THE CONTRACTING REMEDY: *MANN V PATERSON* AND THE CURTAILMENT OF RESTITUTION IN *QUANTUM MERUIT*

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The High Court's decision in Mann v Paterson Constructions Pty Ltd *('*Mann*')*[1] *has severely limited the availability of restitution in* quantum meruit *where a party accepts repudiation of a contract. The High Court has adopted a restrictive approach by reserving* quantum meruit *for work where a contractual right to payment has not accrued. In circumstances where a contractual right to payment* has *accrued, a claim in damages for breach of contract is the appropriate remedy. Valuation of restitution in* quantum meruit *is now, generally, limited to the original contract price. This ensures that parties are no longer able to cherry-pick a claim in damages or restitution. Australia's approach harmonises the primacy-subsidiary nature of the law of contract and restitution by generally limiting restitution to the parties' original contractual allocation of risk.*

INTRODUCTION

The High Court's decision in *Mann* represents a seismic shift in Australia's approach to repudiation and the availability of restitution to recover the value of services provided ('*quantum meruit*') under a contract. Prior to *Mann*, it was understood that a party that accepted repudiation of a contract was able to elect between either damages for breach of contract or restitution in *quantum meruit*.[2] If the aggrieved party elected *quantum meruit*, the value of the remedy sought was unconstrained by the original contract price. This meant that parties had the ability to obtain a windfall particularly where 'the contract … turned out to be under-priced' or where 'the contract has been structured to allocate a higher proportion of the overall contract price to work performed at earlier stages'.[3] Following *Mann*, the High Court has severely limited the availability of restitution in *quantum meruit*. This article critically analyses the way in which the High Court has

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1 (2019) 267 CLR 560 ('*Mann*').

2 *Planché v Colburn* (1831) 8 Bing 14; 131 ER 305 ('*Planché*').

3 *Mann* (n 1) 601 [88] (Gageler J), citing Nicholas Dennys and Robert Clay, *Hudson's Building and Engineering Contracts* (Sweet & Maxwell, 13th ed, 2015) 926 [8-019].

curtailed *quantum meruit* and contextualises Australia's approach amongst the gamut of contractual and restitutionary remedies. Part I provides an overview of the High Court's decision in *Mann*. Part II shows that the ability for an aggrieved party to elect between contractual damages and restitution is now resiled to three distinct situations. Part III addresses the nature of contract law and restitution and shows that restitution will only be available to the extent that it does not undermine contractual obligations. The High Court has made it clear that the availability of restitution is delineated by whether or not a contractual right to payment has accrued or where there is a 'total' failure of consideration. Part IV addresses the fact that the valuation of restitution in *quantum meruit* is now, generally, limited to the original contract price. This position ensures that parties are no longer able to cherry-pick[4] a claim in damages or restitution.[5] A comparative analysis of the United Kingdom and Singapore reveals that Australia now leads the way as one of the narrowest applications of valuation in *quantum meruit*. This approach harmonises the primacy-subsidiary nature of the law of contract and restitution by generally limiting restitution to the parties' original contractual allocation of risk.

PART I

A Mann v Paterson

1 *The Facts*

In *Mann*, the High Court considered the availability of *quantum meruit* for repudiation of a domestic building contract. In March 2014, Angela and Peter Mann ('the Owners') contracted Paterson Constructions Pty Ltd ('the Builder') to build two townhouses under a major domestic building contract in Victoria. Under the contract, the Owners were required to make progress payments to the Builder at six specific stages. Throughout the construction, the Owners requested a number of variations which were carried out by the Builder. In April 2015, before the second townhouse was complete, a dispute emerged between the parties regarding the payment of the variations. On receipt of an invoice for the outstanding variation costs, the Owners repudiated the contract and excluded the Builder from the building site, claiming multiple breaches. In response, the Builder claimed that the Owners' conduct in prohibiting access to the building site amounted to repudiation, which the Builder accepted.

2 *Procedural History*

The Builder commenced proceedings in the Victorian Civil and Administrative Tribunal ('VCAT') against the Owners, seeking damages for breach of contract or restitution for the work, labour and materials provided. VCAT found that the Owners had wrongfully repudiated the contract and that the Builder was entitled to *quantum meruit* for 'an amount that reflects the value of the benefit that it has

4 Rohan Havelock, 'A Taxonomic Approach to Quantum Meruit' (2016) 132 (July) *Law Quarterly Review* 470, 481.

5 See *Ranger v Great Western Railway Co* (1854) 5 HLC 72; 10 ER 824 ('*Ranger*'). See also *Sopov v Kane Constructions Pty Ltd [No 2]* (2009) 24 VR 510, 514 [9]–[11] (Maxwell P, Kellam JA and Whelan AJA) ('*Sopov*'); Havelock (n 4) 481.

conferred upon the Owners, which … is the fair and reasonable value of its work'.[6] VCAT held that, under *quantum meruit*, the amount due was $660,526; whereas the value of damages claimed by the Builder was $446,770. The Owners appealed to the High Court after appeals to the Supreme Court of Victoria and the Victorian Court of Appeal were dismissed.

3 *Issues*

On appeal to the High Court, the critical issue was whether the Owner's repudiation entitled the Builder to elect between damages for breach of contract or restitution in *quantum meruit* for the value of the services rendered. If it was accepted that a claim in *quantum meruit* was available, the second issue was whether the amount recoverable under *quantum meruit* was capped by the original contract price. A third issue which is beyond the scope of this article was whether variations made under s 38 of the *Domestic Building Contracts Act 1995* (Vic) allowed for restitutionary recovery.[7]

4 *Finding*

By a 4:3 majority, the High Court allowed the Builder to elect between damages for breach of contract or restitution in *quantum meruit*. However, in reaching this decision, the High Court limited the availability of an election to circumstances where a contractual right to payment had not accrued. This will typically arise in three circumstances. First, work performed under an entire contract where a single lump sum is payable on completion. Second, work performed under a staged contract where an unconditional right to payment has not arisen. Third, work under an entire contract where a lump sum is payable on completion and where provisional payments are made on account only.[8] In these circumstances, the High Court found that the amount of restitution recoverable will generally be limited to the agreed contract price, or the severable part of the contract price attributable to that work. In all other cases where a contractual right to payment has accrued, the only remedy available for an aggrieved party will be a claim for the price of services rendered by way of an action in debt.

