Quantum meruit

1. What it is

(a) The expression *quantum meruit* means "the amount he deserves" or "what the job is worth". Essentially, quantum meruit is an action for payment of the reasonable value of services performed. It is used in various circumstances where the court awards a money payment that is not determined, subject to what is said below, by reference to a contract. Put in the converse, a claim on a quantum meruit cannot arise if there is an existing contract on foot between the parties to pay an agreed sum. By and large, contractors incline to the view that a quantum meruit claim is the "holy grail" of claims because they can recover all their costs, overheads and profits; it is sometimes thought of as "cost-plus". As I'll come to in a little while, though this view is widely held, it is far from accurate.

(b) Before that though, some of you may be wondering about the legal basis on which a contractor has an entitlement to some form of payment in circumstances where there are no contractual provisions dealing with payment. In essence, quantum meruit claims are based on the law of restitution; specifically, quantum meruit claims flow from the principle of unjust enrichment.

(c) For there to have been unjust enrichment, three things must be established. Firstly, the principal must have been enriched by the receipt of a "benefit". Secondly, that benefit must have been gained "at the contractor's expense". And, thirdly, it would be "unjust" in the circumstances to allow the principal to retain the benefit. Needless to say, there is a good deal of law involved in questions of "benefit", "contractor's expense", and "unjust".

2. How it arises

As I've already mentioned, in a quantum meruit claim the court awards a money payment that is not determined by reference to a contract. Most often this arises where there has been a contract but it has been frustrated, made void, terminated, or is otherwise unenforceable. That is not to say, however, that a quantum meruit claim cannot be made where there is a contract on foot. In this regard, quantum meruit claims can be made where:

(a) There is a contract but no price is fixed by that contract. Where a contractor does work under an express or implied contract, and the contract fixes no price or pricing mechanism for that work, the contractor is entitled to be paid a reasonable sum for his labour and for the materials he has supplied.¹

(b) Quasi-contract. This may arise where, for example, a contractor agrees to start work on site while still negotiating with the principal as to, at least, the essential terms of the contract. Those negotiations subsequently fail. Generally, the cases support the proposition that, in such circumstances, the principal has an obligation

¹ *Powell v Braun* [1954] 1 All ER 484; *Turriff Constructions Ltd v Regalia Knitting Mills Ltd* (1971) 9 BLR 24.
to pay a reasonable sum for the work done. Predictably, however, it does not apply to all cases of failed contracts. In an English case from 1995, for instance, the following circumstances led the court to conclude that there was no such obligation to pay a reasonable sum:

(i) the negotiations were entered into on express terms that each party was free to withdraw from negotiations at any time;
(ii) the negotiations were explicitly said to be "subject to contract";
(iii) the quantum meruit that was being sought had been incurred by the contractor for the purpose of putting the contractor in a good position to win the ultimate contract; it had not been incurred by way of performance under the terms of the anticipated contract; and
(iv) the principal had received no "benefit".

In practice, this type of quantum meruit is frequently constrained by letters of intent that often limit the amount a contractor can recover in the event the contract negotiations fail.

(c) Work outside a contract. Where there is a contract for specific work but the contractor does work outside the contract at the principal's request, the contractor is entitled to be paid a reasonable sum for that work. Implied contract forms the basis of this entitlement.

(d) Work under a void, unenforceable or terminated contract. Where there is a contract but it is void, either for uncertainty or for any other reason, or where the contract is rendered unenforceable by operation of statute, or where the contract has been repudiated by the principal, the contractor may be entitled to claim on a quantum meruit for the work or services. In practical terms, this category is the most common, and it is also this category that causes some grief because contractors sometime wrongly assume that a quantum meruit claim automatically follows when a principal has repudiated the contract.

Repudiation of the contract by the principal – that is, the principal renounces liability under the contract, or shows an intention no longer to be bound by the contract, or shows an intention only to perform the contract in a particular way that is at odds with the contractual terms – does not, in and of itself, bring a contract to an end. If, in fact, the principal indicates that he is no longer ready, willing and able

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3 Regalian Properties v London Docklands Development Corporation [1995] 1 WLR 212
4 Thorn v London Corp. (1876) 1 App.Cas. 120, HL; Parkinson & Co v Commissioners of Works [1949] 2 KB 632, CA; Greenmast Shipping v Jean Lion [1986] 2 Lloyd's Rep. 277.
5 Bevelon Investments Pty Ltd v Kingsley Air Conditioning Pty Ltd (1971) 1 ACLR 24 (Vic Sup Ct);
6 Craven-Ellis v Canons Ltd [1936] 2 KB 403; Phillips v Ellinson Bros Pty Ltd (1941) 65 CLR 221.
7 Pavey and Matthews Pty Ltd v Paul (1987) 162 CLR 221.
to perform the contract in accordance with its terms, the contractor must elect to terminate the contract. The contractor has to elect between continuing the performance of his contractual obligations or accepting the principal's repudiation and bringing the contract to an end. Only if the contractor chooses the latter may he then sue and – if the suit is successful – he must also elect between damages assessed on a quantum meruit or contractual damages.

3. The elements of a quantum meruit claim

(a) It is one thing to establish that a contractor may be entitled to make a quantum meruit claim; it is quite another to determine the extent of the entitlement. As I mentioned earlier, contractors might like to think that quantum meruit is a kind of "holy grail" or "panacea" entitling them to all their costs plus an allowance for profit. However, the reality is somewhat different.

