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RESTITUTIONARY *QUANTUM MERUIT* CLAIMS FOR ADDITIONAL PAYMENT IN CONSTRUCTION CONTRACTS

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I. Introduction

1 The Latin expression "*quantum meruit*" means "the amount he deserves" or "what the job is worth"[1] and denotes payment of a reasonable sum for work done where there is no agreement as to how much one is to be paid for that same work.

2 As Prakash J pointed out in *Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim*[2] ("*Rabiah Bee*"), there exist two types of *quantum meruit* claims under common law – first, contractual *quantum meruit*; second, restitutionary *quantum meruit*.

3 The basis for restitutionary *quantum meruit* claims is the law of restitution and unjust enrichment, which is a branch of the law of obligations with relatively recent origins.[3] Remedies in this regard may be controversial, for instance where such claims potentially undermine the existing contractual arrangements between the parties including the agreed allocation of risks.

1 Stephen Furst & Vivian Ramsey, *Keating on Construction Contracts* (Sweet and Maxwell, 11th Ed, 2021) at para 4-031.
2 [2007] 2 SLR(R) 655.
3 See *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [193].

4 Whilst claims for restitutionary *quantum meruit* in construction projects may arise in a number of different ways,[4] the scope of this article will focus exclusively on the availability of restitutionary *quantum meruit* claims for varied work falling outside the scope of original work envisaged under a construction contract, but which do not constitute valid variations under the contract.

II. The law of restitution for unjust enrichment under Singapore law

5 A restitutionary claim in unjust enrichment falls under a distinct and new branch of the law of obligations, which is separate from claims based in contract, tort or equity.[5] It is a cause of action (with restitution as the remedial response) which is made out when there is no civil wrong but a defendant is unjustly enriched at the expense of the plaintiff.[6]

6 The well-settled elements of a restitutionary claim for unjust enrichment require the following conditions to be satisfied:[7]

(a) the defendant has received a benefit or been enriched;

(b) the enrichment is at the expense of the plaintiff;

(c) it is unjust to allow the defendant to retain the benefit; and

(d) there are no defences available to the defendant.

4 See Andrew Skelton, David Robertson & Zoë Bashforth, "Quantum Meruit as a Remedy in Construction Law", paper presented at the 9th International Society of Construction Law Conference 2021 (March 2022) at para 4.

5 Also distinct from claims for restitution for wrongs. See *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [181].

6 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [48].

7 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540 at [110]; *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [125].

7 The Court of Appeal recently held in the case of *Esben Finance Ltd v Wong Hou-Lianq Neil*[8] ("*Esben Finance*") that restitutionary claims for unjust enrichment are not statutorily time-barred under the Limitation Act[9] as such claims do not fall within the ambit of s 6 of the Limitation Act.[10] An urgent call for legislative intervention has been sounded in this regard, but the lacuna remains in the meantime.

III. Restitutionary *quantum meruit* as a potential remedy in construction law

8 Unconstrained by limitation periods, contractors may therefore start to earnestly explore the possibility of pursuing claims for restitutionary *quantum meruit* in cases where the employer can be argued to be unjustly enriched at the contractor's expense for additional works carried out by the contractor. Some circumstances under which an entitlement to a restitutionary *quantum meruit* claim may arise include where anticipated contracts fail to materialise, work was done under a void or unenforceable contract, work was done under contracts subsequently cancelled for repudiation or breach or otherwise under existing contracts discharged by operation of the doctrine of frustration, or where there was work done outside the scope of the contract.[11]

9 The Singapore High Court recently considered restitutionary *quantum meruit* claims in two cases where the subcontractors left their respective project sites without completing the requisite contractual works.

10 In the first case of *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd*[12] ("*Comfort Management*"), the first defendant, OGSP Engineering Pte Ltd ("OGSP"), was the subcontractor to the

8 [2022] 1 SLR 136.
9 Cap 163, 1996 Rev Ed.
10 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [52].
11 See Andrew Skelton, David Robertson & Zoë Bashforth, "Quantum Meruit as a Remedy in Construction Law", paper presented at the 9th International Society of Construction Law Conference 2021 (March 2022) at para 4.
12 [2020] SGHC 165.

plaintiff, Comfort Management Pte Ltd ("Comfort"), for works relating to the air-conditioning ducting system and mechanical ventilation system on the project. Comfort was in turn a subcontractor to Lead Management Engineering & Construction ("Lead"), who was a subcontractor to the main contractor of the project.

