

# *Before the High Court*

## Discharged Contracts and *Quantum Meruit*: *Mann v Paterson Constructions Pty Ltd*

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### *Abstract*

Should a claimant be entitled to maintain a claim for restitution in respect of work carried out under a contract that is subsequently discharged for breach or repudiation? Should the claimant instead be limited to a contractual claim for damages? If a claim for restitution is maintainable in these circumstances, should the contract price operate as a ceiling upon the sum recoverable? In *Mann v Paterson Constructions Pty Ltd* the High Court of Australia will be presented with an opportunity to consider these questions. The principal object of this column is to outline the different ways in which the relationship between damages and restitution may be understood in this setting.

## **I Introduction**

The obligation to pay damages for loss of bargain is a secondary obligation that arises from the failure to fulfil a primary performance obligation under a contract.<sup>1</sup> At the time the secondary obligation to pay damages arises, it is an unconditional obligation and thus survives discharge of the contract.<sup>2</sup> Where a contract is discharged by the acceptance of an act of repudiation, the right to damages unconditionally accrues when the repudiation is accepted.<sup>3</sup>

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<sup>1</sup> *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 849 (Lord Diplock).

<sup>2</sup> See, eg, *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444, 451 (Barwick CJ); *Berger & Co Inc v Gill & Duffus SA (No 2)* [1984] AC 382, 390 (Lord Diplock). For a discussion of unconditionally accrued rights, see Timothy Pilkington, 'Advance Payments and the Border of Contract and Restitution: *McDonald v Dennys Lascelles* Revisited' in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, forthcoming).

<sup>3</sup> *Johnstone v Milling* (1886) 16 QBD 460, 472–3 (Bowen LJ); *Heyman v Darwins Ltd* [1942] AC 356, 382 (Lord Wright); *Huppert v Stock Options of Australia Pty Ltd* (1965) 112 CLR 414, 426 (Kitto J). In contrast, an unconditionally accrued right to damages for an actual breach may arise before discharge.

In some cases, the application of these principles may give rise to difficult questions as to the relationship between the law of contract and unjust enrichment.<sup>4</sup> Suppose, for instance, C performs work under a contract with D and D repudiates the contract prior to C earning an unconditionally accrued right under the contract to be paid for its work.<sup>5</sup> In such a case, C might be thought to be entitled to ‘elect’ between a claim for damages for loss of bargain and a *quantum meruit* for the fair market value of the work performed.<sup>6</sup> Although the existence of such a remedial choice may initially seem unremarkable, it is capable of producing outcomes that might invite objection. A claimant may be able to recover a sum upon a *quantum meruit* that exceeds the contract price because the quantum of a claim for restitution for work or services is ordinarily determined by reference to the fair market value of the performance conferred, and the concept of ‘fair market value’ has not been understood as invariably consistent with the contract price.<sup>7</sup>

Should a claimant be entitled to maintain a claim for restitution in respect of work or services performed under a contract that is subsequently discharged for breach or repudiation if, at the time of discharge, there is not an unconditionally accrued contractual right to payment for the work or services? Should the claimant instead be limited to a contractual claim for damages for loss of bargain? If a claim for restitution is maintainable in such circumstances, should the contract price operate as a ceiling upon the amount recoverable? In *Mann v Paterson Constructions Pty Ltd*,<sup>8</sup> the High Court of Australia will have an opportunity to consider these questions.<sup>9</sup> Though they have been the subject of considerable judicial and academic consideration, their proper resolution remains the subject of debate. As will be seen, some of these questions are obscured by the lingering shadow of quasi-contract, which, while formally relegated to history, continues to exert an indirect influence over the modern law.<sup>10</sup>

<sup>4</sup> We use the expression ‘unjust enrichment’ throughout to refer to a category of situations in which restitution is available: *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 516 [30] (French CJ, Crennan and Kiefel JJ) (*‘Equuscorp’*).

<sup>5</sup> Of course, where an entitlement to payment has accrued unconditionally prior to discharge, an action for debt lies for its recovery: see *Young v Queensland Trustees Ltd* (1956) 99 CLR 560, 567 (Dixon CJ, McTiernan and Taylor JJ).

