# **INDEX – FINAL ACCOUNTS**

Page 2: General description of a Final Account

Page 3: Final account content detail

Page 6: ‘Typical’ breakdown of house construction final costs [US]

Page 15: Case law concerning finality of final payment settled by agreement [UK]

Page 18: **NZS 3910** relevant extracts

# **Final account** <http://www.designingbuildings.co.uk/wiki/Final_account>

[Construction contracts](http://www.designingbuildings.co.uk/wiki/Construction_contracts) generally provide some mechanism for the final payment to be made to the [contractor](http://www.designingbuildings.co.uk/wiki/Contractor) on completion of the works described in the contract. Generally this payment will be made at the end of the [defects liability period](http://www.designingbuildings.co.uk/wiki/Defects_liability_period) providing that all [patent defects](http://www.designingbuildings.co.uk/wiki/Patent_defects) have been rectified.

Preparing the **final account** is the process of calculating and agreeing any adjustments to the [contract sum](http://www.designingbuildings.co.uk/wiki/Contract_sum) (the amount originally set out in the contract to be paid to the [contractor](http://www.designingbuildings.co.uk/wiki/Contractor) for completion of the works) so that the amount of the final payment can be determined. The amount of the final payment is then set out in the [final certificate](http://www.designingbuildings.co.uk/wiki/Final_certificate) (or final statement). It is possible for the [final certificate](http://www.designingbuildings.co.uk/wiki/Final_certificate) to show that money is owed to the [client](http://www.designingbuildings.co.uk/wiki/Client), rather than due to the [contractor](http://www.designingbuildings.co.uk/wiki/Contractor).

[Construction contracts](http://www.designingbuildings.co.uk/wiki/Construction_contracts) may not specifically require the preparation of a **final account**, although they generally do require the [contractor](http://www.designingbuildings.co.uk/wiki/Contractor) to provide all documents necessary for the adjustment of the [contract sum](http://www.designingbuildings.co.uk/wiki/Contract_sum) within a specified time, and set out the time scale for and consequences of issuing the [final certificate](http://www.designingbuildings.co.uk/wiki/Final_certificate).

The [contract sum](http://www.designingbuildings.co.uk/wiki/Contract_sum) may need to be adjusted for a number of reasons, including:

* [Variations](http://www.designingbuildings.co.uk/wiki/Variations).
* [Fluctuations](http://www.designingbuildings.co.uk/wiki/Fluctuations).
* [Prime cost sums](http://www.designingbuildings.co.uk/wiki/Prime_cost_sum).
* [Provisional sums](http://www.designingbuildings.co.uk/wiki/Provisional_sums).
* Payments to [nominated sub-contractors](http://www.designingbuildings.co.uk/wiki/Nominated_sub-contractor) or nominated [suppliers](http://www.designingbuildings.co.uk/wiki/Supplier).
* Statutory [fees](http://www.designingbuildings.co.uk/wiki/Fees).
* Payments relating to the opening-up and testing of the works.
* [Loss and expense](http://www.designingbuildings.co.uk/wiki/Loss_and_expense).
* [Liquidated and ascertained damages](http://www.designingbuildings.co.uk/wiki/Liquidated_and_ascertained_damages).
* Contra [claims](http://www.designingbuildings.co.uk/wiki/Claims) imposed as a result of the [contractor](http://www.designingbuildings.co.uk/wiki/Contractor)'s operations (such as a third-party claim resulting from [contractor](http://www.designingbuildings.co.uk/wiki/Contractor) [negligence](http://www.designingbuildings.co.uk/wiki/Negligence) or contractual breach, for example, flooding a neighbour's property).
* The release of any remaining [retention](http://www.designingbuildings.co.uk/wiki/Retention).

Agreeing the **final account** can be a complicated, time consuming and adversarial process, often resulting in [disputes](http://www.designingbuildings.co.uk/wiki/Disputes). The process can be made easier if adjustments to the [contract sum](http://www.designingbuildings.co.uk/wiki/Contract_sum) are agreed as the project progresses rather than saving them up for the end. It is also beneficial if the [client's](http://www.designingbuildings.co.uk/wiki/Client%27s) [quantity surveyor](http://www.designingbuildings.co.uk/wiki/Quantity_surveyor) and the [contractor](http://www.designingbuildings.co.uk/wiki/Contractor)'s [quantity surveyor](http://www.designingbuildings.co.uk/wiki/Quantity_surveyor) work together on drafts of the **final account** before agreement it sought. It is preferable that a draft copy of the **final account** is signed off by the [contractor](http://www.designingbuildings.co.uk/wiki/Contractor) as an 'in full and final [settlement](http://www.designingbuildings.co.uk/wiki/Settlement)' prior to issue.

