

Better than Fuller: A Two Interests Model of Remedies for Breach of Contract

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The attempt to combine the contractual interests properly so-called with the restitution interest in the Fuller and Purdue three interests model of remedies for breach of contract is ineradicably incoherent. Stimulated by reflection on contemporary restitution doctrine's understanding of the quasi-contractual remedies of recovery and *quantum meruit*, this paper argues that the complete elimination from the law of contract of the restitution interest, which incorporates those remedies into the three interests model, would improve both the coherence of the model of contractual interests and the substantive law of remedies for breach.

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## **INTRODUCTION**

In the Preface to his *Three Plays for Puritans* written in 1900, George Bernard Shaw asked whether it was now possible to write plays which were 'better than

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Shakespeare?’<sup>1</sup> Those who have some knowledge of Shaw will be more surprised, as he himself ironically claimed they would be, that he did not simply profess to write better plays than Shakespeare than that he ever raised the question whether it was possible to do so. I would neither claim nor wish to have the confidence which more than shaded into arrogance that was central to Shaw’s beguiling but exasperating character, wonderful creative writing, and in some respects authoritarian politics, but it does fall to my lot to summon the confidence to ask a question similar to Shaw’s. In my case, the question is: better than Fuller?

For if no field of discourse other than the monotheistic religions remains dominated by a single figure to remotely the same degree as Shakespeare dominates what Harold Bloom has called ‘the western canon’,<sup>2</sup> it remains the case that the understanding of the common law of remedies for breach of contract remains dominated by the figure of Lon Fuller. Over the forty years since what has become the argument for partial disgorgement of gains was put forward in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*,<sup>3</sup> the English law of remedies has undergone fundamental questioning. If, in light of this, we now seek to markedly improve upon that law, we can do so only if we ask if it is possible to go beyond Fuller; to be better than Fuller.

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<sup>1</sup> G.B. Shaw, *Three Plays for Puritans* (Harmondsworth: Penguin Books, 1946) 29. I have quoted Shakespeare’s name as Shaw gave it, in line with his attempt to rationalise the English language which was, in my opinion, wholly symptomatic of what is objectionable in his politics.

<sup>2</sup> H. Bloom, *The Western Canon* (New York NY: Harcourt Brace, 1994).

<sup>3</sup> [1974] 1 WLR 798 (Ch D). Though it is now largely a matter of legal history, the development of the *Wrotham Park* remedy is set out in D. Campbell and D. Harris, ‘In Defence of Breach: A Critique of Restitution and the Performance Interest’ (2002) 22 *Legal Studies* 208.

The basic architecture of Fuller's conception of remedies is, of course, the three interests model set out in his 1936-37 paper written with his then student William Perdue Jr on 'The Reliance Interest in Contract Damages'.<sup>4</sup> Though my own understanding of remedies remains based on Fuller and Perdue's thinking,<sup>5</sup> it will be argued that the three interests model fails to coherently combine the contractual interests proper, expectation and reliance, with the restitution interest, and that this can be remedied only by the complete elimination of the restitution interest from the law of contract to leave a two interests model of remedies for breach of contract. This two interests model has the attraction that it brings an essential coherence to Fuller's architecture. However, it is put forward, not in pursuit of coherence in itself, but because this coherence has the practical result of improving the remedies for breach by placing them on a purely contractual basis.

### **SOME LOGICAL PROBLEMS WITH THE THREE INTERESTS MODEL**

By focusing on the inadequacy of the relationship of the expectation and reliance interests to the restitution interest, I would not wish to be thought to believe that the three interests model has no other inadequacies. A now enormous literature testifies to the fact that it certainly does, though, of course, to some extent this simply reflects the significance the model rightly has assumed. No doubt the way it has perpetuated a confusion between 'reliance' as a doctrine of liability and 'reliance' as one part of the

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<sup>4</sup> L.L. Fuller and W.R. Perdue Jr, 'The Reliance Interest in Contract Damages' (1936) 46(1) *Yale Law Journal* 52 and (1937) 46(3) *Yale Law Journal* 373.

<sup>5</sup> D. Harris et al, *Remedies in Contract and Tort* (Cambridge: Cambridge University Press, 2nd edn, 2005) 6.

doctrine of remedies is the most important of these.<sup>6</sup> But within the doctrine of remedies itself, it has been incontrovertibly argued that Fuller and Perdue's understanding of the reliance interest, particularly of its relationship to the expectation interest, also is inadequate.<sup>7</sup> As it cannot be argued here, it will merely be claimed that this inadequacy can be overcome, and must be overcome. Though in my conception of the contractual interests the expectation interest is markedly dominant in a way that cuts against the 'scale of enforceability'<sup>8</sup> which Fuller and Perdue themselves put forward, essentially their concepts of expectation and reliance are necessary to our understanding of the contractual interests properly so-called.

The inadequacies which attend the restitution interest, which, to state the obvious, is not a contractual interest properly so-called, cannot be overcome. These specific inadequacies arise from a fundamental logical inconsistency intrinsic to the attempt to combine the contractual interests properly so-called with the restitution interest, the radically different jurisprudential foundation of which has always made it a most uncomfortable, quasi-contractual, graft onto the law of remedies for breach of contract. Now, Lon Fuller was highly respectful of that aspect of the wisdom of the common law that has as its leading expression Holmes' famous claim that 'the life of

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<sup>6</sup> This is the basis of Atiyah's difficulties with the 'pure expectation' award of damages: P.S. Atiyah, 'Contracts, Promises and the Law of Obligations' in *Essays on Contract* (Oxford: Clarendon Press, rev edn, 1990) 33-34.

<sup>7</sup> eg in the US R. Craswell, 'Against Fuller and Perdue' (2000) 67 *University of Chicago Law Review* 99 and in the Commonwealth D. McLaughlan, 'Reliance Damages for Breach of Contract' [2007] *New Zealand Law Review* 417. Professor McLaughlan regards the reliance interest as 'redundant': D. McLaughlan, 'The Redundant Reliance Interest in Contract Damages' (2011) 127 *Law Quarterly Review* 23.

<sup>8</sup> L.L. Fuller, 'To K.N. Llewellyn, 8 December 1938' in R.S. Summers, *Lon L. Fuller* (London: Edward Arnold, 1984) 133.

the law has not been logic: it has been experience'.<sup>9</sup> In his essentially realistic conception of the issues, Fuller conceived of law as one of the foundations of the 'workable social arrangements' which he proposed to examine in a new science of 'economics'.<sup>10</sup> He was not much disturbed when legal categories were not neat, either in general or in his three interests model, and indeed he and Perdue insisted upon the overlapping character of the interests, particularly in respect of the issues addressed here.<sup>11</sup> Strongly influenced by Fuller's attitude towards adjudication in contract and in legal philosophy generally,<sup>12</sup> I have previously perceived, but not balked at accepting, the overlap and inconsistency that is implicit in including the remedies discussed in this paper within the three interests model.<sup>13</sup> But I have come to believe that it is both necessary and, what is more, readily possible (in fact the law has already effectively done it) to eliminate the restitution interest from the model of contractual interests, leaving a two interest, expectation and reliance model which is a potentially coherent conceptual foundation for remedies for breach of contract.

This conclusion has been reached by reflection on the implications of what I have called the 'very expensive mischief' caused by the procession through the law of

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<sup>9</sup> O.W. Holmes, *The Common Law* (Boston MA: Little Brown and Co, 1881) 1. Holmes had coined this phrase a year earlier in an overall disapproving review of Langdell's casebook: Anon, 'Book Notices' (1880) 14 *American Law Review* 233, 234.

<sup>10</sup> L.L. Fuller, 'American Legal Philosophy at Mid-century: Review of E.W. Paterson, *Jurisprudence*' (1954) 6 *Journal of Legal Education* 457, 477.

<sup>11</sup> See n 41 and accompanying text below.

<sup>12</sup> As was the contract theorist who I regard as the successor in significance to Fuller, Ian Macneil: I.R. Macneil, 'Lon Fuller: Nexusist' (1981) 26 *American Journal of Jurisprudence* 219.

<sup>13</sup> See nn 56, 104 and 130 and accompanying text below.

contract of the ‘restitutionary juggernaut’,<sup>14</sup> by which I meant the doctrinally imperialist development of a civil law of obligations originally stated in terms of restitution by Professor Birks,<sup>15</sup> building on what had been achieved by Lord Goff and Professor Jones.<sup>16</sup> The gain-based damages which it is still, albeit perhaps with diminished enthusiasm, being argued should be extended to simple contract on the authority of *AG v Blake (Jonathan Cape Ltd Third Party)*,<sup>17</sup> seek to effect partial or total disgorgement of the gains the defendant obtains through breach. Such damages are, of course, radically different to expectation-based damages, for whereas expectation-based damages seek to compensate the claimant and are quantified by reference to the claimant’s loss, gain-based damages seek to correct the unjust enrichment of the defendant and are quantified by reference to the defendant’s gain. In a body of work reaching back to 1999,<sup>18</sup> I have argued that the extension of these damages to simple contract is extremely ill-advised,<sup>19</sup> and it will here simply be

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<sup>14</sup> D. Campbell, ‘Classification and the Crisis of the Common Law: Review of P. Birks (ed), *The Classification of Obligations*’ (1999) 26 *Journal of Law and Society* 369, 377 and D. Campbell, ‘The Treatment of *Teacher v Calder* in *AG v Blake*’ (2002) 65 *Modern Law Review* 256, 258.

<sup>15</sup> P. Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, rev edn, 1989). The original edition was published in 1985. The basic argument discussed here had been set out in P. Birks, ‘Restitution and Wrongs’ [1982] *Current Legal Problems* 53.

<sup>16</sup> R. Goff and G. Jones, *The Law of Restitution* (London: Sweet and Maxwell, 7th edn, 2007). The first edition was published in 1966. The current edition under the editorship of Professor Charles Mitchell, Professor Paul Mitchell and Dr Watterson so reflects the shift to a doctrine of unjust enrichment as to be quite a different book: C. Mitchell et al, *Goff and Jones on Unjust Enrichment* (London: Sweet and Maxwell, 8th edn, 2010).

<sup>17</sup> [1998] Ch 439 (CA) and [2001] 1 AC 268 (HL).

<sup>18</sup> The latest statement is D. Campbell, ‘A Relational Critique of the *Restatement (Third) of Restitution* § 39’ (2011) 68 *Washington and Lee Law Review* 1063, 1065-66, 1092-3. There are references in this article to some of the previous work.

<sup>19</sup> In a recent number of this journal, Dr Winterton has described Campbell and



assumed that gain-based damages should not be so extended.

