

Insights

QUANTUM MERUIT – HOW MUCH IS TOO MUCH?

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SUMMARY

Parties to a construction contract often consider entering into a letter of intent in advance of agreeing all the contract terms, with the expectation that the contractor will be paid on a quantum meruit basis. In *Moorgate Capital v H.I.G. European*, the court warned that where contract terms have not been agreed, there can be no presumption that a quantum meruit will be paid. Although this is not a construction case, it should serve as a warning to parties entering into letters of intent.

A developer client recently called me for advice on a new residential development project. My client was in the process of negotiating building contract terms, including the contract sum, with its preferred contractor. In the meantime, both parties were keen for the contractor to start the works in order to keep to the project programme. My client asked if an initial letter of intent could be put in place, with a limited scope of work. He suggested that works beyond this scope could be valued at a later date or, failing that, on a quantum meruit basis.

We often receive similar queries from clients. While we would always suggest that a building contract should be entered into before construction works are commenced, it is relatively commonplace for a letter of intent to be issued while negotiations on the contract terms continue in the background. In practice, parties should be careful not to allow the works to progress beyond the scope agreed in a letter of intent without finalising the terms of the building contract, including the contract sum. This could lead to a claim for payment being assessed outside the contractual framework, as a restitutionary claim for a quantum meruit.

What is quantum meruit?

Quantum meruit means “the amount that is deserved” or “as much as one has earned”. It is usually a claim for a reasonable sum for services provided, where the basis for payment is not determined by a contract. A claim for quantum meruit may arise in a number of construction related situations, including:

- Where there is no building contract in existence (or where a contract exists, but essential terms such as the contract sum are not agreed).
- Where works are carried out beyond the originally agreed scope.
- Where the client agrees to pay a reasonable sum for work completed.

The courts have not provided a definitive set of rules to determine how a claim for a quantum meruit or “reasonable sum” is to be calculated. This will depend on the specific circumstances and whether the claim has been brought in restitution for unjust enrichment or by reference to a contractual framework.

Where a quantum meruit is recoverable for work beyond the scope of an existing contract, generally the work cannot be regarded as having been performed under the contract. Instead, the claim sits outside the contractual framework and a restitutionary award should be made on the basis of unjust enrichment. Generally, this is calculated as the value of the benefit received by the defendant at the expense of the claimant, at the time it was received.

Case law

In *British Steel Corp v Cleveland Bridge & Engineering Co Ltd*, contract negotiations were progressing, but had not been finalised. In order to keep the project to schedule, the plaintiff carried out some of the works at the defendant's request. Goff J found that there was no contract but held that the plaintiff was entitled to payment. He commented:

“Both parties confidently expected a formal contract to eventuate. In these circumstances, to expedite performance under that anticipated contract, one requested the other to commence the contract work, and the other complied with that request. If thereafter, as anticipated, a contract was entered into, the work done as requested will be treated as having been performed under that contract; if, contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract the terms of which can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi contract or, as we now say, in restitution.”

In the recent construction case of *Anchor 2020 Ltd v Midas Construction Ltd*, the parties had intended to enter into a JCT Design and Build Contract (2011 Edition). However, the contract was only signed by the contractor. While the court found that a contract had in fact been entered into, Waksman J commented (obiter) that:

“...the proper basis for a Quantum Meruit assessment for the Works in this case, had it arisen for consideration, should be the JCT payment terms as set out in the putative contract.”

Waksman J also referred to *ERDC Group Ltd v Brunel University*, where works were carried out pursuant to successive letters of appointment and then continued beyond the expiry date with no formal contract in place. In *EDRC*, the works carried out after the expiry date were valued on a quantum meruit basis. Interestingly, the valuation was assessed primarily by reference to the rates and prices in the (unsigned) contract.

However, more recently in *Moorgate Capital (Corporate Finance) Ltd v H.I.G European Capital Partners LLP*, a restitutionary claim for payment on a quantum meruit basis was advanced. Moorgate (an adviser on corporate finance and M&A) claimed £1m from HIG (a private equity fund) for services it provided in connection with a corporate acquisition. Moorgate claimed to be entitled to payment pursuant to an oral contract or, in the alternative, by way of quantum meruit on the ground of unjust enrichment for the valuable services that it said it had provided to HIG in connection with the acquisition.

In assessing the claim for unjust enrichment, the court considered the following four questions, identified by Lord Clarke in *Benedetti v Sawiris*:

- Has the defendant been enriched?
- Was the enrichment at the claimant's expense?
- Was the enrichment unjust?
- Are there any defences available to the defendant?

The claim failed. First, the court found that a conversation held between the parties at an evening reception did not amount to a valid contract. Secondly, no “unjust factor” existed that would entitle the claimant to succeed in restitution.

While there are circumstances in which payment for services may be recovered on the basis of a quantum meruit where there is no valid contract (for example, the *EDRC* scenario), this case serves as a useful reminder of the dangers inherent in providing services without a contract in place. In the absence of a contract, there is no general right to payment for requested services. HHJ Keyser QC noted that:

“... proper justification is required for conferring an entitlement to payment on a party who has not contracted to receive payment. It is not the role of the law of unjust enrichment to create for the parties contracts that they never made.”

In the absence of a binding contract, it would appear from *Moorgate Capital* that a successful claim based on quantum meruit will require evidence that both parties at least intend to enter into a formal contract, even if not all the terms (including the contract sum) have yet been agreed. A letter of intent might be a good start.

Practical tips

Back to my client's query. Given the importance of financial certainty for a developer and its contractor, it is never desirable to leave the contract sum "TBC". The parties should always endeavour to agree the key contract terms and enter into a full contract before construction works are commenced. Where this is not feasible, a letter of intent should be put in place, setting out a finite scope of works and the employer's maximum financial liability to the contractor in respect of those works. All efforts should be made to finalise the building contract terms, including the contract sum, before work progresses further, to avoid the uncertain outcomes highlighted in the above cases.

Payment on the basis of a quantum meruit may help those who have found themselves progressing construction works without a contract sum being agreed, but it leaves the valuation of those works uncertain and ripe for dispute.

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