Agreement of the **final account** will allow the [contract administrator](http://www.designingbuildings.co.uk/wiki/Contract_administrator) to issue the [final certificate](http://www.designingbuildings.co.uk/wiki/Final_certificate). The [final certificate](http://www.designingbuildings.co.uk/wiki/Final_certificate) is conclusive that all [patent defects](http://www.designingbuildings.co.uk/wiki/Patent_defects) have been remedied, all adjustments to the [contract sum](http://www.designingbuildings.co.uk/wiki/Contract_sum) have been agreed and all [claims](http://www.designingbuildings.co.uk/wiki/Claims) settled. [Latent defects](http://www.designingbuildings.co.uk/wiki/Latent_defects) may still become apparent after completion of the contract and these may give rise to action for [damages](http://www.designingbuildings.co.uk/wiki/Damages), for [breach of contract](http://www.designingbuildings.co.uk/wiki/Breach_of_contract) or [negligence](http://www.designingbuildings.co.uk/wiki/Negligence).

Where proceedings have begun in relation to a [dispute](http://www.designingbuildings.co.uk/wiki/Dispute), the conclusiveness of the [final certificate](http://www.designingbuildings.co.uk/wiki/Final_certificate) is subject to the findings of those proceedings.

In addition, the [final certificate](http://www.designingbuildings.co.uk/wiki/Final_certificate) itself can be [disputed](http://www.designingbuildings.co.uk/wiki/Dispute) (usually within 28 days). [Adjudication](http://www.designingbuildings.co.uk/wiki/Adjudication), [arbitration](http://www.designingbuildings.co.uk/wiki/Arbitration) or other [dispute](http://www.designingbuildings.co.uk/wiki/Dispute) resolution procedures may then be necessary to resolve the [dispute](http://www.designingbuildings.co.uk/wiki/Dispute). The [final certificate](http://www.designingbuildings.co.uk/wiki/Final_certificate) is then only conclusive in relation to matters that are not [disputed](http://www.designingbuildings.co.uk/wiki/Dispute).

If the [client](http://www.designingbuildings.co.uk/wiki/Client) intends to pay a different amount from that shown on the certificate, they must give notice to the [contractor](http://www.designingbuildings.co.uk/wiki/Contractor) of the amount they intend to pay and the basis for its calculation

# <http://www.scquantitysurveyors.com/final-account>

**Seamus Cooley Quantity Surveyors** [A UK firm]

# **Final Accounts**



SC Quantity Surveyors can deal with the final account preparation, submission & subsequent agreement on behalf of consultants such as architects including both private and public sector clients. Our **Final Accounts service** ensures the following:-

* Clear statement showing the contract sum followed by all necessary adjustments to that sum
* Prepared in accordance with the terms and conditions of the relevant contract eg. JCT [**NZS** **3910**] standard building contract
* All items fully assessed and adjustments made for variations, provisional sums, re-measured works etc.
* Work carried out on a daywork basis is included
* Loss and expense claims/reimbursement accurately assessed and included
* Fluctuations where applicable are included
* Confirmation of the contractor's agreement to final account figure is obtained in writing
* Architect issues final certificate for final payment to main contractor

## Final Account Preparation Procedure

SC Quantity Surveyors prepare the final account in the manner that is best suited for the particular project with the original contract sum as the starting point. An important part of the contractor's quantity surveyor's work is the agreement of the final account. Under the terms of the contract the private quantity surveyor is responsible for its preparation, but in reality the best approach is for both the client's quantity surveyor and the contractor's quantity surveyor to work together to produce an agreed account.

A Final Account in construction contracts is the agreed statement of the amount of money to be paid at the end of a building contract by the employer to the contractor. A final account brings about a sense of finality to the negotiations leading up to the agreement of the Final Account between the parties to the contract.

SC Quantity Surveyors ensures that in accordance with common practice both Employer (or the Employer’s representative) and the Contractor sign the Final Account Statement to signify that the Final Account figure represents the full and final settlement of all claims etc. The settlement of the final account negotiations between the contractor, and the architect or quantity surveyor will in due course trigger the issue of the final account statement and ultimately, enable the architect to issue the final certificate.

Under the terms and conditions of the contract the contractor is to provide the architect or quantity surveyor with all documents necessary for the final account preparation not later than 6 months after practical completion. Within 3 months of receipt of these documents the architect or quantity surveyor is to prepare and ascertain the final account sum and send this to the contractor.

The bulk of the final account will generally consist of measured work priced at the original billed rates. If the contractor's quantity surveyor has reason to doubt the accuracy of any of the original billed items, he can make a request to the quantity surveyor for work concerned to be measured on-site.

The adjustment of the contract sum in the final account normally falls under several relevant items, although the quantity surveyor must have regard to all the matters listed in the standard form of contract and conditions. The contract conditions tabulates all the matters that shall be dealt with in the final account in order to adjust the contract sum in accordance with the conditions.

Sums to be deducted:

1. Prime cost sums and amounts in respect of named subcontractors and associated contractor's profit;
2. Provisional sums and the value of work for which approximate quantities are included in contract bills;
3. Variations that are omissions;
4. Amounts allowable to the employer under the fluctuations clauses;
5. Any other amount that is required by the contract to be deducted from the contract sum.

