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# **Final account – General description**

# **<http://www.designingbuildings.co.uk/wiki/Final_account>** [UK terminology varies from NZ but UK terms are generally recognised wherever Quantity Surveying is a profession i.e. NZ is the odd one out

[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) (= the **Defects Notification Period** **[[1]](#endnote-1)** in **NZS 3910**) 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 = the **Contract Price [[2]](#endnote-2)** in **NZS 3910**) 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 = **Final Payment Schedule** **[[3]](#endnote-3)** in **NZS 3910**). 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). [See **G9 Section 9 NZS 3910**]
* [Fluctuations](http://www.designingbuildings.co.uk/wiki/Fluctuations). [See **12.8 Cost fluctuations NZS 3910**]
* [Prime cost sums](http://www.designingbuildings.co.uk/wiki/Prime_cost_sum). [See **G12.11 Prime Cost Sums NZS 3910**]
* [Provisional sums](http://www.designingbuildings.co.uk/wiki/Provisional_sums). [See **G12.10 Provisional Items NZS 3910**]
* Payments to [nominated subcontractors](http://www.designingbuildings.co.uk/wiki/Nominated_sub-contractor) or nominated [suppliers](http://www.designingbuildings.co.uk/wiki/Supplier) **[[4]](#endnote-4)**. [See **12.9.3;** and **12.11.1 NZS 3910**]
* Statutory [fees](http://www.designingbuildings.co.uk/wiki/Fees). [See **5.11 Compliance with laws NZS 3910**]
* Payments relating to the opening-up and testing of the works.[see **6.4 Inspection, recording, measuring, and testing NZS 3910**]
* [Loss and expense](http://www.designingbuildings.co.uk/wiki/Loss_and_expense).[see **1.2 Definitions**: **Cost** *includes expense or loss and overhead cost whether on or off the Site* **NZS 3910**]
* [Liquidated and ascertained damages](http://www.designingbuildings.co.uk/wiki/Liquidated_and_ascertained_damages) **[[5]](#endnote-5)**.
* 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) [See **12.3 Retention monies NZS 3910**].

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)

[See **11.3 Final Completion Certificate NZS 3910**]. 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 [See **11.4 Effect of Final Completion Certificate NZS 3910**].

[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 [See **12.4.3 NZS 3910**].

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 = 35 Working Days in **NZS 3910 12.5.1(h)**). [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** [SC] **Quantity Surveyors** [A UK firm]

## 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 [i.e. the quantity surveyor employed by the Principal] 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.

Common practice is for both Employer [**Principal** under **NZS 3910**] (or the Employer’s representative – e.g. “*Engineer*” under **NZS 3910**) 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 many contracts the contractor is to provide the architect or quantity surveyor with all documents necessary for the final account preparation typically 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 generally consists of measured work priced at the original billed [scheduled] rates. If the contractor's QS has reason to doubt the accuracy of any of the original billed items, s/he can request the QS measure the relevant work 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** are:

1. Prime cost sums and amounts in respect of named subcontractors [[6]](#endnote-6)and associated contractor's profit;
2. Provisional sums and the value of work for which approximate quantities are included in contract bills [Schedule of quantities];
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** are:

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 the contractor’s 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 – Goods and Services Tax];
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 [schedules of quantities];
7. Any amounts payable by the employer to the contractor to reimburse it for direct loss/and or expense arising from matters materially affecting the regular progress of the works; **[[7]](#endnote-7)**
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 [See **APPENDIX A – COST FLUCTUATION ADJUSTMENT BY INDEXATION NZS 3910**];
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 principal’s 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 most 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 give 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 claims can be expected while having a new home built?**

This is a Perth house-builder’s site but it has useful breakdowns of house building costs

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

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

The schedule for payment during construction in most building contracts allows for regular ‘progress claims’ and there are two common ways this is done.

*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 typically submit a progress claim as and when the main components of construction have been completed on the home, generally calculated by following the formula: Cost of Building to Date \* less payments already made = Invoice Cost + Builders Margin + GST = Progress Claim Amount i.e. the builder will assess the costs to build the new home to a certain point, add their standard percentage mark-up, add GST and will invoice you for that amount. \* If actual costs are used it raises the problem that they may not match the agreed price for the house, and if it is costing the builder more to build than it had estimated it would cost, the builder may have asked for the full contract price before the house is finished.

