High Court of Australia

Mann v Paterson Constructions Pty Ltd [2019] HCA 32 (9 October 2019)

Last Updated: 9 October 2019

HIGH COURT OF AUSTRALIA

KIEFEL CJ,

BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

PETER MANN & ANOR APPELLANTS

AND

PATERSON CONSTRUCTIONS PTY LTD RESPONDENT

Mann v Paterson Constructions Pty Ltd

[2019] HCA 32

9 October 2019

M197/2018

ORDER

1. *Appeal allowed with costs.*

2. *Set aside orders 1 to 3 of the Court of Appeal of the Supreme Court of Victoria made on 12 September 2018 and, in their place, order that:*

(a) the application for leave to appeal be granted;

(b) the appeal to the Court of Appeal of the Supreme Court of Victoria be allowed with costs; and

(c) orders 2 to 5 of the order made by Justice Cavanough of the Supreme Court of Victoria on 21 March 2018 be set aside and, in their place, it be ordered that:

(i) the appeal to the Supreme Court of Victoria be allowed with costs;

(ii) the orders of the Victorian Civil and Administrative Tribunal made on 12 December 2016 be set aside; and

(iii) the matter be remitted to the Victorian Civil and Administrative Tribunal for further determination according to law.

On appeal from the Supreme Court of Victoria

Representation

T J Margetts QC with G F Hellyer and A C Roe for the appellants (instructed by Telford Story & Associates)

J P Moore QC with A J Laird and J A G McComish for the respondent (instructed by Kalus Kenny Intelex)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Mann v Paterson Constructions Pty Ltd

Restitution – Unjust enrichment – Work and labour done – Where land owners and builder entered into contract to which *Domestic Building Contracts Act 1995* (Vic) applied – Where contract provided for progress payments at completion of stages – Where owners requested, and builder carried out, variations to plans and specifications in contract without giving written notice as required by s 38 of Act – Where owners repudiated contract after builder raised invoice claiming for variations – Where contract terminated by builder's acceptance of owners' repudiation – Whether s 38 of Act applied to limit amount recoverable by builder for variations – Whether builder entitled to recover in restitution as alternative to claim in damages for breach of contract – Whether contract price operated as ceiling on amount recoverable by way of restitution.

Words and phrases – "accrued rights", "alternative restitutionary remedy", "common counts", "completed stage", "contract price ceiling", "contractual incentives", "domestic building contract", "failure of basis", "failure of consideration", "limit on recovery", "measure of restitution", "notice", "primary and secondary obligations", "principle of legality", "protective provisions", "qualifying or vitiating factor", "quantum meruit", "quasi-contractual obligation", "repudiation", "restitution", "subjective devaluation", "unjust enrichment", "variations", "work and labour done".

Domestic Building Contracts Act 1995 (Vic), ss 1, 3, 4, 16, 27, 38, 39, 53, 132.

1. KIEFEL CJ, BELL AND KEANE JJ. The appellants entered into a contract with the respondent for the construction by the respondent of two townhouses on land owned by the appellants. The parties fell into dispute in relation to the works. The respondent claimed that the appellants had repudiated the contract, and purported to terminate the contract by accepting that repudiation. The respondent then claimed that it was entitled to recover payment for its work, including variations, upon a quantum meruit. The respondent's claim was upheld by the Court of Appeal of the Supreme Court of Victoria**[1]**.

2. Pursuant to a grant of special leave to appeal, the appellants now challenge the decision of the Court of Appeal on the following grounds:

"[1] The Court of Appeal erred in holding that the respondent builder, having terminated a major domestic building contract upon the repudiation of the contract by the [appellants], was entitled to sue on a quantum meruit for the works carried out by it.

> [2] Alternatively, if the respondent was entitled to sue on a quantum meruit, the Court of Appeal erred in finding that the price of the contract did not operate as a ceiling on the amount claimable under such a quantum meruit claim.
>
> [3] The Court of Appeal erred in allowing the respondent to recover on a quantum meruit basis for variations to the works carried out by the respondent, because it incorrectly found that s 38 of the *Domestic Building Contracts Act 1995* (Vic) did not apply to a quantum meruit claim for variations to works under a domestic building contract."

3. The relevant terms of the contract between the parties, the relevant legislative provisions bearing upon the third ground of appeal, the course of proceedings in the courts below, and the circumstances giving rise to the appeal to this Court, are comprehensively summarised in the reasons of Nettle, Gordon and Edelman JJ. We gratefully adopt their Honours' summary.

4. In our respectful opinion, the issue posed by the first ground of appeal should be resolved in the affirmative, in favour of the appellants. As a result, it is unnecessary to address the second ground of appeal. In relation to the issue raised by the third ground of appeal, we agree with the conclusion and reasons of Nettle, Gordon and Edelman JJ and have nothing useful to add.

The rescission fallacy

5. The appellants' first ground of appeal raises for consideration the correctness of the proposition that a claim for quantum meruit – that is, for the reasonable value of work performed – may be made at the election of the innocent party to a contract as an alternative to a claim for damages in the wake of the termination of the contract for repudiation or breach. That proposition was accepted by the Judicial Committee of the Privy Council in *Lodder v Slowey***[2]**. It has since been applied by the intermediate appellate courts of Victoria**[3]**, New South Wales**[4]**, Queensland**[5]**, and South Australia**[6]**.

6. In *Lodder v Slowey*, the Board upheld the decision of the Court of Appeal of New Zealand in *Slowey v Lodder***[7]**. On the basis of the theory that the relevant contract had been rescinded ab initio, the plaintiff was held entitled to recover a sum assessed as the reasonable value of the services

rendered, even though the amount so assessed might substantially exceed the agreed price. In the Court of Appeal, Williams J said[8]:

"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. As by the consent of both parties the special contract has been set aside, neither can the plaintiff claim for any profit he might have made under it nor can the defendant set up that if the plaintiff had been allowed to complete his performance of the contract he would have made no profit or would have suffered a loss."

7. In the present case, the Court of Appeal followed[9] its previous decision in *Sopov v Kane Constructions Pty Ltd [No 2]*[10]. In *Sopov*, Maxwell P, Kellam JA and Whelan A-JA held that a builder was entitled to advance a claim for quantum meruit in lieu of a claim for damages following its acceptance of the owner's repudiation and the consequent termination of the contract[11]. Their Honours reached that conclusion in deference to the course of judicial authority beginning with *Lodder v Slowey* despite weighty academic criticism[12] and even though their Honours considered that *Lodder v Slowey* and the decisions that followed it "can be seen to have been founded" on what their Honours termed the "rescission fallacy"[13].

8. The reference in *Sopov* to the "rescission fallacy" was apposite. The theory that the contract between the parties becomes "entirely irrelevant"[14] upon discharge for repudiation or breach is indeed fallacious. As Mason CJ said in *Baltic Shipping Co v Dillon*[15]: "It is now clear that ... the discharge operates only prospectively, that is, it is not equivalent to rescission ab initio."

9. The notion that the termination of a contract for repudiation or breach has the effect of rescinding the contract ab initio was unequivocally rejected by this Court in *McDonald v Dennys Lascelles Ltd*[16]. In that case, Dixon J, with whom Rich and McTiernan JJ agreed, said[17]:

"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 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."

10. In this classic statement of principle, Dixon J made two points. The first was that upon the innocent party electing to treat the contract as no longer binding upon it, both parties are discharged from the further performance of the contract, while those rights that have accrued in accordance with the terms of the contract remain enforceable. To say that the contract has come to an end "may in individual cases convey the truth with sufficient accuracy", but "the fuller expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position"[18]. Accordingly, in the case of a building contract, an innocent builder is entitled to recover as a debt any amount that has become due under the terms of the

contract, unless the contract provides to the contrary. The contract in the present case did not provide to the contrary.

11. The second point made by Dixon J was that when the contract is discharged at the election of the innocent party, the contract is "determined so far as it is executory only and the party in default is liable for damages for its breach". His Honour's reference to "damages for its breach" was a reference to what are commonly referred to as "damages for loss of bargain"**[19]**. Such damages, which are to be distinguished from damages for prior breaches of contract**[20]**, are a "substitute for performance" **[21]** of the executory obligations under the contract that the defaulting party is no longer required to perform in specie. "[T]he liability in damages is substituted for the executory obligations to which acceptance of repudiation puts an end."**[22]**

12. The right to damages for loss of bargain that arises in such a case is, in this respect, no less a creature of the contract than the right to recover sums that become due before its termination. In *Lep Air Services Ltd v Rolloswin Investments Ltd***[23]**, in a passage subsequently approved by Brennan J in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd***[24]**, Lord Diplock said:

"Generally speaking, the rescission of the contract puts an end to the primary obligations of the party not in default to perform any of his contractual promises which he has not already performed by the time of rescission ... The primary obligations of the party in default to perform any of the promises made by him and remaining unperformed likewise come to an end as does his right to continue to perform them. But for his primary obligations there is substituted by operation of law a secondary obligation to pay to the other party a sum of money to compensate him for the loss he has sustained as a result of the failure to perform the primary obligations. This secondary obligation is just as much an obligation arising from the contract as are the primary obligations that it replaces".

13. Lord Diplock's analysis serves to focus attention upon the point that the terms of the contract govern the amount of compensation payable by way of damages for loss of bargain**[25]**. Even though the innocent party is no longer entitled to performance of the executory terms of the contract, the terms of the terminated contract inform the quantum of damages recoverable**[26]**: "The damages are assessed by reference to the old obligations but the old obligations no longer exist as obligations." **[27]** As will become clear, in such a case a restitutionary claim unconstrained by the bargain made by the parties would impermissibly cut across the parties' contract.

Contract and the subsidiarity of restitutionary claims

14. Restitutionary claims must respect contractual regimes and the allocations of risk made under those regimes**[28]**. In *Pavey & Matthews Pty Ltd v Paul***[29]**, in a passage cited with approval by French CJ, Crennan and Kiefel JJ in *Equuscorp Pty Ltd v Haxton***[30]**, Deane J said:

"The quasi-contractual obligation to pay fair and just compensation for a benefit which has been accepted 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."

15. In *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* ("*The Trident Beauty*")**[31]**, Lord Goff of Chieveley spoke to similar effect:

"[A]s a general rule, the law of restitution has no part to play in the matter; the existence of the agreed regime renders the imposition by the law of a remedy in restitution both unnecessary and inappropriate."

16. In *Lumbers v W Cook Builders Pty Ltd (In liq)*[32], Gleeson CJ noted that the contractual arrangements in that case "effected a certain allocation of risk" and that there was "no occasion to disturb or interfere with that allocation" and "every reason to respect it"[33]. Gummow, Hayne, Crennan and Kiefel JJ spoke of taking "proper account" of the contractual rights and obligations that existed[34], and said[35]:

"[A]s is well apparent from this Court's decision in *Steele v Tardiani*[36], an essential step in considering a claim in quantum meruit (or money paid) is to ask whether and how that claim fits with any particular contract the parties have made."

17. Their Honours noted that it is essential to consider how the claim fits with contracts the parties have made because, as Lord Goff "rightly warned" in *The Trident Beauty*[37], "serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract"[38].

18. In *MacDonald Dickens & Macklin (a firm) v Costello*[39] in the Court of Appeal of England and Wales, Etherton LJ, with whom Pill and Patten LJJ agreed, in rejecting a restitutionary claim, said:

"The general rule should be to uphold contractual arrangements by which parties have defined and allocated and, to that extent, restricted their mutual obligations, and, in so doing, have similarly allocated and circumscribed the consequences of non-performance. That general rule reflects a sound legal policy which acknowledges the parties' autonomy to configure the legal relations between them and provides certainty, and so limits disputes and litigation."

Accrued contractual rights

19. In circumstances where the respondent has enforceable contractual rights to money that has become due under the contract, there is no room for a right in the respondent to elect to claim a reasonable remuneration unconstrained by the contract between the parties. As Deane J explained in *Pavey & Matthews*, in such a case there is a "valid and enforceable agreement governing the [respondent's] right to compensation", and there is therefore "neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration"[40]. To allow a restitutionary claim in these circumstances would be to subvert the contractual allocation of risk. As Beatson has said[41]:

"[W]here P confers a benefit on D pursuant to a contract, the valuation of that work is a matter of contract, which ... respects the parties' valuation. Valuation is in a sense part of risk allocation: P is taking the risk of market rises and D of falls in the market. To allow P to recover anything other than the contract value – such as the objective value, the market value, or a reasonable value – would be to reallocate that risk."

Damages for loss of bargain

20. The same may be said where, as in the present case, the innocent party has an enforceable contractual right to damages for loss of bargain. The extent of the obligation to pay damages for loss of bargain, governed as it is by the terms of the terminated contract, reflects the parties' allocation of

risk and rights as between each other under the contract. To allow a restitutionary remedy by way of a claim for the reasonable value of work performed unconstrained by the terms of the applicable contract would undermine the parties' bargain as to the allocation of risks and quantification of liabilities, and so undermine the abiding values of individual autonomy and freedom of contract. As Jaffey has said**[42]**:

"The remedial contractual regime is continuous with the contract, giving effect to the contractual allocation of risk, but the unjust enrichment regime creates a striking discontinuity. It gives effect to a different allocation of risk altogether ... It seems that the contract, which was drafted to allocate risk, fails to do so. On this analysis, the availability of the restitutionary remedies undermines the freedom of the parties to determine the terms of their exchange".

21. To put it another way, where "[a] contract is not performed as agreed, this allocation of risk is enforced only if the remedial regime properly reflects the primary relation"**[43]**. 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**[44]**. To allow a restitutionary claim would be to "subvert the default remedial regime of contract law, to which the parties, by contracting, have submitted"**[45]**, and accordingly to subvert the contractual allocation of risk.

22. 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"**[46]**. Similarly, from an American perspective, it has been said that "the noncontractual remedy was originally allowed as a way to fill important gaps in contract remedies, providing compensation in damages that contract law now affords directly"**[47]**. 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 damages is not unjustly enriched by a breach of contract and indeed is not enriched at all"**[48]**.

Roxborough

23. Cases like the present one, concerned with the enforcement of a claim for remuneration for work performed under a contract upon the termination of the contract for repudiation or breach, stand in marked contrast with cases of restitution such as *Roxborough v Rothmans of Pall Mall Australia Ltd***[49]**. In that case, payments of money were held to be recoverable because of the failure of the basis on which the payments had been made by the payers. *Roxborough* was not concerned with a claim for remuneration under a contract for work and labour. More importantly, it was not a case of breach of contract on the part of the defendant where the compensatory principle of the law of contract was engaged. The restitutionary claim did not cut across the contractual charter of the parties' rights and obligations.

24. In *Roxborough*, consistently with the view later taken in *Lumbers*, Gummow J explained that restitutionary claims, such as an action to recover moneys paid on the basis of a failure of consideration, "do not let matters lie where they would fall if the carriage of risk between the parties were left entirely within the limits of their contract"**[50]**. His Honour was at pains to explain that where a plaintiff already has "a remedy in damages ... governed by principles of compensation under which

the plaintiff may recover no more than the loss sustained", allowing the plaintiff to claim "restitution in respect of any breach ... would cut across the compensatory principle" of the law of contract[51].

Total failure of consideration?

25. The respondent argued that the appellants' repudiation prevented it from performing its obligations under the contract and from being remunerated accordingly. On that basis it was argued that there was a total failure of consideration which entitled the respondent to advance a restitutionary claim for quantum meruit. The respondent submitted that whether its obligation under the contract was entire or severable is immaterial, but argued that, if it mattered, the contract in question imposed an entire obligation on the respondent, so that its entitlement to progress payments was conditional upon the performance of the entire obligation.

26. The respondent's argument, in the terms in which it was put, fails because its obligation under the contract was not an entire obligation. The contract between the parties did not impose one entire obligation on the respondent to complete the whole of the contract works in order to become entitled to the payment of an indivisible contract price. The contract provided for the making of staged payments as the work was performed. Nothing in the contract was apt to suggest that these payments were only provisional, and subject to a final taking of accounts. The respondent's obligations are properly construed as severable rather than entire.

27. It is eloquent of the artificiality of the respondent's argument that it strains unreasonably to characterise the contract as one which would deny to the respondent any entitlement to unconditional payment unless and until the whole of the contract works were completed. The appellants' repudiation did not prevent the respondent from performing the totality of its obligations under the contract. The respondent's rights to be paid some instalments of the contract price had accrued before the contract was terminated. The respondent was entitled to be paid those instalments for that work; it was not entitled to claim greater payments by way of a restitutionary claim for quantum meruit. The respondent's rights to the bulk of progress payments had accrued at the date of the repudiation, and there could be no failure of consideration in respect of the work the subject of those accrued rights.

28. It was suggested in the course of argument that some work was done by the respondent before the contract was terminated but for which a right to payment had not yet accrued under the contract, and that there was a total failure of consideration in respect of such work which could support a restitutionary claim for quantum meruit. Some support for this may be found in *Horton v Jones [No 2]* [52], where Jordan CJ said:

"If one party to an express contract renders to the other some but not all the services which have to be performed in order that he may be entitled to receive the remuneration stipulated for by the contract, and the other by his wrongful repudiation of the contract prevents him from earning the stipulated remuneration, the former may treat the contract as at an end and then sue for a *quantum meruit* for the services actually rendered: *Segur v Franklin*[53]."

29. It is evident that Jordan CJ did not advert to the tension between the rescission fallacy which informed *Lodder v Slowey* and the approach in *McDonald*. Much less was Jordan CJ offering a reconciliation of these competing approaches. It is not at all apparent that Jordan CJ accepted that the entitlement to sue for a quantum meruit "for the services actually rendered" did not apply to work for which an entitlement to payment under the contract had accrued before the contract was brought to an end. Indeed, in *Segur v Franklin*[54], Jordan CJ expressly recognised the entitlement to sue for the services "rendered under the contract before it came to an end", evidently referring to *all* such

services. That approach is inconsistent with the basal understanding in *McDonald* that accrued rights to payment under the contract are neither displaced nor enhanced by termination in future. And in any event, for present purposes, it is to be noted that Jordan CJ did not distinguish between an entitlement to a quantum meruit for all the work performed and an entitlement to payment for work performed before termination, but in respect of which a right to payment had not yet accrued under the contract.

30. 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 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 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.

31. The present case affords an example of what experience shows, that proof of an entitlement to a quantum meruit may often involve more complex questions of evidence and evaluation than an assessment of damages for loss of profit upon termination for breach. To require an evaluation of an entitlement to a quantum meruit in respect of that portion of the work performed before termination, but for which a contractual right to payment has not accrued, subject to a qualification that this entitlement should not exceed a fair value calculated in accordance with the contract price or the appropriate part of the contract price, is to commit the parties, and the tribunal obliged to make the necessary assessment, to an exercise involving an unprecedented level of uncertainty and complexity.

32. Given the clear contemporary understanding of the effect of termination, considerations of coherence, certainty and commercial convenience provide ample reason to move on from adherence to the vestiges of what is now seen to be an unprincipled right to remuneration for work done, unconstrained by the terms of the contract. The question which must now be addressed is whether *Lodder v Slowey* should continue to be applied notwithstanding its reliance on the rescission fallacy.

Should *Lodder v Slowey* continue to be applied?

Considerations of principle

33. The respondent sought to sustain the judgment in its favour on the basis that repudiation is a distinctive kind of breach of contract, which has distinctive remedial consequences. It was said that the appellants did not merely depart from the terms of the contract but manifested an intention no longer to be bound by the contract, and that they could not now approbate and reprobate by insisting on adherence to the very contract they repudiated. It was said that where a builder accepts a repudiation by the owners and terminates the contract, it is by definition no longer possible for the builder to complete the promised contractual performance, nor to receive from the owners the

contractual performance promised by them. It was said that the law has rightly recognised the availability of a restitutionary claim for quantum meruit in such circumstances.

34. These submissions echo the observations of Meagher JA in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*[55] that it would be anomalous:

"that a figure arrived at on a quantum meruit might exceed, or even far exceed, the profit which would have been made if the contract had been fully performed ... only ... if there were some rule of law that the remuneration arrived at contractually was the greatest possible remuneration available, or that it was a reasonable remuneration for all work requiring to be performed".

35. Meagher JA, after observing that there is no such rule, went on to say that[56]:

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

36. With respect, the observations of Meagher JA, while avowedly of a piece with the rescission fallacy itself[57], do not afford a satisfactory justification in point of principle for continuing to adhere to it. These observations, and the view urged by the respondent, fail to acknowledge that it is precisely because the parties have agreed upon the contract price for the performance of work that it is to be regarded as "the greatest possible remuneration" for the work agreed to be performed.

37. Absent adherence to the rescission fallacy, there is nothing "anomalous" in a defaulting party enjoying the protection of the contract's ceiling on the amounts recoverable by way of damages. That each party is freed from further performance of its primary obligations is no reason why the innocent party should be entitled to enforce a remedy which has no relationship to the expectations embodied in those primary obligations. It is a matter of public policy that under the law of contract a defaulting party is not to be punished for its breach[58]. As Lord Hoffmann said in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*[59]: "[T]he purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance." And that is so even if the breach was deliberate or self-interested. In *Butler v Fairclough*[60], in a passage later adopted by Gleeson CJ, McHugh, Gummow and Hayne JJ in *Gray v Motor Accident Commission*[61], Griffith CJ said:

"The motive or state of mind of a person who is guilty of a breach of contract is not relevant to the question of damages for the breach, although if the contract itself were fraudulent the question of fraud might be material. A breach of contract may be innocent, even accidental or unconscious. Or it may arise from a wrong view of the obligations created by the contract. Or it may be wilful, and even malicious and committed with the express intention of injuring the other party. But the measure of damages is not affected by any such considerations."

38. In *One Step (Support) Ltd v Morris-Garner*[62], Lord Reed, with whom Baroness Hale of Richmond, Lord Wilson and Lord Carnwath agreed, said:

"The courts will not prevent self-interested breaches of contract where the interests of the innocent party can be adequately protected by an award of damages. Nor will the courts award damages designed to deprive the contract breaker of any profit he may have made as a consequence of his failure in performance. Their function is confined to enforcing either the primary obligation to perform, or the contract breaker's secondary obligation to pay damages as a substitute for performance ... The

damages awarded cannot therefore be affected by whether the breach was deliberate or self-interested."

39. Finally, it is a rhetorical distraction to argue that the defaulting party may not "approbate and reprobate" the contract. The principle in *McDonald* does not permit a defaulting party to approbate as well as reprobate the contract. Rather, the principle states the consequences for the parties where the innocent party elects to terminate the contract in response to the conduct of the defaulting party. That those consequences do not include an enhancement of the innocent party's rights or punishment of the defaulting party does not mean that the defaulting party may repudiate the contract while also claiming its benefit. Rather, it means that termination for repudiation or breach is not an occasion for obtaining a windfall or inflicting a punishment.

The older authorities

40. The respondent submitted that the historical roots of its claim are very deep. It called in aid *Planché v Colburn***[63]**, *De Bernardy v Harding***[64]** and *Prickett v Badger***[65]** as support for the decision in *Lodder v Slowey*.

41. The older cases referred to by the respondent do not afford strong support for *Lodder v Slowey*. In *Planché*, the Court upheld an award of damages by the jury. The reasoning upon which the Court proceeded is not pellucidly clear and may depend upon a "nineteenth century distinction between 'discharged' and 'rescinded' contracts [that] no longer forms part of the law governing breach of contract"**[66]**. What is clear is that nothing in the decision in *Planché* offers support for the notion that a plaintiff may elect between damages for loss of bargain under the contract and a restitutionary claim for quantum meruit**[67]**.

42. In *De Bernardy*, in the judgment of Alderson B, one finds what may be an early statement of the rescission fallacy. His Lordship said**[68]**:

"Where one party has absolutely refused to perform, or has rendered himself incapable of performing, his part of the contract, he puts it in the power of the other party either to sue for a breach of it, or to rescind the contract and sue on a quantum meruit for the work actually done."

