Defining the Limits of Restitution: *Mann v Paterson Constructions Pty Ltd* (2019) 373 ALR 1; [2019] HCA 32

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SYNOPSIS

1. Where a party to a contract terminates for repudiation, they may sue for contractual damages, in relation to work done for which an entitlement to payment has accrued under the contract, at the date of termination. In *Mann v Paterson,*[1] the High Court of Australia confirmed that in such circumstances, the contract is not rescinded *ab initio*, and the calculation of damages is to be undertaken with reference to agreed contractual rates.
2. In circumstances where work has been done but no contractual entitlement has arisen (for example, in contracts which provide for progress or milestone payments, and no entitlement to payment for that work has crystallised at the time of termination) a party may sue for a *quantum meruit*, an action for the reasonable value of services performed. They must satisfy the general elements of a restitutionary claim.
3. The general rule now in these circumstances is that the contract price provides a ceiling for the amount recoverable. There may be exceptions to this rule, which the High Court has not rigidly fixed.

[1] *Mann v Paterson Constructions Pty Ltd* (2019) 373 ALR 1; [2019] HCA 32.

THE DECISION

4. On 9 October 2019, the High Court delivered its judgment in *Mann v Paterson.*[2] The decision was a hotly anticipated one, which clarifies the intersection of contract law and restitution. One notable and far-reaching outcome of this case is a clear statement by all members of the court rejecting the so-called "rescission fallacy," which was evident in a line of cases following the Privy Council's ruling in *Lodder v Slowey* [1904] AC 442,[3] a case appealed from the Supreme Court of New Zealand.
5. It had been previously held, in *Lodder v Slowey* and elsewhere,[4] that where a contract is discharged for repudiation, the contract is unwound, *ab inititio*, or treated as if it the obligations which it contains no longer exist.
6. In such a scenario, a plaintiff could sue in restitution, for unjust enrichment. Such a claim is usually framed as a *quantum meruit*, an action seeking reasonable remuneration for services performed.
7. In this situation, restitutionary damages were calculated with reference to "reasonable" amounts, characteristically with reference to market rates. In practice, market competition and the power of principals has frequently meant that contractual rates are lower than what might be otherwise charged by contractors, and a contractor plaintiff would frequently enjoy a windfall if able to successfully sue in restitution.
8. This has caused disadvantage to some defendants, whose contractual bargain has been disturbed in this way. Principals could be required to pay much more for work done on a project than was ever envisaged at the time the contract was drafted; a contract which was intended by the parties to fully, if not always fairly, allocate risk between them.
9. In *Mann v Paterson*, Kiefel, Bell and Keane JJ noted the "serious mischief" which this could cause:[5]

> *... It may be that some builders actually set the prices at which they bid for work on the expectation that they will be astute to take advantage of an opportunity to elect for a more generous level of remuneration in due course. If that is the case, any such expectation is distinctly not to be encouraged. Honesty and efficiency in trade*

[2] *Mann v Paterson Constructions Pty Ltd* (2019) 373 ALR 1; [2019] HCA 32.
[3] *Lodder v Slowey* [1904] AC 442.
[4] see *Renard Constructions v Minister for Public Works* (1992) 26 NSWLR 234; 9 BCL 40, and *Sopov v Kane Constructions Pty Ltd [No 2]* (2009) 24 VR 510.
[5] *Mann v Paterson,* at [52].

