

# Supreme Court of Victoria - Court of Appeal

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## Sopov & Anor v Kane Constructions Pty Ltd (No 2) [2009] VSCA 141 (15 June 2009)

Last Updated: 7 August 2009

SUPREME COURT OF VICTORIA

COURT OF APPEAL

No 6897 of 2001

COLE SOPOV & NORMA WALKER

Appellants

v

KANE CONSTRUCTIONS PTY LTD

Respondent

KANE CONSTRUCTIONS PTY LTD

Appellant by cross-appeal

V

COLE SOPOV & NORMA WALKER &  
STACKS PROPERTIES PTY LTD (ACN 082  
182 698)

Respondents by cross-appeal

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JUDGES:

MAXWELL P, KELLAM JA and WHELAN AJA

WHERE HELD:

MELBOURNE

DATE OF HEARING:

10 December 2008

DATE OF JUDGMENT:

15 June 2009

CASE MAY BE CITED AS:

*Sopov and Anor v Kane Constructions Pty Ltd (No 2)*

MEDIUM NEUTRAL

[\[2009\] VSCA 141](#)

CITATION:

JUDGMENT APPEALED

[\[2006\] VSC 32](#) (Warren CJ)

FROM:

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RESTITUTION – Work and labour done – Owner’s repudiation of building contract – Works substantially completed – Acceptance of repudiation by builder – Whether *quantum meruit* available as alternative to contract damages – Whether reasonable cost of works equates with reasonable value of works – Whether contract price operates as ‘ceiling’ on *quantum meruit* – Whether contractual entitlements affect *quantum meruit* calculation – Whether *quantum meruit* includes profit component – *Renard Constructions (ME) Pty Ltd v Minister for Public Works* [\(1992\) 26 NSWLR 234](#), *Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd* [\[1995\] 2 Qd R 350](#) followed.

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APPEARANCES:

Counsel

Solicitors

For the Appellants /  
Respondents by cross- appeal

Mr R Manly SC

Pilley McKellar

with Mr C Young

For the Respondent /  
Appellant by cross-appeal

Mr G J Digby QC

Deacons

with Mr M Stirling

MAXWELL P,

KELLAM JA,

WHELAN AJA:

1 In our judgment on the first part of this appeal, handed down in November 2007, we dealt with the question of the termination of the building contract between the appellant owners (‘the Principal’) and the respondent builder (‘Kane’). We upheld the finding of the trial judge that the contract was terminated by Kane’s acceptance of the Principal’s repudiation.

2 The remaining issues raised by the appeal and cross-appeal concern the trial judge’s assessment of the amount payable by the Principal to Kane on a quantum meruit. Following our first judgment, the balance of the proceeding was referred to mediation. Unfortunately, the mediation was unsuccessful and those issues now have to be determined by the Court.

3 For ease of reference, the grounds of appeal relied on respectively by the Principal in its appeal and by Kane in its cross-appeal are set out in Appendix A to this judgment. Argument on these issues extended over a day and a half, but the greater part of the argument concerned whether a quantum meruit claim was available to Kane in the circumstances and, if so, on what basis. Accordingly, we deal with that question first.

### *Availability of a quantum meruit claim*

4 The Principal attacked the quantum meruit findings at four levels. The following propositions were advanced in the alternative:

1. Following its acceptance of the Principal's repudiation of the contract, Kane's only remedy was contractual damages. It was not entitled, as a matter of law, to elect to claim on a quantum meruit.
2. Alternatively, if Kane was entitled to elect a claim on a quantum meruit, the amount recoverable by it was limited to the contract price (pro rata).
3. Alternatively, if the amount recoverable was not limited by the contract price, the contract price was nevertheless the best evidence before the Court of the value of the benefit received by the Principal.
4. Alternatively, if the trial judge was correct to approach the quantum meruit claim on the basis of the total costs incurred and payments made by Kane, additional deductions ought to have been made in order for the calculation to reflect accurately the benefit received by the Principal.

We deal with these propositions in turn.

#### *1. The right to claim quantum meruit*

5 The entitlement of Kane, following its acceptance of the Principal's repudiation, to sue on a quantum meruit rather than for contract damages is supported by high authority of long standing. In 1994, McPherson JA – as a member of the Queensland Court of Appeal in *Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd*<sup>[1]</sup> ('Iezzi Constructions') – was able to say that this entitlement was 'too well settled by authority to be shaken.' His Honour cited *Planche v Colburn*<sup>[2]</sup> and *Segur v Franklin*.<sup>[3]</sup> Reference might also have been made to the 1904 decision of the Privy Council in *Lodder v Slowey*,<sup>[4]</sup> upholding the decision of the New Zealand Court of Appeal in *Slowey v Lodder*,<sup>[5]</sup> and to the 1951 decision of the Full Court of this Court in *Brooks Robinson Pty Ltd v Rothfield* ('Brooks Robinson').<sup>[6]</sup>

6 In *Iezzi Constructions* there was no dispute about the availability of the claim on a quantum meruit as an alternative to a claim for contract damages following acceptance of a repudiation. It was common ground that the alternative remedies were available.<sup>[7]</sup> The Queensland Court of Appeal adopted what had been said two years earlier by the New South Wales Court of Appeal in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* ('Renard').<sup>[8]</sup> In that case, Meagher JA (with whom Priestley and Handley JJA agreed) said:

The law is clear enough that an innocent party who accepts the defaulting party's repudiation of a contract has the option of either suing for damages for breach of contract or suing on a *quantum meruit* for work done.<sup>[9]</sup>

7 As in *Iezzi Constructions*, the availability of quantum meruit in the alternative was not in issue on the appeal in *Renard*. What had to be determined on that appeal was whether the amount payable to the contractor under the contract placed a 'ceiling' on any quantum meruit claim. The Court of Appeal held that it did not. Meagher JA noted the view of the New

Zealand Court of Appeal in *Slowey v Lodder* (supra) that it was immaterial that a judgment awarded on a quantum meruit basis might exceed the amount which would have been payable under the contract.<sup>[10]</sup> His Honour referred to the ‘somewhat lukewarm enthusiasm’ with which decisions to this effect had been received by certain academic writers. Describing the criticism as ‘superficial’, his Honour said that the decisions were ‘right in principle as well as justified by authority.’

8 The point was a short one, in his Honour’s view. If action were brought under the contract, the innocent party would be entitled to damages amounting to the loss of profit which it would have made had the contract been performed rather than repudiated. In that case, the amount of the damages ‘has nothing to do with reasonableness’. On the other hand, if the innocent party sued on a quantum meruit:

he is entitled to a verdict representing the reasonable cost of the work he has done and the money he has expended; the profit he might have made does not enter into that exercise. There is nothing anomalous in the notion that two different remedies, proceeding on entirely different principles, might yield different results. Nor is there anything anomalous in the fact that either remedy may yield a higher monetary figure than the other. Nor is there anything anomalous in the prospect that a figure arrived at on a *quantum meruit* might exceed, or even far exceed, the profit which would have been made if the contract had been fully performed. Such a result would only be anomalous if there were some rule of law that the remuneration arrived at contractually was the greatest possible remuneration available, or that it was a reasonable remuneration for all work requiring to be performed. There is no such rule of law.<sup>[11]</sup>

In expressing agreement with the views thus expressed, Fitzgerald P in *Iezzi Constructions*<sup>[12]</sup> noted that the High Court had on 22 October 1992 refused an application for special leave to appeal from the decision of the New South Wales Court of Appeal in *Renard*.