**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 100% of the building contract amount has been paid.

A typical indicative percentage breakdown follows:

Single Storey Homes:

* Building Deposit – 6.5%
* Slab Down – 16.5%
* Brickwork To Plate High – 22.0%
* Roof Cover – 20.0%
* Lock up – 20.0%
* Practical Completion – 15.0%

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%

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

This method is popular with luxury home builders and is used to ensure a payment is made every month. The amount will vary depending on the percentage of work that has been completed.

Typically, when this method is used the builder will supply the client and the bank [[8]](#endnote-8) with a breakdown of costs against the various stages of construction.

The builder first calculates all of the costs associated with building the new home. An example of a summary of costs that a builder uses follows:

|  |  |
| --- | --- |
| PRELIMINARIES | $1,205 |
| LOCAL AUTHORITY FEES | $5,565 |
| WATER AUTHORITY FEES | $315 |
| WORKS INSURANCE | $3,093 |
| HOME OWNER’S WARRANTY | $1,515 |
| ENGINEER’S FEES | $5,290 |
| DRAFTING & ENERGY CERTIFICATION | $585 |
| CONTRACT SCHEDULING | $324 |
| SURVEYING | $924 |
| SITE SHED & WC HIRE | 840 |
| EARTHWORKS | $5.850 |
| COMPACTION TEST | $833 |
| PLUMBER | $21,485 |
| STORMWATER | $2,348 |
| TERMITE TREATMENT & SLAB CURE | $847 |
| G.F. CONCRETE CURING | $312 |
| G.F. CONCRETOR | $20,614 |
| 1st Floor REINFORCEMENT | $5,900 |
| 1st Floor FORMWORK | $9,212 |
| 1st Floor STEELFIXER | $1,470 |
| G.F. BRICK MATERIALS | $15,976 |
| G.F. BRICK CARTAGE | $1,952 |
| G.F. BRICKLAYER SAND | $799 |
| G.F. BRICK HARDWARE | $3,098 |
| G.F. STRUCTURAL STEEL & LINTELS | $4,792 |
| G.F. TIMBER JOINERY | $887 |
| G.F. ALUMINIUM JOINERY | $20,587 |
| G.F. STEEL JOINERY | $1,314 |
| G.F. BRICKLAYER | $27,904 |
| SCAFFOLD | $7,827 |
| BRICK HOIST | $1,940 |
| G.F. ROOF TIMBER | $14,260 |
| G.F. ROOF STEEL | $1,565 |
| G.F. METAL FASCIA | $1,272 |
| G.F. ROOF HARDWARE | $1,042 |
| G.F. ROOF CARPENTER | $13,368 |
| CRANE HIRE | $840 |
| SITE WELDING | $600 |
| ROOF PLUMBER | $4,455 |
| METAL ROOF & WALL SHEETS | $23,451 |
| PLASTERER | $29,507 |
| PLASTERERS SAND | $773 |
| APPLIED COATINGS | $756 |
| ARCHITECTURAL MOULDINGS | $126 |
| CEILING & WALL LINING | $19,286 |
| DOORS | $4,112 |
| MOULDINGS & SHELVING | $2,005 |
| FIXING HARDWARE | $2,665 |
| FIXING CARPENTER | $6,269 |
| GLAZIER | $142 |
| CABINETS | $60,757 |
| STAIR CASE & BALUSTRADE | $3,900 |
| GRANO WORKER | $1,732 |
| BRICK PAVING MATERIAL | $4,321 |
| PAVING CARTAGE | $231 |
| BRICK PAVER | $2,990 |
| PLUMBING FIXTURES | $8,567 |
| ELECTRICAL & GAS APPLIANCES | $4,092 |
| ELECTRICIAN | $9,849 |
| WATERPROOFING | $250 |
| TILING MATERIAL | $3,626 |
| FLOOR & WALL TILER | $9,082 |
| SHOWER SCREENS & MIRRORS | $2,103 |
| PAINTER | $24,664 |
| GARAGE DOORS | $1,437 |
| INSULATION | $1,891 |
| HOUSE CLEAN | $3,088 |
| SITE CLEAN | $3,800 |
| BIN HIRE | $1,812 |
| GENERAL LABOURING | $1,000 |
| FLOOR SCRAPE | $80 |
| BRICK PATCH | $150 |
| PLASTER PATCH | $200 |
| FIREPLACES | $9,300 |
| HANDOVER ITEMS | $2,000 |
| MAINTENANCE | $2,750 |

The builder then groups items above into major components which creates a summary of major trades and suppliers. From that list, the builder will then show the client the percentage of the total price that will be claimed against each component. It will look something like the following sample;



**Weighting of Claims**

There is evidence of builders increasing their early claim percentages and having only small percentage at the end of the job so as to improve their cash flow [commonly referred to as

‘front end loading’]. See for example the schedule above which claims 100% of PRELIMINARIES of $25,554 when most of the work remains to be done. The work still has to be supervised for example.

