

Claims, Contracts and Quantum Meruit: Striking the Right Balance



In keeping with the Airport Core Project theme this month, I would like to highlight a fairly recent case on the construction list. The case, unlikely to be reported, is useful to highlight poor local practice in documenting agreements, and proof on quantum meruit claims.

Brief Facts

The case in point is *Happy Dynasty Limited v Wai Kee (Zens) Construction & Transportation Co Ltd and Others*, 22 January 1998. There were several parties involved in the action. Happy Dynasty Ltd. was the plaintiff and a sub subcontractor for drilling and blasting works. Wai Kee (Zens) Construction & Transportation Ltd. was the first of three defendants and a subcontractor to the Lantau Expressway Joint Venture, 'LEJV' on the Tai Ho section on the expressway. These are some of the parties although their precise roles become somewhat confused in the judgment. Although Wai Kee was originally a single subcontractor, it entered into a later joint venture subcontract with Huge Host Engineering Ltd. – the third defendant in the action – and in this capacity eventually subcontracted with LEJV. Two other parties, Downer Mining (Asia) Ltd., the second defendant in the action, and Dyno Wesfarmers (HK) Ltd., the third party by counterclaim in the action, seem not even to merit one express reference in the judgment. Thus, it is not clear what role these two latter parties played if any in the proceedings.

The Issues

Numerous issues arose in the case but most of the issues concerned factual rather than legal disputes. The main issue concerned a delay claim and the proper means to value the claim. Happy Dynasty pleaded both quantum meruit and prolongation. A quantum meruit claim usually involves payment of a reasonable sum either where the contract has not been formed, or when formed has omitted some key detail. In our case the subcontract works were to last 13 months but lasted some 31 months instead. Thus, Happy Dynasty alleged losses as a result of the delay. Related questions that arose were whether the subcontract rate of \$12.69 per cubic metre for drilling and blasting during only the original 13-month contract period would apply to the period of delay; or whether some other rate would apply, and if so in what amount. These issues came together and were discussed as a quantum meruit claim.

Short Critique

One of the reasons for the dispute is the failure of the parties to document their agreements. The initial subcontract between Happy Dynasty and Wai Kee was made partly in writing and partly orally. No clear start date was given. The subcontract

was silent on rates after the initial 13-month period. The poorly drafted terms in the original subcontract eventually became the terms in the later joint venture subcontract between Wai Kee and Huge Host. There were many uncertainties that flowed from the failure to properly document their contractual relationship. The uncertainties included the precise contractual chain, who bore what responsibility, who should play a role on site, and even at what rate the subcontractor was to be paid. This is a sad state of affairs when local contractors take so little time to document their relationship that these basic issues are unclear. With this little attention to detail disputes are almost certain to arise and did of course arise in the case.

Quantum meruit

Judge Yam found that the contract rate per cubic metre would only apply for the 13-month contract period but some other rate should apply for the period of delay. He said:

"Counsel for the Plaintiff, submitted that the appropriate rate ought to be fixed by way of quantum meruit based upon a fair valuation of the work ...the best way of establishing a fair and reasonable rate for month 14 onwards is by approaching the matter as one would in a traditional prolongation claim. There is no cleft between a 'quantum meruit claim'...and the 'prolongation claim'...[although] there are slightly different calculations based on the same approach."

This is an interesting finding by Judge Yam. It is unsupported by authority. It may be explained in part by Judge Yam's references to the pleadings, which seemed to equate the two, but this in itself does not provide a legal foundation for the statement. Following this finding, and after touching on several other issues, Judge Yam turned to the question of valuation and relied heavily on expert evidence given on behalf of Happy Dynasty.

Judge Yam: "I accept the Plaintiff's submission that the effect of this is that where one has a rate from which to start (and in many quantum meruit situations there will not be) one starts from the rate unless the rate is unreasonable or excessive. It does not matter what the rate was as long as the work could have been done in 13 months with the resources that would have been used for calculating what the work would have cost to complete in 13 months.

Two points emerge from this quotation. First of all the judge

took the original rate as his starting point. Secondly, he used costs as the touchstone in valuing the work. Is this sound?

By analogy to quantum meruit claims where the contract is found to be void there is no obligation on the court to use the rate agreed. The court is completely free to disregard the rate if it wishes. Turning to costs, generally courts, in determining what is a reasonable sum to be paid in a quantum meruit claim, have laid down no rules. Reasonableness is always a question of fact and varies according to all of the circumstances. In the ordinary case one would expect some evidence to be led on the nature and value of the work performed. In the *Happy Dynasty* case the sole focus was upon cost. This is unusual because cost is only one relevant factor in valuation. Other factors could include comparables, standard rates, bid prices, profits etc. The point again is that cost is only one factor in assessing a claim in a normal case. Other factors used in claims assessment – as opposed to assessing a quantum meruit claim exclusively – could include materials, lost labour productivity or disruption, diseconomies, direct increased costs, lost profits directly and indirectly etc. Hence while cost is a factor in assessing claims it is still only one factor. Therefore when the *Happy Dynasty* quantum meruit claim was equated with a prolongation claim by the judge arguably more factors than just cost should have been considered. It does not mean the judge was wrong to consider cost alone but it was certainly open to him to consider more if he wished and once again the analogy to prolongation

may have implied this. Agreement by both the plaintiff's and defendants' experts as to the costs themselves does not change this suggestion.

