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Recommended Citation

Kianiëff, Muharem. (2013). The Law of Estimates and Quantum Meruit in Canadian Small-Scale Building Contracts. *Journal of the Canadian College of Construction Lawyers*, 105-131.
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The Law of Estimates and Quantum Meruit in Canadian Small Scale Building Contracts

Muharem Kianieff

This paper discusses the legal regime that governs estimates given by building contractors to owners of small businesses. The paper examines the present common law approaches that attempt to adjudicate disputes between contractors and owners by examining the law of estimates and quantum meruit respectively. It is argued that the law has developed in a particular manner in order to protect contractors from information asymmetries vis-à-vis owners in the context of large-scale construction projects. These information asymmetries are not present between owners vis-à-vis contractors in the small scale context, with the end result being that contractors are able to rely on some of the legal devices and doctrines to their advantage against owners. Some recent court decisions have attempted to adjudicate the issue however many of these cases tend to be decided on the basis of findings of fact rather than applying the developed caselaw. The paper argues that transactions costs and uncertainties can be minimized if legislatures were to adopt a bright line rule similar to that in effect in the Province of Ontario with respect to consumer transactions whereby building contracts cannot exceed estimated amounts by more than ten percent. It is argued that this approach brings with it more predictability for small business and also provides a powerful incentive for contractors to take reasonable care in providing estimates to clients who rely on their expertise.

TABLE OF CONTENTS

INTRODUCTION	2
PART ONE: THE HISTORICAL DEVELOPMENT OF THE LAW OF ESTIMATES AND QUANTUM MERUIT	6

<i>Business Realities in Building Contracts</i>	6
<i>The Action for Quantum Meruit</i>	10
<i>Quantum Meruit and the Unjust Enrichment Principle</i>	14
PART TWO: CURRENT PRACTICES IN THE CONSTRUCTION INDUSTRY AS THEY RELATE TO THE USE OF CONTRACTS AND CLAIMS FOR QUANTUM MERUIT	23
<i>Contractual Variations and Risk Allocation</i>	23
<i>The Definition and Nature of “Extras” in a Building Contract</i>	26
<i>The General Law of Estimates</i>	30
PART THREE: RECENT CANADIAN JUDICIAL DECISIONS THAT PERTAIN TO THE ROLE OF ESTIMATES IN BUILDING CONTRACTS	36
<i>Pre – 2006 Jurisprudence</i>	36
<i>Post – 2006 Jurisprudence</i>	41
<i>Estimates and the Claim in Quantum Meruit</i>	42
PART FOUR: THE NEED FOR A NEW BRIGHT LINE RULE	47
CONCLUSION	53

Introduction

One of the realities of modern construction is that things rarely go as one initially anticipated. It has become a standard practice, to budget for unforeseen contingencies since things inevitably end up being more elaborate or cost more than one initially imagined at the outset. Yet, many consumers and small businesses are in the

unenviable position of not knowing what the true cost of a construction project will be, and are therefore dependent upon the expertise of contractors in determining what any given project is likely to cost. Anyone with any experience in building / renovations understands that estimates form a crucial factor in the decision making process. An accurate estimate is essential in order for individuals to make an assessment as to whether they can afford to engage the services of a contractor. The question that this paper will address is what is the liability of a building contractor for an estimate that is a marked departure from the final cost of the project (assuming that the project is unchanged from the time that the estimate was given)?

The question is difficult to answer since most common law provinces in Canada do not have any statutory provisions that govern the law of estimates. In these provinces, the matter is left to be resolved in the courts. With respect to the jurisprudence in this area, recent decisions have attempted to apply certain precedents developed through construction law to what amounts to a basic consumer protection problem. The results, I suggest, have thus far been unsatisfactory since the case law attempts to import judicial remedies that were designed to assist builders in a larger scale context where there is an information asymmetry that renders them vulnerable to errors made in representations made by owners.

The trouble with these decisions is that by importing these remedies to what I shall refer to as the small scale context, courts are in some cases allowing builders to profit

from information asymmetries that they have vis-à-vis small scale owners. This was not the intention of the courts when the original rules were laid down as they were developed to provide a remedy in one context and are now being used in a completely different context. In this paper, a large scale construction project refers to a high value construction project where the owner supplies the contractor with their own engineering and drawings and provides the contractor with the exact specifications related to the project. A small scale project is defined as a lower value construction project where the contractor is expected to develop the technical specifications, engineering and drawings in accordance with the particular design concepts that are communicated to the contractor by the owner. In other words, it is the contractor in this sense that is providing the technical advice to the owner as to how the proposed project may be realized.

The situation is somewhat different, although still problematic in the Province of Ontario. In 2002, Ontario enacted section ten of the *Consumer Protection Act 2002* (hereinafter CPA) that caps the amount that any supplier of goods and services can exceed over and above a previously estimated amount to ten percent over the original estimate.¹ However, this section must be read in conjunction with the definition of “consumer” that is found in section one of the CPA. This definition limits the application of the act to those individuals that are acting for a personal, family or household

¹ *Consumer Protection Act 2002*. S.O. 2002, c. 30. See also the similar provisions in the Saskatchewan *Consumer Protection Act* S.S. 1996, c. C-30.1 at s. 6 (g), Alberta *Fair Trading Act*. R.S.A. 2000, c. F-2 at s. 6 (2) (e), and British Columbia *Business Practices and Consumer Protection Act*. S.B.C. 2004, c. 2 at s. 4 (3)(c)(iii). For the sake of brevity, I will refer to these approaches collectively as the “Ontario rule” as the Ontario version is the most expansive of the four.

purpose and specifically excludes individuals that are acting for a business purpose.² While section ten is no doubt a step in the right direction, the limitations found in section one make owners of small businesses that lack the sophistication of their larger scale counterparts, particularly vulnerable to unscrupulous contractors that use the estimate as a means of inducing parties to enter into a “cost-plus contract.” This type of contract is essentially limitless in the amount that can be charged for the work performed (more on this below). Consequently, remedies for small businesspersons and for individuals in most common law jurisdictions, must be found in the common law (and hence, usually through recourse of a costly court case). Given the fact that the amounts in dispute are relatively low vis-à-vis the significant costs of a trial, contractors have a built in advantage that gives them additional leverage against small businesses in forcing them to settle cases out of court and gives contractors little incentive to take reasonable care in the preparation of their estimates.

This paper will argue that greater certainty and subsequent reductions of transactions costs will be achieved through a bright line rule, preferably established through legislation, that will place restrictions in the variance that final costs may deviate from estimated amounts as they relate to small scale commercial building contracts in a manner that is similar to that which is set out in the Ontario rule with respect to personal or household transactions. A bright line rule will eliminate the uncertainty that allows contractors to pressure small business into favorable settlements out of court and will

² *Ibid.* at s. 1.

serve as a powerful incentive for contractors to adequately take care when offering estimates to small business owners.

Part one of this paper describes the historical origins of the common law as it has developed with respect to the law of estimates for construction projects including the action for quantum meruit for claims beyond the agreed contract. Part two describes some of the contractual devices that are commonly used in construction projects. Part three considers recent judicial decisions dealing with small scale building contracts. Part four offers some concluding observations and considers some modest proposals for reform and also discusses the general law of responsibility for estimates.

Part One: The Historical Development of the Law of Estimates and Quantum Meruit

Business Realities in Building Contracts

Unfortunately, the construction industry does not enjoy particularly high esteem in dealing with consumers, as it is the subject of a rather high volume of complaints. For instance, from 2004 – 2010, home renovations and repairs were the number two ranked consumer complaints at the Ontario Ministry of Consumer services, ranked second only

to collection agencies.³ The construction industry in Canada is a key factor in this country's economic well-being. From 2005 – 2009, the construction industry contributed 5.8% to 6.1% each year to Canada's GDP.⁴ Thus this is an area that warrants significant attention, as measures that will reduce transactions costs will have a positive effect on economic growth generally.

I should state from the outset, that one should not be left with an assumption that erroneous estimates only work against consumers – in fact, it is quite possible for losses with respect to erroneous estimates to fall upon contractors who are forced to bear the loss or risk going to court. Indeed, one of the underlying themes that one finds oneself grappling with when deciding upon what the proper course of action ought to be in cases like this is the old tort question of which party is in the best position to bear the loss.⁵

Suffice it to say, that the conventional approach that contractors tend to follow in cases where there is a dispute in the nature of the work envisaged by the contract and its associated estimates, can trace its origins to circumstances where it is the owner of

³ See Ontario Ministry of Consumer Services website. Available Online at < http://www.sse.gov.on.ca/mcs/en/Pages/Top_Ten_Complaints.aspx > (date accessed: 24 February, 2011).

