# HOW MUCH DOES ONE TRULY DESERVE?

## A critical analysis of the New Zealand and Australian High Courts' approach to quantum meruit claims within the construction industry

**By Katie Kyung**

The Australian High Court case of *Mann v Paterson Construction Pty Ltd*[1] and the New Zealand High Court case of *Electrix Limited v The Fletcher Construction Company Limited*[2] both involved claims of non-contractual quantum meruit by contractors seeking compensation for services performed. The judgments, which were issued one closely following the other, show the different ways the law of restitution has been understood and developed under Australian and New Zealand law. This essay will focus on the different journeys the Australian and New Zealand courts have taken in understanding the law of restitution and how this impacts their analyses of quantum meruit claims, particularly the analysis of how the amount that may be deserved should be measured. This essay will strive to demonstrate that, in light of the purpose of the Construction Contracts Act 2002, the approach taken by the New Zealand court is the approach to be preferred.

### I What is quantum meruit?

*Quantum meruit* literally meaning 'as much as he deserves' or 'what he has earned' is a common law remedy based on principles of restitution. It is a claim for compensation that allows a party to recover the reasonable value of services when there is no enforceable contract. The law effectively imputes the existence of a contract based on the understanding between the parties that a payment would be made for rendering a service and that the service would not be taken gratuitously.

#### *A Legal Taxonomy*

Quantum meruit is considered to be in the same taxonomical class as other forms of action to recover money, such as claims of money had and received or money paid, and claims to recover goods such as a *quantum valebat.*[3] These are collectively known as the law of "quasi-contract."[4] Claims for quantum meruit can be made with or without a contract. Examples of such situations are when the parties may have failed to conclude a contract or the contract lacks an enforceable mechanism. Quasi-contract claims can be made based for loss in the form of expected remuneration or, alternatively, based on the principle of unjust enrichment for restitution of the value of service.[5] For this reason quantum meruit claims have been said to be in a "no man's land" at the intersection between the law of assumed obligations and the law of imposed obligations.[6]

Academic, Peter Birks[7] contributed significantly to the English law of restitution. According to Birks, restitution law, including quantum meruit, and other aspects of quasi-contract law are unified around the civil law notion of unjust enrichment.[8] The

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1 *Mann v Paterson Constructions Pty Ltd* (2019) 373 ALR 1; [2019] HCA 32.
2 *Electrix Limited v Fletcher Construction Company Ltd (No 2)* [2020] NZHC 918
3 Meaning 'as much as it was worth'.
4 *Electrix Limited v Fletcher Construction Company Ltd,* above n 2, at [74].
5 Rohan Havelock "A taxonomic approach to quantum meruit" (2016) 130 L.Q.R. 470 at 470.
6 At 471.
7 Peter Brian Herrenden Birks QC FBA was a Regius Professor of Civil Law at the University of Oxford and is widely known for his contribution for the English law of restitution.
8 Peter Birks *An Introduction to the Law of Restitution* (Clarendon Press, Oxford, 1985).

Birksian model of quantum meruit requires 4 components to be established in order for a claim based on unjust enrichment to be made:

1. Valuable services have been provided;
2. Those services were provided to the defendant;
3. The defendant accepted, used, and enjoyed the services; and
4. The defendant was aware that the party providing the services expected to be paid by the defendant.

*B Challenges to the embrace of unjust enrichment as a unifying legal principle for restitutionary remedies*

In recent times, there has been a rise of criticism to challenge the notion that quantum meruit is based on the concept of unjust enrichment. Courts in many common law jurisdictions have also embraced this idea with varying levels of enthusiasm.[9] Birks himself recognised that a remedy of restitution may be triggered by events other than unjust enrichment.[10] He explains this by saying that the relationship between unjust enrichment and restitution is not naturally perfect and that it can only be made perfect by artificially imposing a restricted interpretation of "restitution."[11] While unjust enrichment does trigger restitution, restitution is naturally triggered by events other than unjust enrichment alone.[12]

