# THE STATUTE OF FRAUDS AND ACTIONS IN RESTITUTION AND DEBT: *PAVEY AND MATTHEWS PTY LTD V PAUL*

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The disparate judgments of the High Court of Australia in *Pavey and Matthews Pty Ltd v Paul*[1] graphically illustrate the unsettled state of the law concerning claims in debt and restitution where a contract is unenforceable under the United Kingdom Statute of Frauds 1677. If a plaintiff has provided goods or services under an unenforceable contract and the defendant, in breach, fails to pay, does the plaintiff have a remedy? Generally, a remedy will be available. It is as yet unsettled, however, whether that remedy should be based on an action in debt or restitution. This distinction can have important consequences especially where, as in *Pavey and Matthews v Paul*, the relevant statute is worded significantly differently from the original Statute of Frauds.

## *Pavey and Matthews Pty Ltd v Paul*

Pavey and Matthews entered into an oral building contract with Mrs Paul. A reasonable sum was to be paid by Mrs Paul upon completion of the work. The work was fully completed, she accepted it and paid $36,000. Pavey and Matthews, however, claimed that $62,945.50 was a reasonable sum and brought an action to recover the difference. Mrs Paul relied on section 45 of the New South Wales Builders Licensing Act 1971 which provides that building contracts entered into by licensed builders are "not enforceable against the other party" unless the contract is in writing signed by the parties. It was clear that section 45 had not been fulfilled.

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1. (1987) 162 CLR 221.

Restitution

Mason and Wilson JJ, along with Deane J, held that Pavey and Matthews were entitled to recovery by quantum meruit. This was not an action to recover a reasonable sum due under the contract, but rather was an action on an obligation to pay a reasonable sum "imposed by law independently of actual contract."[2] Restitutionary principles required that, since the work had not been done gratuitously and Mrs Paul had accepted it without paying for its full value, Pavey and Matthews could succeed in a claim for restitution. This was an independent obligation imposed by law and in no way involved enforcing the unenforceable contract.

In each of the four judgments it was recognised that such an action rests not upon an implied contract but upon "the fundamental principle that one person shall not unjustly enrich himself at the expense of another."[3] The conflict between Brennan J (dissenting) and the majority on this point was over whether such a non-contractual obligation can be imposed where there is an existing but unenforceable contract governing the obligations of the parties. The majority held that an existing but unenforceable contract is no bar to imposing an obligation based upon restitutionary principles and that therefore Pavey and Matthews could recover.

Brennan J, however, thought that no restitutionary obligation could be imposed:

> A subsisting contract is the source and charter of the rights and obligations of the parties, and the law cannot impose other rights and obligations either to vary the contractual provisions or to negative the effect which the Statute of Frauds has upon them.[4]

Since the contract still existed, being merely unenforceable under the Act, there could be no claim to restitution. The authority for the conflicting views of Brennan J and the majority is considered below.[5]

Debt

An alternative to a claim on the independent restitutionary obligation is an action on the derivative obligation to pay the debt aris-

2. Ibid, 234.
3. Ibid, 267 and see also 227, 235, 256.
4. Ibid, 238.
5. See text accompanying n 45 ff.

ing from the performance of the contract. This, unlike the restitution claim, is an action for the contract price, not merely for a reasonable remuneration. In *Pavey and Matthews v Paul*, however, where only a reasonable sum was stipulated in the contract, the amount recovered would be equal under debt and restitution actions. Dawson J held that the enforcement of this derivative obligation was not the enforcement of the contract itself, and was therefore not prevented by section 45.

Brennan J disagreed. Enforcing the derivative debt is not an action on the contract, so statutes in the same terms as the Statute of Frauds do not prevent such an action. A statutory provision in the terms of section 45, which stipulates that the contract is "not enforceable", is, however, very different:

> If section 45 makes the contract wholly unenforceable against the building owner, the contract is incapable of giving rise to a debt on which an action of debt or indebitatus assumpsit might be founded.[6]

Since he had also found that no restitution action was available, Brennan J concluded that Pavey and Matthews could not recover. Deane J went a step further on the debt issue and held that even under the Statute of Frauds there could be no action on the debt. Such an action is still, in reality, an action on the contract.[7]

In *Pavey and Matthews v Paul*, then, two conflicting views were expressed on the availability of a restitution action for benefits conferred under an unenforceable contract. Three different views were taken on the availability of an action on a debt arising under such a contract. None of these views is without authority nor without some logical foundation.

## The Statute of Frauds applies to executed contracts

Before the authority for actions based on debt and restitution can be considered, an older and now rejected method for allowing the plaintiff to recover in these cases, based neither on debt nor restitution, must be considered. Some obiter statements in old cases[8] suggest that the Statute of Frauds has no application at all where the contract has been fully executed by one of the parties.

6. Supra n 1, 243.
7. Ibid, 254.
8. *Simon v Metivier* (1766) 1 Black W 599; 96 ER 347; *Price v Leyburn* (1815) Gow's NPC 109.

If this were the case an action on the contract would be available so there would be no need to resort to restitution or to show that an action on a debt is not an action on the contract which gives rise to that debt. This principle received some support in New Zealand before the First World War,[9] but has been rejected in England[10] and Australia[11] and was rejected in New Zealand in 1921.[12] *In Pavey and Matthews v Paul* it was accepted that the Statute must still apply where the contract is executed.[13]

The difference between saying that an action is available in debt or restitution, and saying that the Statute does not apply at all to executed contracts is well illustrated in *Love v McIntyre*.[14] There, the defendant was to supply timber for a house to the plaintiff. In exchange, the defendant was to be allowed onto the plaintiff's property to cut and remove all the timber trees on the land. The contract was unenforceable, being an oral contract for the purchase of an interest in land. The defendant supplied the house timber, but the plaintiff then brought an action seeking an injunction to prevent the defendant coming onto her land to remove trees. The defendant sought to rely on the oral contract. Sim J, while recognising that the defendant might have a restitutionary claim,[15] held that the Statute did apply to executed contracts and that this unenforceable oral contract could not be pleaded to defeat the plaintiff's claim for an injunction.

It is now clear that the Statute does apply to executed contracts. If there is a remedy when goods or services have been provided under an unenforceable contract, that remedy must be based on debt or restitution, not on an action on the contract.

## Restitution

### Restitution where the contract has been terminated for breach or rescinded

Brennan J's objection to the restitution remedy in *Pavey and Matthews v Paul* was the existence of a subsisting contract which governed

9. *Chapman v Kennedy* (1876) 1 JR NS SC 129, 132; *Fell v The Puponga Coal and Gold Mining Co of New Zealand Ltd* (1904) 24 NZLR 758.
10. *Sanderson v Graves* (1875) LR 10 Ex 234.
11. *Hodge v Rudd* (1902) 19 WN (NSW) 119; *Riley v The Melrose Advertisers* (1915) 17 WALR 127.
12. *Love v McIntyre* [1921] NZLR 339.
13. Supra n 1, 247-248.
14. Supra n 12.
15. Ibid, 342.

the obligations of the parties. He recognised, however, that in cases, unlike *Pavey and Matthews v Paul*, where a partly performed contract has been terminated for breach the plaintiff is entitled to restitution despite the Statute of Frauds.[16] As Goff and Jones say:

> [T]he unenforceable contract is no bar to the claim, since the defendant's breach entitles the plaintiff to determine the contract and proceed in restitution.[17]

In such cases there would be no continuing, primary contractual obligations and an independent, restitutionary obligation, not touched by the Statute, could arise. There appears to be no doubt that a plaintiff who has terminated an unenforceable contract upon a breach by the defendant is entitled to a reasonable remuneration for goods and services provided under that contract.[18] This is the same restitutionary recovery that is available upon the termination for breach of any enforceable contract.

