IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION) **PLAINT NO.14/2002**

BETWEEN **MULTI CONTRACTORS LIMITED** a duly incorporated company having its registered office at Rarotonga

First Plaintiff

AND **PAUL MANGAKAHIA** of Rarotonga, Company Director

Second Plaintiff

AND **COLIN RATTLE** of Muri, Rarotonga

Defendant

Hearing: **20 November 2003**

Counsel: **Mr Tim Arnold for Plaintiffs**
Mr Mitchell for Respondent

Date of Judgment: **9 December 2003**

RESERVED JUDGMENT OF DAVID WILLIAMS J

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Introduction

[1] This case is in the nature of a building dispute but it involves the removal of the residential home ("the house") of the defendant ("Mr Rattle") from its existing location at Muri to a new location 5 metres up a slope, and rotated 90 degrees, on the same section of land. The first plaintiff ("the Contractor") carried out the work between April and early June 2000.

[2] Construction contracts do by their nature generate disputes about payment. If there are delays, variations or other causes of additional expense, those who do the work often consider themselves entitled to additional payment. Those who have the work done often have reasons, good or bad, for saying that the additional payment is not due.

[3] The plaintiff asserts that the total cost of the work requested by the defendant undertaken by the first plaintiff was $29,372.30 of which Mr Rattle has paid the sum of $20,032.87 so there remains outstanding and owed to the Contractor the sum of $9,339.43.

The Preliminary Question for Determination

[4] As a means of trying to resolve the dispute efficiently and economically the parties first referred certain aspects of the dispute for an inquiry and a report pursuant to the provisions of Part XIX of the Code of Civil Procedure of the High Court 1981 to Mr Peter Broadbent, an engineer in Rarotonga. Mr Broadbent reported recently on the scope and extent of the work that had been undertaken. As a second step the plaintiffs invited the Court to decide a preliminary question. The agreed formulation was settled, with the assistance of the Court, at the commencement of this hearing on 20 November 2003. The question reads as follows:

> "Agreed 418 Preliminary Question.
>
> Upon its true construction was the contract for removal and re-erection, viewed at the time of its formation, a fixed price contract under which the work carried out by the Plaintiffs (such work being that identified in the report of Mr Peter Broadbent dated 18.11.2003 was to be completed for $25,000 with the defendant not liable to pay any further sum or sums unless all parties by further agreement express or implied or by way of agreed variations decided accordingly."

[5] There is no equivalent under the code of Civil Procedure of the High Court of the Cook Islands of New Zealand High Court Rule 418. Rule 418 provides as follows:

> "Orders for decision – The Court may, whether or not the decision will dispose of the proceeding, make orders for –
>
> (a) The decision of any question separately from any other question, before, at, or after any trial in the proceeding; and
>
> (b) The formulation of the question for decision and, if thought necessary, the statement of a case."

[6] The nearest analogy is in the Cook Islands Code is Rule 197 which provides that questions of law may be stated in special cases. To avoid any misunderstanding as to the nature of the exercise which is being embarked upon, at the suggestion of the Court, the parties agreed that the provisions of Rule 418 would be taken to apply to the determination of the preliminary question in this case.

Evidential Uncertainties

[7] It will be apparent from the question that Mr Rattle is contending that the contract was a fixed price contract which was to be completed for $25,000 and that he is accordingly not liable for the balance claimed. There was a building removal contract signed between the parties (exhibit 1) but it did not refer to the issues raised in question and was largely directed to provisions providing protection for the builder in the case of any damage incurred during the removal exercise. The only clause which related to cost was as follows:

> "5. The owner will pay the sum of $5,000 before commencement of the removal."

[8] It was apparent from the evidence of the parties and from the submissions of their counsel that both accepted that there must have been either a contract collateral to the written building removal contract dealing with contract pricing matters or a separate subsequent oral and/or written agreement on that matter.

[9] This case is just another example of the problems which arise when parties to building contracts or removal contracts fail to specify clearly in writing what are the precise terms which govern their relationship. It may be said that in the usual building removal case nothing more is needed than the standard form building removal contract such as exhibit 1. However, as will be noted below, this was not a

straightforward building removal and the absence of a proper written contract has created much difficulty. The difficulty has been exacerbated by the conflicting evidence given by the parties. As a consequence there have been left a number of residual uncertainties as to precisely what happened and what were the contractual arrangements.