A comment by an anonymous reviewer of this paper leads me at this point to enter a clarification. My longstanding criticisms of the extension of gain-based remedies to simple contract have been of making those remedies (part of) the default rule of remedies for breach, which is so inimical to the function of contract that it would be impossible unless those damages are made mandatory, for otherwise commercial parties would constantly oust the gain-based remedy.<sup>20</sup> But in principle I have no objection to the parties making a bespoke stipulation for restitution, account of profits, disgorgement, unjust enrichment or whatever as the remedy for breach of their contract. The *Wrotham Park* ‘lost opportunity to bargain’ problem arises from parties’ failure to do exactly this.<sup>21</sup> I have in general repeatedly criticised the parties to complex contracts for failing to make necessary provision for bespoke remedies when the contract they are trying to make requires them to do so.<sup>22</sup> A great deal of the confusion from which this area of the law now suffers stems from an attempt to give remedies to parties who have not themselves secured contractual agreement to those remedies, when the correct contractual response to this should be to enforce what they

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Harris, n 3 above, as the locus of ‘fierce resistance’ to the argument for gain-based damages: D. Winterton, ‘Contract Theory and Gain-based Recovery: A Review of K. Barnett, *Accounting for Profit for Breach of Contract*’ (2013) 76 *Modern Law Review* 1129. The fullest statement of the underlying argument about the nature and function of breach is D. Campbell, ‘The Relational Constitution of Remedy: Co-operation as the Implicit Second Principle of Remedies for Breach of Contract’ (2005) 11 *Texas Wesleyan Law Review* 455.

<sup>20</sup> Campbell, n 18 above, 1109-14.

<sup>21</sup> *ibid*, 1114-26.

<sup>22</sup> D. Campbell, ‘What Do We Mean By the Non-use of Contract?’ in J. Braucher et al (eds), *Revisiting the Contracts Scholarship of Stewart Macaulay: On the Empirical and the Lyrical* (Oxford: Hart, 2013) 182-83.

have agreed.<sup>23</sup> As it happens, I believe that the argument of this paper would lead parties never to frame their remedies in quasi-contractual terms, but if they did so frame them, in principle I could have no objection to this.<sup>24</sup> My objection, or rather advice to those parties, would be that this framing would not work well.

But, except in a restricted sense which will emerge, gain-based damages are not the subject of this paper. Such damages need not, of course, hinge on situations in which the gain is the result of breach of contract, and, indeed, in Birks' extremely influential formulations they came to be part of an argument for a law of unjust enrichment encompassing the entire law of obligations, into which contract would be subsumed. Largely because it was only a part of Birks' enormous ambition, the attempt to expand the availability of gain-based damages for breach has become so convoluted that the simplicity of the original argument for this extension, which was the belief that breach is a legal and moral wrong, has become rather obscured.<sup>25</sup> But within contract the argument for such damages initially claimed the purchase of being an extension of two remedies the availability and the restitutionary nature of which were both regarded as uncontroversial.<sup>26</sup> These were the quasi-contractual action for

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<sup>23</sup> For a detailed examination of an exaggerated but nevertheless illustrative example see D. Campbell, 'The Extinguishing of Contract' (2004) 67 *Modern Law Review* 817.

<sup>24</sup> On the correct attitude the courts should generally adopt towards commercial parties' stipulation of their remedies see S. Rowan, *Remedies for Breach of Contract* (Oxford: Oxford University Press, 2012) ch 5

<sup>25</sup> Campbell, n 18 above, 1090-91.

<sup>26</sup> Goff and Jones, n 16 above, paras 20.007-20.023 and S.J. Stoljar, *The Law of Quasi-contract* (Sydney: Law Book Company, 2nd edn, 1989) ch 8. Dr Swain has brought it to my attention that recent legal historical research raises a question mark against even this claim to an absence of controversy: W. Swain, 'Unjust Enrichment and the Role of Legal History in England and Australia' (2013) 36 *University of New South Wales Law Journal* 1030.

monies had and received following a total failure of consideration<sup>27</sup> and the action for a *quantum meruit* for goods delivered or services rendered without payment.<sup>28</sup>

These remedies have a jurisprudential foundation in correction of unjust enrichment, but it must be added that in their specific case that foundation is, in the pellucid terms of Birks' early analysis of the issues, the restitution of 'subtraction', because the unjust enrichment of the defendant is 'at the expense of' the claimant, being the result of an illegitimate conveyance of a valuable benefit from the latter to the former.<sup>29</sup> Birks' introduction of the category of restitution of wrongs led to the emergence of a very expansive concept of gain-based damages (or disgorgement, or unjust enrichment, etc) because its whole point is that it extends restitution after breach of contract, originally based on subtraction, beyond subtraction.<sup>30</sup> Restitution for wrongs is directed at the correction of the abstract wrong of breach, regardless of whether the claimant suffers a loss by subtraction. This can cover the case where the defendant breaches to maximise gain, the case normally called efficient breach. But it also covers the normal case of breach in which the defendant (with varying degrees of self-consciousness)<sup>31</sup> seeks to make a saving by breaching and paying damages rather than continuing with performance. Disastrously for the argument for gain-based

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<sup>27</sup> *Hudson v Robinson* (1816) 4 M and S 475, 478 per Lord Ellenborough CJ: 'An action for money had and received is maintainable wherever the money of one man has, without consideration, gone into the pocket of another'.

<sup>28</sup> *De Bernardy v Harding* (1853) 8 Exch 822, 824 per Alderson B: 'Where one party has absolutely refused to perform, or has rendered himself incapable of performing, his part of the contract, he puts it in the power of the other party to sue for a breach of it, or to rescind the contract and sue on a *quantum meruit* for the work actually done'. I ignore as obsolete the various sub-divisions of these remedies which contract students of my now venerable generation were perhaps the last to have to study.

<sup>29</sup> Birks, *An Introduction to the Law of Restitution*, n 15 above, 23-24.

<sup>30</sup> Campbell, n 18 above, 1082-83.

<sup>31</sup> *ibid*, 1103.

damages, as it is impossible to prevent treating savings as negative gains, the savings that underlie the normal breach of contract therefore fall foul of restitution for wrongs,<sup>32</sup> with the consequence that the extension of restitution for breach of contract from restitution of subtraction to restitution for wrongs is completely inimical to the law of contract.<sup>33</sup>

In the most valuable remarks on contract he ever made, Birks powerfully criticised the incoherence of the concept of ‘quasi-contract’<sup>34</sup> and wished to expunge it from his revised law of obligations.<sup>35</sup> In his earlier analysis, having contrasted restitution of subtraction to restitution of wrongs, Birks went on to seek to subsume restitution of the former under the latter. This was logically possible, though it was bound to and did (with other causes) lead to the abandonment of a jurisprudence of restitution for a jurisprudence of gain-based damages as, absent subtraction, it is impossible to see of what valuable benefit *restitution* is being made.<sup>36</sup> The initially brilliantly clear restatement of the quasi-contractual remedies as restitution of subtraction has therefore now transmogrified into a somewhat less impressive attempt to generally reconceive those remedies as part of a general law of unjust enrichment. Except insofar as the argument of this paper makes it unavoidable, nothing more will be said about an issue on which I have previously commented at length.

But though I have previously accepted the need for restitution of subtraction,

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<sup>32</sup> *ibid*, 1107-09.

<sup>33</sup> *ibid*, 1093-1106.

<sup>34</sup> Birks, *An Introduction to the Law of Restitution*, n 15 above, 22: ‘If cuckoos had to be quasi-thrushes or constructive blackbirds, we should know less about them’. This analysis survived the restarts Birks later made: P. Birks, *Unjust Enrichment* (Oxford: Clarendon Press, 2003) 233; (2nd edn, 2005) 271.

<sup>35</sup> Birks, *An Introduction to the Law of Restitution*, n 15 above, 29-39.

<sup>36</sup> Campbell, n 18 above, 1079-93.

and so have accepted the need for (reformed versions of) the quasi-contractual remedies, my reading of the treatment of the leading cases on recovery and *quantum meruit* by those advocating a law of unjust enrichment has now led me to believe that the law of contract actually requires no restitutionary remedy at all. I have arrived at my conclusion by criticism of the restitutionary juggernaut and this paper is a statement of that criticism. However, the full significance of this conclusion lies in what it leads us to think of the restitutionary interest essentially as described by Fuller and Perdue as an intended complement to the contractual interests. I now believe that criticism of restitution of wrongs leads on to criticism of restitution of subtraction, and therefore of the restitution interest composed of the quasi-contractual remedies thought to effect restitution of subtraction. Our understanding of the law of contract would be markedly improved if the three interests model were restated as a two interests model, with the restitutionary interest, ie the quasi-contractual remedies, eliminated from the law of contract.

This two interest model provides a framework for conceptualising remedies which is overall superior to that which is implicit in the views of scholars such as Professors Dietrich, Hedley, Jackman and MacInnes who have identified many of the contractual shortcomings of the restitutionary juggernaut, on whose work I have borrowed heavily but of whom I am able to discuss only Professor Jaffey at anything like appropriate length. Against a background of the projected subsumption of the law of contract into a general law of obligations having lost something of its impetus, Dr Priel has recently interestingly argued that that subsumption would have caused the loss of a valuable category of remedies which it is useful to describe as quasi-contractual, and sought a further refinement of the jurisprudence of unjust enrichment

in order to preserve a sense of the (quasi-) contractual.<sup>37</sup> I am in sympathy with Priel's aim, but I believe that what is required is just the opposite of his proposal: the elimination of quasi-contract to leave the remedies for breach of contract on purely contractual terms.

## RECOVERY OF MONIES HAD AND RECEIVED

### Recovery and *quantum meruit* distinguished

Despite recovery and *quantum meruit* sharing a jurisprudential foundation in restitution of subtraction, the English case law strongly distinguishes the two actions,<sup>38</sup> and is right to do so. Because of the different natures of the valuable benefits addressed, recovery and *quantum meruit* work in ways the differences between which are not sufficiently captured by describing those differences as merely problems of, as it were, measurement.<sup>39</sup> Subject to possible considerations of interest and inflation which can be ignored here, a payment of money conveys, of course, the valuable benefit of just that sum of money. The description of the action as recovery is particularly apposite in this sense, for the same sum is simply recovered. Of its nature, therefore, recovery is a practically simple action involving a liquidated sum, analogous in this sense to debt.<sup>40</sup>

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<sup>37</sup> D. Priel, 'In Defence of Quasi-contract' (2012) 75 *Modern Law Review* 54.

<sup>38</sup> Birks, *An Introduction to the Law of Restitution*, n 15 above, 109.

<sup>39</sup> *Restatement (Second) Contracts* § 371 comment a.