Sums to be added:

1. The total amounts of nominated subcontracts finally adjusted in accordance with the relevant subcontract conditions;
2. Where the contractor has tendered for work that was to have been performed by a nominated subcontractor and his tender has been accepted, the amount of the tender suitably adjusted;
3. Any amounts due to nominated suppliers, including cash discounts of 5 per cent, but excluding VAT[GST];
4. The contractor's profit on the above amounts 1,2 & 3;
5. Any amounts payable by the employer relating to statutory fees and charges, opening up and testing, royalties and patent rights, and insurances;
6. The value of work carried out against provisional sums or approximate quantities included in the contract bills;
7. Any amounts payable by the employer to the contractor by way of reimbursement for direct loss/and or expense arising from matters materially affecting the regular progress of the works;
8. Any amount expended by the contractor as a result of loss or damage by fire or other perils where the risks are insured by the employer and the contractor is entitled to reimbursement;
9. Any amount payable to the contractor under the fluctuations clauses;
10. Any other amount that is required by the contract to be added to the contract sum.

All relevant items must be shown separately in the final account, and the nett amount of each variation and amounts due to each nominated subcontractor and nominated supplier listed. When preparing the final account the quantity surveyor should give the contractor's quantity surveyor the opportunity to be present when measurements and details are taken or recorded, so that the document is prepared in full liaison with the contractor.

Delays in the settlement of the final account represent additional cost to the contractor and in the majority of cases the employer is anxious to know his ultimate financial commitment. The architect and the quantity surveyor have a contractual responsibility under the contract to keep to the date stipulated in the contract for completion of the final account and the contractor should produce every assistance in the prompt provision of subcontractors and suppliers’ accounts, agreement of measurement and prices, and the supply of all necessary supporting data.

[**WHAT PAYMENT SCHEDULE CAN I EXPECT WHILE BUILDING?**](http://www.wishlisthomes.com.au/payment-schedule-progress-claims/)

<http://www.wishlisthomes.com.au/payment-schedule-progress-claims/>

*How are payments made while building a new home?*

This is a US site but it has a useful proportional breakdown of house building costs

The payment schedule during construction is referred to in most building contracts as ‘progress claims’ and there are a couple of different ways this is done which we’ll explain in this article.

First, what is a progress claim?

*A progress claim is an invoice from the builder to the client for the work completed on site by the home builder.*

Builders will typically charge you a progress claim when main components of construction has been completed on your home.

The way these figures are calculated generally follows this formula;

Cost of Building to Date – Any payments already made = Invoice Cost + Builders Margin + GST = Progress Claim Amount

What that means is, the builder will assess the costs to build your new home to a certain point, then will add their standard % markup + GST and will invoice you for that amount.

**Progress Claim Method #1 – Fixed progress claim stages**

This method is used by most project home builders and is fairly standard in the industry. Each milestone in construction has a progress claim against it, until finally, the home is completed and you’ve paid 100% of your building contract amount.

Here’s a typical % breakdown used by a number of builders at the moment;

Single Storey Homes

* Building Deposit – 6.5%
* Slab Down – 16.5%
* Brickwork To Plate High – 26.0%
* Roof Cover – 24.0%
* Lock up – 20.0%
* Practical Completion – 7.0%

Double Storey

* Building Deposit – 6.5%
* Ground Floor Slab Down – 10.0%
* Ground Floor Brickwork To Plate High – 16.0%
* Suspended Slab Poured – 11.0%
* First Floor Brickwork To Plate High – 13.0%
* First Floor Roof Cover – 8.5%
* Ground Floor Roof Cover – 7.0%
* Lockup – 15.0%
* Practical Completion – 13.0%

Note: These % figures above are indicative only. Each builder will adjust these according to the home. It should also be noted that some builders may combine stages (like First Floor Roof Cover and Ground Floor Roof Cover) into 1 claim (Roof Cover) instead of using 2.

**Progress Claim Method #2 – % Completion**

When building luxury homes, there’s another method that is very popular with boutique home builders. This method is used to ensure that a payment is made every 30 days, and the amount will vary depending on the % of work that has been completed.

Typically, when this method is used the builder will supply you and the bank with a breakdown of costs against the various stages of construction.

The builder will first take a look at all of the costs associated with building your new home. Here’s an example of a summary of costs that a builder uses;

