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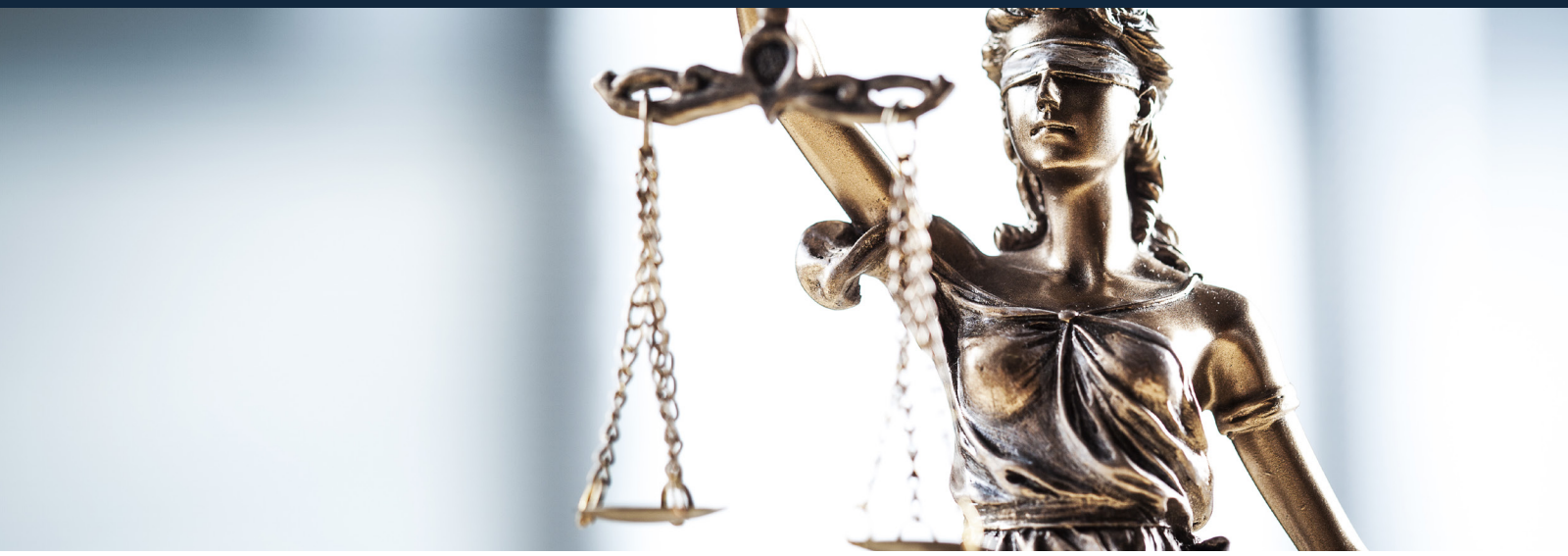

"Hey Mann, is your building contract kaput?" High Court determines that a contract price places a ceiling on a claim for *quantum meruit*

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In some circumstances a builder runs the risk of not being paid for work performed.

Such circumstances include where the builder's right to payment has not yet accrued under a building contract and:

- building contract is unenforceable (e.g. for failure to comply with a statutory regulation);
- building contract is enforceable, but has been terminated as a result of the repudiation of one of the parties; or
- building work is performed outside of the scope of the building contract (e.g. work performed as an 'informal' variation – which is not recorded in writing as required by the contract).

A builder, whilst unable to recover damages under the building contract can recover in restitution as a *quantum meruit* (a reasonable sum of money paid for work done). This is a remedy which ensures, in a building context, that an owner is not "unjustly" enriched for building works performed, when a builder's contractual right to payment was never enforceable or is no longer able to be enforced.

The established position in Australia has been that a builder may recover more for a *quantum meruit* than the specified contract price. This has been a controversial issue for some time and has been described as an outdated legal position which wrongly awards a builder an amount more than which the parties agreed.

However, on 9 October 2019 the High Court of Australia held in *Mann v Paterson Constructions Pty Ltd* that a price agreed under a building contract places a ceiling on the amount recoverable under a *quantum meruit.*

What was the issue?

