

Your Contractual Questions Answered

What Is A Quantum Meruit Claim?

By The Entrusty Group

Entrusty Group, a multi-disciplinary group of companies, of which, one of their specialisation is in project, commercial and contractual management, has been running a regular contractual questions and answers section for Master Builders members in the Master Builders Journal.

In this instalment of this series, Entrusty Group will provide the answer to another frequently asked question above.

This is a topic where contracting parties have an agreement or when one party has performed services and/or works but there has been no agreement on the price or payment terms. Such situations frequently occur in the construction industry where the Contractor often commences the works on the basis of a letter in intent or verbal or even written instruction issued by the Employer or S.O./Architect/Engineer/Project Director (depending on the forms of construction contract used). In some cases, the Contractor is required by the Employer or S.O./Architect/Engineer/Project Director to carry out additional works on an existing contract as a variation to the contract, however the existing contract prices/rates do not cater for the said variation works. Thus, the Contractor will have to claim on a fair and/or reasonable basis, commonly known as *quantum meruit*.

What is Quantum Meruit?

Before we discuss further on this topic let us define what is a claim on *quantum meruit* basis and under what circumstance it is applicable. The expression *quantum meruit* basically means 'the amount he deserves' or 'what the job is worth'. It is a claim for a payment for the work executed where no price has

been agreed or quantified, and usually a claim being assessed in a 'reasonable sum', 'reasonable remuneration', 'fair market rates', 'fair commercial rates' or on similar terms.

An entitlement for *quantum meruit* claim is not applicable if there is an agreement between the parties in the existing contract to pay for the work done. However, there may be *quantum meruit* claims under the contract. This usually arises in two circumstances, namely:

1. When the contract is silent on how work done is to be remunerated or paid. In such

cases, the contract payment terms of a reasonable remuneration or sum will be implied by common law. For example, additional expenses by the Contractor due to a significant change in the quantity of the work which was supposed to be carried out and paid, accordingly.

2. Where the contract contains an express agreement to pay reasonable sum or on similar terms. For example, variation rules of variation work of similar character but not similar conditions to be valued as far as may be reasonable with a fair adjustment/allowance for the difference in



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conditions or where the works is dissimilar in character and conditions to be valued as a fair market rate or price or a fair valuation.

Claim for *quantum meruit* in restitution is usually presented as an alternative claim if indeed there is no contract. It is a quasi-contractual claim under which the claimant merely seeks to be compensated for an amount representing the reasonable sum of the work which he has already completed. This may arise under the following circumstances: ¹

- Where the parties proceed on the mistaken basis that there is an enforceable contract, but there is no contract;
- One party requested for services from the other party which are not governed by any contract;
- Where the contract has been discharged by the operation of the doctrine of frustration;
- Where the contract has been repudiated by the Employer and the Contractor choose to claim for damages for breach of contract or *quantum meruit* in restitution for the work performed.

Standard Forms Of Contract And Malaysia Contracts Act 1950

Many standard construction contract forms in Malaysia allow for the above quantum meruit circumstances to be claimed by the Contractor which utilise the principle of 'reasonableness' with fair adjustment/allowance, fair market rate or fair valuation. Whilst if the Employer is in default, the Contractor can choose to claim under loss and/or expense clauses in the contract or bring legal action to recover his expenses and losses under the principle of quantum meruit. *Table 1* below indicates the relevant clauses of the standard forms of construction contract, where *quantum meruit* may be applicable, when monetary claims arise.

It is pertinent to note that under Section 71 of the Contracts Act 1950 provides for the following:-

Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is

bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

Case Law

The following case laws shed some light to this question as to what circumstances a quantum meruit claim is applicable.

(a) Where the contract is silent on how work done is remunerated or to be paid

In the case of *Parkinson vs Commissioners of Works (1949) 2 K.B. 632*, the Contractor had agreed under a contract to carry out certain work on a cost-plus-profit basis subject to the total profit recoverable limit. The Commissioners were entitled under the contract to instruct work up to £5m, but instructed work actually totalled up to £6.6m, thus exceeding the contract value. The Court of Appeal found that the additional work was outside the contract and thus the Contractor was allowed to be paid on a *quantum meruit* basis, which is beyond the total fixed profit under the contract.

Table 1 - Relevant provisions where *quantum meruit* claims may be applicable under the various Standards Forms of Construction C Construction Contracts in Malaysia

	Brief of Description of Relevent Contract Clauses	Contract Clauses				
		PAM 2006	PAM 1998	JKR 203A	IEM 1989	CIDB 2000
1	Variation	11.0	11.0	25.0	24.0	29.0
2	Additional expenses or loss and/or expense caused by Variation	11.7	11.6	5(d)	5(d) & 24(e)	31.1(h)
3	Loss and expense	24.0	24.0	44	44	31
4	Suspention of work for non payment	24.3(m)				42.10
5	Termination/Determination by Contractor	26.0	26.0		52	45
6	Contractor to recover additional expenses or loss and/or damage from Nominated Sub-Contractor	27.13	27.2(vi)			
7	Fluctuation of Price			53	54	
8	Arbitration	34.0	34.0	54	55	47
9	Governing Law	38.0			56	49

(b) Where the contract contains an express agreement to pay reasonable sum or in similar terms

In *Laserbore Ltd vs Morrison Biggs Wall Ltd (1993) CILL 896*, the learned Judge in deciding the meaning of the term 'Fair and reasonable payments for all works executed', considered that costs plus basis was wrong in principle even though it may sometimes produce the right result. The learned Judge held that in assessing *quantum meruit* claim the appropriate approach was to adopt general market rates or fair commercial rates.



