evidence about each issue in turn, together, responding to each other's evidence (on oath, fully clothed, in court). It was a helpful way of testing their evidence and both made changes to their opinions as a result.

[39] Mr Fulton, for Fletcher Construction, objected to some of Electrix's evidence on the basis it was hearsay. He was content for me to consider that in due course, which I have done. I have not relied upon inadmissible hearsay. Where I quote or refer to an email sent by someone other than a witness it is because I consider it is either not a "statement" within the definition of s 4(1) of the Evidence Act 2006 or it is not relied upon for the truth of its contents. If necessary, I consider the Head Contract, design specification documents and LOIs were business records and admissible under s 19 of that Act.

[40] During the trial, Mr Fulton, for Fletcher Construction, submitted that a few documents are subject to confidentiality concerns for commercial reasons, such as the ultimate overall price of the Precinct project and the daily amount of liquidated damages. I issued judgment granting an application for media access to a variety of documents but not others.[84] As foreshadowed there, before issuing the current

[84] *Electrix Ltd v Fletcher Construction Co Ltd* [2019] NZHC 2678.

judgment, I provided a final draft to counsel for confirmation that the judgment does not contain any commercially confidential information that should not be made public. Mr Fulton submitted that three redactions should be made, regarding the global cost of the project and the amount of liquidated damages. Mr Quinn submitted that there cannot possibly be continuing commercial sensitivity in these figures for Fletcher Construction. He also identified three typographical errors, which I corrected. I agree that there is no good reason for the global project cost to be withheld from the judgment. It is important factual context for the findings in the judgment and a search of Stuff indicates the project cost has been in the public domain since 2015 anyway. In relation to liquidated damages it suffices to note in the judgment that the daily figure was significant.

Issue 1: Was there a contract?

The law about whether a contract exists

[41] Somewhat obviously, the law of contract regulates contractual relationships. But it only does so if there is a contract, at law. Even in commercial contexts, it sometimes occurs that parties do business without forming a contract. In *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* the parties signed a heads of agreement in relation to the supply of gas but further negotiations towards a contract broke down.[85] Four of a full court of five judges in the Court of Appeal found:[86]

> The question whether negotiating parties intended the product of their negotiation to be immediately binding upon them, either conditionally or unconditionally, cannot sensibly be divorced from a consideration of the terms expressed or implicit in that product. They may have embarked upon their negotiation with every intention on both sides that a contract will result, yet have failed to attain that objective because of an inability to agree on particular terms and on the bargain as a whole. In other cases, which are much less common, the intention may remain but somehow the parties fail to reach agreement on a term or terms without which there is insufficient structure to create a binding contract.

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85 *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand* [2002] 2 NZLR 433 (CA). The Court's judgment continues to be applied. See e.g. *Tower Insurance v Nicon Ltd* [2019] NZCA 332 at [30]. And see, in the United Kingdom, *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14, [2010] 1 WLR 753.

86 At [50].

[42] The Court said:

> [53] The pre-requisites to formation of a contract are therefore:
>
> (a) An intention to be immediately bound (at the point when the bargain is said to have been agreed); and
>
> (b) An agreement, express or found by implication, or the means of achieving an agreement (eg an arbitration clause), on every term which:
>
> (i) was legally essential to the formation of such a bargain; or
>
> (ii) was regarded by the parties themselves as essential to their particular bargain.
>
> A term is to be regarded by the parties as essential if one party maintains the position that there must be agreement upon it and manifests accordingly to the other party.
>
> [54] Whether the parties intended to enter into a contract and whether they have succeeded in doing so are questions to be determined objectively. In considering whether the negotiating parties have actually formed a contract, it is permissible to look beyond the words of their "agreement" to the background circumstances from which it arose – the matrix of facts.

[43] The Court said a court "has an entirely neutral approach when determining whether the parties intended to enter into a contract"; whereas, if it is satisfied a contract exists, it will "do its best to give effect to their intention and, if at all possible, to uphold the contract despite any omissions or ambiguities".[87]

[44] In *Fletcher Challenge Energy Ltd*, the majority of the Court found the Heads of the Agreement was "in the nature of a progress report from the negotiators" and was not intended by the parties to be a binding contract.[88] Accordingly, the Court found there was no contract.[89] As Fisher J said in *Transpower New Zealand Ltd v Meridian Energy Ltd*, "it is not for the Court to impose upon the parties a fictional contract which they ought to have agreed upon but in fact did not".[90]

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87 At [58]. And see *Schmuck v Opua Coastal Preservation Inc* [2019] NZSC 118, (2019) NZCPR 513 at [64], n 34.

88 At [74], [83].

89 At [84].

90 *Transpower New Zealand Ltd v Meridian Energy Ltd* [2001] 3 NZLR 700 (HC) at [57].

Submissions

[45] Mr Quinn, for Electrix, submits there clearly was no contract. He submits the burden to prove there was a contract rests on Fletcher Construction, which alleges that in its counterclaim. He submits there would be great injustice in retrospectively imposing on parties a contract that they did not know existed and therefore could not perform except by accident. He submits the cases of *Fletcher Challenge Energy Ltd* and *British Steel Corporation v Cleveland Bridge and Engineering Co Ltd* were closer than this case to forming a contract, but no contracts were found to exist in those cases.[91] Mr Quinn submits the parties anticipated entering a contract but never reached agreement on either a price or a method of valuing the works. He points to the lack of evidence as to why Fletcher Construction made payments to Electrix despite its payment schedules recording the payments were "on account". He submits the very strong inference is that Fletcher Construction never regarded Electrix's right to payment as being determined by, or restricted to, LOIs. He submits the payments made from May 2017 were "on account". Mr Quinn submits there was no evidence of a contract being agreed in: the LOIs; the meeting of 13 April 2015; the events of October 2014 to April 2015; the budget or price; or the head contract, draft sub-contract or MES500.

[46] Mr Fulton, for Fletcher Construction, accepts he bears the burden of proving there was a contract. He submits that, objectively, a partly written and partly oral agreement was concluded between the parties. He submits:

(a) The agreement was for the delivery of electrical services established by Electrix's proposal in response to Fletcher Construction's RFP. The scope of the services, which did not have to be detailed or itemised, was revised during the course of the works as usually happens in the industry.

(b) The price was initially for no more than (a cap of) $15.975 million. That was revised with the electrical re-design between June and August 2015 to no more than $15 million. It was agreed, at the latest, by 4

[91] *British Steel Corporation v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504.

August 2015 but there is a reasonable inference agreement on price was reached in early June 2015.

(c) The terms and conditions of the agreement are primarily contained in the standard terms and conditions of Fletcher Construction's subcontractor agreement. These terms also incorporated the Head Contract terms and conditions. The minutes of a meeting on 13 April 2015 clearly record Electrix's acceptance of the standard terms of the subcontractor agreement and that is the point at which an agreement was concluded. The minutes of the meeting are "a key plank" of Fletcher Construction's argument.

(d) If nothing else, the LOIs provide a minimum significant base level of agreement between the parties. It is inherently unlikely that these commercial parties would have engaged in all these works without agreement on any contractual terms at all.

Was a contract formed at the 13 April 2015 meeting?

[47] I deal first with the meeting of 13 April 2015. The minutes are filled in by pen in a printed template entitled "Preferred Subcontractor meeting". There appear to have been seven people present, who signed the minutes either then or later. It is not clear who filled in the template.[92] There is no evidence a copy of the minutes was subsequently sent to Electrix.[93]

[48] Mr Fulton relies on a statement in the template in bold, on the first page of the minutes after the list of each party's key personnel, which said:[94]

> NB: The purpose of this meeting is to confirm the Subcontractors acceptance and understanding of fundamental conditions in the subcontract agreement as well as review key issues relating to the performance of the subcontract. Changes to the Subcontract Agreement shall not be accepted other than as agreed herewith.

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92 NOE 708/32-709/02.
93 Harris Brief at [35].
94 EBD204/FCC.28.0004.

[49] Over six pages, the template has numbered items under the headings of: Project Information; General Contract Items; Specific Action Items; and Health and Safety. Under item 2, the General Contract Items, the following entries were annotated:

(a) 2.1 Agreed Contract Value (subject to confirmation in the Letter of Acceptance): "TBC". There is no evidence of a letter of acceptance being issued.