In *Mavor v Pyne*,[19] for example, the defendant had contracted to take *Pyne's History of the Royal Residences* in eighteen instalments. After receiving seven or eight instalments the defendant refused to take any more or pay for those he had accepted. The contract was unenforceable under the Statute of Frauds but Best CJ held that the plaintiff was entitled to recover:

> When the first contract was broken off, when the defendant said, "I will not take the whole", I think an implied contract was raised, which may be enforced in this form of action.[20]

Like results were reached in *Pullbrook v Lawes*[21] and *Harman v Reeve*.[22] In *Harman v Reeve* the plaintiff sold two horses to the defendant and agreed to look after them for six weeks until the defendant collected them. The defendant was to pay £30 to cover the price of the horses and "eatage"[23] for the six weeks. The con-

16. Supra n 1, 237.
17. R Goff and G Jones *The Law of Restitution* Third Ed (London: Sweet & Maxwell, 1986) 396.
18. *Horton v Jones (No 2)* (1939) 39 SR(NSW) 305, 319; Goff and Jones ibid.
19. (1825) 2 Car and P 91; 172 ER 41.
20. Ibid, 43.
21. (1876) 1 QBD 284.
22. (1854) 4 WR 599.
23. Cf "tentage" in *May and Butcher Ltd v The King* [1934] 2 KB 17, 18: "a word which has convenience if it has not euphony in its favour".

tract was an oral contract for the sale of goods above the value of £10 and therefore unenforceable under the Statute of Frauds. Nevertheless, it was held the plaintiff could recover; not for the horses, which he still had, but for the eatage which had been supplied at the defendant's request.

In the New Zealand case of *Merrell v Loft*[24] there was an unenforceable oral contract that the plaintiff would do farm work for the defendant and in return the defendant would give the plaintiff a farm. The defendant repudiated the contract. Williams J held that the Statute of Frauds did not prevent the plaintiff recovering reasonable remuneration for the work he had already done:

> [I]t is unquestionable that, if [a contract is] rescinded by a breach on one side which entitles the other to rescind, and goods, labour, &c., have been provided by one party under the special contract and retained by the other party after the rescission, the value may be recovered as on a count of indebitatus assumpsit, provided a new contract can be implied for their value.[25]

Recovery by the plaintiffs in these cases is correct in principle. A plaintiff who terminates an enforceable contract for breach has an action in restitution as an alternative to a damages action. Despite doubts by some writers,[26] the traditional approach, that restitution in such cases is an independent, restitutionary, non-contractual remedy and not merely a restitutionary measure of contractual damages, is still accepted.[27] The existing contract does not bar the action in restitution. Termination of future primary obligations is sufficient to allow an obligation in restitution to be imposed by law.[28] What, then, can prevent the plaintiff who terminates an unenforceable contract for breach from recovering in restitution? The termination is not an action on the contract; it is the plaintiff's own act. The subsequent recovery is quite separate from the con-

24. (1895) 13 NZLR 739.
25. Ibid, 743.
26. F Dawson "Recission and Damages" (1976) 39 MLR 214, 219; J M Perillo "Restitution in a Contractual Context" (1973) 73 Col LR 1208; R Childres and J Garamella "The Law of Restitution and the Reliance Interest in Contract" (1969) 64 North Western Univ LR 433.
27. *Lodder v Slowey* [1904] AC 442; J Carter *Breach of Contract* (Sydney: Law Book Co, 1984) 443; J F Burrows, J N Finn and S Todd *Cheshire and Fifoot's Law of Contract* Seventh New Zealand Ed (Wellington: Butterworths, 1988) 631.
28. *Fibrosa Spolka Ackyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32

tract. It is an action in restitution, not an action on the contract. So the Statute of Frauds bar on actions on the contract has no effect and the terminating plaintiff recovers.

In *Merrel v Loft* Williams J does not make it clear whether the "new contract" is implied by law or by the intention of the parties. The modern view is that it is a non-contractual obligation imposed by law. In either case the new obligation arises independently of the unenforceable contract and so is unaffected by the Statute of Frauds.

Where an unenforceable contract is not merely terminated, but is rescinded for misrepresentation,[29] it is even clearer that the plaintiff should recover in restitution. If the contract is void ab initio and so is to be treated as if it never existed, it is immaterial that the contract is unenforceable. What difference can it make that a contract which never existed was enforceable or unenforceable?

That is not to say, however, that recovery will always be possible where the contract is terminated or rescinded. It may be that the wording or purpose of the relevant statute is more stringent than the original Statute of Frauds and extends to prevent even recovery on an independent, restitutionary action. Such was the case in *Deposit and Investment Co Ltd v Kaye.*[30] The plaintiff made a loan to the defendant but the contract was unenforceable for non-compliance with the New South Wales Moneylenders and Infants Loans Act 1941. When the defendant fell into arrears the plaintiff could not recover, since the purpose of the Act was so wide as to prevent any right of a lender to recover his money in court. The Act did not merely say the contract was unenforceable; it said the borrower's obligations were unenforceable. A similarly wide interpretation of section 45 of the Builders Licensing Act was considered, but rejected, in *Pavey and Matthews v Paul.*[31] That Statute, like the original Statute of Frauds, was not so wide as to prevent recovery on the independent, restitutionary obligation.[32] Prohibiting reliance on oral proof of a contract is very different from prohibiting a builder recovering any remuneration at all for labour and materials.

29. *Johnson v Agnew* [1980] AC 367.
30. [1963] NSWR 833.
31. Supra n 1, 231, 262-263.
32. See Ibbetson, "Implied Contracts and Restitution" (1988) 8 OJLS 312, 326.

When is termination and restitution available?

In the cases discussed above where restitution was available the restitutionary remedy arose when the contract was terminated upon the defendant's breach. The remedy in restitution would have arisen in exactly the same way had the contract been enforceable. The plaintiff was able to recover when the defendant pleaded the Statute of Frauds because the remedy in restitution had arisen. The question then arises as to the circumstances in which the plaintiff can terminate a contract and claim restitution. Clearly there can be no termination simply on the ground that the contract is unenforceable.[33] Equally clearly, a plaintiff whose obligations under the contract have not yet been fulfilled can terminate upon the defendant's repudiatory breach.[34] The difficulty arises in cases such as *Pavey and Matthews v Paul* where the plaintiff has completely executed its obligations under the contract and the defendant's breach is a failure to pay the contract price. Can the plaintiff then terminate the contract and claim restitution, so releasing itself from its contractual obligations, when those obligations have been completely fulfilled anyway? If it cannot, at least on the view of Brennan J, the subsisting contract will be a bar to restitutionary relief where the contract is unenforceable.

In the United States and Canada it seems to be clear that plaintiffs who have completely performed their obligations under a contract cannot terminate and claim restitution,[35] but are limited to an action on the contract:

> Where the contract work has been completed there is no recovery by quantum meruit. The contractor must seek his remedy in the contract. He is limited to the contract price and damages he may be awarded for breaches.[36]

This rule, which is supported by English textbooks on restitution,[37] has a two-fold rationale. First, a restitutionary remedy is not necessary, since, having performed his obligations, the plain-

33. *Thomas v Brown* (1876) 1 QBD 714.
34. *Mavor v Pyne* supra n 19; *Pullbrook v Lawes* supra n 21; *Horton v Jones (No 2)* supra n 18.
35. *Morrison-Knudson Co v British Columbia Hydro and Power Authority* (1978) 85 DLR (3d) 186; United States *Restatement of Law — Contract* Second Ed s 373(2).
36. *Morrison-Knudson Co* ibid, 234.
37. Goff and Jones supra n 17, 465; J H Munkman *The Law of Quasi-Contract* (London: Pitman, 1950) 90.

tiff can maintain an action on the accrued debt. Second, it would not be just for the plaintiff to obtain a possibly higher rate of compensation than that agreed under the contract.[38] Goff and Jones, after citing the rule accepted in the United States, say that,

> [W]e consider this conclusion to be historically sound and to be correct in principle. The plaintiff was granted an action in quasi-contract because he could not sue in debt until he had completed his part of the bargain; but if he has completed the contract, he is entitled to sue for the contract price.[39]

That rule appears to be correct. The termination of a contract for breach does not cancel primary obligations that have already accrued. A restitutionary obligation to pay for work done would conflict with the accrued contractual obligation. The terminating party is as much bound by accrued obligations as the defaulting party, and having made a losing bargain should not be allowed to have that overridden by a restitutionary reasonable remuneration.

