
# QUANTUM MERUIT AS A REMEDY IN CONSTRUCTION LAW

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## Introduction

1 *Quantum meruit* means 'as much as he deserved' or 'the amount deserved' and refers to a claim for a reasonable sum for work performed.[1] A claim for a quantum meruit can arise as a 'contractual quantum meruit' or as a 'non-contractual quantum meruit'.[2]

2 A contractual quantum meruit arises where a principal and a contractor have entered into an agreement to perform work but either no price is agreed for the work, or the parties agree that the contractor is to be paid a reasonable price for the work without stating what the price is. If the contractor performs the work, it is then entitled to reasonable remuneration for the work performed. This is an entitlement that arises under the contract.

3 A non-contractual quantum meruit arises by operation of law where work is performed for another and there is no contract or no enforceable contract. Non-contractual quantum meruit has been controversial both as to the doctrinal basis for the remedy and valuation of the amount deserved. In particular, where there was a concluded contract between the parties, there is concern that a quantum meruit undermines the agreed allocation of risk.

4 The circumstances in which an entitlement to a non-contractual quantum meruit might arise in the context of construction law include:

4.1 **Anticipated contracts which fail to materialise**; where work is undertaken pursuant to a letter of intent or on the basis of a request to perform work in the expectation that the parties would ultimately enter into a contract, but no contract materialises.[3]

4.2 **Work has been done under a void or unenforceable contract**; for example, where work is done under a contract which is

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1 *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 para [150]; Stephen Furst and Sir Vivian Ramsey, *Keating on Construction Contracts* (11th edition, Sweet & Maxwell, 2021) para 4-031.

2 Julian Bailey, *Construction Law, Volume II* (3rd edition, London Publishing Partnership, 2020) paras 6.14–6.15.

3 For example, *Electrix Ltd v The Fletcher Construction Company Ltd* [2020] NZHC 918; *Dickson Elliott Lonergan Ltd v Plumbing World Ltd* [1988] 2 NZLR 608.

unenforceable because it is not in writing and the defendant has accepted the benefit of its performance without paying.[4]

4.3 **Work done under contracts subsequently cancelled for repudiation or breach**; where the parties have entered into an enforceable contract and work is undertaken pursuant to that contract, but the contract is then breached or repudiated and cancelled and the claim for a quantum meruit arises by operation of law as an alternative remedy to damages for breach of contract.[5]

4.4 **Work done under an existing contract which has been discharged by operation of the doctrine of frustration***;* the basis or reason for the provision of services has failed to materialise or failed to sustain itself.[6]

4.5 **Work done outside the scope of the contract**; for example, where work undertaken is so far outside the scope of the contract that the contract can no longer reasonably be applied to the work.[7]

5 This paper focuses on two of these categories – anticipated contracts that fail to materialise, and work done under contracts subsequently cancelled for repudiation or breach. The second situation is the most controversial, as the quantum meruit remedy is seen as competing with damages and potentially undermining the contractual allocation of risk agreed between the parties.

6 The first section of the paper focuses on the availability of non-contractual quantum meruit and the legal basis for the remedy in these two situations under New Zealand law. The second section discusses availability and legal basis under English law. The third section discusses issues arising in relation to the valuation of a non-contractual quantum meruit.

## New Zealand law

7 In the New Zealand context, there are two recent cases which are now leading authorities in relation to the two situations under consideration.

8 For anticipated contracts which fail to materialise, the case is *Electrix Ltd v The Fletcher Construction Company Ltd*.[8] As with earlier cases in New Zealand dealing with this category of claim, the court grapples with

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4 *Cassels v Body Corporate No. 86975* HC Wellington, CIV-2006-485-701, 13 June 2007; *Tuck Construction Ltd v Waipa County* [1967] NZLR 987; *Pavey & Mathews Pty Ltd v Paul* (1987) 162 CLR 221.

5 For example, *Mann*, note 1; *Slowey v Lodder* (1901) 20 NZLR 321 (CA), affirmed on appeal [1904] AC 442 (PC); *Watson v Watson* [1953] NZLR 266; *Canterbury Pipelines Ltd v Christchurch Drainage Board* [1979] 2 NZLR 347 (CA) para [359]; *Seton Contracting Co Ltd v Attorney-General* [1982] 2 NZLR 368 pages 376–379.

6 See *Mann*, note 1, paras [188]–[191]; *Seton Contracting*, note 5, pages 376–379. The position in New Zealand may be governed by the Contract and Commercial Law Act 2017, Subpart 4 (Frustrated contracts).

7 *Seton Contracting*, note 5, pages 376–378; *Meyer v Gilmer* [1899] 18 NZLR 129.

8 *Electrix*, note 1.

the theoretical underpinnings of liability for a non-contractual quantum without finally determining the issue. The case raises issues as to whether the non-contractual quantum meruit remedy in New Zealand law is about the reversal of benefits unjustly obtained or compensating the claimant for work done, and whether the cost of the services provided, rather than the objective market value of the services, is the starting point for valuation of a quantum meruit in these circumstances.

9 Where work has been done under contracts subsequently cancelled, the recent decision of the High Court of Australia in *Mann v Paterson Constructions Pty Ltd*[9] is a leading Australasian authority. The court confirmed the availability of the quantum meruit remedy as an alternative to damages where entire contracts, or 'staged' contracts, are repudiated prior to completion of the whole of the works or a stage and there is no accrued right to payment for the work done. The court also found that the amount recoverable should generally be calculated in accordance with the contract price, but it left open the possibility of exceptions where it would be 'unconscionable' to confine the plaintiff to the contractual measure.

## *Unjust enrichment in New Zealand law*

10 Many common law jurisdictions, in particular England and Australia, have recognised unjust enrichment as an organising legal concept for a range of restitutionary remedies, including the remedy of non-contractual quantum meruit arising in the various circumstances referred to above.[10]

11 In these jurisdictions, it is recognised that four questions should be considered:[11]

a Has the defendant been enriched?

b Was the enrichment gained at the expense of the claimant?

c Was the enrichment at the expense of the claimant unjust?

d Are there any defences available to the defendant?

12 These questions provide an analytical structure for consideration of the various tests used to identify whether there has been an unjust enrichment at the expense of the claimant. For example:

12.1 Tests for 'enrichment' include:

a *Free acceptance* – where a reasonable person should have known that the claimant who rendered services expected to

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9 *Mann*, note 1.

10 Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th edition, Sweet & Maxwell, 2016) paras 1-06 –1-08; *Mann*, note 1, paras [199], [212]–[213].

11 *Goff & Jones*, note 10, para 1-09; *Keating*, note 1, para 4-032; *Mann*, note 1, para [213].

be paid for them but did not take the opportunity to reject the services;[12] and

b *Incontrovertible benefit* – such as the saving of a necessary expense.[13]

12.2 Tests for 'unjustness' include:

a *Total failure of consideration (or basis)* – in this context, 'consideration' is not the same as in the law of contract; rather it means the condition or basis for making the transfer – failure of consideration can occur where there has never been a contract;[14] and again

b *Free acceptance* – because of the unconscionability of the recipient in not availing itself of the opportunity to reject the services.[15]

13 It is important to recognise that there is no general rule in the Australian and English jurisdictions providing a right of recovery whenever it can be established that a defendant has been unjustly enriched at the plaintiff's expense. Claims in unjust enrichment must be brought within or close to some established category or factual recovery situation that is established by past authority or justified by reasoning from past authority.[16]

14 Apart from one recent case,[17] the New Zealand courts have generally resisted adopting unjust enrichment as an organising concept for restitutionary claims such as quantum meruit and the analytical framework discussed above.[18] Instead, in many cases, the court embarks on a survey of case law and academic commentary, attempting to distil the elements afresh. An extreme example is the recent decision in *Northlake Investments Ltd v Wanaka Medical Centre Ltd*.[19] In that case, the court identified nine factors which were considered to be relevant to establishing liability in 'inconclusive negotiation' cases.

15 Several cases have acknowledged academic commentary to the effect that the purpose of the New Zealand law of restitution (and non-contractual quantum meruit) may not be to force the defendant to disgorge some underserved benefit, but to compensate the plaintiff fairly

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12 *Goff & Jones*, note 10, para 17-03.
13 *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health* (2006) 8 NZBLC 101 page 739, paras [86]–[90].
14 *Mann*, note 1, para [168].
15 *Goff & Jones*, note 10, para 17-03.
16 *Goff & Jones*, note 10, para 1-26; *Mann*, note 1, para [213].
17 *BDM Grange Ltd v Trimex (New Zealand) Ltd* [2017] NZHC 1259 paras [48]–[49].
18 See the discussion in *Electrix*, note 3, paras [73]–[87].
19 *Northlake Investments Ltd v Wanaka Medical Centre Ltd* [2019] NZHC 3443.

or restore the plaintiff's position. Thus, it is suggested that establishing an enrichment or benefit to the defendant may not be necessary.[20]

16 However, the law of unjust enrichment and the restitutionary remedies that come within it are not concerned with disgorgement of gains by defendants, nor with compensation for losses sustained by claimants. These are the functions of the law of contract and civil wrongs. Rather, the concern is with the reversal of transfers of benefits between plaintiffs and defendants.[21]

17 In *Morning Star v Canam Construction*, the New Zealand Court of Appeal stated:[22]

> 'We will not attempt to resolve the doctrinal dispute here. It is sufficient to say that there is general agreement that a plaintiff will be able to establish a quantum meruit claim where the defendant asks the plaintiff to provide services, or freely accepts services provided by the plaintiff, in circumstances where the defendant knows (or ought to know) that the plaintiff expects to be reimbursed for those services, irrespective of whether there is an actual benefit to the defendant.'

18 In *Cassels v Body Corporate 86975,* the court considered that unjust enrichment cannot fully account for quantum meruit and that a defendant who accepts services knowing the plaintiff wants payment is liable to pay a reasonable price for them, whether or not the defendant was enriched.[23] The court held:[24]

> 'The elements of a quantum meruit are threefold: the plaintiff provides services for the defendant; the plaintiff wants payment and made that reasonably apparent to the defendant; and the defendant fully accepted the services or at least acquiesced in their provision.'

19 The eschewing of the analytical framework utilised by other common law jurisdictions has arguably resulted in uncertainty and a lack of coherence in New Zealand law as to the doctrinal basis for restitutionary remedies such as quantum meruit, and therefore the factors or elements that must be established by the plaintiff. The High Court of Australia in *Mann* recently confirmed the importance of the analytical framework to the development of the law:[25]

> '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

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20 *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd* CA 90/5 8 August 2006 paras [40]–[50]; *Cassels v Body Corporate 86975* (2007) 8 NZCPR 740 paras [41]–[43]; Electrix, note 3, paras [73]–[87], [96].

21 *Goff & Jones*, note 10, para 1-17.

22 *Morning Star v Canam Construction*, note 20, para [50].

23 *Cassels v Body Corporate 86975*, note 20, para [41].

24 *Cassels v Body Corporate 86975*, note 20, para [43].

25 *Mann*, note 1, para [213].

> incremental development: by analogy with decided cases, albeit that, within that process of development and refinement, the four questions [being the analytical framework] 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.'

### *Anticipated contracts which fail to materialise*

20 The *Electrix* case arose out of the Christchurch Justice and Emergency Services Precinct project. Fletcher Construction issued a request for proposals for the electrical services package. Electrix submitted a proposal at a price of $16,866,182.99 (GST excl). Fletcher Construction confirmed Electrix as its preferred subcontractor in a letter of intent dated 20 October 2014. The letter envisaged that the parties would negotiate a full and formal contract. It referred to 'generally working towards' meeting the main contract GMP 'as included within your submitted tender figure'. Electrix commenced work on the basis of this letter.

21 Subsequently, on 20 March 2015, Fletcher Construction issued Electrix with a second letter of intent. It mentioned a forecast final contract value of 'circa $14 million' and provided Electrix with 'authority to proceed' to engage designers, subcontractors and suppliers up to a value of $2.5 million. The letter stated that 'your original quote will be used as a baseline for you to continually "firm up" sections of work as we work towards a fixed lump sum price'.

22 Subsequent letters of intent referred back to the first letter dated 20 October 2014. Fletcher Construction issued a total of nine letters of intent, totalling $14,055,145 with the last being issued on 13 February 2017. The court found that the letters of intent were the pattern by which Fletcher Construction authorised, and Electrix implemented, construction of the electrical works and were the only formal instrument used by Fletcher Construction and Electrix to regulate their relationship.[26]

23 Problems arose with the provision of the electrical services works. In particular, the detailed design of the electrical works was never completed. There were also issues with the management of the project by Fletcher Construction. Electrix contended that: it had to regularly install, uninstall and reinstall materials as a consequence of problems in sequencing with other subcontractors; it had to install electrical services in a crowded ceiling space, necessary because of delays occasioned by the lack of a detailed design; it had to present finished-looking rooms and areas for inspection when it was not logical to do so according to those works at that time; and generally that the project was under

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26 *Electrix*, note 3, para [25].

significant time pressure driven by deadlines which Fletcher Construction had agreed with the Ministry of Justice.[27]

24 Over the course of the works, Electrix issued 42 payment claims until the end of May 2018, totalling $28,892,016.10. Fletcher Construction paid Electrix $21.6 million overall.