(b) 2.2 Scope of Works (based on the Contract Documents and including): "Electrical from HV/LV, distribution, lighting, power distribution, generators, lightning protection".

(c) 2.3 Subcontract Conditions: three boxes were ticked, against:

(i) Fletcher Construction's Subcontract Agreement;

(ii) Fletcher Construction's Standard Conditions of Subcontract;

(iii) Site Rules: Agreed to abide by.

(d) 2.4 Tender qualifications: four items were written in, regarding access, scaffolding, craneage and transformers.

[50] Mr Fulton submits, objectively, the application of the ticks to item 2.3 constituted unqualified acceptance of those terms and conditions.

[51] Under a heading "3.0 Specific Action Items" was this:

3.1 **Signed Subcontract Agreement**

To be posted/collected for signing after Client approval. Documents must be signed and returned to Fletcher Construction within 10 working days and prior to commencement on site. **No progress payments will be made prior to receipt of the signed subcontract agreement and associated documentation.**

[52] Fletcher Construction's standard subcontract was sent to Electrix on 28 April 2015, in response to Mr Harris's request.[95]

[53] With one exception, the witnesses who were present at the meeting understandably had difficulty remembering much about it:

(a) Other witnesses recalled Mr Chambers leading the meeting.[96] But Mr Chambers could not recall many details of it in giving his evidence.

(b) Mr Wilson considers that, in addition to being logistical, this meeting concerned safety (and perhaps other) aspects of understanding the project.[97] His recollection is that Electrix did not raise issues at the meeting. He states there was not an agreed value to enter in item 2.1.[98] He considers the subcontract agreement was probably not available at the meeting.[99]

(c) Mr Harris does not have any memory of attending the meeting.[100] He is sure he would not have confirmed or otherwise negotiated subcontract conditions with Fletcher Construction, as he did not have authority to do so.[101]

(d) Mr Kenna was at the meeting on his first day of employment by Electrix, though he had worked with Electrix as a contractor before that. He made no mention of this meeting in his brief of evidence or his brief in reply. But under cross-examination, Mr Kenna gave evidence that Mr Harris stated at the meeting there was no agreement with Electrix and he, Mr Harris, said he "could not sign off on anything".[102] Mr Wilson believes Mr Kenna's recollection of Mr Harris' statements was

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95 Harris Brief at [69].
96 NOE 711/5-8, 278/1-5.
97 NOE 707/15-25.
98 NOE 710/4-15.
99 NOE 710/16-25.
100 Harris Brief at [33].
101 Harris Brief at [23]-[29], [34]; Harris Reply at [4]; NOE 184/11-21.
102 NOE 279/22-26.

wrong.[103] Mr Harris does not give evidence of making such statements. The other witnesses do not recall them being made either. Mr Wilson says they were not.

[54] Mr Fulton submits Mr Kenna's evidence about what happened at the meeting, which was not in his briefs, is not credible, is far too convenient and is not consistent with the evidence of the other witnesses that Electrix did not convey to Fletcher Construction their internal authority limits. I do not accept Mr Kenna's evidence.

[55] But I do not consider the evidence comes close to establishing the proposition that Fletcher Construction and Electrix intended the product of their interactions at the 13 April 2015 meeting to have been immediately binding upon them, either conditionally or unconditionally. Indeed, I am not even persuaded they were really contractual negotiations. The context was difficulties with design work on the electrical works. The previous week, on 8 April 2015, Mr Wilson demanded "momentum and urgency on the project".[104] Despite the note in the standard template about the purpose of the 13 April 2015 meeting being to confirm fundamental conditions in the subcontract agreement, the witnesses' evidence suggests otherwise. Mr Chambers, from Fletcher Construction, agreed "the key point of the meeting is to clear the way so that the subcontractor can get on site and start working and do so in a way that complies with whatever rules are relevant for the site".[105]. That fits with the contextual evidence of Fletcher Construction's impatience for work to start, irrespective of design or contractual issues being sorted out.

[56] The evidence of Fletcher Construction's witnesses does not suggest they considered or intended that meeting to have resulted in the parties being bound, conditionally or unconditionally. There is no contemporaneous documentary evidence suggesting either party considered the meeting had that effect. The evidence of Mr Harris, the key Electrix witness, that he did not have authority to commit Electrix to a subcontract,[106] indicates that Electrix did not regard it as having that

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103 NOE 712/9-17.
104 EBD0197/ELX.01470.
105 NOE 800/29-802/5.
106 Harris Brief at [23].

effect. I come to that conclusion even putting aside the evidence of Mr Kenna about Mr Harris's explicit adoption of such a position.

[57] Even if the parties had intended to be bound by the 13 April 2015 meeting, it is not clear to what they would have been bound. The meeting did not agree on a price, an adequate specification of the services to be delivered or the terms and conditions of the subcontract. The essential terms remained inchoate:

(a) There was no agreed contract value, nor a subsequent letter of acceptance of an agreed contract value, as envisaged in the template.

(b) The specification of the scope of works at the meeting was cursory at best. The detailed design had been rejected by the Ministry.

(c) It is not clear what the "ticks" against the boxes for subcontract agreement or standard conditions of subcontract meant. Mr Wilson's evidence, that they meant the terms were accepted,[107] is not credible given that the documents appear not to have even been available at the meeting.

[58] If, as he now says, Mr Wilson believed at the time "that the key terms and parameters of the contract had been agreed by the end" of the meeting, I do not consider that belief was well-founded.[108] And neither party subsequently acted as if they had concluded a contract at that meeting, as I outline below. I do not accept the parties intended to be bound at the meeting of 13 April 2015.

Were the letters of intent evidence of a contract?

[59] Neither do I accept Mr Fulton's submission that the LOIs provide a minimum base level of agreement between the parties. They do provide evidence that Electrix and Fletcher Construction were both working with the "intent" (as the name suggests) that there would be a contract. They indicate some general parameters in terms of what the price and scope of works was expected to be. But they are not evidence of

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107 Wilson Brief at [84].
108 Wilson Brief at [87].

an intention to be immediately bound; rather, the reverse. And they do not constitute agreement on a contract price. The most relevant parts of the first LOI, dated 20 October 2014, recorded:[109]

> We confirm that **Electrix Ltd** has been recommended by Fletcher Construction to be taken to preferred contractor status for the Electrical Services Package on the above named project.
>
> The works will be a contract to the Fletcher Construction Company Ltd's contract works with the client, **The Ministry of Justice.** As discussed in your Mid Bid meetings and Initial Successful Tenderers meeting this period of design co-ordination is likely to take approximately 12 weeks, . . . and includes . . .generally working towards meeting the main contract GMP figure and programme as included within your submitted tender figure.
>
> …
>
> It is envisaged that Electrix Ltd and FCC will enter into a full and formal contract following successful completion of the co-ordination phase by January / February 2015 however, FCC reserve the right to disengage from this Letter of Intent and re-tender these works should sufficient progress to meeting the GMP, programme or clients expectations not be made during the coordination period.
>
> In the meantime, please accept this letter as authority to proceed with engagement as detailed above and any necessary design to meet programme and budget requirements.
>
> No resources or materials for carrying out the works are to be committed or ordered without prior written approval from FCC.

[60] The subcontract was put in the future tense. Electrix was envisaged to be "generally working towards" meeting the GMP.

[61] The second LOI, of 20 March 2015, was issued on the same day Fletcher Construction asked Electrix to issue its own LOIs to its preferred sub-contractors.[110] It mentioned a figure of "circa $14 million". It also envisaged the parties would enter a full and formal contract and said "[i]n the meantime, please accept this letter as authority to proceed with engagement of your Designers, Sub-contractors and suppliers with commitment not to exceed $2.5m".[111] The LOI also stated "your original quote will be used as a baseline for you to continually 'firm up' sections of work as we work towards a fixed price lump sum".

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109 EBD0075/ELX.00227 (emphasis in the original).
110 EBD179/ELX.01331; Werrett Brief at [103].
111 EBD180/FCC.28.0003.

[62] The subsequent LOIs referred back to the first letter of 20 October 2014 (but misstated the year as 2015). The last LOI, of 13 February 2017, was issued for $14,055,145.[112] Yet Fletcher Construction certified and paid more than that. It would not have done so if it had intended the LOIs to be binding.