9 Since 1994, there has been a growing chorus of criticism – judicial as well as academic – of the availability of quantum meruit as an alternative to contract damages where a repudiation is accepted.<sup>[13]</sup> The criticism rests on the following propositions:

1. When a contract is terminated at common law by the acceptance of a repudiation, both parties are discharged from the further performance of the contract, but rights which have already been unconditionally acquired are not divested or discharged unless the contract provides to the contrary.<sup>[14]</sup>
2. If there is a valid and enforceable agreement governing the claimant’s right to payment, there is ‘neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration.’<sup>[15]</sup>
3. Accordingly, there is no room for a restitutionary remedy since the builder’s claim to payment is governed by the contract under which the work was carried out up to the point of repudiation.

10 The decisions in *Lodder v Slowey* and in *Brooks Robinson* can be seen to have been founded on the ‘rescission fallacy’, that is, the notion that the acceptance of a repudiation had the effect of rescinding the contract ab initio. On that view, there was no ‘valid and

enforceable agreement' governing the claim for work and labour done up to the time of acceptance of the repudiation. That fallacy was dispelled by the High Court in 1933 in McDonald, though it persisted in Brooks Robinson, which was decided much later.<sup>[16]</sup> According to the critics, rejection of the rescission analysis should have led – and should certainly now lead – to a recognition that it is an error of principle to permit recovery on a quantum meruit in these circumstances.

11 In our respectful view, these criticisms are very powerful. Unconstrained by authority, we might well have upheld the Principal's argument that Kane's only remedy in these circumstances was to sue on the contract. But we are heavily constrained by authority, as explained earlier. What was said in 1994 to be 'too well settled by authority to be shaken' is all the more so 15 years later.<sup>[17]</sup> We regard the High Court's refusal of special leave to appeal from the decision in Renard as of particular significance, notwithstanding that the point at issue there was whether the contract price placed a ceiling on the quantum meruit claim, not whether such a claim was available in the first place. As we have seen, the New South Wales Court of Appeal in Renard had affirmed the availability of quantum meruit in a repudiation case, despite acknowledging expressly that the rescission theory of repudiation had long since been viewed as 'heretical'.<sup>[18]</sup>

12 The right of a builder to sue on a quantum meruit following a repudiation of the contract has been part of the common law of Australia for more than a century. It is supported by decisions of intermediate courts of appeal in three States, all of which postdate McDonald and two of which postdate Pavey & Matthews. If that remedy is now to be declared to be unavailable as a matter of law, that is a step which the High Court alone can take.<sup>[19]</sup>

13 It is of some significance that this objection (to the availability of quantum meruit) was not taken by the legal representatives of the Principal until they filed their revised submissions on this part of the appeal in October 2008. Kane's principal claim at trial was pleaded, conducted and decided – without objection from the Principal – as a quantum meruit claim.<sup>[20]</sup> This course of events provides eloquent confirmation, in our view, of the fact that the availability of quantum meruit in these circumstances is a settled part of Australian (building) contract law.<sup>[21]</sup>

14 Counsel for the Principal sought to derive support for the attack on the availability of quantum meruit from the High Court's 2008 decision in *Lumbers v W Cook Builders Pty Ltd (in Liquidation)*.<sup>[22]</sup> It is sufficient for present purposes to say that, although the Court reaffirmed strongly the proposition that restitutionary remedies are excluded where risk allocation is governed by contract,<sup>[23]</sup> the decision has no bearing on the issue now under consideration. The restitutionary claim in issue there was a novel claim, made by a party which had no contractual relationship with the party against whom it made the claim but which did have a contractual remedy against another party in respect of the subject-matter of the claim. The High Court rejected what it characterised as an attempt to extend or develop 'the long-established and well-recognised category of cases constituted by claims for work and labour done or money paid at the request of another.'<sup>[24]</sup> The Court had no occasion to review the availability of a quantum meruit claim as between the parties to a contract.

15 There is a further reason why these grounds must be rejected. Quite simply, they have been raised too late.

16 The issue now sought to be ventilated was not raised on the pleadings. Kane pleaded its case on the basis that, if the contract had been validly terminated by its acceptance of the Principal's repudiation, the remedy to which it was entitled was quantum meruit. Kane did also plead contractual claims, and alternative claims for damages for breach of contract, but none of those claims was based on the contract having been terminated. The only basis on which Kane sought recovery consequent upon termination was that of quantum meruit. The Principal's defence merely denied the relevant allegations. The Principal did not give notice, whether in its pleading or otherwise, that if Kane established termination as alleged, the Principal would contend that Kane was not entitled to recover on a quantum meruit or that the contract price should be treated as a ceiling on any such claim.

17 It is true that the first explicit statement of election was not made until August 2005. But it was clear on the pleadings, and from the manner in which the case was conducted, that the only case put on behalf of Kane concerning the remedy referable to the Principal's alleged repudiation was recovery on a quantum meruit. The trial judge expressed that to be the position in her June 2005 reasons.<sup>[25]</sup> This position was also reflected in the written submissions made at the end of the trial by both Kane and the Principal. Her Honour referred in her reasons to the controversy which exists as to the validity of this approach, but the matter was never put in issue by the Principal.<sup>[26]</sup>

18 If the matter had been put in issue in the pleadings, or in the course of the trial, the obvious course for Kane to have adopted would have been to formulate, and endeavour to establish, an alternative case for contractual damages consequent upon termination of the contract. This was never done. In these circumstances the Principal cannot be permitted to raise the matter now.

### ***'The influence of the contract'***

19 In both her principal judgment<sup>[27]</sup> ('the June 2005 reasons') and her December 2005 reasons,<sup>[28]</sup> the trial judge cited the following passage from the reasons of Mason P in *Trimis v Mina*<sup>[29]</sup> ('Trimis'):

Restitution respects the sanctity of the transaction and the subsisting contractual regime chosen by the parties as the framework for settling disputes. This ensures that the law does not countenance two conflicting sets of legal obligations subsisting concurrently. As Deane J explained in the context of the *quantum meruit* claim in *Pavey & Matthews* (at 256),<sup>[30]</sup> if there is a valid and enforceable agreement governing the claimant's right to payment, there is 'neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration'.<sup>[31]</sup>

20 The trial judge reasoned from these dicta as follows:

[W]hile I accept that by the innocent party electing, as a remedy, to sue on a *quantum meruit*, as opposed to suing for damages for breach of contract, a different result may emerge; I nevertheless do not consider that restitutionary remedies should be seen as subverting the bargains made between contracting parties and thereby overthrowing the contractual allocation of risk. To do so, in my view, represents a backward step and misconstrues the real purpose of restitutionary remedies.<sup>[32]</sup>

Accepting that the *quantum meruit* claim was available, nevertheless in her Honour's view

[T]he influence of the contract cannot disappear entirely, even if the contract itself no longer exists.<sup>[33]</sup>

This view – that the contract has a continuing influence – underpinned her Honour’s decision that the assessment of the amount payable on a *quantum meruit* should take into account the conclusions she had reached with respect to claims under the contract for variations and for delay costs.