<sup>6</sup> The idea that a claimant is faced with an ‘election’ in such a case is reflected in much of the case law: see *Chandler Bros Ltd v Boswell* [1936] 3 All ER 179, 186 (Greer LJ); *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435, 462 (Starke J). The language of ‘election’ is also seen in academic writing, see, eg, N C Seddon and R A Bigwood, *Cheshire & Fifoot: Law of Contract* (LexisNexis, 11<sup>th</sup> ed, 2017) 1305. However, the term ‘election’ is not entirely apt to describe the choice a claimant has in such a case: see J W Carter, ‘Discharged Contracts: Claims for Restitution’ (1997) 11(2) *Journal of Contract Law* 130. This point is discussed further below.

<sup>7</sup> See, eg, *Sopov v Kane Constructions Pty Ltd (No 2)* (2009) 24 VR 510, 518–9 [26]–[28] (Maxwell P, Kellam JA and Whelan AJA) (*‘Sopov (No 2)’*).

<sup>8</sup> High Court of Australia, Case No M197/2018.

<sup>9</sup> The appeal also raises questions, not discussed here, as to the interpretation and application of the *Domestic Building Contracts Act 1995* (Vic) s 38.

<sup>10</sup> Under the quasi-contractual conception of restitutionary liability, the obligation to make restitution was thought to rest upon an ‘implied’ contractual promise. As to the development of this understanding of restitutionary liability, see David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999) ch 14. For a brief overview of its gradual abandonment, see Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3<sup>rd</sup> ed, 2015) 45–8.

It is not intended here to offer a definitive answer to each of the questions set out above or to examine all of the issues relevant to their determination. Rather, the object of the brief discussion that follows is to outline the different ways in which the High Court may characterise the relationship between damages and *quantum meruit*, and to dispel a number of misconceptions that have emerged in the course of the relevant debates.

## II Facts and Procedural History

The appeal in *Mann v Paterson Constructions* arises from a dispute in respect of a residential building contract. The appellants ('the Manns') entered into a standard-form contract with the respondent ('the builder') for the construction of two units.<sup>11</sup> The parties' relationship broke down when the project was at an advanced stage of completion.<sup>12</sup> The Manns purported to terminate the contract and to exclude the builder from the worksite.<sup>13</sup> Each party accused the other of having repudiated the contract.<sup>14</sup>

The builder commenced proceedings against the Manns in the Victorian Civil and Administrative Tribunal. The Manns responded with a counterclaim. The Tribunal found that the Manns had repudiated the contract.<sup>15</sup> It further held that the builder was entitled to recover upon a *quantum meruit* for work performed prior to discharge.<sup>16</sup> In arriving at the latter conclusion, the Tribunal relied upon the decision of the Victorian Court of Appeal in *Sopov (No 2)*.<sup>17</sup>

Justice Cavanough granted an application for leave to appeal from the Tribunal's decision and allowed the appeal for the limited purpose of addressing a mathematical error in the Tribunal's orders.<sup>18</sup> The appeal was otherwise dismissed.

The Victorian Court of Appeal granted an application for leave to appeal from the decision of Cavanough J in respect of three of the four grounds upon which the Manns relied.<sup>19</sup> The appeal was dismissed.<sup>20</sup> Significantly, the Court of Appeal refused the application for leave to appeal in respect of the Manns' second ground of appeal, which concerned the availability of a *quantum meruit*.<sup>21</sup> In arriving at this aspect of its decision, the Court made it clear that any departure from the rule that a *quantum meruit* is available where a contract is discharged for breach or repudiation was a step that could be taken only by the High Court of Australia.<sup>22</sup>

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<sup>11</sup> *Mann v Paterson Constructions Pty Ltd* [2018] VSC 119 (19 March 2018), [1].

<sup>12</sup> *Ibid* [2].

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid*.

<sup>15</sup> *Paterson Constructions Pty Ltd v Mann* [2016] VCAT 2100 (12 December 2016), [469]–[518].

<sup>16</sup> *Ibid*.

<sup>17</sup> *Sopov (No 2)* (2009) 24 VR 510.

