QUANTUM MERUIT IN AUSTRALIA -

HOW THE RULES CALCULATING VALUE FOR WORK DONE ARE CHANGING

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QUANTUM MERUIT IN AUSTRALIA — HOW THE RULES CALCULATING VALUE FOR WORK DONE ARE CHANGING*

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1. INTRODUCTION

Claims on a *quantum meruit* are being made more and more frequently in the construction and engineering industry. There are both legal and solid commercial reasons why a Contractor chooses to frame a claim in *quantum meruit* rather than as an entitlement arising under a contract or at common law for breach of contract. A Contractor looks to *quantum meruit* to avoid being held to a bad bargain. This may occur in a number of circumstances. For example a Contractor may have underestimated the cost of the work, perhaps deliberately to be competitive, or may find at the end of the job, because of difficulties encountered beyond expectation at time of tender, the cost of work and materials far exceeds the contract price. *Quantum meruit* is viewed as the route to the "pot of gold" releasing the Contractor from the contract price allowing virtual cost—plus recovefy. The trick for the Contractor is to catch the leprechaun to lead to the pot of gold.

The challenge for the Principal, or a Head Contractor faced with a *quantum meruit* claim by a Subcontractor, is to defeat the attempt to escape a bad bargain by knowing how to resist the claim brought on a *quantum meruit.*

The contractual analysis as the exclusive determinant of analysing liability and compensation recoverable in the construction and engineering industry has been eroded from a number of directions. The law now imposes obligations to make compensation for breaches of norms of conduct causing loss independently of contract under the general law of negligence, The Trade Practices Act 1974 (Commonwealth), promissory estoppel and in restitution via a *quantum meruit* claim compels the defendant to return a gain by which it

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has been enriched at the expense of the claimant. The Courts and the Legislature have intervened to provide a basis for recovery where the contractual analysis fails to provide a fair and just result as between the parties. In commercial terms the question of the boundaries between contractual liability and the law of obligations independent of contract are of vital importance. This article considers the boundaries between contractual liability and an obligation to pay compensation in restitution, and the interface between the two remedies following the Australian High Courts' revised view of the legal basis of the claim in *quantum meruit* in the context of construction and engineering contracts.

Broadly speaking the concept underlying remedies in contract is to compensate the claimant for failure to perform a binding promise. The remedies of damages or specific performance in contract are intended to place the claimant in the position he would have been but for the breach of the binding promise. In contrast, restitution is granted to reverse an unjust enrichment gained by acceptace of a benefit at the expense of the claimant. The contractual remedy is expectation-based and prospective to compensate for failure to fulfil expectations engendered under a binding promise, whereas the restitutionary remedy is benefit-based and retrospective to return the benefit conferred or pay for it.

The general concept of restitution or unjust enrichment as the basis for *quantum meruit* claims is relevant in a direct sense to the identification of the proper basis upon which the *quantum* of compensation recoverable is to be ascertained.

2. WHAT IS A QUANTUM MERUIT CLAIM?

The interface between the law of contract and the restitutionary remedy has created some confusion in the construction and engineering industry. The confusion stems in part from the failure to understand the legal basis of a claim formulated as a *quantum meruit.*

The term *"quantum meruit"* simply means "so much as he has earned". Translated into an action recognised at law, *"quantum meruit"* allowed recovery calculated at a reasonable rate for work actually done. The *quantum valebat* count allowed recovery for the fair market value of materials supplied. The basis of recovery was a liquidated debt for reasonable remuneration for work done either:

2.1 under a contract whether express or implied; or

2.2 where the law itself imposed or imputed an obligation or promise to make compensation for a benefit accepted where there was no valid and enforceable contract between the parties.

A failure to distinguish between the two separate categories of claim, one contractual and the other restitutionary, can create serious difficulties as is

illustrated in *Bond Corporation Pty. Ltd.* v. *Thiess Contractors Pty. Ltd.* (unreported, Supreme Court of Western Australia, Wallace J, 7 December 1988).

2.1 Contractual quantum meruit

In the first category the claim in *quantum meruit* is a claim made under the contract to recover the amount which represents reasonable remuneration where the parties have failed to stipulate a price, where the pricing provisions are void, or where the parties expressly agree that payment shall be a "reasonable sum" possibly to be calculated by reference to prevailing rates of payments in the industry.[1]

In construction and engineering contracts the contractual *quantum meruit* arises, for instance, where the parties stipulate remuneration shall be on a "cost plus" basis without stipulating the formula to be applied[2] or where a variation is required to be valued on the basis of a reasonable price for the work done.

Failure to distinguish between the contractual *quantum meruit* and the restitutionary *quantum meruit* led to two separate arbitrations and then to litigation in *Bond Corporation Pty. Ltd.* v. *Thiess Contractors Pty. Ltd., supra.* The contract entered into was on the AS2124-1981 General Conditions of Contract for the execution of road, earth and drainage works in connection with a residential subdivision at Brigadoon near Perth. Thiess claimed pursuant to clause 23.1 of the General Conditions an entitlement to recover extra costs, losses and expenses in the sum of $1,684,694.00 in complying with the directions of the Superintendent beyond that recoverable elsewhere in the contract. Quantification of the claim was expressed to be "reimbursable on the principle of *quantum meruit*".

The Superintendent rejected the claim on the basis that reliance on clause 23.1 was an attempt to convert the contract from schedule of rates to cost-plus. The Superintendent invited Thiess to re-submit the claim on a proper contractual basis but if Thiess was to pursue the *quantum meruit* claim a dispute should be raised under clause 49.1. Thiess notified a dispute under clause 49.1 (a) to the Superintendent who rejected the claim on the ground that there was no contractual basis for a claim in *quantum meruit.* A notice of reference to arbitration followed, an arbitrator was appointed and Bond took the objection that Thiess did not have the right to arbitrate its claim. This led to preliminary questions of law pursuant to section 39 of the Commercial Arbitration Act 1985 (WA) for testing in the Court.

Acting out of caution Thiess submitted to the Superintendent a requantification of its original claim based as far as possible upon the contractual terms.

[1] The latter was the agreed basis of payment under the unenforceable contract considered by the High Court in *Pavey & Matthews* v. *Paul* (1987) 61 ALJR 151; 69 ALR 577; 162 CLR 221.

[2] I.e. the Contractor is entitled to recover his outlays with respect to materials and subcontractors, an amount representing the reasonable costs of supplying the necessary labour and a component representing reasonable profit on the overall job.

The second claim, almost identical to the original claim, was referred to arbitration. The second arbitrator declined to proceed as it would be ". . . both illogical and undesirable to have essentially the same issues supported by the same evidence determined by two separate tribunals". Thiess sought an order consolidating the two arbitrations and for leave to amend its Points of Claim in the first arbitration.

Wallace J pointed out that what in essence had bedevilled what should have been a straightforward resolution of the parties' differences was Bond's contention that Thiess was not entitled to make a claim based upon a *quantum meruit*. What Thiess was seeking was the benefit to which it was entitled under the provisions of clause 23 which was a contractual *quantum meruit*. It was not a claim outside the contract but a claim under the contract. Thiess was seeking only its entitlement to be paid the actual value of its services where it has been put to loss or expense beyond that provided for elsewhere in the contract by reason of the need to comply with the directions of the Superintendent or the Superintendent's withholding unreasonably, delaying or refusing to give a direction which it was required to give under the contract. The first and second claim were not different but merely alternative methods of calculating Thiess' entitlement under the contract.

2.2 Restitutionary quantum meruit

In the second category of case, the legal basis of the claim in *quantum meruit* is not to recover a debt for reasonable remuneration pursuant to a contract, but is an obligation imposed by law to make monetary restitution for a benefit conferred to reverse an unjust enrichment. The restitutionary *quantum meruit* is not based upon a contract but ". . . will only arise in a case where there is no applicable genuine agreement or where such an agreement is frustrated, avoided or unenforceable. In such a case, it is the very fact that there is no genuine agreement or that the genuine agreement is frustrated, avoided or unenforceable that provides the occasion for (and part of the circumstances giving rise to) the imposition by the law of the obligation to make restitution".[3]

The restitutionary claim cannot succeed if there is a valid and enforceable agreement governing the claimants' right to compensation. Then the contract and only the contract regulates the rights and liabilities of the parties and there is no room for restitutionary rights.[4]

The obligation enforced in the restitutionary *quantum meruit* is different in character from the contractual obligation had it been enforceable. The claim depends upon the claimant establishing the following elements identified by the High Court in the landmark decision of *Pavey & Matthews Pty. Ltd.* v. *Paul:*

[3] *Per* Deane J, *Pavey & Matthews Pty. Ltd.* v. *Paul* (1987) 61 ALJR 151 at 165.

[4] *Pavey & Matthews Pty. Ltd.* v. *Paul* (1987) 61 ALJR 151; *Seton Contracting Co. Ltd.* v. *Attorney General* [1982] 2 NZLR 368; *Gino D'Alessandro Constructions Pty. Ltd.* v. *Powis* [1987] 2 Qd.R.40; *Foran* v. *Wight* (1989) 64 ALJR 1 *per* Mason CJ at 13; *Update Constructions Pty. Ltd.* v. *Rozelle Child Care Centre* (unreported, CA (NSW), Kirby P, Samuels & Priestly JJA, A/223 1988, 27 March 1990).

(a) no subsisting valid and enforceable contract between the parties;
(b) the claimant has performed work conferring a benefit without being paid remuneration as agreed (i.e., the promised exchange value for the benefit);
(c) the benefits conferred were not intended as a gift or done gratuitously (the unenforceable contract, ineffective or informal agreement may be indispensable as evidence to establish this element); and
(d) the benefit has been actually or constructively accepted by the defendant at the expense of the claimant (the "unjust" factor).

What is necessary to establish each element and how it will vary within the various situations where restitution is available is not entirely clear from the decision of the majority of the High Court in *Pavey & Matthews Pty. Ltd.* v. *Paul*. In this case the High Court considered the legal basis of a *quantum meruit* claim in the context of fully-performed contract work by a builder under an unenforceable oral contract, the contract price to be a "reasonable sum" calculated by reference to prevailing rates of payment in the industry, where the owner was resisting payment and defending the action in reliance on section 45 of the Builders Licensing Act 1971 (NSW). The High Court majority, in particular Deane J, regarded the concept of unjust enrichment as ". . . a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of the plaintiff and which assists in the determination, by the ordinary process of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case . . .". It is not yet possible to predict with certainty how the courts will apply the new restitutionary unjust enrichment concept in the claim but the guidelines provided by Deane J and in the joint judgment of Mason and Wilson JJ are the basis for development of the law.

The remedy for *quantum meruit* in restitution or unjust enrichment is now considered to arise independently of and not derivatively from the informal, ineffective or unenforceable contract. The defendant is obliged by law to pay reasonable compensation for work done of which he has accepted the benefit and for which in justice he must pay by way of restitution.[5]

3. CIRCUMSTANCES WHERE RESTITUTIONARY QUANTUM MERUIT IS AVAILABLE

The occasion for the imposition of the obligation imposed by law to make monetary restitution arises where there is no genuine applicable agreement or such agreement is frustrated, avoided or unenforceable and in the

[5] *Pavey & Matthews Pty. Ltd.* v. *Paul* (1987) 61 ALJR 151 at 164 and 168; *Moses* v. *Macferlan* (1760) 2 Burr. 1005; 97 ER 676.

circumstances it would be unjust to permit the defendant to escape paying a reasonable compensation for an enrichment actually or constructively accepted to the countervailing detriment of the claimant.[6] The most frequent situations in which restitutionary *quantum meruit* claims will arise in the construction and engineering industry are where there is:

(1) no genuine agreement between the parties;
(2) work is done in expectation of a contract;
(3) termination of the contract by repudiation;
(4) termination of the contract by frustration;
(5) an unenforceable contract; or
(6) work done outside the contract.

There are a number of decided cases allowing recovery in these situations. The authorities were decided on the now outdated basis of an implied contract and not in terms of an obligation imposed by law because, if the claim could not properly be framed in tort, to accommodate the old forms of action of common law claims, it had to be "dressed in the language of contract".[7] Recovery was based on enforcing a separate and subsequent fictional promise inferred from the circumstances of executed consideration to pay the amount claimed as a debt arising under the ineffective or unenforceable contract. The majority of the High Court in *Pavey & Matthews Pty. Ltd.* v. *Paul* rejected the implied contract theory as the basis for recovery on a *quantum meruit* holding that the true foundation of the right to recover lies in restitution or unjust enrichment.

