Mann v Paterson Constructions Pty Ltd – New Law for Quantum Meruit Claims in Building Contracts

Laina Chan and JW Carter*

Mann v Paterson Constructions Pty Ltd was the first time that the High Court considered the issue of whether a claim in restitution for reasonable remuneration (quantum meruit) is available when a building contract is discharged following a repudiation. In Australia, intermediate appellate courts for the last three decades had determined that an innocent party who terminated a contract for repudiation could elect between damages for breach of contract and for the reasonable value of the work that had been done pursuant to the contract prior to discharge. The High Court has now held that the amount recoverable is subject to a ceiling referable to the contract price. The article considers the reasoning and appropriateness of the decision.

Introduction

Mann v Paterson Constructions Pty Ltd[1] was the first time that the High Court considered the issue of whether a claim in restitution for reasonable remuneration (*quantum meruit*) is available when a building contract is discharged following a repudiation. In Australia, intermediate appellate courts for the last three decades had determined that an innocent party who terminated a contract for repudiation could elect between damages for breach of contract and for the reasonable value of the work that had been done pursuant to the contract prior to discharge.[2] The original premise of the availability of the remedy of restitution when a contract is discharged for repudiation had been erroneously based upon the fallacy[3] that a contract discharged for repudiation is void ab initio rather than discharged *in futuro* with all accrued rights intact. The older cases[4] had proceeded on the basis that a plaintiff had three options available to it when a defendant is in breach of contract. The plaintiff could affirm the contract, terminate and sue for loss of bargain damages, or rescind and sue to recover restitution on a *quantum meruit* basis.

The Facts

In *Mann v Paterson Constructions Pty Ltd*,[5] the builder, Paterson Constructions Pty Ltd, contracted with Mann to construct two townhouses on land owned by Mann. Mann repudiated the contract and

* Laina Chan: Barrister, 2 Selborne Chambers and Melbourne TEC Chambers, Director and Company Secretary of the Society of Construction Law Australia. JW Carter: Professor Emeritus, University of Sydney; General Editor, *Journal of Contract Law*; Consultant, Herbert Smith Freehills.

[1] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164; 36 BCL 12; [2019] HCA 32.

[2] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; 9 BCL 40; *Iezzi Constructions Pty Ltd v Watkins Pacific (QLD) Pty Ltd* [1995] 2 Qd R 350; *Legal Services Commissioner v Baker (No 2)* [2006] 2 Qd R 249; [2006] QCA 145; *Sopov v Kane Constructions Pty Ltd (No 2)* (2009) 24 VR 510; [2009] VSCA 141.

[3] Compare *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 277 (Meagher JA); 9 BCL 40 where Meagher JA said that the view that a repudiation effects a rescission ab initio is a heretical one since *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 but was nevertheless satisfied that the remedy of restitution is available when a contract is *discharged* for repudiation.

[4] See, eg, *Lodder v Slowey* [1904] AC 442.

[5] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164; 36 BCL 12; [2019] HCA 32.

the builder terminated the contract.[6] At the time of termination, the builder had issued several progress claims for work done that remained unpaid and had also carried out work for which it had not yet issued a progress claim.[7] The builder sought to recover on a *quantum meruit* basis the value of the works that had been done pursuant to the contract.

The High Court unanimously accepted that, based upon the authority of *McDonald v Dennys Lascelles Ltd*,[8] a contract terminated for repudiation is not rescinded ab initio.[9] Accrued contractual rights remain for a contract discharged for repudiation.[10]

The Australian Intermediate Courts Are Overruled

Nevertheless, the members of the High Court were split on the issue of whether a plaintiff can sue on a *quantum meruit* when a contract is discharged for the defendant's repudiation. The members of the High Court were unanimous that in relation to debts due and payable for progress claims that have been issued at the time of termination, the builder is only entitled to recover those debts. In relation to the works that had been done but for which a progress claim had not yet been issued, the builder may elect between damages for breach of contract and *quantum meruit*.[11] However, four of the seven judges (Gageler, Nettle, Gordon and Edelman JJ) held that the contract price (or a proportionate part) sets the ceiling of the amount recoverable in a *quantum meruit* claim.[12] By contrast, the other three judges (Kiefel CJ, Bell and Keane JJ) stated that the only remedy available to the builder was damages for breach of contract. In their view, there is no room for a restitutionary remedy "unconstrained by the terms of the applicable contract [which] would undermine the parties' bargain as to the allocation of risks and quantification of liabilities, and so undermine the abiding values of individual autonomy and freedom of contract".[13]

For reasons that follow, the authors are of the view that the minority judges reached the correct outcome given the factual scenario before the High Court. However, with respect, there is no principled reason why *quantum meruit* should not be available in certain circumstances even where a contract is discharged for repudiation.

