

***QUANTUM MERUIT* IN CONSTRUCTION CONTRACTS**

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QUANTUM MERUIT IN CONSTRUCTION CONTRACTS

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*Special thanks to
My family for their love and support*

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ABSTRACT

Quantum meruit claims can arise in both contract and restitution. It is a claim for the reasonable sum for the work done. In the case of ***Renard Construction (ME) Pty Ltd v Minister for Public Works***[1992] 26 NSWLR 234, Meagher JA held that the contractor was entitled to recover a *quantum meruit* that should be quantified on reasonable remuneration basis, not value of the work basis for work performed. In addition, the contract price did not represent a ceiling to the contractor's remedy. Similarly, in the case of ***Murdock v Kennedy*** [1952] 69 WN (NSW) 191, Street CJ. held that the contract was not conclusive evidence, though it may be strong evidence. By referring to these cases, the courts do not seem to be uniformed in devising formula to for quantifying the reasonable amount for *quantum meruit*. Hence, this study intends to identify the methods of assessment used to calculate *quantum meruit* claim. The analysis was carried out by referring to *quantum meruit* cases in Malaysia construction contract. From the study, there are four methods of assessment used based on the value of work basis which are value of work done plus unfixd material, the cost of labours, materials and others plus percentage profit, the value of work done plus unfixd material less remedial cost and LAD and the balance of progress claim. While, the method of assessment used based on the reasonable remuneration basis is the average of remuneration multiply with duration of work performed. This study also found that quantification of *quantum meruit* based on reasonable remuneration basis only involves the pre-contract stage as the scope of assessment.

ABSTRAK

Tuntutan *quantum meruit* boleh berbangkit daripada isu kontrak atau pembayaran kembali (restitution). Ia merupakan tuntutan sejumlah wang yang munasabah bagi kerja-kerja yang telah dilakukan. Dalam kes *Renard Construction (ME) Pty Ltd v Minister for Public Works*[1992] 26 NSWLR 234, Meagher JA memutuskan bahawa pihak kontraktor layak untuk mendapat semula sejumlah wang berdasarkan konsep *quantum meruit* yang mana dikira berdasarkan upah yang munasabah dan bukannya berdasarkan nilai kerja bagi kerja-kerja yang telah dilaksanakan. Disamping itu, harga kontrak tidak mengehendkan jumlah pembayaran kembali kepada kontraktor. Begitu juga dalam kes *Murdock v Kennedy* [1952] 69 WN (NSW) 191, Street CJ memutuskan bahawa kontrak bukannya bukti yang muktamad, walaupun ia mungkin bukti yang meyakinkan. Berdasarkan kepada kes-kes ini, makhamah seolah-olah tidak seragam dalam menghasilkan formula bagi mengira sejumlah wang yang munasabah bagi tuntutan *quantum meruit*. Dengan itu, kajian dijalankan untuk mengenalpasti cara-cara penilaian yang digunakan bagi mengira tuntutan *quantum meruit*. Analisis ini dijalankan dengan merujuk kepada kes-kes yang melibatkan *quantum meruit* dalam kontrak pembinaan di Malaysia. Menurut kajian, terdapat empat cara untuk bagi mengira tuntutan *quantum meruit* berdasarkan nilai kerja. Cara-cara tersebut terdiri daripada jumlah nilai kerja ditambah barang tidak terpasang, kos buruh, barangan, dan lain-lain ditambah peratus keuntungan, jumlah nilai kerja dan barang tidak terpasang ditolak kos pembaikan dan kelewatan, dan baki tuntutan kemajuan kerja. Berikutnya, bagi penilaian berdasarkan upah yang munasabah adalah purata upah didarab dengan tempoh masa sepanjang kerja dilaksanakan. Kajian ini juga menemui bahawa pengiraan berdasarkan upah yang munasabah hanya melibatkan peringkat pra-kontrak sebagai skop penilaian.

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CHAPTER 1

INTRODUCTION

1.1 Background of Research

Contract is defined in various ways. A contract has been defined by Beatson in *Anson's Law of Contract* as 'a legally binding agreement made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others'.¹ Section 2(h) of Contract Act 1950 defines contract as an agreement enforceable by law. Generally, a contract refers to an agreement between two or more parties that sets the rights and duties which is enforceable by law.

