IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA233/2022
[2024] NZCA 430

BETWEEN	EDUBASE LIMITED Appellant
AND	MINISTER OF EDUCATION Respondent

Hearing: 14 November 2023

Court: French, Miller and Courtney JJ

Counsel: A S Ross KC, S T Hartley and T P Refoy-Butler for Appellant
M G Colson KC and H T N Fong for Respondent

Judgment: 10 September 2024 at 11 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The appellant's prayer for relief is amended to provide that the claim for interest begins from 14 May 2020.

C The respondent must pay the appellant $50,000 plus interest from 14 May 2020 to the date of payment pursuant to ss 10 and 12 of the Interest on Money Claims Act 2016.

D The costs judgment is set aside.

E There is no order for costs in the High Court or this Court.

REASONS OF THE COURT

(Given by Courtney J)

Table of contents

Introduction

[1] Edubase Ltd is a licensed provider of home-based childcare. Most of its income is from government subsidies provided through Ministry of Education funding for Early Childhood Education (ECE). In March 2020, Edubase was providing home-based childcare to some 600 children through "educators". Those arrangements came to a halt on 25 March 2020 as a result of a nationwide lockdown imposed in response to the COVID-19 pandemic. The government recognised, however, that home-based childcare would be needed for children whose parents worked in essential services. It introduced a scheme to provide the necessary care. Edubase was one of the entities initially approached to participate in the scheme.

[2] Following initial communications with the Ministry on 25 March 2020 about the terms on which the scheme was likely to be funded, Edubase began making arrangements. By 27 March 2020, Edubase had 26 educators providing care. It contracted with carers at a rate of $12.50 per child per hour, based on its understanding that the terms of the funding would be $30 per child per hour. However, on 1 April 2020, it was advised that Cabinet had approved funding for the scheme on the basis

that carers would be paid $25 per hour and providers like Edubase would be paid a "placement fee" of $60 per carer to cover administration costs.

[3] These terms were far less attractive than Edubase had expected. It continued to provide the services but made it clear that it was seeking different terms. Unlike the other providers under the scheme, it never signed a contract with the Ministry and never invoiced the Ministry for the $60 per carer payment. On 27 April 2020, having made no progress in securing an improvement in the terms being offered, Edubase withdrew from the scheme.

[4] Edubase brought proceedings in the High Court against the Ministry, asserting that the Ministry had made representations as to the terms on which Edubase would be remunerated, that Edubase had relied on the representations and the Ministry had resiled from them. It sought damages of $316,767 plus GST based on promissory estoppel or, alternatively, the same amount based on quantum meruit.

[5] Edubase failed on both causes of action. Churchman J held that there had been no representations of the kind asserted and that Edubase's interpretation of what was conveyed was unreasonable.[1] The Judge found that Edubase had affirmed the contract with the Ministry and,[2] further, that Edubase could not show that it was entitled to any greater amount for the services it provided than what the Ministry had agreed to pay so the claim in quantum meruit would have failed in any event.[3]

[6] Edubase appeals. There is no challenge to the Judge's findings regarding the estoppel cause of action.[4] The only issues for determination are whether the Judge

---

1 *Edubase Ltd v Minister of Education* [2022] NZHC 795 [judgment under appeal] at [165]–[179].

2 At [187]–[192].

3 At [197]–[214]. The Judge held that "it cannot be said that the Ministry did not pay a reasonable price". Edubase said this was an error because it had not invoiced the Ministry for the $60 per carer payment. It had only received the payments that were those passed on to educators: see judgment under appeal, above n 1, at [214]. However, it was clear that the Judge was aware of this fact. We infer that the Judge's finding is properly understood as being that the $60 per carer fee was reasonable. It is not disputed that an invoice for that amount would be paid.

4 Initially, the findings on the estoppel cause of action were the subject of challenge but those grounds were abandoned shortly before the hearing. The appellant also abandoned an application for leave to amend the notice of appeal with respect to the appeal against the estoppel grounds. Costs in respect of the application were not agreed.

erred in finding (1) that Edubase had affirmed the contract and (2) that the $60 per carer payment was a reasonable price for the services Edubase agreed to provide.

[7] Edubase also appeals the Judge's costs decision requiring Edubase to pay costs of $83,578.30 and disbursements of $33,849.16.[5]

Background

Edubase's business model

[8] Edubase is based in Tauranga and is the second largest licensed provider of home-based childcare throughout New Zealand. Its educators are independent contractors who provide childcare and ECE in their own homes. Educators can have up to four children in their care at a time. Edubase also provides a small number of educators who work as nannies in other people's homes. In March 2020, Edubase educators had some 600 children in their care on a regular basis.

[9] Both Edubase and the educators themselves must be registered with the Ministry and meet certain requirements. Edubase assists the educators in that process and provides support for them in terms of business development, marketing and administration, including managing funding. In March 2020, Edubase employed 11 administrative and payroll staff. Edubase also directly employs "visiting teachers" to provide police vetting information, curriculum advice, supervision and mentorship, and ensure that regulatory requirements are satisfied. In March 2020, Edubase employed around 22 visiting teachers.

[10] As we noted at the start, most of Edubase's income is from government subsidies provided through Ministry funding for ECE. Funding is provided on a "per child per hour" basis. Edubase retains a part of every funded hour to cover overheads and profit. The balance is paid to the educators who may also receive payments from parents for non-funded hours. As independent contractors, educators are not eligible for benefits such as holiday leave, sick leave or employer KiwiSaver contributions and must meet their own ACC levies.

---

5 *Edubase Ltd v Minister of Education* [2022] NZHC 2427 [costs judgment] at [45].

[11] A bulk payment calculated at 75 per cent of estimated child attendance for the forthcoming quarter is made to Edubase three times a year, with a "washup" payment made once actual enrolment figures are known.

The childcare scheme for essential workers

[12] Edubase received a bulk payment on 2 March 2020 for the coming four months. On 23 March 2020, the government announced that all ECE services would have to close from midnight 25 March 2020. ECE providers were, however, advised that the bulk payments would not be clawed back, notwithstanding that the ECE services for which they were made would be precluded by the lockdown. The Ministry's bulletin advising that all early learning services would be required to close from midnight 25 March 2020 stated that:

> Government funding will continue as normal. It will not be cut or clawed back.
>
> Funding paid on 2 March 2020 that was enrolment based may not reflect actual attendance through to 31 May 2020. If actual numbers of children who attend is less than enrolment numbers, you will not be required to pay this back. If your service has higher attendance through this period you will claim the funding through the usual wash-up process. This also applies to early learning services on monthly funding.

[13] It was recognised early on that with the closure of usual childcare services during the lockdown, arrangements would need to be made to allow essential workers to continue working. It was proposed that a scheme to provide home-based childcare for essential workers be introduced which would utilise a small number of licensed providers who were already contracted and subsidised. At that time the three largest providers in the country were PORSE In-Home Childcare (NZ) Ltd, Edubase, and Barnardos New Zealand Inc.

[14] Siobhan Murray, a senior policy manager with the Ministry who was closely involved in the development of the essential workers scheme, explained the considerations in developing the scheme. She said that the Ministry's main concern was to ensure that educators themselves would be paid in full by the proposed subsidy. It was also important that educators participating in the essential workers scheme be paid at a similar rate to caregivers under "OSCAR" programmes — the Out of School

Care Recreation programme under which services were mainly paid for by parents' fees with an individual child subsidy for low-income parents. However, OSCAR did not have ongoing guaranteed funding of the kind that home-based ECE providers received and most OSCAR providers employed their staff directly, and so carried greater costs than home-based ECE providers whose educators were independent contractors.