[63] I accept Mr Werrett's and Mr Harris' evidence, for Electrix, that the LOIs were the means by which Fletcher Construction authorised Electrix to spend money procuring materials.[113] I accept Electrix's submission that the LOIs were "essentially a means for giving comfort to Electrix to advance procurement in circumstances where it did not have a contract".[114] Fletcher Construction did not even regard them as necessary for that, when it was anxious to make progress with the project. On 16 August 2016, Mr Fahey, of Fletcher Construction, told Mr Harris, of Electrix, not to worry about a formal response to concerns from the Project Manager, writing in an email "we need some more guys. Me client me pay."[115] On 16 September 2016, Mr Fahey told Mr Harris "Peter, I told you this was approved do not wait for a piece of paper get them ordered".[116]

[64] The references to a contract in Electrix's agreement with the Ministry, and in Electrix's subcontracts, and the reference in a warranty agreement to the 20 March 2015 LOI as a "subcontract", do not alter my view.[117] These documents were signed without much regard to the legalities of the situation which, indeed, appears to be the basis upon which these parties undertook the project throughout. The LOIs are not evidence of an intention to be bound. The payments made by Fletcher Construction to Electrix were "on account" as stated in the payment schedules.

Was a contract otherwise agreed?

[65] I do not consider there is evidence that Electrix and Fletcher Construction intended to be immediately bound at any other point, sufficient to satisfy the pre-

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112 EBD1968/FCC.28.0028.
113 Werrett Brief at [23] and [274]; Harris Brief at [62].
114 Electrix's Closing submissions, 31 October 2019, at [31].
115 EBD1275/ELX.17719. Werrett Brief at [201].
116 EBD 1339/ELX.19823 and Harris Brief at [160].
117 EBD5101/ELX.56295, EBD1049/ELX.14939, EBD5265/FCC.24.0020.

requisite of formation of a contract. Neither did they agree on a contract price which Electrix, at least, reasonably regarded as an essential term.

[66] Mr Fulton submits there was evidence of an agreed price at a number of points:

(a) On 10 June 2015, the Senior Quantity Surveyor stated $15 million was "the amount [the Ministry] will sign for".[118] A letter from Opus on 4 August 2015 stated that budget categorically.[119]

(b) Internal Electrix documents record the $15 million and mid $14 million figures.[120]

(c) Mr Werrett's evidence is that Electrix was expected to deliver for mid $14 million.[121]

(d) Mr Harris accepts that Electrix had committed to deliver within a budget of $15 million, and Mr Wilson is clear Electrix was supposed to come in at mid $14 million.[122]

(e) Mr Wilson's evidence that Fletcher Construction wanted to convert the budget of $15 million into a fixed price between $14 million and $15 million and Mr Prance, Mr Werrett's manager, was clear that Electrix recognised the GMP budget constraint and would work within that.[123]

(f) Fletcher Construction relied upon Electrix's ability to meet the electrical budget when it agreed a variation with the Ministry in late 2015.

[67] None of this evidence indicates the parties agreed on a contract price. I consider the contemporaneous documentary evidence suggests there was an estimated

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118 EBD318/FCC.26.0313.
119 EBD318/FCC.26.313, EBD416/FCC.34.32.
120 Wilson Brief at [158], [163]-[173].
121 NOE 71/32-34, 72/1-10.
122 NOE 187/1-7, 26-35, 189/10-12, 25-28.
123 Wilson Brief at [148]-[149].

ballpark or cap within which Electrix and/or Fletcher Construction (or other actors) expected the contractual price to be agreed. There is no evidence of that being agreed to be a contractual price. And there is no compelling evidence of an intention by the parties to be immediately bound at any particular point. I do not understand the evidence of the witnesses to contradict that.

[68] Mr Wilson was Fletcher Construction's primary witness on this point. His evidence was that "[t]here comes a point where, although the amount is described as a budget it becomes treated as the GMP for the package".[124] But he could not identify exactly when, between Electrix's submission of the bid, and April 2015, the budget figure had been agreed.[125] His evidence, under cross-examination, that Electrix agreed to "work towards" achieving the GMP price without knowing what it was, is not credible.[126] It is also inconsistent with his evidence-in-chief that "it may be correct that the precise price was not finally agreed and the precise make up of the electrical package was continuing to be developed",[127] and, under cross-examination, that "until it's a fixed price lump sum it's still open book".[128] Mr Wilson's evidence under cross-examination is that Electrix would not have been "in contract financially" in January 2016 because "we hadn't actually got a final fixed price".[129] His evidence is insufficiently specific or convincing to sustain an intention to be bound by Fletcher Construction, let alone Electrix. My impression is that, at the time, Mr Wilson was working to a budget, believed others were doing the same and he assumed that was enough without worrying about the legalities.

[69] There is also insufficient evidence that the terms of a contract were provided by the head contract, the draft sub-contract or the MES 500 specification. The terms of the head contract adopted from NZS3910:2003 had been modified by agreement between Fletcher Construction and the Ministry. A template draft subcontract was sent by Fletcher Construction to Electrix, at Electrix's request, on 21 October 2014 and, on 13 May 2016, Electrix asked Fletcher Construction to confirm it was still valid.[130]

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124 Wilson Brief at [145].
125 NOE 714/1-13.
126 NOE 701/15-20.
127 Wilson Brief at [163].
128 NOE 696/25.
129 NOE 735/1-5.
130 EBD64-74/ELX.00216-ELX.00226; EBD928/ELX.12523.

Electrix marked up a version for Fletcher Construction's review in May 2017.[131] There were three versions of the MES 500 specification and the evidence does not suggest it effectively governed the project.[132] There is insufficient evidence these documents were considered by Fletcher Construction and Electrix to govern their relationship.

[70] Furthermore, there is evidence in the contemporaneous documents that one party or the other did *not* regard themselves as having yet formally agreed on a contract on a number of occasions. For example:

(a) On 17 April 2015, Mr Harris invited Mr Wilson and others to a meeting to discuss "the way forward regarding Electrical Contract".[133]

(b) On 8 May 2015, Mr Wilson told Mr Harris to act on a complaint of his because "we are still in a preferred contractor position with Electrix".[134]

(c) On 26 June 2015, annotations on Mr Harris' 15 per cent review of the project stated the "actual contract" and the "price, programme" was "still to be agreed".[135]

(d) On 29 June 2015, Mr Wilson sent an email to Electrix that noted "[w]e have not yet finalised your contract".[136]

(e) On 19 January 2016, Mr Harris told Mr Wilson in an email that "if we were in contract we would be issuing delays".[137]

(f) On 30 September 2016, Mr Harris's draft project report stated "there is still no Contract in place at this time."[138]

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131 Werrett Brief at [260]; Brief of Timothy Harding, 13 October 2019, at [48]-[50].
132 See for example NOE 730/11-30, EBD395/FCC.26.0432.
133 EBD207/ELX.01577.
134 EBD240/ELX.01852
135 EBD446/ELX.04235
136 EBD338/ELX.02575.
137 EBD591/ELX.07399
138 Harris Brief at [165]; EBD1403-1406/ELX.20728-20731.

[71] Finally, the parties agree that they tried to negotiate a formal contract in March 2017 but failed. Fletcher Construction acknowledges that without the other explanation and evidence it points to, an inference could be drawn from the fact of negotiations that there was no prior agreement.[139] I have concluded the other explanations and evidence it points to do not sustain its claim there was a contract. I draw the inference accordingly.

[72] I agree with Mr Fulton that it is inherently unlikely that these commercial parties would have undertaken and paid for the electrical works on the Precinct project without agreement on contractual terms. But that is what they did. They expected they would be able to reach agreement on a contract, but they never did. On the basis of the evidence before me, Fletcher Construction and Electrix did not intend to be bound by a particular agreement at any point and did not agree on the core essential terms for the provision of the services.

Issue 2: Is there liability for the "amount deserved"?

The law of quantum meruit liability for "the amount deserved"

[73] The High Court of Australia recently explained the evolution of what is still known as a claim for quantum meruit: a claim to pay reasonable remuneration for services.[140] From the late sixteenth century in England, a claim of quantum meruit was enforceable under the general form of action for breach of contract (assumpsit). It then came to be enforced by the more convenient form of action for recovery of debt (indebitatus assumpsit). The terminology of quantum meruit endured in relation to services.