> *and commerce are not promoted by a rule that allows the recovery of a windfall by a party who has extracted itself from a losing contract, from which, acting rationally, it would pay to be released…*

10. In his separate judgment, Gageler J said the following about the problem:[6]

> *…If the value of the services rendered is to be determined independently of the contract, as the common law of Australia as declared by intermediate courts of appeal currently stands, recovery in excess of the contract price has the real potential to occur in two main scenarios. One is where the contract has turned out to be under-priced, with the result that the party faces the prospect of making a loss by going on to complete performance. The other is where the contract has been structured to allocate a higher proportion of the overall contract price to work performed at earlier stages for which the party has already accrued a contractual right to payment.*

11. In an attempt to mitigate this uncertainty, it has been common practice for principals to include clauses seeking to prevent claims in restitution, for example, along the following lines (noting that such clauses are not necessarily conclusive in favour of a principal, and other provisions might also be included in the contract which seek to clarify what compensation the contractor is to receive in situations of breach by the principal):

> *If the Principal repudiates the Subcontract, and the Subcontractor terminates, the Subcontractor may i) claim damages, and ii) may not Claim in restitution or quantum meruit. This clause survives the termination of the contract.*

12. Now, through the decision in *Mann v Paterson,* the High Court has limited this uncertainty. Justices Kiefel, Bell and Keane JJ, in their judgment, provide a debunking of the rescission fallacy. Their Honours, in the minority, thought damages should have been awarded with reference to agreed contractual rates, making restitution unnecessary.

[6] *Mann v Paterson,* at [88].

13. The majority, Nettle, Gordon and Edelman JJ, with whom Gageler J agreed and provided separate reasons (all agreeing with the minority in rejecting the rescission fallacy) adopted an "intermediate path," leaving the door open for a *quantum meruit* claim for work which a plaintiff has performed but which does not qualify the plaintiff for a payment under a contract.
14. While the effect of the judgment of the majority is that a *quantum meruit* is still available on a more limited basis, the majority also found that the contract price should generally act as a ceiling on recovery, with Nettle, Gordon and Edelman JJ stating that ceiling might be breached in exceptional circumstances, without stating exhaustively what those circumstances might be.
15. Their Honours noted that in Australia, restitution is an area of the common law which is moulded incrementally, and determining claims in restitution should not be seen as a process of "idiosyncratic discretion."[7]

THE FACTS, PROCEDURAL HISTORY, AND THE STATUTORY CONSTRUCTION ISSUE

16. The Respondent, Paterson Constructions Pty Ltd, contracted with the Manns to construct two townhouses. During construction, relations between owner and builder broke down, and both parties alleged repudiatory behaviour by the other. The owner who was found to have repudiated the contract, by orally requesting variations. Numerous requests for variations were made.
17. At first instance, VCAT determined that the builder was able to recover a *quantum meruit,* with the damages significantly exceeding the contract price. The matter was appealed to Victorian Supreme Court and the Court of Appeal, which upheld the decision of the Tribunal. The High Court, having determined the central point in dispute, ultimately remitted the matter to VCAT for final determination on a number of issues.
18. The case involved statutory interpretation. The *Domestic Building Contracts Act* (Vic) 1995 (the "Act") provided that variations to the contract were to be in writing, and variations had only been requested orally.
19. It was determined that the Tribunal erred in finding that an entitlement to a *quantum meruit* avoided the need to consider the application of the Act. The Court of

[7] *Mann v Paterson*, per Nettle, Gordon and Edelman JJ at [213].

Appeal erred in reaching the conclusion that the Act did not indicate an express intention to cover the field in respect of payments available for variations.[8]

20. The question of variations was remitted to the Tribunal for reconsideration. Section 38(6)(b) of the Act provides some discretion for the Tribunal to allow payments for variations in exceptional cases of hardship or unfairness. Per Nettle, Gordon and Edelman JJ[9] (with Gageler J agreeing):

> *...VCAT did not undertake the exercise required by s 38(6)(b). It proceeded on the erroneous basis that the respondent was entitled to restitution for the variations despite the respondent's failure to comply with s 38. It follows that ... the matter should be remitted to VCAT for further determination of the amounts, if any, payable in respect of variations.*

A BRIEF HISTORY OF THE LAW OF RESTITUTION

21. Restitution is an area of the common law in which ancient debates remain alive and controversial, partly because there has long been difficulty in ascertaining exactly what restitution is, and how it should be developed and applied. It is a concept with a long history, and its principles are common throughout European law, having been received from Roman law. The *Institutes of Justinian* provided for recovery in respect to obligations which arose not in contract, but as though from contract, through the action of *Condictio*, or unjust enrichment.[10]

22. A famous, though for some time controversial, influence on the modern law was the formulation of the Scottish Lord Mansfield in the 1760 case of *Moses and McFarlin:*[11] "In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity." Yet until only fairly recently, much of restitution was governed by a legal fiction that a party might recover through an implied promise, or "quasi-contract."

