QUANTUM MERUIT: RECENT DEVELOPMENTS

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REPUDIATION

The identification of repudiation by a party to a building contract is a commonplace task for construction lawyers and one that is usually of vital significance. If there is doubt about whether a party is entitled to rely upon repudiation to terminate the subject contract the concern of the advisor is elevated because advising the client to accept the repudiation of the other party and bring the contract to an end represents a pivotal decision with potentially grave consequences.

The path to bringing a construction contract to an end may be well signposted and therefore easier to take, as for example in relation to a contract which defines what conduct on the part of each party will constitute a substantial or fundamental breach and which also provides for the notification, timing and the financial and practical consequences of one or other party terminating the contract under its own express terms (for example, AS 2124 -1992, Clause 44). The difficulty with such a contract is likely to arise in relation to the evaluation of whether the offending party's conduct fits the more equivocal criteria for a substantial or fundamental breach defined by the terms of the contract, such as, "*failing to proceed with due expedition and without delay …".* [AS 2124-1992; Clause 44.2(b)] or *"failing to use materials or standards of workmanship required by the Contract"* [AS 2124-1992; Clause 44.2(d)]. Careful consideration is also necessary as to whether the party looking to terminate is in substantial breach and thereby precluded from terminating at law.

Likewise, the evaluation of whether the offending party's "show cause "response sufficiently addresses its alleged breach or breaches is likely to be difficult.

It is to be noted that, as with Clause 44.1 of AS 2124-1992, such meticulously drafted contracts also often expressly reserve common law rights including the right of the party invoking the termination clause to elect to terminate at common law as an alternative way of dealing with the repudiator. Furthermore, as a matter of general principle, unless the terms of the contract reflect a contrary intention, the common law right to bring the contract to an end on the basis of repudiatory conduct subsists even though the contract includes a termination clause.

In the situation where the terms of the contract do not have a regime for termination or where there is a desire to terminate at common law, even though such a regime does exist, the difficult judgment is usually as to whether the conduct complained of is sufficient to meet the common law test for repudiation, namely whether, viewed objectively, the defaulting party's conduct evinces that it does not intend to be bound by the contract [Laurinda Pty Ltd v Capalaba Park Shopping Centre (1989) 166 CLR 623 at 647-8 and Shevill and Anor. v Builders Licensing Board (1982) 149 CLR 620 at 625].

If the legal and factual conclusions founding a decision to rely on repudiation to bring the contract to an end are ultimately correct then the party taking that legal step will often be advantaged, including by that action providing options which would otherwise not have been available. The possibility of recovering on a quantum meruit is one of those options. The quantum meruit option is also typically regarded by contractors as an attractive option because it often holds the promise of a better basis for recovery than under the defunct contract given that the usual starting point of the calculation of the quantum meruit recovery is all of the

reasonable costs of the work undertaken plus a margin, less what the owner has paid to the date of termination.

FOUNDATION OF THE QUANTUM MERUIT

As will be discussed in more detail below, the foundation and the nature of quantum meruit is not without controversy. In the situations postulated above where a building contract is brought to an end at common law or pursuant to its terms (which terms preserve or do not remove common law recovery), the right to a quantum meruit following a justifiable termination continues to exist [Pavey and Matthews Pty Ltd v Paul (1987) 162 C.L.R. 221 at 227 and 257, Kane v Sopov [2009 VSCA 141 at [2]] (Supreme Court of Victoria, Court of Appeal, 15 June 2009, page 261-262)].

Some legal dictionaries refer to a quantum meruit, in general terms, as a formula for determining how much to award a party who has provided goods or services to another (and has not been paid) based on the reasonable value of the goods or services on the basis that the party which has the benefit of the bargain should not be unjustly enriched [*Webster's New World Law Dictionary*]. Others more simply refer to quantum meruit meaning "as much as he deserves" [*Lectic Law Library Lexicon*].

There are a number of other circumstances in which a quantum meruit recovery may arise, including:

(i) In a situation where no formal contract has come into existence, for example where work is commenced before a concluded agreement is reached and negotiations break down [Trollop & Colls v Atomic Power Construction Ltd [1963] 1 WLR 333] or the nature of the work to be done is the only element of the arrangement which is agreed

and that work is performed without the person who performed it being paid [Brenner v First Artists Management Pty Ltd, [1993] 2 VR 221 at 255-257, 256.]

