ADDRESSING THE DOCTRINAL QUAGMIRE BEHIND NON-CONTRACTUAL QUANTUM MERUIT IN NEW ZEALAND

Samantha Romijn*

Non-contractual quantum meruit allows claimants to receive reasonable remuneration for services rendered in the absence of a valid contract. This article examines the development of non-contractual quantum meruit in New Zealand and the doctrinal quagmire that currently surrounds it. The heart of the quagmire is whether non-contractual quantum meruit is intended to reverse unjustly obtained benefits, or whether it enforces mutual agreements and consensual undertakings. In other words, is non-contractual quantum meruit grounded in unjust enrichment and restitution, or in contract/quasi-contract? The existing doctrinal uncertainty has led to inconsistency in the law, as evidenced by the courts' regular reformulation of the non-contractual quantum meruit elements, continued taxonomic confusion and valuation controversies. This article argues that the New Zealand courts should develop non-contractual quantum meruit within the law of contract or quasi-contract, rather than unjust enrichment and restitution, to reflect NCQM's current role as a form of consent-based liability.

I INTRODUCTION

Party C begins work for Party D under the expectation of being paid. D knows that C expects payment and allows the work to proceed. C completes part of the work, but D refuses to pay. There is no valid contract between the parties. Is Party C entitled to remuneration?

In New Zealand, the current answer is likely to be yes, as Party C can claim non-contractual quantum meruit (NCQM). NCQM arises when a valid contract does not exist between the parties, yet the claimant has performed work for the defendant under the expectation that they will receive

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payment. In such cases, the claimant may be entitled to recover reasonable remuneration for the services provided.[1]

But what is the conceptual basis for NCQM in New Zealand? Do the courts award NCQM to give effect to the understanding between the parties? Or is NCQM awarded to reverse the defendant's unfairly obtained benefit? This issue has created, in the words of Miller J, a "doctrinal quagmire".[2] The Court of Appeal in *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd* was the first to recognise this point of uncertainty but chose not to resolve it.[3] Subsequent High Court judgments have similarly succeeded in skirting around the issue. This doctrinal debate has led to inconsistency in the law, as evidenced by the courts' regular reformulation of the NCQM elements, taxonomic confusion that clouds the doctrine, and lingering valuation questions. The most recent NCQM decision,[4] *Electrix Ltd v The Fletcher Construction Co Ltd*, further highlights the consequences of the quagmire, demonstrating the need for the courts to confront the issue head-on.[5]

At present, the New Zealand courts tend to use NCQM as a form of consent-based or agreement-based liability which compensates claimants and protects their reliance interests. As such, this article argues that, moving forward, the courts should resolve NCQM claims through contractual or quasi-contractual frameworks. Two alternative approaches are proposed. First, because contract law governs the rights and obligations arising from agreements and undertakings, NCQM could be removed as an available remedy altogether, leaving claimants with the established contractual and equitable remedies. Secondly, and alternatively, if NCQM *is* a justified remedy, the courts should develop it within the realm of contract law, rather than in the world realm of unjust enrichment or restitution.

Part II of this article provides the context of NCQM by explaining what quantum meruit is, its historical development and the circumstances giving rise to a NCQM claim. Part III examines the NCQM approaches in the United Kingdom and Australia. Part IV outlines New Zealand's current approach to NCQM, detailing the required elements, its taxonomic classification and the approaches to valuation. Part V explores the doctrinal quagmire of NCQM law in New Zealand, using the *Electrix* case to demonstrate the nagging nature of the conceptual confusion.[6] Finally, Part VI considers

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1 Andrew Skelton, David Robertson and Zoë Bashforth "Quantum Meruit as a Remedy in Construction Law" (paper presented at the International Society of Construction Law Conference 2021, March 2022) at [3].

2 *Cassels v Body Corporate 86975* (2007) 8 NZCPR 740 (HC) at [42].

3 *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd* CA90/05, 8 August 2006 at [50].

4 This research essay was submitted on 2 September 2024. On 10 September 2024, the New Zealand Court of Appeal released a new judgment dealing with NCQM: *Edubase Ltd v Ministerof Education* [2024] NZCA 430. Accordingly, *Electrix* is no longer the ""most recent decision"". See the postscript below for a brief discussion of *Edubase*.

5 *Electrix Ltd v Fletcher Construction Co Ltd* [2020] NZHC 918.

6 *Electrix*, above n 5.

potential solutions to the quagmire, concluding that the courts should adopt a contractual or quasi-contractual approach moving forward.

II BACKGROUND OF NON-CONTRACTUAL QUANTUM MERUIT

A What is Quantum Meruit?

"Quantum meruit" is a Latin phrase meaning "the amount deserved". It refers to a claim for reasonable remuneration for work performed.[7] There are two kinds of quantum meruit: contractual and non-contractual.[8] Contractual quantum meruit arises when parties enter a valid contract to perform and pay for work but have not agreed on a set price. The doctrinal basis for contractual quantum meruit is settled in New Zealand and other common law jurisdictions, namely, the contractor is owed a reasonable fee because of the existence of the contract.[9] The second kind of quantum meruit is non-contractual quantum meruit (NCQM). NCQM arises where there is no valid contract between the parties, and the claimant has done work for the defendant under the expectation that they will receive payment.[10]

B History of Quantum Meruit

Before the 16th century, the English courts would not enforce payment for services unless the terms and price had been agreed upon by the parties in advance.[11] The first form of quantum meruit—now known as contractual quantum meruit—was developed by the English Court of Common Pleas as part of assumpsit (an action for a simple breach of contract).[12] Even if no specific price had been agreed upon between the parties, a person could claim quantum meruit if they performed work for the defendant under an actual promise, express or implied, to pay for the services.[13]

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7 Skelton, Robertson and Bashforth, above n 1, at [1]; and *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 at [150].

8 Andrew Skelton "Quantum Meruit and Unjust Enrichment in New Zealand" *At the Bar* (New Zealand, April/May 2022) at 15.

9 Skelton, Robertson and Bashforth, above n 1, at [2].

10 At [3].

11 HO Hunter and JW Carter "Quantum Meruit and Building Contracts" (1989) 2 JCL 95 at 95.

12 *Mann*, above n 7, at [182]; Charles Cato "Restitution - An Introduction" in Restitution in Australia and New Zealand (Cavendish Publishing, Sydney, 1997) at 1; and *Electrix*, above n 5, at [73].

13 David Ibbetson "Unjust Enrichment" in A Historical Introduction to the Law of Obligations (online ed, Oxford Academic, Oxford, 2001) at 269; and Hunter and Carter, above n 11, at 95.

Between the late 16th and 18th centuries, the King's Bench extended quantum meruit into the law of indebitatus assumpsit.[14] Following this development, even if the defendant had made no actual promise of payment, a person could claim quantum meruit, because the court would imply a *fictional* promise to pay.[15] This form of quantum meruit, now known as NCQM, enforced a non-contractual liability and was labelled quasi-contractual.[16] By the start of the 18th century, the courts shifted away from the idea that NCQM claims were based on implied promises and toward the notion that they were based on implied contracts.[17] Under this implied contract approach, the law created a fictitious agreement in order to reach a desired result.[18]

In 1852, the Common Law Procedure Act in England abolished assumpsit and indebitatus assumpsit in favour of contract and tort law.[19] Subsequently, contractual quantum meruit developed as part of the law of contract,[20] while NCQM continued to evolve as part of the law of quasi-contracts through the implied contract theory.[21]

During the 20th century, legal minds began criticising the implied contract.[22] Lord Atkin in *United Australia Ltd v Barclays Bank Ltd* and Lord Wright in *Fibrosa Spolka Akeynja v Fairbaine Lawson Coombe Barbour* observed that quasi-contractual issues should not be resolved through an implied agreement, but on wider considerations of justice.[23] In 1951, Sommerville LJ in *James v Thomas H Kent & Co Ltd* held that the basis for NCQM was no longer quasi-contracts or implied promises, but restitution.[24]

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14 *Mann*, above n 7, at [182]; Cato, above n 12, at 1; and *Electrix*, above n 5, at [73].

