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Mann v Paterson Constructions Pty Ltd—Builders' *Quantum Meruits* Revisited

Duncan Anderson*

Australia; Construction disputes; Construction industry; Quantum meruit; Restitution; Unjust enrichment

Abstract

In 2019, the High Court of Australia in Mann v Paterson Constructions Pty Ltd *changed the basis on which a residential builder may claim a restitutionary remedy or quantum meruit from an owner, upon acceptance of an owner's repudiation of contract. This article considers the changes and analyses whether Australian courts and specialised state and territory building tribunals should implement all these. A conclusion is offered that while restitution in the construction context is meritorious, the grounds for this remedy should not change from "unjust enrichment". Picking up on challenges alluded to in* Mann *and the difficulties experienced by one state building tribunal in implementing restitutionary remedies, this article goes on to describe the unharmonious state of Australian law concerning a builder's ability to claim a quantum meruit, when it is the builder itself that is in default. A conclusion is offered that this important aspect of construction law ought to be placed before the High Court for the purpose of clarification.*

Part one: introduction

On 9 October 2019, the High Court of Australia delivered its judgment in *Mann v Paterson Constructions Pty Ltd* (*Mann*).[1]

The judgment is of considerable importance to the Australian residential building sector and to state and territory tribunals charged with the task of resolving thousands of disputes between residential builders and owners every day. The judgment is also of importance to the wider construction industry by way of application to the commercial sector generally.

The source of the judgment's importance is its impact on the availability to builders of a restitutionary remedy or quantum meruit on termination of residential building contracts for repudiation by owners.

Prior to *Mann*, a builder who accepted an owner's repudiation of a building contract had the option of either suing the owner for damages for breach of contract or suing on a quantum meruit for all work done.

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

The position prior to *Mann* had been established as the law in Australia over a period of many years after courts consistently adopted and applied the decision of the Privy Council in *Lodder v Slowey*.[2] The Victorian Court of Appeal confirmed this position as established law in its 2009 decision in *Sopov v Kane Constructions Pty Ltd (No.2)* (*Sopov*).[3]

The availability of a quantum meruit to a builder was dependent on an assumption that the relevant building contract was *void ab initio* on termination. This became known as the "rescission fallacy" which was inconsistent with the ratio of the High Court's decision in *McDonald v Denny Lascelles Ltd* (*McDonald*)[4] given in 1933.

The ratio in *McDonald* was to the effect that contracts did not become *void ab initio* on termination; unconditional contractual rights acquired prior to termination remained in place and the parties were thereby discharged from further performance.

Mann's primary impact has been to finally apply the ratio in *McDonald* to building contracts thereby removing a builder's ability to recover a quantum meruit for and with respect to *all* work performed for an owner before termination. A builder's quantum meruit remains available with respect to work performed on any contractual building stages remaining incomplete prior to termination.

Also of importance is the decision of the majority in *Mann* to cap the quantum of a builder's restitutionary claim to no more than the maximum amount that would have been payable to it under the relevant building contract had termination not been effected. The majority's decision serves to end the incongruous but not uncommon outcome of a builder's quantum meruit exceeding the maximum amount recoverable under its terminated contractual bargain with the owner. This should also serve to end the dubious practice of some builders in "manufacturing" repudiations of building contracts by owners on loss-making jobs.

Part two of this article sets out the background to the judgment in *Mann* before analysing and summarising the outcome in terms of the availability of a restitutionary remedy to the builder in the circumstances of the case.

Part two then briefly focuses on the various rationale employed first by the four-judge majority in continuing to provide for a builder's quantum meruit on an owner's default and, secondly, by the minority of three judges in concluding that a quantum meruit should not be so available at all. The point is made that of the majority only Gageler J approached the availability of a builder's quantum meruit on the traditional basis of the owners' unjust enrichment. In contrast, Nettle, Gordon and Edelman JJ introduced "failure of consideration" as the preferred ground on which a builder's quantum meruit ought to be awarded in the residential context.

Part three considers Nettle, Gordon and Edelman JJ's judgment by setting out the true nature of "failure of consideration" and analysing its appropriateness as the basis for a restitutionary remedy in the residential building context when compared to unjust enrichment. This involves a conclusion that "failure of consideration" is something different to unjust enrichment.

A conclusion is offered that courts and residential building tribunals should adopt unjust enrichment as the correct ground upon which to award a builder's

[2] *Lodder v Slowey* [1904] A.C. 442.
[3] *Sopov v Kane Constructions Propriety Limited (No.2)* [2009] VSCA 141; 24 VR 510.
[4] *McDonald v Dennys Lascelles Ltd* (1933) 48 C.L.R. 457.

quantum meruit on an owner's default rather than using "failure of consideration" for this purpose in the future.

Part three also considers Kiefel Bell and Keane JJ's minority judgment in *Mann* and analyses whether their Honours' objection to a restitutionary remedy for undue interference with freely bargained contracts providing for risk allocation on default is ultimately valid.

A conclusion is offered that while a builder's quantum meruit must inevitably interfere with contractual remedies available on termination for an owner's repudiation, there are important practical reasons why restitution and contractual remedies should coexist in the residential construction context.

Having concluded that the availability of a builder's quantum meruit ought to be based on unjust enrichment rather than "failure of consideration", Part Four of this article addresses recent difficulties arising around application of both the unjust enrichment criterion and the majority's decision in *Mann* by one Australian residential building tribunal in particular. These difficulties arose in the context of builders' quantum meruit claims, where it was the builders themselves who repudiated the relevant building contract.

