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Quantum Meruit and Building Contracts: Part II Does the Contract Price put a Ceiling on a Recovery via a Quantum Meruit?

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Quantum Meruit and Building Contracts

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PART II—DOES THE CONTRACT PRICE PUT A CEILING ON A RECOVERY VIA A QUANTUM MERUIT?

Introduction

The question posed by the title of this part of the article has been the subject of a substantial amount of commentary by American Legal scholars[1] and has been a central issue in a number of cases, almost all of them involving building contracts. The problem is easy to state: P and D have an agreement for P to construct a building for a total consideration of $X. When P is partially finished, D breaches.[2] If the contract price and the value of the work to date roughly coincide, there is usually little problem in determining P's recovery. The standard rule of measurement is: expenses incurred to date plus expected profit (the 'benefit of the bargain'). Difficulties arise when the value of P's work exceeds the contract price. We are thus concerned in this part with valid and enforceable contracts which have as their distinguishing feature, from the builder's perspective, an element of unprofitability. There are in fact two main situations, or reasons for this scenario.

(1) The contract may have been a bad bargain from its inception, either because the builder underquoted for the entire project or because of an error in relation to a significant part of the project.
(2) The contract may have become a bad bargain because of subsequent events, including (a) incompetence on the part of the builder in execution of the contract; (b) an adverse movement in market prices; (c) interference by the other party; or (d) unforeseen events, perhaps amounting to frustration of the contract.

In either case, at the time when the builder claims to be entitled to the quantum meruit, market prices exceed the contract price. Thus, if $Y represents the market price of the work at the time of D's breach, and $X represents the contract price (or the rateable proportion), then

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* Part I of this article appeared in the previous issue of the *JCL*.

1 See, eg Dobbs, *Remedies*, 1973, § 12.1; Childres & Garamella, 'The Law of Restitution and the Reliance Interest in Contract', (1969) 64 *Nw UL Rev* 433; Palmer, 'The Contract Price as a Limit on Restitution for Defendant's Breach', (1959) 20 *Ohio State LJ* 264.

2 It is critical whether the breach is so substantial that it amounts to a repudiation that frees P from the obligation to continue to perform. If D's breach is relatively minor, P may be obligated to perform but have a claim for damage against D. See generally EA Farnsworth, *Contracts*, 1982, § 8.8; H O Hunter, *Modern Law of Contracts: Breach and Remedies*, 1986, §§ 2.02, 3.02; K E Lindgren, J W Carter and D J Harland, *Contract Law in Australia*, 1986, Ch 19; Rosett, 'Partial, Qualified, and Equivocal Repudiation of Contract', (1981) 81 *Colum L Rev* 93; Seepersad, 'Restitution and Total Failure of Consideration', (1973) 123 *New LJ* 435.

and the debate is whether P may recover $Y or is restricted to a smaller sum awarded by way of restitution or damages. The smaller sum will not be the contract price because P has not completed the work. Indeed, if completion of the contract would have caused a loss to P in excess of the contract value of the work done the sum might be purely nominal if awarded as damages. Our attention is mainly directed to the case where the builder has, to put it colloquially, done his or her sums badly in the first place, but some reference will also be made to the other situations.

The Majority View in the USA

The issue has been the subject of many cases in the United States. By contrast, English and Australian authority is sparse.

In the United States the dominant view is that P, the non-breaching party, may recover on a quantum meruit even if that recovery exceeds the maximum contract price. Perhaps the most influential discussion of the issue appeared in the case of *United States for the Use and Benefit of Susi Contracting Co v Zara Contracting Co.*[3] Zara won a United States Government contract to do excavation, grading and compaction work in connection with an airport expansion. Zara then sub-contracted most of the work to Susi. Disputes developed because of unexpected soil conditions that complicated the job. Zara terminated the sub-contract and completed the job using equipment Susi had furnished. Susi then sued for the reasonable cost and value of the actual work performed plus the rental value of the equipment. In finding generally for *Susi* the court stated:

> For it is an accepted principle of contract law, often applied in the case of construction contracts, that the promisee upon breach has the option to forego any suit on the contract and claim only the reasonable value of his performance . . .
>
> It also appears to be the general view, save for an occasional case viewed as illogical by the text writers, who are solidly in support of the doctrine . . .
>
> These authorities make it quite clear that under the better rule the contract price or the unit price per cubic yard of a construction or excavation contract does not limit recovery. This doctrine is particularly applicable to unit prices in construction contracts; . . . a plaintiff may well have completed the hardest part of a job for which an average cost had been set. But it seems settled now in New York that with the breach fall all the other parts of the contract.[4]

There are two justifications offered by the courts for this result. The first it that of fictitious rescission ab initio. The breaching party is said to have 'offered' to rescind by the breach and termination. The non-breaching party can 'accept' this rescission by electing to sue in restitution for the value of goods and services provided to the defendant as if there never had been a

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3 146 F 2d 606 (2d Cir 1944). The opinion was written by Judge Clark, and the other panel members were Judges Chase and L Hand. All three were respected judges on issues of commercial law. Another early and influential case was *City of Philadelphia v Tripple* 230 Pa 480; 79 A 703 (1911).

4 146 F 2d 606 at 610 (2d Cir 1944). The court cited in support cases from California, Connecticut, Maryland, Massachusetts and Pennsylvania as well as New York plus Restatement of Contracts, § 347 (1932); *McCormick on Damages*, § 166; *Williston on Contracts*, Vol 5, § 1485; *Woodward on Quasi-Contracts* §§ 268, 269; Patterson, 'Builder's Measure of Recovery for Breach of Contract', (1931) 31 *Colum L Rev* 1286.

contract. In the case of *Scaduto v Orlando*[5] the court said:

> [The plaintiff] can 'rescind' the contract and sue in quantum meruit for the value of his services, which is measured, not by the contract rate, but by the actual value of labour and materials . . . and the impact of the rule is to permit the promisee to 'rescind' even a contract upon which he would have lost money and base his recovery on the value of the services which he gave to the defendant irrespective of whether he would have been entitled to recovery in a suit on the contract.[6]

The second justification focuses more explicitly on the notion of fault that seems to pervade these cases. The contract price does not set a ceiling on recovery because the breaching party forfeits his or her rights under the contract by reason of the breach.[7] Fault and the loss of any rights under the contract by the breaching party were express concerns of the California Supreme Court in *Boomer v Muir*,[8] another often cited case.