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[8] *Mann v Paterson,* per Nettle, Gordon and Edelman JJ at [148]; and [160]: "Upon the proper construction of these provisions, they exclude the availability of restitutionary relief for variations implemented otherwise than in accordance with s38."
[9] *Mann v Paterson,* at [161].
[10] *Institutes of Justinian*, at 3.27.
[11] *Moses v Macferlan* (1760) 97 ER 676, at 681.

23. In *Mann v Paterson*, Gageler J traces this development:

> *From the late sixteenth century, implied contractual obligations to pay reasonable remuneration for goods (quantum valebat) or for services (quantum meruit) were enforceable under the general form of action for breach of a simple contract (assumpsit). But, apparently upon the fiction that such remuneration was "a sum certain, quantified by reason or desert", such obligations came to be enforced by the writ of debt and, accordingly, by the more convenient form of action for recovery of a debt: the action for breach of a fictional promise to pay it (indebitatus assumpsit). So convenient was this new form of recovery that the common counts of indebitatus assumpsit for goods sold and delivered and for work and labour done supplanted, and absorbed the terminology of, the earlier contractual remedy upon a quantum valebat and quantum meruit.*
>
> *Over time, these counts, like other indebitatus assumpsit counts, began to be deployed where an obligation arose from the equity of the case, as if upon a genuinely implied contract (quasi ex contractu)...* [12]

24. The fiction of quasi-contract was finally rejected in the 1987 High Court decision of *Pavey & Matthews.*[13] In that case, the parties had contracted orally, yet the applicable statute required the contract to be in writing.[14] Deane J determined that an obligation to make restitution does not arise simply from an implied term of a contract, or from the consensual nature of the parties' transaction, but can also be an obligation imposed by the law, where there is no genuine agreement between the parties.[15]

[12] *Mann v Paterson,* at [182]-[183] (references omitted).
[13] *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 22.
[14] Section 45 of the *Builders Licensing Act* (New South Wales) 1971.
[15] *Pavey and Matthews*, Deane J at 256.

SOME BASIC PRINCIPLES

25. *Mason and Carter's Restitution Law in Australia* provides the following overview:[16]

> *…The underlying principle is the prevention or stripping of gains made by the defendant at the plaintiff's expense, in circumstances recognised by the law as unjust or in consequence of an established wrong. There is however, a handful of exceptional claims that vindicate property rights, whose historical or analogical links justify inclusion.*
>
> *Restitution is part of the civil (i.e. noncriminal) law of obligations. The remedies it provides are both personal and proprietary. Some derive from common law, some from equity; others embody a happy fusion of ideas blended from each historical root…*[17]

26. In the majority of cases, an order for restitution is made on the basis of unjust enrichment. Broadly speaking, there are three elements of unjust enrichment:

    i. *The defendant has received a benefit or enrichment;*
    ii. *The benefit or enrichment was obtained at the expense of the plaintiff; and*
    iii. *Injustice.*

27. The nature and value of a benefit received by a defendant is more difficult to ascertain where it comes in the form of services or goods, as opposed to a liquidated sum, for which a plaintiff might bring an action of *monies had and received*. Where the benefit provided to a defendant differs from what was requested, it is harder for a plaintiff to recover. If a contract does not give a plaintiff discretion to vary the nature of what is provided, then restitution is unlikely to introduce such discretion. However, all the circumstances considered, and it is possible that a lesser benefit has been transferred.