Summary

In conclusion quantum meruit is a special and very helpful remedy. It can be used either where there is a contract or where there is no contract. It can be framed narrowly or along broad restitutionary grounds. When quantum meruit is invoked judges alone should reach their conclusions on what are reasonable sums. Expert evidence can be very helpful in this regard but need not be determinative. Likewise when determining what is reasonable the judge may take into account many factors – of which cost is only one. In short by using quantum meruit with flexibility and discretion it will continue to remain a very important remedy.

Postscript

In a postscript to this case on 2 April 1998 Judge Yam dismissed an application involving the same parties for a stay of execution by Wai Kee and Huge Host on the outstanding judgment debt pending an appeal that has been filed.

J.A. McInnis is an Associate Professor at the Faculty of Law at the University of Hong Kong and the author of Hong Kong Construction Law.

AUSTRALIA

McLean Media Representation Pty Ltd
A.C.N. 002366557
64 Station Street,
PO BOX 544
Newtown Sydney,
Australia 2042
Tel: (61)-2-9519-6455
Fax: (61)-2-9557-1614

CHINA PRC

Lupong Init' Ltd
Flat E, 3/F
Cheung Lok Building
228 Wan Chai Road
Hong Kong
Tel: (852) 2591 0816 / 2572 6919
Fax: (852) 591 6807
Contact: Miss Kwok Wing Hing

FRANCE/SWITZERLAND

Intermedia Ltd
34 boulevard Haussmann
75009 Paris,
France
Tel: (331) 4801 4788
Fax: (331) 4801 4787
Contact: Ms Vivienne Davidson

INDIA

Media Transasia (India) Ltd
K-35 Green Park
New Delhi-110016, India
Tel: (011) 6862687 / 6868775
Fax: (011) 6867641
Telex: 031-73262 MTIL IN
Contact: Mr Suresh Bhayana

Media Transasia (India) Ltd
808 Dalamal Towers
211 Nariman Point
Bombay 400 021, India
Tel: (22) 2844265 / 2856852
Fax: (22) 287 1302
Telex: 1-84269 MTIL IN
Contact: Ms Radhika Arora

ITALY

Ediconsult Internazionale s.r.l.
Piazza Fontane Marose, 3
16123 Genova, Italy
Tel: (10) 583684
Fax: (10) 566578
Contact: Mr Vittorio Garofalo

JAPAN

Mhas Media
3-35-1-302
Hongodai,
Sakae-ku,
Yokohama 247
Japan
Tel/Fax: 045- 891-1852
Contact: Mr. Mikio Tsuchiya

KOREA

JES Media International
RM704, Nanyang Bldg
37-12, Charmwon-Dong
Seocho-Gu, Seoul
137-030 Korea
Tel: (020) 545 8001
Fax: (020) 549 8861
Contact: Mr Yong J. Baek

PHILIPPINES

Bon Gre Corporation
13 Mercury Street,
Congressional Subdivision II,
Tandang Sora, Quezon City,
Philippines
Tel: (632) 926 0088
Fax: (632) 926 0094
Contact: Thomas H.C. Vargas

THAILAND

Media Transasia Thailand Ltd
14/F, Orakarn Building
26 Chidlom Road, Ploenchit
Bangkok 10330
Thailand
Tel: (662) 2519905-7
Fax: (662) 2535335
Telex: (086) 84003 MEDTRAN TH
Contact Mr J. S. Uberoi

UNITED KINGDOM

The Colin Turner Group
City Cloisters,
188-196 Old Street
London EC1V 9BX
United Kingdom
Tel: (171) 490 5551
Fax: (171) 490 2271
Telex: (051) 261140 TURNER G
Contact: Mr Anthony Turner (MD)

USA

Riverside Media Sales
89 Saranac Ave / P.O. Box 2100
Lake Placid
NY 12946
USA
CT-NCL
Tel: (518) 523 4794
Fax: (518) 523 4708
E-mail: rmsmedia@kcs.keene.k12.ny.us
Contact: Mr W John Holmes

Marston Webb International
60 Madison Avenue,
Suite 1011
New York,
NY 10010
USA
Tel: (212) 684 6601
Fax: (212) 725 4709
Telex: (023) 420773 BRANINT
Contact Madlene Olson