

Quantum Meruit: What Homeowners Need to Know

Quantum meruit is a legal principle that allows builders to be compensated for work completed without an agreement in place. It is based on the idea that someone who has performed work for another person should not be left without compensation, even if there is no formal agreement in place.

In this article, we will explore the principle of quantum meruit and what homeowners need to know to protect themselves from claims.

The Law: Home Building Act

The [Home Building Act](#) expressly provides circumstances where the Builder is not entitled to compensation, save for on a quantum meruit basis. Section 94 of the [Home Building Act 1989 \(NSW\)](#) reads:

1. If a contract of insurance required by section 92 is not in force, in the name of the person who contracted to do the work, in relation to any residential building work done under a contract (the "uninsured work"), the contractor who did the work—

a. is not entitled to damages, or to enforce any other remedy in respect of a breach of the contract committed by any other party to the contract, in relation to that work, and

b. is not entitled to recover money in respect of that work under any other right of action (including a quantum meruit).

1A. Despite section 92(2) and subsection (1), if a court or tribunal considers it just and equitable, the contractor, despite the absence of the required contract of insurance, is entitled to recover money in respect of that work on a quantum meruit basis.

A more common circumstance that prohibits the builder claiming compensation for works performed for on a quantum meruit basis is when the Builder fails to comply with the terms of their home building contract.

This is a screenshot of the NSW HIA Contract variation clause that the Builder must comply with.

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Clause 18. Variations

Variations may change the contract price.

Refer to Clause 40 for Mandatory Conditions.

The builder may ask the owner for evidence of ability to pay for the variation. See Clause 7.2.

- 18.1 A **variation** must be in writing and signed by or on behalf of the **builder** and the **owner**. Either the **owner** or the **builder** may ask for a **variation**.
- 18.2 If the **owner** asks for a **variation**, the **builder** must reply in writing as soon as is reasonable.
- 18.3 The reply is to be either:
- (a) a signed written offer to carry out the **variation** detailing:
 - (i) the work required to carry out the **variation**;
 - (ii) the price of the **variation**; and
 - (iii) any extension of time to the **building period** as a result of carrying out the **variation**; or
 - (b) a refusal to carry out the **variation**. The **builder** does not have to give any reasons for refusing to carry out a **variation**.
- 18.4 If the **owner** does not give to the **builder** signed written acceptance of the **builder's** offer within 5 **working days** of the **builder** giving the reply, the **builder's** offer is deemed to be withdrawn
- 18.5 If the price of a **variation** is not agreed prior to it being carried out that price includes:
- (a) the deduction of the reasonable cost of all deletions from the **building works**; and
 - (b) the addition of the total cost of all extra work plus the **builder's margin** applied to that cost.
- 18.6 The price of a **variation** is due and payable at the next progress payment after it is carried out unless a different time is agreed.
- 18.7 The **owner** must not unreasonably withhold consent to any **variation** which is required for the **building works** to comply with the law or a requirement of any **statutory or other authority**.
- 18.8 The **owner** acknowledges that the colour and grain of timber, granite and other natural materials can vary. The **builder** is to use reasonable endeavours to match the colour or grain of any sample selected by the **owner** but is under no liability if there is a difference and such difference is not a **variation**.

Owner Copy

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This is a screenshot of the NSW Master Builders Association BC4 Contract variation clause that Builders must comply with.

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14. Variations – How to Deal with Changes to the Work