|  |  |
| --- | --- |
| PRELIMINARIES | $1,205.00 |
| SHIRE FEES | $5,565.00 |
| WATER AUTHORITY FEES | $315.25 |
| CONTRACTS WORKS INS | $3,092.66 |
| HOME OWNER’S WARRANTY | $1,515.35 |
| ENGINEERS FEES | $5,290.00 |
| DRAFTING & ENERGY CERTIFICATION | $585.00 |
| CONTRACT SCHEDULING | $324.00 |
| SURVEYING | $924.00 |
| SITE SHED & WC HIRE | $840.42 |
| EARTHWORKS | $1.00 |
| COMPACTION TEST | $833.20 |
| PLUMBER | $21,485.00 |
| STORMWATER | $2,348.00 |
| TERMITE TREATMENT & SLAB CURE | $847.00 |
| GF CONCRETE CURING | $312.22 |
| GF CONCRETOR | $20,614.00 |
| FF REINFORCEMENT | $5,900.00 |
| FF FORMWORK | $9,212.50 |
| FF STEELFIXER | $1,470.00 |
| GF BRICK MATERIALS | $15,976.30 |
| GF BRICK CARTAGE | $1,952.48 |
| GF BRICKLAYER SAND | $799.10 |
| GF BRICK HARDWARE | $3,098.25 |
| GF STRUCTURAL STEEL & LINTELS | $4,792.63 |
| GF TIMBER JOINERY | $887.00 |
| GF ALUMINIUM JOINERY | $20,587.84 |
| GF STEEL JOINERY | $1,314.69 |
| GF BRICKLAYER | $27,904.00 |
| SCAFFOLD | $7,827.00 |
| BRICK HOIST | $1,940.00 |
| GF ROOF TIMBER | $14,260.35 |
| GF ROOF STEEL | $1,565.59 |
| GF METAL FASCIA | $1,272.06 |
| GF ROOF HARDWARE | $1,042.03 |
| GF ROOF CARPENTER | $13,368.66 |
| CRANE HIRE | $840.00 |
| SITE WELDING | $600.00 |
| ROOF PLUMBER | $4,455.00 |
| METAL ROOF & WALL SHEETS | $23,451.30 |
| PLASTERER | $29,507.11 |
| PLASTERERS SAND | $772.90 |
| APPLIED COATINGS | $756.00 |
| ARCHITECTURAL MOULDINGS | $126.41 |
| CEILING & WALL LINING | $19,286.00 |
| DOORS | $4,112.40 |
| MOULDINGS & SHELVING | $2,004.72 |
| FIXING HARDWARE | $2,664.59 |
| FIXING CARPENTER | $6,268.87 |
| GLAZIER | $141.60 |
| CABINETS | $60,756.79 |
| STAIR CASE & BALUSTRADE | $3,900.00 |
| GRANO WORKER | $1,732.00 |
| BRICK PAVING MATERIAL | $4,320.80 |
| PAVING CARTAGE | $231.40 |
| BRICK PAVER | $2,990.00 |
| PLUMBING FIXTURES | $8,567.00 |
| ELECTRICAL & GAS APPLIANCES | $4,092.32 |
| ELECTRICIAN | $9,848.75 |
| WATERPROOFING | $250.00 |
| TILING MATERIAL | $3,626.14 |
| FLOOR & WALL TILER | $9,081.50 |
| SHOWER SCREENS & MIRRORS | $2,102.90 |
| PAINTER | $24,664.45 |
| GARAGE DOORS | $1,437.00 |
| INSULATION | $1,891.12 |
| HOUSE CLEAN | $3,088.00 |
| SITE CLEAN | $3,800.00 |
| BIN HIRE | $1,812.00 |
| GENERAL LABOURING | $1,000.00 |
| FLOOR SCRAPE | $80.00 |
| BRICK PATCH | $150.00 |
| PLASTER PATCH | $200.00 |
| FIREPLACES | $9,300.00 |
| HANDOVER ITEMS | $2,000.00 |
| MAINTENANCE | $2,750.00 |

The builder then groups items into major components which creates a summary of major trades and suppliers. From that list, the builder will then show you the % claimed against each main component. It will look something like this;



**Weighting of Claims**

In recent years, there has been some investigation into builders increasing their early claim %’s and having only small %’s at the end of the job.

This can be in an issue for a several reasons, but first and foremost there is greater risk to the client when this is done. If a builder were to go out of business, you may have paid too much for your new home, leaving the insurer in a situation where more money is required to complete your home than is left on your bank loan.

The first progress schedule we showed on this post is one such claim schedule. This is weighted incorrectly.

Single Storey Homes

* Building Deposit – 6.5%
* Slab Down – 16.5%
* Brickwork To Plate High – 26.0%
* Roof Cover – 24.0%
* Lock up – 20.0%
* Practical Completion – 7.0%

As you can see, the final claim is only 7% of the work. That final 7% accounts for cabinets, ceramic tile supply and labour, shower screens, mirrors, robe fit-out, plumbing fixtures and fittings, brick paving etc…

A more realistic Practical Completion claim would be somewhere around 15% of the contract value, meaning the brickwork and roof cover claims are probably too high.

This is why we really like the % Completion claims – for two reasons.

1. The Home Builder has a consistent and regular cash flow. This means his contractors are paid on time and he is paid a fair supervision amount each month. Also, they are only paid if they have production on site.
2. You’re only ever paying for work that has been completed, and the figures are far more transparent.

**Home Loan Repayments**

For most people, they borrow the full amount for their block of land and their new home.

This means after settlement, you’ll start making repayments on your block of land. However, you should expect that your repayments will increase incrementally as your building loan is drawn down by the builder.

In the case of most of these claims, you’ll notice that 90% of the loan is often drawn down at Lock-up stage. Typically, a home will still take 3 or more months after lock-up before it’s completed and you take possession.