Basis of Availability of Remedy of Quantum Meruit for the Work in Progress

Retention of a Benefit

Nettle, Gordon and Edelman JJ justified the availability of *quantum meruit* on the basis that there has been a "retention of a benefit received on a basis which has totally failed to materialise".[14] The owner

[6] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [137], [141], [145], [149] (Nettle, Gordon and Edelman JJ); 36 BCL 12; [2019] HCA 32.

[7] The builder had carried out approximately $50,000 worth of variations at the request of Mann. However, the builder had not complied with *Domestic Building Contracts Act 1995* (Vic) s 38. The issue of whether the builder is ultimately entitled to payment for these variations was remitted back to the Victorian Civil & Administrative Tribunal (VCAT) to determine whether the criteria in s 38(6) are satisfied: *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [108] (Gageler J), [161], [219] (Nettle, Gordon and Edelman JJ); 36 BCL 12; [2019] HCA 32.

[8] *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457.

[9] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [9] (Kiefel CJ, Bell and Keane JJ), [62] (Gageler J), [165] (Nettle, Gordon and Edelman JJ); 36 BCL 12; [2019] HCA 32.

[10] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [19] (Kiefel CJ, Bell and Keane JJ), [57] (Gageler J), [172] (Nettle, Gordon and Edelman JJ); 36 BCL 12; [2019] HCA 32.

[11] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [105] (Gageler J), [110] (Nettle, Gordon and Edelman JJ); 36 BCL 12; [2019] HCA 32.

[12] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [105] (Gageler J), [205] (Nettle, Gordon and Edelman JJ); 36 BCL 12; [2019] HCA 32.

[13] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [20] (Kiefel CJ, Bell and Keane JJ); 36 BCL 12; [2019] HCA 32.

[14] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [188], [190], [215]; 36 BCL 12; [2019] HCA 32.

would be unjustly enriched otherwise.[15] This was a starting point for Gageler J as well. Gageler J recognised the "unjustness" of the defaulting party retaining the benefit of services rendered.[16] Nettle, Gordon and Edelman JJ did not want to preclude the availability of *quantum meruit* "where a doctrine of the common law has grown up over several centuries – as has the availability of restitutionary relief for work and labour done under a partially completed entire obligation following termination of a contract for breach – and the doctrine remains principled and coherent, widely accepted and applied in kindred jurisdictions, it can hardly be regarded as a sufficient basis to discard it that some of the conceptions which historically informed its gestation have since changed or developed over time. Whatever doubts might remain about the theoretical underpinnings of the doctrine by reason of the problematic nature of its origins or subsequent developments in the law of contract, it is too late now for this Court unilaterally to abrogate the coherent rule simply in order to bring about what is said to be a greater sense of theoretical order to the range of common law remedies".[17]

The authors agree that there is no difficulty with having coexisting remedies in contract and in restitution[18] so long as there is a proper basis for a remedy in restitution. Remedies for breach of contract and restitution may not be inconsistent and may therefore coexist. For example, consistently with *Mann v Paterson Constructions Pty Ltd*, the contractor ought to be able to recover the reasonable value of work done towards earning the next progress payment as well as loss of profit for breach of contract for the balance of the contract. The availability of both remedies would not lead to the contractor being overcompensated.[19] Further, to the extent that the remedies in contract and in restitution are inconsistent then the contractor need only elect between these remedies at the point when the remedies are pursued to judgment so that judgment may be pronounced to give effect to one right rather than the other.[20]

In our opinion, the procedural benefits of having alternative remedies in contract and restitution ought not to be determinative. However, the receipt of a benefit by the owner ought not be the sole determinant either. It is critical that the owner has exercised the choice to accept the benefit. This is consistent with the general approach of the High Court in earlier cases on ineffective contracts.[21]

Practical Consequences

To determine whether *quantum meruit* ought to be available as a remedy, Gageler J looked at the "practical consequences of continuing to allow an innocent party to maintain a non-contractual *quantum meruit* as an alternative to an action for unliquidated damages for breach of contract".[22] According to Gageler J, positive practical consequences include the procedural advantage of having an action in debt for *quantum meruit* over an action for damages for breach of contract;[23] the value of services rendered is

[15] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [199]; 36 BCL 12; [2019] HCA 32.