It is a different matter, however, where the defendant's remaining obligation is to provide goods or services. There is then no accrued debt and the plaintiff's remedy is in damages. There arises an alternative remedy in restitution.[40] *Merrell v Loft*,[41] the facts of which have already been discussed, shows that where the plaintiff has fully performed and the defendant's outstanding obligation is to provide goods, land, or services, the plaintiff may terminate the contract upon the defendant's breach and recover in restitution. It was not clear in *Merrell v Loft* whether the plaintiff had fully performed his obligations or not, but Williams J held that in either event the plaintiff was entitled to recover a reasonable remuneration for his services.[42]

Restitution where the plaintiff has completely performed an unenforceable contract

No action in restitution can arise where the plaintiff has completely performed an enforceable contract and the defendant, in

38. *Morrison-Knudson Co* supra n 35; *Oliver v Campbell* 273 P 2d 15 (1954).
39. Supra n 17, 465.
40. See *Restatement of Law — Contract* supra n 35, s 373 comment b and illustrations. See also *Trimtor Building Consultants v Hilton* [1983] 1 NSWLR 259.
41. Supra n 24.
42. Ibid, 743.

breach, fails to pay the contract price. Therefore, if the contract is unenforceable, there is no remedy in restitution which can be enforced despite the Statute of Frauds. Nevertheless, the plaintiff may have a remedy. First, there is some authority that an accrued debt is enforceable even when the contract from which it arises is not. That proposition will be considered later, but for present purposes it will be assumed that the accrued debt is unenforceable whenever the contract is unenforceable. Second, there is significant authority that if the accrued debt is unenforceable, then although there is no obligation in restitution that can be enforced *despite* the Statute of Frauds, there is nevertheless an obligation in restitution that arises *because* of the Statute of Frauds. That was the view adopted by the majority in *Pavey and Matthews v Paul.* A remedy in restitution arises to ensure that the Statute of Frauds does not operate to unjustly enrich the defendant. That is quite different from restitution where the plaintiff has only partly performed and terminates upon the defendant's repudiatory breach. Here the obligation in restitution arises because of the Statute of Frauds, rather than being enforced despite the Statute. Brennan J dissented on the ground that such a remedy would undermine the effect of the Statute.

The issue now being considered then, is whether an obligation in restitution can arise *because* an accrued debt has been made unenforceable by the Statute of Frauds.

It has already been noted[43] that in *Pavey and Matthews v Paul* it was unanimously agreed that recovery on a quantum meruit, based on an independent obligation, depends on a principle of unjust enrichment, not on an implied contract to pay a reasonable remuneration. It used to be thought, however, that an implied contract had to be found before an obligation independent of the original contract could be imposed.

The better rule is that if the independent obligation to pay a reasonable remuneration depends on an implied contract, that obligation cannot arise where a debt has accrued under an unenforceable contract. As Brennan J says in *Pavey and Matthews v Paul*, "a contract cannot be implied from the facts of a case while another

43. See text accompanying n 3.

contract between the parties on the same matter is subsisting".[44] Certainly it seems illogical to suggest that an intention to enter a new contract can ever be implied where there is a subsisting contract between the parties governing the same matter.

Nevertheless, there are several cases where it has been held that such a contract can be implied where the original contract under which a benefit has been conferred is unenforceable.[45] In *Scott v Pattison*[46] an action was brought to recover a reasonable remuneration for services performed under an employment contract unenforceable under the Statute of Frauds. It was held that, despite the contract, "the party who has rendered the services can sue the other party in debt on an implied contract to pay him according to his deserts".[47] A like result was reached in Canada in *Re Meston.*[48] There was an unenforceable oral contract between father and son that the son do work for the father and the father leave property in his will to the son. The will proved to be invalid upon the father's death, and the son brought the action for a reasonable remuneration. The Saskatchewan Court of Appeal held that the son could recover despite the subsisting contract. However, because the imposed independent obligation was based on implied contract, the Limitations Act applied and there could only be recovery for work done within six years of the father's death. The Limitations Act would not have applied if the independent obligation had been seen as resting upon restitutionary principles rather than implied contract.[49]

Recovery on an implied contract has received some support in New Zealand. In *Tipling v TPR Printing Co Ltd*[50] Cooke J held that recovery could be made on an independent obligation to pay for work done under an unenforceable contract. He did not determine whether that independent obligation was based on implied

44. Supra n 1, 234-235.
45. This view was supported by H Mayo K C "Quantum Meruit in the Case of Contracts within the Statute of Frauds" (1933) 7 ALJ 145.
46. [1923] 2 KB 723.
47. Ibid, 727.
48. [1925] 4 DLR 887.
49. See discussion in *Deglman v Guaranty Trust Co of Canada and Constantineau* [1954] 3 DLR 785, 795-796.
50. [1955] NZLR 136.

contract or restitution, but at least thought implied contract was a possibility, even where there is a pre-existing contract.

It now appears to be accepted, however, that there can be no implied contract where there is already an unenforceable contract. *Scott v Pattison*[51] has been widely criticised on this ground.[52] In *Britain v Rossiter*[53] an action to recover for work done under an employment contract which was unenforceable under the Statute of Frauds failed. It was held that the unenforceable contract was a bar to any new, enforceable contract being implied. Also, Williams J makes it quite clear in *Merrell v Loft* that no new contract could have been implied had the previous unenforceable contract not been terminated.[54]

If the implied contract approach is adopted, the more logical rule is that there can be no implied contract governing the same matter as a subsisting contract. This will be so even if the subsisting contract is unenforceable. Therefore, unless a debt action can be brought,[55] the party who renders goods or services under an unenforceable contract will be without a remedy if the other party fails to pay and the implied contract approach is adopted.

The implied contract approach is, however, now generally rejected. The independent obligation to pay a reasonable remuneration is seen to be based upon the principle of unjust enrichment. This view was accepted unanimously in *Pavey and Matthews v Paul.*[56] It has long been accepted in Canada and England.[57] In New Zealand in *Van den Berg v Giles*[58] Jeffries J adopted the well-known passage in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* where Lord Wright said:

> Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract; the obligation is as efficacious as if it were upon a con-

51. Supra n 46.
52. *Pavey and Matthews v Paul* supra n 1, 234-235; *Deglman v Guaranty Trust* supra n 49, 794; A T Denning "Quantum Meruit and the Statute of Frauds" (1925) 41 LQR 79.
53. (1883) 11 QBD 123.
54. Supra n 24; 743.
55. See text accompanying n 138 ff.
56. Supra n 1, 267 and also see 227, 235, 256.
57. *James v Thomas H Kent and Co Ltd* [1951] 1 KB 551, *Deglman v Guaranty Trust* supra n 49, 794.
58. [1979] 2 NZLR 111, 121.