21 With great respect, we do not think that this view can be sustained. It is because the quantum meruit remedy rests on the fiction of the contract’s having ceased to exist ab initio that the contract can have no ‘continuing influence’ when the value of the work is being assessed on a quantum meruit. It is because this alternative remedy does ignore the bargain which the parties struck, and does ignore the rights accrued under the contract up to the date of termination, that the availability of quantum meruit in the alternative is now seen as anomalous. But, for reasons we have already given, those incongruities are as entrenched as the remedy itself. It is true that the contract price is relevant on a quantum meruit, but not because of any ‘continuing influence’ of the contract. The price is merely a piece of evidence, showing what value the parties attributed – at a particular time – to the work which the builder was agreeing to perform.

22 The point was made in emphatic terms by the Queensland Court of Appeal in *Iezzi Constructions*. McPherson JA said:

Once the contract is gone it is the law that must determine whether payment should be made for the work done, and not the terms of an agreement that the parties have by their words and conduct finally put aside and discarded.<sup>[34]</sup>

Thomas J likewise rejected the proposition that

the contract, which was the original source of the parties rights, in effect reaches into the quantification of the *quantum meruit* claim and governs the result notwithstanding the termination of the original contract.<sup>[35]</sup>

23 Importantly, *Trimis* was a quite different case from the present. Following the builder’s acceptance of the owner’s repudiation, the builder had sued not on a quantum meruit but in contract, for damages. Hence the task of the court was ‘to put the builder in the same position he would have been in had he completed the whole job.’<sup>[36]</sup> One aspect of the case concerned variations claimed by the builder. Because of the absence of writing, these claims were not allowed as variations of the contract.<sup>[37]</sup> The trial judge allowed the variations, however, as restitutionary claims. This finding was overturned by the Court of Appeal. Mason P said:

Unlike the situation in *Pavey & Matthews*, the building contract in the present case was in writing and enforceable. The builder was entitled to sue under it for damages. And the owners were entitled to invoke its terms, notwithstanding the builder’s termination for repudiation, in relation to rights “unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected.”<sup>[38]</sup>

...



Termination for breach or repudiation does not divest the party in breach of rights accrued unconditionally before termination.[\[39\]](#)

Even then, Mason P did not deny that a restitutionary claim might have been available, but held that in the case at hand the restitutionary claim could not succeed because the trial judge had not made the findings which would have been necessary to support such a claim. The necessary findings were that the owners had agreed to pay extra for the variations; that the variations were costlier to the builder than contractual performance; and that the owners received benefit additional in value to that contracted for.[\[40\]](#)

### *2. Is the contract price a ceiling?*

24 For reasons we have given, where the claim is made on a quantum meruit the contract price does not impose a ceiling on the amount recoverable, though it may provide a guide to the reasonableness of the remuneration claimed.[\[41\]](#) The price agreed on at the time of entry into the contract is evidence – and no more – of the view of the parties at that time as to the value of the work to be performed.

25 The proper approach to assessment of a quantum meruit claim is, as the trial judge said, to ascertain the fair and reasonable value of the work performed.[\[42\]](#) Axiomatically, the measure of the restitutionary remedy is the value of the benefit conferred on the party which received it. Once it is accepted that the quantum meruit claim is available independently of the contract, then it follows – as Meagher JA said in *Renard*[\[43\]](#) - that it would be ‘extremely anomalous’ if the defaulting party could invoke the contract which it has repudiated to impose a ceiling on the amounts recoverable.

### *3. Is the contract price the best evidence of value?*

26 Nor is the contract price ‘the best evidence’ of the value of the benefit conferred. As counsel for Kane pointed out, the contract price is struck prospectively, based on the parties’ expectations of the future course of events. The quantum meruit, on the other hand, is assessed with the benefit of hindsight, on the basis of the events which actually happened.

27 In the present case, Kane submitted, the contract price provided very little guidance because the actual course of events in the carrying out of the works was ‘radically different’ from what had been anticipated when the contract was entered into. Counsel pointed, for example, to the trial judge’s findings about the incompetence, and lack of independence, of the person appointed by the Principal to be the superintendent of the project.[\[44\]](#) Her Honour found that the superintendent’s shortcomings ‘had a cumulative and influential effect upon the performance of the contract.’[\[45\]](#)

28 As the New South Wales Court of Appeal said in *Renard*, there is no conceptual difficulty in the notion that the ‘fair and reasonable’ value of the benefit conferred may exceed the price for which the contractor agreed to carry out the works in question.[\[46\]](#) Restitutionary liability is independent of contract. In a case like the present, the choice of remedy defines the question which must be answered.

29 In our respectful view, her Honour was fully entitled to approach the assessment of the value of the works in the way she did, by requiring Kane Constructions to prove:



- (a) the total costs incurred and payments made by it in carrying out the works; and
- (b) that the amounts in question were fair and reasonable in the circumstances.[\[47\]](#)

30 At trial and again on appeal, it was contended for the Principal that proof of the costs incurred in performing the work did not establish the value of the work.[\[48\]](#) It was also contended that there had been no proof by Kane that the costs were reasonable. In our view, these submissions should be rejected. First, it is well-established that the value of the work done can be proved by evidence of costs actually incurred.[\[49\]](#) It is hardly surprising that this should be so. The (reasonable) cost of constructing a building seems a perfectly sensible measure of the value of the benefit conferred.[\[50\]](#) Ex hypothesi, the owner would have incurred that cost had it undertaken the construction itself.

31 Secondly, Kane's entire quantum meruit case was founded on the proposition that the costs the subject of the detailed evidence led were reasonably incurred.[\[51\]](#) So much should have been readily apparent to those representing the Principal, as it was to the trial judge. The Principal chose not to put in issue the reasonableness of the costs – either in the pleadings[\[52\]](#) or by cross-examination of Kane's witnesses or by the calling of expert evidence to challenge the quantum claimed. Had that matter been put in issue, it would have fallen to Kane to seek to meet the challenge. That not having occurred at trial, it is not an objection which can be raised on appeal.[\[53\]](#)

32 We therefore reject the Principal's submission that Kane failed to establish the value of the work and, hence, that the only course open to the judge was to take as her starting-point 90 per cent of the contract price. We turn to consider the various arguments about the appropriate adjustments to the cost figure.

