LEVEL

# TWENTY SEVEN

CHAMBERS

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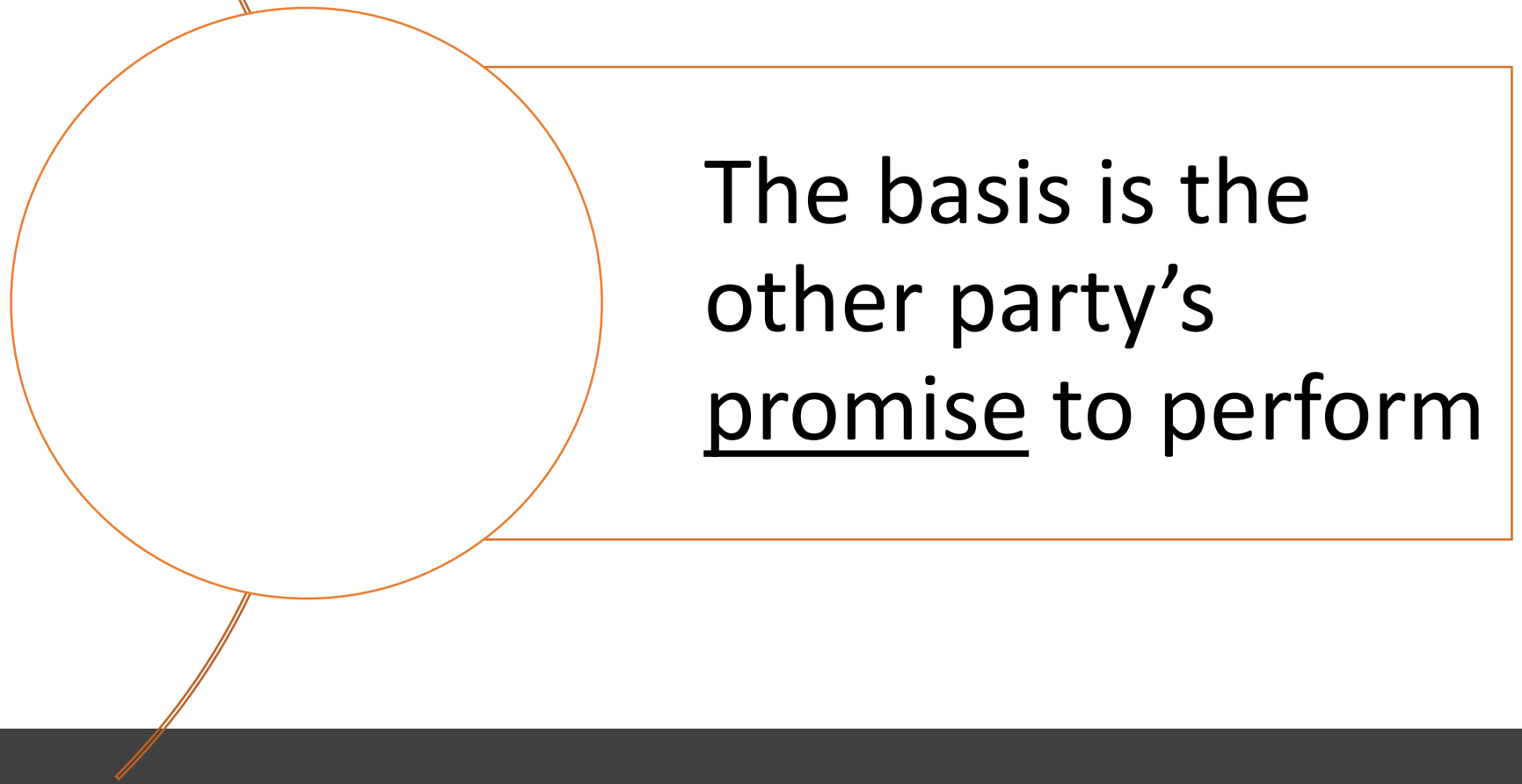
# Quantum meruit claims following the High Court's decision in *Mann v Paterson Constructions Pty Ltd*