Deane J suggested in this case that the change in approach from the analysis of an agreement implied in law to restitution or unjust enrichment is merely a changed perception of the basis of the obligation to pay for work done and unlikely greatly to affect the circumstances in which the common law imposed an enforceable obligation to pay compensation for a benefit accepted. It is suggested, however, that it is a significant change in the law. The mere tender of executed performance, that is, the claimant has done all on his part required under the contract and has not been paid the contract price, will not now justify a claim for recovery. It must be shown that the defendant has in fact actually or constructively accepted a benefit. In addition the amount which may be recovered is not the contract sum but a reasonable remuneration for the work performed and accepted which in all the relevant circumstances is fair and just compensation.

The impact of this change to the legal basis for recovery on a *quantum meruit* may impact upon the categories of case where the circumstances have previously been regarded as giving rise to recovery on a *quantum meruit*. The decided authorities must now be treated with caution and reassessed to determine whether they fall within the High Court's new approach. Where no benefit is actually conferred and accepted by work performed at the request

[6] *ANZ Banking Corporation* v. *Westpac Banking Corporation* [1987-8] CCR 662.

[7] *Per* Deane J in *Pavey & Matthews Pty. Ltd.* v. *Paul* (1987) 61 ALJR 151, at 165. See Gareth Jones, "Restitution: Unjust Enrichment as a Unifying Concept in Australia" (1988) 1 *Journal of Contract Law* 8.

of another[8] a right to recovery probably should be analysed not in terms of a restitutionary *quantum meruit* but by reference to the development of the doctrine of promissory estoppel or perhaps consumer protection legislation.[9]

3.1 No genuine agreement

On the contractual analysis a contract may not have come into existence because:

(a) there has been no correspondence of offer and acceptance resulting in a binding contract;
(b) there is no concluded agreement because the parties have failed to agree on an essential term so that the contract is incomplete or the langugage used by the parties is such that the Court cannot give it any clear meaning to determine what it was the parties agreed;
(c) there has been a failure of fulfilment of a condition precedent to the contract coming into existence; or
(d) the agreement is qualified by reference to a need for some future agreement by the parties.

In this category of case the parties commonly proceed on the assumption that there is in existence a binding genuine agreement governing their transaction.

It has been said that "uncertainty" is a concept much loved by lawyers.[10] In construction and engineering contracting it is indeed a favoured mechanism for striking down a contract to allow recovery for a Contractor on a *quantum meruit* claim. It is, however, not easy to invalidate a contract on the ground of uncertainty. As McPherson J said in *Rowella Pty. Ltd.* v. *Hoult* (1987) 1 Qd.R.383 at 393: "The modern tendency is to give content and effect to contractual terms despite a superficial vagueness: see *Upper Hunter County District* v. *Australian Chilling & Freezing Co. Ltd.* (1968) 118 CLR 429, 436-437; *Hammond* v. *Vam Ltd.* (1972) 2 NSWLR 16."

The test is that the language employed by the parties is "so obscure and so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention."[11]

[8] For example in the fact situation in *Planche* v. *Colburn* (1831) 8 Bing. 14 where the claimant was compensated for reliance expenditure with no benefit conferred on the defendant to ground a restitutionary-based remedy. The claimant had been engaged under a contract to write a book on costume and ancient armour for a series of works called "The Juvenile Library". The defendant abandoned the series after the claimant had written a chapter and refused to pay anything. The Court held the claimant could recover on a *quantum meruit* without tendering the chapter.

[9] See *Waltons Stores (Interstate) Ltd.* v. *Maher* (1988) 164 CLR 389; Finn, P, "Commercial Law and Morality", 17 MULR 87.

[10] *Banque Brussels Lambert SA* v. *Australian National Industries Ltd.* (unreported, Supreme Court NSW, Rogers CJ, Comm.D, 12 December 1989 at 40).

[11] *Per* Lord Wright *Scammell (G) & Nephew Ltd.* v. *Ouston* [1941] AC 251 applied by Barwick CJ in *Upper Hunter County District Council* v. *Australian Chilling & Freezing Co. Ltd.* (1968) 118 CLR 429 at 437; see also *Australian Broadcasting Commission* v. *Australasian Performing Right Association Ltd.* (1973) 129 CLR 99 at 109-10.

In circumstances where the Contractor is successful in "getting rid" of the contract by voiding it for uncertainty or mutual mistake, recovery on a restitutionary *quantum meruit* will be available.

In *Bevelon Investments Pty. Ltd.* v. *Kingsley Airconditioning Pty. Ltd.* (unreported, Supreme Court Vic. Newton J, 17 August 1971) a Contractor succeeded on a claim for *quantum meruit* where the original contract was held void for uncertainty because of deficiencies in the rise and fall clause which, in its exceptional brevity, failed to lay down an intelligible formula for the adjustment of the price in consequence of alteration in costs.

The latter case raises the issue in the situation of contracts held void for uncertainty, of a Contractor's entitlement to recover on a *quantum meruit* where the pricing provisions only are void. The general principle here is that where work is carried out pursuant to a contract which does not express any agreement as to price, the law will imply a promise to pay a reasonable price[12] and an action may be maintained for a contractual *quantum meruit.* Similarly where all the pricing provisions are rendered void and are severable from the contract, the Contractor will be able to recover a reasonable remuneration for the work done and materials supplied where it is consistent with the intention of the parties that a reasonable price should be paid and a term to that effect may be implied.[13]

Difficulties may however arise in the situation where the pricing provisions are void only in part. In *Carr & Ors.* v. *Brisbane City Council* (1956) QSR 402 a clause was contained in a contract for the removal and disposal of night soil and provided that if the cost to the Contractor of carrying out the contract should increase after commencement, then the Council, ". . . will be prepared to negotiate with such Contractor with a view to making good to him any such increased cost which for such reason as aforesaid he has actually and necessarily incurred". The Contractor claimed that the clause was uncertain, that it was of the essence of the contract and therefore the whole contract was void for uncertainty and the Council must pay the Contractor reasonable remuneration on the basis of a *quantum meruit.* Mansfield SPJ held that the word "negotiate" was inconsistent with the idea of a concluded contract. In so far as the clause could be construed as an agreement to negotiate, the inherent promise was illusory and conferred no legal rights and further since the contract had been concluded and had been performed by the Contractor it could not be contended that the whole contract was void for uncertainty. Thus the Contractor was left with a lump sum contract with no provision for rise and fall.

The High Court in *M R Hornibrook (Pty.) Ltd.* v. *Eric Newham (Wallerawang) Pty. Ltd.* (1971) 45 ALJR 523 considered an alternative basis of claim in *quantum meruit* for recovery sought under a subcontract as rectified to include

[12] *Powell* v. *Braun* [1954] 1 All ER 484; *Turriff Constructions Ltd.* v. *Regalia Knitting Mills Ltd.* (1971) 9 BLR 24.

[13] *Foley* v. *Classique Coaches Ltd.*[1934] 2 KB 1; as to severability see *Whitlock* v. *Brew* (1968) 118 CLR 445.

a rise and fall provision. The High Court allowed rectification of the subcontract to accord with the parties' intention but said in *obiter*, that had the agreement as rectified never come into force as an express contract binding upon the parties because the terms of the subcontract were subject to the approval of the owner:

> ". . . we are of the opinion that the plaintiff is entitled nevertheless to recover payment for the work done by it, of which the defendant has taken the benefit. On that basis there was no operative express contract and it is not necessary to consider the question discussed in *James* v. *Thomas H. Kent & Co. Ltd.* [1951] 1 KB 551 and *Turner* v. *Bladin* (1951) 82 C.L.R. 463 at 474, whether such a claim should be based in legal theory upon implied contract or upon quasi-contract."

In *Way* v. *Latilla* [1937] 3 All ER 759 a claim was made for services rendered at the defendant's request in obtaining valuable information and concessions (worth around $1m) in gold mines in West Africa. The claimant maintained that these services had been rendered by him pursuant to a binding agreement whereby the defendant had agreed to give the claimant a share in the concessions in the gold mines and pay for the information so supplied. The defendant had not paid as agreed and the claimant sought damages for breach of the agreement or alternatively a *quantum meruit*. The House of Lords held that there was no concluded contract between the parties because they had never reached agreement about an essential term, namely, the amount of the share in the concessions which the claimant was to receive in respect of the gold mines in West Africa. However, the claimant was entitled to remuneration on a *quantum meruit* as:

> ". . . the work was done by the [claimant] and accepted by the [defendant] on the basis that some remuneration was to be paid to the [claimant] by the [defendant]. There was thus an implied promise by the [defendant] to pay on a *quantum meruit*, that is, to pay what the services were worth."[14]

Although the House of Lords in *Way* v. *Latilla, supra*, expressed the nature of the claim as an implied promise to pay, the occasion giving rise to the entitlement to recovery on a *quantum meruit* may be analysed as in *M R Hornibrook (Pty.) Ltd.* v. *Eric Newham (Wallerawang) Pty. Limited*[15] on the basis that there had been full performance of the work, the benefit of that work was accepted and it was unjust in the circumstances to allow the defendant to retain the benefit without paying compensation.

3.2 Negotiations aborted: work done in anticipation of contracts which do not materialise

This is an area where Contractors have been successful in recovering compensation on a *quantum meruit*. Substantial preparatory work may be performed in expectation of the formal execution of a contract or pursuant

[14] [1937] 3 All ER 759 *per* Lord Wright at 765.
[15] (1971) 45 ALJR 523.

to a Letter of Intent while negotiations proceed as to the terms of the contract. The courts have not doubted that the law of restitution has a role to play where negotiations abort and the anticipated contract fails to materialise. However, as observed by Rogers J in *Hooker Corporation Ltd.* v. *Darling Harbour Authority & Ors; Harrah's* v. *Darling Harbour Authority & Ors.*(unreported, Supreme Court of NSW, 30 October 1987) at 68:

> "The law of restitution is an area still in an exploratory stage and its parameters have not yet been authoritatively defined. That it has a proper role to play in circumstances where there is expenditure by a party in the expectation that a contract would be awarded to it admits of no doubt. That having been said, what the precise requirements are that may found such a claim and what defences are open to resist such a claim are uncertain in the extreme. It will only be on a case by case exploration that the relevant principles will ultimately be exposed."

It is suggested that the claim as formulated by the High Court in *Pavey & Matthews* v. *Paul* (1987) 61 ALJR 151 requires a re-appraisal of those situations in which the previously-decided cases have allowed recovery for work done or expenditure incurred by a party in the expectation of a contract. It is to be noted that there are other analyses open, contractual[16] and in promissory estoppel,[17] which may provide a basis for compensation in respect of such work performed or expenditure incurred.

The commercial issue in this situation is which of the parties accepted the risk of loss for work carried out in pursuance of informal arrangements

[16] *Turiff Construction Ltd.* v. *Regalia Knitting Mills Ltd.* (1971) 9 BLR 20; (1972) EGD 257 where recovery for preparatory work performed on the basis of a Letter of Intent was allowed despite the lack of a formal agreement. It was held, that although the Letter of Intent sent in reply to a request by the Contractor that it required ". . . an early Letter of Intent . . . to cover Turiff Ltd. for the work they will now be undertaking", to meet the Principal's requirements for completion, was expressed to be ". . . subject to agreement on an acceptable contract", there was an ancillary contract covering payment for the preparatory work. The contractual analysis of the relationship turned on:

(i) the intentions of the parties in the offer by the Contractor to carry out the preparatory work with the urgency required by the Principal,
(ii) the Letter of Intent was an acceptance of that offer and the Contractor expected to be paid; and
(iii) the Principal knew this and encouraged it to do the work.

The contractual analysis of the relationship of the parties doing work after a Letter of Intent to found recovery will rarely be open: see *Eagle Star Nominees Ltd.* v. *K. B. Hutcherson Pty. Ltd.* (unreported, Sup.Ct.Qld., Helman AJ, 4 May 1989) noted (1989) ACILL 62.