B *What is* Quantum Meruit*?*

Quantum meruit refers to a claim for the 'reasonable payment for services performed for another'.[9] The term translates to 'what one has earned'. *Quantum meruit* can be used in two contexts. The first is a claim that is based in contract for 'compensation for loss in the form of (expected) remuneration'.[10] This may arise where the contract is silent on the rate for the services rendered. The second is a

6 *Paterson Constructions Pty Ltd v Mann* [2016] VCAT 2100, [119] (Senior Member Walker).

7 *Domestic Building Contracts Act 1995* (Vic) s 38.

8 See Wayne Jocic, 'A Tale of Two Townhouses and Quantum Meruit: Mann v Paterson Constructions Pty Ltd', *Opinions on High* (Blog Post, 16 October 2019) <https://blogs.unimelb.edu.au/opinionsonhigh/2019/10/16/jocic-mann/>.

9 Havelock (n 4) 470. See also JH Baker, 'The History of Quasi-Contract in English Law' in WR Cornish et al (eds), *Restitution: Past, Present and Future* (Hart Publishing, 1998) 37, 42–3.

10 Havelock (n 4) 470 (emphasis omitted).

claim for restitution lying within the category of unjust enrichment. Havelock suggests that in both contexts, '"quantum meruit" denotes not the underlying claim itself, but the remedial measure common to both claims: reasonable or market-value remuneration'.[11] In *Mann*, the majority's decision focused on the second application of *quantum meruit*. That is, an aggrieved party's reasonable compensation for the value of services rendered, being a claim for restitution.

PART II

A *Various Causes of Action*

1 *Historical Development*

Historically, where an innocent party terminates a contract for repudiation, that party will be able to elect between damages for breach of contract or restitution for the reasonable value of the services rendered. It is unclear when and on what grounds the availability of these causes of action first emerged. Arguably, the 1831 England and Wales High Court decision of *Planché*[12] first 'spawned' this legal doctrine.[13] In *Planché*, the plaintiff was engaged to write a book for the defendant publisher. However, before the manuscript was delivered, the defendant repudiated the contract. The decision in *Planché* has been heavily criticised for not providing 'a principled explanation' as to the availability of a dual cause of action.[14] In *Mann*, Kiefel CJ, Bell and Keane JJ found that the reasoning in *Planché* was 'not pellucidly clear and may [have] depend[ed] upon a "nineteenth century distinction between 'discharged' and 'rescinded' contracts [that] no longer forms part of the law governing breach of contract"'.[15] Despite these grievances, similar reasoning was applied in *De Bernardy v Harding* ('*De Bernardy*').[16] In *De Bernardy*, Alderson B in the Court of Exchequer found that where a contract is repudiated, the aggrieved party has 'the power … to sue for a breach of [contract], *or* to rescind the contract and sue on a quantum meruit for the work actually done'.[17] Likewise, the Privy Council's decision in *Lodder v Slowey* ('*Lodder*')[18] found that an aggrieved party may 'treat the [repudiated] contract as at an end and sue for work and labour done *instead* of suing for damages for breach of the contract'.[19] In other words, *Lodder* held that repudiation was an appropriate remedy in lieu of damages for breach of contract. Similarly to *Planché*, the decisions in *Lodder* and *De Bernardy* faced heavy criticism, and were regarded by Gageler J in *Mann* as being

11 Ibid.

12 *Planché* (n 2).

13 *Mann* (n 1) 594 [69] (Gageler J).

14 Ibid.

15 Ibid 587 [41] (Kiefel CJ, Bell and Keane JJ), quoting Charles Mitchell and Charlotte Mitchell in '*Planché v Colburn* (1831)', in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart Publishing, 2006) 65, 91.

16 (1853) 8 Ex 822; 155 ER 1586 ('*De Bernardy*').

17 Ibid 1587 (Alderson B) (emphasis added).

18 *Lodder v Slowey* [1904] AC 442 ('*Lodder*').

19 Ibid 453 (Lord Davey for the Court) (emphasis added).

'devoid of reasoning'.[20] More recently, in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* ('*Renard*'),[21] the Court found that 'an innocent party who accepts … repudiation of a contract has the *option* of either suing for damages for breach of contract or suing on a quantum meruit for work done'.[22]

Following *Renard*, strong opposition against the availability of a dual cause of action was expressed by the Victorian Court of Appeal in *Sopov*.[23] In *Sopov*, it was observed that 'there has been a growing chorus of criticism … of the availability of quantum meruit as an alternative to contract damages where a repudiation is accepted'.[24] The Court considered these criticisms to be 'very powerful' and that, had the Court been '[u]nconstrained by authority', it would have rejected the dual cause of action.[25]

2 *Restraining the Various Causes of Action*

The ability to elect various causes of action has survived *Mann*, however, it is now limited to circumstances where a contractual right to payment has not accrued. As above, this will typically arise in three circumstances. First, work performed under an entire contract where a single lump sum is payable on completion. Second, work performed under a staged contract where an unconditional right to payment has not accrued. Third, work under an entire contract where a lump sum is payable on completion and where provisional payments are made on account only.[26] In other words, a claim for damages for breach of contract and restitution in *quantum meruit* are now delineated on the basis of whether or not a contractual right to payment has accrued. This has brought some clarity as to the basis on which a claim in restitution in *quantum meruit* is founded — a basis which has lacked proper enunciation since *Planché*. To understand the reason as to why the various causes of action have survived, it is necessary to analyse the basis on which restitution in *quantum meruit* is grounded. This is addressed in Part III.

20 *Mann* (n 1) 594 [69].

21 (1992) 26 NSWLR 234 ('*Renard*'). See also *Iezzi Constructions Pty Ltd v Watkins Pacific Pty Ltd* [1995] 2 Qd R 250.