A dispute arose under a building contract. The owner refused to pay certain invoices rendered by the builder. The builder terminated the building contract on the basis that the owner had repudiated the contract.

The builder sued the owner and successfully recovered the amount of $660,526.41 in the Victorian Civil and Administrative Tribunal (**VCAT**) as a *quantum meruit.*

In succeeding in this claim for a *quantum meruit*, the builder had recovered an amount considerably more than it would have expected to recover had the claim been confined to the building contract.

No ceiling?

The owners appealed the decision, on a ground (among others) that VCAT had failed to take into account the contract price in assessing the *quantum meruit* award. The Victoria Court of Appeal dismissed the owner's appeal and held that:

- a contract price (or a specified part thereof) does not impose a ceiling on a *quantum meruit* claim;
- a contract price may provide a guide of the reasonableness of the *quantum meruit* claim;
- the proper approach is to ascertain the fair and reasonable value of the work performed and measure the benefit of the value conferred; and
- *quantum meruit* is valued with the benefit of hindsight and the parties' expectations as to future events are not relevant.[1]

What did the High Court decide?

The owners successfully appealed the Victoria Court of Appeal's decision to the High Court.

The High Court held (per Nettle, Gordon and Edelman JJ, Gageler J agreeing) that in these circumstances it was not appropriate for the builder to recover more in *quantum meruit*, than it would have expected under the contract.

> *"The contract price reflects the parties' agreed allocation of risk. Termination of the contract provides no reason to disrespect that allocation."* per Nettle, Gordon and Edelman JJ at [205]

The High Court gave weight to the general principle that where a contract is terminated, the contract will continue to apply to acts done up until the point of termination. The High Court could not in its reasoning justify why the agreed contract price should no longer apply.[2] Both parties had bargained and relied on that price. In circumstances where a contract price exists, the High Court rejected the longstanding position in Australia that a *quantum meruit* should be calculated primarily upon the basis of an objective value of the work performed.

More specifically, the High Court found that different circumstances will prescribe how a claim of *quantum meruit* should be calculated, such as where:

- **a contract is "unenforceable"**: the parties can use the contract price as evidence of the value of the services rendered to an owner, rather than as a strict ceiling. However, the High Court left open a possibility by which a party to an unenforceable contract could use the contract price as a ceiling in the amount claimed for a *quantum meruit*. An enquiry into why the contract became unenforceable may be a relevant consideration.[3]
- **a contract (*with* a contract price or rate) is terminated**: the prima facie position is that a

builder should not be awarded a greater sum than that of the price specified in the contract.[4] There are however exceptional circumstances in which it would be unconscionable to confine a builder to the contract price (for example, where the owner's continuing breaches rendered the contract unprofitable).[5]

- **a contract (*without* a contract price or rate) is terminated**: the value of the claim should be assessed by an objective price, supported by evidence of costs common for similar works under the same market conditions.[6]

What does this mean practically?

Builders under a *quantum meruit* claim are now unable to rely on a terminated contract to receive more than the contract price for building works they have carried out.

Recovering or defending a claim in a *quantum meruit* is complicated. If you find yourself in a building dispute, you should seek legal advice immediately.

If you would like further information on terminating a building contract, please read our previous article "Home and Hosed? Tips for terminating residential building contracts".

Should you wish to discuss any matters arising out of this article, please contact:

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[1] *Mann v Paterson Constructions Pty Ltd [2018] VSCA 231, [46], citing Sopov (2009) 24 VR 510, 518*
[2] *Mann v Paterson Constructions Pty Ltd [2019] HCA 32, per Nettle, Gordon and Edelman JJ at [204]*
[3] *Ibid. per Nettle, Gordon and Edelman JJ at [204] and Gageler at [100]*
[4] *Ibid. per Nettle, Gordon and Edelman JJ at [217] and Gageler at [105]*
[5] *Ibid. per Nettle, Gordon and Edelman JJ at [216]*
[6] *Ibid. per Nettle, Gordon and Edelman JJ at [203]*