[74] Initially, a defendant's promise to repay the plaintiff had to be proved expressly. But, over time, courts increasingly implied a promise, regardless of the intentions of the parties.[141] Quantum meruit sat alongside other forms of action to recover money ("money had and received" or "money paid"), and goods ("quantum

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139 Fletcher Construction's Closing Submissions, 31 October 2019 [Fletcher Construction's Closing], at [70].

140 *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32, (2020) 373 ALR 1 at [150].

141 Graham Virgo *The Principles of the Law of Restitution* (3rd ed, Oxford University Press, 2015) at 44-47; Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) at [9.2.2].

valebat").[142] Collectively, they came to be known as the law of "quasi-contract".[143] Quasi-contract played a key part in, and was swept into, the American creation of the field of restitution law from the early 1890s.[144]

[75] Ironically, the dynamism of restitution law as a unified field of law died away in the United States in the 1960s or 1970s but was reborn in England and the Commonwealth.[145] The seminal English text, Lord Goff and Professor Jones' *Law of Restitution* [*Goff & Jones*], was first published in 1966.[146] Professor Peter Birks offered a comprehensive view of restitution law, including quantum meruit and other aspects of quasi-contract, unified around the civil law notion of unjust enrichment.[147] The law of restitution, and quantum meruit in particular, in England and Wales now seems firmly tethered to the conceptual foundation of unjust enrichment, though there are periodic academic attempts to cast loose again.[148]

[76] In England and Wales, unjust enrichment obliges a defendant with no defence to disgorge a benefit unjustly derived at the expense of a plaintiff.[149] Quantum meruit in this wider sense is available when there is no contract.[150] A defendant is said to be unjustly enriched by a plaintiff's services if the defendant requested them or freely accepted them, knowing the plaintiff expected to be paid.[151] The unjustness of an enrichment could be found in factors such as the "failure of basis", where a benefit is conferred on the basis of a condition which is not fulfilled,[152] or "free acceptance", where a defendant is aware of the benefit, chooses not to expressly refuse it and appreciates the benefit is not conferred gratuitously.[153] *Goff & Jones* states that where benefits are transferred in anticipation of a contractual agreement which is intended to

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142 Virgo, above n 141, at 45.
143 Kit Barker and Ross Grantham *Unjust Enrichment* (2nd ed, LexisNexis, Chatswood (NSW), 2018) at [1.6].
144 Chaim Saiman "Restitution in America: *Why the US Refuses to Join the Global Restitution Party"* (2008) 28 Oxford Journal of Legal Studies 99 at 101.
145 At 102-103.
146 Gareth Jones (ed) *Goff & Jones: The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998) [*Goff & Jones*].
147 Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, Oxford, 1985).
148 See, recently, Andrew Burrows "In Defence of Unjust Enrichment" (2019 78 Cambridge Law Journal 521.
149 *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938 at [9].
150 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256.
151 *Goff & Jones,* above n 146, at 18.
152 At [12-01].
153 At [17-09]–[17-16].

provide for payment for those benefits, and the contractual agreement does not materialise, the general principles of failure of basis apply.[154] Alternatively, the free acceptance of the services might be a source of enrichment and/or injustice.

[77] Courts in most common law jurisdictions have espoused, with varying levels of enthusiasm, the notion that quantum meruit and other aspects of restitution law are founded on the concept of unjust enrichment. But Professor Birks himself was aware that a remedy of restitution is triggered by events other than unjust enrichment.[155] There has been a resurgence of academic commentary criticising the equation of restitution law and unjust enrichment.[156] And New Zealand courts have not joined so enthusiastically with other jurisdictions' embrace of unjust enrichment as a unifying doctrinal foundation. We have risen to the challenge recently posed by Gagelaar J in the Australian High Court, of resisting "the temptation to intellectual gratification that accompanies any quest to portray cases in which the common law recognises an obligation of restitution as the conscious or unconscious application of one Very Big Idea".[157] In characteristically pragmatic New Zealand fashion, we have generally resisted the embrace of unjust enrichment as a unifying doctrinal foundation for quantum meruit, in favour of identifying its more precise elements.

[78] In *Dickson Elliott Lonergan Limited v Plumbing World Limited,* Eichelbaum J observed that the cases are fact dependent but identified the following elements as relevant:[158]

(a) The defendant represented that it would proceed with the proposal.

(b) The defendant requested the plaintiff should commence work immediately.

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154 At [16-01].

155 P Birks "Misnomer" in W Cornish et al (eds) *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (Hart, Oxford, 1998).

156 For example, Hanoch Dagan *The Law and Ethics of Restitution* (Cambridge University Press, Cambridge, 2004) at ch 2.

157 *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32, (2019) 373 ALR 1 at [80].

158 *Dickson Elliott Lonergan Limited v Plumbing World Limited* [1988] 2 NZLR 608 (HC) at 613.

(c) The work would have been of benefit to the defendant had the contract proceeded.

(d) If it had, the plaintiff would have been indirectly compensated for the costs of such work.

(e) The defendant made a unilateral decision not to proceed.

[79] In 2005, in *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health*, Winkelmann J in the High Court observed "the quantum meruit cause of action continues to evolve".[159] She accepted a quantum meruit claim, where services were provided in anticipation of a contract, was "solidly based on principles of unjust enrichment, rather than upon a notion of implied contract".[160] She held a request to provide services or free acceptance of the services provided was required, but proof of a benefit to the defendant, in the sense of economic value, was unnecessary.[161]

[80] The Court of Appeal's decision in 2006, in *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd,* is the most authoritative recent decision on quantum meruit.[162] The Court noted quantum meruit is "generally seen" as being a restitutionary claim and "is said to be based upon unjust enrichment principles".[163] But the Court acknowledged the critique by Professors Grantham and Rickett that the purpose of quantum meruit is not to force the defendant to disgorge some wrongfully obtained benefit, on the basis of unjust enrichment, but to fairly compensate the plaintiff for services provided, based on the law of promissory obligations.[164] The Court noted that if quantum meruit was based on unjust enrichment, the requirement of a benefit to the defendant was logical. But if its true purpose was to compensate the plaintiff, the nature and extent of the benefit may have little or no relevance.[165] The Court cited *Dickson Elliot Lonergan Limited* and *Villages of New Zealand*

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159 *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health* 8 NZBLC 101,739 (HC) at [74].
160 At [76].
161 At [73], [81]-[90].
162 *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd* CA90/05, 8 August 2006 at [50].
163 At [40].
164 At [43] citing Ross B Grantham and Charles E F Rickett *Enrichment & Restitution in New Zealand* (Hart Publishing, Portland, 2000).
165 At [44].

(Pakuranga) Ltd as claims that were upheld even though there was no benefit to the defendant. The Court declined to resolve the doctrinal dispute, saying:

> [50] We will not attempt to resolve the doctrinal dispute here. It is sufficient to say that there is general agreement that a plaintiff will be able to establish a quantum meruit claim where the defendant asks the plaintiff to provide certain services, or freely accepts services provided by the plaintiff, in circumstances where the defendant knows (or ought to know) that the plaintiff expects to be reimbursed for those services, irrespective of whether there is an actual benefit to the defendant.

[81] In 2007, In *Cassels v Body Corporate 86975*, Miller J noted a further possible basis for a quantum meruit claim, advanced by Professor Watts.[166] Watts suggested the conceptual difficulties disappeared if restitution's concern to restore a plaintiff's position, rather than enrichment's concern to strip undeserved gains, was seen as the basis of the action.[167] As the Court quoted, Watts noted that a lack of enrichment has not prevented the courts from awarding quantum meruit and suggested:[168]

> A person is entitled to reasonable reward for time and effort expended on another's behalf, at the behest or with the acquiescence of that other, the time and effort not being intended nor appearing to be gratuitous.

[82] Miller J thought Grantham and Rickett's writings were of similar effect and characterised *Morning Star* as having "skirted the doctrinal quagmire".[169] He considered the better view was that unjust enrichment cannot fully account for quantum meruit and that a defendant who accepts services knowing the plaintiff wants payment is liable to pay a reasonable price for them, whether or not the defendant was enriched.[170] Miller J held:[171]

> The elements of a quantum meruit claim are threefold: the plaintiff provided services for the defendant; the plaintiff wanted payment and made that reasonably apparent to the defendant; and the defendant freely accepted the services or at least acquiesced in their provision.