In *Mann*, Gageler J distinguished the case of a defaulting builder from that before the Court, describing such case as a more difficult category raising its own problems.[5] Notwithstanding these observations, the Queensland Consumer and Administrative Tribunal (QCAT) and its Appeal Board have recently applied the High Court's decisions in *Pavey & Matthews Pty Ltd v Paul*[6] and in *Mann* in a number of decisions, to grant quantum meruits in favour of repudiating builders.

Part Four sets out why these QCAT decisions are unsatisfactory and how the current state of this aspect of Australia's common law is unharmonious and in need of clarification by the High Court.

Part five of this article concludes that for reasons of fairness and practicality, the decision of the majority in *Mann* to maintain a builder's restitutionary remedy on an owner's default is meritorious.

However, the continued existence of such a remedy on an owner's default begs the question as to how courts and tribunals ought to deal with quantum meruit claims by builders, when it is the builders who are in default. With the law presently in an unharmonious state, this article concludes by offering a view as to what might be the focus of any reconsideration of this by the High Court in the future.

Part two: background to the High Court's decision in *Mann*

In 2014 and 2015, the respondent builder built two residential units for the appellant owners on land at Blackburn in Victoria.

The units were built under a domestic building contract to which the Domestic Building Contracts Act 1995 (Vic) (DCBA) applied. Consistent with this legislation, the contract provided for the owners to pay the builder for work done and materials supplied, on completion by the builder of stages throughout construction of the units.[7]

[5] *Mann* [2019] HCA 32 at [81], per Gageler J.

[6] *Pavey & Matthews Pty Ltd v Paul* (1987) 162 C.L.R. 221.

[7] When the parties entered their building contract in March 2014, s.40 of the Domestic Building Contracts Act 1995 (Vic) (DCBA) prohibited a builder from demanding or recovering more than certain percentages of the entire

By March 2015, the units were near completion. Disputes arose as to monies claimed and other matters and the owners purported to terminate the contract and exclude the builder from the site. Each party accused the other of wrongful repudiation.[8]

The Victorian Civil and Administrative Tribunal (VCAT) held that the owners had wrongfully repudiated the building contract and the builder was entitled to recover payment for all work done in constructing the units, on a quantum meruit basis.

VCAT applied the principles discussed by the Victorian Court of Appeal in *Sopov*. These were that a builder may pursue a claim for a quantum meruit with respect to all work performed, in lieu of an alternative claim for damages, following acceptance of an owner's repudiation and consequent contract termination . VCAT applied *Sopov* notwithstanding the inconsistent ratio of the long-standing decision of the High Court in *McDonald*:

> "Where a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding …, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance …, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected."[9]

VCAT assessed the amount due to the builder at $660,526.41, after taking into account the cost of rectifying defects and amounts already been paid by the owners. In so doing, VCAT noted that "by succeeding in a claim for a quantum meruit, the Builder has recovered considerably more than it might have recovered had the claim being confined to the Contract".[10]

The owners were unsuccessful on seeking leave to appeal to both the Victorian Supreme Court and Court of Appeal. The owners persevered and were granted special leave to appeal to the High Court. The appeal was heard before seven judges on 14 May 2019 and the Court issued its reasons on 9 October 2019.

The High Court's decision

As noted, the High Court unanimously decided that the ratio of its decision in *McDonald* applied to claims by builders, arising upon termination of residential building contracts for repudiation by owners. That was to the exclusion of the principles from *Sopov*, applied by VCAT at first instance.

Consequently, the builder was not entitled to payment on a quantum meruit basis for all non-variation work and materials undertaken and supplied, prior to termination of the building contract.

contract price, at completion of various stages of a domestic building. For contracts to build all stages of a domestic building, these maximum percentages were 10% for the base stage, 15% for the frame stage, 35% for the lock-upstage and 25% for the fixing stage. Clause 11.8 and Item 23 to the Appendix of the parties' building contract effectively provided for the owners to make progress payments to the builder as in section 40 of the DCBA, with a final 10% of the contract price to be paid on completion.

[8] *Mann* [2018] VSC 119 at [2].

[9] *McDonald* (1933) 48 C.L.R. 457 at [476]–[477].

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

With this entitlement removed, the High Court was unanimously of the view that the builder could recover any amount due on completion of a contractual building stage from the owner as a debt.

This represented a significant change to the law in Australia concerning the availability of restitution to builders on acceptance of owners' repudiatory conduct with the parties' rights to restitution now arguably being subsidiary to their contractual rights.[11]

The High Court was divided on the question of the builder's claim against the owner for work undertaken and materials supplied after the most-recently completed building stage and before contract termination.

The builder had no contractual claim for payment with respect to this work in progress as the circumstances giving rise to the owners' obligation to make payment were the builder's completion of the next stage under the building contract. This future obligation ceased when the building contract terminated.

In essence, the four-judge majority of Gageler, Nettle, Gordon and Edelman JJ held that the builder was entitled to a quantum meruit for this work in progress, while the minority found the builder had no such restitutionary claim. Of this majority, Nettle, Gordon and Edelman JJ based their finding as to the builder's entitlement to a quantum meruit on the notion of "total failure of consideration".[12] This aspect of their Honours' decision is discussed in Part Three below.

In contrast, Gageler J took a pragmatic approach recognising the unjustness of the builder's circumstances when compared with those of the owners:

> "Through acceptance of the wrongful repudiation of the defaulting party, the innocent party is thereby in the present position of having rendered services in part performance of the contract for which that party has not accrued and cannot accrue a contractual entitlement to be paid. The defaulting party is correspondingly in the present position of having had the benefit of the services rendered in part performance of the contract for which that party has not incurred and will not incur any contractual obligation to pay."[13]

Availability of a builder's quantum meruit in these circumstances accords with the old English cases of *Planche v Colburn*[14] and *Appleby v Myers*.[15] In these, a person undertaking work for a specific sum could not recover anything prior to completion of the whole, unless performance was prevented by default of the party for whom work was being done. Contrary to views recently expressed in Australia,[16] it is submitted there ought to be no grounds for a defence to a builder's quantum meruit in the event of its performance being prevented in this way.