25 Towards the end of the project, issues arose between the parties with regard to payment and Fletcher Construction withheld more of the payments requested by Electrix. Ultimately, Fletcher Construction's payment schedules stated: 'On account payment until contract negotiation advanced to resolution of contract method and cost substantiation'.[28]

26 Electrix claimed an additional $7 million plus interest from Fletcher Construction for the work undertaken. Fletcher Construction counterclaimed, saying it paid Electrix some $7 million too much, whether there was a contract or not.

27 The court found that no contract had been formed between Electrix and Fletcher Construction. The parties did not intend to be immediately bound by essential terms at any point. Although they expected to reach agreement on the contract, they never did.[29]

28 With regard to the letters of intent, the court found that while they provided evidence that Electrix and Fletcher Construction were working with the intention that there would be a contract, they were not evidence of an intention to be immediately bound. The court noted that in the original letter of intent, the subcontract was put in the future tense. In the second letter of intent the parties envisaged that they would enter into a contract and 'in the meantime' the letter was authority to proceed with works not exceeding $2.5 million. The court also noted that the last letter of intent dated 13 February 2017 was issued for $14,055,145, yet Fletcher Construction certified and paid more than that, which it would not have done if it had intended the letter of intent to be binding.[30]

29 Fletcher Construction also relied on other evidence to contend that there was an agreed price at a number of points. In particular, Fletcher Construction referred to a budget of $15 million for the electrical services works which was intended to be a Guaranteed Maximum Price and that Electrix was supposed to come in at mid-$14 million. However, there was also evidence to the effect that the parties did not regard themselves as having formally agreed on a contract on a number of occasions. In particular, the court found that there was a concerted effort by the parties to negotiate a formal contract from March 2017 which ultimately failed, and the court drew an inference that the fact of the negotiations at that point meant there was no prior agreement.

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27 *Electrix*, note 3, paras [14]–[23].
28 *Electrix*, note 3, para [29].
29 *Electrix*, note 3, paras [47]–[72].
30 *Electrix*, note 3, paras [59]–[64].

30 The court awarded Electrix the sum of $7,473,207 (GST excl) on the basis of a non-contractual quantum meruit.

**Availability of remedy**

31 The court considered the availability of the remedy of non-contractual quantum meruit in New Zealand law.

32 Palmer J reviewed the caselaw and academic commentary in relation to the New Zealand law of non-contractual quantum meruit referred to above. In common with earlier cases, he eschewed the analytical framework for assessing entitlement adopted in other common law jurisdictions which accept unjust enrichment as an organising concept, finding that:[31]

> 'The New Zealand law of non-contractual quantum meruit is not exclusively tethered to unjust enrichment, but there is reasonable coherence in what is required as a matter of practice.'

33 The court determined that the remedy was available because:[32]

> 'In this case, uncertainty in theoretical underpinnings do not disturb the issue of liability. Mr Fulton, for Fletchers, accepts that, if there was no contract, then a quantum meruit claim has to be addressed. It is clear Fletcher Construction requested Electrix to provide the services it did and freely accepted the services once provided. Fletcher Construction knew Electrix expected to be reimbursed. Fletcher Construction is liable to Electrix for the "amount deserved", the non-contractual quantum meruit.'

**Doctrinal basis**

34 It is apparent from the discussion in the case that the doctrinal basis for liability in *Electrix* is not necessarily unjust enrichment. Rather, the court appears to accept the position of academic commentators that the New Zealand law of non-contractual quantum meruit is more concerned with compensating a plaintiff for services provided or restoring the plaintiff's position.[33]

35 Interestingly, the court adopts as the elements of a non-contractual quantum meruit both a 'request' for services and 'free acceptance' of those services. A request for services has been adopted in some jurisdictions as a test of enrichment or benefit on the basis that where a person requests and receives something that a reasonable person would realise is not provided gratuitously, the recipient will be enriched by the receipt.[34]

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31 *Electrix*, note 3, para [85].
32 *Electrix*, note 3, para [86].
33 *Electrix*, note 3, paras [85] and [96].
34 James Edelman and Elise Bant, *Unjust Enrichment* (2nd edition, Hart Publishing, 2016) pages 112–115.

36 In the case of free acceptance, as referred to earlier, it is relied on in some jurisdictions as both a test of enrichment or benefit and a test of unjustness.[35] It is said to operate as a test of enrichment in that if the recipient knew or should have known that the provider of the services expected to be paid for them but did not take an opportunity to reject the services, then the recipient is not able to argue that the services received were not a benefit to it. It is also said to be an 'unjust' factor because of the unconscionability of the recipient in not availing itself of the opportunity to reject the services.[36]

37 The reliance on these tests for unjust enrichment, when the objective of the remedy is expressed to be compensation or restoration (rather than reversal of an enrichment) exposes the doctrinal quagmire that the New Zealand law of non-contractual quantum meruit finds itself in.

38 As discussed above, it is suggested that the way forward is not to cast non-contractual quantum meruit as a compensatory remedy (as if it is a remedy governed by the law of contract) but to acknowledge that the remedy arises on the basis of unjust enrichment and to adopt the analytical framework adopted by other kindred common law jurisdictions, enabling a principled and coherent development of the common law.

**Quantum**

39 Palmer J acknowledged the approach to valuation of a non-contractual quantum meruit in English law; being to identify the objective market price of the services and then allow for the defendant to prove that it did not value the benefit at all or as much (subjective devaluation).[37]

40 Palmer J then reverted to the position identified above that the New Zealand law of non-contractual quantum meruit does not necessarily require proof of a benefit to the defendant and can extend to providing redress for those who have been unjustly impoverished.[38]

41 The ultimate approach taken to valuation is encapsulated in the following paragraphs:[39]

> 'In this case, there is no contract and no agreement on the price of the services. Accordingly, it is difficult to put any weight on what was said about budgets, expectations or in negotiation. And there is no evidence quantifying the benefit of the services specifically to the defendant. The market price of the services that could have been used to undertake the works is relevant but the cost of the services actually provided is a better starting point. Those costs

35 *Goff & Jones*, note 10, para 17-03.
36 Edelman & Bant, note 34, pages 116–117 and 316–317.
37 *Electrix*, note 3, para [90]; *Benedetti v Sawiris* [2013] UKSC 50; *Mann*, note 1, para [208].
38 *Electrix*, note 3, para [96].
39 *Electrix*, note 3, paras [98]–[99].

should reflect the market value of the particular inputs used and the provision of those particular services at the relevant time and in the relevant circumstances. Together with the addition of a market-related profit margin, I consider that will reflect the reasonable cost of the services to the service supplier. If the defendant can show that the actual costs incurred were more than what was reasonable in the market conditions at the time for the work undertaken they should be reduced by that amount.

No expectation interest in a contract price has crystalised, for courts to award as damages in cases such as this. But by assessing the reasonable cost of the services to the supplier, the court can uphold the plaintiff's reliance interest in the anticipated relationship. That provides the purchaser of the services with incentives to conclude the contract. After all, the purchaser is able to avoid requesting, or to decline to accept the services, which is relevant to liability existing at all. The ability of the defendant to challenge the reasonableness of the costs in the market conditions at the time, and the uncertainty about whether they will necessarily be recovered, ameliorates any moral hazard for the service provider to pad their costs.'

42 In summary, the approach to valuation determined by the court is as follows:

a Determine the cost of the services actually provided as the starting point;

b Add a market-related profit margin; and

c If the defendant can show that the actual cost incurred was more than was reasonable in the market conditions at the time for the work undertaken, then the cost is reduced accordingly.

43 This approach resulted in Electrix being awarded the amount of $7,473,207 (GST exclusive) which seems to be close to 100% recovery of its actual costs plus margin.

44 It is apparent that the court considered that an objective of the remedy was to uphold the plaintiff's reliance interest in the anticipated relationship. The difficulty with this approach is that the 'reliance interest' is usually recognised as an interest protected by damages for breach of contract rather than the law of non-contractual quantum meruit.[40]

45 The reference to an interest protected by damages for breach of contract again indicates the difficulties with the approach taken by the New Zealand courts. It is submitted that the provider of the services should have as much incentive to conclude a contract as the purchaser. Where a contract is not concluded, the provider puts itself at risk in continuing to

[40] L Fuller and WR Perdue, 'The Reliance Interest in Contract Damages' (1936) 46 Yale Law Journal 52 and 373.

provide the services, as it has not got the protection of the law of contract and damages. Having decided to run that risk, the provider should not be able to recover any more than the fair value of the benefit conferred on the recipient.

46 The court also found that, because there was no contract and no agreement had been reached on the price of the services, it was difficult to put any weight on the evidence about budgets, expectations and negotiations between the parties. In *Way v Latilla*, in the context of assessing the value of non-contractual quantum meruit, the House of Lords held that:[41]

> 'the court may take into account the bargaining between the parties … as evidence of the value which each of them puts upon the services. If the discussion had ranged between three percent on the one side and five percent on the other … the court would not be likely to depart from somewhere about those figures, and would be wrong in ignoring them altogether and fixing remuneration on an entirely different basis, upon which, possibly, the services would never have been rendered at all.'

47 In *Electrix*, there was evidence that Electrix submitted a proposal at a price of approximately $17 million and the parties considered that a 'value engineering' process could reduce that price. Subsequently, at least one of the letters of intent referred to a final forecast subcontract value of around $14 million for the electrical services, and letters of intent were issued authorising work to around that amount. There was also evidence of a concerted effort to negotiate a formal contract around March 2017 involving an exchange of agreements; negotiations went through various stages of being about a lump sum, costs-plus and verified costs. In the circumstances, it seems that there may have been sufficient evidence of bargaining between the parties for the court to take into account in assessing the value of the quantum meruit.

48 The third section of this paper discusses the application of the legal principles as to valuation, in particular the approach taken by the court to the expert quantity surveying evidence adduced by the parties and practical issues in relation to the valuation of materials, labour, preliminary and general costs, profit and project-specific difficulties.

### *Work done under a contract which is subsequently cancelled for repudiation or breach*

49 In this scenario, there has been an enforceable contract in place between the parties under which services have been provided, but as a result of repudiation or breach of the contract, the contract is cancelled. The primary obligations of the parties remaining unperformed come to an end and are substituted at law by a secondary obligation on the defaulting party to pay damages to the innocent party for the loss

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41 *Way v Latilla* [1937] 3 All ER 759 (HL) page 764.

sustained by him as a result of the breach or repudiation.[42] An issue arises to whether, as an alternative to the claim for damages, the innocent party has a claim for a non-contractual quantum meruit in respect of the services provided under the contract prior to the cancellation.

50 Until recently, the leading case in New Zealand law was the decision of the Privy Council in *Lodder v Slowey*.[43] That case involved the construction of road works, including a tunnel. After the original contractor abandoned the project, the defendants entered into a contract with the plaintiff for the completion of the work. The plaintiff carried out works under the contract for approximately eight months. Subsequently, the defendants repudiated the contract by wrongfully exercising the power of seizure and re-entry under the contract. The New Zealand Court of Appeal held that the plaintiff was entitled to treat the contract as at an end and to sue on a quantum meruit for the value of his work and labour. The decision was upheld by the Privy Council.

51 There is a question as to whether the Contractual Remedies Act 1979 (and subsequently the Contract and Commercial Law Act 2017) excludes the common law remedy. That was the conclusion reached by the High Court in *Brown & Doherty Ltd v Whangarei County Council*.[44] However, it remains arguable that, while the legislation is a self-contained code covering the circumstances in which a contract may be cancelled, it does not exclude common law remedies arising on cancellation such as quantum meruit.[45]

52 Putting aside the issue of whether the common law remedy is available in New Zealand, the current leading case in Australasia is the recent decision of the High Court of Australia in *Mann v Paterson Constructions*.[46] In that case, Mr and Mrs Mann entered into a domestic building contract with Paterson Constructions for the construction of two double-storey townhouses. In April 2014, with one of the two townhouses completed, a dispute arose regarding payment for variations that had been orally instructed by the owners and implemented by the contractor. After the contractor issued an invoice for the outstanding variation costs the owners repudiated the contract and the contractor accepted that repudiation, thus terminating the contract.

53 The contractor claimed against the owners in the Victorian Civil and Administrative Tribunal for damages for breach of contract (in the amount of $446,000), or alternatively restitution for the work, labour and materials involved (in the amount of $945,000). The Tribunal found that the contractor was entitled, at the contractor's election, to restitution on a

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42 *Moschi v Lep Air Services Ltd, Lep Air Services Ltd v Rolloswin Investments Ltd* [1973] AC 331; *Photo Productions v Securicor Transport Ltd* [1980] AC 827.