That means you’re going to be making (almost) full repayments on your loan, before you’ve moved in.

Keep that in mind when you build so you’re well prepared during those last couple of months when things generally get a bit tight.

**What If I’m Paying For Some Of The Build, And The Banks Paying The Rest?**

Lets say you are wanting to build a new home for $500,000 and have $200,000 in your bank account and you have a bank loan approved for $350,000. You’re planning on using $50,000 of your money at the end of the build, to pay for some finishing items and to purchase some new furniture.

Who pays what and when?

The banks will all require you to pay your portion of the bill first, and they will take care of the rest.

That means you’ll be expected to pay $150,000 before the bank releases a cent.

It’s not how most clients want it done, but the banks generally do this to ensure that money isn’t spent before the building is completed, which is fair enough.

However, this means you should be prepared in advance and perhaps want to discuss this with your builder. If you have funds in fixed term deposits, you’ll need to make sure you’re able to get those funds out when the builder needs them.

If you can’t, the builder is entitled to stop work and also charge you late fees on your payment.

So be prepared!

We hope this has cleared up some of your questions relating to progress claims and payment schedules. For the most part, just be aware that the banks will release your funds in accordance with your contract, and your repayment amounts will increase as they release more and more money.

# **JCT contract: the effect of a settlement agreement on the final account provisions** <http://www.lexology.com/library/detail.aspx?g=fd833a4b-369e-446b-ae33-f06ce0fdb833>

[**Norton Rose Fulbright LLP**](http://www.lexology.com/contributors/905/) [A UK law firm]

**United Kingdom** January 27 2010

The two main issues before the court were whether the settlement agreement which the parties entered into post practical completion in relation to the final account was intended to replace the contractual final account procedure in **clause 30** of the **JCT standard form of contract** and if so, whether the settlement agreement between the parties amounted to a full and final settlement of all claims and cross-claims arising between the parties.

***YJL London Ltd v Roswin Estates LLP [2009] EWHC 3174 (TCC)***

The employer engaged the contractor to carry out the refurbishment and extension of an office block in London under the terms of the **JCT Standard Form of Building Contract**, With Contractor’s Design, 1984 edition (the **Contract**).

Practical completion was certified on 25 June 2007, following which the contractor and the employer’s agent negotiated the contractor’s final account claim. Negotiations were protracted and an agreement was finally recorded in writing on 15 December 2008. [18 months]

The dispute in this case centred on the final account provisions set out in **clause 30** of the Contract.

**The Final Statement [a final claim by the Contractor] and Final Account [equivalent to an invoice]**

**Clause 30** of the Contract provided that:

* **Final Account**- the contractor was required to submit the Final Account and Final Statement for agreement by the employer within 3 months of practical completion.
* **The Final Statement**- was to set out: (i) the amounts already paid by the employer to the contractor; (ii) any adjustments made to the contract sum as a result of operation of the contract conditions [e.g. Variations; fluctuations; and included sums]; and (iii) the difference (if any) between (i) and (ii) expressed as a balance due to either party.
* **The Final Account and the Final Statement**- as submitted by the contractor was to become conclusive as to the balance due between the parties one month after the date of submission.
* **Employer’s Final Account and Statement**- if the contractor failed to submit the Final Account and the Final Statement, the employer could put the contractor on notice to provide the same within two months, failing which the employer was able to prepare an Employer’s Final Account and Employer’s Final Statement, which would become conclusive as to the balance between the parties one month after the date of submission.

**The Settlement Agreement**

The Final Account Agreement (the **Settlement Agreement**) recorded that:

“The Contractor hereby acknowledges that the payment of £3,144,045 shall be in full and final settlement of all demands, claims for extensions of time or otherwise, requests, liabilities, costs, expenses whatsoever and howsoever owed to the Contractor by the Employer under the Contract or otherwise implied by law or arising in tort and whether in relation to events arising which have accrued prior to the date hereof and which arise or could arise in the future.”

The Settlement Agreement also recorded that the contractor agreed that the Settlement Agreement represented full and final settlement of all its obligations for work executed under the Contract including but not limited to compliance with the following:

* all drawings, requirements and schedules detailed in the contract documents;
* instructions issued under the Contract;
* making good all defects during the defects liability period; and
* all contractual responsibilities under the Contract.

The Final Account Summary (attached to the Settlement Agreement) demonstrated how the final figure of £3,144,045 was calculated. This document set out a variety of items and potential disputes which had been taken into account and included within the final figure.

It was common ground that under the Settlement Agreement there was a final balance of £136,395.60 which was due and owing to the contractor. The employer failed to pay this outstanding balance.

**Was the Settlement Agreement intended to replace the contractual clause 30 process?**

The employer sought to argue that the Settlement Agreement was not intended to displace **clause** **30** of the Contract, that the contractor was in breach of **clause 30** because it failed to submit a Final Account or a Final Statement in accordance with **clause 30**, and that therefore no sum was payable by the employer.

The court rejected this argument and held that the parties had sensibly chosen to arrive at the Final Account and the Final Statement by a process of agreement. That agreement was clearly reflected in the Settlement Agreement.