[15] In terms of remuneration for providers under the essential workers scheme, Ms Murray said:

> I had reservations about increasing the funding and wanted to understand providers' marginal costs in operating the Scheme — ie, the additional costs that had not already been covered by the ECE subsidies that had been provided and were not being clawed back. As discussed earlier, in Edubase's case this was around $1,060,791.24. I assumed that the administration costs for the scheme would be covered by the ECE subsidies that government had already paid.
>
> The care would be provided by educators who had already been safety checked and police vetted as part of their engagement as a home-based educator and their home had already been checked by the provider — these were sunk costs. I assumed that the administration would be undertaken by existing employees of the provider who the provider had an obligation to pay throughout the lockdown. … The scheme would also not involve the main costs associated with providing home-based ECE — providers did not have to provide ongoing oversight of the care arrangements or provide support for a curriculum to be delivered. The scheme would only require some upfront administration in matching educators and families and paying educators using their existing payment systems.

[16] On 25 March 2020 the COVID-19 Ministerial Group agreed to directly fund the scheme, which had not yet been fully developed. An outline was contained in a decision paper lodged with the Ad Hoc Cabinet Committee on COVID-19 Response the previous day. At this stage a flat fee of $30 per hour was being considered.

[17] Colin Meehan was the National Manager of Early Childhood Education – Regulations and Planning at the Ministry. He was closely involved in implementing the scheme to provide childcare for essential workers. On 25 March 2020, Mr Meehan called one of Edubase's then Directors, David Best, to introduce himself. Later in the day he emailed Mr Best advising that:

What we are thinking (subject to change …)

- We will contract your organisation (and the other two) through a contract for service
- This contract will sit outside other MoE arrangements, so as not to affect other funding arrangements such as the 6 hr maximum for the ECE subsidy …
- The figure we are working with is $30 per hour – at this point this is subject to Treasury approval but this is the figure we put forward
- The contract for service would be with the licensed service, with an expectation that the home educator is appropriately remunerated. The arrangement between the licensed service provider and home carer is yours to manage

…

[18] On the basis of that information, Edubase immediately began preparing to provide the new service. There were numerous things to consider, including fielding inquiries from essential workers (many of whom were not existing Edubase clients), making arrangements for personal protective equipment, responding to questions from educators on matters such as the wage subsidy, the engagement of more educators from other providers and the requirements for police vetting of new staff.

[19] In the absence of any confirmed funding arrangement, Edubase produced a contract for its educators under which it engaged the contractors to provide childcare services to essential workers during the lockdown and any other services agreed on, for $12.50 per hour per child on the basis of timesheets that would be provided weekly.

[20] By the end of the week, 26 Edubase educators were providing care for children of essential workers. There were also more than 60 children who had not yet been able to be placed with educators and work continued to find placements for those children.

[21] On 1 April 2020, Mr Meehan emailed Edubase with details of the funding proposal. He advised that decisions were still being progressed through Cabinet but provided the following details on a without prejudice basis:

Funding

The funding for the support scheme is as follows:

- Licensed home based providers in the scheme will be paid a flat rate per carer of $60 plus GST as an administration fee
- Each home-based carer will be funded at $25 per hour excluding GST
- Ministry of Education ECE subsidies (including 20 Hours ECE) cannot be claimed for these hours.
- This funding will not impact any eligibility under the COVID-19 wage subsidy scheme — Note: this is yet to be approved by Cabinet

[22] The email went on to set out the criteria for funding. These included that the scheme was only for the duration of the four-week Alert Level Four lockdown period, for the children of essential workers aged between 0–14 years and where the carer had an existing relationship with Edubase as an educator prior to 25 March 2020. In addition, essential workers were not to be charged any additional fees.

[23] The email added:

> We are conscious that demand for child care is unknown and data is emerging of unmet needs in some geographical pockets. We will be expanding this scheme beyond the three initial providers. We are now working through how to do this in a manner that is fair, while continuing to focus on essential worker needs.

Edubase responds to the terms of the scheme

[24] Based on Mr Meehan's initial email, Edubase had anticipated that the rate would be $30 per child per hour, which Edubase would apportion between itself and the educators as it saw fit. It did not consider that the $60 administration fee per carer would cover the work required to administer the scheme. And the $25 per hour to be paid to the educators meant that those with only one child to care for would be entitled to more than the contracted $12.50 per child per hour it had agreed with the educators, leaving Edubase out of pocket. Educators who had three or more children in their care

would receive less under the scheme but Edubase felt obliged to meet the commitment it had made to them, again leaving it out of pocket.[6]

[25] Because educators had already signed contracts and Edubase's position as one of the providers for the scheme had already been publicised, Edubase decided that it had to continue to provide the services. Nevertheless, Mr Best emailed Mr Meehan expressing his dissatisfaction and concern with the MoE's funding structure. He pointed out that Edubase had a total of 32 staff working full-time, including evenings and weekends, to set up and administer the scheme. Edubase's accountants had suggested that this was at a cost to the business of $15.39 per hour, with the result that the proposed flat fee of $60 per carer for administration was not feasible.

[26] Mr Meehan's response was non-committal. The next day, 2 April 2020, Mr Best emailed Mr Meehan again, proposing a different basis for remuneration of the providers and educators. Mr Meehan responded:

> My guess is that some people (be that Treasury, Policy, Advisers…) might have a view that "your" actions are as simple as – parent A calls, you connect parent A with care [sic] B, process a view time sheets etc. Bear in mind, I'm overly simplify for effect.
>
> What won't necessarily be understood is exactly what [your] "back office" team is doing …
>
> I think there is value in us being able to put forward a more fulsome description of what is actually involved.
>
> I think it would also assist to understand how much of the normal ECE funding (which has not been clawed back) "covers" some of your staff

[27] Mr Best immediately responded with more detail about what was involved in administering the scheme. There were further exchanges but they did not progress matters. Then, on 6 April 2020, Mr Meehan emailed Mr Best attaching a contract and a letter from the Associate Deputy Secretary – Operational Delivery Sector Enablement and Support. The Deputy Secretary acknowledged that Edubase had been providing services without a contract:

---

[6] The respondent notes that Edubase ended up recontracting at the $25 per hour rate with all but one of the educators caring for three or more children each. In respect of the one educator who insisted on being paid $12.50 per child per hour, Edubase inflated her hours so as to claim time and a half from the Ministry. The Judge therefore found the claim that Edubase was paying some carers out of their own funds was unsubstantiated: see judgment under appeal, above n 1, at [52]–[56].

> I appreciate that under unusual circumstances you have worked with us in good faith and without the usual formal contractual agreement or confirmation of funding arrangements. …
>
> The initial parameters for this arrangement were discussed with you over the phone and subsequently followed-up via email and further phone calls. However, there have been some misunderstandings about expectations so I hope the following will provide clarification.

[28] The email went on to advise that under the scheme all that was required was supervision and care for the children of essential workers. The usual curriculum planning and implementation, and involvement of visiting teachers would not be needed. There was to be no ongoing support other than for payment and report processing. This was why the administration fee was to be referred to as a placement fee. The funding for the services was confirmed as a one off $60 placement fee per carer and a $25 per hour for the home-based carer.

[29] Mr Best was unhappy with the offer and emailed Mr Meehan as follows:

> We have been considering the impact of the Service Agreement, and have the following comments we would like addressed please:
>
> Of the 89 families placed so far that have started in care (and are being paid this week), Edubase currently have a relationship with only 6 of these families. Therefore, we find it unreasonable to accept that "we are being funded for these children already" given that the majority are not currently using our resources.