43 *Lodder v Slowey*: note 5.

44 *Brown & Doherty Ltd v Whangarei County Council* [1990] 2 NZLR 63.

45 New Zealand Law Society Intensive, *Current Issues in Remedies*, March 2010, pages 61–62.

46 *Mann*: note 1.

quantum meruit basis for an amount reflecting the reasonable value of the work performed and the materials used. The Tribunal awarded the contractor $660,000 which it said was the fair and reasonable value of the work and was substantially more than the contractor would have been entitled to under the contract for the work completed prior to termination.

54 The owners appealed to the High Court of Australia after having earlier appeals substantively dismissed. The court found that the contractor was entitled to elect recovery on the basis of a non-contractual quantum meruit for uncompleted stages of the works in respect of which there was no accrued right of payment. The court held that the amount recoverable on the quantum meruit should prima facie not exceed a fair value calculated in accordance with the contract price or appropriate part of the contract price (although it was recognised there may be exceptions which will be discussed below). The court held that the Tribunal was therefore in error in assessing the amount of restitution otherwise than in accordance with the contract rates.

**Availability of remedy**

55 The court recognised that many of the earlier cases allowing a non-contractual quantum meruit following repudiation depended on the notion that cancellation of the contract avoided the contract *ab initio*, ie as if the contract had not been made. It is apparent that this was the basis for the decision in *Lodder v Slowey*. However, the accepted position now is that discharge of a contract for repudiation or breach only operates prospectively and not retrospectively, ie the parties are only released from the obligation and entitlement to perform the contract further.[47] As a result, the agreed allocation of risk remains relevant.

56 Notwithstanding this development in the law, the court confirmed the availability of the remedy, stating:[48]

> '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. 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

47 *Heyman v Darwins Ltd* [1942] AC 356 (HL); *Johnson v Agnew* [1980] AC 367 (HL); Contract and Commercial Law Act 2017 (NZ), s 42.

48 *Mann*, note 1, para [199].

said to be a greater sense of theoretical order to the range of common law remedies.'

57 The court considered that, generally, construction contracts are divided into stages and the contract price is apportioned between the stages by means of specified progress payments payable at the completion of each stage; and are accordingly viewed as containing divisible obligations of performance. The court held that where all the contract work under a construction contract has been completed, or where an entire stage of a contract has been completed, and the progress payment has become due, then there is no entitlement to a quantum meruit and the contractor is confined to a remedy of debt for the amounts due, or damages for breach of contract. However, if there are uncompleted stages or part of the entire works is not complete, then there will be an entitlement to a quantum meruit.[49]

58 It follows that where a contract does not specify stages of work and corresponding amounts to be paid upon completion of those stages, a contractor may be entitled to claim on a quantum meruit basis for the entirety of the works performed.

59 The difficulty with the divisible obligations analysis is that, while it may be clear that there is an accrued right to payment where a contract is expressly divided into stages with the total contract price apportioned between the stages, it is not clear in the case of other construction contracts where payments are made by way of monthly progress payments which are provisional or 'on account' payments pending the final claim. For example, this may be the position under NZS3910:2013: clause 6.6.3 allows the Engineer to correct a sum certified by the Engineer in any previous payment schedule provided the contractor is notified in writing; clause 12.2.9 allows the principal to require amendments to or deductions from amounts payable in subsequent payment schedules. This raises an issue as to whether the contractor has an accrued right to payment for the relevant work where corrections, amendments or deductions can subsequently be made up to the final payment schedule.

**Doctrinal basis**

60 The High Court identified the 'qualifying or vitiating' factor underlying the obligation on the part of the enriched party to make restitution as total failure of consideration (failure of basis).[50] When considered together with the court's analysis of value, it seems that the doctrinal basis for the remedy is unjust enrichment, although the court also made it clear that unjust enrichment is not an all-embracing theory of restitutionary rights and remedies.[51]

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49 *Mann*, note 1, para [176], and also Gageler J, para [104]–[105].
50 *Mann*, note 1, paras [168], [173]–[176], [190].
51 *Mann*, note 1, para [199].

61 The court confirmed that 'total' failure of consideration is required. However, the impact of that rule is ameliorated when 'consideration' is understood to mean 'basis' or 'purpose' for the performance.[52]

62 The court explained that where an obligation to provide work and labour is 'entire' (so that nothing is due until the contract is completed) and the contract is cancelled after part performance for repudiation, there will be a total failure of consideration, in that the contractor's right to complete performance and earn the price will have failed – the 'consideration' in the sense of the condition or 'basis' for performance by the contractor has failed. In other words, the contractor has not received any part of the benefit bargained for (price) under the contract.[53]

63 If the contract is divisible into several entire stages then, on termination of the contract for repudiation, there will be total failure of consideration in respect of 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.[54]

**Quantum**

64 The issue here is whether the valuation of the quantum meruit should be assessed in accordance with the agreed contract price, so as to avoid undermining the agreed allocation of risk between the parties. For example, there is a concern that a plaintiff may be able to take advantage of cancellation to escape from a bad bargain. Arguably, that is what occurred in *Mann* at first instance, as the tribunal awarded the contractor a much greater amount for the work undertaken than it would have recovered under the contract had it not been repudiated.

65 The High Court recognised that the contract price reflects the parties' agreed allocation of risk and that termination of a contract provides no reason to disrespect that allocation.[55] However, the court noted that the Supreme Court of the United Kingdom in *Benedetti*[56] did not go as far as to make the contract price the limit of restitutionary recovery. The Supreme Court was supportive of the conclusion that the amount to be allowed by way of restitution should not ordinarily exceed the contract price, but left open the possibility of exception. The High Court considered that it should adopt a similar approach, finding that:[57]

> '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

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52 Edelman & Bant, note 34, pages 253–260.
53 *Mann*, note 1, paras [168], [172]–[173].
54 *Mann*, note 1, paras [174] and [176].
55 *Mann*, note 1, para [205].
56 *Benedetti v Sawiris*: note 37.
57 *Mann*, note 1, para [215]; Gageler J found at paras [102]–[105] that 'The amount [recoverable] cannot exceed the portion of the overall price set by the Contract that is attributable to the work'.

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 on 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.'

66 However, the court also recognised that there may be cases where 'in accordance with principle, the circumstances will dictate that it would be unconscionable to confine the plaintiff to the contractual measure'.[58] An example given by the majority is the infamous case of *Boomer v Muir*.[59] In that case, the plaintiff had suffered delays and increased costs as a result of breaches by the defendant of his obligations under the contract. This had resulted in a significant cost overrun that rendered the contract unprofitable. It was apparent that this was taken into account in the assessment of the quantum meruit that was awarded to the plaintiff, which provided for recovery well in excess of the contract price.[60]

67 Other issues that may arise in relation to the valuation of a quantum meruit in accordance with the contract price and which may lead to 'unconscionable' outcomes are:

67.1 Where a contractor's early performance is more expensive than its later performance of the contract (for example, if early performance is in winter). In these circumstances, it may not be appropriate to apply a strict pro rata calculation to the valuation of a quantum meruit.[61]

67.2 Where the expected benefits to the contractor from the existence or completion of the contract include intangible or non-price benefits which have resulted in a contract price significantly lower than the market price (such as the possibility of, or a promise of, future work).[62]

67.3 Where the contractor has undertaken additional work, or has incurred increased costs as a result of unforeseen conditions, or as a result of a change in law, but has no accrued right to a payment in respect of these events prior to the cancellation of the contract. In such circumstances, it seems that these events should be taken into account in assessing the value of the quantum meruit.[63]

68 In the third section of this paper further consideration is given to the practical implications of the outcome in *Mann,* including how the

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58 *Mann*, note 1, para [216].
59 *Boomer v Muir* (1933) 24 P 2d 570.
60 Andrew Skelton, *Restitution and Contract* (Mansfield Press, Oxford, 1998) pages 77–85, and specifically 82–83.
61 Skelton, note 60, pages 78–79.
62 Skelton, note 60, pages 80–81; *Mann*, note 1, para [205].
63 Skelton, note 60, pages 79–80.

contract price should be apportioned and applied in valuing a quantum meruit, and examples of where it may be unconscionable to limit the plaintiff to the contractual measure.

## English law

### *Unjust enrichment under English law*

69 It was not until the 1966 publication of Goff & Jones' ground-breaking work in *The Law of Restitution* that English law began developing a principled basis for the law of restitution based on the principle of unjust enrichment, with the remedy being a quantum meruit.[64]

70 Since then, the English courts have reduced the conceptual structure of a claim in unjust enrichment to the following four questions, as identified earlier in this paper:

a Has the defendant been enriched?

b Was the enrichment at the claimant's expense?

c Was the enrichment unjust?

d Are there any defences?[65]

71 For the third question, under English law, the plaintiff must positively establish at least one 'unjust factor.'[66] These unjust factors, which include mistake, undue influence, and failure of basis '*explain why a defendant must make restitution to the plaintiff*.'[67]

72 While the courts historically applied these questions rigidly, they have recently supported a more flexible approach: 'the questions are not themselves legal tests, but are signposts towards areas of inquiry involving a number of distinct legal requirements.'[68]

73 The issues addressed in the *Mann* and *Electrix* cases highlight the unsettled relationship under English law between contract law and the law of unjust enrichment as potential sources for remedies in circumstances where:

a work is done under a contract which is subsequently cancelled following a repudiatory breach; or

b enrichment is conferred under an anticipated contract that fails to materialise.

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64 Robert Goff and Gareth Jones, *The Law of Restitution* (1st edition, Sweet & Maxwell, 1966); *Avonwick Holdings Ltd v Azitio Holdings Ltd* [2021] EWCA Civ 1149 para [51].

65 *Benedetti v Sawiris*, note 37, para [10].

66 *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19, [2012] 2 AC 337 (Lord Reed) para [41].

67 Richard Wilmot-Smith and Paul Darling, *Wilmot-Smith on Construction Contracts* (4th edition, OUP, 2021) para 3.52.

68 *Investment Trust Companies v HMRC* [2017] UKSC 29 para [41].

74 The following section will consider the English law position on the availability of claims for unjust enrichment brought in these two circumstances, as well as the doctrinal basis and approach to assessment of quantum for such claims.

### *Availability of quantum meruit for work done under a contract which is subsequently cancelled for repudiation or breach*

75 In *Mann*, the court was right to observe that, at least with regard to work for which a contractual right to payment has already accrued, '*the law of restitution in the UK and the law of restitution in Australia are no longer quite as far apart as imagined*.'[69] However, the extent of divergence between the two jurisdictions on this point still remains unclear.

76 In *Newton Woodhouse v Trevor Toys Ltd*,[70] the plaintiff had agreed to perform certain works for a lump sum, with payments to be made periodically for work performed. The owner failed to make two outstanding progress payments to the contractor, which, as a consequence, refused to go on with its work. It was held that the owner, by failing to make the progress payments, had repudiated the contract, and the judge at first instance found that a remedy in quantum meruit was available. The decision was upheld by the Court of Appeal. However, Glidewell LJ, addressing the issue for the Court of Appeal stopped short of endorsing the historic view that a contractor in these circumstances had the option to pursue compensation for work done at contract prices, or to pursue the restitutionary remedy (and potential windfall) of a quantum meruit valued at a reasonable price.[71]

77 In *Taylor v Motability Finance*,[72] a finance director had helped secure for his former employer an £80 million settlement of an insurance claim, for which he received £67,500 – the maximum bonus under the company's bonus policy. Arguing that his subsequent termination was a repudiatory breach of his employment contract, he sought to recover in unjust enrichment the value of his services in bringing about the settlement, which he argued was worth £375,000.

78 The English High Court found that the claimant had fulfilled his contractual duties and had been paid his salary and bonus accordingly. Although he may have been entitled to damages for breach, the court held that where a contract has been repudiated, but a party has an accrued right to payment, an innocent party *does not* have the option to elect a restitutionary claim and ignore its acquired contractual one:

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69 *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32.

70 *Newton Woodhouse v Trevor Toys Ltd*, Court of Appeal, (Unreported, 20 December 1991).

71 Glidewell LJ made this finding on the basis that, whilst the Official Referee at first instance had believed he was 'departing from the contract and awarding a sum based purely on the quantum meruit', in fact his reasoning made it clear that he had based the calculation of compensation on contract rates in line with '*recent authorities*'.

72 *Taylor v Motability Finance Ltd* [2004] EWHC 2619 (Comm).