[17] *Waltons Stores (Interstate) Ltd.* v. *Maher* (1988) 62 ALJR 110; a prospective lessor of commercial premises recovered damages against a prospective lessee for work performed in demolishing old premises and work done in constructing new premises designed and programmed for completion to the prospective lessee's requirements which work was performed whilst negotiations were continuing as to the terms of the lease. No contract had come into existence. The High Court allowed recovery either because:

(a) the prospective lessee had led the prospective lessor to rely on assumption there was a binding contract and was estopped from denying it; or
(b) that the prospective lessor had been led to believe a contract would come into existence so that the implied voluntary promise was to be enforced on the reasoning that it would be unconscionable conduct of the prospective lessee to ignore the assumption and was estopped from retreating from its implied promise to complete the contract.

See, however, *Eagle Star Nominees Ltd.* v. *K. R. Hutcherson Pty. Ltd., supra,* where the argument failed that a subcontractor was estopped from denying a contract because the Contractor after issue of a Letter of Intent was led to believe by the Subcontractor's conduct in commencing the work on the site that formal acceptance of the tender and written agreement was unnecessary or a mere formality.

pending finalisation and execution of a contract. The risk analysis clearly underlies the decided cases. Indeed in *Hooker Corporation Ltd.* v. *Darling Harbour Authority & Ors.* Rogers J saw the assumption of risk as crucial to the restitutionary basis of recovery on a *quantum meruit.*

A Contractor tendering incurs overhead expenditure in the preparation of a tender recoverable indirectly if the tender is successful but non-recoverable, in the absence of contrary agreement, if unsuccessful. The Contractor as tenderer accepts the risk of expenditure in the hope of being awarded the job. It not infrequently occurs, however, that the Contractor is informed that his tender is the lowest and both parties behave in the expectation that a contract will eventuate on terms to be negotiated. The Principal may for its own commercial reasons require a tight contract programme so that the Contractor starts substantial preparatory work. A Letter of Intent may be sent to the Contractor stating the intention of the Principal to accept the tender and conclude a contract. In these circumstances the Contractor commonly performs work or incurs expenditure exceeding that normally undertaken as a gamble in bidding for the work, for example, in gearing up for the project by preparing detailed estimates and construction programmes, forgoing other projects, employing additional staff, negotiating with specialist subcontractors, ordering materials, and may commence work on the site at the request of the Principal.

The Contractor in such circumstances is not incurring the expenditure in the expectation of payment otherwise than under the contract once concluded as part of the total contract price. Where negotiations abort and the anticipated contract fails to materialise recovery on a *quantum meruit* has been analysed on the basis of whether each of the parties took the risk of the expenditure involved so that it would lie where it fell or whether in the circumstances the risk should fall on one of the parties so that the other should recover all or part of its expenditure.

The situation is different where, as is prudent, the Contractor only commences work after obtaining a binding promise to pay for the preparatory work or on receipt of a Letter of Intent which contains a contractual promise to pay for the work done (usually up to a specified limit) in the event that no contract is ultimately entered into. Here the Contractor will have a contractual entitlement independent of the anticipated contract, to be paid for the preparatory work on the basis agreed ensuring a certain outcome for both parties if negotiations abort.

In *William Lacey (Hounslow) Ltd.* v. *Davis* [1957] 1 WLR 932; [1957] 2 All ER 712 the defendant was the owner of premises which had been damaged during the War and which it proposed to rebuild. The plaintiff having submitted the lowest tender for rebuilding was led to believe and thereafter acted on the assumption that it would receive the contract. Subsequently the plaintiff did a considerable amount of extra work at the defendant's request in the form of preparation of calculations and submission of estimates. All of this extra work was held to fall outside the normal services which a builder

customarily performs without charge when invited to tender for the erection of a building. If a contract had materialised the work would have been paid for as part of the total price payable under the contract. The contract, however, fell through because the defendant decided to sell the premises instead of proceeding with the work of reconstruction. The plaintiff claimed recovery of the costs incurred. The defendant argued that the common expectation that a contract would materialise and the plaintiff's services be rewarded by the profits arising from the contract negatived the proposition that the parties had impliedly agreed that the services should be remunerated in any other way.

Barry J held that the plaintiff was entitled to remuneration on a *quantum meruit* basis for the work done at the request of the defendant which went beyond the original tender. Barry J relying on *Craven-Ellis* v. *Cannons Ltd.* [1936] 2 KB 403 said at 939:

> "I am unable to see any valid distinction between work done which was to be paid for under the terms of a contract erroneously believed to be in existence and work done which was to be paid for out of the proceeds of the contract which both parties erroneously believed was about to be made. In neither case was the work to be done gratuitously, and in both cases the party from whom payment was sought requested the work and obtained the benefit of it. In neither case did the parties actually intend to pay for the work otherwise than under the supposed contract, or as part of the total price which would become payable when the expected contract was made. In both cases when the beliefs of the parties were falsified, the law implied an obligation—and, in this case, I think the law should imply an obligation—to pay a reasonable price for the services which had been obtained. I am, of course, fully aware that in different circumstances it might be held that work was done gratuitously merely in the hope that the building scheme would be carried out and that the person who did the work would obtain the contract. That, I am satisfied, is not the position here. In my judgment, the proper inference from the facts proved in this case is not that this work was done in the hope that this building might possibly be reconstructed and that the plaintiff company might obtain the contract but that it would done under a mutual belief and understanding that this building was being reconstructed and that the plaintiff company was obtaining the contract."

The principle in *William Lacey (Hounslow) Ltd.* v. *Davis* was followed and extended in *Sabemo Pty. Ltd.* v. *North Sydney Municipal Council* (1977) 2 NSWR 880. In this case the successful tenderer for the redevelopment of the North Sydney Civic Centre incurred considerable expenditure in preparation of redevelopment proposals. The Council eventually resolved not to proceed with the redevelopment. The tenderer sought recovery in restitution on a *quantum meruit*. Sheppard J characterised the case as one where the tenderer and the Council knew full well that there was no contract but were working towards the day when they would enter into a contractual relationship. Sheppard J after an extensive review of the authorities, decided that the approach to resolution of the problem is to be found by asking, "On whom in all the circumstances of the case should the risk fall?"[18]

[18] (1977) 2 NSWLR 880 *per* Sheppard J at 889 citing Denning LJ and Romer LJ in *Jennings and Chapman Ltd.* v. *Woodman Matthews & Co.* (1952) 2 TLR 409 and Denning LJ in *Brewer Street Investments Ltd.* v. *Barclays Woollen Co. Ltd.* [1954] 1 QB 428 at 437.

Sheppard J posed the question:

> "As these parties proceeded after the acceptance of the tender, who was taking the risk? Was each, in all the circumstances, risking the substantial expenditure in which it was involved so that, if for any reason, the transaction did not proceed or eventuate, the loss would lie where it fell, or were there some circumstances, if that event transpired, in which the law (not the parties by reason of some common intention imputed by it to them) should say that one party should be entitled to recover all or part of its expenditure from the other?"[19]

Hence, no obligation was to be imposed by the law unless it was established that it was the defendant who was in fact taking the risk of loss if the contract as contemplated did not materialise. Sheppard J decided that there was in existence a general principle in some circumstances, in cases of this kind, ". . . when the law, irrespective of the common intention of the parties, will impose on one an obligation to pay the other for the work done"[20] even where it was work necessary to be done in the course of the parties putting themselves in a position to contract, usually regarded as at the risk of the party spending the money. An important circumstance and a determining factor in the decision was that the defendant deliberately decided to drop the proposal. His Honour was of the opinion that if the transaction had gone off because the parties were unable to agree, then each party would have taken a risk in incurring the expenditure which it did that the transaction might go off because of a *bona fide* failure to reach agreement on some point of substance in such a complex transaction. However, that risk should not be borne when one party has unilaterally decided after substantial and continuing work had been done not to go on.

Sheppard J rejected the contention that there could be no recovery unless a benefit accrued to the defendant in respect of the work which was done and for which payment was claimed. His Honour said:

> "In my opinion, the better view of the correct application of the principle in question is that, where two parties proceed upon the joint assumption that a contract will be entered into between them, and one does work beneficial for the project, and thus in the interests of the two parties, which work he would not be expected, in other circumstances to do gratuitously, he will be entitled to compensation or restitution, if the other party unilaterally decides to abandon the project, not for any reason associated with *bona fide* disagreement concerning the terms of the contract to be entered into, but for reasons which, however valid, pertain only to his own position and do not relate at all to that of the other party."[21]

The risk analysis of recovery was also foremost in the reasoning in two cases where parties had been negotiating a lease, and where in the expectation that a lease would be granted, considerable work was carried out on the premises to the prospective lessees' specifications.

In *Jennings & Chapman Ltd.* v. *Woodham Matthews & Co.* (1952) 2 TLR 409

[19] (1977) 2 NSWLR 880 at 899.
[20] (1977) 2 NSWLR 880 at 900.
[21] (1977) 2 NSWLR 880 at 903.

the plaintiffs were lessees of shop premises. They proposed to sub-let part of the premises to the defendant, a solicitor, and agreed to alter them according to his requirements. The defendant agreed to pay the cost of the alterations and to take a sub-lease of the offices as soon as the work was completed. On completion of the work the lessors refused to agree to the division of the shop into offices in breach of covenants in the head lease relating to user of the premises and cutting or maiming of the timbers or walls so that the sub-lease could not be granted. The plaintiffs sued for the price of the work done but were disentitled to recover because in all the circumstances of the case it was held the risk should fall on the plaintiffs who were in fact taking the chance of entry into the sub-lease as they knew of the conditions which had to be fulfilled before they could grant a sub-lease.

In *Brewer Street Investments Ltd.* v. *Barclays Woollen Co. Ltd.* [1954] QB 428 prospective tenants entered into negotiations with the owner as to the terms of a lease. Agreement on the principle matters had been reached subject to contract. The plaintiff undertook to make certain alterations in the premises to the defendants' specifications who accepted responsibility for the cost. The parties were eventually unable to agree on a term of the lease. The lease fell through. The Court approached the question of recovery by the plaintiff for the work done by asking on whom should the risk fall. The Court decided the prospective tenants ought to pay all the costs thrown away as work was done to meet their special requirements and was *prima facie* for their benefit and not for the benefit of the landlord. In the whole of the circumstances the defendants were "taking the risk" for their own purposes in the hope they would get the benefit of it if the lease was finally agreed and granted.

Robert Goff J in *British Steel Corporation* v. *Cleveland Bridge and Engineering Co. Ltd.* (1981) 24 BLR 94; [1984] 1 All ER 504 held that the risk of work done pursuant to a Letter of Intent in anticipation of a contract fell completely on the party requesting the work under the Letter of Intent. The case throws sharply into relief the risks that may be run by a Principal who sends out a Letter of Intent to suit his commercial objectives of tying the Contractor into performance for the contract price and expediting the work to meet the project's timetable, but fails to deal with the basis of payment of work undertaken by the Contractor pursuant to the Letter postponing concluding the contract until the Contractor agrees to onerous contract terms.

In this case British Steel Corporation (BSC) entered into negotiations with Cleveland Bridge and Engineering Co. Ltd. (CBE) for the manufacture of 137 cast steel nodes for the centre of a steel frame of a bank to be constructed in Saudi Arabia. Discussions took place between the parties with a view to a contract being entered into for the manufacture of the cast steel nodes for CBE by BSC to the specifications required. CBE sent a Letter of Intent to BSC advising of the intention to enter into a subcontract on the standard form of subcontract for use in conjunction with the ICE General Conditions of Contract and requesting BSC to proceed immediately with the works pending the preparation and issue of the subcontract. BSC did not reply to

the letter expecting a formal order to follow shortly thereafter. There were further discussions between the parties as to the specifications to be met in the manufacture of the nodes, the price, the dates of delivery and the form of contract to be entered into. BSC did not agree to the onerous terms of the contract promulgated by CBE which provided for unlimited liability for consequential loss arising from late delivery.

Despite the failure to agree on a price or other contract conditions BSC went ahead with the casting and delivery of the nodes in stages in an effort to comply with CBE's requirements for delivery. Deliveries continued despite a failure to agree to the contract terms and despite CBE's failure to make interim payment. BSC delivered 136 of the nodes but retained the last node because the price had not been paid. The final node was not delivered until 4 months later having been delayed by a strike of steel workers.