> tract. The obligation is a creation of law, just as much as an obligation in tort.[59]

Goff and Jones call the implied contract theory "a meaningless, irrelevant and misleading anachronism."[60]

What is the effect on the unenforceable contract cases of accepting the unjust enrichment approach? Goff and Jones, and Deane J in *Pavey and Matthews v Paul*, think it has a substantial effect. Although an unenforceable contract is a bar to implying a contract, it is not, they say, a bar to imposing a non-contractual obligation. It is because the contract under which services have been provided is unenforceable that the extra restitutionary obligation to pay arises:

> The quasi-contractual obligation to pay fair and just compensation for a benefit which has been accepted will only arise in a case where there is no applicable agreement or where such an agreement is frustrated, avoided *or unenforceable*. In such a case, it is the very fact that there is no genuine agreement or that the genuine agreement is frustrated, avoided *or unenforceable* that provides the occasion for (and part of the circumstances giving rise to) the imposition by the law of the obligation to make restitution."[61] (emphasis added)

Similarly, Goff and Jones believe that *Scott v Pattison*[62] is correctly decided because it can be seen as being based on restitution rather than implied contract.[63]

Brennan J's dissenting view on this issue in *Pavey and Matthews v Paul* is the most important aspect of his judgment. The mere fact of a contract being unenforceable is not, he said, sufficient to give rise to a restitutionary obligation. That would duplicate obligations and negative the proper effect of the Statute of Frauds:

> If it were possible to impose a quasi-contractual obligation to pay a reasonable remuneration when there is a subsisting unwritten contract which falls within the Statute of Frauds, the imposed obligation would be either inconsistent with the contract or it would duplicate the contractual obligation. An inability to sue on a contract provides no ground for imposing a quasi-contractual obligation to pay remuneration, and the effect of the Statute on the contractual obligation cannot be circumvented by substituting a corresponding quasi-contractual obligation.[64]

59. Supra n 28, 62.
60. Supra n 17, 10.
61. Supra n 1, 253.
62. Supra n 46.
63. Supra n 17, 397.
64. Supra n 1, 238.

The weight of authority, however, is overwhelmingly in favour of the majority view. Those authorities will be considered first. It will then be submitted that a comparison with the approach taken to restitution on related issues shows also that the majority view is in no way inconsistent with any general principle of restitution law.

## The authorities

Goff and Jones,[65] and Munkman[66] adopt the same view as the majority in *Pavey and Matthews v Paul.* If goods or services have been provided under an unenforceable contract so that a debt has accrued and the other party fails to pay, restitution is available.

This proposition is well supported by nineteenth century English cases.

In *Scarisbrick v Parkinson*[67] it was held that a plaintiff could recover on an obligation to pay a reasonable remuneration arising independently of an unenforceable contract:

> The plaintiff served the defendant for the full period of three years under an agreement which was not legally available in evidence as an agreement, because it was not reduced to writing as, under the Statute of Frauds, it ought to have been. But for services performed, the law implies a payment.[68]

The obligation imposed was not one to pay the contract price, but rather, one to pay a reasonable remuneration of which the contract price was merely evidence.

A case upon which Deane J placed some reliance[69] is *Sanderson v Graves.*[70] In this case it was clearly recognised that an independent obligation can arise where a debt has accrued under an unenforceable contract governing the same matter. On the particular facts, however, it was held that no such obligation arose:

> There are cases where, when the thing is executed, a defendant might be liable, eg, on a contract to paint and deliver a picture on and not before a day distant more than a year. If at the time appointed the person ordering the picture took it, he would be held to have renewed his promise at the moment. So of any other case where the law would imply a promise on the doing of anything by the promisor.[71]

65. Supra n 17, 397.
66. Supra n 37, 89.
67. (1869) 20 LT 175.
68. *Scarisbrick v Parkinson* ibid.
69. Supra n 1, 247.
70. Supra n 10.
71. Ibid, 238.

Bramwell B's language in the above passage might be construed as adopting the implied contract approach. In *Pavey and Matthews v Paul*, however, Deane J thought that Bramwell B "was referring to a 'promise' or obligation arising ... by implication or imputation of 'the law'."[72]

This case will be considered more closely below[73] as an illustration of restitutionary principles in particular cases. It will be submitted that it is wrongly decided. Since it was accepted that an obligation could arise, the plaintiff should, on the facts, have been able to recover. The question now being considered, however, is whether an obligation in restitution can arise at all where a debt has accrued under an unenforceable contract. *Sanderson v Graves* is authority that it can.

*Souch v Strawbridge*[74] is another case upon which Deane J relied.[75] Here there was a contract for the maintenance of a child. The child had been maintained but the defendant had failed to pay. In fact, the contract did not come within the Statute of Frauds at all. Tindal CJ held, however, that even if it had done the plaintiff could have recovered. The exact basis on which he thought this was so is the subject of some disagreement. In the early New Zealand cases *Souch v Strawbridge* was treated as supporting the now clearly rejected principle that the Statute of Frauds does not apply at all to executed contracts.[76] In *Pavey and Matthews v Paul* Brennan J thought Tindal CJ was contemplating an action on the debt deriving from the contract.[77] This interpretation was also adopted by Lord Denning in an article in 1925,[78] and again in his original judgment in *James v Kent and Co*[79] (although *Souch v Strawbridge* is not cited in his revised judgment in that case).[80]

However, it is submitted that it is beyond doubt that Tindal CJ's remarks in *Souch v Strawbridge* were based on the existence of an

72. Supra n 1, 247.
73. See text accompanying n 120 ff.
74. (1846) 2 CB 804; 135 ER 1161.
75. Supra n 1, 254.
76. Supra n 9 and n 12 see Mayo supra n 45.
77. Supra n 1, 246.
78. Lord Denning supra n 52 and see Ibbetson supra n 32, 322-323.
79. [1950] 2 All ER 1099, 1103.
80. Supra n 57.

*independent* obligation, not on the debt *deriving from* the contract. This was the interpretation adopted by Deane J in *Pavey and Matthews v Paul*[81] and also in *Schwarstein v Watson*.[82]

In *Souch v Strawbridge* the Chief Justice said that recovery by the plaintiff, if the contract had been unenforceable, would be equivalent to "an action for goods sold and delivered, whence the law implies a promise on the defendant's part to pay for them."[83] This is further (and perhaps even more completely) shown in an exchange during the submissions of counsel for the defendant:

> Manning, Serjt ... The defendant is charged upon an express contract. If that be rejected, what remains? The action is then an action against a stranger ... [Cresswell J The child being supported by the plaintiff at the defendant's request.] There was no request, apart from the express contract, proved. [Tindal CJ If a man enters into a contract to serve another for two years, no action will lie for non-performance of that contract, unless it be reduced into writing. But, if the service has been performed under it, an action for work and labour will lie.][84]

With respect, it is difficult to see how Brennan J and Lord Denning could justify their view that Tindal CJ was not contemplating an independent obligation arising to pay a reasonable remuneration where a debt has accrued under an unenforceable contract.

*Knowlman v Bluett*[85] is a case similar to *Souch v Strawbridge*. The defendant had agreed to pay the mother of his illegitimate children for maintaining them. Again, the Statute of Frauds did not apply. It was said, however, that if it had done, the plaintiff could have recovered on an action for "money paid at the defendant's request".[86]

All the above cases support recovery of a reasonable remuneration on an independent obligation where there is an unenforceable contract completely performed by the plaintiff.

The nineteenth century authority is not, however, all one way. In *Kelly v Webster*[87] there was an oral assignment of lease, including "certain venetian blinds, passage-lamp, and partitions therein con-

81. Supra n 1, 254.
82. [1985] 3 NSWLR 134, 137.
83. Supra n 74, 814; 1164.
84. Ibid, 811; 1163.
85. (1874) LR 9 Ex 307.
86. Ibid, 308.
87. (1852) 12 CB 283; 138 ER 912.

tained"[88] for £100. The oral contract for an interest in land was unenforceable under the Statute of Frauds. The assignee paid only £51 and the action was brought by the assignor to recover the balance. Counsel for the assignor claimed that on the authority of *Souch v Strawbridge*[89] the assignor could recover. It was held that he could not. It was noted in *Turner v Bladin*,[90] however, that *Kelly v Webster* is distinguishable, because the action was brought on the contract for the contract price, not in debt or on an independent obligation to pay a reasonable remuneration.

The same can be said of *Cocking v Ward*.[91] This was another unenforceable assignment of lease case: the lease had been assigned, but the assignee failed to pay. The plaintiff succeeded on an account stated, but not on his alternative action on the unenforceable contract. In *Pulbrook v Lawes*[92] Blackburn J noted that in *Cocking v Ward* there was no claim based upon an independent obligation to pay a reasonable remuneration.