<sup>18</sup> *Mann v Paterson Constructions Pty Ltd* [2018] VSC 119 (19 March 2018), [84]–[86].

<sup>19</sup> *Mann v Paterson Constructions Pty Ltd* [2018] VSCA 231 (12 September 2018), [150] (Kyrou, McLeish and Hargrave JJA).

<sup>20</sup> *Ibid*.

<sup>21</sup> *Ibid*.

<sup>22</sup> *Ibid* [95]–[97].

### III Three Approaches

There are at least three possible approaches to the relationship between damages and a *quantum meruit* in cases exemplified by *Mann v Paterson Constructions*. The first is to maintain that no such choice is available, and that the plaintiff is limited to an award of damages. The second is that such a choice is available, and that the amount recovered upon a *quantum meruit* may exceed the sum to which the innocent party would be entitled to in damages. The third approach recognises a *quantum meruit* as being maintainable, but would have the contract price operate, at least in most instances, as a ceiling upon the amount claimable.<sup>23</sup> Each approach merits consideration in turn.

#### A *The Primacy of Contract*

The preponderance of judicial and academic opinion favours the view that restitutionary rights are subsidiary to those arising from contract.<sup>24</sup> Though that view might be traceable in part to the lingering influence of quasi-contract, it is nonetheless susceptible of justification on a number of bases.<sup>25</sup> The first rests upon a respect for the voluntary allocation of risk between parties, consistent with individual autonomy.<sup>26</sup> The second turns upon a concern for transactional security; that is, the desire to ensure that parties are confident about the integrity of their bargains.<sup>27</sup> The subsidiarity of restitution to contract was acknowledged by the High Court of Australia in *Lumbers v Cook Builders* where, in rejecting a builders' claim for restitution, the Court said that 'if allowed, [such a claim] would redistribute not only the risks but also the rights and obligations for which provision was made by the contract the Lumbers made with Sons'.<sup>28</sup>

An additional reason why contractual rights might be understood as, or give the appearance of being, primary follows from an interpretation of restitution as concerned with reversing benefits where consent to the transfer of the benefit is defective. As Smith has observed,<sup>29</sup> the situations to which Lord Mansfield referred in *Moses v Macferlan*, namely: 'money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express, or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation,

<sup>23</sup> Edelman and Bant suggest that although the contract price should generally operate as a ceiling, this might not be a blanket rule: see James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2<sup>nd</sup> ed, 2016) 84.

<sup>24</sup> For a discussion of the subsidiarity of unjust enrichment, see Ross Grantham and Charles Rickett, 'On the Subsidiarity of Unjust Enrichment' (2001) 117(Apr) *Law Quarterly Review* 273.

<sup>25</sup> It is not difficult to see why the fictions of quasi-contract necessitated an acceptance of the subsidiarity of restitutionary liability: where a matter was governed by an effective contract, there could be no room for the implication of a promise dealing with that same matter.

<sup>26</sup> *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 664 [80] ('*Lumbers v Cook Builders*'); *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848 (Lord Diplock); Grantham and Rickett, above n 24, 293.

<sup>27</sup> *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 388 (Lord Mustill).

<sup>28</sup> (2008) 232 CLR 635, 664 [80] (Gummow, Hayne, Crennan and Kiefel JJ).

<sup>29</sup> Lionel Smith, 'Unjust Enrichment: Big or Small?' in Simone Degeling and James Edelman (eds) *Unjust Enrichment in Commercial Law* (Lawbook, Thomson Reuters, 2008) 36–7.

contrary to laws made for the protections of person under those circumstances’,<sup>30</sup> all justify restitution substantially on the basis that the claimant’s consent was defective in some way. Thus understood, there is no need for restitution where the agreed contractual basis for the transfer is satisfied or there is provision in the parties’ contract for what is to occur should the basis for the transfer fail. This idea may be seen as having led to a characterisation of restitution as ‘gap-filling’ or supplementary to contract.