> To hold that payments under the contract may limit the recovery where the contract is afterwards rescinded through the defendant's fault seems to us to involve a confusion of thought. A rescinded contract ceases to exist for all purposes. How then can it be looked to for one purpose, the purpose of fixing the amount of recovery? . . . The contract is annihilated so effectively that in contemplation of law it has never had any existence even for the purpose of being broken.[9]

In the *Boomer* case the impact of the doctrine was especially apparent. The plaintiff's damage claim on a contract action would have amounted to about $20,000. His suit on a quantum meruit brought him a recovery of $250,000, a difference that is surprisingly large today and that must have been startling 56 years ago in the midst of the Depression.

The role of fault was discussed by the court in the *Scaduto* case in response to an argument by the defendant that the contract price should set a ceiling. The defendant cited *Jones and Jones v Judd*,[10] a New York case from 1850, in which recovery was based on the contract rate. Judge Anderson, writing for the court in *Scaduto*, noted, however, that *Jones v Judd* was really an action for contract damages and not for the quantum meruit. The termination of the contract had occurred 'without any fault on the part of the defendant' and, therefore, 'the plaintiff lacked the power to rescind, and sue in quantum meruit and could only recover at the contract rate to the date of termination'.[11] This

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6 81 F 2d 587 at 595 (2d Cir 1967). Interestingly, this approach (breach as an offer to rescind) has been used by some courts to allow a modification without consideration. In a leading case an employee under contract threatened to leave because a competitor offered him more money. He was given a raise to induce him to stay (not to breach). The court upheld the raise, reasoning that there was an offer to rescind, an acceptance, and a new contract. This analysis also has provided a way around the problem of *Foakes v Beer* (1884) 9 App Cas 605. See HO Hunter, *Modern Law of Contracts: Formation, Performance, Relationship of Parties*, 1987, § 17.03[2][b]. But the view that a repudiation is in effect an offer to rescind has been rejected in England. See *Moschi v Lep Air Services Ltd* [1973] AC 331 at 349–50 criticising *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 QB 699 at 731.

7 *United States for the Use and Benefit of Coastal Steel Erectors Inc v Algernon Blair Inc* 479 F 2d 638 at 640 (4th Cir 1973). ('In these cases it is no doubt felt that the Defendant's breach should work a forfeiture of his right to retain the benefits of an advantageous bargain.')

8 24 P 2d 570 (Calif Dist Ct App 1933).

9 24 P 2d 570 at 577 (Calif Dist Ct App 1933).

10 4 NY 411 (1850).

11 *Scaduto v Orlando* 381 F 2d 587 at 595–6, note 8 (2d Cir 1967).

language suggests that it is a wilful repudiation of the entire contract that triggers the right to rescind (while also relieving the non-breaching party of any further obligation to perform) and that, perhaps, the claimant will be limited to contract damages if the breach is unintentional or the result of factors outside the direct control of the breaching party. How this analysis ties in with the results in frustration and commercial impracticability cases is an interesting and difficult question that deserves separate consideration.

Sometimes it is not altogether clear, however, what rationale a court is using. In a 1984 decision the Arizona Court of Appeal followed the general rule and allowed recovery on a quantum meruit without limitation by the contract price. In so doing the court stated 'we are not adopting the common argument that since the contract was rescinded it no longer exists, and therefore it cannot provide a price limiting the contractor's recovery'.[12] Unfortunately, the court failed to state what argument it was adopting nor why it refused to adopt what it described as 'the common argument'.[13]

The Minority View in the USA

There remain courts that refuse to follow the majority approach and adhere to the view that the contract remains alive at least to impose a ceiling on recovery. These cases do not reject, in general, the use of a quantum meruit approach to measuring the plaintiff's recovery. They recognise that proportionate payments under the contract may be inadequate because the plaintiff may have performed the more difficult and costly work, but the payment schedule may be based on an average.[14] Nevertheless, there is a reluctance to allow the plaintiff to recover more than the agreed upon bargain.

> We believe using the contract price as a ceiling, on restitution is the better reasoned resolution of this question. Had Johnson [plaintiff] fully performed, his recovery would be limited to the contract price, since he would be suing for specific performance of the liquidated debt obligation under the contract . . . it is illogical to allow him to recover the full cost of his services when, if he completed the house, he would be limited to the contract price plus the agreed upon extras.[15]

English and Australian Cases

In so far as the dominant view in the United States depends on rescission ab initio as a remedy for breach of contract it would be difficult to apply to Anglo-Australian law for the simple fact that, in cases of breach, rescission ab initio is not an available right except in cases where it is expressly conferred by

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12 *Murdock-Bryant Construction Inc v Pearson* 146 Ariz 57; 703 P 2d 1206 at 1217, note 7 (Ariz App 1984).

13 In fact, this case need not be analysed the same as others in this area. It involved either mistake or deceit by the defendant. Plaintiff contracted to do an excavation job based on the defendant's representations about soil conditions and rock. The site turned out to contain half again as much rock as the defendant had represented. The result was more in the nature of a reformation than in the nature of a restitution.

14 This was a concern expressed in *Susi v Zara*, but the result there was to allow recovery of costs and expenses without regard to the contract. Compare, eg *Kehoe v Rutherford* 56 NJL 23, 27 A 912 at 914 (1893) where the plaintiff was allowed to recover only a ratable proportion of the contract price. ('What is done was done under the contact, and should be paid for accordingly.')

15 *Johnson v Bovee* 574 P 2d 513 at 514 (Colo App 1978). The other cases on point are substantially older. See, eg *Edward Thompson Co v Kollmeyer* 46 Ind App 400, 92 NE 660 (1910); *Reifschneider v Beck* 148 Mo App 725, 129 SW 232 (1910); *Cozad v Elam* 115 Mo App 136, 91 SW 434 (1905); *Massey v Taylor, Wood & Co* 45 Tenn 447, 98 Am Dec. 429 (1868); *Wuchter v Fitzgerald* 83 Ore 672, 163 P 819 (1917).

the contract.[16] However, the fact that there are authorities which favour such a right[17] may explain the existence of some support for the view that the contract price does not place a ceiling on the plaintiff's recovery. These authorities must be tested today against contract theory which treats termination as the available right, and a restitution theory which treats termination as a sufficient basis for a restitutionary claim.[18]

If rescission is not an available remedy for a breach, then it is conceptually difficult—some might say impossible—to justify a remedy in restitution which ignores the contract. The only remedy would appear to be damages for the breach calculated in the normal way. Furthermore, the common law courts outside the United States have been reluctant to allow restitutionary remedies in disputes arising from broken contracts. Two areas stand out: where the plaintiff has sought to make the defendant liable for profits made as a consequence of breach; and to allow some measure of return to the party in breach.[19]

