

1. Overview

- 1.1 This case is a prime example of the perils of large-scale construction litigation.
- 1.2 The case took about seven years to reach the trial stage and consumed 50 hearing days. The detailed judgment (over 1,000 pages) was delivered two years after the hearing and close of post-trial submissions (the submissions contributed to the time taken for the judgement). There was a large transcript, a huge volume of witness statements and exhibits, and prolix submissions.
- 1.3 The trial judge was scathing in his comments on the way the case had been managed and presented, especially by the contractor. The contractor was ultimately substantially unsuccessful.
- 1.4 The contractor's case involved site access, redesign, construction resequencing, and additional and accelerated works claims. A large majority of the claims were not brought based on contractual entitlements under the Contract. Instead, the contractor endeavoured to pursue various claims for compensation for extra work and delay and disruption on a non-contractual basis.
- 1.5 This case nicely summarises the legal basis of each non-contractual claim but also demonstrates the evidential difficulties a contractor will face in pursuing them.

2. Facts

- 2.1 The plaintiff, DM Drainage and Constructions Pty Ltd (DMC), is a civil engineering construction contractor specialising in pipe installation, pumping stations, civil work, mechanical installation and fabrication work. The defendant, Karara Mining Ltd (KML), is a mining company.
- 2.2 On or about 6 July 2010 DMC and KML entered into contract 1450-CON-CPI003 (Rev 1) (Contract) for the installation of an operations water package for the KML iron ore project. The original contract sum was AU\$26.663 million.
- 2.3 The Contract included for DMC to construct a water pipeline of around 136km from a borefield called Yandanooka to KML's mine site. The original date for practical completion was 29 May 2011. DMC commenced work around September 2010 and reached practical completion on 29 September 2011.

- 2.4 There were numerous variations to the works under the Contract. KML paid DMC AU\$53,841,001 in relation to the Contract. DMC went to court in 2012 seeking a further AU\$19.1 million for alleged additional work, delays and disruption. KML lodged a counterclaim based on unjust enrichment for repayment of alleged overpayments totalling AU\$7.1 million (arising primarily from adjudication determinations in DMC's favour).
- 2.5 The parties were in dispute regarding the significance of the change to construction sequence and design, whether DMC had already been adequately compensated for the design changes and whether DMC had substantiated any entitlement to further payment for alleged delay and disruption.
- 2.6 The case came to a hearing in 2019 with closing written submissions received in late 2019.

3. Issues

- 3.1 DMC brought four types of claims:
 - (a) The "reprice claim" – an equitable or promissory estoppel claim, arising out of KML's failure to assess DMC's reprice that was undertaken by DMC at the request of KML.
 - (b) Restitutionary or quantum meruit claims – DMC claimed that it was entitled to payment of a reasonable sum for the work that it performed in accordance with three directions from KML allegedly outside the Contract.
 - (c) A *Liebe v Molloy* implied contract claim – DMC claimed that work performed was work done for and at the request of KML pursuant to an implied contract that entitled it to payment of a reasonable sum for the work performed, allegedly outside the Contract.
 - (d) Numerous variation claims under the Contract.
- 3.2 The second, third and fourth claims were alternative claims to the reprice claim.

4. Decision

- 4.1 Justice Vaughan found that KML was the substantially successful party. DMC was awarded only about AU\$670,000 whereas KML's counterclaim award exceeded AU\$6 million.

Equitable or Promissory Estoppel Claim

- 4.2 DMC claimed there was an alleged assumption that:
- (a) There was to be a reprice process that would provide for an adjustment of the contract sum for the performance of the works to allow for delay, disruption, loss of productivity and damages related to delay and this process would supersede the extension of time, variation and claim provisions of the Contract.
 - (b) In carrying out its assessment of the reprice, KML would act reasonably and in good faith.
- 4.3 Justice Vaughan outlined the principles of promissory estoppel. He then concluded that DMC failed at the first hurdle in that DMC did not have an understanding or belief as to the reprice or reprice process in terms of DMC's contended for assumption. That alleged assumption was essentially that KML would make a reasonable reprice assessment, rather than a mere assumption that the reprice would be negotiated.
- 4.4 DMC had relied, to an extent, on oral conversations that occurred a long time before trial. His Honour pointed out the difficulties of proof that arise generally, and had arisen here, where a party relies on oral statements in the absence of contemporaneous records or corroboration. His Honour emphasised the necessity for good record keeping, including time sheets, for example, to show time and costs related to particular resequencing, and noted that reliable and accurate record keeping was generally deficient on the part of DMC.
- 4.5 In the course of his judgement, His Honour made observations on the reliability and usefulness of evidence relied on by the contractor, including daily job sheets, daily shift records and weekly reports, to prove resources used on affected works and as a basis for spreadsheets for claims.
- 4.6 His Honour's observations of the deficiencies in the site records would be useful guidance for contractors seeking to improve the reliability and usefulness of their records and for general project purposes, as well as having beneficial litigation outcomes.
- 4.7 It followed that DMC had not established that it expected or assumed that a legal relationship existed (or was to exist) between the parties in relation to the reprice process, which conditioned the parties' strict legal rights under the Contract.
5. Even if DMC had established that it held the contended for assumption, he was not satisfied that KML's representations and conduct were capable of conveying that assumption to a reasonable person.