43. Pollock CB took the somewhat different view that**[69]**:

"It was a question for the jury, whether, under the circumstances, the original contract was not abandoned, and whether there was not an implied understanding between the parties that the plaintiff should be paid for the work actually done as upon a quantum meruit."

44. It may be that Pollock CB is to be understood on the basis that the original contract was "closed" by abandonment and the making of a new contract entirely to replace the old. Unhelpfully, Platt B "concurred", apparently with both Pollock CB and Alderson B**[70]**.

45. In *Prickett*, Williams and Crowder JJ each purported to follow *Planché* and *De Bernardy*. Willes J said**[71]**:

"The plaintiff would have been entitled to receive the commission agreed on, if the defendant's conduct had not prevented his earning it. I must confess I do not see why the jury should not have given him the full amount."

46. It would appear that Willes J concluded that the plaintiff had done all that was required under the contract to earn the commission provided by the contract.

47. These older authorities are not so clear or consistent as to afford compelling support for the original adoption of the rescission fallacy. Much less do they support its continued application in the light of the contemporary appreciation of its inconsistency with basal principle.

An "open" contract

48. The respondent also argued that the critical point in cases of termination for repudiation is that a claim for quantum meruit is available because there is no longer an "open" contract between the parties. This argument proceeds on a misunderstanding of what is meant by an "open" contract. The reference in the authorities to an "open contract" is a reference to a contract that has not been rescinded ab initio and so remains enforceable. In this regard, the reference to an "open" contract in argument in *Prickett***[72]** was to a contract that was "unperformed", as distinct from what was described by Deane J in *Pavey & Matthews***[73]** as "a case where there is no applicable genuine agreement or where such an agreement is frustrated, avoided or unenforceable".

49. When, in *Steele v Tardiani***[74]**, Dixon J, with whom McTiernan J agreed, said that the fact of a contract being "open and, to that extent, unperformed, excludes any implied obligation ... to pay a fair and reasonable remuneration for the work done", his Honour was referring to a contract which, though unperformed, remains enforceable. The author of the classic passage in *McDonald*, when speaking of an "open" contract in *Steele v Tardiani*, could only have been referring to a contract that was enforceable, whether by an action for damages or otherwise**[75]**.

Summary

50. *Lodder v Slowey* should no longer be applied.

51. When this Court in *McDonald* rejected the notion that termination of a contract upon acceptance of a repudiation has the effect of rescinding the contract ab initio, it removed the "reason" or "foundation"**[76]** of the holding in *Lodder v Slowey*. Subsequent decisions have "disclosed weakness in the reasoning"**[77]** of *Lodder v Slowey*, and that decision is "no longer really consistent with the course of judicial decision"**[78]** in this country. It having become evident "that an error of principle has occurred by judicial decision", and in circumstances where it is not necessary to overrule any past decision of this Court to do so, "the error should be corrected judicially"**[79]**. *Lodder v Slowey* has come to be recognised as "no more than a legal fiction"; as such it is "not to be maintained"**[80]**. Especially in a context such as the present, "it is of great importance that these principles should be correctly defined, for, if not, there is a danger that the error may spread in other directions, and a portion of our law be erected on a false foundation"**[81]**.

52. In any given case, there may be considerations that militate against exercising the power to overrule a longstanding decision. It is "impossible to lay down precise rules according to which this power will be exercised"**[82]**. In *Ross Smith v Ross Smith***[83]**, Lord Reid acknowledged that it would have been a compelling consideration that it "could reasonably be supposed that anyone has regulated his affairs in reliance on its validity, but it would be fantastic to suppose that anyone has ... entered into any kind of transaction, on the faith of" the longstanding decision. The same may be said in relation to *Lodder v Slowey*, the fallacious reasoning of which may give rise to serious mischief. 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 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. In *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd*[84], Finn J observed that:

"It ... has long been recognised that 'it is difficult to see why breach, which saves the plaintiff further loss, should be grounds for recovery of a greater sum [than the contract price]': Dobbs, *Law of Remedies*, vol 3, §12.7(5) ... As is said in Mason and Carter, *Restitution Law in Australia* at [1430]: 'There is ... little to be said in principle or policy for a rule which provides a clear incentive to manufacture or snatch at repudiation as a means of escaping a bad bargain.'"

Conclusion and orders

53. 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[85]. "There will generally be no need to have recourse to a remedy in restitution" where a claim in contract is available[86]. In the present case, there is no good reason to consider that damages for breach of contract would fail to meet the justice of the case such that a restitutionary claim for quantum meruit should be available. It is not necessary to consider the position in other contexts or with respect to other restitutionary claims as the present case is concerned only with a claim for remuneration for work and labour done under a contract terminated for repudiation or breach.

54. The appeal should be allowed. Orders 1, 2 and 3 of the Court of Appeal should be set aside. In their place, it should be ordered that the application for leave to appeal be granted; the appeal to the Court of Appeal be allowed with costs; orders 2 to 5 of the primary judge be set aside and, in their place, it be ordered that the appeal to the primary judge be allowed with costs; the decision of the Victorian Civil and Administrative Tribunal be set aside; and the matter be remitted to the Tribunal for further determination according to law.

55. The respondent should pay the appellants' costs of and incidental to the appeal to this Court.

56. GAGELER J. Nettle, Gordon and Edelman JJ describe the nature and history of this long-running dispute between the appellant Owners and the respondent Builder. I adopt their abbreviations.

57. As their Honours explain, the Builder's claim to recover by way of restitution a sum of money representing the value of work done by the Builder for the benefit of the Owners before the Contract was terminated upon the Builder's acceptance of the Owners' repudiation covered work within three distinct categories:

(1) work done by the Builder in respect of variations to the plans and specifications set out in the Contract which were asked for by the Owners;

(2) work done by the Builder in respect of the plans and specifications set out in the Contract for which the Builder had accrued a contractual right to payment under the Contract at the time of its termination; and

(3) work done by the Builder in respect of the plans and specifications set out in the Contract for which the Builder had not yet accrued any contractual right to payment under the Contract at the time of its termination.

58. Section 38 of the DBC Act governs recovery by the Builder for work done within category (1). I agree with the construction of s 38 arrived at by Nettle, Gordon and Edelman JJ and I agree with the

substance of their Honours' reasons for arriving at that construction.

59. Construed within the context of the DBC Act as a whole, the limited statutory entitlement conferred by that section exhibits a sufficient legislative intention to exclude recovery at common law[87]. The intention is manifest in the express terms of s 38(6), if the conditions in s 38(6) are not met, and appears by necessary implication from the measure of the entitlement set out in s 38(7), if the conditions in s 38(6) are met. The combined effect is that recovery at common law is in all circumstances excluded and that the Builder is limited to recovery under s 38(7) if, but only if, the conditions in s 38(6) are met.

60. The common law governs recovery by the Builder for work done within categories (2) and (3). Recovery for work done within each of these categories is limited by the common law principles that govern imposition of an obligation to pay by way of restitution a sum of money representing the value of work, enforceable by an action that can be described following *Pavey & Matthews Pty Ltd v Paul*[88] as a non-contractual *quantum meruit*.

61. The correct outcome in relation to work done within category (2) is that a non-contractual *quantum meruit* is not available to the Builder. In my opinion, the preferable outcome in relation to work done within category (3) is that a non-contractual *quantum meruit* is available to the Builder. Although those conclusions accord with the conclusions reached by Nettle, Gordon and Edelman JJ, I reach them by a narrower path of reasoning.

Category (2): work for which the Builder has accrued a contractual right to payment

62. There can be no doubt about the outcome in relation to work done within category (2). The result of the Builder's acceptance of the Owners' repudiation is that the Builder still has in respect of that work the same accrued contractual right to payment under the Contract as the Builder had up until the time of termination of the Contract[89]. The Builder can enforce that accrued contractual right in a common law action in debt[90].

63. The continuing existence of a contractual right to payment, enforceable by an action in debt, leaves no room to recover payment by another action in debt on a non-contractual *quantum meruit*. Times past, any such action would need to have proceeded on the fiction of an implied contractual promise on the part of the Owners to pay for an executed consideration by the Builder. Then, it would have been enough to say that a contract would not be implied to the extent that the rights of the parties were governed by an express or "special" contract[91].

64. Now, it is sufficient to point out that, through the contractual creation of the debt, the Builder has received from the Owners exactly what the Builder agreed with the Owners that the Builder would receive for having done the work. The continuing existence of the enforceable contractual obligation to pay for the work means that there is "neither occasion nor legal justification for the law to superimpose or impute" a different, non-contractual obligation on the part of the Owners to pay for the work[92]. The more general point is that "[n]o action can be brought for restitution while an inconsistent contractual promise subsists between the parties in relation to the subject matter of the claim"[93]. The continuing application of the regime of rights and obligations set out in the Contract to govern the mutual rights and obligations of the parties in respect of payment for the work has the result that the law of restitution simply "has no part to play in the matter"[94].

Category (3): work for which the Builder has not accrued a contractual right to payment

65. More difficulty attends the outcome in relation to work done within category (3). Determining the outcome requires this Court to make a choice. Should the Builder be restricted in respect of that work

to enforcing the Builder's undoubted entitlement to recover damages for loss occasioned to the Builder in consequence of the termination of the Contract? Or should the Builder be able to elect to recover instead an amount representing the value of the work by way of restitution on a non-contractual *quantum meruit*?

66. No decision of this Court is directly in point. Statements made by three members of the Court in *Automatic Fire Sprinklers Pty Ltd v Watson*[95], concerning whether a wrongfully dismissed employee is entitled to recover the value of services rendered or is confined to unliquidated damages for breach of the contract of employment, might be thought to point in both directions. The statements were unnecessary to the decision in that case.

67. Restricting the Builder to recovering damages for breach of contract has the support of some statements made in the House of Lords in *Ranger v Great Western Railway Co*[96] and of a formidable body of recent academic and professional writing[97]. Allowing the Builder to elect to recover an amount representing the value of the work by way of restitution on a non-contractual *quantum meruit* accords with the received understanding of the common law in Australia as repeatedly accepted in intermediate courts of appeal over the last three decades[98]. It also accords with the predominant approach of courts in the United States[99].

68. The source of the received understanding in Australia can be traced on one line of descent back through the Privy Council's endorsement in *Lodder v Slowey*[100] of the decision of the New Zealand Court of Appeal under appeal in that case[101] to a series of scantily reported English cases towards the middle of the nineteenth century which began with *Planché v Colburn*[102].

69. Examination of *Planché v Colburn* does not readily reveal a principled explanation for the doctrine it spawned[103]. The Privy Council's decision in *Lodder v Slowey* is devoid of reasoning. The decision of the New Zealand Court of Appeal under appeal in that case appears to have proceeded on the notion that termination of a contract by acceptance of a repudiation operated to "rescind" the contract in the sense of avoiding the legal operation of the contract for the past as well as for the future[104]. Adherence to that notion accords with the explanation of *Planché v Colburn* and its progeny in the notes to the same 1868 edition of Bullen and Leake's *Precedents of Pleadings*[105] as was referred to in *Roxborough v Rothmans of Pall Mall Australia Ltd*[106]. The notion was subsequently authoritatively rejected in *McDonald v Dennys Lascelles Ltd*[107].

70. There are, however, two characteristically scholarly and concise judgments of Jordan CJ, delivered shortly after *McDonald v Dennys Lascelles Ltd* and without reference to *Lodder v Slowey*, which provide a different and more satisfying justification for the received understanding. In *Segur v Franklin*[108], Jordan CJ noted with reference to *McDonald v Dennys Lascelles Ltd* that it was then "clearly settled that if one party to a contract repudiates his liabilities under it, the other party may treat such repudiation as an invitation to him to regard himself as discharged from the further performance of the contract". The consequence, he noted, was that the other party "may accept this invitation and treat the contract as at an end, except for the purposes of an action for damages for breach of contract ... or", he added, "in a proper case, an action for a *quantum meruit*"[109]. Jordan CJ went on to explain[110]:

> "Where a wrongful repudiation has the effect of preventing the other party from becoming entitled to receive remuneration for services already rendered, which remuneration, according to the terms of the contract, he is entitled to receive only if the contract is wholly carried into effect, the innocent party, who has elected to treat the contract as at an end may, instead of suing for damages, maintain an action to recover a *quantum meruit* for the services

> which he has rendered under the contract before it came to an end. Such an action is not regarded as an action for an unliquidated claim, but an action for a debt or liquidated demand".

71. Returning to the topic in *Horton v Jones [No 2]*[111], Jordan CJ re-emphasised that "[a] claim to a *quantum meruit* is in the theory of the law a liquidated claim; and the claimant, if he is successful, is entitled to recover the amount at which he has assessed his claim, unless the jury reduces it". That is an important statement about the nature of the common law action, to which I will return. Jordan CJ added that there were circumstances in which an action for a *quantum meruit* would lie "[w]here there is or has been an express contract between the parties". He instanced[112], with reference to *Segur v Franklin*:

> "If one party to an express contract renders to the other some but not all the services which have to be performed in order that he may be entitled to receive the remuneration stipulated for by the contract, and the other by his wrongful repudiation of the contract prevents him from earning the stipulated remuneration, the former may treat the contract as at an end and then sue for a *quantum meruit* for the services actually rendered".

72. Jordan CJ's explanation of the basis for a claim on a *quantum meruit* for the value of services rendered by the innocent party proceeded expressly on the modern understanding, settled in *McDonald v Dennys Lascelles Ltd*, that termination of a contract on acceptance of repudiation operates only for the future. Unlike the reasoning of the New Zealand Court of Appeal in the decision upheld in *Lodder v Slowey*, the reasoning of Jordan CJ did not proceed on the notion that acceptance of repudiation operates to render a contract void from the beginning. The notion had been discarded then, as it remains discarded now.

73. The explanation given by Jordan CJ in *Segur v Franklin* and in *Horton v Jones [No 2]* proceeded on the same conception of the nature of a non-contractual *quantum meruit* as was implicit in his Honour's reasons for judgment in *Horton v Jones*[113]. In an exposition of the common law pivotal to the reasoning of Deane J in *Pavey*[114], Jordan CJ in *Horton v Jones* characterised a non-contractual *quantum meruit* for services rendered as "an action of debt" to enforce an obligation, imposed by law independently of any genuine agreement between the parties, to pay "reasonable remuneration for the executed consideration"[115].

74. Within the explanation in *Segur v Franklin* and *Horton v Jones [No 2]*, in my opinion, are reasons consistent with *Pavey*'s recognition of "unjust enrichment" as a "unifying" (as distinct from "universal" or "all-embracing"[116]) legal concept as to why the common law should recognise a right to restitution in the particular category of case[117]. Within the same explanation, in my opinion, is also guidance as to what the proper measure of restitution in that category of case should be[118]. For reasons that will become apparent, I am unable to answer the ultimate question, of whether the common law of Australia should continue to recognise a right to restitution in this category of case, without also determining the proper measure of restitution.

75. The starting point is to appreciate that the category of case is one in which it is the "very fact" that a contract becomes 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"[119]. The innocent party has rendered services in part performance of the totality of the services necessary to be performed in order for the innocent party to accrue a contractual entitlement to payment in the future. Termination of the contract, consequent upon acceptance by the innocent party of its repudiation by the defaulting

party, supervenes. The result is that "as on the one side no further acts of performance can be required, so, on the other side, no liability can be brought into existence [since] it depends upon a further act of performance"[120]. Through acceptance of the wrongful repudiation of the defaulting party, the innocent party is thereby in the present position of having rendered services in part performance of the contract for which that party has not accrued and cannot accrue a contractual entitlement to be paid. The defaulting party is correspondingly in the present position of having had the benefit of the services rendered in part performance of the contract for which that party has not incurred and will not incur any contractual obligation to pay.

76. To recognise the "unjustness" of the defaulting party having had the benefit of the services rendered by the innocent party in part performance of the contract in a case of a default amounting to a wrongful repudiation, I do not think it necessary to analogise to any other category of case. Nor do I think it appropriate to attempt to discern and apply some other all-embracing criterion of liability in the common law of restitution. By preferring to maintain a narrow focus, I am adhering to the standard common law judicial technique of deciding no more than what needs to be decided.

77. A submission of the Builder causes me to divert from that narrow focus if only to explain why I choose to maintain it. The submission is to the effect that the justification for the common law to continue to recognise a right to restitution in the particular category of case is now sufficiently to be found in the application of the concept of "failure of basis".

78. The concept of "total failure of consideration", renamed as "failure of basis", was invoked in novel circumstances to explain the imposition of an obligation to repay money that had been paid in *Roxborough*[121] and to explain the imposition of an obligation to pay for services that had been rendered in *Barnes v Eastenders Cash & Carry Plc*[122]. Undoubtedly, the concept can help to explain the imposition of obligations to make restitution across a range of established categories of case. The present category is one in which the concept has some explanatory power[123]. One party has rendered services, from which the other has benefited, on a "basis" that "has failed to sustain itself" in the events that have occurred. That is to isolate an important part of the story. But it is not to tell the whole story. The other important parts that need to be told are that the services were rendered pursuant to a valid contract which the defaulting party has wrongfully repudiated and which the innocent party has terminated so as to result in the innocent party failing to accrue a right to payment for the services under the contract yet having an entitlement to claim damages from the defaulting party for non-completion of the contract.

79. Useful as the concept of total failure of consideration or failure of basis can be, it is important not to surrender to that one concept the hegemonic status steadfastly denied to the concept of unjust enrichment[124]. The common law method, as Sir Frederick Jordan himself observed extra-judicially, has never purported to be one in which the determination of a particular case has been deduced from supposed "fundamental principles of justice". The general principles of the common law are, in his language, "built up" from the "collation of decided cases"[125]. They are monitored by reference to how well they fit within the wider body of the law and how well they work in practice; where problems are revealed, they can be revised or even abandoned at the appropriate level within the judicial hierarchy.

80. Bearing constantly in mind the adage that the life of the common law has been not logic but experience[126], there is a need to resist the temptation to intellectual gratification that accompanies any quest to portray cases in which the common law recognises an obligation of restitution as the conscious or unconscious application of one Very Big Idea. The need is to avoid the pitfalls of overgeneralisation[127], just as it is to ensure that considerations that are practically important but theoretically inconvenient are not overlooked or underappreciated.

81. In the common law of restitution, as in the common law of tort, particular categories of case give rise to their own particular sorts of problem. Once properly identified, the problems that arise in any particular category "will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle"**[128]**. That is what needs to happen here. The various categories of case in which money paid under a contract might or might not be recovered on the ground of a total failure of consideration or failure of basis having resulted from the termination of the contract, upon acceptance of a repudiation**[129]** or upon the happening of a frustrating event**[130]**, raise their own problems. So too does the more difficult category of case where it is the defaulting party who seeks to recover the value of services rendered to the innocent party**[131]**. For present purposes, all of them can be put to one side.

82. The critical question in the present category of case is why the common law should not treat the innocent party as adequately remunerated for the services rendered to the defaulting party by having an entitlement to maintain an action for damages for breach of the contract in part performance of which the innocent party rendered those services. Accentuating that question is the common law's belated recognition of the availability to the innocent party of damages measured by reference to the loss attributable to the innocent party's reliance on the contract**[132]**. Indeed, a plausible explanation of *Planché v Colburn* and its nineteenth century progeny is that most if not all were cases in which the party who had rendered services before the other's repudiation was in substance compensated in damages measured by reference to his or her reliance loss**[133]**.

83. My view is that the answer to that critical question cannot lie in the notion of the contracting parties having arrived at a contractual "allocation of risk", which the common law of restitution will not disturb**[134]**. Contracting parties are, of course, at liberty to determine by contract the "secondary" obligations, which are to arise in the event of breach or termination of the "primary" obligations they have chosen to bind them**[135]**. Even where the parties have not so determined, it may for some purposes be appropriate to describe obligations that the common law imposes to pay damages for breach of contract as "secondary" obligations which, in the event of termination by acceptance of a repudiation, are "substituted" for the primary obligations**[136]**. However, it would be artificial as a matter of commercial practice and wrong as a matter of legal theory to conceive of contracting parties who have not addressed the consequences of termination in the express or implied terms of their contract as having contracted to limit themselves to the contractual remedy of damages in that event. Parties contract against the background of the gamut of remedies that the legal system makes available to them. The common law gives to them the benefit, and saddles them with the detriment, of what they expressly or impliedly agree in their contract. Outside the scope of what they agree in their contract, the common law gives to them what the common law itself allows them to get.

84. Nor can I see that the answer is to be found in the notion that overlapping remedies in contract and in restitution are in some way anomalous. Tidiness has never been a feature of a common law system. Overlapping remedies available at the option of an innocent party against another party who is in contractual default are commonplace. Remedies at common law can overlap with those in equity. At common law, causes of action in contract can overlap with causes of action in tort, and the potential for a cause of action in restitution to overlap with a cause of action in damages for breach of contract was recognised in *Baltic Shipping Co v Dillon***[137]**.

85. Rather, I consider that answering the critical question needs to be informed by a weighing of the practical consequences of continuing to allow an innocent party to maintain a non-contractual *quantum meruit* as an alternative to an action for unliquidated damages for breach of contract. To those consequences I now turn.

86. One practical consequence which flows from a non-contractual *quantum meruit* being "in the theory of the law" an action for a debt is that the action can have significant procedural advantages to an innocent party over an action for damages for breach of contract under procedural rules in Australian courts[138]. Typically, those advantages include a capacity to obtain default judgment[139].

87. More importantly, a non-contractual *quantum meruit* has the advantage that proof of the value of services rendered is almost invariably more straightforward than proof of contractual loss. Questions of causation and remoteness play no part. The availability of the action allows the innocent party to choose to adopt the course of quickly and cheaply obtaining judgment for an easily quantifiable liquidated amount instead of embarking on a long and more expensive and more uncertain pursuit of a potentially larger judgment for unliquidated damages. Choice by the innocent party to adopt that course has the flow-on systemic advantage of shortening trial and pre-trial processes.

88. The practical considerations are not all one way. Against permitting recovery on an action for a non-contractual *quantum meruit* for the value of services rendered under the contract is the prospect of a party recovering more as a result of termination of the contract than would have been due to that party had the contract been performed. 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[140].

89. With the potential to recover more from termination than from completion comes the incentive to terminate: to search out and seize upon conduct able to be characterised as a repudiation with a view to making more out of engaging in the ensuing litigation than is available to be made out of completing the contract. Compounding the incentive for one contracting party to find conduct amounting to repudiation is a corresponding incentive for the counter-party to do whatever can be done to avoid it. The result "is to invert the normal interest of such a party regarding the other's contractual performance"[141]:

> "While the performing party's objective is to provoke a default, the recipient's goal is to safeguard a favorable bargain – avoiding the risk of default by excessive precautions and 'overperformance.' It is difficult to think of a clearer incentive to inefficiency in the contractual relation."

90. The function of a common law remedy is to remediate an innocent party, not to penalise a defaulting party, and not to distort the incentive of either party to perform the contract. The policy of the common law demands that the problem of distorted contractual incentives be addressed.

91. In my opinion, the problem is more appropriately addressed by limiting the measure of restitution than by denying the availability of the common law action for restitution. If the measure of the value of the services rendered by the innocent party is capped by reference to the contractually agreed remuneration for those services – the contract price – the distortion is substantially eliminated.

92. "Upon a *quantum meruit*, usually the value of services is assessed by reference to charges commonly made by others for like services"[142]. 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.

93. The approach of the Court of Appeals of New York in *Buccini v Paterno Const Co*[143] is instructive[144], albeit that it concerned a non-contractual *quantum meruit* for services rendered which was brought after termination of a contract in circumstances more akin to frustration than to repudiation. There an individual had been engaged by a building owner under a contract for services which provided for disputes to be determined by arbitration. The individual died before the services were completed. Under New York law, the effect of his death was to terminate the contractual obligation to complete the services, leaving the owner liable for the benefit of such services as had been rendered. Cardozo CJ explained how the common law of restitution could be the source of that liability[145]:

> "The parties may say by their contract what compensation shall be made in the event of [death]. The award will then conform to the expression of their will. They may leave the subject open, to be governed by the law itself. The award will then conform to the principles of liability in quasi contract and to the considerations of equity and justice by which that liability is governed."