22 Renard (n 21) 277 (Meagher JA), quoted in Chris Fenwick, 'Quantum Meruit for Building Services Provided under an Unenforceable or Terminated Contract' [2005] 101 *Australian Construction Law Newsletter* 6, 6 (emphasis added). See also *Segur v Franklin* (1934) SR (NSW) 67, 72 (Jordan CJ).

23 *Sopov* (n 5).

24 Ibid 514 [9] (Maxwell P, Kellam JA and Whelan AJA). See also Peter Mann and Angela Mann, 'Appellants' Submissions', Submission in *Mann v Paterson*, M197/2018, 1 February 2019, 4 ('Mann Submission').

25 *Sopov* (n 5) 514–15 [11] (Maxwell P, Kellam JA and Whelan AJA).

26 See Jocic (n 8).

PART III

A *The Nature of the Law of Contract and Restitution*

1 *Primacy of Contract and Subsidiarity of Restitution*

The law of contract is recognised as the 'primary regulator of rights and remedies'.[27] This is for two reasons. First, to respect the 'voluntary allocation of risk between parties'.[28] As Havelock notes, this is 'consistent with individual autonomy'.[29] Second, to ensure transactional security so that parties can be confident about the integrity of their agreements and that any rights or remedies that arise from those obligations are enforced according to the terms of the contract.[30]

Subsidiary to the law of contract is the law of restitution. Grantham and Rickett describe the nature of restitution as

> subsidiary in the sense that the scope and operation of the principle of unjust enrichment [and restitution generally] are necessarily constrained by the scope and operation of the other core doctrines of the private law, being consent-based obligations (dominantly but not solely the law of contract).[31]

In other words, restitution performs a gap-filling role where there is an absence of an effective contract. This dynamic between the law of contract and restitution was enunciated by Lord Goff in *Pan Ocean Shipping Ltd v Creditcorp Ltd* ('*Pan Ocean*'): 'as a general rule, the law of restitution has no part to play in the matter; the existence of the agreed regime renders the imposition by the law of a remedy in restitution both unnecessary and inappropriate'.[32]

This hierarchy of rights was also recognised in *Pavey & Matthews Pty Ltd v Paul* ('*Pavey*')[33] where Deane J held that restitution 'will only arise in a case where there is no applicable genuine agreement or where such an agreement is frustrated, avoided or unenforceable'.[34] More recently, Deane J's finding was affirmed in the High Court decision of *Lumbers v W Cook Builders Pty Ltd (in liq)* ('*Lumbers*').[35]

27 Havelock (n 4) 472. See also Steve Hedley, 'Implied Contract and Restitution' (2004) 63(2) *Cambridge Law Journal* 435, 438; Peter Jaffey, *The Nature and Scope of Restitution: Vitiated Transfers, Imputed Contracts and Disgorgement* (Hart Publishing, 2000) ch 2.

28 Havelock (n 4) 473, citing *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 654 [46] (Gleeson CJ).

29 Havelock (n 4) 472.

30 Ibid 473.

31 Ross Grantham and Charles Rickett, 'On the Subsidiarity of Unjust Enrichment' (2001) 117 (April) *Law Quarterly Review* 273, 273 (citations omitted).

32 [1994] 1 WLR 161, 164 ('*Pan Ocean*').

33 (1987) 162 CLR 221 ('*Pavey*').

34 Ibid 256 (Deane J, Brennan J dissenting at 238).

35 (2008) 232 CLR 635, 663 [79] (Gummow, Hayne, Crennan and Kiefel JJ) ('*Lumbers*').

In *Lumbers*, the High Court held that restitutionary claims must respect contractual regimes. In particular, the High Court quoted with approval Lord Goff in *Pan Ocean*, finding that 'serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract'.[36] The implications of this hierarchy are that 'any applicable contract must be the *starting point of the analysis*'.[37] It is only where there is no contract, or where a contract 'has been fully disposed of', that there will be space for restitution.[38] It follows that where a contractual right has accrued, the appropriate remedy will be damages for breach of contract.

2 *The Nature of Contractual Rights and Compensation*

Contractual rights may accrue by virtue of the terms of the contract.[39] These rights may be express or implied. These rights give rise to a corresponding 'primary' obligation which is 'determined by an interpretation of the terms of the contract'.[40] Tarrant suggests that '[t]he most common accrued right is the right to bring an action for a debt which is a liquidated sum under the contract'.[41] A further right to compensation may accrue by virtue of a breach of contract irrespective of the terms of the contract. These rights give rise to a corresponding 'secondary' obligation which will 'arise in the event of breach or termination of the "primary" obligations'.[42] These secondary obligations are imposed by law and typically require the defaulting party to pay compensatory damages.[43] In other words, these 'secondary' obligations are court-ordered remedial rights that arise on the breach of a contract. These rights cover breaches prior to termination and breaches that *result* in termination. To that end, it is suggested that in both circumstances, the contractual rights are unconditional.[44] The unconditional nature of these rights was emphasised by Dixon J in *McDonald v Dennys Lascelles Ltd* ('*McDonald*'):

> Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected.[45]

36 Ibid, quoting *Pan Ocean* (n 32) 166.

37 Havelock (n 4) 474 (emphasis added).

38 Ibid 477.

39 See John Tarrant, 'Total Failure of Consideration' (2006) 33 *University of Western Australia Law Review* 132, 132.

40 Ibid 134.

41 Ibid.

42 *Mann* (n 1) 599–600 [83] (Gageler J).

43 See *Robinson v Harman* (1848) 1 Ex 850; 154 ER 363, 365 (Parke B) ('*Robinson*'); *Moschi v Lep Air Services Ltd* [1973] AC 331, 350 (Lord Diplock). See also *Taylor v Motability Finance Ltd* [2004] EWHC (Comm) 2619 [24] (Cooke J) ('*Taylor*').

44 See generally *Robinson* (n 43) 365 [855] (Parke B).

45 (1933) 48 CLR 457, 476–7 (Dixon J) ('*McDonald*').