⁴ Statistics Canada. *Canada Year Book 2010*. Catalogue Number 11 – 402 X. Ottawa: Statistics Canada, 2010. Available online: Statistics Canada website < <http://www.statcan.gc.ca/pub/11-402-x/2010000/pdf/construction-eng.pdf> > (date accessed: 24 February, 2011).

⁵ See generally Justice Learned Hand's judgment in *United States v. Carroll Towing Co.* 159 F.2d 169 (2d. Cir. 1947).

the proposed project that has an information asymmetry that they use to their advantage, rather than the contractor in a typical small-scale project. Thus in order to get an appreciation for the position these contractors find themselves, it is worthwhile to consider some of the business realities that face contractors that engage in larger scale projects.

Typically, projects of this nature require a contractor to submit a tender in a competitive bidding process whereby the project owner ultimately selects the bid that can accomplish their goals for the lowest possible price. In the pre-tender phase, the contractor is provided with a set of drawings or specifications that they are then asked to base their tender upon. It is this information that poses the greatest financial risk for the contractor since any misrepresentations (innocent or otherwise), or errors, could result in the contractor being forced to bear the risks of errors in estimations that are contained in the tender. The risks for the contractor include inaccuracies in the quantities of items to be supplied, or units of material to be excavated or provided such as fill that are contained in the owner's drawings.⁶ These are typically estimated amounts, and thus any variances therefrom can have very significant effects on the builder's costs.⁷ This is further compounded when pre-engineering leaves much to be

⁶ Goldsmith, Immanuel. *Goldsmith on Canadian Building Contracts* (4th Edition) (loose-leaf). Thomas G. Heintzman Ed. Toronto: Thomson – Carswell, 2007 at 2 – 5 (footnotes omitted).

⁷ *Ibid.*

desired and errors subsequently come to light once work is substantially under way or practically completed.⁸

To quote from Immanuel Goldsmith:

Although an owner may provide expressly that the quantities provided are estimates only, it is suggested that an “estimate” must be more than a rough guess; it must bear some relation to reality. This has been recognized in a number of government and other contracts in recent years by the inclusion of a provision that if the quantities vary by 15 per cent, or in some cases 20 per cent, more or less, the parties will renegotiate the prices. To the extent that such a provision is merely an agreement to agree, the result in the case of an overrun or underrun is that there is no agreement between the parties with regard to the item in question until a new price has been negotiated, and if the parties cannot agree on a new price, there is no express contract with regard to that particular item and, if it is one that is fundamental to the contract, there may be no contract at all.⁹

One will notice that from a legal perspective, the primary options available to contractors in these tender types of cases are traditional contractual remedies and remedies in quasi – contract. In the event that a contract is held to be valid between the parties, the contractor can avail themselves of remedies for breach of contract or misrepresentation either innocent or fraudulent. The remedies available for these actions include damages or in some cases rescission.¹⁰

⁸ *Ibid.*

⁹ *Ibid.* at 2 – 6 to 2 – 7 (footnotes omitted).

¹⁰ *Ibid.* at 2 – 4.

The risk to the contractor is very high if they fail to accurately estimate the complexity and costs of the job before them. As such, there exists a significant financial incentive for the contractor to protect themselves in contract based upon their own estimations of proposed project. Should this estimate prove to be faulty and the contract does not adequately protect the contractor for their excess costs, there exists the risk that the contractor will go unpaid for the work that they have performed. As a result, omissions in contract drafting or in estimations that give rise to a project with inaccurate estimates or are more elaborate than originally thought, can lead to significant consequences to contractors who must bear any burdens associated with these errors and omissions. The common law has recognized this fact as one leading to an injustice where the owner is said to receive a benefit without having to pay for it and it is through the action in quantum meruit (below) that the law provides a remedy to contractors for the benefits of any work that they have conferred on the owner.

The Action for Quantum Meruit

The situation becomes somewhat more complicated where proposed contractual terms do not reflect a consensus ad idem, and thus falls outside of the terms of the contractual relationship. In these cases, the contractor must look for a remedy in restitution. The remedy that is typically requested in situations where parties enter into

an agreement for the supply of goods and services where there is a failure to negotiate a price term, is one to recover the “reasonable value” of the goods and services that are supplied. This is typically made by means of a claim in *quantum meruit* and *quantum valedeet* for the value of the services rendered and goods supplied respectively [hereinafter quantum meruit].¹¹ That is to say, that the plaintiff in a quantum meruit claim is alleging that the defendant has received a benefit in the form of an improvement to their property that they cannot expect to retain without having to pay something reasonable for the value of the improvement. For our purposes here, I will focus on the claim in quantum meruit in dealing with the nature of the claims raised in building contracts.

With respect to building contracts, quantum meruit is typically pleaded as an alternative argument when the terms of the building contract prove to be ineffectual. This arises where there is a dispute with respect to the nature of the work to be performed under the building contract that one of the parties refuses to honour. In the building context, this can occur where the contractor is asked to perform work that would properly be said to fall outside of the building contract and hence can be classified to be an “extra” from the perspective of the builder. From the owner’s perspective this would pertain to work that the owner thought ought to be considered to

¹¹ See *936464 Ontario v. Mungo Bear Ltd* (2003). 258 D.L.R. (4th) 754 (Here the court rejected the notion that quantum meruit is an equitable remedy), See also *McLean v. Insurance Corp. of British Columbia*, [2007] 5 W.W.R. 724 at para. 69 where Justice Rogers states that quantum meruit is an equitable remedy for which any claimant thereof must come to court with clean hands. While this argument may be effective for our purpose below, the literature in restitution tends to view quantum meruit as a restitutionary remedy rather than an equitable one (see discussion below).

fall under the work described under the contract but which the builder claims is outside of the scope of the work agreed upon.

The precise nature of the remedy in quantum meruit is one that has changed over time to reflect a changing consensus of the historical basis upon which the remedy has been awarded. This is important to note since the changes in the legal basis for the remedy have wide ranging effects on precisely which legal doctrines ought to apply when considering the merits of a claim in quantum meruit. Quantum meruit is a restitutionary remedy and there has been some debate over where it originates – is it a species of the common law legal restitution and its related concepts of *assumpsit* and quasi - contract,¹² is it derived from equitable restitution that comprises mainly of constructive trusts, resulting trusts and equitable liens¹³ or is it something that owes its existence to some other organizing restitutionary principles that are distinct from the traditional legal and equitable restitutionary remedies?

Over the past ten years, the authorities in Canada and the United Kingdom have tended to move away from the notion of quantum meruit as being an equitable remedy or species of implied contract. Indeed, it is important to note that the implied contract theory that once formed the basis for actions in quasi contract has since fallen out of

¹² Doug Rendleman. “Quantum Meruit and the Subcontractor: Has Restitution Jumped off Dawson’s Dock?” 79 (2000) *Texas Law Review* 2055, at 2060.

¹³ *Ibid.*

favour among Anglo-Canadian restitutionary scholars¹⁴ who have now tended to view the unjust enrichment principle as the proper organizing principle of restitution.¹⁵ This has had a significant impact on the analysis that pertains to quantum meruit itself, which in turn has led to some confusion with respect to the nature of the claim itself, and how it ought to apply to cases of building contracts both in the large and small scale contexts.

Historically, the nature of the claim in quantum meruit was one that demanded that an individual receive a reasonable remuneration for the services rendered to another.¹⁶ In order to render the defendant liable, the plaintiff had to show that the services were requested in some manner by the defendant.¹⁷ It is at this juncture that the confusion over whether quantum meruit is a species of quasi – contract or whether it is based on the unjust enrichment principle arises. Quantum meruit cases tend to arise pursuant to contracts where the remuneration or prices of goods and services have not been agreed.¹⁸ As a result, one could then use quasi – contract to “imply” that a party that requests goods and services from another has implicitly promised to pay for them. However, this analysis has been found unsatisfactory in the literature, and as was mentioned above, the literature has tended to characterize quantum meruit as one that

¹⁴ See for instance Lord Goff of Chievely and Gareth Jones. *The Law of Restitution*. London: Sweet and Maxwell, 2007 at 1 – 004.

¹⁵ See Goff and Jones *supra* at 1-012 to 1-016 and Peter D. Maddaugh and John D. McCamus. *The Law of Restitution Looseleaf Edition*. Aurora: Canada Law Book, 2010 at 2:200 to 2:400.

¹⁶ See Maddaugh and McCamus *supra* note 15 at 4:200.30.

¹⁷ See Goff and Jones *supra* note 14 at 1-002.