Further, if there was any doubt that this was the correct answer the judge referred to two well-known rules of contract construction:

* First, the court’s interpretation was the only interpretation of the documents that was in accordance with business common sense (*Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC 191*). The judge held that the expressions used by the employer’s agent in the Settlement Agreement: “Final Account Agreement”, “Final Account Statement” and “Final Summary” were designed to be considered by the reasonable businessman to be final - they plainly denoted the end of the accounting process under **clause 30**.
* Secondly, if there was any ambiguity in the words used by the employer’s agent, then that ambiguity must be resolved against the employer (because the employer’s agent was acting on the employer’s behalf in preparing and sending the settlement agreement to the contractor) in accordance with the contra proferentem principle (*Lexi Holdings v Stainforth [2006] EWCA Civ 988*).

**Did the Settlement Agreement amount to a full and final settlement or did it permit the making of further claims?**

The employer sought to argue that the Settlement Agreement was not in full and final settlement of all claims and cross-claims between the parties and that it was entitled to raise allegations of defective work in respect of: cracked glazing; misaligned structural columns; bowed flooring; damaged cladding; and a failure to provide health and safety files and sub-contractor warranties.

The court rejected the employer’s argument and held that:

* The Settlement Agreement (and the Final Account Summary) were documents intended to comply with the provisions of **clause 30** and so they were conclusive as to the balance due between the parties.
* The words in the Settlement Agreement were intended to convey that no further claims for money (whether by way of damages or sums due under the contract) could be made. This was strengthened by the use of the words “represents full and final settlement in respect of his obligations for work executed under the contract”.
* Similarly, the Final Account Summary expressly included a number of items of work which the contractor had not completed and items of defective works which still required attention. Again this suggested that incomplete or defective items of work were intended to be incorporated into the settlement agreement however and whenever they arose.
* It was difficult to see what claims for defects could survive the Settlement Agreement. It was very clear that any claims arising from patent defects (namely defects that were either known about as at December 2008) or defects which could reasonably have been discovered at that time were intended to be settled.

The court accepted that it was more difficult to say with any certainty that claims in respect of latent defects were in the parties’ minds at the time of the settlement and that as a result it was harder to say that, in the absence of any express reference to them, the Settlement Agreement encompassed such defects.

However, it was unnecessary to decide this point as the employer had not pleaded such a case. Many of the employer’s listed defects were expressly identified in the Final Account Summary and fell under the category of patent defects as they appeared to be either snagging items or items which were or could have been seen well before the Settlement Agreement. Consequently the employer’s listed defects fell within the scope of the Settlement Agreement.

**Editors’ comments**

This case is a reminder to parties to think about the scope of liability when recording the terms of a settlement agreement particularly in relation to the question of whether a contractor is to remain liable for latent defects. Even though in this case the court accepted that it was difficult to say that claims in respect of latent defects were in the parties’ minds at the time of the settlement agreement, the failure to plead any case of latent defects meant that this question was left open. It would have been better to address the issue of latent defects expressly in the settlement agreement.

 [*YJL London Ltd v Roswin Estates LLP [2009] EWHC 3174 (TCC)*](http://www.bailii.org/ew/cases/EWHC/TCC/2009/3174.html)

**NZS 3910:2013** New Zealand Standard **Conditions of contract for building and civil engineering**

**Construction Superseding (in part) NZS 3910:2003**

**12.4 Final payment claim**

**12.4.1**

Not later than 1 Month after the issue of the Final Completion Certificate or within such further time as the Engineer may reasonably allow, the Contractor shall submit a final account of all the Contractor’s payment claims in relation to the Contract. The final account shall be signed by the Contractor and endorsed ‘final payment claim’, and shall be the Contractor’s final payment claim under the Contract. The final payment claim shall be served on the Engineer as agent of the Principal and at the same time a copy of the final payment claim shall be provided to the Principal.

**12.4.2**

The final payment claim shall:

**(a)** Identify the Contract and the relevant period or periods to which the final payment claim relates,

which shall cover the period up until completion of all of the Contractor’s obligations under the Contract;

**(b)** Identify the work to which the final payment claim relates (which shall include all Contract Works yet to be completed by the Contractor or paid for by the Principal);

**(c)** Show the claimed amount in respect of that work, the amount or amounts claimed by the Contractor in respect of all outstanding claims, and the manner in which all such sums have been calculated;

**(d)** Indicate the due date for payment which, subject to **12.5.6**, shall be 45 Working Days after the date of service of the final payment claim; and

**(e)** Where the final payment claim is intended to be a payment claim under the **Construction Contracts Act**, state that it is made under that **Act** and include any information required by that **Act**.

**12.4.3**

Submission of the final payment claim by the Contractor shall be conclusive evidence that the Contractor has no outstanding claim against the Principal other than as contained therein, except for any item which has been referred to arbitration under **Section 13** or to Adjudication. The Principal shall not be liable to the Contractor for any matter in connection with the Contract unless contained within the final payment claim but this shall not preclude the later correction of any clerical or accounting error.