The use of the principles and remedies that are closely aligned with restitution, however, is not entirely a recent phenomenon. The nineteenth century case of *Planché v Colburn*[20] allowed an author to recover on a quantum meruit for work done on a book even though the defendants (publishers) had gone out of business and had no need for it and even though the author did not complete the work. In *Lodder v Slowey*[21] the Privy Council affirmed a decision of the Court of Appeal of New Zealand[22] that allowed a plaintiff contractor to elect between damages and restitution, on a quantum meruit, after the defendants breached and excluded the plaintiff from the site thereby preventing him from completing the job. The contract had been for the construction of a tunnel and the trial judge refused to award more than a nominal sum because there was no evidence that the contract would have been profitable. He also rejected the claim for restitution which found favour with the Court of Appeal. That court regarded the question of profit as immaterial. Whether this decision and the majority view in the United States will be applied in Australia is uncertain, although the recent decision of Brownie J in *Minister for Public Works v Renard Constructions (ME) Pty Ltd.* [23] does provide some support for its application

Recovery when the Contract is Executed

Oddly, when the defendant breaches by refusing to pay after full performance by the performing party, the only claim is for the price. Thus a performing party who has a disadvantageous contract relative to the prevailing market

16 *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457; *Johnson v Agnew* [1980] SC 367.
17 For example, *Brooks Robinson Pty Ltd v Rothfield* [1951] VLR 405.
18 See Lindgren, Carter and Harland, *Contract Law in Australia*, 1986, para 1904.
19 See G Jones, 'The Recovery of Benefits Gained From a Breach of Contract', (1983) 99 *LQR* 443 citing and discussing, eg *Tito v Waddell (No 2)* [1977] Ch 106 at 332; *Radford v De Froberville* [1977] 1 WLR 1262; *Joyner v Weeks* [1891] 2 QB 31. See also A S Burrows, Contract, Tort and Restitution—A Satisfactory Division or Not?' (1983) 99 *LQR* 217 at 232-3; Samuel Stoljar, 'Restitutionary Relief for breach of Contract', (1989) 2 *JCL* 1; J L R Davis, 'Damages' in P D Finn, (ed) *Essays on Contract*, 1987, p 200 et seq; J Beatson, 'What Can Restitution do for You?', (1989) 1 *JCL* 65.
20 (1883) 8 Bing 14; 131 ER 305.
21 [1904] AC 442
22 (1902) 20 NZLR 321.
23 Unreported, Supreme Court of NSW 15/2/89.

value of work will be substantially better off if the paying party terminates the agreement prior to completion. This was made clear in *United States for the Use and Benefit of Harkol Inc v Americo Construction Co Inc*,[24] a decision of a federal court in Massachusetts. The plaintiff was a subcontractor on a public works project and began work in June 1955. After a while the general contractor had difficulty in making progress payments as they fell due. The general contractor was so far in arrears by September 1956 that the subcontractor said that it could not proceed. If the subcontractor had held firm, it might have been successful in seeking recovery on a quantum meruit.[25] However, the general contractor orally agreed to make payment in full if the subcontractor would complete the job. The subcontractor did so, but payment still was not forthcoming. Having completed the job, the subcontractor's only claim was for the price, and the court rejected a quantum meruit claim on the defendant's motion for partial summary judgment.[26]

Another court stated that a party to a fully executed contract may recover in quantum meruit for the reasonable value of the services, but subject to a ceiling of the contract price.[27] That may seem like a roundabout way of getting to the same result—recovery of the contract price on full performance—but in a close case there may be some importance in the distinction. If a performing party, who has terminated performance by reason of the non-performing party's breach, sues on the contract, the defendant may be able to set off against the claim for damages the cost to complete the contract, so long as the defendant has not abandoned the contract. (The defendant may have breached the agreement, but still want to complete the project.) Bringing suit on the contract affirms it, and even though the plaintiff may be relieved of any further obligation to perform by reason of the defendant's breach, the contract remains the measuring rod. If the cost to complete exceeds the contract price to complete, the plaintiff may be unable to recover anything more than progress payments due to the date of breach if not already paid.[28] The quantum meruit approach avoids this problem, because the defendant cannot set off the cost to complete.

Whatever the variations or justifications among the courts, there does seem to be unanimity on the conclusion. The plaintiff has a claim for the price, after complete performance, regardless of the market value of the services rendered and goods provided by the plaintiff.[29]

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24 168 F Supp 760 (D Mass 1958).

25 'When one party to a contract acts in total breach of his obligation the other may cease performance and rather than sue for damages, ie, his outlay to the date of the breach plus lost profits . . . he may "rescind", and seek to restore the status quo, in which case recovery may be measured by the value of the services not limited by the contract price.' 168 F Supp 760 at 761 (D Mass 1958).

26 The court also rejected the suggestion that the oral agreement of September 1956 superseded the original agreement and substituted a fair value standard for the price term.

27 *Dye v Hill* 20 Ariz 466, 181 P 462 (1919).

28 *Scaduto v Orlando* 381 F 2d 587 at 595, n 7 (2d Cir 1967); Restatement of Contracts, § 329, comment g and § 335 (1932). In one sense this is another way of limiting the plaintiff's recovery to the expected benefit of the bargain, which may be zero or less if the contract is an unprofitable one. On the other hand there are likely to be start-up transaction costs associated with a new contractor coming in to finish a job, and it seems unfair to charge those against a plaintiff who has been discharged of the obligation to perform further. It is also unclear what role, if any, the concept of fault plays in this analysis.

29 H O Hunter, *Modern Law of Contracts: Breach and Remedies*, 1986, §§ 806, 9.02[4]. Section 373(2) of the Restatement (Second) of Contracts (1981) states: 'the injured party has no right to restitution if he has performed all of his duties under the contract and no performance by the other party remains due other than the payment of a definite sum of money for that performance'.

Measuring the Recovery

When recovery on a quantum meruit is appropriate the standard for measurement 'is the amount for which the services and material supplied could have been purchased from one in [plaintiff's] position at the time and place the services were rendered'.[30] The contract price is evidence of value and it certainly may be considered, although it is not conclusive. In the American courts the determination of fair value is usually a jury question,[31] but sometimes a court may treat a jury's determination as advisory. Proof of fair value in a construction case can become extremely complicated because there are so many variables.[32] There is always the possibility that the contract price may be the most compelling evidence because it is certain and because it does represent an arm's length deal.

As a result of the recent series of judgments by members of the High Court in the case of *Pavey & Matthews Pty Ltd v Paul*[33] it is likely that the role of restitutionary remedies and the relationship of restitution to contract will become matters of intense debate in Australian law circles.