<sup>40</sup> As it happens, the attempt to identify the grounds of recovery in *Atkin's Court Forms*, vol 12(2) paras 62-9 retains a number of antique or absurd distinctions which give rise to extreme doctrinal difficulties, but the nature of the remedy sought is simple. Recovery is described as quasi-contract *tout court* and completely distinguished from *quantum meruit*, which is separately dealt with under para 49, which takes a similar approach.

However, the nature of *quantum meruit* is quite different. Some work of independent quantification is always required to express the valuable benefit conveyed in *quantum meruit* in terms of a sum of money, and this quantification may be very difficult. But, as I shall argue, this difficulty is greatly exacerbated by regarding the task as of a restitutionary rather than a contractual nature.

First, however, recovery.

### **Recovery as reliance**

On the basis of the distinction between recovery and *quantum meruit* just set out, the first thing that strikes one about the former is that it should be completely redundant in terms of Fuller and Perdue's three interests model.<sup>41</sup> The money paid by the claimant conveys an identical valuable benefit to the defendant and so restitution is made by a payment by the defendant identical to the payment by the claimant. As the money payment by the claimant constitutes a reliance expenditure and so generates a reliance interest, and as the payment by the claimant is identical to the valuable benefit, this means that the reliance interest and the restitution interest in actions for monies had and received are identical. In the interests of theoretical economy, then, it would appear that the action for monies had and received could be eliminated and replaced with a contractual claim in reliance to identical effect. Of course, if the claimant wishes to claim any element of expectation in addition to reliance, it will

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<sup>41</sup> eg Fuller and Perdue, n 4 above, 71: 'The reliance interest is ... generally broad enough to cover all the cases coming under the restitution interest'. In terms of the general doctrinal argument 'that the claim arising on total failure of consideration' can be reconceptualised in terms of reliance, I have nothing to add to P. Jaffey, *The Nature and Scope of Restitution* (Oxford: Hart, 2000) 56-61.

claim in contract.

The elimination of recovery as redundant would yield the very substantial benefit of effectively abolishing one of the most muddled and unhelpful rules in the law of contract, the rule that failure of consideration must be total in order to generate the right for the claimant to elect recovery. The absurdities and injustices which this rule is widely acknowledged to generate will not be discussed.<sup>42</sup> They have led to a situation where the rule is so hedged about that, as Treitel has it, it ‘is now much qualified’,<sup>43</sup> or, as I would put it, is now lost in its exceptions. However, the acknowledged case for abolition of the rule has foundered,<sup>44</sup> and the most telling reason for this is that such abolition would require co-ordinated reform of the whole law of restitution of subtraction. It is, of course, particularly inconsistent (if particularly welcome) that it is settled that the total failure rule should not apply to a *quantum meruit*.<sup>45</sup> Incredibly to me,<sup>46</sup> many advocates of basing the entire law of obligations on unjust enrichment are currently seeking to put failure of consideration

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<sup>42</sup> eg Law Commission, *Law of Contract: Pecuniary Restitution on Breach of Contract* [1975] EWLC C65, pt 3.

<sup>43</sup> E. Peel, *Treitel’s Law of Contract* (London: Sweet and Maxwell, 13th edn, 2011) 1134. *Dawood v Heath* is cited at 1133 n 18 as an example of partial recovery allowed because apportionment ‘is in fact easy’.

<sup>44</sup> Law Commission and Scottish Law Commission, *Sale and Supply of Goods* [1987] EWLC 180, paras 6.1-6.5.

<sup>45</sup> Birks, *An Introduction to the Law of Restitution*, n 15 above, 226-234.

<sup>46</sup> And, much more significantly, incredibly to Professor Kull, the Reporter for *Restatement (Third) Restitution and Unjust Enrichment*: A. Kull, ‘A Consideration Which Happens to Fail’ (forthcoming 2015) 51 *Osgoode Hall Law Journal*. I am grateful to Professor Kull for showing me this paper in draft. Kull has never shared the designs on the whole of the law of obligations pursued by the leading Commonwealth advocates of unjust enrichment: A. Kull, ‘Rationalising Restitution’ (1995) 83 *California Law Review* 1191 and A. Kull, ‘Disgorgement for Breach, the ‘Restitution Interest’ and the *Restatement of Contracts*’ (2001) 79 *Texas Law Review* 2021. See further J. Dietrich, ‘The Third Restatement of Restitution, the Role of Unjust Enrichment and Australian Law’ (2011) 35 *Australian Bar Review* 160.



at the heart of their enterprise.<sup>47</sup> This will be put to one side.<sup>48</sup> The argument here is that simply eliminating the quasi-contractual remedies from the law of contract is a clearly superior alternative for those whose interest is in the smooth working of the law of contract.

### **Recovery as restitution**

It follows from what has just been said that it is logically essential for any argument for the retention of recovery to show that it can sometimes yield a valuably different result to an action based on reliance. The only occasion on which this can be argued to take place that raises an issue of real interest is that which Professor Burrows calls ‘escape from a bad bargain’,<sup>49</sup> when the claimant may obtain substantial damages in restitution ‘even though its expectation (or reliance) damages ... would be nil’.<sup>50</sup>

Burrows’ principal illustration of this argument is a 1961 sale of goods case heard by McNair J in the Commercial Court: *Dawood (Ebrahim) Ltd v Heath (Est 1927)*.<sup>51</sup> The

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<sup>47</sup> A. Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford: Oxford University Press, 2013) para 15(1). See further A. Burrows, ‘Is There a Defence of Good Consideration’ in C. Mitchell and W. Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment* (Oxford: Hart, 2013); F. Wilmot-Smith, ‘§ 38 and the Lost Doctrine of Failure of Consideration’ in Mitchell and Swadling (eds), *loc cit*; A. Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd edn, 2011) chs 14-15 and C. Mitchell et al, n 16 above, paras 12.10-12.31.

<sup>48</sup> Jaffey has made the essential criticisms in a recent note in this journal on *Benedetti v Sawiris* [2013] UKSC 50: P Jaffey, ‘Unjust Enrichment and Contract’ (2014) 77 *Modern Law Review* 983. I am grateful to Professor Jaffey for showing me this casenote in draft.

<sup>49</sup> Burrows, *The Law of Restitution*, n 47 above, 344-5. I put to one side, for reasons of space without argument, Burrows’ claim that there are three other possible advantages of recovery: *ibid*, 345-346.

<sup>50</sup> *ibid*, 344.

<sup>51</sup> [1961] 2 Lloyd’s Rep 512 (Comm Ct). The reported case consolidated two actions

best way to understand this escape from a bad bargain situation is to turn immediately to the case.

In *Dawood v Heath*, the claimant contracted to buy 44.2 tons of galvanised steel sheets at a rate of £73.10s (£73.50p)/ton, giving a contract price of £3248.14s (£3248.70p). The claimant successfully argued that the contract stipulated delivery of equal tonnages of sheets of five different lengths of 6, 7, 8, 9 and 10 ft, but that the entire delivery was of 6 ft lengths only.<sup>52</sup> The now repealed<sup>53</sup> section 30(3) of Sale of Goods Act 1893<sup>54</sup> provided that:

Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description which are not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

Under this provision, the claimant was able to accept the 8.84 tons (20%) of the delivery which it claimed fulfilled its requirement for sheets of that length and reject 35.36 tons (80%) on the ground that they were not in correspondence with the stipulated sizes and so goods of a different description to those included in the contract. This involved a successful argument that this was a breach of condition allowing rejection to which I shall return.

Given its successful rejection of part of the delivery, then, if the practical possibility of the seller ‘curing’ by redelivery of the rejected part did not arise or was

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arising from two different contracts between overlapping claimants and the same defendant. A third party was involved, but, though served, did not appear in the proceedings. The precise facts are clouded by these complexities, but I shall treat the claimants as one, ignore the third party, and silently simplify the complexities.

<sup>52</sup> *ibid*, 520 col 1.

<sup>53</sup> section 30(3) was re-enacted as section 30(4) of The Sale of Goods Act 1979 (c 54) and section 30(4) was repealed by the Sale and Supply of Goods Act 1994 (c 35), s 3(3).

<sup>54</sup> 56 and 57 Vict (c 71), hereinafter SoGA.

not acceptable to the buyer,<sup>55</sup> the buyer's natural remedy would be to obtain substitute sheets and, if necessary, claim market damages under section 51 of SoGA. But a subsidiary fact that makes this case of interest here was that this was a falling market and the market price was £70/ton, so, given that the contract rate was £73.10s (£73.50p)/ton, a market damages claim could not arise. The claimant not only would have suffered no loss but would be able to buy the substitute sheets for (£70/ton x 35.36 tons =) £2475 4s (£2475 20p), which would be £123.15s 2d (£123.76p) less than the aliquot contract price of (£73.10s (£73.50p)/ton x 35.36 tons =) £2598.19s.2d (£2598.96).

The principal fact that makes *Dawood v Heath* of interest to us is that the claimant had paid for the sheets in advance. This takes the claimant's possible expectation claim out of the *prima facie* measure of market damages under section 51(3), the difference between the contract price and the market price, for, having already paid the contract price, the claimant would not want to be confined to just the difference but would want compensation of payment of the entire market price. This complication, which arises from the shorthand way in which the claimant is combining expectation and reliance damages, poses no real problem for Fuller and Perdue's model and can be put to one side. But the payment in advance gives rise to a problem which cannot be dealt with in this way.

For, having already received the payment, the defendant obviously could pay the market damages out of that payment and retain the £123.15s 2d (£123.76p)

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<sup>55</sup> Though the English law of sales knows no formal remedy of cure, this is remedy (i)(b)(i) (with possible damages under (i)(a)(iii)) identified in E. McKendrick, *Goode on Commercial Law* (London: Penguin Books, 4th edn, 2010) 397.

difference. It must be stressed that this *is* the correct outcome on the basis of expectation damages. After performance, the claimant expected to have paid £3248.14s (£3248.70p) for 44.2 tons of steel sheets. Ignoring any incidental damages, the claimant will have had to pay an additional £2475 4s (£2475 20p) for substitute sheets bought at the prevailing market price of £70/ton. Damages quantified at £70/ton would cancel out the £2475 4s (£2475 20p) and so put the claimant in the position it would have been in had the contract had been performed. Market damages calculated at the contract rate of £70.10s (£70.50p) would put the claimant in a £123.15s 2d (£123.76p) better position than it would have been in had the contract been performed. But by correctly not doing this, an expectation award leaves the £123.15s 2d (£123.76p) in the hands of the defendant.