- (a) The works may be varied by such things as:
- (i) execution of additional work;
 - (ii) decreases in or omissions from the works;
 - (iii) changes in the character or quality of any material or work such as may be necessary due to the existence of a latent condition;
 - (iv) changes in the levels, lines, positions or dimensions of any part of the works.
- (b) For the sake of clarity a variation is established by:
- (i) **written** instructions from the **Owner** or the **Owner's** representative; and/or
 - (ii) the supply to the **Builder** of post contract details such as updated or further plans and drawings and /or specifications; and/or
 - (iii) the discovery of an otherwise unknown or latent condition; and/or
 - (iv) an instruction issued by a Relevant Authority under **Clause 12**
- which alters the work done, the work to be done or requires adjustments to an existing situation or the work which was otherwise expected to be done.
- Accordingly a variation may, for example, result from such things as a request from the **Owner**, a choice made by the **Owner**, dealing with latent conditions and complying with the requirements of a Relevant Authority.
- (c) The **Builder** is not obliged to vary the contract works or carry out any extra work unless the **Builder** consents. Such consent will not be unreasonably withheld.
- (d) (i) If the **Builder** agrees to undertake a variation requested or required by the **Owner**, the variation is to be detailed in **writing** and signed by the **Owner** (or the **Owner's** agent) and the **Builder**. Documents detailing the variation, including as appropriate, amended drawings or specifications, become contract documents.
- (ii) The **Builder** may require, prior to the execution of any variation that the **Owner** produce evidence, satisfactory to the **Builder**, of the **Owner's** capacity to pay for the variation.

Builder to Advise Value of Variations

- (e) The **Builder**, within a reasonable time of receipt of instructions to execute a variation (i.e. an instruction signed by the **Owner** or **Owner's** agent), is to notify the **Owner**, in **writing**, of the value of the variation.

Less Work due to a variation

- (f) Where the works are decreased or omitted the cost of the work not now required is to be deducted from the contract price. Cost in this case means the actual cost of labour, subcontractors or materials saved by the

Builder because the work and/or materials is now not required. No other deduction is required by reason of the work or materials being decreased or omitted.

Additional work due to a variation

- (g) Where the work to be done is increased, the cost of the extra work is to be added to the Contract Price. The **Builder** can choose when and how often to claim payment for variation work and is not required to wait until the next stage claim.
- (h) Where a price has not been previously agreed for additional work, the **Builder** may proceed with the variation work and the price to be paid for the work will be the **cost** as calculated in accordance with **Clause 14(f)** below, plus the allowance specified in **Schedule 2 item 1**.
- (i) The cost referred to in **Clause 14(h)** above, unless otherwise agreed, will be calculated as follows:
- (i) for work, including supervision and administration, by the **Builder** or **Builder's** employees, the rates for such labour are those set out in Item **Schedule 2 item 2**;
 - (ii) where the work or some part of it is executed by a sub-contractor, the cost to be paid under **Clause 14(h)** above is the amount properly paid or payable to the sub-contractor which will be established by provision of a proper tax invoice from the sub-contractor engaged to do the extra work.
 - (iii) the price for materials is the cost of the materials to the **Builder**.
 - (iv) Any other cost paid by the **Builder** to any third party that is necessary for the carrying out of the variation works.

All Directions Concerning Work are to be Given to the Builder

- (i) Neither the **Owner** nor any duly appointed representative will give or be entitled to give at any time directions to the **Builder's** workers or sub-contractors concerning the works or any part thereof. All instructions are to be given to the **Builder** and are to be in **writing**.

15. Allowance for Prime Cost Items and Provisional Sum Items and Work

- (a) A prime cost allowance for the cost to the **Builder** of a prime cost item and a provisional sum item, including a prime cost item for the supply of materials and a provisional sum item for the supply of labour, shall be included in the contract price of the works.
- (b) A prime cost allowance for the cost to the **Builder** of a prime cost item, including the supply of materials, shall be included in the contract price of the works.
- (c) A provisional sum allowance for the cost to the **Builder** of a provisional sum item, including the supply of labour, shall be included in the contract price of the works.
- (d) Details of prime cost items and allowances for provisional sum items and work, shall be set out in the table of allowances in **Schedule 2 Item 15**. The contract price of **Schedule 2 Item 15** shall be included in the contract price of the works.

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The NCAT has discussed the principles of quantum meruit in many recent cases including:

- Suecha Pty Ltd v VSD Glass & Timber Pty Ltd [2020] NSWCATAP 170;
- Woodward v Warwick Green Building Pty Ltd [2021] NSWCATAP 210;
- Rekrut and Scott v Champion Homes Sales Pty Ltd [2017] NSWCATAP 187;
- Roude v Helwani [2020] NSWCA 310;
- Rice v JR and SD Farmer t/as Urban Bespoke Homes [2020] NSWCATAP 208; and
- Paraiso v CBS Build Pty Ltd [2020] NSWSC 190.