The nucleus of all contracts is an agreement.² However, in order to be legally binding, an agreement must satisfy certain requirements such as an intention to create legal relations, certainty, capacity to contract and consideration provided by each parties.³ Besides, the consideration remains a fundamental requirement for the

¹ Richards, P. (2004). *Law Of Contract*. (6th ed.). Essex: Pearson Education Limited p9.

² Wu, M.A, and Beatrix, V. (1991). *The Commercial Law Of Malaysia*. (2nd ed.). Selangor. Pearson Malaysia Sdn. Bhd. p6.

³ Elliott, C., and Quinn, F. (2007). *Contract Law*. (6th ed.). Essex: Pearson Education Limited. p10.

formation of legally enforceable contract.⁴ Section 10(1) of Contract Act 1950 stated that an agreement must be made 'by the free consent of parties competent to contract, for lawful consideration and with lawful object'. In brief, there are two essential components to be legally binding which are the agreement and consideration.

The consideration may involve the performance of some act in return to the promise.⁵ This consideration component of the contract brings up several other provisions that should be addressed such as obligations and conditions of the contract which explained clearly the actions needed from each party to fulfil the terms of the contracts as well as liabilities and performance and payment terms in the contract.⁶ In addition to the contents of a contract one has also to assess what effect a breach of a particular term will have on the ability of the parties to terminate the contract or to claim for damages.⁷ In summary, the contract contains the provision regarding the performance, terms, conditions, obligations, liability, payment terms and breach of contract.

One of the provisions contain in contract relates to breach of contract. A breach of contract is defined by Curzon in *A Dictionary of Law* as 'the refusal or failure by a party to contract to fulfil an obligation imposed on him under that contract'.⁸ Breach of one's contract entitles remedies.⁹ In brief, the innocent party entitles certain remedies in the event of failure to act or perform under the terms of agreement.¹⁰

⁴ Willson, J.F. (1957). *Principles Of The Law Of Contract*. London: Sweet & Maxwell Limited. p41.

⁵ *Ibid*

⁶ Anon. (2010). Available from: <http://www.allbusiness.com/legal/contracts-agreements/731-1.html> assessed on 5th May 2011

⁷ Richards, P. (2004). *op.cit.* p105.

⁸ Harban, S. (2002). *Engineering and Construction Contracts Management-Law and Principles*. Kuala Lumpur: LexisNexis. p175.

⁹ Orhan Seyri Ari, *The Law of Contract Of England: Law of Contract Summarised*. Available at <http://www.geocities.com/cntrct/> assessed on 10 May 2011.

¹⁰ Epstein, A. (2008). *Contract Law Fundamentals*. New Jersey: Pearson Prentice Hall. p143.

Damages represent the most common remedies claimed by an innocent party for breach of contract.¹¹ That is the innocent party is entitled to claim for a financial amount which would compensate him for the loss incurred as a result of the breach committed by the other party.¹² However, only certain types of serious breaches will entitle an innocent party not only to a claim for damages but also to be discharged from all future obligations. Under common law, the right of an innocent party to terminate the contract and to treat the contract as discharged arises when there are repudiated and a fundamental breach.¹³ Generally, in the event of breach, the innocent party may bring the contract to an end if the breach is serious and entitled to claim financial amount as remedy.

Actions for damages and in restitution involve claiming compensation.¹⁴ A claim for damages is a claim for compensation for financial loss.¹⁵ In contrast, a claim under restitution is compensation for value of the goods or services¹⁶ rendered at other's request.¹⁷ Section 71 of Contract Act 1950 stated that:

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.

A *quantum meruit* is based on restitution principles. A *quantum meruit* claim is defined by Beatson in *Anson's Law of Contract* as a claim arising 'where goods are supplied or services rendered by one person to another in circumstances which entitle him to be recompensed by that other by receiving a reasonable price or

¹¹ Harban, S. (2002). *op.cit.* p200.

¹² Chow, K.F. (2004). *Law and Practice of Construction Contracts*. (3rd ed.). Singapore: Sweet & Maxwell Asia. p126.

¹³ Cheong, M.F. (2007). *Civil Remedies in Malaysia*. Selangor: Sweet & Maxwell Asia. p9.

¹⁴ Beale, H. (1980) *Remedies for Breach of Contract*. London: Sweet & Maxwell Limited. p2.

¹⁵ Ashworth, A. (2006). *Contractual Procedures In Construction Industry*. (5th ed.). Essex: Pearson Education Limited. p33.

¹⁶ Epstein, A. (2008). *op.cit.* p144.