This outcome is what Burrows means by a bad bargain and it obviously runs against a wish to correct unjust enrichment. Whilst it is in the end unacceptable that two different rules yielding two different outcomes may be applied to the same set of facts, on this occasion the quantification of damages on a restitutionary basis seems to solve the problem in *Dawood v Heath*.<sup>56</sup> This problem was described, in terms of payment per ton, by McNair J thus:

The next point is whether the plaintiff's right to recover the money which they have paid in advance ... stands as a claim to recover the money as money paid ... for a consideration which has wholly failed. The contrary view is that the remedy only stands in damages, so that if ... the market price at the time of delivery conformed to £70 against the contract price of £73 10s, there would be recovered on this argument £70/ton and not £73 10s [£73.50p]/ton, leaving a profit of £3.10s [£3.50p] in the pockets of the seller.<sup>57</sup>

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<sup>56</sup> On my own former acceptance of this argument see Harris et al, n 5 above, 233-35.

<sup>57</sup> *Dawood v Heath*, n 51 above, 518 col 2.

And, of course, given this choice, the restitutionary remedy should be chosen:

The buyer's right to recover that part of the purchase price which relates to the goods so properly rejected is clearly ... the right to recover money for a consideration which has wholly failed and which, accordingly must be regarded as money paid to the buyer's use.<sup>58</sup>

Though it is not mentioned in the case, the possibility of displacing the *prima facie* rule under section 51(3) and awarding recovery is explicitly provided for under section 54: 'Nothing in this Act shall affect the right of the buyer ... to recover money paid where the consideration for the payment of it has failed'. But, despite this, the choice between expectation and restitution was not, with respect, open to McNair J. The merely partial rejection meant that *Dawood v Heath* should not have been able to be regarded as a recovery case because there was part performance, ie there was no total failure of consideration, and 'has failed' under section 54 should have been read accordingly. In order to read 'has failed' as 'has failed totally in respect of part of the delivery', as he did in the passage just quoted, McNair J relied on the authority of a number of sale of goods interpretations of section 30(1) of SoGA which he extended to section 30(3), and he did not discuss the problem posed by the general principle.

*Dawood v Heath* has accordingly taken its place amongst the plethora of exceptions to the total failure rule which constitute what should simply be called 'the sale of goods exceptions'. No doubt this status was conveyed by its being cited as authority for the breach of section 30(3) leading to recovery under section 54 in *Chalmers' Sale of Goods*.<sup>59</sup> In one of the leading contemporary authorities on sales, it

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<sup>58</sup> *ibid*, 519 col 2 - 520 col 1.

<sup>59</sup> This was not stated in the 14th edn of 1963 but in M. Mark, *Chalmers' Sale of Goods* (London: Butterworths, 15th edn, 1967) 119 n (o) (now M. Mark, *Chalmers' Sale of Goods* (London: Butterworths, 18th edn, 1981) 183 n (h)). Without entering

is now cited as authority for the proposition that ‘in the event of breach of [section 30 of the Sale of Goods Act 1979], the buyer is entitled to recover a proportionate part of what he has paid as on a total failure of consideration, notwithstanding that he may have accepted and retained a part of the goods’.<sup>60</sup> Such a recognition of sale of goods as an exception to the general rule is a brazen acceptance of what ultimately is logically unacceptable. *Burrows* is in one sense even more brazen, but it is a brazenness that has the advantage of clearly expressing a truth. Taking a line also taken by Birks,<sup>61</sup> *Burrows* simply uses *Dawood v Heath* as one of many illustrations that the law in general actually is that recovery is available for partial failure of consideration,<sup>62</sup> a position which he then goes on to argue is correct in principle.<sup>63</sup> I will just put all this to one side. If the argument here is accepted, this problem simply disappears from the law of contract.

Having admitted the plausibility of *Burrows*’ escape from a bad bargain justification for recovery on facts like those in *Dawood v Heath*, which seem to amount to a justification of recognising the restitution interest, it will now be argued

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into the detail of section 30, *Dawood v Heath* was unproblematically cited as one of the authorities for recovery in the case of a short delivery in Law Commission, n 42 above, para 51.

<sup>60</sup> J.N. Adams and H. MacQueen, *Atiyah’s Sale of Goods* (Harlow: Longmans, 12th edn, 2010) 137.

<sup>61</sup> McNair J’s argument had been essentially reproduced in P. Birks, ‘Failure of Consideration’ in F.D. Rose (ed), *Consensus ad Idem* (London: Sweet and Maxwell, 1996) 187.

<sup>62</sup> *Burrows*, *The Law of Restitution*, n 47 above, 325 n 42. *Burrows*, *ibid*, 325, 344 n 21 draws attention to *DO Ferguson and Associates v Sohl* (1992) 62 BLR 95 (CA) as a case which is similar to *Dawood v Heath*. But, with respect and without argument, I will simply state that this is not so in one most important respect. For whereas the outcome in *Dawood v Heath* is correct once one accepts the way it was pleaded, which is why the case is so interesting, *Ferguson* is simply wrongly decided.

<sup>63</sup> *Burrows*, *The Law of Restitution*, n 47 above, 342-344.

that that justification has no actual substance.

### **The effectiveness of recovery as way of avoiding a bad bargain**

The key to understanding *Dawood v Heath* is to recognise, as Burrows recognises, that it involves a ‘scenario [which] will be rare’.<sup>64</sup> In fact it is more than rare. It is of only vanishingly small importance. It involves a problem which in their seminal paper on mitigation Goetz and Scott described as arising from a ‘double lightning bolt’, though the precise law involved is different from that which they discussed.<sup>65</sup> There is only one English authority clearly to the same effect as *Dawood v Heath*:<sup>66</sup> *Wilkinson v Lloyd*, an 1845 purchase of shares case.<sup>67</sup> In the US, *Bush v Canfield*,<sup>68</sup> an 1818 sales case analogous to *Dawood v Heath*,<sup>69</sup> plays a larger role in the understanding of the US law than does *Dawood v Heath* in understanding the English, and it is one of two cases<sup>70</sup> on which the illustration<sup>71</sup> of recovery (reconceptualised as an instance of rescission) in *Restatement (Third) Restitution and Unjust Enrichment* § 37 is based.

But, in a way which calls *Dawood v Heath* to mind, § 37 describes *Bush v Canfield* as

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<sup>64</sup> *ibid*, 344.

<sup>65</sup> C.J. Goetz and R.E. Scott, ‘The Mitigation Principle: Toward a General Theory of Contractual Obligation’ (1983) 69 *Virginia Law Review* 967, 996.

<sup>66</sup> cf n 62 above.

<sup>67</sup> (1845) 7 QB 27. The facts of *Wilkinson v Lloyd* gave rise to effectively identical litigation brought by one Mr Leeman against the same defendant, and *Wilkinson v Lloyd* was treated as deciding this matter as well. *Wilkinson v Lloyd* was mentioned or considered in five nineteenth century cases which add nothing to our discussion, and, save for a brief citation (with *Bush v Canfield*) in *Friends’ Provident Life Office v Hillier Parker May and Rowden* [1997] QB 85, 102 (CA), its subsequent life has been confined to the textbooks.

<sup>68</sup> 2 Conn 485 (1818).

<sup>69</sup> *Bush v Canfield* would now be decided under UCC § 2-711(1), which would do the relevant part of the work of SoGA, s 54.

<sup>70</sup> The other is *Nash v Towne* 72 US 689 (1866).

<sup>71</sup> § 37 illustration 2.

‘rare’ and its result ‘striking’.<sup>72</sup> Why is this the case?

*Dawood v Heath* is and will always be extremely rare because its facts turn on a conjunction of two circumstances each of which is itself rare. First, it involves an advance payment. Payment on any other terms would have meant that the facts of *Dawood v Heath* could not have arisen, and commercial sales are overwhelmingly on terms of payment on delivery or on credit. That this is the case has, of course, nothing to do with our concerns here. But to the vestigial extent that awareness that payment in advance gives rise to the risk of the seller availing itself of *Dawood v Heath*, the buyer will be loath to make such a payment. In essence, such assistance as *Dawood v Heath* affords a claimant can be nullified by a simple payment tactic.

Secondly, the seller breached in a falling market. In a falling market, a seller will be particularly determined to perform as rejection will lead to it having to resell the goods at a market price lower than the original contract price. The seller will be aware that the buyer may take, as it were, the opposite attitude, for if the buyer lawfully rejects the goods, it will be able to buy a substitute at the lower price. Burrows sees this issue.<sup>73</sup> This is, in a sense, the obverse of identifying *Dawood v Heath* as a bad bargain. But Burrows does not, with respect, appreciate its significance. Given the advance payment in *Dawood v Heath*, had the seller realised its own goods would not be in correspondence and that the buyer would likely reject them, the seller could have bought corresponding goods at the lower market price,<sup>74</sup>

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<sup>72</sup> § 37 comment b.

<sup>73</sup> Burrows, *The Law of Restitution*, n 47 above, 344.

<sup>74</sup> That the price was lower is compelling evidence that substitute goods were available. And if, of course, there were no substitute goods, *Dawood v Heath* would very likely have involved a consequential loss and been pleaded as an expectation



delivered them, and kept the £123.15s 2d (£123.76p) difference. As the seller would not have been in breach, recovery would not have been available to the buyer. So, even in the rare case of advance payment, such assistance as *Dawood v Heath* affords a claimant can be further nullified by a simple performance tactic.

In sum, the rule, if this is the right way to put it, in *Dawood v Heath* is of no practical significance and can, it is submitted, be dropped. It can easily be avoided and, save in a vanishingly small number of cases, it is. The paucity of authority shows that it has effectively already been dropped. With it goes the escape from a bad bargain justification for recovery and with this goes this element of quasi-contract in the law of remedies for breach of contract.

### **The consequences of recovery in bad bargain cases**

Though the argument just made disposes of the escape from bad bargain justification of recovery, before leaving recovery it is instructive to ask why, if that argument is accepted, the seller in *Dawood v Heath* did not adopt the suggested tactic of buying and delivering corresponding goods. The answer is that this was a case of what Goetz and Scott, building upon Llewellyn, called a ‘surprise rejection’.<sup>75</sup> The issue of the remedy, though it clearly was to the forefront of McNair J’s thinking (apparently influenced by highly ingenious pleading), was dealt with very briefly. The bulk of his judgment does not address remedy but liability. The parties’ dispute was very predominantly about the description of the goods to be delivered.

We have seen that the claimant buyer successfully argued that the contract

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claim.

<sup>75</sup> Goetz and Scott, n 65 above, 997.

stipulated delivery of equal tonnages of sheets of five different lengths. On this interpretation of the contract, a delivery of sheets entirely of one length was a breach of section 30(3) of SoGA. The defendant seller's unsuccessful argument was that the contract allowed delivery of one length only. Though McNair J firmly resolved the dispute in favour of the claimant buyer – we can recall him referring to 'goods so properly rejected'<sup>76</sup> – I believe that any fair reading of the convoluted negotiations described in the judgment would show that the defendant seller's position had merit, even if it was wrong.<sup>77</sup> There can be no reasonable doubt that, when making the delivery, the seller believed it had discharged its obligations by performance. (This is why the seller did not itself buy and deliver substitute goods). This being the case, it is arguable that the availability of recovery allowed the claimant to react to emerging difficulties in a way which should not be encouraged. This argument requires, somewhat unfortunately in a paper which seeks to focus on general principles, further discussion of the sale of goods aspect of *Dawood v Heath*.