15 Andrew Barker "Restitution for Unjust Enrichment" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (Thomas Reuters, New Zealand, 2011) 390 at 9.2.2.

16 Ibbetson, above n 13, at 270.

17 At 272; and *Mann*, above n 7, at [183].

18 Ibbetson, above n 13, at 270; and *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at [7].

19 Hunter and Carter, above n 11, at 96; and Cato, above n 12, at 3.

20 *Pavey & Matthews Pty Ltd*, above n 18, at [7].

21 *Electrix*, above n 5, at [74].

22 Cato, above n 12, at 4.

23 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 27–28; and *Fibrosa Spolka Akeynja v Fairbaine Lawson Coombe Barbour* [1943] AC 32 at 63–64.

24 *James v Thomas H Kent & Co Ltd* [1951] 1 KB 551 at [556].

Despite growing interest in restitution, the common law jurisdictions continued to use NCQM as part of the law of quasi-contracts and implied contract theory.[25] It was not until 1966, when Goff and Jones published the first edition of their book *The Law of Restitution*,[26] that these jurisdictions began to embrace restitution as the conceptual basis for NCQM.[27] By the end of the 20th century, the common law jurisdictions had integrated the law of quasi-contracts into the law of restitution,[28] casting aside the implied contract theory.[29]

C Circumstances Where a Non-contractual Quantum Meruit Claim Might Arise

There are five main circumstances where a claimant might be entitled to NCQM:[30]

(1) when work is done in anticipation of a contract that fails to materialise;
(2) when work is done under an unenforceable or void contract;
(3) when work is done outside the scope of an existing contract;
(4) when work is done under a contract that is cancelled because of repudiation or breach; and
(5) when work is done under a contract that is discharged due to the doctrine of frustration.

1 Work done in anticipation of a contract that fails to materialise

Jack Alexander describes this as the most complicated category of NCQM claims.[31] This category tends to arise when the claimant performs work on the basis of a letter of intent, or where the defendant has requested that the claimant start work while the formal contract is in the process of negotiation.[32]

The leading case in New Zealand is *Electrix Ltd v The Fletcher Construction Co Ltd* (*Electrix*).[33] The case arose out of a dispute over payment for electrical services performed by Electrix for Fletcher

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25 See *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932 (QBD) at 936; and *Watson v Watson* [1953] NZLR 266 at 270.

26 Robert Goff and Gareth Jones *The Law of Restitution* (1st ed, Sweet & Maxwell, 1966).

27 *Dargamo Holdings Ltd and another v Avonwick Holdings Ltd and others* [2021] EWCA Civ 1149 at [51]; and Skelton, Robertson and Bashforth, above n 1, at [69].

28 *Electrix*, above n 5, at [74]; and Dan Priel "In Defence of Quasi-Contract" (2012) 75 MLR 54 at 54.

29 See *Van den Berg v Giles* [1979] 2 NZLR 111 at 121; *Pavey & Matthews Pty Ltd*, above n 18, at [10]; and *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669.

30 Skelton, Robertson and Bashforth, above n 1, at [4].

31 Jack Alexander "Pleading Claims for Quantum Meruit in New Zealand" (2023) NZLJ 383 at 384.

32 Skelton, Robertson and Bashforth, above n 1, at [4.1].

33 *Electrix*, above n 5. Note the point raised above n 4 that this article was written prior to the Court of Appeal's 2024 judgment in *Edubase*.

Construction on the Christchurch Justice and Emergency Services Precinct project.[34] In October 2014, Fletcher Construction issued a letter of intent to Electrix, noting that the parties would negotiate a formal contract but that Electrix should start work in the meantime.[35] Throughout their relationship, Fletcher Construction issued nine letters of intent to Electrix authorising work totalling $14,055,145 (excluding GST).[36] Electrix worked on the basis of these letters of intent. Ultimately, the parties failed to conclude a final, formal contract.[37] By the end of the project, Electrix had issued payment claims totalling just under $29 million, and Fletcher Construction had paid Electrix $21.6 million.[38] Electrix claimed that Fletcher Construction still owed it approximately $7 million and sued.[39] Despite the letters of intent, the High Court held that there was no contract between the parties, because at no point was there intent to be immediately bound by essential terms.[40] However, the Court concluded that Electrix was entitled to NCQM for the services it had performed for Fletcher Construction.[41]

2 Work performed under a void or unenforceable contract

The most recent New Zealand case in this category is *Cassels v Body Corporate 86975* (*Cassels*).[42] The defendant bought a future development unit in a complex that was operated by a body corporate.[43] The body corporate rules required unit proprietors to contribute to the fund used for administrative expenses.[44] The defendant refused to pay the levies.[45] The body corporate could not enforce their rules against the defendants as they did not comply with the Unit Titles Amendment Act 1979.[46] However, the body corporate was entitled to NCQM for the services it had performed for the defendant.[47]

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34 At [1].

35 At [9].

36 At [30].

37 At [1].

38 At [30].

39 At [1].

40 At [72].

41 At [86].

42 *Cassels*, above n 2.

43 At [1].

44 At [3].

45 At [1].

46 At [31].

47 At [49].

3 Work performed outside the scope of the contract

This category arises "when the contract work has been so greatly altered that the work actually done cannot be regarded as done under the contract at all".[48]

An early New Zealand case falling within this category is *Wilkins and Davies Construction Co Ltd v Geraldine Borough*.[49] The defendant had contracted with the claimant for the construction of a sewage treatment station, which involved the claimant constructing a sinking tank and pump chamber. Two issues arose. First, the land that the tank was to be sunk into contained a heavy clay pan. This made the claimant unable to excavate the land by machine. Secondly, the water content of the clay meant the tank had to be redesigned. One argument advanced by the claimant was that those issues meant that the services provided were outside the scope of the original contract, and that they should be entitled to NCQM for the extra work.[50] The Court held that the claimant was not entitled to NCQM as the work was "necessary to enable the plaintiff to carry out its obligations".[51]

To date, it seems that there has not been a successful New Zealand NCQM claim under this category.[52]

4 Work done under a contract that is cancelled because of repudiation or breach, and work done under a contract that is discharged due to the doctrine of frustration

The cases of *Grant v Lotus Gardens Ltd and Brown* and *Doherty Construction (Whangarei) Ltd v Whangarei County Council* held that the Contractual Remedies Act 1979 (CRA) removed the availability of NCQM claims where a contract was cancelled due to repudiation or breach.[53] The CRA has since been repealed and replaced by the Contract and Commercial Law Act 2017 (CCLA). The aforementioned cases might suggest that the CCLA should be interpreted in the same way as the CRA, meaning that the legislation removes NCQM as an available remedy for cancelled or frustrated contracts.[54] However, Skelton, Robertson and Bashforth propose that, while the CCLA serves as a code outlining the conditions under which a contract can be cancelled, it does not necessarily eliminate

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48 *Seton Contracting Co Ltd v Attorney-General* [1982] 2 NZLR 368 (HC) at 377.