94. Going on to deal with the measure of the value of the services rendered by the deceased able to be claimed by the executrix of the deceased in an arbitration, Cardozo CJ said[146]:

> "Death of the contractor has not nullified the contract in the sense of emancipating the claimant from the restraint of its conditions. They limit her at every turn. She cannot stir a step without reference to the contract, nor profit by a dollar without adherence to its covenants. ... The interrupted work may have been better than any called for by the plans. Even so, there can be no recovery if the contractor willfully and without excuse has substituted something else. ... The value proportionately distributed may be greater than the contract price. Even so, the price, and not the value, will be the maximum beyond which the judgment may not go. ... 'The recovery in such a case cannot exceed the contract price, or the rate of it for the part of the service performed.' ... The question to be determined is not the value of the work considered by itself and unrelated to the contract. The question to be determined is the benefit to the owner in advancement of the ends to be promoted by the contract."

95. The statement quoted by Cardozo CJ to the effect that recovery "cannot exceed the contract price, or the rate of it for the part of the service performed" drew on language, frequently repeated in nineteenth century American cases, which derived from that of the Supreme Court of Indiana in *Coe v Smith*[147]. There recovery on a *quantum meruit* claim was explained, in terms that remain apposite today, as "compensation for benefit received and enjoyed"[148]. With express reference to the potential for the quantum of recovery to distort contractual incentives, it was said of the position of the party whose benefit was the result of contractual performance[149]:

> "He is to pay no more than the amount in which he has been benefited, and this will be determined by the jury, all things being considered ... and the amount recovered must, in no case, exceed the contract price, or the rate of it for the part of the contract performed. This, policy would not permit, lest a temptation should be held out to break contracts in an advanced stage of

> performance, in hopes of higher compensation than might be stipulated for in the contract."

96. That was a rare and lucid articulation of sound common law policy at a time when, for the most part, in the determination of issues of quantum the jury was left to be the conscience of the common law. The historical role of the jury in determining the measure to be recovered on a *quantum meruit* was acknowledged in Jordan CJ's already quoted reference in *Horton v Jones [No 2]* to the entitlement of the successful claimant "to recover the amount at which he has assessed his claim, *unless the jury reduces it*"**[150]**. Neither in *Planché v Colburn* nor in any of its nineteenth century English progeny does it appear that the amount in fact awarded by a jury exceeded the contract price. In none of them, however, does the question appear to have arisen for determination as to whether the contract price placed a ceiling on the amount a jury could determine.

97. An argument that the policy of the common law in some way limited the measure recoverable on a *quantum meruit* by an innocent party for services rendered in performance of a contract later terminated on acceptance of a repudiation was put to and rejected by the New Zealand Court of Appeal in *Slowey v Lodder***[151]**, the decision upheld by the Privy Council on appeal in *Lodder v Slowey*. Just what that argument was is not entirely clear. The consequence of that lack of clarity is that I am not convinced that the actual decision in *Lodder v Slowey* was necessarily wrong.

98. One of the two members of the New Zealand Court of Appeal who gave judgment in *Slowey v Lodder* was Williams J. He seems to have understood the argument of the respondents to the appeal to that Court as being to the effect that the measure of recovery on the *quantum meruit* should have been the same as the measure of damages for breach of contract**[152]**. He rejected it. As the argument was so understood, I think he was correct to reject it. To my mind, there is no satisfactory answer to his rhetorical question: "If the result must be the same, how can it profit a plaintiff to have – what he certainly has – an alternative remedy?" To require the innocent party to prove the measure of damages for breach of contract in order to sustain an action for *quantum meruit*, or to permit the defaulting party to prove that measure of damages in order to meet it, would rob the action of its principal practical advantage over an action for damages.

99. The other member of the New Zealand Court of Appeal who gave judgment in *Slowey v Lodder* was Conolly J. He seems to have understood the same argument as being to the effect that the measure should not have exceeded the contract price for the services rendered**[153]**. He accepted it in principle. As the argument was to be so understood, I think he was correct to accept it in principle.

100. On a non-contractual *quantum meruit* to recover remuneration for services rendered in performance of an unenforceable contract, the general approach has been to treat the contract price as no more than evidence of the value to the owner of the services rendered**[154]**. The reason is not difficult to discern: were the contractual price automatically to be treated as the measure of the value of the services "it might be persuasively contended that the action on a quantum meruit was an indirect means of enforcing the [unenforceable] contract"**[155]**. Deane J nevertheless suggested in *Pavey***[156]** that "[t]he defendant will also be entitled to rely on the unenforceable contract, if it has been executed but not rescinded, to limit the amount recoverable by the plaintiff to the contractual amount in a case where that amount is less than what would constitute fair and reasonable remuneration". How far that suggestion can be taken need not now be considered.

101. Whatever the position in relation to an unenforceable contract, my view is that the contract price should limit a non-contractual *quantum meruit* to recover remuneration for services rendered in part performance of an enforceable contract that is later terminated so as to preclude future recovery of the contractual amount by an action to enforce the contract. To impose that limit on recovery is

consistent with the general approach articulated by Cardozo CJ in *Buccini* and with the specific approach accepted in principle by Conolly J in *Slowey v Lodder*.

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

103. To the extent that they allowed recovery in excess of the contract price for the services rendered, *Renard Constructions (ME) Pty Ltd v Minister for Public Works*[157], *Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd*[158] and *Sopov v Kane Constructions Pty Ltd [No 2]*[159] were, in my opinion, wrongly decided.

104. Qualified to ensure that the amount recovered cannot exceed the portion of the contract price that is attributable to the services rendered, there is no reason to depart from the common law principle of recovery expounded by Jordan CJ in *Segur v Franklin* and *Horton v Jones [No 2]*. The principle is sound in theory and, so qualified, is beneficial in practice.

105. The preferable outcome, in my opinion, is accordingly that the Builder can recover from the Owners by way of restitution on a non-contractual *quantum meruit* an amount in respect of the work done by the Builder for which the Builder had accrued no contractual right to payment under the Contract at the time of its termination. The amount recoverable is a liquidated amount representing reasonable remuneration for the work. That amount cannot exceed the portion of the overall price set by the Contract that is attributable to the work.

106. Having drawn on the approach of the Court of Appeals of New York in *Buccini* in reaching that conclusion, I need to add that I have not ignored the law in the United States on the precise topic of the ability of an innocent party to recover the value of work done in the performance of a repudiated contract. Doctrinal assistance from the American case law is limited by the relative infrequency with which the topic has arisen for appellate decision and by adherence in at least some of the leading cases to the theory of repudiation rejected in *McDonald v Dennys Lascelles Ltd*[160].

107. Noteworthy, however, is that my preferred outcome accords in practical effect with the position adopted by the American Law Institute in 2010 in the *Restatement (Third) of Restitution and Unjust Enrichment*, notwithstanding that it is couched in different terminology and arrived at by a different conceptual route[161]. The common law rule there adopted is that, as an alternative to damages for expectation loss, a plaintiff who is entitled to a remedy for repudiation may recover "[p]erformance-based damages" measured by "the market value of the plaintiff's uncompensated contractual performance, not exceeding the price of such performance as determined by reference to the parties' agreement"[162]. Of some consolation, given the close division in this Court, is the reporter's note that the subject-matter of the rule is "one of the most controversial topics under the name 'restitution'" [163].

Conclusion

108. For these reasons, I agree with the orders proposed by Nettle, Gordon and Edelman JJ.

109. NETTLE, GORDON AND EDELMAN JJ. This is an appeal from a decision of the Court of Appeal of the Supreme Court of Victoria (Kyrou, McLeish and Hargrave JJA)[164]. The essential questions are whether remuneration for work and labour done by the respondent for the appellants under a domestic building contract, before the contract was terminated by the respondent's

acceptance of the appellants' repudiation, is recoverable by the respondent under the contract or, alternatively, as restitution for unjust enrichment and, if the latter, whether the contract limits the amount of restitution that may be awarded.

110. For the reasons which follow, insofar as the work and labour done was work and labour done in response to a requested variation within the meaning of s 38 of the *Domestic Building Contracts Act 1995* (Vic) ("the DBC Act"), any amount of remuneration must be determined in accordance with ss 38 and 39 of the DBC Act. Insofar as the work and labour done, not being variations, comprised completed stages of the contract as defined in the contract, the amount of remuneration payable is essentially that which is prescribed by the contract for those stages, and any damages for breach of contract are to be calculated accordingly. Insofar, however, as any of the work and labour done, not being variations, comprised part of a stage of the contract that had not been completed at the time of termination, the respondent is entitled, at its option, to damages for breach of contract or restitution, but the amount of restitution should be limited in accordance with the rates prescribed by the contract.

The facts

111. On 4 March 2014, the appellants entered into a Master Builders Association Form HC-6 (Edition 1 - 2007) "major domestic building contract"**[165]** with the respondent for the construction by the respondent of two double-storey townhouses ("the Units") on the appellants' land in Blackburn, Victoria ("the Works"), at a fixed price of $971,000 (including GST) ("the Contract").

112. The Contract was "[p]repared in accordance with" the DBC Act, and cl 25.7 stated that the Contract would "in all respects be governed by and construed in accordance with the laws that apply in the State of Victoria".

113. Clause 11.8 of the Contract provided that:

"The **Owner** will make **Progress Payments** to the **Builder** in accordance with the agreed and completed Progress Payments Table as set out in Item 23 of the **Appendix**."

114. Item 23 of the Appendix was as follows:

Contract to build through to all stages	5%	$48,550.00	**Deposit**
	10%	$97,100.00	**Base Stage**
	15%	$145,650.00	**Frame Stage**
	35%	$339,850.00	**Lock up Stage**
	25%	$242,750.00	**Fixing Stage**
	10%	$97,100.00	**Final Payment** Upon **Completion**
	= 100%	$971,000.00	**Total**

115. Clause 12.1 of the Contract provided that:

"If the **Owner** wishes to vary the **Plans**, or **Specifications** then the **Owner** will give to the **Builder** a written notice describing the variation requested."

116. Clause 12.2 of the Contract provided in substance that the Builder was not required to carry out any requested variation but that, if the Builder reasonably believed that the requested variation would not require an amendment to any permit, cause any delay in reaching Completion (as defined), and add any more than 2% to the Original Contract Price (as defined), the Builder might at its discretion carry out the variation.

117. Clause 12.3 of the Contract provided in substance that, if the Builder reasonably believed that the requested variation would require an amendment to any permit, cause any delay in reaching Completion, or add any more than 2% to the Original Contract Price, the Builder would give a written notice to the Owner stating that the Builder refused or was unable to carry out the requested variation or, alternatively, stating the effect the variation would have on the Works, whether or not an amendment to any permit would be required, a reasonable estimate of any delay in reaching Completion, the cost of the variation, and the effect of that cost on the Contract Price.

118. Clause 12.4 of the Contract provided in substance that the Builder would not commence any variation requested by the Owner unless either the Owner had given the Builder a written request for the variation, which was to be attached to the notice required to be given by the Builder under cl 12.3, or the following condition was satisfied:

"the **Builder** reasonably believes that the variation requested by the **Owner**:

(i) will not require any amendment to any permit; AND

(ii) will not cause any delay in reaching **Completion**; AND

(iii) will not add more than 2% to the **Original Contract Price**."

119. Clause 12.8 of the Contract provided, so far as is relevant, that:

"Whenever the **Builder** has, under Clause 12.4 ..., accepted an obligation to carry out a variation then the **Owner** hereby agrees to PAY to the **Builder**:

• the agreed variation price

OR

if the variation falls within clause 12.2 and no price had been agreed for the variation, the documented cost of carrying out the variation plus 15% of that cost for the **Builder's** margin

LESS

any deposit that the **Owner** may have already paid in respect of that variation under Clause 12.6.

> The **Builder** may include in its payment claims amounts of money in respect of all additional work completed [and related materials and services provided] to the date of the claim."

120. During the course of the Contract, the appellants orally requested 42 variations – 11 in relation to the front Unit ("Unit one") and 31 in relation to the back Unit ("Unit two") – without giving any written notice in accordance with cl 12.1. None of those variations added more than 2% to the Original Contract Price. The respondent carried them out without giving written notice under cl 12.4.

121. A certificate of occupancy for Unit one issued on 3 March 2015, and on 18 or 19 March 2015 the appellants made what was described as the "final payment" in respect of that Unit. As has been seen, the Contract made no provision for a final progress payment in respect of Unit one as such, but rather only in respect of both Units – the Works – as an aggregate whole. It is not apparent from the proceedings below whether what was described as the "final payment" in respect of Unit one was sought and paid pursuant to a variation of the Contract or explicitly or implicitly on account of one or more of the progress payments provided for in the Contract.

122. At or about the time of handover of Unit one, the respondent informed the appellants that there was an amount in excess of $48,000 due to be paid for the extensive variations which they had requested to Unit one. The appellants replied: "We'll see about that".

123. On or about 17 March 2015, the respondent raised an undated invoice claiming variations and/or extras in the sum of $48,844.92 in respect of Unit one. There were no attached invoices, accounts or other documents in support of the claim.

124. On 16 April 2015, the appellants' solicitors wrote to the respondent's solicitors alleging that on or about 16 February 2015 the respondent had advised the appellants that it would not continue carrying out the Works until its claim for variations in respect of Unit one was paid; that the respondent had purported to raise the invoice of 17 March 2015 "in breach of clauses 12 and 13 of the [Contract] and contrary to the requirements of sections 37 and/or 38 of the [DBC Act]" (and without providing relevant invoices and other supporting documentation in support of the claim); and that the respondent had committed further identified breaches of the Contract, which, in combination, were said to amount to a repudiation of the Contract, which the appellants accepted.

125. On 22 April 2015, the respondent's solicitors replied denying that the respondent had repudiated the Contract; alleging in the alternative that any repudiation had been waived; and observing that it was not apparent why the respondent's request to be paid for variations was in any way repudiatory.

126. On 28 April 2015, the appellants' solicitors wrote again, presumably maintaining their position that the respondent had repudiated the Contract, which repudiation the appellants had accepted. On the same day, the respondent's solicitors replied that the appellants' purported determination of the Contract was itself repudiatory; that the respondent accepted their repudiation of the Contract; and that the respondent might institute "proceedings seeking damages against your clients for breach of the contract or for restitution on a quantum meruit basis".

Relevant statutory provisions

127. Section 1 of the DBC Act provides in substance that the "main purposes" of the DBC Act are to regulate contracts for carrying out domestic building work, provide for the resolution of domestic building disputes by the Victorian Civil and Administrative Tribunal ("VCAT"), and require builders carrying out domestic building work to be insured.

128. Section 3(1) defines a "domestic building contract" as "a contract to carry out, or to arrange or manage the carrying out of, domestic building work other than a contract between a builder and a

sub-contractor", and defines a "major domestic building contract" as "a domestic building contract in which the contract price for the carrying out of domestic building work is more than $5000 (or any higher amount fixed by the regulations)". Perforce of ss 3(1) and 5, "domestic building work" includes, and the DBC Act applies, inter alia, to, the construction of a home.

129. Section 4 provides, inter alia, that one of the "objects" of the DBC Act is to enable domestic building work disputes to be resolved as quickly, efficiently and cheaply as possible having regard to the needs of fairness.

130. Section 16(1) provides that a "builder who enters into a domestic building contract must not demand, recover or retain from the building owner an amount of money under the contract in excess of the contract price unless authorised to do so by this Act", under pain of 100 penalty units. Section 16(2) stipulates, however, that s 16(1):

"does not apply to any amount that is demanded, recovered or retained in respect of the contract as a result of a cause of action the builder may have that does not involve a claim made under the contract."

131. Section 27(1) provides in substance that a domestic building dispute exists between a builder and the building owner if the latter fails to pay the builder any amount due to the builder under a domestic building contract by the date it is due. Section 27(2) provides, however, that a building owner may still dispute any matter relating to work carried out under a domestic building contract notwithstanding having paid for the work.

132. So far as is relevant, s 38 provides that:

"Variation of plans or specifications – by building owner

> (1) A building owner who wishes to vary the plans or specifications set out in a major domestic building contract must give the builder a notice outlining the variation the building owner wishes to make.
>
> (2) If the builder reasonably believes the variation will not require a variation to any permit and will not cause any delay and will not add more than 2% to the original contract price stated in the contract, the builder may carry out the variation.
>
> (3) In any other case, the builder must give the building owner either –
>
> (a) a notice that –
>
> (i) states what effect the variation will have on the work as a whole being carried out under the contract and whether a variation to any permit will be required; and
>
> (ii) if the variation will result in any delays, states the builder's reasonable estimate as to how long those delays will be; and
>
> (iii) states the cost of the variation and the effect it will have on the contract price; or

(b) a notice that states that the builder refuses, or is unable, to carry out the variation and that states the reason for the refusal or inability.

...

(5) A builder must not give effect to any variation asked for by a building owner unless –

(a) the building owner gives the builder a signed request for the variation attached to a copy of the notice required by subsection (3)(a); or

(b) subsection (2) applies.

(6) A builder is not entitled to recover any money in respect of a variation asked for by a building owner unless –

(a) the builder has complied with this section; or

(b) [VCAT] is satisfied –

(i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of paragraph (a); and

(ii) that it would not be unfair to the building owner for the builder to recover the money.

(7) If subsection (6) applies, the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit.

(8) This section does not apply to contractual terms dealing with prime cost items or provisional sums."

133. Section 53 provides, so far as is relevant, that VCAT "may make any order it considers fair to resolve a domestic building dispute" and, without limiting that power, that VCAT may:

"order the payment of a sum of money –

(i) found to be owing by one party to another party;

(ii) by way of damages (including exemplary damages and damages in the nature of interest);

(iii) by way of restitution".

134. Section 132(1), in effect, prohibits parties to a domestic building contract from contracting out of the DBC Act. However, under s 132(2), parties may include terms in the contract that impose greater

or more onerous obligations on a builder than are imposed by the DBC Act.

Proceedings at first instance

135. On 25 June 2015, the respondent instituted a proceeding in VCAT seeking the following relief:

(a) damages in the sum of $446,770.18, including claims for variations in the amount of $231,515.16 for both Units and prime cost adjustments in the amount of $176,877.54; or

(b) alternatively, a balance of moneys for work and labour done and materials provided up to the date of termination in the amount of $518,597.97.

136. By updated particulars of damage filed on 1 August 2016, the respondent amended its claim for the balance of moneys for work and labour done from $518,597.97 to $944,898 (the latter being based on the interim report of a quantity surveyor and registered builder retained by the respondent, who assessed the total value of work and labour done under the contract to be $1,898,673, which, after deduction of payments already made under the contract, yielded the balance of $944,898).

137. After a hearing extending over some 20 sitting days and including an on-site inspection and evidence by 11 expert witnesses and 11 lay witnesses, VCAT (Senior Member Walker) found**[166]** that the appellants had wrongfully repudiated the contract and that the repudiation was accepted by the respondent on 28 April 2015 as bringing the contract to an end.

138. VCAT extracted**[167]** the following paragraph from the decision of the Court of Appeal of the Supreme Court of Victoria in *Sopov v Kane Constructions Pty Ltd [No 2]***[168]**:

"The right of a builder to sue on a quantum meruit following a repudiation of the contract has been part of the common law of Australia for more than a century. It is supported by decisions of intermediate courts of appeal in three States, all of which postdate *McDonald*[**[169]**] and two of which postdate *Pavey & Matthews*[**[170]**]. If that remedy is now to be declared to be unavailable as a matter of law, that is a step which the High Court alone can take."

Evidently on that basis, VCAT reasoned**[171]** as follows:

"Because of the conclusion that I have reached on the termination issue the Builder's claim for recovery on a quantum meruit basis is established and it is entitled to an amount that reflects the value of the benefit that it has conferred upon the Owners, which I think is the fair and reasonable value of its work. The assessment that I have to make is not the builder's entitlement according to the Contract but rather, the reasonable value of the work and materials the Owners have requested and the value of the benefit they have received from the Builder.

> Accordingly, it is unnecessary for me to determine whether section 38 or the equivalent provision in the Contract document applies. If I find that the work that was done was requested by the Owners, the Builder is entitled to its fair and reasonable value which might be quite different from the claim that it has made or what it might have been entitled to under the terms of the Contract. Consequently, in regard to each variation I only need to determine whether or not the work was requested and whether or not it has been included in the valuation that Mr Pitney has made."

139. In the result, VCAT held**[172]** that:

"The amount to be paid by the Owners of [sic] the Builder with respect to the benefit that it has conferred upon them is calculated as follows:

Value of the work assessed without defects	$1,722,611.00
less rectification of defects as above	$116,297.59
Value of the benefit conferred upon the Owners	$1,606,313.41
less net amount paid	$ 945,787.00
Amount due to the Builder	$ 660,526.41"

140. VCAT added**[173]**, as if it were not otherwise apparent, that:

"by succeeding in a claim for a quantum meruit, the Builder has recovered considerably more than it might have recovered had the claim been confined to the Contract".

The appeal to the Supreme Court of Victoria

141. The appellants sought leave to appeal to the Supreme Court of Victoria pursuant to s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic). By their proposed notice of appeal, the appellants advanced 13 questions of law and 17 grounds of appeal. At the outset of the hearing of the appeal, however, senior counsel for the appellants informed the primary judge (Cavanough J) that there were only "two underlying issues" involving alleged error of law on the part of VCAT: first, whether VCAT wrongly treated *Sopov v Kane* as establishing that a construction contract terminated by a party's acceptance of the other party's repudiation is "void *ab initio*" or, alternatively, erred because *Sopov v Kane* was wrongly decided; and, secondly and consequently, whether VCAT had further erred in holding that, because the contract was avoided *ab initio*, s 38 of the DBC Act did not apply.

142. The primary judge determined**[174]** the first issue in favour of the respondent, on the basis that VCAT made no error in its interpretation of *Sopov v Kane* and that *Sopov v Kane* "is, according to the High Court, the 'prevailing authority' for working out the amount which the builder is able to claim in restitution (as an alternative to a claim for breach of contract)". His Honour's reference to the High Court was to the observation in *Southern Han Breakfast Point Pty Ltd (In liq) v Lewence Construction Pty Ltd***[175]** that the *Building and Construction Industry Security of Payment Act 1999* (NSW) is not "concerned to provide security for payment of an amount which, according to prevailing authority, might be claimed as an alternative to damages by way of restitution for work carried out (or goods and services supplied) in the event of the construction contract terminating on acceptance of repudiation". His Honour also referred**[176]** to the refusal of special leave to appeal from the Court of Appeal's decision in *Sopov v Kane***[177]**.

143. The primary judge determined**[178]** the second issue in favour of the respondent, on four bases:

(1) that the DBC Act does not define "variation" but, as it appeared to his Honour, the "relevant context of the word in the [DBC Act] tends to favour the meaning of a change in the terms of the contract rather than a change in the work";

(2) that, although "[i]t is plainly open to a Parliament to regulate what may or may not be recovered by way of a claim in restitution in relation to building work", upon its proper construction s 38 does not do so, for several reasons, principally that it relates to the recovery of "any money in respect of a

variation", rather than for "the cost of any work performed or materials supplied under the variation" (as the previous Act had done**[179]**);

(3) that, as it appeared to his Honour, s 16(2) of the DBC Act contemplates a builder being awarded a sum of money in excess of the contract price pursuant to an extra-contractual cause of action, such as a restitutionary claim; and

(4) that "it was confirmed in *Sopov v Kane* ... that, in Australia, the entitlement of a builder to sue on a *quantum meruit* rather than for contractual damages was 'too well settled by authority to be shaken'".

