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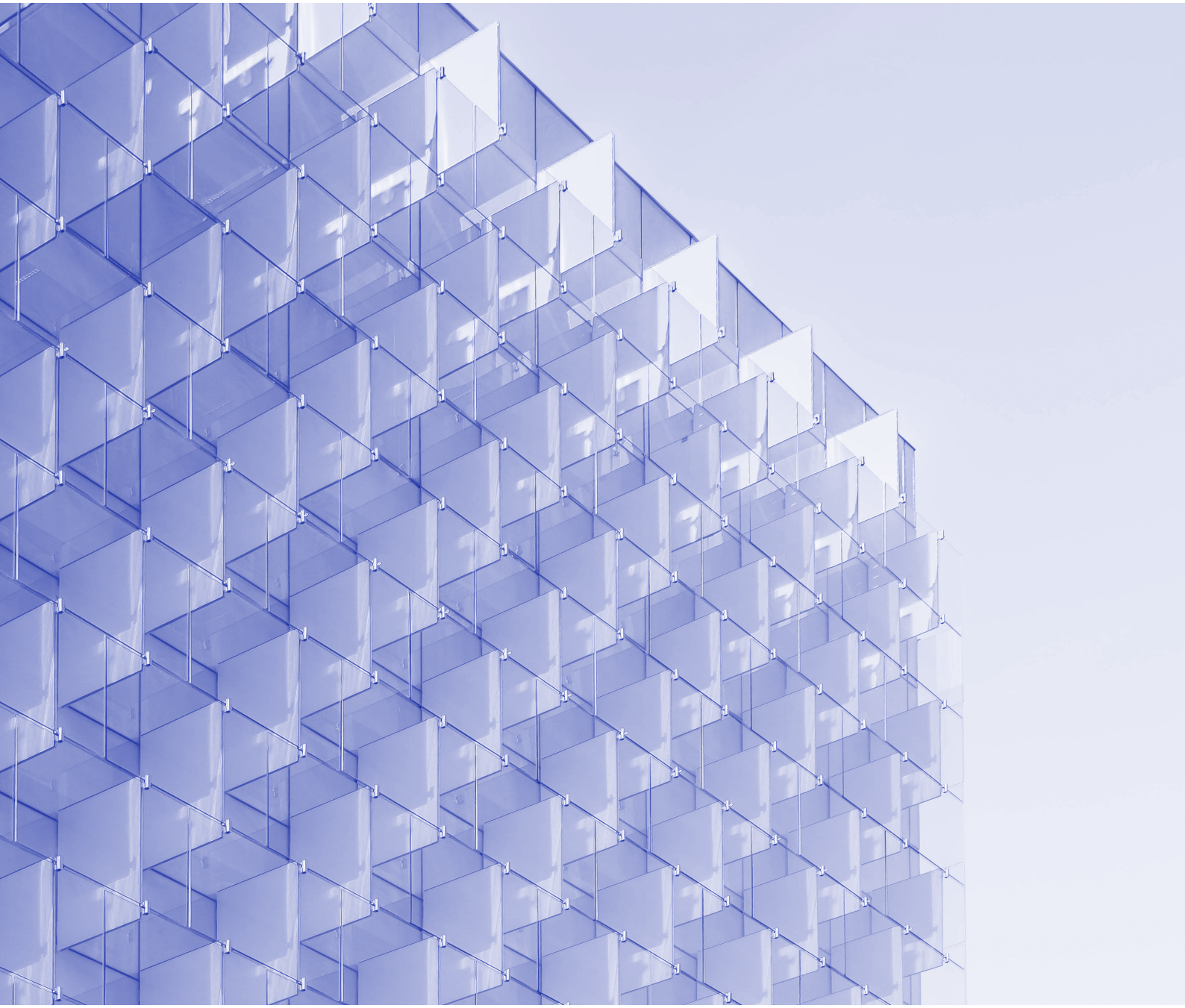

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The ACLN acknowledges the Australian Aboriginal and Torres Strait Islander peoples of this nation. We acknowledge the traditional custodians of the lands on which our company is located and where we conduct our business. We pay our respects to ancestors and Elders, past, present and emerging.

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# EDITORIAL

**Myra Nikolich**

The Hon Peter Vickery QC considers the impact COVID–19 is having on construction contracts. The paper focusses on the construction industry in Australia and elsewhere in the common law world and, in particular, on construction contracts in those jurisdictions. The author examines two legal remedies which may be deployed to manage the impacts of the disease; namely, the common law doctrine of frustration, and the contractual remedy of force majeure. Clearly COVID–19 is setting a new context for the construction industry, with a very real risk of building site closures. In order to minimise this risk, government needs to be proportionate in its responses, whilst the construction industry needs to react with creativity, flexibility and a public–spirited approach. As the author states, 'the antidote for the construction industry in this time of great uncertainty is a very human one'—collaboration and communication will be key to steering construction projects to successful outcomes.

Sam Porz argues that in a highly competitive, profit–driven construction industry, the current legislative framework is inadequate to prevent destruction of Aboriginal heritage and that institutionalised changes are needed to provide the necessary protections. The author discusses in detail how the legislation developed in the current framework is systematically set up to favour non–Indigenous builders and landowners and fails to adequately prevent construction on sacred sites. In order to solve these issues and offer adequate protection to areas of cultural significance, reform is needed, emphasising the role of Indigenous communities in the construction process and their relationships with other contracting parties.

David Solomon's article focuses on the methods used for calculating lost time injury frequency rates and the unbalanced focus received in their favour in comparison to the positive performance indicators that reflect a more accurate representation of effective occupational health and safety performance on site.

Daniela Yaneva considers to what extent new technologies can be used to minimise aggressive risk shifting practices in the construction industry. She discusses the notion of risk allocation in terms of current trends in the Australian construction industry, and outlines some of the negative consequences that stem from onerous risk shifting; namely, an increase in project costs, an increased risk of insolvency, and a deterioration of the commercial relationship between contracting parties. The author proposes a semi–automation approach to risk allocation to demonstrate that utilising new technologies, in conjunction with traditional processes, can improve collaboration between project participants by ensuring consistency and completeness of information, and increasing transparency and trust between parties.