Lord Goff[13] and Jones[14] refer to unjust enrichment as an organising concept which assists the courts in grouping decided cases on the basis that they share a common feature in which the defendant has been enriched by the receipt of a benefit at the expense of the claimant. However, the underlying reasons for the courts to deem a defendant's enrichment to be unjust vary in each circumstance.[15] For example, a claim for unjust enrichment may be to seek the value of a service or a right retained. There is no genus to which these species belong – it is only a weak kind of unity to say that each situation is concerned with some kind of "enrichment".[16] In this sense, the law of unjust enrichment more closely resembles the law of torts, which recognises a variety of reasons why a defendant must compensate a claimant for harm than the law of contract, which is based on a single principle that expectations formed by binding promises must be fulfilled. As such, Lord Goff and Jones say that "English law does not have a unified theory of restitution."[17]

## II The Australian courts' position

Australia recognises unjust enrichment as falling within the equity jurisdiction of the court to provide remedies in situations where it would be unconscionable for the defendant to retain an enrichment. While Australia recognises unjust enrichment as a unifying principle, it is at most a unifying taxonomical label that assists in finding an obligation to make restitution in appropriate circumstances.[18]

The Australian High Court case of *Pavey & Mathews Pty Ltd v Paul* is a leading case which recognised unjust enrichment as a unifying legal concept.[19] In this case, Pavey & Mathews orally agreed to renovate Mrs Paul's cottage for an agreed sum of $63,000. Once the works were finished, Pavey & Mathews demanded the outstanding balance of $27,000 but was challenged by Mrs Paul on the basis that there was no contract in writing as was required by the Builders Licensing Act and therefore claimed that the oral contract was unenforceable.

The majority of the Australian High Court found in favour of Pavey & Mathews and awarded the outstanding balance, based not on a promise to pay but rather on a quantum meruit basis. In reaching this decision, the High Court held that Mrs Paul had accepted the work done by Pavey & Mathews and that Pavey & Mathews were to be remunerated for it. In recognising

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9 *Electrix Limited v Fletcher Construction Company Ltd,* above n 2, at [77].
10 Peter Birks "Misnomer" in W Cornish et al (eds) *Restitution: Past, Present, and Future: Essays in Honour of Gareth Jones* (Hart, Oxford, 1998).
11 At 32.
12 Ibid.
13 Robert Lionel Archibald Goff, Baron Goff of Chiveley, PC, FBA, was an English barrister and judge who was Senior Lord of Appeal in Ordinary, the equivalent of today's president of the Supreme Court. He is well known for establishing unjust enrichment as a branch of English law and as the co-author of 'Goff and Jones on the Law of Unjust Enrichment'.
14 Gareth Hywel Jones, QC, FBA was a British academic and long time fellow of Trinity College, Cambridge, and Professor of Law at the University of Cambridge. He is widely known as the co-author of 'Goff and Jones on the Law of Unjust Enrichment'.
15 Robert Stevens "The Unjust Enrichment Disaster" (2018) 134 L.Q.R. 574 at 576.
16 Ibid.
17 Robert Goff and Gareth Jones *Goff and Jones: The Law of Unjust Enrichment* (9th ed, Thomson Reuters, London, 2016) at para 1-08.
18 *Mann v Paterson Constructions Pty Ltd*, above n 1, at pg 82.
19 *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5, (1985) 162 CLR 221 (4 March 1987), High Court.

the claim of quantum meruit, Deane J acknowledged that unjust enrichment constitutes a unifying legal concept that encompasses an obligation on the part of a defendant to make a fair and just restitution for a benefit derived at the expense of a plaintiff.[20] Deane J also considered that the owner should not be prevented from relying on the contract even if the reasonable cost of the work was to exceed the contract price.[21]