Gageler J recognised that the ability of a builder to recover a quantum meruit from an owner depended upon the latter having been unjustly enriched by the former.

[11] David Winterton and Timothy Pilkington, "Mann v Paterson Constructions Pty Ltd: The Intersection of Debt, Damages and Quantum Meruit" (2020) 44(2) *Melbourne University Law Review* 1, 45.

[12] *Mann* [2019] HCA 32 at [168], per Nettle, Gordon and Edelman JJ.

[13] *Mann* [2019] HCA 32 at [75], per Gageler J.

[14] *Planche v Colburn* (1831) 8 Bing 14; 131 E.R. 305.

[15] *Appleby v Myers* (1866–1887) LR 2 CP 651.

[16] Laina Chan and JW Carter, "Mann v Paterson Constructions Pty Ltd—New Law for Quantum Merit Claims in Building Contracts" (2020) 36 *Building and Construction Law Journal* 4, 9–10, 11.

Unjust enrichment had previously been at the heart of the High Court's seminal decision concerning a builder's right to a quantum meruit in the context of a residential building contract, in *Pavey & Matthews Pty Ltd v Paul* (*Pavey*).[17] The majority there held that an action on a quantum meruit brought by a builder against an owner in the context of an unenforceable building contract did not rest on implied contract but rather on a claim to unjust enrichment. The unjust enrichment of the owner was said to arise by way of her having accepted benefits accruing from the builder's performance.

In addition to the owners in *Mann* having the benefit of services rendered without any contractual liability to pay, Gageler J was clearly influenced in his decision by the fact of the owners having been in default.[18]

In holding a restitutionary remedy was not available to the builder, the minority of Kiefel Bell and Keane JJ based their decision around well-known legal authorities to the effect that the law of restitution has no part to play in circumstances where there remains in force a contractual regime providing for risk allocation between the parties on default. This aspect of their Honours' decision is also discussed in Part Three below.

Part three: Nettle, Gordon and Edelman JJ's judgment in *Mann*—"failure of consideration" as the basis for a builder's restitutionary remedy

As noted, Nettle, Gordon and Edelman JJ found the builder was entitled to a quantum meruit for its work in progress after the most-recently completed building stage, with such entitlement grounded upon a "failure of consideration".

Their Honours explained the notion of "failure of consideration" and its relevance to the availability of a restitutionary remedy to a builder on termination for an owner's repudiation as follows:

> "Upon acceptance that the contract is repudiated … the contractor's right to complete the performance and earn the price will have failed, and thus nothing will be due under the contract for such part of the work as has been completed. In that event, the 'consideration'—in the sense of the condition or the 'basis' for the performance by the contractor—will have failed, and restitution will lie as upon a quantum meruit in respect of work and labour done up to the point of termination. In those circumstances, there is a 'qualifying or vitiating' factor, namely, a total failure of consideration, giving rise to a restitutionary remedy in the alternative."[19]

"Failure of consideration" appears grounded upon a builder undertaking work on the basis it will receive future consideration by way of payment, with that consideration then failing on termination of the contract.

However, two extracts from authorities referred to by their Honours serve to place the notion of "failure of consideration" in a broader light.[20] In *Roxborough v Rothmans of Paul Mall* Gleeson CJ, Gaudron and Hayne JJ said:

[17] *Pavey & Matthews Pty Ltd* (1987) 162 C.L.R. 221 at [227], per Mason and Wilson JJ; [256], per Deane J.
[18] *Mann* [2019] HCA 32 at [75], per Gageler J.
[19] *Mann* [2019] HCA 32 at [173], per Nettle, Gordon and Edelman JJ.
[20] *Mann* [2019] HCA 32 at 60 fn.208; at 81 [199], per Nettle, Gordon and Edelman JJ.

> "Failure of consideration is not limited to non-performance of a contractual obligation, although it may include that. … Deane J … gave as an example 'a case where the substratum of a joint … endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the … endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it.'"[21]

In the same decision, Gummow J said:

> "Is it unconscionable for Rothmans to enjoy the payments in respect of the tobacco licence fee, in circumstances in which it was not specifically intended or specially provided that Rothmans should enjoy them? The answer should be in the affirmative. Here, 'failure of consideration' identifies the failure to sustain itself of the state of affairs contemplated as a basis for the payments the appellants seek to recover."[22]

"Failure of consideration" refers to a failure to carry through or sustain an underlying state of affairs, upon which a contribution of money or other property to a joint endeavour has been based.[23] It is akin to the civilian idea of *causa data causa non secuta*; things given upon a basis, that basis having failed.[24]

In contrast to an owner's unjust enrichment from a builder's performance described by Gageler J, "failure of consideration" addresses the unfairness inherent in someone retaining a benefit conveyed on a mutually agreed basis, in circumstances where the mutually agreed basis subsequently and unexpectedly ends.[25]

In *Mann*, the failure of consideration might simply be viewed as the failure to carry through or sustain the building contract, by way of the owner's repudiation and consequential termination by the builder.

Certainly, with both parties having been discharged from further contract performance on termination, the work done by the builder prior to termination was able to be enjoyed by the owners, in circumstances in which it was not specifically intended or provided that they should enjoy that work.

