

# Claims for *quantum meruit*

Bradley Dean reports on *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32



The High Court has held that the amount recoverable in a *quantum meruit* claim made following the repudiation of a contract may not exceed that which would have otherwise been available under the contract. In so doing, the High Court has not followed the previously accepted position arising from *Lodder v Slowey* [1904] AC 442 to the effect that a claim for *quantum meruit* could exceed what might otherwise have been payable under the contract.

## Background

The appellants entered into a contract with the respondent, a builder, for the construction of two townhouses on land owned by the

appellants. The contract was prepared in accordance with the *Domestic Building Contracts Act 1995* (Vic) (DBC Act).

After entering into the contract, the appellants orally requested a number of variations in relation to the townhouses. The variations were carried out by the respondent.

At or about the time of the handover of one of the newly-constructed townhouses, the respondent issued an invoice to the appellants for the cost of the variations requested by the appellants.

The appellants refused to pay the invoice on the basis that it was issued in breach of the contract.

The appellants further asserted that the respondent had breached other aspects of the contract, and the breaches were said to amount to a repudiation of the contract by the respondent, which the appellants accepted. In response, the respondent denied having repudiated the contract, asserted that the appellants' purported determination of the contract was itself repudiatory and confirmed that the respondent accepted the appellants' repudiation of the contract.

The respondent instituted proceedings in the Victorian Civil and Administrative Tribunal (VCAT) seeking damages, or 'alternatively, a balance of moneys for work and labour done and materials up to the date of termination'. VCAT found the appellants had wrongfully repudiated the contract, and that the repudiation was accepted by the respondent as bringing the contract to an end. Having made those findings, VCAT determined that the respondent's 'claim for recovering on a *quantum meruit* basis [was] established', and the respondent was 'entitled to an amount that reflected the value of the benefit that it ... conferred upon the Owners' – that is, 'not the builder's entitlement according to the contract but rather, the reasonable value of the work and materials the [appellants] requested and the value of the benefit they have received from the builder'. VCAT observed that, 'by succeeding in a claim for a *quantum meruit*, the Builder ... recovered considerably more than it might have recovered had the claim been confined to the Contract' (see *Mann* at [135]-[140]).

The appellants sought and were granted leave to appeal to the Supreme Court of Victoria. The appeal was determined in favour of the respondent.

The appellants then sought and were granted leave to appeal to the Court of Appeal. The Court of Appeal granted leave on a limited basis and dismissed the appeal.

The appellants were granted special leave to appeal to the High Court.

### The High Court decision

In three judgments, the High Court unanimously allowed the appeal.

In a joint judgment, Kiefel CJ, Bell and Keane JJ allowed the appeal on the basis that the Victorian Court of Appeal erred in holding that the respondent was entitled to sue on a *quantum meruit* for the works carried out by it.

Their Honours observed that the notion that a 'contract between ... parties becomes 'entirely irrelevant' upon discharge for repudiation or breach is ... fallacious. As Mason CJ said in *Baltic Shopping Co v Dillon* [(1993) 176 CLR 344 at 356]: 'It is now clear that ... the discharge operates only prospectively, that is, it is not equivalent to rescission ab initio.'

Their Honours stated (at [19]-[20]) that in circumstances where the respondent has enforceable contractual rights to money that has become due under the contract 'there is no room for a right in the respondent to elect to claim a reasonable remuneration unconstrained by the contract between the parties'. To do so 'would be to subvert the contractual allocation of risk'. The same applied where, as in *Mann*, 'the innocent party has an enforceable contractual right to damages for loss of bargain'. Their Honours stated further that to allow a restitutionary remedy by way of a claim for the reasonable value of work performed unconstrained by the terms of the applicable contract 'would undermine the parties' bargain as to the allocation of risks and quantification of liabilities, and so undermine the abiding values of individual autonomy and freedom of contract'.

Their Honours thus determined that *Lodder v Slowey* should no longer be applied (at [50]).

In a separate joint judgment, Nettle, Gordon and Edelman JJ also allowed the appeal.

Their Honours identified three categories of work performed by the respondent:

- (1) work done in response to a requested variation within the meaning of s 38 of the DBC Act, the amount of remuneration for which being determined in accordance with ss 38 and 39 of the DBC Act;
- (2) work, not being work done in response to a requested variation, comprising completed stages of the contract as defined in the contract, the amount of remuneration for which being that prescribed by the contract, with any damages for breach of contract to be calculated accordingly; and
- (3) work, not being work done in response to a requested variation, comprising part of a stage of the contract that had not been completed at the time of termination, being work in relation to which the respondent was entitled, at its option, to damages for breach of contract or restitution, with the amount of restitution being limited in accordance with the rates prescribed by the contract.

In relation to the third category, their Honours observed (at [205]) that 'where a contract is enforceable, but terminated for repudiation, there are no reasons of practicality and few in principle to eschew the contract price'. Although the contract is terminated for breach, 'it continues to apply to acts done up to the point of termination, and it remains the basis on which the work was done'. Accordingly, there 'is ... nothing about the termination of the contract as such

that is inconsistent with the assessment of restitution by reference to the contract price for acts done prior to termination'.

Their Honours also referred to the allocation of risk, consistent with the observations of Kiefel CJ, Bell and Keane JJ, namely that the contract price reflected the parties' 'agreed allocation of risk' and that termination of the contract 'provides no reason to disrespect that allocation' (at [205]).

Their Honours further observed that 'just as a contract may inform the scope of fiduciary and other equitable duties' the price at which a defendant has agreed to accept the work comprising an entire obligation 'is logically significant to the amount of restitution necessary to ensure that the defendant's retention of the benefit of that work is not unjust and unconscionable' (at [214]). Their Honours said that that approach is consistent with 'the Australian understanding of restitutionary remedies that a contract, although discharged, should inform the content of the defendant's obligation in conscience to make restitution where the failed basis upon which the work and labour was performed was the contractor's right to complete the performance and earn the price according to the terms of contract' (at [215]).

Accordingly, Nettle, Gordon and Edelman JJ concluded that it was appropriate to recognise that where an entire obligation (or divisible stage of a contract) for work and labour was terminated by the plaintiff upon the plaintiff's acceptance of the defendant's repudiation of the contract, the amount of restitution recoverable as upon a *quantum meruit* by the plaintiff for work performed as part of the entire obligation (or the divisible stage of the contract) 'should prima facie not exceed a fair value calculated in accordance with the contract price or appropriate part of the contract price' (at [215]).

Their Honours acknowledged, however, at [203]-[204], that there may be circumstances in which 'it is necessary or appropriate that the benefit of work to the defendant be determined without reference to a contract price', e.g. where a claim to *quantum meruit* is founded upon a contract which does not expressly fix a price for services, or where the claim is founded on an obligation to pay for services rendered under a contract which is unenforceable.

In a separate judgment, Gageler J also allowed the appeal, concluding that the amount recoverable on a non-contractual *quantum meruit* as remuneration for services rendered in performance of a contract prior to its termination by acceptance of a repudiation 'cannot exceed that portion of the contract price as is attributable to those services' (at [102]).

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