[83] In 2017, in *BDM Grange Ltd v Trimex (New Zealand) Ltd,* Duffy J observed that the idea unjust enrichment might provide a distinct and overarching cause of

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166 *Cassels v Body Corporate 86975* (2007) 8 NZCPR 740 (HC) citing Peter Watts "Restitution – A Property Principle and a Services Principle" [1995] RLR 49.
167 Watts at 73.
168 *Cassels v Body Corporate 86975* at [41].
169 At [42].
170 At [41].
171 At [43].

action, encapsulating all personal restitutionary causes of action, has still to gain acceptance in New Zealand.[172] But, "[n]onetheless, the doctrine is seen to be a unifying legal concept which underlies and so shapes their evolving forms".[173] She considered there appeared to be acceptance in both England and Wales and in New Zealand that:[174]

> any personal restitutionary claim (quantum meruit included) usually entails four elements: (a) the defendant has been enriched; (b) the enrichment is at the expense of the claimant; (c) the enrichment is unjust; and (d) consideration is then given to any applicable defences.

[84] Most recently, in 2019, was *Northlake Investments Ltd v Wanaka Medical Centre Ltd*.[175] Osborne J analysed nine factors found by Professor Baker to run through relevant cases across common law jurisdictions. He observed that rendering services without a defendant obtaining a benefit does not bar a claim, on the authority of *Morning Star*.[176] He had regard to factors including: the extent of risk undertaken by the plaintiff; whether the services would normally be provided free of charge; whether the plaintiff accelerated work at the request of the defendant; and why a project did not materialise. He found the circumstances pointed strongly against any expectation of reimbursement, each party accepted the risks, and he declined the claim.[177]

[85] So, for the past 50 years an ongoing jurisprudential debate has swirled around and within the law about the nature and scope of restitution and unjust enrichment in common law jurisdictions. The New Zealand law of non-contractual quantum meruit is not exclusively tethered to unjust enrichment, but there is reasonable coherence in what is required as a matter of practice.

[86] In this case, uncertainty in theoretical underpinnings do not disturb the issue of liability. Mr Fulton, for Fletcher Construction, accepts that, if there was no contract, then a quantum meruit claim has to be addressed.[178] It is clear Fletcher Construction

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172 *BDM Grange Ltd v Trimex (New Zealand) Ltd* [2017] NZHC 1259 at [48].
173 At [48].
174 At [49].
175 *Northlake Investments Ltd v Wanaka Medical Centre Ltd* [2019] NZHC 3443.
176 At [235].
177 At [261]-[266].
178 Fletcher Construction's Closing at [83].

requested Electrix to provide the services it did and freely accepted the services once provided. Fletcher Construction knew Electrix expected to be reimbursed. Fletcher Construction is liable to Electrix for the "amount deserved", the non-contractual quantum meruit.

[87] But what is the amount deserved? Theoretical underpinnings may have practical consequences for how the law of quantum meruit is applied in marginal cases. In particular, they could affect the principles governing the amount recovered.

Law on what amount is deserved

[88] In *Benedetti v Sawaris*, Lord Clarke in the United Kingdom Supreme Court said the correct approach to the amount to be paid in a non-contractual quantum meruit claim "is to ask whether the defendant has been unjustly enriched and, if so, to what extent".[179] The recovery may be the same, where there has been full performance of a contract or where there is no contract.[180] But where a contract has not been fully performed, the amount of damages due for non-performance of the contract will not necessarily be the same as the reasonable sum for the amount of the work actually done. This has two consequences. First, the question of whether there is a contract can be "of crucial importance".[181] Second, the question of the underlying foundation of non-contractual quantum meruit may influence the amount a plaintiff may recover.

[89] The English approach to the amount recoverable for non-contractual quantum meruit, based on unjust enrichment, is most authoritatively set out, at length, in *Benedetti v Sawaris*. A useful encapsulation is in *Chitty*:[182]

> **Valuing enrichment** In *Benedetti v Sawaris* the Supreme Court clarified the law on valuing an enrichment. Value is to be ascertained at the time when the enrichment was received and without regard to subsequent profit accruing. The starting point for the valuation exercise is to identify the objective market value of the benefit. A significant distinction is to be drawn between the "ordinary market value" and the "objective value of the benefit". The former is the price which would have been agreed in the market in the absence of some unusual characteristic of the purchaser, whereas the latter is the value of the benefit to the reasonable person in the position of the defendant. Usually

179 *Benedetti v Sawaris,* above n 149, at [9].
180 Andrew Burrows *The Law of Restitution* (OUP, Oxford, 2011) at 52.
181 *British Steel Corp v Cleveland Bridge and Engineering Co Ltd*, above n 91, at 509.
182 HG Beale (ed) *Chitty on Contracts* (33rd ed, Sweet & Maxwell, London, 2018) vol 1 at [29-024]. See also *Goff & Jones,* above n 146, at [4.08]-[4.25].

> both values will be the same, and will simply involve an assessment of what it would have cost a reasonable person to acquire the goods or services elsewhere in the market. The objective value of the benefit may be higher or lower than the ordinary market value by virtue of the defendant's position, where the defendant's position would have been taken into account by the market. This includes, for example, the defendant's buying power which enables him to negotiate a low price, his credit rating and the defendant's age, gender, occupation and state of health. This objective value may be reduced but not increased by reference to the defendant's own personal preferences and idiosyncratic views as to the value of the enrichment. It follows that subjective devaluation is recognised and subjective over-valuation is not recognised, although Lord Clarke, with whom Lords Kerr and Wilson agreed, did reserve the possibility of recognising subjective over-valuation in exceptional circumstances; he did not indicate what those circumstances might be. The defendant bears the burden of proving the subjective devaluation.

[90] This approach starts with the plaintiff proving the market price (the objective value) of the services. Then the burden is on the defendant to prove it did not subjectively value the benefit at all or as much (a subjective devaluation). In its recent judgment in *Mann v Paterson*, (in the context of contractual quantum meruit) the Australian High Court endorsed the English starting point of valuing enrichment by way of an objective market price.[183]

[91] *Goff & Jones* also suggests:

(a) deductions should be made for time spent repairing or repeating defective work;[184]

(b) when calculating the profit element of an award, the court should consider all relevant circumstances including industry pricing levels at the time the work was done, any competitive edge the claimant might have enjoyed over industry rivals, and any indication in negotiations between that the claimant was willing to accept a lower price;[185] and

(c) where a claimant does work in a way that leaves the defendant exposed to extra costs because of delays or the need for remedial work, the amount of the restitutionary award should be reduced because the

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183 *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32, (2019) 373 ALR 1 at [208].
184 *Goff & Jones*, above n 146, at [5-43].
185 At [5-43].

claimant's work is simply worth less than it would be if it was carried out to a reasonable standard.[186]

[92] *Keating on Construction Contracts* says this:[187]

> The enrichment should be valued at the time it was received and, where the benefit was in the form of services, the starting point was normally the objective market value of the services, tested by the price which a reasonable person in the defendant's position would have had to pay for them and taking into account conditions which increased or decreased their objective value to any reasonable person in that position.

And:[188]

> The site conditions and other circumstances in which the work was carried out, including the conduct of the other party, are relevant to the assessment of reasonable remuneration. The conduct of the party carrying out the work may be relevant. Additions may be appropriate for prolongation of the work and deductions may be made for defective work or design or for inefficient working. Useful evidence in any particular case may include abortive negotiations as to price, prices in a related contract, a calculation based on the net cost of labour and materials used plus a sum for overheads and profit, measurements of work done and materials supplied, and the opinion of quantity surveyors, experienced buildings or other experts as to a reasonable sum. Although expert evidence is often desirable there is no rule of law that it must be given and in its absence the court normally does the best it can on the materials before it to assess a reasonable sum.