Although Australian law has not generally understood restitution in terms of correcting normatively defective transfers of value as it is in England,<sup>31</sup> recognition has been given to restitution as fulfilling a supplementary or gap-filling role. In *Pavey & Matthews Pty Ltd v Paul*, Deane J said that ‘it is the very fact that there is no genuine agreement ... that provides occasion for ... the imposition ... of the obligation to make restitution’.<sup>32</sup> Similarly, in *Roxborough v Rothmans of Pall Mall Australia Ltd*, Gummow J spoke of restitution for a total failure of consideration as ‘illustrative of the gap-filling and auxiliary role of restitutionary remedies’ that operate in the absence of contract and ‘do not let matters lie where they would fall if the carriage of risk between the parties were left entirely within the limits of their contract’.<sup>33</sup> In this respect, Gummow J understood there to be an analogy between restitution and equity insofar as both fulfil a corrective role of ameliorating the harshness of other doctrines.<sup>34</sup>

The perceived subsidiary or supplementary function of restitution to contract has led certain commentators to argue that there should not be a choice available between damages and a *quantum meruit* where a contract is discharged for breach or repudiation. In the view of these commentators, the recognition of such a choice is incompatible with an approach to restitution as fulfilling a gap-filling role or one that respects the normative primacy of contract.<sup>35</sup> Havelock, for example, reasons that in respect of damages for loss of bargain, the parties’ contract defines their rights and obligations,<sup>36</sup> in the sense that the damages are an unconditionally accrued secondary obligation whose purpose is to put the innocent party, so far as money can do so, in the position they would have been in had the contract been performed.<sup>37</sup> To allow for a *quantum meruit* would ‘subvert the voluntary allocation of risk’<sup>38</sup> because it is measured by the fair market value of the work or services and not the price the parties agreed.

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<sup>30</sup> *Moses v Macferlan* (1760) 2 Burr 1005, 1012.

<sup>31</sup> *Investment Trust Companies v Revenue and Customs Commissioners* [2018] AC 275, 295 [42] (Lord Reed JSC).

<sup>32</sup> *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 256.

<sup>33</sup> (2001) 208 CLR 516, 545 [75].

<sup>34</sup> *Ibid.*

<sup>35</sup> Rohan Havelock, ‘A Taxonomic Approach to *Quantum Meruit*’ (2016) 132(Jul) *Law Quarterly Review* 470, 481; Peter Birks, *An Introduction to the Law of Restitution* (Oxford Clarendon Press, 1991) 47; Jack Beatson, ‘The Temptation of Elegance: Concurrence of Restitutionary and Contractual Claims’ in William Swadling and Gareth Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford University Press, 1999) 151–2.

<sup>36</sup> Havelock, above n 35, 481; *Moschi v Lep Air Services Ltd* [1973] AC 331, 350 (Lord Diplock).

<sup>37</sup> *Robinson v Harman* (1848) 1 Exch 850, 855 (Parke B).

<sup>38</sup> Havelock, above n 35, 481.

It is, however, important to observe that any rejection of the availability of a *quantum meruit* in such circumstances would create an exception to the general rule that an innocent party has a prima facie right to recover benefits upon discharge for breach where there has been a total failure of consideration.<sup>39</sup> There are two reasons why the general rule's application in respect of work or services can be seen as controversial. The first is that unlike money or property, work or services cannot be returned. As Stevens explains, what the law reverses is the performance itself as rendered by C and accepted by D.<sup>40</sup> Second, restitution for work or services has traditionally been awarded to the amount of the fair market value for the work or services performed. This means the beneficiary of the work or services may be required to pay to the claimant a sum, to reverse the performance rendered, that is greater than that they agreed to pay under their contract.

If one accepts restitution as subsidiary or supplementary to contract, the question that arises is how, in cases such as *Mann v Paterson Constructions*, best to account for those ideas.<sup>41</sup> Should restitution upon a total failure of consideration for work or services be treated as an exception to the general availability of restitution for a total failure of consideration after discharge? Or should the law's adoption of a blanket rule that the value of what the defendant has received in cases of work or services is the fair market value, or its understanding of how the fair market value is determined, be refined?