[30] Mr Best went on to point out that the duties of its teachers and administration staff continued through the lockdown period and included planning, policy review, internal assessments, maintaining teacher registration folders, interacting with families and educators and so on. He concluded:

> Colin, we are paying our carers $12.50 per child, per hour, this we discussed with you in the first few days of lockdown. We believe that we should be reasonably compensated for the work that we have put in and continue to do to provide the necessary care of the children. I trust we can resolve this funding matter, to note we are making another payment to the Carers (approx. $41,000) based on $12.50 per hour, per child.

[31] Edubase continued to push the Ministry to alter the terms on which it would be funded, with no success. On 16 April 2020, Mr Best emailed Mr Meehan:

> I appreciate you responding to my emails, however I do not accept your responses, for reasons I have previously raised with you.
>
> We will reserve our rights and address at a more convenient time.
>
> To date we have supplied you with 3 invoices relating to carer payments for the last three weeks. [W]e would appreciate reimbursement for those and for the remaining weeks of lockdown.

[32] The invoices that Edubase had submitted were in respect of the carers' hours with the Ministry paying the invoices and Edubase passing the payments on to the carers. A total of $250,674.39 (excluding GST) was paid for 18,101 childcare hours on a per hour basis. Edubase did not invoice the Ministry for the $60 placement fee.[7]

[33] The term of the scheme was originally set to expire on 22 April 2020 in line with the four-week Alert Level Four lockdown, but that date was varied to 27 April 2020 once the lockdown was extended. Edubase declined to participate in the scheme after 27 April 2020. In an email to Mr Meehan on 22 April, Mr Best advised that it would not be signing a variation to continue with the scheme and:

> As mentioned, we are reserving our right to negotiate the first agreement under Alert Level 4-Lockdown, at a more suitable time.
>
> Edubase is not prepared to carry on with the terms of your agreement past Alert Level 4 from midnight Monday 27th April 2020[.]
>
> …
>
> I remind you that other providers, that did not offer up their services continued to receive funding and we could have done likewise. This agreement was to sit outside of that funding and deserves recognition by way of fair and reasonable compensation. We simply fail to accept that MoE believe we have already been funded for these children when in fact, just 14 out of 100 families were existing within our own networks. We have not been funded for these children at all. They have all come at a huge administrative cost to our Organisation.
>
> Administration costs for time and effort from all our staff have not been accounted for under your "placement fee".
>
> …
>
> Moving into the next two weeks we are reluctant to be continuing this form of support for families into level 3 under a similar guise, we cannot when it's not financially viable; rather we would revert back to pre[-COVID-19] conditions.

---

7 See above n 3.

Subsequent events

[34] On 9 June 2020 Edubase's lawyers wrote to the Ministry advising that:

> Edubase is dissatisfied with the way that it has been treated and MoE's attempt to take a step back from the level of funding that was originally indicated. It is our client's view that this is unconscionable and that it is entitled to receive more than what MoE's revised and final level of funding was made.
>
> Edubase formally demands payment of $316,767, over and above the sum it has received under the Proposal. This is the sum that it considers it is entitled to receive for the work that was done.

[35] The letter of demand laid a foundation for estoppel on the basis that Edubase undertook the provision of services in good faith and actively encouraged by the Ministry. The Ministry rejected any suggestion that it had made representations about what the scheme would be and added:

> Furthermore, when provided with the Cabinet approved funding conditions and aware that we had commenced engaging with other providers, [Edubase] continued to deliver the services.
>
> …
>
> Furthermore, it should not be overlooked that during the same period the Ministry agreed not to claw back any regulated early childhood services funding paid to your client in advance, despite children not attending early childhood centres during the lockdown period. We estimate the amount that [Edubase] would otherwise have had to pay back to be about $528,000.

[36] In August 2020, preparations began to reintroduce the essential workers scheme in the event of another Alert Level 4 lockdown. The terms of the scheme were revised, with the fee to the provider increased to $10 per hour.

First ground of appeal: the finding of affirmation

The High Court decision

[37] The Ministry's pleaded position was that it had reached a concluded contract with Edubase. Having denied making any representations, it pleaded that:

> Instead, statements were made in order to provide information to allow the parties to consider entering into a contract for the provision of services.
>
> On or about 6 April 2020, the Ministry of Education sent Edubase a written contract for the provision of services.

> Edubase provided the services and therefore, by its conduct, accepted the terms of the written contract …

[38] In its opening submissions, however, the Ministry asserted that, notwithstanding Edubase's reservation of its rights as to the terms on which it was providing the services, Edubase had affirmed the contract by its conduct and that its provision of the services led the Ministry to alter its position significantly.

[39] The existence of a contract is essential to the defence of affirmation. However, the Judge did not make a clear finding as to the existence of the contract. He came to the issue after setting out the factual narrative at some length and having determined the issue of estoppel:[8]

> [187] The Ministry has raised a defence of affirmation. Factual findings therefore need to be made on the relevant conduct. Here, the exchange between Mr Meehan and Mr Best on 1 April 2020 is relevant. By this point, Mr Best knew that the actual terms of the proposal were different to what he had thought they were going to be. He knew that he had the opportunity, at this point, of pulling out. He articulated the possibility of doing so and received the response from Mr Meehan that if that occurred, Mr Meehan would have to find another provider. Mr Best says that he had no option but to continue. He points to the fact that he had already signed contracts with the educators and that the Ministry had already told the public that Edubase were to be one of the providers.

[40] The Judge identified as relevant the fact that the contracts Edubase had entered into with its educators did not, in fact, compel it to continue on that basis because all but one had been happy to enter into new contracts based on the Ministry's terms and "in respect of the one who did not wish to do so, Edubase falsified the hours they claimed from the Ministry for their work so that Edubase was no worse off".[9] Further, Edubase had sought to take advantage of the goodwill and reputational enhancement that flowed from the public announcement that it would be one of the scheme providers. The Judge concluded that:[10]

> [190] Ultimately, it seems that Edubase made a commercial decision that the potential reputational enhancement to be obtained from continuing with the Scheme was more valuable to them than the benefits of withdrawing from the Scheme as at 1 April.

---

8 Judgment under appeal, above n 1.

9 At [188].

10 Footnote omitted. Quoting *SK Shipping Europe Ltd v Capital VLCC 3 Corp* [2022] EWCA Civ 231, [2022] 2 All ER (Comm) 784 at [74].

> [191] There is no doubt that Mr Best was unhappy with the $60 flat administrative fee and kept trying to persuade Mr Meehan that it should be changed. However, the fact that a party may be unhappy and purport to reserve rights does not preclude the Court from finding that they have nonetheless affirmed [a] contract by their conduct. This matter was recently considered by the … Court of Appeal [of England and Wales] who held:
>
> > … where a party makes an unconditional demand of substantial contractual performance of a kind which will lead the counterparty and/or third parties to alter their positions in significant respects, such conduct may be wholly incompatible with the reservation of some kinds of rights, even if the party demanding performance purports at the same time to reserve them.

Appeal

[41] Edubase complains, first, that the Judge erred in allowing the Ministry to advance an affirmative defence at trial without having pleaded it. It is correct that the defence should have been pleaded. There is, however, no indication that Edubase objected when the Ministry signalled in its opening that it would be asserting affirmation. And while Edubase raised its objection in closing, it nevertheless went on to address the issue in its submissions. There was no complaint in either the High Court or in this Court that Edubase was prejudiced in responding to the point. The issue was a legal one only, and adequately addressed in closing submissions. There was never any suggestion that different evidence would have been called had the point been pleaded. This complaint does not provide any basis on which to impugn the decision.