*Pavey* served as a starting point where judges at state and federal level began to recognise the principle of unjust enrichment.[22] However, the suggestion of unjust enrichment as a cause of action has consistently been rejected. Rather, unjust enrichment has been recognised as a legal idea which explains why the law recognises an obligation on the defendant to make a fair and just restitution for a benefit derived at the expense of a plaintiff in a variety of distinct categories of case.[23] As such, it is an interpretive device that assists in applying and developing existing restitutionary rules.[24] Courts have therefore been rejecting the idea that the Birksian framework provides a uniform identification of the elements of a single cause of action of unjust enrichment.[25] Rather, the Australian courts recognise that unjust enrichment serves as a unifying concept which assists in the analysis of different but analogous categories of restitutionary claims in a principled manner.[26] In Australia, the Birksian framework has been accepted to the extent that it provides analytical questions to maintain coherence in the analysis of various restitutionary claims.

The interpretative function of the unifying legal concept of unjust enrichment was expressly approved by the majority in the most recent High Court case of *Mann v Paterson. Mann v Paterson* was a case which involved a contract between the Manns and Paterson Constructions Pty Ltd (**Paterson**) to construct townhouses. During the period of construction, the Manns orally requested 42 variations. Paterson carried out the variations but did not give written notices as according to the process under the contract and s 38 of the Domestic Building Contracts Act for owner initiated variations. Upon completion of one of the townhouse units, Paterson requested a payment of $48,000 for the oral variations. The Manns refused to pay on the basis that the written notice was not provided and alleged that Paterson had repudiated the contract and that they had accepted the repudiation. Paterson denied repudiation of the contract and alleged that it was in fact the Manns' conduct that was repudiatory and that it had accepted the repudiation. Paterson commenced proceedings for restitution on a quantum meruit basis.

In this case, the majority allowed an appeal and held that a builder was entitled to sue for restitution on the basis of quantum meruit in relation to a terminated building contract for work carried out before termination but for which no contractual right to payment had accrued at the time of termination. However, the court did not allow recovery upon quantum meruit for work carried out before termination and for which a contractual right to payment had accrued at the time of termination. The contractor's rights in relation to that work were limited to damages for breach of contract. The majority, comprised of Nettle J, Gordon J and Edelman J, reconfirmed that unjust enrichment may be conceived of as a unifying legal concept which serves a taxonomical function that assists in understanding why the law recognises an obligation to make restitution in particular circumstances.[27]

The dissenting judgment, delivered by Gageler J, cautioned against recognising "an obligation of restitution as the conscious or unconscious application of one "Very Big Idea."[28] Gageler J observed that, in the common law of restitution, particular categories of case give rise to their own particular sorts of problems. He considered that courts should avoid mere application of a unifying legal concept of unjust enrichment for restitutionary claims. Instead, he remarked that courts should identify the particular category of case that the issue belongs to and to then assess the factors which tend for or against the finding of restitution.[29]

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[20] At 256-257.
[21] At 257.
[22] *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662, 673 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ*); Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* [1988] HCA 44; (1988) 165 CLR 107, 175 (Gaudron J); *National Mutual Life Association of Australasia Ltd v Walsh* [1987] 8 NSWLR 585, 595 (Clarke J); *Public Trustee v Fraser* [1987] 9 NSWLR 433, 443 (Kearney J).
[23] Kit Barker "Unjust Enrichment in Australia: What Is(n't) It? Implications for Legal Reasoning and Practice" (2020) 43(3) Melbourne University Law Review (advance) at 8.
[24] At 9.
[25] *Pavey & Matthews Pty Ltd v Paul*, above n 19; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175; *Mann v Paterson Constructions Pty Ltd,* above n 1.
[26] Warren Swain "Unjust Enrichment and the Role of Legal History in England and Australia" [2013] UNSWLawJl 41; (2013) 36(3) UNSW Law Journal 1030 at 1042.
[27] *Mann v Paterson Constructions Pty Ltd*, above n 1, at 81.
[28] *Mann v Paterson Constructions Pty Ltd*, above n 1, at 30.
[29] Ibid.