### ***Profit and overhead***

33 The trial judge concluded that Kane was not entitled to the 10 per cent margin which it had claimed as representing overhead and profit. Her Honour said:

In my view, the margin does not arise. In the determination of a claim based on quantum meruit the approach of the courts is to assess an amount on the basis of work actually done and on the basis that it is fair and reasonable in the circumstances. It does not seem to me that a component of a margin is one contemplated by the authorities in the context of assessing a claim based on quantum meruit. It is the actual cost of the work done that is intended to be the subject of the assessment on a quantum meruit. A profit margin seems to me to lie more properly with contractual damages rather than on a quantum meruit. Accordingly, no allowance is included in the assessment on the quantum meruit for a profit margin as claimed by the plaintiff.[\[54\]](#)

34 The appeal submission for Kane was that this was an error of principle and that there was a legal entitlement to claim a margin. Reliance was placed on unqualified statements to that effect in *Brooking on Building Contracts* – unaltered on this point between the first edition in 1974 and the fourth edition in 2004 – and in *Keating on Construction Contracts*.[\[55\]](#) The recent New South Wales decisions in *Walter Construction Ltd v Walker Corporation Ltd*[\[56\]](#) and *ABB Engineering Construction Pty Ltd v Abigroup Contractors Pty Ltd*[\[57\]](#) were cited as recent instances of the conventional approach.[\[58\]](#)

35 The existence of the entitlement to a profit margin seems entirely consistent with the restitutionary objective of measuring the value of the benefit conferred. The inclusion of a margin for profit and overhead means that the calculation approximates the replacement cost of the works. As we have said, it is an appropriate index of value to ascertain what it would have cost the Principal to have had these works carried out by another builder in comparable circumstances. The answer to that question must necessarily include that other builder's margin.

36 Importantly, senior counsel for the Principal accepted in argument that Kane's submission about entitlement to a margin was correct in principle. He argued that the judge's conclusion was to be understood not as a rejection of the principle but as a decision – which, he contended, was perfectly understandable – that in the particular circumstances of the case there should be no allowance for a margin.

37 This submission must be rejected. As appears from the extract set out above, her Honour's conclusion was expressed in general terms, to the effect that quantum meruit was concerned only with cost and not with margin. It having been common ground on the appeal that such a conclusion was contrary to established principle, this ground of the cross-appeal must succeed.

38 As to the calculation of the margin, Kane contended at trial and again on appeal that a margin of 10 per cent should simply be added to the total cost to cover profit and overhead. The Principal, on the other hand, submitted on the appeal that

the Builder's indirect expenses (amounting to 10 per cent of revenues) are already built into its quantum meruit claim. ... Having been compensated for its indirect expenses and having led no evidence of its discrete profit component (or even that it would have made a profit on the project), there was simply no proper basis on which the trial judge could have awarded the Builder any additional amount for "profit".

39 Senior counsel for the Principal conceded that no such argument was advanced at the trial (when the Principal was represented by other counsel). He maintained, however, that no such submission had been necessary, precisely because the 'indirect expenses' were already built into Kane's calculation of costs, which the judge accepted. Once again, this submission must be rejected. Since – as was conceded on the appeal – there could have been no dispute as to Kane's entitlement to have a margin component included in the quantum meruit assessment, the only basis upon which the Principal might have opposed – at trial – Kane's claim for the addition of the 10 per cent was that the margin was already built into the costs claimed. That argument was not advanced. Nor was it suggested that the figure of 10 per cent was unreasonable. Had it been, the trial judge could have investigated the detailed aspects of the evidence on which the Principal now relies to make good its contentions, and Kane could have called such further evidence as might have been required to meet them.

40 For familiar reasons, arguments of that kind cannot be advanced for the first time on appeal.<sup>[59]</sup> Kane is entitled to have the 10 per cent margin added.

### ***Deduction of rejected variation claims under the contract***

41 Kane raised for determination in the proceeding variation claims totalling \$440,723. By agreement, the claims – and the arguments for and against each claim – were set out in a

Scott Schedule. Her Honour allowed variation claims totalling \$162,418 and rejected claims totalling \$278,574. The figures are not in dispute. Kane's complaint concerns the judge's decision that the quantum of the unsuccessful variation claims should be deducted from its quantum meruit entitlement.

42 In our view, that complaint is well-founded. The variation claims were advanced, and decided, as claims under the contract. So much is clear from the nature of the competing arguments set out in the Scott Schedule, which involved a close examination of the original scope of the works as defined by the contract. For reasons given earlier, no such question arises when the claim under consideration is a claim on a quantum meruit.

43 If the work the subject of the variations has been carried out – and there was no dispute here that it had been – the only question is the fair and reasonable value of the work. It is irrelevant whether or not the work fell outside the original contractual scope. All that matters is that the performance of the work has conferred a benefit on the owner, for the reasonable value of which the builder should be remunerated.

44 The amount awarded to Kane must therefore be increased by the amount of \$278,574 which was deducted in error.

***Should there have been a deduction in respect of amounts paid for plastering works?***

45 Kane subcontracted the plastering works to MTK Plastering for \$420,000. In its quantum meruit claim, however, Kane included the total payments made for and in relation to the plastering works, which amounted to \$858,870. The judge awarded Kane the full amount. The Principal contends that the amounts over and above the sub-contract price (totalling \$438,870) should not have been awarded, as they 'were not supported by any evidence that they formed part of the fair and reasonable value of the works performed'.

46 In response, Kane points out that:

Whilst there was cross-examination of Kane's witnesses, Tivendale and Le Hy Ta, on some MTK items, the Principal did not submit to the trial Judge at trial that the payments made by Kane were other than fair and reasonable, and should be disallowed from the quantum meruit claim, if successful. Nor did the Principal submit that any deduction should [be] made on account of: (1) payments made to MTK; or (2) on behalf of MTK; or (3) to third party plasterers used by Kane for plastering works. At trial, the Principal only submitted that rectification costs and liquidated damages should be deducted. In determining the judgment debt, both of these were taken into account.

47 The sequence of events relevant to this issue may be summarised as follows. Kane's witness, Gary Tivendale, gave evidence of the amounts paid by Kane in respect of the plastering work. These comprised payments made direct to MTK; payments made on behalf of MTK – for materials and in respect of employee entitlements; and payments made to other contractors to complete the works. Mr Tivendale explained that the total amounts paid by Kane exceeded the sub-contract sum 'due to the cash flow situation that MTK had, and the commercial decisions that Kane Constructions undertook in order to keep them on site and mitigate the delays and the other ramifications to the project.'

48 The only cross-examination of Mr Tivendale on this topic concerned the question whether the amounts claimed included the cost of rectification works. Mr Tivendale responded that Kane's claim had been reduced by an amount of \$24,711 referable to rectification. The trial judge expressly accepted this evidence.<sup>[60]</sup> Crucially, there was no suggestion in cross-examination that any of the 'commercial decisions' made by Kane in relation to MTK was unreasonable or that any of the amounts paid in respect of the plastering works was not properly the subject of the quantum meruit claim. Nor was any such contention advanced in the final submission on behalf of the Principal, which said only this:

Kane's evidence that they had to pay almost double the subcontract sum because the plastering sub-contractor was in some form of financial difficulty is incomprehensible and not corroborated by any witness. It remains simply an assertion.

