LEVEL

TWENTY SEVEN

CHAMBERS

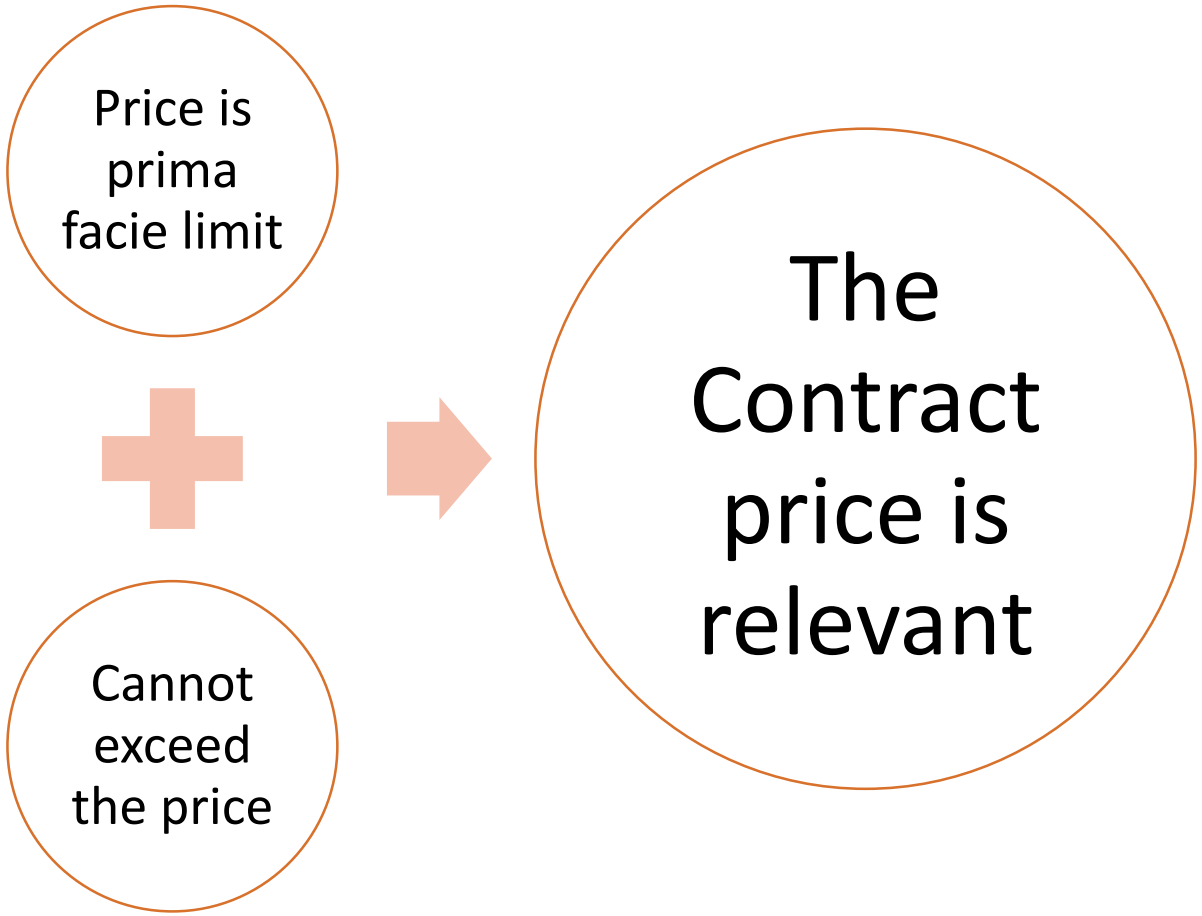
LEVEL TWENTY SEVEN CHAMBERS

Quantum meruit claims following the High Court's decision in *Mann v Paterson Constructions Pty Ltd*