Overall, while there are still some voices of dissent, the consensus in Australia is that unjust enrichment functions as a unifying legal concept of restitutionary claims which share certain normative features implicit in the idea of one person gaining unjustly at the expense of another.

### III The New Zealand courts' position

New Zealand courts have risen to the challenge posed by Gageler J to resist applying unjust enrichment as a unifying principle of restitution. Palmer J in *Electrix v Fletcher* presented a very helpful summary of how the law of quantum meruit has developed in New Zealand, which I discuss in more detail below.

In *Electrix v Fletcher,* Fletcher Construction Company Limited (**Fletcher**) engaged Electrix Limited (**Electrix)** as its electrical subcontractor to carry out electrical works on the Christchurch Justice Precinct. The parties never agreed to a formal contract, however, Electrix's works were carried out as outlined in the relevant letters of intent. As described by Palmer J, this "troubled project" faced difficulties as the electrical works were impeded by poor management, disruptions, and continual alterations to the scope and design of works. Electrix also suffered from significant time pressure to meet the deadline Fletcher had agreed to with the Ministry of Justice, the principal of the project. The parties failed to negotiate a contract price or a method of valuation and therefore, a contract never eventuated. Over the life of the project, Electrix had issued 42 payments to the sum of nearly $29 million. Fletcher's paid Electrix $21.6 million based on nine letters of intent, totalling approximately $14 million. Electrix brought a $7 million quantum meruit claim for its work and Fletcher counterclaimed under the Fair Trading Act for a refund of approximately $7 million for misrepresentation of contract price.

New Zealand courts have adopted the views of Professors Grantham[30] and Rickett's[31] that the purpose of quantum meruit is not to force the defendant to disgorge some wrongfully obtained benefit on the basis of unjust enrichment, but to fairly compensate the plaintiff for work undertaken or losses sustained. This focus on the compensation of the plaintiff, rather than the enrichment of the defendant, is evident in many New Zealand cases.

In 2005, the High Court case of *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health* addressed an allegation that the Ministry of Health (**Ministry**) was obliged to pay Villages of New Zealand (**VONZ**) for rest home services it provided to residents who were qualified for the state funded rest home subsidy.[32] The services in question were provided while there was no agreement between VONZ and the Ministry. The court found in favour of VONZ and rejected the Ministry's defence that they had not benefitted by reason of services as the services were provided to the residents.

In so finding, Winkelmann J held that a request to provide services or free acceptance of the services provided was a requisite element, but that proof of a benefit to the defendant, in the sense of economic value, was unnecessary.[33] This was also confirmed in 2006 in *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd*, where the Court of Appeal acknowledged the views of Professors Grantham and Rickett to conclude that if the true purpose of quantum meruit was to compensate the plaintiff, the nature and extent of the benefit to the defendant would have little or no significance.[34]

In 2007, in *Cassels v Body Corporate 86975,*[35] Miller J noted a further possible basis for a quantum meruit claim advanced by Professor Watts.[36] Watts had suggested that the conceptual difficulties disappeared if restitution's concern to restore a plaintiff's position was seen as the basis of the action, rather than enrichment's concern to disgorge from the defendant of some wrongfully obtained benefit.[37] Miller J concluded that the better view was that a defendant who accepts services knowing that the plaintiff is expecting payment is liable to pay a reasonable price for the service whether the defendant was enriched or not. In making this conclusion, Miller J considered Professors Grantham and Rickett's views on the importance of distinguishing between cases founded on the principle of restorable enrichment and those cases of a promissory nature, for which the court does not restore an enrichment but rather awards compensation for the performance of a service.[38]

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31 Professor Charles Rickett is Auckland University of Technology's Dean of Law. His research interests are primarily in equity and trusts, restitution and the law of obligations

32 *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health* 8 NZBLC 101,739 (HC).

33 At [73], [81]-[90].

34 *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd* CA90/05, 8 August 2006 at [44].