The Principal and Elements of Quantum Meruit

Senior Member Thode in *Durastyle Homes Pty Ltd v Gosling; Gosling v Durastyle Homes Pty Ltd* [2022] NSWCATCD 106 expressed the principles and elements of quantum meruit succinctly as follows.

"88. If the quantum meruit claim involves an unenforceable variation, the builder must prove the homeowner had actual knowledge of the additional works; that the works were outside the contract; and the builder expected to be paid for the additional work.

89. In respect of all quantum meruit claims, the onus is on the builder to establish the reasonable value of the work that performed and accepted by the homeowner. This is a question of fact. Relevant evidence will include any invoices/receipts of the builder; time sheets of the builder; rates under the contract for labour and materials; and expert evidence that analyses the work actually performed and the reasonable cost of such work.

90. The amount recoverable in a quantum meruit claim cannot exceed the amount that would have been payable under the contract for that component of the work."

What is Quantum Meruit?

Quantum meruit is a Latin phrase that translates to "what one has earned" or "what the job is worth". In a legal context, it refers to a claim made by a builder for compensation for work completed without a formal agreement in place. This can happen when a contract is terminated before completion, or if there was no contract in place to begin with.

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The principle of quantum meruit is based on the idea that builders should not be left without compensation if they have performed work for a homeowner. The courts will take into account a number of factors to determine the fair and reasonable value of the work performed, including the cost of materials, the cost of labour, and the complexity of the work.

Mann v Patterson Constructions Pty Ltd

The most recent High Court authority where quantum meruit was at issue is Mann v Patterson Constructions Pty Ltd. In this case, the homeowners, Peter and Angela Mann, engaged Patterson Constructions to build double-storey townhouses on their property. Before the completion of the second townhouse, the Manns asserted that the builder had repudiated the contract and terminated the contract. The builder then claimed compensation for the fair and reasonable value of the work performed, including 42 variations directed by the Manns.

The case went through several rounds of appeals, with the builders arguing that they were entitled to compensation on a quantum meruit basis. The homeowners argued that the builders were not entitled to such compensation, as they had a contractual claim available.

In the end, the High Court found that the builders were not entitled to claim compensation on a quantum meruit basis, as they had accrued a right to payment under the contract. However, the Court did note that there may be circumstances where it is appropriate for a builder to recover an amount greater than the contract price, but this would be in exceptional cases only.

The Onus is on the Builder

It is important to note that the onus is on the builder to establish their entitlement to compensation under quantum meruit. At a minimum, the Builder must prove that they have performed work, that the work has been accepted by the homeowner, and that the homeowner has been unjustly enriched by the work.

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Protecting Yourself as a Homeowner

As a homeowner, there are steps you can take to manage your risk and defend yourself against a quantum meruit claim from a builder. Here are a few key things to keep in mind:

- Have a written contract in place. This will clearly outline the scope of work, the cost, and the payment schedule.
- Keep detailed records of any variations or changes to the scope of work. Owners should not consent to any change to the contract works other than as provided by the terms of the contract. This will help to establish whether the builder has a valid claim for additional compensation.
- Keep records of any payments made to the builder. This will help to establish whether the builder has already been paid for the work in question.
- Seek legal advice if you are unsure of your rights or if you are facing a quantum meruit claim from a builder.
- The moment you identify that the Builder has deviated from the contract, you should express clearly and consistently in writing your objection. You should require the Builder to remedy the non-conformance with the contract.
- Owners should be mindful that emails and text messages along with evidence of costs incurred may be sufficient evidence for the Builder to establish their quantum meruit entitlement.

Legal Advice

Homeowners should engage a construction lawyer if they have received a claim for works which is not consistent with the terms of the contract.

[Contracts Specialist](#) is a specialist building and construction law firm based in Sydney. If you are a homeowner and have received claims for payment beyond the contract or quantum meruit claims then call John Dela Cruz for a free 15 minutes consultation.

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