[10] Courts are always reluctant to decide cases on the basis of the onus of proof. However, in cases redolent of evidential uncertainty, such as this one, there is sometimes no alternative. Therefore it becomes necessary to examine the pleadings to decide where the onus lies in relation to the preliminary question.

Pleadings and Onus of Proof

[11] The relevant parts of the statement of claim of the 13th of May 2002 are as follows:

> "4. BY written agreement dated the 6th day of April 2000, the First Plaintiff, acting by and through the Second Plaintiff entered into a written contract with the Defendant to remove the residential home of the Defendant ("the house") from its location at Muri to a new location higher on the same section. The Defendant agreed to pay the sum of $5,000 **on account of consideration for** the removal of the house from one location to the other by the First Plaintiff as directed by the Defendant. That contract was limited to the removal process and did not relate to any necessary preparation construction or reconstruction work to be undertaken to the house, nor to any other work to be undertaken on or around the house.
>
> 5. THE Defendant instructed the First Plaintiff (by verbal instruction and physically pointing out the place in question) as to the required location of the house and the house was relocated in accordance with those instructions.
>
> 6. THE Defendant then requested that the First Plaintiff undertake further work, specifically, to undertake construction of the foundations for the house as relocated and to undertake ancillary work such as site clearance and driveway formation. The Defendant was unable to provide the First Plaintiff with an engineering plan of the required works and accordingly the First Plaintiff declined to commit to a fixed price and instead agreed to undertake the work on the basis of the notified rates of the First Defendant for such work ..."

The pleading went on to identify the precise hourly rates for different types of work and asserted that "those rates were, at the time the standard rates charged by the first plaintiff to its customers for those items and were accepted, as such, by the defendant." Invoices were produced dated May 24 and September 19, 2000 which charge machine hire at those rates. Those accounts were paid. That fact is not

decisive because Mr Rattle refused to pay any amount beyond the allegedly agreed limit of $25,000.

[12] The statement of claim continued:

> "7. THE First Plaintiff also offered to contract on the basis of the labourers of the First Plaintiff being charged at the standard rates charged by the First Plaintiff to its customers (initially $35 per hour and on and from 12 June 2000 at $45 per hour) and those rates were also agreed to by the Defendant.
>
> 8. THE First Plaintiff advised the Defendant that it would, from time to time, use the services of the third parties in performance of certain aspects of the work, and it was agreed that the cost to the First Plaintiff of those services would be reimbursed by the Defendant.
>
> 9. THE Plaintiff thereupon commenced work clearing vegetation and levelling, including but not limited to:
>
> a) removal of six fully grown coconut trees and bush debris;
>
> b) bringing in fill to back-fill stump holes, level section and fill foundation platform for house;
>
> c) trucking out debris (14 loads);
>
> d) necessary excavation and levelling work to make a level site out of a hillside sloped at 35 degrees or more and the forming of an access drive (requiring 11 loads of fill and 14 hours levelling and shaping and filling with the bobcat);
>
> e) the digging of footings and smaller tree clearance with the Backhoe MF40 for nine hours and loading operations by the rubber wheel 596 Hymac;
>
> f) filling and loading of necessary stockpiled materials (for cartage to section) by 596 Hymac and use of 596 Hymac to manoeuvre house in its relocation and in to aid in lifting the necessary underpinning steel beams. This machine was used in these activities for a total of twelve hours.
>
> g) carriage of steel lifting beams, tools, cement mixer, boxing materials and approximately 160 blocking timbers (initially), two tons of cement, necessary steel mesh amounting to a further 3 truck loads.
>
> 10. THE work of clearing, levelling and forming the foundation area for the house occupied the First Plaintiff for a period of approximately three weeks, delays being occasioned by heavy rain in April and May 2000. Up to 25 May 2000 casual labour charges totalled 73 hours, and by that time the First Plaintiff's workmen had undertaken further work including fixing profiles, tying steel and commencing excavation and preparation of footings.

11. IN connection with the work for the foundation the First Plaintiff purchased material from T & M Heather Limited and specifically:

a) 314 lengths of D 12 reinforcing rod, 20 lengths of R6 reinforcing rod, 10 K6 tire wire, 10 sheets 668 mash to a cost of $3,336;

b) two tons of cement at a cost of $875; and

c) 1000 standard 8 in blocks, 500 8 inch bond blocks, 300 F/N 8 inch blocks and 150 half 8 inch blocks together with 10 loads of ready mix, 17 MPA to a total sum of $7,057.50.

such that the total materials cost incurred in respect of that purchase as $11,268.50.