[16] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [75]–[76]; 36 BCL 12; [2019] HCA 32.

[17] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [199]; 36 BCL 12; [2019] HCA 32.

[18] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [84]; 36 BCL 12; [2019] HCA 32.

[19] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 277 (Meagher JA); 9 BCL 40. Compare *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 366 (Mason CJ), 372 (Brennan J), 383 (Deane and Dawson JJ), 383 (Toohey J, who agreed with the judgment of Mason CJ), 387 (Gaudron J). A plaintiff would be overcompensated if a plaintiff could recover full restitution of the fare for the 14-day cruise and full damages for mental distress and inconvenience for the same breach of contract.

[20] JW Carter, *Carter's Breach of Contract* (LexisNexis Butterworths, 2nd ed, 2019) [10-58]; *Ciavarella v Balmer* (1983) 153 CLR 438, 449; *Galafassi v Kelly* (2014) 87 NSWLR 119, 135 [75]; [2014] NSWCA 190; *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 30.

[21] See, eg, *Steele v Tardiani* (1946) 72 CLR 386, 402 (Dixon J), 408 (McTiernan J); *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 653–654 (Gleeson CJ), 656 (Gummow, Hayne, Crennan and Keifel JJ); 24 BCL 337; [2008] HCA 27; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 374 (Deane and Dawson JJ), 385 (Gaudron J); *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 227 (Mason CJ and Wilson J), 255 (Deane J), 267 (Dawson J).

[22] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [85] and ff; 36 BCL 12; [2019] HCA 32.

[23] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [86]; 36 BCL 12; [2019] HCA 32. At [198], Nettle, Gordon and Edelman JJ also identified this benefit which may provide easier and quicker recovery including by way of summary judgment.

easier to prove than damages for loss of bargain where issues of causation and remoteness may arise.[24] Issues of mitigation may also arise in quantifying damages for breach of contract. Gageler J says that these benefits ultimately lead to shorter trial and pre-trial processes.[25] On the other hand, the availability of *quantum meruit* could lead to a builder recovering more than would have been due to the builder had the contract been performed. This would occur if the contract had been underpriced or if the payments had been structured to allocate a higher proportion of the contract price to work performed at the earlier stages of the contract.[26] Gageler J considered that these "distorted contractual incentives" had to be addressed[27] and limiting the measure of restitution was appropriate rather than denying the availability of *quantum meruit*.[28]

Having considered the practical consequences and the attendant policy issues, Gageler J decided that restitution was available for work in progress, that is, for which the next progress payment has not been earned. He disagreed with *Renard Constructions (ME) Pty Ltd v Minister for Public Works*,[29] *Iezzi Constructions Pty Ltd v Watkins Pacific (QLD) Pty Ltd*,[30] and *Sopov v Kane Constructions Pty Ltd (No 2)*[31] to the extent that they permitted recovery in excess of the contract price for services rendered.[32] All majority judges said that the price agreed reflects the allocation of risk and the bargain struck between the parties.[33] It is also consonant with the public policy of encouraging parties to honour their contracts and remove any temptation to break contracts in an advanced stage of performance, in the hopes of higher compensation than agreed between the parties.[34] Nettle, Gordon and Edelman JJ however left open the possibility that in an appropriate case, it might be unconscionable to limit the amount recoverable pursuant to *quantum meruit* to the contract price.[35] Gageler J did not leave that possibility open.