Those cases, then, where it has been held that the plaintiff could not recover, are distinguishable because the actions were brought on the unenforceable contracts themselves. The nineteenth century English cases, therefore, overwhelmingly support the approach taken by the majority in *Pavey and Matthews v Paul*. A debt arising from an unenforceable contract is no bar to an obligation arising in restitution if the debt is unenforceable.

The same approach has been taken this century in England. In his initial judgment in *James v Kent and Co*[93] Lord Denning thought that if a plaintiff has partly performed he can recover in restitution where the contract was unenforceable, but that if he has fully performed his action should be on the debt deriving from the contract. In his revised judgment,[94] however, Lord Denning took a different approach, holding that whether he has partly or completely performed, the plaintiff's action is in restitution. Lord Den-

88. Ibid, 913
89. Supra n 74.
90. (1951) 82 CLR 463, 475.
91. (1845) 1 CB 858; 135 ER 781.
92. Supra n 21, 290.
93. Supra n 79, 1103.
94. Supra n 57, 556.

ning expressly notes that although the unenforceable contract is a bar to implying a new contract, it is not a bar to imposing a non-contractual obligation in restitution.[95]

There is considerable Australian authority apart from *Pavey and Matthews v Paul* supporting the restitution approach where a debt has accrued.

Perhaps the strongest authority, because it expressly states that an obligation in restitution can arise *because* a contract is unenforceable, is *Horton v Jones (No 2)*.[96] This was not, however, a case where a debt had accrued. Horton had agreed to look after and provide a home for Jones, who in return was to make a will leaving Horton land and the proceeds of various life assurance policies. Horton cared for Jones until his death, but Jones failed to make the will. The contract was unenforceable, being an oral contract for an interest in land. It had earlier been held in *Horton v Jones (No 1)* that the plaintiff was entitled to maintain a claim upon a quantum meruit for services rendered.[97] In *Horton v Jones (No 2)* Jordon CJ said this:

> Where there is or has been an express contract between the parties, the cases in which it has been held that an action for a quantum meruit may be maintained are the following:...(2) If one party to an express contract renders to the other some, but not all the services which have to be performed in order that he may be entitled to receive the remuneration stipulated for by the contract, and the other by his wrongful repudiation of the contract prevents him from earning the stipulated remuneration, the former may treat the contract as at an end and then sue for a quantum meruit for the services actually rendered...(3) If a person renders services to another under a contract which is unenforceable by reason of the absence of the written evidence required by the Statute of Frauds, and the other sets up the Statute as an answer to an action for the stipulated remuneration, it has been held that the former is entitled to recover a quantum meruit: *Scott v Pattison*.[98]

In *Ward v Griffiths Bros Ltd*[99] there was an unenforceable oral employment contract not to be performed within one year. The contract stipulated a weekly wage, plus a lump sum £200 payment at the end of the plaintiff's two years service. The plaintiff worked for

95. Ibid.
96. Supra n 18 and see *Horton v Jones (No 1)* (1934) 34 SR (NSW) 359.
97. Supra n 96, 367.
98. Supra n 18, 319.
99. (1928) 28 SR (NSW) 425.

two years and the wages were paid, but the defendant employer failed to pay the lump sum. The plaintiff recovered £200, not because he was owed £200 under the contract, but because the total weekly wages were £200 less than a reasonable remuneration for the total work to which the plaintiff was entitled in restitution.

A restitutionary action for the recovery of money where there was an unenforceable contract also succeeded in *Crombie v Crombie*.[100] There is further support for recovery in restitution in *Borg v Borg*,[101] which involved an unenforceable share-farming contract.

The Australian cases, then, support the view that a restitutionary action is available where a debt has arisen under an unenforceable contract. The New Zealand cases provide further support for such an action. In *Tipling v TPR Printing Co Ltd*[102] there was a subsisting employment contract which was unenforceable under the Statute of Frauds. Cooke J in the Supreme Court of New Zealand held that an independent obligation to pay a reasonable remuneration arose despite the subsisting contract, although he was not sure whether it should be based on restitution or implied contract.[103]

It remains only to consider the North American authorities. The position adopted in section 108(d) of the United States *Restatement of the Law of Restitution* is that:

> A person who has conferred a benefit upon another in the performance of a contract or bargain with the other which the other has failed to perform is entitled to restitution, as follows:
> (a) if the other has committed a material breach of contract, in accordance with the rules [governing termination for breach],...
> (d) if the other is privileged not to perform because of the Statute of Frauds...[104]

The Supreme Court of Oregon in *McGilchrist v F W Woolworth Co* said:

> [T]he authorities are practically in accord that an action in quantum meruit may be maintained for services rendered under an oral contract unenforceable by reason of the Statute.[105]

Similarly the Supreme Court of Canada in *Deglman v Guaranty Trust* held that an obligation can arise in restitution where there has been

100. (1903) SALR 147.
101. (1952) 52 SR (NSW) 92.
102. Supra n 50.
103. See text accompanying n 48 ff.
104. United States *Restatement of Law — Restitution.*
105. 7 P(2d) 982, 985 (1932).

a breach of an "existing but unenforceable contract."[106]

It may be said, then, that the authorities throughout the common law jurisdictions overwhelmingly support the view taken by the majority in *Pavey and Matthews v Paul*. An obligation may arise in restitution where the plaintiff has fully performed and the defendant has failed to pay the contract price.

Principles of restitution

Can Brennan J's dissenting view in *Pavey and Matthews v Paul* be supported on any general principle of restitution law, if not on the authorities? It is submitted that it cannot. Brennan J's view that an obligation in restitution cannot "duplicate the contractual obligation"[107] is wrong. Concurrent obligations in contract and restitution can exist where an accrued contract debt is unenforceable.

At first sight Brennan J's views seem to be supported by this statement of general principle by Goff and Jones:

> If A confers a benefit on B under a valid contract, he must seek his remedy under that contract and not in restitution. The parties' rights and duties are governed by the contract.[108]

Indeed, further on, Goff and Jones add that "similar principles apply even if the contract is unenforceable."[109] It is submitted, however, that the case which Goff and Jones footnote to this second passage illustrates why Brennan J was wrong to hold, on this general principle, that there could be no recovery in restitution in *Pavey and Matthews v Paul*.

The case is *Smith v Hartshorn*.[110] Under an unenforceable oral contract the plaintiff and defendant agreed to go into partnership working a dairy farm. Property, livestock, and machinery were to be provided by the defendant and labour by the plaintiff. After a few months the parties agreed that the plaintiff should leave the partnership. The contract, however, remained on foot.[111] There was a partnership bank account and the plaintiff had a right to forty percent of the money in the account. The important point is

106. Supra n 49.
107. Supra n 1, 239.
108. Supra n 17, 31.
109. Ibid, 32.
110. (1960) 60 SR (NSW) 391.
111. Ibid, 392.

that there had been no breach whatsoever by the defendant, who had not denied the plaintiff's rights over a portion of the joint bank account. It was held that the plaintiff's action to recover a reasonable remuneration for the labour he had provided failed, but it appears that there could have been recovery had the defendant broken the contract:

> The contract was merely unenforceable; it was not void, *and at no time did the defendant deny the continued right of the plaintiff to a participation in the joint account.* That, to my mind, is sufficient of itself, coupled with the circumstances of the termination of the contract,[112] to remove the case out of the category of those in which a right to recover on a quantum meruit arises by quasi contract.[113] (emphasis added)

This passage, from one of the very cases which Goff and Jones cite to justify their statement of general principle, shows that the principle is not as wide as Brennan J's application of it. In *Smith v Hartshorn* it was recognised that if services had been provided under the contract and the defendant had broken the contract (as in *Pavey and Matthews v Paul*), then an obligation in restitution could arise.

It is submitted that the general principle stated by Goff and Jones is limited to two situations. The first is to prevent recovery by a party in restitution where, under the terms of the contract, there is no entitlement to recover. That was the case in *Smith v Hartshorn*, and is also what occurred in *Cutter v Powell*[114] and *Phillips v Ellinson Bros Pty Ltd.*[115] In those two cases there were entire contracts and the plaintiffs only partly performed. Under the terms of the contracts, the plaintiffs were not entitled to recover. But this was certainly not the case in *Pavey and Matthews v Paul*. The second is to prevent actions in restitution where a perfectly adequate action on the contract is available. Again, this was not the case in *Pavey and Matthews v Paul*. These are the only two proper applications of the principle upon which Brennan J relies.