[42] The second complaint is that the Judge failed to identify and apply the correct legal principles. Edubase's argument in both the High Court and in this Court has been that there was never any concluded contract between the parties. For the reasons we come to next, we consider that this ground must succeed.

[43] Mr Ross KC, for Edubase, submitted that the Judge wrongly relied on the decision in *SK Shipping Europe Ltd v Capital VLCC 3 Corp* as identifying the relevant principles when the relevant principles are in fact those described by this Court in *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd*.[11] This

---

[11] *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 (CA).

submission is correct in the sense that affirmation can only arise in the context of an existing contract and *Fletcher Challenge Energy* addresses the pre-requisites for the conclusion of a binding contract.[12] In *SK Shipping Europe Ltd* there was an existing contract that one party purported to rescind, the other purported to terminate and the former had affirmed the contract.[13] That was not the situation here.

[44] Affirmation is explained in *Burrows, Finn and Todd on the Law of Contract in New Zealand*:[14]

> At common law the innocent party was not obliged to cancel in respect of a breach by the other party, however serious or fundamental that breach might be. The guilty party could not unilaterally terminate a contract by breaking it. It is clear that this common law position is preserved by the Contract and Commercial Law Act 2017. Sections 36 and 37 provide only that a party may cancel a contract in respect of the types of breach there outlined, not that the contract is automatically cancelled by them. Section 38 provides that cancellation is not permissible if the innocent party affirms the contract; and s 41 provides that cancellation does not take effect before notice of it is given to the other party. Thus, the innocent party is presented with an election. He or she may either affirm the contract by treating it as still in force, or on the other hand treat it as finally and conclusively discharged, that is, cancel it. …
>
> …
>
> If the innocent party chooses to keep the contract on foot, the status quo is preserved intact. The contract "remains in being for the future on both sides".[15]

[45] In *Crump v Wala*, Hammond J described affirmation in the following terms:[16]

> … affirmation … is an equitable doctrine. It rests on the underlying notion that an aggrieved person must elect between fundamentally inconsistent rights. If somebody in relation to a contract says, "I am content to take damages," that person cannot then subsequently be heard to say, "I have changed my mind on that, and I now wish to rescind the contract."

[46] In this case, therefore, affirmation could only arise as an issue if there was a concluded contract between Edubase and the Ministry that could be affirmed. The Judge's finding, that Edubase "made a commercial decision that the potential

---

12 At [53] and [54].

13 *SK Shipping Europe Ltd v Capital VLCC 3 Corp*, above n 10, at [26] and [78].

14 Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) at [18.3] and [18.3.1].

15 *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447 (CA) at 464–465 per Lord Denning MR.

16 *Crump v Wala* [1994] 2 NZLR 331 (HC) at 336.

reputational enhancement to be obtained from continuing with the scheme was more valuable to them than the benefits of withdrawing from the scheme",[17] fell short of a finding that the parties had entered into a contract. We are satisfied, on the undisputed facts, that no contract came into existence.

[47] In *Fletcher Challenge Energy*, this Court said:[18]

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

[48] It is perfectly clear from correspondence that Edubase never agreed to the terms that were being offered. It expressly reserved its rights to continue negotiating those terms, particularly the administration fee. The fact that it continued to provide services and to invoice the Ministry for the carer component does not, in our view, reach the threshold of a concluded contract.

[49] This case is not dissimilar to *Transpower New Zealand Ltd v Meridian Energy Ltd*.[19] Transpower, which owns and operates the national electricity

---

17 Judgment under appeal, above n 1, at [190].
18 *Fletcher Challenge Energy Ltd v Electricity Corp of New Zealand Ltd*, above n 11.
19 *Transpower New Zealand Ltd v Meridian Energy Ltd* [2001] 3 NZLR 700 (HC).

transmission grid, offered its services to Meridian by way of "posted terms", being standard terms and conditions combined with standard prices, pending the completion of negotiations on a bespoke contract. The parties had previously negotiated a heads of agreement, the terms of which differed significantly from the posted terms. Meridian declined to accept the posted terms and maintained that it would rely on the heads of agreement while further discussions were underway. In an action by Transpower against Meridian for unpaid transmission charges claimed under the new standard terms, Fisher J summarised the issue and his conclusion as follows:

> [2] The principal question is a contractual one that arises where one party offers a benefit to another on stated terms. Can the offeree argue that it is not contractually bound if it takes the benefit while clearly rejecting the terms? I have concluded that as a general principle it can, and that in consequence Meridian is not bound by the suggested contract upon which Transpower sues. Transpower could have sued in quantum meruit but elected not to do so. …

[50] Transpower argued that, by voluntarily using the national grid, Meridian had accepted that use of the national grid could only occur under a contract and, in the absence of a signed contract, the standard posted terms would constitute the contract. The Judge accepted that Meridian knew that Transpower was offering its services on the basis that there had to be a contract, that Transpower required that in the absence of a signed contract the posted terms would apply and that by its conduct Meridian had demonstrated an intentional use of Transpower's services. But, Meridian's express rejection of the posted terms meant that no contract arose:

> [41] … For contract purposes Meridian's conduct differs in no way from that of any other consumer who elects to make use of a service offered on a contractual basis. But for associated verbal rejections Meridian's conduct would have constituted acceptance of Transpower's offer.
>
> [42] However, Transpower could not choose to take notice of one form of response (use of the services) while ignoring the other (verbal rejection of posted terms). Meridian's responses had to be viewed as a total package. The question is how an objective and reasonable observer placed in the shoes of Transpower would have interpreted Meridian's statements and conduct in their totality. Meridian's position was unambiguous. It was rejecting Transpower's offer of posted terms while also making it plain that it intended to use Transpower's services. … The critical point is that from Transpower's perspective Meridian was plainly rejecting the only basis upon which there could have been a contract, namely posted terms.
>
> [43] Interpreted in that light, there could be no contract. Meridian's conduct in taking Transpower's services was no more than an acceptance of posted terms than Transpower's provision of the services was an acceptance

> of Meridian's suggestion that they rely on the [heads of agreement]. The fact was that on an objective appraisal of the representations held out by each party there was no coincident offer and acceptance. To the contrary, there was express and unambiguous disagreement.

[51] The position is the same here. Edubase could not have made it clearer that it did not agree to the $60 administration fee. The fact that it provided the services, having made that clear, did not result in a concluded contract. Rather, the Ministry continued to accept the services knowing that there was no agreement on the fee. Affirmation was therefore not available as a defence.

Second ground of appeal: quantum meruit

The decision in the High Court

[52] Edubase claimed $316,767 (plus GST) as the fair price for the administrative services it provided during the nearly five weeks it participated in the scheme. This was calculated on the basis of $17.50 per hour per child for 18,101 child hours of care. The $17.50 figure was based on subtracting the $12.50 rate agreed with educators from the $30 per hour rate initially discussed with the Ministry. It also proposed alternative amounts of $278,574 (plus GST) (based on the average cost to Edubase of delivering childcare), $265,164 (plus GST) (based on the usual subsidy and parental fee split) and $209,662 (based on 10 per cent of Edubase's annual running costs). As we explain later, none of these amounts are pursued on appeal.