Julian Bailey and Kevin Touhey discuss the decision in *Cubic Metre Pty Ltd v C&E Critharis Constructions Pty Ltd* [2020] NSWSC 479. The case involved the supply of sandstone materials by a subcontractor that were not fit for purpose, which meant that the builder's work for the property owner was defective. At issue was how the main contractor could claim its loss against the subcontractor, and how that loss should be measured. The case offers some insight into

what happens when the main contractor's liability to the employer hasn't yet been determined or may not exist.

Bob Gaussen discusses protection of payments in the building and construction industry during COVID–19. The author suggests that the most effective guarantee of ensuring that money promptly flows through the contractual chain to those who performed the work is to implement cascading trusts.

Simon Forsterling reports on the trend in modern construction contracts to use the provisional sum mechanism as a buffer which can be drawn on to cover variations without impacting the contract sum, or for scope items for which there is a lack of design/engineering detail. This creates a substantial problem for some contractors, who end up bearing the risk of additional time and delay cost arising from provisional sum 'blow–outs', simply because the traditional contract mechanism was inadequate in those cases. The author offers some suggestions to help avoid disputes about 'blow–outs' under provisional sums.

Hubert Wajszel and Ashlea Hawkins discuss insurance implications as a consequence of the Victorian Building Authority's 'tough stance' on building practitioner conduct in the wake of the 'combustible cladding crisis'. The authors discuss in detail the 'show cause' process and list a number of issues that may help both building practitioners and their insurers to navigate the show cause process.

We are fortunate to have four really interesting case notes in this issue, which we hope you enjoy reading as much as we did.

Joanne Staugas, Leah Wright and Sarah Johnson discuss *Tincknell v Duthy Homes Pty Ltd* [2020] SASCFC 24, a recent decision from South Australia which related to the construction of a three–storey residential building. The builder instituted proceedings against the owners to recover the final progress claim and the owners cross–claimed seeking damages for defective works and liquidated damages for failure to reach timely practical completion. The case provides useful guidance on a number of issues of interest to construction lawyers, including damages for defective construction work, whether representations as to competence might be misleading and deceptive, and the ability to contract out of the prevention principle.

Nicholas Gallina analyses the High Court decision in *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32, a case which focuses on the legal consequences that arise when a contract is terminated for repudiation. The author's analysis is comprehensive and highly recommended reading.

Avendra Singh and Jennifer Boutros discuss the decision in *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 93. The case clarified that a non–compliant supporting statement by a head contractor under section 13(7) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) will not invalidate a payment claim or render ineffective service of a payment claim under the Act.

Andrew Archer analyses the decision in *Bundanoon Sandstone Pty Ltd v Cenric Group Pty Ltd* [2019] NSWCA 87, a case which dealt with the issue of good faith in the termination of construction contracts. In this case, the court held that a show cause notice issued by a principal under a construction contract was not issued in good faith (because it was redolent of bad faith) with the consequence that reliance on it to terminate the contract was (along with other invalid grounds) a repudiation.

# CONSEQUENCES WHEN A CONTRACT IS TERMINATED FOR REPUDIATION

## *MANN V PATERSON CONSTRUCTIONS PTY LTD* [2019] HCA 32

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**Owen Dixon Chambers West, Melbourne**

## INTRODUCTION

This paper analyses the High Court decision in *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32.

The decision focuses on the legal consequences which arise when a contract is terminated for repudiation. In this instance the contract was a domestic building contract for the construction of two town houses. The decision considers how claims for payment for three different categories of work are to be treated:

(a) First, work completed where a contractual right to payment had accrued before termination. (Typically work in respect of a completed stage of the domestic building work.)

(b) Second, work completed where a contractual right to payment had not accrued before termination. (Typically work in respect of an incomplete stage of the domestic building work.)

(c) Third, work in the nature of variations requested by owners.

This paper does not consider the third category of work. Nor does it consider the legal consequences which arise where a contract is frustrated or there are issues regarding contract formation, such as fraud.

Given its facts, the decision is to a degree limited to domestic building contracts (i.e. regulated by the *Domestic Building Contracts Act 1995* (Vic)) which have been terminated for repudiation.

However, the discussion in the decision of principles regarding restitution as upon a *quantum meruit* are of general application to commercial contracts.

## SUMMARY OF FACTS

Home owners (Mann) engaged a builder (Paterson) to build two town houses pursuant to a domestic building contract which provided for the contract price to be paid progressively upon satisfactory completion of various stages of work.

The homeowners repudiated the contract, and the builder accepted that conduct as a repudiation and terminated the contract. The builder claimed it was entitled at law to elect between remedies and recover either on the basis of:

(a) damages for breach of contract; or

(b) restitution as upon a *quantum meruit* for all work carried out up to the time of termination.

The Victorian Civil and Administrative Tribunal, the Victorian Supreme Court and the Victorian Court of Appeal found the builder was entitled to make such an election and recover pursuant to a *quantum meruit* for the value of all work it had carried out, i.e. for the first, second and third categories of work referred to above.

Three grounds of appeal were argued before the High Court. The table below identifies the grounds of appeal and how they were decided by each of the justices.

## SUMMARY OF THE HIGH COURT'S FINDINGS AS TO RESTITUTION AS UPON A *QUANTUM MERUIT*

In relation to the first category of work, all justices agreed that where a contract is terminated for repudiation, the remedy of restitutionary *quantum meruit* is no longer available and the non–breaching party is limited to recovering damages for breach of contract.

In relation to the second category of work, there was disagreement among the justices as to the legal consequences which arise where a contract is terminated for repudiation:

(a) The majority justices, comprising Nettle, Gordon and Edelman JJ who published a joint judgment allowing the appeal, and Gageler J who also allowed the appeal, concluded the non–breaching party is entitled by way of remedy to recover, at its election:

(i) damages for breach of contract; or

(ii) restitution as upon a *quantum meruit* but limited by the contract price.