Statements in the other cases cited by Goff and Jones also show that the principle is not intended to apply where there has been

112. Sugarman J must mean termination of the active partnership, since Herron J clearly stated, and Sugarman J does not appear to have disagreed, that the contract was still on foot, ibid.
113. Supra n 110, 394.
114. (1795) 6 TR 320; 101 ER 573.
115. (1941) 65 CLR 221.

a breach of a contract and the terms of the contract do not bar recovery, but no recovery is in fact possible on the contract. In *Gompertz v Denton* Bayley B said,

> I take the rule to be, that, if the contract remains open *so as to give the party a right to recover damages for a breach of warranty*, he cannot maintain an action of indebitatus assumpsit on the ground of the failure of consideration."[116] (emphasis added)

That shows that the principle is only to apply where there can in fact be recovery on the contract.

As the principle is employed by Brennan J, and indeed as it is stated by Goff and Jones, it assumes the altogether wider aspect of totally prohibiting concurrent obligations in contract and restitution. It is submitted that this wider application of the principle is not justifiable. This submission is supported not only by the limited scope of the judgments in *Smith v Hartshorn* and *Gompertz v Denton*, but also by the Statute of Frauds cases already discussed.

The majority view in *Pavey and Matthews v Paul* is not only correct on the authorities, but is also correct in principle. The accrued debt is no bar to a claim in restitution if it is unenforceable. It is that very unenforceability that gives rise to the restitutionary obligation.

Brennan J, however, objected to that. When a partly performed unenforceable contract is terminated for breach an obligation in restitution arises and the enforcement of that obligation is allowed despite the Statute of Frauds. Where an unenforceable contract has been completely performed, however, and a debt has accrued, there is no existing remedy in restitution. The restitutionary obligation only arises when the Statute of Frauds is pleaded, because it is only then that it is needed to replace primary contractual obligations which are no longer effective. The remedy in restitution is allowed because of, not despite, the Statute of Frauds. That, said Brennan J, subverts the Statute.[117]

It is submitted, however, that there is no subversion. Restitutionary obligations arise where there is unjust enrichment however that enrichment arises. Restitution will in some cases correct unjust enrichment created by statute where a statute makes a con-

116. (1832) 1 C and M 207, 209; 149 ER 376, 377.
117. Supra n 1, 238.

tract illegal.[118] Equally, restitution can correct unjust enrichment created by the Statute of Frauds. The only ground for saying it cannot is if the purpose of the Statue is construed as barring that remedy. The purpose of the Statute of Frauds, however, is not to punish those who enter oral contracts by denying them any remedy, but to prevent reliance in court upon oral terms of certain classes of contract.[119] That purpose is not subverted by allowing a remedy in restitution which does not require proof of the terms of the contract.

On the authorities, in principle, and on the policy of the Statute, where the plaintiff has conferred goods or services on the defendant and a debt has accrued, a reasonable remuneration can be recovered in restitution if the defendant fails to pay and the debt is unenforceable.

Applying restitution principles to particular cases

An obligation in restitution can arise where there has been a breach of contract, even when an unenforceable debt has accrued. However, it will never be enough that there has simply been a breach. The facts must also be such that, on the principles of restitution, there is an unjust enrichment of the type that gives rise to liability. In cases such as *Pavey and Matthews v Paul* this is no problem as there had clearly been an unjust enrichment at the plaintiff's expense.

The point is illustrated by *Sanderson v Graves*.[120] There had been a breach of a subsisting but unenforceable contract. It was held that although an obligation in restitution could arise in such circumstances, on the particular facts none did. It is submitted that this case was wrongly decided. On the facts there was an unjust enrichment such as to give rise to an obligation to pay a reasonable remuneration.

There had been a written lease between the parties which provided that there was to be no right of assignment without consent and that upon any assignment with consent the lessor was to receive half the profit which the lessee made from that assignment. A new

118. Goff and Jones supra n 17, 406 ff.
119. *Earl of Falmouth v Thomas* (1832) 1 C and M 89; 149 ER 326.
120. Supra n 10 and see text accompanying n 65 ff.

and oral lease, however, was entered into which was unenforceable under the Statute of Frauds. This new lease contained no covenant against assignment without consent, but the lessor's right to half the profits of any assignment remained in force. The lessee assigned the lease at a profit of £1300, but refused to give the lessor his share. Bramwell B said, "the law implies no such promise [that is, an obligation in restitution] as that relied on here on the granting of a lease."[121] It is submitted that, on the principles of restitution, the learned judge was wrong.

The lessor's right to assignment profits cannot be regarded as consideration solely for the right to assign, since the assignment profits clause was also included in the old lease where there had been no right to assign. The chance which the lessor obtained of receiving this profit, then, must be seen as part of the general consideration for the right to occupy. That being so, it may well be that the other consideration (the lump sum paid for the lease, and the rent) was reduced in recognition of the lessor being entitled to a half share in any assignment profits. The lump sum and rental alone may have been less than the true value of the lease.

If it could be shown that the reasonable value of the lease was indeed more than what the lessor had received, then the difference should be recoverable in restitution. A breach by one party to an unenforceable contract, which reduces the consideration received by the other (here the chance of a profit) gives the other party a right in restitution to the difference between the reasonable value and the money he has actually received (although the contract price may be a limit on that recovery).[122]

Indeed, in the earlier case *Griffith v Young*,[123] which was not cited in *Sanderson v Graves*, it was held that the lessor could recover in similar circumstances. It must be said, however, that *Griffith v Young* was decided on rather different grounds. The assignee knew that part of the money he was paying to the first lessee was to go to the lessor under the (unenforceable) agreement the lessor had with the first lessee. The obligation in restitution arose not because the first

121. Ibid, 238.
122. See text accompanying n 130 ff.
123. (1810) 12 East 513; 104 ER 201.

lessee had unjustly acquired any benefit from the act of the lessor, but because he had received money from a third person for the use of the lessor. That is a separate class of action in restitution.[124]

Quantum of recovery

The next question is how a reasonable remuneration for goods or services provided is to be measured. Two issues arise where those goods or services were provided under an unenforceable contract.

First, it is clear that the contract price is admissible as evidence of the reasonable value of the goods or services. This rule has been recognised in England,[125] Australia[126] and the United States.[127] In New Zealand in *Tipling v TPR Printing Co Ltd* Cooke J said:

> It is clear, I think, that on such a claim as this the contractual rate of remuneration is admissible as evidence, because it shows the value that each of the parties has put upon the services.[128]

There could be no such evidence in *Pavey and Matthews v Paul* where the contract merely stipulated a reasonable sum.

It was argued by counsel in *Scarisbrick v Parkinson*[129] that the unenforceability of the contract under the Statute of Frauds made it inadmissible as evidence. That argument is clearly wrong. Adducing the contract as evidence is not enforcing or bring an action upon it.

The second issue is whether the unenforceable contract price is a ceiling. If a reasonable remuneration is less than the contract price, then the plaintiff's recovery will be less than if an action on the contract had been available.[130] Is the converse true? If the plaintiff has contracted for a price less than a reasonable remuneration, can a claim for full reasonable remuneration nevertheless be made when the defendant breaches the unenforceable contract? There is authority both ways, but it is submitted that the better view is that such a claim cannot be made unless the contract has been terminated or rescinded.

124. Goff and Jones supra n 17, 517 ff.
125. *Scarisbrick v Parkinson* supra n 67.
126. *Ward v Griffiths* supra n 99; *Horton v Jones* (No 1) supra n 96
127. *McGilchrist v F W Woolworth Co* supra n 105, 985
128. Supra n 50, 139.
129. Supra n 67, 176.
130. Supra n 1, 262-263.