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(c) Where the parties proceeded on the mistaken basis that there is an enforceable contract, but there is no contract

In the case of *British Steel Corporation vs Cleveland Bridge & Engineering Co Ltd (1981) 24 BLR 94*, where the Court held that two types of contract could arise following a letter of intent, first, an 'executory' contract and secondly an 'if' contract. There was no 'executory' contract (where each party has reciprocal obligations) since material terms remained in a state of negotiation. There was also no 'if' contract (where the letter of intent constituted a standing offer which would result in a contract if acted upon) since work was being done pending a contract whose terms were still being negotiated. Of particular importance was the lack of agreement as to British Steel Corporation's (BSC) liability for consequential loss and delay. BSC had commenced work in order to expedite performance under the anticipated contract. Because the work was not referable to any contractual terms, Cleveland was obliged to pay a reasonable sum for the work done. There was no contract and could therefore be no contractual obligation to complete the work within a reasonable time, meaning Cleveland's counterclaim for late delivery cannot succeed. ²

The decision in BSC was approved in *Herman Suerken GmbH & Co KG v Selco (Shipyard) Pte Ltd (1991) 3 CLJ 2289* which the learned Judge summarised that the implication of a letter of intent 'would be to enable the Defendants to recover on a *quantum meruit* for work done pursuant to the direction.'³

In a Malaysian case, *Ayer Itam Tin Dredging Malaysia Berhad vs YC Chin Enterprise Sdn Bhd (1994) 2 AMR 32:1631*, the learned Judge in deciding whether there was a concluded contract between the parties, dealt with both the nature of letters of intent and *quantum meruit*.

He held that arrangement made 'subject to contract' or 'subject to the preparation and approval of a formal contract', or in similar terms, would mean that the parties were still negotiating and did not intend to be bound until a formal contract was made. 'Subject to contract clause' terms would not prevent the formation of a contract in exceptional circumstances. In the learned Judge's view, with the several essential matters still remaining to be settled between the parties, the letter of intent did

not constitute a binding contract at law but was only a record terms agreed by the parties as basis for a contract negotiation.

As for the question of compensation for work done prior to the dispute, the learned Judge held that a claim on a *quantum meruit* basis for the preliminary works carried out on the site was successful but was subject to a maximum limit of RM300,000. ³

(d) One party requests for services from the other party where these were governed by a contract

In case of *Constain Civil Engineering Ltd vs Zanen Dredging & Contracting Co (1997) 85 BLR 77*, the instructions given did not constitute authorized variations of the subcontract works because they required work to be done outside the scope of the subcontract entitling the Subcontractor to payment on a *quantum meruit* basis.

(e) Where the contract has been discharged by the operation of the doctrine of frustration

In case of *BP Exploration Co (Libya) vs Hunt (No 2) (1982) 1 All ER 125*, where the Plaintiff was engaged

to develop an oil field on the Defendant's land and was to be paid by oil from the wells. The learned Judge gave BP a sum of US\$35m representing as the compensation or 'benefit' received by the Defendant prior to the wells, which were already commissioned but before BP could have received all the oil as payment, were nationalised by the Government of Libya.

(f) Where the contract has been repudiated by the Employer and the Contractor choose to claim for damages for breach of contract or quantum meruit in restitution for the work performed

In case of *Renard Construction Ltd vs Minister of Public Works (1992) 26 NSWLR 234*, the Court held that a claim in *quantum meruit* following a wrongful termination should be quantified on reasonable remuneration basis, not value of the work basis.

CONCLUSION

Whether a *quantum meruit* claim is derived under the contract or restitution or letter of intent, the precise wording in the agreement or the specified obligations of the parties are pertinent. If one party acted on it in speculation that they are entitled for the payment of the services/works executed in the absent express agreement to payment and the other party had benefited from it, then the principle of *quantum meruit* which entitled the injured party to a claim for payment on a reasonable sum for services/works executed shall apply as per Section 71 of the Contracts Act 1950. However, there are some pitfalls and uncertainties should the matter be brought to the court, as it will need to consider whether the services/works executed are not gratuitous or one party has

"benefited" from the services/works executed.

In view of the above, it is advisable that the party who requires the services/works to be executed by another party on an urgent basis should at least ensure that both parties have agreed

preferably in writing, the essential terms such as the scope of works, payment, time period, contractual obligations and other pertinent terms. This is to avoid any costly and lengthy disputes between the parties concern when it is referred to arbitration/litigation subsequently. **MBAM**

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In the next issue of the MBAM journal the article will answer the question on **'Can A Letter Of Intent Be Construed As An Enforceable Contract?'**



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