BSC sought recovery for the value of the nodes on a *quantum meruit* on the basis that no binding contract had been entered into. CBE contended there was a contract contained in the Letter of Intent and other correspondence and the conduct of BSC in proceeding with the manufacture of the nodes. CBE counter-claimed for damages for breach of contract for late delivery.

Robert Goff J held that there was no binding contract by the combination of the Letter of Intent and manufacture of the nodes since at that stage the parties were still negotiating over material contractual terms such as price and delivery dates. BSC was entitled to recover on a *quantum meruit* for work performed in anticipation of a contract and as there was no binding contract between the parties there was no legal basis for CBE's counter-claim for damages for later delivery. Robert Goff J stated:

> "Both parties confidently expected a formal contract to eventuate. In these cirumstances, to expedite performance under that anticipated contract, one requested the other to commence the contract work, and the other complied with that request. If thereafter, as anticipated, a contract was entered into, the work done as requested would be treated as having been performed under that contract; if, contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract the terms of which can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as having been done pursuant to that request, such an obligation sounding in quasi-contract or, as we now say, in restitution. Consistently, with that solution, the party making the request may fnd himself liable to pay for work which he would not have had to pay for as such if the anticipated contract had come into existence, e.g., preparatory work which will, if the contract is made, be allowed for in the price of the finished work . . ."[22].

In *Dickson Elliott Lonergan Ltd.* v. *Plumbing World Ltd.* [1988] 2 NZLR 608 Eichelbaum J (as he then was) in the High Court of New Zealand considered recovery in restitution on the basis of *quantum meruit* in the situation where a developer performed services at the request of a prospective tenant in anticipation of a lease which failed to materialise. The developer had learned that the defendant was looking for new office accommodation and put to the

[22] [1984] 1 All ER 504 at 511.

defendant a scheme whereby it would purchase a building site, design and build a multi-storey building to the defendant's requirements on the site and lease it long term to the defendant. Draft heads of agreement were drawn up, further negotiations and correspondence ensued. After considering alternative sites the defendant informed the developer that its Board of Directors had chosen its site. The developer prepared a detailed proposal for the work with practical completion to be by the end of March 1987 as the defendant expected to have to vacate its existing premises by 31 March, 1987. The defendant informed the developer that the defendant's Board had approved the plan and requested the developer to proceed rapidly emphasising the importance to the defendant of timing. The developer started work immediately. Two weeks later the defendant, without revoking its approval of the existing plan, asked the developer to prepare a proposal for an alternative site which had become available. The developer declined and asked for a positive response to its own proposal and was informed that the defendant had decided to proceed instead with the development of the alternative site. The developer claimed the cost of the work performed in the preparation of the plans and specifications necessary for building approval to allow a start on construction to achieve the completion date.

Eichelbaum J stated that to recover within the restitutionary principle the precise mix of elements required before the claim will succeed varies with the factual situation and identified the elements which may not all need to be satisfied to establish the claim:

> "(a) the defendant's representation that it would proceed with the proposal;
> (b) its request that the plaintiff should commence work immediately;
> (c) the fact that such work would have been of benefit to the defendant had the contract proceeded;
> (d) if it had, indirectly the plaintiff would have been compensated for the cost of such work;
> (e) the defendant made a unilateral decision not to proceed."[23]

Eichelbaum J held that it was not essential that the defendant receive an actual benefit from the plaintiff's work, the developer in this case having done work simply related to its own development in the erection of a building for personal ownership.

Does the risk analysis, combined with the other factors identified in the cases, conform to the nature of the claim and elements for success laid down in *Pavey & Matthews* v. *Paul* (1987) 61 ALJR 151? It is suggested that the following is the position:

(a) The High Court has discarded the emphasis on a request engendering expectations of payment and/or reliance expenditure as a determining factor in recovery concentrating on actual or constructive acceptance of work derived at the expense of the claimant. Restitution is granted to reverse an unjust enrichment, and not to fulfil expectations generated by an "implied" promise breached when the Principal unilaterally abandons the project.

[23] [1988] 2 NZLR 608 at 613.

(b) The risk analysis is of relevance in the context of establishing whether or not the work was performed gratuitously. The situation of a Contractor incurring expenditure in the preparation of a tender remains unaltered. The "gamble" aspect of tendering can be analysed in restitutionary terms by asking whether the defendant has accepted a benefit by the expense incurred in the tendering process at the expense of the claimant or whether it is work that a tenderer normally performs gratuitously as part of overhead costs in running its business. Work performed at the request of the Principal over and above the normal tendering process by which the Principal gains a benefit at the detriment of the Contractor is non-gratuitously conferred and must in justice be paid for.

(c) The requirement of acceptance of a benefit by the services rendered does not sit comfortably with the risk analysis which permits recovery where there has been no benefit conferred on the defendant by the services rendered in anticipation of a contract. Sheppard J in *Sabemo*[24] and Eichelbaum J in *Dickson Elliott*[25] were firmly of the view that conferral of a benefit on the defendant was not an essential element for recovery. Indeed, Sheppard J in *Sabemo* observed that the case before him was not a case of unjust enrichment.[26] The reasoning is not in accord with the High Court's reformulation of a claim in *quantum meruit* as being founded in the law of restitution and unjust enrichment.

(d) In *Hooker Corporation*[27] substantial work and expenditure had been carried out by the Hooker-Harrah consortium at the insistence of the New South Wales Government involving the demolition of buildings and re-location of Sydney City Council electricity cables on the site which conferred an actual benefit on the Government. Rogers J, however, decided that in the circumstances it would not be unjust not to recompense the consortium as the consortium had taken the risk in expending money prior to entry into a formal contract and there was nothing unjust in allowing the loss to lie where it fell.[28] The approach taken by Rogers J in the *Hooker–Harrah* case of looking to assumption of risk in deciding the "unjust" factor[29] may be sensible commercially in considering the expectations of parties to a commercial transaction but it is suggested, with all due respect, proceeds on a misconception of the basis of the claim. The remedy looks to whether or not in all the relevant circumstances there has been a

[24] [1977] 2 NSWLR 880 at 903.

[25] [1988] 2 NZLR 608 at 612.

[26] [1977] 2 NSWLR 880 at 897.

[27] Unreported, Supreme Court of NSW, Rogers J 30 October 1987.

[28] The Court of Appeal allowing an appeal found that there was in existence a contract so that it was unnecessary to deal with the restitutionary claim (unreported, Mahoney, Priestly, & Clarke J JA, 20 September 1988).

[29] In the Court of Appeal it was only Clarke JA who made reference to this aspect of the judgment of Rogers J Clarke JA at 25 accepted that even if the question posed was correct the answer depended on an evaluation of all the circumstances up until when the Government expressed its determination not to proceed but found it unnecessary to decide the question (unreported, Court of Appeal, New South Wales, Mahoney, Priestly, Clarke J JA, 20 September 1988).

benefit non-gratuitously conferred and accepted which has unjustly enriched the defendant at the expense of the claimant and not to a fair and just adjustment between the parties on the basis of who assumed the risk of non-fulfilment of a contingency required to be satisfied before any contract could be awarded. There will be no benefit conferred or accepted if a risk-taker performs work gratuitously in the hope of a contract so the unjust factor does not arise.

The essential question in restitution is whether the recipient of a benefit has been unjustly enriched at the expense of the provider if the goods are not returned or services not paid for. In *William Lacey*[30] the defendant received an actual benefit or "enrichment" identified by Barry J as being the use in negotiations with the War Damage Commission of the calculations and estimates prepared by the builder to obtain a much higher "permissible amount" for the reconstruction. Barry J thought it was justifiable to surmise that the approved reconstruction plans and increase in the "permissible amount" increased the price of the damaged building which the defendant obtained when it ultimately sold. Similarly in *British Steel Corporation* v. *Cleveland Bridge & Engineering Co. Ltd.* (1981) 24 BLR 94; [1984] 1 All ER 504, CBE received an actual benefit by the delivery of the 137 nodes.

It is suggested that conformably with the modern law on *quantum meruit* recovery of compensation for work performed in anticipation of a contract which fails to materialise will be available only where there can be demonstrated an acceptance of a benefit by the defendant. Where there is no demonstrable benefit as in *Sabemo*[31] or *Dickson Elliot Lonergan Ltd.*,[32] the restitutionary claim will not be available.

The restitutionary analysis of work done in anticipation of a contract or pursuant to Letters of Intent has been criticised as suffering the inadequacy in commercial transactions of throwing the entire risk of incomplete negotiations on only one of the parties.[33] This criticism is not limited to this particular category of case but applies in all circumstances where there is no contract governing the relationship. In a contract the parties have the opportunity to "fine tune" their relationship to take into account the risks associated with the transaction, to protect themselves against the risks eventuating and to price accordingly. However, where a contract is not concluded and the work is partially or fully executed the restitutionary remedy looks to reversing the unjust enrichment and not to the commercial expectations of the parties which, if they are to be expressed, can only be expressed in a contract.[34]

It does not necessarily follow that the failed expectations of the defendant

[30] [1957] 1 WLR 932.
[31] [1977] 2 NSWLR 880.
[32] [1988] 2 NZLR 608.
[33] SWN Ball, "Work Carried Out In Pursuance of Letters of Intent—Contract Or Restitution?" (1983) 99 LQR 572.
[34] *Per* Robert Goff J, *British Steel Corporation v. Cleveland Bridge Co.* [1984] 1 All ER 504 at 511-512.

cannot in some manner be accommodated within the restitutionary remedy. Deane J in *Pavey & Matthews Pty. Ltd.* v. *Paul* observed that ordinarily compensation will correspond to the fair value of the benefit provided by reference to remuneration calculated at a reasonable rate for work actually done or the fair market value of materials supplied but:

> "In some categories of case . . . it would be to affront the requirements of good conscience and justice which inspire the concept of restitution to determine what constitutes fair and just compensation by reference only to what would represent a fair remuneration for the work involved or a fair market value of goods supplied"[35]

In the case before the High Court no reference was made to losses consequent to the defendant on acceptance of the work as the contract was unenforceable only by the claimant and not by the defendant who was not deprived of the ability to recover in respect of defective work or other loss. In the claim in a *quantum meruit* the claimant must prove what work has been performed of benefit or enriching the recipient and it is suggested this would require a taking into account whether the work was properly executed without defects or reduction in value in the hands of the recipient because of tardy performance or the unsatisfactory manner of performance exposed it to extra expense.

This was considered by the English Court of Appeal in *Crown House Engineering Ltd.* v. *AMEC Projects Ltd.*(Slade, Stocker and Bingham, LJJ, (1989) 48 BLR 32) in a case where Crown as M & E sub-contractor to AMEC sought interim payment on summary application for progress payments due on interim certificates under the subcontract or, alternatively, if no contract had been concluded, for a reasonable sum as *quantum meruit*. The amount certified, it was argued, constituted conclusive evidence against AMEC of the value of the work done by Crown for *quantum meruit* purposes and it could not, on the authority of *British Steel Corporation* v. *Cleveland Bridge* be diminished in amount by AMEC's cross-claims for costs incurred as a result of the timing and manner by which Crown carried out the work. Slade LJ rejected both propositions. The first on the basis that the amount certified was calculated by reference to the subsisting or contemplated contractual conditions which would by their terms have entitled AMEC to make two deductions and included as a provisional agreement an amount for loss and expense incurred by Crown which, if there was no contract, AMEC would have no liability to pay. Hence the amount calculated in the progress certificate was not an admission of the value of the work performed by Crown in the hands of AMEC. On the second proposition Slade LJ observed *British Steel* was arguably distinguishable only because in that case the amount of *quantum meruit* claims had been agreed subject to setting off the alleged cross-claims.

Whether and in what circumstances on the assessment of a claim for services rendered on a *quantum meruit* it might be open to a defendant to assert that the value of the services should be reduced because tardy performance

[35] *Pavey & Matthews Pty. Ltd.* v. *Paul* (1987) 61 ALJR 151 at 168.

or unsatisfactory manner of performance exposed it to extra expense or claims by third parties, was an open question. In some circumstances denial of reduction of these bases would result in injustice of the nature the whole law of restitution was intended to avoid. Bingham LJ stated in somewhat stronger terms that the doctrine of unjust enrichment, from which *quantum meruit* was in part derived, did not require that the assessment of a benefit requested and accepted be made without regard to acts or omissions of the Contractor when rendering those services which had served to depreciate or even eliminate their value to the recipient.