The Entire Contract and Total Failure of Consideration

Unless the parties agree otherwise, a building contract is an entire contract with payment only due at the completion of the contract. However, the parties may agree that progress payments will be made on the occurrence of certain events[36] such as the issuance of a certificate by an architect. The building contract however remains an entire contract as an owner has no interest in procuring a partially completed building and the fact that the contract allows for progress claims does not change this fact.[37] This underlying premise remains even when there is a payment mechanism. A payment mechanism does not have the effect of rendering an entire contract truly severable. On the face of the judgment, the majority judges have premised their judgments upon an incorrect assumption about the effect of progress claims on an entire contract.[38]

---

[24] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [87]; 36 BCL 12; [2019] HCA 32.

[25] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [87]; 36 BCL 12; [2019] HCA 32.

[26] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [88]; 36 BCL 12; [2019] HCA 32.

[27] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [90]; 36 BCL 12; [2019] HCA 32.

[28] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [91]; 36 BCL 12; [2019] HCA 32.

[29] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; 9 BCL 40.

[30] *Iezzi Constructions Pty Ltd v Watkins Pacific (QLD) Pty Ltd* [1995] 2 Qd R 350.

[31] *Sopov v Kane Constructions Pty Ltd (No 2)* (2009) 24 VR 510; [2009] VSCA 141.

[32] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [103]; 36 BCL 12; [2019] HCA 32.

[33] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [91] (Gageler J), [214] (Nettle, Gordon and Edelman JJ); 36 BCL 12; [2019] HCA 32.

[34] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [95]–[96]; 36 BCL 12; [2019] HCA 32.

[35] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [216]; 36 BCL 12; [2019] HCA 32.

[36] Carter, n 20, [6-87].

[37] See Julian Bailey, *Construction Law* (Informa from Routledge, 2nd ed, 2016) [6.331] and [6.337].

[38] This appears to be because the High Court refused the builder leave to contend without a Notice of Contention that the contract was an entire contract despite the fact that the position of Mann was that the contract was divisible: *Mann v Paterson Constructions Pty Ltd* [2019] HCATrans 92 (14 May 2019) 53 lines 2346–2351. Kiefel CJ said that such a proposition would have had insufficient

Nettle, Gordon and Edelman JJ said that to recognise the availability of restitutionary relief for work performed under an entire obligation up to the point of termination, as an alternative to damages for breach of contract, is not necessarily unprincipled.[39] There is nothing in the judgment of *McDonald v Denny Lascelles Ltd* that excludes the availability of restitutionary relief when a contract is terminated by the innocent party for repudiation. Nettle, Gordon and Edelman JJ said that "restitutionary obligations are imposed by operation of law in response to circumstances including the retention of a benefit received on a basis which has totally failed to materialise. … But circumstances other than the unenforceability or avoidance of a contract ab initio, including frustration and termination, may provide the occasion for, and form part of the circumstances giving rise to, an obligation to pay what is reasonable".[40] Their Honours seem to be suggesting that the fact of termination may justify the availability of a remedy in restitution. The authors contend that termination, by itself, as a justification for the availability of restitution, is insufficient. Some further conduct is required, such as the decision to retain a returnable benefit, as a prerequisite. The genesis of this requirement is discussed below.

In *Appleby v Myers*,[41] the Exchequer Chamber refused to grant the plaintiff a remedy in restitution. The plaintiff had agreed to erect a steam engine and machinery. The contract had divided the works into 10 different parts with separate prices for each part but no time had been fixed for payment. The works were substantially complete although not absolutely complete – the plaintiff retained the right to replace the work – when the building, including the steam engine and machinery, was destroyed by fire. No payment had been made under the contract at the time of the fire and the work remained at the plaintiff's risk. The defendant argued that as the contract was an entire one, the plaintiff ought not to recover anything. The Court agreed. In circumstances where the building was accidentally damaged through no fault of either party, the plaintiff was excused from completing the entire contract but was not entitled to recover any compensation or restitution. The Court said that the plaintiffs having contracted to do an entire work for a specific sum, can recover nothing unless the work is done or it can be shown that it was the defendant's fault that the work was incomplete or there is something to justify the conclusion that the parties had entered into a fresh contract.[42] The only basis for an automatic right for *quantum meruit*, alluded to in *Appleby v Myers*[43] and derived from *Planche v Colburn*[44] was therefore rescission ab initio of the contract for the defendant's fault. In all other cases, the defendant's acceptance of the benefit of performance had to be proved. However, a contract terminated for repudiation is not rescinded ab initio but merely discharged.[45] In these circumstances, the automatic right to restitution now depends on discharge after part performance, not rescission ab initio.