Sean Russell

>> The Majority's Answer

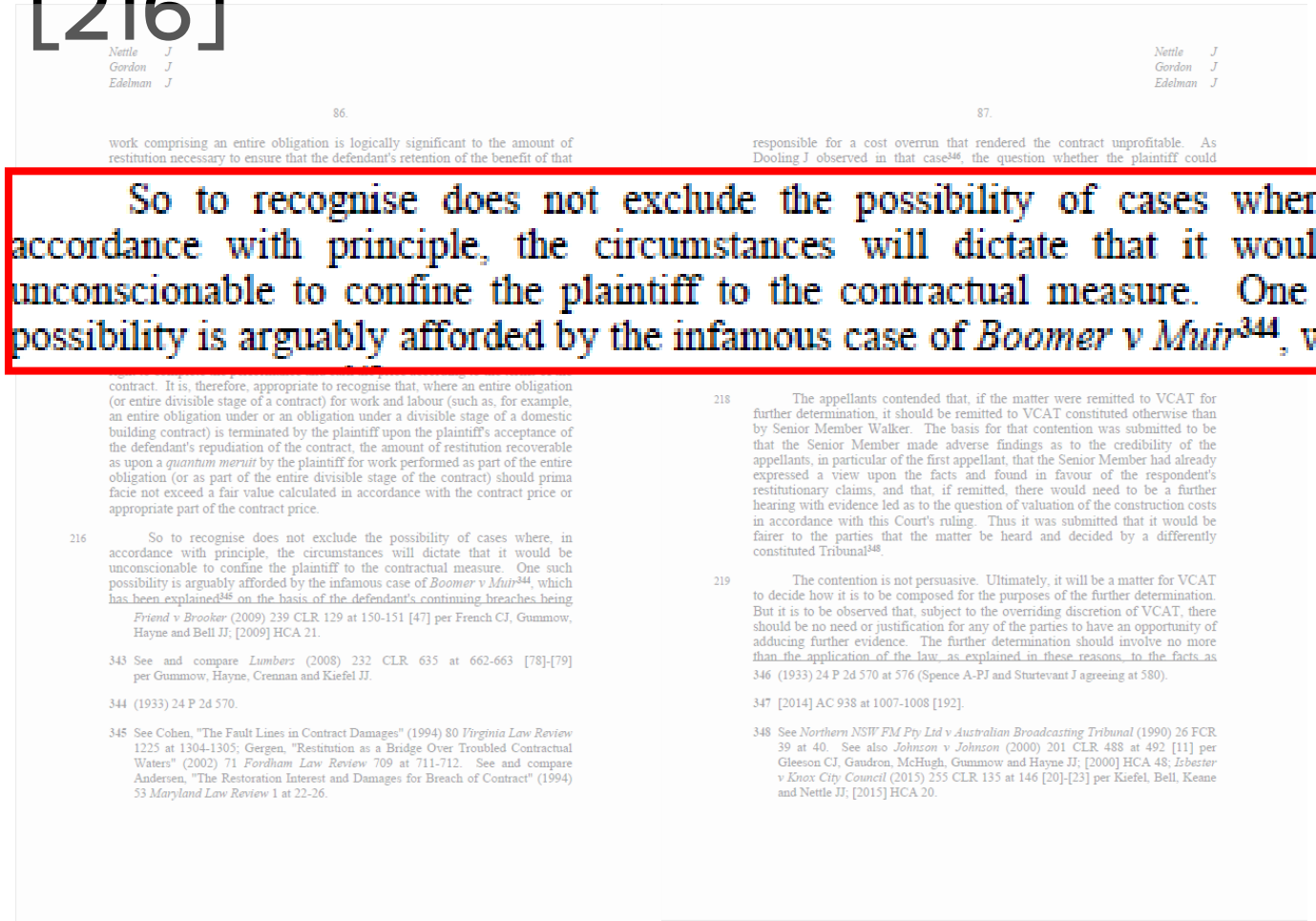
>> Slightly different approaches



>> Nettle, Gordon and Edelman at [215]-[216]

adopt a similar approach. It is consistent with the Australian understanding of restitutionary remedies that a contract, although discharged, should inform the content of the defendant's obligation in conscience to make restitution where the failed basis upon which the work and labour was performed was the contractor's right to complete the performance and earn the price according to the terms of the contract. It is, therefore, appropriate to recognise that, where an entire obligation (or entire divisible stage of a contract) for work and labour (such as, for example, an entire obligation under or an obligation under a divisible stage of a domestic building contract) is terminated by the plaintiff upon the plaintiff's acceptance of the defendant's repudiation of the contract, the amount of restitution recoverable as upon a *quantum meruit* by the plaintiff for work performed as part of the entire obligation (or as part of the entire divisible stage of the contract) should prima facie not exceed a fair value calculated in accordance with the contract price or appropriate part of the contract price.