3.3 Repudiation

A controversial occasion for the availability of the restitutionary remedy is in recovery on a *quantum meruit* for services rendered and goods supplied under a contract terminated for breach. The granting of restitution to a Contractor in the situation of discharge of a contract for breach involves a consideration of who as between the parties is "innocent" and the question of whether performance must be entire to ground recovery under the contract.

3.3.1 Claims by an "innocent" Contractor

In circumstances where the Principal wrongfully repudiates a contract and that repudiation is accepted by the Contractor, the common law right to claim *quantum meruit* for services rendered or goods supplied as an alternative to the remedy of damages for breach of contract is well established in cases such as *Lodder* v. *Slowey* [1914] AC 442 (affirming [1900] 20 NZLR 321) and *De Bernady* v. *Harding* (1853) 8 Ex. 822; 155 ER 1586. The right to elect recovery on a *quantum meruit* rather than sue for damages where the Principal has prevented performance or substantial performance of the contract by the Contractor has not been doubted and has been applied in a long line of cases.[36] It is no answer to a claim in *quantum meruit* that full performance would not have been profitable.[37] The Contractor has the right to elect between the two alternative remedies and need not make the election until judgment.[38]

The right in the circumstances of termination by breach to sue on a *quantum meruit* to recover reasonable and fair remuneration for the work performed unlimited by the *pro-rata* contract price is widely regarded as an anomaly in

[36] See *Ettridge* v. *Vermin Board of the District of Murat Bay* [1928] SASR 124; *Brooks Robinson Pty. Ltd.* v. *Rothfield* [1951] VLR 405; *Stevenson* v. *Hook* [1956] 73 WN (NSW) 207; *Gabriel* v. *Sea & Retaining Wall Constructions Pty. Ltd.* (1987) 3 BCL 162; *Jennings Construction Ltd.* v. *Q H & M Birt Pty. Ltd.* (unreported, Supreme Court NSW, Cole J, 16 October 1988); *The Minister for Public Works* v. *Renard Constructions (ME) Pty. Ltd.* (unreported, Supreme Court to NSW, Brownie J, 15 February 1989).

[37] *Brooks Robinson Pty. Ltd.* v. *Rothfield* [1951] WR 405 at 409.

[38] *Morrison-Knudsen Co.* v. *BC Hydro and Power Authority*, 85 DLR 186 at 227; *Lodder* v. *Slowey, supra.*

the law.[39] The right to recover has been supported in the cases on the basis, expressed by Williams J in *Lodder* v. *Slowey* [1900] 20 NZLR 321 at 358: "As the Defendant has abandoned the special contract, and as the Plaintiff has accepted that abandonment, what would have happened if the special contract had continued in existence is entirely irrelevant."

The illogical result which can flow from the "innocent" Contractor being permitted to choose between the alternative remedies in restitution or damages is readily seen. As Duncan Wallace QC points out in *Hudson's Building and Engineering Contracts,* 10th ed. at pp. 601-602, a Contractor who underestimates and is fortunate enough to be presented with the opportunity to terminate for breach can avoid inevitable losses by electing a *quantum meruit.* The "innocent" Contractor, by electing *quantum meruit* valued at the reasonable cost to the Contractor of performing the works, may not only recover an amount in excess of the damage actually suffered by termination and turn an unprofitable contract around but may also be able to cover his own poor performance in carrying out the contract work. The potential for recovery of an amount far in excess of what the Contractor would have received had the contract been completed without taking into account poor performance persuaded Brownie J in *The Minister for Public Works* v. *Renard Constructions (ME) Pty. Ltd.* (unreported, Supreme Court, NSW 15 February 1989) to the view that valuation of a *quantum meruit* in the circumstance of termination by breach should be valued by reference to the value to the recipient of the work rather than the cost incurred by the provider of the work.

There is strong authority that the "innocent" Contractor is not restricted to the *pro-rata* contract price in a claim on *quantum meruit.* The contract price is evidence to be considered in determining a reasonable price or appropriate amount of compensation but does not operate as a limit or ceiling upon the *quantum meruit* claim.[40] The avenue for subverting bargains raises the question of whether the restitutionary remedy should in fact be available at all and if so whether the "innocent" party should be limited to the *pro-rata* contract price.

The question is posed for the following reasons:

(a) The right to elect was originally granted for procedural reasons which no longer obtain and on the now out-dated proposition that termination for breach rescinded the contract *ab initio.*[41] Termination by breach unlike

[39] See Goff & Jones, *The Law of Restitution,* 3rd ed., 1986 at 465-468; *Hudson's Building & Engineering Contracts,* 10th ed., 1970 and 1st Supplement at 602; *Brown & Doherty Construction (Whangarei) Ltd.* v. *Whangarei County Council* (unreported, High Court of N.Z., Auckland Registry, Smellie J, 26 November 1987); *The Minister for Public Works* v. *Renard Constructions (ME) Pty. Ltd.* (unreported, Supreme Court NSW Brownie J, 15 February 1989.)

[40] *Horton* v. *Jones* (No. 1) (1934) 34 SR (NSW) 359; *M R Hornibrook (Pty.) Ltd.* v. *Eric Newham (Wallerawang) Pty. Ltd.* (1971) 45 ALJR 523; *Pavey & Matthews Pty. Ltd.* v. *Paul* (1987) 61 ALJR 151 *per* Deane J at 166; *Jennings Construction Ltd.* v. *Q H & M Birt Pty. Ltd.* (unreported, Supreme Court NSW, Cole J, 16 December 1988); *The Minister for Public Works* v. *Renard Constructions (ME) Pty. Ltd.* (No. 2) (unreported, Supreme Court NSW, Cole J, 26 October 1989).

[41] See *McDonald* v. *Dennys Lascelles Ltd.* (1933) CLR 457; *Heyman* v. *Darwins Ltd.* [1942] AC 356; *Johnson* v. *Agnew* [1980] AC 367. This line of authority establishes that where a party to a contract upon a breach by the other contracting party elects to treat the contract as no longer binding, the contract is not

termination by frustration does not leave the "innocent" party without a remedy or partial performance up until the time of termination.

(b) The only incentive for an "innocent" party to elect to claim on a *quantum meruit* is to be released from the contract price and thereby recover more than would have been recoverable for damages for breach, effectively to turn an unprofitable contract into a profitable contract. In addition in the restitutionary claim there is no duty on the "innocent" party to mitigate the loss.

(c) Allowing recovery outside contract unrestricted by the contract price, it must be assumed, is based upon a concept that the defaulting party is benefited by necessary expenditure saved in that the defaulting party would have been prepared to pay the market price rather than the contract price for the work done. If, however, the defaulting party would not have been prepared to pay the market price but would have only accepted the benefit at the bargained-for price it would appear to be an anomalous result.

(d) The further anomaly arises from the established proposition that where the "innocent" party has completed or substantially completed performance of the contract, the only action is on the contract and the only claim is for balance of the contract price. Hence, where the "innocent" party has elected to continue with the work in the face of a repudiatory breach of contract by the Principal, the Contractor is precluded from recovering on a *quantum meruit* after completion and is restricted to recovery under the contract.[42]

It has not been questioned that the right to elect recovery on a *quantum meruit* in the circumstances of termination by breach has survived the High Court decision in *Pavey & Matthews Pty. Ltd.* v. *Paul* (1987) 61 ALJR 151. It may be, however, that termination by breach falls outside the categories delineated by Deane J In all of the categories identified by Deane J the claimant is without a remedy in contract because the contract never came into existence, is void or voidable from the beginning, frustrated, or unenforceable. A contract discharged by breach terminates the contract only in so far as it is executory and the party in default is liable for damage for its breach, and rights in the Contractor which accrued prior to termination continue.

The approach of the NSW Supreme Court to the continued availability of the right to elect subsequent to the High Court decision in *Pavey & Matthews Pty. Ltd.* v. *Paul* (1987) 61 ALJR 151 requires the conclusion that notwithstanding the continued existence of the contract to determine the rights and obligations of the parties for performance until the time of termination and the remedy of damages for breach, the "innocent" Contractor

rescinded as from the beginning. Both parties are discharged from further performance of the contract but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial performance of the contract and causes of action which have accrued from the breach continue unaffected.

[42] *Morrison-Knudsen Co. Inc.* v. *British Columbia Hydro & Power Authority* (1978) 85 DLR (3d) 186.

may elect to ignore the bargain and recover under a *quantum meruit* unrestricted by the contract price.[43] There is, however, a divergence of authority on the basis for quantification of the *quantum* recoverable in circumstances of discharge for breach. Cole J is of the opinion that the "innocent" party is entitled to the reasonable cost of performing the works[44] whereas Brownie J concluded that, as the concept of restitution or unjust enrichment is the basis of the entitlement to a *quantum meruit,* the *quantum* is to be assessed by reference to the value to the recipient of the work performed.

3.3.2 Claims by a defaulting contractor

As the law presently stands recovery by a defaulting Contractor for partial performance under the law of contract depends upon whether the contract in question is "entire" or "divisible".

Where the contract is divisible the defaulting Contractor can recover payment under the contract for any divisible part or parts of services rendered or materials supplied by him under the contract.[45]

If the contract is entire, full performance is a condition precedent to payment leaving the defaulting Contractor without remedy in respect of partial performance. The leading authority is *Sumpter* v. *Hedges* [1898] 1 QB 673 where a builder contracted to build two homes and stables on the owner's land for £565. The builder performed work to a value of £333, receiving part payment of the price prior to abandonment of the contract, the builder having run out of money. The owner completed the building using materials which the builder had left on the land. The builder claimed for work done and materials supplied on a *quantum meruit.* The Court held that the contract was entire and the builder was thus unable to recover on the contract, having abandoned the original contract and there were no circumstances from which a fresh contract to pay for the work done could be inferred as the owner had had no choice whether to accept or reject the work done.The builder did recover the value of the materials left behind and used by the owner presumably on the basis that the owner had the opportunity to reject the materials.

To alleviate the draconian consequences of the common law concept of entire obligations the courts have allowed a defaulting Contractor an action on the contract if there has been substantial performance of the contract.[46] It is unclear whether the doctrine of substantial performance is a mitigation of the rules applicable to entire contracts or whether contracts where the doctrine

[43] *Jennings Construction Ltd.* v. *Q H & M Birt Pty. Ltd., supra; The Minister for Public Works* v. *Renard Constructions (ME) Pty. Ltd., supra; The Minister for Public Works* v. *Renard Constructions (ME) Pty. Ltd. (No. 2), supra.*

[44] *Jennings Construction Ltd.* v. *Q H & M Birt Pty. Ltd., supra; The Minister for Public Works* v. *Renard Constructions (ME) Pty. Ltd. (No.2), supra.*

[45] *Mersey Steel & Iron Co. Ltd.* v. *Naylor Benzon & Co.* (1884) 9 App. Cas. 434; *Steele* v. *Tardiani* (1946) 72 CLR 386.

[46] *Dakin & Co.* v. *Lee* [1916] 1 KB 566; *Hoenig* v. *Isaacs* [1952] 2 All ER 176; *Simpson Steel Structures* v. *Spencer* [1964] WAR 101; *Bolton* v. *Mahadeva* [1972] 1 WLR 1009.

applies should properly not be regarded as entire at all. Denning LJ in *Hoenig* v. *Isaacs* [1952] 2 All ER 176 suggested that the doctrine cannot operate if the parties have expressly intended that complete performance is required. The doctrine of substantial performance is, on this view, of limited operation applying only where on a proper construction of the contract substantial performance only is a condition precedent to payment. The defaulting Contractor may recover, within the narrow limits of the doctrine of substantial performance, the contract price less a deduction for the cost of defects and omissions.