11 The subcontract between Comfort and OGSP (the "Comfort Subcontract") was a "back-to-back" lump sum subcontract referencing the upstream subcontract between Comfort and Lead (the "Lead Subcontract").

12 OGSP commenced work in October 2013 but demobilised and withdrew from site on 9 October 2014 – at which time, the contractual works were found not to have been fully completed.

13 OGSP commenced adjudication and obtained an adjudication determination for the sum of $832,020.78 (excluding GST) against Comfort on or around 21 April 2017 (the "AD"). The AD included a sum, $621,828.73, for completed works under the alleged second variation order ("VO 2"). After Comfort paid the amount determined in the AD, it commenced court proceedings against OGSP claiming for, among other things, a return of the moneys paid under the AD, including that relating to VO 2. In relation to the VO 2 works, OGSP counterclaimed the sum of $621,828.73 if the AD is set aside, and alternatively, a quantum meruit in respect of the works actually completed for VO 2.

14 The High Court had to decide on the issues of whether OGSP was entitled to recover on VO 2 and, if so, in what amount?

15 Clause 11 of the Comfort Contract requires written instructions to be given for a valid variation, but there was no such written instruction for VO 2. Vinodh J dismissed OGSP's contractual claim for VO 2 as there was a lack of written instructions to support OGSP's claim under the Comfort Subcontract. He also found that there was no waiver of the aforesaid requirement for a valid variation.

16 However, part payment of VO 2 was allowed under OGSP's restitutionary *quantum meruit* claim.[13] The High Court accepted that OGSP carried out part of VO 2 before withdrawing from site, and the benefit of those works accrued to Comfort as it was paid by Lead for those works, *ie*, Comfort was unjustly enriched at OGSP's expense as the additional VO 2 works were partially completed.

17 In valuing OGSP's *quantum meruit* claim, the High Court considered the scope and value of VO 2, and the extent to which the VO 2 works were completed by OGSP. Unfortunately, the evidence in this regard was unsatisfactory, but the High Court eventually allowed OGSP to recover about two-thirds of VO 2 on a *quantum meruit* basis, *ie*, $414,552.

18 In the second case of *Vim Engineering Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd*[14] ("*Vim Engineering*"), the plaintiff, Vim Engineering Pte Ltd ("Vim"), was the subcontractor to the defendant, Deluge Fire Protection (SEA) Pte Ltd ("Deluge"), and Deluge was in turn the subcontractor to Samsung C&T Corporation ("SCT"), the main contractor for the building and construction project.

19 Clause 16 of the subcontract between Vim and Deluge stated that all variation works shall be carried out only with written instructions from Deluge's project manager. However, there were no written instructions from Deluge's project manager which could support Vim's variation claims, and the High Court dismissed Vim's claims under the subcontract accordingly. Vim's assertions of waiver and estoppel in relation to the requirement for written instructions under cl 16 were also not made out on the evidence.

20 In relation to the alternative claim in restitutionary *quantum meruit* pursued by Vim in respect of the additional variation works, it alleged that Deluge received and accepted the

13 See *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2020] SGHC 165 at [129] and [130].

14 [2021] SGHC 63.

variation works, and had been paid for the same by SCT. However, the High Court found that Deluge was not unjustly enriched because there was no evidence that Deluge had received payment from SCT for the variation works claimed by Vim. The High Court also referenced cl 16 of the subcontract, and pointed out that if Vim had in fact performed any variation works, it did so contrary to cl 16. Vim's *quantum meruit* claim was thus dismissed. The High Court was not required to address the interaction between liability (of the lack thereof) in contract and liability in unjust enrichment as no unjust enrichment was found in this case.