49 *Wilkins and Davies Construction Co Ltd v Geraldine Borough* [1958] NZLR 985 (HC).

50 At 986.

51 At 995.

52 Alexander, above n 31, at 383–384.

53 *Grant v Lotus Gardens Ltd* [2013] NZCCLR 16 (HC) at [29]; and *Brown and Doherty Construction (Whangarei) Ltd v Whangarei County Council (No 2)* [1990] 2 NZLR 63 (HC) at 67.

54 Skelton, Robertson and Bashforth, above n 1, at [4.4] and [51].

NCQM as a remedy available at common law.[55] This article does not aim to resolve whether the CCLA excludes this category of NCQM claims in New Zealand. It proceeds on the assumption that NCQM could still be available in such situations.

III THE APPROACHES OF OTHER COMMON LAW JURISDICTIONS

A United Kingdom

Under the English approach, NCQM is a restitutionary remedy awarded to reverse the defendant's unjust enrichment.[56] To determine whether restitution should be awarded for unjust enrichment, the English courts rely on a four-question framework:[57]

(1) Has the defendant been enriched?
(2) Was the enrichment at the claimant's expense?
(3) Was the enrichment unjust?
(4) Are any defences available to the defendant?

In a NCQM context, there are three ways that a claimant can show that the defendant was enriched:[58]

(1) through free acceptance of services;
(2) through a request for services; or
(3) through receipt of an incontrovertible benefit.

Free acceptance arises where "a reasonable person should have known that the claimant who rendered services expected to be paid for them but did not take the opportunity to reject the services".[59] A request for services arises "where a person requests and receives something that a reasonable person would realise is not provided gratuitously".[60] A defendant is considered to have received an incontrovertible benefit where the claimant's services have saved the defendant from a necessary expense.[61]

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55 At [51].

56 See *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189; and *Barton v Morris* [2023] UKSC 3, [2023] AC 684.

57 *Barton*, above n 56, at [77].

58 Skelton, Robertson and Bashforth, above n 1, at [12]; and *Benedetti v Sawiris* [2013] UKSC 50 at [13].

59 Skelton, Robertson and Bashforth, above n 1, at [12.1].

60 At [35].

61 At [12.2].

To assess if the enrichment was unjust, the claimant must rely on a restitutionary ground, which will also be the cause of action pleaded (since unjust enrichment itself is not a cause of action).[62] In a NCQM context, the claimant will usually seek to show that the enrichment was unjust due to failure of basis.[63] Failure of basis (sometimes referred to as failure of consideration) means that "the state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist, has failed to sustain itself".[64] For example, in cases where there was an anticipated contract that failed to materialise, the failure of basis argument might be that the claimant's services were provided under the mutual expectation of a formal contract eventuating, and that this expectation failed.[65] In situations where there was a valid contract that was subsequently frustrated or cancelled, the joint expectation will usually be that the contractually agreed performance would occur, and this expectation or basis fails when the contract is not fully performed.[66]

Between 2012 and 2015, English courts showed some support for adopting free acceptance as both a test for enrichment and an unjust factor.[67] However, in 2019, the Court of Appeal in *Barton v Gwyn-Jones* noted that free acceptance as an unjust factor was controversial.[68] In the 2023 Supreme Court decision, Lord Burrows SCJ observed that "free acceptance is not an unjust factor in English law".[69] Following these developments, it is unlikely that free acceptance is an unjust factor or ground of restitution in the United Kingdom.

Once a court has worked through the unjust enrichment framework, it may award NCQM as a remedy to achieve restitution. The amount awarded under a NCQM award is determined by reference to the objective market value of the services performed by the claimant. Subjective devaluation can become relevant, shifting the burden to the defendant to prove that they received no value or less than

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62 Kit Barker "Unjust Enrichment in Australia: What Is(n't) It? Implications for Legal Reasoning and Practice" (2020) 43 MULR 903 at 929; and *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29 at [41].

63 Skelton, Robertson and Bashforth, above n 1, at [117].

64 *Equuscorp Pty Ltd v Haxton* [2012] HCA 7, (2012) 246 CLR 498 at [31]. See also *Barton,* above n 56, at [81].

65 Skelton, Robertson and Bashforth, above n 1, at [117].

66 Peter Jaffey "Restitution" in Roger Halson and David Campbell (eds) *Research Handbook on Remedies in Private Law* (Edward Elgar, Cheltenham, 2019) 110 at 122.

67 Goff and Jones "Free Acceptance" in C Mitchell, P Mitchell and S Watterson *Goff and Jones on Unjust Enrichment* (10 ed, Thomas Reuters, England, 2022) 565 at 17-01.

68 *Barton v Gwyn-Jones* [2019] EWCA Civ 1999 at [38].

69 *Barton,* above n 56, at [230].

the market price.[70] At present, there is no case that authoritatively determines whether the contract price agreed between the parties, if there is one, should limit the NCQM amount awarded.[71]

B Australia

In Australia, the conceptual basis for NCQM differs slightly from the United Kingdom. In the United Kingdom, a claimant is entitled to payment because the defendant should not be enriched unjustly at the claimant's expense.[72] By contrast, in Australia, a claimant is entitled to a remedy because the defendant should not enjoy a benefit when it is unconscionable for them to do so. Put another way, in Australia, NCQM is a restitutionary remedy grounded in equitable notions of good conscience.[73] Despite this conceptual divergence from the United Kingdom, the High Court in *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* held that "contemporary legal principles of restitution or unjust enrichment can be equated with seminal equitable notions of good conscience".[74] Kit Barker suggests that this means "there is no difference in substance between liability for unjust benefits and unconscionable or unconscientious ones".[75]

Although Australian NCQM is grounded in equity, unjust enrichment still plays a role in the Australian approach. The courts deal with unjust enrichment as an assisting legal principle and have begun to embrace the four-step unjust enrichment framework used in the United Kingdom.[76] In NCQM cases, the cause of action relied on is typically failure of basis. However, unlike in the English context, free acceptance is taken to be a standalone unjust factor.[77]

The NCQM amount in Australia is calculated by reference to the objective market value of the services performed by the claimant. Then, the defendant can show a subjective devaluation.[78] However, Australian authorities are more conclusive than those in the United Kingdom when it comes to determining what approach to take in a situation where a contract price has been concluded between

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70 *Benedetti v Sawiris,* above n 58, at [18]; *Electrix*, above n 5, at [90]; and Skelton, Robertson and Bashforth, above n 1, at [39].

71 Skelton, Robertson and Bashforth, above n 1, at [108].

72 *Benedetti*, above n 58, at [13].

73 Barker, above n 62, at 914.

74 *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 at 673.

75 Barker, above n 62, at 914.

76 At 923.

77 At 930; *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd* (No 3) [2014] WASC 162 at [79]; and *Boulos Holdings Pty Ltd v Edwin Davey Pty Ltd* [2021] NSWSC 689 at [376].

