DETERMINATION OF AMOUNT DUE ON A QUANTUM MERUIT
DETERMINATION OF THE COST OF RECTIFICATION OF DEFECTIVE WORK

Monteleone v AV Constructions Pty Ltd and Anor, New South Wales Supreme Court, Court of Appeal, 12 December 1989.

The plaintiffs were owners who entered into an agreement with AV Constructions Pty Ltd for the construction of a garage with a concrete roof and a laundry to be erected on part of that roof.

It was found by the court at first instance that the contract was a "do and charge" contract. It was common ground that the work was unsatisfactory in that the roof leaked and did not comply with the requirements of the building code.

A number of questions came before the Court of Appeal. These questions, and the court's finding on these questions, can be summarised as follows:

1. What is the appropriate method of determining the amount due on a quantum meruit.

The builder submitted that it had expended more than $6,000.00 on the cost of material and labour for the works. The builder did not have any invoices to support this claim. The builder stated that all invoices had been provided to the owners.

The court accepted that ".... evidence of cost is at least prima facie evidence of value". The court quoted, with approval, the following passage from Hudson, Building & Engineering Contracts 8th ed at 310:

> "In practise, in determining a reasonable price, the courts may act upon evidence calculated upon the cost of labour, plant and materials plus a reasonable percentage for profit or they may act upon evidence of what reasonable rates for the work involved will be."

2. What is the appropriate method to adopt to determine the cost of rectification to be allowed in respect of defective works?

There was evidence before the court regarding two alternative techniques of rectification. The difference in the techniques related to the type of membrance to be used to waterproof the concrete slab roof. The cost of one membrane was approximately $4,000.00 whereas the cost of the other membrane was approximately $1,500.00. The expert evidence suggested that the more expensive membrane was a reasonable method to adopt and that the less expensive membrane would last for only 4 years, compared to a life expectancy of 14 years for the more expensive membrane.

The Judge at first instance only allowed the owners the cost of the less expensive membrane. The Judge made this allowance having regard to the following:

(i) There was no evidence from the owner that she would carry out the more expensive remedy.
(ii) The more expensive remedy was not in keeping with the rest of the premises as reflected in photographs before the Court.
(iii) The more expensive remedy was not in keeping with the use to which the slab which constituted the roof was to be put.

The court referred to the High Court's decision in *Bellgrove v Eldridge* (1954) 90 CLR 613 and in particular the judgment of Webb and Taylor JJ at page 620. The court concluded that having regard to the matters discussed in *Bellgrove's* case the Judge at first instance was in error and that the more expensive rectification procedure should be allowed to the owner.

Although the case did not involve a significant sum of money it did involve the court re-stating its views on the appropriate method for compensating owners in respect of defective works and for assessing a builder's entitlement under a "do and charge" contract.

- Phillip Greenham

INTEREST - FAILURE TO CLAIM

It is not unusual for a claimant to fail to claim interest in the initial pleadings and to later seek leave to amend the pleadings to include a claim for interest, but it is unusual for the claimant to seek to do so after the delivery of the judgment in the case.

In the Queensland Supreme Court case *Steel v The Council of the Shire of Bowen* (1990) Aust. Torts Reports 81/002 the judge allowed the plaintiff to claim interest even though the plaintiff's counsel had forgotten to claim it until judgment was delivered.

The case concerned a claim for damages for breach of contract. The award was $15,000 and the judge awarded interest of $6,300 for three and a half years at 12% per annum.

It is relevant to note that the judge allowed the late claim under the 'slip rule' and the applicability of the 'slip rule' was not disputed. Under the uniform Commercial Arbitration Act 1984 (NSW) section 30 there is a power for an arbitrator or court to correct an accidental slip in an arbitration award but it should not be assumed that the Queensland case would necessarily be followed where the claimant in an arbitration forgets to claim interest until after the arbitrator delivers an award and the other party does not concede that section 30 empowers the arbitrator to permit the claim for interest under the 'slip rule'.

- Philip Davenport