Certainly Deane J in *Pavey and Matthews v Paul* thought that the contract price would be a limit on a reasonable remuneration:

> The defendant will also be entitled to rely on the unenforceable contract, if it has been executed but not rescinded, to limit the amount recoverable by the plaintiff to the contractual amount.[131]

The limitation itself has limits. It seems clear from what Deane J said that if the plaintiff's obligations have not been completely performed, the plaintiff will not be limited to the relevant proportion of the contract price. The limitation only applies where the obligations are completely performed. This approach avoids the difficulties which would arise in apportioning part of the contract price to the part of the work performed.

A very different view was taken by the Supreme Court of Oregon in *McGilchrist v F W Woolworth Co*:

> [I]t is inconsistent and illogical to urge the invalidity of a contract void under the statute, to defeat plaintiff's cause of action, and then assert it to be binding and conclusive as to the measure of recovery.[132]

Despite Belt J's language is it clear that the contract was not invalid, but merely unenforceable under the Statute of Frauds, and it is referred to as such in other places.

It is submitted that the decision in *McGilchrist v F W Woolworth Co* was right, but that the passage quoted above is not. There was an unenforceable contract of employment under which "the plaintiff performed services for defendant at a wage less than the reasonable value thereof in consideration of the agreement of the latter to employ him as a manager at the end of his apprenticeship."[133] The plaintiff's wages were fully paid, but the defendant, in breach, failed to employ him as a manager.

It is submitted that the court was wrong to think it was awarding a reasonable remuneration beyond the contract price. The contract price should not be seen as the wages alone, but as the wages plus the right to be employed as a manager. Indeed it was recognised that "the work which plaintiff performed was in consideration of the entire agreement."[134] In allowing recovery beyond the set wages

131. Ibid, 258.
132. Supra n 105, 985.
133. Ibid, 984.
134. Ibid, 986.

the court was not, as it seems to have thought, going beyond the contract price at all.

The better view on principle would appear to be that a reasonable remuneration cannot be greater than the contract price where a debt has accrued. This is a valid application of the general principle stated by Goff and Jones concerning the relationship of restitution and subsisting contracts,[135] the wider view of which is discussed and rejected above.[136] Although concurrent obligations can exist in contract and restitution, it is a different thing entirely to say that plaintiffs can recover in restitution what they have contracted not to be able to recover under a subsisting contract.

Where plaintiffs have made losing bargains under subsisting unenforceable contracts, and have completely performed their obligations, they should be entitled to reasonable remuneration only insofar as that does not exceed the contract price.

It is a different matter entirely, however, if the unenforceable contract has been terminated for breach before a debt has accrued, or rescinded ab initio for misrepresentation. Where there is a misrepresentation the plaintiff might not have entered the contract but for the misrepresentation, and if the plaintiff had it would have been at a more favourable price, so there is no justification for limiting recovery in restitution to the contract price. In any event, the price set under a contract that is deemed never to have existed can have no effect.

Where the contract has been terminated for breach, primary contractual obligations that have not already accrued are cancelled. One of these is the obligation to accept only the contract price, and no more, for services provided. That obligation does not accrue until the work is finished and the price is due. It cannot be claimed that recovery in restitution should be limited by a contractual obligation that has been terminated.[137]

## Debt

Thus far it has been assumed that a debt arising from an unenforceable contract is itself unenforceable. There is considerable

135. Supra n 17, 31.
136. See text accompanying n 108 ff.
137. *Lodder v Slowey* supra n 27, but see Goff and Jones supra n 17, 467; Childres and Garamella supra n 26.

authority to support the view, however, that an action on a debt is quite separate from an action on the contract giving rise to that debt, and so survives the application of the Statute of Frauds. If that is so there can be no ground for imposing the obligation in restitution discussed above which arises *because* the debt cannot be enforced.

A party may have performed all obligations under a contract so that the other is obliged, under the contract, to pay a sum of money. A debt has arisen upon receipt by the other of the goods or services. In *Pavey and Matthews v Paul*, Dawson and Brennan JJ thought that an action is available on such a debt, despite the contract from which the debt arises being unenforceable under a statute expressed in similar terms to the Statute of Frauds.[138] The action on the debt is separate from the action on the contract, so is not touched by the Statute.

The issue is whether the action on the debt is indeed separate so that the Statute of Frauds does not apply. Deane J thought that it was not. An action on a debt deriving from the contract is still an action on the contract.[139] Certainly the debt action is not as separate as that in restitution. In debt, the very terms of the obligation are established by the contract. Mason and Wilson JJ expressed no opinion on the availability of a debt action.

It might be thought that the availability of an action on the debt depends on the fictional promise to pay the debt in the writ of indebitatus assumpsit. The action is on the fictional promise to pay the debt, not on the contract, so the Statute of Frauds cannot apply. That logic, however, depends upon the fictional undertaking (assumpsit) being given a role in determining substantive rights in the modern law. Lord Wright, in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*,[140] said that it could have no such role since the requirement to specify a particular form of action was abandoned. In *Pavey and Matthews v Paul* Deane J went further and said that the fictional undertaking never did affect substantive rights,[141] and was purely a procedural device. Certainly it seems

138. See text accompanying n 5 ff.
139. Supra n 1, 254.
140. Supra n 28, 63.
141. Supra n 1, 255.

unjustified to claim that procedural fictions which are no longer necessary be given a substantive role. An action on the debt, then, depends on the debt itself being seen as separate from the contract. It is to be noted that neither Dawson nor Brennan JJ in supporting the debt action where there is an unenforceable contract placed any reliance upon the fictional promise.

There are good grounds for believing that an action on the debt is separate from an action on the contract. In the sixteenth century if one provided goods or services and the other failed to fulfil a promise to pay for them, the action to recover payment was in debt, not assumpsit. In *Slade's case*[142] in 1602 it was decided that an action in assumpsit could also be used to recover the promised payment. The rationale behind the assumpsit action to enforce the promise was very different from in debt. In assumpsit, as in the modern law of contract, the action was based on the breach of a binding agreement. The plaintiff sought, as he now seeks in contract, a remedy for the defendant's wrong of breaching the agreement. But debt is different. The action is not based on a claim that the defendant has failed to do something that he promised to do. Rather in debt there is a thing, the sum of money, that the creditor holds and the action is to recover the thing wrongfully detained. The detention, not the promise to pay, is the basis of an action in debt.[143] It seems wrong to suggest that any action not brought on a promise is an action in contract.

Neither, it is submitted, does a debt action *enforce* a contract within the terms of the New South Wales Builders Licencing Act 1971 at issue in *Pavey and Matthews v Paul*. The action does not rest on the ground of enforcing the promise to pay at all; it rests on an obligation that derives from, but is separate to, the contract. That was the view taken by Dawson J.[144]

The authorities on the availability of an action in debt

As long ago as the 1830s the authorities were in disaccord over the availability of an action on a debt arising from an unenforceable

142. 4 Co Rep 91; 76 ER 1072.
143. A W B Simpson *A History of the Common Law of Contract. The Rise of the Action of Assumpsit* (Oxford: Clarendon Press, 1975) 79-80.
144. Supra n 1, 265.

contract. In *Mayfield v Walsley* there was a contract for the sale of wheat and dead stock. Abbott CJ said:

> Supposing that the plaintiff cannot recover the residue on a declaration for crops bargained and sold, founded on the original contract, on the ground that it is void by the Statute of Frauds, yet I think he may recover on a declaration, stating that the defendant was indebted for the value of crops...which the defendant was allowed to take.[145]

A very different view, however, was taken in *Earl of Falmouth v Thomas*.[146] The plaintiff leased land to the defendant upon which was growing crops owned by the plaintiff. The defendant was to buy the crops for £200, but after cutting down and taking the crops he did not pay. There was no agreement in writing as required by the Statute of Frauds. The plaintiff brought an action claiming that "the defendant was indebted in £200 for crops bargained and sold."[147] Lord Lyndhurst CB held that the only recovery available was on a quantum meruit:

> [A]dmitting that the defendant is to pay for the crops, he ought to pay for them, not upon the terms and footing of that bargain and sale, but upon a quantum meruit ... To allow the plaintiff to recover upon this bargain and sale, and to have the price regulated by it, would be in direct opposition to the statute.[148]

The fact that recovery would be regulated by the contract price was considered enough to bring the debt action within the Statute of Frauds.