A point raised by Gareth Jones in an article previously published in the *JCL*[34] is that except for a brief passage in the judgment of Deane J, none of the judgments in *Pavey & Matthews* addresses the problem of measurement and the role of the contract—whether express or implied in fact, enforceable or not—in measuring the quantum meruit. It is Jones' view[35] that the contract is a critical factor in that measurement.

> But claims arising out of contracts which are not *enforceable* by the plaintiff present their own special problems of valuation. For clearly the contract price cannot be ignored; and there is good authority that it should not, and should form a ceiling to any recovery. In principle, the plaintiff should recover the market value of his services or the contract price, whichever is the lower figure.

There is much to recommend Jones' view. Whether his view prevails depends, in large part, on the extent to which Australian courts are influenced by American judicial opinions on the same subject.

Breach by the Performing Party

The cases that have addressed the central issue of this paper all have involved suits by a performing party against a paying party.[36] What is the result when the performing party breaches? The approach followed by every American jurisdiction is to award the plaintiff the difference, if any, between the contract

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30 *Scaduto v Orlando* 381 F 2d 587; 595 (2d Cir 1967); Restatement (Second) of Contracts, § 373, comment d. (1981); Perillo 'Restitution in the Second Restatement of Contracts', 81 *Colum L Rev* 37 (1981). Compare *Flett v Deniliquin Publishing Co Ltd* [1964-65] NSWR 383.

31 See, eg *Bernini v Zylka*, 51 AD 2d 689; 379 NYS 2d 104 (1976).

32 For a general discussion see Douthwaite, *Attorney's Guide to Restitution*, § 8.2 (1977). On the necessity of sound evidence see *Development Corp of Ga v Berndt* 131 Ga App 277; 205 SE 2d 868 (1974).

33 (1987) 162 CLR 221.

34 G Jones, 'Restitution: Unjust Enrichment as a Unifying Concept in Australia?' (1988) 1 *JCL* 8.

35 (1988) 1 *JCL* 8 at 13-14. But compare *Minister for Public Works v Renard Constructions (ME) Pty Ltd* (unreported) Supreme Court of NSW 15/2/89 at 26-9; *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 WLR 912.

36 The paying party, eg a general contractor, may be a performing party in co-operation with the other party, but the point is that one's main obligation is to provide services and materials and the other's main obligation is to pay money.

cost to complete and the actual cost to complete[37] plus incidental transaction costs. This protects the paying party's expectancy; that is, complete performance for the agreed upon price. At the same time this approach casts upon the breaching party the risk that the contract was substantially below the market. If the performing party realises that the contract is unprofitable, it may be to his or her advantage to cut losses and breach, but there is the risk that nothing will be saved if he is ultimately liable for the cost of completion. Presumably the cost of completion also will include a competitor's profit.

A particularly difficult problem may arise, however, if the cost to complete according to the terms of the agreement is grossly disproportionate to the injury suffered by the non-breaching party by reason of the defendant's failure to complete.[38] Two cases illustrate fundamentally different approaches to this problem. One, *Groves v John Wunder Co*,[39] strictly applied the cost to complete formula; the other, *Peevyhouse v Garland Coal & Mining Co*,[40] refused to award the cost to complete because of the great difference between that cost and the actual economic injury to the plaintiff.

The defendant in the *Groves* case had purchased the right to use part of the plaintiff's property as a rock quarry. The contract stipulated that the defendant would fill the quarry and reclaim the land after removing the rock, but the defendant failed to do so. The evidence showed that the cost of the reclamation would be $60,000, but that the diminution in value of the real estate by reason of the quarry was $12,000. The defendant argued that the plaintiff would be fully compensated by an award equal to the diminution in value, but the court held otherwise and ordered payment of a sum equal to the cost of reclamation.[41] On virtually identical facts the court in *Peevyhouse* reached the opposite result and only allowed a recovery of the difference in value before and after the

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37 This must be within the bounds of reasonableness. If the contract called for construction of a house of average quality, the plaintiff cannot charge a defaulting contractor with the cost of finishing it off in luxury style with gold plated fixtures and the like.

38 The American courts generally follow the rule of substantial performance and if the performing party's breach involves a trifling matter or one that is of little or no economic consequence to the other party, then the courts say that there is no liability because there is no injury. The most important opinion is that of Cardozo J in *Jacob & Youngs Inc v Kent* 230 NY 239, 129 NE 889 (1921). The plaintiff complained that the defendant used the wrong brand of pipe for the plumbing in a new house. That was true, but there was no liability because the pipe used was of a similar quality, and, furthermore, it would have been wasteful to rip the pipe out of the walls just to replace it with another brand. The result might be different in a case involving a peculiarly personal contract, as, for example, one to prepare a custom made suit. *Brown v Foster* 113 Mass 136 (1873). A party may ensure particular performance by making it a condition to the reciprocal obligation to pay and not merely a covenant of performance. See, eg *Waynick Constr Inc v York* 70 NC App 287, 319 SE 2d 304 (1984); *Winn v Aleda Constr Co* 227 Va 304, 315 SE 2d 193 (1984). There is no doubt, however, that the 'substantial performance' rule is accepted and applied throughout the US. See, eg *Publicker Chem Corp v Belcher Oil Co* 792 F 2d 482 (5th Cir 1986); *Schneider v Dumbarton Developers Inc* 767 2d 1007 (DC Cir 1985); Restatement of Contracts, §§ 275, 346 (1932); Farnsworth, *Contracts*, 1982, § 8.12. The UCC, however, contains a perfect tender rule in § 2-601 for sales of goods, but there are so many exceptions carved out by other sections of the UCC that there is effectively a substantial performance rule under that statute as well. H O Hunter, *Modern Law of Contracts: Breach and Remedies*, 1986, § 2.02[2]. See also Priest, 'Breach and Remedy for the Tender of Nonconforming Goods Under the Uniform Commercial Code: An Economic Approach', 91 *Harv L Rev* 960 (1978). And see Part I of this article text at n 65ff.

39 205 Minn 163, 286 NSW 253 (1939).

40 382 P 2d 109 (Okla 1962).

41 There was no requirement that plaintiff use the money to reclaim the land. He could spend it as he liked. Compare *Tito v Waddell (No 2)* [1977] Ch 106 at 332.

defendants began a strip-mining operation.[42] Although the *Peevyhouse* opinion recognises that the cost to compelte is the normal measure of recovery, the opinion goes on to state that:

> Where the contract provision breached was merely incidental to the main purpose in view, and where the economic benefit which would result to [plaintiff] by full performance of the work is grossly disproportionate to the cost of performance, the damages which [plaintiff] may recover are limited to the diminution in value resulting to the premises because of the nonperformance.[43]

The second Restatement generally follows the holding of the *Peevyhouse* case. Comment c to § 348 states, in part:

> If an award based on the cost to remedy the defects would clearly be excessive and the injured party does not prove the actual loss in value to him, damages will be based instead on the difference between the market price that the property would have had without the defects and the market price of the property with the defects. This diminution in market price is the least possible loss in value to the injured party, since he could always sell the property on the market even if it had no special value to him.