Only about 20 years ago, the suggested basis for recovery in relation to this type of circumstance was on a "quasi-contract" for a fair and reasonable sum payable to the person who has done the work. However, under contemporary jurisprudence, recovery in this situation is founded on restitutionary principles concerned to obviate unjust enrichment [Pavey at 256].

(ii) Where unpaid-for work is undertaken and the relevant contract is somehow rendered unenforceable or void, for example because of the effect of legislation [Johnson Tyne Foundry Pty Ltd v The Councillors of Maffra (1948) 77 CLR 545 at 560, and Pavey at 256].

(iii) Where the contract is frustrated and a statutory quantum meruit is available [Frustrated Contracts Act 1958].

It is to be emphasized that, in Australia,

> *"…… if there is a valid and enforceable agreement governing the claimant's right to compensation, there would be neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration. The quasi-contractual obligation to pay fair and just compensation for a benefit which has been accepted will only arise in a case where there is no applicable genuine agreement or where such an agreement is frustrated, avoided or unenforceable. In such a case, it is the very fact that there is no genuine agreement or that the genuine agreement is frustrated, avoided or unenforceable that provides*

the occasion for (and part of the circumstances giving rise to) the imposition by the law of the obligation to make restitution." [Pavey, per Deane J, at 256]

In Australia and in the United Kingdom, there is long established, and recent, authority to support the entitlement of a contractor to elect to sue and recover on a quantum meruit, rather than for damages for breach of contract, if it lawfully terminates the building contract based on the owner's repudiation; see McDonald v Dennys Lascelles (1933) 48 CLR 457 at 476-7, per Dixon J:

"When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected." [476-477]

and more recently in Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234, at 277, per Meagher JA :

"The law is clear enough that an innocent party who accepts the defaulting party's repudiation of a contract has the option of either suing for damages for breach of contract or suing on a quantum meruit for work done." [277]

An entitlement to relief on a quantum meruit, in certain circumstances, was recognized as early as 1831 in Planche v Coburn (1831) 131 ER 305, and then notably in 1904 when the Privy Counsel considered an appeal from the New Zealand Court of Appeal in Lodder v Slowey [1904] AC 442. In Lodder v Slowey, the Privy Council affirmed that an innocent party who terminates a contract by acceptance of a defaulting party's repudiation may sue on a quantum meruit for the value of work done before repudiation. As recently as Renard (Meagher JA page

276-277) and Kane v Sopov ([2009] VSCA 141 at pages 2 and 5), this right has been upheld in Australia.

It is to be noted that, although Dixon J elaborated the law of contract in McDonald, as set out in the extracted passage above, a number of decisions subsequent have accepted that, upon acceptance of repudiation, the innocent party may effectively recover on the basis of a rescission ab initio, doing away with the contract and permitting a remedy on a quantum meruit and consonant with the availability of restitutionary relief in Pavey 256, Brooks Robinson Pty Ltd v Rothfield [1951] VLR 405 and Renard, at page 277.

The conceptual difficulty is that the High Court in McDonald (page 477) has held that, on termination founded on a repudiatory breach, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach. Therefore the contract is not void ab initio hence, on one view, the difficulty in treating it as of no application or relevance in assessing the entitlement of the innocent party. This has inspired some to identify the area of quantum meruit founded on repudiation as based on a "fiction", namely that the subject contract ceased to exist ab initio.

Some commentators have also raised criticism of a quantum meruit as an alternative remedy, in light of McDonald, and pointed to the possible anomaly of a contractual outcome in which the contractor's recovery for accrued entitlements under the terminated contract, plus recovery for loss of profit, would be modest compared with the alternative of recovering on a quantum meruit for a fair and reasonable price. The remedies are sometimes also criticized as inconsistent and or anomalous.

In Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd [1995] 2 QdR 350, work under a subcontract was largely complete when the proprietor went into liquidation, not paying the

builder who stopped the works and closed the site, thereby repudiating the subcontract. The subcontractor then terminated and sued for damages for breach of contract in respect of unpaid work; in the alternative, the subcontractor sought to recover on a quantum meruit. In Iezzi the Queensland Court of Appeal also recognized the right in these circumstances to elect for and succeed on a quantum meruit.