Nettle, Gordon and Edelman JJ acknowledged this. They said that at the time of *Planche v Colburn* rescission ab initio was considered necessary in order to recover in restitution.[46] Nevertheless, their Honours say that it is now recognised that restitution is available when there has been the retention of a benefit received on a basis which has totally failed to materialise.[47]

In the context of a building contract, discharge of the contract at a date when no progress payment has been earned, will always bring about a failure of consideration if the concept is used in the sense

prospects of success: 61 lines 2731–2735. However, this procedural fact was not mentioned by any of the judges in their various judgments.

[39] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [188]; 36 BCL 12; [2019] HCA 32.

[40] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [188]; 36 BCL 12; [2019] HCA 32.

[41] *Appleby v Myers* (1866–1867) LR 2 CP 651.

[42] *Appleby v Myers* (1866–1867) LR 2 CP 651, 661.

[43] *Appleby v Myers* (1866–1867) LR 2 CP 651.

[44] *Planche v Colburn* (1831) 8 Bing 14; 131 ER 305.

[45] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [9] (Kiefel CJ, Bell and Keane JJ), [62] (Gageler J), [165] (Nettle, Gordon and Edelman JJ); 36 BCL 12; [2019] HCA 32.

[46] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [188]; 36 BCL 12; [2019] HCA 32.

[47] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [188]; 36 BCL 12; [2019] HCA 32.

employed by Nettle, Gordon and Edelman JJ. If the contract is an entire one, termination for total non-performance will bring about a total failure of consideration for a money payment. In this scenario, any moneys paid in advance are recoverable.[48] However, it is more likely than not that parties to a building contract would have structured their entire contract to allow for progress payments, retention of which is not conditional upon full performance of the entire contract. As discussed above, a building contract that allows for progress payments does not render an entire contract severable.

Incomplete performance of an entire contract which results in the innocent party receiving and retaining any substantial part of the benefit expected under the contract means that the failure of consideration will only be partial and not total.[49] In the absence of a total failure of consideration, there is no basis for recovery of the whole or any part of the purchase price in restitution.[50] The innocent party would typically be limited to recovery of damages for breach of contract.[51] To rule otherwise has the indirect effect of overruling *Baltic Shipping Co v Dillon*[52] where the High Court held that Mrs Dillon was only entitled to damages for breach of contract rather than restitution of her full fare for the cruise as there had not been a total failure of consideration when the ship sank on the tenth day of a fourteen day cruise in the South Pacific. Mrs Dillon had received many benefits under the contract. A total failure of consideration therefore cannot be the foundation of the availability or otherwise of restitutionary relief in the context of entire contracts.

It is unfortunate that Nettle, Gordon and Edelman JJ founded the entitlement to restitution upon an incorrect assumption that the building contract was severable because it provided for progress payments. If the building contract had been properly treated as an entire contract then there would not have been a total failure of consideration so as to entitle the builder to recover in restitution.

Receipt of a Benefit

It follows that the availability of restitutionary relief by way of *quantum meruit* once a builder has received progress payments ought not to be determined by whether the owner has received the benefit of incomplete works since the previous progress payment. Not only is it inconsistent with *Sumpter v Hedges*[53] which the authors discuss below, it is inconsistent with the comments made by the Bench in earlier decisions of the High Court in *Steele v Tardiani*,[54] *Pavey & Matthews Pty Ltd v Paul*,[55] *Lumbers v W Cook Builders Pty Ltd (in liq)*[56] and *Baltic Shipping Co v Dillon*[57] where conferral and acceptance of the benefit was considered a prerequisite for restitution.

---

[48] *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 385 (Gaudron J), 388–389 (McHugh J).

[49] *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 350, 353 (Mason CJ), 378 (Deane and Dawson JJ), 386 (Gaudron J), 388 (McHugh J).

