

Introduction

The High Court will soon rule on a builder's availability to recover payment on a "quantum meruit" basis in circumstances where an owner has repudiated a construction contract. This will be a significant decision, as the High Court will be asked to reconsider the current common law position that a builder is entitled to be paid on a quantum meruit basis where it has accepted an owner's repudiation of a construction contract.

On 14 December 2018, the High Court granted the appellants (Owners) special leave to appeal the Victorian Court of Appeal's decision in *Mann v Paterson Constructions Pty Ltd*¹. The grounds of appeal include that the Court of Appeal erred in holding that the respondent (Builder), having terminated a building contract upon the repudiation of the contract by the Owners, was entitled to sue on a quantum meruit basis for works carried out by it.

The Current Common Law Position

When a contract is terminated, the contractual parties usually keep all of the contractual rights that they accrued during the life of the contract. This means that even after the contract is terminated, a party to the contract can sue the other party for any amounts that it was owed before the contract was terminated.

As such, a builder to a construction contract can recover payment from the owner for unpaid work performed before the contract was terminated. In most circumstances, the builder is only entitled to be paid for amounts properly due (or calculated) under the contract.

However, a quirk in the law exists where if a construction contract is terminated as a result of a repudiation, the builder can recover payment from the owner (or superior/head contractor) on a quantum meruit basis.

A repudiation occurs when a party (e.g. the owner) demonstrates an intention not to be bound by its obligations under the contract. So if, for instance, the contract requires a party to make a payment at a certain time and, when the time for payment arises, the party not only fails to make the payment, but also says words such as "I am never going to pay," that would be a good indication of that party's intention not to be bound by the contract. In that situation, the other party would be able to "accept" that party's repudiation and terminate the contract.

When this situation occurs in a building case and a builder accepts the owner's repudiation, the existing state of the law is that a builder can recover payment on a quantum meruit basis. This means that instead of being limited to claiming only what is properly due under the contract, the builder can claim a reasonable sum for performing **any work**, whether the work was performed under the contract or not. By way of example, on a quantum meruit basis, a builder can recover its additional costs of performing "variation" work in circumstances where the owner may otherwise have had a valid claim that the work was within the original contract scope.

Case Facts

In March 2014, the Owners, Peter and Angela Mann, contracted the Builder, Paterson Constructions Pty Ltd, to build two townhouses for a lump sum price. The works were not completed by the due date of 17 November 2014. Unit 1 was completed and handed over to the Owners on 19 March 2015. On 16 April 2015, before Unit 2 was completed, the Owners asserted that the Builder had repudiated the contract and proceeded to accept that repudiation. The Owners alleged that the Builder's delay in carrying out the works constituted a repudiation by the Builder.

On the date the Owners accepted the Builder's alleged repudiation, they refused the Builder entry to the building site (the Builder having rejected the allegation that it had repudiated the contract). On 28 April 2015, the Builder asserted that the Owners' refusal to allow it entry to the building site itself amounted to a repudiation, which the Builder proceeded to accept.

The Builder applied to the Victorian Civil and Administration Tribunal (VCAT), claiming AU\$944,898 against the Owners on a quantum meruit basis. In the alternative, the Builder sought relief for sums allegedly due under the contract (which is the usual position where a quantum meruit is unavailable).

VCAT Decision and Supreme Court Decision

VCAT found that the Owners' purported termination of the contract constituted repudiation and that the Builder had validly determined the contract on 28 April 2015 when it accepted that repudiation. The Owners were ordered to pay the quantum meruit sum of AU\$660,526.41, being the reasonable value of the whole of the work performed by the Builder (regardless of whether that work was within the original contract scope or not) less the amounts already paid by the Owners and the cost of rectification of defects.

The Owners then appealed to the Supreme Court of Victoria. The Supreme Court upheld the tribunal's decision, in favour of the Builder.

1 [2018] VSCA 231 ("*Mann*")

Appeal and Court of Appeal Decision

The Owners appealed the Supreme Court's decision to the Court of Appeal. The Owners argued that the proceedings afforded the Court of Appeal a particularly good opportunity to reconsider the correctness of the long-established principle that a builder can sue on a quantum meruit in the circumstances of the case.

The Owners submitted that the availability of quantum meruit in a case such as the present has been the subject of previous criticism by the courts and referred to the observations made by the Victorian Court of Appeal in *Sopov v Kane Constructions Pty Ltd*² in that regard. The Court of Appeal's criticism in that case rested upon the following three propositions:

- Where a contract is terminated at common law by the acceptance of a repudiation, both parties are discharged from the further performance of the contract, but rights that have already been unconditionally acquired are not divested or discharged unless the contract provides to the contrary.
- If there is a valid and enforceable agreement governing the claimant's right to payment, there is "neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration".
- Accordingly, there is no room for a restitutionary remedy (such as a quantum meruit) since the builder's claim to payment is governed by the contract under which the work was carried out up to the point of repudiation.

The Court of Appeal in *Sopov* stated that unconstrained by authority, it might well have upheld the argument that the builder's only remedy was to sue under the contract. However, it noted that the right of a builder to sue on a quantum meruit basis in the circumstances had been part of the common law of Australia for more than 100 years, and had been recognised by courts of appeal in three states (Victoria³, New South Wales⁴ and Queensland⁵). The court noted that if the quantum meruit remedy was to be declared unavailable as a matter of law, that is a step the High Court alone could take.

The Court of Appeal in *Mann* endorsed the observations made by the Court of Appeal in *Sopov* and noted that nothing had transpired in the nine years since those observations were made to lessen their force. The court held that it was bound by *Sopov*, *Renard* and *Iezzi* and given there was no submission by the Owners that these decisions were wrong, there was no opportunity for the court to reconsider the correctness of those decisions.

High Court Watch

The case was heard in the High Court on 14 May 2019, and we expect the decision will be handed down in the next few months. We will closely monitor the developments in this case and provide an update following the High Court's judgment.

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² *(No 2) (2009) 24 VR 510* ("*Sopov*")

³ *Brooks Robinson Pty Ltd v Rothfield* [1951] VLR 405

⁴ *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 ("*Renard*")

⁵ *Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd* [1995] 2 Qd R 350 ("*Iezzi*")