Accordingly, notwithstanding McDonald, in Victoria, New South Wales and Queensland, the intermediate appellate Courts have relatively recently affirmed the right to elect for and recover on a quantum meruit, in Kane, Renard and Iezzi.

In Renard at 277, Meagher JA responded as follows to criticisms of the type referred to above by commenting on the cases which recognized the continuing right to a quantum meruit, in appropriate circumstances, even after McDonald:

> *"But to my mind this criticism of them is superficial. They are right in principle as well as justified by authority. The law is clear enough that an innocent party who accepts the defaulting party's repudiation of a contract has the option of either suing for damages for breach of contract or suing on a quantum meruit for work done. An election presupposes a choice between different remedies, which presumably may lead to different results. The nature of these different remedies renders it highly likely that the results will be different. If the former remedy is chosen the innocent party is entitled to damages amounting to the loss of profit which he would have made if the contract had been performed rather than repudiated; it has nothing to do with reasonableness. If the latter remedy is chosen he is entitled to a verdict representing the reasonable cost of the work he has done and the money he has expended; the profit he might have made does not enter into that exercise. There is nothing anomalous in the notion that two different remedies, proceeding on entirely different principles, might yield different results. Nor is there anything anomalous in the fact that either remedy may yield different results. Nor is there anything anomalous in the fact that either remedy may yield a higher monetary figure than the other. Nor is there anything anomalous*

in the prospect that a figure arrived at on a quantum meruit might exceed, or even far exceed, the profit which would have been made if the contract had been fully performed". [at 277]

On a simplistic basis, there is also some attraction to the idea that where one party, before completion, turns its back on its fundamental obligations, the innocent party should not be constrained to pursue its strictly contractual entitlements, which usually gives rise to difficult proofs and contractual constraints to recovery, but simply be able to recover the benefit accepted by the repudiating party and derived at the expense of the innocent party, to that point.

There is also controversy as to whether or not a quantum meruit recovery is governed to any extent by the terms of the contract which has been brought to an end by the innocent party, subsequent to repudiation. In Kane v Sopov [2009] VSCA 141 at 23, the Court of Appeal considered that the quantum meruit under consideration was not governed by the provisions of the contract nor by conclusions arrived at as to the Contractor's entitlements under the provisions of the contract. The Court of Appeal also observed that for the purposes of the quantum meruit claim it was however potentially relevant as to whether the works are being completed in a reasonable time [at 23].

In Renard and in the context of an argument about whether the quantum meruit assessment should be capped by the contract sum agreed under the terminated contract, Meagher JA rejected the contention that a quantum meruit claim by a contractor should be subject to any ceiling to be derived from the terms of the contract and made the following observation:

"The most one can say is that the amount contractually agreed is evidence of the reasonableness of the remuneration claimed on a quantum meruit: strong evidence perhaps, but certainly not conclusive evidence. On the other hand, it would be extremely anomalous if the defaulting party when sued on a quantum meruit could invoke the contract which he had repudiated in order to impose a ceiling on amounts otherwise recoverable." [278]

CRACKS IN THE EDIFICE OF UNJUST ENRICHMENT AS A UNIFYING LEGAL CONCEPT

In Pavey, Deane J. referred to unjust enrichment as a unifying legal concept (at 256).

However, by 2001, in Roxborough and Ors. v Rothmans of Pall Mall Australia Limited (2001) 208 CLR 516 at 544-545, Gummow J. observed:

> *"Unless, as this court indicated in David Securities Pty Ltd v. Commonwealth Bank of Australia, unjust enrichment is seen as a concept rather than a definitive legal principle, substance and dynamism may be restricted by dogma. In turn, the dogma will tend to generate new fictions in order to retain support for this thesis. It also may distort well settled principles in other fields, including those respecting equitable doctrines and remedies, so as to answer the newly mandated order of things. Then various theories will compete, each to deny the others. There is support in Australian legal scholarship for considerable scepticism respecting any all-embracing theory in this field, with the treatment of the disparate as no more than species of the one newly discovered genus."* [544-545]

