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High Court of Australia clarifies the availability of the remedy of restitution on a 'quantum meruit' basis

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Summary

a) On 9 October 2019, in the judgement of *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 (**Mann**), the High Court of Australia clarified the ability for contractors to claim on a *quantum meruit* basis.

b) *Quantum meruit* refers to an equitable claim for restitution for the unjust enrichment of the defendant. In the case of a terminated, but previously valid contract, the unjust enrichment element is satisfied where work has been performed, but a right to payment has not yet accrued.

c) Restitution is not compensatory in nature, but rather is determined according to the benefit accruing to the defendant. Prior to *Mann*, a number of cases had resulted in awards to contractors by way of *quantum meruit* that substantially exceeded the amounts that would otherwise have been payable had the relevant contracts not been terminated. Further, unlike other claims in equity, once unjust enrichment is established, liability is strict and independent of the fault of the defendant, and is not subject to obligations to mitigate or remoteness of damage concepts (that would otherwise apply to a claim for damages under contract).

d) For these reasons, restitution has been considered an advantageous avenue of claim when compared to a claim for compensatory damages.

e) In *Mann* the High Court determined that:

(1) repudiation takes effect prospectively, such that the already accrued contractual rights of the parties remain enforceable by way of a claim in debt, or a claim for compensatory damages;

(2) to the extent a plaintiff has accrued a contractual right to payment in respect of a portion of the works, there will not be a total failure of consideration in relation to that portion, and the plaintiff will not be entitled to restitution;

(3) to the extent the plaintiff:

(A) will only become entitled to payment if the works are wholly completed; or

(B) has not accrued the right to a payment in respect of another portion of the works,

there will be a total failure of consideration (in relation to the whole or the portion, as relevant), and the contractor may recover in restitution (*quantum meruit*), as an alternative to claiming compensatory damages;

(4) since a claim in restitution is based on a failure of consideration, it will typically be the case that the amount payable in restitution will be determined by reference to the contract sum; and

(5) there may be circumstances where restitution is not limited by the contract sum, including where the contract does not fix a contract price, the payment clause is unenforceable, or where the continued breaches of the principal have caused the contract to be unprofitable.

f) In this regard, the High Court substantially narrowed the scope for amounts payable in restitution to exceed the otherwise contracted amount.

Insights

a) When contracting, since a progress payment may exclude a right to claim on a *quantum meruit* basis, parties should be mindful to ensure that progress payments reflect an appropriate portion of the contract sum, and do not capture works which are not yet complete.

b) While not considered in Mann, there may be scope for parties to specify in the contract that individual progress payments are not severable from the total contract price. In that case, to the extent a right to a progress payment has accrued, a *quantum meruit* claim might be excluded entirely; although care should be taken regarding the possible adverse consequences of avoiding severability, for instance in the case of uncertainty or illegality of part of a contract.

c) Including staged progress payments in a contract may provide some protection from a *quantum meruit* claim.

d) The High Court's decision in Mann will have limited application in circumstances where a contract is found to be void *ab initio* (*i.e.* the contract was never validly in existence). In that case, there will be a total failure of consideration, and while the voided contractual terms may be led in evidence as to the amount of restitution, they may not be determinative.

e) Parties should consider the extent to which their contract might refer to consideration other than the contract sum. While not considered in Mann, there may be non-monetary benefits that a plaintiff may seek to argue a defendant has gained pursuant to the contract. Such benefits may be capable of being claimed in restitution, in addition to amounts in relation to the contract sum.

f) Parties should exercise extreme care when considering whether to claim that a contract has been repudiated.

Facts scenario

a) The facts concerned a contract entered into in March 2014 by the appellant as owners (**Owners**), and the respondent as builder (**Builder**), for the construction of two townhouses in Blackburn, Victoria at a fixed price of AUD971,000. During the course of the contract, the Owners orally requested 42 variations in relation to the front townhouse (**Unit 1**) and 31 in relation to the rear townhouse (**Unit 2**). In March 2015, following the issue of a certificate of occupancy in relation to Unit 1, the Owners paid what has been described as a 'final payment'. While the contract provided for a number of staged payments, it did not provide for this 'final payment' in respect of Unit 1. At the time of handing over Unit 1, the Builder advised the Owners that there was an amount in excess of $48,000 payable for the variations to Unit 1, and subsequently issued an invoice for $48,844.92.[1]

b) In April 2015, the Owners' solicitors wrote to the Builder alleging that:

(1) the Builder had advised the Owners that it would not continue carrying out the Works until its claim for variations in respect of Unit 1 had been paid;

(2) that the invoice for the variations had been raised in breach of the contract, and the *Domestic Building Contracts Act 1995* (Vic); and

(3) the Builder had committed further identified breaches of the contract which, in combination, were said to amount to a repudiation of the contract.[2]

c) In response, the Builder's solicitors replied denying repudiation; and on the Owners reasserting repudiation by the Builder, the Builder's solicitors replied that the claim of repudiation was itself a repudiation, and accepted that repudiation.[3]

[1] *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 at [120] to [123] (Nettle J, Gordon J and Edelman J).