78 *Mann*, above n 7 at [92].

the parties. In Australia, the amount awarded should generally not exceed that value unless it would be unconscionable to confine the claimant to the contractual measure.[79]

IV THE CURRENT NON-CONTRACTUAL QUANTUM MERUIT LAW IN NEW ZEALAND

Following the abandonment of the law of quasi-contracts and implied contract theory at the end of the 20th century, the English courts swiftly adopted unjust enrichment and restitution as the new doctrinal basis for NCQM, while Australia embraced equity and restitution. Although the New Zealand courts acknowledged that NCQM was restitutionary, they did not adopt a unifying doctrinal basis beyond this.[80] Skelton, Robertson and Bashforth observe that the reluctance to embrace a clearer doctrinal foundation has created uncertainty and incoherence in the development of NCQM law in New Zealand.[81] This is evident in New Zealand's ongoing reformulation of the NCQM elements, continued taxonomic confusion and unsettled approaches to valuation.

A Elements of the NCQM Claim

In 2005, the High Court in *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health* (*VONZ*) established the elements of a NCQM claim as follows:[82]

(a) a request by the defendant of the plaintiff to provide services or; free acceptance of the services provided by the defendant; and
(b) a benefit to the defendant from the provision of the services.

In 2006, the Court of Appeal in *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd* (Morning Star) revised the VONZ test, removing the need for the claimant to establish a benefit:[83]

> … a plaintiff will be able to establish a quantum meruit claim where the defendant asks the plaintiff to provide certain services, or freely accepts services provided by the plaintiff, in circumstances where the defendant knows (or ought to know) that the plaintiff expects to be reimbursed for those services, irrespective of whether there is an actual benefit to the defendant.

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79 At [215]; and Katie Kyung "How Much Does One Truly Deserve?" (6 August 2021) Hesketh Henry <www.heskethhenry.co.nz> at 5.

80 *Electrix*, above n 5, at [96]; *Cassels*, above n 2, at [40]–[41]; and *Morning Star*, above n 3, at [40].

81 Skelton, Robertson and Bashforth, above n 1, at [19].

82 *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health* (2006) 8 NZBLC 101,739 (HC) [*VONZ*] at [73].

83 *Morning Star*, above n 3, at [50].

In 2007, the High Court in *Cassels v Body Corporate 86975* largely adopted the *Morning Star* test, but added in the requirement that the claimant must make their expectation of payment reasonably apparent:[84]

> The elements of a quantum meruit claim are threefold: the plaintiff provided services for the defendant; the plaintiff wanted payment and made that reasonably apparent to the defendant; and the defendant freely accepted the services or at least acquiesced in their provision.

In 2017, the High Court in *BDM Grange Ltd v Trimex (New Zealand) Ltd* attempted to move away from a free acceptance model and towards an unjust enrichment framework:[85]

> There appears to be common acceptance … that any personal restitutionary claim (quantum meruit included) usually entails four elements: (a) the defendant has been enriched; (b) the enrichment is at the expense of the claimant; (c) the enrichment is unjust; and (d) consideration is then given to any applicable defences.

In 2019, the High Court in *Northlake Investments Ltd v Wanaka Medical Centre Ltd* preferred to use the following nine factors to determine entitlement to NCQM:[86]

(1) whether negotiations were 'subject to contract';
(2) whether the claimant 'accepted the risk' of negotiations failing;
(3) whether the defendant benefited from the work done;
(4) whether the work was an 'accelerated part of contract performance' or was merely 'preparatory' to the contract;
(5) whether the work was for a purpose extraneous or collateral to the contract itself, so as to fall outside its 'ambit';
(6) whether the defendant requested the work done;
(7) whether the work was of a kind normally provided free of charge;
(8) the relative fault of the parties in respect of the failure in negotiations; [and]
(9) whether the claimant was acting in order to benefit the defendant, or out of his or her own 'self-interest'.

The 2020 case of *Electrix* is the most recent NCQM case in New Zealand.[87] In that case, the High Court upheld the Court of Appeal's approach in *Morning Star*.[88]

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84 *Cassels*, above n 2, at [43].

85 *BDM Grange Ltd v Trimex (New Zealand) Ltd* [2017] NZHC 1259 at [49].

86 *Northlake Investments Ltd v Wanaka Medical Centre Ltd* [2019] NZHC 3443 at [233].

87 *Electrix*, above n 5. Again, see above n 4 for the clarification that the 2024 Court of Appeal *Edubase* decision had not yet been made.

88 At [80] and [86].

While many of the cases attempt to "distil the elements afresh",[89] it seems that a NCQM claim will currently be successful if the defendant requested the claimant's services in circumstances where they knew (or ought to have known) that the claimant expected payment, or where the defendant freely accepted the claimant's services.

B Approach to Valuation

The High Court in *Cassels* held that the starting point for a NCQM award is the market price of the services, and that subjective devaluation may be open to the defendant.[90] It also noted that "the court should always be influenced by a price that the person receiving the services has agreed to pay for them".[91]

However, the High Court in *Electrix* embraced a different approach involving the following three steps:[92]

(a) determining the actual cost of the services provided by the plaintiff;
(b) adding a market-related profit margin; and
(c) reducing the cost if the defendant can show that the actual costs incurred were more than what was reasonable in the market conditions at the time.

C Cause of Action or Remedy?

There is uncertainty in New Zealand regarding the taxonomic classification of NCQM.[93] Some New Zealand judges refer to NCQM as a cause of action,[94] others refer to it as a remedy,[95] with some appearing to treat it as both.[96] This article suggests, as other commentators have, that NCQM ought to be classified as a remedy.[97] This is because NCQM is a response to an event, not an event in its own right. Lord Burrows SCJ has noted the following:[98]

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89 Skelton, above n 8, at 15.

90 *Cassels*, above n 2, at [42], [51] and [54].

91 At [52].

92 *Electrix*, above n 5, at [98]; and Skelton, Robertson and Bashforth, above n 1, at [42].

93 Alexander, above n 31, at 385.

94 *VONZ*, above n 82, at [73]. See also *Morning Star*, above n 3, at [40] citing *VONZ*, above n 82, at [76]; and *Electrix,* above n 5, at [79] citing *VONZ*, above n 82, at [74].

95 *Cassels*, above n 2, at [34].

96 *Northlake,* above n 86, at [206], [217] and [232]; and *BDM Grange Ltd,* above n 85*,* at [47], but then see at [52] citing *VONZ*, above n 82, at [74].

97 Alexander, above n 31, at 385; and Barker, above n 62, at 934.

98 *Barton,* above n 56, at [204].

> … it is unhelpful merely to plead a claim for a quantum meruit (just as it would be unhelpful merely to plead a claim for damages) because such a claim does not clarify the cause of action.

Given that NCQM claims are currently based on tests of free acceptance and requests for services, it is arguable that these should be regarded as the relevant causes of action.