21 The circumstances in both cases above involve work allegedly done outside the original scope of the contract, but which did not constitute valid variations under the relevant contracts. It is noteworthy that the High Court considered that the restitutionary *quantum meruit* claims could subsist alongside the contractual claims for the same subject works, and proceeded to consider whether the necessary conditions for such claims were made out.

22 Contractors who fail to comply with formalities under the contract and are contractually disentitled to any additional time or payment for varied works may thus contemplate an attractive (but controversial) remedy by way of restitutionary *quantum meruit*. However, such an approach may sit uncomfortably with the real likelihood of undermining the contractual allocation of risks as agreed between the parties under the contract.

IV. There cannot be a claim in restitution parallel to an inconsistent contractual promise between the parties

23 The observations of Prakash J in *Rabiah Bee* at [123] are apposite as she noted that:

> It is also relevant that there cannot be a claim in *quantum meruit* if there exists a contract for an agreed sum and *there cannot be a claim in restitution parallel to an inconsistent contractual promise between the parties*. [emphasis added]

24 The English Court of Appeal is also keen for claims in unjust enrichment to respect contractual regimes and the risk

allocations as agreed between contracting parties. It was explained simply in the case of *Avonwick Holdings Ltd v Azitio Holdings*[15] that "the claim in unjust enrichment is not allowed to contradict the terms in the contract", although the former is not inferior or subsidiary to a claim in contract. A similar position was reached by the Australian courts in the case of *Trimis v Mina*[16] where it was observed that "[n]o action can be brought for restitution while an inconsistent contractual promise subsists between the parties in relation to the subject matter of the claim".

25 Accordingly, the question of compatibility between the decisions in the two recent High Court cases of *Comfort Management* and *Vim Engineering* and Prakash J's abovementioned observations in *Rabiah Bee* arises.

(a) The contractual promises in both recent High Court cases were similar in that variations would only be considered valid when the contractually stipulated criteria were satisfied, *ie*, written instructions are required (and in the case of *Vim Engineering*, such instructions needed to be issued by specified personnel).

(b) It was held in both cases that the contractual requirements were not met, and there were no valid variations under the respective contracts.

(c) Notwithstanding the above, the High Court proceeded to consider in both instances whether the conditions for a restitutionary *quantum meruit* claim were made out. In the case of *Comfort Management*, such conditions were satisfied and the subcontractor succeeded in its restitutionary *quantum meruit* claim despite failing on its contractual variation claim.

26 Should the High Court have refused to even begin considering the restitutionary *quantum meruit* claims in the light of Prakash J's observations in *Rabiah Bee* that there cannot be a claim in restitution parallel to an inconsistent contractual promise between the parties?

15 [2021] EWCA Civ 1149 at [75].
16 [1999] NSWCA 140 at [54].

27 The authors do not think so. However, in due course, it will be helpful to have a higher court's deliberations on the relevant issues.

28 In the meanwhile, the authors turn to Prakash J's acceptance of the reference to Goff and Jones' *The Law of Restitution*[17] in *Rabiah Bee*, which stated as follows:

> [I]f the innocent party has rendered services or has supplied goods under a contract, which has not been substantially performed and which has been determined by him because of the other party's breach, he may recover the value of the services rendered or the goods supplied, on a quantum meruit or a quantum valebat respectively, rather than sue for damages for loss arising from the breach. The party in breach cannot deny that he has received a benefit. It is said that because the contract is at an end, he cannot keep the innocent party to the contract price.

29 In principle, there is no reason why a claim in restitutionary *quantum meruit* cannot subsist alongside a parallel contractual claim in respect of the same works. Unless there are clear provisions excluding or limiting remedies in unjust enrichment, such restitutionary remedy should not be denied to a party at whose expense the other party was unjustly enriched.

V. Conclusion

30 The current situation affords contractors a glimmer of hope in spite of the lack of compliance with the contractual requirements for a valid variation, but exposes employers, main contractors and other upstream contractors to restitutionary claims for unjust enrichment should there be additional works instructed and carried out beyond the original scope of the contract.

17 Sweet and Maxwell, 5th Ed, 1998 at p 531.