[53] The Judge identified the issue to be determined as being the reasonable price for the services provided on the basis of an objective enquiry into what a reasonable person in the Ministry's position would have to pay for the service.[20] He prefaced his discussion with the following comments:

> [197] The context of the present case is relevant to an objective assessment of reasonable market value. The present circumstances differ somewhat from two commercial parties engaging in a traditional arms-length fashion. There is an overlay of public law in this case. The Ministry was responding to a sudden and unique event. Government policy was being hastily developed. There was no prior experience or established practice to draw on. The concept of [there] being "market price" for the services covered by the Scheme is therefore somewhat artificial. The childminding service that the Scheme

[20] Judgment under appeal, above n 1, at [195] and [196], citing *Worldwide NZ LLC v NZ Venue and Event Management Ltd* [2014] NZSC 108, [2015] 1 NZLR 1 at [27].

> implemented was substantially different from the services delivered by ECE providers. It is therefore not possible to assume that remuneration under the Scheme should be the same as remuneration for providing ECE services.

[54] Initially, the Judge identified the market as being "the market for basic childcare services existing in March/April 2020" but shortly afterwards described it as being "childcare services for the children of essential workers in April/March 2020".[21] We do not see any significance in the slight change in the description.

[55] The Judge identified the following factors as relevant. First, there were 31 participants in the scheme during the relevant period. The fact that all were paid on the same basis supported an inference that the remuneration specified in the scheme was in fact the market rate.[22]

[56] Secondly, "the Government implemented a number of policy settings to ensure that the benefit obtained by Edubase was reasonable".[23] Specifically, this included the fact that the advance funding provided for ECE services was not going to be clawed back and that payments received under the scheme would not be counted when assessing applications for the wage subsidy.[24] The Judge considered it relevant that the Ministry was:

> [211] … a Government department responding to a unique situation which had not been experienced before, in respect of which it had developed a suite of policies, the individual components of which all had a value to Edubase and a detriment to the Government.

[57] The third factor was that "[t]here was no-one other than the Government paying for these services, but there were a number of providers who [it] must be assumed made rational decisions about whether or not to agree to provide the services."[25]

---

21 Judgment under appeal, above n 1, at [199] and [200].
22 At [200].
23 At [201].
24 At [202].
25 At [212].

[58] Finally, the Judge accepted opinion evidence from the Ministry that the providers of the service such as Edubase would not incur any significant additional expenditure beyond their "business as usual" costs by entering into the scheme.[26]

[59] The Judge concluded that, taking all these circumstances into account, "it cannot be said that the Ministry did not pay a reasonable price for the childcare services that Edubase agreed to provide".[27] He undertook a cross-check by assessing the level of profit able to be generated from the price paid. Acknowledging that profitability could vary according to factors relevant to a particular market participant, the Judge nevertheless concluded that as a result of policy initiatives by the government Edubase achieved a level of financial performance in April 2020 substantially better than it had achieved in the preceding two years, in which it did not make a profit in any month, or the balance of the 2021 financial year.[28]

[60] Edubase asserts that the Judge failed to properly consider the full context in which the services were provided, wrongly took into account the fact that normal ECE funding was not being clawed back, and wrongly treated the assessment of damages for quantum meruit purposes as subject to an "overlay of public law".[29]

The issue on appeal

[61] Edubase now contends that $100,270 plus GST is the reasonable amount on a quantum meruit basis. This figure was only referred to in passing in closing submissions in the High Court. It is calculated on the basis of 10,027 carer hours at $10 per hour, that being the rate paid to providers under the revised scheme.

[62] The focus of Edubase's challenge to the Judge's conclusion on quantum meruit is the extent to which the Judge was entitled to take into account the circumstances in which the scheme was introduced, especially the fact that the ECE bulk funding was not clawed back and that providers under the scheme were still entitled to claim the wage subsidy.

---

26 At [205].
27 At [214].
28 At [206].
29 At [197].

[63] The Ministry says that Edubase ought not be permitted to advance a newly formulated quantum for the first time on appeal and, in any event, there is no principled basis for the new figure. The Ministry maintains, at most, Edubase might have incurred additional costs of $12,997 over its usual costs and that the $60 placement fee was the reasonable price.

Quantum meruit — relevant principles

[64] The development of quantum meruit and identification of its doctrinal basis has been a long and, in New Zealand, still evolving process.[30] In the United Kingdom it is accepted as being based on unjust enrichment.[31] In *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd*, this Court acknowledged that, while quantum meruit is generally seen as being a restitutionary claim based on unjust enrichment principles,[32] there is also a view held by some commentators that the purpose of quantum meruit is to ensure that the plaintiff is fairly compensated for the services provided, rather than to force the defendant to disgorge a wrongfully obtained benefit.[33] This distinction has implications in terms of the nature and extent of any benefit identified:[34]

> If quantum meruit is based on unjust enrichment principles, [the requirement for a benefit is logical because] the focus of the claim will be on making the defendant disgorge the unjustly gained benefit. But if the true purpose of the claim is to compensate the plaintiff for the services it has provided to the defendant, the nature or extent of the benefit obtained by the defendant may have little or no relevance.

[65] The Court in *Morning Star* declined, however to resolve the doctrinal dispute, preferring to identify specific elements it considered would permit recovery:[35]

> It is sufficient to say that there is general agreement that a plaintiff will be able to establish a quantum meruit claim where the defendant asks the plaintiff to provide certain services, or freely accepts services provided by the plaintiff,

---

30 See Palmer J's discussion of the history of quantum meruit in *Electrix Ltd v Fletcher Construction Co Ltd (No 2)* [2020] NZHC 918 at [73]–[87].

31 *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938 [Benedetti UKSC judgment] at [9].

32 *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd* CA90/05, 8 August 2006 at [40], citing *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health* (2005) 8 NZBLC 101,739 at [76].

33 *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd*, above n 32, at [42], citing Ross Granthan and C E F Rickett *Enrichment and Restitution in New Zealand* (Hart, Oxford, 2000); and *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health*, above n 32, at [72].

34 *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd*, above n 32, at [44].

35 At [50].

> in circumstances where the defendant knows (or ought to know) that the plaintiff expects to be reimbursed for those services, irrespective of whether there is an actual benefit to the defendant.

[66] In *Cassells v Body Corporate 86975*, decided the following year, Miller J considered that:[36]

> The better view appears to be that unjust enrichment cannot fully account for quantum meruit and that a defendant who accepts services knowing that the plaintiff wants payment is liable to pay reasonable price for them, whether or not the defendant was enriched.

[67] Miller J accepted that a plaintiff may claim in quantum meruit even where the defendant has not received any benefit.[37] This supported the view that quantum meruit could not be explained fully by unjust enrichment.

[68] Although the Supreme Court has not expressed a firm view on how the basis of quantum meruit should be viewed, it has recognised that its function is, at least in part, to compensate the plaintiff. In *Worldwide NZ LLC v New Zealand Venue and Event Management Ltd*, it said:[38]

> What is clear, however, is that quantum meruit involves claims for reasonable compensation to be paid for services where the level of remuneration has not been agreed and that this compensation is fixed by the courts …

[69] Reflecting these views, Palmer J recently observed in *Electrix Ltd v Fletcher Construction Co Ltd (No 2)*:[39]

> [96] While unjust enrichment may well be a useful conceptual foundation for some aspects of the law of restitution, it has limitations that do not make it a satisfactory unifying conceptual foundation. … The normative objectives of the New Zealand law of restitution in relation to non-contractual quantum meruit are not confined only to dispossessing those unjustly enriched but can extend to providing redress for those who have been unjustly impoverished.