## B *Concurrent Claims*

Although courts and commentators have routinely described a claimant as being faced with an 'election' between damages and a *quantum meruit*, this expression is somewhat misleading. As Carter has observed:

Under the modern law, where a breach occurs, damages are always available, and the decision to exercise a right of discharge does not operate to divest the promisee of the right to make the claim. ... Since the plaintiff does not give up its right to contract damages, either by making the claim for restitution or on receiving judgment for the return of money paid or for reasonable remuneration, damages can always be sought following discharge.<sup>42</sup>

It is thus preferable to speak in terms of the existence of 'concurrent' claims in this setting.<sup>43</sup>

Arguments in support of the concurrent availability of damages and a *quantum meruit* have generally rested upon three contentions. The first is that there is historical support for the concurrent recognition of both remedies. As Bailey

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<sup>39</sup> *Giles v Edwards* (1797) 7 TR 181; *Rowland v Divall* [1923] 2 KB 500. This is not to say this is the only type of situation where a *quantum meruit* is available.

<sup>40</sup> Robert Stevens, 'The Unjust Enrichment Disaster' (2018) 134(Oct) *Law Quarterly Review* 574, 580.

<sup>41</sup> In addition, ideas of 'negation' and 'coherence' are also relevant in this context. For reasons of space, a full discussion of those ideas is not possible here.

<sup>42</sup> Carter, above n 6, 141–2. See further J W Carter, *Carter's Breach of Contract* (LexisNexis, 2<sup>nd</sup> ed, 2018) 652.

<sup>43</sup> Though the claims may aptly be described as concurrent, it must of course be noted that the usual rule against double recovery applies.

points out,<sup>44</sup> the origins of the availability of the concurrent *quantum meruit* remedy are generally traced to two 19<sup>th</sup>-century cases: *Planché v Colburn*<sup>45</sup> and *De Bernardy v Harding*.<sup>46</sup>

In *Planché*, the plaintiff was engaged by the defendant publisher to research and write a book. The defendant repudiated the contract before the manuscript was delivered. The plaintiff's claim for a *quantum meruit* succeeded. Chief Justice Tindal held:

when a special contract is in existence and open, the Plaintiff cannot sue on a *quantum meruit*: part of the question here, therefore, was, whether the contract did exist or not. It distinctly appeared that the work was finally abandoned; and the jury found that no new contract had been entered into. Under these circumstances the Plaintiff ought not to lose the fruit of his labour ...<sup>47</sup>

In *De Bernardy*, the defendant engaged the plaintiff to sell tickets abroad for the viewing of the Duke of Wellington's funeral procession. The claimant incurred expense in organising accommodation for the purchasers of tickets and on advertising. However, before any tickets had been sold, the defendant repudiated the contract. The plaintiff claimed a *quantum meruit* for the work he had performed. He was met with a defence that there was a contract between the parties. Baron Alderson held that if one party has 'absolutely refused to perform' or has rendered themselves incapable of performing their part of the contract, the other party has 'either to sue for a breach of it, or to rescind the contract and sue on a *quantum meruit* for the work actually done'.<sup>48</sup>

In the early 20<sup>th</sup> century, courts generally continued to adhere to the idea that a claimant could choose between damages and a *quantum meruit*.<sup>49</sup> In *Lodder v Slowey*,<sup>50</sup> a subcontractor was found to be entitled to a claim for a *quantum meruit* against the head contractor following termination. It was said the subcontractor 'was in the circumstances entitled to treat the contract as at an end and to sue on a *quantum meruit* for work and labour done and materials supplied'.<sup>51</sup> In *Chandler Bros Ltd v Boswell*, Greer LJ considered it 'long well settled' that an innocent party 'is entitled, if he so choose, to claim damages or claim on *quantum meruit* basis'.<sup>52</sup> Such sentiments were also present in Australia.<sup>53</sup> For example, in *Horton v Jones (No 2)* Jordan CJ said that if one party to a contract 'renders to the other some but not all the services which have to be performed' before they are entitled to receive payment under the contract, and the other wrongfully repudiates thereby preventing the

<sup>44</sup> Julian Bailey, 'Repudiation, Termination and *Quantum Meruit*' (2006) 22 *Construction Law Journal* 217, 220.

<sup>45</sup> (1831) 131 ER 305 ('*Planché*').

<sup>46</sup> (1853) 155 ER 1586 ('*De Bernardy*').

<sup>47</sup> *Planché* (1831) 131 ER 305, 306.