12. IN the period 26 May 2000 to 1 June 2000 the First Plaintiff:

a) completed the foundation floor;

b) completed block filling;

c) poured the necessary concrete floor.

Specialist subcontractors were employed namely:

a) Tere Iakimo for steel fixing purposes;

b) Tiare Landscapers (hire of Bobcat 1840) $520; and

c) Landholding Limited (hire of compactor) $280.

13. THE Defendant then requested the First Plaintiff to undertake further work by way of lifting the house a total 5 m above ground level and the First Plaintiff agreed to take the work on the rate as set out above. The Defendant also requested that the building be turned by 90 degrees to align the southern side of the house to seaward (southeast).

14. THE First Plaintiff undertook all necessary work in preparing the house, removing decking, plumbing, detaching the house from the foundation, lifting it onto its foundation and turning the house to set on the new foundation over a total of 76 and a half hours those hours being spaced over a period of approximately five weeks. The First Plaintiff then undertook all work necessary elevate the house in excess of 5 m, in consultation with the Defendant and in co-operation with the requirements of the block layer retained by the Defendant for the purpose of laying blocks (the First Plaintiff's role in that matter being confined to steel tying, and block drilling).

15. THE final work by the First Plaintiff for the Defendant was to concrete the necessary anchors of the house and to lower the house onto the completed block work, removal of beam cradles, blocking timber, scaffolding and other equipment, finally, the erection of 4 large tanalised posts."

[13] There was an alternative claim on a quantum meruit basis if it should be found that the arrangement between the first plaintiff and/or the second plaintiff and the defendant was insufficiently precise as to the form of the basis of a contract.

[14] The statement of defence admitted paragraph 4 in its original form. Since the amendment to paragraph 4 was made at trial there was no pleading to the new form of paragraph 4. However counsel for the defendant appeared to acknowledge in his submissions, consenting to the altered paragraph 4, that it was clear that the $5,000 could not be said to have been the agreed sum for the complete contract of removal. To that extent he seemed to align himself to the structure of the pleading, which in paragraphs 5 and 6, referred to subsequent instructions which were accepted by the Contractor and which necessarily involved sums far greater than $5,000. Indeed, it was agreed that two cheques were paid on the 20th of April totalling $15,000.

[15] As to paragraph 6, the defendant denied that there was an agreement to undertake the work on the basis of the notified rates. The defendant pleaded that the second plaintiff:

> "... gave the quote of $25,000 which would include the following:
>
> - Remove the trees, fill the stump holes, provide the footings, concrete floor, block work (both labour and materials), resiting and raising the house and bolting the house onto the concrete block work,
>
> - And the defendant undertook that the job would take three weeks and that he the defendant would be full time on the job and would look after the house to make sure that nothing went wrong.
>
> 7. THE defendant further says that he asked the plaintiff to provide a written quote, but the response was that he the defendant did not know how to put the written quote together. Accordingly the verbal quote of $25,000.00 was accepted."
>
> ...
>
> 10. As to paragraphs 9, 10, 11 and 12 of the statement of claim the defendant says -
>
> (a) To commence the job the plaintiff required a deposit of $10,000.00 being the first payment, this being for materials for the concrete blocks, cement, steel, sand, aggregate, ready mixed concrete and $5,000.00 for labour and incidental materials. This was paid to him in two cheques.

(b) The defendant and his family left for New Zealand for three weeks holiday to avoid having to move to another house while the work was being done and were advised by the plaintiff that the work would be completed prior to their return.

(c) While away the defendant entrusted the house key to the plaintiff.

(d) On his return, three weeks later (14 May 2000) the defendant found that the only work that had been done on the job was the removal of the trees and the profiles for the house had been erected. The defendant also discovered that property valued at $1,500.00 had been stole from the house, which items have never been recovered. Further stolen items came to light, the total amounting to $3,150.00.

(e) When asked why the work had not been completed, the plaintiff said that the weather had been unsuitable and he had broken his shoulder. He again said that it would take three weeks to complete and the price would still be $25,000.00 but, that he needed (then) a further $3,032.87. The defendant reiterated that if the job was gong to cost more than $25,000.00 he did not want to go ahead with it.