144. In the result, the primary judge granted leave to appeal, and allowed the appeal for the limited purpose of correcting a minor mathematical error in VCAT's orders, but otherwise dismissed the appeal.

The appeal to the Court of Appeal

145. The appellants sought leave to appeal to the Court of Appeal on four grounds, in substance as follows:

(1) that the primary judge erred in holding that VCAT applied correct legal principle in proceeding on the basis that, where a building contract is terminated by a builder by acceptance of the owner's repudiation of the contract, the contract is avoided *ab initio*, without having regard to the cost actually incurred by the respondent in carrying out the building contract or the discrepancy between the amount awarded and the contract price (Ground 1);

(2) that the primary judge erred in holding that VCAT was legally permitted to conclude that, where a building contract is terminated by a builder by acceptance of the owner's repudiation of the contract, the builder is entitled at law to sue for restitution as upon a *quantum meruit* for work and labour done, rather than being confined to a remedy in damages for breach of contract (Ground 2); and

(3) that the primary judge erred in holding that s 38 of the DBC Act did not bar the respondent's claim for restitution as upon a *quantum meruit* for variations (Grounds 3 and 4).

146. The Court of Appeal refused leave to appeal on Ground 2, granted leave to appeal on Grounds 1, 3 and 4, and dismissed the appeal. As to Grounds 1 and 2, their Honours found**[180]** no error in VCAT's method of assessment of reasonable remuneration, observing in effect that only this Court could determine that *Sopov v Kane* was wrongly decided, given that the Court of Appeal in that decision had followed the decision of the Privy Council in *Lodder v Slowey***[181]** and the Court of Appeal of the Supreme Court of New South Wales in *Renard Constructions (ME) Pty Ltd v Minister for Public Works***[182]**; that this Court had refused special leave to appeal in both *Renard Constructions* and *Sopov v Kane*; that *Sopov v Kane* had been followed by the Court of Appeal of the Supreme Court of Queensland in *Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd***[183]**; and that this Court in *Southern Han* had footnoted *Sopov v Kane* as "prevailing authority". Further, their Honours held**[184]** that, as VCAT found that the scope of work performed by the respondent substantially differed from the scope of work in the Contract, VCAT was justified in not relying on the Contract Price in assessing the *quantum meruit* amount.

147. In rejecting Grounds 3 and 4, their Honours accepted**[185]** that:

"where a builder carries out a variation to the building work at the request of an owner, s 38 has the following effect:

(a) If the builder has complied with the notice requirements of s 38, the builder is entitled to recover the agreed contractual price for a variation.

(b) If the builder has not complied with the notice requirements of s 38 but s 38(2) or s 38(6)(b) applies, s 38(6) does not 'apply' within the meaning of s 38(7) and:

(i) if the parties have agreed to a contractual price for a variation, the builder is entitled to recover the agreed price;

(ii) but if the parties have not agreed to a contractual price for a variation, the builder is not entitled to recover on the 'cost plus profit' basis in s 38(7).

(c) If the builder has not complied with the notice requirements of s 38 and neither s 38(2) nor s 38(6)(b) applies, s 38(6) 'applies' within the meaning of s 38(7), and so the builder is entitled to recover on the 'cost plus profit' basis in s 38(7), and not under the contract, irrespective of whether the parties have agreed to a contractual price for a variation."

148. Their Honours reasoned**[186]**, however, that, because the right of a builder to sue for restitution as upon a *quantum meruit* as an alternative to an action for damages "seeks to achieve an equitable outcome by ensuring that the builder receives a fair and reasonable amount for the benefit the builder has conferred", and because, in their Honours' view, there is nothing in the text, purpose or legislative history of s 38 which requires that it be construed as extending to claims in *quantum meruit*, the principle of legality strongly favours a construction which does not exclude the restitutionary remedy. They added**[187]** that:

"Moreover, if claims in quantum meruit were excluded by the section, an anomalous result would follow. In the situation where the prohibition in s 38(6) applies but no contractual price has been agreed for the variation, s 38(7) is not attracted, for the reasons explained above. No part of s 38 would fill the gap by giving the builder an entitlement to payment. Accordingly, if claims in quantum meruit are within the scope of s 38(6), a builder in that situation could recover nothing at all. There is no apparent reason why the provision would pursue that objective, and no language suggesting such an outcome. The construction of s 38 that we have adopted would enable a builder to recover payment for a variation on a quantum meruit basis in the situation postulated above."

The appeal to this Court

149. By grant of special leave, the appellants appeal to this Court on three grounds, being in substance:

(1) the Court of Appeal erred in holding that the respondent was entitled, after accepting the appellants' repudiation of the contract, to recover in restitution as upon a *quantum meruit* rather than being confined to a claim in damages for breach of contract (Ground 1);

(2) alternatively, if the respondent were entitled to claim in restitution as upon a *quantum meruit*, the Court of Appeal erred in failing to hold that the contract price operated as a ceiling on the sum recoverable as such (Ground 2);

(3) the Court of Appeal erred in holding that s 38 of the DBC Act does not apply to a claim for restitution as upon a *quantum meruit* in respect of variations (Ground 3).

A matter of nomenclature

150. As Professor John Chipman Gray once said, although people "are very ready to accept new ideas, provided they bear old names", a "loose vocabulary is a fruitful mother of evils"**[188]**. The issues on this appeal, as at first instance and before the Court of Appeal, were described in terms of "*quantum meruit*", sometimes on the assumption that the phrase identifies a species of restitution for unjust enrichment. But 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. To plead a claim today merely by reference to that language of the form of action tells a lawyer very little, and a layperson nothing at all, as to (i) whether the cause of action is one to enforce the contract, seeking payment of a reasonable price implied into the contract**[189]**, (ii) whether it is an asserted claim for a restitutionary remedy for breach of contract**[190]**, or (iii) whether it is a remedy arising by operation of law in that category of actions concerned with restitution in the category of unjust enrichment. This litigation has only ever been concerned with the final category.

Application of s 38 of the DBC Act to variations

151. It is convenient, however, to begin with Ground 3, the application of s 38 of the DBC Act to the respondent's claim for restitution as upon a *quantum meruit* in respect of variations.

152. As was earlier noticed, s 38(1) requires a building owner who wishes to vary the plans or specifications set out in a major domestic building contract to give the builder a notice outlining the variation proposed. Unlike some other provisions of the DBC Act, such as s 34(2), s 38(1) does not expressly stipulate that the notice must be in writing. But it is apparent from the text, context and purpose of s 38 that "a notice" means a notice in writing.

153. Textually, s 38(1) refers to "*a notice*" – as opposed simply to "*notice*" – the former being more naturally and ordinarily suggestive of a notice in tangible form, and the latter more appropriate for a notice that may be given orally**[191]**. Contextually, s 37(1) stipulates that a builder who wishes to vary the plans or specifications set out in a major domestic building contract "must give the building owner *a* notice" describing the proposed variations; and, when read in conjunction with s 37(2)(a) – which refers to the building owner giving the builder "a signed consent to the variation *attached* to a *copy* of *the* notice required by subsection (1)" – it is apparent that "*a* notice" in s 37(1) means a notice in writing. Section 38 then provides for owner-initiated variations in substantially identical form to the manner in which s 37 provides for builder-initiated variations; and, since the pattern of s 38 is, by design, functionally identical to the pattern of s 37, it is apparent that "*a* notice" in s 38 is intended to have the same meaning it has in s 37, namely a notice in writing**[192]**. That conclusion is fortified by the consideration that one of the principal objects of the DBC Act, as set out in s 4, is to enable domestic building disputes to be resolved as quickly, efficiently and cheaply as possible**[193]**. And it is also consistent with the legislative intention as stated**[194]** in the Explanatory Memorandum to the Bill which introduced the DBC Act:

"*Clause* 38 requires a building owner who seeks a variation to the plans or specifications set out in a major domestic building contract to give the builder *written* notice of the proposed variation. The

builder must then give the building owner a written notice indicating the overall effect of the proposed variation ... The builder is not required to give this notification if he reasonably believes the variation will not cause delay and will not add more than 2% to the contract price ... A builder cannot recover any money in relation to the building owner-requested variations unless this provision is complied with or the Tribunal orders as for clause 37. The provision does not apply to prime cost items or provisional sums."

154. As will be recalled, s 38(5) prohibits a builder from giving effect to any owner-initiated variation unless the building owner has given a signed request attached to a copy of the notice required by s 38(3)(a). And s 38(6) of the DBC Act provides that a builder is not entitled to recover "any money" in respect of a variation asked for by a building owner (other than for prime cost items and by way of provisional sums**[195]**), unless either the builder has complied with "this section" or VCAT is satisfied of the matters prescribed by s 38(6)(b).

155. Given the terms of s 38(5), the requirement in s 38(6) for the builder to have complied with "this section" is met only if:

(a) the owner has given the builder a notice in writing in accordance with s 38(1) and the builder has complied with s 38(3) by giving the owner a notice in writing in accordance with s 38(3)(a) within the reasonable time prescribed by s 38(4); *or*

(b) the owner has given the builder a notice in writing in accordance with s 38(1) and the builder satisfies the requirements of s 38(2) in that the builder reasonably believes the variation will not require variation to a permit, cause any delay or add more than 2% to the original contract price stated in the contract.

If one or other of those conditions is satisfied, and the plans or specifications are so varied, s 39(b) provides that the contract price is taken to be the price as adjusted to take account of the variation.

156. By contrast, if neither condition is satisfied, then, perforce of s 38(6)(b), the builder is not entitled to recover any money in respect of an owner-initiated variation (other than for prime cost items and by way of provisional sums) unless VCAT is satisfied:

(i) that there are exceptional circumstances *or* that the builder would suffer a significant or exceptional hardship by reason of the builder's failure to comply with s 38 in either of the two respects mentioned above; *and*

(ii) that it would *not* be unfair to the building owner for the builder to recover the money.

If VCAT is so satisfied, then s 38(7) has the effect that the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit.

157. The apparent purpose and legislative effect of these provisions is that a builder shall not be permitted to recover any money in respect of owner-initiated variations (other than for prime cost items and by way of provisional sums) except in accordance with these provisions. As such, they function as protective provisions**[196]**, designed to prevent the kinds of problems likely to arise where domestic building contract variations are dealt with informally, as by oral request by an owner for a variation and compliance by the builder without first agreeing with the owner on the price and other consequences of giving effect to the variation; in particular, to avoid the surprises and consequent disputation likely to arise where plans and specifications under a major domestic building contract are varied without the degree of formality mandated by s 38(1) and (2) or (3). Hence, subject to only one

exception, they prohibit a builder recovering any money in respect of owner-initiated variations unless the required degree of formality has been observed. The one exception reflects a legislative recognition that there can sometimes be instances of non-compliance which are in themselves exceptional or would result in the builder suffering exceptional hardship and in which it is not unfair to require the owner to pay a reasonable recompense for the variation, namely, the cost of the variation and a reasonable profit margin in accordance with s 38(7).

158. The respondent submitted, in effect, that the DBC Act draws a distinction between building *contracts* and building *works* and expressly preserves remedies in respect of the latter "by way of restitution". Counsel for the respondent referred to ss 16 and 53 of the DBC Act and invoked the principle of legality in support of that submission. The submission must be rejected. Neither s 16 nor s 53 of the DBC Act supports an argument of that generality. Whether or not s 16(2) envisages claims in restitution for work performed under a major domestic building contract – and, for present purposes, that is not a question that needs to be decided – relevantly its only effect is as an exception to the prohibition in s 16(1) against a builder recovering more under a domestic building contract than is allowed by the contract or otherwise by the Act. It does not in terms or effect in any way suggest a qualification of the explicit operation of s 38(5)**[197]**. Similarly, the power which s 53 of the DBC Act confers on VCAT to make such order as VCAT considers fair to resolve a domestic building dispute, including an order for restitution, is a general power which of necessity operates subject to more specific express and implied limitations, and s 38 is a specific provision that specifically limits the amounts which may be recovered for variations**[198]**. By their text, context and purpose, ss 37 and 38 reflect a legislative intent to cover the field of the remuneration payable to builders for work and labour done in response to requested variations under major domestic building contracts. To permit any alternative form of recovery for work under such a variation – whether contractual or restitutionary and including pursuant to s 16 or s 53 – would have the effect of frustrating or defeating, or at least operating inconsistently with, that intent**[199]**.

159. Nor does the principle of legality gainsay that. Although, as the respondent contended, it requires a clear indication of intent to conclude that legislation abrogates common law rights**[200]**, with the required clarity increasing the more that the rights are "fundamental"**[201]** or "important" **[202]**, the indications here are sufficient to abrogate any contractual or restitutionary rights. The prohibition applies in terms to recovery of *any* money "in respect of" a variation. That is an expression of wide connotation**[203]**, which, in the context in which it appears, should be taken to mean what it says. It prohibits the recovery of *any* money, and that means the recovery of *any* money whether under contract or in restitution. It may be, as the primary judge observed and the respondent contended, that other expressions could have been used to convey the same sense still more pellucidly. But the fact that such other expressions were not selected does not suggest an absence of legislative intent to achieve the result of prohibiting the recovery of any money**[204]**.

160. Upon the proper construction of these provisions, they exclude the availability of restitutionary relief for variations implemented otherwise than in accordance with s 38. In the event of failure to comply with the requirements of either s 38(1) and (3) or s 38(1) and (2), a builder's only right of recovery for variations under a domestic building contract is under s 38(6)(b) (if VCAT is satisfied of the matters for which it provides) for the amounts prescribed by s 38(7).

161. Here, there was no compliance with s 38(1) or (3), and, because there was no compliance with s 38(1), there could not be compliance with s 38(2)**[205]**. For the same reason, cl 12.2 of the Contract was not engaged. Possibly, the respondent could have satisfied VCAT of the matters referred to in s 38(6)(b). But 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 Ground 3 should be upheld and that the matter should be remitted to VCAT for further determination of the amounts, if any, payable in respect of variations.

Recovery of restitution as an alternative to contractual remedies

162. As s 38 has no application to that part of the respondent's claim that was not in respect of variations, it is next necessary to determine whether the respondent was entitled to recover restitution for a cause of action in the category of unjust enrichment (rather than for amounts due under the contract or damages for breach of contract) in relation to those aspects of its claim which were for work and labour done otherwise than in response to requested variations within the meaning of s 38.
163. As was earlier mentioned**[206]**, s 53 of the DBC Act conferred power on VCAT to make any order it considered fair and reasonable to resolve the domestic building dispute between the respondent and the appellants, including an order for payment of a sum of money by way of restitution. VCAT ordered that the appellants pay the respondent restitution as upon a *quantum meruit*. Presumably, VCAT did so in reliance on s 53. But it was not open to VCAT to regard it as fair and reasonable to make a restitutionary order in the circumstances unless restitution would have been available at law**[207]**. The question is whether it would have been.

(i) Restitution upon termination for breach

164. Where a contract remains "open" – that is, "not discharged"**[208]** – there is generally "neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration"**[209]**. Such an obligation or promise "would be either inconsistent with the contract or ... would duplicate the contractual obligation"**[210]**. But the position at law for contracts that are "closed", including, relevantly, those terminated for repudiation, is different.
165. At least since the decision of Dixon J in *McDonald v Dennys Lascelles Ltd*, it has been accepted that, where a party to a contract elects to accept the other party's repudiation of the contract, both parties are released from contractual obligations which are not yet due for performance, but existing rights and causes of action continue unaffected**[211]**. Dixon J explained**[212]** the position thus:

"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 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**[213]**." (emphasis added)

166. As the law stands in Australia, as it does in England, New Zealand, Canada and the United States, upon termination for repudiation of an uncompleted contract containing an entire obligation (or, as will be seen, divisible stages) for work and labour done, the innocent party may sue either for

damages for breach of contract or, at the innocent party's option, for restitution in respect of the value of services rendered under the contract[214].

167. The availability of restitution, and the form of restitutionary remedy awarded, will depend on the type of enrichment alleged[215]. Generally speaking, a personal restitutionary remedy will be assessed as money had and received where the alleged enrichment is the receipt of money; it will be assessed as upon a *quantum meruit* where the alleged enrichment is the receipt of services; and it will be assessed as upon a *quantum valebant* where the alleged enrichment is the receipt of goods. Where the alleged enrichment takes more than one form, such as the provision of money and services to a party, the other party is entitled to the money paid together with a reasonable sum for the services, subject, of course, to prohibitions against double recovery[216].

168. The "qualifying or vitiating"[217] factor giving rise to a prima facie obligation on the part of the enriched party to make restitution is a total failure of consideration, or a total failure of a severable part of the consideration[218]. In this context, consideration means the matter considered in forming the decision to do the act: "the state of affairs contemplated as the basis or reason for the payment" [219]. In many cases the relevant basis will be the benefit that is bargained for. In those cases, "[t]he test is whether or not the party claiming total failure of consideration has in fact received any part of the benefit bargained for under the contract or purported contract"[220].

169. More specifically, a total failure of consideration for work done exists by reason of the termination of a contract for breach where the basis on which the work was done has failed to materialise or sustain itself[221], and the total failure of consideration is seen as the occasion and part of the circumstances giving rise to the other party's obligation to make restitution to the extent of the fair value of that work[222]. It is for that reason that no such obligation can arise while the obligation under which the benefit was conferred and accepted remains enforceable, open and capable of performance[223].

170. Where a contractor is only entitled to receive remuneration if the contract is wholly carried into effect, and the other party's wrongful repudiation of the contract has the effect of preventing the contractor from becoming entitled to receive remuneration for services already rendered, the contractor may, after electing to treat the contract as at an end, maintain an action to recover restitution as upon a *quantum meruit* for those services, instead of suing for damages[224].

171. An illustration is provided by *Automatic Fire Sprinklers Pty Ltd v Watson*, in the context of employment contracts. Latham CJ and Starke J each held[225] that, where an employee is bound by contract, the terms of which are such that the employee is not entitled to claim any remuneration unless he or she serves for a specified period, and the employer wrongfully dismisses the employee before the latter becomes entitled to be paid wages, the employee is not entitled to any remuneration under the employment contract because he or she has not earned it in accordance with the contract terms. If the employment contract is no longer open, however – that is, if the employee has exercised his or her right to accept the employer's repudiation as discharging the contract – the employee may elect between two remedies: the employee may claim damages for the loss sustained as a result of the wrongful dismissal *or* the employee may claim for restitution as upon a *quantum meruit* for the value of the work done[226].

(ii) Entire obligations and divisible obligations

172. It follows from what has been said that, 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"[227]), 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

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**[228]** assessed by reference to the contract price less the cost of completing the work**[229]**.

173. 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**[230]**. 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**[231]**, 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"**[232]** 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.

174. 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**[233]**; (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**[234]**.

175. 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**[235]**.

176. 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**[236]**. 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.

177. In this matter, it is apparent from the manner in which the Contract expressly provided for stages, and specified that progress payments were payable upon completion of each stage, that the obligation of performance under the Contract was divisible. Accordingly, for the reasons stated, the respondent's right to recovery in respect of the completed stages (other than for variations) was limited to the amount due under the Contract on completion of those stages or damages for breach of contract, and the respondent's right to recovery in respect of the uncompleted stages (other than for variations) was restricted to restitution for work and labour done in respect of those stages or damages for breach of contract.

178. As the matter stands, it is not entirely clear which stages had been completed. Given the terms of VCAT's decision, it appears not unlikely that all stages up to and including the Lock up Stage had been completed in relation to both Units, and it may be inferred from the fact that a final payment claim in relation to Unit one was made and paid before termination that Unit one had been completed. But according to the terms of the Contract, the stages as described in the Contract relate to the total development comprised of the two Units, and it is not suggested that there are means within the Contract for apportioning the progress payments as between the two Units. For that reason, although a final progress payment for Unit one was claimed and paid prior to termination, it is not apparent whether what was described as the final payment in respect of Unit one was sought and paid pursuant to a variation of the Contract or explicitly or implicitly on account of one or more of the progress payments for which the Contract provided. It is another question which will need to be investigated upon remitter of the matter to VCAT.

179. What can be said for present purposes, however, is that, as matters stand, it appears that there was at least one stage as specified in the Contract which was *not* complete as at the time of termination. If so, the respondent may have a claim for restitution of the value of work and labour done towards completion of that stage. But, to repeat, to the extent that there were stages which had been completed at the time of termination, so that the right to progress payments payable in respect of those stages had accrued, the respondent had *no* right to restitution in respect of work comprised in those stages. The respondent's rights of recovery in respect of those stages are limited to the respondent's rights under the Contract for the progress payments payable in respect of those stages or damages for breach of contract.

(iii) History of restitutionary relief

180. The appellants contended that the body of authority which stands in support of the current state of the law derives from an historical misconception that acceptance of a repudiation operated to rescind the contract *ab initio* and thereby divest rights earlier accrued under the contract**[237]**. In the appellants' submission, now that it is understood that such a contract is terminated only *de futuro*, cases such as *Sopov v Kane* should be seen as wrongly decided or at least as no longer to be followed. In the appellants' submission, logic and a proper appreciation of principle require that, in such a case, the innocent party should be limited to its rights to amounts due under the contract, and damages for breach of contract.

181. The modern claim for restitution of the value of work and labour done derives from the common count of *quantum meruit*. In order to appreciate the significance of the appellants' contention, it is necessary, therefore, to understand a little of the history of the remedy**[238]**.

182. 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*)[239]. But, apparently upon the fiction that such remuneration was "a sum certain, quantified by reason or desert"[240], such obligations came to be enforced by the writ of debt[241] 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*)[242]. 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*[243].

183. 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*)[244]. But this development was hindered by the decision in *Cutter v Powell*, which in effect proceeded from the "axiom" that "where the parties have come to an express contract none can be *implied*" to the contestable conclusion that a contract for payment of a specific sum only upon completion of works precluded any obligation to pay reasonable remuneration – whether contractual *or quasi-contractual* – even where the recipient of work had repudiated the contract before the other party had had the opportunity to complete the work and qualify for payment[245].

184. In mitigation of the harshness to which that gave rise, shortly after *Cutter v Powell* was decided, Lord Kenyon CJ held[246] in *Giles v Edwards* that plaintiffs prevented from performance "by the defendant's default" had "a right to put an end to the whole contract and recover back the money that the plaintiffs had paid under it". Later, that reasoning was extended to goods supplied under a contract, Best CJ remarking[247] in *Mavor v Pyne* that "[i]f a man agrees to deliver me one hundred quarters of corn, and after I have received ten quarters, I decline taking any more, he is at all events entitled to recover against me the value of the ten that I have received".

185. Then, in *Planché v Colburn*[248], the Court of Common Pleas held that an author who had been engaged to write a treatise for a proposed publication for children to be called "The Juvenile Library" was entitled to sue for *quantum meruit* after the contract was "finally abandoned". Gaselee and Bosanquet JJ emphasised[249] the plaintiff's entitlement to remuneration for work done albeit never received by the publisher. Tindal CJ identified[250] "the question here" – "whether the contract remained in existence or not" – as having been decided by the jury's finding of abandonment.

186. As will be apparent, the ratio of *Planché v Colburn* was less than clear. Nonetheless, it was cited[251] in the second edition of *Smith's Leading Cases* as authority for a seemingly sole and general right of an innocent party in response to any repudiation of a contract "to elect to rescind" and, "on doing so, *immediately* sue on a *quantum meruit* for anything ... done ... previously to the rescision [sic]". That was something of an overstatement. But in the years which followed, it was uncritically cited and applied[252], usually by reference to *Planché v Colburn* and *Smith's Leading Cases*.

187. Three later developments in the law of contract initiated by *Hochster v De La Tour*[253] then further undermined the theoretical basis of the rule. They were the recognition of the implied obligation of cooperation[254] (now commonly described as the rule in *Mackay v Dick*[255]), the doctrine of anticipatory breach[256], and the development over time of the distinctions as now understood between the concepts of abandonment by consent, termination and rescission[257]. Seeking to accommodate those developments, the editors of the last edition of *Smith's Leading Cases* asseverated[258] that the innocent party to a repudiation was entitled *alternatively* to affirm the contract and demand performance, to terminate and sue for damages, *or* to rescind the contract *ab initio* and sue on a *quantum meruit*. But, less than a decade later, that third option was debased by the recognition in *McDonald* that termination for breach does not avoid a contract *ab initio*.