---

36 *Cassells v Body Corporate 86975* (2006) 8 NZCPR 740 (HC) at [41], referring to Peter Watts "Restitution – A Property Principle and a Services Principle" (1995) 3 RLR 49 at 70.

37 *Cassells v Body Corporate 86975*, above n 36, at [42], citing *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd*, above n 32, at [50]. See also *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health*, above n 32, at [81].

38 *Worldwide NZ LLC v New Zealand Venue and Event Management Ltd*, above n 20, at [27], n 24, citing *Harrson v Franich* [2007] NZCA 538 at [32]; and Benedetti UKSC judgment, above n 31, at [17].

39 *Electrix Ltd v Fletcher Construction Co Ltd*, above n 30.

[70] Leaving aside the debate as to the true nature of the claim, it is clear that New Zealand courts have settled on the elements that will justify recovery under quantum meruit, namely that (1) the plaintiff has provided services to the defendant, (2) the plaintiff made clear their expectations of being paid and (3) the defendant freely accepted, or least acquiesced in the provision of the services.[40]

[71] The Ministry accepts that quantum meruit is available to Edubase — the contest is the level of entitlement it can quantify. In most cases, regardless of how the remedy has been characterised, the courts have treated the market value of the services as the proper starting point.

[72] In *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health*, a provider of residential care and rest home services sought payment from the Ministry of Health for services provided to residents for a period during which it did not have a current agreement with the relevant statutory body.[41] Its previous agreements to provide the services had been extended by notices issued under s 51 of the New Zealand Public Health and Disability Act 2000. At the relevant time, the s 51 notices had expired but negotiations were on foot for a new agreement and the Ministry of Health had advised that it intended to issue a new s 51 notice.[42] While Winkelmann J did not use the term market value, she accepted that the rate in the proposed s 51 notice was good evidence of the "reasonable value" of the services.[43]

[73] In *Cassells*, Miller J viewed the market value of the services as the natural starting point and then identified other relevant considerations that might affect the outcome.[44] The case concerned a claim by a body corporate against a unit owner in quantum meruit for body corporate services provided in relation to the unit. The unit holder was not a member of the body corporate because he had purchased a future development unit, for which a unit entitlement had not yet been assigned.[45] Miller J

---

40 *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health*, above n 32, at [73]*; Cassells v Body Corporate 86975*, above n 36, at [43]; *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd*, above n 32, at [50].

41 *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health*, above n 32, at [3].

42 At [13] and [14].

43 At [92].

44 *Cassells v Body Corporate 86975*, above n 36, at [51]–[55].

45 At [1] and [2].

considered that the reasonable price for the services could be determined by reference to what other proprietors were paying.[46]

[74] The distinction in approach between New Zealand and the United Kingdom can be seen in *Benedetti v Sawiris*, where the United Kingdom Supreme Court observed that:[47]

> [9] It is common ground that the correct approach to the amount to be paid by way of a quantum meruit where there is no valid and subsisting contract between the parties is to ask whether the defendant has been unjustly enriched and, if so, to what extent. The position is different if there is a contract between the parties.

[75] The Court considered that the figure to be paid on this approach was the "objective market value" of the services, which could be reduced if the defendant could show that the subjective benefit to them was lower than the ordinary market value ("subjective devaluation").[48] The latter step would run counter to the views expressed in both *Villages of New Zealand* and *Cassells* that a plaintiff may recover even though the defendant has not received any benefit.[49]

[76] Nevertheless, *Benedetti* contains extensive and helpful observations regarding the objective enquiry into market value. Lord Clarke considered that the test is the price a reasonable person in the defendant's position would have had to pay for the services.[50] This figure is found by identifying the ordinary market value of the services, taking into account conditions that increase or decrease the objective value of the benefit to any reasonable person in the same position as the defendant. He added:[51]

> The editors of *Goff & Jones* note that such conditions would seem to include the defendant's buying power in a market[:]

---

46 At [58].

47 Benedetti UKSC judgment, above n 31.

48 At [15] and [18].

49 *Cassells v Body Corporate 86975*, above n 36, at [42], citing *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd*, above n 32, at [50]; and *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health*, above n 32, at [81].

50 Benedetti UKSC judgment, above n 31, at [17], citing *Benedetti v Sawiris* [2010] EWCA Civ 1427 [Benedetti EWCA judgment] at [140].

51 Benedetti UKSC judgment, above n 31, at [17], quoting Charles Mitchell and others *Goff and Jones: The Law of Unjust Enrichment* (8th ed, Sweet and Maxwell, London, 2011) at [4-10].

> so that a defendant who can invariably negotiate a better price for the product than any other buyer will be allowed to say that this price reflect the "objective value" of the product to him, or, in effect, that there is one market for him and another for everyone else.

[77] Lord Reed addressed the importance of context in determining market value:[52]

> [104] … It is an expression which can be used in more than one way, but the definition used by the Royal Institution of Chartered Surveyors captures the essence of the concept:
>
> > The estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction after proper marketing and where the parties had each acted knowledgably, prudently and without compulsion.
>
> [105] So understood, market value is specific to a given place at a given time. That point can be illustrated by the episode in *Vanity Fair* in which Becky Sharp sells her horses during the panic which grips the British community in Brussels after the battle of Waterloo, when rumours reach the city that Napoleon has defeated Wellington and that his army is approaching. The circumstances create a market in which horses are exceptionally valuable, and Becky obtains a price which is far in excess of the ordinary value. It is, nevertheless, the value of the horses in the market in which they are sold.
>
> [106] That example illustrates the general point that market value depends critically on the identification of the relevant market, since there are different markets for many types of goods and services.

[78] More recently, in *Electrix*, a "non-contractual" quantum meruit case concerning construction costs, Palmer J suggested a slightly different approach:[53]

> [97] … Information about the market value of the services is still relevant to assessing the reasonable cost of the services provided. But just as relevant is the cost to the plaintiff of providing the services in the circumstances of the work at the time. That may be different from the market value of the work done. …
>
> [98] In this case, there is no contract and no agreement on the price of the services. Accordingly, it is difficult to put any weight on what was said about budgets, expectations or in negotiation. And there is no evidence quantifying the benefit of the services specifically to the defendant. The market price of the services that could have been used to undertake the works is relevant. But the costs of the services actually provided is a better starting point. Those costs should reflect the market value of the particular inputs used in the provision of those particular services at the relevant time and in the relevant circumstances. Together with the addition of a market-related profit margin,

---

52 Benedetti UKSC judgment, above n 31.

53 *Electrix Ltd v Fletcher Construction Co Ltd*, above n 30.

> I consider that will reflect the reasonable costs of the services to the service supplier. If the defendant can show that the actual costs incurred were more than what was reasonable in the market conditions at the time for the work undertaken, they should be reduced by that amount.

[79] Treating the cost of services as the preferred starting point in the enquiry into market value would represent a departure from the settled approach of seeking the objective market value of services provided. While the cost to the plaintiff of providing the services may be a helpful factor in some cases — and construction cases are likely to be such cases — we see that as a useful cross-check rather than a starting point in preference to objective market value.

[80] The real issue in the present case is to identify relevant contextual factors against which to, first, identify the market in which the services were provided and, secondly, assess the market value of those services.

The relevant context

[81] We start with Mr Ross' submission that the Judge erred in accepting that Edubase was only being asked to provide a "babysitting service" when, on Mr Best's evidence, that was not clear until 6 April 2020. Initially, Edubase expected to provide a service that was the same or similar to its usual home-based education service. We do not accept this submission. It ought to have been clear to Edubase from the outset that the Ministry would be seeking basic childcare services, not ECE by home-based educators.