¹⁸ Maddaugh and McCamus *supra* note 15 at 4:200.30.

is based on unjust enrichment rather than quasi-contract as a predominant principle that will allow one to find the conceptual unity that is required in order to reconcile the majority of claims that are enforced by this cause of action.¹⁹

Quantum Meruit and the Unjust Enrichment Principle

Since quantum meruit can properly be classified to be based upon unjust enrichment, it only follows that any claim for quantum meruit conform to the tests that have been laid down in order to qualify for restitutionary relief. The Supreme Court of Canada has tended to revisit the notion of restitutionary remedies and the basis upon which such remedies can be awarded from time to time in response to numerous changing social values and numerous developments that occur outside of Canada. The test has been more recently refined in the 2004 Supreme Court case of *Garland vs. Consumers' Gas*.²⁰ Here Mr. Justice Iacobucci defined the test for unjust enrichment as comprising of three elements:

1. an enrichment of the defendant;
2. a corresponding deprivation of the plaintiff; and

¹⁹ See note 15 *supra*.

²⁰ *Garland vs. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25.

3. an absence of juristic reason for the enrichment.²¹

In reaching this determination, Justice Iacobucci makes reference to the aforementioned test as being well established in Canada.²² Where this case departs from the older established caselaw is in its elaboration of the third prong of the test – the absence of a juristic reason for the enrichment.

In *Garland*, the court held that while the principle of unjust enrichment should be allowed to move beyond its traditional confines, guidelines ought to be offered to trial judges in order to indicate the boundaries of the new equitable cause of action.²³ As such, the court laid down a new test that will govern the applicability of the third prong. According to the court, the plaintiff must show that no juristic reason from an established category exists to deny recovery.²⁴ The established categories include a contract, disposition of law, a donative intent and other valid common law, equitable or statutory obligations.²⁵ If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the

²¹ *Ibid* as per Iacobucci J. at para. 30 citing *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at p. 848; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 784.

²² *Ibid.* at para. 30.

²³ *Ibid.* at para. 40.

²⁴ *Ibid.* at para. 44.

²⁵ *Ibid.*

analysis.²⁶ The case is rebuttable where the defendant can show that there is another reason to deny recovery and allow the defendant to retain the benefit in question. The court defines these factors as:

- i) the reasonable expectations of the parties; and
- ii) public policy considerations.

In a later decision, the court held that the test for juristic reasons is a flexible one and that the relevant factors that the court may take into account will depend upon the situation before the court.²⁷

The development of the juristic reasons tests has had an impact on claims in quantum meruit in addition to influencing traditional cases in restitution. Historically, in any action for quantum meruit, the plaintiff had to demonstrate that the defendant had in some manner, requested and freely accepted the benefit that they now refused to compensate the plaintiff for. This was particularly the case where a claim in quantum meruit is asserted in situations where services are rendered pursuant to a contract which had not been substantially performed and which the defendant had wrongfully

²⁶ *Ibid.*

²⁷ *Kerr v. Baranow*, [2011] S.C.C. 10 at para. 44.

repudiated.²⁸ The principle of free acceptance finds its expression in the equitable doctrine of acquiescence which serves to protect the improver of land in circumstances where the property owner has stood by, or allowed them to do so, in which case courts have held it unconscionable for the landowner to deny that they have received a benefit.²⁹ It is this paradigm that has traditionally guided claims for quantum meruit in the case of building contracts that have been frustrated or repudiated in some manner by one of the parties.

Indeed, this poses some issues with respect to claims in quantum meruit that are asserted in the context of building contracts. As the Supreme Court stated in *Garland*, defendants in cases involving established categories of restitutionary relief such as contracts, may still have recourse to the third prong of the test for restitutionary relief (absence of juristic reason) as a means of rebutting the prima facie case made by the claimant. Questions arise however, when the contract itself is the subject of dispute with respect to the type of work that is called for to be performed pursuant to the contract (see discussion above). That is to say, what if any, is the restitutionary remedy that one can look to in cases where the contract that is the subject of the dispute is itself deemed to be ineffectual?

²⁸ See Goff and Jones *supra* note 14 at 1 – 021.

²⁹ *Ibid.* at 1 – 021.

The conventional restitutionary approach with respect to ineffectual agreements has held that an unjust enrichment may occur where benefits are conferred through the performance of obligations that are ineffective for a number of reasons.³⁰ These include by reason of:

- want of formality,
- lack of capacity of one of the parties,
- want of authority on the part of an agent purporting to bind a principal,
- mistake, misunderstanding or uncertainty, or
- being induced by misrepresentation.³¹

The general rule in common law and equity has been to grant recovery of benefits that have been conferred through the performance of such agreements.³² However, where an agreement fails by reason of illegality, the general rule is said to be the converse – that is to say that restitutionary relief will be denied.³³ This fact has been labeled a deficiency by Maddaugh and McCamus, who argue that in the case of ineffective transactions, the question that must be posed in the context of restitutionary claims for the recovery of benefits conferred under an ineffective transaction is whether the

³⁰ Maddaugh and McCamus *supra* note 15 at 3:400.20.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

granting of relief will undermine the rule of contract law that had rendered the transaction ineffective.³⁴ They also identify a couple of subsidiary questions that may arise in the ineffective transactions context including:

1. Should the contract in question act as a guide in setting a limit for the relief that is granted in the restitutionary claim?
2. Is the unwillingness of the plaintiff or defendant to go forward with the ineffective transaction relevant to the determination to impose restitutionary liability on the defendant?³⁵

Maddaugh and McCamus posit that the answers to these questions need to be considered within the context of the particular ineffective transaction to which they are thought to be pertinent.³⁶

It can be argued that this mode of analysis is in keeping with the third prong of the test laid out by Justice Iacobucci in *Garland* above and certainly can be built into an analysis of the application of the third prong of the test to the facts under consideration. One way of viewing both of these approaches is to say that they are meant to guard

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

against the possibility that an award under unjust enrichment may serve to undermine a well-established rule in contract law by having a party “lose” under the contract but “win” in restitution. As such then, it can be said that one way to view the two approaches is to import a sort of equitable “clean hands” doctrine that is meant to ensure that the party that is seeking relief from the Court has not in any manner contributed to the failure of the contract.

When considering the application of the third prong of the test in *Garland* to building contracts, one will notice that the result of the test may vary based upon the conduct of the contractor and the owner respectively. Considering the first part of the test, the reasonable expectations of the parties, one could argue that in any building contract, each side is expecting to have work performed as described by the contract, for the price that is stipulated under the contract. However, what happens when an informational asymmetry is present? In the large scale context where the owner has the informational advantage, the contractor can very well argue that they would expect the owner to furnish them with all of the requisite information that is required to get an accurate picture of the nature of the work involved so that the contractor can make an informed tender. Moreover, they would also expect to be compensated for all of the work they have performed and would not expect to carry out any additional work that is not called for under the building contract.

The situation is different in the smaller scale context where there is a reliance on the contractor's expertise on the part of the owner. Here the owner can argue that they would reasonably expect the contractor to advise them of the nature of the work to be performed and give them an accurate estimation of the costs that are involved. This is the case since it is the contractor that possesses the technical expertise that the owner is relying on in order to decide upon the type of work that they are prepared to contract for. An owner could reasonably expect that the contract reflect closely the estimate that was given with respect to the costs associated with the proposed project.

With respect to the public policy prong of the test, one cannot help but consider the questions raised by Maddaugh and McCamus above, namely would the granting of a restitutionary remedy frustrate rules and doctrines developed in contract law? I would submit however, that the proper way to analyze cases of this nature lies in a consideration of the informational asymmetries that exist between the owner and the contractor. As such, any court will be called upon to determine which of the two parties is in the best position to ascertain the nature of the work to be done pursuant to the contract and which party is in the best position to furnish the other with an accurate estimate of the quantity and cost of the work to be performed.

Returning once again to the question posed with respect to the contract itself as a guide to quantifying the amount of the remedy awarded. Here again, the answer is largely dependent upon whether one is considering the large scale or small scale

context. If the contract has a fixed price associated with it, this is certainly something that can be useful to a court in assessing the relative value that each of the parties has attached to the work performed.³⁷ However, in the small scale context where cost plus contracts are more prevalent, the nature of the contract itself renders the value calculation much more difficult to ascertain. This then puts courts in the unenviable position of feeling obliged to award “something” for the benefit of the work that has been performed since the contract itself obliges the owner to compensate the contractor for any and all work performed. This award will most likely occur as a factual determination at trial which may or may not objectively reflect the true value of the benefits conferred. Further issues emerge however, if one considers that the contract may have been entered into by the owner as a result of representations contained in the estimate that they may have relied upon to their detriment. From a public policy perspective, courts will be called upon to balance freedom of contract considerations against imposing liability on the contractor on the basis of a misrepresentation that is brought about by a faulty estimate. However, since the determination is difficult to make and certainly depends upon the particular facts before the court at any given time, there is an element of uncertainty here as to how that balancing will occur and upon what basis can damages be awarded on an objective basis thereby increasing transactions costs in the small scale context.

³⁷ Goff and Jones *supra* note 14 at 20 – 022.