> '[T]he parties, in agreeing a contract, intend that to apply and there is therefore no room for restitution at all where there is full contractual performance by one party and, even on the Claimant's own case part performance by the other ... there is no room for a remedy outside the terms of the contract where what is done amounts to a breach of it where ordinary contractual remedies can apply and payment of damages is the secondary liability for which the contract provides.'[73]

79 Whilst this decision may appear to offer a clear statement of the law, and one which apparently aligns with the approach taken by the High Court of Australia in *Mann*, there are two important points to note:

a first, the decision in Taylor (and to some extent subsequent authority) appears to rely on a distinction between claims involving the provision of goods and services and claims involving money which lacks a coherent theoretical basis; and

b second, this line of authority has still not dealt conclusively with earlier authorities which underpinned the historic position as to a plaintiff's right to elect its preferred remedy.

80 As to the first point, in coming to his conclusion in *Taylor*, Cooke J appears to have relied on a distinction between claims involving the provision of goods and services on the one hand, and claims involving money on the other. The suggestion is that where a claimant has paid money but received nothing in return, a restitutionary claim be available.[74] However if a non-money benefit is supplied by a claimant who substantially performs its obligations, the contractual regime governs; there is 'no room' for restitution. This distinction, which has been called '*difficult to defend*'[75] and '*illogical*',[76] seems to be based conceptually on the notion that there can be no '*failure of basis*' with regards to goods and services once performance has commenced.

81 In the subsequent English High Court decision of *Elek v Bar Tur* , the court avoided this error by taking the approach we see echoed by the High Court of Australia in *Mann*, namely finding that the relevant distinction is not based on the nature of the enrichment received, but between cases where a contractual claim has accrued (as in *Taylor*), and cases where no contractual claim has yet accrued.[77] The court found that the claimant, who had provided services but had not completed contractual performance (and therefore was not contractually entitled to payment), *could* bring a restitutionary claim with regard to those services when the contract was repudiated rather than seeking damages

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73 *Taylor v Motability Finance*, note 72, para [23].

74 *Taylor v Motability Finance*, note 72, para [25].

75 Hugh Beale (ed), *Chitty on Contracts* (33rd edition, Sweet & Maxwell, 2019) para 29-073.

76 Graham Virgo, *The Principles of the Law of Restitution* (OUP, 2015), available at: https://ebrary.net/106122/law/breach_contract_defendant.

77 *Elek v Bar Tur* [2013] EWHC 207 (Ch).

for breach.[78] However, this recognition of the historic position came only reluctantly, with David Donaldson QC sitting as a Deputy Judge of the Chancery Division,[79] noting that 'though … I regard the rule as conceptually unsound and fertile with unattractive consequences, doctrinal purity and logic does not always win out in the common law' and that if the rule was to be rejected, then in light of a 'significant, if elderly' body of English case law, this would have to happen at a higher level in the judicial hierarchy.[80]

82 Unhelpfully, a subsequent High Court decision, *Howes Percival LLP v Page*,[81] then applied *Taylor*, and apparently endorsed the distinction between money and non-money benefits, without any consideration of *Elek v Bar Tur*.

83 As to the second point above, the High Court authority endorsing the rule followed in *Mann* that there is no space for restitution where contractual entitlement to payment has already accrued, may give the impression of being long settled under English law; this is not the case.[82] The authorities have failed to deal conclusively with what the judge in *Elek v Bar Tur* described as a 'significant, if elderly' body of English case law advocating the broader, historic, position in favour of the innocent party's right to elect a restitutionary remedy.

84 In *Taylor*, Cooke J treated the issue very briefly, without considering the historical authority which at least suggests that the claimant had the option to ignore the contractual claim and instead to claim a quantum meruit:

> '[I]t has long been held in both England and the Commonwealth that a party who has performed services or carried out work under a contract repudiated by another party may exercise a choice between … damages for loss … or … obtaining a reasonable price, quite independently of the contract prices, for all work done up to the time of termination.'[83]

85 Notwithstanding that these cases have yet to be formally dealt with, it is true, as the court in *Mann* also addresses, that the strength of this precedent is questionable. *Keating on Construction Contracts*[84] notes that the cases either only endorse the availability of restitution in this context equivocally,[85] assert this position obiter,[86] are non-binding,[87] or

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78 *Elek v Bar Tur*, note 77, para [12].

79 The matter was appealed to the Court of Appeal. However, the court, dismissing the appeal, did not consider or disturb the issues of law upon which the first instance decision was based; *Elek v Bar Tur*: note 77.

80 *Elek v Bar Tur*, note 77, para [12].

81 *Howes Percival LLP v Page* [2013] EWHC 4104 (Ch) paras [307]–[312].

82 See generally Julian Bailey, 'Repudiation, Termination, and Quantum Meruit', (2006) 22(4) Const LJ 217–240.

83 Nicholas Dennys and Robert Clay, *Hudson's Building and Engineering Contracts* (14th edition, Sweet & Maxwell, 2019) para 8-022.

84 *Keating*, note 1, para 9-062.

85 *Planche v Colburn* (1831) 8 Bing 14.

treat the issue with little to no reference to good authority and otherwise assume the position without substantial treatment.[88]

86 Further, aside from the fact that these cases arose before the modern law of unjust enrichment was developed, again as the court in *Mann* pointed out, these older cases were decided under the influence of the 'rescission fallacy', ie, that after a repudiatory breach, a contract was treated as void *ab initio*.[89] This view has now been rejected in England.[90] As Cooke J noted in *Taylor*, it is now recognised that upon the breach of primary obligations of a contract, secondary obligations – that is, to pay damages – are triggered and survive the repudiated contract.[91]

87 So where does this leave us in terms of the availability of a quantum meruit for work done under a repudiated contract? In the absence of a statement by a high authority, the position as to whether restitution based on a total failure of basis is available where goods or services have been provided under a repudiated contract remains controversial.[92] The upshot is that, although the approach in *Mann* has been applied in the UK, it cannot unequivocally be said that English law has adopted the Australian distinction between a contractual entitlement to payment which has already accrued prior to termination, and work for which no entitlement has accrued.

### *Basis of quantum meruit for work done under a contract which is subsequently cancelled for repudiation or breach*

88 It is not only the availability of a restitutionary remedy for benefits transferred under a repudiated contract that is unclear under English law, but also the juridical basis upon which that remedy is available. This lack of clarity ultimately stems from the fact that 'the relationship between liability in contract and liability in unjust enrichment has been, and continues to be, problematic.'[93]

89 As discussed, in *Taylor* Cooke J came to his conclusion by mentioning that the secondary liability which springs up following a repudiated contract leaves no room for restitution where a contractual right has accrued.[94] This implies a disavowal of those earlier cases which held

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86 *Bernardy v Harding* (1853) 8 Exch 822; *Appleby v Myers* (1867) LR 2 CP 651; *Luxor (Eastbourne) v Cooper* [1940] AC 108.
87 *Lodder v Slowey* [1904] AC 442 (PC).
88 *Lodder v Slowey*: note 87; *Chandler Bros Ltd v Boswell* [1936] 3 All ER 179 (CA); *Lusty v Finsbury Securities* (1991) 58 BLR 66 (CA).
89 *Mann*, note 1, paras [5]–[10].
90 *Johnson v Agnew*: note 47; *Photo Production v Securicor Transport*: note 42; *Lep Air Services v Rolloswin Investments*: note 42.
91 *Taylor v Motability Finance*, note 72, para [23].
92 Virgo: note 76.
93 *Avonwick v Azitio*, note 64, para [65].
94 *Taylor v Motability Finance*, note 72, para [23].

that the claimant did have a choice between a remedy in contract or restitution, but did so under the influence of the 'rescission fallacy'.

90 However, although *Elek v Bar Tur* purportedly relies on *Taylor,* these same historic cases are cited as the reason why, with great reluctance, David Donaldson QC felt bound to hold that the option to elect restitution had to be made available where the claimant had not yet acquired a contractual right.[95]

91 So long as restitution continues to be available under these circumstances, the approach taken by the Australian High Court in *Mann* provides a principled way forward from this unsatisfactory state. In *Mann*, the majority came to the same conclusion as in *Elek v Bar Tur*, ie*,* that a restitutionary remedy was available*,* but it did so by finding that although the rescission fallacy has no place in modern legal reasoning, there is another juridical ground – failure of basis – which does support a claimant's ability to elect to sue in unjust enrichment in these circumstances.[96]

92 No English decision has yet relied on failure of basis as the trigger for recovery following repudiation in the construction context, even though failure of basis is recognised in the UK as an 'unjust factor' capable of giving rise to a claim in unjust enrichment.[97]

93 It is 'well established' in England that for an unjust enrichment claim founded on failure of basis, the failure needs to be total 'if even a very small part of the benefit which formed the basis for the payment has been conferred, no action will lie.'[98] It is perhaps this idea which led Cooke J in *Taylor* to suggest that there could be no restitution where a non-money benefit has been conferred through substantial performance of the provision of goods or services and there is repudiatory breach.

94 To overcome this, the court in *Mann* apportioned the performance under the contract. Apportionment has also been recognised and applied under English law – 'Modern authorities show that the courts are prepared, where it reflects commercial reality, to treat consideration as severable.'[99] Therefore it can be said that the constituent elements of the court's reasoning in *Mann* are already in effect in the UK.

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95 *Elek v Bar-Tur*, note 77, paras [12]–[13].

96 *Mann*, note 1, paras [168]–[171].

97 *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd* [2008] EWCA 1449, [2009] 1 WLR 1580 paras [50], [62] and [67]; *Test Claimants in the FII Group Litigation v Revenue and Customs* Commissioners, note 66, para [81]; *Prudential Assurance Co Ltd v Commissioners for Her Majesty's Revenue and Customs* [2018] UKSC 39 para [74].

98 *Avonwick v Azitio*, note 64, para [102]; *Fibrosa Spolka Akcyjna v Farburn Lawson Combe Barbour Ltd* [1943] AC 32 para [77]; *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 WLR 912 (CA) para [924B]; *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574 (HL) para [588].

99 *Barnes v The Eastenders Group* [2014] UKSC 26 para [114].

95 Of course, there will be cases where, because of the nature of the obligations being performed, apportionment is not possible.[100] In some cases where work is planned in distinct phases, it may be straightforward to apportion the price payable. In others, however, where there may be multiple overlapping streams of work, or where the work is not otherwise of a divisible nature, seeking to apportion payment across performed and unperformed obligations may be difficult or impractical. But, undoubtedly, the ability to apportion reduces the practical significance of the 'total failure of consideration' rule.[101]

96 The above discussion assumes that the contract language itself allows for the claimant to choose to recover in unjust enrichment. Another consequence of the overturning of the rescission fallacy has been the recognition that even after a repudiatory breach, a contract's provisions may continue to govern the parties' relationship in various respects. On the one hand, the fact that the parties have chosen to contract is not, itself, sufficient evidence to imply a term excluding or limiting remedies in unjust enrichment.[102] On the other hand, however, so long as a valid contract governs the transfer of the disputed benefit, parties can certainly expressly exclude or limit a remedy in unjust enrichment.[103] Courts may also find that language of the contract interpreted objectively shows that the building works were meant to be an entire, indivisible obligation,[104] so that applying the apportionment doctrine would conflict with 'commercial reality.'

97 Commentators are divided on the extent to which judges should accept that parties have excluded a remedy in unjust enrichment where this has not been made explicit.[105] Although the Court of Appeal recently insisted that the law of unjust enrichment is 'complementary, though not *subsidiary*, to the law of contract,' as discussed further below, the court was also firm in its view that there will be no space for restitution where this would undermine or contradict the contractual allocation of risks.[106] This suggests that the English courts may more readily infer an intention to exclude recovery of a quantum meruit even in the absence of express language to that effect.[107]

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100 For an example of the limitations of apportionment based on the nature of the contractual performance see *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB).

101 *Avonwick v Azitio*, note 64, para [103].

102 *Goff & Jones*, note 10, para 3-12

103 Gerard McMeel, 'Unjust Enrichment, Discharge for Breach, and the Primacy of Contract' in *Mapping the Law: Essays in Memory of Peter Birks* (OUP, 2016) page 235.

104 *Sumpter v Hedges* [1898] 1 QB 673 (CA) para [674].

105 See eg Barker, 'Unjust Enrichment: Containing the Beast' (1995) 15 Oxford Journal of Legal Studies 457, 143; cf Gerard McMeel: note 103.

106 *Avonwick v Azitio*, note 64, paras [76] and [121].

107 Gerard McMeel, note 103, page 235.

### *Valuation of quantum meruit for work done under a contract which is subsequently cancelled for repudiation or breach*

98 There is no binding English authority on whether the contract price serves as a limit on recovery in unjust enrichment where a contract has been terminated for repudiatory breach.[108]

99 In the Supreme Court case of *Benedetti v Sawiris*,[109] Lord Clarke said that a claim for unjust enrichment is 'not a claim for compensation of loss, but for recovery of a benefit unjustly gained [by a defendant] ... at the expense of a claimant.' The difficulty with this is that the status of any 'bargain' reached between the parties is not obvious.[110]

100 Some older authority suggests that the claimant can recover the full value of the enrichment without regard to any limit imposed by the parties' agreement.[111] However, more recent cases indicate that the concerns *about* respecting contractual allocations of risk and preventing contractors from escaping bad bargains – the same factors which led the court in *Mann* to condition the availability of unjust enrichment claims in this context on a cap on recovery based on the contract price - have become just as salient in the UK.