Though the mixed delivery aspect of *Dawood v Heath* made it a SoGA, s 30(3) case in terms of the prevailing sales law, behind a breach of section 30(3) lies a breach of section 13, which, though the law now is different as we shall see, in 1961 read: 'Where there is a contract for the sale of goods by description, there is an implied *condition* that the goods shall correspond with the description' (emphasis added). Section 30 is headed 'Delivery of wrong quantity', and its other sub-sections all dealt with delivery of wrong quantities of goods which are themselves in correspondence. Section 30(3) was quite different. The 'mixed delivery' is mixed, not

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<sup>76</sup> See n 58 and accompanying text above.

<sup>77</sup> *Dawood v Heath*, n 51 above, 514 col 2 – 518 col 1.

because the delivery is of the wrong quantity, but because some of the goods do not correspond with description, leaving a short quantity of goods which do correspond. Section 30(3) was merely an application of section 13 to the particular situation of a mixed delivery when the singling out of that situation, whatever its original justification, has long been thought to make no sense. As has been mentioned, section 30(3) has been repealed, and what now is section 30 is a deplorable patchwork which is a travesty of Chalmers' achievement. But if we put to one side the difficulties caused by section 30 and focus on the fundamental section 13 aspect of *Dawood v Heath*, we can see that the availability of recovery in circumstances like those of that case is, not merely so easily nullified as to be pointless, but would be unhelpful were it not nullified.

It has been authoritatively argued that section 13 is itself redundant and should be repealed.<sup>78</sup> By effectively saying the seller must deliver what it has undertaken to deliver, section 13 adds nothing, but merely duplicates, in the form of an implied term, the obligation the seller has expressly undertaken by describing the goods in a way on which the buyer relies. However, rather than it being redundant, it is more accurate to say that, certainly in 1961, section 13 did add something, but nothing positive. The duplication was imperfect. For if description was regarded as a matter determined by the statement of the express terms of the contract, the consequences of a failure to correspond would depend on the seriousness of the breach regulated by the

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<sup>78</sup> eg M.G. Bridge, '*Reardon Smith Lines Ltd v Yngvar Hansen-Tangen, The Diana Prosperity* (1976)' in C. Mitchell and P. Mitchell (eds), *Landmark Cases in the Law of Contract* (Oxford: Hart, 2008) 348. Professor Bridge's latest review of the current state of the law concludes that section 13 'is close to being rendered otiose': M.G. Bridge, *Sale of Goods* (Oxford: Oxford University Press, 3rd edn, 2014) para 7.32.

distinction between conditions and warranties under section 11 of SoGA. But if it was regarded as a breach of section 13 (lying behind section 30(3)), in 1961 a failure to correspond mandatorily was a breach of condition allowing rejection, and this is exactly how McNair J regarded the lack of correspondence of 80% of the sheets.<sup>79</sup> Recalling the language of section 30(3), it will be seen that that section simply posited rejection of the goods which fail to correspond as the remedy for a mixed delivery, ie it without question treated a breach as a breach of condition on the pattern of a breach of section 13.

Once the Victorian sales practices which gave sale by description a defensible meaning became redundant so that that meaning has now almost entirely been lost, the principal commercial consequence of section 13 has been to give the buyer the possibility of treating relatively minor breaches as grounds for rejection unconnected with what is now called satisfactoriness or with fitness for purpose under section 14, typically in order to take advantage of a falling market. This is the problem which all students of sales and many students of the general principles of contract identify with *Arcos Ltd v EA Ronaasen and Son*.<sup>80</sup> We know that the goods in *Arcos* were satisfactory and fit for purpose, and so their rejection on the basis of section 13 has widely been taken to defeat the purpose of the contract.<sup>81</sup> As *Dawood v Heath* was entirely pleaded on the basis of section 30(3), we do not know whether the goods were satisfactory or fit for purpose, and even if section 14 had been raised, breach of

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<sup>79</sup> *Dawood v Heath*, n 51 above, 518 col 2.

<sup>80</sup> [1933] AC 470 (HL).

<sup>81</sup> I have argued that this is so only in a way which leaves *Arcos* a much more sensible decision than it is generally regarded in D. Campbell, 'Arcos v Ronaasen as a Relational Contract' in D. Campbell et al (eds), *Changing Concepts of Contract* (Basingstoke: Palgrave Macmillan. 2013).

that section was, as with section 13, also then classified as a breach of condition, so we would not necessarily have learned how serious any breach of section 14 actually was. *Dawood v Heath* was, of course, decided prior to the changes to the common law of conditions and warranties in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha*,<sup>82</sup> or the replacement of ‘condition’ by ‘term’ in sections 12-15<sup>83</sup> and the insertion of section 15A into the 1979 Act.<sup>84</sup> It appears to be a case where, because of (subjective) differences in the understanding of an agreement which was considerably and convolutedly altered in the course of negotiations,<sup>85</sup> the goods delivered may well have been in breach of section 14. But even if this was the case, it leads us to ask why the defendant did not, if it did not, offer to cure by supplying conforming goods, or why, if it did offer to cure, the claimant chose to reject the non-conforming goods and sue for damages as, on McNair’s finding about the content of the agreement, it had the power to do under section 30(3). We absolutely do know that *Dawood v Heath* took place in the context of a falling market and would not otherwise have come before the court, and this seems unquestionably significant.

The suspicion surely arises that *Dawood v Heath* could have been a sort of *Arcos* case. To be frank, so rare are the circumstances of *Dawood v Heath* that the point is of small or no significance. Nevertheless, it seems that, in such circumstances, recovery can be used to bring about the same sort of outcome as the law of conditions was used to bring about in *Arcos*. There is no good reason for this. It is very telling that, in a textbook discussion of the classification of terms, Burrows and his co-

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<sup>82</sup> [1962] 2 QB 26 (CA).

<sup>83</sup> Sale and Supply of Goods Act 1994, s 7(2), Sched 2(5).

<sup>84</sup> *Ibid*, s 4(1).

<sup>85</sup> *Dawood v Heath*, n 51 above, 515 col 1 – 518 col 1.

authors disapprovingly cite *Arcos* as an illustration of the claim that ‘A party may seek to rely on ... a trivial breach to get out of a contract which has proved unprofitable, perhaps because of change in the market’.<sup>86</sup> It is submitted that it is very likely (one cannot be sure) that *Dawood v Heath* is subject to just the same criticism.

## ***QUANTUM MERUIT***

### ***Planché v Colburn***

Though we shall see that his views are nuanced, Burrows argues that the extensively discussed possibility of a *quantum meruit* ‘reversing’ the contractual allocation of risk should be allowed when he identifies escape from a bad bargain as the main justification for *quantum meruit* as well as recovery.<sup>87</sup> Unlike in respect of recovery, however, I cannot avoid at least brief discussion of one of the other justifications Burrows gives for *quantum meruit*, that it is useful in a situation of ‘failure of consideration and an incontrovertible or requested benefit’.<sup>88</sup> This is the situation long associated with *Planché v Colburn*,<sup>89</sup> though Burrows specifically says that that case does not belong in his category,<sup>90</sup> citing instead *De Bernardy v Harding*<sup>91</sup> as his principal authority for this use of *quantum meruit*.<sup>92</sup>

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<sup>86</sup> J. Beatson et al, *Anson’s Law of Contract* (Oxford: Oxford University Press, 29th edn, 2010) 145.

<sup>87</sup> Burrows, *The Law of Restitution*, n 47 above, 347-350.

<sup>88</sup> *ibid*, 346-347.

<sup>89</sup> (1831) 8 Bing 14.

<sup>90</sup> Burrows, *The Law of Restitution*, n 47 above, 346 n 31.

<sup>91</sup> n 28 above.

<sup>92</sup> Burrows, *The Law of Restitution*, n 47 above, 346-347. I acknowledge there is a dictum in this case that is used in this way, indeed I have cited it, but as reported *De Bernardy* does not explain how the award of £12 12s was reached, and I do not think it can be precise authority for anything, save for the interest of the question I posed

In *Planché v Colburn*, the claimant was an author who agreed, for a fee of £100, to write a book for a series of children's books being brought out by the defendant publisher. Having lost faith in the series, the defendant told the claimant the series was to be cancelled and that it no longer wished to take the book the claimant was writing. The claimant had, however, written a substantial part of the manuscript by this time. He brought a breach of contract action which, on the best reading of the proceedings, was treated as an action for a *quantum meruit*, and was awarded £50.

Our knowledge of *Planché v Colburn* has been immensely improved by recent academic researches,<sup>93</sup> the detail of which it is not sought to convey here. But though, in particular, Professor Carter's very illuminating account of contemporaneous procedure is essential to understand 'The *Planché v Colburn* Line of Cases',<sup>94</sup> actually understanding these cases is not really now the main issue. What is of contemporary importance is that *Planché v Colburn* 'has been treated in countless authorities as stating a proper basis for restitution for work done at the request of the

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some years ago (Campbell, 'Classification and the Crisis of the Common Law' n 14 above, 370) of why Birks continually felt obliged to pass off 'his novel ideas as the uncovering of past truths'. An answer to this question must refer to Gummow J's criticism of basing a 'modern ... normative doctrine of restitution or unjust enrichment' on 'close attention to cases decided in the 18th or 19th centuries', when 'it is a reasonable criticism of much of the modern writing on restitution that it does not get the past right': W. Gummow, 'Unjust Enrichment, Restitution and Proprietary Remedies' in P.D. Finn (ed), *Essays on Restitution* (North Ryde: Law Book Company, 1990) 60. What, in the end, is at issue here is the 'danger' against which Professor Ibbetson has warned us of too directly 'treating old cases as simply early applications of modern principles, capable of being analysed by reference to current understandings': D. Ibbetson, 'Unjust Enrichment in English Law' in E.J.H. Schrage (ed), *Unjust Enrichment and the Law of Contract* (The Hague: Kluwer, 2001) 45.

<sup>93</sup> J.W. Carter, 'Discharged Contracts: Claims for Restitution' (1997) 11 *Journal of Contract Law* 130 and C. Mitchell and C. Mitchell, '*Planché v Colburn*' in C. Mitchell and P. Mitchell (eds), *Landmark Cases in the Law of Restitution* (Oxford: Hart, 2006).