That is, the unconditional nature of these contractual obligations is what results in contractual allocations of risk surviving termination and repudiation. The unconditional nature of these rights is best explained by the notion that 'a right can be unconditionally acquired *from the other party*',[46] but 'at the same time be contingent in that it depends on some *independent* event or condition being met'.[47] Tarrant explains this dynamic by asserting that 'a right to sue can become absolute by a two stage process'.[48] The first stage is characterised as a conditional accrued right. This is because the right has 'vested but is still conditional … on an event *independent* of the performance of either party under the contract'.[49] The second stage 'is the happening of the particular event or condition specified in the contract. Once this condition has been met the right to sue for the amount is absolute'.[50] In other words, the fact that the law imposes these secondary obligations necessarily implies that the law acknowledges the parties' original allocation of risk. As a result, the termination of a contract through acceptance of repudiatory conduct does not absolve either party of their secondary obligations;[51] rather, the secondary obligations are enlivened by the fact that the contract has been lawfully terminated.

While repudiation of a contract will have the effect of discharging both parties from *future* performance, rights 'which have already been unconditionally acquired'[52] will not be 'divested or discharged' unless the contract provides to the contrary.[53] In determining remedies, the contract will remain effective 'for the purpose of assessing loss and damage'.[54] For these reasons, secondary contractual obligations to pay damages survive the accepted repudiation of a contract. These secondary obligations, albeit imposed by law, respect the contractual regimes and risk allocations made by the agreeing parties at the time the contract was entered into. Importantly, this approach is consistent with the primacy of contract and subsidiarity of restitution — that is, restitution is only available in order to gap-fill the space that the law of contract does not occupy.

B *Accrued Contractual Right to Payment*

In light of the nature of accrued contractual rights, the High Court unanimously held that the only remedy available for work that was completed prior to termination where a contractual right to payment had accrued was a claim for damages for breach of contract. Consequently, the Builder was unable to pursue *quantum meruit* for completed work where a contractual right had accrued. This

46 Tarrant (n 39) 136 (emphasis in original).

47 Ibid (emphasis added).

48 Ibid.

49 Ibid (emphasis added).

50 Ibid.

51 See, eg, *Taylor* (n 43) [23]–[24] (Cooke J).

52 *McDonald* (n 45) 477 (Dixon J).

53 Ibid. See also Mann Submission (n 24) 4 [11].

54 Mann Submission (n 24) 4 [11].

was because, to allow an aggrieved party to elect restitutionary remedies in lieu of damages for breach of contract would be to undermine the parties' contractual allocation of risk.

Chief Justice Kiefel, Bell and Keane JJ found that 'there [was] no room for a right' to elect *quantum meruit* where a contractual right to payment had accrued.[55] The subsidiarity of restitutionary claims meant that such claims could not be allowed while contractual claims existed. That is, '[w]here payment has become due under the terms of the contract, the accrued rights and obligations remain in the domain of the parties' contractual agreement'.[56]

The only difference in Justice Gageler's reasons was that his Honour focused 'not on the existence of contractual claims *simpliciter*, but on the availability of an action in debt to enforce the right to payment'.[57] Justice Gageler highlighted this issue by finding that '[n]o action can be brought for restitution while an inconsistent contractual promise *subsists* between the parties in relation to the subject matter of the claim'.[58] Nettle, Gordon and Edelman JJ concurred, however their Honours relied on the terminology of 'closed' and 'open' contracts. Their Honours found that '[w]here a contract remains "open" — that is, "not discharged" — there is generally "neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration"'.[59]

C *No Accrued Contractual Right to Payment*

The greatest uncertainty that remains following *Mann*, is the availability of restitution in *quantum meruit* for work completed where no contractual right to payment has accrued. While the majority found that restitution *is* available, the varied rationale provided by each judgment as to the basis (or lack thereof) of restitution is far from unanimous. The split judgments are symptomatic of the complex nature of the law of restitution as well as the long lineage of confused and ambiguously reasoned cases.

55 *Mann* (n 1) 579 [19] (Kiefel CJ, Bell and Keane JJ).

56 Stuart Cosgriff and Clare Maguire, 'High Court Rules on Quantum Meruit and Repudiation: Has Certainty Accrued?' (2020) 31(3) *Australian Construction Law Bulletin* 29, 30. See also *Mann* (n 1) 576 [10] (Kiefel CJ, Bell and Keane JJ), 592–3 [64] (Gageler J), 630–1 [176]–[177] (Nettle, Gordon and Edelman JJ).

57 Marcus Roberts and Caitlin O'Neil, 'Mann v Paterson Constructions Pty Ltd (2019) 93 ALJR 1164; [2019] HCA 32' 94(2) *Australian Law Journal* 113, 114 (emphasis in original), citing *Mann* (n 1) 592 [63] (Gageler J).

58 *Mann* (n 1) 592 [64] (emphasis added), quoting *Trimis v Mina* [1999] NSWCA 140, [54] (Mason P), quoted in *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1, 156 [655] (Finn J).

59 *Mann* (n 1) 624–5 [164] (citations omitted), citing *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 541 [67] (Gummow J) ('*Roxborough*') and *Pavey* (n 33) 256 (Deane J).

Chief Justice Kiefel, Bell and Keane JJ adopted the most restrictive approach by extending the reasoning as per accrued contractual rights. Their Honours held that '[r]estitutionary claims must respect contractual regimes and the allocations of risk made under those regimes'; otherwise '[t]o allow a restitutionary claim … would be to subvert the contractual allocation of risk'.[60]

The subsistence of the secondary contractual obligations meant that there could be no room for a claim in restitution in *quantum meruit*. Their Honours' approach represents a strict application of the contractual theory by respecting the subsidiarity of *quantum meruit* to the contract's primacy. The reasoning of Kiefel CJ, Bell and Keane JJ is that any non-contractual claim is excluded by the parties' allocation of risk even when events occur, for which the parties have not provided, that justify the contract's termination. On its face, the minority's judgment is most logical, at least insofar as it reflects this theory, however, it crucially overlooks the fact that parties' contracts often do not fully allocate such risks.[61]