(f) The defendant and his family then moved into a rental flat next door, a cost of $600.00 per month until the job was completed.

(g) When the block was finally completed and the house lowered and bolted down the final payment was made at $2,000.00.

11. THE original contact was for an all inclusive sum of $25,000.00. The block laying was part of the contract but the plaintiff said that he did not have the funds to pay the block layer and the defendant would have to do so to enable the job to be finished.

...

13. THAT the final work on the contract was never completed by the plaintiff and the defendant had to hire and pay three workers to complete the job.

14. THAT the contract was for $25,000.00. The first plaintiff did not meet his contractual obligations, the workmanship was substandard, he did not complete certain parts of the job, other workmen had to be hired and the plaintiff did not comply with the Building Code requirements in having the work inspected at each stage of the contract."

[16] When the Court canvassed the onus of proof with counsel, counsel for the plaintiff asserted that since the allegation of a fixed price contract was raised by the defendant the defendant must carry the burden of proving it. However, counsel for the defendant argued that since the plaintiff in its statement of claim at paragraphs 6 and 7 was asserting pricing on the basis of notified rates and specifically contended that the

first plaintiff declined to commit to a fixed price the plaintiff must prove that the contract was not a fixed price contract.

[17] Although the language of paragraph 6 gives some support to the defendant's arguments I consider that it is Mr Rattle who must bear the onus of proof. The general rule for determining the incidence of legal burden in civil cases was stated by Walsh JA in *Currie v Dempsey* [1967] 2 NSWR 332 at 539:

> "In my opinion, the burden of proof in the first sense [sc the legal burden] lies on the plaintiff, if the fact alleged (whether affirmative or negative in form) is an essential element in his cause of action, eg if its existence is a condition precedent to his right to maintain the action. The onus is on the defendant, if the allegation is not a denial of an essential ingredient in the cause of action, but is one which, if established, will constitute a good defence, that is, an "avoidance" of the claim which, prima facie, the plaintiff has."

[18] While it is true that the plaintiff pleaded that the first plaintiff declined to commit to a fixed price, that assertion is not part of the essential cause of action but rather a preliminary observation as to the cause of action which itself alleges a contractual obligation to pay on the basis of notified rates without any limit as to a total amount payable. That is how I read the cause of action. Thus I consider that the true position is that the defendant is relying on the alleged fixed price contract to resist payment of the final amount. Accordingly he must bear the burden of proof.

Legal Principles Concerning Fixed Price Contracts

[19] The common law recognises at least four basic kinds of contract so far as price is concerned:

(a) lump sum contracts.

(b) measure and value contracts.

(c) cost reimbursable contracts.

(d) contracts for a reasonable price.

[20] *Hudson's Building and Engineering Contracts* (11th ed, Sweet & Maxwell, 1995, London) states at 8.001 that it is possible to divide contracts into those:

> "...where the extent and design of the work is not sufficiently known at the time of the contract (where, in the absence of a cost-reimbursable approach some form of "measure and value" or "schedule" contract, employing either a schedule of rates or a relatively primitive or approximate bill of quantities, is likely to be used) or, on the other hand, those contracts where the work is sufficiently pre-planned at the time of contracting to enable either a lump sum

(that is, fixed price) contract, or a modern English-style measured contract with fully detailed bills of quantities or schedules of rates, to be used."

[21] Thus, the essence of a fixed price or lump sum contract is that not only is a fixed price agreed between the parties, but furthermore there is sufficient detail in the contract (generally in the form of attached specifications or drawings) to evidence pre-planning at least to the extent that:

(a) a fixed price is capable of ascertainment;

(b) detailing the minimum standard of work to be carried out by the contractor, although this will not necessarily include indispensable or contingency expenditure; and

(c) it is possible to clarify work covered by the contract in contrast to variations ordered by the owners.

[22] Thus, with a fixed price or lump sum contract the need for additional documentation is essential. At 3.023 Hudson states:

> "Whether lump sum or measured, all fixed price contracts will require at least some written description or specification to supplement the drawings and indicate the full extent and quality of the required work."

[23] Further at 3.024:

> "Lump sum or fixed price contracts of any degree of sophistication will need a document to introduce some certainty into the valuation of such variations as may be ordered."

[24] In contrast, cost reimbursable contracts entitle the contractor to recover the actual cost of carrying out the works calculated in accordance with agreed criteria: See Kennedy-Grant *Construction Law in New Zealand* (1999) at 11.07.