49 The trial judge rejected this submission and allowed the MTK payments (other than for rectification) as part of the quantum meruit claim.<sup>[61]</sup> An attempt to reargue this issue after judgment was rejected in the December reasons.<sup>[62]</sup> Her Honour specifically noted in those reasons that there had been no challenge at the trial to the reasonableness of the costs claimed by Kane.<sup>[63]</sup>

50 The trial submission of the Principal was rightly rejected. Far from being 'incomprehensible', the evidence given by Mr Tivendale was perfectly cogent, as appears from the summary of that evidence in the judge's reasons.<sup>[64]</sup> For the most part, the lack of challenge to the evidence is unsurprising. Most of the payments which the Principal now seeks to challenge – payments actually made by Kane to MTK, or to other subcontractors to complete the work, or for the purchase of materials – formed part of the cost of the works performed.

51 It is certainly too late for the Principal to challenge the payments (totalling approximately \$63,000) made by Kane in respect of entitlements of MTK employees to superannuation and long service leave. No complaint was made at trial that these payments should not be treated as part of the reasonable costs of the plastering works. Plainly enough, that contention cannot be advanced for the first time on appeal.

52 This ground of appeal must fail.

### ***Delay costs***

53 In its statement of claim, Kane sought 180 days of time extensions and \$769,583 by way of associated delay costs. In the defence and counterclaim, the Principal denied Kane's contractual entitlement to either the extensions or the delay costs.

54 The claim under the contract succeeded in part. The judge allowed the extension of time claim to the extent of 56 days and four hours.<sup>[65]</sup> Her Honour had already held<sup>[66]</sup> that the evidence relied on by Kane in support of its EOT claim was 'appropriate and admissible'. Further, her Honour noted that the Principal did not challenge the evidence led by Kane with respect to the quantum of delay costs, nor 'suggest that such costs were not necessarily incurred or were not fair and reasonable'.<sup>[67]</sup>

55 Following the delivery of her Honour's reasons for judgment, the Principal submitted for the first time in August 2005 that, in the computation of Kane's quantum meruit entitlement,

there should be a deduction of the sum of \$583,271. That represented the difference between the total of the delay cost claims which Kane had made under the contract and the amount of \$186,311 which the judge had awarded Kane on that account.[\[68\]](#)

56 In her December 2005 reasons, the judge said:

[Senior counsel for Kane] contended that the [Principal] had not specifically pleaded the delay point or adduced evidence of what was a reasonable time for the builder to finish the work in the context of what was fair and reasonable (as he maintained was required on the *quantum meruit* claim), as an alternative to the contractual time frame. Counsel for the [Principal] disputed [that] assertion, stating that the [Principal] had put all of the matters of the *quantum meruit* in issue and that at all times the onus was on [Kane] to establish its claim.

I would also note [Kane's] submission that it is not in the nature of an accrued right under the contract for the wrongful party to assert a set-off against the innocent party's *quantum meruit* claim. I do not agree. Whilst it may not be construed as a "right", as I outlined in my reasons, in determining whether the costs claimed are fair and reasonable, the amount to which a plaintiff is entitled on the making out of a *quantum meruit* claim may properly take account of matters such as delays, rectification and liquidated damages, if any.

As already stated, I consider that contractual entitlements are relevant in the determining the plaintiff's claim on a *quantum meruit*. In this instance, and in considering what is fair and reasonable in the circumstances, I determine that the reduction of \$583,271 for delays, as sought by the [Principal], should be allowed.[\[69\]](#)

57 On the appeal, Kane drew attention to the following passages from her Honour's principal judgment:

The Jobpac reports were critical to the *quantum meruit* claim. They provided information relating to the total costs and payments made by [Kane]. The total sum [was] \$4,746,911. The report was produced as part of the evidence of Le Hy Ta. *The [Principal] did not cross examine Le Hy Ta on his evidence with respect to whether the costs incurred by the plaintiff were fair and reasonable. In that respect it remained unchallenged. ... Furthermore, the [Principal] did not challenge the evidence of Tivendale with respect to the quantum of delay costs or suggest that such costs were not necessarily incurred or were not fair and reasonable. It was the evidence of Tivendale that Kane incurred the amounts of the delay costs and the quantum was fair and reasonable and reflective of the delay costs actually incurred. This evidence was also given by Le Hy Ta.*

...

In reliance upon the evidence of Le Hy Ta, Tivendale and Lucas, together with the Jobpac reports, [Kane] argued that it had proved the quantum of the costs incurred and established that those costs were fair and reasonable. There was no challenge by the [Principal] to the proofs by [Kane] of these matters under the *quantum meruit* claim. Further, the defendants did not dispute that the work was performed. The issue was whether the work was part of the contract or necessitated by the actions of [Kane].[\[70\]](#)

58 On the basis of these statements, the submission for Kane on the appeal was in these terms:

Kane's alternative case was on a *quantum meruit* for the fair and reasonable cost of the works. The Court was satisfied that the costs of the works put forward at trial by Kane was both fair and reasonable (see the evidence cited in paragraph 36 above). Having established this aspect of its alternative case, the trial Judge had no evidentiary basis to find:

(a) what, in all the circumstances was a reasonable time for the performance of the works, at the date of the termination of the contract;

(b) that the *quantum meruit* works were not completed in a reasonable time. (This possible defence was not pleaded or addressed on the evidence or the submissions at trial by the principals);

(c) that any components of the alternatively assessed quantum were generated by unreasonable delay by Kane in the completion of the works. (This possible defence was not pleaded or addressed on the evidence or the submissions at trial by the principals);

(d) that Kane's alternative *quantum meruit* claim should be reduced by contractual delay costs associated with the contractual claims for extension of time made by Kane but not upheld by the Court; or

(e) that Kane's disallowed time extension claims reliably reflected actual delays to the progress of the works for which Kane was responsible. Kane submits that many time extension claims addressed by the trial Judge and disallowed were disallowed on grounds which did not in any way rely on an assessment that Kane was responsible for the subject delay (such as inclement weather and industrial action).

59 It was common ground that the claimant for a quantum meruit must show that the works were completed within a reasonable time. What constitutes a reasonable time is a question of fact to be considered by reference to the circumstances which existed at the time the contractual services were performed but excluding circumstances which were under the control of the party performing the services.<sup>[71]</sup> In the present case, the relevant questions would have been: first, what would in ordinary circumstances have been a reasonable time for Kane to carry out the relevant works; and, secondly, to what extent the time for performance was in fact extended by circumstances outside Kane's control. As counsel for Kane pointed out, the common law is, in important respects, more forgiving of delays – for example, those attributable to sub-contractors, or to bad weather – than were the delay provisions of the building contract.

60 Those questions were simply not investigated at the trial. Kane submits that this was the direct consequence of the way in which the Principal chose to conduct its defence of Kane's claim. Those matters not having been put in issue at trial, so the submission went, there was no evidentiary basis upon which her Honour could reach the conclusion she did which was that there had been disentitling conduct on the part of Kane.