35 *Cassels v Body Corporate 86975* (2007) 8 NZCPR 740 (HC).

36 Peter Watts QC is a barrister as well as a Visiting Professor at the University of Oxford, and a Senior Research Fellow at Harris Manchester College, Oxford. He is also a Fellow of the Royal Society of New Zealand (Te Apārangi).

37 *Cassels v Body Corporate 86975*, above n 35, citing Peter Watts "Restitution – A Property Principle and a Services Principle" [1995] RLR 49.

38 *Cassels v Body Corporate 86975*, above n 35, at [42] citing Ross B. Grantham and Charles E.F. Rickett *Enrichment and restitution in New Zealand* (Hart, Oxford, 2000) at 166.

In summary, in New Zealand, the law of non-contractual quantum meruit is more plaintiff-centred in the sense that it focuses on protecting the plaintiff's interests to restore its position rather that being exclusively tethered to unjust enrichment.

## IV Valuation of quantum

The difference in the New Zealand and Australian courts' understanding of unjust enrichment has implications on the measure of the amount deserved as a remedy for quantum meruit claims. This is evident in the way the courts assessed the amount recoverable in *Mann v Paterson Construction Ltd* and *Electrix v Fletcher Construction Ltd*.

### *A The Australian approach*

In *Mann v Paterson,* the Australian High Court endorsed the English Supreme Court's ruling in *Benedetti v Sawiris & ors.*[39] *Benedetti* was a case which involved a claim of quantum meruit for services performed in acquiring funding for the acquisition of a company pursuant to an anticipated contract which failed to materialise. In this case, the Supreme Court stated that the basis of the calculation for a restitutionary claim in unjust enrichment would be the objective market price of those services. The Supreme Court held that this objective market price should also be subject to the concept of 'subjective devaluation' which poses a reduction in the objective market value to reflect the subjective value of the services to the defendant. In reaching this decision, the Supreme Court held that this would ensure reasonableness of the value of the service on the basis that a benefit is not always worth its market value to a particular defendant. [40] The court also considered the principle of 'subjective revaluation', which considers the defendant's subjective opinion of the value of the services to result in an amount that is beyond its market value. The court rejected this principle on the basis that, unlike subjective devaluation, the concept was not necessary to protect a defendant's freedom of choice. In other words, allowing the defendant to subjectively value the benefit higher than its objective market would defeat restitution's purpose to allow downward subjectivity only when it is able to protect a defendant's freedom of choice.[41]

The court also considered the role that contract prices play when determining the value of the service. In his judgment, Lord Neuberger suggested that contract prices should serve as a cap on amounts recoverable for a restitutionary claim as "*it would seem wrong, at least in many such cases, for the claimant to be better off as a result of the law coming into his rescue, as it were, by permitting him to invoke unjust enrichment".*[42] This showed the court's concern for the potentially limitless remedy that a plaintiff could seek in quantum meruit claims.

This principle was also adopted in *Mann v Paterson* in which the High Court also confirmed that the contract price would act as a cap on amounts recoverable under quantum meruit claims. In reaching this decision, the court expressed its concern of the disruptive effect that restitutionary remedies for quantum meruit claims would bring if the amount of remedy awarded was to exceed the sum otherwise due to the defendant under the contract. The majority held that this concern can be allayed by the principle that any benefit in restitution would be made in reference to the contract price. This was also supported by Gagelaar J, who was also of the view that the amount recoverable by a plaintiff on a non-contractual quantum meruit claim cannot exceed the portion of the overall price set by the contract that is attributable to the work.[43]

### *B The New Zealand approach*

One of the first cases that discussed the measure of the amount deserved was *Slowey v Lodder.*[44] In this case, Williams J rejected the notion that the measure of recovery on quantum meruit claims should be the same as the measure of damages for a breach of contract claim. In reaching this decision, Williams J remarked that to cap the amount deserved to the contract price would be to strip the claimant of his or her advantage in bringing an alternative remedy to a claim for damages for a breach of contract. In this case it was upheld that the plaintiff was entitled to recover an amount which reflected a reasonable value of the services rendered, even if that amount substantially exceeded the agreed price.