**12.5 Final Payment Schedule**

**12.5.1**

The Engineer shall assess the final payment claim and may amend it as necessary to comply with the terms of the Contract and with the Engineer’s valuation of the work carried out. Subject to **12.5.6**, the Engineer shall, in accordance with the following process, provide a Final Payment Schedule in response to the final payment claim not later than 35 Working Days after the date of service of the final payment claim. Not later than 20 Working Days after the date of service of the final payment claim, the Engineer shall, on behalf of the Principal, provide a Final Payment Schedule to the Contractor and a copy to the Principal, which shall be provisional in accordance with **12.5.1(h)** and shall:

**(a)** Identify the final payment claim to which it relates;

**(b)** Identify the date when the final payment claim was served on the Engineer, and the due date for payment under **12.5.9**;

**(c)** Identify the date when the Final Payment Schedule is provided;

**(d)** Show the sum certified by the Engineer, which shall comprise the value of the Contractor’s final payment claim amended as necessary under **12.5.1**, less previous sums certified by the Engineer under **12.2.2(d)**, and less any other deductions required by the Contract or by law;

**(e)** Show the manner in which the sum under **12.5.1(d)** has been calculated;

**(f)** Set out the reason or reasons for any difference between the sum under **12.5.1(d)** and the claimed amount;

**(g)** State that the sum under 12.5.1(d) shall be the provisional scheduled amount; and

**(h)** State that the Final Payment Schedule is provisional only until the expiry of 35 Working Days after the date of service in **12.5.1(b)**, after which time the sum under **12.5.1(d)** shall become the scheduled amount unless within that time a replacement Final Payment Schedule is provided under **12.5.3**.

**12.5.2**

Not later than 30 Working Days after the date on which the final payment claim was served on the Engineer, the Principal may notify the Engineer in writing (with a copy to the Contractor) of any amendments or deductions that the Principal intends to make from the sum certified by the Engineer. Such notice shall show the reasons for the amendments or deductions and the manner in which they have been calculated.

**12.5.3**

In the event that the Principal has notified the Engineer and the Contractor of any amendments or deductions under **12.5.2**, then not later than 35 Working Days after the date on which the final payment claim was served on the Engineer, the Engineer shall, on behalf of the Principal, provide a replacement Final Payment Schedule to the Contractor and a copy to the Principal, which shall contain:

**(a)** The information stated under **12.5.1(a)** to **(f);**

**(b)** The amendments or deductions which the Principal has notified under **12.5.2** and which are not included in the sum certified by the Engineer under **12.5.1(d)** (and which shall not be deemed to be certified by the Engineer);

**(c)** The reasons for and the manner in which such amendments and deductions have been calculated;

**(d)** The scheduled amount, which shall be the sum certified by the Engineer under **12.5.1(d)** as amended by any amendments and deductions under **12.5.3(b)**; and

**(e)** A statement that the Final Payment Schedule supersedes the Final Payment Schedule provided under **12.5.1**.

**12.5.4**

Where no replacement Final Payment Schedule is provided within the time required under **12.5.3**, the provisional Final Payment Schedule provided under **12.5.1** shall become the Final Payment Schedule and the sum certified by the Engineer under **12.5.1(d)** shall become the scheduled amount.

**12.5.5**

When including in a Final Payment Schedule any amendments and deductions required by the Principal, the Engineer shall be acting only as agent of the Principal under **6.2.1(a)** [Principal’s agent] and not under **6.2.1(b)** [independent arbiter].

**12.5.6**

If the Engineer is unable to provide a Final Payment Schedule within the period of 20 Working Days referred to in **12.5.1**, the Engineer shall before the expiry of that period issue a statement of the reasons why a Final Payment Schedule cannot be issued or otherwise dealt with in accordance with the Contract. The Engineer shall also issue further explanatory statements at Monthly intervals (or other periods determined by the Engineer as reasonable) until the provision of the Final Payment Schedule under **12.5.1**. At the time of issuing any explanatory statement under **12.5.6**, the Engineer shall issue a certificate in the form of a Progress Payment Schedule in accordance with **12.2.2** for

all amounts due under the Contract which can reasonably be certified at that time, and the process under **12.2** shall apply as if the final payment claim had been served as a progress payment claim 7 Working Days prior to the date of the Progress Payment Schedule issued under **12.5.6**. Where the Engineer issues Progress Payment Schedules under **12.5.6**, the Final Payment Schedule under **12.5.1** shall be provided no later than 6 Months after the date of the Final Completion Certificate.

**12.5.8**

If the Engineer gives a decision under **13.2** which amends the Final Payment Schedule, then the Engineer shall forthwith issue a further certificate in the form of a Final Payment Schedule incorporating the amendment, and the process under **12.5.1** to **12.5.5** shall apply as if a final payment claim had been served under **12.4.1**, 20 Working Days prior to the date of that Final Payment Schedule.