61 The appeal submission for the Principal contended, on the other hand, that the deduction from the quantum meruit should have been almost twice as large as it was. Senior counsel acknowledged that, in deducting the sum of \$583,271, the judge had accepted the submission advanced on the Principal's behalf at trial. It was now recognised, however, that the trial submission had erroneously taken as its starting-point the figure of \$769,583, which was Kane's delay claim made pursuant to the contract. The Principal's submission on the appeal

was that ‘it was not correct ... simply to translate that claim as being delay costs pursuant to the quantum meruit.’

62 According to the Principal’s submission, the proper basis for assessing the delay costs to which Kane was not entitled pursuant to the quantum meruit claim was:

- (i) first, to determine the number of days for which Kane was not entitled to delay costs; and
- (ii) second, to determine the delay costs actually incurred by Kane on each of those days.

The submission included a table setting out the Principal’s calculation of the proper deductions to be made, based on the trial judge’s findings on extensions of time and the evidence about the actual costs incurred by Kane. According to that table, the total amount of the delay costs to which Kane was not entitled was \$1,149,081, meaning that an additional amount of \$565,809.04 should have been deducted.

63 While the premise of the Principal’s submission is correct, the conclusion must be rejected. As discussed earlier, the quantum meruit claim is not governed by the provisions of the contract nor by conclusions arrived at as to Kane’s entitlements under those provisions. The question for the purposes of the quantum meruit claim – whether the works had been completed in a reasonable time – was a different question, raising different issues of fact and law.

64 It was never suggested by the Principal that it would dispute the quantum meruit claim on the basis that there had been unreasonable delay in completion. On this point as in relation to others, this Court is being asked to conduct a detailed factual investigation of matters which were simply not litigated. This was made quite clear when those representing the Principal presented, on the first day of the appeal hearing, a document of some three and a half pages in length setting out a detailed computation of delay costs.

65 As we have concluded in relation to other issues raised for the first time on the appeal, it is simply not open to the Principal to advance a different case from that which it advanced at trial. In our respectful view, the learned judge was in error in deducting an amount for delay costs calculated in accordance with the contract. No evidentiary basis had been established for deducting any amount as part of the assessment of the amount recoverable on quantum meruit. This aspect of the cross-appeal must also succeed.

### ***Unfixed materials***

66 The contention for the Principal was that the trial judge had failed to deduct sums totalling \$97,184 for ‘unfixed materials retained by the subcontractors for which the [Principal] received no benefit’. Senior counsel acknowledged, however, that this issue had not been raised at trial, either in cross-examination or in submissions.

67 In the circumstances, this ground was advanced only formally. Senior counsel had prepared an ‘aide memoire’ containing references to the relevant parts of the evidence but, having made the concession to which we have referred, elected not to provide it to the court. This was, we think, an appropriate recognition of the fact that the Principal’s failure to pursue this matter at trial precluded it from being agitated on appeal.



68 This ground must fail.

***Amounts unpaid based on the Jobpac reports***

69 This ground concerned what was said to be an arithmetical error. The short point was that the correct total of the payments identified in the Jobpac reports was \$63,331 less than the total claimed by, and awarded to, Kane.

70 This matter was not raised at trial. The quantum calculation was not disputed, as her Honour found. Nor was the point raised in the Principal's submissions of August 2005, which followed her Honour's direction to the parties 'to submit proposed minutes of orders reflecting the reasons published'. It was raised for the first time in a supplementary submission filed in February 2006.

71 By then, in our view, it was too late. The time for disputing the quantum of the claim had long since passed. This ground must also fail.

***Internal variations***

72 Under this ground, the Principal contended that the judge failed to deduct amounts paid by Kane to its subcontractors over and above the subcontract price 'where there was no evidence that the additional sums represented part of the fair and reasonable value of the work performed.' Four particular subcontracts were identified in the appeal submission.

73 Once again, however, senior counsel for the Principal was constrained to concede that – as with the unfixed materials point – this matter had not been ventilated at the trial. In those circumstances, it must once again follow that the point cannot now be raised. This ground also fails.

***Deduction variations***

74 In her June 2005 reasons, the trial judge stated that Kane was entitled to recover upon a quantum meruit subject to the adjustments to be made arising from the deduction variations Scott Schedule.<sup>[72]</sup> The trial judge deducted the sum of \$83,695 against Kane's quantum meruit entitlement for deduction variation items where Kane did not perform the work as specified by the contract.

75 In the deduction variations Schedule, 55 items were allowed by the trial judge in the total sum of \$216,611. Of this total sum of \$216,611 allowed to the Principal as contractual deduction variations:

- (a) Kane and the Principal agreed that \$40,000 would be deducted from Kane's quantum meruit claim by virtue of a settlement agreement;
- (b) Kane conceded that the further sum of \$41,284 ought be deducted against Kane's quantum meruit entitlement; and
- (c) the trial judge agreed with Kane's submission that works not performed by Kane, and in respect of which it had not incurred costs, should not be deducted from Kane's quantum meruit. These items were in the sum of \$51,632.

76 On the appeal, Kane repeated the submission it made to the trial judge, as follows. Where Kane did not perform the item of work as specified by the contract, but costed the work within its quantum meruit claim on the basis of what it had done (and not on the basis of what the contract specified), there ought be no deduction. Kane pointed out, correctly, that the deduction variation claims were brought by the Principal on the basis that the work had not been performed in accordance with the contract and that there should therefore be a corresponding financial reduction against the contract price. This has no relevance to, and affords no defence to, Kane's quantum meruit claim, which it brought and calculated on an entirely different basis – that of costs actually incurred.

77 The Principal's answer to this contention was that which the judge gave, namely, that Kane had agreed to the variation questions being dealt with by means of the Scott Schedule and should not now be permitted to resile from that agreement.<sup>[73]</sup> With respect, we are unable to agree. Provided that the work was done and the costs of the work were fair and reasonable – and the Principal did not suggest otherwise – Kane was entitled to recover the costs on the quantum meruit. For reasons given earlier, non-compliance with the contract was wholly irrelevant for the purposes of this non-contractual assessment.

78 This aspect of the cross-appeal must also succeed.

### **Conclusion**

79 For the reasons we have given, the appeal must be dismissed and the cross-appeal allowed on all grounds. The amount payable to Kane by the Principal must be recalculated in accordance with these reasons for judgment, and the order below varied accordingly.

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## **APPENDIX A**

### **Grounds of Appeal**

1. Her Honour erred in holding that consequent upon the respondent's termination of the contract by its acceptance of the appellant's repudiatory conduct, the respondent was entitled at law to be paid upon a *quantum meruit* for the work performed by it.
2. Her Honour erred in failing to hold that where the work performed by the respondent and accepted by the appellant was pursuant to a contract, any entitlement of the respondent to be paid upon a *quantum meruit* for the work performed by it was governed by and limited to the contractual terms and price.
3. Her Honour erred in her assessment of the respondent's *quantum meruit* claim by:
  - 3.1 Failing to assess, or properly assess, the fair and reasonable value of the work performed by the respondent.
  - 3.5 Allowing time related costs, including labour and supervision, incurred after 3 March 2000 which, her Honour found, was the extended date for practical completion of the works under the contract.
  - 3.6 Allowing the full amount of the respondent's claim for the cost of works which the respondent had fully performed as at the date of the contract was terminated, whereas the

*quantum meruit* claim should have been reduced to reflect the contract values for each of those completed elements of work, namely:

Work	Deduction
3.6.1 Structural Steel	\$110,234.00
3.6.2 Masonry	\$66,791.52
3.6.3 Roofing	\$13,768.00
3.6.4 Steel Wall Framing and Plastering	\$418,487.97
3.6.5 Mechanical Services	\$33,563.58

3.7 Failing to reduce the respondent's claim in respect of internal variations claimed as between it and its sub-contractors, in the sum of \$600,478.78 for which the appellants are not liable to pay.