<sup>48</sup> *De Bernardy* (1853) 155 ER 1586, 1587.

<sup>49</sup> See *Heyman v Darwins Ltd* [1942] AC 356, 397–8 (Lord Porter); *Elkington v Wandsworth Corp* (1924) 41 TLR 76; *George Trollope & Sons v Caplan* [1936] 2 KB 382, 390 (Greer LJ); *Thomas v Hammersmith BC* [1938] 3 All ER 201; *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, 141 (Lord Wright).

<sup>50</sup> [1904] AC 442.

<sup>51</sup> *Ibid* 451 (Lord Davey).

<sup>52</sup> [1936] 3 All ER 179, 186.

<sup>53</sup> *Segur v Franklin* (1934) 34 SR (NSW) 67, 72 (Jordan CJ).

innocent party ‘from earning the stipulated remuneration, the former may treat the contract as at an end and then sue for a *quantum meruit* for the services actually rendered’.<sup>54</sup>

Two observations should be made in respect of the abovementioned line of authorities that have continued to be relied upon by Australian intermediate appellate courts.<sup>55</sup> First, many of these cases appear to proceed upon the false assumption that where a contract is discharged as a result of an accepted repudiation, the contract is rescinded *ab initio* and, therefore, damages are not available.<sup>56</sup> Second, they place repeated reliance upon *Planché*. However, as Havelock points out, nowhere in that case is it suggested that the claimant had the ability to elect between damages and a *quantum meruit*.<sup>57</sup>

The second argument is that there is nothing unusual about concurrent remedies arising from distinct grounds of legal claims and liabilities. One may, for example, generally pursue concurrent remedies in contract and tort,<sup>58</sup> and tort and unjust enrichment.<sup>59</sup> This sort of argument was made by Meagher JA in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*:

There is nothing anomalous in the notion that two different remedies proceeding on entirely different principles, might yield different results. Nor is there anything anomalous in the fact that either remedy may yield a higher monetary figure than the other. Nor is there anything anomalous in the prospect that a figure arrived at on a *quantum meruit* might exceed, or even far exceed, the profit which would have been made if the contract had been fully performed.<sup>60</sup>

It is true that concurrent remedies are available throughout the law of obligations. However, it is an error to suppose that, in and of itself, such an observation supports the proposition that the same should apply, by analogy, in respect of contract and unjust enrichment. Only by examining the reasons that support concurrent remedies in, for example, contract and tort and then considering if they apply to contract and unjust enrichment is such an approach informative.<sup>61</sup>

The third argument is that to allow a *quantum meruit* does not undermine the contractual allocation of risk. The builder, in its written submissions in *Mann v Paterson Constructions Pty Ltd*, says:

Insofar as the contractual allocation of risk was undermined in this case, it was undermined by the fact of the owners’ repudiation; not by the remedies available to the builder upon accepting that repudiation. ... The law sufficiently respects party autonomy by confining claims in quantum meruit

<sup>54</sup> (1939) 39 SR (NSW) 305, 319 (Jordan CJ).

<sup>55</sup> *Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd* [1995] 2 Qd R 350, 361 (McPherson JA).

<sup>56</sup> For a discussion of the emergence of this rule, see Steven Lurie, ‘Towards a Unified Theory of Breach: Tracing the History of the Rule that Rescission Ab Initio is Not a Remedy for Breach of Contract’ (2003) 19(3) *Journal of Contract Law* 250.

<sup>57</sup> Havelock, above n 35, 480.

<sup>58</sup> *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

<sup>59</sup> *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109.

<sup>60</sup> (1992) 26 NSWLR 234, 277.

<sup>61</sup> Charlie Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (Oxford University Press, 2015) 40–8.

to those services in fact requested by the defendant. And insofar as the availability of quantum meruit in cases of repudiatory breach may dissuade some defendants from repudiating their contracts, then it serves ... to uphold, not to undermine, the contractual bargain.<sup>62</sup>

In short, this argument contends that the parties' autonomy is respected because a *quantum meruit* is confined to services requested by a defendant and because an award of a *quantum meruit* where the contract is repudiated may have a deterrent effect. Both of those propositions may be accepted for argument's sake. Neither, however, says anything about why a *quantum meruit* that exceeds the damages to which a claimant is entitled in contract does not undermine the parties' autonomy.