[2] Ibid [124].

[3] Ibid [125] to [126].

d) The Builder instituted proceedings at the Victorian Civil and Administrative Tribunal (**VCAT**), including on the basis of an assessed value of work and labour done of $1,898,673 (for a claimed amount of $944,898, once payments already made were taken into account), well in excess of the contract sum.[4]

e) VCAT determined that the contract had been wrongfully repudiated by the Owners, and that the Builder's acceptance of repudiation was valid. In making its decision, referring to the decision of the Court of Appeal of the Supreme Court of Victoria in *Sopov v Kane Constructions Pty Ltd [No 2]* (2009) 24 VR 510, it is clear that VCAT felt bound by precedent to grant relief on a *quantum meruit* basis.[5] VCAT awarded the Builder an amount based on a value of the benefit conferred on the Owners of $1,606,313.41 ($660,526.41 after taking into account amounts already paid) and observed:

> *"by succeeding in a claim for a quantum meruit, the Builder has recovered considerably more than it might have recovered had the claim been confined to the Contract."* [6]

f) Subject to the correction of minor mathematical errors, the determination of VCAT was upheld by the Supreme Court of Victoria and the Court of Appeal.

g) The High Court unanimously overturned the decision of the lower courts, and referred the matter back to VCAT for recalculation in accordance with the contractual rates.

Quantum meruit as a remedy

Quantum meruit is typically used as short hand for relief in restitution for unjust enrichment.

"*Restitution is concerned with the restoration to the plaintiff of a benefit conferred on the defendant at the expense of the plaintiff in circumstances which make it unjust that the defendant should retain the benefit.*"[7]

The remedy is not compensatory, but rather determined by reference to the benefit conferred.[8] It is an entirely separate basis of claim to compensatory damages.

The benefit is to be determined subjectively to the defendant however, in a simple case, that subjective benefit has typically been considered to be evidenced by reference to a reasonable value of the work performed, and may include a margin. The receipt of money, an increase in the value of the defendant's assets, or the avoidance of a necessary expense are regarded as incontrovertible benefits.[9]

Further, unlike other claims in equity, once unjust enrichment is established, liability is strict and independent of the fault of the defendant, and in this way it is a liquidated claim.[10]

The possibility that a party may be awarded a reasonable value for the work performed, and the evidentiary advantages of a claim, means that restitution has been considered as a more favourable remedy compared to compensatory damages.

The qualifying factor - total failure of consideration

In order to establish that the enrichment of the defendant is 'unjust' it is necessary to establish some factor making it so.[11] In the case of the repudiation of an otherwise valid contract, the High Court set out that the qualifying factor "*is a total failure of consideration, or a total failure of a severable part of the consideration*".[12]

Consideration in this context means the matter considered in forming the decision to do the act and that, in many cases, the relevant basis will be the benefit that is contracted for.[13]

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[4] Ibid [135] to [136].

[5] Ibid [138] to [139].

[6] *Paterson Constructions Pty Ltd v Mann (Building and Property)* [2016] VCAT 2100 at [528].

[7] Westlaw AU, *The Laws of Australia* (online at 16 October 2019) 29 Restitution, '29.1 Restitution' [29.1.10].

[8] Ibid.

[9] Ibid [29.1.420] to [29.1.460].

[10] Ibid [29.1.420] to [29.1.220].

[11] Ibid [29.1.210].

[12] *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 at [168] (Nettle J, Gordon J and Edelman J).

[13] Ibid [168] to [169].

By way of example:

a) where a contract is terminated for breach such that the basis on which the work was done has failed to materialise, there will be a total failure of consideration; and

b) where a contract "*remains enforceable, open and capable of performance*", there will be no such total failure of consideration.[14]

The time at which repudiation is effective

Repudiation only takes effect prospectively rather than retrospectively (*ab initio*). This principle was unanimously accepted by the High Court.