V THE DOCTRINAL QUAGMIRE IN NEW ZEALAND

A Morning Star

After the common law's rejection of the law of quasi-contracts, the Court of Appeal in *Morning Star* was the first in New Zealand to address the new doctrinal uncertainty surrounding NCQM.[99] The Court recognised that NCQM, as a restitutionary remedy, tends to be associated with unjust enrichment principles, meaning that NCQM is awarded to reverse the defendant's unjustly obtained benefit.[100] However, the Court also observed the alternative perspective advanced by commentators like Grantham and Rickett, who argue that NCQM is better understood as a remedy of remuneration that responds to promissory obligations.[101] The Court recognised that the doctrinal foundation underpinning NCQM would influence the direction in which the law developed.[102] Despite this acknowledgment, the Court chose not to resolve the dispute, leaving the doctrinal basis of NCQM unclear.[103]

B Worldwide NZ LLC v New Zealand Venue and Event Management Ltd

Worldwide NZ LLC v New Zealand Venue and Event Management Ltd was a Supreme Court case that addressed the circumstances in which an interest could be awarded under s 87(1) of the Judicature Act 1908.[104] Although NCQM was not a live issue in the case, the Court observed that NCQM claims were formerly based on an implied contract theory and that this approach had since been doubted. The Court refrained from further commenting on or clarifying the doctrinal basis of NCQM.[105]

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99 *Morning Star*, above n 3.

100 At [40], [41] and [44].

101 At [43].

102 At [44].

103 At [50].

104 *Worldwide NZ LLC v New Zealand Venue and Event Management Ltd* [2014] NZSC 108.

105 At [27].

C Electrix v Fletcher Construction

The High Court's approach in *Electrix* illustrates that the doctrinal quagmire, first identified by the Court of Appeal in *Morning Star*, remains unresolved. The High Court's approach is discussed in the following paragraphs.

1 Unjust enrichment and NCQM

Despite noting that unjust enrichment is not a satisfactory unifying conceptual foundation for NCQM law in New Zealand,[106] the High Court relied on free acceptance and request for services as the elements of a NCQM claim.[107] As Skelton, Robertson and Bashforth observe, the issue with this is that these are tests typically associated with an unjust enrichment approach.[108] In jurisdictions like Australia and the United Kingdom, the concepts of request for services and free acceptance are used to prove that the defendant has been enriched. Additionally, some jurisdictions, such as Australia, treat free acceptance as an unjust factor. This indicates that the current NCQM test in New Zealand is not necessarily as detached from unjust enrichment as the courts claim it to be.

2 Restitution and NCQM

Although the High Court seemed to accept that NCQM is part of the law of restitution, it did not employ a restitutionary approach.[109] Had it treated NCQM as truly restitutionary, it would have focused on reversing the defendant's benefit.[110] Accordingly, the NCQM award would be based on the defendant's objective gain and calculated according to the market value of the services provided.[111] This method would be consistent with practices in Australia and the United Kingdom. However, Palmer J diverged from this by using NCQM to provide Electrix with redress, protect its reliance interest and compensate it for its work.[112] Consequently, the NCQM award was calculated by reference to the services rendered by Electrix.[113] The problem with this approach is that remedies

106 *Electrix*, above n 5, at [96].

107 At [86].

108 Skelton, Robertson and Bashforth, above n 1, at [35]–[37].

109 At [77] and [96].

110 Goff and Jones "Unjust Enrichment and Restitution" in C Mitchell, P Mitchell and S Watterson *Goff and Jones on Unjust Enrichment* (10 ed, Thomas Reuters, England, 2022) 565 at 1-21; and Skelton, Robertson and Bashforth, above n 1, at [16].

111 Goff and Jones "Personal Remedies and Interest Awards" in C Mitchell, P Mitchell and S Watterson *Goff and Jones on Unjust Enrichment* (10 ed, Thomas Reuters, England, 2022) 565 at 36-02.

112 *Electrix*, above n 5, at [96] and [99].

113 At [97].

targeted at compensation or protecting a claimant's reliance interest belong to the worlds of contract law or civil wrongs, not restitution.[114]

3 Quasi-contracts, implied contract theory and NCQM

The High Court observed that the doctrinal basis of NCQM, formerly grounded in the law of quasi-contracts, had been swept into the law of restitution.[115] However, the Court's approach to NCQM resembled the quasi-contractual approach adopted in *Dickson Elliott Lonergan Ltd v Plumbing World Ltd (Dickson Elliott)*.[116]

Dickson Elliott arose from the claimant's proposal to purchase a building site, design and build a multi-storey building to the defendant's requirements, and lease it to the defendant. The defendant selected the claimant's site for development, drafted heads of agreement and encouraged the claimant to begin work. The defendant later requested a proposal for a different site, which the claimant refused. The defendant proceeded with the alternative site, so the claimant sought NCQM for the work already performed.[117] Eichelbaum J held that the quasi-contractual claim was established, as the defendant had both benefitted from and requested the claimant's services. NCQM was awarded to protect the claimant's reliance interest and provide compensation for the work performed.[118]

Eichelbaum J's application of NCQM as part of the law of quasi-contracts has similarities to Palmer J's use of NCQM as part of the law of restitution in *Electrix*. Like Eichelbaum J in *Dickson Elliot*, Palmer J awarded NCQM because Fletcher Construction had requested the claimant's services, and because the claimant's reliance interest should be upheld. This parallel suggests that despite New Zealand's asserted shift towards a restitutionary framework, the courts may still be drawing on quasi-contractual principles in their application of NCQM.

Furthermore, Winkelmann J in *VONZ* observed that if NCQM claims are only established when there has been a clear request for services, this suggests an alignment with the former and rejected implied contract theory.[119] Although the current NCQM test in New Zealand also accommodates claims based on free acceptance, the continued relevance of a request for services test suggests that the implied contract theory may not have been "laid to rest".[120]

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114 Skelton, Robertson and Bashforth, above n 1, at [16]; Skelton, above n 8; and Barker, above n 15, at 391 and 392.

115 *Electrix*, above n 5, at [74].

116 *Dickson Elliot Lonergan Ltd v Plumbing World Ltd* [1988] 2 NZLR 608 (HC).

117 At 609–610.

118 At 613.

119 *VONZ*, above n 82, at [76].

120 At [76].

D Summary

Electrix illustrates the doctrinal confusion clouding NCQM in New Zealand. The free acceptance test aligns with unjust enrichment principles, while the request for services test overlaps with both unjust enrichment and implied contract theory. Additionally, the justification for awarding NCQM, and the method of valuation, reflects contractual or quasi-contractual ideals. Although the courts broadly agree that NCQM is restitutionary, it is not awarded in a manner consistent with restitutionary principles. Indeed, "quagmire" aptly describes the current state of New Zealand's NCQM law.

VI OPTIONS FOR RESOLVING THE DOCTRINAL QUAGMIRE

It is time for the courts to confront the doctrinal quagmire of NCQM and to clarify what its conceptual basis is. This part explores three potential doctrinal approaches:

(1) Adopting the law of unjust enrichment and restitution.
(2) Embracing the law of promissory obligations and restitution.
(3) Following a contractual approach.

Andrew Skelton argues that NCQM should not be governed by the law of contract or promissory obligations, advocating instead for an unjust enrichment framework, as seen in the other common law jurisdictions.[121] This article counters that view. Currently, a NCQM claim will be successful if the defendant requested the claimant's services in circumstances where they knew (or ought to have known) that the claimant expected payment, or where the defendant freely accepted the claimant's services. This indicates that NCQM liability is agreement-based or consent-based.[122] This inference is further supported by the fact that NCQM can be used to protect a claimant's reliance interest. Because agreements and consent are the foundations of contractual liability, this article supports option (3): adopting a contractual approach to circumstances giving rise to NCQM claims, rather than trying to fit NCQM situations into a restitution or unjust enrichment model.