3.9 Allowing the sum of \$63,333.61 for items of cost claimed, but for which, on the evidence, the respondent had not paid.

3.10 Allowing the respondent the sum of \$92,960 for unfixed materials, which the respondent alleged it had paid its sub-contractors after the date of termination.

3.13 Allowing the respondent the entire sum of \$889,864.84 for amounts paid to MTK Plastering as part of the respondent's *quantum meruit* claim when the evidence disclosed that:

3.13.1 Substantial rectification and rework was required in respect of that work;

3.13.2 The sum claimed included "adjustments" for non-productive time and other costs not demonstrably incurred;

3.13.3 Substantial labour costs were incurred after the date for practical completion of the work.

### **Grounds of cross-appeal**

4(a) Her Honour ... erred in law, in rejecting the appellant's claim for a 10 per cent overhead/profit margin in the sum of \$461,356 as a component of the appellant's *quantum meruit*. Her honour ... was wrong in holding where the appellant was held to be entitled to recover on a *quantum meruit*, upon rightful rescission of the relevant contract between the appellant and the respondents it was not reasonable for the appellant to recover overhead profits as part of the reasonable cost of the work it performed.

4(b) Her Honour ... erred in law in deducting the sum of \$278,574.91 from the appellant's *quantum meruit* entitlement such sum being the amount of the appellant's contractual variations claims under the relevant contract between the appellant and the respondents, which were rejected by her Honour ... as being variations to the contract works performed by the appellant under the said contract. Her Honour was wrong ... in holding that upon the appellant rightfully rescinding the said contract, and recovering on a *quantum meruit*, the value of the appellant's contractual claims for extra work which were held to be

unrecoverable under the said contract, should be set off against the fair and reasonable cost of the appellant performing its work.

4(c) Further and alternatively to (b) her Honour ... erred in law in deducting the sum of \$25,324.99 from the appellant's *quantum meruit* entitlement, such sum being the overhead and profit component of the appellant's contractual variations claim which were rejected by her Honour ... as being variations to the contract works. Her Honour ... having determined that the appellant was not entitled to recover a margin for overhead and profit within its *quantum meruit* claim, was wrong in double deducting the overhead and profit component of the appellant's rejected variations claims from its *quantum meruit* entitlement.

4(d) Her Honour ... erred in law in deducting the sum of \$83,695 from the plaintiff's *quantum meruit* entitlement, such sum being a portion of the respondents' contractual 'deduction variations' claims which her Honour the Chief Justice determined in favour of the respondents under the said contract. Her Honour the Chief Justice was wrong in holding that upon the appellant rightfully rescinding the said contract, and recovering on a *quantum meruit*, the value of the respondents' claims for contractual work not performed by the appellant, should be set off against the fair and reasonable cost of the appellant performing its work.

4(e) Her Honour ... erred in law in deducting the sum of \$583,271.96 from the appellant's quantum meruit entitlement, such sum being the amount of the appellant's contractual delay costs claim which was held to be unrecoverable under the said contract. Her Honour ... was wrong in holding that upon the appellant rightfully rescinding the said contract, and recovering on a *quantum meruit*, the appellant's unsuccessful claims for delay costs under the contract should be set off against the fair and reasonable cost of the appellant performing its work.

4(f) Further and alternatively to (e), her Honour ... erred in law in deducting the sum of \$184,153.19 from the appellant's *quantum meruit* entitlement, such sum being the overhead and profit component of the appellant's delay costs claims which were held by her Honour ... to be unrecoverable under the said contract. Her Honour ... having determined that the appellant was not entitled to recover a margin for overhead and profit within its *quantum meruit* claim, was wrong in double deducting the overhead and profit component of the appellant's rejected delay costs claims from its *quantum meruit* entitlement.

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[1] [\[1995\] 2 Qd R 350](#), 361.

[2] [\[1831\] EngR 856](#); [\(1831\) 8 Bing 14](#); [131 ER 305](#).

[3] [\(1934\) 34 SR \(NSW\) 67](#).

[4] [\[1904\] AC 442](#).

[5] [\(1901\) 20 NZLR 321](#).

[6] [\[1951\] VLR 405](#), 409.

[7] [\[1995\] 2 Qd R 350](#), 353 (Fitzgerald P).

[8] [\(1992\) 26 NSWLR 234](#).

[9] *Ibid* 277.

[10] *Ibid* 266-7.

[11] *Ibid* 277-8.

[12] [\[1995\] 2 Qd R 350](#), 357.

[13] See, for example, JW Carter, E Peden, GJ Tolhurst, *Contract Law in Australia* (5th ed, 2007) [38–39]; S Furst and V Ramsay, *Keating on Construction Contracts* (8th ed, 2006) 8-046; I Jackman, *The Varieties of Restitution* (1998) 82–5; K Mason, JW Carter, GJ Tolhurst, *Mason and Carter’s Restitution Law In Australia* (2nd ed, 2008) [1430]; R Mulheron, ‘Quantum Meruit upon Discharge for Repudiation’ [\(1997\) 16 Australian Bar Review 150](#); *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [\[2003\] FCA 50](#); [\(2003\) 128 FCR 1](#), 155-7 [651]–[659] (Finn J); *Taylor v Motability Finance Ltd* [2004] EWHC 2619 [23]–[26].

[14] *McDonald v Dennys Lascelles Limited* [\(1993\) CLR 457](#), 476-7 (‘McDonald’).

[15] *Pavey & Matthews Proprietary Limited v Paul* [\[1987\] HCA 5](#); [\(1987\) 162 CLR 221](#), 256 (‘Pavey & Matthews’).

[16] [\[1951\] VLR 405](#), 409.

[17] See, for example, *Abigroup Contractors Pty Ltd v ABB Service Pty Ltd* (2005) 21 BCL 12; [\[2004\] NSWCA 181](#), [159].

[18] [\(1992\) 26 NSWLR 234](#), 277.

[19] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [\[2007\] HCA 22](#); [\(2007\) 230 CLR 89](#), 151–2 [135], 160 [163]; cf *Johnson v Agnew* [\[1980\] AC 367](#), 396–8.

[20] *Kane Constructions Pty Ltd v Sopov* (2006) 22 BCL 92, 148; [\[2005\] VSC 237](#), [856].