<sup>94</sup> Carter, n 93 above, 140

defendant’,<sup>95</sup> whilst it is really no such thing.<sup>96</sup> The £50 is obviously arbitrary, an equal loss splitting which has been justified as the best one can do when it is hard to give a more plausible figure.<sup>97</sup> There are obvious contradictions involved in arguing for restitution of a valuable benefit when that benefit is unwanted by the defendant who obviously thinks it valueless.<sup>98</sup> In an attempt to address such issues in a way which allowed the type of reasoning identified with *Planché v Colburn* to be marshalled as authority for restitution, Birks tried to set ‘market value’ aside as ‘irrelevant’ by claiming that ‘benefits in kind have value to a particular individual only so far as he chooses to give them value’, the value having to be quantified as a matter of ‘subjective revaluation’.<sup>99</sup> But this is of far less importance than that the claimant should either have been awarded £100 or nothing.

*Planché v Colburn* is a case which, in modern terms, should have been decided on normal contractual principles depending on the interpretation of the contract. The defendant did offer to take the completed manuscript, and pay £100 for it, to publish in a series of books for adults. The claimant, ‘probably the most important British playwright of his generation’,<sup>100</sup> did not want to have work written for a juvenile audience appear in such a series, or be put to the trouble of completely rewriting the book. Depending on whether the contract was for publication by the defendant or for

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<sup>95</sup> *ibid.*, 141.

<sup>96</sup> *ibid.* See also Harris et al, n 5 above, 236-38 and Jaffey, n 41 above, 47-48.

<sup>97</sup> The typical argument to this effect envisages the claimant being paid by royalty, which, of course, would be uncertain in the circumstances, arguably justifying the *quantum meruit* and its arbitrariness: *Restatement (Second) Contracts* § 352 illustration 1. But *Planché v Colburn* did not involve payment by royalty but by fixed fee.

<sup>98</sup> Harris et al, n 5 above, 237.

<sup>99</sup> Birks, *An Introduction to the Law of Restitution*, n 15 above, 109-110.

<sup>100</sup> C. Mitchell and C. Mitchell, n 93 above, 71.



publication by the defendant in a series for juveniles, the claimant should have been awarded the contractual sum of £100, or not have succeeded at all because it was he who breached.<sup>101</sup>

The reason why *Planché v Colburn*, and the other cases cited to similar effect such as *De Bernady v Harding*, are interpreted as they now are is a wish to fudge, based on a failure to understand, or perhaps rather to look in the face, the contractual allocation of risk.<sup>102</sup> Even if we allow that they might be taken out of their historical context to be used as authority for modern day propositions about the law, specifically for the use of *quantum meruit* as a remedy for breach of contract, these cases are actually but poor value as authority for such use.

The sentiment – I think this is the right word<sup>103</sup> – that lies behind *Planché v Colburn* is, however, of great current importance because it haunts and makes very difficult to understand the most important use now made of *quantum meruit*, as a principle of quantifying damages in many fundamentally breached construction cases.<sup>104</sup> Because of the breach, it is argued, it may well happen that the payments to

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<sup>101</sup> I understand that it would be even more anachronistic to do so, but *Planché v Colburn* could be examined as a mitigation case turning on whether the claimant should have allowed the publication of the book outside of the juvenile series.

<sup>102</sup> I put to one side a realist position maintained by a number of distinguished US scholars which I believe is subject to this criticism, but only up to a point. Seeking to avoid what they regard as unwelcome limits on the way the rules of damages operate to protect the expectation interest, these scholars explore the use of restitution as a way of avoiding those limits: eg W.C. Whitford, 'Relational Contracts and the New Formalism' [2004] *Wisconsin Law Review* 631, 641 n 37: 'A legal realist might argue that a judge armed with promissory estoppel and *quantum meruit* remedies can do almost anything she could with expectation damages'.

<sup>103</sup> J.P. Dawson, *Unjust Enrichment* (Boston, MA: Little, Brown, 1951) 8: a 'general principle prohibiting enrichment through another's loss ... has the peculiar faculty of inducing quite sober citizens to jump right off the dock'.

<sup>104</sup> On my own former acceptance of this use of *quantum meruit* see Harris et al, n 5

the claimant provided for under the contract no longer reflect the work the claimant has done or the valuable benefit that work conveys to the defendant. *Quantum meruit* seems to be a magic formula which must be invoked in order to move away from the contractually agreed price,<sup>105</sup> and this becomes particularly clear, as Burrows claims, in losing contract cases where the claimant would have had a negative expectation from which it escapes by claiming a *quantum meruit*.

Though there is some very commonly cited Commonwealth authority endorsing an escape from a bad bargain in these circumstances,<sup>106</sup> Burrows also draws on the extremely well-known US case of *Boomer v Muir et al*,<sup>107</sup> used as an illustration in this connection in the *Restatement (Second) Contract* § 373 and *Restatement (Third) Restitution and Unjust Enrichment* § 38,<sup>108</sup> and discussed innumerable times in the secondary literature. *Boomer v Muir* is treated in this way because its facts seem to display so very striking a discrepancy between what could be awarded in contract and restitution. As Burrows, entirely typically, has it: ‘the claimants recovered a *quantum meruit* of \$257,000 for work on building a dam even though they were entitled to only

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above, 238-40.

<sup>105</sup> ‘Employ the vocabulary of restitution’ as Kull has it: American Law Institute, *Restatement (Third) of the Law of Restitution and Unjust Enrichment: Tentative Draft No. 3* (Philadelphia PA: American Law Institute, 2004) 229. To put the point the other way around: ‘we are still asked to believe that the action is non-contractual because ... centuries ago reference to the contract was taboo’: J.M. Perillo, ‘Restitution in a Contractual Context’ (1973) 73 *Columbia Law Review* 1208, 1216.

<sup>106</sup> *Lodder v Slowey* [1904] AC 442, 453 (PC) (affirming (1900) NZLR 32 (NZ Supreme Court)); *Rover International v Cannon Film Sales Ltd (No 3)* [1989] 1 WLR 912 (CA) and *Reynard Construction (ME) Pty v Minister of Public Works* (1992) 26 NSWLR 234 (Court of Appeal of New South Wales).

<sup>107</sup> 24 P 2d 570 (Cal App 1933).

<sup>108</sup> § 38 illustrations 17-18.

another £20,000 under the contract'.<sup>109</sup> But, with respect, I submit this was not a very striking discrepancy, or indeed a discrepancy, at all.

### ***Boomer v Muir***

R.C. Storrie and Co, a construction company of which Robert B. Muir was a partner, was awarded a general contract to build a hydro-electric plant. This was a major project for which Storrie and Co was to be paid US\$7,691,889, approximately \$100 million in 2015 values. Storrie and Co entered into a subcontract with H.H. Boomer under which Boomer would build a storage dam as part of the project. In addition to itself carrying out other parts of works that would be necessary to allow Boomer to make progress as anticipated, Storrie and Co was to provide much of the power and materials necessary for Boomer's works, and to make staged payments to Boomer in the way that is ordinary in construction contracts. The work was to be completed on or before 1 December 1927. Almost immediately serious disputes arose, which considerable modification of the original agreement did not quell, and Boomer eventually quit the site with the works substantially built but incomplete on 15 December 1927. At that time, Boomer was to still to be paid \$20,000 under the contract. In procedurally complicated litigation involving, not only the partners of Storrie and Co, but also numerous third party sureties, Storrie and Co, which completely denied liability, was found to have fundamentally breached the subcontract by not making progress with the other works and by failing to supply power and materials in a satisfactory manner. Boomer was awarded \$275,965.06 as a

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<sup>109</sup> Burrows, *The Law of Restitution*, n 47 above, 347.

*quantum meruit* for value of the work done less the staged payments received.

There were, it seems, three alternative courses of action which Boomer could have elected to pursue. In quoting the relevant passage of the judgment, each will be given a number:

It is well settled in California that a contractor who is prevented from performing his contract by the failure of the other party to furnish materials has a choice of three remedies: He may [1] treat the contract as rescinded and recover upon a *quantum meruit* so far as he has performed; he may [2] keep the contract alive, offering complete performance, and sue for damages for delay and expense incurred; or he may [3] treat the repudiation as putting an end to the contract for purposes of performance and sue for the profits he would have realized.<sup>110</sup>

It is essential to note that none of these alternatives would give rise to the striking *prima facie* discrepancy between the contractual sum and the restitutionary sum for which the case is so well-known. Boomer elected [1] and was awarded \$275,965.06 on a restitutionary basis. But neither [2] nor [3] would have led to an award of contractual damages of \$20,000. \$20,000 was what remained to be paid under the terms of the contract. It is not a measure of the damages Boomer would have received had he brought an action for either [2] or [3] on a contractual basis.

[2], which, as is common in construction disputes of this sort when the parties can no longer work together, was not a practical possibility, would have led to completion of the works, and, with the payment of the \$20,000, Boomer would have received his entire contract price, which would have included the margin of net profit envisaged at the time of the agreement. He would then have claimed all his extra costs as reliance damages.<sup>111</sup> From the reported facts, we cannot quantify these extra costs,

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<sup>110</sup> *Boomer v Muir*, n 107 above, 573.

<sup>111</sup> The difficulty arises that these reliance costs are in excess of the reliance costs

but they must have been very substantial. The part of his whole contract price that amortised his anticipated expenditure under the contract plus reliance damages for these extra costs would have left Boomer's net profits intact, and in this way his expectation would have been protected.<sup>112</sup> But, to repeat, [2] was not a practical possibility.

[3] was a practical possibility, but it would have been an inadequate remedy for Boomer. He would have quit the site leaving the works unfinished and sued only for his expectation, if we interpret 'sue for the profits he would have realized' as sue for his net profits. This interpretation of [3] creates an alternative course of action which I will number [3a]. As his reliance expenditures had increased so much, [3a] would certainly have left Boomer with a diminished expectation and no doubt in a losing contract. This is the contractual outcome most commentators have in mind when contrasting it to the therefore superior restitutionary outcome. However, this result is not based on Boomer's receipt of only the \$20,000 which remained to be paid. That sum features only as part of the contract price when quantifying Boomer's expectation as his net profit. Nevertheless, [3a] is an inadequate remedy for Boomer and the

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originally anticipated. In a sense, these extra costs are mitigation expenses the reasonableness of which must be assessed. But as such assessment is also implicit in the very concept of reliance, for expenses incurred in reliance on the contract must themselves be reasonable, then, for the purposes of this paper, this difficulty can be ignored. But in construction law practice, the claimant continuing to perform in the context of a failing relationship can give rise to very serious difficulty indeed, as *Boomer v Muir* itself illustrates.

