



## CONSTRUCTION LAW UPDATE No. 903

### More than the contract price?

#### Introduction

A recent Victorian Court of Appeal decision shows the inherent difficulties likely to be faced by a party who wrongfully terminates a contract (*Sopov v Kane Constructions*).

#### The history

In 1999, Sopov engaged Kane Constructions (“Kane”) to carry out the renovation and extension of a disused boiler house under a standard form contract, AS2124. The works under the contract were to be completed in 130 days but a year later were still incomplete. Kane had raised complaints about the plans and drawings, the lack of a suitably qualified superintendent and the failure of the superintendent to allow claims for variations and extensions of time and to certify progress claims.

Ultimately, when Progress Claim No. 14 was certified by the superintendent and not paid by Sopov, the dispute escalated. Sopov deducted liquidated damages for delays from the amount certified by the superintendent. Kane issued a notice to Sopov asking why it should not terminate the contract due to Sopov’s refusal to pay the certified amount. Sopov responded, saying it was entitled to withhold the payment because Kane had delayed completion.

Kane disagreed, suspended work and removed its equipment from the site. Sopov then threatened to call on the bank guarantee. Kane terminated the contract, saying that Sopov’s threats were a repudiation of the contract.

Sopov then took over the works, engaging a major subcontractor previously contracted to Kane.

#### Kane claims in *quantum meruit*

Kane said that because the contract had been terminated, it was entitled to sue in *quantum meruit*. *Quantum meruit* is a latin phrase literally meaning “what it deserves”. Generally, a party claims in *quantum meruit*

when there is no contract or the contract does not provide for an enforceable claim for money.

In this instance, Kane could have claimed under the contract, as when AS2124 is terminated the parties are able to bring claims for their rights as at the time of the termination.

#### Why claim in *quantum meruit* ?

It is unusual for a party to claim in *quantum meruit* if there is an agreed contract price and an enforceable contractual claim. It appears that Kane elected to do so because the contract price was lower than the commercial value of the work and Kane saw an opportunity to try to claim the real value of the work.

The first hurdle for Kane was to overcome Sopov’s contention that it had been justified in calling on the bank guarantee and that Kane’s termination was wrongful. If this contention was accepted by the Court, the contract would remain on foot. If parties are in a binding contract, there is no basis for bringing a claim in *quantum meruit* for the work covered by the contract.

In the Supreme Court, the trial judge agreed with Kane that Sopov had repudiated the contract and said Kane was entitled to terminate and bring the claim in *quantum meruit*. However the trial judge said that the amount of the *quantum meruit* claim was to be assessed by a consideration of what was due under the contract. The judge refused Kane’s claim for variations that had been disallowed under the contract and reduced its claim for delay damages on the basis of the terms of the contract.

Both parties appealed; Sopov said that Kane was only entitled to claim under the contract and Kane appealed as to the amount of the damages awarded in *quantum meruit*. The Court of Appeal heard the appeal in two stages. In November 2007, the Court heard the first stage of the appeal and upheld Kane’s right, as the innocent party to a terminated

contract, to elect whether to bring its claim in *quantum meruit* or in contract. The Court referred assessment of the damages to mediation. The mediation failed.

### **The Court of Appeal on assessing damages**

The second stage of the appeal has now been completed and has confirmed that the contract price does not put a ceiling on the amount of damages payable under *quantum meruit* in an action brought following the repudiation of a contract. The Court noted that there is widespread academic criticism of this approach but said it was constrained to follow this line in view of the 1992 refusal of the High Court for leave to appeal in *Renard Constructions v Minister of Public Works*.

The Court noted that if the innocent contractor accepts a repudiation of the contract and then elects to claim under the contract, it can claim for the amount of compensation it would have been entitled to in the event that the contract had been performed, subject to any mitigation.

However, if the same contractor elects to claim under *quantum meruit* it is entitled to claim for the reasonable cost of the work that it has done. The two alternative paths can lead to very different results where the works actually performed have been different to the parties' expectations when they negotiated the contract.

For example, in this case there were several major differences due to disallowed variations, a subcontractor default and substantial delays causing additional costs to the builder. Some \$278,524 in variations had been disallowed by the superintendent under the contract. Kane's plastering subcontractor had run into financial and other difficulties requiring Kane to expend an additional \$438,870 in engaging others to rectify and complete the plastering. An amount of \$538,271 had been incurred by Kane due to the project being delayed. All three of these claims had been disallowed by the trial judge because they were outside of the contract.

The Court of Appeal disagreed and said that the contract terms are only evidence of what the parties considered reasonable when they entered into the contract. The Court said a *quantum meruit* assessment is made on the basis of what has occurred, not what was expected. It allowed all of these claims on the basis that they were costs reasonably incurred by Kane. In addition, Kane could add a 10% margin for profit.

There are comments in the reasons of the Court of Appeal as to the manner in which Sopov presented its case and in particular, failed to put certain arguments or challenge some evidence until the appeal was heard. While it is difficult to assess the impact of these matters, it may be that the difference in the two alternative results would have been lessened but for these matters.

### **Conclusion**

A party who breaches a contractual condition may render itself vulnerable to a claim that it has repudiated the contract. When a party is issued with a notice to "show cause" as to why a contract should not be terminated, it should seek legal advice and act accordingly. Failure to do so can amount to a repudiation of the contract and can open the door to a claim in *quantum meruit* that may result in an award of damages well in excess of the previously agreed contract sum.

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