This leaves little room for sentimental attachments to property or to any other interests not easily translated into the language of the marketplace.

If the performing party breaches by reason of poor or defective performance as opposed to incomplete performance or unauthorised variations, then the solution is similar to that used to satisfy breach of warranty claims. The plaintiff can recover the 'difference in the value of the structure as built and the value of the structure as it should have been built'.[44] That is essentially the same as the diminution in value formula of *Peevyhouse*, but the evidence most often used to prove the difference in value is the cost of repair, an approach to proof that borrows from the *Groves* case.[45] One can, of course, draw a distinction between cases involving injury to the freehold (digging a rock quarry) and those involving defective construction of building. In the latter the cost of repair and the difference in value will usually be fairly closely connected, but land suitable for a quarry often is of relatively low value for other uses. Even if it is rendered virtually useless by a quarry pit, the total loss in value may well be substantially less than the cost of filling in the pit and reclaiming the land.[46]

An interesting remedial problem that is beyond the scope of this paper is the following: Builder agrees with Owner to construct a building for, say, $100,000. The price fairly reflects costs and includes a reasonable profit. However, Owner's choice of building is wrong for the location or the times and its construction does little or nothing to enhance the value of the land; indeed, a potential buyer of the land would discount its value by the cost of

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42 Reclamation would have cost $29,000. The jury awarded $5000. Because the jury's award was greater than the value of the land in the first place the court reduced this to $300, which it found to be the diminution in value.

43 382 P 2d 109 at 114.

44 *Jack v Heard Contractors Inc v Moriarty* 185 Ga App 317 at 318 (1987). Compare *Bellgrove v Eldridge* (1954) 90 CLR 613.

45 *Jack v Heard Contractors Inc v Moriarty* 185 Ga App 317 at 318 (1987). See also, *Ray v Strawsr'a* 183 Ga App 622, 359 SE 2d 376 (1987); *Bales v Martin* 737 SW 2d 46 (Tex App 1987).

46 The lingering problem is the one of choice. Would the landowner have sold the mineral rights *without* the covenant of reclamation? If so, would the landowner have demanded a higher price? If the defendant never intended to comply with the reclamation covenant, should there be an action for deceit?

razing the structure. If the Builder breaches, should Owner's claim be calculated by reference to Owner's idiosyncratic interest in this building or should Owner be limited by principles of economic efficiency and the avoidance of waste to calculations based on the objective market value of the structure and the land even though that might result in a net recovery of zero? If the 'purpose of contract damages is solely to indemnify for actual loss, not to deter breach'[47] then perhaps Owner may have little cause for complaint. That overlooks, however, Builder's promise to construct a building of a certain quality for a certain price without regard to its ultimate market value. Certainly there are times when owners choose to improve properties in ways that are not objectively sound from an economic perspective, but the owners' eccentricities may not be a good excuse for the performing party's failure. Recognising this kind of problem as well as others having to do with foreseeability, waste, efficiency and so forth, the drafters of the second Restatement suggested that courts have wide leeway in fitting damages to particular circumstances. Section 351(3) states:

> A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.[48]

Criticisms of the Dominant American View on Quantum Meruit Recoveries after Contract Breaches

In the *Susi* case the court referred to those relatively few cases holding the contract price to be a ceiling on recovery as 'illogical'. But more than a few American commentators have concluded that the opposite is true; there is less logic on the side of the majority view. Commentators in England and Australia have also been critical of the majority view.[49]

This whole area of the law has an air of mystery about it. In the ordinary contract action, the contract itself is the measuring device. There are many instances in which a quantum meruit recovery is preferred, such as situations giving rise to a quasi-contract claim or disputes arising from agreements that do not have definite price terms.[50] If the parties have agreed upon a consideration, however, courts usually look to that consideration as the guideline for awarding damages. In this context the casees that allow a plaintiff to

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47 Simon, 'A Critique of the Treatment of Market Damages in the Restatement (Second) of Contracts', 81 *Colum L Rev* 80 at 85 (1981). Professor Simon cites *Nobs Chem USA Inc v Koppers Co* 616 F 2d 212 (5th Cir 1980); *Coast Trading Co v Cudahy Co* 592 F 2d 1074 (9th Cir 1979).

48 For criticism of this and other damages provisions of the Second Restatement, see Harvey, 'Discretionary Justice Under the Restatement (Second) of Contracts', 67 *Cornell L Rev* 666 (1982); Young, 'Half Measures', 81 *Colum L Rev* 19 (1981). In defence see E A Farnsworth, 'Ingredients in the Redaction of the Restatement (Second) of Contracts', (1981) 81 *Colum L Rev* 1. Professor Farnsworth was Reporter for the second Restatement. His defence should not be surprising.

49 See J W Carter, *Breach of Contract*, 1984, para 1212; Lindgren, Carter and Harland, *Contract Law in Australia*, 1986, para 2319; R Goff and G Jones, *The Law of Restitution*, 3rd ed, 1986, pp 467–8; Compare Ewan McKendrick, 'The Battle of the Forms and the Law of Restitution', (1988) 8 *Oxford J Legal Stud* 197 at 206–7.

50 Section 2–305 of the UCC, for example, expressly provides for contracts with open price terms and the statute as well as cases applying it suggest a variety of ways of determining a fair price. See, e g *Spartan Grain & Mills Co v Ayers* 517 F 2d 214 (5th Cir 1975). See also Goldberg, 'Price Adjustment in Long Term Contracts', 1985 *Wis L Rev* 527; Hillman, 'Court Adjustment of Long Term Contracts: An Analysis Under Modern Contract Law', 1987 *Duke LJ* 1.

sue 'off' the contract for the market value of services rendered pursuant to the contract are anomalous. Courts may be trying to take into account the possibility of consequential damages that would not otherwise be recoverable, or they may be faced with a complex array of facts and interrelationships in which it is more difficult to determine actual reliance expenses and projected profits than to determine the market value of the work completed.[51] Whatever the underlying pragmatic reasons for this approach it is one that is not strictly consistent with ordinary contract cases.