This increases risk to the client because if a builder goes out of business, the client has paid too much for the new home, leaving the insurer in a situation where more money is needed to complete the home than is left on the bank loan.

# **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 three 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 [There were standard conditions in common use several decades ago whereby if a final account was agreed and later latent defects became apparent, the contractor was absolved from any responsibility for them – sensibly that clause fell into disuse].

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** [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. [Contractor to serve a final payment claim on the Engineer after the Final Completion Certificate is issued]

**12.4.2**

The final payment claim shall: [final payment claim contents]:

**(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; [identity of contract and period covered]

**(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); [the work covered]

**(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; [dollar sums claimed and how 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 [due date for payment]

**(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**. [whether claimed under the **Construction Contracts 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 [DISPUTES]** 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. [Final payment claim is evidence of no further claims but subject to outcome of formal dispute resolution proceedings]

**12.5 Final Payment Schedule** [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: [Engineer assesses final payment claim, amends it as necessary, provides a *provisional* Final Payment Schedule to the Contractor with a copy to the Principal that…]

**(a)** Identify the final payment claim to which it relates; [identifies the relevant payment claim]

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

**(c)** Identify the date when the Final Payment Schedule is provided; [identifies date 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; [shows sum certified less deductions]

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

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

**(g)** State that the sum under 12.5.1(d) shall be the provisional scheduled amount; and [state the scheduled sum is PROVISIONAL]

**(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**. [state scheduled sum is only PROVISIONAL for 35 Working Days when the scheduled sum becomes payable unless the Engineer issues a replacement Final Payment Schedule, presumably the consequence of the Contractor raising issues as to why the Schedule is less than the claimed amount and agreeing with the Engineer any changes, who will then issue a new Schedule.

**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. [Principal informs Engineer intention to alter whatever sum the Engineer certified for payment, for example to deduct liquidated damages. In following Principal’s instructions to change the amount payable, Engineer acts as the Principal’s agent]

**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:[Engineer to issue a replacement Final Payment Schedule on Principal’s behalf if the Principal wants to make deductions which will contain…]:

**(a)** The information stated under **12.5.1(a)** to **(f);** [as above]

**(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); [Principal’s changes]

**(c)** The reasons for and the manner in which such amendments and deductions have been calculated; [reasons for changes and how amended]

**(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 [dollar value Principal will pay]

**(e)** A statement that the Final Payment Schedule supersedes the Final Payment Schedule provided under **12.5.1**. [statement that the Principal’s Schedule replaces the Engineer’s Schedule]

**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. [if the Principal does not amend the Engineer’s PROVISIONAL Final Payment Schedule within the time allowed the PROVISIONAL Schedule becomes the FINAL Schedule]

**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. [If the Engineer cannot produce a Final Payment Schedule s/he must state why not and do so monthly until the reasons for not producing one are resolved but must issue a Schedule authorising whatever s/he can reasonably certify for payment whenever she makes such a statement]

**12.5.7**

If the Contractor fails to submit its final account under 12.4.1, the Engineer may issue a certificate in the form of a Final Payment Schedule for such amount, if any, as he or she may assess as if the Contractor had submitted a final payment claim, and the process under 12.5.1 to 12.5.5 shall apply. [if the Contractor fails to issue a final account the Engineer can make his/her own assessment of payment due and issue a Final Payment Schedule]

**12.5.8**

If the Engineer gives a decision under **13.2** [Engineer’s review] 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. [if the Engineer issues a ‘formal decision’ which affects the final payment due to the Contractor s/he can issue an amended 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. [the Principal has 10 Working Days to pay the amount certified by the Final Payment Schedule plus GST]

**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. [the Principal’s failure to amend the Engineer’s Final Payment Schedule does not affect the Principal’s rights to recover money from or amend payments to the Contractor, except as prevented by 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: [the Principal’s only obligations toward the Contractor after the Final Payment Schedule is issued are to pay:]

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

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

**(c)** To pay any monies which are or become payable under **Section 13**; [monies payable under formal dispute resolution process]

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

**(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. [unpaid payable monies owing prior to the issue of the Final Payment Schedule]

**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**. [deadlines for settlement under **NZS 3910** are longer than those under the **Construction Contracts Act** to allow more time to reach a settlement]

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

Deadline (Working Day) [as set out]