The doctrine of substantial performance may be invoked to defeat a claim on a *quantum meruit*. In *Simpson Steel Structures* v. *Spencer* [1964] WAR 101 a builder agreed to construct a farm shed for the owner of land for a lump sum price of £2,159. The building when completed had serious structural defects with the cost of rectification £560. The builder claimed the contract price less the cost of correcting the defective work or alternatively on a *quantum meruit*. Hale J held that there had not been substantial performance of the lump sum contract as the cost of making good the totality of the defects was 33⅓% of the contract price. The builder could recover nothing for the partial performance of the contract work even though it left the owners in possession of a structure of substantial value which had cost the builder a considerable sum and for which the owners were not obliged to pay anything. Hale J did suggest that one day the courts may feel able in this type of building contract to introduce an equity to allow recovery which: ". . . would have the attraction of getting rid of the uncertain criteria of 'substantial performance' and of being capable of being made to do substantial justice between the parties in any given case . . .".[47]

It is suggested, in accord with the views of Hale J, a defaulting contractor should be entitled to restitution for the benefits conferred by partial performance accepted by the other party.[48]

In principle there would appear to be no reason why a Contractor as "contract-breaker" should not be able to recover on a restitutionary *quantum meruit* for work performed prior to termination of the contract. The Principal is "enriched" by the partial performance. The "unjust" factor is satisfied by a non-gratuitous benefit actually or constructively accepted at the expense of the Contractor. And there can be no recovery under the "entire" contract.

The authorities, however, have denied restitutionary relief to a defaulting Contractor on the reasoning that the Principal has no choice as to whether to accept or reject the benefit of the work done and cannot be said to have freely accepted the benefit in simply keeping his own property.[49] The concept

[47] [1964] WAR 105.

[48] *Cf:* The 1975 English Law Commission, Working Paper No. 65, "Pecuniary Restitution on Breach of Contract" and the South Australian Law Reform Committee, 19th Report, 1986, suggesting reform of this area of law to provide a remedy in restitution for partial performance of contracts.

[49] *Sumpter* v. *Hedges* [1898] 1 QB 673; *Summers* v. *The Commonwealth* (1918) 25 CLR 144; *Cooper* v. *Australian Electric Co. (1922) Ltd.*, 25 WALR 66.

of "free acceptance", that is, that a Principal is unable to exercise a free choice to reject or accept a benefit where the benefit is affixed to its land did not seem to concern the High Court in *Pavey & Matthews Pty. Ltd.* v. *Paul* (1987) 61 ALJR 151 in granting restitutionary relief to a builder who had completely executed work under an unenforceable contract. It is perhaps explicable on the basis that where the defaulting Contractor has only partially performed the Principal cannot be said to have freely accepted when the agreement was to pay only upon full performance under an "entire" contract. It does not however accord with the restitutionary focus on the gain in the hands of the recipient and not non-fulfilment of expectations generated by promises.

Although the rules relating to what constitutes "acceptance" were not defined by the High Court in *Pavey & Matthews Pty. Ltd.* v. *Paul,* it appears to have been assumed in that case that the owner had actually or constructively accepted the dwelling constructed on her land pursuant to an unenforceable building contract. The approach of the High Court may well be that "free" acceptance in the sense of an opportunity to accept or reject occurs not at the time of the claim, that is, after discharge for frustration or breach, but at the time of request for the work to be performed. The notion of free acceptance after the event giving rise to the occasion for the obligation to be imposed to make restitution would appear to owe more to the implied contract theory of recovery on *quantum meruit* which was the basis of the decision in *Sumpter* v. *Hedges* [1898] 1 QB 673, namely that no fresh contract to pay could be implied because the owner in that case had no choice whether to accept or reject the work. It seems to be contrary to the principle underlying the remedy to allow a Principal subjectively to devalue a benefit in its hands by saying that what it had contracted for was entire performance, partial performance being unacceptable even though the Principal is left with a valuable asset.

3.4 Frustration

Frustration of a contract discharges the parties from future performance. Frustration occurs where, without default of either party, as a matter of construction of the contract: ". . . the performance of the contract in the events which have occurred is radically different from performance of the contract in the circumstances which it, construed in the light of the surrounding circumstances, contemplated".[50]

At common law no restitution was available for services or goods supplied prior to the frustrating event.[51] The loss fell where it lay at the time of the frustrating event. A Contractor is limited to such progress payments already made or due prior to the frustrating event although the value of the work done might well exceed the progress payments. Recovery on a *quantum meruit*

[50] *Per* Mason J, *Codelfa Construction Pty. Ltd.* v. *State Rail Authority of NSW* (1982) 56 ALJR 468.
[51] *Cutter* v. *Powell* (1795) 6 TR 320; *Appleby* v. *Myers* (1867) LR 2 CP 651.

in the event of frustration has been available only for work done after the frustrating event.[52] The situation in England following the decision in *Fibrosa Spolka Akcyjana* v. *Fairbairn, Lawson, Combe, Barbour Ltd.* [1943] AC 32 is that money paid under a contract thereafter frustrated is recoverable where there has been a total failure of consideration.[53]

Under the Frustrated Contracts Acts in place in New South Wales, Victoria and South Australia[54] a Contractor is able to recover on what is in effect a statutory *quantum meruit* for work performed prior to the frustrating event. The general effect of the legislation is to preserve the rights of the parties which accrued prior to the frustrating event, and, for a party who has wholly or partly performed his obligations under the contract, to be paid according to the terms of the contract and the intention of the parties to the contract. The underlying *rationale* of the legislation is to be found in the principle of unjust enrichment so that a party who receives a benefit other than money must pay the other party monetary compensation not exceeding the value of the benefit obtained. A Contractor under an entire contract, as Keating observes in *Building Contracts,* 4th ed. at p. 107, may be in no better position under the statute than at common law. The Contractor must show that the Principal has received a valuable benefit and the amount the Contractor can recover cannot exceed the value of the benefit conferred. Where the contract works are totally destroyed and of no benefit to the Principal, the Contractor may recover nothing.[55]

The position at common law relating to recovery on a restitutionary *quantum meruit* is now thrown into some doubt after the decision in *Pavey & Matthews Pty. Ltd.* v. *Paul* (1987) 67 ALJR 151. Deane J at 165 specifically referred to frustration as an occasion giving rise to the obligation to make restitution. It is not clear whether he was referring to recovery for performance prior to frustration or merely referring to the existing restitutionary remedy for work performed after the frustrating event. In the situation where a contract has been partially performed prior to the frustrating event and the partial performance remains of benefit to the Principal after frustration, on the reasoning in *Pavey & Matthews Pty. Ltd.* v. *Paul,* the Contractor should have an entitlement to a grant of restitution in respect to the benefit conferred by the partial performance which has been actually or constructively accepted by the Principal.

[52] *Codelfa Construction Pty. Ltd.* v. *State Rail Authority of NSW* (1982) 149 CLR 337.

[53] The unfairness which can result from the *Fibrosa* decision is discussed by S N Ball, *op. cit.,* footnote 30 at p. 579.

[54] Frustrated Contracts Act 1978 (NSW); Frustrated Contracts Act 1959, (Vic.); Frustrated Contracts Act 1988 (SA).

[55] For a detailed analysis of the equivalent English legislation and valuation of the benefit conferred prior to the frustrating event, see *BP Exploration Co. (Libya) Ltd.* v. *Hunt Co. (No. 2)* [1979] 1 WLR, affirmed [1983] 2 AC 352.

3.5 Unenforceable contracts

The High Court in *Pavey & Matthews Pty. Ltd.* v. *Paul* (1987) 61 ALJR 151 decided by majority that there is a right to recover for the value of work done and materials supplied pursuant to an unenforceable oral building contract which has been fully executed, provided that the executed consideration is accepted by the Owner. The claimant in this case held a builder's licence under the Builders Licensing Act 1971 (NSW). He sued the owner, for whom renovation work was carried out under an oral contract, for a reasonable sum for work done and materials supplied. The Builder framed the claim in *quantum meruit* because non-compliance with section 45 of the Act precluded recovery by a licensed builder under an oral contract. The contract did not in fact provide for a fixed sum but required the payment of a reasonable remuneration for work done to be calculated by reference to prevailing industry rates. The Owner relied on section 45 and contended that an action on a *quantum meruit* amounted to a direct or indirect enforcement of the oral contract.

The Builder succeeded at first instance. However, on appeal the Court of Appeal found for the Owner holding, as it did also in *Schwarstien* v. *Watson* [1985] 3 NSWLR 134, that an action in debt for the contract sum for completed building work was an action to enforce the contract and therefore prohibited by the legislation.

The Full Court of the Supreme Court of Queensland in *Gino D'Alessandro Constructions Ltd.* v. *Powis* [1987] 2 Qd.R, 40 expressly refused to follow the New South Wales Court of Appeal, and affirmed the decision of McPherson J in *Fablo Pty. Ltd.* v. *Bloore* [1983] Qd.R. 107, that the analogous provision in Queensland, namely section 75 of the Builders Registration and Home Owners Protection Act 1979, did not preclude recovery on a *quantum meruit* by a builder who had completed or substantially completed the building work on a dwelling house even though the contract was not in writing and signed by the parties as required by section 75. The Queensland Full Court took a different view of the statutory intention expressed in the legislation to that taken by the New South Wales Court of Appeal which has found that the intention was to prevent recovery of remuneration unless the contract was in writing. The view taken in Queensland was that the legislative intent was

> ". . . to ensure so far as possible, that a degree of precision is introduced into house building contracts, so that it can be readily determined what is work to be done and whether loss or damage has been suffered . . . so as to attract the benefit of the insurance afforded by . . ." the Act.[56]

The High Court majority approved the approach taken by the Full Court of Queensland and reversed the decision of the New South Wales Court of Appeal. The High Court decided that the consequence of the interpretation of the statute in the New South Wales Court of Appeal of the statutory intent

[56] *Gino D'Alessandro Constructions Pty. Ltd.* v. *Powis* [1987] 2 Qd.R. 40 at 56.

was too draconian to have been intended and preferred an interpretation which served the statutory purpose while avoiding a harsh and unjust operation. Deane J approved the propositions expressed by Jordan CJ in *Horton* v. *Jones (No. 1)* (1934) 34 SR (NSW) 359 at 367-368 namely:

(a) "The mere fact that the consideration is executed is not sufficient to make the Statute of Frauds inapplicable."
(b) "If, however, a person does acts to the benefit of another in the performance of a contract (upon which an action cannot be brought by reason of the Statute of Frauds), and the other so accepts the benefit of those acts, or otherwise behaves in relation to them, that, in the absence of the . . . contract the former could maintain an action . . . upon the common money counts, he may sue in *indebitatus* to obtain reasonable remuneration for the executed consideration . . . ."
(c) "The existence of the unenforceable contract prevents a new contract, in respect of which special *assumpsit* could be maintained, from being implied from the act performed . . .; and the unenforceable contract may be referred to as evidence, but as evidence only, on the question of amount . . ."
(d) The appropriate action to obtain such reasonable remuneration is "an action of debt". In such a case the action is in *indebitatus* only.

The claim is, hence, independent of any genuine agreement and the obligation to pay is imposed by law and does not depend on an inference of an implied promise. So analysed, the obligation sought to be enforced was one arising independently and not derivatively from the unenforceable contract and did not depend upon a fictional promise to pay and was not therefore precluded by the Statute of Frauds as it had no contractual origin. The action is brought on a common *indebitatus* count consistently with the Statute of Frauds as it is founded on an obligation arising independently of the unenforceable contract in restitution or unjust enrichment and not directly or indirectly to enforce the contract.

Deane J referred to the basis upon which *quantum* of remuneration or compensation was to be ascertained in an action on *quantum meruit* brought independently of the unenforceable contract. The existence of the contract and the terms of the contract are not irrelevant but may be referred to as evidence on the question of the appropriate amount of compensation. A defendant may in fact rely on the unenforceable contract in two situations:

(a) If the unenforceable contract has not been rescinded by the claimant or otherwise terminated, the defendant is free to rely on it as a defence to the claim for compensation in a case where the defendant is ready and willing to perform his obligations under it; and
(b) If the unenforceable contract has been executed but not rescinded, the defendant is entitled to rely on the unenforceable contract to limit the amount recoverable by the claimant to the contractual amount where that amount is less than what would constitute a fair and reasonable remuneration. The contract price operates as a ceiling on recovery in such circumstances.