Part Two: Current Practices in the Construction Industry as they Relate to the Use of Contracts and Claims for Quantum Meruit

Contractual Variations and Risk Allocation

Having regard to previous instances where large scale projects exposed contractors to significant risks with respect to onerous or vague contractual terms, the industry has responded with the development of a number of contractual variations that are designed to reflect different bargains that may be entered into between contractors and owners alike. I will discuss each of the variations below. Needless to say, the questions that these forms are designed to address are primarily directed to the mode by which the contractor's services are to be remunerated. Drawing upon Goldsmith, some of the more common forms of building contracts include:

Fixed Price / Lump Sum Contracts: Under this type of contract, the contractor agrees to carry out all of the work involved in the construction for a fixed lump sum.³⁸ As such, the contractor is legally bound to complete all of the work agreed upon in the contract for the agreed upon price and no more regardless of whether or not the work may be more than the contractor anticipated.³⁹ Contracts of this nature often provide for a contingency allowance in order to deal with any unforeseen contingencies as they may

³⁸ Goldsmith *supra* note 6 at 4 – 2.

³⁹ *Ibid.*

arise.⁴⁰ Notice however, that all of the risk that the project may cost more than anticipated, or any benefit that arises from the project coming in under budget, will accrue to the detriment or benefit of the contractor as the case may be.

Contracts of this nature tend to be favoured by owners since this type of contract defines the maximum liability to be incurred in connection with the work and shifts the risk of substantial unforeseen costs onto the contractor.⁴¹ According to Goldsmith, the contractor in substance provides a guarantee that the work will not exceed the stipulated amount and as a result, before entering into such a contract, a contractor is advised to be fully familiar with the nature of the work to be carried out, and should provide for an appropriate contingency allowance.⁴²

Unit Price Contracts: Under this type of arrangement, each unit of work, whether it involves the supply of materials or the provision of labour has a specific price and the total contract price is calculated by multiplying the number of different units by the respective unit prices and then adding the two calculated amounts together.⁴³ This contract has the benefit of giving the owner some idea of the total price, but unlike the fixed price contract, it does not guarantee that the final amount will not be substantially

⁴⁰ *Ibid.*

⁴¹ *Ibid.* at 4 – 3.

⁴² *Ibid.*

⁴³ *Ibid.*

exceeded.⁴⁴ Moreover, there is no guarantee to the contractor that the total contract price will not be less if it should come about that there are fewer units of work to be done than was originally anticipated.⁴⁵ These types of contracts typically contain provisions specifying what overhead and profit allowance the contractor is entitled to since this is the only means available to them to obtain revenue under the contract.⁴⁶

Cost Plus Contracts: Under these types of contracts, owners agree to pay the contractor their actual direct costs of doing the work in addition to a stipulated percentage for overhead and profit.⁴⁷ The percentage of profit is a matter of agreement between the parties, however the figure that is typically used is 10 per cent⁴⁸ with some cases deciding that a markup of 20 per cent on labour and material may be considered reasonable.⁴⁹

Unlike the fixed price contract, this type of contract is the most favourable for contractors.⁵⁰ Goldsmith states that although the contractor cannot make any exorbitant

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* at 4 – 4.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.* at 4 – 5.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* citing *Hastie v. Brooks* (1970), 3 NBR (2d) 475 (Co. Ct.) and *MacDonald v. Ransom* (1969), 1 NSR (2d) 81 (T.D.)

⁵⁰ *Ibid.*

profits, they are assured of not making a loss.⁵¹ Hence, in this instance, one could argue that it is the owner that is guaranteeing the contractor that they will have all of their costs covered as all of the risk of the work being more involved than was originally envisaged now shifts to the owner who must assume all of the risk.

In addition, the cost price concept is also typically used in order to price “extras” that may arise over the course of construction or to cover any unforeseen items in a unit price contract where there may be insufficient time to negotiate additional unit prices.⁵² The nature of what constitutes an “extra” is also of some significance for our purposes. If there are variations in the proposed project, or if there are any unforeseen circumstances that the contractor did not anticipate, then they will attempt to bill the owner over and above the original terms contained in the contract on the basis that the work in question has subsequently followed the signing of the contract and hence goes beyond what the contractor originally bargained for (more on this below).

The Definition and Nature of “Extras” in a Building Contract

It is helpful at this juncture to review the law as it relates to what constitutes an “extra” and how the contract that pertains to this work is actually formed. In the ordinary course,

⁵¹ *Ibid.*

⁵² *Ibid.*

a contractor is obliged to perform only such work as is included in the original contract.⁵³ Contracts typically then contain a clause that provides for the contingency that extra work may need to be performed or that the owner may request alterations to the original project and hence, the owner is given the right under the original contract to order extra work and the contract will specify the method of payment for such work (typically on a cost plus basis).⁵⁴

Goldsmith defines an extra as work, that although not specified for in the contract, the owner is nevertheless entitled to require the contractor to perform, as distinct from work properly called for by the contract or work that is substantially different from and wholly outside of the scope of the work contemplated by the contract.⁵⁵ With respect to work that is required to be performed under the contract, the contractor is obliged to perform the work without being entitled to any further remuneration beyond the contract price.⁵⁶ However, where work is performed that is outside of the scope of the contract, the owner cannot compel the contractor to perform the work at all unless a new

⁵³ *Ibid.* at 4 – 13.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* at 4 – 15.

⁵⁶ *Ibid.* citing *Skene v. Royal Bank* (1920), 59 DLR 46 (SCC); *J.H. Tremblay Co. v. Greater Winnipeg Water Dist.*, (1920), 1 WWR 976 (SCC); *Green v. Orford* (1888), 16 OAR 4; *Elford & Cornish v. Thompson* (1912), 1 DLR (Sask.); *Litchfield Bulldozing & Demolition Ltd. v. PCL Construction Limited* (1985), 14 CLR 287 (B.C. Co. Ct.); *Brunswick Construction Ltee. v. New Brunswick* (1986), 23 CLR 56 (NB QB); *Campeau Corporation v. Canada* (1988); 84 NR 231 (Fed. CA); *Family Home Improvements Ltd. v. Scopa* (1992), 7 CLR (2d) 302 (Ont. Master); *Flegel Construction (1981) Ltd. v. John Smith Indian Band Muskoday Reserve No. 99* (1994), 17 CLR (2d) 27 (Sask. QB), additional reasons at (1995), 17 CLR (2d) 27n (Sask. QB), *Central Automatic Sprinkler Ltd. v. Trident Construction Co.* (2000), 2 CLR (3d) 189 (N.S. SC).

agreement is entered into between the parties.⁵⁷ It should be noted, however, that in the absence of any specific agreement as to price, the contractor can recover on a quantum meruit basis.⁵⁸ With respect to work that is in original drawings and specifications that formed a part of the original contract, Goldsmith states:

If, on the proper construction of the contract documents, which generally include the drawings and specifications, the item of work is one which the contractor is required to perform, it cannot be an extra, notwithstanding the fact the contractor may have failed to realize at the time of entering into the contract that he would be required to perform such work. If on the other hand, the work is not specifically called for by the contract when properly interpreted, but is nevertheless properly within the scope of the work as originally contemplated, it is an "extra."⁵⁹

However, in order to qualify as an extra, there is an additional requirement: the work in question must have been authorized either explicitly or implicitly by the owner.⁶⁰

Otherwise, the consequences for the contractor are described by Goldsmith as follows:

A contractor who voluntarily and without instructions does additional work not required by the contract is not entitled to

⁵⁷ *Ibid.* citing *Ramsay v. Bd. of School Trustees* (1915) 25 DLR 133 (CA); *Boyd v. South Winnipeg Ltd.* [1917], 2 WWR 489 (Man. CA); *Dom. Paving and Const. Co. v. Toronto* (1907), 9 OWR 38 (CA); *Ross v. Regina Agricultural etc. Exhibition Assn.* (1911), 19 WLR 53 (Sask.); *Legendyk & Co. v. R.* (1984), 9 CLR 301 (Fed. TD).

⁵⁸ *Ibid.* at 4 – 15 footnote 34 citing *D.B. & J. (1971) Ltd. v. Cornwall* (1978), 22 Nfld. & P.E.I. Rep. 215 (P.E.I. SC); *Alex Gair & Sons Ltd. v. Lepinski* (1997), 36 CLR (2d) 250 (B.C. SC).

⁵⁹ *Ibid.* at 4 – 15 to 4 – 16 (footnotes omitted).

⁶⁰ *Ibid.* at 4 – 16.

any extra payment therefor unless the owner, by standing with knowledge of what is being done, can be held to have impliedly authorized such extra work, or unless the extra work was necessitated by a misrepresentation made by the owner.⁶¹

The question remains, how is this authorization to take place? In the typical large scale project, an engineer or supervising architect acting on behalf of the owner will typically call for and authorize extras as the necessity for such work arises in the course of construction.⁶² Legally speaking, many building contracts contain express provisions that specify what condition precedents must be satisfied in order to entitle the contractor to payment.⁶³ Quite often, these provisions will require the contractor to obtain written instructions or authorization from the owner or their agent.⁶⁴ As was mentioned above, remuneration with respect to extras is typically assessed on a cost plus basis.

