

The Resolution of Antipodean Construction Disputes in the 21st Century – the repertoire, quantum meruit and New Zealand jurisprudence

John Sharkey AM
29 August 2011



NORTON ROSE

Sopov v Kane Constructions Pty Ltd (No.2) [2009] VSCA 141

- The contract price does not impose a ceiling on the amount recoverable on a quantum meruit;
- The contract price is not ‘the best evidence’ of the value of the benefit conferred;
- The contract price is evidence – and no more – of the view of the parties at the time of entry into the contract as to the value of the work to be performed.

Lodder v Slowey [1904] 1 AC 442

“Their Lordships also agree with the learned judges as to the proper measure of damages, or (more accurately) as to the right of the respondent to treat the contract as at an end and sue for work and labour done instead of suing for damages for breach of the contract.”

at 453

Slowey v Lodder 20 NZLR 321

“But a quantum meruit is different. The right to sue on it rests on this: that the defendant has done something which is equivalent to an abandonment of the contract on his part. Then the right arises for the plaintiff to say, ‘You have abandoned the contract. Se be it; let the contract be rescinded. But you have in your hands the fruits of my labour: pay me for the work I have done and the materials I have supplied.’”

at 350

Sopov v Kane Constructions Pty Ltd [2007] VSCA 257

Chronology

| | |
|-------------------------------------|------------------|
| Date of contract | 20 August 1999 |
| Contract is terminated | 6 October 2000 |
| Supreme Court proceedings commenced | 25 July 2001 |
| Trial commences | 21 August 2003 |
| Reasons for judgment | 26 July 2005 |
| Final orders made | 6 February 2006 |
| Judgment of Court of Appeal | 22 November 2007 |

Sopov v Kane Constructions Pty Ltd [2007] VSCA 257

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|---|------------------|
| High Court dismisses application for special leave to appeal on liability | 23 May 2008 |
| Quantum appeal heard by Court of Appeal | 10 December 2008 |
| Court of Appeal dismisses quantum appeal | 15 June 2009 |
| High Court dismisses application for special leave to appeal on quantum | 11 December 2009 |

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The reaction of clients

- the growth of relationship contracting

“The Project Alliance Participants embrace the fact that one of the prime advantages of alliancing is to avoid disputation and litigation.

The contractual structure is designed to reinforce the fact that there are to be no disputes or litigation, the only exception being in the event of Wilful Default by a Project Alliance Participant.

To that end, a failure by any Project Alliance Participant to perform any obligation or to discharge any duty or in connection with this Project Alliance Agreement will not give rise to any enforceable obligation at law or in equity except to the extent that the failure also constitutes a Wilful Default.”

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The reaction of clients

- the growth of relationship contracting
- the growth of provisional determination mechanisms

Some thoughts for reform

- The role of judges
 - early neutral evaluation
 - panels of judges
 - interim payments
 - limited length trials
 - no trial?

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“Many litigants may have a greater need for an inexpensive and prompt resolution of their dispute, however rough and ready, than an unaffordable and tardy one, however close to perfection.”

Judge William Schwartzer.

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