(b) Nettle, Gordon and Edelman JJ, left open the possibility that the amount recoverable on a restitutionary *quantum meruit* could exceed the contract price if circumstances dictate that limiting recovery by reference to a ceiling limit of the contract price would be 'unconscionable'.

(c) The minority, Kiefel CJ, Bell and Keane JJ who published a joint judgment, concluded that the remedy of restitutionary *quantum meruit* is not available and the non–breaching party is entitled to recover damages for loss of profit.

Nettle, Gordon and Edelman JJ justified allowing recovery on a restitutionary *quantum meruit* for the second category of work, in large measure on the concept of total failure of consideration. Gageler J disagreed that the concept of total failure of consideration provided sufficient justification for retaining the restitutionary remedy for the second category of work. In his opinion, it was better to look to whether a non–breaching party should be considered to have been adequately remunerated by its entitlement to bring an action for damages for breach of contract, especially where the damages can be measured by reference to the reliance of the non–breaching party on the contract.

Some matters which influenced the High Court included:

(a) the contract price agreed by the parties and the risk allocations effected by the contract;

(b) a concern to curb potential windfall gains by builders who elect to recover as upon a *quantum meruit* rather than damages for breach; and

(c) the incentive to terminate a contract which may arise in circumstances where there is potential for recovery of more money by terminating than by completing the contract works.

The following table identifies how the High Court justices decided the three grounds of appeal.

| | Majority | | Minority |
|---|---|---|---|
| Grounds of appeal to the High Court[1] | Nettle, Gordon and Edelman JJ[2] | Gageler J[3] | Kiefel CJ, Bell and Keane JJ[4] |
| [1] The Court of Appeal erred in holding that the respondent builder, having terminated a major domestic building contract upon the repudiation of the contract by the [appellants], was entitled to sue on a *quantum meruit* for the works carried out by it. | Dismissed | Dismissed | Upheld |
| [2] Alternatively, if the respondent was entitled to sue on a *quantum meruit*, the Court of Appeal erred in finding that the price of the contract did not operate as a ceiling on the amount claimable under such a *quantum meruit* claim. | Upheld | Upheld | No decision |
| [3] The Court of Appeal erred in allowing the respondent to recover on a *quantum meruit* basis for variations to the works carried out by the respondent, because it incorrectly found that section 38 of the *Domestic Building Contracts Act 1995* (Vic) did not apply to a *quantum meruit* claim for variations to works under a domestic building contract. | Upheld | Upheld | Upheld |

## MAJORITY VIEW

### NETTLE, GORDON AND EDELMAN JJ

Upon termination for repudiation, the non–breaching party is entitled to recover, in respect of:[5]

(a) the first category of work: damages for breach of contract (i.e. payment for a completed stage of work[6] calculated in accordance with the contract); and

(b) the second category of work, at the election of the non–breaching party:

(i) damages for breach of contract; or

(ii) restitution as upon a *quantum meruit*, ordinarily limited by the 'contract price or appropriate part of [it]'.

This formulation applies to entire contracts, and contracts divisible into several entire stages.[7] Generally, a construction contract will be construed as containing divisible obligations if payment of the total contract price is by progress payments apportioned between completed stages of work.[8] Determination of whether a contract contains an obligation which is entire or divisible is a matter of construction.[9]

In a typical domestic building contract, the stages of work will often be base, frame, lockup and fixing, with a fixed percentage of the contract price to be paid at the completion of each stage.[10]

### TOTAL FAILURE OF CONSIDERATION JUSTIFIES ALLOWING RESTITUTION AS UPON A *QUANTUM MERUIT* FOR THE SECOND CATEGORY OF WORK

In the case of the second category of work, the concept of total failure of consideration and the rejection of the rescission fallacy[11] appear to have been central to their Honours' reasoning.

Their Honours stated that it is a total failure of consideration (or the total failure of a severable part of the consideration payable under a contract) which justifies recovery of restitution as upon a *quantum meruit* in circumstances where a contract is terminated for repudiation.[12]

A total failure of consideration occurs when a payment is made pursuant to a contract, but the performance which is required in return for that payment, has not eventuated and will not eventuate. In this context, 'consideration' refers to actual performance, as opposed to the promise to perform.[13]

Their Honours adopted an expansive view of total failure of consideration, consistent with what was said in *Roxborough v Rothmans of Pall Mall Australia Ltd*[14], by the High Court (Gleeson CJ, Gaudron and Hayne JJ) which stated:

*Failure of consideration is not limited to non–performance of a contractual obligation, although it may include that' and further that 'the concept embraces payment for a purpose which has failed as, for example, where a condition has not been fulfilled, or a contemplated state of affairs has disappeared.*[15]

Consistent with *Roxborough*, their Honours' conclusion was that a total failure of consideration for work done arises:

*... by reason of the termination of a contract for breach where the basis on which the work was done has failed to materialise or sustain itself.*[16]

Their Honours rejected as a fallacy the suggestion that acceptance of repudiatory breach has the effect of rescinding a contract *ab initio*.

On the contrary, the parties are discharged from future performance of the contract, and retain all rights and causes of action which accrued up to the point of termination.[17]

Gageler J and the minority justices, Kiefel CJ, Bell and Keane JJ, also agreed that acceptance of repudiatory breach does not have the effect of rescinding a contract *ab initio*.[18]

Consistent with the rejection of the rescission fallacy and their Honours' consideration of total failure of consideration, the following conclusions may be drawn:

(a) Where the breaching party's repudiatory conduct prevents crystallisation of the non–breaching party's entitlement to recover a contractual payment for work completed before termination (e.g. because a prescribed stage of work was incomplete), there is a total failure of consideration (for the work done in the incomplete stage), and the non–breaching party is entitled to elect between remedies and recover either:[19]

(i) payment of damages for breach of contract; or

(ii) restitution as upon a *quantum meruit* for the value of the work completed but in respect of which there is no present contractual right to payment.