Where authorization for extras is not expressly provided, the law in this area remains somewhat unsettled. For instance, Goldsmith cites a line of cases that state that contractors that fail to obtain written authorizations under contracts that require them as a condition precedent to payment for any extra work, cannot recover additional payment

⁶¹ *Ibid.* at 4 – 16.

⁶² *Ibid.* at 4 – 18.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

therefor.⁶⁵ However, there are still some unresolved ambiguities despite some of these holdings. For example, a contractor is entitled to recover even in the absence of the architect's approval if the work is collateral to the contract and not performed pursuant to it.⁶⁶ In addition, whether or not a written order is a condition precedent to payment is a matter of construction of the contract that may be considered to be waived by the owner's conduct⁶⁷ or acquiescence.⁶⁸

The General Law of Estimates

Finally, it is worth considering what the law of estimates has to say before moving on to see how all of these actions fit together in modern jurisprudence. Construction parlance tends to draw a distinction between estimates and quotations. Generally

⁶⁵ *Ibid.* at 4 – 19 citing *Small v. M'Cullough* (1857), 8 NBR 484 (CA); *Oldershaw v. Garner* (1876), 38 UCQB 37 (CA); *O'Brien v. R.* (1880), 4 SCR 529; *Wood v. Stringer* (1890), 20 OR 148; *Williams v. Cornwall Paper Co.* (1906), 9 OWR 111; *Toronto v. Metallic Roofing Co.* (1906), 37 SCR 692; *Reynolds v. Carleton Place Board of Education* (1926), 31 OWN 332 (CA); *R. v. Cimon* (1893), 23 SCR 62; *Indust. Const. Ltd. v. Lake Side Center Co.* (1976), 20 NBR (2d) 321 (QB); *Boulder Construction Builders Ltd. v. Calgary (City)* (1985), 16 CLR 14 (Alta. QB).

⁶⁶ *Ibid.* at footnote 120 citing *Montreal Drywall and Taping Co. v. Brunswick Construction Ltd.* (1975) 11 NBR (2d) 223 (CA).

⁶⁷ *Ibid.* at 4 – 20 citing *Melville v. Carpenter* (1853), 11 UCQB 128 (CA); *Demenico v. Earls* (1945), OWN 375; *LeBlanc v. Lutz* (1916) 34 DLR 454 (N.B. CA); *Price v. Swift Can. Co.* (1932), 4 MPR 543 (N.B. CA); *J.R. Jones Bldrs. Ltd. v. Gossen* (1978), 40 NSR (2d) 286 (Co. Ct), *Woollatt Fuel and Lumber (London) Ltd. v. Matthews Group Ltd.* (1982), 128 DLR (3d) 68 (Ont CA) (leave to appeal to the Supreme Court of Canada refused 35 OR (2d) 140 n (SCC); *Colautti Construction Ltd. v. Ottawa* (1984), 7 CLR 264 (Ont. CA); *Max Helmer Construction Ltd. v. McNally Contractors Ltd.* (1986), 24 CLR 131 (B.C. SC); *Dic Enterprises Ltd. v. Kosloski* (1987), 26 CLR 85 (Sask. QB); *Kei-Ron Holdings Ltd. v. Coquihalla Motor Inn* (1996), 29 CLR (2d) (B.C. SC); *Redheugh Construction Ltd. v. Coyne Contracting Ltd.* (1996), 29 CLR (2d) 39 (B.C. CA).

⁶⁸ *Ibid.* citing *Bannerman v. Detroit Yukon Mining Co.* (1907), 6 WLR 704 (Y.T. CA); *Alta. Bldg. Co. v. Calgary* (1911), 16 WLR 443; *Acme Invt. Ltd. v. York Structural Steel Ltd.* (1974), 9 NBR (2d) 699 (CA); *Sargeant Douglas & Co. v. Kozic Holdings Ltd.* (1985), 17 CLR 13 (B.C. SC); *Pitz v. Lavallee* (1986), 23 CLR 88 (Man. QB); *Homes by Wallace Ltd. v. Werklund* (1992), 1 CLR (2d) 53 (Alta. QB); *Nu West Decorating Ltd. v. Gateway Construction & Equipment Ltd.* (1992), 1 CLR (2d) 313 (Man. QB).

speaking, an estimate is frequently characterized as an “educated guess” as to what a particular job might cost.⁶⁹ These can be given in writing or orally.⁷⁰ As such, there is no “guarantee” that the maker warrants that the figures used will be accurate. In contrast, a quotation is a fixed price offer made to the consumer that cannot be changed even to taken into account previously unforeseen circumstances once accepted. One Australian governmental authority even goes so far as to describe a quotation as a legally enforceable document⁷¹ although a distinction is also made with “cost plus quotations.”⁷²

It is interesting to note however that legally speaking, the cases in England and Canada on the law of estimates make no distinction between estimates and quotations (more on this below). As far back as 1826, courts have been asked to interpret the legal effect of an estimate / quotation. In *Money Penny v. Hartland*⁷³ Best C.J. states at 172:

But if a surveyor delivers in an estimate, greatly below the sum at which a work can be done, and thereby induces a

⁶⁹ See “Price lists, estimates, quotations and tenders.” U.K. Govt. Business Link website. Available Online at: < <http://www.businesslink.gov.uk/bdotg/action/detail?itemId=1073792180&type=RESOURCES> > (date accessed: 15 March, 2011).

⁷⁰ *Ibid.*

⁷¹ See “Quotes and Estimates.” ACT Planning and Land Authority website. Available Online at: < http://www.actpla.act.gov.au/topics/design_build/finances/quotes > (date accessed: 15 March, 2011).

⁷² *Ibid.*

⁷³ *Money Penny v. Hartland and another* (1826), 172 ER 171.

private person to undertake what he would not otherwise do; then I think he is not entitled to recover . . .

Later on at 173 – 174, the Chief Justice continues:

It appears from the case cited,⁷⁴ that my Lord Chief Justice Abbott was of the same opinion. His Lordship says, “I think it of great importance to the public, that gentlemen in the situation of the plaintiff should know, that if they make estimates and do not use all reasonable care to make themselves informed, they are not entitled to recover any thing.”

... It is said that to-day there is a difference between an estimate and a contract. I do not agree in that observation: between honest men there is no difference at all. A man should not estimate a work at a price at which he would not contract for it; for if he does, he deceives his employer.

Note that there is no element of fraud or deceit that needs to be alleged here in order to prove the case.

This was followed by the famous judgement of Lord Denning in *Esso v. Mardon*⁷⁵ that involved the representations made by Esso to a prospective franchisee regarding the expected throughput that Esso had forecast for a particular petrol station with rent to be calculated accordingly. The throughput was originally estimated at 200,000 gallons per annum, which the defendant originally questioned but was reassured by Esso’s representatives that they had extensive experience in these matters and that they stood

⁷⁴ *Moneypenney v. Hartland* (ante, vol. 1, p. 352).

⁷⁵ *Esso Petroleum Co. Ltd. v. Mardon* [1976] 1 QB 801.

by their projections.⁷⁶ The actual throughput was 78,000⁷⁷ and was a financial disaster for Mardon following which, Esso attempted to eject him and Mardon counterclaimed on the basis of negligent misrepresentation.⁷⁸ With respect to the liability that a professional has in making forecasts / estimates / projections to another, Lord Denning states:

It seems to me that if such a person makes a forecast, intending that the other should act upon it – and he does act upon it, it can well be interpreted as a warranty that the forecast is sound and reliable in the sense that they made it with reasonable care and skill ... If the forecast turned out to be an unsound forecast such as no person of skill or experience should have made, there is a breach of warranty.⁷⁹

Later on his Lordship continues:

... if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another – be it advice, information or opinion – with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side to enter into a contract with him, he is liable in damages.⁸⁰

⁷⁶ *Ibid.* at 804 – 805.

⁷⁷ *Ibid.* at 816.

⁷⁸ *Ibid.* at 804.

⁷⁹ *Ibid.* at 818.

⁸⁰ *Ibid.* at 820.