**12.5.9**

The scheduled amount under **12.5.1(d)** or **12.5.3(d)** as the case may be, together with the amount of goods and services tax payable shall be paid by the Principal to the Contractor within 10 Working Days of the date of the Final Payment Schedule or, in the case of a scheduled amount under **12.5.1(d)**, the date when the provisional Final Payment Schedule becomes the Final Payment Schedule.

**12.5.10**

Failure by the Principal to notify the Engineer or Contractor under **12.5.2** that it requires any amendments to or deductions from amounts payable to the Contractor shall not prejudice any other method of recovery of such deductions or the Principal’s right to dispute any sum certified by the Engineer, except as provided in the Contract.

**12.6 Effect of Final Payment Schedule**

**12.6.1**

Upon the issue of the Final Payment Schedule the Principal shall cease to be liable to the Contractor in respect of any of the Principal’s obligations under the Contract, except for the Principal’s obligations:

**(a)** To pay the scheduled amount shown as payable in the Final Payment Schedule;

**(b)** To pay any retention monies under **12.3** which are or become payable;

**(c)** To pay any monies which are or become payable under **Section 13**;

**(d)** To pay interest which is or becomes payable under **12.7**; and

**(e)** To pay any scheduled amounts shown in any Payment Schedule provided prior to the provision of the Final Payment Schedule but unpaid at that time.

**G12.4 and G12.5 Final payment claim and Final Payment Schedule**

The time frame and deadlines for the final payment claim generally mirror those for progress payment claims, although the deadlines are longer. It may take time to resolve the amounts due to settle the Contractor’s final account, so longer periods are allowed for claim assessment and settlement of the final account. The 35 Working Day period referred to in **12.5.1** establishes the time required for the provision of a Final Payment Schedule for the purposes of **Section 22(b)(i)** of the

**Construction Contracts Act**.

The time frame and deadlines for the final payment claim are summarised below:

Deadline (Working Day)

**WD 0** Contractor serves final payment claim on Engineer; copy to Principal.

 All subsequent deadlines number from this date **12.4.1**

**WD 20** Engineer provides Final Payment Schedule to Contractor; copy to Principal. **12.5.1**

 Final Payment Schedule should be stated as ‘provisional’ in case it is necessary

 for a Replacement Final Payment Schedule to be provided under ***12.5.3***.OR **12.5.6**

 If a Final Payment Schedule cannot be provided, Engineer issues explanatory

 statement and certificate in form of a Progress Payment Schedule

**WD 30** Principal may notify Engineer of any amendments or deductions, with

 reasons; copy to Contractor **12.5.2**

**WD 35** *If Principal notifies amendments or deductions under* ***12.5.2****:* **12.5.3**

Engineer provides replacement Final Payment Schedule to Contractor;

 copy to Principal *OR*

 *if no Principal’s deductions are notified under* ***12.5.2****:* **12.5.4**

 No action is required: the original Final Payment Schedule issued

 under ***12.5.1*** ceases to be provisional.

**WD 45** Principal shall pay the Contractor. **12.5.9**

The Working Day 35 deadline after service of the Contractor’s payment claim is the most crucial. The actions taken by the Engineer and the Principal will determine at Working Day 35 the amount that the Principal shall pay the Contractor. That amount will be:

**(a)** If no replacement Final Payment Schedule is provided under **12.5.3**, the scheduled amount in the Final Payment Schedule provided under **12.5.1**; OR

**(b)** If a replacement Final Payment Schedule is provided under **12.5.3**, the scheduled amount under that replacement Final Payment Schedule; OR

**(c)** If the Engineer fails to provide either a provisional Final Payment Schedule under **12.5.1** or a replacement Progress Final Payment Schedule under **12.5.3** by the Working Day 35 deadline, the unpaid balance of the claimed amount in the Contractor’s final payment claim as a consequence of **section 23(2)** of the **Construction Contracts Act**.

**G12.5.6** If the Engineer is unable to provide a Final Payment Schedule within the required time, the Engineer shall notify the parties accordingly, giving reasons, and provide a Progress Payment Schedule for what can be certified, and likewise at Monthly intervals thereafter until the Final Payment Schedule is able to be provided. In this case, the process defaults to that for progress payment claims as if the final payment claim had been served as a progress payment claim

7 Working Days prior to the date of this Progress Payment Schedule.

**G12.5.7** If the Contractor fails to submit a final claim, the Engineer may issue a certificate in the form of a Final Payment Schedule. The Principal has 10 Working Days in which to notify any deductions which it requires, after which the Engineer has 5 Working Days in which to issue a replacement Final Payment Schedule. If the Principal does not notify any deductions, the Final Payment Schedule will cease to be provisional 15 Working Days after the issue of that Schedule. Within 10 Working Days after that date, or 10 Working Days after the issue of the replacement Final Payment Schedule, the Principal shall make the final payment to the Contractor. Where the Engineer issues a Final Payment Schedule in the absence of a claim from the Contractor, and the Contractor does not agree with the scheduled amount, the Contractor’s recourse is to initiate dispute proceedings, either through the dispute procedures in **Section 13** or under the **Construction Contracts Act**.