(b) By contrast, where the breaching party's repudiatory conduct does not prevent crystallisation of the non–breaching party's entitlement to payment for work completed before termination, (e.g. completed stages of work where a right to a progress payment has accrued at the point of termination), there can be no total failure of consideration, and the non–breaching party's remedy is damages for breach of contract (but not restitution as upon a *quantum meruit*).[20]

## TWO MAIN PROPOSITIONS AGAINST RETENTION OF A RESTITUTIONARY REMEDY REJECTED—THE IMPORTANCE OF THE PRACTICAL VALUE OF RESTITUTIONARY CLAIMS

Their Honours reasoned that the arguments which were advanced against the retention of a restitutionary remedy as the alternative to the right to recover contractual damages were based on two principal propositions, both of which they rejected.[21]

### FIRST PROPOSITION

The first proposition is that when a contract is terminated for breach, and the non–breaching party has only partially completed the contractual work, then the proper characterisation of the legal basis upon which the work was performed, is the breaching party's promise to perform the contract, and because that promise is enforceable by an action for damages for breach, there can be no total failure of consideration.[22]

In summary, this proposition was rejected for two reasons:

First, the proposition wrongly assumes that in the law of total failure of consideration, consideration is the promise to perform.

Second, the proposition wrongly assumes an obligation to pay damages for breach is one imposed by contract.

The first reason for rejection of the first proposition is based on the difference between contract formation, and total failure of consideration, in particular, as to what constitutes consideration in simple contracts.[23]

The High Court reasoned that:[24]

(a) in the law of contract formation, the promise to perform is often regarded as the relevant consideration (as enforceable contracts may be formed by the exchange of a promise for a promise, or by the exchange of a promise for an act); whereas

(b) in the law of total failure of consideration (and the right to recover money on that ground), generally speaking it is the performance of the promise (as opposed to the promise itself) which is considered to be the relevant element of the consideration.

The second reason for rejection of the first proposition is that an obligation to pay damages is not imposed by a contract as such, but rather, that obligation arises by operation of law.[25]

### SECOND PROPOSITION

The second proposition is that assuming it is correct to characterise the basis on which works have been carried out as being a party's performance of its contractual obligations (as opposed to the promise of performance), then the breaching party's failure to perform may be the subject of contractual remedies.

Their Honours indicated these remedies included the implied contractual obligation of cooperation, and the doctrine of anticipatory breach. Their Honours indicated that these are adequate to put the non–breaching party in the position in which it would have been, had the contract been performed.[26]

Their Honours stated that the second proposition militating against the retention of a restitutionary remedy 'has more to commend it' than the first proposition.[27]

However, the overall persuasiveness of the second proposition is limited as it said nothing about the practical value of a restitutionary claim—i.e. that a:

*... claim for restitution is a liquidated demand which, by contrast to an unliquidated claim for damages, may provide easier and quicker recovery including by way of summary judgment.*[28]

## TERMINATION FOR REPUDIATION IS NOT INCONSISTENT WITH ASSESSING RESTITUTION BY REFERENCE TO CONTRACT RATES

Their Honours considered the proposition that a:

*... defendant cannot refuse to abide by the contract and at the same time claim its protection.*

That proposition carried little weight because the rights accrued pursuant to a contract terminated for breach continue to apply up to the point of termination.

This remains the basis upon which works were carried out, and there is nothing about the termination of a contract which is inconsistent with the assessment of the amount of restitution payable for works performed before termination, by having regard to the contract price as a ceiling.[29]

## SIGNIFICANT CONSIDERATIONS FOR LIMITING RESTITUTIONARY CLAIMS TO CONTRACT RATES—WINDFALL GAINS BY BUILDERS AND THE CONTRACTUAL DISTRIBUTION OF RISK

Their Honours were concerned about the:

*... potential for disparity between the amounts recoverable by way of restitution for work done under a contract which is terminated for breach and the amounts recoverable by way of damages for breach ...*

which they described as being:

*... alarmingly widespread in domestic building disputes ...*[30]

Their Honours' considered it was better to address the potential disparity by, as a general rule, limiting the amount recoverable by way of restitution as upon a *quantum meruit* by the rates provided in the contract, rather than doing away with the remedy of restitution as upon a *quantum meruit*.[31] They observed that developing the law in this way was consistent with the distribution of risks effected by contract.[32]

## RESTITUTIONARY CLAIMS AS UPON A *QUANTUM MERUIT* MAY POSSIBLY EXCEED CONTRACT PRICE

Their Honours stated that in their view, as a general position, the rates provided in a contract which contains an entire obligation to perform (or an entire divisible stage of such a contract) will ordinarily constitute the limit or ceiling for the amount of a claim for restitution as upon a *quantum meruit* for work performed. However, they left open the possibility that such a claim could possibly exceed the contract price, if the circumstances 'dictate that it would be unconscionable to confine the plaintiff to the contractual measure'.[33]

Their Honours cited as a possible example of such a circumstance the United States decision in *Boomer v Muir*[34] which involved continuing breaches of contract by the defendant, including the failure to deliver materials as rapidly as required, which caused cost overruns which in turn rendered the plaintiff's contract unprofitable.[35] In that case, although the plaintiff's damages for breach of contract would have amounted to some $20,000, his claim for recovery of reasonable remuneration amounted to $250,000. Recovery of this sum was justified by the view that as '[a] rescinded contract ceases to exist for all purposes' and '[t]he contract is annihilated so effectively that in contemplation of law it has never had any existence', the amount fixed as the contract price was not a limit on the restitutionary claim.[36]

## GAGELER J

Upon termination for repudiation, the non–breaching party is entitled to recover, in respect of:[37]

(a) the first category of work: damages for breach of contract; and

(b) the second category of work, at the election of the non–breaching party, either:

(i) damages for breach of contract; or

(ii) a non–contractual *quantum meruit*, not exceeding 'the portion of the overall price set by the contract that is attributable to the work'.[38]

In summary, Gageler J's opinion is essentially the same as that of Nettle, Gordon and Edelman JJ. The only difference between them is the language used to limit the restitutionary *quantum meruit*. Nettle, Gordon and Edelman JJ limit it by reference to the 'contract price or appropriate part of [it]'.[39] Gageler J limits it by reference to 'the portion of the overall price set by the contract that is attributable to the work'.[40] The difference in language does not appear to be material.