188. Contrary to the appellants' submissions, however, so to recognise does not mean that the availability of restitutionary relief for work performed under an entire obligation up to the point of termination (as an alternative to damages for breach of contract) should now be regarded as unprincipled. For although at the time of *Planché v Colburn* it was considered necessary that an express contract be avoided *ab initio* in order to imply the quasi-contractual obligation which grounded a claim in *indebitatus assumpsit* for work and labour done**[259]**, it is now recognised that restitutionary obligations are imposed by operation of law in response to circumstances including the retention of a benefit received on a basis which has totally failed to materialise**[260]**. Of course, as has been observed**[261]**, it is still the case that no such obligation can arise while the reciprocal obligation for which the benefit was conferred and accepted remains enforceable, open and capable of performance. But circumstances other than the unenforceability or avoidance of a contract *ab initio*, including frustration and termination, may provide the occasion for, and form part of the circumstances giving rise to, an obligation to pay what is reasonable.

189. The position which arises upon frustration of a contract is therefore instructive. Under the rule in *Taylor v Caldwell***[262]** it was once the law that, where an entire obligation to perform work and labour became impossible of performance before completion of the work, both parties were excused from further performance of the contract and neither party had any right of recovery in respect of that part of the work which had been completed or moneys paid in anticipation of its completion**[263]**. That changed with the decision of the House of Lords in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*, which recognised**[264]** that it is not necessary that the contract be "wiped out altogether" in order to attract restitutionary relief. As Viscount Simon LC stated, where moneys are paid to secure performance of a result, and performance becomes impossible, there is a total failure of consideration in respect of moneys paid because the inducement which brought about the payment is not fulfilled. The same applies to the frustration of a contract for the provision of services. There is a total failure of consideration for the provision of the services where "the state of affairs contemplated as the basis or reason for the [services] has failed to materialise or, if it did exist, has failed to sustain itself"**[265]**.

190. Principle, coherence and authority dictate that the position in relation to a contract terminated for repudiation be the same. Although it was once thought that the innocent party's right to recover reasonable remuneration for the work done up to the point of termination depended on the notion that termination avoided the contract *ab initio* – thereby leaving the way clear to imply a quasi-contractual obligation on the part of the other party to pay reasonable remuneration for that work – now it is recognised that there may be a total failure of consideration for the work so done because, by reason of the termination, the basis on which the work was done has failed to materialise or sustain itself, and that total failure of consideration is seen as the occasion and part of the circumstances giving rise to the other party's obligation to make restitution to the extent of the fair value of that work.

191. Admittedly, there is a difference between frustration and termination for breach, in that, in the case of frustration, the party who has undertaken work under the contract has no right to damages for breach of contract – there being no breach of contract involved in frustration – and is, therefore, without a remedy other than restitution; whereas, in the case of termination for breach, the innocent party has a right to sue for damages for breach of contract in theory sufficient to put him or her in the position in which he or she would have been if the contract had been performed**[266]**. On that basis, it has been contended that what applies to frustration cannot or should not be transposed to termination for breach**[267]**. There is also a great deal of academic writing which is similarly critical of the existence of a non-contractual remedy upon termination.

192. Essentially, the arguments against retention of the alternative restitutionary remedy conduce to two principal propositions. The first is that, where a contract is terminated for breach after the innocent party has partially completed the work for which the contract provides, the proper characterisation of the basis or condition on which the work was performed can only ever be the other party's promise to perform the contract (as opposed to the objective basis of the other party's performance of it), and, because the promise is enforceable by an action for damages, there is no failure of consideration**[268]**. The second is that, if it is correct to characterise the basis or condition on which the work has been undertaken as being the other party's performance of that party's contractual obligations (as opposed to being limited to that party's promise to perform them), the other party's failure to perform them yields a contractual remedy which is appropriate and adequate to put the innocent party in the position in which he or she would have been if the contract had been performed; and, therefore, there is no need or justification for the imposition of an alternative restitutionary remedy**[269]**.

193. The first proposition is at odds with long-accepted learning in England and in this country**[270]** and should be rejected. As Viscount Simon LC stated in *Fibrosa***[271]**:

"In English law, an enforceable contract may be formed by an exchange of a promise for a promise, or by the exchange of a promise for an act – I am excluding contracts under seal – and thus, in the law relating to the formation of contract, the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled.

If this were not so, there could never be any recovery of money, for failure of consideration, by the payer of the money in return for a promise of future performance, yet there are endless examples which show that money can be recovered, as for a complete failure of consideration, in cases where the promise was given but could not be fulfilled".

194. The first proposition should also be rejected for the reason that it is premised on a misconception that an obligation to pay damages for breach of contract is an obligation imposed by the contract as such, which reflects the bargain struck between the parties and which survives termination like a debt due under the contract.

195. Traditionally, the remedial obligation to pay damages for breach of contract has been understood as an obligation "arising by operation of law"**[272]**. Whether or not there is any role for the objective or manifested intention of the parties in ascertaining boundaries of liability in an award of damages**[273]**, the proposition that the award of damages is somehow a product of the agreement of the parties as an alternative to performance is not easily reconciled with several established notions at law and in equity, including the normative principles which govern the quantification of damages**[274]** and the grant of specific performance and injunctions on the basis that damages are an "inadequate" remedy**[275]**. The parties contract for performance, not damages. In short, as Windeyer J said, "[i]t is ... a faulty analysis of legal obligations to say that the law treats a promisor as having a right to elect either to perform his promise or to pay damages. Rather ... the promisee has 'a legal right to the performance of the contract'."**[276]**

196. The position is clearer still with respect to damages for anticipatory breach of contract. By itself, the repudiation of a contract does not entitle the innocent party to loss of bargain damages for anticipatory breach: the entitlement arises only, if at all, upon the innocent party's election to terminate

the contract[277], and the power of termination itself arises by operation of law, with the result that clear words are necessary to exclude it[278]. It follows, *a fortiori*, that the law, not the agreement of the parties, furnishes the obligation to pay damages consequent upon termination for breach. And that conclusion is only reinforced by authority to the effect that such damages are "available under the general law" upon termination for breach of a term fundamental in character, but "require very clear words" where the term is expressly deemed to be fundamental[279].

197. Much that has been written to the contrary proceeds from the Austinian philosophical distinction which Lord Diplock first drew between primary and secondary rights or obligations arising under a contract in *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association*[280], and to which his Lordship thereafter returned on 17 further occasions before his death in 1985[281]. It is true that, while sitting on the Court of Appeal, his Lordship described[282] the secondary obligation to pay damages for breach of contract as "consensual" and related it to an assumption of responsibility. But, in the House of Lords, he repeatedly affirmed that it is the law, not the agreement of the parties, which furnishes that obligation[283]. Notably, in *Moschi v Lep Air Services Ltd*, his Lordship posited[284] that an obligation to compensate in monetary terms "is substituted by operation of law" for the primary obligations. By then describing it as "just as much an obligation arising from the contract as are the primary obligations it replaces", his Lordship merely acknowledged that the contract remained the "source"[285] of that liability in damages, which liability for that reason was covered by a guarantee of obligations under a contract. Such reasoning in no way denies the concurrent existence of other obligations having a different source in law, including restitution for unjust enrichment. Later, in *Photo Production Ltd v Securicor Transport Ltd*, his Lordship observed[286] that "judicial consensus over the years", and occasionally "Parliament in passing a statute", had recognised obligations by reference to the perceived expectations of "reasonable businessmen". With respect, that is no doubt so, but the fact that courts have historically calculated damages on the basis of some such assumption is in no sense opposed to the conclusion that it is the law as opposed to the contract as such that imposes the obligation to pay damages for anticipatory breach of contract. Rather, it tends to confirm it. The rights to which Dixon J referred in *McDonald* as having "already been unconditionally acquired" before termination for breach are not to be conceived of as including an entitlement to damages for loss of bargain which arises only upon termination; and, once that is understood, it will be seen that it denies the possibility of any inconsistency "with the obligations relevant parties undertook by their contractual arrangements"[287]. In the end, the parties' consensual allocation of rights and obligations says nothing about the existence of concurrent remedies following termination for repudiation; "in the absence of ... agreement, the law must decide" [288].

198. Theoretically, the second proposition has more to commend it. Arguably, the latter-day developments of the implied contractual obligation of cooperation and the doctrine of anticipatory breach have so much ameliorated the injustice[289] which spawned the quasi-contractual remedy of *quantum meruit* for work and labour done that a restitutionary remedy is no longer necessary to alleviate the unjust enrichment of the recipient of the benefit of it. But the remedy is one of considerable practical value. A claim for restitution is a liquidated demand which, by contrast to an unliquidated claim for damages, may provide easier and quicker recovery including by way of summary judgment. And as Leeming JA observed in *Fistar v Riverwood Legion and Community Club Ltd*[290], "there is nothing foreign to the Australian legal system in a plaintiff having alternative claims arising out of the same facts"[291]. Further, as *United Australia Ltd v Barclays Bank Ltd* shows[292], the law has mechanisms for deciding when a plaintiff becomes committed to one rather than the other remedy. The doctrine of election between remedies sits in the wider framework of election and

inconsistency which Stephen J considered[293] in *Sargent v ASL Developments Ltd*. Coherence does not depend on singularity. Coherence can be, and often is, achieved through other mechanisms[294].

199. Moreover, as Gummow J was at pains to point out in *Roxborough v Rothmans of Pall Mall Australia Ltd*[295], ours is not a system in which the theory of unjust enrichment comes first and decisions must then be made to comply with it. It is a common law system of *stare decisis* that develops over time and through which general principle is derived from judicial decisions[296]. Unjust enrichment may be conceived of as a "unifying legal concept"[297] which serves a "taxonomical function"[298] that assists in understanding why the law recognises an obligation to make restitution in particular circumstances. But it is in no sense an all-embracing theory of restitutionary rights and remedies pursuant to which existing decisions are to be accepted or rejected by reference to the extent of their compliance with its proportions[299]. Consequently, where a doctrine of the common law has grown up over several centuries – as has the availability of restitutionary relief for work and labour done under a partially completed entire obligation following termination of a contract for breach – and the doctrine remains principled and coherent, widely accepted and applied in kindred jurisdictions, it can hardly be regarded as a sufficient basis to discard it that some of the conceptions which historically informed its gestation have since changed or developed over time[300]. Whatever doubts might remain about the theoretical underpinnings of the doctrine by reason of the problematic nature of its origins or subsequent developments in the law of contract, it is too late now for this Court unilaterally to abrogate the coherent rule simply in order to bring about what is said to be a greater sense of theoretical order to the range of common law remedies.

200. Admittedly, there is cause for concern about the potential for disparity between the amounts recoverable by way of restitution for work done under a contract which is terminated for breach and the amounts recoverable by way of damages for breach of contract. That phenomenon – alarmingly widespread in domestic building disputes of the kind in issue, as it appears – implies a need for development of the law in a manner which better accords to the distribution of risks for which provision has been made by contract. But, as will be explained, that is a problem which may be addressed with less far-reaching measures than abrogation of the rule of recovery and more consistently with the accepted techniques of common law development[301]. Ground 1 must be rejected.

The contract price as a limitation on the sum recoverable

201. Until about the turn of the twentieth century, the measure of restitutionary relief for work and labour done by an innocent party under an entire obligation in a contract terminated for repudiation was truly *quantum meruit* – the amount earned – and thus generally a *pro rata* proportion of the contract price[302]. By 1900, however, a practice seems to have emerged in some American jurisdictions of putting the question of assessment to the jury in the form of what the work and labour done was worth, which directed attention only to its reasonable value rather than the contract price[303].

202. That practice was followed at the trial in *Slowey v Lodder*[304], and, on appeal, the New Zealand Court of Appeal (whose decision was upheld by the Privy Council[305]) rejected an argument[306] that the jury's verdict was excessive because it was "not made up on the basis of the contract". The reasoning of the Court of Appeal is doubtful. Williams J approached[307] the matter on the basis that, because the contract was "rescinded", it was to be regarded as "abandoned" and thus as having no application to acts done and rights accrued up to the point of rescission. Conolly J exposed[308] some difficulties with the early authorities, principally *Planché v Colburn*, but, like

Williams J, did not fully address the leading authorities supporting the *pro rata* or contract measure. Nevertheless, *Lodder* gave rise to the notion, which has held sway since at least the last half of the twentieth century, that the amount recoverable upon a *quantum meruit* is the objective value of the work and labour done, usually measured by reference to the reasonable cost of performing it**[309]**. Such a method of quantification in effect equates the value of "the benefit or 'enrichment' actually or constructively accepted" by the defendant**[310]** with the benefit to the hypothetical willing but not anxious purchaser of like services**[311]**, and that, in turn, with the expenditure by the plaintiff in reliance on the contract**[312]**. Not infrequently it has resulted in awards of restitution substantially in excess of the contract price. *Sopov v Kane* is one example of the phenomenon, and the amount of restitution awarded by VCAT in this case is another.

203. In some circumstances, it is necessary or appropriate that the benefit of work to the defendant be determined without reference to a contract price. As Dixon J observed in *South Australian Harbors Board v South Australian Gas Co***[313]**, identification of "a fair and reasonable rate of remuneration, in other words a *quantum meruit*", raises a "question of fact", the answer to which "depends very much upon the methods of reasoning which are pursued". Where the claim to *quantum meruit* is founded upon a contract which does not expressly fix a price for services, "usually" the value of those services will be "assessed by reference to charges commonly made by others for like services", unless no such standard is available**[314]**. In such cases, practical necessity justifies the default application of an objective price derived from outside the contract which ordinarily depends on evidence of supply costs and market conditions**[315]**.

204. Equally, where the claim is founded on an obligation to pay for services rendered under a contract which is unenforceable, it has been held that "[o]rdinarily" the measure of restitution "will correspond to the fair value of the benefit provided (eg remuneration calculated at a reasonable rate for work actually done or the fair market value of materials supplied)"**[316]**. Prices stated in the contract are regarded as relevant, but they remain "evidence only, on the question of amount"**[317]**. That approach is informed by a legal concern that direct application of the contract price would risk incoherence with the policy of the law rendering the contract unenforceable, although this will always require consideration of that policy. As Mason and Wilson JJ noted in *Pavey & Matthews Pty Ltd v Paul***[318]**:

"If the effect of bringing an action on a quantum meruit was simply to enforce the oral contract in some circumstances only, though not in all the circumstances in which an action on the contract would succeed, it might be persuasively contended that the action on a quantum meruit was an indirect means of enforcing the oral contract."

205. By contrast, where a contract is enforceable, but terminated for repudiation, there are no reasons of practicality and few in principle to eschew the contract price. It has been said that "[t]he defendant cannot refuse to abide by the contract and at the same time claim its protection" against the innocent plaintiff**[319]**. But, as has been seen**[320]**, where a contract is terminated for breach, it continues to apply to acts done up to the point of termination, and it remains the basis on which the work was done. There is, therefore, nothing about the termination of the contract as such that is inconsistent with the assessment of restitution by reference to the contract price for acts done prior to termination. The contract price reflects the parties' agreed allocation of risk**[321]**. 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**[322]**. 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[323].

206. The incongruity of restitutionary awards in excess of contract price, and related anomalies, have been acknowledged in other jurisdictions. In England, it has been held at first instance that there can be no justification for restitutionary recovery in excess of the contract price[324]. That accords with the position in some jurisdictions in the United States, which have either in effect returned to the *pro rata* contract price as the prima facie measure of the innocent party's recovery of *quantum meruit* or adopted the total contract price as a limit on the recovery otherwise assessed[325]. According to the *Restatement of the Law Third, Restitution and Unjust Enrichment*[326], "modern academic commentary is almost uniformly critical of a rule that permits money 'restitution' free of the contract price".

207. More recently, in England, the courts have adopted a more nuanced approach. In *Cressman v Coys of Kensington (Sales) Ltd*, Mance LJ observed[327] that the "general concern" of the law on restitution "is with benefit to the particular defendant, or so-called 'subjective devaluation'"[328].

208. In *Benedetti v Sawiris*, the Supreme Court of the United Kingdom accepted that concepts responding to subjective devaluation may be applied in appropriate cases. Lord Clarke of Stone-cum-Ebony JSC observed[329] that "the starting point in valuing the enrichment is the objective market value, or market price, of the services performed", the relevant price being that "which a reasonable person *in the defendant's position* would have had to pay for the services". His Lordship went on to hold[330], however, that, because of "the fundamental need to protect a defendant's autonomy", a defendant would be "entitled to prove that he valued the relevant services (or goods) provided by the claimant at less than the market value"; albeit, and importantly, not by reference to subjective intentions or expectations of the value of the services to the defendant at the relevant time.

209. Lord Reed JSC, although doubting the aptness of the expression "subjective devaluation", accepted[331] that a court is free to depart from market value either where receipt of a benefit is involuntary or where the recipient assumed responsibility for payment on a particular basis – for example, that the cost of the service would be a specific sum. And importantly, as his Lordship observed[332], while in practice most such cases are likely to fall within the scope of the law of contract, "some could fall within the scope of unjust enrichment (eg if a contract were void or unenforceable)".

210. Lord Neuberger of Abbotsbury PSC, although not expressing a concluded view on the subject, stated[333] as follows:

"In my view, it may well be that, in some cases of unjust enrichment, subjective devaluation could be invoked by a defendant to justify the award of a smaller sum than that which would be prima facie payable ...

> [I]t may often be unreasonable for a claimant to claim a market-based payment ... where there have been prior discussions and the defendant has indicated that he would not be prepared to pay as much as the market price for the benefit.

It would seem wrong ... for the claimant to be better off as a result of the law coming to his rescue, as it were, by permitting him to invoke unjust enrichment, than he would have been if he had had the benefit of a legally enforceable contractual claim for a quantified sum."

211. Their Lordships' observations in *Benedetti* accord with the contention in *Goff & Jones*[334], and the contentions of other leading academic writers to similar effect[335], that the law of restitution should respect the contracting parties' allocation of risk. In that regard, the learned editors of *Goff & Jones* state[336] that:

"this is not indirectly to enforce the terms of a contract that has been terminated; rather, it is a reflection of the fact that the ground of recovery is failure of basis, and the parties have agreed what the basis of the transfer is to be. The contract price implicitly allocates certain risks to the supplier of the goods or services, such as the risk that the market value of the goods or services will increase before performance, and the risk that the goods or services prove to be more costly to supply than the supplier had anticipated. Allowing a supplier bringing an action in unjust enrichment to recover more than the contract price for any goods or services supplied under the contract would clearly reallocate those risks to the purchaser."

212. Until recently, one view of English restitutionary jurisprudence was to treat the concept of unjust enrichment as if it were a definitive legal principle that supplies a sufficient premise for direct application by rigid, uniform application of questions concerning whether there is (1) an enrichment, (2) at the plaintiff's expense, (3) in circumstances of an unjust factor, and (4) subject to defences[337]. Within that rigid approach, there was something of a tendency to treat tests for and measures of "enrichment" as governed by a single principle; thus encouraging a view of the benefit abstracted from the contract price[338]. More recently, some members of the Supreme Court of the United Kingdom have cautioned against mechanical application of the "four questions" of enrichment, expense, injustice and defences[339]. In *Swynson Ltd v Lowick Rose Llp*, Lord Sumption JSC denied[340] that English law had a universal theory which explains all of the cases in which restitution is available. In view of those developments, it may be that the law of restitution in the United Kingdom and the law of restitution in Australia are no longer quite as far apart as was previously imagined.

213. Whether or not that is so, however, in this country restitution arises in recognised categories of case and is not necessarily available whenever, and to the extent that, a defendant is enriched at the plaintiff's expense in circumstances that render the enrichment unjust[341]. Although, over time, novel categories of case may come to be recognised, or existing categories refined, that must occur in accordance with the common law's ordinary process of incremental development: by analogy with decided cases, albeit that, within that process of development and refinement, the four questions may serve to focus attention on the nature, availability and measure of restitutionary relief, and so assist in structuring understanding as to avoid the development of the law of unjust enrichment degenerating into an exercise in idiosyncratic discretion.

214. Accordingly, in this country, it has not been found necessary to resort to a generalised approach of so-called subjective devaluation and, at least to that extent, what was held in *Benedetti* is incapable of direct application. But the concerns which inform the analysis in *Benedetti* are just as relevant here as they are in England. For just as a contract may inform the scope of fiduciary and other equitable duties[342], the price at which a defendant has agreed to accept the work comprising an entire obligation is logically significant to the amount of restitution necessary to ensure that the defendant's retention of the benefit of that work is not unjust and unconscionable. In point of principle, deference to contract as a reflection of parties' agreed allocation of risk is at least as appropriate in Australia as it is in England[343].

215. As has been seen, the decision of the Supreme Court of the United Kingdom in *Benedetti* did not go so far as to make the contract price the limit of restitutionary recovery. Although supportive of the conclusion that the amount to be allowed by way of restitution should not ordinarily exceed the

contract price, it leaves open the possibility of exception. It is appropriate that this Court adopt a similar approach. It is consistent with the Australian understanding of restitutionary remedies that a contract, although discharged, should inform the content of the defendant's obligation in conscience to make restitution where the failed basis upon which the work and labour was performed was the contractor's right to complete the performance and earn the price according to the terms of the contract. It is, therefore, appropriate to recognise that, 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.

216. 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***[344]**, which has been explained**[345]** 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**[346]**, 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***[347]**, 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.

217. In this matter, it was not suggested that there are circumstances sufficient to warrant departure from the prima facie position that a claimant should not achieve a better result by way of restitution than under the contract. It follows that VCAT was in error in assessing the amount of restitution otherwise than in accordance with the contract rates. Ground 2 should be upheld.

Remitter to VCAT and costs

218. The appellants contended that, if the matter were remitted to VCAT for further determination, it should be remitted to VCAT constituted otherwise than by Senior Member Walker. The basis for that contention was submitted to be that the Senior Member made adverse findings as to the credibility of the appellants, in particular of the first appellant, that the Senior Member had already expressed a view upon the facts and found in favour of the respondent's restitutionary claims, and that, if remitted, there would need to be a further hearing with evidence led as to the question of valuation of the construction costs in accordance with this Court's ruling. Thus it was submitted that it would be fairer to the parties that the matter be heard and decided by a differently constituted Tribunal**[348]**.

219. The contention is not persuasive. Ultimately, it will be a matter for VCAT to decide how it is to be composed for the purposes of the further determination. But it is to be observed that, subject to the overriding discretion of VCAT, there should be no need or justification for any of the parties to have an opportunity of adducing further evidence. The further determination should involve no more than the application of the law, as explained in these reasons, to the facts as already found, and the recalculation of amounts in accordance with contractual rates and, if determined by VCAT to be applicable by reference to the criteria prescribed by s 38(6)(b), by reference to the rate prescribed in relation to variations by s 38(7) of the DBC Act. The evidence already adduced and the findings already made are complex and extensive, and it is evident that the Senior Member, with the benefit of having dealt with the matter until now, would be much better placed to apply the evidence and

findings than would another member coming freshly to the task. Given the nature of the task involved in the redetermination, it is difficult to accept, or even suppose, that the hypothetical observer could reasonably perceive a realistic possibility of any degree of bias.

220. The respondent contended that, if the appeal were allowed, the costs of the appeal from VCAT to the primary judge should be reserved to his Honour for redetermination. The basis of that contention was said to be that, because the appellants had originally advanced 13 questions of law and 17 grounds of appeal, but proceeded with only two issues, there were likely to be costs thrown away which the appellants should bear and which his Honour would be best placed to determine.