In Farah Constructions Pty Limited & Ors. v Say-Dee Pty Limited, (2007) 230 CLR 89, the High Court, in the context of an appeal concerning rights and obligations arising in connection with a joint venture for the redevelopment of a parcel of inner-suburban land in Sydney and when overturning the judgment of the New South Wales Court of Appeal, touched on unjust enrichment. The Court stated critically, in part, as follows:

> *"It was not contended by Say-Dee before the Court of Appeal that if the wife and daughters had no constructive knowledge that they would nevertheless hold the interests they acquired in trust for Say-Dee on the basis of unjust enrichment. But Tobias JA sought to extend the first limb of Barnes v Addy to encompass strict liability on the footing of unjust enrichment. He was in error for four reasons. First, there is no overarching principle of law in Australia that a party who is*

'unjustly enriched' by receipt of a benefit at the expense of another party must make restitution to that other party in respect of that benefit." [page 95]

Clearly, there is also controversy, generally, about the extent of the entitlement to recovery on the basis of unjust enrichment, quite apart from the sub-set of controversy surrounding a quantum meruit on discharge of a contract founded on repudiation.

ASSESSMENT OF THE QUANTUM MERUIT

In Brenner v First Artists Management Pty Ltd [1993] 2 VR 221, Byrne J (although concerned with a management agreement contract) provided guidance in the assessment and proof of a quantum meruit claim, as follows (from the Head Note):

(1) *There are two broad categories of claim commonly described as quantum meruit: one, where goods or serves are provided under an existing and enforceable contract which contains an express or implied term to pay a fair and reasonable sum for them; and the other, where the law imposes on a person an obligation independent of contract to pay a fair and reasonable sum for the goods or services, such obligation arising from the law of restitution or unjust enrichment. The obligation to make restitution will not arise where there is a subsisting enforceable contract between the parties for the performance of the services in question.*

Pavey & Matthews Pty Ltd v. Paul (1987) 162 C.L.R. 221 and Update Constructions Pty Ltd v. Rozelle Child Care Centre Ltd (1990) 20 N.S.W.L.R. 251, followed.

(2) *The claim was one of the second category, that is, a claim in restitution arising out of services performed. In such a case, the gist of the claim is that a person has actually or constructively accepted the benefit of the claimant's services in circumstances where it would be unjust for that person to do so without taking restitution to the claim.*

Pavey & Matthews Pty Ltd v. Paul (1987) 162 C.L.R. 221, followed.

(3) The claimant must establish that the person from whom restitution is claimed is the person who accepted the services. Certain of the services provided by the plaintiffs provided by the plaintiffs were provided at the request of F.A.M. at a time when the plaintiffs understood that they would in due course be recompensed by F.A.M., and that it was for F.A.M. they were providing the services. In those circumstances there can be no room for restitution by Braithwaite. The fact that Braithwaite under his contract with F.A.M. and the investors stood to benefit ultimately from the income of F.A.M. derived as a result of those services does not impose on him an obligation in restitution.

(4) There is no requirement that "benefit" for the purpose of the rule of restitution in a claim for payment of services must be an economic benefit. Nor is there a requirement that the provider of the services show that any benefit has arisen as a direct consequence of a particular service rendered.

(5) In a claim based on restitution for the benefit of services provided, the question whether the services constitute a benefit must be considered from the perspective of the recipient, and it is the services themselves which fall to be considered, not the end product of those services.

Planche v Colburn (1831) 8 Bing. 14; 131 E.R. 305, referred to.

B.P. Exploration Co. (Libya) Ltd v. Hunt (No. 2) [1979] 1 W.L.R. 783, distinguished.

Byrne J. also made the following additional statements about the assessment of a quantum meruit:

"It is convenient at the outset to set out the legal principles which I apply in making the assessment. First, my task is not to assess damages for breach of contract. The claims of the plaintiffs presuppose that no contract existed. Accordingly, I am not concerned to assess the sum which would compensate Fenner and Brenner for the benefits they might have received had they remained as managers or Braithwaite or the full term of the management engagement of June

1987 or that made in January 1988, even if it were possible to determine this, given the infirmities of this engagement." [p. 262]