Referring to various precedents, Nettle, Gordon and Edelman JJ identified that:

> *"where a contract remains "open" – that is not "discharged" – there is generally "neither occasion nor legal justification for the law to superimpose or impute and obligation or promise to pay reasonable remuneration.""*[15]

and:

> *"…where a party elects to accept the other party's repudiation of the contract, both parties are released from the contractual obligation which are not yet due for performance, but existing rights and causes of action continue unaffected."*[16]

Availability of restitution where payment has become due

The consequence of the parties' existing rights and causes of action remaining unaffected by acceptance of repudiation is that, to the extent a party has become entitled to payment in respect of a severable part of the works, there will not be a total failure of consideration in respect of those works.

The High Court identified that a construction contract, under which the total contract price is divided between stages by way of progress payments, should be viewed as containing divisible obligations of performance. Following acceptance of repudiation:

a) for a completed stage, there will be no total failure of consideration, and the contractor's remedy for those works will be restricted to a claim in debt for the amount due, and damages for breach of contract; and

b) for an incomplete stage, there will be a total failure of consideration, and the contractor may recover in restitution, as an alternative to damages for breach of contract.[17]

In contrast, if a contractor will only become entitled to payment if the contract is wholly completed, and the other party's wrongful repudiation means that the entitlement to payment does not arise, there will also be a total failure of consideration, and the contractor may recover in restitution, as an alternative to damages for breach of contract.[18]

Restitution will typically be limited by the contract sum

The High Court found no trouble with the remedies of contractual damages and restitution co-existing. Particularly, they noted that restitution is a liquidated demand which, compared to an unliquidated claim for damages, may provide for easier and quicker recovery, including by way of summary damages.[19]

The High Court did identify that there is cause for concern about the potential disparity between amounts recoverable by restitution versus damages.[20]

> *"It may be that some builders actually set the prices at which they bid for work on the expectation that they will be astute to take advantage of an opportunity to elect for a more*

[14] Ibid [168] to [169].

[15] Ibid [164].

[16] Ibid [165].

[17] Ibid [176].

[18] Ibid [170], [173] to [174].

[19] Ibid [198].

[20] Ibid [200].

> *generous level of remuneration in due course. If that is the case, any such expectation is distinctly not to be encouraged. Honesty and efficiency in trade and commerce are not promoted by a rule that allows recovery of a windfall by a party who has extracted itself from a losing contract, from which, acting rationally, it would pay to be released."*[21]

In that respect, the High Court noted that in some circumstances it is necessary or appropriate that the benefit to the defendant be determined without reference to a contract price, for example where the contract does not fix a contract price.[22]

In another example, the High Court approved of the principle that, in respect of an unenforceable payment clause, prices stated in the contract are regarded as relevant, but remain evidentiary only of a fair value for the benefit provided.[23]

However, noting that the contract remains the basis upon which the work was performed, the High Court found that:

> *"where an entire obligation (or entire divisible stage of a contract) for work and labour… is terminated by the plaintiff upon the plaintiff's acceptance of the defendant's repudiation of the contract, the amount of restitution recoverable upon a quantum meruit by the plaintiff for work performed as part of the entire obligation… should prima facie not exceed a fair value calculated in accordance with the contract price or appropriate part of the contract price."*[24]

The High Court noted that "*the contract price reflects the parties' agreed allocation of risk,*", and that termination of the contract provides no reason to disrespect that allocation.[25]

The High Court approved of the statement that "*this is not indirectly to enforce the terms of a contract that has been terminated; rather it is a reflection of the fact that the ground of recovery is a failure of basis, and the parties have agreed what the basis of transfer is to be*".[26] And elsewhere, "*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*".[27]

That being said, the High Court recognised that it is possible that there may be cases where the circumstances will dictate that it would be unconscionable to confine the plaintiff to the contract sum, for instance, where the continued breaches of the defendant have rendered the contract unprofitable. The question in that case is whether it would be equitable to depart from the contract sum.[28]

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[21] Ibid [52] (Kiefel CJ, Bell J and Keane J).

[22] Ibid [203] (Nettle J, Gordon J and Edelman J).

[23] Ibid [204].

[24] Ibid [215].

[25] Ibid [205].

[26] Ibid [211], referring to Mitchell, Mitchell and Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment*, 9th ed (2016) at 71-72 [3-54].

[27] Ibid [214].

[28] Ibid [216].