



No more 'get out of jail cards' for contractors

High Court winds back the scope of quantum meruit claims under terminated contracts

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Commonly claimed as an alternative remedy to damages under a contract terminated for breach or repudiation, a *quantum meruit* claim comes with the potential to generate a windfall for contractors that have underpriced their work by allowing them to calculate the value of the work performed by reference to the actual cost of the work, rather than the agreed contract price. The availability of a *quantum meruit* claim - Latin for "the amount he deserved" or "what the job is worth" - has long been the subject of heated debate, in particular for its lack of regard for commercial bargain, to the advantage of contractors.

The High Court's recent decision in *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 has narrowly missed the opportunity to abolish the alternative remedy, as proposed by three of the seven High Court judges. Instead, the majority determined that the alternative remedy should remain, but that it should only apply to work performed for which a contractual right to payment has not yet accrued, and the value of that work should be determined by reference to the agreed contract price.

In short, the High Court decided:

- Termination of a contract for breach or repudiation does not render the contract void *ab initio* (i.e. as if it was never created or valid to begin with). Contractual rights and obligations accrued in relation to work performed prior to termination survive and exclude the operation of *quantum meruit* as an alternative remedy;
- Accordingly, if the work performed by the contractor is work for which the contractor became entitled to payment under the contract prior to its termination, the contractor's entitlement to that payment will survive and there is no place for any alternative remedy;
- However, if the work performed by the contractor is work for which the contractor had not become entitled to payment under the contract at the time of termination because, for example:
 - the contract provides that the contractor only becomes entitled to payment of the contract price when it completes the whole of the work required under the contract, or
 - the contract provides for milestone payments which only become payable upon completion of the relevant milestone, and the work performed relates to a milestone which was only partially completed; or
 - the contract provides for monthly progress payments and the contract is terminated before the date on which the contractor is permitted to submit a payment claim in respect of the work,

then the contractor will be entitled to claim an amount representing the value of the work by way of a *quantum meruit* claim, as an alternative to claiming damages for loss suffered by the contractor in consequence of the termination of the contract; and

- Where the contractor elects to bring a *quantum meruit* claim, the amount recoverable will be limited by reference to the agreed contract price.

Implications for the construction industry

Quantum meruit claims were considered the "holy grail" of contractor claims, because they offered a contractor who has underpriced work and is facing a loss if the contract is fulfilled an opportunity to claim all of its costs, plus a reasonable profit margin, if it could point to conduct by the other party that amounts to breach of the contract that entitles the contractor to terminate, or that displays an unwillingness or an inability to render substantial performance of the contract. They were akin to a "get out of jail card".

But such claims will now be far less attractive to contractors, as they can no longer be made in respect of work for which a contractual right to payment under the contract has accrued. Further, where they can be made - i.e. in respect of work for which a contractual right to payment has not accrued - the amount which can be recovered will be limited to the portion of the agreed contract price that is referable to the relevant work.

Project owners will also want to reconsider the use of provisions that suggest the contractor's obligation to build the works is an 'entire obligation' i.e an obligation that only creates an entitlement to payment when the whole of the works have been completed or that any progress or interim payments are "payment on account" of the contract price that is only payable upon fulfillment of the entire obligation, and therefore repayable if the entire obligation is not fulfilled. Whilst the use of entire obligation provisions may give the owner the ability to assert that it owes nothing under the contract unless and until the whole of the works have been completed, they also enable the contractor to pursue a *quantum meruit* claim in respect of work performed in partial completion of an entire obligation. Entire obligation and "payment on account" drafting is also at odds with the industry's understanding of the progress payment or milestone payment regimes commonly found in Australian construction contracts, so it is no surprise that some members of the High Court found the argument that the contractor was not entitled to any unconditional payment unless and until the whole of the work is completed to be 'artificial'.

The High Court's decision also leaves open the sometimes difficult question of how a contract price is to be apportioned in practice for the purposes of valuing a *quantum meruit* claim. Not surprisingly, one judge stated: "[i]ssues concerning the identification and appropriate method of apportionment of the contract price are best left to be addressed on a case by case basis if and when they arise". Another three similarly observed that difficult questions arise as to: "apportionment of the contract price, such as where performance of a small part of the entire obligation is the most valuable part of the contractor's work"; and "identifying the contract price, such as where the expected benefits to the contractor include not only payments of money but also the value of promises or releases". Accordingly, the valuation of a *quantum meruit* claim is likely to provide a fertile ground for dispute.

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