221. That contention is also unpersuasive. As already noticed, senior counsel for the appellants informed the primary judge at the outset of his opening that there were only two issues, and thereafter the application for leave to appeal and the appeal to his Honour proceeded accordingly. Consequently, although it is not inconceivable that there were some costs thrown away by reason of the inclusion in the appellants' notice of appeal of the other grounds and questions of law, it is not apparent that they were substantial enough to justify departure from the ordinary course that costs should follow the event. The ordinary course should be adhered to.

Conclusion and orders

222. It follows that the appeal should be allowed with costs. Orders 1, 2 and 3 of the Court of Appeal should be set aside. In their place, it should be ordered that the application for leave to appeal be granted; the appeal to the Court of Appeal be allowed with costs; orders 2 to 5 of the primary judge be set aside and, in their place, it be ordered that the appeal to the primary judge be allowed with costs; the orders of VCAT be set aside; and the matter be remitted to VCAT for further determination according to law.

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[1] *Mann v Paterson Constructions Pty Ltd* [2018] VSCA 231.

[2] [1904] AC 442.

[3] *Brooks Robinson Pty Ltd v Rothfield* [1951] VicLawRp 58; [1951] VLR 405; *Sopov v Kane Constructions Pty Ltd [No 2]* (2009) 24 VR 510.

[4] *Segur v Franklin* [1934] NSWStRp 7; (1934) 34 SR (NSW) 67; *Horton v Jones [No 2]* [1939] NSWStRp 35; (1939) 39 SR (NSW) 305; *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.

[5] *Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd* [1994] QCA 49; [1995] 2 Qd R 350; *McGowan v Commissioner of Stamp Duties* [2001] QCA 236; [2002] 2 Qd R 499; *Speakman v Evans* [2002] QCA 293; *Legal Services Commissioner v Baker [No 2]* [2006] QCA 145; [2006] 2 Qd R 249.

[6] *Independent Grocers Co-operative Ltd v Noble Lowndes Superannuation Consultants Ltd* (1993) 60 SASR 525; *Maxcon Constructions Pty Ltd v Vadasz* [2016] SASCFC 119.

[7] (1901) 20 NZLR 321.

[8] *Slowey v Lodder* (1901) 20 NZLR 321 at 358.

[9] *Mann v Paterson Constructions Pty Ltd* [2018] VSCA 231 at [92]- [97].

[10] (2009) 24 VR 510.

[11] *Sopov v Kane Constructions Pty Ltd [No 2]* (2009) 24 VR 510 at 514-515 [9]-[12].

[12] See *Sopov v Kane Constructions Pty Ltd [No 2]* (2009) 24 VR 510 at 514 [9] fn 13. See also Kull, "Restitution as a Remedy for Breach of Contract" (1994) 67 *Southern California Law Review* 1465; Havelock, "A Taxonomic Approach to Quantum Meruit" (2016) 132 *Law Quarterly Review* 470.

[13] *Sopov v Kane Constructions Pty Ltd [No 2]* (2009) 24 VR 510 at 514 [10].

[14] *Slowey v Lodder* (1901) 20 NZLR 321 at 358.

[15] [1993] HCA 4; (1993) 176 CLR 344 at 356; [1993] HCA 4. See also *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd* [1936] HCA 6; (1936) 54 CLR 361 at 379; [1936] HCA 6; *Baltic Shipping Co v Dillon* [1993] HCA 4; (1993) 176 CLR 344 at 390; *Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd* [2008] HCA 22; (2008) 236 CLR 342 at 345-346 [2]; [2008] HCA 22; *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* [2013] HCA 36; (2013) 248 CLR 619 at 639 [69]; [2013] HCA 36; *Southern Han Breakfast Point Pty Ltd (In liq) v Lewence Construction Pty Ltd* [2016] HCA 52; (2016) 260 CLR 340 at 365 [79]; [2016] HCA 52.

[16] (1933) 48 CLR 457; [1933] HCA 25.

[17] *McDonald v Dennys Lascelles Ltd* [1933] HCA 25; (1933) 48 CLR 457 at 476-477.

[18] *Heyman v Darwins Ltd* [1942] AC 356 at 399.

[19] See, eg, *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444; [1976] HCA 21; *Shevill v Builders Licensing Board* (1982) 149 CLR 620; [1982] HCA 47; *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17; [1985] HCA 14; *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245; [1988] HCA 11; *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 234 CLR 237; [2008] HCA 10.

[20] See *Dominion Coal Co Ltd v Dominion Iron and Steel Co Ltd* [1909] AC 293 at 311; *Photo Production Ltd v Securicor Transport Ltd* [1980] UKHL 2; [1980] AC 827 at 849-850; *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* [1985] HCA 14; (1985) 157 CLR 17 at 48; *Lombard North Central Plc v Butterworth* [1986] EWCA Civ 5; [1987] QB 527 at 535; *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245 at 273; *Baltic Shipping Co v Dillon* [1993] HCA 4; (1993) 176 CLR 344 at 356.

[21] *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20; [2019] AC 649 at 673 [35].

[22] *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* [1985] HCA 14; (1985) 157 CLR 17 at 48.

[23] [1973] AC 331 at 350. See also *Raja's Commercial College v Gian Singh & Co Ltd* [1977] AC 312 at 319; *Photo Production Ltd v Securicor Transport Ltd* [1980] UKHL 2; [1980] AC 827 at 848-849; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* ("*The New York Star*") [1980] UKPCHCA 1; (1980) 144 CLR 300 at 306; [1981] 1 WLR 138 at 145; [1980] 3 All ER 257 at 262; *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* ("*The Scaptrade*") [1983] 2 AC 694 at 702; *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546 at 568; *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20; [2019] AC 649 at 672 [34].

[24] [1985] HCA 14; (1985) 157 CLR 17 at 48. See also *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245 at 254, 273; *Re Dingjan; Ex parte Wagner* [1995] HCA 16; (1995) 183 CLR 323 at 341; [1995] HCA 16.

[25] cf *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 at 1446; [1966] 3 All ER 128 at 141-142.

[26] *Re Dingjan; Ex parte Wagner* [1995] HCA 16; (1995) 183 CLR 323 at 341.

[27] *Lep Air Services Ltd v Rolloswin Investments Ltd* [1973] AC 331 at 345.

[28] See *Steele v Tardiani* [1946] HCA 21; (1946) 72 CLR 386 at 402; [1946] HCA 21; *Lumbers v W Cook Builders Pty Ltd (In liq)* [2008] HCA 27; (2008) 232 CLR 635 at 654-655 [45]- [48], 662-663 [77]-[79], 671 [111], 673 [122], 674 [126]; [2008] HCA 27; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 514 [26]; [2012] HCA 7. See also *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 WLR 161 at 164-166; [1994] 1 All ER 470 at 473-475.

[29] [1987] HCA 5; (1987) 162 CLR 221 at 256; [1987] HCA 5.

[30] (2012) 246 CLR 498 at 529 [64].

[31] [1994] 1 WLR 161 at 164; [1994] 1 All ER 470 at 473-474.

[32] [2008] HCA 27; (2008) 232 CLR 635.

[33] *Lumbers v W Cook Builders Pty Ltd (In liq)* [2008] HCA 27; (2008) 232 CLR 635 at 654 [46].

[34] *Lumbers v W Cook Builders Pty Ltd (In liq)* [2008] HCA 27; (2008) 232 CLR 635 at 662 [77].

[35] *Lumbers v W Cook Builders Pty Ltd (In liq)* [2008] HCA 27; (2008) 232 CLR 635 at 663 [79].

[36] [1946] HCA 21; (1946) 72 CLR 386.

[37] [1994] 1 WLR 161 at 166; [1994] 1 All ER 470 at 475.

[38] *Lumbers v W Cook Builders Pty Ltd (In liq)* [2008] HCA 27; (2008) 232 CLR 635 at 663 [79]. Gleeson CJ also quoted the relevant passage of Lord Goff's speech in *The Trident Beauty* with approval: see at 655 [47].

[39] [2011] EWCA Civ 930; [2012] QB 244 at 251 [23].

[40] [1987] HCA 5; (1987) 162 CLR 221 at 256.

[41] Beatson, "The Temptation of Elegance: Concurrence of Restitutionary and Contractual Claims", in Swadling and Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (1999) 143 at 151-152.

[42] Jaffey, "Restitutionary Remedies in the Contractual Context" (2013) 76 *Modern Law Review* 429 at 438-439 (footnote omitted).

[43] Jaffey, "Restitutionary Remedies in the Contractual Context" (2013) 76 *Modern Law Review* 429 at 437.

[44] Compare *Lumbers v W Cook Builders Pty Ltd (In liq)* [2008] HCA 27; (2008) 232 CLR 635 at 663 [79].

[45] Havelock, "A Taxonomic Approach to Quantum Meruit" (2016) 132 *Law Quarterly Review* 470 at 481.

[46] *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; (2001) 208 CLR 516 at 545 [75]; [2001] HCA 68.

[47] Kull, "Restitution as a Remedy for Breach of Contract" (1994) 67 *Southern California Law Review* 1465 at 1468.

[48] Kull, "Restitution as a Remedy for Breach of Contract" (1994) 67 *Southern California Law Review* 1465 at 1467 (emphasis omitted).

[49] [2001] HCA 68; (2001) 208 CLR 516.

[50] *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; (2001) 208 CLR 516 at 545 [75].

[51] *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; (2001) 208 CLR 516 at 557 [105].

[52] [1939] NSWStRp 35; (1939) 39 SR (NSW) 305 at 319.

[53] [1934] NSWStRp 7; (1934) 34 SR (NSW) 67 at 72.

[54] [1934] NSWStRp 7; (1934) 34 SR (NSW) 67 at 72.

[55] (1992) 26 NSWLR 234 at 277-278.

[56] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 278.

[57] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 277.

[58] See, eg, *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 at 544-545 [21]-[22], 577-578 [155]-[156], 605-607 [253]-[256]; [2016] HCA 28. See also *Addis v Gramophone Co Ltd* [1909] UKHL 1; [1909] AC 488 at 494; *Johnson v Unisys Ltd* [2003] 1 AC 518 at 530 [15]; *Priebe & Sons Inc v United States* [1947] USSC 133; (1947) 332 US 407 at 417-418.

[59] [1997] UKHL 17; [1998] AC 1 at 15.

[60] [1917] HCA 9; (1917) 23 CLR 78 at 89; [1917] HCA 9 (citation omitted).

[61] [1998] HCA 70; (1998) 196 CLR 1 at 6-7 [13]; [1998] HCA 70.

[62] [2018] UKSC 20; [2019] AC 649 at 673 [35].

[63] (1831) 8 Bing 14 [131 ER 305].

[64] [1853] EngR 648; (1853) 8 Exch 822 [155 ER 1586].

[65] [1856] EngR 933; (1856) 1 CB (NS) 296 [140 ER 123].

[66] Mitchell and Mitchell, "*Planché v Colburn* (1831)", in Mitchell and Mitchell (eds), *Landmark Cases in the Law of Restitution* (2006) 65 at 91.

[67] See Havelock, "A Taxonomic Approach to Quantum Meruit" (2016) 132 *Law Quarterly Review* 470 at 480.

[68] *De Bernardy v Harding* [1853] EngR 648; (1853) 8 Exch 822 at 824 [155 ER 1586 at 1587].

[69] *De Bernardy v Harding* [1853] EngR 648; (1853) 8 Exch 822 at 824 [155 ER 1586 at 1587].

[70] *De Bernardy v Harding* [1853] EngR 648; (1853) 8 Exch 822 at 824 [155 ER 1586 at 1587].

[71] *Prickett v Badger* [1856] EngR 933; (1856) 1 CB (NS) 296 at 308 [140 ER 123 at 128].

[72] [1856] EngR 933; (1856) 1 CB (NS) 296 at 302 [140 ER 123 at 125].

[73] [1987] HCA 5; (1987) 162 CLR 221 at 256.

[74] [1946] HCA 21; (1946) 72 CLR 386 at 402.

[75] See, eg, *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339 at 364-365, part of which was cited by Dixon J in *McDonald v Dennys Lascelles Ltd* [1933] HCA 25; (1933) 48 CLR 457 at 477.

[76] *PGA v The Queen* [2012] HCA 21; (2012) 245 CLR 355 at 373 [30]; [2012] HCA 21. See also *Lissenden v C A V Bosch Ltd* [1940] AC 412 at 426.

[77] *West Ham Union v Edmonton Union* [1908] AC 1 at 5, adopted in *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* [1986] HCA 34; (1986) 160 CLR 626 at 677-678; [1986] HCA 34.

[78] *PGA v The Queen* [2012] HCA 21; (2012) 245 CLR 355 at 371 [24].

[79] *Dillingham Constructions Pty Ltd v Steel Mains Pty Ltd* (1975) 132 CLR 323 at 334; [1975] HCA 23. See also *West Ham Union v Edmonton Union* [1908] AC 1 at 5; *Bourne v Keane* [1919] AC 815 at 830.

[80] *PGA v The Queen* [2012] HCA 21; (2012) 245 CLR 355 at 373 [30].

[81] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] UKHL 4; [1943] AC 32 at 45.

[82] *Admiralty Commissioners v Valverda (Owners)* [1938] AC 173 at 194.

[83] [1963] AC 280 at 303. See also *Bourne v Keane* [1919] AC 815 at 874.

[84] [2003] FCA 50; (2003) 128 FCR 1 at 157-158 [662].

[85] See *McDonald v Dennys Lascelles Ltd* [1933] HCA 25; (1933) 48 CLR 457 at 477-478.

[86] *Goss v Chilcott* [1996] AC 788 at 797.

[87] cf *Comptroller-General of Customs v Kawasaki Motors Pty Ltd [No 2]* [1991] FCA 518; (1991) 32 FCR 243 at 258; *Chippendale Printing Co Pty Ltd v Commissioner of Taxation* [1996] FCA 1259; (1996) 62 FCR 347 at 366-369.

[88] [1987] HCA 5; (1987) 162 CLR 221 at 256-257; [1987] HCA 5.

[89] *McDonald v Dennys Lascelles Ltd* [1933] HCA 25; (1933) 48 CLR 457 at 476-477; [1933] HCA 25; *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd* [1936] HCA 6; (1936) 54 CLR 361 at 379-380; [1936] HCA 6; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50; (2003) 128 FCR 1 at 155 [651].

[90] *Young v Queensland Trustees Ltd* [1956] HCA 51; (1956) 99 CLR 560 at 567, 569; [1956] HCA 51.

[91] *Summers v The Commonwealth* [1918] HCA 33; (1918) 25 CLR 144 at 153; [1918] HCA 33.

[92] *Pavey* [1987] HCA 5; (1987) 162 CLR 221 at 256.

[93] *Trimis v Mina* (1999) 16 BCL 288 at 296 [54], quoted in *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50; (2003) 128 FCR 1 at 156 [655].

[94] *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 WLR 161 at 164; [1994] 1 All ER 470 at 474.

[95] [1946] HCA 25; (1946) 72 CLR 435 at 450, 462, 465; [1946] HCA 25.

[96] [1854] EngR 73; (1854) 5 HLC 72 at 96, 118 [1854] EngR 73; [10 ER 824 at 834, 843].

[97] eg, Dennys and Clay, *Hudson's Building and Engineering Contracts*, 13th ed (2015) at 926-927 [8-019]; Mason, Carter and Tolhurst, *Mason & Carter's Restitution Law in Australia*, 3rd ed (2016) at 484-487 [1168], 592-593 [1408], 609-611 [1430]; Furst and Ramsey, *Keating on Construction Contracts*, 10th ed (2016) at 282-284 [9-058]-[9-063]; Havelock, "A Taxonomic Approach to Quantum Meruit" (2016) 132 *Law Quarterly Review* 470 at 480-482; Jackman, *The Varieties of Restitution*, 2nd ed (2017) at 89-90, 116-121; Carter, *Contract Law in Australia*, 7th ed (2018) at 920-921 [38-39].

[98] eg, *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd* [1994] QCA 49; [1995] 2 Qd R 350; *Legal Services Commissioner v Baker [No 2]* [2006] QCA 145; [2006] 2 Qd R 249; *Sopov v Kane Constructions Pty Ltd [No 2]* (2009) 24 VR 510.

[99] eg, *Boomer v Muir* (1933) 24 P 2d 570; *United States v Zara Contracting Co Inc* (1944) 146 F 2d 606; *Loomis v Imperial Motors Inc* (1964) 396 P 2d 467; *Paul Hardeman Inc v Arkansas Power & Light Co* (1974) 380 F Supp 298; *Murdock-Bryant Construction Inc v Pearson* (1984) 703 P 2d 1206.

[100] [1904] AC 442.

[101] *Slowey v Lodder* (1901) 20 NZLR 321 at 358.

[102] (1831) 8 Bing 14 [131 ER 305]. See *De Bernardy v Harding* [1853] EngR 648; (1853) 8 Exch 822 [155 ER 1586]; *Prickett v Badger* [1856] EngR 933; (1856) 1 CB (NS) 296 [140 ER 123]; *Inchbald v The Western Neilgherry Coffee, Tea, and Cinchona Plantation Co (Ltd)* [1864] EngR 726; (1864) 17 CB (NS) 733 [144 ER 293]; *Appleby v Myers* (1867) LR 2 CP 651.

[103] See Mitchell and Mitchell, "*Planché v Colburn* (1831)", in Mitchell and Mitchell (eds), *Landmark Cases in the Law of Restitution* (2006) 65.

[104] *Slowey v Lodder* (1901) 20 NZLR 321 at 356-358.

[105] Bullen and Leake, *Precedents of Pleadings in Personal Actions in The Superior Courts of Common Law*, 3rd ed (1868) at 37.

[106] [2001] HCA 68; (2001) 208 CLR 516 at 524-525 [14]; [2001] HCA 68.

[107] [1933] HCA 25; (1933) 48 CLR 457 at 476-477.

[108] [1934] NSWStRp 7; (1934) 34 SR (NSW) 67 at 72.

[109] [1934] NSWStRp 7; (1934) 34 SR (NSW) 67 at 72.

[110] [1934] NSWStRp 7; (1934) 34 SR (NSW) 67 at 72.

[111] [1939] NSWStRp 35; (1939) 39 SR (NSW) 305 at 317.

[112] [1939] NSWStRp 35; (1939) 39 SR (NSW) 305 at 319.

[113] [1934] NSWStRp 32; (1934) 34 SR (NSW) 359.

[114] [1987] HCA 5; (1987) 162 CLR 221 at 250-251.

[115] [1934] NSWStRp 32; (1934) 34 SR (NSW) 359 at 367.

[116] See *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14; (2014) 253 CLR 560 at 595 [74], 615 [130], 617 [136], 618-619 [139]-[141]; [2014] HCA 14.

[117] *Pavey* [1987] HCA 5; (1987) 162 CLR 221 at 256-257.

[118] *Pavey* [1987] HCA 5; (1987) 162 CLR 221 at 256-257.

[119] *Pavey* [1987] HCA 5; (1987) 162 CLR 221 at 256.

[120] *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd* [1936] HCA 6; (1936) 54 CLR 361 at 380.

[121] [2001] HCA 68; (2001) 208 CLR 516 at 524-529 [14]- [24], 555-558 [101]-[109], 589 [199].

[122] [2014] UKSC 26; [2015] AC 1 at 41-44 [103]- [115].

[123] cf Beatson, "The Temptation of Elegance: Concurrence of Restitutionary and Contractual Claims", in Swadling and Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (1999) 143 at 148-149.

[124] cf *Roxborough* [2001] HCA 68; (2001) 208 CLR 516 at 543-544 [71]- [73]; *Barnes v Eastenders Cash & Carry Plc* [2014] UKSC 26; [2015] AC 1 at 41 [102], 43 [113].

[125] Jordan, *Appreciations* (1950) at 58-59.

[126] Holmes, *The Common Law* (1881) at 1.

[127] See Smith, "Restitution: A New Start?", in Devonshire and Havelock (eds), *The Impact of Equity and Restitution in Commerce* (2019) 91 at 95-96.

[128] *Sullivan v Moody* (2001) 207 CLR 562 at 580 [50]; [2001] HCA 59.

[129] eg, *Baltic Shipping Co v Dillon* [1993] HCA 4; (1993) 176 CLR 344 at 350-354; [1993] HCA 4, discussing, amongst other cases, *McDonald v Dennys Lascelles Ltd* [1933] HCA 25; (1933) 48 CLR 457 at 477 and *Dies v British and International Mining and Finance Corporation* [1939] 1 KB 724.

[130] eg, *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] UKHL 4; [1943] AC 32.

[131] eg, *Sumpter v Hedges* [1898] 1 QB 673, discussed in *Steele v Tardiani* [1946] HCA 21; (1946) 72 CLR 386 at 403; [1946] HCA 21; *Lumbers v W Cook Builders Pty Ltd (In liq)* [2008] HCA 27; (2008) 232 CLR 635 at 656 [51]- [52]; [2008] HCA 27. See also McFarlane and Stevens, "In Defence of *Sumpter v Hedges*" (2002) 118 *Law Quarterly Review* 569.

[132] *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64; [1991] HCA 54.

[133] Kull, "Restitution as a Remedy for Breach of Contract" (1994) 67 *Southern California Law Review* 1465 at 1489, referring to Fuller and Perdue, "The Reliance Interest in Contract Damages: 2" (1937) 46 *Yale Law Journal* 373 at 394. See also *Tridant Engineering Co Ltd v Mansion Holdings Ltd* [2000] HKCFI 1 at 107.

[134] cf *Lumbers v W Cook Builders Pty Ltd (In liq)* [2008] HCA 27; (2008) 232 CLR 635 at 663 [79].

[135] *Moschi v Lep Air Services Ltd* [1973] AC 331 at 350.

[136] *Photo Production Ltd v Securicor Transport Ltd* [1980] UKHL 2; [1980] AC 827 at 849.

[137] [1993] HCA 4; (1993) 176 CLR 344 at 355.

[138] See generally Mason, Carter and Tolhurst, *Mason & Carter's Restitution Law in Australia*, 3rd ed (2016) at 1025 [2922].

[139] eg, *Supreme Court (General Civil Procedure) Rules 2015* (Vic), r 21.03(1)(a); *City Mutual Life Assurance Society Ltd v Giannarelli* [1977] VicRp 53; [1977] VR 463 at 468. See also *Alexander v Ajax Insurance Co Ltd* [1956] VicLawRp 70; [1956] VLR 436 at 445; *Edwards v Australian Securities and Investments Commission* [2009] NSWCA 424; (2009) 264 ALR 723 at 739-740 [81]- [87].

[140] Dennys and Clay, *Hudson's Building and Engineering Contracts*, 13th ed (2015) at 926 [8-019].

[141] Kull, "Restitution as a Remedy for Breach of Contract" (1994) 67 *Southern California Law Review* 1465 at 1472.

[142] *South Australian Harbors Board v South Australian Gas Co* [1934] ArgusLawRp 81; (1934) 51 CLR 485 at 501; [1934] HCA 45.

[143] (1930) 253 NY 256.

[144] cf Beatson, "The Temptation of Elegance: Concurrence of Restitutionary and Contractual Claims", in Swadling and Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (1999) 143 at 164.

[145] (1930) 253 NY 256 at 258.

[146] (1930) 253 NY 256 at 258.

[147] (1853) 4 Ind 79.

[148] (1853) 4 Ind 79 at 82.

[149] (1853) 4 Ind 79 at 82-83.

[150] [1939] NSWStRp 35; (1939) 39 SR (NSW) 305 at 317 (emphasis added).

[151] (1901) 20 NZLR 321 at 353.

[152] (1901) 20 NZLR 321 at 358.

[153] (1901) 20 NZLR 321 at 366.

[154] *Horton v Jones* [1934] NSWStRp 32; (1934) 34 SR (NSW) 359 at 367.

[155] *Pavey* [1987] HCA 5; (1987) 162 CLR 221 at 228.

[156] [1987] HCA 5; (1987) 162 CLR 221 at 257.

[157] (1992) 26 NSWLR 234.

[158] [1994] QCA 49; [1995] 2 Qd R 350.

