

LEVEL

TWENTY
SEVEN

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]



Nettle, Gordon and Edelman at [193]-[194]

Nettle J
Gordon J
Edelman J

other party's promise to the other party's performance of an action for damages, if it is correct to characterize the obligations as being undertaken as being obligations (as opposed to the other party's failure to perform appropriate and adequate obligations) she would have been in no need of justification.

193 The first proposition is at odds with long-accepted learning in England and in this country²⁷⁰ and should be rejected. As Viscount Simon LC stated in *Fibrosa*²⁷¹:

"In English law, an enforceable contract may be formed by an exchange of a promise for a promise, or by the exchange of a promise for an act – I am excluding contracts under seal – and thus, in the law relating to the formation of contract, the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled.

If this were not so, there could never be any recovery of money, for failure of consideration, by the payer of the money in return for a promise of future performance, yet there are endless examples which show that money can be recovered, as for a complete failure of consideration, in cases where the promise was given but could not be fulfilled".

268 See, eg, McLure, "The Contract", in Dege, (2008) 209 at 211 *Quantum Meruit & University Law Review*.

269 See, eg, Beatson, "Contractual Claims: Essays in Honour of Restitutionary Review" 429 at 440 (2016) 132 *Law Quarterly Review*.

270 See *Fibrosa* [1943] AC 42 at 53 per Lord Atkin, 56 per Lord Russell of Killowen, 82 per Lord Porter; *David Securities* (1992) 175 CLR 353 at 382 per Mason CJ, Deane, Toohy, Gaudron and McHugh JJ; *Baltic Shipping* (1993) 176 CLR 344 at 350-351 per Mason CJ (Brennan and Toohy JJ agreeing at 367, 383), 376 per Deane and Dawson JJ, 389 per McHugh J. See also Havelock, "A Taxonomic Approach to *Quantum Meruit*" (2016) 132 *Law Quarterly Review* 470 at 490-492.

271 [1943] AC 32 at 48.

274 See *Winham v Ella* (1972) 127 CLR 454 at 466-467 per Walsh J; *Johnson v Perez* (1988) 166 CLR 351 at 356 per Mason CJ; [1988] HCA 64.

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Rule in Contract" (2008) 28 *Legal Studies* 112; Lawson, "The Remoteness Rules in Contract: Holmes, Hoffmann, and Ships that Pass in the Night" (2012) 23 *King's Law Journal* 1; Edelman and Bourke, "F W Guest Memorial Lecture 2017: *Hadley v Baxendale*" (2018) 15(2) *Otago Law Review* 1; Edelman, McGregor on Damages, 20th ed (2018) at 196-197 [8-172]-[8-173].



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268 See, eg, McI
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(2008) 209 at 211-213; Raghavan, "Failure of Consideration as a Basis for
Quantum Meruit following a Repudiatory Breach of Contract" (2016) 42 *Monash
University Law Review* 179 at 186-187, 197.

269 See, eg, 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 151-152; Jaffey,
"Restitutory Remedies in the Contractual Context" (2013) 76 *Modern Law
Review* 429 at 440-441; Havelock, "A Taxonomic Approach to Quantum Meruit"
(2016) 132 *Law Quarterly Review* 470 at 481.

270 See *Fibrosa* [1943] AC 32 at 48-49 per Viscount Simon LC, 72 per Lord Wright,
cf at 53 per Lord Atkin, 56 per Lord Russell of Killowen, 82 per Lord Porter;
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Gaudron and McHugh JJ; *Baltic Shipping* (1993) 176 CLR 344 at 350-351 per
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271 [1943] AC 32 at 48.

The first proposition should also be rejected for the reason that it is
premised on a misconception that an obligation to pay damages for breach of
contract is an obligation imposed by the contract as such, which reflects the
bargain struck between the parties and which survives termination like a debt due
under the contract.

Traditionally, the remedial obligation to pay damages for breach of
contract has been understood as an obligation "arising by operation of law"²⁷².
Whether or not there is any role for the objective or manifested intention of the
parties in ascertaining boundaries of liability in an award of damages²⁷³, the
proposition that the award of damages is somehow a product of the agreement of
the parties as an alternative to performance is not easily reconciled with several
established notions at law and in equity, including the normative principles
which govern the quantification of damages²⁷⁴ and the grant of specific
performance and injunctions on the basis that damages are an "inadequate"
remedy²⁷⁵. The parties contract for performance, not damages. In short, as

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272 *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 at 317 [23] per Gleeson CJ,
Gaudron and Gummow JJ; 176 ALR 693 at 699; [2000] HCA 64, quoting *Stoczni
Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574 at 585 per Lord Goff of
Chieveley; [1998] 1 All ER 883 at 893. See also *Grain v Imperial Airways Ltd*
[1937] 1 KB 50 at 69 per Greer LJ.

273 See and compare *Transfield Shipping Inc v Mercator Shipping Inc* [2009] AC 61 at
68 [12] per Lord Hoffmann. See also Robertson, "The Basis of the Remoteness
Rule in Contract" (2008) 28 *Legal Studies* 172; Lawson, "The Remoteness Rules in
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