¹⁷ Elliott, C. and Quinn, F. (2007). *op.cit.* p328.

remuneration'.¹⁸ It utilises the principle of 'reasonableness' with fair adjust or allowance, fair market rate or fair valuation for the work performed.¹⁹ The innocent party is entitled to be paid 'what he deserved' or 'as much as he has earned'.²⁰ In brief, *quantum meruit* is a claim of reasonable sum for the work done.

Claim for *quantum meruit* commonly arises in the construction industry.²¹ The situation which a *quantum meruit* claim is most likely to arise in the construction context are as below:²²

1. Where there is an express undertaking by the employer to pay reasonable sum in return for the services rendered.
2. Where professional or trade services are requested by the employer (for example under letter of intent), but no price is agreed. Here it is implied that reasonable sum will be payable.
3. Where a price fixing clause in a contract fails to operate
4. Where extra work is ordered which falls outside the scope of a variations clause.²³
5. Where an apparent contract under which work is done is in fact void.

Briefly, the *quantum meruit* claim is derived under the contract or restitution or letter of intent. If one party acted in speculation that they are entitled for the

¹⁸ Richards, P. (2004). *op.cit.* p384.

¹⁹ The Entrusty Group. (2007). *What Is A Quantum Meruit Claim*. Available at http://mc2.vicnet.net.au/home/bdps/group_files/Issue_9_June2002.pdf assessed 4th May 2011

²⁰ *Farnsworth v Garrard* [1807] 1 Camp 38, KB; *ERDC Construction Ltd v HM Love & Co* [1994] 70 BLR 67.

²¹ Longley, N. (2006). *Let's Be Reasonable Quantum Meruit and Asian equivalents*. Available at <http://www.tannerdewitt.com/media/publications/quantum-meruit--methods-of-assessment.php> assessed on 5th May 2011.

²² Murdoch, J. and Hughes, W. (2008). *Construction Contracts Law and Management*. (4th ed.). New York: Tylor & Francis. p313

²³ *Sir Lindsay Parkinson & Co Ltd v Commissioners of Works and Public Buildings* [1949] 2 KB 632

payments of the services or 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 or work done executed. This principle applied as per Section 71 of the Contracts Act 1950.

1.2 Problem Statement

Quantum meruit is the term used where the contractor claim reasonable remuneration for work carried out for the owner.²⁴ The *quantum meruit* typically is regarded by contractor 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 *quantum meruit* recovery is all of the reasonable cost of the work.²⁵ The amount recoverable on a *quantum meruit* claim may potentially exceed the amount that would have been recovered if the contract had been fully performed.²⁶ Besides, there is no rule of law that the contractually agreed remuneration is the greatest possible remuneration available.²⁷

In the case of *Renard Construction (ME) Pty Ltd v Minister for Public Works*²⁸, the owner wrongfully repudiated the contract which was subsequently terminated by the contractor before completion of the works. *Quantum meruit* was

²⁴ Mondaq Business Briefing. (2009). Article: *Vic Appeal Court Confirms Builder's Right To Claim A Quantum Meruit Where Owner Repudiates Contract*. Available at: <http://www.highbeam.com/doc/1G1-203142526.html> assessed on 4th May 2011

²⁵ Digby, G.J. (2009). *Quantum Meruit: Recent Development*. Available at http://www.mtecc.com.au/uploads/papers/John_Digby_QC_2009_Quantum_Meruit_Paper_10_11_09.pdf assessed on 5th May 2011

²⁶ Chandana, J. (2009). *Dealing with Quantum Meruit Claims in Nutshell*. Available from: http://articlesbase.com/law_articles/dealing-with-quantum-meruit-claims-in-nutshell-1378163.html assessed on 5th May 2011.

²⁷ *Renard Construction (ME) Pty Ltd v Minister for Public Works* [1992] 26 NSWLR 234

²⁸ [1992] 26 NSWLR 234.

calculated in accordance with reasonable remuneration and the contractor was entitled to recover sum AUS\$285,000 for work performed in the construction of two pumping station. The final value of contract was AUS\$209,000. Further, Meagher JA held that the contractor was entitled to recover a *quantum meruit* that should be quantified on reasonable remuneration basis, not value of the work basis for work performed prior to termination, and the contract price did not represent a ceiling to the contractor's remedy.