>> Nettle, Gordon and Edelman at [215]-[216]



Nettle J
Gordon J
Edelman J

86.

work comprising an entire obligation is logically significant to the amount of restitution necessary to ensure that the defendant's retention of the benefit of that

So to recognise does not exclude the possibility of cases where, in accordance with principle, the circumstances will dictate that it would be unconscionable to confine the plaintiff to the contractual measure. One such possibility is arguably afforded by the infamous case of *Boomer v Muir*[344], which

contract. It is, therefore, appropriate to recognise that, where an entire obligation (or entire divisible stage of a contract) for work and labour (such as, for example, an entire obligation under or an obligation under a divisible stage of a domestic building contract) is terminated by the plaintiff upon the plaintiff's acceptance of the defendant's repudiation of the contract, the amount of restitution recoverable as upon a *quantum meruit* by the plaintiff for work performed as part of the entire obligation (or as part of the entire divisible stage of the contract) should prima facie not exceed a fair value calculated in accordance with the contract price or appropriate part of the contract price.

216 So to recognise does not exclude the possibility of cases where, in accordance with principle, the circumstances will dictate that it would be unconscionable to confine the plaintiff to the contractual measure. One such possibility is arguably afforded by the infamous case of *Boomer v Muir*[344], which has been explained[345] on the basis of the defendant's continuing breaches being

Friend v Brooker (2009) 239 CLR 129 at 150-151 [47] per French CJ, Gummow, Hayne and Bell JJ; [2009] HCA 21.

343 See and compare *Lumbers* (2008) 232 CLR 635 at 662-663 [78]-[79] per Gummow, Hayne, Crennan and Kiefel JJ.

344 (1933) 24 P 2d 570.

345 See Cohen, "The Fault Lines in Contract Damages" (1994) 80 *Virginia Law Review* 1225 at 1304-1305; Gergen, "Restitution as a Bridge Over Troubled Contractual Waters" (2002) 71 *Fordham Law Review* 709 at 711-712. See and compare Andersen, "The Restoration Interest and Damages for Breach of Contract" (1994) 53 *Maryland Law Review* 1 at 22-26.

Nettle J
Gordon J
Edelman J

87.

responsible for a cost overrun that rendered the contract unprofitable. As Dooling J observed in that case[346], the question whether the plaintiff could

218 The appellants contended that, if the matter were remitted to VCAT for further determination, it should be remitted to VCAT constituted otherwise than by Senior Member Walker. The basis for that contention was submitted to be that the Senior Member made adverse findings as to the credibility of the appellants, in particular of the first appellant, that the Senior Member had already expressed a view upon the facts and found in favour of the respondent's restitutionary claims, and that, if remitted, there would need to be a further hearing with evidence led as to the question of valuation of the construction costs in accordance with this Court's ruling. Thus it was submitted that it would be fairer to the parties that the matter be heard and decided by a differently constituted Tribunal[348].

219 The contention is not persuasive. Ultimately, it will be a matter for VCAT to decide how it is to be composed for the purposes of the further determination. But it is to be observed that, subject to the overriding discretion of VCAT, there should be no need or justification for any of the parties to have an opportunity of adducing further evidence. The further determination should involve no more than the application of the law, as explained in these reasons, to the facts as

346 (1933) 24 P 2d 570 at 576 (Spence A-PJ and Sturtevant J agreeing at 580).

347 [2014] AC 938 at 1007-1008 [192].

348 See *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal* (1990) 26 FCR 39 at 40. See also *Johnson v Johnson* (2000) 201 CLR 488 at 492 [11] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; [2000] HCA 48; *Isbester v Knox City Council* (2015) 255 CLR 135 at 146 [20]-[23] per Kiefel, Bell, Keane and Nettle JJ; [2015] HCA 20.

>> Gageler at [101]-[102]

Whatever the position in relation to an unenforceable contract, my view is that the contract price should limit a non-contractual *quantum meruit* to recover remuneration for services rendered in part performance of an enforceable contract that is later terminated so as to preclude future recovery of the contractual amount by an action to enforce the contract. To impose that limit on recovery is consistent with the general approach articulated by Cardozo CJ in *Buccini* and with the specific approach accepted in principle by Conolly J in *Slowey v Lodder*.

The common law rule should accordingly be that the amount recoverable on a non-contractual *quantum meruit* as remuneration for services rendered in performance of a contract prior to its termination by acceptance of a repudiation cannot exceed that portion of the contract price as is attributable to those services. Issues 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.

recover the value of work done in the performance of a repudiated contract.

157 (1992) 26 NSWLR 234.

158 [1995] 2 Qd R 350.

159 (2009) 24 VR 510.