### C *Harmonisation*

A final approach is to reject the primacy of damages in contract, but to hold that the contract price operates as a ceiling on the amount that can be claimed upon a *quantum meruit*. There are a number of bases upon which to reach such a conclusion.

The distinguishing feature of the law of restitution has, in Australia, broadly been understood in terms of allowing the recovery by one person of a benefit transferred to another where retention of the benefit would be unconscionable.<sup>63</sup> Insofar as a *quantum meruit* is a restitutionary remedy, its primary object must be understood in such terms. If restitution is concerned with the recovery of benefits, a question that follows is how one measures the benefit a defendant has retained. One approach to this issue has been the notion of 'subjective devaluation', according to which the existence and extent of a defendant's benefit depends upon the subjective value attributed to it by the defendant. A further approach, advocated by Edelman and Bant, is that value is determined by an objective measure of the value of the benefit chosen to a reasonable person in the position of the defendant.<sup>64</sup> In other words, 'objective' value is to be qualified by the defendant's position.

An award of a *quantum meruit* and contract damages could conceivably be brought into alignment through reliance upon the concept of subjective devaluation; that is, that the contract price reflects the subjective value and thus the benefit on the part of the beneficiary of the work or services. Edelman and Bant are also of the view that, on their preferred analysis, it is possible to reconcile both remedies. They explain that '[i]n 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'.<sup>65</sup>

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<sup>62</sup> Paterson Constructions Pty Ltd, 'Submissions of the Respondent' in *Mann v Paterson Constructions Pty Ltd*, Case No M197/2018, 1 March 2019, [21]–[22].

<sup>63</sup> See, eg, *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 543–51 [70]–[89] (Gummow J); *Equuscorp* (2012) 246 CLR 498, 517 [32] (French CJ, Crennan and Kiefel JJ); *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 568 [1] (French CJ), 597 [81] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

<sup>64</sup> Edelman and Bant, above n 23, 83.

<sup>65</sup> *Ibid* 84.

In Australia, unjust enrichment is not a freestanding criterion for the imposition of legal liability.<sup>66</sup> As the High Court said in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*, ‘unjust enrichment is not the basis of restitutionary relief in Australian law’;<sup>67</sup> the enquiry is instead conducted by reference to equitable principles.<sup>68</sup> It follows that the sum that a defendant must make in restitution to a claimant cannot conclusively be determined by reference to the extent of the benefit the defendant has received. Rather, one must consider the extent to which it would be against conscience for a defendant to retain a particular benefit. This directs attention to a further way in which damages and a *quantum meruit* may be harmonised under the Australian understanding of restitution. That is, where a defendant has received some benefit through performance of a contract, conscience may dictate that only the value which the contracting parties have subjectively attributed to the bargained for work or services operates as a ceiling on the amount that a claimant may receive in restitution.<sup>69</sup>

#### IV Conclusion

*Mann v Paterson Constructions* raises interesting and difficult questions concerning the relationship between contract and unjust enrichment. The preceding discussion has examined three approaches available to the High Court. In making its choice between those three alternatives, the Court will do much to clarify the operation of *quantum meruit* claims in circumstances where the relevant works or services are performed under a contract.

Of equal interest will be the analytic framework that the Court adopts in dealing with the appeal. There remain questions as to how equitable principles, which have been favoured by the Court in the restitutionary context, operate in respect of restitution for work or services and how notions such as ‘unconscionable retention’ are to be applied.

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<sup>66</sup> *Equuscorp* (2012) 246 CLR 498, 516 [30] (French CJ, Crennan and Kiefel JJ); *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd (No 3)* [2014] WASC 162 (7 May 2014), [50] (Edelman J).

<sup>67</sup> (2014) 253 CLR 560, 596 [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

<sup>68</sup> *Ibid* 568 [1] (French CJ), 592–6 [65]–[76] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

<sup>69</sup> An example of an Australian case that may illustrate this approach is *Ford v Perpetual Trustees Victoria Ltd* (2009) 75 NSWLR 42.