

CASE LAW UPDATE

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Consulate Ventures Inc v Amico Contracting & Engineering (1992) Inc

2011 ONCA 418 (Released June 2, 2011)

Restitution – *Quantum meruit* – Valuation

This dispute arose following work carried out by Consulate Ventures ("**Consulate**") and its principal, together with Amico Contracting ("**Amico**") and Windsor Factory Outlet Mall ("**Windsor**"), on a project that turned 22 acres of land into a thriving manufacturer's outlet mall. On the day before Phase I of the mall was to open, Amico and Windsor took the position for the first time that they did not have a binding joint venture agreement with Consulate.

Consulate sought damages for breach of contract or restitutionary relief based on *quantum meruit*. The trial judge dismissed the claim in its entirety because: (a) there was no formal joint venture agreement and therefore no contract claim; and (b) the *quantum meruit* claim was dependent in law on a contractual relationship.

On the original appeal, the Court of Appeal rejected the idea that a *quantum meruit* claim is dependent on the existence of a valid contract, and found that Consulate was in fact entitled to such relief. The court sent the matter back for a new trial to determine damages and liability. At the new trial, Newbould J. valued the *quantum meruit* claim at \$2.25 million, and found Amico and Windsor to be jointly liable. Amico and Windsor appealed these findings.

The appellants took issue with the trial judge's valuation approach. The court preferred the approach of Consulate's expert, who placed a value of \$20 per square foot on the services rendered, though the judge reduced the figure to \$10 per square foot. The appellants submitted that the proper approach would have been to cost out the services on an item-by-item basis in accordance with market rates, and that the trial judge impermissibly looked at the amount by which the services increased the value of the project.

The Court of Appeal rejected this assertion. The Court of Appeal did agree that the proper approach for valuing the *quantum meruit* claim was the "value received" rather than the "value added" approach, but found that the expert on whom the judge relied was keenly aware of the difference between the two. Had the expert applied a value-added approach, he would have valued the claim even higher. The Court of Appeal noted that the manner in which the "value received" is to be calculated is flexible and not mechanistic. It is possible to take a contextual

approach to the valuation, particularly since the remedy is founded in equity. The trial judge correctly recognized that, in this case, any attempt to value the services on a piecemeal basis would be artificial and not in keeping with the true role of Consulate's principal. The trial judge appropriately took into account the unique experience and expertise of Consulate's principal, the scarcity of such expertise within the marketplace, and the fact that Consulate's principal did not view his services as piecemeal in nature and was acting as a co-venturer.

Another ground of appeal was that Amico should not have been held liable as it was only involved in the construction work and did not derive any direct benefit from the services provided by Consulate. The Court of Appeal rejected this argument. The trial judge found that Amico was involved in more ways than simply construction. Amico and Windsor were essentially "fingers of the same hand" and both gained directly from the successful development of the property.