Putting a cap on restitution*:*
***Mann v Paterson Constructions Pty Ltd* [2019] HCA 32**

Tristan Lockwood, *Senior Lawyer, AGS*
Jordan English, *Lecturer in Law, Magdalen College, Oxford*

In *Mann v Paterson Constructions Pty Ltd*,[1] a majority of the High Court of Australia confirmed that where a contract is terminated following acceptance of a repudiation, the innocent party can claim, as an alternative to damages for breach of contract, restitution for the value of work and labour done at the request of the breaching party for which a contractual right to payment has not yet accrued. A majority also held that the amount of restitution will generally be limited by the price of the contract or the appropriate part of the contract price attributable to the work.

Facts

Landowners entered into a contract with a builder to construct two residential townhouses in Blackburn, Victoria. The building contract, which was in a standard form, provided for progress payments in relation to identified stages (ie base stage, frame stage, lock up stage etc). The total value of the contract was $971,000.

The contract stated that if the owners wished to vary the plans or specifications, then the owners needed to provide written notice describing the requested variation. If the builder reasonably believed that the requested variation would, among other things, add more than 2% to the original contract price, the builder was required to give a written notice to the owner stating either (i) that the builder refused or was unable to carry out the work, or (ii) the effect the variation would have, and the cost and delay that would be caused by carrying out the requested variation.

During the course of the contract, the owners orally requested 42 variations, none of which added more than 2% to the original contract price. At around the time the first of the two townhouses was being handed over, the builder informed the owners that there was an amount in excess of $48,000 due on account of the extensive variations. Ultimately, following a disagreement about the amount owing, both parties purported to terminate the contract on the basis of the other's repudiation.

In the ensuing proceeding in VCAT, a quantity surveyor gave evidence that the total value of the works under the contract, less rectification costs, was $1,606,313.41 – considerably more than the $945,787 paid (or payable) by the owners to the builder under the contract.

Issues

The courts below determined that the owners had repudiated the contract and that the builder had validly terminated the contract upon acceptance of that repudiation. Three main issues of law arose for determination by the High Court:

1. Was the builder limited to damages for breach of contract, or could the builder, at its option, seek restitution of the value of work and labour done at the owners' request (ie a claim for a *quantum meruit*)?

2. If so, was that claim limited by the contract price?

3. Did s 38 of the *Domestic Building Contracts Act 1995* (Vic) ("the DBC Act") preclude a claim for restitution assessed on a *quantum meruit* basis in respect of the variations? Section 38 of the DBC Act relevantly mirrored the terms of the contract, but prohibited a builder from recovering money in respect of an owner-initiated variation unless the relevant requirements under s 38 of

1 [2019] HCA 32.

the DBC Act, which were reflected in the contract, had been complied with. Importantly, these provisions had not been complied with.[2]

High Court's decision

The High Court's main conclusions were as follows:

1. All members of the Court agreed that with respect to work and labour done in response to a requested variation within the meaning of s 38 of the DBC Act, any remuneration was to be determined in accordance with ss 38 and 39 of that Act.[3] Nettle, Gordon, and Edelman JJ noted that "the apparent purpose of [those] provisions is that a builder shall not be permitted to recover any money in respect of owner-initiated variations … except in accordance with [those] provisions".[4] Upon their proper construction, they excluded "the availability of restitutionary relief for variations implemented otherwise than in accordance with s 38."[5]

2. As for work and labour done which did not constitute variations, but which comprised completed stages of the contract, the Court was also unanimous in finding that the builder's only right was for recovery of the amount due under the contract and any damages for breach of contract.[6] In other words, where there is an accrued contractual right to payment in respect of work done under the contract, the party claiming will be limited to an action for the agreed sum (ie debt) and damages for any breach of contract. Restitution assessed on a *quantum meruit* basis is not available.

3. A majority of the Court held that in respect of work and labour done which did not constitute variations, but which comprised stages of the contract that were incomplete, the builder was entitled to either damages for breach of contract or restitution, but that the amount of restitution was limited by the price of the contract or the appropriate part of the contract price referrable to the work.[7] As discussed below, however, there was not agreement on whether there might be exceptions to this general rule.

Comment

The decision is undoubtedly a significant one for practitioners and will be of interest to academics, particularly those with an interest in contract and restitution. Undoubtedly, the two most important conclusions in the case are that:

1. a claim in quantum meruit is available as an alternative to a claim in damages following acceptance of a repudiation where there is a total failure of consideration, or a total failure of a severable part of the consideration; and

2. such a claim is limited by the contract price (or such portion of the contract price as is attributable to the services performed or benefits conferred).

---

2 ibid at [159].
3 ibid at [4] per Kiefel CJ, Bell, and Keane JJ; [58]-[59] per Gageler J; [110] per Nettle, Gordon and Edelman JJ.
4 ibid at [157].
5 ibid at [160].
6 ibid at [19] per Kiefel CJ, Bell and Keane JJ; [62]-[64] per Gageler J; [110], [172] per Nettle, Gordon and Edelman JJ.
7 ibid at [101] per Gageler J; [110], [215]-[216] per Nettle, Gordon and Edelman JJ. Kiefel CJ, Bell and Keane JJ disagreed with the majority on this issue, holding that no claim for restitution should be available where there is either an accrued right to payment or a claim for damages: see [19]-[52].