<sup>112</sup> Goff and Jones, n 16 above, para 20.021 believe the problem in *Boomer v Muir* is that 'if Boomer had performed or substantially performed his contract, his only claim would have been for the balance of the contract price and for any loss suffered because of the breach by the defendant of the terms of the contract'. With the greatest respect, I believe that, properly understood, this contractual award would have been adequate.

contrast to the restitutionary remedy which allows Boomer to escape a losing contract seems to be, as Burrows claims, a good one for restitution.

Boomer's election of alternative [1], the *quantum meruit*, will have required the court to quantify the valuable benefit that Boomer conveyed. In one sense, such valuation will have been independent of the contract price, for, of course, the problem was that the dispute meant that the initially agreed pricing scheme did not accurately represent Boomer's actual performance. Given the finding of liability, we are obliged to say that Boomer had been put to much extra expense by Storrie and Co's breach.

But the quantification of the value of the actual performance will have been carried out with reference to the objective market values prevailing in the construction industry.<sup>113</sup> When giving detail of Boomer's increased costs, the court said:

The jury might well have found that Boomer's cost of operation had been substantially increased by Storrie and Co's continuing breaches. There is substantial evidence that Boomer suffered delays and increased costs by Storrie and Co's failure to deliver materials to the job as rapidly as required. There is evidence that Boomer's costs were considerably increased by failure of Storrie and Co to excavate the cut-off trench as rapidly as should have been done. There is evidence that the diversion of air from the compressors to other portions of the work and the delay in restoring the burned air compressors hampered Boomer and increased his costs.<sup>114</sup>

Goff and Jones are right, then, to tell us that the \$275,965.06 'represented the market value of Boomer's services and labour'.<sup>115</sup> I can see no quantification issue arising when making an award for these costs that does not arise in any inquiry into the reasonableness of contract damages (or mitigation expenses). When a claimant is

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<sup>113</sup> E.W. Patterson, 'Builder's Measure of Recovery for Breach of Contract' (1931) 31 *Columbia Law Review* 1286, 1299-1307.

<sup>114</sup> *Boomer v Muir*, n 107 above, 578.

<sup>115</sup> Goff and Jones, n 16 above, para 20.021.

put to ‘extra expense’ by a defendant seller’s failure to deliver goods, we do not need to invoke the words ‘*quantum meruit*’ in order to award damages which constitute a sum different to the contract price, whether the damages are market damages, incidental damages, consequential damages, or a combination of these. It is not so much that the metaphysical conundrums of subjective revaluation are avoided by this approach, it is that this contractual approach is the only one possible other than the arbitrary and unfounded loss splitting exemplified by *Planché v Colburn*. The *quantum meruit* in *Boomer* will, in fact, have been a contractual award, although it was not, of course, an award of only (what remained to be paid of) the contract price.

A purposive interpretation of [3], which I remind the reader was ‘treat the repudiation as putting an end to the contract for purposes of performance and sue for the profits he would have realised’,<sup>116</sup> would yield an alternative remedy which I will number [3b]. Under [3b], *Boomer* would sue for contractual damages which, in the end, would represent his net profits envisaged at the time of the agreement, ie net profits plus reliance damages sufficient to leave those net profits intact. This does not at all appear to be what was meant by [3] in California in 1933. What seems to have been meant was [3a], which, as I have said, meant that [1] was superior. In an important analysis of *Boomer v Muir*,<sup>117</sup> Professor Gergen has, on the basis of something like the argument I have just made, concluded that ‘the law of restitution may not be needed to reach the result in *Boomer*, given modern rules of contract

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<sup>116</sup> See n 110 above.

<sup>117</sup> It was the principal resource drawn upon by Kull in dealing with the contract ceiling issue in the *Restatement*: American Law Institute, n 105 above, 338-339. Kull’s thinking on this point was that ‘the proper measure of protected expectation in a given case [should] be addressed directly, without resort to the fictions of recovery based on restitution rather than contract’: *ibid*, 340.

law'.<sup>118</sup> Gergen helpfully draws attention to the rules which may have obliged *Boomer* to elect to bring an action in restitution, in particular the *Restatement (First) Contracts* § 333, which stated that reliance expenditures 'are not recoverable in excess of the full contract price promised by the defendant'. Though Gergen himself does not do so,<sup>119</sup> I would maintain that, absent these restrictive rules, the *quantum meruit* is doctrinally and practically redundant. Its work not only can be done by contract but *is* done by contract, and though, as I have said, the reported facts do not allow us to definitely say this, I am of the opinion this will have been done even in *Boomer*.

### **The views of Jaffey distinguished**

In a recent paper, Professor Jaffey has added to the argument that the *quantum meruit* should be replaced by remedies on a contractual basis, especially in terms of recognising the reliance interest.<sup>120</sup> Jaffey says all I would hope to say about the rival contractual and restitutionary elements of the quasi-contractual remedies considered as a doctrinal question of liability. But on considering the implications of Jaffey's

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<sup>118</sup> M.P. Gergen, 'Restitution as a Bridge Over Troubled Contractual Waters' (2002) 71 *Fordham Law Review* 709, 714. Gergen goes on to identify 'the "total cost" method of calculating damages under a construction contract when a defendant hinders a contractor's performance [as the] solution to the *Boomer* problem'.

<sup>119</sup> Though he generally concludes, *ibid*, 741, that 'it is time to do away with the general right to restitution on breach of contract', Gergen would, however, retain restitutionary 'rules that are more closely tailored to specific situations': *ibid*. I cannot agree with his identification of the situations for which restitution is appropriate, which turn on the case for gain-based damages in situations other than restitution for subtraction. This is the case I have argued against previously and which I have put to one side in this paper.

<sup>120</sup> P. Jaffey, 'Restitutionary Remedies in the Contractual Context' (2013) 76 *Modern Law Review* 429, nb 449-450. I am grateful to Professor Jaffey for showing me this paper in draft.



argument for the quantification of the *quantum meruit*, a most important point of difference between our arguments arises. Jaffey accepts that, ‘when a contract breaks down’, a *quantum meruit* which proportions loss is theoretically superior to a contractual measure, but ‘in reality ... to give proportionate effect to the contract will usually, if not invariably, be impracticable’.<sup>121</sup> However, these alternatives are not, in my opinion, in reality available, and the difficulties of quantification do not have the significance Jaffey believes. Jaffey agrees with *Anson* that:

there may be problems in allocating a particular proportion of the contract price to a particular part of the contractual performance due from the claimant. One reason is that the claimant’s costs may include fixed costs incurred at the start; another is that there may be economies of scale that would be obtainable from full performance but are not realised from part performance.<sup>122</sup>

For this reason, he prefers the contractual measure, though this may well ‘over-compensate’ the claimant, to the *quantum meruit*, which is not practically available.

The implication of the argument of this paper is that there is no necessity to make, because there is no real possibility of making, the choice between contract and *quantum meruit* that Jaffey posits. If, labouring under the current understanding of damages for partially completed construction works, we move from a contract measure to a *quantum meruit*, there is no magic solution of the quantification issue which follows the invocation of this quasi-contractual formula,<sup>123</sup> and these

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<sup>121</sup> *ibid*, 448-49.

<sup>122</sup> *ibid*, 449, quoting *Anson*, n 86 above, 596. See further J. Beatson, *The Use and Abuse of Unjust Enrichment* (Oxford: Clarendon Press, 1991) 12-15. For an acceptance of this argument in the construction law literature see J. Bailey, ‘Repudiation, Termination and *Quantum Meruit*’ [2006] *Construction Law Journal* 217, 236-237.

<sup>123</sup> R. Childres and J. Garamella, ‘The Law of Restitution and the Reliance Interest in Contract’ (1969) 64 *Northwestern University Law Review* 433, 443: ‘the valuation

difficulties remain identical for quantification which is said to be based on restitution or on contract. Jaffey's effective reversal of the situation brings no improvement, and would leave the contract measure unjustifiable as compensation, because as Jaffey has it the quantification of that measure is *ex hypothesi* wrong and therefore effectively a penalty rightly open to attack.

Though the last thing that can be said is that our current understanding of this crucial point is clear,<sup>124</sup> it is submitted that, if we relinquish the belief that we need to recite the words *quantum meruit* to release us from being bound to the original contract price, we can see that the quantification that goes on in construction cases is objective, contractual quantification with values determined by reference to the market, with the contract values themselves often playing a very significant evidential role.<sup>125</sup>

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problem may be at least as difficult in restitution as in contract'.

<sup>124</sup> The leading construction authorities are characterised by ambivalence about what a *quantum meruit* actually is: eg S. Furst and V. Ramsey, *Keating on Building Contracts* (London: Sweet and Maxwell, 9th edn, 2012) para 4.021: 'The courts have laid down no rules limiting the way in which a reasonable sum is to be assessed ... Where a *quantum meruit* is recoverable ... the work cannot generally be regarded as though it had been performed ... under the contract. The contractor should be paid at a fair commercial rate for the work done ... the appropriate measure of the sum due [is] reasonable remuneration for executing the work not the value the work to the other party'. A telling statement in R. Wilmot-Smith, *Construction Contracts* (Oxford: Oxford University Press, 2nd edn, 2010) para 3.06 is that: 'the assessment of *quantum meruit* is usually based on reasonable and necessarily incurred actual cost including reasonable on and off site overheads plus an appropriate addition for profit. The actual costs can be checked by the use of standard rates and prices from publications such as Spon. In any case expert evidence as to market rates may be needed'. Spon is a set of costs guides very widely used in the estimation of construction contract prices.

<sup>125</sup> In 2008 I taught an LLM course on remedies at the Faculty of Law, University of Auckland. One student, Mr Kelly Quinn, a barrister with international experience of construction law and practice, submitted a final paper on 'The Value of *Quantum Meruit* as a Remedy in Construction Disputes'. Essentially of publishable quality, this

## Escape from a bad bargain in construction cases and the contract ceiling

Without wishing to put words in his mouth, it seems that Burrows substantially agrees with the argument just made about *quantum meruit* in the *Boomer v Muir* type of case, but subject to an important caveat. We have seen that in the *Planché v Colburn* type of case what Birks called subjective revaluation played an essential role in establishing a distance between the contractual outcome and what was claimed to be the subjective definition of valuable benefit. The issue is very significantly different in the *Boomer v Muir* situation, for in commercially important construction cases of this type<sup>126</sup> it has been authoritatively argued that it is very unwise to try to ‘reverse’ the contractual result in the way that is central to the reluctance to look such a result in the face in *Planché v Colburn*.<sup>127</sup> The issue naturally arises whether to impose a contract ceiling on the award made, and, of course, the literature on this in respect of *quantum meruit* is very large.<sup>128</sup> Though one suspects it may have been *per incuriam* because the judgment was itself so preoccupied with the \$20,000 as never to bring

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paper examined, in such detail as the reports of the quantifications allowed, a large number of the cases described as *quantum meruit* awards in the leading construction law textbooks, and explained them as effectively contractual awards. This paper has had a large influence on the discussion of *quantum meruit* here.