In contrast, Nettle, Gordon and Edelman JJ based a claim for restitution in *quantum meruit* in unjust enrichment by virtue of a total failure of consideration, or a total failure of a severable part of the consideration.[62] The law of total failure of consideration differs from that of the law of contract formation.[63] The law of contract formation is predicated on a *promise to perform*, whereas the law of total failure of consideration is predicated on *performance of the promise*.[64] Consequently, Nettle, Gordon and Edelman JJ reasoned that when a contract is terminated for breach where no contractual right to payment has accrued, the breach is based on non-performance rather than a breach of a *promise* to perform.[65] By adopting this approach, their Honours found that *quantum meruit* is 'a remedy arising by operation of law in that category of actions concerned with restitution in the category of unjust enrichment'.[66] In doing so, their Honours provided most generously for the availability of restitution.[67]

The term unjust enrichment is often recognised as being merely an 'organising concept that groups decided cases on the basis that they share a set of common features'.[68] Mitchell, Mitchell and Watterson write that 'the "unjust" element in

60 *Mann* (n 1) 578 [14], 579 [19] (Kiefel CJ, Bell and Keane JJ).

61 See also Kit Barker and Ross Grantham, *Unjust Enrichment* (LexisNexis, 2nd ed, 2018) 71–2.

62 *Mann* (n 1) 627 [168] (Nettle, Gordon and Edelman JJ).

63 Nicholas Gallina, 'Consequences When a Contract Is Terminated for Repudiation: *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32' [2020] (May/June) *Australian Construction Law Newsletter* 42, 45.

64 Ibid.

65 *Mann* (n 1) 637–8 [192] (Nettle, Gordon and Edelman JJ).

66 Ibid 619 [150].

67 See Jocic (n 8).

68 Charles Mitchell, Paul Mitchell and Stephen Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th ed, 2016) 7–8 [1-08] ('*Goff & Jones*'), quoted in Robert

"unjust enrichment" is simply a "generalisation of all the factors which the law recognises as calling for restitution"'.[69] Relatedly, the High Court has embraced the concept as a taxonomical one. For example, in *Equuscorp Pty Ltd v Haxton*,[70] French CJ, Crennan and Kiefel JJ held that unjust enrichment 'has a taxonomical function referring to categories of cases in which the law allows recovery by one person of a benefit retained by another. … [I]t does not found or reflect any "all-embracing theory of restitutionary rights and remedies"'.[71]

Accordingly, there are early signs that the High Court has become more reconciled to unjust enrichment provided its function is limited and it is seen not as a single cause of action that can be pleaded in abstract terms, but as a category of cause of action that gives rise to restitution.[72] Nonetheless, the term's use and meaning remains relatively misunderstood. For this reason, the nebula that is unjust enrichment means that basing a remedy on such a concept is as confusing as it is uncertain. In *Mann*, Gageler J warned against reliance on unjust enrichment: 'Useful as the concept of total failure of consideration or failure of basis can be, it is important not to surrender to that one concept the hegemonic status steadfastly denied to the concept of unjust enrichment.'[73]

Justice Gageler's criticism of the judgment of Nettle, Gordon and Edelman JJ judgment goes to the heart of the controversy that is: on what grounds should restitution be awarded? Reliance on unjust enrichment as a foundation for restitution in *quantum meruit* introduces unnecessary uncertainty and only contributes to a lineage of confused cases.

Despite Gageler J's criticism, his Honour refrained from specifying on what basis (total failure of consideration or failure of basis) restitution in *quantum meruit* should be founded (and in doing so, supported the notion that neither doctrine was sufficiently relevant). Instead, Gageler J grounded *quantum meruit* on an action for debt imposed by law independently of the contract.[74] Unlike Nettle, Gordon and

Stevens, 'The Unjust Enrichment Disaster' (2018) 134 (October) *Law Quarterly Review* 574, 575–6.

69 *Goff & Jones* (n 68) 7 [1-08] citing *Wasada Pty Ltd v State Rail Authority of New South Wales [No 2]* [2003] NSWSC 987, [16] (Campbell J), quoting Keith Mason and JW Carter, *Restitution Law in Australia* (Butterworths, 1995) 59 [227].

70 (2012) 246 CLR 498.

71 Ibid 516 [30], quoting *Roxborough* (n 59) 544 [72] (Gummow J). See also the High Court's reference to the taxonomic function in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Pty Ltd* (2014) 253 CLR 560, 579 [20] (French CJ), 618 [138]–[139] (Gageler J). See also Kit Barker, 'Unjust Enrichment in Australia: What Is(n't) It?' (2020) 43(3) *Melbourne University Law Review* 14.

72 See generally David Winterton and Timothy Pilkington, '*Mann v Paterson Constructions Pty Ltd*: The Intersection of Debt, Damages and *Quantum Meruit*' (2020) 44(2) *Melbourne University Law Review* 679.

73 *Mann* (n 1) 598 [80] (Gageler J). Cf *Roxborough* (n 59) 543–4 [71]–[73] (Gummow J); *Crown Prosecution Service v Eastenders Group* [2015] AC 1, 41 [102], 43 [113] (Lord Toulson JSC).

74 *Mann* (n 1) 593 [65], 599–600 [83].

Edelman JJ, Gageler J avoided reliance on unjust enrichment. Justice Gageler also avoided reference to contractual risk allocation — finding that '[p]arties contract against the background of the gamut of remedies that the legal system makes available to them'.[75] His Honour found that it was 'artificial as a matter of commercial practice and wrong as a matter of legal theory' to deprive parties of non-contractual remedies where the parties are silent on the precise consequences of termination.[76] Justice Gageler found that an aggrieved party that has performed work retains a right to sue in debt, holding that such a claim is 'imposed by law independently of any genuine agreement between the parties'.[77] His Honour referred to this claim as 'an action for a non-contractual *quantum meruit*'[78] (rather than restitutionary *quantum meruit*), thereby avoiding the loaded connotations that are associated with 'restitution'.[79]

While Nettle, Gordon and Edelman JJ and Gageler J arrived at the same conclusion — that *quantum meruit* will be available where no contractual right to payment has accrued — the varied justifications in each judgment reveal an area of law that remains unsettled. While a principled explanation of the law has developed since *Planché* and *Pan Ocean*, there is yet to be a unified conception of what grounds restitution in *quantum meruit* is founded on.