101 In Taylor,[112] Cooke J said 'there can also be no justification, even if a restitutionary claim is available, for recovery in excess of the contract limit.'

102 In *Benedetti v Sawiris*,[113] cited by the court in Mann, Lord Neuberger commented obiter that

> 'It would seem wrong, at least in many such cases, 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.'[114]

103 The recent Court of Appeal case of *Avonwick v Azitio*, however, arguably sends mixed signals in this regard (albeit in the context of a subsisting contract rather than a repudiated one). On the one hand, Carr LJ approved the statement from Professor Burrows' *The Law of Restitution* that 'there may be no undermining of the risks undertaken by the parties and no inconsistency between contract and unjust

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108 *Goff & Jones*, note 10, para 3-47.
109 *Benedetti v Sawiris*: note 37.
110 David Sawtell, 'Enrichment-based claims for a Quantum Meruit in Construction Disputes' (2019) International Construction Law Review 101–119, page 110.
111 Eg *Lodder v Slowey*: note 87, *Chandler Bros v Boswell*, note 88, para [186]; and *Rover International v Cannon Film Sales*, note 98, paras [927]–[928].
112 *Taylor v Motability Finance*: note 72.
113 *Benedetti v Sawiris*: note 37.
114 Cited in *Mann*, note 1, para [215].

enrichment'[115] and further that 'the claim in unjust enrichment is not allowed to contradict the terms of the contract.'[116]

104 This suggests that a claimant seeking to recover more than the contract price in the UK is likely to have difficulty.

105 On the other hand, however, in the same case, the Court of Appeal also highlighted the fact that the failure of basis ground respects the 'distinct but complementary roles' of contract and unjust enrichment explaining that 'the very need to establish failure of consideration is sufficient to prevent unwarranted subversion of the contract, because if all parties had known that the consideration would fail, the benefit would never have been conferred.'[117]

106 The statement that establishing failure of consideration alone is 'sufficient' to prevent 'unwarranted subversion' of the contract could be taken to suggest that a contractual cap on recovery is considered to be an unnecessary rule under English law. It also impliedly assumes that there may be circumstances where the 'subversion' of a contract will be warranted, though without giving any indication of when this will be the case.

107 In *Mann*, the court's response to this question was that there could be an exception to the contract price cap based on 'unconscionability.'[118]

108 The English courts have yet to rule definitively on whether, beyond the contract price being a guide, it should operate as a 'cap' on a quantum meruit recovery in these circumstances. The desirability of their giving such a definitive ruling raises an interesting debate, one that is especially apposite in the context of the construction industry. There are clearly significant benefits in leaving some room for flexibility in approach, as the High Court in *Mann*. Whether application of a concept of 'unconscionability' or some other threshold for when 'subversion' of the parties' agreement will be justified is the preferred approach is a topic for discussion on another occasion. For the time being, this remains another aspect of the availability of a quantum meruit remedy which carries some uncertainty and scope for future argument before the English courts.

### *Availability of quantum meruit where enrichment is conferred under an anticipated contract*

109 The *Electrix* case raises the question of availability of quantum meruit with respect to claims for services that are performed in anticipation of a contract.[119]

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115 *Avonwick v Azitio*, note 64, para [73].
116 *Avonwick v Azitio*, note 64, para [75].
117 *Avonwick v Azitio*, note 64, para [73].
118 *Mann*, note 1, para [216].
119 *Electrix*, note 3.

110 As a starting point, the English courts have established that, in principle, when a contractor carries out work in the reasonable anticipation that a contract will be concluded and the works will be paid for, and the employer receives a benefit from the execution of the work but the contract fails to materialise, the contractor may claim in unjust enrichment.[120] Generally, the work must have been requested, freely accepted, or (possibly) constitute an incontrovertible benefit.

111 A key threshold question which will, therefore, determine the availability of a quantum meruit in these circumstances in the English courts will naturally be whether a contract has been formed. There is no room for a claim in unjust enrichment on the basis of activity carried out in anticipation of a contract, if, in fact, the contract was formed.

112 Problems with determining whether an enforceable contract has been formed arise frequently in the context of documents that are common in the UK construction industry as elsewhere, including comfort letters, pre-contract documents such as letters of intent and memoranda of understanding, as well as tender correspondence and draft agreements labelled 'subject to contract.' Letters of intent – the subject of the claim in *Electrix* – are particularly widespread and often 'used unthinkingly in the UK construction industry.'[121] Their ambiguous contractual worth, stemming from the fact that 'letters of intent come in all sorts of forms … there can therefore be no prior assumptions'[122] make them particularly problematic in this context.[123]

113 In *Whittle Movers Ltd v Hollywood Express*, the defendant selected a subcontractor for distribution services after a tender process, and thereafter exchanged a number of documents that were listed as 'subject to contract', as well as a letter of intent that stated that any work undertaken before a contract was concluded was undertaken at the subcontractor's own risk. Although an interim agreement was signed, the parties never formally concluded a long-term contract, even though the subcontractor began performance and invoicing. The High Court found that the parties had formed a contract, but the Court of Appeal reversed the decision, allowing the claimant to bring its claim in unjust enrichment.[124]

114 Relying on Lord Goff's judgment in *British Steel Corporation v Cleveland Bridge & Engineering Co Ltd*,[125] the Court of Appeal in *Whittle* said that 'a court should not strain to find a contract because a restitutionary remedy can solve most if not all the problems.'[126] This

120 *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 (HL).
121 *Iliffe v Feltham Construction Ltd* [2014] EWHC 2125 (TCC).
122 *ERDC Group Ltd v Brunel University* [2006] EWHC 687 (TCC) para [27].
123 See *Ampleforth Abbey Trust ('The Claimants') v Turner & Townsend Project Management Ltd* [2012] EWHC 2137 (TCC); *ERDC Group v Brunel University*: note 122.
124 *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189.
125 *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504.
126 *Whittle Movers v Hollywood Express*, note 124, para [15].

appeared to conflict with the approach taken to the task of establishing whether a contract had been formed as developed by the dictum of Steyn LJ in *Percy Trentham*, a construction case which suggested that the courts may readily find that contracts have been formed, especially where both parties have rendered performance.[127]

115 This apparent tension was addressed by the Supreme Court in *RTS v Müller*,[128] where Lord Clarke denied that there was a conflict between the approach of Steyn LJ in *Percy Trentham* and that of Lord Goff in *British Steel*. Instead, Lord Clarke emphasised that whether there is a contract should be handled on a case by case basis. The core test involves considering

> 'what was communicated between [the parties] by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.'[129]

In some circumstances, the court allowed that conduct could lead to the conclusion that a contract had been formed, even if terms of 'economic significance' had not been finalised or if documents were stated to be 'subject to contract.'[130]

116 This decision brought English law closer in line with that of New Zealand, where in *Electrix* it was noted that the court's approach to whether a contract has formed should be '*entirely neutral*.'[131]

### *Basis for quantum meruit where enrichment is conferred under an anticipated contract*

117 Per *British Steel*, where work is done in anticipation of a contract, the typical ground for restitution on a quantum meruit basis will be failure of basis.[132] Of course, the claimant will have to show that the transfer made was conditional. Often in this context, the condition will be the award of the contract.[133] If, on the other hand, the transfer was unconditional, the English courts may find that the claimant undertook work at its own risk. Another way that this may be expressed is through the distinction between performance that is 'anticipatory', in the sense that the parties actually anticipated a contract being formed (presumptively conditional), and performance that is merely preparatory

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127 *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25 (CA), page 27.
128 *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH* [2010] UKSC 14 para [54].
129 *RTS v Müller*, note 128, para [45].
130 *RTS v Müller*, note 128, para [45].
131 *Electrix*, note 3, para [43].
132 *British Steel v Cleveland Bridge*, note 125, para [511].
133 See eg *Countrywide Communications Ltd v ICL Pathway Ltd* [2000] CLC 324 (QB).

(presumptively unconditional).[134] Again, this is an intensely factual exercise.[135]

118 'Free acceptance' has also been used as a basis both to establish enrichment and to prove injustice under these circumstances. Although it can be difficult to distinguish from failure of basis, depending on the facts, it has been recognised as having an independent status as an unjust factor.[136] An incipient area of law,[137] it will not be discussed at length here; but the role of free acceptance as a basis for a restitutionary claim has been summarised as follows by Goff & Jones:

> '[A defendant] will be held to have benefited from the services rendered if he, as a reasonable man, should have known that the claimant who rendered the services expected to be paid for them, and yet did not take a reasonable opportunity open to him to reject the proffered services. Moreover, in such a case, he cannot deny that he has been unjustly enriched.'[138]

### *Valuation of quantum meruit where enrichment is conferred under an anticipated contract*

119 As discussed above in the context of unjust enrichment claims following the repudiation of a contract, the English law approach to the valuation of a quantum meruit is well established and is founded on the notion that it is a claim not for compensation of loss, but for recovery of benefit unjustly gained by the defendant.[139] Accordingly, the starting point will be an assessment of the value of the services assessed by reference to their market value, and not the cost of delivery as in *Electrix*. As noted, however, this leaves open the question of the status, if any, which should be accorded to any commercial negotiations between the parties.

120 Whilst there will, by definition, be no finalised contract price where an agreement fails to materialise, the question may still arise as to the probative value of any figures discussed in negotiations.

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134 *Wilmot-Smith on Construction Contracts*, note 67, para 3.60.

135 See *Moorgate Capital (Corporate Finance) Ltd v HIG European Capital Partners LLP* [2019] EWHC 1421 (Comm) HHJ Keyser QC at paras [93]–[103] (the claimant was merely a risk-taker); *MSM Consulting v United Republic of Tanzania* [2009] EWHC 121 (QB) (no unjust enrichment where the contractor performed tender preparation work for an invitation to bid); *Regalian Properties Ltd v London Docklands Development Corp* [1995] 1 WLR 212 (Ch) (preparatory work executed under a tender that was accepted expressly 'subject to contract' and where the parties could withdraw at any time was incurred at the contractor's own risk).

136 *Rowe v Vale of White Horse DC* [2003] EWHC 388 (Admin), [2003] 1 Lloyd's Rep 418 para [13]; *Dry Bulk Handy Holding Inc v Fayette International Holdings Ltd (The Bulk Chile)* [2013] EWCA 184, [2012] 2 Lloyd's Rep 594 paras [81] – [82]; *Professional Cost Management Group Ltd v Easynet Ltd* (Unreported, 9 July 2012) para [90]; *Diamandis v Wills* [2015] EWHC 312 (Ch) para [82].

137 Although it is at least more developed than the basis of 'incontrovertible benefit', which will not be discussed here for space reasons.

138 *Goff & Jones*, note 10, para 17-03.

139 *Benedetti v Sawiris*: note 37.

121 In *Way v Latilla*, Lord Atkin held that:

> 'If no trade usage assists the courts … the court may take into account the bargaining between the parties, not with a view to completing the bargain for them, but as evidence of the value which each of them puts upon the service.'[140]

Some older English authority supported the view that a claimant could recover the full value of the enrichment without regard to any limit imposed by the parties' agreement.[141] However, as noted above, more recent cases reflect concerns about preventing parties from escaping bad bargains and respecting contractual allocations of risk. Given this more recent dicta,[142] in the future it should be anticipated that the English courts will scrutinise the parties' interactions and can be expected to put weight on the bargain or anticipated contract as evidence for the valuation exercise. How much weight will be treated very much on a case by case basis and will likely depend on how tentative or developed the parties' negotiations and any anticipated bargain was.[143]

## Valuation issues

### *Introduction*

122 This section of the paper focuses on valuation issues arising in the context of a non-contractual quantum meruit.

123 First, the issue of 'What is a reasonable sum?' is addressed. Valuation methods are then discussed particularly in the context of anticipated contracts which fail to materialise and with reference to the recent *Electrix* case,[144] and the expert quantity surveying evidence adduced by the parties, covering materials, labour, preliminary and general costs, profit and project-specific difficulties.

124 There is then discussion on valuation in the context of work done under a contract that has subsequently been repudiated and the practical implications of the outcome in *Mann*[145] discussed above; including how the contract price should be apportioned and applied in valuing a quantum meruit, and circumstances where it may be unconscionable to limit the claimant to the contractual measure.

### *What is a reasonable sum?*

125 As discussed above, a quantum meruit refers to a claim for a reasonable sum for work performed. The courts have held that the contractor should

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140 *Way v Latilla*, note 41, page 764.

141 Eg, *Lodder v Slowey*: note 87; *Chandler Bros v Boswell*, note 88, para [186]; and *Rover International v Cannon Film Sales*, note 98, paras [927]–[928].