[93] To date, the New Zealand case law has not delved too deeply into the principles governing the calculation of an amount deserved. Where claims for non-contractual quantum meruit have been successful, the court has generally referred to the plaintiff's ability to recover the reasonable cost of the services. The judgment examining that in more depth was by Miller J in *Cassels*.[189] He recognised that "there is seldom just one price that meets the test of reasonableness" and held, in the presence of imperfect information, "the court should not lightly find that a plaintiff has failed to prove quantum".[190] He held the starting point is market price, any agreed price must always influence the court, the benefit to the defendant is a relevant consideration and the

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186 At [5-52].
187 Stephen Furst and Vivian Ramsey (eds) *Keating on Construction Contracts* (10th ed, Sweet & Maxwell, London, 2016) at [4-037].
188 At [4-040] (citations omitted).
189 *Cassels v Body Corporate 86975*, above n 166.
190 At [50].

court must consider any subjective valuation.[191] He accepted the relative price for the body corporate's services paid by others was an important reference point and assessed the reasonableness of the aggregate expenses of the body corporate.[192]

Submissions

[94] Mr Quinn, for Electrix, submits:

(a) Quantum meruit is a recognised but sui generis right of action rather than being founded on unjust enrichment. In this case, the practical outcome of a quantum meruit claim is likely to be the same as if there was an implied term in a contract for payment of a reasonable sum.

(b) The first step is to identify the actual costs, though that is not necessarily determinative.[193] The next step is to determine whether they were reasonably incurred. The objective market value should take into account labour, materials, preliminary and general costs, overheads and, where the works are completed, an allowance for margin or profit. The works being valued may include scope that would have been excluded by a contract. They are assessed in hindsight, on the basis of events which actually happened.[194] So the conduct of the parties and site conditions are relevant to whether the reasonable sum should be higher or lower. Allowance should be made for disruption, prolongation and defective or inefficient works. It is relevant that this project was known to have been troubled from the outset.

(c) Electrix relies principally upon Mrs Williams' expert evidence of a top-down view of what Electrix spent in undertaking the works plus a contribution to the running of their business and a small profit. This approach is the most consistent with the legal authorities. This is cross-checked against Mr Thompson's bottom-up quantity surveying

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191 At [51]-[54].
192 At [56]-[57].
193 *EDRC Group Ltd v Brunel University* [2006] EWHC 687 (TCC) at [42]; *Sopov v Kane Constructions Pty Ltd (No 2)* [2009] VSCA 141, (2009) 25 VR 510 at [26]-[30].
194 *Sopov* at [26].

approach which is based on NECA Manual rates and takes into account the peculiar circumstances of the Precinct project. Ms Wallace's review of instructions to Electrix is essentially irrelevant.

(d) Overall, the reasonable value of the work done by Electrix was $29,073,207. So Fletcher Construction must pay Electrix a further $7,473,207 (GST excl) plus simple interest (of five per cent) from the end of the work on 1 June 2018, under ss 10 or 24 of the Interest on Money Claims Act 2016.

[95] Mr Fulton, for Fletcher Construction, submits:

(a) Electrix does not plead unjust enrichment as a cause of action, but just claims for a reasonable sum for the work Electrix completed.[195] That is sufficient and there is no need to enter into the question of benefit to Fletcher Construction. As a minimum, Fletcher Construction should pay no more than the $21.6 million it has already paid and the reasonable sum is actually less than that when tested.

(b) Relying on *Benedetti v Sawiris,* the starting point is the objective market value of the services performed, which a reasonable person in the defendant's position would have to pay, rather than any compensatory amount. Accordingly, the fair and reasonable value of the work done needs to be assessed, based on reasonable rates and fair remuneration. The work was not unusually complicated or affected by delays.

(c) *Mann v Paterson's* finding that, prima facie, the price acts as a ceiling in a failed contract environment is relevant here. What agreements have been reached between the parties ought to be recognised. Fletcher Construction's legitimate expectations, and agreement with Electrix, that the cost would not exceed $15 million, cannot be ignored. Neither can its refusal to pay more than $21.6 million which is evidence of its

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195 Fletcher Construction's Opening Submissions, 7 October 2019, at [16].

view of the reasonableness of the costs. Electrix's lower cost forecasts in 2015 to 2017 go to what Fletcher Construction reasonably expected to pay.

(d) The LOIs are strong probative evidence of what the parties had accepted between them would be a reasonable way to look at the value of the scope of works. Mr Quincey's expert evidence analysed the letters and the final outcome should be framed around his assessment.

(e) Actual cost is only part of the evidence. Total cost claims in contractual cases inform how to assess the claim.[196] Fletcher Construction accepts in principle that they would have caused some extra work and costs.[197] But Electrix's claims about the delays and disruption they faced are too general to provide a reliable assessment. The claims fall away when specific examples are examined in relation to programming and planning, specifications, design, delays, rework and disruption. And it covers over their own faults, inefficiency and poor management, which are not reimbursable and of which Mr Chambers and Mr Tweeddale set out many examples.[198]

(f) Fletcher Construction relies on Mr Hanlon's expert estimate of $17,920,411 for the baseline market price for the works which can be modified for an assessment for difficulty and disruption. Although Fletcher Construction maintains its claim, a detailed analysis of the expert evidence suggests a reasonable sum would be $19,482,296.

Approach to the amount deserved

[96] While unjust enrichment may well be a useful conceptual foundation for some aspects of the law of restitution, it has limitations that do not make it a satisfactory unifying conceptual foundation. As seen above, that is recognised by academic

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196 *Walter Lilly & Co Ltd v Mackay* [2012] EWHC 1773 at [486].

197 Fletcher Construction's Closing at [184].

198 *Serck Controls Ltd v Drake & Scull Engineering* [2000] All ER 725 at [55]; Chambers Brief at [22]-[23]; NOE 2528/41-44, 50-57; Tweeddale Brief at [19]-[20], [42]-[43], [56]-[63], [73]-[75], [77]-[78], [80]-[85], [86]-[91], [99]-[106].

commentary in relation to restitution generally and in relation to quantum meruit in particular. It is recognised in the New Zealand case law in relation to non-contractual quantum meruit, particularly in *Morning Star* and *Cassels v Body Corporate 86975*. The normative objectives of the New Zealand law of restitution in relation to non-contractual quantum meruit are not confined only to dispossessing those unjustly enriched but can extend to providing redress for those who have been unjustly impoverished.

[97] This has nuanced consequences for the assessment of relief. It makes sense that the English understanding that unjust enrichment underlies quantum meruit leads to a focus on the benefit to the defendant. Starting with the market value of the services and adjusting for the value of the services in the hands of the defendant is a logical corollary of that. But, in New Zealand law, benefit to the defendant is not always necessary. Information about the market value of the services is still relevant to assessing the reasonable cost of the services provided. But just as relevant is the cost to the plaintiff of providing the services in the circumstances of the work at the time. That may be different from the market value of the work done. For example, if certain electrical wiring needed to be rewired several times, the cost of the services actually provided (several times) would be greater than the market value of the work done (once). The English case law recognises that.

[98] In this case, there is no contract and no agreement on the price of the services. Accordingly, it is difficult to put any weight on what was said about budgets, expectations or in negotiation. And there is no evidence quantifying the benefit of the services specifically to the defendant. The market price of the services that could have been used to undertake the works is relevant. But the costs of the services actually provided is a better starting point. Those costs should reflect the market value of the particular inputs used in the provision of those particular services at the relevant time and in the relevant circumstances. Together with the addition of a market-related profit margin, I consider that will reflect the reasonable costs of the services to the service supplier. If the defendant can show that the actual costs incurred were more than what was reasonable in the market conditions at the time for the work undertaken, they should be reduced by that amount.

[99] No expectation interest in a contract price has crystallised, for courts to award as damages in cases such as this. But, by assessing the reasonable cost of the services to the supplier, the court can uphold the plaintiff's reliance interest in the anticipated relationship. That provides the purchaser of the services with incentives to conclude the contract.[199] After all, the purchaser is able to avoid requesting, or to decline to accept the services, which is relevant to liability existing at all. The ability of the defendant to challenge the reasonableness of the costs in the market conditions at the time, and the uncertainty about whether they will be necessarily be recovered, ameliorates any moral hazard for the service provider to pad their costs.

[100] This case depends largely on my assessment of the expert evidence. My assessment, and the result, would be the same irrespective of the theoretical underpinnings of the law of quantum meruit. But it is informed and assisted by the conceptual underpinnings of non-contractual quantum meruit law in New Zealand law.