A Adopt Unjust Enrichment and Restitution

Skelton has argued that the New Zealand courts should embrace this approach, as it would lead to a more "principled and coherent development" of NCQM law.[123] Indeed, one advantage of adopting an unjust enrichment approach is that it could clarify and stabilise New Zealand's NCQM law. An unjust enrichment approach would eliminate the confusion surrounding the NCQM elements, taxonomy, approach to valuation and conceptual basis. This is because, by adopting the Australian and English approaches, New Zealand would apply the unjust enrichment factors to NCQM claims,

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121 Skelton, above n 8, at 17.

122 Jaffey, above n 66, at 124; Ross Grantham and Charles Rickett "Personal and Proprietary Restoration" in Enrichment and Restitution in New Zealand (Hart, Oxford, 2000) at 402-403; and Barker, above n 15, at 392.

123 Skelton, above n 8, at 17.

treat NCQM as a remedy rather than a cause of action, calculate NCQM based on the market value of the services provided, and award NCQM on the basis that benefits received unjustly or unconscionably should be reversed.

Nevertheless, this article argues that adopting unjust enrichment as the doctrine behind NCQM is to be avoided. Commentators, such as Professor Peter Jaffey and Henry Cooney, have raised issues with the Australian and English unjust enrichment approaches. Their criticisms suggest that unjust enrichment may not provide the clarity or coherence that New Zealand's NCQM law so desperately needs.

1 Issues with free acceptance

If New Zealand were to adopt Australia's approach to unjust enrichment (rather than the United Kingdom's), a claimant could likely rely on free acceptance as both the test for enrichment *and* as evidence of an unjust factor. Since New Zealand's current approach is largely based on free acceptance, Australia's method might seem appealing: It would allow the courts to continue imposing liability upon defendants who freely accept services. Although using free acceptance as the test for enrichment might not present major issues, using it as a standalone unjust factor would create two significant problems.

First, free acceptance can cut across the parties' autonomy and reward risk-taking.[124] To establish free acceptance, it is enough that the defendant knew or ought to have known that the claimant expected payment, even if the defendant never actually agreed to pay.[125] In Australia, the prevailing view seems to be that the claimant is entitled to relief because it is unfair for a defendant to accept benefits when they had an opportunity to reject them.[126] However, both Andrew Burrows and William and Day challenge this view.[127] They argue that the absence of an agreement means there is no injustice in refusing to pay the claimant: the claimant is a risk-taker who, without any inducement, voluntarily decided to gamble on the defendant's willingness to pay.[128] Burrows contends that the law should not protect the claimant against the very risk they undertook, asserting that the claimant's risk-taking "cancels out any shabbiness" in the defendant's free acceptance.[129]

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124 William Day and Graham Virgo "Risks on the Contract/Unjust Enrichment Borderline" (2020) LQR 349 at 354.

125 At 354.

126 Skelton, Robertson and Bashforth, above n 1, at [36].

127 Andrew Burrows "Free Acceptance and the Law of Restitution" (1988) LQR 576; and Day and Virgo, above n 124.

128 Day and Virgo, above n 124, at 354; and Burrows, above n 127, at 577–578.

129 Burrows, above n 127, at 578.

The second problem with free acceptance is that it imposes liability on the defendant for a failure to reject services.[130] Professor Dan Priel notes that "the law does not typically impose liability on people who have an opportunity to save people from running risks",[131] while Professor Andrew Simester similarly expresses that it would be "undesirable to have a general law of obligations founded on passive rather than active conduct".[132]

These two issues raise concerns about whether New Zealand should continue to approach NCQM situations through a test of free acceptance.

2 Issues with failure of basis

If New Zealand adopted an unjust enrichment approach, claimants could rely on failure of basis as a cause of action. Failure of basis presents a higher threshold than free acceptance because it requires an actual agreement between the parties.[133] Although failure of basis resolves the issues caused by free acceptance, it introduces its own challenges by interfering with and undermining contract law.[134]

Failure of basis arises when a benefit is conferred on the joint understanding that the defendant's right to retain the benefit is conditional, and that condition subsequently fails.[135] Commentators have noted that failure of basis is used to uphold agreements between parties.[136] The problem with this is that contract law already governs the rights and obligations of parties who enter into mutual and objective agreements.[137] Jaffey has observed that this means that failure of basis essentially serves the purpose of contract law but "in a different guise".[138]

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130 Graham Virgo "Principles Underlying the Recognition of the Grounds of Restitution" in *The Principles of the Law of Restitution* (3rd ed, Oxford Academic, Oxford, 2015) at 124.

131 Priel, above n 28, at 61.

132 Andrew Simester "Unjust Free Acceptance" [1997] LMCLQ 103 at 103.

133 Day and Virgo, above n 124, at 354.

134 At 354.

135 *Barton,* above n 68, at [78].

136 Henry Cooney "Anticipated Contracts and Unjust Enrichment" [2023] LMCLQ 399 at 400; Timothy Pilkington "Failure of Condition or Implied Term" (2021) 84 MLR 371 at 379–380; and Jaffey, above n 66, at 121.

137 Cooney, above n 136, at 400.

138 Peter Jaffey "The Way Forward" in Warren Swain, and Sagi Peari (eds) *Rethinking Unjust Enrichment: History, Sociology, Doctrine, and Theory* (Oxford Academic, Oxford, 2023) 219 at 229.

Failure of basis can apply both to cases where services are provided without a contract, and where work is done under a contract that later becomes invalid. In both cases, the use of failure of basis can create problems.

(a) Contracts that are cancelled or frustrated

In situations where contracts are cancelled or frustrated, the failure of basis argument is that the claimant's provision of services was conditional on the contractually agreed performance, and that this condition failed when the contract was not fully performed.[139] Jaffey argues that, although the contract may no longer be valid, the termination of the contract does not nullify it.[140] As such, the legal consequences of the non-performance of a contract should be governed by contract law, rather than restitution:[141]

> The issue is fundamentally what rights, duties and liabilities arise from the parties' agreement, and, in the light of these, what legal consequences arise from its non-performance. This must in principle be a matter for contract law.

(b) Unenforceable contracts, anticipated contracts and work done outside the scope of a contract

These situations differ from contracts that are cancelled or frustrated because the defendant's promise to pay for the claimant's services was not a contractual promise. While the failure of basis claim in these circumstances is non-contractual, the claim arises because the parties were in agreement about the conditions of the transaction.[142] Cooney has noted that "a mutual and objectively determined condition of remuneration for a transaction looks more like a contract than a reason for restitution".[143]

Situations involving anticipated contracts are particularly incompatible with a failure of basis analysis. In these instances, a claimant will usually argue that they conferred the benefit (their services) on the joint understanding that the defendant's right to retain the benefit was conditional on a formal contract being entered into later. Cooney argues that it is difficult to assert that the services were provided under a mutual understanding that a contract would be finalised, given that the parties will be in the middle of ongoing negotiations at the time the work is performed. According to Cooney, what exists in anticipated contract cases is merely a shared assumption that a contract would *likely* materialise. This expectation, based on the likelihood of a contract, is not necessarily a basis that fails if the formal contract is not finalised.[144] While failure of basis is often applied to anticipated contract

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139 Jaffey, above n 66, at 122.

140 At 123.

141 At 122.

142 Paul Davies "Anticipated Contracts: Room for Agreement" (2010) 69 CLJ 467 at 468–469.

143 Cooney, above n 136, at 402.

144 At 400.

situations, Cooney's analysis casts doubt on whether failure of basis is truly compatible with anticipated contract scenarios.