6. In the circumstances, the Court was not satisfied that the suggested deferral or delay in submission of claims under the Contract constituted material detriment for the purpose of the equitable estoppel claim. DMC had not established that it had suffered substantial disadvantage as a consequence of refraining from acting due to the reprice process. Additionally, the Court was not satisfied as to the claimed reprice figure as the expert evidence as to the reprice figure was found to be unreliable.
- 6.1 DMC's unconscionability case also failed given the findings as to the contended for assumption. Even if DMC had established the contended for assumption, Justice Vaughan would have found that the contended for assumption was self-induced. KML's representations and conduct were not capable of conveying the contended for assumption to a reasonable person. On that basis alone, it could not be unconscientious for KML to insist on its strict legal rights under the Contract.

Restitution/Quantum Meruit Claim

- 6.2 Justice Vaughan was satisfied that the additional work requested by the three primary directions was within the general scope of the Contract, and not outside the Contract, as the basic nature of the works remained the same.
- 6.3 DMC's *quantum meruit* claim failed. DMC had not established that it performed any additional work pursuant to one or more of the three directions for which its entitlement to remuneration was not governed or regulated by the Contract.
- 6.4 Additionally, DMC had overreached in its pleaded case as to the content of the three directions and not established, with specificity, all the affected work that was required or performed as a result of each of the three directions.

Implied Contract Claim

- 6.5 This claim was dismissed for the reasons given in rejecting the *quantum meruit* claim. It had not been established that any additional works performed by DMC pursuant to one or more of the three directions was work outside the Contract.
- 6.6 The formalities of the Contract made it unlikely that the parties intended to enter into further agreements for additional work informally by means of DMC carrying out work in accordance with one or more of the directions.
- 6.7 There was a lack of certainty as to what, if anything, was agreed in relation to the performance of additional work outside the Contract.
- 6.8 His Honour found that the directions did not alter the basic nature of the works to be performed. Irrespective of the resequencing and redesign, it remained the position that DMC was to excavate, lay pipes and backfill along the pipeline route.

6.9 In the circumstances, a reasonable person in the position of the parties at the time of the primary directions would not have concluded that there was an agreement or understanding whereby KML was requesting that DMC perform works and DMC was agreeing to perform works outside of the scope of the Contract.

Variation Claims

6.10 The variation claims were dealt with as contractual claims.

Time Bars

6.11 Significantly, it was found that even if DMC succeeded in its promissory estoppel reprice claim, the restitutionary claim or the implied claim, KML had a complete defence that those claims were barred because they were not claimed in the final payment claim.

6.12 His Honour found that certain variation claims were not barred as the bar had been waived.

Case Management Comments

6.13 His Honour was especially critical of the fact the litigation had consumed resources of the parties and the court that were significantly disproportionate to the amounts in issue (about AU\$26 million was in issue).

6.14 His criticisms extended to what he stated was an adoption of an “extravagant approach to the litigation” particularly by DMC. In His Honour’s view, DMC, by its legal representatives, “sought to litigate by quantity and mass of materials (sometimes referred to as ‘trial by avalanche’) rather than identifying the essential legal and factual nature of its complaint and presenting the evidence – and only that evidence – required to address that case. Little consideration has been given to whether the way in which DMC’s case was prepared and presented was efficient and effective. From my perspective much of the materials as pressed on the court have served only to obscure rather than elucidate.”

6.15 Justice Vaughan provided a multitude of reasons for expressing these views:

(a) The papers for the judge occupied three volumes. DMC’s final statement of claim was nearly 600 pages.

(b) The witness statements were exceedingly and unnecessarily long, going well beyond evidence to be expected in a case of this type. The witness statements were stated by His Honour to be “in the form of an unchecked stream of narrative about every aspect of the work under the Contract and sought to introduce and reproduce (and often unnecessarily comment upon) the documentary record.”

(c) The expert evidence relied on by DMC was “tendentious and difficult to follow”. His Honour described the evidence as “death by a thousand spreadsheets.” Even more concerning to His Honour than the volume of the expert evidence was the amount of the so-called expert evidence that was inadmissible and the degree to which DMC sought to introduce supplementary expert evidence in the course of the trial.

(d) DMC’s written closing submissions were contained in six volumes and over 1,490 pages. Little attention was given to the readability and navigability of the document. His Honour accepted he should have put a page limit on the submissions but noted he did ask they be clear and concise, which proved not to be the case. His Honour observed that the prolixity of the submissions obscured meritorious points.

(e) Much of the written submissions were a selective rehash of tendentious evidence, without regard to difficulties exposed in the cross-examination of DMC’s witnesses, which failed to assist His Honour by providing for an objective consideration of the evidence and the issues.

Referee Comments

6.16 His Honour concluded that much of the dispute, especially the variation claims, could and should have been dealt with by a referee. His Honour felt much of the case involved a disproportionate use of public resources. His Honour referred to the power of the Court to refer a matter or part of it to a referee (under sections 50-55 Supreme Court Act; Order 4A Rules 2, 9; Order 35).

6.17 The reluctance of the Court in the past to refer any aspect of a case to a referee without the consent of both parties was noted. His Honour felt this case was a good example why that historical reluctance should be put aside for large-scale building and construction disputes.

6.18 His Honour issued directions to the parties pursuant to his provisional view that he should appoint a referee to assist him in the assessment of a lump sum order for costs of the present litigation before him.

7. Significance

7.1 This case constitutes a salutary lesson in the proper conduct of large-scale litigation.

7.2 In particular, Justice Vaughan’s judgment appears to herald a turning point in the Supreme Court of Western Australia’s views of the conduct of large-scale construction disputes. His Honour’s specific comments on the use of referees in such litigation are a change in the way the Court has historically dealt with its power to appoint referees. It is likely a wider, unilateral approach to the Court’s referees power will be adopted by the Court in future.

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