Expert evidence

[101] There is less difference between the parties about what the legal principles are than about how they apply here. Mr Hanlon and Mr Quincey, for Fletcher Construction, consider the reasonable cost of the electrical works is $17,920,411 and $18,632,296 (GST excl) respectively. Mrs Williams and Mr Thompson, for Electrix, consider it is $29,073,207 and $30,613,168 (GST excl) respectively.[200] My decision comes down to how I treat the expert evidence.

[102] In general, I find Mrs Williams' evidence, for Electrix, to be the most valuable. She was the only expert to assess the actual costs of Electrix's work revealed through its comprehensive Workbench project management software which includes quotes, purchase orders, invoices and signoffs on materials and numbers of employees, timesheets, hours and leave reports for labour.[201] The evidence of Mrs Stanley, who

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199 See generally, Robert Cooter and Melvin Aron Eisenberg "Damages for Breach of Contract" (1985) 73 California Law Review 1432.

200 As summarised, after adjustments during the trial, by Mr Quinn in Electrix's Closing submissions at [201].

201 Brief of Catherine Williams, 22 October 2019, [Williams Brief]; Supplementary Brief of Catherine Williams, 22 October 2019 [Williams Supplementary]; Reply Brief of Catherine Williams, 22 October 2019 [Williams Reply]; Joint Report of Williams and Quincey, 3 October 2019 [Williams and Quincey Joint Report], at [14].

administered Workbench for Electrix, is that money could not be paid or received by Electrix unless it was supported by an entry in Workbench.[202] Her evidence was not disturbed by cross-examination. I consider the information reliable.[203]

[103] Mrs Williams relies on the cost information rather than what was charged. She omits certain charges if she is not satisfied about them. She conducts a variety of verification tests. For example, she verifies the labour recorded was possible and logical and on the one occasion she could not validate that, she corrects the cost information.[204] She also reduces the Workbench direct labour costs to account for possible discrepancies with other time recording sources.[205] She could not verify two suppliers' costs of materials so, although she considered there is a high probability the costs were actually incurred by Electrix, she initially excluded them.[206] Because further documentation was then discovered, she includes them.[207]

[104] Mrs Williams is satisfied, on the basis of the 600 hours of analysis she undertook over four months, that the costs to Electrix of the electrical works are not excessive or unreasonable in the context of the work carried out.[208] Her opinion is that 13 per cent of the cost blowout in the project over Electrix's original bid was due to scope creep, a further 27 per cent was due to the 14 months of delay after 13 December 2016, and the remaining 60 per cent was from the disruption to the management of the project.[209] The contemporaneous evidence and the evidence of the witnesses of fact seems to me to be consistent with that assessment.

[105] I do not accept some of what Mrs Williams said about the role of an expert. For example, experts should not speculate (if that is what she meant) and often have to make assumptions. But I do not consider her answers to those questions impacted on her assessment of the costs. I consider Mrs Williams' methodology, approach and

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202 Brief of Kylie Stanley, 14 October 2019, at [5].
203 NOE 105/27-31.
204 Williams Brief at [4.3]-[4.23].
205 Williams Brief at [4.26]-[4.61].
206 Williams Brief at [4.76]-[4.92].
207 Williams Supplementary at [1.10]-[1.16].
208 Williams Opening Statement, NOE 607/27-31.
209 Williams Opening Statement, NOE 611/32-612/5; Williams Reply at [3.35].

evidence about costs is reliable. I am particularly grateful to her for agreeing to give her evidence by AVL days after giving birth.

[106] Second, I find Mr Hanlon's evidence, for Fletcher Construction, is helpful as far as it goes, but suffers from limitations in its assumptions. It is based on a conventional high-level quantity surveying approach to the market value of the services provided by Electrix. Mr Hanlon confirms he is valuing the works as built, rather than what had been done to build them.[210] In estimating New Zealand labour rates Mr Hanlon relies on his experience combined with what he considers was market information (about costs). But those sources of information are not available to me and are only vaguely grounded.[211] Because the results of his analysis of labour rates are comparable to that of Mrs Williams that does not matter so much, other than to raise a question for me about the basis for his analysis. Similarly, Mr Hanlon used a 25/75 ratio for labour to materials, based on the QV Costbuilder software. Again, the basis for that is not clear. Mr Hanlon accepts some averaging was involved but it is not clear what sort of averaging.[212] Neither is it clear how his rates account for cost, cartage, waste, fixings, equipment and labour (CCWFEL).[213] And Mr Hanlon's assessment does not take account of the difficulties with the project in terms of the lack of design, poor management and disruption to the provision of electrical works.

[107] Third, I find Mr Quincey's evidence is somewhat helpful as far as it goes. Mr Quincey provides his assessment of the works as instructed to be constructed, based mainly on the LOIs. But his sell rate for labour ($40 per hour) is out of line with the opinions of the other experts ($51.25 for Mrs Williams and $53.69 for Mr Hanlon and Mr Thompson). I do not consider his estimates of the amount of labour required, which are based on the LOIs and, in turn Fletcher Construction's GMP, are necessarily reliable, relative to the Workbench data.[214] And I am not confident about the accuracy of the as-built drawings, which are the basis of his assessment of the quantity of

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210 NOE 407/18-26.
211 For example, see NOE 417/6-17.
212 NOE 574/15-23.
213 NOE 372/24-373/11.
214 Williams Reply at [3.1]-[3.6].

materials, relative to the Workbench data. His evidence does not engage with the difficulties with this particular project, though he acknowledged there were some.[215]

[108] Fourth, I do not find the evidence of Mr Thompson, for Electrix, as helpful as that of the others. His bottom-up quantity surveying approach contains some questionable elements which did not stand up well under cross-examination, particularly in relation to his use of NECA labour constants and the basis for his estimates of margin, as I outline below.

[109] Fifth, I do not find Ms Wallace's evidence particularly helpful. That is because of the scope of the task she was set by Fletcher Construction, not the quality of her evidence. Ms Wallace reviews Mr Werrett's schedule of instructions by Fletcher Construction to Electrix, and any other instructions she could identify and tracks where they were able to be related to Electrix's payment claims. She expressly states she had not attempted to assess the reasonable value of the work undertaken by Electrix. I do not find her evidence particularly relevant to the issues I have to determine.

Reasonable cost of the electrical works

[110] *Materials.* There was not much difference between the parties in relation to the underlying reasonable cost of materials. The differences between the two sets of experts were in an approximate range of $350,000 to almost $2 million.

[111] I am not confident about the basis of Mr Hanlon's prices. And I doubt the basis for Mr Thompson's assumptions about the numbers of light-fittings. I confess to surprise that experts could differ by around 3,000 regarding the number of lightbulbs in a building. I am less surprised that counsel did not consider my suggestion that they jointly count the light fittings would be particularly illuminating. In any case, Mrs Williams' evidence is consistent with Mr Hanlon's evidence on the question of light-fittings. She discounts charges, such as the internal Vinci charges, if she does not know enough about them.[216] Overall, in relation to materials, I rely on Mrs Williams'

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215 NOE 813/5-24, NOE 847/20-33.
216 NOE 655/16-18.

evidence because it is most directly tied to actual costs which I accept as a good indicator of the reasonable market cost of materials at the time. The other experts' evidence is based on more questionable assumptions.

[112] There is also a difference between the parties in relation to the radio room. This appears primarily to be a difference in the classification of costs. Under cross-examination, Mr Harris explains that the costs questioned by Mr Quincey concerned works that were not necessarily undertaken in the radio room but were related to the radio room.[217]

[113] *Labour*. There were more substantial differences between the sets of experts regarding labour costs, in the order of $4.3 million to $6.2 million.