D *Drafting Implications*

The High Court's decision introduces particular uncertainty for unstaged commercial contracts that provide for regular payments on account only.[80] Interim payments on account only have commonly been understood as manifesting a clear intention that the parties' obligations are to be entire.[81] In other words, they are *conditional* on completion of the contract or part thereof.[82] This principle was articulated by Finn J in *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* ('*GEC Marconi*'):[83]

> If a contract or obligation is to be found to be entire notwithstanding that the contract or obligation provides for payment by instalments, the contract on its proper construction must indicate that the instalments are nonetheless conditional upon complete performance of the contract or obligation, that is, that they are refundable if

75 Ibid 600 [83].

76 Ibid. See also Roberts and O'Neil (n 57) 114–15.

77 *Mann* (n 1) 596 [73].

78 Ibid 601 [88].

79 See generally Havelock (n 4).

80 See, eg, Standards Australia, *Australian Standard: General Conditions of Contract for Design and Construct* (Standards Australia, 5 April 1995) cl 42.1 ('*AS 4300–1995*').

81 Karan Raghavan, 'Failure of Consideration As a Basis for *Quantum Meruit* Following a Repudiatory Breach of Contract' (2016) 42(1) *Monash University Law Review* 179, 191.

82 Ibid.

83 (2003) 128 FCR 1 ('*GEC Marconi*').

> this does not occur because of the default of the party that is to render the performance …[84]

To reconcile Finn J's statement on the conditional nature of payments made only on account with the above analysis, it is submitted that there are three possible outcomes following *Mann*. Under the reasoning of Nettle, Gordon and Edelman JJ, an aggrieved builder will likely retain concurrent remedies — damages for breach of contract and *quantum meruit* — due to restitution based on a total failure of consideration. In contrast, under the reasoning of Kiefel CJ, Bell and Keane JJ, it is unlikely that an unconditional contractual right to payment will be enforceable where payment is held on account only. Finally, Gageler J's reasoning is most uncertain. According to Gageler J, *quantum meruit* recovery is pleaded as a debt and therefore, it remains unclear as to whether the builder has accrued a contractual right enforceable in debt.

Even greater uncertainty arises where a contract provides for progress payments but does not specify whether the payments are to be made on account only. For example, in the case of *Ettridge v Vermin Board of the District of Murat Bay* ('*Ettridge*'),[85] the Full Court of the South Australian Supreme Court found that the progress payments had been unconditionally acquired upon completion of the work to which each related, 'and that such right survived a subsequent termination of the contract'.[86] Similarly, in *GEC Marconi*, Finn J found that the 'various devices used in [the contract] to protect [the principal] against … possible delay or default' by the builder[87] — which included payment of liquidated damages and bank guarantees — implied 'that the builder's right to progress payments was intended to be unconditional, and the payments so received [were] non-refundable'.[88] In contrast, in the case of *Ownit Homes Pty Ltd v Batchelor* ('*Ownit Homes*'),[89] Thomas J found that the builder's right to progress payments 'more closely resemble[d] a right to a payment on account than an accrued right to final payment'.[90]

The discrepancies between *Ettridge*, *GEC Marconi* and *Ownit Homes* are ultimately a consequence of the particular terms of the relevant contracts. Raghavan highlights that in *Ettridge* and *GEC Marconi* 'the progress payments were apportioned by reference to the nature of the work performed, and were conditional upon the work being certified by or on behalf of the principal'.[91] Conversely, in *Ownit Homes*, the contract 'did not contain any procedure for the

84 Ibid 165 [706]. See also Raghavan (n 81) 188–9.

85 [1928] SASR 124 ('*Ettridge*').

86 Raghavan (n 81) 191, citing ibid.

87 *GEC Marconi* (n 83) 167 [714], quoted in Raghavan (n 81) 191.

88 Raghavan (n 81) 191, citing *GEC Marconi* (n 83) 166–7 [713]–[714] (Finn J).

89 [1983] 2 Qd R 124 ('*Ownit Homes*').

90 Ibid 135.

91 Raghavan (n 81) 192.

review or certification of the builder's work'.[92] The courts' varied approaches to progress payments that do not specify whether such payments are made on account only, suggest that in ambiguous circumstances, courts will look to the surrounding contractual provisions to determine whether such payments were intended to be conditionally or unconditionally accrued.

E *The Rescission Fallacy*

One area of law that *Mann* has provided greater clarity is in rejecting the rescission fallacy, being the misunderstanding that a contract that is discharged for repudiation is void ab initio.[93]

The rescission fallacy describes the erroneous understanding that repudiation of a contract will render all obligations under the contract void from the beginning. The rescission fallacy first emerged following the Privy Council's decision in *Lodder*,[94] a case that concerned a contractor who was excluded from a work site. Before that appeal, Williams J of the Court of Appeal of New Zealand had held that

> [a]s the defendant has abandoned the special contract, and as the plaintiff has accepted that abandonment, what would have happened if the special contract had continued in existence is *entirely irrelevant*.[95]

This understanding that repudiation of a contract renders all past and future obligations void spurred a pedigree of intermediate appellate court decisions that applied the rescission fallacy. It was not until *McDonald* that Dixon J rejected the fallacy:

> When a party … elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired.[96]

In *Mann*, Kiefel CJ, Bell and Keane JJ emphatically rejected the rescission fallacy. Their Honours held that '[t]he theory that the contract between the parties becomes "entirely irrelevant" upon discharge for repudiation or breach is indeed fallacious'.[97] Their Honours affirmed that the rescission fallacy had been dispelled by Dixon J in *McDonald*.[98] In support, the High Court reiterated Mason CJ's

92 Ibid.

93 See *McDonald* (n 45) 469 (Starke J).

94 *Lodder* (n 18).

95 *Slowey v Lodder* (1901) 20 NZLR 321, 358 (emphasis added).

96 *McDonald* (n 45) 476–7.

97 *Mann* (n 1) 575 [8] (Kiefel CJ, Bell and Keane JJ) (citations omitted).