"Second, the fundamental yardstick is what is a fair and reasonable remuneration or compensation for the benefit accepted actually or constructively by Braithwaite. It will be recalled that in the context of liability I drew a distinction between the benefit which is presumed where a person requests another to perform services, and the end-product of those services. Take the case of a selling agent who after one hour's work achieves a sale which earns an enormous profit to the principal. What is in these circumstances the benefit to the principal? In my view the answer to this difficulty is suggested by Deane J. in Pavey's Case, at p. 263. Where the services have been performed at the requested of a defendant or under an ineffective contract, the fair value of the work of the party will ordinarily be the remuneration calculated at a reasonable rate for the work actually done, for the defendant having obtained the benefit of the plaintiff's work ought to be permitted to enjoy this work without having paid for it. The assessment then, must have regard to what the defendant would have had to pay had the benefits been conferred under a normal commercial arrangement. The enquiry is not primarily directed to the cost to the plaintiff of performing the work since the law is not compensating that party for loss suffered. See Minister for Public Works v. Renard Constructions (ME) Pty Ltd (unreported, Brownie J., Supreme Court of N.S.W., 10369/1988, 15 February 1989), at pp. 28-9. Compare Renard Constructions (ME Pty Ltd v. Minister for Public Works (1992) 26 N.S.W.L.R. 234, at p. 276. But this is not to ignore these costs for the reasonable remuneration for work must have some regard to the cost of its performance. See Jennings Construction Ltd v. OH & M Birt Pty Ltd (unreported, Cole J., Supreme Court of N.S.W., 13110/1988, 16 December 1988.)" [pp. 262-263]

"Fourth, in many cases the appropriate method of assessing the benefit of the work is by applying an hourly rate to the time involved in performing those services. If this procedure is adopted, the court may have regard to the rate of remuneration which is commonly accepted in the industry. But in so doing, it should have regard to the standing of the person performing the services, the difficulty of the task, the fact that the services required imagination and creativity which may be

difficult to discern in the end product. See also Graham & Baldwin v. Taylor, Son and Davis (1965) 109 S.J. 793; Hudson's Building & Engineering Contracts, 10th ed., pp. 1830." [p. 263]

"Fifth, in the case where the services are of such kind that it is difficult or impossible to assess the number of hours involved or to itemize the premise services, the court is entitled to make a global assessment or to reduce or increase the remuneration which can be proved with some certainty in order to reflect the fair and reasonable value. See The Commonwealth of Australia v Amman Aviation Pty Ltd (1991) 174 C.L.R. 64, at p. 83. In such a case the court is simply performing the task of the jury, which would be directed to have regard to all the circumstances and to return a verdict in the proper sum." [pp. 263-264]

Difficult issues arise, however, where accrued entitlements under the discharged contract are required to be taken into account in evaluating the extent of the quantum meruit. The deductions required on account of defective work (not a component of a fair and reasonable sum) and an accrued entitlement on the part of the owner in relation to liquidated damages at the time of termination, are problematic because they call into question concomitant "contractual" issues like what extensions of time should alleviated against liquidated damages.

This area clearly raises a host of tensions about reference to the discharged contract and the concept of the discharged contract no longer regulating the party's rights and entitlements [Kane v Sopov [2005] VSC 237 at 265 and 277, and [2009] VSCA 141 at 21].

CONCLUSION

What emerges in relation to the above developments in relation to quantum meruit in Australia is:

(1) There appears to have been some retreat from what might earlier have been seen as unjust enrichment developing as a unifying legal concept, which "retreat" may provide a sharper

focus for the controversies in relation to the recovery on a quantum meruit arising when an innocent party accepts the repudiation of an uncompleted contract;

(2) There is controversy in relation to what some contend is a “fiction” in relation to a partially performed contract which is repudiated because the effect of the innocent party electing to bring the contract to an end is relief on a quantum meruit as if the contract had ceased to exist ab initio;

(3) There is controversy as to the extent to which the terms of the contract inform the assessment of a quantum meruit in circumstances where a contract is brought to an end on the basis of repudiation;

(4) There is scope for debate about factors like the timely progress of the subject work to the date the subject contract was brought to an end, which might be taken into account in the assessment of a quantum meruit, for example because builder’s costs incurred in respect of performing defective work and/or costs associated with the builder’s delays may not be recoverable by reason of those costs not having been reasonably incurred.

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