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[16] *Mason and Carter's Restitution Law in Australia,* K. Mason, J.W. Carter, G. Tolhurst, (Second Edition) 2008, Lexis-Nexis Butterworths (an updated third edition is available).
[17] *Mason and Carter's Restitution Law in Australia,* at [102].

28. Reliance by the plaintiff can be an important factor, though a distinction should be drawn between the principles of restitution and promissory estoppel. Often, where a claim for restitution is made out, there may be some degree of unconscionability on the part of the defendant, but ordinarily, it is not necessary to establish unconscionability to establish the necessary injustice. According to *Mason and Carter's Restitution Law in Australia*:

> *...Recovery in restitution is not tied to specific (or general) categories of wrongdoing. In most situations, restitution is merely an order that the defendant restore to the plaintiff a benefit received from the plaintiff, with interest. There is, therefore, usually no need to determine whether any tort, breach of contract or other wrong has been committed. Indeed, in the majority of cases where the primary sense of restitution is relied upon, the defendant will not in fact have committed any breach of duty or other actionable wrong...*[18]

29. Frequently, the critical factor is whether a defendant freely accepted a benefit, which involves consideration of whether the defendant had an opportunity to reject the benefit, having sufficient knowledge of the relevant circumstances which gave them the ability to do so.[19]
30. Two frequently considered older cases illustrate some of the principles involved. In the 1898 case of *Sumpter and Hedges,*[20] the plaintiff abandoned a building contract after doing work on the defendant's land. It was held that the defendant had no choice but to accept the work performed on its land. The contract was entire, and the plaintiff could not recover in contract. However the defendant later used building materials left behind by the plaintiff, which was arguably a benefit which had been freely been accepted.
31. In 1946, a different result was reached in the 1946 case of *Steele v Tardiani*.[21] Timber, which had not been cut to the requested lengths, was left by the plaintiff on the defendant's land, which the defendant then sold. The defendant was found to have obtained a benefit, which it would be unjust to retain, without payment being made to the plaintiff.

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[18] *Mason and Carter's Restitution Law in Australia*, at [160].
[19] A defendant who did not request the services but accepts them in a situation where they were able to be rejected, might be held to have freely accepted: see for example *Angelopoulos v Sabatino* (1995) 65 SASR 1.
[20] *Sumpter and Hedges* [1898] 1 QB 673.
[21] *Steele v Tardiani* (1946) 72 CLR 386.

32. Where the plaintiff is in breach of contract, it is often harder to demonstrate that services were actually of benefit to the defendant. Also, where a contract provides an express clause that a party is to forfeit a sum in a certain situation, restitution will ordinarily not intervene, though there may be the possibility of a claim for relief against forfeiture.
33. Restitution can assist where there has been a total failure of consideration.[22] This is the case where the contract is entire, and actual or substantial performance cannot be demonstrated. Additionally, contracts frequently contain severable components. *Roxborough v Rothmans Pall Mall Australia Ltd*[23] provides an example. In that case, Rothmans had charged retailers of its tobacco products an amount for tobacco licences. When the legislation establishing the licences was held to be invalid, the licence fee was found to be a severable component of the contract price, for which there had been a total failure of consideration, no valid licence having been passed to the retailers.
34. It is important to remember that, in the usual course of events, it is only when a contract is discharged for breach or repudiation that an opportunity arises to seek restitution. *Mann v Paterson* confirms that it is the ineffectiveness of a contact to provide remuneration which is the precondition to the claim in restitution. Some of the most interesting and useful passages from the judgment are extracted below.