## A NON–CONTRACTUAL *QUANTUM MERUIT* IS AN ACTION IN DEBT, AND IS PRECLUDED BY THE AVAILABILITY OF A COMMON LAW ACTION IN DEBT TO RECOVER A PAYMENT WHICH HAS ACCRUED UNDER A CONTRACT

Gageler J's view was that where a builder (i.e. the non–breaching party) has, before termination, accrued a contractual right to payment (i.e. by completion of a designated stage of work), there is no room in the law for the remedy of restitution on a non–contractual *quantum meruit*.[41]

His Honour's reasoning was based on an understanding of the legal basis for recovery of:

(a) a restitutionary action on a non–contractual *quantum meruit*; and

(b) a payment which has accrued under a contract.

Gageler J confirmed that the contractual right of a builder to recover a payment which has accrued under a contract is enforceable by a common law action in debt.[42]

He also observed that a restitutionary action on a non–contractual *quantum meruit* is also an action in debt.[43] This was established in *Pavey & Matthews Pty Ltd v Paul*.[44] In that case, a company which was a licensed builder renovated a cottage for Paul pursuant to an oral contract which required Paul to pay reasonable remuneration at market rates. Paul argued he was not obliged to pay the builder for the renovation works because section 45 of the *Builder's Licensing Act 1971* (NSW) provided that contracts for building works were not enforceable by builders unless they were in writing.

The High Court held that Paul could not rely on the statute because, while it precluded an action for breach of contract, the builder had a right to restitution based on unjust enrichment which was independent of the oral contact. The judgment of Deane J noted that a restitutionary action based on unjust enrichment to recover payment for work performed is an action in debt:

*... the underlying obligation or debt for the work done, goods supplied, or services rendered does not arise from a genuine agreement at all. It is an obligation or debt imposed by operation of law which 'arises from the defendant having taken the benefit of the work done, goods supplied, or services rendered ... and which can be*

*enforced as if it had a contractual origin ...*[45]

Gageler J explained that the availability of an enforceable contractual action in debt precludes recourse to a separate and alternative action in debt on a non–contractual *quantum meruit*, in the following terms:[46]

*(a) The availability of 'the enforceable contractual obligation to pay for the work means that there is 'neither occasion nor legal justification for the law to superimpose or impute' a different, non–contractual obligation on the part of the owners [i.e. Mann] to pay for the work'; and*

*(b) The more general point is 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'.*

This approach highlights the significant importance his Honour placed on the contract.

## INJUSTICE WHERE A NON–BREACHING PARTY HAS CARRIED OUT WORK BUT HAS NOT ACCRUED, AND CANNOT ACCRUE, A CONTRACTUAL RIGHT TO PAYMENT

Gageler J demonstrated the injustice which may result when the non–breaching party, having accepted the repudiation of the breaching party, and having only partially completed an entire stage of work under a contract, has not, and cannot, accrue a contractual entitlement to be paid for that partially completed work.[47]

The injustice is not limited to the non–breaching party, who has performed work for which it has not accrued and cannot accrue a contractual right to payment. This is because the breaching party will have received the value of that work but has not accrued, and cannot accrue, a contractual liability to pay.

Gageler J indicated that this injustice was an important consideration which led him to conclude that the remedy of restitution on a non–contractual *quantum meruit* ought be available.[48]

## THE 'CRITICAL QUESTION' IS—ARE DAMAGES FOR BREACH OF CONTRACT SUFFICIENT?

For the second category of work, where a contractual right to payment has not accrued before termination, neither total failure of consideration, nor contractual risk allocation, adequately address this question.

His Honour accepted that:

*... the concept of 'total failure of consideration', renamed as 'failure of basis ...*

can

*... help to explain the imposition of obligations to make restitution across a range of established categories of case,*

and

*... has some explanatory power*

in the scenario where a contract is terminated for reputation and the non–breaching party has not accrued a contractual right to payment.[49]

However, his Honour explained that by focusing on the notion that '[o]ne party has rendered services, from which the other has benefited, on a 'basis' that 'has failed to sustain itself'…', the concept of total failure of consideration fails to take proper account of an important circumstance, which is that the non–breaching party may (after the contract is terminated for repudiation) claim damages for breach of contract for 'non–completion of the contract'.

In this respect his Honour said the concept of total failure of consideration:[50]

... the main effect of the High Court decision is that restitutionary claims are now far less attractive because the recoverable amount will generally be limited by the ceiling of the contract price.

(a) isolates an important part of the overall circumstances (attending the imposition of an obligation to make restitution when a contract is terminated for repudiation and the non–breaching party (the builder) has not accrued a contractual right to payment); but

(b) misses out on other important parts of those circumstances including that 'the services were rendered pursuant to a valid contract which the defaulting party has wrongfully repudiated and which the innocent party has terminated so as to result in the innocent party failing to accrue a right to payment for the services under the contract yet having an entitlement to claim damages from the defaulting party for non–completion of the contract'.

His Honour stated that where a contractual right to payment has not accrued, the 'critical question' is whether the non–breaching party should be considered to have been adequately remunerated by its entitlement to bring an action for damages for breach of contract, especially where the damages can be measured by reference to the non–breaching party's reliance on the contract.[51]

His Honour observed that where a contractual right to payment has not accrued at termination, an entitlement by the non–breaching party to restitution on a non–contractual *quantum meruit* ought not be denied by:

(a) the notion that the parties have arrived at a contractual allocation of risk—as it would be incorrect to conclude that parties who have failed to address the consequences of termination in their contract intended (either expressly or impliedly) to limit themselves to the contractual remedy of breach of contract;[52] or

(b) the fact that remedies at common law can overlap with remedies in equity.[53]

### THE 'CRITICAL QUESTION' IS ANSWERED BY REFERENCE TO THE PRACTICAL CONSEQUENCES OF ALLOWING A NON–CONTRACTUAL *QUANTUM MERUIT* AS AN ALTERNATIVE REMEDY TO A CLAIM FOR DAMAGES FOR BREACH

His Honour considered the 'critical question' ought be answered by reference to the practical consequences of permitting a non–breaching party to:

*... maintain a non–contractual quantum meruit as an alternative to an action for unliquidated damages for breach of contract.*[54]

In his Honour's opinion, some of the practical consequences favouring permitting recovery on a non–contractual *quantum meruit* include that:[55]

(a) a non–contractual *quantum meruit* is considered to be an action for debt, and as such, has procedural advantages over an action for damages for breach of contract, typically including a capacity to obtain default judgment; and

(b) the proof of the value of services rendered for a non–contractual *quantum meruit* is almost invariably more straight forward to prove compared to contractual loss—as questions of causation and remoteness play no part.

