CASE IN BRIEF

AUSTRALIA EXAMINES THE LEGITIMACY OF *QUANTUM MERUIT* CLAIMS FOLLOWING CONTRACT TERMINATION FOR REPUDIATION

In *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32, the High Court of Australia has clarified the ongoing controversy as to the remedial options available to a contractor that has terminated a contract following a repudiation by the principal.

Mann v Paterson Constructions Pty Ltd: the facts

The appellants, Peter and Angela Mann, engaged the respondent, Paterson Constructions Pty Ltd (**Paterson**), to construct two double story town houses on their Langtree Court property in Blackburn, Melbourne. The terms of the engagement were recorded in a written construction contract. Construction commenced in March 2014, but the town houses were not completed by the due date for completion in December 2014. Unit 1 was completed and handed over to the Manns in March 2015. In April 2015, before the completion of the second unit, the Manns said that Paterson had refused to return to site until payment of an invoice for variations was paid and that works completed were defective. They argued that this amounted to a repudiation of the contract which they then purported to accept.

Paterson's position was that the Manns had unlawfully terminated the contract, that unlawful termination itself amounted to a repudiation which Paterson then purported to accept.

Whatever the case, one thing was certain – the contract had been terminated one way or another.

In the first instance, Paterson was successful in seeking relief on a *quantum meruit* basis. That judgment was upheld by the Supreme Court of Victoria. Special leave to appeal was granted for the Manns to challenge that decision in the High Court of Australia.

There were two key issues before the High Court. First, whether a contractor was entitled to sue on a *quantum meruit* after terminating the contract for repudiation, and second, if the contractor was so entitled, whether the contract price operated as a ceiling on the amount able to be claimed on a *quantum meruit* basis, even where the contract had been terminated.

The position prior to Mann

In a case where a contract had been terminated following a repudiation of that contract, the innocent party was entitled to elect to sue for damages on the basis of breach of contract or on a quantum meruit basis. Damages awarded on a quantum meruit basis might exceed what would be recoverable under a breach of contract action. This is the position followed by much of the common law world.

To understand how the Australian common law developed to adopt this position, it is necessary to examine the establishing line of authorities starting with the Privy Council decision in *Lodder v Slowey* [1904] NZPC 3. In that case, the Privy Council held that contracts terminated for repudiation were rescinded *ab initio*. This meant that the contract was treated as though it had never existed, so claims for compensation were not restricted by the contract price. Rather, they were at large.

Without a contract to constrain the claimant to breach of contract damages, a restitutionary claim for *quantum meruit* became available as an alternative cause of action. An action for *quantum meruit* allows recovery of a fair and reasonable sum for services or goods supplied when there is no contract or no contractual agreement to govern payment. The amount recoverable in *quantum meruit* could therefore far exceed that available under a breach of contract claim, particularly if the contract had been underpriced.

The result of the Privy Council decision in *Lodder* was that the contract price agreed in a contract, which had been partially performed but terminated prior to completion, could be entirely irrelevant to the question of quantum of damages if one party could prove repudiation of the contract by the other party. There was significant criticism of this position.

The next key development is found in a decision of the High Court of Australia in the case of *McDonald v Dennys Lascelles* Ltd [1933] HCA 25. In that case, the High Court rejected the notion that termination of a contract for repudiation had the effect of rescinding the contract in its entirety. In doing so, it overturned the 'rescission fallacy' — the notion that the repudiation of a contract has the effect of rescinding it *ab initio*.

McDonald corrected the illogicality that an existing contract under which parties had performed some obligations could be rescinded *ab initio*. However, subsequent cases persisted in applying the 'rescission fallacy.'

The issue as to whether a claim for *quantum meruit* as an alternative to contractual damages was still available was raised in *Sopov v Kane Constructions Pty Ltd* [No 2] [2009] VSCA 141.

The Supreme Court of Victoria declined to follow *McDonald*. The Court acknowledged that *McDonald* appeared to overturn the 'rescission fallacy'. However, the Court noted that the decision in *Brooks Robinson Pty Ltd v Rothfield* [1951] VLR 405 created a line of authority which – relying on the 'rescission fallacy' – continued to allow a contractor to advance a claim for *quantum meruit* in lieu of a claim for contractual damages following the contractor's acceptance of the principal's repudiation and the consequent termination of the contract.