There is another anomaly. The injured party has little incentive to seek damages 'off' the contract unless the contract is a losing proposition or unless it is substantially below market rates. In most of these cases the contract has been a good one for the owner, and it does not appear to make sense for the owner to breach. Indeed, upon close examination there is often some question about the nature of the breach and whether one party wilfully repudiated or whether each party was, in some sense, at fault. If that is so, then it is incorrect to treat them all as if they were wilful, total repudiation cases. Professors Kessler and Gilmore offer a biting description of the typical case:

> The situation is that A has entered into a contract with B under which A for a price of $10,000, has agreed to do work which it becomes clear as the job progresses, will cost $20,000. Everyone agrees that, except for the remote possibility of reformation for mistake or something of the sort, A, if he completes the job, gets only $10,000. B merely has to sit tight, meanwhile punctiliously performing his own obligation under the contract, to get $20,000 worth of work for half of its cost. Under such circumstances is it plausible that B would ever lapse into a default which would allow A to get off the hook by 'rescinding' the contract and bringing his quantum meruit action for restitution? Yet, in case after case of this type, we are solemnly assured by the court that B did in fact 'default'. One possible explanation is [that] the actual situation is complicated and confused, there are mutual recriminations, each party accuses the other of bad faith, misconduct and faulty performance; until the judicial dice have been rolled, no one has the least idea of which side is in breach and which is not. Most opinions in litigation of this sort, however, become extremely cryptic at the point of explaining exactly what B's mysterious default consisted of.[52]

Indeed it is odd that courts are so willing to ignore the parties' negotiated transaction and their own risk allocation. The substitution of a public law approach (payment for enrichment) for the private law of the contract is generally contrary to one of the major themes of contract law—respect for and enforcement of privately created law subject only to countervailing public policies of overriding importance. The public policy behind most of restitution is the prevention of unjust enrichment. Usually the defendant has converted or detained property, abused a trust, or received materials or services for which he or she should have paid. More often than not the defendant's action is tortious or very close to being tortious. The plaintiff may have the option to sue in tort for damages or in restitution for return of the property taken or for

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51 This may not always be true. The transactional costs of proving fair market value (eg testimony from third parties, discovery disputes, evidentiary disputes, the greater likelihood of appealable error) may be quite substantial.

52 Kessler and Gilmore, *Contracts*, 2nd ed, 1970, p 1060. See also Childres and Garamella, 'The Law of Restitution and the Reliance Interest in Contract', (1969) 64 *Nw Ul Rev* 433.

disgorgement of unjustly acquired gain. The concept of restitution allows a court to fashion a remedy that provides the plaintiff with a money remedy equivalent to the market value of the goods or services provided by the plaintiff or taken by the defendant. This restitution approach to remedies may be much more suitable, for example, in a case involving the provision of services or the wrongful taking of something like a mineral right. Ordinary trespass damages may be insufficient and it may be impossible for the defendant to 'restore' anything. Imposition of a promise to pay can force the defendant at least to pay fair value.[53]

The unjust enrichment cases are conceptually simple. There is little quarrel with the notion that one should pay for or restore (together with profits therefrom) property that is wrongfully taken or detained. Similarly, there is no quarrel with the notion that a knowing and willing[54] recipient of benefits should pay for those benefits. The difficulty presented by the cases considered in this paper is the extension of principles of restitution to cover a failed contract in which it is not unjust in any public law sense for the defendant to have received or to have retained services or goods. The plaintiff was required by the contract to provide the services or goods and there was no abuse of trust or taking of property when the defendant received them. Of course the defendant is expected to pay, but that expectation *arises from the contract* and not from a publicly imposed duty. The private law origin of this expectation is abundantly clear in the rule that the plaintiff who performs in full has a claim for the contract price, as on a debt, and for *nothing more*.[55]

The extension of restitution beyond unjust enrichment is not a recent development. One line of cases, well illustrated by *Britton v Turner*,[56] used restitutionary principles to avoid the harsh result that the law of unilateral contracts demanded. In *Britton* the plaintiff was a farm labourer who had agreed to work for 12 months for a total lump sum consideration of $120.[57] The labourer quit after almost 10 months of work. The defendant argued that there was no liability because the plaintiff did not complete his agreed upon performance. This was the standard law of unilateral contracts,[58] but the plaintiff was allowed to recover upon a count in quantum meruit for the reasonable worth of his labour.[59] The defendant's argument was that the plaintiff's unexcused failure to complete performance destroyed the contract and any obligation on the part of the defendant. There was substantial support for this argument and against any suggestion of recovery on a quantum meruit.[60]

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53 This may be an especially useful remedy where the plaintiff has no real out of pocket loss, but only a lost opportunity, yet the defendant has a substantial gain. See eg *Roberts v Sears, Roebuck & Co* 575 F 2d 976 (7th cir 1978); *Matarese v Moore-McCormack Lines Inc* 158 F 2d 631 (2d Cir 1946).

54 The 'knowing and willing' limitation excludes claims by the official intermeddler who, by unilateral acts, seeks to make another his or her debtor.

55 Perhaps there could be a claim for consequential damage, eg for late payment, subject to the rules of foreseeability, but, even so, that claim would arise from the contract and not from some external principle of justice.

56 6 NH 481 (1834).

57 The facts are not discussed in detail in the opinion, but, in the normal course, a farm hand would have received room and board and sundry other in-kind payments during the year and have been paid his cash wages after the harvest.

58 For the standard distinction between unilateral and bilateral contracts see Restatement of Contracts, § 12 (1932).

59 The recovery was $95, almost precisely the proportionate amount that would have been due had the contract provided for monthly instalment payments.

60 See, eg *Starke v Parker* 19 Mass 267 (1824); *Giles v Edwards* (1797) 7 TR 181, 101 ER 920.

Nevertheless, the court held that the defendant had been enriched by almost ten months of labour and that, having been willing to pay for this labour in the first place, it would be unfair to allow the defendant to retain the benefit of the labour without payment. Today the *Britton* case probably would be decided in accordance with one of the following rules of contract law:

(a) part performance by the promisee acts as acceptance and creates a binding, bilateral agreement;[61]
(b) part performance by the promisee estops the promisor from denying and thereby avoiding the promise to pay;[62]
(c) unless clearly impossible, the parties' actions should be construed to imply a bilateral agreement.[63]

In his influential treaties entitled *The Law of Quasi Contracts*, published in 1913, Woodward simply expanded the concept of quasi-contract to include cases that involved the receipt of a benefit that it was neither wrongful to receive nor wrongful in any general sense to keep whether or not there was an enrichment of the defendant's estate. This was a departure from the approach of Keener who published *A Treatise on the Law of Quasi-Contracts* in 1893. Keener's thesis was that quasi-contract, as an outgrowth of restitutionary principles, was wholly independent of contract. It was a body of law based upon legal duty and the concept of justice as opposed to contract, which had its basis solely in private agreement. Keener's distinction between contract and quasi-contract became an accepted principle of American law.[64] But Keener limited quasi-contract to cases of unjust enrichment, and did not include cases involving what might be called the 'just' receipts of benefits, the broader range encompassed by Woodward in his more sweeping definition of the term. The first Restatement of Contracts tended to follow the Woodward approach, and the second Restatement borrows from both Kenner and Woodward.