In adopting "failure of consideration" as the basis for a builder's quantum meruit, their Honours sought to reduce the role of unjust enrichment as the guiding criterion as to whether this ought to be so available.[26]

The notion that a builder may claim a quantum meruit from a defaulting owner based on a "failure of consideration" is not new and has previously been the subject of criticism.

One such criticism was that "failure of consideration" or "failure of basis" could never be made out when, as in the case of a building contract an obligation to perform work is entire.[27] It was argued that work under an entire contract is done

[21] *Roxborough v Rothmans of Paul* (2008) 208 C.L.R. 516 at 525 [16], per Gleeson CJ, Gaudron J and Hayne JJ.
[22] *Roxborough* (2008) 208 C.L.R. 516 at 557 [104], per Gummow J.
[23] McFarlane and Stevens, "In Defence of Sumpter v Hedges" (2002) 118 *Law Quarterly Review* 569 at 575.
[24] McFarlane and Stevens, "In Defence of Sumpter v Hedges" (2002) 118 *Law Quarterly Review* 569 at 575.
[25] *Mann* [2019] HCA 32 at [215], per Nettle, Gordon and Edelman JJ.
[26] *Mann* [2019] HCA 32 at [199], per Nettle, Gordon and Edelman JJ.
[27] McFarlane and Stevens, "In Defence of Sumpter v Hedges" (2002) 118 *Law Quarterly Review* 569 at 577.

in the expectation payment will be made only when the work is complete. As there is no expectation of reward for part performance, there can be no "failure of basis" in circumstances where an entire contract ends prior to its execution.

A further criticism centred on the question of how the basis on which a builder renders performance under an entire building contract ought to be characterised.[28] It was argued that the basis on which a builder renders performance is the *promise* of counter-performance by way of an owner's payment, rather than *actual* counter-performance by way of payment receipt. That being the case, no failure of consideration could arise on termination for an owner's repudiation, provided the builder could still enforce the promise to pay by an action for damages.[29]

Placing the merits of these criticisms to one side, it is submitted that both may be overcome if restitution for "failure of consideration" is viewed as a response to the unfairness inherent in an owner retaining work performed by a builder under a building contract, after this unexpectedly ends. Esoteric arguments centred on the basis upon which a builder performs its entire obligation under a building contract must fall away, if "failure of consideration" is taken to refer to "a case where the substratum of a joint … endeavour is removed".[30]

With these criticisms placed to one side, the question arises as to whether "failure of consideration" ought to replace unjust enrichment as the true basis upon which a builder may obtain a quantum meruit from a defaulting owner.

In the time since *Mann* was delivered, Nettle, Gordon and Edelman JJ's alternative basis for a restitutionary remedy in a construction context has found support from at least one Australian lower court.

Before the District Court of Western Australia in *Nasso v Fury*,[31] the plaintiff had entered an entire contract for the defendant to construct and deliver a fishing boat, for a lump sum of $275,400. The plaintiff paid a deposit and interim amount in consideration of the entire contract, totalling $115,400. The defendant repudiated the contract, which the plaintiff accepted in circumstances where the plaintiff received no benefit whatsoever.

The Court found the plaintiff entitled to restitution of $115,400, the consideration for which had totally failed. In drawing heavily on the majority's decision in *Mann* the Court concluded that:

> "By a 4-3 majority the High Court held that following termination, by an acceptance of repudiation, of a partly performed construction contract, where there has been a total failure of consideration, a claim in restitution lies providing the terminated contract was an entire contract requiring one divisible scope of works to be delivered to the purchaser or owner in consideration of the purchaser's payment of a single lump sum contract price."[32]

While Gageler J had found the builder entitled to a quantum meruit on the basis of the owners' unjust enrichment and not "failure of consideration", this extract demonstrates a willingness on the part of at least one Australian lower court to

[28] Raghavan, "Failure of Consideration as a Basis for Quantum Meruit following a Repudiatory Breach of Contract" (2016) 42 *Monash University Law Review* 179 at 193–197.
[29] Raghavan, "Failure of Consideration as a Basis for Quantum Meruit following a Repudiatory Breach of Contract" (2016) 42 *Monash University Law Review* 179 at 197.
[30] *Roxborough* (2008) 208 C.L.R. 516 at 525 [16], per Gleeson CJ, Gaudron J and Hayne JJ.
[31] *Nasso v Fury* [2020] WADC 61.
[32] *Nasso* [2020] WADC 61 at [574].

look to "failure of consideration" as the proper basis for a restitutionary remedy in a construction context.

It is submitted that notwithstanding Nettle, Gordon and Edelman JJ's judgment in *Mann*, Australian lower courts and residential building tribunals should nevertheless look to unjust enrichment as the correct basis upon which to consider builders' quantum meruit claims brought about from contract termination for repudiation by owners.

In *Pavey*, it was the *majority* of the High Court that had considered unjust enrichment as the appropriate yardstick by which to award a quantum meruit to a builder in a residential building context.[33] Australian courts and tribunals are therefore arguably bound to implement this criterion in the future.

Apart from that, unjust enrichment is in a practical sense better suited as the governing criterion for a builder's entitlement to a quantum meruit on an owner's default, when compared with "failure of consideration".

That is due to the peculiar nature of contracts to build on land, in that an owner always retains possession of work performed on his or her land after a builder terminates for the owner's repudiation.[34]

An enquiry as to the availability of restitution to a builder on an owner's default can only start from the point where the owner has possession of the builder's work and the owner's corresponding, future contractual obligation to make payment has ceased to exist. In this context, unjust enrichment of the owner is well-suited as the criterion against which such an enquiry should be undertaken.