THE MINORITY AND THE RESCISSION FALLACY

35. In *Mann v Paterson,* Kiefel, Bell and Keane JJ trace the history of the rescission fallacy, noting that the concept was rejected by the High Court in the 1933 case of *McDonald v Dennys Lascelles Ltd.*[24] Their Honours noted with approval the following passage from the judgment of Dixon J:

> *When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or*

[22] see *Mason and Carter's Restitution Law in Australia,* at [170].
[23] *Roxborough v Rothmans Pall Mall Australia Ltd* (2001) 185 ALR 335.
[24] *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457.

discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach.[25]

36. Kiefel, Bell and Keane JJ expanded on the unsatisfactory consequences of the fallacy (references omitted):

> *...Allowing recovery of remuneration for services rendered in the amount ordered by the courts below in this case would be to allow a windfall to the respondent that is distinctly inconsistent with the respect due to the contract made by the parties as the charter whereby their commercial risks were allocated between them and their liabilities limited. To allow a restitutionary claim would be to "subvert the default remedial regime of contract law, to which the parties, by contracting, have submitted", and accordingly to subvert the contractual allocation of risk.*
>
> *To allow a restitutionary claim for quantum meruit to displace the operation of the compensatory principle where the measure of compensation reflects contractual expectations would be inconsistent with what Gummow J described as the "gap-filling and auxiliary role of restitutionary remedies"...*
>
> *...Further, the restitutionary claim for quantum meruit cannot be supported on the basis that it is needed to prevent the defaulting party from being unjustly enriched because "a party who is liable in*

[25] *Mann v Paterson*, at [8-9]. Mason CJ's remarks on the subject in *Baltic Shipping Co v Dillon* are similarly referred to with approval.

damages is not unjustly enriched by a breach of contract and indeed is not enriched at all.[26]"

37. Nettle, Gordon and Edelman JJ agreed with the above analysis where contractual remedies are available, and found support for this approach in the meaning of the term *quantum meruit*:

> *…The Latin may mislead. It means only "as much as he deserved", and as such refers to a sum certain which represents the benefit of services. As is explained in what follows, it was a label given to a form of action which fell into desuetude, superseded by counts in indebitatus assumpsit, even before the abolition of the forms of action. In its historical use, the form of action was truly contractual, describing an implied price of a reasonable sum for work done…*[27]

38. In contrast to the majority, Kiefel, Bell and Keane JJ were of the view that there was no need to resort to restitution. Their Honours did not approve of the idea that restitution might be available for components of the work for which there had been a total failure of consideration, and noted the potential practical difficulties of such an approach:

> *To allow a restitutionary claim for quantum meruit in respect of work done before termination, but in respect of which a right to payment has not yet accrued, on the basis of a total failure of consideration* ***is to apply the rescission fallacy under another guise*** [emphasis added] *because it treats the contract as if it were unenforceable as having been avoided ab initio. If it be accepted that the better course is now to acknowledge that to allow an unconditional entitlement to payments for stages of work completed by a builder to be divested at its election in order to clear the way for the recovery of a reasonable sum for that work is so clearly inconsistent with the principle stated in McDonald that it should no longer be maintained, then the law should not allow a right of election on the part of the builder to claim a reasonable payment for*

[26] *Mann v Paterson*, at [21-22].
[27] *Mann v Paterson*, at [150].

> *work done under the contract in respect of which an unconditional entitlement to payment has not yet accrued. To recognise such rights would necessarily introduce a degree of novelty for no reason other than to preserve the vestigial operation of what is, ex hypothesi, now recognised as a fallacy. In addition, to recognise such rights would give rise to complex questions of proof and evaluation necessitated by the multi-partite analysis required as a result. It is no part of the duty of the courts to complicate litigation in this way for the parties.*[28]

39. Nonetheless, Kiefel, Bell and Keane JJ noted there may be some circumstances where they would have found restitution might still intervene (references omitted):

> *It may be that in some cases justice will not be done without a restitutionary claim. Different considerations may apply in cases where advance payments are sought to be recovered by restitutionary claims for money paid, although it may be that the law of contract adequately provides for such cases. "There will generally be no need to have recourse to a remedy in restitution" where a claim in contract is available...*[29]