98 Ibid 575 [9], quoting *McDonald* (n 45) 476–7 (Dixon J, Rich J agreeing at 467, McTiernan JJ agreeing at 486).

decision in *Baltic Shipping Co v Dillon* that 'the discharge [of the contract] operates only prospectively, that is, it is not equivalent to rescission ab initio'.[99]

Despite this rejection, Nettle, Gordon and Edelman JJ's decision failed to strike the final nail in the rescission fallacy's proverbial coffin. Their Honours' reasoning was criticised by Kiefel CJ, Bell and Keane JJ as 'apply[ing] the rescission fallacy under another guise' by relying on the 'vitiating factor' of 'total failure of consideration'[100]. This is because, to treat a stage of a contract as severable and to entitle an aggrieved party to either damages or restitution, is to treat the severable stage as void ab initio. It is the equivalent of treating an entire contract that is rescinded for repudiation as void ab initio. However, in defence of Nettle, Gordon and Edelman JJ, it may be argued that their Honours' reasoning draws a subtler distinction — where a separate amount of work is specified for a distinct sum of money and the money is not paid, then the basis for providing that work fails in total and a restitutionary cause of action arises independently of the contract. The contract that has been terminated then only constrains the restitutionary right if it expressly or impliedly provides for a different sum (or no sum) to be paid. Nonetheless, Kiefel CJ, Bell and Keane JJ's criticism suggests that such reasoning is not abundantly clear. Accordingly, while the High Court unanimously rejected the recission fallacy, the basis of Nettle, Gordon and Edelman JJ's judgment appears to employ the same fallacious reasoning that was categorically dismissed by Deane J in *McDonald*.

PART IV

A *Valuation*

The debate concerning the valuation of *quantum meruit* is often thought to have two dimensions — whether there is a policy-based ceiling on the claim (to prevent the original bargain being displaced) and whether there is a 'valuation ceiling'.[101] The scope of this article is confined to the latter.

Historically, the valuation of *quantum meruit* has been the fair and reasonable remuneration for work performed.[102] Typically, these services have been assessed objectively. Following *Mann*, the amount of restitution recoverable will generally be limited to the agreed contract price, or the severable part of the contract price attributable to that work. The High Court's decision has, in part, harmonised the tension between the primacy of contract, subsidiarity of restitution, and the ability

99 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 356 (Mason CJ) ('*Baltic Shipping*'), quoted in *Mann* (n 1) 575 [8] (Kiefel CJ, Bell and Keane JJ).

100 *Mann* (n 1) 583 [30].

101 See generally Andrew Burrows, 'In Defence of Unjust Enrichment' (2019) 78(3) *Cambridge Law Journal* 521.

102 *Mann* (n 1) 584 [31] (Kiefel CJ, Bell and Keane JJ), 640–1 [197] (Nettle, Gordon and Edelman JJ). See also *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 850 (Lord Diplock).

of an aggrieved party to elect between damages for breach of contract and restitution. This was emphasised by Nettle, Gordon and Edelman JJ:

> [T]he 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*.[103]

Nonetheless, their Honours suggested that there may be 'circumstances sufficient to warrant departure from the prima facie position that a claimant should not achieve a better result by way of restitution than under the contract'.[104] Justices Nettle, Gordon and Edelman do not elaborate on which circumstances will justify a departure from this general position. Their Honours' unwillingness to adopt a hard-line approach to *quantum meruit* valuation is, predictably, consistent with their broad application of restitution.

Surprisingly, Edelman J appears to recant on his Honour's prior, extra-curial position on *quantum meruit* valuation. In *Unjust Enrichment*, Edelman and Bant suggested that reconciliation of contractual remedies and restitution is possible:

> In the case of a simple contract involving the performance of a service for a price, the award of restitution should *never* exceed the contract price because that was the objective price at which the service was chosen.[105]

Despite Edelman and Bant's position, the majority holding in *Mann* did not go so far as making such a definitive statement. Their Honours also did not go so far as adopting the United Kingdom's approach of subjective devaluation — a means of valuing *quantum meruit* upon the subjective value attributed to it by the defendant.[106]

Justice Gageler agreed with Nettle, Gordon and Edelman JJ but on narrower grounds. His Honour held that the amount recoverable under *quantum meruit* was capped by the contract price. However, unlike the plurality, Gageler J did not leave open the possibility that in certain circumstances an amount recoverable in restitution could deviate from the contract price. Justice Gageler's reasoning was predicated on the concern that parties may be able to recover 'in excess of the contract price'.[107] As such, parties may be motivated by 'distorted contractual incentives',[108] namely 'the potential to recover more from termination than from

103 *Mann* (n 1) 650–1 [215] (emphasis added).

104 Ibid 651 [217].

105 James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd ed, 2016) 84 (emphasis added).

106 See John Eldridge and Timothy Pilkington, 'Before the High Court: Discharged Contracts and *Quantum Meruit*' (2019) 41(2) *Sydney Law Review* 255, 263.

107 *Mann* (n 1) 601 [88].

108 Ibid 602 [90].

completion comes the incentive to terminate'.[109] This may arise where the 'contract has turned out to be under-priced' or where 'the contract has been structured to allocate a higher proportion of the overall contract price to work performed at earlier stages'.[110] In doing so, Gageler J has quashed an aggrieved party's ability to 'cherry-pick'[111] a claim in damages or restitution — whichever yielded a better return.[112]

Chief Justice Kiefel, Bell and Keane JJ did not consider whether the contract price acted as a ceiling for the amount recoverable in *quantum meruit*. This was because their Honours found that a claim in restitution was not available to the Builders. Nonetheless, the minority acknowledged that 'termination for repudiation or breach is not an occasion for obtaining a windfall or inflicting a punishment'.[113] Their Honours stressed that '[t]o allow a restitutionary remedy… unconstrained by the terms of the applicable contract would undermine the parties' bargain as to the allocation of risks and quantification of liabilities'.[114] Their Honours' finding, albeit not directly considering the calculation of restitution, intimates the need to avoid remedies that exceed the agreed contract price.

