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TWENTY SEVEN

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Quantum meruit claims following the High Court's decision in *Mann v Paterson Constructions Pty Ltd*

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>> *Mann v Paterson* – the "minority" decision

- Kiefel CJ, Bell and Keane JJ held that appeal ground 1 should be upheld.

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

>> *Mann v Paterson* – the minority decision (2)

- The minority titled this section of the decision "The recission fallacy".
- They stated that the basis of the theory is that when an innocent party accepts repudiatory conduct and terminates a contract the contract is then rescinded ab initio (from the beginning) – and effectively treated as if it never existed.
- That theory is then said to give rise to the position that the plaintiff can recover a sum assessed as a reasonable value of the services rendered – even if it might significantly exceed the contract price.

>> *Mann v Paterson* – the minority decision (3)

- It was noted that the Victorian Court of Appeal in Mann followed its previous decision in *Sopov v Kane Constructions Pty Ltd [No 2]* in this regard – largely in deference to the significant body of authority which had accepted the principles on the previous slide.

- It was noted that the Court of Appeal noted "weighty academic criticism" and "the recission fallacy".

- But the High Court found that:

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

>> *Mann v Paterson* – the minority decision (4)

- Their Honours noted that the notion that the termination of a contract for repudiation or breach has the effect of rescinding the contract ab initio was "unequivocally rejected" by the High Court in *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 (see particularly 476-477).

- The effect of this was noted to be that the builder is entitled to recover as a debt any amount that has become due under the Contract before termination – unless the contract provides to the contrary.

>> *Mann v Paterson* – the minority decision (5)

- The reasons then note that, insofar as any future performance of the contract is concerned, the builder is left with the right to damages for "loss of bargain": quoting Lord Diplock's analysis in *Lep Air Services Ltd v Rolloswin Investments Ltd* [1973] AC 331 at 350 (also approved by Brennan J in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 48).

- Given that analysis, their Honours found that any restitutionary claim, unconstrained by the bargain, would "*impermissibly cut across the parties contract*".

>> *Mann v Paterson* – the minority decision (6)

In circumstances where the respondent has enforceable contractual rights to money that has become due under the contract, there is no room for a right in the respondent to elect to claim a reasonable remuneration unconstrained by the contract between the parties. As Deane J explained in *Pavey & Matthews*, in such a case there is a "valid and enforceable agreement governing the [respondent's] right to compensation", and there is therefore "neither occasion nor legal

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the contract value – such as the objective value, the market value, or a reasonable value – would be to reallocate that risk."

Damages for loss of bargain

The same may be said where, as in the present case, the innocent party has an enforceable contractual right to damages for loss of bargain. The extent of the obligation to pay damages for loss of bargain, governed as it is by the terms of the terminated contract, reflects the parties' allocation of risk and rights as between each other under the contract. To allow a restitutionary remedy by way of a claim for the reasonable value of work performed unconstrained by the terms of the applicable contract would undermine the parties' bargain as to the allocation of risks and quantification of liabilities, and so undermine the abiding values of individual autonomy and freedom of contract. As Jaffey has said[42]:

>> *Mann v Paterson* – the minority decision (6)

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>> *Mann v Paterson* – the minority decision (7)

- The minority then rejected an argument that the repudiation prevented the respondent from performing its obligations under the contract and being remunerated accordingly.
- Did so because obligations in that contract were properly seen as severable.
- Stated that the law should now not allow a right of election on the part of a builder to claim reasonable payment for work done under the contract in respect of a right to unconditional payment has not accrued.

>> *Mann v Paterson* – the minority decision (8)

- The minority also rejected an argument that this principle (denying the right to quantum meruit) would allow a party to "approbate and reprobate" the contract: in other words to have refused to perform its obligations but insist on the terms.

- It was stated that the defaulting party is not to be punished nor should the innocent party have its rights enhanced.

- Stated that the decision in *Lodder v Slowey*, applied in many appellate courts, should not be applied.

>> *Mann v Paterson* – the minority decision (9)

longstanding decision. The same may be said in relation to *Lodder v Slowey*, the fallacious reasoning of which may give rise to serious mischief. It may be that some builders actually set the prices at which they bid for work on the expectation that they will be astute to take advantage of an opportunity to elect for a more generous level of remuneration in due course. If that is the case, any such expectation is distinctly not to be encouraged. Honesty and efficiency in trade and commerce are not promoted by a rule that allows the recovery of a windfall by a party who has extracted itself from a losing contract, from which, acting rationally, it would pay to be released. In *GEC Marconi Systems Pty Ltd v BHP Information*