[25] Such contracts allow for overhead and profit, either as an agreed fee or percentage, or through some method of ascertaining particular costs. This could include, for instance, an agreement for an hourly rate in respect of labour combined with an agreement to reimburse the contractor in respect of costs for materials. The latter is what is said by the plaintiffs to have been agreed in this case.

The Evidence

[26] Mr Mangakahia gave evidence and explained that his company was the only company in the Cook Islands engaged solely in the removal of buildings. In his time he had removed about 70 buildings. He was not a builder as such. He explained the background of the initial contact by Mr Rattle and said that Mr Rattle's proposal was unusual and complex. In the first place the house had to be moved up a slope 5 metres and then turned around 90 degrees on the new location and lifted upwards. Originally a new mezzanine floor was to be created when the house was moved to the new site but eventually that proposal was abandoned. He said the existing house itself created problems because of its substantial height. He said he had never moved a building of this height and all of these factors made this removal job a major challenge. He accepted that he usually had fixed price contracts but said that he did not follow his usual practice here because of the novelty and difficulty of the job.

[27] Mr Mangakahia said that, after the initial discussion, there were site visits where he had discussions with Mr Rattle which gave him a better picture of what was required. It became obvious that considerable block laying would be needed. Mr Mangakahia was not a block layer and Mr Rattle agreed that a block layer would have to be brought onto the site. Mr Mangakahia was adamant that no plans whatsoever were ever provided to him from the beginning to the end of the job nor were there any written specifications. No quantity surveyor was appointed. Mr Mangakahia said he took a number of photographs at the commencement and as the job progressed. This was to show the progress of the job and what had actually been done. The photographs were necessary in the absence of plans. (The photographs were produced to the Court.) He said he had an engineer at the Ministry of Works supervise the job so that it would be completed satisfactorily notwithstanding the absence of plans.

[28] As to discussions about price, he denied that he said to Mr Rattle that he would do the job for a fixed price of $25,000. He described the $5,000 mentioned in the contract as merely a preliminary payment to "get off the ground". He said there was too much uncertainty for a fixed price. He agreed that the sum of $25,000 had come into the conversations. This was when Mr Rattle asked him of the likely overall cost. Mr Mangakahia said he gave an indication of cost by reference to his own home which

had been removed at a cost of $25,000. However, he said he pointed out to Mr Rattle that that was a removal on flat ground. He insisted that if there had been a contract for a fixed price of $25,000 he would have put it in his standard contract form in the usual way.

[29] As to the suggestion that Mr Rattle had, as pleaded in paragraph 10(e) of the statement of defence and counterclaim, reiterated that if the job was going to cost more than $25,000 he did not want to go ahead with it he acknowledged that this had been said in the course of general discussion but denied that he had agreed to it. He said that the eventual agreed outcome was to do the job in stages. He said that Mr Rattle had said there was some urgency getting the work done because he was going to carry on his new jewellers business in part of the house. In this part of his evidence Mr Mangakahia conveyed the clear impression that in spite of his concern not to exceed $25,000 the eventual instruction from Mr Rattle had been to proceed.

[30] Mr Rattle gave evidence on his own behalf. He said that Paul Mangakahia was a friend of his and they were on good terms. He still had regard for him and regretted these problems had arisen. He claimed that a few days after the initial meeting in his jewellers shop, at another meeting, Mr Mangakahia had said he could do it all for $25,000 and by this was meant site preparation, steel work, concrete blocking and all other work. He claimed that on that basis they decided to go ahead. He also said that Mr Mangakahia had stated that $25,000 would be adequate for the job.

[31] Mr Rattle said that the original arrangement was that the removal job was to be done while Mr Rattle was in New Zealand. Work had not progressed very far on his return. He said at that point he reiterated that he had only $25,000 and if it was going to cost more he would not go ahead – he would buy all his jewellery tools first and get a pattern of income going from his new jewellery business and leave the project until later. At this stage the house was still in a position where it could be lived in. He agreed that after this arrangement he had moved out of the house and the job had gone ahead. He said it was after moving out that the plaintiff sought to charge on the basis of hourly rates.

[32] As to why there had been no written quotation he claimed that Mr Mangakahia had said he had not given a written quotation because he could not write one up. Mr

Rattle said he understood this was because, like his own son, Mr Mangakahia was dyslexic.