However, one argument against permitting the non–breaching party recovering on a non–contractual *quantum meruit*, is the prospect of a party recovering a larger amount by termination of the contract than from completing it.[56] His Honour noted this has real potential to occur when:

(a) the contract has been under–priced. Here a party may make a loss by continuing to perform the contract, but a profit if it is terminated for repudiation; and

(b) the contract price has been front loaded, i.e. disproportionality allocated to work which is to occur at early stages of a project.

With 'the potential to recover more from termination than from completion comes the incentive to terminate'. This gives rise to distorted incentives leading one party to look for any conduct amounting to repudiation, and the other 'to do whatever can be done to avoid it'.[57]

His Honour rejected the argument that the amount recoverable on a *quantum meruit* should be the same as the amount recoverable as the measure of damages for breach of contract. This was rejected because to require a non–breaching party to prove the measure of damages for breach of contract, in order to sustain an action for *quantum meruit*, would rob the remedy of *quantum meruit* of its principal practical advantage over an action for damages for breach of contract—i.e. an action for a *quantum meruit* does not require consideration of questions of causation and remoteness.[58]

His Honour's view was that the distorted incentives associated with recovery of a non–contractual *quantum meruit* can be substantially eliminated' by changing the law so that (for the second category of work, where a contractual right to payment has not accrued at termination):

*... the amount recoverable on a non–contractual quantum meruit as remuneration for services rendered in performance of a contract prior to its termination by acceptance of a repudiation cannot exceed that portion of the contract price as is attributable to those services.*[59]

## MINORITY VIEW

### KIEFEL CJ, BELL AND KEANE JJ

The minority justices concluded that upon termination for repudiation, the remedy of

restitution as upon a *quantum meruit* ought not be available at all. Instead, the non–breaching party is entitled to recover, in respect of:[60]

(a) the first category of work, damages for breach of contract; and

(b) the second category of work, damages for loss of profit (i.e. the profit it would have earned had the contract been fully performed).

## RESTITUTIONARY CLAIMS MUST BE RESTRAINED BY CONTRACTUAL RISK ALLOCATIONS

Their Honours concluded that restitutionary claims must be restrained by contracts and the risk allocations effected by them.[61] This was an important aspect of their reasoning as it was reflected in their view of restitutionary claims in relation to both the first and second categories of work.

They stated that where a non–breaching party has an enforceable contractual right to payment for completed work, (i.e. the first category of work), then allowing that party to recover a reasonable remuneration unconstrained by the terminated contract:

*... would be to subvert the contractual allocation of risk.*[62]

They observed it would also subvert the contractual allocation of risk if the law were to permit a restitutionary claim where a non–breaching party has an enforceable contractual right to damages for loss of bargain (i.e., losses resulting from a contract not running its full course).[63]

The scenario where a non–breaching party has a right to recover loss of bargain damages is effectively the second category of work because the scenario relates to work carried out for which a contractual right to a progress payment has not accrued before termination.

## CONTRACT PAYMENTS WHICH ARE PROVISIONAL ARE RELEVANT TO DETERMINING WHETHER A CONTRACT CONTAINS AN ENTIRE OR DIVISIBLE OBLIGATION

Their Honours rejected the builder's argument that there was an entire obligation under the contract.[64] This is because the contract provided for progress payments to be made when stipulated stages of work were completed. In this respect, their Honours stated that:

*... [n]othing in the contract was apt to suggest that these payments were only provisional, and subject to a final taking of accounts.*[65]

This statement goes to determining whether a contract contains an obligation which is entire or divisible. As previously mentioned, the majority of the justices, Nettle, Gordon and Edelman JJ, noted that making such a determination is matter of contract construction.[66]

The minority justices' statement extracted above highlights that one factor relevant to the construction exercise is whether contract payments are expressed to be provisional or subject to a final taking of accounts.

Their Honours did not refer to security of payment legalisation[67] in the context of determining whether, for the purpose of restitutionary claims, a contract is to be considered to contain entire or divisible obligations. Care must be taken when drawing inferences from this because security of payment legalisation did not apply to the domestic building contract before the High Court.

Nonetheless, the failure to refer to the legalisation suggests that the minority justices may view such legislation as not having the effect of rendering, for the purpose of restitutionary claims, a building contract (to which the legislation applies) and which is otherwise to be regarded as containing divisible obligations, into a contract which contains an entire obligation.

## ALLOWING RESTITUTIONARY CLAIMS FOR THE SECOND CATEGORY OF WORK ON THE BASIS OF A TOTAL FAILURE OF CONSIDERATION IS AKIN TO APPLYING THE RESCISSION FALLACY

As to the first category of work, their Honours observed that there could be no total failure of consideration in respect of works to which the builder had an accrued contractual right to payment before termination.[68]

As to the second category of work, their Honours stated that:

*... the law should not allow a right of election on the part of the builder to claim a reasonable payment for work done under the contract in respect of which an unconditional entitlement to payment has not yet accrued.*[69]

To allow a restitutionary claim for *quantum meruit* for such work (i.e. the second category of work) on the basis of a total failure of consideration, would be:

*... to apply the rescission fallacy under another guise because it treats the contract as if it were unenforceable as having been avoided ab initio.*[70]

## A PARTY WHO REPUDIATED A CONTRACT, AND THEN SEEKS TO ENFORCE CONTRACT RATES TO LIMIT DAMAGES PAYABLE TO THE NON–BREACHING PARTY, IS NOT REALLY TRYING TO HAVE IT BOTH WAYS

Their Honours considered the proposition that:

*... it would be extremely anomalous if the defaulting party when sued on a quantum meruit could invoke the contract which he has repudiated in order to impose a ceiling on amounts otherwise recoverable.*[71]

This proposition was criticised on two grounds:

First, the proposition is 'avowedly of a piece with the recession fallacy itself'.[72]

Second, the proposition is unsatisfactory because it fails to acknowledge the parties' agreement on contract price is to be regarded as 'the greatest possible remuneration' for the work agreed to be performed.[73]

### REQUIRING A BREACHING PARTY TO PAY MORE THAN THE CONTRACT PRICE IS AKIN TO PUNISHING IT FOR ITS BREACH

Having given significant importance to the contract price agreed by the parties, their Honours indicated that requiring the breaching party to pay an amount of damages in excess of the contract price is akin to punishing that party for its breach of contract.