Canadian cases have held estimates to be binding in light of the fact that the contractor is a professional whose expertise the owner is relying upon and paying for. The following quotation was considered in the leading case of *Kidd v. Mississauga Hydro-Electric Commission et al.*⁸¹ Here Justice Grange states:

The cases dealing with estimates generally concern the obligation of the architect or engineer to predict the cost of the work of others: see *Pratt v. St. Albert Protestant Separate School District No. 6* (1969), 69 W.W.R. 62, affirmed 71 W.W.R. 320; and *Saxby and Pokorny v. Fowler* (1977), 3 Alta. L.R. (2d) 47. But in principle I can see no reason why the same result should not pertain to the estimator's own work particularly where it is shown that the defendant acted upon the false estimate to his detriment.⁸²

The concept was considered more recently in the case of *Wolski v. Puckett*⁸³ where Justice Johnson states:

The defendant went so far as to testify that if there were things he forgot when he prepared his estimate, or that he had failed to budget for, he could charge those things to the plaintiffs as extras. Such an interpretation would relieve the defendant of any responsibility to exercise skill and care in preparing his estimate, or in his management of the

⁸¹ *Kidd v. Mississauga Hydro-Electric Commission et al.* (1979), 97 DLR (3d) 535, 23 OR (2d) 385 (H.C.J.)

⁸² *Ibid.* at 540.

⁸³ *Wolski v. Puckett* (2006) 54 CLR (3d) 205.

construction, for which he was charging the plaintiffs his fee.⁸⁴

Note here also that the scope of the ability of a builder to charge omitted items or items that have cost overruns as “extras” has also been significantly curtailed. In a similar vein is the following passage of Justice Wilson from *Cherry Homes v. Perler*:

When he [the contractor, Mr. Eddy] received the plans, if he realized that the project was larger than he had initially anticipated, he had an obligation to advise Mr. Perler [the owner], before construction started, that the estimate would have to be increased. If there were not sufficient specifications to enable Mr. Eddy to give an accurate estimate, which he says was the case, it was his obligation to advise Mr. Perler of that, not to provide a price based on inadequate specifications.⁸⁵

However, courts have allowed some variation for unforeseen expenditures in estimates, though the figure varies depending on the facts of the case ranging from 5 – 15% (see discussion below). This line of jurisprudence has also found support for the necessity of increasing costs where the work asked for goes beyond what was originally envisaged. Speaking of a lawyer’s obligation to their client, Madam Justice McLachlin (as she then

⁸⁴ *Ibid.* at para. 53.

⁸⁵ *Perler infra* note 92 at para. 39.

was) elaborated on the limited circumstances in which a finding may be made as follows:

Depending on the circumstances, a lawyer may not be bound by an estimate, if for example, he or she does work outside the estimate at the request of the client, or if the client by his or her conduct unduly increases the amount of the work, or if unforeseen circumstances add a new and unexpected dimension to the work.⁸⁶

Hence, the question turns on how much of a deviation from the estimate is the result of an error or omission on the part of the estimator and to what extent can the deviation be attributed to the requests or conduct of the client.

Part Three: Recent Canadian Judicial Decisions that Pertain to the Role of Estimates in Building Contracts

Pre – 2006 Jurisprudence

Part of the difficulty for consumers these days stems from the lack of uniformity that is presently found in recent jurisprudence that attempts to deal with the law of estimates and their application to small scale building contracts. The approach taken in the cases

⁸⁶ *Roberts & Muir v. Price* (1987) 19 BCLR (2d) 375 (B.C. CA) at 378.

can be characterised as attempting to apply a literal interpretation of contracts against the backdrop of assessing what, if any, is the contractual effect of representations with respect to cost that are made by the builder to the owner. The difficulty in this approach is that despite the fact that contractors are attempting to impose concepts and remedies that have been developed in the context of larger scale building projects (cost – plus contracts, liability for extras etc.), the approach taken by courts has been to adopt some of the concepts to traditional contract law rather than viewing them as forming part of the law of estimates per se and the jurisprudence associated therewith (this is all the more surprising since *Mardon*⁸⁷ has been a fixture in most modern contract casebooks!). That is to say, the approach has been to situate the estimate as an ordinary pre contractual representation that may or may not be incorporated into the eventual building contract rather than applying the tests that specifically pertain to estimates. Part of the difficulty of this approach is that it does not account for the possibility that the contractor possesses special knowledge or skill in providing the estimate that the owner relies upon to their detriment.

Until recently, the cases in this area from the 1970s onwards have a chequered history as the majority of cases have tended to take a rather ad hoc approach to deciding the issue on the basis of findings of fact exclusively rather than applying previous precedents. Many of these decisions take place at the trial level and hence the outcomes largely vary from court to court. While Canadian jurisprudence had made

⁸⁷ *Mardon supra* note 75.

advances forward with respect to the law of estimates generally with decisions such as *Kidd*,⁸⁸ the legal doctrines found in *Kidd*,⁸⁹ *Mardon*,⁹⁰ *Moneypenney*⁹¹ et al. had not yet found their way into judicial interpretations of the role of estimates with respect to small scale building contracts.

The nature of the claim advanced by builders in these cases follows a standard theme. Typically, a builder will argue that any representations made in any pre-contractual negotiations constitutes an estimate that is either not binding due to the estimate / quotation dichotomy⁹² or is no longer valid as a result of the presence of extras (either explicitly requested by the owner or arising as a result of unforeseen circumstances with respect to the nature of the work at the time the estimate is made).⁹³ Moreover, it is argued that since the actual contract that is entered into between the contractor and the owner is a cost plus contract, any representations asserted through the estimate are negated since the owner has explicitly agreed to pay for the contractors expenses as they arise plus whatever percentage mark up has been agreed

⁸⁸ *Supra* note 81

⁸⁹ *Ibid.*

⁹⁰ *Supra* note 75

⁹¹ *Supra* note 73

⁹² See for example *Rhodes v. Redden* [1917] 51 NSR 17 (N.S. SC); *Sawchuk v. Jones* [1992] 5 CLR (2d) 66; *Ram Industrial Equipment (Toronto) Ltd. v. Kolson* [1996] 15 OTC 70 (ON. CJ); *Medallion Developments Inc. v. Close* [1998] BCJ No. 1129 (B.C. SC); *Greenhill Properties (1977) Ltd. v. Sandcastle Recreation Centre* [1998] 39 CLR (2d) 205 (B.C. SC); *Cherry Homes Ltd v. Perler* [2004] 32 CLR (3d) 8 (B.C. SC); *Goldar Associates Ltd. v. Mill Creek Developments Ltd.* 33 CLR (3d) 63 (B.C. SC);

⁹³ See for example *Rhodes supra* note 92; *Kolson supra* note 92; *Medallion supra* note 92; *Perler supra* note 92; *Goldar supra* note 92; *Strait Construction v. Odar* [2006] 52 CLR (3d) 139; *Wolski supra* note 83;

to by the parties.⁹⁴ In the event that the court finds the initial contract between the two parties is not binding, the contractor will make a claim in quantum meruit in the alternative.⁹⁵

As was previously mentioned above, many of the cases up until 2006 tended to rely on judicial findings of fact that sought to determine whether or not the estimate given by the contractor constituted part of the actual contract between the contractor and the owner. Indeed, the approach taken by the courts is one where the matter was to be decided on which party's evidence the court chose to believe rather than a strict application of the caselaw. To wit, in one of the cases, *Cherry Homes v. Perler*, the Court discusses the application of the case law *after* making a determination of the precise nature of the contract between the parties.⁹⁶ Justice Wilson even explicitly states: "I have not, to this point, referred to the cases provided by either counsel. That is because I consider the matter to be largely one of fact, rather than one requiring application of the law."⁹⁷ Similar findings of fact can be found in numerous other cases.⁹⁸ While some cases do attempt to apply case law, they mainly apply general contract doctrines rather than applying the law of estimates discussed above.⁹⁹

⁹⁴ See for example *Sawchuk supra* note 92; *Greenhill supra* note 92; *Perler supra* note 92; *L. Merrick Developments Ltd. v. Fidler* [2008], BCPC 199 (B.C. PC); *Odar supra* note 93;

⁹⁵ See for example *Kolson supra* note 92; *Medallion supra* note 92; *Greenhill supra* note 92; *Goldar supra* note 92;

⁹⁶ *Perler supra* note 92 at paras. 40 and 53.

⁹⁷ *Ibid.* at para. 73.

⁹⁸ See for instance *Rhodes supra* note 92; *Sawchuk supra* note 92 at para. 32; and *Medallian supra* note 92 at para. 12 and 14;

One rather curious decision emerging in the mid 1990's is the case of *Ram Industrial Equipment Ltd. v. Kolson*.¹⁰⁰ The case is notable because, despite the fact that the plaintiff contractor had not pleaded quantum meruit as an alternative claim, the court proceeded to grant the remedy nevertheless. The reasoning by Justice McIsaac was that there was no reason to deprive the plaintiff of their rightful claim since the defendant accepted the benefit of the work carried out¹⁰¹ and that "the circumstances of the case cry out for such relief."¹⁰² Unfortunately, no mention is made of the case law that pertains to quantum meruit, but rather the issue is decided by means of applying a case that states that the remedy is available even if it is not pleaded.¹⁰³ *Kolson* was subsequently upheld by the Ontario Court of Appeal¹⁰⁴ although in the higher court's decision, reference is made to the fact that the plaintiff contractor filed a written copy of his argument with the trial judge that had been prepared the day before and that this argument did contain a section on quantum meruit and that submissions were made before the trial judge with respect to the claim.¹⁰⁵ One can only hope then that this

⁹⁹ For example, see *Rhodes supra* note 92; *Greenhill supra* note 92 and *Wolski supra* note 83;

¹⁰⁰ *Supra* note 92.