142 In *Taylor v Motability Finance*: note 72, Cooke J said 'there can also be no justification, even if a restitutionary claim is available, for recovery in excess of the contract limit.'

143 Sawtell, note 110, page 110.

144 *Electrix*: note 3.

145 *Mann*: note 1.

be paid at a fair commercial rate for work done, *Greenmast Shipping v Jean Lion*.[146] That is to say, that a fair commercial rate represents a reasonable sum.

126 In *Mann,* Gaegler J found that usually 'the value of services is assessed by reference to charges commonly made by others for like services', ie, the market value of the services. However, he also noted that the usual basis of assessment may not amount to the appropriate measure of restitution in every case.[147] Nettle, Gordon and Edelman JJ stated that in some circumstances 'it is necessary or appropriate that the benefit of work to the defendant be determined without reference to a contract price', and the value of the services may be 'assessed by reference to charges commonly made by others for like services', and where no such standard is available, the plaintiff can rely on an objective price derived from evidence of actual costs and market conditions.[148]

127 Keating states that in relation to construction contracts, the starting point should be the 'fair commercial rate for the work done' but taking into account applicable conditions which may increase or decrease the objective value to a reasonable person. Keating notes that such conditions include site conditions and the conduct of the parties; other useful evidence may include abortive negotiations, prices in a related contract, net costs of labour and materials plus a sum for overheads and profit, measurements of work done and materials supplied and the opinion of experts as to a reasonable sum.[149]

128 In the recent case of *Electrix*, the court provided guidance as to how a reasonable sum may be valued in New Zealand in circumstances where the work has been done in the expectation of a contract, but the parties have been unable to finalise a contract.[150]

129 The court noted that, in English and Australian law, the starting point is establishing the market price (objective value)[151] of the services, and the burden is then on the defendant to prove that it did not subjectively value the benefit at all or as much as the market price (subjective valuation).[152] However, the court found that, in the New Zealand context, the better starting point is the actual costs incurred by the plaintiff (for labour, materials, plant, on-site overheads, off-site overheads and, where works are completed,[153] profit), as these amounts include for prolongation and

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146 *Greenmast Shipping Co SA v Jean Lion et Cie SA* [1986] 2 Lloyd's Rep 277 (QB).

147 *Mann*, note 1, para [92].

148 *Mann*, note 1, para [203].

149 *Keating*, note 1, paras 4-037–4-038.

150 *Electrix*: note 3.

151 There is a distinction between 'ordinary market value' and 'objective value of the benefit': the former is the price which would have been agreed in the market in the absence of some unusual characteristic of the purchaser, whereas the latter is the value of the benefit to the reasonable person in the position of the defendant: *Chitty on Contracts*, note 75, para 29-024.

152 *Electrix*, note 3, paras [89]–[90].

153 Where works are installed on site, these works are interpreted to fulfil the test of completeness required for profit to be payable; where materials are stored on or off-site

disruption, and are therefore only required to be adjusted for the contractor's own inefficiencies where they materially add to the cost of the project.[154]

130 The court held that if the defendant can show the actual costs incurred were more than what would have been reasonable to pay in the market at the time the work was done, the award should be reduced by the amount of the difference between the actual cost and market value: this poses the question, does this approach remove, in part, 'subjective devaluation' as it places greater emphasis on the wider market value and even more so on the cost to the plaintiff of providing the services in the circumstances at the time it was done, and less on the defendant's individual circumstances?

131 The court considered that the defendant's ability to challenge the reasonableness of the actual cost in the market conditions at the time, and the uncertainty about whether they will be recovered 'ameliorates any moral hazard' associated with the plaintiff's potential 'to pad their costs'.[155]

### *Valuation methods*

132 In *Electrix,* different methods of valuation of a reasonable sum were adopted by the expert witnesses for the parties:[156]

a Assessment of actual cost;

b Measurement and valuation of the works based on as-built information;

c Bottom-up approach (that is to say, a first principles approach considering the inputs required in terms of labour/plant/materials taking into account the anticipated productivities to deliver the work along with any wastage and cartage associated with the materials, plus allowances for preliminary & general costs and off-site overheads and profit);

d Assessment of the works instructed to be constructed based on the letters of intent issued; and

e Assessment of the works detailed in Fletcher Construction's schedule of instructions to Electrix, cross-referenced against Electrix's payment claims.

133 The court favoured the assessment of the actual costs method over the other methods adopted. The court found that robust analysis of the actual

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or deposit payments are required to be made on an actual costs basis, it is interpreted that profit will not be payable on these costs.

154 *Electrix*, note 3, para [98].

155 *Electrix*, note 3, para [99].

156 *Electrix*, note 3, paras [101]–[109].

costs had been undertaken by the expert witness adopting this approach, supported by project management software entries, and any unverified charges were discounted from the calculated reasonable sum. The analysis presented of the cause of cost overruns and the resultant effect was found useful by the court and was supported by contemporaneous evidence and evidence of the witnesses of fact. The court accepted the expert's assessment that the actual costs were not excessive or unreasonable in the context of the works carried out.

134 The court did not consider that the method of measuring the as-built information took into account the circumstances under which the works were performed, and that the approach was high-level and reliant on the use of averaged labour constants obtained from cost libraries and averaged labour/materials ratios; the court found this approach imprecise compared with the assessment of the actual costs method.

135 The court did not find the bottom-up approach as helpful as the other approaches, mainly because of the application of labour constants and the basis for calculating margin.

136 The court found the assessment of the works instructed to be constructed based on the letters of intent useful to some extent, but the labour rates used were out of line with other experts. The court found the evidence limited in terms of its reliability compared with that of the data from the project management software used by Electrix's expert, and expressed concern over the accuracy of the as-built drawings, which formed the basis of the expert's assessment of materials quantities, relative to the project management software data. This approach also did not take into account the difficulties faced by the project.

137 The court did not find helpful the cross-reference of Fletcher Construction's schedule of instructions to Electrix's payment claims, as it was not particularly relevant to the issues under determination and the expert expressly stated that she had not attempted to assess the reasonable value of the work done by Electrix.

138 From this it is evident that assessment of the actual costs was the preferred starting point for valuing a reasonable sum. However, that is not to say that the assessment of the actual costs cannot be benchmarked or tested against first principles estimates (bottom-up approach) or measurement of the works based on as-built information, as long as these assessments consider the circumstances the works were performed under. It is interesting that the court questioned the accuracy of the as-built information, as this typically would have been produced by the specialist subcontractor, in this case Electrix.

### *Valuing the works based on actual cost*

139 The use of actual cost to value the reasonable sum does not mean simply taking the amount charged and presenting it as the reasonable sum

calculated. It is apparent from *Electrix* that the courts will consider the following matters when valuing a reasonable sum based on actual costs:

139.1 Good record keeping – this is key to a successful claim for reasonable costs. It is also costly and time consuming. The Society of Construction Law's *Delay and Disruption Protocol*[157] provides guidance that can be applied to all record keeping practices such as:

a records must be generated at the same time as the work progresses, and not after the event;

b documentation of all work underway (both on and off site), along with the circumstances the work on site is being performed under;

c records should cover procurement, design, approvals, manufacturing, installations, construction, coordination, commissioning and taking over (as applicable), and should be categorised as progress / resource / cost / programme / correspondence and administration / contract negotiation and tender records;

d records should be checked and stored appropriately as long as required under statute and inconsistencies in the records should be identified, with comments added to explain any such inconsistencies where possible;

e ideally, records should be signed by both parties.

139.2 The type of software and the associated administration procedures used to manage the actual costs incurred on a project should be considered on its merits. Electrix adopted Workbench project management software to manage its projects and provided robust evidence that money could not have been paid or received unless there was a corresponding Workbench entry. There are other similar software packages available, such as Jobpac, Oracle and SAP, which can be used by contractors to manage their project accounts, having due regard for the size and capability of the contractor in question. Processes involving cost centre coding and internal quantity surveying verification of costs provide clear audit trails that the costs have been properly and reasonably incurred.

139.3 Verification that the labour and plant hours are logical (is one person in two places at the same time; is one person working more than eight hours in a day and if so, why?) and can be validated (what timesheets, photographic records, site diaries and the like are available to corroborate the claims?) is required – that is to say, validation that the costs have been reasonably and properly incurred is necessary. Adjustments should be

[157] Society of Construction Law, *Delay and Disruption Protocol* (2nd edition, 2017).

made where this is not the case. Evidence should be provided that such adjustments were considered and made should it initially not be possible to establish to a high probability that the costs were actually incurred. However, if further supporting information is subsequently provided that the costs have been incurred, the costs can be included in the calculations.[158]

139.4 Consider the context in which the works have been undertaken – try to consider the cause and effect of any cost overruns, were they due to the contractor's own conduct, or due to matters outside its control such as scope changes, delay and disruption caused by others? – consider what contemporaneous records are available to support this analysis as well as evidence from witnesses of fact; this may require some 'measured mile' or 'earned value' analysis (refer to the Society of Construction Law's *Delay and Disruption Protocol* for further explanation of these methods of analysis[159]) to be undertaken to support the analysis – ie have due regard to the circumstances under which the works were performed; simply measuring the drawings and estimating a reasonable price does not reflect the events that occurred on site and the conduct of the parties.

139.5 Beware of notional assessments based on labour constants, as these do not consider circumstances on site. Labour constants detailed in price books and rate libraries such as *QV Cost Builder* and *Rawlinsons New Zealand Construction Handbook* are '*intended as an average guide only*',[160] they do not consider variables such as the type of project, site conditions, location, scope for use of mechanical plant or conduct of the parties. In *Electrix*, the court questioned the validity of the application of these constants, as they are based on averaging and are reflective of the project as drawn, rather than as built. It is reasonable that the application of these constants, with no careful consideration as to the circumstances the work was done under, be treated with caution. Whilst it is useful to use ratios of labour to materials and labour constants as a means of benchmarking and testing whether costs incurred are reasonable, where typical ratios and constants are not achieved, it is advisable to ascertain the cause and quantify the effect of events that result in differences. In some instances, it may be necessary for the quantity surveying expert to produce a first principles estimate to test the actual costs. These first principles estimates should be based on labour and plant productivities calculated taking into account circumstances on site with

158 Further detailed guidance on record keeping can be found in Part B of The Society of Construction Law's *Delay and Disruption Protocol*: https://www.scl.org.uk/sites/default/files/documents/SCL_Delay_Protocol_2nd_Edition_Final.pdf.

159 *SCL Delay & Disruption Protocol*, note 157, para 18.16.

160 *Rawlinsons New Zealand Construction Handbook* (28th edition) para [5-501] and https://www.QVCostBuilder.co.nz.

reasonable rates applied, along with the cost for the supply of materials, including cartage and adjustments to materials quantities for wastage.

139.6 Rates should be reviewed in the context of what was reasonable to pay in the market at the time the works were performed, having due regard for labour, plant, materials supply, cartage, waste and fixings:

a Valuation of materials can be undertaken through verifying invoices paid in relation to the project management software used on the project. Invoices can be checked against first principles estimates for the associated work as detailed above, and supply rates can be verified with suppliers, providing that the quantity surveying expert has an understanding that different contractors obtain different discounts and rebates from suppliers for the materials that they purchase across their portfolio of projects on an annual basis. Wastage and constructability are key considerations. For example, 800mm SDR17 PN10 drainage pipes are supplied in 6m to 18m lengths; sufficient numbers of pipes will need to be procured to allow efficient construction with minimal joints, due to both the risk of leakage at the joint and the cost of electro butt fusion welding.

b Labour rates for directly employed staff can be verified, based on pay slips with percentages included for ACC, holidays, sick pay, training levies and the like. Labour provided by agencies can be valued by verifying invoices paid in relation to the project management software used on the project, with the application of a reasonable margin, having been tested against what was reasonable in the market at the time the work was done, included in the sell rate. Productivities can be checked against first principles estimates as detailed above, with labour constants being used as a benchmarking tool only.

c Plant invokes interesting questions around depreciation values and maintenance costs associated with any owned plant which can be debated between the quantity surveying experts, with evidence presented to the court on the matter as may be required. Hired plant can be valued in the same way as described above for labour and materials.

d Preliminary & General costs for management and supervision can be valued in the same manner as labour. Hire of accommodation, hoardings, gantries, cranes, hoists, scaffolding, propping and the like, whether as internal or external charge, can be valued in the same manner as materials or plant. Quantities for hardstandings and access roads and the like can be measured, based on the accommodation used and the route taken from the gate to the workface(s). The overall costs can be benchmarked or tested

against other projects of a similar nature (market value) through the calculation of the Preliminary & General costs as a percentage of the total physical works amounts, having due regard to the circumstances under which the work was performed.

e A profit element should be included in the award of a reasonable sum. It has been suggested that this be calculated having regard to industry pricing levels at the time the work was performed, any competitive edge the claimant might have over industry rivals and any indications in negotiations that the claimant was willing to accept a lower price.[161] However, in *Electrix,* the court stated that where there is no agreement on prices, '*it is difficult to put any weight on what was said about budgets, expectations or in negotiations*'.[162] On this basis, the court discounted the margins that the parties were negotiating on because those negotiations failed.[163] So how do we calculate a reasonable level of profit? By examining the contractor's accounts for the three previous years closest to the works taking place?[164] However, this approach does not allow the contractor to maintain his commercial privacy and may result in an unfair award based on skewed data if jobs delivered in that period either over or under performed. In *Electrix*, the court was satisfied by the proximity of three of the four quantity surveying experts' calculated margin percentages to one another, and discounted the fourth, as it considered it an outlier in comparison to the other three. Determining market-related margin percentages for projects of a similar nature as a means of benchmarking or testing a reasonable sum could be undertaken; percentages may be applied at different rates for labour, materials, subcontract costs and plant (hired vs owned). Confirming the scope of what is included in margin (for Off-site Overheads) and what is included in Preliminary & General costs (for On-site Overheads) is key.