[21] As to the position in England, see J Bailey, ‘Repudiation, Termination and Quantum Meruit’ [\(2006\) 22\(4\) Const L J 235](#).

[22] [\[2008\] HCA 27](#); [\(2008\) 232 CLR 635](#).

[23] *Ibid* 655, 663, 671 ([47], [79], [111]).

[24] *Ibid* 665 ([86]) (emphasis in original).

[25] *Kane Constructions Pty Ltd v Sopov* (2006) 22 BCL 92, 148; [\[2005\] VSC 237](#), [856].

[26] *Ibid* 149 ([863]).

[27] Ibid.

[28] *Kane Constructions Pty Ltd v Sopov* (No 2) [2005] VSC 492.

[29] (2000) 16 BCL 288, 296-7; [1999] NSWCA 140, [54].

[30] *Pavey & Matthews* [1987] HCA 5; (1987) 162 CLR 221, 256.

[31] Ibid. Priestley and Handley JJA agreed with Mason P.

[32] *Kane Constructions Pty Ltd v Sopov* (No 2) [2005] VSC 492, [26] (citations omitted).

[33] Ibid [28].

[34] *Iezzi Constructions* [1995] 2 Qd R 350, 362.

[35] Ibid 370.

[36] *Trimis v Mina* (2000) 16 BCL 288, 295; [1999] NSWCA 140, [47], [50].

[37] By reason of provisions of the *Home Building Act 1989* (NSW).

[38] Citing *McDonald* [1933] HCA 25; (1933) 48 CLR 457, 477.

[39] *Trimis v Mina* (2000) 16 BCL 288, 296; [1999] NSWCA 140, [55].

[40] Ibid 297-8 ([60], [64]). Mason P referred to the earlier decision of the New South Wales Court of Appeal in *Update Constructions Pty Ltd v Rozelle Childcare Centre Ltd* (1990) 20 NSWLR 251, which in turn relied on the early High Court decision in *Liebe v Molloy* [1906] HCA 67; (1906) 4 CLR 347.

[41] *Renard* (1992) 26 NSWLR 234, 278; *Iezzi Constructions* [1995] 2 Qd R 350, 357, 362, 370; *Brenner v First Artists' Management Pty Ltd* [1993] 2 VR 221, 263; *Pavey & Matthews* [1987] HCA 5; (1987) 162 CLR 221, 252.

[42] *Kane Constructions Pty Ltd v Sopov* (2006) 22 BCL 92, 148; [2005] VSC 237 [867]; *Pavey & Matthews* [1987] HCA 5; (1987) 162 CLR 221, 263-4.

[43] (1992) 26 NSWLR 234, 278.

[44] *Kane Constructions Pty Ltd v Sopov* (2006) 22 BCL 92, 111-2; [2005] VSC 237 [610].

[45] Ibid 112 ([611]).

[46] (1992) 26 NSWLR 234. See also *Brooks Robinson* [1951] VLR 405, 409.

[47] *Kane Constructions Pty Ltd v Sopov* (2006) 22 BCL 92, 150, 151-2; [2005] VSC 237 [868], [876], [878].

[48] Ibid 151 ([873]).

[49] D Cremean, M Whitten, B Shnookal, *Brooking on Building Contracts* (4th ed, 2004) [8.6]; S Furst and V Ramsay, *Keating on Construction Contracts* (18th ed, 2006) 4-020; *Renard* [\(1992\) 26 NSWLR 234](#); *ABB Engineering Construction Pty Ltd v Abigroup Contractors Pty Ltd* [\[2003\] NSWSC 665](#); *Brenner v First Artists' Management Pty Ltd* [\[1993\] 2 VR 221](#), 263.

[50] K Mason, JW Carter, GJ Tolhurst, *Mason and Carter's Restitution Law in Australia* (2nd ed, 2008) [1416].

[51] *Kane Constructions Pty Ltd v Sopov* (2006) 22 BCL 92, 151; [\[2005\] VSC 237](#) [873].

[52] *Kane Constructions Pty Ltd v Sopov* (No 2) [\[2005\] VSC 492](#), [46].

[53] *Coulton v Holcombe* [\[1986\] HCA 33](#); [\(1986\) 162 CLR 1](#); *Whisprun Pty Ltd v Dixon* [\[2003\] HCA 48](#); [\(2003\) 200 ALR 447](#).

[54] *Kane Constructions Pty Ltd v Sopov* (2006) 22 BCL 92, 152; [\[2005\] VSC 237](#), [878] (citations omitted); see also *Kane Constructions Pty Ltd v Sopov* (No 2) [\[2005\] VSC 492](#), [29], [32]–[34].

[55] D Cremean, M Whitten, B Shnookal, *Brooking on Building Contracts* (1st ed, 1974; 4th ed, 2004) 67, 115; S Furst and V Ramsay, *Keating on Construction Contracts* (8th ed, 2006) 4-020.

[56] [\[2001\] NSWSC 283](#); [\(2001\) 47 ATR 48](#), [413]–[414]; [\[2001\] NSWSC 283](#), [413]–[414].

[57] [\[2003\] NSWSC 665](#), [195]–[198].

[58] See also *Walker v Davlyn Homes Pty Ltd* [\[2003\] QCA 565](#), [15], [36].

[59] *Coulton v Holcombe* [\[1986\] HCA 33](#); [\(1986\) 162 CLR 1](#); *Whisprun Pty Ltd v Dixon* [\[2003\] HCA 48](#); [\(2003\) 200 ALR 447](#).

[60] *Kane Constructions Pty Ltd v Sopov* (2006) 22 BCL 92, 146-7; [\[2005\] VSC 237](#), [843]–[4], [847].

[61] *Kane Constructions Pty Ltd v Sopov* (2006) 22 BCL 92, 153; [\[2005\] VSC 237](#), [906].

[62] *Kane Constructions Pty Ltd v Sopov* (No 2) [\[2005\] VSC 492](#), [46].

[63] *Ibid.*

[64] *Kane Constructions Pty Ltd v Sopov* (2006) 22 BCL 92; [\[2005\] VSC 237](#), [201].

[65] *Kane Constructions Pty Ltd v Sopov* (2006) 22 BCL 92, 153; [\[2005\] VSC 237](#), [900].

[66] *Ibid* 122-3 ([676]).

[67] *Ibid* 150 ([870]).



[68] *Kane Constructions Pty Ltd v Sopov* (No 2) [2005] VSC 492, [37].

[69] *Ibid* [39]–[41].

[70] *Kane Constructions Pty Ltd v Sopov* (2006) 22 BCL 92, 150-1; [2005] VSC 237, [868], [870], [872] (emphasis added by respondent).

[71] *British Steel Corporation v Cleveland Bridge & Engineering Co Ltd* (1981) 24 BLR 94, 123 (Goff J), applying *Pantland Hick v Raymond & Reid* [1893] AC 22.

[72] *Kane Constructions Pty Ltd v Sopov* (2006) 22 BCL 92, 153; [2005] VSC 237, [906].

[73] See *Kane Constructions Pty Ltd v Sopov* (No 2) [2005] VSC 492, [49], [53]–[56].