This meant that where a principal repudiated a contract leading to termination by the contractor, the contractor was entitled to elect between a claim for general loss of bargain damages under the contract or a claim in restitution on *quantum meruit* for the recovery of the value of work completed to the date of termination. The practical implication being that a contractor could claim a windfall if it was able to engineer a repudiation by the principal in a situation where the contract had become a financial loss for contractor. This posed significant risk to employers in that the agreement as to price the parties had agreed to would be undermined in the case of a repudiation leading to termination.

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The High Court held that a contractor could no longer claim compensation on a *quantum meruit* basis with respect to works where it had accrued a contractual entitlement to payment. In other words, the 'rescission fallacy' was no longer good law in respect of contracts that provide for separable stages or portions which have been completed prior to termination and in respect of which the contractor has accrued rights in the nature of a debt.

However, *quantum meruit* could still apply in relation to works for which the contractor had not accrued a right to payment. This might occur if the contract was an entire contract, ie where the contractor is not entitled to payment until the whole of the works are completed or if the right to payment had not yet accrued for certain separable portions of the contract. In such a situation, the total amount recoverable under *quantum meruit* would be capped by the agreed price for that particular uncompleted stage or portion of the works and future separable portions no longer able to be performed by the contractor.

The position in New Zealand

The position in New Zealand is rather unique. Initially, *Lodder* was followed by the New Zealand courts[1]. In 1979, however, the Contractual Remedies Act (**CRA**), was enacted to "reform the law relating to remedies for misrepresentation and breach of contract." There was no provision in the CRA for recovering damages on a *quantum meruit* basis following termination of contract for repudiation.

The question as to whether the CRA had displaced the common law remedies, rendering a claim in *quantum meruit* unavailable, was raised in the case of *Brown & Doherty Ltd v Whangarei County Council* [1990] 2 NZLR 63. In that case, the Judge held that s 7(1) of the CRA did replace the common law right of rescission with a right of cancellation as defined in the CRA. *Quantum meruit* would normally be available for a contract rescinded *ab initio*, but is not available under the CRA for a cancelled contract[2]. It was held that there was no right to claim in *quantum meruit* after the enactment of the CRA[3]. The Judge was persuaded in this view primarily because of the illogicality inherent in the previous common law. Now, the statutory scheme provides that the court may grant any relief the court thinks just. This imports a test of reasonableness otherwise absent from a claim in *quantum meruit*.

In 2017, the Contract and Commercial Law Act (**CCLA**) was enacted, incorporating various acts including the CRA. Remedies available upon cancellation of a contract are now provided for by section 43 of the

CCLA. As with ss 9 and 10 of the CRA, *quantum meruit* is not provided for. Even if there were substantive changes to that legislation in the future, it is unlikely that the current position on *quantum meruit* would change.

Comment

Mann confirms that *quantum meruit* claims, although not to be written off entirely, are now clearly limited in scope.

The decision has been much awaited as it has clarified the ongoing controversy as to what remedial options are open to a contractor upon termination of a building contract following repudiation by the principal. However, questions remain, particularly with uncertainty in relation to restitutionary claims as to whether simple pro-rating of the contract price or market value subject to the contract price cap is the appropriate methodology to calculate the amount recoverable and as to how an adjustable contract price may limit any *quantum meruit* assessment or how provisional payments might be dealt with in the same context.

This case has understandably drawn the attention of many in the legal field; it overturns in Australia an approach which has been upheld throughout much of the common law world for over 100 years. It will be interesting to see how other jurisdictions respond to *Mann v Paterson*. It is likely that, noting the dissatisfaction with the approach thus far, *Mann v Paterson* will spark change in other jurisdictions throughout the common law world.[4]

End Notes

[1] *Watson v Watson* [1953] NZLR 266; and Snell v Potter [1953] NZLR 696.

[2] The remedies for cancellation were described in ss 9 and 10 of the CRA (now s 43 of the CCLA), and do not include the remedy of *quantum meruit*.

[3] This was affirmed in *Programmed Maintenance Services (NZ) Ltd v Witters* HC Auckland CIV 2008-416-90, 8 April 2009.

[4] See Kull, "Restitution as a Remedy for Breach of Contract" (1994) 67 Southern California Law Review 1465; Havelock, "A Taxonomic Approach to Quantum Meruit" (2016) 132 Law Quarterly Review 470; Mark P. Gergen, Restitution as a Bridge Over Troubled Contractual Waters, 71 Fordham L. Rev. 709 (2002).

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