[159] (2009) 24 VR 510.

[160] eg, *Boomer v Muir* (1933) 24 P 2d 570 at 577; *Loomis v Imperial Motors Inc* (1964) 396 P 2d 467 at 468-469. See also Mason, Carter and Tolhurst, *Mason & Carter's Restitution Law in Australia*, 3rd

ed (2016) at 608 [1429].

[161] As to which see Gergen, "Restitution as a Bridge over Troubled Contractual Waters" (2002) 71 *Fordham Law Review* 709, esp at 736-741.

[162] *Restatement (Third) of Restitution and Unjust Enrichment* §38(2)(b).

[163] *Restatement (Third) of Restitution and Unjust Enrichment* §38 at 644.

[164] *Mann v Paterson Constructions Pty Ltd* [2018] VSCA 231.

[165] As defined in s 3(1) of the DBC Act.

[166] *Paterson Constructions Pty Ltd v Mann (Building and Property)* [2016] VCAT 2100 at [507].

[167] *Paterson Constructions Pty Ltd v Mann (Building and Property)* [2016] VCAT 2100 at [509].

[168] (2009) 24 VR 510 at 515 [12] per Maxwell P, Kellam JA and Whelan A-JA.

[169] *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457; [1933] HCA 25.

[170] *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; [1987] HCA 5.

[171] *Paterson Constructions Pty Ltd v Mann (Building and Property)* [2016] VCAT 2100 at [119]- [120].

[172] *Paterson Constructions Pty Ltd v Mann (Building and Property)* [2016] VCAT 2100 at [528].

[173] *Paterson Constructions Pty Ltd v Mann (Building and Property)* [2016] VCAT 2100 at [533].

[174] *Mann v Paterson Constructions Pty Ltd* [2018] VSC 119 at [19] (footnote omitted).

[175] [2016] HCA 52; (2016) 260 CLR 340 at 362 [66] per Kiefel, Bell, Gageler, Keane and Gordon JJ (footnote omitted); [2016] HCA 52.

[176] *Mann v Paterson Constructions Pty Ltd* [2018] VSC 119 at [19] fn 17.

[177] *Sopov v Kane Constructions Pty Ltd* [2009] HCATrans 338.

[178] *Mann v Paterson Constructions Pty Ltd* [2018] VSC 119 at [61], [72], [77]-[80], [82] (emphasis omitted).

[179] *House Contracts Guarantee Act 1987* (Vic), s 19(1).

[180] *Mann v Paterson Constructions Pty Ltd* [2018] VSCA 231 at [90]- [94], [96].

[181] [1904] AC 442.

[182] (1992) 26 NSWLR 234.

[183] [1994] QCA 49; [1995] 2 Qd R 350.

[184] *Mann v Paterson Constructions Pty Ltd* [2018] VSCA 231 at [84].

[185] *Mann v Paterson Constructions Pty Ltd* [2018] VSCA 231 at [129] (footnote omitted).

[186] *Mann v Paterson Constructions Pty Ltd* [2018] VSCA 231 at [142], [144].

[187] *Mann v Paterson Constructions Pty Ltd* [2018] VSCA 231 at [145].

[188] Gray, "Some Definitions and Questions in Jurisprudence" (1892) 6 *Harvard Law Review* 21 at 21.

[189] See, eg, *Horton v Jones [No 2]* [1939] NSWStRp 35; (1939) 39 SR (NSW) 305 at 319, point (1) per Jordan CJ.

[190] Kull, "Restitution as a Remedy for Breach of Contract" (1994) 67 *Southern California Law Review* 1465. See also the remarks of Professor Kull as Reporter in American Law Institute, *Restatement of the Law Third, Restitution and Unjust Enrichment* (2011) §1 at 10, referring to "part of contract law" and "a parallel source of liability".

[191] Oxford English Dictionary, online, "notice", sense 9a, cf sense 1a, available at <https://www.oed.com/view/Entry/128591>.

[192] See *Clyne v Deputy Commissioner of Taxation* [1981] HCA 40; (1981) 150 CLR 1 at 10 per Gibbs CJ; [1981] HCA 40.

[193] See and compare *Pavey & Matthews* [1987] HCA 5; (1987) 162 CLR 221 at 228-229 per Mason and Wilson JJ.

[194] Victoria, *Domestic Building Contracts and Tribunal Bill 1995*, Explanatory Memorandum at 7 (second emphasis added). The name of the Act was changed from *Domestic Building Contracts and Tribunal Act 1995* by s 36 of the *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998* (Vic).

[195] DBC Act, s 38(8).

[196] See and compare *Deposit & Investment Co Ltd v Kaye* (1963) 63 SR (NSW) 453 at 460-461 per Walsh J; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 518 [34] per French CJ, Crennan and Kiefel JJ; [2012] HCA 7.

[197] See *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* [1948] HCA 24; (1948) 77 CLR 1 at 29 per Dixon J; [1948] HCA 24; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50; (2006) 228 CLR 566 at 585-586 [50]- [51] per Gummow and Hayne JJ; [2006] HCA 50.

[198] See *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* [1932] HCA 9; (1932) 47 CLR 1 at 7 per Gavan Duffy CJ and Dixon J; [1932] HCA 9; *Bruton Holdings Pty Ltd (In liq) v Federal Commissioner of Taxation* [2009] HCA 32; (2009) 239 CLR 346 at 353 [17] per French CJ, Gummow, Hayne, Heydon and Bell JJ; [2009] HCA 32.

[199] See *Equuscorp* (2012) 246 CLR 498 at 514 [25] per French CJ, Crennan and Kiefel JJ.

[200] See and compare *Sargood Bros v The Commonwealth* [1910] HCA 45; (1910) 11 CLR 258 at 279 per O'Connor J; [1910] HCA 45; *Pyneboard Pty Ltd v Trade Practices Commission* [1983] HCA 9; (1983) 152 CLR 328 at 341 per Mason A-CJ, Wilson and Dawson JJ; [1983] HCA 9; *Berowra Holdings Pty Ltd v Gordon* [2006] HCA 32; (2006) 225 CLR 364 at 373 [23] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; [2006] HCA 32.

[201] See, eg, *Bropho v Western Australia* [1990] HCA 24; (1990) 171 CLR 1 at 18 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1990] HCA 24; *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ, 446 per Deane and Dawson JJ; [1994] HCA 15; *Oates v Attorney-General (Cth)* (2003) 214 CLR 496 at 513 [45] per Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ; [2003] HCA 21.

[202] *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49; (2002) 213 CLR 543 at 553 [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; [2002] HCA 49; *Lee v New South Wales Crime Commission* [2013] HCA 39; (2013) 251 CLR 196 at 217-218 [29] per French CJ, 310 [313] per Gageler and Keane JJ; [2013] HCA 39.

[203] *Trustees Executors & Agency Co Ltd v Reilly* [1941] VicLawRp 22; [1941] VLR 110 at 111 per Mann CJ, quoted in *Powers v Maher* [1959] HCA 52; (1959) 103 CLR 478 at 484-485 per Kitto J; [1959] HCA 52. See also *R v Khazaal* [2012] HCA 26; (2012) 246 CLR 601 at 613 [31] per French CJ; [2012] HCA 26.

[204] See and compare *Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Ltd* [2009] HCA 19; (2009) 239 CLR 305 at 342 [117] per Heydon J; [2009] HCA 19.

[205] See [155] above.

[206] See [158] above.

[207] See and compare *Sue v Hill* [1999] HCA 30; (1999) 199 CLR 462 at 485 [42] per Gleeson CJ, Gummow and Hayne JJ; [1999] HCA 30; Leeming, "Overlapping Claims at Common Law and in Equity – An Embarrassment of Riches?" (2017) 11 *Journal of Equity* 229 at 241-243.

[208] *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; (2001) 208 CLR 516 at 541 [67] per Gummow J; [2001] HCA 68.

[209] *Pavey & Matthews* [1987] HCA 5; (1987) 162 CLR 221 at 256 per Deane J. See also *Horton v Jones [No 2]* [1939] NSWStRp 35; (1939) 39 SR (NSW) 305 at 319 per Jordan CJ; *Steele v Tardiani* [1946] HCA 21; (1946) 72 CLR 386 at 402 per Dixon J; [1946] HCA 21; *Automatic Fire Sprinklers Pty Ltd v Watson* [1946] HCA 25; (1946) 72 CLR 435 at 450 per Latham CJ; [1946] HCA 25; *Lumbers v W Cook Builders Pty Ltd (In liq)* [2008] HCA 27; (2008) 232 CLR 635 at 663 [79] per Gummow, Hayne, Crennan and Kiefel JJ; [2008] HCA 27; cf *Roxborough* [2001] HCA 68; (2001) 208 CLR 516 at 527-528 [21] per Gleeson CJ, Gaudron and Hayne JJ, 577-578 [166] per Kirby J.

[210] *Pavey & Matthews* [1987] HCA 5; (1987) 162 CLR 221 at 238 per Brennan J.

[211] *Baltic Shipping Co v Dillon* [1993] HCA 4; (1993) 176 CLR 344 at 356 per Mason CJ (Brennan and Toohey JJ agreeing at 367, 383), 390 per McHugh J; [1993] HCA 4; *Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd* [2008] HCA 22; (2008) 236 CLR 342 at 345-346 [2] per Gleeson CJ, Gummow, Heydon, Crennan and Kiefel JJ; [2008] HCA 22; *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* [2013] HCA 36; (2013) 248 CLR 619 at 639 [69] per Crennan, Kiefel, Bell, Gageler and Keane JJ; [2013] HCA 36; *Southern Han* [2016] HCA 52; (2016) 260 CLR 340 at 365 [79] per Kiefel, Bell, Gageler, Keane and Gordon JJ. See also *Re Dingjan; Ex parte Wagner* [1995] HCA 16; (1995) 183 CLR 323 at 341 per Brennan J; [1995] HCA 16; *Bailey v New South Wales Medical Defence Union Ltd* (1995) 184 CLR 399 at 430 per McHugh and Gummow JJ; [1995] HCA 28; *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* [2008] HCA 10; (2008) 234 CLR 237 at 261 fn 84 per Gleeson CJ, Kirby, Heydon, Crennan and Kiefel JJ; [2008] HCA 10; *Willmott Growers Group Inc v Willmott Forests Ltd (Receivers and Managers Appointed) (In liq)* [2013] HCA 51; (2013) 251 CLR 592 at 637-638 [156] per Keane J; [2013] HCA 51; *Heyman v Darwins Ltd* [1942] AC 356 at 399 per Lord Porter; *Photo Production Ltd v Securicor Transport Ltd* [1980] UKHL 2; [1980] AC 827 at 844 per Lord Wilberforce (Lord Diplock, Lord Keith of Kinkel and Lord Scarman agreeing at 851, 853), 850 per Lord Diplock.

[212] *McDonald* [1933] HCA 25; (1933) 48 CLR 457 at 476-477.

[213] See *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339 at 365 per Bowen LJ; *Hirji Mulji v Cheong Yue Steamship Co* [1926] AC 497 at 503 per Lord Sumner; *Cornwall v Henson* [1899] 2 Ch 710 at 715, revd [1900] 2 Ch 298; Salmond and Winfield, *Principles of the Law of Contracts* (1927) at 284-289; Morison, *Rescission of Contracts* (1916) at 179-180.

[214] *Planché v Colburn* (1831) 1 Moo & S 51, a fuller report than (1831) 8 Bing 14 [131 ER 305]; *Lodder v Slowey* [1904] AC 442; *Brooks Robinson Pty Ltd v Rothfield* [1951] VicLawRp 58; [1951] VLR 405; *Renard Constructions* (1992) 26 NSWLR 234; *Iezzi Constructions* [1994] QCA 49; [1995] 2 Qd R 350; *Sopov v Kane* (2009) 24 VR 510. See Mason, Carter and Tolhurst, *Mason & Carter's Restitution Law in Australia*, 3rd ed (2016) at 482-487 [1166]-[1168]; Mitchell, Mitchell and Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment*, 9th ed (2016) at 64 [3-36]; Grantham and Rickett, *Enrichment and Restitution in New Zealand* (2000) at 165-170; Maddaugh and McCamus, *The Law of Restitution*, 2nd ed (2004) at 586-600 [19:200]; American Law Institute, *Restatement of the Law Third, Restitution and Unjust Enrichment* (2011) §38.

[215] See generally Mason, Carter and Tolhurst, *Mason & Carter's Restitution Law in Australia*, 3rd ed (2016) at 15-16 [115], 1018-1023 [2908]-[2916]; Mitchell, Mitchell and Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment*, 9th ed (2016) at 9-10 [1-13], 19-20 [1-36]; Birks, *Unjust Enrichment*, 2nd ed (2005) at 287; Burrows, *The Law of Restitution*, 3rd ed (2011) at 15-16.

[216] See *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 at 1774 [42]-[44]; [2008] 4 All ER 713 at 736-737. See also *Baltic Shipping* [1993] HCA 4; (1993) 176 CLR 344 at 354-355.

[217] *Equuscorp* (2012) 246 CLR 498 at 516 [30] per French CJ, Crennan and Kiefel JJ, citing *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48; (1992) 175 CLR 353 at 379 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; [1992] HCA 48.

[218] *Steele* [1946] HCA 21; (1946) 72 CLR 386 at 401 per Dixon J; *David Securities* [1992] HCA 48; (1992) 175 CLR 353 at 383 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; *Roxborough* [2001] HCA 68; (2001) 208 CLR 516 at 524-526 [14]- [17] per Gleeson CJ, Gaudron and Hayne JJ.

[219] *David Securities* [1992] HCA 48; (1992) 175 CLR 353 at 382 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ, quoting Birks, *An Introduction to the Law of Restitution* (1989) at 223.

[220] *David Securities* [1992] HCA 48; (1992) 175 CLR 353 at 382 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ, quoting *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 WLR 912 at 923 per Kerr LJ (Nicholls LJ agreeing at 938); [1989] 3 All ER 423 at 433, 444.

[221] See *Roxborough* [2001] HCA 68; (2001) 208 CLR 516 at 525 [16] per Gleeson CJ, Gaudron and Hayne JJ, 556-557 [103]-[104] per Gummow J; *Equuscorp* (2012) 246 CLR 498 at 517-518 [31]-[33] per French CJ, Crennan and Kiefel JJ; *Barnes v Eastenders Cash & Carry Plc* [2014] UKSC 26; [2015] AC 1 at 42-43 [104]- [114] per Lord Toulson JSC (Baroness Hale of Richmond DPSC, Lord Kerr of Tonaghmore, Lord Wilson and Lord Hughes JJSC agreeing).

[222] See and compare *Pavey & Matthews* [1987] HCA 5; (1987) 162 CLR 221 at 256 per Deane J.

[223] *Steele* [1946] HCA 21; (1946) 72 CLR 386 at 402 per Dixon J. See *Trimis v Mina* (1999) 16 BCL 288 at 296 [54] per Mason P (Priestley and Handley JJA agreeing at 299 [78], [79]); *Lumbers* [2008] HCA 27; (2008) 232 CLR 635 at 663 [79] per Gummow, Hayne, Crennan and Kiefel JJ.

[224] *Segur v Franklin* [1934] NSWStRp 7; (1934) 34 SR (NSW) 67 at 72 per Jordan CJ (Street J and Maxwell A-J agreeing at 72); *Horton v Jones [No 2]* [1939] NSWStRp 35; (1939) 39 SR (NSW) 305 at 319 per Jordan CJ. See also McFarlane and Stevens, "In Defence of *Sumpter v Hedges*" (2002) 118 *Law Quarterly Review* 569 at 578.

[225] The majority held that the purported dismissal of an employee was ineffectual in law to terminate the employment. As Latham CJ and Starke J each would have held that the purported dismissal was effective to terminate the employment, their Honours considered this point: see *Automatic Fire Sprinklers* [1946] HCA 25; (1946) 72 CLR 435 at 448, 459 per Latham CJ, 463 per Starke J.

[226] *Automatic Fire Sprinklers* [1946] HCA 25; (1946) 72 CLR 435 at 450 per Latham CJ, 461-462 per Starke J.

[227] *Steele* [1946] HCA 21; (1946) 72 CLR 386 at 401 per Dixon J.

[228] *Steele* [1946] HCA 21; (1946) 72 CLR 386 at 402 per Dixon J; *Baltic Shipping* [1993] HCA 4; (1993) 176 CLR 344 at 350 per Mason CJ (Brennan and Toohey JJ agreeing at 367, 383), 377 per Deane and Dawson JJ. See also *Roxborough* [2001] HCA 68; (2001) 208 CLR 516 at 557-558 [106] per Gummow J.

[229] See Edelman, *McGregor on Damages*, 20th ed (2018) at 979 [31-022].

[230] See [168] above.

[231] *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61; (2007) 233 CLR 115 at 135-136 [44] per Gleeson CJ, Gummow, Heydon and Crennan JJ; [2007] HCA 61.

[232] *Roxborough* [2001] HCA 68; (2001) 208 CLR 516 at 525 [16] per Gleeson CJ, Gaudron and Hayne JJ, 557 [104] per Gummow J; *Equuscorp* (2012) 246 CLR 498 at 517 [31] per French CJ, Crennan and Kiefel JJ; *Barnes* [2014] UKSC 26; [2015] AC 1 at 42 [105]- [107] per Lord Toulson JSC (Baroness Hale of Richmond DPSC, Lord Kerr of Tonaghmore, Lord Wilson and Lord Hughes JJSC agreeing).

[233] See generally *Steele* [1946] HCA 21; (1946) 72 CLR 386 at 401 per Dixon J; *David Securities* [1992] HCA 48; (1992) 175 CLR 353 at 383 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ.

[234] See *David Securities* [1992] HCA 48; (1992) 175 CLR 353 at 383 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; *Goss v Chilcott* [1996] AC 788 at 797-798 per Lord Goff of Chieveley for the Privy Council; *Roxborough* [2001] HCA 68; (2001) 208 CLR 516 at 526-527 [18]- [19] per Gleeson CJ, Gaudron and Hayne JJ, 558 [109] per Gummow J.

[235] See *Whincup v Hughes* (1871) LR 6 CP 78 at 81 per Bovill CJ.

[236] *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50; (2003) 128 FCR 1 at 164-165 [704], [705] per Finn J, noting that in each case the question is one of construction. See also Furst and Ramsey, *Keating on Construction Contracts*, 10th ed (2016) at 85-86 [4-007].

[237] For academic support for this view, see, eg, Hunter and Carter, "Quantum Meruit and Building Contracts" (1989) 2 *Journal of Contract Law* 95 at 111-112; Jackman, *The Varieties of Restitution*, 2nd ed (2017) at 116-121.

[238] See *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14; (2014) 253 CLR 560 at 605 [107] per Gageler J; [2014] HCA 14.

[239] See, eg, *Floyd v Irish* (1588) in Glisson and Gulston, *A Survey of the Law* (1659) at 96; *Dellaby v Hassel* [1687] EngR 350; (1588) 1 Leon 123 [74 ER 114]; *Royle v Bagshaw* [1653] EngR 305; (1590) Cro Eliz 149 [78 ER 407]. See also Greening (ed), *Chitty's Treatise on Pleading and Parties to Actions*, 7th ed (1844), vol 1 at 351; Bullen and Leake, *Precedents of Pleadings in Personal Actions in The Superior Courts of Common Law*, 3rd ed (1868) at 35; Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (1975) at 65, 497-498.

[240] Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (1975) at 65-66, 498-499.

[241] See, eg, *The Six Carpenters' Case* [1572] EngR 452; (1610) 8 Co Rep 146a at 147a per Brian CJ [1572] EngR 452; [77 ER 695 at 697]; *Waring v Perkins* (1621) Cro Jac 626 [79 ER 539]. The point was not without controversy: see *Mason v Welland* [1728] EngR 62; (1685) Skin 238 [90 ER 109].

[242] See, eg, *King v Locke* [1685] EngR 1977; (1662) 1 Keb 422 [83 ER 1030]; *Tate v Lewen* [1845] EngR 247; (1671) 2 Wms Saund 371 [85 ER 1159]. See also Ames, "The History of Assumpsit: II – Implied Assumpsit" (1888) 2 *Harvard Law Review* 53 at 58-60; Denning, "*Quantum Meruit* and the Statute of Frauds" (1925) 41 *Law Quarterly Review* 79 at 83-84; *Pavey & Matthews* [1987] HCA 5; (1987) 162 CLR 221 at 230-232 per Brennan J; Stoljar, *The Law of Quasi-Contract*, 2nd ed (1989) at 187-192; Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) at 149.

[243] See *Pavey & Matthews* [1987] HCA 5; (1987) 162 CLR 221 at 251 per Deane J.

[244] See, eg, *Hays v Warren* (1733) W Kel 117 [1733] EngR 43; [25 ER 522]; *Keck's Case* (1744) in Bridgman (ed), *Buller's Introduction to the Law Relative to Trials at Nisi Prius*, 7th ed (1817) at 139a. See also *Pavey & Matthews* [1987] HCA 5; (1987) 162 CLR 221 at 232 per Brennan J; Barton, "Contract and *Quantum Meruit*: The Antecedents of *Cutter v Powell*" (1987) 8 *Journal of Legal History* 48 at 58-60; Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) at 269-272.

[245] (1795) 6 TR 320 at 324 per Lord Kenyon CJ (emphasis added), see also at 325 per Ashhurst J, 325 per Grose J, 326 per Lawrence J [101 ER 573 at 575-577]. See and compare Stoljar, "The Great Case of Cutter v Powell" (1956) 34 *Canadian Bar Review* 288; *Pavey & Matthews* [1987] HCA 5; (1987) 162 CLR 221 at 237 per Brennan J; Barton, "Contract and *Quantum Meruit*: The Antecedents of *Cutter v Powell*" (1987) 8 *Journal of Legal History* 48 at 48-49, 61-62; Ibbetson, "Implied Contracts and Restitution: History in the High Court of Australia" (1988) 8 *Oxford Journal of Legal Studies* 312 at 317-318; *Baltic Shipping* [1993] HCA 4; (1993) 176 CLR 344 at 385 per Gaudron J.

[246] [1797] EngR 392; (1797) 7 TR 181 at 182 [101 ER 920 at 921].

[247] [1825] EngR 766; (1825) 3 Bing 285 at 288 [130 ER 522 at 524].

[248] (1831) 1 Moo & S 51. See also *Planché v Colburn* [1831] EngR 722; (1831) 5 Car & P 58 at 61-62 per Tindal CJ [172 ER 876 at 877-878] for the summing up at *nisi prius*.

[249] (1831) 1 Moo & S 51 at 53-54.

[250] (1831) 1 Moo & S 51 at 52-53.

[251] Smith, *A Selection of Leading Cases on Various Branches of the Law*, 2nd ed (1842), vol 2 at 11-12 (emphasis in original).

[252] See, eg, *De Bernardy v Harding* [1853] EngR 648; (1853) 8 Ex 822 at 823 per Hoggins and Malcolm (*arguendo*), 824 per Alderson B [1853] EngR 648; [155 ER 1586 at 1587]; *Bartholomew v Markwick* [1864] EngR 90; (1864) 15 CB (NS) 711 at 716 per Erle CJ [1864] EngR 90; [143 ER 964 at 966]; *Slowey v Lodder* (1901) 20 NZLR 321 at 351 per Morison and Skerrett (*arguendo*), 356-357 per Williams J, 362 per Conolly J, affd [1904] AC 442 at 451 per Lord Davey for the Privy Council.

[253] [1853] EngR 760; (1853) 2 El & Bl 678 [118 ER 922].

[254] [1853] EngR 760; (1853) 2 El & Bl 678 at 688-689 per Lord Campbell CJ [118 ER 922 at 926]. See J F Burrows, "Contractual Co-operation and the Implied Term" (1968) 31 *Modern Law Review* 390.

[255] (1881) 6 App Cas 251 at 263 per Lord Blackburn. See also *Butt v M'Donald* (1896) 7 QLJ 68 at 71 per Griffith CJ (Cooper and Power JJ agreeing at 71); *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 448-449 per McHugh and Gummow JJ; [1995] HCA 24.