In calculating the *quantum* what is involved is the payment of an amount which constitutes in all relevant circumstances fair and just compensation for

the benefit or enrichment actually or constructively accepted which requires taking into account any identifiable real detriment sustained by reason of the builder's failure to comply with the requirements of the statutory provision. Deane J did not consider the mere fact that reasonable remuneration for the building work done at the building owner's request exceeded the building owner's expectation would constitute any such identifiable real detriment, as it was not necessary for the purposes of the statutory provision that a written contract contain either an agreed price or an estimate of the cost.

It was not necessary for the High Court in *Pavey & Matthews Pty. Ltd.* v. *Paul* to consider whether partial performance under an unenforceable contract would ground recovery in *quantum meruit*. The approval of *Horton* v. *Jones (No. 1)* (1934) 34 SR (NSW) 359 and *Gino D'Alessandro Constructions Pty. Ltd.* v. *Powis* [1987] 2 Qd.R. 40 suggests acceptance of the proposition that if partial performance is freely accepted under a contract which is unenforceable the Principal will be obliged to make a payment by way of restitution for the work done of which he has received the benefit.

In *Gino D'Alessandro Constructions Pty. Ltd.* v. *Powis* the Queensland Full Court held that:

> "... a Builder, who has completed the building work on a dwelling house apart only from matters falling within the doctrine of 'substantial performance' (see *Fablo Pty. Ltd.* v. *Bloore* at 112), will in Queensland be entitled to recover the sum due for the work on completion, even though the contract is not in writing and signed by the parties as required by section 75."

It is suggested that the importation into the restitutionary remedy of the contractual doctrine of "substantial performance" to ground recovery is no longer necessary or relevant to recovery on a *quantum meruit* based on a legal theory of restitution and not implied contract. Partial performance whether substantial or not, on the reasoning of the High Court, should give rise to an obligation on the Principal to make a fair and just restitution for a benefit actually or constructively accepted at the expense of the claimant by that partial performance.

Where there has been partial performance the Contractor must be able to show that the contract has been terminated for fundamental breach, repudiation or frustration.[57] If the partially performed unenforceable contract has not been rescinded or otherwise terminated by the claimant the Principal may rely on it as a defence to the claim for compensation where he is ready and willing to perform his obligations under it.[58]

[57] *Gino D'Alessandro Constructions Pty. Ltd.* v. *Powis* [1987] 2 Qd.R.40 at 59; *Matthes* v. *Curlong* (1955) 55SR (NSW) 357, *James Birrel Mack & Partners* v. *Neil Gary Evans* (1985) 1 BCL 345—recovery on a *quantum meruit* where the contract was discharged by agreement.

[58] Deane J *Pavey & Matthews Pty. Ltd.* v. *Paul* (1987) 6 ALJR 151 at 166.

3.6 Work done outside the contract

The most difficult area for recovery on a *quantum meruit* is for additional or varied work performed outside the contract or not payable pursuant to the contract because of failure to fulfil conditions precedent to recovery. The basic proposition is that where there is a contract for specified work and the Contractor does work outside the contract at the Principal's request, the Contractor is entitled to be paid a reasonable sum for the work.[59]

In *Sir Lindsay Parkinson & Co. Ltd.* v. *Commissioner of Works* [1949] 2 KB 632, the Contractor agreed under a varied contract to carry out certain works to be ordered by the Commissioners on a cost-plus-profit basis subject to limitation as to the total amount of profit. The Commissioner ordered work far in excess of the amount so compensated although not different in character, and as a result the work was not completed until a year beyond the anticipated completion date. The actual cost of the contract was £6,680,000 but it was held on the true construction of the varied contract that the Commissioners had authority to order work only to the value of £5,000,000. In these circumstances it was held that the work executed so far exceeded the stipulated work, that it was beyond the ambit of the contract and had to be paid for by the Commissioners at a reasonable remuneration on a *quantum meruit.*[60] The reasoning in this case proceeded on the basis of the implication of a term as to the ambit of the original contract obligation. It is doubful that such a term would now be implied.[61]

The position is simply stated in *Hudson's Building and Engineering Contracts,* 10th ed. at 549:

> "It is seldom, however, that it is possible to contend that a contract for building or engineering work is so changed as to entitle the Contractor to recover payment otherwise than in accordance with the contract, unless and until some stand is taken by the Contractor in the matter. The continued execution of the works without protest under the terms of the contract, as, for example, the application for and the receipt of payment from time to time upon the certificate of the Engineer or Architect, will render it difficult for a Contractor to contend that the contract has no application to the work as executed so as to enable him to payment on a *quantum meruit.*"

The veracity of the statement is demonstrated by the cases. In *Balfour Beatty* v. *Kidston Goldmines Ltd.* [1989] 2 Qd.R 105, the Contractor claimed reasonable remuneration in lieu of the contract price for work it argued was done pursuant to variations of such a nature that the cumulative effect had fundamentally changed the scope of the work from that which had been anticipated at the time of tender. Dowett J reviewed the authorities, in particular, *Thorn's Case* and *Sir Lindsay Parkinson* and held that in the context of clause 40 of AS2124-1981 there was no implied term limiting the amount

[59] *Thorn* v. *London Corporation* (1876) 1 App. Cas. 120 at 127; *Sir Lindsay Parkinson & Co. Ltd.* v. *Commissioner of Works* [1949] 2 KB 623; *Wegan Constructions Pty. Ltd.* v. *Wodonga Sewerage Authority* (1978) VR 67.

[60] [1949] 2 KB 632 *per* Cohen LJ at 655-659 and Asquith LJ at 622 and 667.

[61] See *Codelfa Construction Pty. Ltd.* v. *State Rail Authority of NSW* (1982) 56 ALJR 468.

of extra work as existed in the cost plus contract in the *Sir Lindsay Parkinson* case. His Honour said at 133:

> "It was always open to the Builder to decline to do extra work, and the Builder did not do so. Thus there is no basis upon which it an be asserted either that the contract was brought to an end so that it is possible to sue upon a *quantum meruit,* so alternatively, that any part of the work performed was not done pursuant to the contract upon its proper construction."

That it is not ordinarily sufficient for the Contractor to claim after the works are completed is supported in other authorities, namely, *Seaton Contractng Co. Ltd.* v. *Attorney General* [1982] 2 NZLR 368 and *A McAlpine & Sons* v. *Transvaal Provincial Administration* (1974) 3 SALR 506.

To recover on a *quantum meruit* for additional or varied work it must be shown that on a proper construction of the contract, the work is in fact outside the scope of the contract and not work which is merely more of the same kind and character as contemplated by the contract.[62] The cumulative affect of a large number of variations does not cause a fundamental change to the works if the variations may fairly be said to be a change to the works as described and not different in kind from that contemplated by the contract.[63]

Where on a proper construction of the contract the Principal has no power to order a variation after practical completion has been certified, extra work ordered is not a variation within the scope of the variations clause and is a matter of separate arrangement between the parties which, in the absence of agreement, would be compensable on a claim in contractual *quantum meruit.*[64]

It is not an unusual event in the construction and engineering industry for a Contractor to perform extra or additional work without compliance with procedural requirements of variation clauses, such as an order in writing from the Superintendent, and later seek compensation for that work. The restitutionary remedy of a claim on a *quantum meruit* is not as yet a fully explored basis for recovery in the circumstances.

It was considered by the New South Wales Court of Appeal in *Update Constructions Pty. Ltd.* v. *Roselle Child Care Centre* (unreported, Kirby P, Samuels,

[62] The additional or "varied" work must be so peculiar, so unexpected and so different from what either party reckoned or calculated upon that it is not within the contract at all: *per* Lord Cairns in *Thorn* v. *London Corporation* (1876) 1 App.Cas.120 at 127. See also *Balfour Beatty* v. *Kidston Goldmines Ltd., supra.* Cases like *Wegon Constructions Pty. Ltd.* v. *Wodonga Sewerage Authority* [1979] VR 67 which seem to suggest a wider proposition were decided on the basis of explicit contract provisions limiting the power to vary to a specific percentage of work over and above that described in the contract. Provisions containing a specific percentage limit on the power to vary are to be found in AS2124-1981 and FIDIC, 3rd ed. A more general limitation on the power to vary is to be found in AS2124-1986 and JCCA85.

[63] *Balfour Beatty Power Constructions Australia Pty. Ltd.* v. *Kidston Goldmine Ltd. supra; J & W Jamieson Construction Ltd.* v. *Christchurch City* (unreported, Christchurch High Court, Cooke P, No. A108-82, 8 November 1984).

[64] *J & W Jamieson Construction Ltd.* v. *Christchurch City* (unreported, Christchurch High Court, Cooke P., No. A108-82, 8 November 1984). See *Commissioners of the State Bank of Victoria* v. *Costain Australia Ltd.* (1984) 5 BCLRS 193 where the variation was ordered after the time for practical completion had passed but practical completion had not been certified.

Priestly JJA 27 March 1990). The decision illustrates that recovery of compensation for work done without an order in writing is dependent upon the proper interpretation of the contract in question.

The contract was for the construction of a child care centre financed by federal funding via the Social Security Department. The federal grant was available only upon certain terms and conditions which included appointment of an architect and no extra funding for variations to contract items during construction unless prior agreement had been obtained from the Minister. The builder was aware, at least in general terms, of the conditions of the grant and suggested that the variations clause, Clause 8 of the contract, be struck out. The parties deleted clause 8 but did not delete two other provisions of the contract which referred to variations both of which made cross-reference to clause 8. These were clauses 6 and 16 of the contract.

Clause 6 obliged the Builder to comply with all statutory requirements which, if they involved a variation from the contract drawings or specifications, entitled the Builder to extra cost on compliance with the procedural requirements in the clause. Clause 16 dealt with latent site conditions and provided that if conditions below the surface of the site were different from what the drawings or specifications showed or if they were not on the drawings or specifications and the Builder had tendered on a basis different from that actually encountered, then any additional cost would be met by the owner provided the Builder followed the stated procedures in the clause.

During the course of construction it was discovered that the proposed building was located on the site of an old well in relation to which the Builder alleged that the "bearing value" was uncertain and sought the advice of a structural engineer. The structural engineer suggested that additional reinforcing steel was required in the foundations. The Builder had to dig out new footings and provide additional adequate foundations to the building. On removal of a floor of the pre-existing structure new drainage provision was found to be necessary to comply with the requirements of the Metropolitan Water, Sewerage and Drainage Board. Additional work was also required by the Board of Fire Commissioners, Fire Prevention Department, to bring a ceiling into compliance with the fire regulations.

The Builder informed the architect appointed of the necessity for the additional works and that he would be looking to the owner for re-imbursement. The architect concurred that the work had to be done and at the cost of the Owner. The Builder did not comply with the procedural requirements of clause 6 to give written notice of the reasons for the varation and applying for instructions. Nor did the Builder comply with the requirements of Clause 16 in obtaining the Owners' instruction when a change in ground conditions was encountered. The Builder claimed the sum of $20,000 for carrying out the extra work.

The Arbitrator found for the Builder either on the basis:

(a) The procedural requirements set out in the clauses were directory and not conditions precedent to payment for additional work; or

(b) By analogy with the High Court decision in *Liebe* v. *Molloy* (1906) 4 CLR 347.

The Arbitrator found that the architect acted as agent for the Owner for the design and supervision of the building work and treated the agent as one whose conduct would bind the Owner.

Leave was granted to appeal to the Supreme Court on the question of law of whether in the absence of written notice the Arbitrator was entitled to find for the Builder. The question, however, during the course of the hearing became whether on any basis it had been open to the Arbitrator to find the Owner liable for the additional work. Rogers CJ Comm. D held that the lack of compliance with the procedural requirements of written notification and instruction were fatal to the Builder's claim under the contract and in the circumstances there could be no recovery under the *Liebe* v. *Molloy* principle which was in any event now more satisfactorily explained by reference to the restitutionary principles in *Pavey & Matthews Pty. Ltd.* v. *Paul.*

The Court of Appeal reversed the decision of Rogers CJ Comm. D on the basis of an estoppel arising from the fact that the Owner's agent, the architect, led the Builder (i) to suppose that the requirement of writing under Clause 6 would not be enforced and (ii) to act to its detriment by both not giving the written notice when it could still have done so, and doing the work. The estoppel was that the Owner could not after those events rely on the writing requirement in Clause 6.[65]

The Court of Appeal did not doubt that the principles in the High Court decision in *Liebe* v. *Molloy*, although now properly to be seen as based in concepts of restitution rather than implied contract following the High Court decision in *Pavey & Matthews Pty. Ltd.* v. *Paul*, would found recovery in an appropriate case for additional work carried out without compliance with procedural requirements in variation clauses. Priestly JA, with whom Samuels JA agreed, concluded that in circumstances where the Principal:

(a) had actual knowledge of the extra works as they were being done;
(b) knew that the works claimed for were "outside the contract" in the sense of being work which the Contractor was not required to do by the contract; and
(c) knew that the Contractor expected to be paid for them as extras,

this would result in liability on the Principal.