(b) The basic reason for this is that courts have not provided clear guidelines to assist in determining what is a "reasonable sum", although it is clear that the contractor ought to be paid a fair commercial rate for the work done in all the relevant circumstances. However, the essential problem remains the lack of precision in deciding what is reasonable in the circumstances. What might be reasonable for the principal is unlikely to be so for the contractor, and vice versa. For instance, a principal will want to limit his liability – if he is liable at all – to the contractor's actual or tender costs. The contractor, on the other hand, may want the reasonable sum to reflect the value of the work to the principal. At other times, the contractor might take the view that actual costs, plus an allowance for profit and overheads, should form the basis of a reasonable sum while the principal might adopt the view that what is reasonable should be determined by reference to the failed contract. Some difficult questions arise and, unfortunately, there are few straightforward answers:

(i) Who should have the benefit if the contractor has managed to secure his resources (subcontractors, labour, materials and so on) at an especially low price? That is, should the principal have to pay less than a fair commercial rate in such circumstances?

(ii) What if the fair commercial rate for the work is entirely out of proportion to the value of the work to the principal? That is, what if $10,000 worth of work (valued on a fair commercial rate) adds $100,000 to the value of a property? And what if it adds nothing to the value of a property? This kind of issue was considered in a 1989 case in the NSW Supreme Court.

8 Kane Constructions v Sopov [2005] VSC 237.
10 This was the position adopted in Sanjay Lachhani v Destination Canada (UK) Ltd (1997) 13 Const LJ 279.
12 The Minister for Public Works v Renard Constructions (ME) Pty Ltd (unreported, NSW Sup Ct, 15 Feb 1989).
judge focussed on the restitutionary nature of a quantum meruit claim; that is, he took the view that the focus should be on the benefit to the principal. Since the object of a quantum meruit claim is to prevent a principal from becoming unjustly enriched, it should be the value of the work to the principal that ought to be measured, and not the cost of doing it. Nevertheless, in the same judgement, the judge noted that it might be appropriate – depending on the facts of any particular case – to assess the value of the quantum meruit by reference to contract rates.

(iii) If there has been a contract which, for whatever reason, is now void, unenforceable or terminated, should the contractor be limited to the amount of the contract price? The importance of this is most evident in the context of a losing contract; that is, where the value of the work (assessed at a fair commercial rate) far exceeds what the contractual amount the principal was obliged to pay. For instance, in a 1933 Californian case, a contractor had been engaged in the construction of a dam and, near completion, the principal breached the contract in such a way that the contractor was justified in terminating the contract, and did terminate the contract. The court eventually awarded the contractor on the quantum meruit claim more than 10 times his outstanding contractual entitlement. It is cases like this that give rise to the "holy grail" aura surrounding quantum meruit. A 1992 case in the NSW Court of Appeal saw the judges adopt a similar position in relation to a contract that had been repudiated by the principal. Here, they specifically allowed for the prospect that the figure arrived at on a quantum meruit might exceed, or even far exceed, the profit that would have been made had the contract been fully performed. By contrast, in the context of an unenforceable contract, the High Court took the view in a 1987 case that the contract price set the ceiling for what was recoverable. In that case, a contractor had carried out work for a principal in circumstances where there was a verbal but no written contract. This fell foul of the provisions of the then Builders Licensing Act 1971 (NSW), the precursor to the Home Building Act 1989 (NSW), which required such contracts to be in writing. The court found that the contract was unenforceable by the contractor as against the principal. Nevertheless, the contractor was able to claim on a quantum meruit but could claim no more than the contract price. These two cases are not necessarily inconsistent; the former involves a contract that has been terminated while the later involves a contract that is merely unenforceable by one party against the other.

(iv) Even the question of whether a contractor should be entitled to profit is not clear cut. The generally accepted industry position appears to be that a

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13 Boomer v Muir 24 P 2d 570 (Cal App 1933)
14 Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234.
15 Pavey and Matthews Pty Ltd v Paul (1987) 162 CLR 221.
contractor should, in the normal course of a quantum meruit claim, be entitled to some measure of profit. However, a recent decision in the Victorian Supreme Court\(^{16}\) casts considerable doubt on even this. Though the contractor had claimed a 10% margin for profit and overhead as part of his quantum meruit claim, the judge declined to award that part of it; she took the view that a margin should form no part of a quantum meruit claim. Firstly, in the judge’s view, it is the value of the actual work done that is intended to be the subject of a quantum meruit claim and, secondly, talk of margins lie more properly within an assessment of contractual damages rather than on a quantum meruit claim.

4. **Concluding words**

What do we distil from all of this?

- Quantum meruit claims are based on the law of restitution and flow from the principles of unjust enrichment.

- They can arise in certain circumstances: where there is a contract but no price has been fixed by that contract; quasi-contract, such as work carried out prior to contractual terms being settled, work done outside the scope of a contract; and, importantly, work under a void, unenforceable, or terminated contract.

- Where a contract has been repudiated by the principal, a contractor must elect to accept the repudiation and terminate the contract before commencing proceedings.

- Though contractors often think of quantum meruit as a cost-plus “holy grail” the reality is that courts have not provided clear guidelines about what may be recovered under the broad heading of a “reasonable sum” determined by reference to a fair commercial rate.

- Accordingly, the peculiar facts of any particular case are likely to have a greater influence on the outcome of a case than are anything else. Sometimes contractors have done very well out of a quantum meruit claim; sometimes the results have been less than might have been expected or desired, as in the recent Victorian case where the contractor could not even recover his margin.

\(^{16}\) *Kane v Sopov* [2005] VSC 237