(c) Summary

The criticisms from Jaffey and Cooney demonstrate that a failure of basis analysis is unsatisfactory in NCQM situations. Further, Jaffey doubts whether it even makes sense to apply a framework based on conditionally transferred benefits when dealing with the provision of services, noting that services "cannot be returned or reversed in any literal sense, only paid for".[145]

3 *Wider implications of adopting an unjust enrichment approach in New Zealand*

Another important consideration when evaluating the adoption of unjust enrichment as the doctrine for NCQM is the broader impact it could have on other areas of the law. Quantum meruit, quantum valebat and money had and received all originated from the old indebitatus writs.[146] Like NCQM, quantum valebat and money had and received were then developed through the law of quasi-contracts, before finding their place within the law of restitution.[147] In the United Kingdom, all three actions have been swept into the law of unjust enrichment.[148] As noted by Sean McAnally, it would seem strange to adopt an unjust enrichment approach in New Zealand that excludes any of these three actions, given that they are all "children of the indebitatus assumpsit writ".[149]

The Court of Appeal decision in *Pollock v Pollock* hints (although does not state) that New Zealand might be moving towards an unjust enrichment approach for money had and received.[150] This article does not delve into whether unjust enrichment is the appropriate doctrine for the action of money had and received (an area fraught with its own "morass of conflicting and confused case law" that involves "clumsy courtship of unjust enrichment").[151] However, it is clear that if the courts are to embrace unjust enrichment as the unifying doctrine for NCQM, they would also need to address its implications for these related actions.

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145 Jaffey, above n 138, at 229.

146 *Mann*, above n 7, at 182; and Cato, above n 12, at 1.

147 Graham Virgo "The Principle of Unjust Enrichment" in *The Principles of the Law of Restitution* (3rd ed, Oxford Academic, Oxford, 2015) at 45.

148 Sean McAnally "Money had and received: we're sorry, will you have us back?" [2023] NZLJ 258 at 260.

149 At 260.

150 *Pollock v Pollock* [2022] NZCA 331 at [81]–[92].

151 McAnally, above n 148, at 273.

4 *Conclusion on unjust enrichment*

While adopting unjust enrichment might resolve some of the current flaws in New Zealand's NCQM law, the issues surrounding free acceptance and failure of basis make it clear that there are significant issues with embracing this approach. As such, this article argues that the High Court in *Electrix* was justified in resisting the embrace of unjust enrichment as the unifying doctrinal foundation for NCQM in New Zealand.[152]

B Adopt Restitution and Promissory Obligations

While the New Zealand courts have not explicitly adopted this option, it appears to be the approach they are currently implementing. This option is unsatisfactory because attempting to base NCQM on both restitution and the law of promissory obligations creates confusion.

The New Zealand judgments cite Grantham and Rickett, as well as Blanchard and Baker, to point out that NCQM may be a response to a promissory obligation.[153] Those commentators have noted that, in situations giving rise to NCQM claims, there is a consensual understanding between the parties that the claimant will perform services and the defendant will pay for them. NCQM gives effect to the non-contractual agreement between the parties by awarding the claimant with compensation for their services.[154]

New Zealand's current approach to NCQM is partly based on promissory principles, because the courts focus on the mutual understanding between the parties and use NCQM to compensate the claimant for their work. However, the New Zealand courts also label NCQM as restitutionary, grounding the claim in restitutionary tests like requests for services and free acceptance. The issue here is that a remedy providing compensation or remuneration is not a restitutionary remedy.[155] It is difficult to see how NCQM can simultaneously be based on the law of promissory obligations and restitution.

Even if restitutionary remedies did not have to be concerned with the reversal of a benefit and could serve a compensatory function, an approach that straddles the law of restitution and promissory obligations would still create issues. For example, should the cause of action in NCQM situations be based on restitution ideals (free acceptance or failure of basis) or should it be grounded in promissory obligations? The conflicting doctrines create ambiguity, making it an undesirable option for the future development of NCQM.

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152 *Electrix*, above n 5.

153 *Morning Star*, above n 3, at 42; and *Cassels*, above n 2, at 42.

154 Ross Grantham and Charles Rickett "Personal and Proprietary Restoration" in Enrichment and Restitution in New Zealand (Hart, Oxford, 2000) at 402–403; and Barker, above n 15, at 392.

155 Grantham and Rickett, above n 154, at 403; and Barker, above n 15, at 391–392.

C Adopt the Law of Contract or Quasi-contracts

Jaffey has advocated for the United Kingdom to adopt this approach, and this article argues that it is the option that should be embraced in New Zealand.[156] Since situations giving rise to NCQM claims arise from mutual agreements and consensual exchanges between parties, NCQM should be dealt with through a contractual framework.

This article proposes two ways that the courts could implement a contractual approach: either removing NCQM as an available restitutionary remedy and leaving claimants to rely on established contractual or equitable causes of action and remedies; or, as Jaffey has suggested in the United Kingdom, modifying and developing the settled law of contract so that it can account for a broader range of contractual remedies, including NCQM.

1 Remove NCQM as a restitutionary remedy

(a) Frustrated and cancelled contracts

The CCLA may remove the ability to claim NCQM when a contract has been frustrated or cancelled.[157] Even if the CCLA has not removed NCQM as an available remedy at common law, it has effectively rendered it redundant. When a contract has been cancelled, s 43(3)(a) allows the court to order a party to pay a sum it thinks is just. If a contract is frustrated, but Party B has already bestowed a benefit on Party A for the purpose of performing the contract, Party B may recover from Party A an amount the court considers just through s 63 of the CCLA. These provisions suggest that the established contractual frameworks within the CCLA are already equipped to do the work that NCQM would do in this area.

(b) Anticipated contracts, unenforceable or void contracts and work done outside the scope of the contract

When a claimant has performed services without any legally binding promise of payment, they cannot rely on a contractual cause of action and will not be entitled to a contractual remedy. This article contends that the claimant ending up without a remedy is not necessarily an unfair outcome. Professor Paul Davies argues that parties who provide services before a contract is finalised are risk-takers and it is not unjust for the law to hold them accountable for the consequences of the risks they knowingly assume.[158] Similarly, Priel notes the argument that "contract is the legal mechanism with

156 Jaffey, above n 66.

157 See discussion in Part II of this article.

158 Davies, above n 142, at 469.

which people can regulate their future risks, and those who avoid it when they could have used it do not deserve the law's assistance".[159]

While there may be a lingering sense of unfairness in situations where a claimant is left without a remedy, such unfairness may well be justified. As observed by Davies, "performing without an agreement already in place is the wrong way round and should be discouraged".[160] Additionally, Jaffey argues that allowing a remedy in this situation:[161]

> … would completely undermine the process of negotiation leading to contract, which is based on the assumption that only if an agreement is reached can there be any liability to pay for a benefit conferred.

The United Kingdom Supreme Court in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* framed the point well: "The moral of the story … is to agree first and to start work later."[162]

In cases where the absence of a remedy would result in genuine unfairness or injustice, the doctrine of estoppel can serve as a means to give effect to the non-contractual agreement.[163] Estoppel was specifically designed to fill the gap left by a formalistic contractual approach.[164] As such, this article argues that estoppel, not restitution, should be relied on in cases where a strictly contractual approach proves inadequate.