[256] *Hochster* [1853] EngR 760; (1853) 2 El & Bl 678 at 689-690 per Lord Campbell CJ [118 ER 922 at 926]. See also *Walsh v Alexander* [1913] HCA 24; (1913) 16 CLR 293 at 305 per Isaacs J; [1913] HCA 24.

[257] *Hochster* [1853] EngR 760; (1853) 2 El & Bl 678 at 685 per Crompton J (*arguendo*) [118 ER 922 at 924-925]. See also *Summers v The Commonwealth* [1918] HCA 33; (1918) 25 CLR 144 at 151-153 per Isaacs J; [1918] HCA 33, affd (1919) 26 CLR 180; [1919] HCA 20.

[258] Chitty, Denning and Harvey, *A Selection of Leading Cases on Various Branches of the Law*, 13th ed (1929), vol 2 at 35, 46-47. See also Denning, "*Quantum Meruit* and the Statute of Frauds" (1925) 41 *Law Quarterly Review* 79 at 79-80.

[259] See Mitchell and Mitchell, "*Planché v Colburn* (1831)", in Mitchell and Mitchell (eds), *Landmark Cases in the Law of Restitution* (2006) 65 at 89-91.

[260] See [169] fn 221 above.

[261] See [169] above.

[262] [1863] EngR 526; (1863) 3 B & S 826 [122 ER 309].

[263] See *Appleby v Myers* (1867) LR 2 CP 651 at 660 per Blackburn J for the Court; *Civil Service Co-operative Society v General Steam Navigation Company* [1903] 2 KB 756 at 764 per Earl of Halsbury LC (Lord Alverstone CJ and Cozens-Hardy LJ agreeing at 765, 766); *Chandler v Webster* [1904] 1 KB 493 at 499 per Collins MR, 501 per Romer LJ, 502 per Mathew LJ; *In re Continental C and G Rubber Co Pty Ltd* [1919] HCA 62; (1919) 27 CLR 194 at 201 per Knox CJ and Barton J; [1919] HCA 62.

[264] [1942] UKHL 4; [1943] AC 32 at 47-48 per Viscount Simon LC, 52-53 per Lord Atkin, 57 per Lord Russell of Killowen, 60 per Lord Macmillan, 69-70 per Lord Wright, 73 per Lord Roche, 81, 83 per Lord Porter. See *Baltic Shipping* [1993] HCA 4; (1993) 176 CLR 344 at 356 per Mason CJ (Brennan and Toohey JJ agreeing at 367, 383).

[265] *Barnes* [2014] UKSC 26; [2015] AC 1 at 42 [107]- [108] per Lord Toulson JSC (Baroness Hale of Richmond DPSC, Lord Kerr of Tonaghmore, Lord Wilson and Lord Hughes JJSC agreeing), quoting Birks, *An Introduction to the Law of Restitution* (1989) at 223. See [188] above.

[266] See *Robinson v Harman* [1848] EngR 135; (1848) 1 Ex 850 at 855 per Parke B [1848] EngR 135; [154 ER 363 at 365]; *Livingstone v Rawyards Coal Company* (1880) 5 App Cas 25 at 39 per Lord Blackburn; *Wenham v Ella* [1972] HCA 43; (1972) 127 CLR 454 at 471 per Gibbs J; [1972] HCA 43; *The Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54; (1991) 174 CLR 64 at 80-82 per Mason CJ and Dawson J, 98 per Brennan J, 116-117 per Deane J, 134 per Toohey J, 148 per Gaudron J, 161 per McHugh J; [1991] HCA 54.

[267] See Hunter and Carter, "Quantum Meruit and Building Contracts" (1989) 2 *Journal of Contract Law* 95 at 113; Stewart and Carter, "Frustrated Contracts and Statutory Adjustment: The Case for a Reappraisal" (1992) 51 *Cambridge Law Journal* 66.

[268] See, eg, McLure, "Failure of Consideration and the Boundaries of Restitution and Contract", in Degeling and Edelman (eds), *Unjust Enrichment in Commercial Law* (2008) 209 at 211-215; Raghavan, "Failure of Consideration as a Basis for *Quantum Meruit* following a Repudiatory Breach of Contract" [2016] MonashULawRw 7; (2016) 42 *Monash University Law Review* 179 at 186-187, 197.

[269] See, eg, Beatson, "The Temptation of Elegance: Concurrence of Restitutionary and Contractual Claims", in Swadling and Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (1999) 143 at 151-152; Jaffey, "Restitutionary Remedies in the Contractual Context" (2013) 76 *Modern Law Review* 429 at 440-441; Havelock, "A Taxonomic Approach to Quantum Meruit" (2016) 132 *Law Quarterly Review* 470 at 481.

[270] See *Fibrosa* [1942] UKHL 4; [1943] AC 32 at 48-49 per Viscount Simon LC, 72 per Lord Wright, cf at 53 per Lord Atkin, 56 per Lord Russell of Killowen, 82 per Lord Porter; *David Securities* [1992] HCA 48; (1992) 175 CLR 353 at 382 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; *Baltic Shipping* [1993] HCA 4; (1993) 176 CLR 344 at 350-351 per Mason CJ (Brennan and Toohey JJ agreeing at 367, 383), 376 per Deane and Dawson JJ, 389 per McHugh J. See also Havelock, "A Taxonomic Approach to Quantum Meruit" (2016) 132 *Law Quarterly Review* 470 at 490-492.

[271] [1942] UKHL 4; [1943] AC 32 at 48.

[272] *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 at 317 [23] per Gleeson CJ, Gaudron and Gummow JJ; 176 ALR 693 at 699; [2000] HCA 64, quoting *Stocznia Gdanska SA v Latvian Shipping Co* [1998] UKHL 9; [1998] 1 WLR 574 at 585 per Lord Goff of Chieveley; [1998] UKHL 9; [1998] 1 All ER 883 at 893. See also *Grein v Imperial Airways Ltd* [1937] 1 KB 50 at 69 per Greer LJ.

[273] See and compare *Transfield Shipping Inc v Mercator Shipping Inc* [2008] UKHL 48; [2009] AC 61 at 68 [12] per Lord Hoffmann. See also Robertson, "The Basis of the Remoteness Rule in Contract" (2008) 28 *Legal Studies* 172; Lawson, "The Remoteness Rules in Contract: Holmes, Hoffmann, and Ships that Pass in the Night" (2012) 23 *King's Law Journal* 1; Edelman and Bourke, "F W Guest Memorial Lecture 2017: *Hadley v Baxendale*" [2017] OtaLawRw 1; (2018) 15(2) *Otago Law Review* 1; Edelman, *McGregor on Damages*, 20th ed (2018) at 196-197 [8-172]-[8-173].

[274] See *Wenham v Ella* [1972] HCA 43; (1972) 127 CLR 454 at 466-467 per Walsh J; *Johnson v Perez* [1988] HCA 64; (1988) 166 CLR 351 at 356 per Mason CJ; [1988] HCA 64.

[275] See *J C Williamson Ltd v Lukey and Mulholland* [1931] HCA 15; (1931) 45 CLR 282 at 298 per Dixon J; [1931] HCA 15; *Dougan v Ley* [1946] HCA 3; (1946) 71 CLR 142 at 150 per Dixon J; [1946] HCA 3.

[276] *Coulls v Bagot's Executor and Trustee Co Ltd* [1967] HCA 3; (1967) 119 CLR 460 at 504; [1967] HCA 3. See also *Zhu v Treasurer of New South Wales* [2004] HCA 56; (2004) 218 CLR 530 at 574-575 [128] per Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ; [2004] HCA 56.

[277] *Barrick v Buba* [1857] EngR 610; (1857) 2 CB (NS) 563 at 579-580 per Cockburn CJ [1857] EngR 610; [140 ER 536 at 543-544]; *Wilkinson v Verity* (1871) LR 6 CP 206 at 209-210 per Willes J for the Court; *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* [1954] HCA 25; (1954) 90 CLR 235 at 250 per Kitto J; [1954] HCA 25; *Ogle v Comboyuro Investments Pty Ltd* [1976] HCA 21; (1976) 136 CLR 444 at 458 per Gibbs, Mason and Jacobs JJ; [1976] HCA 21; *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* [1985] HCA 14; (1985) 157 CLR 17 at 31 per Mason J (Wilson, Deane and Dawson JJ agreeing at 38, 51, 56); [1985] HCA 14; *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245 at 260-261 per Mason CJ (Deane, Dawson and Toohey JJ agreeing at 265); [1988] HCA 11. But see Vold, "Anticipatory Repudiation of Contracts and Necessity of Election" (1928) 26 *Michigan Law Review* 502 at 519, attributing this rule to dubious headnotes of *Avery v Bowden* [1855] EngR 842; (1855) 5 El & Bl 714 [119 ER 647] and *Reid v Hoskins* [1855] EngR 851; (1855) 5 El & Bl 729 [119 ER 653]. See also Liu, *Anticipatory Breach* (2011) at 156.

[278] *Concut* (2000) 75 ALJR 312 at 317 [23] per Gleeson CJ, Gaudron and Gummow JJ; 176 ALR 693 at 699-700. See and compare *Koompahtoo* [2007] HCA 61; (2007) 233 CLR 115 at 136 [46] per Gleeson CJ, Gummow, Heydon and Crennan JJ.

[279] *Shevill v Builders Licensing Board* [1982] HCA 47; (1982) 149 CLR 620 at 627-628 per Gibbs CJ; [1982] HCA 47.

[280] [1966] 1 WLR 287; [1966] 1 All ER 309.

[281] See Foxton, "How Useful is Lord Diplock's Distinction between Primary and Secondary Obligations in Contract?" (2019) 135 *Law Quarterly Review* 249.

[282] *C Czarnikow Ltd v Koufos* [1966] 2 QB 695 at 730.

[283] See also *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20; [2019] AC 649 at 672 [34] per Lord Reed JSC (Baroness Hale of Richmond PSC, Lord Wilson and Lord Carnwath JJSC agreeing).

[284] [1973] AC 331 at 350.

[285] See *Moschi* [1973] AC 331 at 347-348, referring to "bailment", "tort" and "unsatisfied judgments" as other sources of legal obligation. See also *Photo Production* [1980] UKHL 2; [1980] AC 827 at 850.

[286] [1980] UKHL 2; [1980] AC 827 at 850.

[287] *Lumbers* [2008] HCA 27; (2008) 232 CLR 635 at 663 [78] per Gummow, Hayne, Crennan and Kiefel JJ.

[288] *Fibrosa* [1942] UKHL 4; [1943] AC 32 at 43 per Viscount Simon LC.

[289] See [187] above.

[290] [2016] NSWCA 81; (2016) 91 NSWLR 732 at 743 [48] (Bathurst CJ and Sackville A-JA agreeing at 734 [1], 750 [88]).

[291] See also *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 at 581 per Lord Wilberforce.

[292] [1941] AC 1.

[293] (1974) 131 CLR 634 at 641-642; [1974] HCA 40.

[294] See also *O'Connor v S P Bray Ltd* [1936] NSWStRp 14; (1936) 36 SR (NSW) 248 at 257-259 per Jordan CJ.

[295] [2001] HCA 68; (2001) 208 CLR 516 at 544 [72]- [73]. See also Windeyer, *Lectures on Legal History*, 2nd ed (rev) (1957) at 5.

[296] See also *Breen v Williams* (1996) 186 CLR 71 at 115 per Gaudron and McHugh JJ; [1996] HCA 57; *D'Arcy v Myriad Genetics Inc* (2015) 258 CLR 334 at 350 [26] per French CJ, Kiefel, Bell and Keane JJ; [2015] HCA 35.

[297] *Pavey & Matthews* [1987] HCA 5; (1987) 162 CLR 221 at 256-257 per Deane J; *David Securities* [1992] HCA 48; (1992) 175 CLR 353 at 375 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; *Lumbers* [2008] HCA 27; (2008) 232 CLR 635 at 665 [85] per Gummow, Hayne, Crennan and Kiefel JJ.

[298] *Equuscorp* (2012) 246 CLR 498 at 516 [30] per French CJ, Crennan and Kiefel JJ; *AFSL* [2014] HCA 14; (2014) 253 CLR 560 at 579 [20] per French CJ, 618 [138] per Gageler J.

[299] *Roxborough* [2001] HCA 68; (2001) 208 CLR 516 at 543 [70] per Gummow J, quoting Finn, "Equitable Doctrine and Discretion in Remedies", in Cornish et al (eds), *Restitution: Past, Present and Future* (1998) 251 at 251-252.

[300] See and compare Holmes, *The Common Law* (1881) at 5; Windeyer, *Lectures on Legal History*, 2nd ed (rev) (1957) at 109.

[301] See and compare *Wenham v Ella* [1972] HCA 43; (1972) 127 CLR 454 at 466 per Walsh J.

[302] *Lilley v Elwin* [1848] EngR 312; (1848) 11 QB 742 at 755 per Coleridge J for the Court [1848] EngR 312; [116 ER 652 at 657]; *Goodman v Pocock* [1850] EngR 632; (1850) 15 QB 576 at 580 per Lord Campbell CJ [1850] EngR 632; [117 ER 577 at 579]; *Macnamara v Martin* [1908] HCA 86; (1908) 7 CLR 699 at 706 per Griffith CJ (Barton J agreeing at 707); [1908] HCA 86. See also *Hulle v Heightman* [1802] EngR 57; (1802) 2 East 145 at 147-148 [102 ER 324 at 325]; *Thomas v Williams* [1834] EngR 818; (1834) 1 Ad & E 685 at 689 per Lord Denman CJ for the Court [1834] EngR 818; [110 ER 1369 at 1371]; *Melville v De Wolf* [1855] EngR 358; (1855) 4 El & Bl 844 at 849 per Lord Campbell CJ for the Court [1855] EngR 358; [119 ER 313 at 315]; Smith (ed), *Addison on Contracts*, 8th ed (1883) at 451-452; Skelton, *Restitution and Contract* (1998) at 53.

[303] See, eg, *Merrill v Ithaca and Owego Rail Road Co* (1837) 16 Wend 586 at 594 per Cowen J for the Court and *Lincoln v Schwartz* (1873) 70 Ill 134 at 137 per Sheldon J for the Court, cited in Sedgwick, *A Treatise on the Measure of Damages*, 8th ed (1891), vol 2 at 318.

[304] (1901) 20 NZLR 321 at 325.

[305] *Lodder v Slowey* [1904] AC 442.

[306] (1901) 20 NZLR 321 at 353 per Chapman and Findlay (*arguendo*).

[307] (1901) 20 NZLR 321 at 358.

[308] (1901) 20 NZLR 321 at 362.

[309] See, eg, *Brooks Robinson* [1951] VicLawRp 58; [1951] VLR 405 at 409 per Dean J (Martin and Sholl JJ agreeing at 407, 409); *Renard Constructions* (1992) 26 NSWLR 234 at 277 per Meagher JA (Priestley and Handley JJA agreeing at 271-272, 283); *Iezzi Constructions* [1994] QCA 49; [1995] 2 Qd R 350 at 362 per McPherson JA; *Sopov v Kane* (2009) 24 VR 510 at 518 [24]-[25], 519 [30] per Maxwell P, Kellam JA and Whelan A-JA.

[310] *Pavey & Matthews* [1987] HCA 5; (1987) 162 CLR 221 at 263 per Deane J.

[311] See and compare *Spencer v The Commonwealth* (1907) 5 CLR 418 at 441 per Isaacs J; [1907] HCA 82; *Kenny & Good Pty Ltd v MGICA (1992) Ltd* [1999] HCA 25; (1999) 199 CLR 413 at 436 [49]-[50] per McHugh J; [1999] HCA 25; *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2008] HCA 5; (2008) 233 CLR 259 at 275-277 [48]- [51] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; [2008] HCA 5.

[312] See and compare Fuller and Perdue, "The Reliance Interest in Contract Damages: 1" (1936) 46 *Yale Law Journal* 52 at 54-55; *The Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54; (1991) 174 CLR 64.

[313] [1934] ArgusLawRp 81; (1934) 51 CLR 485 at 499 (Evatt and McTiernan JJ agreeing at 508); [1934] HCA 45.

[314] *South Australian Harbors Board v South Australian Gas Co* [1934] ArgusLawRp 81; (1934) 51 CLR 485 at 501 per Dixon J, see also at 490 per Starke J.

[315] See *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* [1982] HCA 53; (1982) 149 CLR 600 at 616 per Brennan J; [1982] HCA 53.

[316] *Pavey & Matthews* [1987] HCA 5; (1987) 162 CLR 221 at 263 per Deane J.

[317] See *Scarisbrick v Parkinson* (1869) 20 LT 175 at 177 per Kelly CB; *Ward v Griffiths Bros Ltd* [1928] NSWStRp 29; (1928) 28 SR (NSW) 425 at 427 per Street CJ; *Horton v Jones* [1934] NSWStRp 32; (1934) 34 SR (NSW) 359 at 367-368 per Jordan CJ; *Pavey & Matthews* [1987] HCA 5; (1987) 162 CLR 221 at 236-238 per Brennan J, 250, 252, 257 per Deane J, 267-268 per Dawson J.

[318] [1987] HCA 5; (1987) 162 CLR 221 at 228.

[319] Lord, *Williston on Contracts*, 4th ed (2003), vol 26, §68:41 at 475.

[320] See [165] above.

[321] See Mason, Carter and Tolhurst, *Mason & Carter's Restitution Law in Australia*, 3rd ed (2016) at 610 [1430].

[322] See, eg, *Whincup v Hughes* (1871) LR 6 CP 78 at 81 per Bovill CJ.

[323] See, eg, *Attwood v Maude* (1868) LR 3 Ch App 369.

[324] *Taylor v Motability Finance Ltd* [2004] EWHC 2619 (Comm) at [26] per Cooke J.

[325] See Palmer, *The Law of Restitution* (1978), vol 1, §4.4(c) at 398-401; Skelton, *Restitution and Contract* (1998) at 57-60.

[326] American Law Institute, *Restatement of the Law Third, Restitution and Unjust Enrichment* (2011) §38 at 645.

[327] [2004] EWCA Civ 47; [2004] 1 WLR 2775 at 2787 [28] (Thorpe LJ and Wilson J agreeing at 2795 [52], [51]).

[328] See Birks, *An Introduction to the Law of Restitution* (1989) at 109-132; Burrows, *The Law of Restitution*, 3rd ed (2011) at 47-60; Virgo, *The Principles of the Law of Restitution*, 3rd ed (2015) at 69-72.

[329] [2013] UKSC 50; [2014] AC 938 at 956 [15], 957 [17] (Lord Kerr of Tonaghmore and Lord Wilson JJSC agreeing), quoting *Benedetti v Sawiris* [2010] EWCA Civ 1427 at [140] per Etherton LJ (emphasis added).

[330] [2013] UKSC 50; [2014] AC 938 at 957 [18].

[331] [2013] UKSC 50; [2014] AC 938 at 986-987 [113]- [117].

[332] [2013] UKSC 50; [2014] AC 938 at 987 [115].

[333] [2013] UKSC 50; [2014] AC 938 at 1006 [187], 1007-1008 [191]-[192].

[334] Mitchell, Mitchell and Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment*, 9th ed (2016) at 51 [3-10], 53-54 [3-16]-[3-17], 71-72 [3-52]-[3-54].

[335] Virgo, *The Principles of the Law of Restitution*, 3rd ed (2015) at 99-102; Edelman and Bant, *Unjust Enrichment*, 2nd ed (2016) at 84, 141-151; Mason, Carter and Tolhurst, *Mason & Carter's Restitution Law in Australia*, 3rd ed (2016) at 95-96 [215], 609-610 [1430]; Furst and Ramsey, *Keating on Construction Contracts*, 10th ed (2016) at 283-284 [9-062].

[336] Mitchell, Mitchell and Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment*, 9th ed (2016) at 71-72 [3-54].

[337] See, eg, *Banque Financière de la Cité v Parc (Battersea) Ltd* [1998] UKHL 7; [1999] 1 AC 221 at 227 per Lord Steyn, 234 per Lord Hoffmann; *Benedetti* [2013] UKSC 50; [2014] AC 938 at 955 [10] per Lord Clarke of Stone-cum-Ebony JSC (Lord Kerr of Tonaghmore and Lord Wilson JJSC agreeing); *Menelaou v Bank of Cyprus Plc* [2016] AC 176 at 187 [18] per Lord Clarke of Stone-cum-Ebony JSC, 197 [61] per Lord Neuberger of Abbotsbury PSC. See Mitchell, Mitchell and Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment*, 9th ed (2016) at 8 [1-09].

[338] See, eg, Birks, *An Introduction to the Law of Restitution* (1989) at 116-117.

[339] See, eg, *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29; [2018] AC 275 at 295 [40]- [42] per Lord Reed JSC (Lord Neuberger of Abbotsbury PSC, Lord Mance, Lord Carnwath and Lord Hodge JJSC agreeing); *Swynson Ltd v Lowick Rose Llp* [2017] UKSC 32; [2018] AC 313 at 326 [22] per Lord Sumption JSC (Lord Neuberger of Abbotsbury PSC, Lord Clarke of Stone-cum-Ebony and Lord Hodge JJSC agreeing), 351-352 [110]-[112] per Lord Neuberger PSC. See also *Skandinaviska Enskilda Banken AB (Publ) v Conway* [2019] 3 WLR 493 at 520-521 [79]-[80] per Lord Reed, Lord Wilson, Lord Lloyd-Jones, Lord Briggs and Sir Donnell Deeny.

[340] [2017] UKSC 32; [2018] AC 313 at 326 [22] (Lord Neuberger of Abbotsbury PSC, Lord Clarke of Stone-cum-Ebony and Lord Hodge JJSC agreeing).

[341] *David Securities* [1992] HCA 48; (1992) 175 CLR 353 at 378-379 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; *AFSL* [2014] HCA 14; (2014) 253 CLR 560 at 595 [73]- [74] per Hayne, Crennan, Kiefel, Bell and Keane JJ, 618 [139] per Gageler J.

[342] See, eg, *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41 at 97 per Mason J; [1984] HCA 64; *Bofinger v Kingsway Group Ltd* [2009] HCA 44; (2009) 239 CLR 269 at 291 [52] per Gummow, Hayne, Heydon, Kiefel and Bell JJ; [2009] HCA 44, quoting *The Equity Trustees Executors & Agency Co Ltd v New Zealand Loan & Mercantile Agency Co Ltd* [1940] VicLawRp 35; [1940] VLR 201 at 205 per Lowe J; *Friend v Brooker* [2009] HCA 21; (2009) 239 CLR 129 at 150-151 [47] per French CJ, Gummow, Hayne and Bell JJ; [2009] HCA 21.

[343] See and compare *Lumbers* [2008] HCA 27; (2008) 232 CLR 635 at 662-663 [78]- [79] per Gummow, Hayne, Crennan and Kiefel JJ.

[344] (1933) 24 P 2d 570.

[345] See Cohen, "The Fault Lines in Contract Damages" (1994) 80 *Virginia Law Review* 1225 at 1304-1305; Gergen, "Restitution as a Bridge Over Troubled Contractual Waters" (2002) 71 *Fordham Law Review* 709 at 711-712. See and compare Andersen, "The Restoration Interest and Damages for Breach of Contract" (1994) 53 *Maryland Law Review* 1 at 22-26.

[346] (1933) 24 P 2d 570 at 576 (Spence A-PJ and Sturtevant J agreeing at 580).

[347] [2013] UKSC 50; [2014] AC 938 at 1007-1008 [192].

[348] See *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal* (1990) 26 FCR 39 at 40. See also *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488 at 492 [11] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; [2000] HCA 48; *Isbester v Knox City Council* [2015] HCA 20; (2015) 255 CLR 135 at 146 [20]- [23] per Kiefel, Bell, Keane and Nettle JJ; [2015] HCA 20.