The Restatement (Second) ignores the conflict between the rationales of 'unjust enrichment' and 'receipt of benefit', frequently basing its rhetoric upon the former while grounding its operative rules primarily on the latter. When a proper case for restitution is advanced, the Restatement (Second) usually allows recovery for benefits conferred whether or not the defendant has been enriched in estate.[65]

Despite apparent approval of a rather broad understanding of quasi-contract, the drafters of the second Restatement did retreat somewhat from the proposition that the contract—if there is one—does not limit the recovery in failed contract cases where the plaintiff is allowed to sue 'off' the contract. The first Restatement clearly followed what is the dominant American view as set forth

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61 This rule was adopted to avoid the unilateral contract problem presented by a case such as *Britton*. See Restatement of Contracts § 31 (in cases of doubt an agreement should be treated as bilateral) and § 45 (part performance equals acceptance) (1932); Restatement (Second) of Contracts, § 50 (1981); UCC, § 2-206; *Lincoln National Life Ins Co v NCR Corp V Wilshire* 135 Cal 654, 67 P 1086 (1902); *Hill Aircraft Corp v Planes Inc* 158 Ga App 151, 279 SE 2d 250 (1981). Compre *Billings Cottonsdeed Inc v Albany oil mill Inc* 173 Ga App 825, 328 SED 2d 426 (1985).

62 See, eg *Siegel v Codner* 153 Ga App 438, 265 SE 2d 287, aff'd 246 Ga 368, 271 SE 2d 465 (1980); *Marchiondo v Scheck* 78 NM 440, 432 P 2d 405 (1967); *Powers Construction Co Inc v Salem Carpets Inc* 322 SE 2d 30 (SC App 1984).

63 See, eg *Davis v Jacoby*, 1 Cal 2d 370; 34 P 2d 1026 (1934).

64 See A L Corbin, 'Quasi-Contractual Obligation', (1912) 21 *Yale LJ* 533; Dawson, *Unjust Enrichment* (1951); Perillo, 'Restitution in a Contractual Context', (1973) 73 *Colum L Rev* 1208.

65 perillo, 'Restitution in the Second Restatement of Contracts', (1981) 81 *Colum L Rev* 37 at 38.

in cases such as *Susi v Zara*, discussed above.[66] This also seems to be the view expressed in § 373(2) of the second Restatement, but comment b to § 374 suggests that the contract price *should* set a cap on recovery. In one of the earlier drafts, there was an explicit rejection of the dominant view and a clear statement that the contract price should set a cap on recovery.[67] Professor Farnsworth, the reporter for the second Restatement, has said that it is neutral on the subject and that it neither approves nor disapproves the use of the contract price to limit restitutionary recoveries in failed contract cases.[68] The ambiguity of the second Restatement may be frustrating to scholar and lawyer, but that ambiguity may accurately reflect uncertainties[69] among legal academics and practising lawyers, uncertainties that may well find their way into judicial opinions. Certainly among legal scholars the trend is toward a healthy skepticism of the reasoning in cases such as *Susi v Zara*. Professor Perillo's comments are particularly in point:

> Restitution for breach is a contractual remedy; consequently, it seems inappropriate to ignore the parties' allocation of the risks. Should a plaintiff who would have lost on the contract receive an amount that not only spares him from further loss but also compensates him as if he had made a profitable bargain? Perhaps, on the erroneous assumption that the restitutionary action is divorced from the contract upon which the performance was based, that a contractual breach necessarily involves fault, or that the defendant is profiting from his own breach if he uses the contract to shield against greater liability. This last thought ignores the fact that the defendant's profit, if any, stems from the parties' bargain and not from any subsequent wrongdoing.[70]

Oliver Wendell Holmes' statement that the 'duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else',[71] has become a commonly accepted and fundamental principle of the American common law of contract. It is central to the theory of efficient breach which has been ably and amply developed by law and economic scholars.[72] The Holmes' view simply does not work if the non-breaching party can sue 'off' the contract. Consider, for example, the owner who determines that finishing a building project does not make sense because the market

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66 Above, see text at n 3.

67 Tentative Draft number 14, § 387(2) (1979).

68 Farnsworth, *Contracts*, 1982, § 913, n 22.

69 The original idea behind the various Restatements was to draw together the doctrines of contracts, torts, property, etc into comprehensive collections of black letter principles, amplified by comments and illustrations. The goal was to *re-state* the law, not to *re-form* it. There is little doubt that the opinions of the various drafters have made their way into each of the Restatements and that each of these has tended to define the law as well as to describe it. The ambiguities of the second Restatement in this area, however, are probably more consistent with the original goal than a firm statement one way or the other would have been.

70 Perillo, 'Restitution in the Second Restatement of Contracts', (1981) 81 *Colum L Rev* 37 at 44–5.

71 O W Holmes, 'The Path of the Law', (1987) 10 *Harv L Rev* 457 at 462.

72 See, eg Posner, *Economic Analysis of the Law*, (1977) pp 88–90; Barton, 'The Economic Basis of Damages for the Breach of Contract', (1972) 1 *Legal Studies* 277; Birmingham, 'Breach of Contract, Damage Measures, and Economic Efficiency', (1970) 24 *Rutgers L Rev* 273; Goetz & Scott, 'Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach', (1977) 77 *Colum L Rev* 554. For a critique of the theory of 'efficient breach', see Craswell, 'Contract Remedies, Renegotiation and the Theory of Efficient Breach', (1988) 61 *So Calif L Rev* 630. For a different normative approach, see Fried, *Contract As Promise* (1981). See also Linzer, 'On the Amorality of Contract Remedies—Efficiency, Equity and the Second Restatement', (1981) 81 *Colum L Rev* 111; Michelman, 'Norms and Normativity in The Economic Theory of Law', (1978) 62 *Minn L Rev* 1015.

has changed or the project was not properly designed for the time or location. If it would be economically wasteful to carry through, then to serve the goal of an efficient allocation of resources the owner should halt the project and terminate the contract. For the owner to be able to make a rational choice he needs to have some idea of relative costs, and, in the normal course, he should be able to look to the contract. Full performance will cost $x; a termination after partial performance should cost less, but no more, if what Holmes said was true. However, if the performing party is free to sue 'off' the contract and to try to prove that the value of the work to date exceeded the contract price,—$Y—then the owner has difficulty in making a rational economic decision. Indeed, it may be impossible to do so.[73]

Despite the theoretical and practical criticisms of the rule established by cases such as *Susi v Zara*, that rule is still the prevailing one. Contracting parties have to contend with the apparent anomaly that in some cases, under some circumstances, a breach will have consequences beyond the normal. General principles of equity and justice may be employed to sort out the claims of one party to a broken contract against the other party.