Similarly, in the case of *Jennings Construction Ltd v QH & M Birt Pty Ltd*²⁹, it was held by the learned Judge Cole that there was no authority which compelled the conclusion that for a claim in restitution under a terminated contract, the contract price represent a constraints upon recovery. Regard could be had to the contract price in determining the reasonable remuneration of the contractor, but it did not produce an obligatory result.³⁰

Accordingly, in *Murdock v Kennedy*³¹, Street CJ. held that the contract was not conclusive evidence, though it may be strong evidence. Therefore it seems that the contract price and rates in the contract may constitute evidence of the reasonableness of sum claimed but they do not act shackle the quantification of *quantum meruit* claim.³²

By referring to these cases, the courts do not seem to be uniformed in devising formula for quantifying the reasonable amount for *quantum meruit*. Therefore, the construction industry player would deliberately eager to know what are the methods being used in calculating *quantum meruit* claim based on reasonable remuneration basis and value of the work basis in Malaysia.

²⁹ [1988] unreported, Supreme Court NSW

³⁰ Bailey, J. (2006). *Repudiation, Termination and Quantum Meruit*. Available at <http://www.scl.org.uk> assessed on 4th May 2011.

³¹ [1952] 69 WN (NSW) 191

³² *Ibid.*

1.3 Objective of Research

Following the issues stated above, this research attempts to:-

1. To identify the methods of assessment used to calculate a *quantum meruit* claim.

1.4 Scope of Research

The study covered Malaysia cases in related to *quantum meruit* and they were restricted to construction contract only.

1.5 Significance of the Research

The significant of the research is to give an insight of the method of assessment used to calculate *quantum meruit* claim. It may help the players in the construction industry to have more complete understanding on the method used in this type of claim. Furthermore, it can be a guideline to the innocent party whether to choose to claim damages under the contract or to bring legal action to recover his work done under *quantum meruit*.

1.6 Research Methodology

In order to achieve the research objective, a systematic method in conducting this research has been organized. Basically, this research methodology was inclusive of four major stages. Stage 1: initial study and finding the research topic, objective, scope and outline; Stage 2: collecting data and research design; Stage 3: analyzing and interpreting data and Stage 4: writing-up. Figure 1 shows the flow chart of the research process and the methods of approach used for this research.

1.6.1 1st Stage: Initial Study and Finding Research Topic, Objective, Scope and Outline

First stage of research was about initial study. It involved the process to identify the area of study by discussion with lecturers and friends, and some initial literature review to get research issues. After this, research topic and the objective were then determined. Further studies have been done to make out the research scope and outline as well.

1.6.2 2nd Stage: Collecting Data and Research Design

Second stage of research was the data collection stage. In this stage, relevant data and information were collected. The relevant data were collected from reference books, journals, seminar papers, articles, related website, etc. All collected data and information were recorded systematically. Sources of secondary data

consist of Acts, reference books, articles, seminar papers and relevant websites such as LexisNexis database and Cljlaw website. These sources are useful and essential in completing the chapter on literature review.

(a) Books

Books on the subject of *quantum meruit* in construction contract and damages were read to gain in depth knowledge regarding the research field.

(b) Seminar Papers and Articles

Seminar papers and articles were the other sources referred to besides the reference books.

(c) Acts, Statutes, Legislations and Rules

Act was also one of the important sources being referred in order to complete the chapter on literature review. Act used and referred in this research was Contract Act 1950.

1.6.3 3rd Stage: Analyzing and Interpreting Data

Third stage of research was analysis phase. All the collected data were arranged, interpreted and analyzed. All the analyzed data were then rearranged for the writing purposes. This stage has streamlined the process of writing of the paper.

1.6.4 4th Stage: Writing-up

Fourth stage of research was the writing up stage. In this stage, the author has reviewed on the whole process of the study with the intention to identify whether the research objective has been achieved. Further research has been suggested after presenting the research findings, recommendations and limitations of the study. The conclusion and recommendations were made on the findings during the analysis stage.