Their Honours noted this would be contrary to public policy, even in circumstances where the breach was deliberate or motivated by self–interest.[74]

### THE AVAILABILITY OF A DAMAGES CLAIM IN CONTRACT GENERALLY EXCLUDES THE REMEDY OF A RESTITUTIONARY CLAIM—BUT MIGHT THE NEED TO DO JUSTICE BETWEEN THE PARTIES BE AN EXCEPTION?

Their Honours said where the remedy of a claim for damages for breach of contract is available, restitutionary claims will generally be excluded. They explained this as follows:[75]

*It may be that in some cases justice will not be done without a restitutionary claim. Different considerations may apply in cases where advance payments are sought to be recovered by restitutionary claims for money paid, although it may be that the law of contract adequately provides for such cases. 'There will generally be no need to have recourse to a remedy in restitution' where a claim in contract is available. In the present case, there is no good reason to consider that damages for breach of contract would fail to meet the justice of the case such that a restitutionary claim for quantum meruit should be available. It is not necessary to consider the position in other contexts or with respect to other restitutionary claims as the present case is concerned only with a claim for remuneration for work and labour done under a contract terminated for repudiation or breach.'*

The references in the above extract to the need to do justice between the parties, raises the possibility, although perhaps only faintly, that the minority might, in some very limited circumstances, be prepared to allow a restitutionary claim as upon a *quantum meruit* where a contract has been terminated for repudiation.

### PROVING AN ENTITLEMENT TO A *QUANTUM MERUIT* IS MORE COMPLEX THAN AN ASSESSMENT OF DAMAGES FOR LOSS OF PROFIT

Seemingly contrary to Gageler J's view, the minority indicated that experience suggests that proving:

*... an entitlement to a quantum meruit may often involve more complex questions of evidence and evaluation than an assessment of damages for loss of profit upon termination for breach.*[76]

The minority stated that limiting the amount of recovery pursuant to restitutionary claims as upon a *quantum meruit* to an amount which would not exceed a fair value calculated in accordance with the contract price or the appropriate part of the contract price, is to commit parties and decision makers to 'an unprecedented level of uncertainty and complexity'.[77] This is because such a requirement would presumably necessitate two sets of calculations:

(a) one calculation to arrive at a reasonable price unrestrained by the contract price; and

(b) another separate calculation to arrive at a reasonable price constrained by the contract price.

## CONCLUSION

The remedy of a restitutionary claim as upon a *quantum meruit* remains available for:[78]

(a) the second category of work; and

(b) work carried out pursuant to a contract which contains an entire obligation to perform.

However, the main effect of the High Court decision is that restitutionary claims are now far less attractive because the recoverable amount will generally be limited by the ceiling of the contract price.

Pursuing restitutionary claims should not be entirely ruled out as there remains a possibility that the contract price limitation on the amount which is recoverable may not apply if there are circumstances which would make doing so 'unconscionable'.[79] It is difficult to know what the High Court was referring to when it used this expression. However:

*... a clear understanding of the term is necessary because, without it, the notion can decline all too readily into generalised jurisprudence for the courts doing whatever they deem to be fair.*[80]

Lord Radcliffe put it more colourfully in *Bridge v Campbell Discount Co Ltd* [1962] AC 600 where he said:

*Unconscionable' must not be taken to be a panacea for adjusting any contract between*

*competent parties when it shows a rough edge to one side or the other, and equity lawyers are, I notice, sometimes both surprised and discomfited by the plentitude of jurisdiction, and the imprecision of rules that are attributed to 'equity' by their more enthusiastic colleagues ...*[81]

An example of a circumstance which may activate recovery pursuant to the remedy of a restitutionary *quantum meruit* which is not limited by the ceiling of the contract price, is the situation where there have been continued breaches by a party which cause cost overruns which in turn renders a contract unprofitable for the non–breaching party. The behaviour of parties during a project ought hereafter be carefully examined to determine whether unconscionability can be pleaded in an attempt to remove the contract price limitation.

A restitutionary claim as upon a *quantum meruit* may also be available where a contract provides for progress payments to be paid 'on account' or renders them subject to a final reckoning. This highlights the importance of careful drafting as determining whether a contract contains an entire or divisible obligation is a matter of contract construction. Moreover, it should be remembered that the availability of a restitutionary claim as upon a *quantum meruit* can be excluded by an express contract term.

## REFERENCES

1. *Mann v Paterson* at [2], [149].

2. *Mann v Paterson* at [222].

3. *Mann v Paterson* at [108], as well as [58]–[61].

4. *Mann v Paterson* at [4].

5. *Mann v Paterson* at [110], [177], [179], [215].

6. See section 40 of the *Domestic Building Contracts Act 1995* (Vic) which stipulates stages of work and percentages of the contract price recoverable by a builder for each stage.

7. An 'entire contract', in contrast to a 'divisible contract' or 'severable contract', is a contract pursuant to which a party must perform all of its contractual obligations before becoming contractually entitled to the contract price or any part of it (see for example, *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184 at [93]. An entire contract is sometimes known as a 'lump sum contract'. However, this may be misleading because the term 'lump sum contract' may simply indicate that a contract price is fixed, as opposed to indicating whether or not consideration under a contract is divisible (see Julian Bailey, *Construction Law*, 3rd edition, 2020, Volume II, at page 608).