THE MAJORITY: AN INTERMEDIATE PATH

40. The joint judgment of the majority, Nettle, Gordon and Edelman JJ, with which Gageler J agreed, provided the following extended and useful analysis (references omitted):

> *...Where, under a contract for work and labour, a party is entitled to payment upon completion of any part of the work (which is to say that the obligation to complete that work is "infinitely divisible"), where the contract expressly fixes a price for services, and where the contract is terminated by that party's acceptance of the other party's*

[28] *Mann v Paterson*, at [30].
[29] *Mann v Paterson*, at [53].

repudiation of it, the party so terminating the contract will have an accrued right to payment under the contract for that part of the work that has been done. There will have been no failure of consideration. Accordingly, that party's remedy in respect of that part of the work that has been done will generally be restricted to a claim for what has accrued due or damages for breach of contract assessed by reference to the contract price less the cost of completing the work.

By contrast, if the obligation to perform work and labour is "entire", so that nothing is due until all of the work has been completed by the contractor, then, upon termination of the contract by the contractor's acceptance of the other party's repudiation of it, there will be a total failure of consideration. Upon acceptance that the contract is repudiated, either by a renunciation or a manifested unwillingness or inability to perform the contract substantially according to the contract terms, the contractor's right to complete the performance and earn the price will have failed, and thus nothing will be due under the contract for such part of the work as has been completed. In that event, the "consideration" – in the sense of the condition or the "basis" for the performance by the contractor – will have failed, and restitution will lie as upon a quantum meruit in respect of work and labour done up to the point of termination. In those circumstances, there is a "qualifying or vitiating" factor, namely, a total failure of consideration, giving rise to a restitutionary remedy in the alternative.

By further contrast, if the obligation to perform work is divisible into several entire stages, then, upon termination of the contract for repudiation: (i) the contractor so terminating the contract will have accrued rights under the contract for those stages that have been completed; (ii) there will be a total failure of consideration in respect of the stages that have not been completed, because the contractor's right to complete the performance and earn the price will have failed and nothing will be due under the contract in respect of those uncompleted stages; and (iii) restitution will lie as upon a quantum meruit in respect of the work and labour done towards completion of

the uncompleted stages as an alternative to damages for breach of contract.

The underlying principle concerning restitution of the value of work and labour where the basis for performance has failed is the same as that concerning restitution of money paid where the basis for the payment has failed. Hence, where a contract for the sale and delivery of a dozen bags of cement provides for the price in full to be paid in advance, and, at the point of termination of the contract by the purchaser's acceptance of the supplier's repudiation of it, only four bags have been delivered, the contract may be treated as severable as to the remaining eight bags and eight-twelfths of the price paid in advance recovered by way of restitution as money had and received as upon a total failure of consideration in relation to those eight bags.

Generally speaking, a construction contract which is divided into stages, and under which the total contract price is apportioned between the stages by means of specified progress payments payable at the completion of each stage, is viewed as containing divisible obligations of performance. In that event, where at the point of termination of the contract by the builder's acceptance of the principal's repudiation some stages of the contract have been completed, such that progress payments have accrued due in respect of those stages, there will be no total failure of consideration in respect of those stages. The builder will have no right of recovery in restitution in respect of those stages, and the builder's rights in respect of those completed stages will generally be limited to debt for recovery of the amounts accrued due or damages for breach of contract. But if there are any uncompleted stages, there will be a total failure of consideration in respect of those stages due to the failure of the builder's right to complete the performance and earn the price. In that event, there will be nothing due under the contract in relation to those stages, and restitution as upon a quantum meruit will lie in respect of work and labour done towards completion of those uncompleted stages.[30]

[30] *Mann v Paterson*, at [172-176].