The indeterminate nature in measuring the amount deserved was reflected in Miller J's judgment in *Cassels v Body Corporate 86975,* where he remarked that there is seldom just one price that meets the test of reasonableness.[45] In *Cassels*, Miller J held that the starting point in determining the amount deserved should be the market price and that the court should also consider any agreed price between the parties, the benefit of the service to the defendant, as well as any subjective valuation such as the special position of the parties and the value that the services may have for the defendant.[46]

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[39] *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938.
[40] At [16].
[41] At [29].
[42] At [192].
[43] *Mann v Paterson Constructions Pty Ltd*, above n 1, at 37.
[44] *Slowey v Lodder* (1901) 20 NZLR 321.
[45] *Cassels v Body Corporate 86975,* above n 35, at [50].
[46] Ibid, at [51]- [54].

In its analysis of the measure of the quantum deserved, the High Court in *Electrix v Fletcher* explored the trend of quantum meruit claims in New Zealand where benefit to the defendant is not a necessity to prove the claim. The court considered that while market value is relevant to assess the reasonableness of the cost of the services provided, the project-specific cost, which takes into account various circumstances of the work, was equally important.[47] In a case like *Electrix v Fletcher* where there was no contract, no agreement on the price of the services, and no available evidence to quantify the benefit of the services to the defendant, the court approached the issue by determining the cost of the actual services provided as the starting point. In doing so, Palmer J stated that the actual cost should reflect the market value of the services at the relevant time and circumstances of the construction project. The court relied on expert evidence relating to labour, margins, preliminary and general, and project-specific difficulties to determine the reasonable cost of the services in the circumstances of the work at the time the service was rendered. The overall amount of nearly $7.5 million awarded to the plaintiffs was determined through a project-specific analysis of the market price which took into consideration the project-specific difficulties such as the lack of a detailed design for the electrical works, the delays, disruption and the time pressure that Electrix had experienced throughout the project.

### *C Academic commentary*

The measure of the amount recoverable for quantum meruit claims has also been the subject of academic debate. Lord Goff and Jones suggest that deductions should be made for time spent in repairing or repeating defective work, and that the court should consider all relevant circumstances such as industry pricing levels at the time the work was carried out, any negotiations of the claimant's willingness to accept a lower price for their service, any market dominant position that the claimant may have enjoyed, as well as any extra cost that may have incurred as a result of the claimant not having carried out the service to a reasonable standard.[48]

Keating on Construction Contracts suggests that the valuation of a service rendered should start at the objective market value of the service and take into account any conditions which would result in an increase or decrease of this objective value to any reasonable person in that position.[49] Keating further adds that the site conditions as well as any other circumstances in which the work was carried out such as the conduct of the party carrying out the work, their position in the market and negotiations as to the contract price would be relevant considerations to take into account when deciding the value of the service that a reasonable person in the defendant's position would pay for.

## V Which approach is preferred?

The consequences for the assessment of relief is reflective of the different views the Australian and New Zealand courts take on the law of restitution and, in particular, on whether the primary focus should be on compensating the plaintiff or disgorging the defendant of its enrichment.

As explored above, the Australian courts have accepted unjust enrichment as a unifying principle of the law of restitution. The focus is on the enrichment of / benefit to the defendant and therefore the measure of damages starts with a determination of the market value of the services with an allowance for a possible downward adjustment for the subjective value of the services to the defendant. The defendant bears the burden of proving the subjective devaluation.

Conversely, the New Zealand courts believe that unjust enrichment is not a unifying conceptual foundation of the law of restitution. Therefore, while it also adopts the market rate as the starting point to measure the amount deserved, it also takes into account various other factors that are specific to the work provided by the plaintiff, with a focus on compensating the plaintiff for the work performed.