To determine the crucial issue of whether the work in respect of which compensation claimed was "outside the contract" required a construction of the contractual provisions pursuant to which the work was performed.

Work performed under Clauses 6 and 16 of the contract in question were held to be not "outside the contract" in the sense in which the High Court had used that term but was work which had to be done to complete the

[65] Priestley JA with whom Samuels JA agreed applied *Waltons Stores (Interstate) Ltd.* v. *Maher* (1988) 164 CLR 387, *Silvoi Pty. Ltd.* v. *Barbaro* (1988) 13 NSWLR 466, *Austotel Pty. Ltd.* v. *Franklins Self Serve Pty. Ltd.* (1989) 16 NSWLR 582 and *Foran* v. *Wight* (1989) 64 ALJR 1 in arriving at the conclusion on the estoppel issue.

contract work and which the Builder had no option but to perform. As the work was work within the contract and governed by the contract no question of restitution could arise. In contrast, work ordered under the general variation clause was "work outside the contract" and not work which the builder was obliged to perform to complete the building work.

The conclusion that work which may be properly ordered under a variation clause is "work outside the contract" may seem somewhat surprising given that in the usual contract provision it is work a Contractor is obliged to perform. In this case the general variation clause was consensual only requiring the Builder to do additional or extra work if he agreed to do so and no order in writing was required.

However, the contract in *Liebe* v. *Molloy* provided:

> "In the case of any extra work required to be done or ordered either by the architect or proprietor such order must be in writing stating the nature of the same together with the fixed amount, and to be signed by the architect and indorsed by the proprietor; otherwise no extra of any kind shall be recognised or paid for."

There was also a stipulation that if the Contractor should be called upon to do work he considered did not come within the contract and the architect refused to give an order, the Contractor should nevertheless perform the work and give notice of a dispute to be referred to arbitration.

The Contractor claimed compensation for "extras" to a value of £5,000. Griffiths CJ observed that there was a written contract between the parties and the "extras" claimed for could not be brought within the terms of the contract because of the express stipulation that no "extras" should be paid for unless by an order in writing by the architect indorsed by the proprietor. However, that express stipulation did not exclude an obligation to pay where one man does work for another at his request. The question for Griffiths CJ was whether, notwithstanding the absence of written orders, there was under the circumstances an implied contract to pay for the "extras". The circumstances were those outlined by Priestly JA above. On the question of whether the "extras" were "work outside the contract" Griffiths CJ stated at 353, "The works in question, . . . were, in a sense at any rate, extras." The sense in which the Chief Justice was using the term seems to have been that work not described or implied as necessary to be done for the performance of the contract as shown on the specifications and drawings but which could be ordered validly under the general variations clause was "work outside the contract."

Kirby P in dissent on this point, expressed the view that the restitutionary principles in *Pavey & Matthews Pty. Ltd.* v. *Paul* applied even where there was a basis for recovery under the written contract. His Honour said at 20:

> ". . . once the conceptual basis of the entitlement to recovery was accepted to be, not the contract which the parties entered (if any), nor even a contract which the law will imply but a notion of fairness or conscience, the basis of the claim can be seen to be quite different. It is not contract at all, it is 'the obligation which the law imposes to make restitution'."

A claim in restitution is on this view not able to be defeated by the terms of the written contract but is imposed outside the contract—the claim founded in the obligation on the Principal to provide restitution to the Contractor for works the advantage of which the Principal has taken.

The basis for recovery identified by the majority of the Court of Appeal based on *Liebe* v. *Molloy* needs to be treated with caution as dependent upon the clause under consideration and the nature of the Contractor's obligations under the contract. However, in an appropriate case the decision suggests that where a general variations clause requires an order in writing as a precondition to payment for additional work and no such order is given but the Principal knows the work to be "work outside the contract", knows the works are being done, and knows that the Contractor expects to be paid, the restitutionary remedy will be available.

4. ARBITRATION AND CLAIMS FOR A RESTITUTIONARY QUANTUM MERUIT

An important impact of the reformulation of the legal basis of a claim in *quantum meruit* as lying in restitution or unjust enrichment is that a restitutionary *quantum meruit* may not fall within the scope of a standard arbitration clause.

The point arose for consideration in *Bliss Corporations Ltd.* v. *Kobe Steel Ltd.* (unreported, Supreme Court NSW Smart J, 29 September 1987) noted 1 ACILL 4. The arbitration clause in Article 40 of the agreement was in the following wide terms: "All disputes, controversies or differences which may arise between the parties, out of or in relation to or in connection with the contract or the breach thereof, shall be finally settled by arbitration in Tokyo . . .".

Bliss Corporation alleged that no enforceable contract existed between it and Kobe Steel in relation to the manufacture and supply of roller tables and ancillary equipment. Bliss argued that it was entitled to a *quantum meruit* for this work which did not fall within the arbitration agreement and hence Kobe Steel's application for a stay of proceedings on the claim should not be granted. The disputes the subject of the arbitration agreement were those arising out of or in relation to or in connection with the contract or the breach thereof and as the *quantum meruit* claim depended upon there being no concluded enforceable contract it followed there was no contract out of which or in relation to which or in connection with which the dispute could arise.

Kobe Steel relied on the decision of Sellers J in *Government of Gibraltar* v. *Kenney* [1956] 2 QB 410 where the arbitration clause provided: "If any dispute or difference shall arise or occur between the parties hereto in relation to anything or matter arisng out of or under this agreement the same shall be referred to . . . (an) . . . arbitrator." After completion of the works disputes arose between the parties which included a claim for remuneration on a

quantum meruit for the whole of the work performed, on the footing that the contract was frustrated and had ceased to have any affect. Sellers J expressed the view that the arbitration clause was very wide and a *quantum meruit* claim fell within its ambit on the footing that *quantum meruit* was in quasi-contract arising on an implied contract and was an incident which arises out of the contract. Smart J observed that the view taken by Sellers J was not easy to reconcile with the High Court decision in *Pavey & Matthews Pty. Ltd.* v. *Paul.* Smart J said at 7-8:

> "Where, as here, the claim is that there was no concluded enforceable agreement, it is difficult to see how a *quantum meruit* claim based on the execution of the work and its acceptance by Kobe can be said to be an incident arising out of the contract.
>
> While Article 40 employs very wide language and extends to all disputes which may arise out of or in relation to or in connection with the contract or its breach, this Article does not cover a *quantum meruit* claim. Article 40 proceeds on the basis of there being an agreement, whereas the *quantum meruit* claim proceeds on the basis of there being no enforceable concluded contract".[66]

An appropriately worded arbitration clause to comprehend a restitutionary *quantum meruit* claim within its scope could take the following form: "Any dispute or difference arising out of or in connection with the work".[67]

5. CONCLUSION

The circumstances where restitutionary obligations will be imposed have yet to be finally determined. The significant change in the law brought about by the reformulation of the claim in *Pavey & Matthews Pty. Ltd.* v. *Paul* has ramifications in all areas where the claim has previously been regarded as available. Indeed, it can no longer be predicted with certainty that where claims have not been allowed in the past, such as, for work performed prior to a frustrating event, or partial performance by a "contract breaker", they may not now be the subject of a grant of restitution to pay for a non-gratuitously conferred benefit. Equally where claims have been allowed in the past, such as, for work performed under a contract terminated by breach or work performed in reliance of a contract which fails to materialise, they may now be the subject of reappraisal.

It has been said that the restitutionary *quantum meruit* is the "Siamese twin"[68] of the developing doctrine of estoppel, both providing a remedy for a claimant where the contractual analysis fails to provide a fair and just solution. The possibilities of recovery opened up by the expansion of the

[66] This view was also taken by the Supreme Court of Queensland in *Milgun Pty. Ltd.* v. *Austco Pty. Ltd. and State of Queensland* [1988] 2 Qd.R. 670 that a claim for a restitutionary *quantum meruit* could not be the subject of a charge under the Subcontractor's Charges Act 1974-1979 (Qld.) as it was not "money that is payable or is to become payable . . . for work done . . . under the subcontract".

[67] A form of wording suggested by Smart J in *Bliss Corporation Ltd.* v. *Kobe Steel Ltd., supra,* at 6.

[68] Finn, P, "Commerce, The Common Law and Morality", 17 MULR 1989, pp. 87-99.

doctrine of estoppel may fill the gap where the restitutionary remedy is not available. The potential is illustrated by comparison of the facts in *Sabemo* and *Dickson Elliott Lonergan Ltd.* where the reliance and unconscionable conduct factors were not dissimilar to *Waltons Stores Ltd.* v. *Maher*. The doctrine of estoppel was successfully invoked to found recovery for the Builder in *Update Constructions Pty. Ltd.* v. *Rozelle Child Care Centre* where the restitutionary remedy was excluded by the existence of a valid and enforceable contract governing the situation between the parties.

The developments in the law in restitutionary *quantum meruit* and the doctrine of estoppel are evidence of the tendency in the courts to provide flexible remedies outside contract to redress unfair or unconscionable conduct in commercial transactions. The merit or otherwise of this approach is a matter for philosophical debate but it can be said that parties entering into commercial transactions may no longer do so in the hope and certainty that their commercial expectations and assumptions will be determined solely by reference to the arrangements entered into.

The law of restitutionary *quantum meruit* based on the concept of unjust enrichment is as yet in its formative stages. It is tolerably clear that a Contractor able to establish the performance of work not subject to a valid and enforceable contract which conferred a benefit not intended as a gift which has been actually or constructively accepted by a Principal at the expense of the Contractor will succeed on a claim on a restitutionary *quantum meruit*. It also seems clear that the contract price does not operate as a ceiling on the *quantum* recoverable other than under an unenforceable contract which has not been terminated.

There are a number of elements in the restitutionary claim in need of clarification. For example, when is a benefit "actually or constructively accepted?" Is acceptance assumed from the request for the work? Does it require standing by and allowing the work to be performed in the knowledge it is to be paid for? Or must the recipient have the opportunity to accept or reject after the parties become aware that there is no contract governing the situation? Resolution of what is "acceptance" is of particular significance in the construction and engineering industry where work performed and materials supplied result in an improvement in land and become, on affixation and incorporation into the works, the property of the owner of the land. How can the owner be said to "accept" its own property?

A further element giving rise to difficulty is what is a "benefit" and how is it to be valued for purposes of remuneration? Liability is benefit-based and is to pay for the gain in the hands of the recipient which it would be unjust to allow the recipient to retain without making payment. Deane J in establishing the guidelines for quantification in *Pavey & Matthews Pty. Ltd.* v. *Paul* said that monetary restitution involves payment of an amount which constitutes "fair and just compensation for the benefit" which will ordinarily correspond to the fair value of the benefit provided, that is, remuneration calculated at a reasonable rate for work actually done or the fair market value

of materials supplied. Does this mean that the benefit is to be valued by the costs incurred to the provider or the value in the hands of the recipient? It appears that the valuation of the benefit by reference to the enhanced value of the property will rarely if ever form the basis for calculating *quantum*. In determining the "relevant circumstances" to calculate a fair and reasonable remuneration it may be possible for the recipient to have brought into account defects in the work performed which have to be rectified, other losses associated with acceptance of the work and the Contractor's own poor performance increasing costs without leading to the result that the Principal is thereby enabled to devalue subjectively the gain in his hands.

How the courts deal with these issues will be of considerable legal and commercial interest. Although suggestions have been made throughout the article, definitive answers must be arrived at by the courts as these aspects arise for a decision. In the development of the law on restitutionary *quantum meruit* the industry and lawyers involved in the industry have a considerable role to play.