Following *Mann*, the calculation of *quantum meruit* has been curtailed to the agreed contract price, subject to Nettle, Gordon and Edelman JJ's holding that there may be limited circumstances in which an excess of the agreed contract price may be appropriate. This approach harmonises the primacy-subsidiary nature of the law of contract and restitution by generally limiting restitution to the parties' original contractual allocation of risk. Australia's approach in *quantum meruit* valuation now leads the way amongst common law jurisdictions. This ensures that greater certainty of valuation is afforded to aggrieved parties relying on a claim in *quantum meruit*. Australia's evolution is most clear when compared with the United Kingdom and Singapore.

1 *United Kingdom*

The United Kingdom has 'not go[ne] so far as to make the contract price the limit of restitutionary recovery'.[115] Rather, Nettle, Gordon and Edelman JJ observe that in *Benedetti v Sawiris* ('*Benedetti*'),[116] the Supreme Court of the United Kingdom found that 'subjective devaluation may be applied in appropriate cases'.[117] As above, subjective devaluation refers to a method of valuing *quantum meruit* by reference to the subjective value attributed to it by the defendant. In *Benedetti*,

109 Ibid 601 [89].

110 Ibid 601 [88], citing Dennys and Clay (n 3) 926 [8-019].

111 See generally Havelock (n 4) 481. See also *Ranger* (n 5) 834.

112 See *Ranger* (n 5) 834. See also *Sopov* (n 5) 514–15 [9]–[11]; Havelock (n 4) 481.

113 *Mann* (n 1) 586 [39].

114 Ibid 580 [20].

115 Ibid 650 [215] (Nettle, Gordon and Edelman JJ).

116 [2014] AC 938 ('*Benedetti*').

117 *Mann* (n 1) 647 [208] (Nettle, Gordon and Edelman JJ).

Lord Clarke JSC explained that 'the starting point in valuing the enrichment is the objective market value, or market price, of the services performed'.[118] From there, the price may be 'revalued' to one 'which a reasonable person *in the defendant's position* would have had to pay for the services'.[119] Similarly, Lord Neuberger PSC concluded that

> in some cases of unjust enrichment, subjective devaluation could be invoked by a defendant to justify the award of a smaller sum [but] … [i]t would seem wrong … for the claimant to be better off as a result of the law coming to his rescue, as it were, by permitting him to invoke unjust enrichment, than he would have been if he had had the benefit of a legally enforceable contractual claim for a quantified sum.[120]

Benedetti's use of 'subjective devaluation' represents a soft line approach to *quantum meruit* calculation compared to Nettle, Gordon and Edelman JJ leaving open the possibility that in some circumstances, *quantum meruit* will not be capped by the agreed contract price. Despite these differences, it is nonetheless evident that Australia and the United Kingdom are in the midst of a renaissance of restitutionary claims as both jurisdictions retreat 'from a more expansive approach to the law of restitution'.[121] This approach is in contrast with Singapore.

2 *Singapore*

Australia and the United Kingdom's position may be contrasted with the more traditional approach found in Singapore. For example, in *Eng Chiet Shoong v Cheong Soh Chin* ('*Cheong Soh Chin*'),[122] the Court of Appeal of Singapore found that the valuation of restitution in *quantum meruit* was to be determined from the objective market rate of the work performed by the defendants. The valuation of the work was determined by expert evidence on what would be a reasonable sum in the circumstances.[123] That is, *Cheong Soh Chin*'s approach is reminiscent of cases such as *Lodder*. The Court of Appeal's approach in *Cheong Soh Chin* highlights Australia's divergence from the historical position. Interestingly, in *Cheong Soh Chin*, neither the plaintiffs nor the defendants argued that the calculation of *quantum meruit* should differ from the market rate by operation of subjective devaluation or subjective re-evaluation. This suggests that neither parties, nor the Court of Appeal, considered the developments in comparative jurisdictions such as Australia (albeit this case was decided prior to *Mann*) or the United Kingdom as contestable. It is yet to be seen whether Australia's restrictive approach to *quantum meruit* valuation will be replicated in other common law jurisdictions. However, to the extent that *Mann* has harmonised the primacy-

118 *Benedetti* (n 116) 956 [15] (Lord Clarke JSC), quoted in *Mann* (n 1) 647 [208] (Nettle, Gordon and Edelman JJ).

119 *Benedetti* (n 116) 957 [17] (Lord Clarke JSC), quoting *Benedetti v Sawiris* [2010] EWCA Civ 1427, [140] (Etherton LJ) (emphasis added).

120 *Benedetti* (n 116) 1006 [187], 1007–8 [192] (Lord Neuberger PSC).

121 Stevens (n 68) 574.

122 (2016) 4 SLR 728 ('*Cheong Soh Chin*').

123 Ibid 762–3 [87]–[92] (Andrew Phang Boon Leong JA for the Court).

subsidiary nature of the law of contract and restitution, it is arguable that other jurisdictions will follow.

CONCLUSION

The High Court's decision in *Mann* has severely limited the availability of restitution in *quantum meruit*. The ability for an aggrieved party to elect between contractual damages and restitution is now resiled to three distinct situations. First, work performed under an entire contract where a single lump sum is payable on completion. Second, work performed under a staged contract where an unconditional right to payment has not accrued. Third, work under an entire contract where a lump sum is payable on completion and where provisional payments are made on account only.[124] A corollary to this is that restitution will only be available to the extent that it does not undermine contractual obligations. The High Court has made it clear that the availability of restitution is delineated by whether or not a contractual right to payment has accrued. Valuation of restitution in *quantum meruit* is now, generally, limited to the original contract price. This position ensures that parties are no longer able to 'cherry-pick'[125] a claim in damages or restitution.[126] A comparative analysis of the United Kingdom and Singapore reveals that Australia now leads the way as one of the strictest applications of valuation in *quantum meruit*. This approach harmonises the primacy-subsidiary nature of the law of contract and restitution by generally limiting restitution to the parties' original contractual allocation of risk.

124 See generally Jocic (n 8).

125 Havelock (n 4) 481.

126 See *Ranger* (n 5) 834. See also *Sopov* (n 5) 514–5 [9]–[11].