¹⁰¹ *Ibid.* at para 8.

¹⁰² *Ibid.* at para. 7.

¹⁰³ *Ibid.* citing *Burns v. Pocklington* (1985), 5 CPC (2d) 18 (Ont. CA).

¹⁰⁴ *Ram Industrial Equipment (Toronto) Ltd. v. Kolson* [1998], 115 OAC 348 (Ont. CA).

¹⁰⁵ *Ibid.* at para. 5.

resolves the ambiguity present in the trial decision and that the lower court decision can be viewed in this light.

Post – 2006 Jurisprudence

The situation began to change in 2006 with the case of *Strait Construction Ltd. v. Odar*.¹⁰⁶ Here Justice Dorgan attempts to reconcile the various cases that had appeared over the years and organize the ratios in the form of a series of questions that attempt to determine whether or not an estimate is intended to have contractual effect.¹⁰⁷ The questions are as follows:

1. Did the agreement provide for a percentage of the project cost as a fee to the contractor?¹⁰⁸
2. Was price of overriding importance for the owner and was that communicated to the contractor?¹⁰⁹
3. Was an estimate provided and did the owner rely on the estimate?¹¹⁰

¹⁰⁶ *Supra* note 92.

¹⁰⁷ *Fidler supra* note 94 at para. 86.

¹⁰⁸ *Odar supra* note 92 at para. 18 citing *Sawchuk supra* note 92.

¹⁰⁹ *Ibid.* citing *Hugh's Contracting Ltd. v. Reid* [1998], BCJ No. 73 (B.C. SC); and *Medallion supra* note 92; *Perler supra* note 92.

¹¹⁰ *Ibid.* citing *Greenhill supra* note 92.

4. Did the owner require the contractor to design a project at a specified cost or seek assurances as to what the project would cost?¹¹¹
5. Did the contractor pay for the materials and labour and then bill the owner on a regular basis for the work done?¹¹²
6. Did the contractor make it clear that it was not assuming any of the risk that the final price would exceed the estimate?¹¹³
7. Did the contractor provide the owner with information regarding rates of labour and equipment rental etc.?¹¹⁴

It is then added that even if the contract does provide for payment on a cost plus basis, the contractor may still be held liable in the appropriate circumstances.¹¹⁵ As we can see the court is attempting to reconcile a number of varying approaches arising out of the cases and this in fact may lead to a rather onerous evidentiary burden on the part of plaintiffs that are alleging faulty estimates.

Estimates and the Claim in Quantum Meruit

¹¹¹ *Ibid.* citing *Greenhill supra* note 92.

¹¹² *Ibid.* citing *Sawchuk supra* note 92; *Greenhill supra* note 92; and *Hugh's supra* note 109.

¹¹³ *Ibid.* citing *Sawchuk supra* note 92.

¹¹⁴ *Ibid.* citing *Hugh's supra* note 109; and *Greenhill supra* note 92.

¹¹⁵ *Ibid.* at para. 19 citing *Medallian supra* note 92.

With respect to the claim for quantum meruit, unfortunately, one finds a similar approach whereby the remedy is granted without any attempt to apply previous jurisprudence as it relates to typical claims for quantum meruit.¹¹⁶ However, one does notice a rather interesting variation with respect to how the claim in quantum meruit is to be valued. In *Goldar Associates Ltd. v. Mill Creek Developments Ltd.*¹¹⁷ Justice Masuhara quotes with approval¹¹⁸ from the decision in *Mt. Cheam Developments Ltd. v. Clark*¹¹⁹ where a contractor provided an estimate of \$59 800 and later claimed \$85 485.75. The Court in *Mt. Cheam* held that the estimate was binding and then proceeds to quote with approval from the headnote to *Jamieson Construction Co. v. Lacombe & Northwestern Railway*¹²⁰ that states:

The amount to which a contractor is entitled on a *quantum meruit* is the value of the work from the point of view of the value of the services rendered by him, not the benefit to the person for whom the work is done. He is entitled to recover as 'cost', the cost and expenses which he actually incurred in doing the work insofar as they were reasonable in amount and reasonably and justifiably incurred with regard to all the circumstances and conditions of time and place and relationship of the parties and otherwise existing from time to time from the beginning of negotiations for the doing of the work to its conclusion. The burden of proving that the disbursements were reasonable and otherwise proper is on him.¹²¹

¹¹⁶ See *Kolson supra* note 92 at paras. 7 and 8; *Greenhill supra* note 92 at paras. 106 to 116 and *Goldar supra* note 92 at paras. 26 to 29.

¹¹⁷ *Goldar supra* note 92.

¹¹⁸ *Ibid.* at para. 27.

¹¹⁹ *Mt. Cheam Developments v. Clark* (1988), 32 CLR 273 (B.C. SC).

¹²⁰ *Jamieson Construction Co. v. Lacombe & Northwestern Railway* [1926] 1 WWR 628 (Alta. CA).

¹²¹ *Ibid.*

Justice Masuhara then continues by citing *Mt. Cheam* below:

In evaluating quantum meruit, Courts may use the estimate as a starting point and then determine what range of variance from that estimate was reasonable in the circumstances. For instance, the Court in *Mt. Cheam Developments*, supra at ¶11, adopted the 15% leeway rule first articulated by the P.E.I. Court of Appeal in *Serafin v. Johnston*¹²², as follows:

. . . '[A]n estimate must be more than a rough guess; it must bear some relation to reality.' A fuller reading of this passage indicates that it related to a situation where plans and specifications in some detail have initially formed the basis of such estimate. The cases cited by the appellant in support of this proposition, with which one cannot argue, granted the premise upon which such 'an estimate' is based, confirm that proposition, within a leeway of approximately 15%. . . .

The Court's task, therefore, is to determine the value of the services rendered, by considering the reasonable costs and expenses incurred in performing the services, having regard to the amount of reasonable variance from the estimate in all the circumstances between the parties.¹²³

Thus as we can see, courts have used estimates as a means of limiting the amount that the contractor is allowed to claim pursuant to quantum meruit rather than simply relying on the contractor to specify what the work is worth after it has been carried out.

¹²² (1977), 12 Nfld. & P.E.I.R. 169, [1977] P.E.I.J. No. 64 (P.E.I. C.A.)

¹²³ *Goldar supra* note 92 at paras 26 to 29.

Another rather novel approach is found in *L. Merrick Developments Ltd. v. Fidler*.¹²⁴ In assessing the value of the work performed pursuant to the claim in quantum meruit, the Court made reference to a third party publication entitled *Handscomb's Yardstick for Costing 2005*.¹²⁵ This is a trade publication that sets out standard construction rates for different types of work according to the going rates in various regions throughout the country (an example given is \$3 per meter of drywalling for Vancouver). The rates in this publication were then used as an objective standard in determining the reasonableness of the amounts claimed for the work performed.¹²⁶ It will be interesting to see whether this becomes more widespread as a means of objectively assessing the value of the work performed for the purposes of determining an award in quantum meruit.

Part of the difficulty with these recent decisions is that they fail to draw a clear baseline legal test that conforms to some of the dicta handed down by courts over the years. While Madam Justice Dorgan is to be commended for her efforts to systemize and lay down appropriate principles that will guide courts in the future, owners seeking relief from the courts must still overcome a significant evidentiary burden if they seek relief from the cost plus contracts and alternative quantum meruit claims made by

¹²⁴ *Fidler supra* note 92.

¹²⁵ Author Unknown. *Handscomb's Yardsticks for Costing: Cost Data for the Canadian construction industry*. Robert S. Means Co., 2005.

¹²⁶ *Fidler supra* note 92 at paras. 23 to 28.

contractors. In contrast, the situation in the earlier cases of *Moneypenney*,¹²⁷ *Mardon*,¹²⁸ and *Kidd*¹²⁹ remains much more clear, as all that the plaintiff has to establish is that an estimate was given and that they have relied upon it in inducing them to enter into the contract with the contractor. As such, all that must be proved is that the representation in the form of the estimate was made and that this served as the basis under which the consumer made their decision to enter into the contract with the contractor to their eventual detriment. Indeed, it is respectfully submitted that the previous approach is the better one as it eliminates the necessity to discuss of rates of labour, percentages of profit, billings, whether the owner made clear price was of overriding concern and the like.