[50] *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 384–385 (Gaudron J), 388–389 (McHugh J). See also *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, [173] (Gordon, Nettle and Edelman JJ); 36 BCL 12; [2019] HCA 32, where their Honours say: "if the obligation to perform work and labor is 'entire' so that nothing is due until all of the work has been completed by the contractor, then upon termination of the contract by the contractor's acceptance of the other party's repudiation to it, there will be a total failure of consideration".

[51] *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 377 (Deane and Dawson JJ).

[52] *Baltic Shipping Co v Dillon* (1993) 176 CLR 344.

[53] *Sumpter v Hedges* [1898] 1 QB 673.

[54] *Steele v Tardiani* (1946) 72 CLR 386, 402 (Dixon J), 408 (McTiernan J).

[55] *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 227 (Mason and Wilson JJ), 235 (Brennan J), 263 (Deane J), 267 (Dawson J). The authors note that *Pavey & Matthews Pty Ltd v Paul* was not a case about whether quantum meruit was available when a contract was discharged after repudiation. Instead, the issue was whether quantum meruit was available in circumstances where the oral contract for building works was not enforceable by reason of the conditions of the builder's licence.

[56] *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 653–654 (Gleeson CJ), 656 (Gummow, Hayne, Crennan and Keifel JJ); 24 BCL 337; [2008] HCA 27.

[57] *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 374 (Deane and Dawson JJ), 385 (Gaudron J).

In *Sumpter v Hedges*,[58] Collins LJ said that *quantum meruit* is available when the owners have taken the benefit of the work in circumstances where the owner had the option to take or not to take the benefit of the work done. In these circumstances, a new contract could be implied that the owner would pay for the work on a *quantum meruit* basis.[59] In our opinion, to justify a *quantum meruit* claim, rather than a claim, for damages, the owner must have the choice of whether or not to accept the incomplete work. A smoothly running construction project does not typically see the owner repudiating its payment obligations under the contract. There are often issues with performance in terms of time and quality in such projects which lead to repudiatory conduct on the part of the owner. The cost of having another contractor complete works often riddled by defects and abandoned by another contractor often exceeds the price for the original contract. It can also be difficult for an owner to find another contractor willing to take on incomplete works where latent defects may exist. Ought an owner in these circumstances be compensated for these additional costs or should these costs just be brought to account while valuing the services that the owner has received the benefit of? That is, should these additional costs be set off against the reasonable remuneration that the contractor is entitled to for the works done? The prevention principle indicates that an owner will not be entitled to claim these costs as it is the party that has wrongfully repudiated the contract. Nevertheless, the authors contend that because of these issues, an owner should not automatically be subject to the remedy of *quantum meruit* if this element of choice is not present.

Further, how should the work in progress be valued? Specifically, should a court take into account the total value of the services provided under the contract and not just the value of the work in progress as it may not be possible to carry out this exercise in a vacuum? This question becomes significant if the progress claims are skewed so that the value of the progress claims that have been issued pursuant to the contract exceeds the value of the services rendered. How, if at all, should this be brought to account? Common sense suggests that the value of the total services[60] provided up to the date of termination should be taken into consideration when valuing the *quantum meruit* claim. Otherwise, the builder could obtain a windfall. However, the practical effect of doing this is a remedy in *quantum meruit* for the whole of the services rendered and not just for the value of the incomplete works for which a progress claim has not been issued. The High Court also did not refer to the retentions that the owner would presumably be holding onto. How should these moneys be brought to account in valuing the *quantum meruit* claim?

What Is the Position for Unauthorised Variations?

Mann v Paterson Constructions Pty Ltd is silent on the issue of variations that have not been authorised in accordance with the contractual mechanism but have been performed.[61] The variations may have been performed at the request of the owner or they may have been performed out of necessity even though they had not been expressly requested by the owner. If the contractual mechanism precludes the entitlement of the builder to be paid for these variations then the issue of unjust enrichment arises. In both scenarios, the owner would have received the benefit of the variations. If this was the sole test

[58] *Sumpter v Hedges* [1898] 1 QB 673, 676.

[59] The implied contract is used as a rationalisation for the remedy of restitution. *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 357 per Mason CJ where his Honour said (footnotes omitted): "there was little room for restitutionary obligation imposed by law except as a 'quasi-contractual' appendix to the law of contract. As a result, until recently, restitutionary claims were disallowed when a promise could not be implied in fact [footnote omitted]. However, since *Pavey & Matthews Pty Ltd v Paul*, such an approach no longer represents the law in Australia".