These circumstances may be contrasted with those in *Nasso v Fury* concerning construction of a boat. The prospective boat owner and innocent party paid a deposit and upfront amount to the builder under the contract. There was obvious unfairness to the prospective boat owner from the builder then retaining these payments in circumstances where the builder subsequently repudiated the contract without providing the owner with any benefit at all. It can be seen that "failure of consideration" was well-suited as the basis for restitution in favour of the prospective boat owner in these circumstances.

Kiefel, Bell and Keane JJ's judgment in *Mann*—criticisms of restitution in a contractual context

As noted, the minority of Kiefel, Bell and Keane JJ decided that the builder should have no restitutionary remedy with respect to its work performed after the most-recently completed building stage and before contract termination. Their Honours referred to a series of extracts from authorities to the effect that:

> "The quasi-contractual obligation to pay fair compensation for a benefit which has been accepted will only arise … where there is no applicable genuine agreement or where such agreement is frustrated, avoided or unenforceable."[35]

As there was an applicable enforceable building contract in *Mann*, the law of restitution could not apply. The builder could enforce its expectation interest by a damages claim against the owners for loss of profit.

[33] *Pavey & Matthews Pty Ltd* (1987) 162 C.L.R. 221 at 227, per Mason and Wilson JJ; 256, per Deane J.
[34] *Sumpter v Hedges* [1898] 1 Q.B. 673 at 676, per Collins LJ.
[35] *Pavey & Matthews Pty Ltd* (1987) 162 C.L.R. 221 at [256], per Deane J.

Extracts from authorities referred to by their Honours pointed to a number of important reasons why restitution ought not to be available to a contracting party, where an enforceable contractual regime for risk allocation remained in place on default:

1. An additional legal remedy is unnecessary;
2. Problems arise in extending restitution to the extent that this redistributes risks provided for under an applicable contract; and
3. It is desirable to uphold the ability of private persons and entities to contract freely and allocate risks as they see fit, without imposing judicial notions of fairness and good conscience on them.[36]

As to the reason in point 2 above, their Honours were concerned that restitutionary remedies "unconstrained by the bargain made by the parties would impermissibly cut across the parties' contract".[37] Their Honours' concern was well-placed in that before VCAT, the builder had recovered considerably more by way of a quantum meruit, than it may have done by way of a contractual claim. This has, however, been allayed by the decision of the majority in *Mann* to cap the amount of builders' quantum meruits by reference to the contractual remuneration.

The reasons in points 1 and 3 above remain as criticisms as to why restitution ought not to be available to a builder on termination of a contract for an owner's repudiation.

On the face of things, these criticisms may appear to be allayed by application of the ratio in *McDonald* according to the following argument:

1. A simple building contract for a lump sum is an "entire contract", in the sense that a builder must undertake all work required thereunder before the owners' obligation to pay can arise.
2. In *Mann*, the High Court considered that the rule as to payment for an "entire obligation" applied with respect to each contractual building stage under the building contract, rather than to the contract as a whole. The builder had to complete all work on a building stage, before the owners' obligation to make payment for that work could arise.
3. When a contractual obligation to undertake work is entire in this way, no restitutionary remedy can usurp this. For restitution to be available, the building contract under which the entire obligation is created must first be done away with.
4. Applying *McDonald*, the building contract creating the entire obligation is terminated from the time the builder conveys to the owner acceptance of his or her repudiation and the requirement as to entire performance as a condition to payment thereby ends.
5. "Failure of consideration" as described by Nettle, Gordon and Edelman JJ is then able to operate freely to allow a restitutionary remedy in the builder's favour.

[36] *Mann* [2019] HCA 32 at [7]–[8], per Kiefel, Bell and Keane JJ.
[37] *Mann* [2019] HCA 32 at [6]–[7], per Kiefel, Bell and Keane JJ.

While superficially attractive, applying the ratio in *McDonald* and "failure of consideration" as the basis for a restitutionary remedy as above cannot have the effect of eliminating the wider contractual regime for risk allocation and liability quantification available to the parties to a building contract on breach.[38]

Elimination of this wider contractual regime was previously achieved by way of the "rescission fallacy" which has finally been debunked in *Mann*.

The conclusion must be that the important reasons in points 1 and 3 above as to why restitution ought not to be available alongside enforceable contractual remedies remain entirely valid.

While the problem of restitution clashing with contractual remedies on termination of a building contract appears insoluble, it is submitted there are important practical reasons as to why restitution and contractual remedies should nevertheless coexist. As Gageler J set out in Mann:

> "More importantly, a non-contractual quantum meruit has the advantage that proof of the value of services rendered is almost invariably more straightforward than proof of contractual loss. Questions of causation and remoteness play no part. The availability of the action allows the innocent party to adopt the course of quickly and cheaply obtaining judgment for an easily quantifiable liquidated amount… ."[39]

Few would doubt the ease and cost-effectiveness of recovering a liquidated debt, compared to proving loss of profit. Importantly, the availability of restitution to a builder on termination of a contract for an owner's repudiation is entirely consistent with the overall procedure of the specialised state and territory building tribunals with exclusive jurisdiction to deal with such matters.[40]

Part four

Whatever one's view as to whether a builder should have recourse to a quantum meruit on contract termination for an owner's repudiation, there is no doubt such recourse remains available as a result of the majority's decision in *Mann*.

If justification for this were needed, few would doubt the obvious unfairness to a builder in terminating a building contract for an owner's repudiation in circumstances where the owner's contractual obligation to pay for work on an uncompleted building stage ceases to exist.

In contrast, the availability of a quantum meruit to a builder in circumstances where an owner terminates a building contract for a builder's repudiation presents a greater challenge.