**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: [35 Working Days after the Contractor served its final payment claim the amount the Principal must pay the Contractor has been settled as the amount in:]

**(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**; [Final Payment Schedule] OR

**(b)** If a replacement Final Payment Schedule is provided under **12.5.3**, the scheduled amount under that replacement Final Payment Schedule; [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**. [the unpaid balance of the Contractor’s final payment claim]

**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. [problems stopping the Engioneer from issuing a Final 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**. [Engineer certification of final payment due to Contractor if Contractor fails to submit a final payment claim]

1. As defined in **NZS 3910 11.1 Defects Notification Period** The Defects Notification Period for the Contract Works or any

 Separable Portion shall commence on the date of Practical Completion of the Contract Works or Separable Portion. The

 Defects Notification Period shall be 3 Months unless some other period is stated in the Special Conditions. [↑](#endnote-ref-1)
2. As defined by **NZS 3910 1.2 Definitions** The sum provided in the Contract as payable for the completion of the Contract

 Works calculated in accordance with **2.2**, **2.3**, or **2.4** as applicable, subject to such adjustments as are provided for in the

 Contract [↑](#endnote-ref-2)
3. The NZ word *schedule* rather than the UK *certificate* was introduced by the **Construction Contracts Act** in 2003 [↑](#endnote-ref-3)
4. **NZS 3910** does not define *supplier* and makes no reference to a *supplier* being *nominated.* A *supplier* who custom makes

 a product e.g. precast concrete units for a particular job arguably becomes a **Subcontractor** even if it does not install the

 units. If the product is standard it is usually available from more than a single *supplier*, and because the product itself is

 specified it would be unusual to nominate a *supplier* to provide it although that may effectively happen if for example

 there was a single supplier for the product. Other forms of contract may distinguish between a **Subcontractor** and a

 *supplier* differently, for example a company that custom makes precast concrete units but does not install them could be

 referred to as a *supplier*. [↑](#endnote-ref-4)
5. **NZS 3910** **Schedule 1 – Special Conditions of Contract – Specific Conditions of Contract**

 **10.5 Damages for late completion**

 **10.5.1** Liquidated damages shall be applied as follows:

 • In respect of the Contract Works: *($ per Working Day)*

 • In respect of any Separable Portion(s): *($ per Working Day for each Separable Portion)* [↑](#endnote-ref-5)
6. In the UK *Nominated* Subcontractors contract with the Contractor and enter into a collateral agreement with the

 Principal whereby the Principal becomes responsible for any delay the *Nominated* Subcontractor causes to the

 Contractor on Site. The Principal gives the Contractor an extension of time for the delay plus its costs of delay and

 recovers the amount plus the cost to the Principal of the delay from the *Nominated* Subcontractor. A *Named* Contractor

 is an alternative whereby the Principal names a Subcontractor which the Contractor employs under the same conditions

 as any other of its domestic Subcontractors. **NZS 3910** has no provision for *Named* Subcontractors. [↑](#endnote-ref-6)
7. Contract conditionstypically give the contractor time extensions for certain delaying events e.g. bad weather, and in

 certain circumstances the contractor will receive its costs of delay especially for delay caused by the principal such as

 may arise out of Variations. In some situations circumstances disrupt work on site without affecting the due date for

 completion, but impact on workforce productivity and increases the contractor’s costs. Such circumstances are

 referred to as those which *disturb the regular progress of the works.* The subject is not specifically mentioned in

 **NZS 3910** but the contractor’s cost in such situations would be recoverable under **10.3.7**. [↑](#endnote-ref-7)
8. This applies when the builder is working for a client who is responsible for the design and who owns the land on which

 the house is to be built. When a builder/developer builds a speculative house, i.e. there is no owner yet, the builder

 ideally buys the land on which the house will sit on ‘builder’s terms’ which is typically 10% deposit and balance in six

 months [no interest paid], and borrows the money for materials and labour using the land as security if the bank or

 other lender agrees. The bank will allow the loan to be withdrawn in accordance with an agreed schedule subject to

 proof of the builder/developer having completed the claimed value of work. The bank will typically work to a simple

 schedule of payments e.g. certain percentages when the ground floor slab is placed; when the building is enclosed and

 weather-tight, and when the interior is complete. The builder tries to complete the building as quickly as possible

 [interest will be paid on the land after six months and on the loan for materials and labour as it is withdrawn] for it to be

 sold to allow the loans to be paid off as interest free as possible. The contractor will also hold back from paying its

 suppliers and subcontractors as long as possible to use their credit rather than money it has to borrow. [↑](#endnote-ref-8)