139.7 Agreement on quantities should be reached where possible, though joint site inspections can be undertaken if agreement cannot be reached based on measurements undertaken separately.

139.8 If costs incurred cannot be explained or verified, it is advisable to discount the claim for these costs.

139.9 How much checking of actual costs is enough checking? The quantity surveying expert whose evidence was accepted in *Electrix* undertook 600 hours of analysis of the actual costs over 4 months (based on a 40-hour working week, that is

161 *Goff & Jones*, note 10, paras 4.08–4.25.
162 *Electrix*, note 3, para [98].
163 *Electrix*, note 3, para [116].
164 *SCL Delay & Disruption Protocol*, note 157, Part C – 2.4.

> almost full time over that duration); the cost of undertaking this analysis would not have been insignificant. Typically, I would expect a minimum of 80% of the costs to be checked both in terms of verifying the actual costs were incurred and confirming that their value was reasonable in the market at the time and under the circumstances the works were performed.

### *The parties' conduct*

140 In *Electrix*, the court found that the project experienced significant problems caused *'by the lack of design, poor coordination and management and intense time pressure'* adding significantly to Electrix's costs to deliver the works. This issue was taken into account because the valuation preferred by the court was based on actual costs.[165]

141 The application of actual costs as a basis of valuation means that the contractor will recover costs arising from project difficulties outside his making; so, for example, he would recover delay costs arising from earthworks taking place at a much reduced productivity in the winter compared with the planned works taking place in the summer; or the cost of abortive works such as re-wiring of electrical work, or the cost of disruption due to the actions of others. However, the contractor's claim should also be discounted for his own non-performance.

142 In *Electrix,* the court acknowledged that it would be surprising if some of the problems on the project were not caused by Electrix. However, there was 'insufficient evidence Electrix caused difficulties or inefficiencies greater than would usually be expected in a large commercial project' and insufficient evidence that 'Electrix's actions or decisions materially added to the cost of the project.'[166] Presumably, this finding was based in part on the quantity surveying expert opinion that:

> '13 per cent of the cost blowout in the project over Electrix's original bid was due to scope creep, a further 27 per cent was due to the 14 months delay after 13 December 2016 and the remaining 60 per cent was from the disruption to the management of the project'.[167]

The court decided that the application of a reasonable sum based on Electrix's actual costs, with no adjustment made for its own non-performance, allowed it compensation for matters arising outside of its control, and that, owing to their nature, the effect caused by the problems facing the project could not be precisely quantified.

143 Keating notes that it is unclear whether it is permissible or relevant to consider the plaintiff's conduct when assessing a reasonable sum, and whether, due to this conduct the defendant has suffered any unnecessary

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165 *Electrix*, note 3, para [120].
166 *Electrix*, note 3, para [121].
167 *Electrix*, note 3, para [104].

additional costs.[168] Keating's comment is based on *Crown House Engineering Ltd v Amec Projects Ltd*,[169] in which the court did not consider whether hinderances caused to other subcontractors with associated costs should be taken into account when assessing reasonable costs awarded, as this was not required of it. However, it is apparent from *Serck Controls Ltd v Drake & Scull Engineering Ltd*,[170] also referred to in Keating, that adjustments for the contractor's own non-performance are relevant. It would be reasonable to expect a contractor to estimate what it would typically expect its own non-performance for a project of a similar nature to be, and to discount its claim by such amount if it is a material amount.

### *Defining the limit of the reasonable sum in relation to the contract price*

144 In *Mann v Paterson Constructions*, Gageler J held that, '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.' Gageler J went on to say, '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.'[171]

145 Nettle, Gordon and Edelman JJ held that, 'The contract price reflects the parties' agreed allocation of risk. Termination of the contract provides no reason to disrespect that allocation. Granted, there may be difficult questions of apportionment of the contract price, such as where performance of a small part of the entire obligation is the most valuable part of the contractor's work.'[172] However, 'the amount of restitution recoverable as on 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.'[173]

146 An example of how the contract price could be fairly apportioned as part of the valuation of a non-contractual quantum meruit following termination, and where there is no accrued right to payment for the relevant part of the works, is set out as follows:

146.1 **Physical contract works complete on site** – measure works based on site visit and design information and value

168 *Keating*, note 1, paras 4-039–4-040.
169 *Crown House Engineering Ltd v Amec Projects Ltd* (1989) 48 BLR 32 (CA).
170 *Serck Controls Ltd v Drake & Scull Engineering Ltd* (2000) 73 Con LR 100 (TCC) para [113].
171 *Mann*, note 1, para [102].
172 *Mann*, note 1, para [205].
173 *Mann*: note 1.

accordingly. For a Lump Sum contract, if there is a Schedule of Quantities, works are valued by applying the measured quantities to the rates; if the Schedule of Prices is a trade summary, the works are valued on a reasonable basis having due regard to the works performed, based on the contract price. For a Measure & Value contract, the contract administrator's measure of works completed on site, unless proved to be incorrect by the contractor, should form the basis of payment.

146.2 **Variations** – measure works based on a site visit and variations instructed and value accordingly, having regard to the valuation of variations rules prescribed under the contract.

146.3 Works paid for should have been performed in accordance with the contract; monies for works containing **patent defects** should not become due (ie deduction made for remedies required to make works compliant).

146.4 **On-site Overheads** – where the rates included in the Contract Price are exclusive of On-site Overheads, check the status of the programme, verify if there have been any delays and the cause and effect of those delays, and calculate sum owing for time related costs. Fixed costs for establishment and demobilisation to be paid such that the contractor is compensated for removing his plant from site and for making safe the contract works; such instruction may give rise to additional costs depending on the state of the construction works and the measures that may be required to make them safe. Where the rates in the Contract Price are inclusive of On-site Overheads, these costs are recovered through the valuation of the work completed, having due regard to the Schedule of Prices.

146.5 **Off-site Overheads & Profit (Margin)** – where the rates in the Contract Price are inclusive of Off-site Overheads & Profit, these costs are recovered through the valuation of the work completed, having due regard to the Schedule of Prices. Where the rates are exclusive of Off-site Overheads & Profit, these costs are recovered through the application of the percentage derived from the Schedule of Prices to allow the recovery of these costs.

146.6 The **Cost of Materials** ordered for the works which have been delivered to the contractor or for which the contractor is legally obliged to accept delivery, and which the contractor has delivered to the other party (excluding an allowance for profit):

a **Materials stored on and off site** – Proof of ownership of materials stored on and off site should be provided; materials stored off site should be insured by the subcontractor and should continue to be stored and labelled correctly, vesting certificates should be in place. Materials held on and off site

should be inspected to confirm the quantities and value of the materials (having regard to the contract price).

b **Deposit payments** are likely to fall into this category, for example lifts typically require a significant deposit to be paid on placement of an order – commercial terms agreed with the subcontractor may not be back to back with those agreed under the head contract when it comes to such payments; but the contract price is based on the sums quoted by the subcontractor for these works and as such deposit payments may be recoverable; the principal may continue to pay the subcontractor directly for works undertaken after cancellation of the head contract in order to receive the materials.

146.7 Where the contract is not a fixed price, the **cost fluctuation adjustment** due is payable up to the date of termination and should be calculated in accordance with the provisions in the contract at the agreed indices.

146.8 **Who owns retentions** – where the payer wrongfully repudiates, retentions held should also be taken into account in calculating the quantum meruit.

146.9 **Due regard to the circumstances and behaviours** – costs incurred due to delay and disruption should be taken into account; whilst costs associated with the contractor's own inefficiencies should not be borne by the principal.

146.10 **Less any amounts previously paid** – if the above calculated sum is less than the amount previously paid, then the award would be nil, as the plaintiff would have already recovered its costs.

147 As we can see from the above, there are factors that give rise to the adjustment of the contract price and as such the original contract price cannot be taken in isolation as the basis for calculating the quantum meruit for the relevant part of the works.

### *Circumstances where it may be unconscionable to limit the plaintiff to the contractual measure*

148 As discussed above, in *Mann v Paterson Constructions*, the court left open the possibility of cases where it would be '*unconscionable to confine the plaintiff to the contractual measure*'.[174] This section of the paper will consider potential situations whereby such circumstances may arise and discuss how works could be valued in these situations.

149 The following circumstances have been identified where it may be unconscionable to limit the plaintiff to the contractual measure:

149.1 Where works are instructed outside the scope of the contract;

174 *Mann*, note 1, para [216].

149.2 Where there are significant costs incurred at the start of the project;

149.3 Where high value works need to be performed early, including advance procurement of high value materials, or where there is front loading of the cashflow profile with early works having a higher value due to over inflation (ie initial works have been weighted such that the contractor has attached a higher unit rate to the works than would be typical in the market, to allow earlier recovery of costs as a means of forward financing the works);

149.4 Where there have been acts of prevention under the contract scope resulting in variations, disruption and delays for which the contractor would have been entitled to an extension of time or additional costs;

149.5 Where the contract price was inadequate for the performance of the contract:

a where the contract price was inadequate due to an error in the tender or commercial decision to offer an unprofitable price;

b in circumstances where there was a 'race to the bottom'; and

149.6 Where the contract price was based on a Schedule of Prices that was incorrect or was based on a Measure & Value contract.

### *Works instructed outside the scope of the contract*

150 A key case considering the matter of where works are instructed outside the scope of the contract is *Blue Circle Industries v Holland Dredging Co (UK) Ltd*.[175] Holland Dredging was appointed to dredge in Larne Lough, Northern Ireland, so that larger vessels would be able to dock. The tender referred to the dredged material being deposited in areas approved by the public authorities, with the intention being that they would be deposited in suitable areas in the Lough. An alternative plan was agreed that the excavated materials would be used to create an artificial bird island. The court decided that the island was so peculiar, so unexpected and so different from what could be anticipated under the contract that it was undertaken wholly outside the scope of the original dredging contract and therefore was considered as a separate contract.

151 Where works are instructed that are so far outside what could be reasonably contemplated under the original contract, it stands to reason that we cannot look to the contract to value the works as if they were undertaken as a variation, as the circumstances under which the works are performed and the nature of the works are so different from those included under the contract works that to do so would potentially be unfair.

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175 *Blue Circle Industries plc v Holland Dredging Co (UK) Ltd* (1987) 27 BLR 40 (CA).

152 In such circumstances, it is incorrect to regard the work as though it were performed under the contract, and the contractor is entitled to be paid a reasonable sum for the work.[176] The principles that apply to valuing a quantum meruit where no contract price has been agreed would apply – see the discussion above. It follows that, if the contract was cancelled for repudiation prior to completion, and the contractor was entitled to a quantum meruit, then it would be unconscionable to limit valuation of the quantum meruit to the contractual measure.

### *High value works are performed early/front loaded cashflow*

153 In the technology field, or process & engineering field, it is not uncommon for high value services, and even works, to be performed early on at considerable cost, meaning that a strict pro rata calculation based on the contract price may not reflect the benefit conferred.

154 Similarly, if the contract price is calculated such that the cashflow is front loaded (which may have been done as a means of managing the risk associated with a fixed price lump sum contract), an issue arises as to how the quantum meruit should be valued if the contract is terminated early. If it is valued in accordance with the relevant part of the contract price, the plaintiff may receive a windfall when compared with the actual value of the work and/or services provided at that stage.

### *Acts of prevention or breach of contract*

155 As discussed earlier, consideration should also be given to the parties' conduct when calculating a reasonable sum. It may be that the parties' behaviour resulted in delay, disruption and change so significant that it would be unconscionable to limit the plaintiff's award to the contractual measure.