Clarifying the basis of recovery

In terms of the basis for recovery, the judgment of Nettle, Gordon and Edelman JJ makes clear that the claim is one for restitution following a total failure of consideration, or a total failure of a severable part of the consideration.[8] Their Honours explain that "consideration" in this context does not mean that required for the valid formation of a contract, but rather "the matter considered in forming the decision to do the act: 'the state of affairs contemplated as the basis or reason for the payment'."[9] We could equally speak of failure of basis,[10] or failure of condition.[11]

Their Honours identify that "[i]n many cases the relevant basis will be the benefit that is bargained for".[12] In other words, the basis, or condition, of the payment or conferral of a benefit is that the party conferring the benefit would obtain the benefit or counter-performance that she bargained for under the contract.

Understood in this way, the structure of the claim is simple. If one party is to build a house and is only to be paid if the house is complete (ie the obligation is entire), then if the other party repudiates his or her obligations under the contract and the innocent party chooses to treat himself or herself as discharged, there will be a total failure of consideration.[13] The basis upon which the work was done, namely that it would be remunerated, has failed, and restitution, assessed on a *quantum meruit* basis, will follow. As Nettle, Gordon and Edelman JJ explained, the same applies with respect to divisible stages of a contract – "there will be a total failure of consideration in respect of the stages that have not been completed".[14]

It can be seen immediately why there is no alternative claim in restitution in respect of accrued rights to payment under the contract for that part of the work that has been done. The condition of the work (that it would be paid) has not failed – the party claiming still has a right to payment. "There will have been no failure of consideration".[15]

The minority on this issue (Kiefel CJ, Bell and Keane JJ) held that the same logic applied to damages for the loss of bargain.[16] If the party claiming has a right to damages for the loss of bargain, how can there be a total failure of consideration? The answer, it is submitted, is that the failure of condition is the failure of counter-performance. It is no answer to say that the party has a claim for damages. This only begins to looks plausible if one takes the view, often attributed to Oliver Wendell Holmes,[17] that contractual promises are promises to perform or, alternatively, pay damages. But this is not the view taken in Australian law.[18] As Nettle, Gordon and Edelman JJ observed "[t]he parties contract for performance, not damages".[19] For this reason, the view of the majority is to be preferred.

Contract price as a limitation upon the amount recoverable

The majority consensus was that the quantum meruit claim is, generally speaking, to be limited by the contract price. Nettle, Gordon and Edelman JJ explained that "where a contract is terminated

8 ibid at [168].
9 ibid at [168].
10 Not to be confused with "absence of basis". For this distinct idea see: Peter Birks, *Unjust Enrichment* (Oxford University Press, 2005) 129-160.
11 The terminology adopted, for example, in Frederick Wilmot-Smith, 'Reconsidering 'Total' Failure' (2013) 72 *Cambridge Law Journal* 414.
12 *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 at [168].
13 ibid at [173].
14 ibid at [174].
15 ibid at [172].
16 See ibid at [20]-[22].
17 Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 462; although it would seem that this may have been a misreading of Holmes: see Joseph M Perillo, 'Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference' (2000) 68 *Fordham Law Review* 1085.
18 *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460 at 504.
19 *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 at [195].

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."[20] Their Honours therefore said:

> "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."[21]

Unfortunately, their Honours went further and said that this "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".[22] While it can be said that "'[n]ever say never' is a wise judicial precept",[23] it is respectfully submitted that on this occasion their Honours should have laid down a firm rule. In this respect, the result reached by Gageler J, namely that the claim in quantum meruit is in all cases limited to the contract price or the appropriate part of the contract price, is to be preferred.[24] It should be noted, however, that his Honour reached this result by a different process of reasoning to Nettle, Gordon and Edelman JJ.[25]

Status of the unjust enrichment concept

The judgment of Nettle, Gordon and Edelman JJ is clear on the position in Australian law. As their Honours explain, while the concept of unjust enrichment may be a "unifying legal concept" or serve a "taxonomical function":

> "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".[26]

A further observation which may be of interest to readers is their Honours' suggestion that in view of recent developments in English law "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."[27] The United Kingdom Supreme Court has recently emphasised that "the adoption of the concept of unjust enrichment in modern law, as a unifying principle underlying a number of different types of claim, does not provide the courts with a tabula rasa, entitling them to disregard or distinguish all authorities pre-dating the *Lipkin Gorman* case".[28] And in *Swynson Ltd v Lowick Rose Llp*,[29] Lord Sumption stated that "English law does not have a universal theory to explain all the cases in which restitution is available."

Academics have identified these cases as a retreat "from the more expansive approach to the law of restitution"[30] and for some,[31] although not all,[32] this move has been welcomed. We do not engage with this debate here, but merely note the possible convergence of English and Australian law on the issue.

---

20 ibid at [205].
21 ibid at [215].
22 ibid at [216].
23 *In re Spectrum Plus Ltd* [2005] 2 A.C. 680 at 699 [41] per Lord Nicholls.
24 *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 at [101]-[102].
25 See eg ibid at [79]-[80].
26 ibid at [199].
27 ibid at [212].
28 *Investment Trust Companies v Revenue and Customs Commissioners* [2018] AC 275 at 295 [40].
29 [2018] AC 313, 326 [22].
30 Robert Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 574, 574.
31 See Robert Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 574 and Lionel Smith 'Restitution: A New Start?' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing, 2019) 91.
32 Andrew Burrows, 'In Defence of Unjust Enrichment' (2019) 78(3) *Cambridge Law Journal* 521.