[82] The government announcement that accompanied the 25 March 2020 email made it clear that the scheme was to be a service for essential workers only, to enable them to perform essential work. It was known that the scheme would only run for the length of the Alert Level 4 lockdown. It was obvious that many children of essential workers would be school age, which was not the market that Edubase usually serviced. It was also obvious that under the terms of the lockdown important features of Edubase's usual services could not be provided — there would be no home visits and the educators were restricted to providing care for a single household. Clearly, providing anything beyond basic childcare would not be practical.

[83] We turn to next to Mr Ross' argument that the Judge wrongly treated the supply of childcare services as having a "public law overlay" rather than undertaking an orthodox enquiry into the market value of those services. He submitted that public law concepts had no place in arrangements entered into in a commercial setting. He relied, analogously, on cases involving judicial review of commercial decisions by public bodies. In *Lab Tests Auckland Ltd v Auckland District Health Board* for example, this Court made the point that the Court would only intervene in contracting decisions by public bodies in a commercial context in limited circumstances.[54]

[84] We do not see any real analogy. The High Court was not being asked to intervene in a decision, but instead to actually fix the amount the Ministry should pay for the services provided. However, we do agree that because childcare is a service typically offered on a commercial basis, the level of commerciality involved in the scheme must be relevant to the market value of the childcare services being sought under the scheme. That question can only be answered by reference to the context in which the services were provided.

[85] It is inarguable that the scheme was introduced in the context of a public health emergency in which normal childcare services could no longer be provided but arrangements had to be made to ensure that essential workers could go to work. While we think that the reference to a "public law overlay" was an inapt description, we infer that this is what the Judge intended to convey.

[86] For the duration of the lockdown, the market for Edubase's usual service of home-based education for pre-schoolers subsidised by the Ministry ceased to exist. The market that did exist, albeit temporarily, was for basic childcare services under the essential workers' scheme. These services were accessible by essential workers only and had to cater for children up to 14 years old. Further, the services would not be subsidised but instead provided pursuant to a contract with the Ministry for whatever hours were needed by the essential workers. The question is therefore: in this market, what was a reasonable amount for Edubase to receive to administer the scheme?

---

[54] *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [59].

[87] Mr Colson KC, for the Ministry, submitted that what the government was prepared pay under the scheme was the market value because the Ministry was the sole purchaser of the services. The flat $60 fee was what the Ministry was prepared to pay for policy reasons, the scheme was not a bespoke commercial contract with Edubase but a government funding decision and the government was not intending to claw back the bulk funding or take into account the payment in determining Edubase's eligibility for the wage subsidy. Mr Colson also pointed out that all other providers accepted the government's offer.

[88] Starting with the last point, we see the response of other providers as of some significance but not determinative. Edubase's position is only comparable to PORSE and Barnardos — the large providers approached urgently, before the scheme was fully developed. PORSE had also been concerned at the low level of the fee, which indicated that the fee was not pitched at a reasonable level even if PORSE had ultimately accepted the terms offered. Barnardos, as Mr Ross pointed out, is a charitable organisation and so did not need to concern itself with profit.

[89] We turn to Mr Colson's other points regarding context. We do not see the position as simply being that because the Ministry was the only purchaser of the services, whatever it was prepared to pay had to be the market value. Initially the Ministry sought to engage the three largest existing providers because it was anxious to achieve nationwide coverage. The proposed arrangements, although different from Edubase's usual service, would nevertheless be the kind of service provided under normal commercial arrangements.

[90] The fact that the Ministry was the sole purchaser undoubtedly gave the Ministry negotiating power. But the fact that Ministry needed to implement an essential workers' scheme quickly meant that the large providers such as Edubase had power too. Market forces were not so lop-sided that the services Edubase provided had little value or that Edubase had no choice in the matter. There is no reason that the usual approach to assessing the market value of the services could not apply, namely, the estimated amount for which the services should be provided between willing parties in an arm's length transaction after where the parties had each acted knowledgably, prudently and without compulsion.

[91] One of the contextual factors in approaching the question in this way, however, is the existing relationship between the Ministry and Edubase, which is at the heart of the appeal. The existing relationship between Edubase and the Ministry is analogous to cases involving parties who have been in a contractual relationship such as existed in *Villages of New Zealand*. We do not see that the fact the ECE funding provided for a different type of childcare service means that it could be ignored in finding the market value of the services provided under the essential workers' scheme.

[92] In formulating the policy of the essential workers' scheme, Ms Murray expressly considered that the advance payment of subsidies for ECE services that could not be provided during lockdown, and which the Ministry had decided would not be clawed back, would cover administration of the essential workers' scheme. In her view, funding the essential workers scheme separately would allow providers to "double dip". Mr Meehan, however, appreciated that the administration of the scheme from the providers' perspective was likely to be higher than the Ministry anticipated and also considered that the scheme would "fall over, if we did not give providers anything to cover their administrative costs". In a discussion paper prepared by the Ministry for the Cabinet Committee on COVID-19 Response dated 2 April 2020, the rationale for allowing providers to access the wage subsidy as well as being funded to provide the essential workers service was explained as the need to encourage providers to participate in the scheme.

[93] The Ministry explained the basis on which funding was to be offered in a letter to Edubase on 6 April 2020:[55]

> The ECE funding subsidy is *guaranteed* for this funding period up to 31 May 2020. You have received advanced funding to support meeting your *usual* governance, management, operational costs and administrative functions. There is no clawback despite children not attending your services. The government has also put in place access to new funding that aims to support businesses, employees, self-employed and contractors.
>
> …
>
> The placement fee ($60) is to help cover any *additional* governance, management, operational and administration costs you might incur specifically for placing in-home carers with families at this time. For example, receiving and making phone calls, checking existing records, collating

[55] Emphasis in original.

> paperwork, recording information and managing payment of wages. This funding is in addition to the ECE funding subsidy you have already received. …

[94] In our view, the market value of the services Edubase provided under the essential workers' scheme was the amount that would see Edubase in substantially the same position it would have been in, had it continued to provide its usual services. That meant that the advanced bulk funding and access to the wage subsidy had to be included in assessing what a reasonable fee was.

[95] However, a notional reasonable purchaser of Edubase's services for the essential workers' scheme would have appreciated the fact that more administrative work would be required and would have priced the administrative fee accordingly. It is apparent from Ms Murray's evidence that the Ministry underestimated the amount of administrative work required by providers to implement the scheme.

[96] Initially, the level of demand was completely unknown. Edubase did not know how many of its existing clients were essential workers. It turned out that only a small proportion of Edubase's existing clients were essential workers and most of the children coming into the care of Edubase educators were new to the organisation. This meant fielding a high number of inquiries from essential workers needing care arrangements, reorganising the basis on which educators would provide care because care could only be provided for one household, advertising and preparing contracts. The slimmed down "babysitting" service that the Ministry required did not necessarily mean a lower level of administrative work.

What is the reasonable amount for Edubase's services?

[97] At trial, the Ministry adduced evidence from a forensic accountant, Barry Jordan, that Edubase's actual additional costs in providing the services under the scheme were $12,997 (plus GST). However, Mr Jordan's assessment compared Edubase's administration overhead costs for the period of April to June 2020 with the same period in 2019. He found that in 2020 Edubase's administration costs were "significantly lower" than the equivalent month in the previous year. Edubase's staff costs (excluding the wage subsidy) were less, not more, in 2020 compared to 2019. Mr Jordan summarised his position as:

> I have seen no evidence that Edubase incurred levels of additional overhead costs anything close to the amounts claimed when its staff changed activities in March / April to establish and run the new programme. Whilst I have no reason to doubt that staff undertook additional work to set up the programme, over a very short and sustained period of time, Edubase did not, as best that I can determine, remunerate its team at any higher rates for this extra work or provide remuneration in the form of extra duty allowances or overtime. …
>
> When I examined the non-staff administration costs on a row by row level, at best, Edubase might have incurred an additional $12,997 [plus GST].