8. *Mann v Paterson* at [176].

9. *Mann v Paterson*, see the footnote 236 at [176].

10. Parties can agree on whatever stages and percentages they prefer or accept the nominated stages and percentages stipulated in section 40 of the *Domestic Building Contracts Act 1995* (Vic).

11. The 'rescission fallacy' contemplates that the termination of a contract for repudiation has the effect of rescinding the contract *ab initio*, therefore allowing a claim in *quantum meruit* as an alternative to damages for breach of contract.

12. *Mann v Paterson* at [168].

13. Cheshire & Fifoot, *Law of Contract*, 10th ed, 2012, at page 1,237.

14. *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

15. *Roxborough* at [16].

16. *Mann v Paterson* at [169], see also [168].

17. *Mann v Paterson* at [165].

18. *Mann v Paterson* at [8], [9], [69] and [72].

19. *Mann v Paterson* at [170].

20. *Mann v Paterson* at [179].

21. *Mann v Paterson* at [192]–[199].

22. *Mann v Paterson* at [192].

23. *Mann v Paterson* at [193]. A simple contract is one made orally or in writing, rather than a contract made under seal. Simple contracts require consideration to be valid and may be implied from the conduct of the parties to the contract.

24. *Mann v Paterson* at [193].

25. *Mann v Paterson* at [194] and [195]. In this context, their Honours: (a) at [197], noted that the 'parties contract for performance, not damages'; and (b) at [195], referred with approval to the statement by Windeyer J, in *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460 at 504, that '[i]t is ... a faulty analysis of legal obligations to say that the law treats a promisor as having a right to elect either to perform his promise or to pay damages'.

26. *Mann v Paterson* at [192] and [198]. Their Honours did not discuss these remedies.

27. *Mann v Paterson* at [198].

28. *Mann v Paterson* at [198].

29. *Mann v Paterson* at [205].

30. *Mann v Paterson* at [200].

31. *Mann v Paterson* at [200].

32. *Mann v Paterson* at [200], [205].

33. *Mann v Paterson* at [216].

34. (1933) 24 P 2d 570.

35. *Mann v Paterson* at [216].

36. *Boomer v Muir* (1933) 24 P 2d 570 at 577, 579 and 580.

37. *Mann v Paterson* at [57], [61], [62]–[64], [101], [102], [105]. Note that at [61], Gageler J stated that although his conclusions 'accord with the conclusions reached by Nettle, Gordon and Edelman JJ, I reach them by a narrower path of reasoning'. At [87], Gageler J referred to a choice (or an election), where he said 'Choice by the innocent party to adopt that course [referring to adopting the course of a 'non–contractual *quantum meruit* claim] has ...'

38. Gageler J adopted the term 'non–contractual *quantum meruit*'. The term was used in *Pavey & Matthews Pty Ltd v Paul* (1987) 69 ALR 577 to describe an action commenced to enforce an obligation to pay by way of restitution the value of work performed (see *Mann v Paterson* at [60]).

39. See majority view above.

40. See Gageler J at (b)(ii) above.

41. *Mann v Paterson* at [63].

42. *Mann v Paterson* at [63].

43. *Mann v Paterson* at [63].

44. (1987) 69 ALR 577 (*Pavey & Matthews*)

45. *Pavey & Matthews* at 603.

46. *Mann v Paterson* at [64].

47. *Mann v Paterson* at [75], see also [70]–[74].

48. *Mann v Paterson* at [75], [76].

49. *Mann v Paterson* at [77], [78].

50. *Mann v Paterson* at [78].

51. *Mann v Paterson* at [82].

52. *Mann v Paterson* at [83].

53. *Mann v Paterson* at [84].

54. *Mann v Paterson* at [85].

55. *Mann v Paterson* at [86], [87].

56. *Mann v Paterson* at [88].

57. *Mann v Paterson* at [89], [90].

58. *Mann v Paterson* at [98]. See also paragraph 56(b) of this paper above.

59. *Mann v Paterson* at [102].

60. *Mann v Paterson* at [4], [9], [14], [19], [20], [25]–[30], [50], [51], [53], [54].

61. *Mann v Paterson* at [14], and [14]–[18] generally. At [14], their Honours stated that restitutionary claims 'must respect contractual regimes and the allocations of risk made under those regimes'.

62. *Mann v Paterson* at [19].

63. *Mann v Paterson* at [20], see also [13] where their Honours stated that where a contract is terminated for repudiation, the terms of the terminated contract inform the quantum of damages recoverable, and hence a 'restitutionary claim unconstrained by the bargain made by the parties would impermissibly cut across the parties' contract'.

64. *Mann v Paterson* at [25], [26].

65. *Mann v Paterson* at [26].

66. See paragraph 15 above.

67. *Building and Construction Industry Security of Payment Act 2002* (Vic)

68. *Mann v Paterson* at [27]. Their Honours stated that the builder's 'rights to the bulk of progress payments had accrued at the date of the repudiation, and there could be no failure of consideration in respect of the work the subject of those accrued rights'.

69. *Mann v Paterson* at [30].

70. *Mann v Paterson* at [30].

71. *Mann v Paterson* at [35]: extracting a statement by Meagher JA in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 278.

72. *Mann v Paterson* at [36].

73. *Mann v Paterson* at [36].

74. *Mann v Paterson* at [37].

75. *Mann v Paterson* at [53] (cases footnotes omitted).

76. *Mann v Paterson* at [31]. See paragraph 56(b) of this paper above for Gageler J's view.

77. *Mann v Paterson* at [31].

78. Restitutionary claims as upon a *quantum meruit* are also available in circumstances not associated with the termination of a contract for repudiation, such circumstances (which are not the subject of this case note) include the frustration of a contract, and when there are issues going to contract formation such as fraud or unilateral mistake.

79. *Mann v Paterson* at [216].

80. See Paul Vout, 'Notions of Unconscionability', in Paul Vout (ed), *Unconscionable Conduct: Laws of Australia* (Thomson Reuters, 3rd ed, 2017) 124, 129.

81. *Bridge v Campbell Discount Co Ltd* [1962] AC 600 at 626.

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