Moreover, a bright line rule as established in the earlier cases eliminates the need to even consider the case from the quantum meruit perspective. The cases are quite clear that even if the contractor has made a faulty estimate that has been relied upon by the owner to their detriment, this does not necessarily negate the original contract so as to give rise to a remedy though quasi contract or even in reliance of the unjust enrichment principle – after all, the contractor cannot claim that the owner has been enriched unjustly if the entire *raison d'être* for the loss stems from the contractor's failure to take adequate care in the preparation of their estimate that they must now bear the consequences thereof.

¹²⁷ *Moneypenney supra* note 73.

¹²⁸ *Mardon supra* note 75.

¹²⁹ *Kidd supra* note 81.

Part Four: The Need for a New Bright Line Rule

The law in this area has come full circle from the original development of the law of estimates and quantum meruit as they apply to building contracts. On the one hand, the case law had initially been developed to protect contractors from unscrupulous owners who provided contractors with specifications that were either distorted or incomplete and then expected contractors to perform work that was more extensive than originally envisaged or was a radical departure from the original specifications that were provided to the contractor. To be sure, these situations may be still present today even in the context of small scale building contracts.¹³⁰ However, it can be argued that one of the reasons for many of these disputes was the power imbalance that resulted from information asymmetries that existed between contractors and owners and ensuring that contractors were reasonably compensated for the work that they were engaged to perform.

As we have seen, information asymmetries are also present in the small scale context where reliance is placed by the owner on the knowledge and skill of the contractor. Under the present legal regime, it is now the small scale owner who must go to great lengths to demonstrate to the contractor (and the court) that it is relying on

¹³⁰ See for example *Odar supra* note 93 where a couple originally contracted to build a bed and breakfast and then half way through construction, decided to change the project to a luxury bed and breakfast but insisted that portions of the original estimate were still binding.

their expertise in order to obtain an accurate estimate of the cost of the proposed project and to ascertain what level of work needs to be performed in order to realize the project. Rather than providing the contractor a detailed set of specifications that the contractor is invited to bid upon, the level of reliance on the contractor's expertise is even greater in the small scale context where the contractor is not only expected to carry out the work called for in the contract, but is also expected to provide their expertise in providing for the architecture and engineering for the project as a whole. While the former remedy was designed to compensate for an information asymmetry that was particular to how business was conducted in the construction industry, the remedy (that is to say reliance on unfettered cost plus contracts and quantum meruit in the alternative) is now being used against those who are at the informational disadvantage as a result of their lack of familiarity with the art of construction and everything that it entails. What was at one time a defensive mechanism that could be used to shield contractors, can now be used by contractors at great lengths against small scale consumers and small businesses.

Indeed, were legislatures to extend the ten percent rule found in Ontario across the country and even extend its application to small scale business owners in particular, I submit that endless cases of litigation could be avoided, and more stability brought to the marketplace. Just as business is said to benefit from predictability and certainty in the marketplace, the ten percent rule would allow small business to make more informed choices and decisions without the high transactions costs that result from lower confidence in the numbers that are supplied by contractors that lack an incentive

to take reasonable care in preparing their estimates that others are relying upon. The ten percent variance represents a reasonable compromise in allowing the contractor to recover for some unforeseen expenditures but placing an upper limit to the amount that is recovered.

It may be argued that the extension of the ten percent rule is unnecessary in the case of small business owners, since they are presumed to be sophisticated parties that can comprehend the terms that they are being offered in these cost plus contracts and are free to negotiate any terms that they deem necessary. As such, any statutory interventions can be seen as an unnecessary intrusion into the private dealings of individuals and a restriction of the freedom to contract.

However, what recent cases demonstrate is that far from being a bargain between two equally positioned parties, there is confusion over just what is entailed by the cost plus contract. It is worth remembering that this is a contract that was developed to redress some of the inequities that were previously experienced by contractors. As such, the particular form of this contract may be completely foreign even to experienced business people that have absolutely no background in construction. And indeed, the representations that are made to the owner by the contractor through their quote / estimate would leave one to believe, quite reasonably I would think, that the final costs under the cost plus contract will bear some relation to the estimated amount subject to minor variances as a result of unforeseen circumstances. Thus while not assuring the

owner of a precise amount to be billed, a reasonable individual ought to draw the inference that since the contractor is a professional offering their professional assessment of the costs of the proposed project, this individual may be presumed to be offering an estimate that will be sound and accurate.

Yet one of the broader questions to be contemplated if one were to consider broadening the ten percent rule, is how could such a regulation be extended to cover the small business person typically engaged in these small scale projects without disrupting the present legal regime that applies to large scale contracts? One possible way would be to amend provincial consumer protection statutes so that transactions under a predefined dollar value would be covered under its provisions rather than the current test as to whether an individual is acting for a personal or household purpose. It is respectfully submitted, that such an approach will encourage parties to take reasonable care in drafting contracts for high value construction projects but will provide a bright line rule that will benefit small businesses by allowing for greater cost certainty that is crucial for getting many of these businesses off to a successful start.

After all, it is rather curious that small business persons are presumed by the CPA in its present form to be sophisticated parties that are capable of protecting their interests when in fact this may not necessarily be the case while at the same time certain sophisticated individuals are protected by the act so long as they are acting in a personal capacity. To wit, a small businessperson engaging the services of a contractor

for a project, say for around \$50 000, receives no protection under the Act despite the fact that they may have no experience in construction whatsoever. In contrast, a land developer building a \$4 million dollar home for their own personal use can avail themselves of the provisions of the act. Obviously, the land developer is in a better position to understand the nature of the bargain that is entered into than is the small businessperson. And presumably, one should be more diligent with contracts of such a high value. I will leave aside the question of whether all of the provisions of the consumer protection statutes ought to be amended so as to reconsider the definition of a consumer as this should be developed more fully in another paper. Suffice it to say, that with respect to this issue in particular, the state of the law in its present form leaves much to be desired from a public policy perspective.

As we have seen, many of the cases that have been litigated over the past number of years are primarily trial level decisions. These decisions have been rather uneven as more often than not, they are decided on the basis of findings of fact. As such, with the present claims made by contractors of claims on the basis of the cost plus contract, with quantum meruit pleaded in the alternative, there exists little incentive for the contractor to exercise the level of care that one could reasonably expect of a professional in a comparative circumstance.

After all, under current conditions, a contractor is in a much better position than the owner at the outset before litigation is even commenced. For instance, the contractor

enters litigation confident that in the event that the initial cost plus contract is set aside as a result of a faulty estimate, or significantly curtailed as a result of the court finding that the estimate is binding, they can at least be assured of a finding in favour of what the value of the project is reasonably worth through an assessment in quantum meruit. In other words, the contractor is assured *at a minimum* that they will be compensated for the work they have performed even if they have claimed a significantly higher amount pursuant to the contract. The dispute in court will likely revolve around what work was originally contemplated by the estimate and what can be termed to be an “extra” not covered by the original estimate. Since the amounts in dispute are typically not very high, the contractor can rely on a potentially positive outcome in quantum meruit in settlement negotiations since the economic costs of litigation may work against the plaintiff owner relative to the costs of litigation.

Although many of the recent cases have been gently edging towards the existing law of estimates in contract law and quantum meruit in restitution, the results are still less than satisfactory. A bright line rule that limits the ability of contractors to recover over and above their estimated amounts (subject of course to a reasonable allowance for minor unforeseen contingencies) will help to resolve this confusion, relieve courts from the tedious exercise of determining whether or not the estimate has any contractual effect, bring greater predictability for small business, and provide for a stronger incentive for contractors to take care when preparing their estimates. Indeed, given the vulnerability of owners in this position, it can be argued that the contractor is in the best position to bear the loss in these cases.

Conclusion

The historical evolution of the law as it pertains to a builder's liability of estimates can be viewed as an attempt to maintain balance. Initially, the caselaw developed in such a manner so as to protect contractors that were acting in good faith from the conduct of unscrupulous owners that sought to capitalize on information asymmetries to the detriment of contractors who were in some cases misled, and were forced to bear the burden of relying on the owner's faulty specifications. In recent years, the law has been used by contractors against owners that are relying on the contractor's expertise in advising them of what is involved in the proposed project and what it will cost.

It has become clear that the law must now be readjusted in order to get the balance right. A bright line rule is necessary to ensure that small-scale owners can confidently rely on the estimates that they are given by contractors. This will result in greater predictability and certainty and reduce transactions costs as a result. Contractors will benefit as instances of unscrupulous contractors using misleading estimates will decrease. This will go a long way towards increasing confidence in the industry and rewarding contractors that provide accurate estimates – individuals that have been unjustly prejudiced as a result of the actions of unscrupulous individuals that have hurt the industry as a whole.