In *Mann*, Gageler J described the circumstances in which a defaulting party seeks to recover the value of services rendered to an innocent party as presenting "a more difficult category of case" that raised its own problems.[41] Notwithstanding

[38] While application of the ratio in *McDonald* cannot affect the wider regime of remedies available on termination or breach of contract, it is argued this serves to answer any argument to the effect that a builder's restitutionary remedy is inconsistent with the rule as to payment for an "entire" obligation. That is because an owner's contractual obligation to make payment only upon completion of an entire obligation necessarily ceases upon contract termination.

[39] *Mann* [2019] HCA 32 at [32]–[33], per Gageler J.

[40] See, e.g. Victorian Civil and Administrative Tribunal Act 1998 (Vic) s.98(1)(d); "The Tribunal must consider each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consider of the matters before it permit."

[41] *Mann* [2019] HCA 32 at [30]–[31], per Gageler J.

these observations, QCAT and its Appeal Board have recently awarded quantum meruits in favour of defaulting builders in several cases.

On 10 August 2018 prior to *Mann*, the QCAT Appeal Tribunal gave its decision in *Partington v Urquhart (No.2)* (*Partington*).[42]

The Appeal Tribunal found that the builder had not lawfully terminated his residential building contract with the owners, after they failed to remit the enclosed stage progress payment. This was due to the builder not having completed the enclosed stage by the time of payment demand.

On concluding the builder could not claim contractual damages, the Appeal Tribunal considered whether the builder was entitled to a quantum meruit.

The Appeal Tribunal referred to the majority finding in *Pavey* in that a builder's right to a quantum meruit depended on a claim based on unjust enrichment, with the basis for such claim being the owner's acceptance of works performed. The Appeal Tribunal noted it was not sufficient for works performed simply to have been beneficial to the owners.

The Appeal Tribunal concluded the owners had accepted the benefit of works performed by the builder by utilising and building on work done in the enclosed stage. It found the builder entitled to a quantum meruit for the reasonable value of the work performed in the enclosed stage, assessed at $160,162.89. The Appeal Tribunal assessed the owners' damages for costs to complete construction at $200,000, which was set off against the amount due to the builder.

On 18 November 2019 shortly after *Mann*, QCAT gave its decision in *Manson v Brett (No.2)*.[43]

In the first edition of this case, QCAT found that the owners had validly terminated their residential building contract with the builder in April 2014. Termination by the owners had been because of the builder unlawfully suspending works, after the owners had not paid a progress claim for the enclosed stage under the building contract. The builder had not completed works required for the enclosed stage and was not entitled to payment.

The builder claimed a quantum meruit for work done towards the enclosed stage, based on *Partington*. The owners resisted the builder's claim submitting inter alia that:

1. The builder was not the innocent party on termination of the contract;
2. The builder had been able to obtain payment under the contract for work performed on the enclosed stage but by his own wrongful repudiation had denied himself of this;
3. There was no injustice in the owners retaining works that the builder had been legally obliged to perform and for which the builder would have been paid had he not been in breach.

QCAT followed *Partington* and allowed the builder a quantum meruit for works performed towards the enclosed stage of the owners' house. QCAT referred to the analysis in *Partington* noting that:

> "… the view of the Appeal Tribunal is consistent with the recent decision of the High Court in *Mann*…. The majority (comprising Gageler, Nettle, Gordon

[42] *Partington v Urquhart (No.2)* [2018] QCATA 120.
[43] *Manson v Brett (No.2)* [2019] QCAT 411.

> and Edelman J) held that in respect of incomplete stages, the builder was entitled to recover payment for the incomplete stages on restitution upon a claim of quantum meruit."[44]

QCAT considered that the majority's decision in *Mann* allowed a builder to claim a quantum meruit in respect of incomplete building stages, irrespective of whether or not it had been at fault in termination of the residential building contract.

On 19 August 2020, the QCAT Appeal Tribunal gave its decision in *Brett v Manson t/as Manson Homes*.[45] This was an application by the owners in *Manson v Brett (No.2)* for an order to stay enforcement of QCAT's decision.

In rejecting the application, the Appeal Tribunal erroneously set out [150] of the judgment of Nettle, Gordon and Edelman JJ in *Mann*, in its written judgment.[46] The Appeal Tribunal then concluded from its error that the focus of a builder's quantum meruit claim should be acceptance of his work "and not merely whether he was in breach".[47]

These decisions indicate a willingness by QCAT to award quantum meruits in favour of defaulting builders on grounds of the owners' unjust enrichment as in *Pavey*, as well as on the basis that the majority's decision in *Mann* now provides judicial authority for such awards. It is submitted these QCAT decisions are unsatisfactory for a number of important reasons.

First, the High Court's decision in *Pavey* involved a scenario inherently different from those in the QCAT decisions above.

Pavey concerned a builder who had completed all of the work required of him under an oral contract to renovate a cottage. The owner accepted the work and moved in without paying.

By virtue of s.45 of the then Builders Licensing Act 1971 (NSW), the builder could not enforce his contract with the owner, as this had not been in writing. It may be inferred that the owner sought to take advantage of the situation and avoid payment by this means. In delivering the principal judgment of the High Court Deane J observed that these circumstances:

> "… would inevitably lead to injustice in those cases where a builder had discharged all his obligations under the building contract only to find that he was unable to recover any payment at all by reason of some innocent failure to ensure that the contract satisfied the requirements of the section."[48]

Injustice may also be perceived from the perspective of New South Wales homeowners generally taking advantage of a statutory provision, so as to obtain something for nothing.