[60] It is the view of the authors that it will be necessary to take into account the costs of rectification of any defects present in the work when carrying out a valuation of the work done. Practical problems arise if there are defects present in work that has already been done and paid for. Should the costs of rectifying those defects be taken into account when valuing the work in progress that has not already been paid for? Or should these amounts be subject of a claim on the retention amounts under the contract? Common sense suggests that the value of defects in the entire works should be taken into account when valuing the work done. However, the treatment of the High Court of the contract as one with separable portions with the remedy of restitution only available for one separable portion makes such an approach problematic.

[61] In *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164; 36 BCL 12; [2019] HCA 32, the right of the builder to be paid for variations was determined by the *Domestic Building Contracts Act 1995* (Vic).

of whether the builder is entitled to a remedy of *quantum meruit* for the value of the variations then the owner could find themselves exposed to claims for *quantum meruit* for benefits that they had not requested and had not wanted.

In *ENE 1 Kos Ltd v Petroleo Brasileiro SA Petrobras (The Kos)*,[62] Lord Sumption approved the general rule that English law does not allow a general right of recovery for benefits conferred on others against their will or expenses incurred in the course of conferring them. There is no recovery for benefits "officiously" conferred. As Bowen LJ had said in *Falcke v Scottish Imperial Insurance Co*[63] "[l]iabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will".

An errant builder who plies the owner with unwanted and unnecessary variations will not be able to recover in *quantum meruit*. This is consistent with the dictates of justice. However, what about essential variations that are bestowed upon the owner? If the building works cannot continue without the performance of the variation then the builder ought to be compensated even if the owner did not request the works. While it is undeniable that an owner ought not be liable to compensate the builder for these variations if it does not have the option of accepting or rejecting the benefit supplied, the owner may have constructively accepted the benefit given the essential nature of the services provided.[64] In these circumstances, the builder ought to be remunerated for the work done. However, what would be the appropriate measure? In *Pavey & Matthews Pty Ltd v Paul*,[65] Deane J suggested that it would be an affront to the requirements of good conscience and justice for unsolicited but subsequently accepted work done in improving property to be valued according to the reasonable rate for work actually done, in circumstances where remuneration for the unsolicited work calculated at what was a reasonable rate would far exceed the enhanced value of the property. In these circumstances, the enhanced value of the property might be the appropriate measure. The authors do not form a concluded view as to what might be the appropriate measure. In their view, this ought to be determined on a case-by-case basis.

Conclusion

McDonald v Dennys Lascelles Ltd does not preclude the availability of restitution by way of *quantum meruit* in circumstances where a contract has been terminated for repudiation. That said, the authors are of the view that a restitutionary remedy ought to be available if a plaintiff can demonstrate that the owner has taken the benefit of the work in circumstances where the owner had the option to accept or reject the benefit of the work done.[66] Without this element of choice being a necessary ingredient of the availability or otherwise of *quantum meruit*, the claim is in substance one for damages.

In *Mann v Paterson Constructions Pty Ltd*, the High Court did not refer to whether the owners had exercised their choice to accept the benefit of the work in progress. The point was regarded as irrelevant. In circumstances where it is unclear whether the cost of completion of the incomplete works will exceed the original contract price, whether there are any defects present in the works in progress, and where the underlying premise of the High Court that the works that form the scope for each progress claim constitute a separable entire portion is incorrect, it seems to us that the High Court ought not to have found that *quantum meruit* was available as a remedy at all. The restricted availability of *quantum meruit* also raises many practical difficulties and it is likely that these issues of quantification were not considered by the High Court. Damages for breach of contract, which are always available when a contract is discharged for repudiation, would have been the sole appropriate remedy on the facts in *Mann v Paterson Constructions Pty Ltd*.

[62] *ENE 1 Kos Ltd v Petroleo Brasileiro SA Petrobras (The Kos)* [2012] 2 AC 164, [19]–[20]; [2012] UKSC 17.

[63] *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234, 248.

[64] See *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 263–264.

[65] *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 264.

[66] *Sumpter v Hedges* [1898] 1 QB 673.