

Introduction

This update follows our [June 2019](#) article and addresses the recent decision of the High Court of Australia in *Mann v Paterson Constructions Pty Ltd*, which reconsidered the 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 the contract.¹

On 9 October 2019, the High Court held, by majority, that a builder can recover on a quantum meruit based in restitution, as an alternative to a claim in damages for breach of contract, but the amount will generally be limited to a fair value calculated in accordance with the contract price or the appropriate part of the contract price.

Previous Common Law Position

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

A builder can recover payment from the owner for unpaid work performed before the contract was terminated. The builder would only be entitled to be paid for amounts properly due, calculated under the contract.

However, a quirk in the law existed where if a construction contract was terminated as a result of a repudiation, the builder could recover on a quantum meruit basis (i.e. the reasonable value of the work done). This could be more than the builder would be entitled to under the contract for the same work.

Court of Appeal Decision

Following proceedings in the Victorian Civil and Administration Tribunal (VCAT) and the Supreme Court of Victoria, the Court of Appeal in *Mann v Paterson Constructions Pty Ltd* [2018] VSCA 231 reaffirmed the decision in *Sopov v Kane Constructions Pty Ltd*,² which confirmed the entitlement to payment on a quantum meruit basis for the benefit that the builder has conferred on the owner by performing work at the owner's request.³ The *Mann* decision endorsed the notion that the quantum meruit remedy is so entrenched in Australian common law⁴ that it was a matter that only the High Court could review and alter. The High Court took up the invitation by granting special leave to appeal from the Victorian Court of Appeal's decision.

¹ A repudiation occurs when a party demonstrates an intention not to be bound by its obligations under the contract. The other party is then entitled to "accept" that party's repudiation and terminate the contract.

² (No 2) (2009) 24 VR 510 ("Sopov").

³ *Mann v Paterson Constructions Pty Ltd* [2018] VSCA 231 at 144.

⁴ By way of decisions including *Sopov*, *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, and *Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd* [1995] 2 Qd R 350.

High Court Decision

The High Court has now unanimously held that, in the context of a work and labour contract terminated by acceptance of a repudiation:

- The builder's (or subcontractor's) only right to recovery for any stage of the contract completed by the time of termination was for the amount due under the contract on completion of that stage and any damages for breach of contract; and
- For any uncompleted stage of the contract, the builder (or subcontractor) was entitled to claim damages for breach of contract.

A majority of the court further held:

- Where a right to payment has not accrued, the builder (or subcontractor) was generally entitled, in the alternative, to recover restitution for work and labour done and materials supplied in respect of uncompleted stages; but
- The amount so recoverable should generally not exceed a fair value calculated in accordance with the contract price or the appropriate part of the contract price.

Key Takeaways

While a claim based on quantum meruit is still available to a builder seeking compensation for repudiation, the restriction on the amount recoverable is a major change in existing common law.

We expect that builders claiming payment following owner repudiation of a contract will now be more likely to pursue claims for damages in breach of contract relating to unperformed work, rather than claim quantum meruit, because of the general position that there will be a limit on the amount recoverable under quantum meruit and difficulties in assessing the claim.

The decision would appear to give protection to owners from claims by builders contrary to the risk allocation provided for in the contract, even when the owner has repudiated the contract.

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