This may be contrasted with the scenarios in the QCAT decisions above. In these, the builders were deprived of the opportunity to earn their price not by

[44] *Manson* [2019] QCAT 411 at 25 [134].
[45] *Brett v Manson t/as Manson Homes* [2020] QCATA 122.
[46] At [31] of its written judgment in *Brett v Manson t/as Manson Homes*, the Appeal Tribunal reproduced [150] of the judgment of Nettle, Gordon and Edelman JJ in *Mann* with the final sentence of this paragraph reading: "The issue therefore appears to involve other considerations including, for instance, whether there was an acceptance by the applicants of the respondent's work, and is not confined to whether the respondent was in breach." This final sentence does not appear in the reports of *Mann* at [2019] HCA 32 and (2019) 373 A.L.R. 1.
[47] *Brett v Manson t/as Manson Homes* [2020] QCATA 122 at 9 [32].
[48] *Pavey & Matthews Pty Ltd* (1987) 162 C.L.R. 221 at 245, per Deane J.

defaulting owners seeking to obtain advantage by way of a statutory provision, but rather by their own wrongdoing.

In these circumstances, there is a question as to whether the owners could truly be said to have been unjustly enriched by the defaulting builders. That is particularly the case, given the owners in the QCAT decisions are likely to have had to pay more to complete construction of their houses, than would have been the case, had the builders not defaulted. In addition, with *McDonald* now applying, defaulting builders will now be able to retain owners' payments made on completion of building stages, prior to termination.

Secondly, by its terms, the majority's decision in *Mann* relates only to claims by builders for a quantum meruit on termination of building contracts for repudiation *by owners*. *Mann* is not authority for the availability of quantum meruits to builders on termination of a building contract irrespective as to the circumstances of termination and QCAT wrongly claimed it as such, in the decisions above.

Thirdly, the QCAT decisions above are inconsistent with established authority.

In the well-known decision of the English Court of Appeal in *Sumpter v Hedges*,[49] the plaintiff builder entered an entire contract to construct buildings for the defendant owner, for a lump sum. The builder abandoned the contract before finishing the job. Applying the law as it then stood, the builder could not recover payment under the entire contract, as the work was not completed. The rule requiring substantial completion of all work under an entire building contract as a condition precedent to payment remains as the law in England today.[50]

As to the Australian position, reference is made to the 2012 decision of the New South Wales Court of Appeal in *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd*.[51]

In 2003, the appellant commercial builder and respondent owner entered into a written joint venture to develop a property at Miranda in New South Wales. Disputes arose and in August 2006 the owner terminated the joint venture. The trial judge found that the owner's termination had been in response to the commercial builder's repudiation of the joint venture, which the Court of Appeal upheld.

In the Court of Appeal, the commercial builder reasserted its claim to a quantum meruit for unpaid building work. Claiming the support of the decision of the Victorian Court of Appeal in *Sopov*, the commercial builder's counsel submitted the claim was one "to recover a benefits gained at our [Cordon's] expense in circumstances where it would be unjust and unconscionable for the respondent [Lesdor] to retain it".[52] The Court of Appeal rejected the commercial builder's quantum meruit claim for a number of well-considered reasons, including that the authority of *Sumpter v Hedges* suggested this was not available.

It may be argued that QCAT was bound to follow the decision of New South Wales Court of Appeal in *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd*, in its decisions above. In giving its judgment in another restitution-based case in 2007, the High Court confirmed that intermediate appellate courts and trial judges in Australia should not depart from decisions at common law by an

[49] *Sumpter v Hedges* [1898] 1 Q.B. 673.
[50] See, e.g. *Cleveland Bridge UK Ltd v Multiplex Constructions (UK) Ltd* [2010] EWCA Civ 139 at [114]–[138].
[51] *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184.
[52] *Cordon Investments Pty Ltd* [2012] NSWCA 184 at 77 [195], per Bathurst CJ.

intermediate appellate court in another jurisdiction.[53] This edict applies with equal force to state and territory residential building tribunals.

Aspects of the decision in *Sumpter v Hedges* lead to a further important point bearing on the question of whether an owner may be enriched, upon termination of a partially completed building contract for a builder's default.

That point may be summarised as the problem of identifying the conference of a benefit on, or acceptance of a benefit by, an owner upon termination of a partially completed building contract for a builder's default.[54]

In *Sumpter v Hedges*, the Court found that the builder could not recover a quantum meruit because, as the law then stood, no evidence existed as to a fresh contract to pay for the work done. Such evidence concerned the owner's acceptance of the builder's work about which the Court said:

> "Where, as in the case of work done on land, the circumstances are such as to give the defendant no option whether he will take the benefit of the work or not, then one must look to other facts than the mere taking the benefit of the work in order to ground the inference of a new contract…. The mere fact that a defendant is in possession of what he cannot help keeping, or even has done work upon it, affords no ground for such an inference. He is not bound to keep unfinished a building which in an incomplete state would be a nuisance on his land."[55]

The essence of the problem is that, upon termination of a building contract on a builder's default, any owner of land on which partially completed building work is situated has no option but to take the benefit of this.

In these circumstances, an owner could not be said to have been enriched, simply by being in possession of partially completed building work on his or her land. Something more is required of an owner before a restitutionary obligation could arise. Based on the extract from *Sumpter v Hedges* above, this would go beyond an owner merely completing an unfinished building.

The Supreme Court of New South Wales set out the position definitively in its 2005 decision of *Oliver v Lakeside Property Trust Pty Ltd* (*Oliver*).[56]

In this case, the plaintiffs provided the defendants with town planning services concerning a golf course and guesthouse project at Wyong in New South Wales. The Court found it was a condition of the parties' contract for the plaintiffs to provide town planning services until completion of the project. In the event, the plaintiffs ceased providing services before then. The Court also held the plaintiffs' obligation to provide town planning services to be entire.