<sup>126</sup> J. Uff, *Construction Law* (London: Sweet and Maxwell, 11th edn, 2013) 166: this is a question of ‘the highest commercial importance’.

<sup>127</sup> Goff and Jones, n 16 above, paras 20.020-20.023. Birks, *An Introduction to the Law of Restitution*, n 15 above, 288 originally acknowledged the force of the point, but, as Burrows always argued, it was inconsistent of him to do so: A. Burrows, ‘Free Acceptance and the Law of Restitution’ (1988) 104 *Law Quarterly Review* 576, 586-90.

<sup>128</sup> Goff and Jones, n 16 above, paras 20.020-20.023, frame their views with reference to what remains the principal review of the literature on the doctrinal wisdom of reversal of risk and the contract ceiling, to which the reader is referred for further references: A. Kull, ‘Restitution as a Remedy for Breach of Contract’ (1994) 67 *Southern California Law Review* 1465, 1468-1478.

Boomer's expectation interest into proper focus, the *ratio* of *Boomer v Muir* is that such a limit should not be imposed.<sup>129</sup> I myself have previously argued for such a limit,<sup>130</sup> but I no longer think the argument correct as I no longer accept that the contractual damages and *quantum meruit* approaches, though certainly based on different, in fact opposed, abstract principles, are different in actual fact.

Committed in principle to the position that 'the cause in action in unjust enrichment is distinct from, and need not bow down to, contract',<sup>131</sup> Burrows in one sense disregards the contract ceiling. But, acknowledging the force of the argument behind it, he tries to partially close the gap between contract and restitution by use of objective contractual evidence:

the *pro rata* contract price is likely to be crucial in establishing the defendant's benefit ... unless one takes the extreme and unconvincing view that the contract price is irrelevant ... the (pro rata) contract price is likely to be important not in avoiding a conflict with contract but as an inherent element of the unjust enrichment claim: more specifically, in establishing the defendant's benefit.<sup>132</sup>

I believe this is right and I have benefitted from reflecting upon it.

The contract ceiling is itself an ultimately unacceptable compromise, and, if it is submitted, it is unnecessary. Four situations must be distinguished. First, the basic finding in *Boomer v Muir* that was taken to justify the *quantum meruit* and the disregard of the contract ceiling was that the extra expense Boomer incurred was the result of Storrie and Co's breach:<sup>133</sup>

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<sup>129</sup> *Boomer v Muir*, n 107 above, 577.

<sup>130</sup> Harris et al, n 5 above, 239-240.

<sup>131</sup> Burrows, *The Law of Restitution*, n 47 above, 349.

<sup>132</sup> *ibid*, 349, 350. In my opinion unconvincingly, Burrows, *ibid*, 350, claims that Birks himself took this point: Birks, n 61 above, 135-137

<sup>133</sup> G.M. Cohen, 'The Fault Lines in Contractual Damages' (1994) 80 *Virginia Law*

If Boomer had valid claims for damages arising under the contract by reason of the fact that his cost of operation had been wrongfully increased, it would seem inequitable to limit him to the recovery of the contract price upon a rescission for Storrie and Co's failure of performance.<sup>134</sup>

This is often treated as a case of reversal, but it is not. As Storrie and Co caused the loss, normal contractual principles require them to compensate Boomer for it.

But what if, secondly, if Boomer had himself caused the extra expense by inefficiently part-performing the works, Storrie and Co then breaching? This has been regarded as the paradigmatic case of reversal. If it was, it would be quite wrong and should be prevented. But a *quantum meruit* would place an objective market valuation on the work done, and such a valuation would not acknowledge that a benefit was conveyed by the inefficient way the work was performed. It would acknowledge only the market value of the work done. This would leave Boomer to bear the extra expense for which he himself was responsible. The same result would be reached, though on a clearer basis, by a properly conducted contractual quantification, which would attribute to Storrie and Co only such loss as it caused. This quantification of damages would yield the expectation that Boomer would have obtained by payment of the price upon completion of the contract. Neither *quantum meruit* nor this quantification would effect a reversal.

Is it different if, thirdly, Boomer had himself caused the extra expense by initially underestimating the cost of the works, part-performed incurring that expense, and Storrie and Co then breached? This is a difficult case. A *quantum meruit* would have to allow Boomer to recover the objective market value of the work done as

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Review 1225, 1304.

<sup>134</sup> *Boomer v Muir*, n 107 above, 578.

independently assessed by the court. This would lead to a restitutionary award which would not merely be higher than the contract price for those works, but would in fact reverse a losing contract. Theoretically, the contractual damages which would be awarded on the basis of a negative expectation would not effect this reversal. The question which ultimately lies behind debate about the contract ceiling is whether this reversal is wise.

I do not pretend to have a solution to what is a very difficult question of construction law and practice. Estimating the price of complex construction works is a 'relational' contractual undertaking which cannot and does not work by precisely allocating risks at the time of the original agreement,<sup>135</sup> which is why the standard forms of construction contract are predominantly concerned with providing for modification,<sup>136</sup> why the parties to complex construction contracts typically make extensive provision for modification, and why opposition to modification is normally considered both legally unsupportable and practically most unwise. As it was famously put in *Williams v Roffey Bros and Nicholls (Contractors) Ltd*: 'a main contractor who agrees too low a price with a subcontractor is acting contrary to his own interests. He will never get the job finished without paying more money'.<sup>137</sup> To a very considerable extent, concern about the reversal of the allocation of risk

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<sup>135</sup> See the use of construction examples in I.R. Macneil and P.J. Gudel, *Contracts: Exchange Transactions and Relations* (New York NY: Foundation Press, 2001) pt 2. This part of Macneil's second casebook is based on what is still the leading analysis of contract planning: I.R. Macneil, 'A Primer of Contract Planning' (1975) 48 *Southern California Law Review* 627.

<sup>136</sup> eg I.E. Ndekugri and M.E. Rycroft, *The JCT 05 Standard Building Contract* (London: Butterworths, 2nd edn, 2009) ch 6.

<sup>137</sup> [1991] 1 QB 1, 10G (CA). On the crucial point see further D. Campbell, 'Good Faith and the Ubiquity of the "Relational" Contract' (2014) 77 *Modern Law Review* 475, 477-81.

represented by an original estimate is misplaced as there is no fixed allocation of that risk to reverse.<sup>138</sup>

But there is a limit, and the precise case we should consider is, fourth and lastly, where a party (let us assume a subcontractor) has (incompetently) given an estimate which is inaccurately low and outside of the bounds of permissible modification such that the contractor has a reasonable expectation that the price of the work should be kept within an acceptable penumbra of the estimate. As in the case of recovery's likely effect on sales disputes over correspondence with description, it is submitted that restitution cannot make a useful contribution to the law in such a case. The subcontractor should in contractual principle be confined to a negative expectation. Whether this is a practical possibility will be moot. Not the least of the issues are the hazards of litigation, for in the report of *Boomer v Muir* even more than in that of *Dawood v Heath*, it is clear that the defendant was completely surprised to be found in breach.

Whatever the actual facts of construction law in action, in circumstances where the contractor did under-price in a way for which it should be responsible, the construction law authorities are rightly unanimous that the law should strive to enforce the original allocation of risk.<sup>139</sup> *Quantum meruit* will work against this. Given the existence of the possibility of reversal by means of *quantum meruit*, it would be most naïve not to anticipate that the subcontractor would seek to gain access

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<sup>138</sup> The necessity of placing our attempts to deal with 'the losing contract rule' in its relational context has been authoritatively stated in W.J. Woodward Jr, 'Restitution Without Context: An Examination of the Losing Contract Problem in the *Restatement (Third) of Restitution*' in Braucher et al (eds), n 22 above.

<sup>139</sup> eg Furst and Ramsey, n 124 above, para 8.046.

to the restitutionary remedy by finding in the contractor's performance some ground for termination. This attitude is the more likely to be influential in leading to a finding of breach as the contractor would, *ex hypothesi*, be anxious to hold the subcontractor to the agreed prices. The situation was recognised in *Restatement (Second) Contracts* § 373 comment d:

Since a contract that is a losing one for the injured party is often an advantageous one for the party in breach, the possibility should not be overlooked that the breach was provoked by an injured party in order to avoid having to perform.

Such an inducement to unco-operative bad faith contracting is indefensible. To anyone committed to contractual values, then, *quantum meruit*, like recovery, is, not only of far less significance than it appears to be, but, to the extent it is significant, it is inconsistent with contracting in good faith.

## CONCLUSION

It has been argued that the quasi-contractual remedies of recovery and *quantum meruit* that were recognised in Fuller and Perdue's restitution interest and Birks' restitution of subtraction play no positive role in the law of remedies of breach of contract. It is very arguable that, if they play a significant role at all, it is a negative one. They should be eliminated from the law of contract. If this argument is accepted, then it is possible to end this paper on a positive note. For it has shown that it would be wrong to believe that the career of the restitutionary juggernaut over the law of contract, though this is a most unsuitable terrain for it, has left nothing but wreckage in its wake. We can, more than a decade after *Blake*, see it has left an overall positive legacy. By pushing the criticism of the expectation interest paradigm further than it



previously had been pushed, it has allowed us to identify what is wrong with that paradigm more clearly than we previously had been able to do, and it has allowed us to see how to radically improve that paradigm. In the most drastic surgery yet proposed for the Fuller and Perdue three interests model (some, of course, would kill it off, but this is not surgery), I think we should entirely do away with the restitution interest and leave a two interests, purely contractual model.

I fear this contribution will be seen to fall a long way short of the pure reclassification of the entire law of obligations which the restitutionary juggernaut had or has as its *summum bonum*. Indeed, the contribution is of an opposed nature, for it argues that coherence within the law of contract requires us to identify, precisely, a law of *contract*, based on expectation (and reliance). Birks powerfully criticised the incoherence of the concept of quasi-contract and wished to expunge it from his revised law of obligations. This, it has been argued, we should do, but the best way to do it is by, not limiting our criticism to restitution for wrongs and leaving restitution for subtraction intact, but by completely eliminating restitution from contract.

In light of this, perhaps those impelling the restitutionary juggernaut might be thought to have made a contribution to the law of contract akin to that made in aesthetic theory by ‘those investigators who have relied upon Reason’ identified by Richards, who, ‘though they have sat down without the necessary facts to think the matter out, have at least thoroughly discredited a method which, apart from their labours, would hardly have been suspected of the barrenness it has shown’.<sup>140</sup>

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<sup>140</sup> I.A. Richards, *Principles of Literary Criticism* (London: Routledge, 2nd edn, 2001) 3-4.