In order to assess which approach is better to measure the amount deserved for a quantum meruit claim within the construction industry, it is important to remind ourselves of the context in which quantum meruit claims arise. Quantum meruit claims within the construction industry often arise where a plaintiff has rendered services and the defendant "freely accepts" those services on the understanding that it is non-gratuitous and actively refuses to compensate the plaintiff for those services rendered.

The cases we have explored above involve an understanding between the parties that, first, services were to be conferred on the basis that the plaintiff was to be compensated, and, secondly, the understanding that the services will be rendered by the plaintiff to his detriment.[50] It is important to note that the event which triggers a remedial claim is not an improper enrichment but the act of free acceptance of the performance of services. This was recognised by Palmer J in *Electrix v*

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[47] *Electrix Limited v Fletcher Construction Company Ltd (No 2),* above n 2, at [97].
[48] *Goff and Jones,* above n 17, at [5-43] and [5-52].
[49] Stephen Furst and Vivian Ramsey (eds) *Keating on Construction Contracts* (10th ed, Sweet & Maxwell, London, 2016) at [4-037].
[50] Ross B. Grantham and Charles E.F. Rickett *Enrichment and restitution in New Zealand* (Hart, Oxford, 2000) at 257.

*Fletcher* where he observed that the unjustness of an enrichment can be found on a "failure of basis" or "free acceptance."[51] Therefore, the remedy itself is not restitutionary. Rather, the recovery is more a compensation for the plaintiff's services. To echo the Court of Appeal's words in *Morning Star v Canam Construction,* quantum meruit is "generally seen" as being a restitutionary claim.[52]

In light of the compensatory nature of a claim of quantum meruit, I believe that the approach by the New Zealand courts better represents the approach that should be taken for recovery through the remedy of quantum meruit claims within the construction industry. The true meaning of "as much as deserved" can be represented by setting the market value of the services provided as a starting point and re-evaluating through a project-specific assessment.

The position as to whether the contract price should act as a cap on amounts recoverable under a quantum meruit claim should depend on whether there ever was a contract to begin with. Professor Watts considers that prima facie, an agreed price ought to govern the reasonable price of the services.[53] This proposition is also supported by Professors Grantham and Rickett with their rationale that, in the absence of a mistake, awarding an amount that is different to that agreed between the parties would have the effect of rewriting the bargain and altering the risk allocation that was implicit in the agreement.[54] In light of this, I agree with the Australian High Court that, in a situation like *Mann v Paterson,* where there was a once-enforceable contract which was eventually repudiated, the contract price should set a cap on the amount recoverable by the plaintiff. This would also allay the concern of a defendant facing the fear of liability in limitless amounts.

In the specific context of the construction sector, a focus on compensation for the plaintiff, as opposed to unjust enrichment of the defendant, also makes sense. As the cases we have discussed demonstrate, quantum meruit is most likely to be sought in situations where a contractor or subcontractor has performed construction services for which an upstream defendant is refusing to pay. Due to the nature of the sector, the plaintiff will likely have their own contracts with suppliers and further specialist sub-contractors, all of whom will functionally (if not at law) depend on payment flowing downstream from the defendant.

As the Construction Contracts Act (**CCA**) regime recognises, cash flow is the life blood of the construction sector and there are strong public policy reasons to ensure that cash can appropriately flow. The CCA attempts to ensure this in cases of construction contracts. In the absence of an effective contract, however, a focus on quantum meruit relief on paying a reasonable compensation to the contractor / sub-contractor having regard to the specifics of the project in question will better serve these purposes than a focus on whether the upstream party has been unjustly enriched.

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51 *Electrix Limited v Fletcher Construction Company Ltd (No 2),* above n 2, at [45].

52 *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd*, above n 34, at [40].

53 Peter Watts "Restitution – A Property Principle and a Services Principle" (1995) 3 RLR at 80.

54 *Enrichment and restitution in New Zealand,* above n 50, at 257.