The plaintiffs claimed to be entitled to a reasonable remuneration based on a quantum meruit and in rejecting this, the Court said:

> "… I am not satisfied that the defendants had an opportunity to reject the plaintiffs' partial performance, or had voluntarily accepted the partial performance. Indeed, the need to establish either an independent act of acceptance of the partial performance or that the defendant had acquiesced

[53] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at 59 [135], per Gleeson Gummow Callinan Heydon and Crennan JJ.
[54] *Lumbers v W Cook Builders Pty Ltd (In Liquidation)* (2008) 232 C.L.R. 635 at 656 [51]–[52], per Gleeson CJ.
[55] *Sumpter v Hedges* [1898] 1 Q.B. 673 at 676, per Collins LJ.
[56] *Oliver v Lakeside Property Trust Pty Ltd* [2005] NSWSC 1040.

> in the partial performance, makes it difficult for a plaintiff in breach to recover the cost of partially performing an entire obligation, particularly in the context of services where there will have been no opportunity to reject: …"[57]

The Court concluded by saying:

> "In the absence of a voluntary choice to accept the proposed performance by the plaintiffs, the claim to reasonable remuneration based on a quantum meruit fails."[58]

The Court in *Oliver* was clear in its view that a defaulting plaintiff would have difficulty recovering on a quantum meruit, where the circumstances of the case were such that the defendant could not have voluntarily chosen whether to accept or reject services rendered by the plaintiff. It is submitted there is no conceptual reason why the Court's analysis should not apply with equal force to deny builders' quantum meruit claims made on their own default.

The above analysis bares out Gageler J's observations in *Mann*, that the circumstances in which a defaulting party seeks to recover the value of services rendered to an innocent party serve to present "a more difficult category of case" raising its own problems.[59]

The problems appear to centre on the issue of the conference of a benefit on, or acceptance of a benefit by, an innocent building owner in circumstances where the owner cannot help but take possession. Contrary to the views in the QCAT decisions above, neither *Pavey* nor *Mann* provide authority for an obvious conference or acceptance of such a benefit. Indeed, the above analysis shows that subsisting Australian case law serves to deny a defaulting builder any claim for a quantum meruit against an innocent building owner.

The dilemma of an innocent owner on termination of contract for a builder's default has previously been recognised and discussed in two different categories of restitutionary case, coming before the High Court.[60] However, this issue is yet to be definitively resolved before Australia's highest appellate court.

Part five: conclusion

The decision in *Mann* concerns the ability of a builder to claim a quantum meruit upon acceptance of an owner's wrongful repudiation of a residential building contract.

While such a matter may appear narrow and confined, quantum meruit claims by builders against defaulting owners are commonplace in the residential building tribunals in Queensland, New South Wales, the Australian Capital Territory and Victoria.

After *Mann*, a builder remains able to claim a quantum meruit from a defaulting owner with respect to work performed during the time after the most-recently

[57] *Oliver* [2005] NSWSC 1040 at [81]. The Court followed this extract setting out references to extracts from five Australian journal articles and texts in support. Among other things, the Court at [85] referred to the case of *Sumpter v Hedges* as being instructive.

[58] *Oliver* [2005] NSWSC 1040 at [89].

[59] *Mann* [2019] HCA 32 at [30]–[31], per Gageler J.

[60] *Steele v Tardiani* (1946) 72 C.L.R. 386 at [402]–[403], per Dixon J; *Lumbers v W Cook Builders Pty Ltd (In Liquidation)* (2008) 232 C.L.R. 635 at 656 [51]–[52], per Gleeson CJ.

completed building stage under the contract and termination. Such a claim is limited to the amount that would have been payable under the building contract.

Availability of restitution to a builder on termination of a building contract for an owner's repudiation overlays the builder's contractual remedies in its freely bargained contract. The decision of the minority in *Mann* shows there is considerable high authority to say this ought to be fatal to a restitutionary remedy in the construction context.

Nevertheless, there are good reasons as to why a builder ought to have restitution on termination of the building contract for an owner's repudiation.

A builder's obligation to perform an individual stage of a residential building contract is still viewed as being "entire". Consequently, a repudiating owner is relieved of his or her obligation to pay upon termination. No one would doubt the fairness in allowing a builder to recover against an owner in circumstances where the owner retained the work performed without any contractual obligation to pay for this.

In addition, when compared with loss of profit claims, a liquidated restitutionary claim is much easier and cheaper to prosecute through the state and territory residential building tribunals that have exclusive jurisdiction to deal with such matters. The decision by the majority in *Mann* to allow for builders' quantum meruit claims to continue is therefore meritorious.

One potential drawback of the majority's decision is that the basis of a builder's quantum meruit upon termination for an owner's repudiation is perhaps uncertain. While three judges out of the four-judge majority allowed the builder a quantum meruit based on a "failure of consideration", this article argues that for practical reasons courts and residential building tribunals should eschew this in favour of the long-standing basis for a builder's quantum meruit, unjust enrichment.

Although *Mann* clarifies that restitution is available to a builder on an owner's default, it begs the question as to how courts and residential building tribunals ought to deal with builders' restitutionary claims when it is the builders themselves who repudiate the building contract.

The analysis in Part four of this article demonstrates that the law relating to this question is far from harmonious. That being the case, homeowners in the same position as the homeowners in the QCAT decisions set out in Part four ought to be encouraged to embark on bringing their appeals before the High Court so that this aspect of the common law of Australia may be clarified.

It is finally submitted that any appeal coming before the High Court ought to centre on the issue whether in the context of a builder's repudiation there is any conference of benefit on or acceptance of benefit by the innocent building owner. The absence of a voluntary choice on the part of an innocent owner as to whether to accept or reject a partially completed building serves to leave this question well open.