

ORDER RESTORED: HIGH COURT CLARIFIES QUANTUM MERUIT

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Legal Briefings – By **Geoff Hansen, Dan Dragovic, Alison Stead and Andrew Mason**

After over a decade of uncertainty, the High Court yesterday reined in the use of the *quantum meruit* remedy.

A majority of the Court found that builders can no longer seek compensation on a *quantum meruit* basis in relation to works where the builder has accrued a right to payment under the contract. While builders can commence a claim on a *quantum meruit* basis for any works performed where the builder has not accrued a right to payment under the contract, the amount claimed cannot exceed the contract price for those works.¹

KEY TAKEAWAYS: WHAT THIS MEANS FOR YOU

- The High Court has provided some clarity as to when a party is entitled to commence a claim on a *quantum meruit* basis.
- While the High Court has clarified the position in relation to entire contracts, fixed milestone payment contracts and separable portion contracts, it has left open the question of the applicability of the principles handed down by the Court in the context of contracts with “on account” progress payment regimes. The question will arise as to whether or not such “rights” to payment, prior to the completion of the contract, are accrued at the time of termination. The answer will likely turn on the particular payment regime and termination provisions in question, which will, unfortunately, lead to further debate about the applicability of these principles.
- The Court has confirmed that the proper role of restitutionary remedies is “gap-filling and auxiliary” to any contractual claims. In doing so, the Court has emphasised that restitutionary remedies should not undermine the risk allocation agreed by parties to the relevant contract.
- This case highlights the danger of parties orally agreeing to vary works under a contract.
- Parties should ensure that they are aware of and comply with the requirements of any written agreement or legislative provisions when directing variation to the scope of works in order to be entitled to payment. The written agreement or applicable legislative provisions may limit the claims a party may bring.
- This case highlights that great care needs to be taken when asserting that a counterparty has repudiated a contract, because making such an assertion can itself constitute repudiation of the contract – as happened to the Appellants in this case.

FACTS AND EARLIER PROCEEDINGS

EVENTS GIVING RISE TO THE DISPUTE

Peter and Angela Mann (the **Appellants**) engaged Paterson Constructions Pty Ltd (the **Respondent**) to construct double-storey townhouses on their property. The contract was a written domestic building contract under the *Domestic Building Contracts Act 1995* (Vic) (**Domestic Building Contracts Act**). Before the completion of the second of the two townhouses, the Appellants asserted that the Respondent had repudiated the contract and purported to terminate the contract. The Respondent alleged this conduct constituted repudiation of the contract.

The Respondent commenced an application in the Victorian Civil and Administrative Tribunal (**VCAT**), claiming compensation for the fair and reasonable value of works it performed – including works performed in accordance with 42 variations directed by the Appellants.

VCAT found that the Appellants had orally directed 42 variations to the works and that the Appellants' had repudiated the contract. VCAT ordered the Appellants to pay the sum of \$660,526.41.

APPEAL TO THE VICTORIAN SUPREME COURT AND COURT OF APPEAL

The Appellants appealed to the Supreme Court and then the Court of Appeal. On each occasion, the Appellants argued that the Respondent was not entitled to compensation on a *quantum meruit* basis because the Respondent had a contractual claim available.

In the alternative, the Appellants argued that if the Respondent were entitled to compensation on a *quantum meruit* basis:

- any compensation was capped by the contract price; or
- the variations were captured by section 38 of the Domestic Building Contracts Act, which the Respondent had failed to comply with.

Both of the Appellants' appeals failed.

THE HIGH COURT'S DECISION

The Court unanimously upheld the Appellants' appeal, finding that the Respondent was not entitled to seek compensation on a *quantum meruit* basis. However, the justification for the conclusion among the Justices differed.

A majority of the Court, consisting of Justices Nettle, Gordon, Edelman and (writing separately) Gageler, held that a builder would not be entitled to claim compensation on a *quantum meruit* basis in respect of works where the builder had accrued a right to payment under the contract. That is, for example, where the contract works are divided into stages under which the total contract price is apportioned between the stages by specified progress payments.² The majority did find that a builder could commence a claim on a *quantum meruit* basis where the builder has not accrued a right to payment under the contract – for example, where payment is not due until the completion of the whole of the works.³ However, the total amount recoverable by a *quantum meruit* claim, where a contract is terminated for repudiation, is limited to the contract price for the particular stage or portion of the works.⁴

Justices Nettle, Gordon and Edelman found that there may be circumstances where it is appropriate that a builder recover an amount greater than the contract price, although this would be in exceptional cases only.⁵ However, this view was not shared by the other Justices.⁶

The Court unanimously held that section 38 of the Domestic Building Contracts Act excluded the availability of restitutionary relief for variations directed otherwise than in accordance with that section.⁷ Therefore, the Respondent could not commence a claim for the 42 variations issued by the Appellants on a *quantum meruit* basis, and was limited to recovering the amounts prescribed by the Domestic Building Contracts Act.

ENDNOTES

1. C.f. [2019] HCA 32 [21]-[22] (Kiefel CJ, Bell and Keane JJ), [101]-[102] (Gageler J) and [205], [215]-[216] (Nettle, Gordon and Edelman JJ).
2. [2019] HCA 32 [62]-[64] (Gageler J), [176] (Nettle, Gordon and Edelman JJ). C.f. the minority's reasons at [30]-[32] (Kiefel CJ, Bell and Keane JJ).
3. [2019] HCA 32 [21]-[22] (Kiefel CJ, Bell and Keane JJ), [62]-[64] (Gageler J), [176] (Nettle, Gordon and Edelman JJ).
4. [2019] HCA 32 [101]-[102] (Gageler J), [205] (Nettle, Gordon and Edelman JJ).
5. [2019] HCA 32 [216]-[217] (Nettle, Gordon and Edelman JJ).
6. See [2019] HCA 32 [21]-[22] (Kiefel CJ, Bell and Keane JJ) and [101]-[102] (Gageler J).
7. [2019] HCA 32 [4] (Kiefel CJ, Bell and Keane JJ), [58] (Gageler J) and [160]-[161] (Nettle, Gordon and Edelman JJ).

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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