[33] He said he thought that the cost of the job in the end would be about $25,000. He said he took the $25,000 "on trust" from a good friend. He acknowledged that some of the uncertainties and difficulties about the job had been made clear to him by Mr Mangakahia.

[34] Mrs Rattle also gave evidence. She referred to discussions prior to the commencement of the work. She said that after being asked to "price the job", Mr Mangakahia came back with $25,000 for "the whole job". She asserted that she and her husband had said that the work would have to be done for $25,000 and that this had been conveyed to Mr Mangakahia. She said that if she and her husband had known the price was higher than $25,000 they would not have gone ahead. They were under some financial pressure at the time in the establishment of their new jewellery business.

[35] The end result is that there are conflicting accounts of what was said and what was agreed on the price issue.

Plans

[36] No plans were produced on the first day of the hearing when the evidence was heard. However, the defendant and his counsel, in contrast to Mr Mangakahia, contended that plans did exist. On the second day of the hearing, when all oral evidence had been concluded, the parties by consent produced three plans. The date of all the plans was given as the 20th of April. All plans were described as "proposed residence for Colin Rattle". They had been approved by the Ministry of Works Building Controller on the 17th of May 2000 and had obviously been used to obtain the necessary building permit.

[37] The first plan 1/3 showed four site elevations and depicted the new lower portion of the house which was to be placed under the exiting building. Plan 2/3 was a foundation and floor plan which also included some cross sections. Plan 3/3 was some detail about stairs, wall bracing and sill block detail.

[38] Counsel for the plaintiff pointed out that the date of the plans, 20th of April, was the same day that two cheques for $15,000 were written by Mr Rattle and handed to Mr Mangakahia and this was about the time Mr Rattle went overseas. The date of approval of the contract, 17th of May, was submitted by counsel for the plaintiff to be well after the time that Mr Mangakahia was asked to "quote" for the contract. It was suggested that this strongly supported Mr Mangakahia's view that he had never been given any plans upon which to quote. Counsel for the defendant said from the bar that Mr Rattle's view was that there were two sets of plans and they were prepared well before he went to New Zealand and that he had given them to Mr Mangakahia. The plaintiff contended, and I accept, that the contractual negotiations were complete by the time the $15,000 was paid and the plans surfaced for the first time.

Analysis and Conclusions

[39] Against this background the Court has come to the conclusion that the defendant has not established an agreement for a fixed price contract. The Court finds as a fact that there was discussion of a $25,000 limit, but this was raised by Mr Mangakahia by reference to his own removal and to give some indication of the likely cost involved. The Court accepts his evidence that the particularly challenging nature of this project was such that he could not realistically and safely agree to a fixed price contract. The fact that he has done so many fixed price contracts but refused to make this contract of that kind is a telling point.

[40] Moreover, the date of the plans support Mr Mangakahia's case, which I uphold, that he was never given plans until after the time the contractual arrangements were made. It is more likely that the April 20 plans were under the control of Mr Rattle and a builder who originally built the house, Mr Ian Kaika, whom Mr Rattle brought along to work in with Mr Mangakahia as the building contractor.

[41] The absence of plans and specifications at the relevant time is a strong if not decisive indication that this was not and could not be a fixed price contract: See paragraphs [19] to [25] above.

[42] It is not denied by Mr Mangakahia that words were said to the effect "that if it is more than $25,000 we will not proceed", but I have come to the view that this was said, as a means of conveying to the contractor the general boundaries of the plaintiff's pricing

expectations. The Court finds in this case, in spite of the fact that the Rattles mentioned they would have difficulty if $25,000 was exceeded, that the Rattles were in the end prepared to proceed on the basis of a general understanding that the price would be in the vicinity of $25,000.

[43] In summary I find that the defendant upon whom the onus of proof rests has not satisfied the Court on the balance of probabilities that the plaintiffs agreed to a lump sum fixed price contract for $25,000.

[44] Accordingly, the two parts of the agreed preliminary question are answered in the negative.

[45] The plaintiffs are entitled to one set of costs having succeeded on the preliminary question. The parties should endeavour to agree the amount of those costs. In case agreement cannot be reached the question of costs is reserved for future consideration by way of written submissions from the parties, such submissions to be lodged no later than 28 days from the date of this judgment.

SIGNED at Auckland on December 9 2003 at 4.30pm.

David Williams J