[114] The sell rates used by Mr Thompson, Mr Hanlon and Mrs Williams were reasonably well-aligned. I accept Mrs Williams' rates. Mr Fulton objects to Mrs Williams using Electrix's sell rate, which he submits was inflated, particularly in relation to agency labour. Mrs Williams' evidence is that she validated the margin on labour by looking at how it was built up and assessing the reasonableness of the sell rate. She considers what Electrix charged was reasonable, was in line with what they promised to charge and with what Fletcher Construction knew they were charging.[218] I take it as indicative of the market rates then applying. Mr Fulton accepts that actual costs are a relevant consideration. And Mrs Williams' average sell rate is apparently less than Mr Thompson's (with which Mr Hanlon was content).[219]

[115] The differences between the experts appear mainly to derive from differences over the amount of time required. Mr Thompson's use of NECA labour constants provides a misleading impression of precision in the time required. He acknowledges under cross-examination that application of the guidance in the NECA Manual suggested a number of aspects of Electrix's work should be categorised as "difficult" (with weightings accordingly) but he categorises them as "very difficult" (with accordingly greater weightings) based on Electrix's view of the difficulties in the

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217 NOE 217/4-13.
218 NOE 652/32-653/3.
219 NOE 418/5-10.

project. He acknowledges his estimate of additional working times in his labour values are impressionistic.[220] I do not regard Mr Thompson's evidence about the amount of labour required as particularly helpful. And Mr Hanlon's and Mr Quincey's assessments do not properly take into account the work actually done. For the reasons I give below about the particular difficulties of the project, I rely on Mrs Williams' evidence.

[116] *Margins.* The evidence of Mrs Williams, Mr Hanlon and Mr Quincey is reasonably well aligned concerning margins. Mr Hanlon and Mr Quincey used across-the-board margins of seven per cent and 6.06 per cent, respectively, for all labour and materials. I accept as reasonable Mrs Williams' estimate of a 6.06 per cent margin on labour (which coincides with Mr Quincey's). I also accept Mrs Williams' estimate of margins on materials which appears to average 7.5 per cent overall. Mr Thompson characterises his margin as 12 per cent. It is true that 12 per cent of his resulting figure was margin. But, as Mr Fulton submits, that means the margin on the underlying costs is 13.95 per cent. Mr Thompson's explanation of the basis for his assessment is unpersuasive.[221] That estimated margin is too high, considered in light of the other evidence. I am conscious that the parties considered a margin of 11 or 11.5 per cent, in their 2017 negotiations of a contract on a cost-plus basis.[222] But those negotiations failed.

[117] *Preliminary and general.* There were differences between the two sets of experts of some $3.4 million to $4.3 million regarding preliminary and general expenses.

[118] Mr Thompson's estimate of preliminary and general costs falls out as a residual from other calculations, is not consistent with that of the other experts and apparently comes to 32 per cent.[223] I do not accept his evidence that it reflects a market price. Mr Hanlon uses a global seven per cent of materials, in which he includes head office costs, indirect labour costs, small tools and insurances. The actual preliminary and general costs in Electrix's last payment claim were $1,617,582. Mr Fulton criticises

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220 NOE 517/8-19.
221 NOE 463/31-464/14.
222 EBD2609/FCC.05.831.
223 NOE 541/2-3, 21.

Mrs Williams for changing the composition of the preliminary and general charges, charging for the design work and making assumptions about material costs.[224] I consider the judgments she made about those matters were reasonable.

[119] Mr Hanlon and Mr Quincey do not take into account Electrix's work on design. Electrix did not have formal design responsibility and, indeed, rejected requests by Fletcher Construction that it have that responsibility. But, as detailed above, Electrix clearly provided substantial assistance to Fletcher Construction in design development and technical review. It was well beyond ECI work that any early contractor would do. Some of this was reflected in Workbench records for technical review, which Mrs Williams relies on. I accept Mrs Williams' allowance of $1,063,273 for this work in her assessment of preliminary and general costs.[225]

[120] *Project-specific difficulties.* As detailed earlier in the judgment, I find there were considerable problems with the project caused by the lack of design, poor coordination and management and intense time pressure. It is to be expected that these factors added significantly to Electrix's costs in undertaking the electrical works. I consider the evidence of the difficulties facing Electrix is consistent and reliable, although it does not readily lend itself to precise quantification. The evidence of Mr Hanlon and Mr Quincey does not take such problems into account. Mr Quincey is reluctant to put a figure on the project-specific difficulties but, when pressed, thinks it would be "below 10 [per cent]".[226] Mrs Williams' evidence does take these problems into account because it is based on Electrix's actual costs. Mr Thompson applies impressionistic mark ups of 11 per cent for downtime and 13 per cent for lost time and inefficiency. But that is on top of allowances he had already made for the difficulty of the work in his labour values. I consider Mrs Williams' evidence is the most useful.

[121] As I also found earlier in the judgment, it would be surprising if some problems were not also caused by Electrix.[227] But I do not consider there is sufficient evidence Electrix caused difficulties or inefficiencies greater than what would usually be expected in a large commercial project. Fletcher Construction's substantiation for its

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224 Fletcher Construction's Closing Submissions at [253]-[261]. NOE 655/1-656/10.
225 Williams Reply at [6.4].
226 NOE 846/10-18.
227 See also Williams Reply at [3.31]-[3.32].

arguments about this is thin. I do not accept there is sufficient evidence that Electrix's actions or decisions materially added to the cost of the project.

[122] *Overall reasonable cost.* Having worked through each element of the costs, I regard the overall cost of the Precinct project assessed by Mr Hanlon and Mr Quincey to be substantially lighter than reasonable. I am not confident of all of Mr Thompson's methodology. I accept Mrs Williams' expert analysis of Electrix's actual and reasonable costs in providing its electrical works services. That cost is certainly higher than what each party expected at the beginning of the Precinct project. That is largely because of the problems deriving from the lack of a detailed design for the electrical works, the associated scope creep, delays and disruption combined with the time pressure on all parties and the difficulties posed by acceleration.

[123] I also accept Electrix's claim for interest under s 10 of the Interest in Money Claims Act 2016, from 1 June 2018, after Electrix's last payment claim.

Issue 3: Do Fletcher Construction's counterclaims succeed?

[124] If Fletcher Construction does not succeed on the first two issues, as I hold it does not, it counterclaims against Electrix on the basis of the Fair Trading Act 1986 and negligent misrepresentation. These claims were not pressed strongly in argument and can be dealt with briefly.

Fletcher Construction's Claims

[125] Section 9 of the Fair Trading Act 1986 prohibits conduct in trade that is, or is likely to be, "misleading or deceptive conduct". Where a claimant suffers loss because of that, the Court has a remedial discretion under s 43. Fletcher Construction claims Electrix represented at various times that it could complete the electrical works for various amounts, from $14,055,145 plus GST (in its acceptance of LOIs from January 2016 to February 2017) to $16,866,183 (in its October 2014 bid). It claims Electrix agreed in meetings with Mr Wilson that the bid amount could be value managed down to the budget and delivered for "mid $14M" plus GST. Fletcher Construction says it specifically relied on Electrix and that Electrix's suggested completion cost of $14.9 million in April 2016, in particular, was misleading.

[126] Fletcher Construction also claims Electrix owed it a duty of care in tort in making representations about the cost at which it could deliver the works, which Fletcher Construction relied upon and Electrix breached, causing Fletcher Construction loss.

Electrix's response

[127] Mr Quinn submits Fletcher Construction did not call any witness who gave evidence they were misled by Electrix, and Fletcher Construction was not misled. If Fletcher Construction suffered loss at all, he submits that is arguably because it failed to conclude a contract with Electrix and there is no evidence that failure was caused by Electrix. And there is no evidence of loss by Fletcher Construction.

Decision on counterclaims

[128] Fletcher Construction's counterclaims are poorly founded and have the air of attempted leverage or distraction rather than serious claims. It is not clear exactly what misrepresentations are alleged. The October 2014 bid was expressly open only for 30 days. It resulted in no contract. The April 2016 email was a schedule with no text, makes no representation and was not understood at the time to have done so.[228] The various statements by Electrix personnel about the budget were statements of intent or expectation about the future or statements of opinion. There were no actionable misrepresentations under the Fair Trading Act or at tort law. If there were, Fletcher Construction has not established how they caused loss or what loss they caused. The counterclaims must fail.

Result

[129] Electrix succeeds in its claim of quantum meruit for the reasonable cost of the services it provided to Fletcher Construction, in the amount of $7,473,207 (GST excl) plus simple interest of five per cent per annum. Fletcher Construction's counterclaims fail.

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[228] Werrett Brief at [191]-[192]; EBD928/ELX.12523.

[130] Ordinarily, based on the result I have reached, I would award costs for the case to Electrix. But counsel have submitted I may need to hear further from them about costs. If costs cannot be agreed between the parties, they are each to file submissions of no more than 10 pages within 10 working days of receipt of the judgment.

Palmer J