

LEVEL

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TWENTY  
SEVEN

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CHAMBERS



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*

# >> So, what went wrong?

The basis is the other party's promise to perform

- Contrary to authority
- Premised on a misconception
- Nettle, Gordon and Edelman at [193]-[194]

There is no need for restitution, damages are adequate

- More to commend it, BUT
- Practical value in liquidated demand and more straightforward proof
- Common law system is messy
- Nettle, Gordon and Edelman at [198]-[199]
- Gageler at [84], [86]-[88]

The parties have contractually allocated risk

- Artificial and wrong in principle
- Gageler at [83]

## >> Gageler at [83]

My view is that the answer to that critical question cannot lie in the notion of the contracting parties having arrived at a contractual "allocation of risk", which the common law of restitution will not disturb<sup>134</sup>. Contracting parties are, of course, at liberty to determine by contract the "secondary" obligations, which are to arise in the event of breach or termination of the "primary" obligations they have chosen to bind them<sup>135</sup>. Even where the parties have not so determined, it may for some purposes be appropriate to describe obligations that the common law imposes to pay damages for breach of contract as "secondary" obligations which, in the event of termination by acceptance of a repudiation, are "substituted" for the primary obligations<sup>136</sup>. However, it would be artificial as a matter of commercial practice and wrong as a matter of legal theory to conceive of contracting parties who have not addressed the consequences of termination in the express or implied terms of their contract as having contracted to limit themselves to the contractual remedy of damages in that event. Parties contract against the background of the gamut of remedies that the legal system makes available to them. The common law gives to them the benefit, and saddles them with the detriment, of what they expressly or impliedly agree in their contract. Outside the scope of what they agree in their contract, the common law gives to them what the common law itself allows them to get.

<sup>135</sup> *Moschi v Lep Air Services Ltd* [1973] AC 331 at 350.

<sup>136</sup> *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 849.