[98] Mr Ross argued that Mr Jordan's assessment of the additional cost to Edubase was based on his comparison of Edubase's costs over the period April to June, and so it failed to account for the cost of the initial period of the scheme from 24 to 31 March 2020. On Mr Best's and Ms Dunn's evidence, an enormous amount of work was put in from the moment Edubase was approached by the Ministry to become involved in this scheme. They described the uncertainty, including the fact that it was not known who would be classed as an essential worker, the need for legal advice regarding contracts and service agreements, the setting up of a system for recording enquiries and managing new care arrangements. Ms Dunn said that they received dozens of calls for every family that was successfully placed. We accept that the costs to Edubase were higher than the $12,997 plus GST identified by Mr Jordan.

[99] We do not, however, accept that the reasonable figure is the $100,270 (plus GST) now contended for. Mr Ross submitted that this figure, which is based on the Ministry's rate of $10 per care hour under the revised scheme, is reasonable because it was actually offered by the Ministry — and accepted by Edubase — under the revised scheme in 2021 for less challenging services but in broadly comparable circumstances.

[100] Ms Murray explained how the revised fee of $10 per care hour was reached. In early 2021, the Ministry reviewed the scheme on the basis of feedback from providers. The clear view from providers was that the flat fee of $60 was not adequate to cover their costs. Ms Murray said that, based on the providers' feedback, she considered that the original scheme had higher costs for providers than originally thought. Her assumption in designing the original scheme was that the cost for providers would only relate to placing educators and administering the payments and that most, or all, of the scheme's costs would have been met from the ECE subsidy

payments. However, it appeared that the scheme involved a higher level of follow up and ongoing contact than she had originally assumed.

[101] Ms Murray said that the $10 per care hour fee under the revised 2021 scheme was "not based on a robust assessment of providers' genuine costs relating to the scheme, as this information was not available to us. Rather it was [Mr Meehan's] judgement that the $10 per hour would provide sufficient incentive for providers to participate in the revised scheme." In addition, by 2021 the Ministry had better information on which to cost the likely usage and therefore total expenditure of the scheme. The 2020 costings had overestimated demand from families and supply from providers with the result that the cost of the scheme was much lower than had been expected.

[102] We accept that the increased fee was intended to recognise that the previous fee had been inadequate. Incentivising providers necessarily meant addressing that issue. But we do not accept that the fee under the revised scheme was intended to be an exact assessment of the cost to providers. There were other factors, including that the cost of the original scheme was now known to have been much lower than expected, thereby relieving pressure on the Ministry in terms of pricing. Therefore, while the fee under the revised scheme assists in determining a reasonable amount for Edubase's services, the fee alone does not represent the reasonable amount.

[103] Nor do we accept that Edubase's claim that if it had not participated in the scheme in 2020, it could have undertaken other work to create business opportunities and attend to aspects of its business. Edubase's complaint is that it was not reasonably compensated for the services it provided. It did not — and could not — claim for opportunities lost as a result of its decision to provide those services.

[104] Assessing claims under quantum meruit must sometimes proceed without the level of information that would allow an exact calculation and instead as a matter of impression. As Miller J put it in *Cassells*:[56]

---

[56] *Cassells v Body Corporate 86975*, above n 36.

> [50] The court's task is to fix a reasonable price for the services. It is inherent in such a standard that there is seldom just one price that meets the test of reasonableness. The court is also frequently called upon to exercise judgment on imperfect information.

[105] Taking account of the benefits that Edubase had from its ECE funding and the wage subsidy, together with the incomplete evidence of Edubase's costs, we consider that a figure of $50,000 represents a price a reasonable person in the Ministry's position would have had to pay for the services.

[106] Edubase claimed interest on any sum awarded pursuant to ss 9 and 10 of the Interest on Money Claims Act 2016 but did not specify the period for which interest was sought as required by s 25(1). The deficiency was not addressed before us, however, s 25(4) provides that a court can make or accept an amendment to the statement of claim to ensure compliance with the requirements of s 25. This Court recently set out the correct approach to such amendments in *Chen v Huang*.[57] There can be a late amendment to the pleadings provided an applicant can overcome the three criteria identified by this Court in *Elders Pastoral Ltd v Marr*: the amendment is in the interests of justice, it will not significantly prejudice the other party and it will not cause significant delay.[58] We consider the criteria are met in this case. The appropriate period for interest is from 14 May 2020 until the date of payment and we amend the pleading accordingly.[59]

Appeal against the costs judgment

[107] The Judge ordered Edubase to pay the Minister $83,578.30 in costs plus disbursements of $33,849.16.[60] This represented a 30 per cent uplift from scale costs and the allowance for second counsel. The uplift was made on the basis that the estoppel claim was misconceived and the Ministry had been put to significant cost in defending it. The Judge rejected Edubase's argument that, rather than an uplift, there

---

57 *Chen v Huang* [2024] NZCA 38 at [237]–[247].

58 *Elders Pastoral Ltd v Marr* (1987) 2 PRNZ 383 (CA) at 385.

59 The terms of the contract proposed by the Ministry in respect of invoicing, while never agreed, do not appear to have been in dispute. They provided that the provider would invoice charges in respect of each week no later than the Wednesday of the following week and that, subject to any disputes, the Ministry would endeavour to pay each such invoice on the Thursday in the week after the invoice was received. Edubase ceased providing services on 27 April 2020, and so would have expected to receive payment at the latest on 14 May 2020.

60 Costs judgment, above n 5, at [45].

should be a discount to reflect the fact that the Ministry had rejected a settlement proposal by Edubase.

[108] This Court may set aside or vary orders for costs made in the court appealed from.[61] Given the outcome of the substantive appeal, we set aside the costs judgment. However, we do not remit the case back to the High Court for reassessment of costs, as would be usual.

[109] Both parties have had some success. Costs in the High Court would be set on the basis that Edubase prevailed on the quantum meruit claim. But the estoppel claim clearly lacked merit and was time-consuming in terms of evidence. Moreover, substantial evidence was devoted to the assertion of quantum figures which were not sustainable and, ultimately, abandoned. In these circumstances, we consider the expense of relitigating the issue of costs would be disproportionate to the amounts at issue and that costs should lie where they fall.[62]

Costs in this Court

[110] Although Edubase has succeeded, it persisted with its challenge to the estoppel finding until shortly before the hearing. And the quantum sought was much lower than previously contended for. We consider that costs should lie where they fall in this Court also.

Result

[111] The appeal is allowed.

[112] The appellant's prayer for relief is amended to provide that the claim for interest begins from 14 May 2020.

[113] The respondent must pay the appellant $50,000 plus interest from 14 May 2020 to the date of payment pursuant to ss 10 and 12 of the Interest on Money Claims Act 2016.

---

61 Court of Appeal (Civil) Rules 2005, r 53J.
62 See *Skids Programme Management Ltd v McNeill* [2012] NZCA 491 at [12].

[114] The costs judgment is set aside.

[115] There is no order for costs in the High Court or this Court.

Solicitors:
Holland Beckett Law, Tauranga for Appellant
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent