

LEVEL

TWENTY
SEVEN

C H A M B E R S



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

Sean Russell

Liability limited by a Scheme approved under professional standards legislation

>> The Majority's Approach





Nettle, Gordon and Edelman JJ, [1999]

through which general principle is derived from judicial decisions²⁹⁶. Unjust enrichment may be conceived of as a "unifying legal concept"²⁹⁷ which serves a "taxonomical function"²⁹⁸ that assists in understanding why the law recognises an obligation to make restitution in particular circumstances. But it is in no sense an all-embracing theory of restitutionary rights and remedies pursuant to which existing decisions are to be accepted or rejected by reference to the extent of their compliance with its proportions²⁹⁹. Consequently, where a doctrine of the common law has grown up over several centuries – as has the availability of restitutionary relief for work and labour done under a partially completed entire obligation following termination of a contract for breach – and the doctrine remains principled and coherent, widely accepted and applied in kindred jurisdictions, it can hardly be regarded as a sufficient basis to discard it that some of the conceptions which historically informed its gestation have since changed or developed over time³⁰⁰. Whatever doubts might remain about the theoretical underpinnings of the doctrine by reason of the problematic nature of its origins or subsequent developments in the law of contract, it is too late now for this Court unilaterally to abrogate the coherent rule simply in order to bring about what is said to be a greater sense of theoretical order to the range of common law remedies.

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294 See also *O'Connor v Jordan* CJ.
295 (2001) 208 CLR 177
History, 2nd ed (re-
296 See also *Breen v Williams* (1999) 190 CLR 471 at 472 per Gummow and Kiefel JJ; [1996] HCA 57; *D'Arcy v Myriad Genetics Inc* (2015) 258 CLR 334 at 350 [26] per French CJ, Kiefel, Bell and Keane JJ; [2015] HCA 35.
297 *Pavey & Matthews* (1987) 162 CLR 221 at 256-257 per Deane J; *David Securities* (1992) 175 CLR 353 at 375 per Mason CJ, Deane, Toobey, Gaudron and McHugh JJ; *Lumbers* (2008) 232 CLR 635 at 665 [85] per Gummow, Hayne, Crennan and Kiefel JJ.
298 *Eguscorp* (2012) 246 CLR 498 at 516 [30] per French CJ, Crennan and Kiefel JJ; *AFSL* (2014) 253 CLR 560 at 579 [20] per French CJ, 618 [138] per Gageler J.
299 *Roxborough* (2001) 208 CLR 516 at 543 [70] per Gummow J, quoting Finn, "Equitable Doctrine and Discretion in Remedies", in Cornish et al (eds), *Restitution: Past, Present and Future* (1998) 251 at 251-252.
300 See and compare Holmes, *The Common Law* (1881) at 5; Windeyer, *Lectures on*

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301 See and compare *Wanham v Ella* (1972) 127 CLR 454 at 466 per Walsh J.
302 *Lilley v Elwin* (1848) 11 QB 742 at 755 per Coleridge J for the Court [116 ER 652 at 657]; *Goodman v Pocock* (1830) 15 QB 576 at 580 per Lord Campbell CJ [117 ER 577 at 579]; *Macnamara v Martin* (1908) 7 CLR 699 at 706 per Griffith CJ (Barton J agreeing at 707); [1908] HCA 86. See also *Hulle v Heightman* (1802) 2 East 145 at 147-148 [102 ER 324 at 325]; *Thomas v Williams* (1834) 1 Ad & E 685 at 689 per Lord Denman CJ for the Court [110 ER 1369 at 1371]; *Melville v De Wolf* (1855) 4 El & Bl 844 at 849 per Lord Campbell CJ for the Court [119 ER 313 at 315]; Smith (ed), *Addison on Contracts*, 8th ed (1883) at 451-452; Skelton, *Restitution and Contract* (1998) at 53.
303 See, eg, *Merrill v Ithaca and Owego Rail Road Co* (1837) 16 Wend 586 at 594 per Cowen J for the Court and *Lincoln v Schwartz* (1873) 70 Ill 134 at 137 per Sheldon J for the Court, cited in Sedgwick, *A Treatise on the Measure of Damages*,

>> Gageler, [80]

Bearing constantly in mind the adage that the life of the common law has been not logic but experience¹²⁶, there is a need to resist the temptation to intellectual gratification that accompanies any quest to portray cases in which the common law recognises an obligation of restitution as the conscious or unconscious application of one Very Big Idea. The need is to avoid the pitfalls of overgeneralisation¹²⁷, just as it is to ensure that considerations that are practically important but theoretically inconvenient are not overlooked or underappreciated.

principles of the common law are, in his language, "built up" from the "collation of decided cases"¹²⁵. They are monitored by reference to how well they fit within the wider body of the law and how well they work in practice; where problems are revealed, they can be revised or even abandoned at the appropriate level within the judicial hierarchy.

⁸⁰ Bearing constantly in mind the adage that the life of the common law has been not logic but experience¹²⁶, there is a need to resist the temptation to

¹²¹ (2001) 208 CLR 516 at 524-529 [14]-[24], 555-558 [101]-[109], 589 [199].

¹²² [2015] AC 1 at 41-44 [103]-[115].

¹²³ cf Beatson, "The Temptation of Elegance: Concurrence of Restitutory and Contractual Claims", in Swadling and Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (1999) 143 at 148-149.

¹²⁴ cf *Roxborough* (2001) 208 CLR 516 at 543-544 [71]-[73]; *Barnes v Eastenders Cash & Carry Plc* [2015] AC 1 at 41 [102], 43 [113].

¹²⁵ Jordan, *Appreciations* (1950) at 58-59.

belated recognition of the availability to the innocent party of damages measured

¹²⁶ Holmes, *The Common Law* (1881) at 1.

¹²⁷ See Smith, "Restitution: A New Start?", in Devonshire and Havelock (eds), *The Impact of Equity and Restitution in Commerce* (2019) 91 at 95-96.

¹²⁸ *Sullivan v Moody* (2001) 207 CLR 562 at 580 [50]; [2001] HCA 59.

¹²⁹ eg. *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 350-354; [1993] HCA 4, discussing, amongst other cases, *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 477 and *Dies v British and International Mining and Finance Corporation* [1939] 1 KB 724.

¹³⁰ eg. *Fibroza Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32.

¹³¹ eg. *Sumpter v Hedges* [1898] 1 QB 673, discussed in *Steele v Tardiani* (1946) 72 CLR 386 at 403; [1946] HCA 21; *Lumbers v W Cook Builders Pty Ltd (In liq)* (2008) 232 CLR 635 at 656 [51]-[52]; [2008] HCA 27. See also McFarlane and Stevens, "In Defence of *Sumpter v Hedges*" (2002) 118 *Law Quarterly Review* 569.