156 The case of *Boomer v Muir* is an interesting example.[177] Boomer abandoned the construction of a large storage dam, which was part of a large hydroelectric project managed by Storrie & Co, although it was nearing completion, claiming that Storrie had breached the contract in a number of ways, which Storrie denied. When he stopped work, Boomer had been paid all but the remaining $20,000 of the contract price of $330,000; his costs were in excess of $600,000. The court agreed with Boomer that Storrie had materially breached the contract and awarded Boomer its unrecovered costs as restitution. Storrie had caused Boomer substantial delays and increased costs due to its failure to deliver materials to the job at the rate required, its failure to excavate the cut-off trench as fast it should have, and it hampered Boomer by diverting air from the compressors to other areas of the work, with an associated delay in restoring the burned air compressors. It was held that it would be equitable to permit the plaintiff to depart from the pricing structure

176 *Keating*, note 1, para [4-801].
177 *Boomer v Muir*: note 59.

agreed with the defendant and so allow an award that was in excess of the contract price, and the conduct of the defendant was a key consideration in this matter.

### *Where the contract price was inadequate for the performance of the contract*

#### Inadequate due to an error in the tender price or commercial decision to offer an unprofitable price

157 Where the contract is repudiated after partial performance, the repudiation removes the plaintiff's ability to compete the performance and earn the full price. However, if the plaintiff has made a mistake in his pricing, ie, he has made a bad bargain and the contract is unprofitable, the repudiation and a claim for a quantum meruit may allow the plaintiff to escape from a bad bargain by recovering the market price for the work undertaken.

158 In *Mann v Paterson Constructions*, the court referred to the Supreme Court of the United Kingdom decision in *Benedetti v Sawiris,* in which Lord Neuberger stated that:

> 'It would seem wrong … for the claimant to be better off as a result of the law coming to his rescue … 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.'[178]

159 In *Kehoe v Borough of Rutherford*,[179] Kehoe agreed to grade 4,200 feet of street at $0.65/foot, for the total price of $2,743. After he had completed about 60% of the work, the defendant in breach of contract prevented him from completing the work, at which point Kehoe lodged a quantum meruit claim. The claim was based on the reasonable value for work done of $3,153 (Kehoe's actual costs incurred), with $1,891 of work remaining to be performed. Kehoe had been paid $1,850 of the contract price of $2,743 (67% of the contract price), meaning that it would have cost him $1,891 to earn the balance of the contract price owing of $893. The court held that Kehoe was entitled to recover only the proportionate part of the contract price and therefore denied relief, as Kehoe had already recovered more than this. Whilst Kehoe made a loss from this contract, he may have made the decision to suffer this loss as it would have been less than if his crew and plant were sitting idle.

160 The case shows that a claim for a quantum meruit cannot be used to save the plaintiff from his decisions and put him in a better position than he would have been in had he completed the work; the risk profile agreed under the contract is not altered where the award is limited to the contractual measure.

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178 *Mann*, note 1, para [210].

179 *Kehoe v Borough of Rutherford* (1893) 56 NJL 23, 27 A 912.

161 However, as also noted in *Mann v Paterson*, there may be cases where it is difficult to identify the contract price, 'such as where the benefits to the contractor include not only payments of money but also the value of promises of releases'.[180] In these cases, it may be unconscionable to restrict the plaintiff to the contractual measure; the valuation of the benefit conferred should properly take account of the fact that the contract price has been discounted because of non-price benefits which the plaintiff will no longer receive.

**Where there was a 'race to the bottom'**

162 Similarly, where the tender process has resulted in a 'race to the bottom', the plaintiff had the opportunity not to conclude the negotiations with the defendant and not to enter into contract, and as such it is not for the quantum meruit award to reverse his commercial decision to proceed with the deal. However, a potential basis to a claim for a reasonable sum based on 'unconscionability' in such circumstances could arise if the plaintiff were able to demonstrate some duress at the time of tender negotiations which culminated in an inadequate tender price.

***Where there were errors in the SOP or the contract was measure & value***

163 Where a contract price is established based on a Schedule of Prices (SOP), as set out above in the case of *Kehoe v Borough of Rutherford,* the limit of the award is calculated through the application of the quantity of the work performed up to the point of repudiation at the contract rate for undertaking that work; this principle applies when calculating the limit of the award based on the contract price under both Lump Sum and Measure & Value contracts. Where the plaintiff has made an error in the rates or discounted his rates, he is to be bound by them. However, if there is an error in the quantities included in the SOP, this should not adversely affect the plaintiff.

**Lump sum price but errors in the SOP**

164 It seems unrealistic to expect SOPs to describe every detail of the works required to the minutest level, and they are not required to do so at common law, as works not expressly mentioned but necessary to complete the work the contractor has undertaken to do are implicitly included. However, wording used to incorporate Standard Methods of Measurement into contracts, as seen in JCT forms in the UK,[181]

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180 *Mann*, note 1, para [205].

181 JCT Standard Building Contract With Quantities (SBC/Q) clause 2.2.2.1 which provides that the bills of quantities 'are to have been prepared in accordance with the Standard Method of Measurement … published by the …' and clause 2.2.2.2 which provides that errors or omissions in bills of quantities shall be corrected and that correction be treated as a Variation, which extends an error or omission to include a departure from the Standard Method of Measurement.

contradicts this; such clauses could put the principal in the position of guaranteeing absolute accuracy of the SOP, which is why NZS 3910 includes express terms to the contrary:

> NZS 3910: 2013 - Clause 2.2.2
>
> Any Schedule of Prices in the Contract shall be used as a basis for computing Payment Schedules and for valuing Variations and for no other purpose. **The Principal does not warrant that any quantities included in any Schedule of Prices are complete or accurate**. (Emphasis added)

165 Based on the principles noted in *Mann v Paterson Constructions*, a quantum meruit award in circumstances where the contract has been repudiated should not result in a departure from the risk allocation agreed under the contract. However, in situations where there is a discrepancy in quantities which is so significant that the SOP rates are inapplicable, it may be 'unconscionable' to confine the contractor to the contractual measure for the works in question and a quantum meruit may be valued on an assessment of the actual costs incurred.

166 In the case of NZS3910, this situation is already provided for under clause 2.2.4 and the valuation of variations provisions (9.3.7):

> NZS3910: 2013 Clause 2.2.4
>
> If any discrepancy is identified in the Schedule of Prices the Engineer or the Contractor shall so notify the other. The Engineer shall issue a written direction to resolve the discrepancy. **For the purposes of 2.2, discrepancy shall mean**:
>
> **(a) Any inconsistency between the Drawings or Specifications on the one hand and the Schedule of Prices on the other, either as to measurement or description not being any inconsistency for which the Contractor is responsible;**
>
> (b) **Any omission or inaccuracy in the compilation, preparation or copying of the quantities included in the Contract not being an omission or inaccuracy for which the Contractor is responsible.** (Emphasis added)
>
> NZS3910: 2013 Clause 2.2.5
>
> **If a significant discrepancy has occurred it shall be treated as a Variation**. (Emphasis added)

**Measure & Value contracts**

167 The limit defined by the contract price would be calculated based on the actual quantity of works performed at the agreed contract rate. Where there is a discrepancy between the quantity in the SOP for a particular item of work and the quantity of the work actually done, this will not constitute a Variation, meaning that the contractor is required to do as much of the work as may be necessary at the agreed rate, subject to any express terms to the contrary in the contract.

168 Based on the principles noted in *Mann v Paterson Constructions*, a quantum meruit award in circumstances where the contract has been repudiated should not result in a departure from the risk allocation agreed under the contract. However, in the context of a measure and value contract, where the actual quantities of any single item differ to such an extent as to make prices in the SOP unreasonable, it may be 'unconscionable' to confine the contractor to the contractual measure and a quantum meruit may be valued on an assessment of the actual costs incurred for the works in question.

169 In the case of NZS3910, this situation is already provided for under section 2.3.4 and the valuation of variation provisions (section 9.3.7).

> Clause 2.3.4
>
> Any quantities given in the Schedule of Prices are provided for the purpose of evaluating tenders and may be taken as a reasonable assessment of the quantities involved in the Contract Works. **Where the actual quantity of any single item differs from that given in the Schedule of Prices to such an extent as to make the scheduled price for that or any other item unreasonable then the change in quantity shall be treated as a Variation**. (Emphasis added)

170 This poses the question of under what circumstances would it be unreasonable to use the scheduled price? The test is only likely to be met where the change in the actual quantity has a resultant cost effect that is material.

171 Similarly, where an item of work has been omitted by error from the Schedule of Prices, NZS3910 provides for these works to be treated as a variation, and valued in accordance with the rules set out in the contract:

> Clause 2.3.1
>
> In a measure and value contract the Contract Price shall be calculated according to the measured quantity, as determined by the Engineer, of each item of work carried out at the rates set out in the Schedule of Prices and to have allowed in its price to cover the whole range of work included within those items. **Where an item of work has clearly been omitted by error from the Schedule of Prices, as where other items of a similar kind have been included, the work omitted shall be treated as a Variation**. (Emphasis added)

172 That is to say, where works are omitted in error from the Schedule of Prices, it may be 'unconscionable' to confine the contractor to the contractual measure and a quantum meruit may be valued on an assessment of the actual costs incurred for the works in question.

173 It is evident that there are circumstances under which it would be unconscionable to limit the plaintiff to the contractual measure in terms of calculating a reasonable sum. It is also evident that there are

circumstances where the agreed risk allocation provisions of the contract themselves provide for an appropriate adjustment of the contract price so as to provide for a reasonable sum.

## Conclusion

174 The availability of the restitutionary remedy of a quantum meruit (the amount deserved) has long provided claimants with alternative recourse where contractual remedies are unavailable or fail. Claims of this type have played an important role in the construction sector where procurement methods and payment and scope change mechanisms create circumstances where questions may arise as to the availability of a contractual claim.

175 Taking the recent decisions of the High Court of Australia, in *Mann v Paterson Constructions*, and the High Court of New Zealand in *Electrix Ltd v The Fletcher Construction Company Ltd* as a starting point, this paper has considered the modern application of the law on quantum meruit under New Zealand, Australian and English law focusing on the two specific scenarios addressed in those cases: first where work is completed in anticipation of a contract which is never finalised as in *Electrix*; and secondly, where the question arises as to payment for work done under a contract which has been terminated following a repudiation as considered in *Mann*.

176 Whilst our survey of the current law reveals a general convergence in the approaches of the Australian, New Zealand and English courts as to availability of the remedy, it also highlights that some doctrinal issues remain unresolved within and between jurisdictions.

177 With respect to the availability of a quantum meruit for work completed under a repudiated contract, the position adopted by the Australian High Court in *Mann*, recognising the so-called 'rescission fallacy' which held such contracts to be void *ab initio*, is generally the approach we could expect a court in New Zealand or England to take. As a consequence, the historic rule that a claimant in these circumstances may elect to claim in contract or to seek a quantum meruit, even if the latter meant allowing the claimant to escape from a bad bargain, will most likely no longer be given effect. Instead, at least in respect of work to which a contractual entitlement to payment has already arisen, the position seems to be that the quantum meruit remedy is not available. In respect of work to which no contractual entitlement has yet arisen, there is also general accord between the jurisdictions that a quantum meruit may be available, although in New Zealand it remains arguable as to whether the Contract and Commercial Law Act 2017 excludes this remedy. There is also consensus that a quantum meruit in these circumstances should not exceed a fair value calculated on the basis of the contract price, although the courts recognise the possibility of exception to avoid 'unconscionable' outcomes.

178 As to the doctrinal basis for a quantum meruit, this is where there is some divergence. In *Mann* the High Court of Australia founded the remedy on the principle of unjust enrichment arising from a failure of basis (or total failure of consideration). Whilst the English courts also recognise this as a valid basis for an unjust enrichment claim, the failure of basis approach has yet to be applied in the context of a repudiated construction contract leaving some uncertainty as to whether its availability is still founded on the historic cases, which themselves rested on the rescission fallacy. New Zealand, by contrast, as shown in the decision in *Electrix,* remains sceptical of unjust enrichment as the basis for the remedy, preferring, instead, to treat quantum meruit as a compensatory remedy designed not to reverse unjust enrichment, but to compensate the unpaid party for services performed.

179 For work done under a contract which is never realised, the situation considered in *Electrix*, both the New Zealand and the English courts will grant a remedy based on a quantum meruit and, in assessing the availability of the remedy both will consider whether the services in question were requested and/or freely accepted. However, the diverging views on doctrinal basis; unjust enrichment under English law and a bespoke compensatory remedy under New Zealand law, lead to differences in approach to quantification. Under English law the starting point will be the market value of the benefit received by the employer, whereas the New Zealand courts will look first at the actual cost incurred by the contractor.

180 The authors suggest that the well-reasoned decision of the Australian High Court in *Mann* provides sound juridical basis for a continued rationalisation and convergence of approach between Australian, New Zealand and English law as to the availability of a quantum meruit based on the theory of unjust enrichment.

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*is to promote the study and understanding of*
*construction law amongst all those involved*
*in the construction industry'*

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