Much of the conceptual confusion in this area probably derives from the use of the term 'restitution' as a shorthand description for certain categories of contract damages. A two part article published in the *Yale Law Journal* 52 years ago by Professors Fuller and Perdue has been exceptionally important in categorising contract remedies.[74] Fuller and Perdue identified three categories: (a) the expectancy remedy; (b) the reliance remedy; and (c) the restitution remedy.

The expectancy remedy is the usual 'benefit of the bargain' remedy whereby the plaintiff recovers the profit expected on the transaction. Although it is the classic, 'pure' substitutional remedy, more than a few plaintiffs have found it to be unsatisfactory because recovery of the expectancy rarely includes recovery of the transaction costs, especially attorney's fees, associated with establishing and enforcing the remedy.[75]

The goal of the reliance remedy is to return the plaintiff to the status quo ante by requiring the defendant to pay the costs incurred to date by the plaintiff. This approach is used most frequently when it is difficult or impossible to determine the plaintiff's expected profit or when it appears that there was to be little or no profit.[76] Practically, it is a way to provide the non-defaulting party with his or her costs. Conceptually, the goal of the reliance remedy is fundamentally different from that of the expectancy remedy. The idea is not to reach the monetary equivalent of specific performance and thereby to recreate the contract, but to reach the position that would have existed for the plaintiff if there had not been a transaction. The expectancy recovery affirms the

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73 If both parties have made a bad deal, one commentator has suggested an allocation of loss, on an early termination, that is consistent with the relative losses each would have sustained on full performance. Dobbs, *Remedies*, 1973, § 12-24 at 912-24. No court has embraced this approach, most probably because the calculations necessary to accomplish the desired result would be too complicated and would be wasteful of scarce judicial resources.

74 Fuller and Perdue, 'The Reliance Interest in Contract Damages', (1936) 46 *Yale LJ* 52.

75 See H O Hunter, *Modern Law of Contracts: Breach and Remedies*, 1986, § 11.02; E A Farnsworth, 'Legal Remedies for Breach of Contract', (1970) 70 *Colum L Rev* 1145.

76 See, eg *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377.

existence of a contract; the reliance recovery tries to deny it.[77]

The term 'restitution' as used by Fuller and Perdue is a term of art to describe remedial approaches that have their conceptual roots in notions of equity and fair dealing. The goal is to make the breaching party give up or pay for an unfair gain, and the focus of the remedy is on the defendant rather than on the plaintiff. Older cases tended to resort to restitutionary remedies when the usual contract remedies were inadequate to do justice or when some legal principle prevented a normal damage recovery.[78]

The Fuller and Perdue categorisation of contract remedies has been useful, and it has had an enormous impact. The outline of their article is followed in § 344 of the second Restatement with no significant variations. Professor Hudec has noted that many of the leading cases on contract remedies cite and rely on the Fuller and Perdue article.[79] Their method of analysis even seems to permeate opinions when the judge and lawyers are not consciously aware of the article. Professor Danzig chronicled an interesting lawsuit against a plastic surgeon in which the counsel for the both sides as well as the trial judge applied the reliance interest principles as discussed by Fuller and Perdue even though all appeared to be ignorant of the specific article.[80] If nothing else the Danzig study suggests how firmly established the article has become as part of the received wisdom in American contract law.

Therefore, it may not be surprising that a court might turn to restitutionary remedies in a complicated case where it is difficult to determine the expectancy or to separate out all the costs. It may seem an appropriate and straightforward way to do 'justice' and to prevent a contract breacher from avoiding liability, or what the court considers to be appropriate liability. The difficulty, of course, is that in doing so the court substitutes public law principles of justice for the private law created by the parties. This approach also ignores the parties' own freely made risk allocations and introduces an element of uncertainty into the contract that makes it more difficult to decide, rationally, whether, it is better to continue the contract or whether it makes more sense to terminate.

Restitution also has played some role in cases of frustrated contracts where courts have been reluctant to leave the parties in their respective positions at the time of frustration because to do so would be unjust. The frustration cases do not provide a happy model for the resolution of disputes that grow out of breaches for the straightforward reason that frustration usually arises from

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77 The reliance remedy presents the possibility of several problems. What are reasonable costs? What if the costs are greater than the contract price? (Generally, the plaintiff has to bear the excess.) How does a court take into account lost opportunities and other consequential losses? See H O Hunter, *Modern Law of Contracts: Breach and Remedies*, 1986, §§ 7.02[3], 7.03[4][C], 7.04; E A Farnsworth, 'Legal Remedies for Breach of Contract', (1970) 70 *Colum L Rev* 1145.

78 See H O Hunter, *Modern Law of Contracts: Breach and Remedies*, 1986, § 7.02[4].

79 Hudec, 'Restating the Reliance Interest', (1982) 67 *Cornell L Rev* 704 at 705.

80 The case was *Sullivan v O'Connor*, 363 Mass 579; 296 NE 2d 183 (1973) discussed in Danzig, *The Capability Problem in Contract Law*, 1978, pp 5–43. Although *Sullivan* appears to be a medical malpractice case, it was really one for breach of warranty. The 'nose job' that the defendant surgeon performed on plaintiff did not turn out as wel as she expected or as he had warranted. For a somewhat similar case see *Hawkins v McGee* 84 NH 114, 146 A 641 (1929) (doctor said that operation on boy's crabbed hand would make it a '100 per cent good hand', but operation was less than perfect; held, breach of an express warranty).

some externality[81] rather than from a deliberate act of one of the parties. Furthermore, to the extent that restitutionary principles have been applied in frustrated contract cases, it has been more to restore something like a pre-payment than to provide a recovery on a quantum meruit.[82]

81 Determining what is an acceptable 'externality' that justifies the frustration defense is itself a matter of some difficulty as shown by the American cases on commercial impracticability under, § 2-615 of the UCC. See generally, *Anderson on the Uniform Commercial Code*, 1983, Vol 4I, § 2-615; 3 *Hawkland UCC Series*, 1982, § 2-615.

82 See generally, Goff and Jones *The Law of Restitution*, 3rd ed, 1986, pp 484-504.