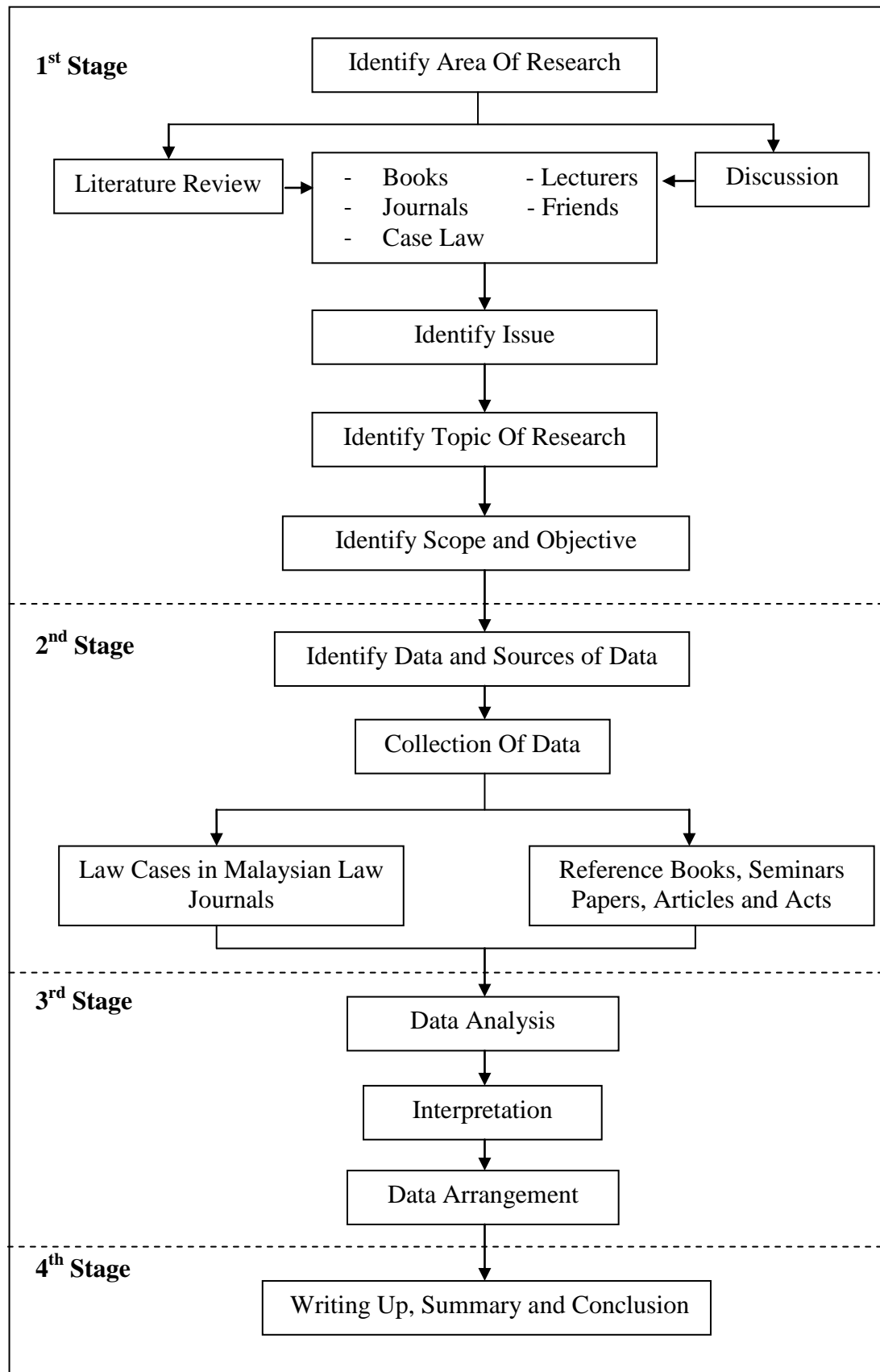


Figure 1: Research Process and Methods of Approach

1.7 Structure of Research

This dissertation is divided into five (5) chapters and each chapter covered different scope of studies. The outlines for each chapter are as follows:

1.7.1 Chapter 1

First Chapter is basically an introduction on the topics, problem statement, objectives, scope, significance of research, research methodology and outline of structure of research.

1.7.2 Chapter 2

Second Chapter is basically literature review about damages including the principles of damages, compensatory nature of damages, limitation on awards of damages, principles of assessment of damages and burden proof of damages.

1.7.3 Chapter 3

Third chapter is basically literature review about *quantum meruit* including meaning and nature of *quantum meruit*, circumstances entitlement of *quantum meruit*, conditions to claim *quantum meruit*, method assessment of *quantum meruit* and issues related to *quantum meruit*.

1.7.4 Chapter 4

Forth chapter is basically focusing on the cases review. Analysis conducted to identity what are the methods of assessment used to calculate *quantum meruit* claim.

1.7.5 Chapter 5

Fifth chapter comprises of the discussion on finding and interpretation of the data collected, conclusion and recommendation. The findings and analysis, conclusion and recommendation are utilized in order to answer the objective of the research.

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