In New Zealand, there is one unified equitable estoppel doctrine based on unconscionability. The Court of Appeal in *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* outlined the four elements to successfully establishing equitable estoppel:[165]

(1) the plaintiff's belief or expectation has been created or encouraged by words or conduct by the defendant;

(2) to the extent an express representation is relied upon, it was clearly and unequivocally expressed;

(3) the plaintiff reasonably relied to its detriment on the representation; and

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159 Priel, above n 28, at 59.

160 Davies, above n 142, at 469.

161 Peter Jaffey "Unjust Enrichment and Contract" (2014) 77 MLR 983 at 985.

162 *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] 1 WLR 753 at [1].

163 Ross Grantham and Charles Rickett "Free Acceptance and Unconscientious Receipt" in Enrichment and Restitution in New Zealand (Hart, Oxford, 2000) at 261.

164 At 263.

165 *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 at [44].

(4) it would be unconscionable for the defendant to depart from the belief or expectation.

Estoppel imposes a higher threshold for claimants than the current restitutionary NCQM test. In a New Zealand NCQM claim, the claimant does not need to establish that the defendant actively encouraged their expectation of payment or that their expectation was reasonable; it suffices that the defendant was merely aware of the claimant's expectation.[166] This article contends that the stricter requirements that come with an estoppel claim are important for protecting commercial agreements. Requiring the defendant to engage in a positive act—such as explicitly encouraging the claimant's expectation of payment—is desirable. It is unfair to require a defendant to pay the claimant if the defendant merely failed to reject a service, especially given that the law is generally opposed to imposing liability for omissions. Additionally, the requirement that the claimant's expectation be reasonable prevents the courts from endorsing undue risk-taking. If a claimant subjectively believes they will receive payment for their services, but that belief is wholly unreasonable, it is hard to see why they should be entitled to payment. Therefore, while estoppel may present additional hurdles for claimants, these hurdles serve an important protective function. Notably, in *VONZ*, both NCQM and estoppel claims were successful,[167] indicating that any extra challenges posed by the estoppel test are not insurmountable.

2 Develop NCQM as a contractual or quasi-contractual remedy

If NCQM is still a justified remedy, the New Zealand courts should acknowledge that it is being used to impose consent and agreement-based liability. Because those are the foundations of contractual liability, both Jaffey and Priel argue that any further development of NCQM should arise "on the edges of contract law, rather than at the heart of restitution law".[168] This development would allow the courts to continue awarding NCQM as a means of compensating claimants and giving effect to agreements, while removing the rest of the doctrinal confusion that has arisen through NCQM's ties to restitution and unjust enrichment.

Jaffey proposes that the courts could develop the law of contract so that conditions for imposing contractual liability are relaxed. This might involve rethinking what an agreement is and its effect in contract law.[169] Both Jaffey and Priel acknowledge that this approach may face objections, given it involves altering the "deeply entrenched" rules of contract law, rather than the newer and "relatively fertile ground" of restitution.[170] Jaffey posits that, in the end, what should matter is the nature of the

166 See the discussion of the NCQM elements above in Part IV of this article.

167 *VONZ*, above n 82.

168 Jaffey, above n 66, at 122; and Priel, above n 28, at 64.

169 Jaffey, above n 66, at 122–123.

170 Priel, above n 28, at 64. See also Jaffey, above n 66, at 122.

liability. Given that liability in NCQM claims is grounded in the goal of giving legal effect to agreements or understandings, it should be developed through contract law.[171]

Another potential argument against this proposed approach might be that it appears to revive the former implied contract theory. Although this approach may be quasi-contractual, it is distinct from the implied contract theory. The implied contract theory involved the law creating a fictitious agreement between the parties in order to reach a desired legal outcome.[172] By contrast, this proposal focuses on examining the *genuine* agreements between the parties and determining the rights and obligations which should arise out of them.

VII CONCLUSION

The doctrinal quagmire surrounding NCQM is creating confusion and inconsistency in New Zealand law. It is time for the courts to confront this issue head-on. Despite New Zealand's assertions that NCQM is generally restitutionary, the courts appear to be veering towards a contractual or quasi-contractual approach in practice: NCQM acts as a form of consent-based or agreement-based liability designed to compensate claimants and protect their reliance interests. This use of NCQM is logical, as situations involving the provision of services are ultimately about agreements, not unjustly obtained benefits that need to be reversed.

This article argues that New Zealand should continue to diverge from the other common law jurisdictions and embrace the reality that contract principles underpin NCQM. Doing so might make it clear that NCQM is no longer necessary: claimants can rely on established contractual remedies and, where those fall short, equitable relief. Alternatively, it could lead to the development of NCQM within the framework of contract law. Developing New Zealand's law of contract to include NCQM would likely spark a new debate surrounding the limits of consent-based liability and raise questions about the appropriate cause of action for NCQM claims. However, as Professor Priel argues, at least the debate would be taken away from the law of restitution and into the more logical domain—contract law.[173]

VIII POSTSCRIPT

This research essay was submitted on 2 September 2024. On 10 September 2024, the New Zealand Court of Appeal released a new judgment surrounding NCQM: *Edubase Ltd v Minister of Education (Edubase)*.[174] Though not analysing the case in depth, this postscript makes two broad points about the implications of *Edubase* for NCQM law:

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171 Jaffey, above n 66, at 122.

172 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council,* above n 29.

173 Priel, above n 28, at 64.

174 *Edubase Ltd v Minister of Education* [2024] NZCA 430

(1) what the decision means for the doctrinal basis of NCQM; and

(2) what the decision means for the High Court judgment in *Electrix Ltd v The Fletcher Construction Co Ltd*.

A What the Decision Means for the Doctrinal Basis of NCQM

The Court of Appeal acknowledged that NCQM is sometimes viewed as a restitutionary claim grounded in unjust enrichment, while other times, NCQM is viewed as a compensatory claim based on promissory obligations. The Court decided to "leave aside the debate as to the true nature of the claim",[175] noting that "the development of quantum meruit and identification of its doctrinal basis has been a long and, in New Zealand, still evolving process."[176] This means that *Edubase* has not resolved New Zealand's NCQM doctrinal quagmire.

B What the Decision Means for Electrix

When determining the correct approach to valuation of a NCQM award, the Court of Appeal noted that the most recent High Court decision in *Electrix* took a "slightly different approach" by treating the cost of the services, rather than the objective market value, as the starting point.[177] The Court of Appeal effectively overturned this particular aspect of *Electrix*. It noted that beginning with the cost of services would depart from "the settled approach of seeking the objective market value of services provided" and that the cost of services should serve as a cross check rather than the starting point.[178]

This aspect of the *Edubase* judgment makes NCQM law in New Zealand more straightforward, as it eliminates the confusion surrounding how the courts should approach valuation. However, as the doctrinal basis of NCQM has been left open, it is possible that the approach to valuation may also continue to evolve. If the New Zealand courts later decide to follow the English approach grounded in unjust enrichment and restitution, then a valuation assessment that begins with the objective market value of the services makes sense: unjust enrichment is concerned with reversing benefits, and the objective market value of the services reflects the benefit that the defendant objectively obtained. If, however, the courts later decide that NCQM is actually about promissory obligations and providing claimants with fair compensation, then starting with the cost of the services incurred by the particular claimant, rather than the objective market value, may become the more appropriate approach.

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175 At [70].

176 At [64].

177 At [78].

178 At [79].