Lord Denning wrote two articles in 1925[149] and 1939[150] supporting the debt action. It is respectfully submitted, however, that the cases relied upon there do not support debt actions under unenforceable contracts. In the 1925 article reliance was placed primarily on *Souch v Strawbridge*.[151] It has been submitted above that *Souch v Strawbridge* was based on recovery in restitution rather than debt.[152]

In his initial judgment in *James v Kent and Co*[153] Lord Denning

145. (1824) 3 B and C 357, 362; 107 ER 766, 768.
146. Supra n 119.
147. Ibid, 108; 334.
148. Ibid, 109; 335.
149. Supra n 52.
150. A T Denning "Quantum Meruit: The Case of Craven-Ellis v Canons Ltd" (1939) 55 LQR 54.
151. Supra n 74.
152. See text accompanying n 81 ff.
153. Supra n 79.

repeated his earlier opinion, again relying on *Souch v Strawbridge.* Subsequently, however, he appears to have changed his mind, and in an amended judgment[154] made no mention of any possible debt action, preferring to say that the action to recover where a contract is unenforceable is in restitution.

Perhaps the best authority for the debt action is obiter in the High Court of Australia in *Turner v Bladin.*[155] In that case the doctrine of part performance applied, so it was not strictly necessary to consider whether an action in debt could be enforced. Relying, however, upon the initial judgment of Lord Denning in *James v Kent and Co,*[156] the court held that the plaintiffs might also have recovered on the debt that had accrued:

> [T]he defendant became indebted to the plaintiffs for the balance of purchase money and interest. An action to recover these sums would not be an action on the agreement...[157]

There is earlier Australian support for that proposition in *Koellner v Breese.*[158] There, land had been conveyed under an unenforceable contract and the defendant failed to pay. It was held, on the authority of *Knowlman v Bluett,*[159] that the vendor could recover:

> Where the contract, although not in writing, has been so far executed that nothing remains to be done but payment of the money, which may be recovered in an action under the common count, the Statute of Frauds is no answer to such action.[160]

It is not really clear whether the recovery was in debt or restitution. In *Pavey and Matthews v Paul* Deane J treated *Koellner v Breese* as supporting recovery in restitution rather than in debt.[161] Certainly that view is not untenable given the reliance placed on *Knowlman v Bluett,* a case very clearly decided on the basis of a wholly independent obligation. Nevertheless, it is submitted that Deane J was wrong, and Brennan J was correct[162] to treat *Koellner v Breese* as a case supporting recovery on the derivative debt, as it was held that the vendor could recover "the price of land sold and conveyed"[163] and not

154. Supra n 57.
155. Supra n 90.
156. See *Pavey and Matthews v Paul* supra n 1, 259.
157. Supra n 90, 474.
158. (1909) 9 SR(NSW) 457.
159. Supra n 85.
160. Supra n 158, 459.
161. Supra n 1, 249.
162. Ibid, 592.
163. Supra n 158.

merely a reasonable remuneration. If the obligation to pay rested in restitution, or even on a new implied contract, only a reasonable remuneration would have been payable.

The separate debt action has been supported by later Australian cases. It was actually applied to allow recovery on a debt arising under an unenforceable contract in *Fablo Pty Ltd v Bloore*[164] and in *Llewellyn v Brown and Milton Pty Ltd.*[165] In *Schwarstein v Watson*[166] a similar view to that adopted by Brennan J in *Pavey and Matthews v Paul* was taken: the debt action was not available solely because the statute making the contract unenforceable was more widely worded than the original Statute of Frauds. Recovery in *Trimtor Building Consultants v Hilton*[167] was in restitution, but it was recognised that a debt action might be available.[168]

Soon after *Turner v Bladin* was decided, an article by H A J Ford considered what authority there was for recovery by a plaintiff on a debt arising under an unenforceable contract. It was concluded that, "there is tentative authority for the view that he can."[169] It is to be noted, however, that *Earl of Falmouth v Thomas*[170] was not cited in that article.

The authorities, then, are in disagreement. The conflicting judgments in *Pavey and Matthews v Paul* have added to the confusion.

## The relationship of debt and restitution actions

Where there is an unenforceable contract, there cannot be both a restitutionary action and an enforceable debt. The very justification for imposing a restitutionary right to a reasonable remuneration where the parties have already set a contract price is that the contract price cannot be recovered. As Deane J says in *Pavey and Matthews v Paul*:

> [I]t is the very fact that...the genuine agreement is frustrated, avoided or unenforceable that provides the occasion for (and part of the circumstances

164. [1983] 1 Qd R 107.
165. (1961) 80 WN (NSW) 336.
166. Supra n 84.
167. Supra n 40.
168. Ibid, 262.
169. H A J Ford "Indebitatus Assumpsit and the Statute of Frauds" (1952) 6 Res Judicata 71, 88.
170. Supra n 119.

giving rise to) the imposition by the law of the obligation to make restitution.[171]

The whole basis of the obligation in restitution is not merely that the contract is unenforceable but that, because the contract is unenforceable, the contract price cannot be recovered. If it can be, the independent obligation in restitution does not arise.

This has been recognised in the cases. None of the judges in *Pavey and Matthews v Paul* suggested that there could be alternative claims in debt and restitution. In his initial judgment in *James v Kent and Co*[172] where Lord Denning supported the debt action, he said that the restitution action would only arise where the plaintiff had only partly performed his obligations so that no debt had arisen. It was only in his amended judgment,[173] where he abandoned the idea of recovery in debt, that Lord Denning recognised that restitution was available where there had been full performance so that a debt had arisen.

There is, then, a significant clash of authorities. On the one hand many cases have been cited where an obligation in restitution is imposed where a debt has accrued under an unenforceable contract. The whole rationale for that obligation is that the debt is unenforceable. On the other hand there is considerable authority for the proposition that the accrued debt is not unenforceable at all. If that is so, the cases allowing restitution must be wrongly decided.

It is submitted that the better view is that the accrued debt is enforceable. Actions in debt are based on a quite different principle from contract actions. Although since *Slade's*[174] case a contract action has also been available where there is an accrued debt, the separate debt action is still available,[175] and is unaffected by the Statute of Frauds. The cases allowing restitution where a debt has accrued upon the plaintiff's complete performance of an unenforceable contract, then, are wrongly decided.

171. Supra n 1, 256.
172. Supra n 79.
173. Supra n 57.
174. Supra n 142.
175. *Fablo Pty Ltd v Bloor*, supra n 164, 110.

## Conclusion

The conclusions that have been reached can be stated in the form of four basic propositions:

1 It is well settled that the Statute of Frauds applies to contracts completely performed by one party.

2 If one party to a contract has partly performed and the other commits a repudiatory breach, the innocent party's right to restitution upon termination survives the unenforceability of the contract. That is also true where one party has fully performed and the other refuses to perform where the defaulting party's obligation is something other than the payment of a sum of money.

3 If one party to a contract has fully performed, and the breach of the other is a failure to pay the contract price, no action in restitution can arise on the ground of the breach because it would conflict with the accrued debt. If the contract is unenforceable, however, there is significant authority that an action in restitution can arise *because* the Statute of Frauds has made the contract price irrecoverable.

4 However, there is also significant authority that the contract price *is* recoverable in that situation. There is an action in debt, separate from the action on the contract, which is not affected by the Statute of Frauds. If that is correct, and the better view appears to be that it is, all the cases where restitution is recovered where a debt has accrued under an unenforceable contract must be wrongly decided. The rationale for the remedy in restitution is that the contract price cannot be recovered. If it can be recovered there is no justification for imposing an obligation in restitution.