41. Nettle, Gordon and Edelman JJ determined that the contract price should ordinarily provide a ceiling on recovery (references omitted):

> *...Where a contract is enforceable, but terminated for repudiation, there are no reasons of practicality and few in principle to eschew the contract price...The contract price reflects the parties' agreed allocation of risk. Termination of the contract provides no reason to disrespect that allocation. Granted, there may be difficult questions of apportionment of the contract price, such as where performance of a small part of the entire obligation is the most valuable part of the contractor's work. There may also be difficult questions in identifying the contract price, such as where the expected benefits to the contractor include not only payments of money but also the value of promises or releases. But such difficulties of valuation and apportionment have long been encountered in other areas.*[31]

42. Gageler J, in agreement, added the following (references omitted):

> *Upon a quantum meruit, usually the value of services is assessed by reference to charges commonly made by others for like services". That is to say, the amount recovered is usually measured at the market value of the services rendered. Inherent in the nature of the obligation enforced on a quantum meruit being to pay only "reasonable remuneration", however, is that the usual basis of assessment may not yield the appropriate measure of restitution in every case.*[32]

And:

> *The common law rule should accordingly be that the amount recoverable on a non-contractual quantum meruit as remuneration for services rendered in performance of a contract prior to its termination by acceptance of a repudiation cannot exceed that portion of the contract price as is attributable to those services. Issues concerning the identification and appropriate method of*

[31] *Mann v Paterson*, at [205].
[32] *Mann v Paterson*, at [92].

apportionment of the contract price are best left to be addressed on a case by case basis if and when they arise.[33]

43. While the contract price was found to impose a ceiling in this case, Nettle, Gordon and Edelman JJ noted that there could be exceptional circumstances in which a plaintiff could recover more than the contract price (references omitted):

> *... Where an entire obligation (or entire divisible stage of a contract) for work and labour (such as, for example, an entire obligation under or an obligation under a divisible stage of a domestic building contract) is terminated by the plaintiff upon the plaintiff's acceptance of the defendant's repudiation of the contract, the amount of restitution recoverable as upon a quantum meruit by the plaintiff for work performed as part of the entire obligation (or as part of the entire divisible stage of the contract) should prima facie not exceed a fair value calculated in accordance with the contract price or appropriate part of the contract price.*
>
> *So to recognise does not exclude the possibility of cases where, in accordance with principle, the circumstances will dictate that it would be unconscionable to confine the plaintiff to the contractual measure. One such possibility is arguably afforded by the infamous case of Boomer v Muir, which has been explained on the basis of the defendant's continuing breaches being responsible for a cost overrun that rendered the contract unprofitable. As Dooling J observed in that case, the question whether the plaintiff could recover in excess of the contract price "depends upon whether it is equitable to permit" the plaintiff to depart from the pricing structure agreed with the defendant. Nonetheless, as Lord Neuberger of Abbotsbury PSC observed in Benedetti, in many such cases it would appear wrong that a claimant should be entitled to a better result in restitution than would have been available to him or her under contract.*[34]

[33] *Mann v Paterson*, at [102].
[34] *Mann v Paterson,* at [215- 217].

CONCLUDING REMARKS

44. For the parties in *Mann v Paterson*, this was a nightmare litigation scenario. For everyone else it serves as a cautionary tale. First and foremost, the case serves as a warning that contractual documentation needs to be well-considered and clear, even on small projects, and there should ongoing compliance with local statute (such as the *Home Building Act* (NSW) 1989).
45. Principals (and head contractors, when dealing with sub-contractors) will now have greater certainty that any compensation payable by them will be calculated in accordance with the terms of a contract. Contractors will have less opportunity to escape a bad bargain, and need to ensure that proposed rates are realistic. Terminating for repudiation will become less attractive in some circumstances.
46. Contract pricing structures could take on even greater significance, bearing in mind that where the contract does not provide an effective way of compensating a contractor for services rendered, restitution might fill the gap, though the damages payable are unlikely to depart what was envisaged in the contract, or a similar apportionment thereof. In NSW, the operation of the *Security of Payment Act* (NSW) 1999 will need to be considered.
47. Future decisions should clarify what exceptional situations might warrant departure from the general rule that the sum recovered should not exceed the contract price.