Sean Russell

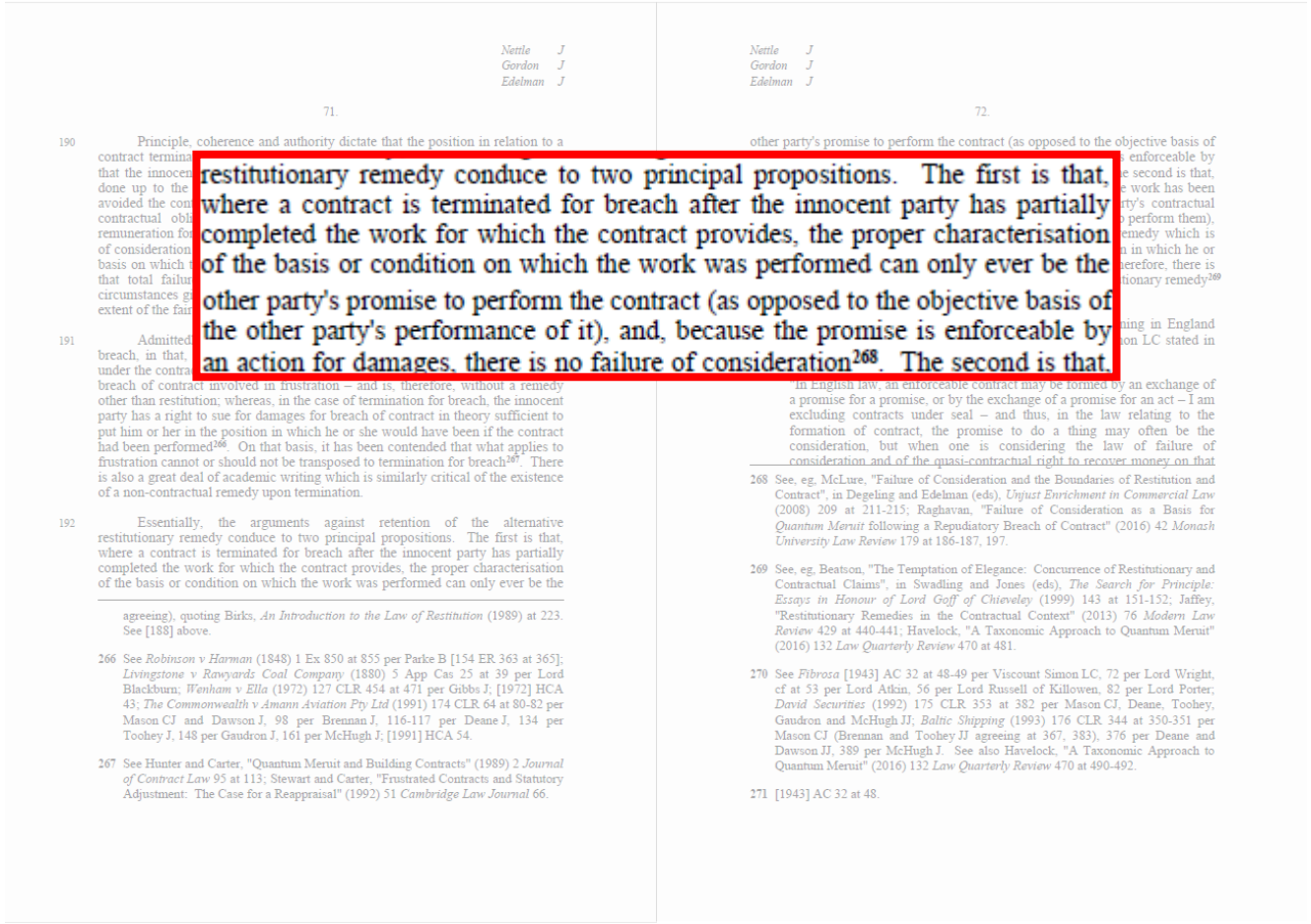
# >> But first, some uncontroversial basics

- This decision only applies to termination by an innocent party following repudiation or fundamental breach
  - Gageler, [75]-[76]; Nettle, Gordon and Edelman [215]
- Termination following repudiation does not render the contract void *ab initio* but excuses future performance
  - *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, 476-477, approved by everyone
- Where there is an accrued right to payment because there is a divisible obligation (or a divisible series of entire obligations), the remedy is contractual not restitutionary
  - Nettle, Gordon and Edelman [172]-[173]; Gageler [63]; Kiefel, Bell and Keane [19]
- Whether the obligation is entire or divisible is a question of construction
  - Nettle, Gordon and Edelman [175]-[176]; fn 236

# >> Justifications for minority position



# >> Nettle, Gordon and Edelman at [192]



Nettle J
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breach of contract involved in frustration – and is, therefore, without a remedy other than restitution; whereas, in the case of termination for breach, the innocent party has a right to sue for damages for breach of contract in theory sufficient to put him or her in the position in which he or she would have been if the contract had been performed[266]. On that basis, it has been contended that what applies to frustration cannot or should not be transposed to termination for breach[267]. There is also a great deal of academic writing which is similarly critical of the existence of a non-contractual remedy upon termination.

192 Essentially, the arguments against retention of the alternative restitutionary remedy conduce to two principal propositions. The first is that, where a contract is terminated for breach after the innocent party has partially completed the work for which the contract provides, the proper characterisation of the basis or condition on which the work was performed can only ever be the

agreeing), quoting Birks, *An Introduction to the Law of Restitution* (1989) at 223. See [188] above.

266 See *Robinson v Harman* (1848) 1 Ex 850 at 855 per Parke B [154 ER 363 at 365]; *Livingstone v Rawyards Coal Company* (1880) 5 App Cas 25 at 39 per Lord Blackburn; *Wenham v Ella* (1972) 127 CLR 454 at 471 per Gibbs J; [1972] HCA 43; *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80-82 per Mason CJ and Dawson J, 98 per Brennan J, 116-117 per Deane J, 134 per Toohey J, 148 per Gaudron J, 161 per McHugh J; [1991] HCA 54.

267 See Hunter and Carter, "Quantum Meruit and Building Contracts" (1989) 2 *Journal of Contract Law* 95 at 113; Stewart and Carter, "Frustrated Contracts and Statutory Adjustment: The Case for a Reappraisal" (1992) 51 *Cambridge Law Journal* 66.

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268 See, eg, McLure, "Failure of Consideration and the Boundaries of Restitution and Contract", in Degeling and Edelman (eds), *Unjust Enrichment in Commercial Law* (2008) 209 at 211-215; 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 Restitutionary 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, "Restitutionary 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; *David Securities* (1992) 175 CLR 353 at 382 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; *Baltic Shipping* (1993) 176 CLR 344 at 350-351 per Mason CJ (Brennan and Toohey 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.

# >> Justifications for minority position

The basis is the other party's promise to perform

There is no need for restitution; damages are adequate

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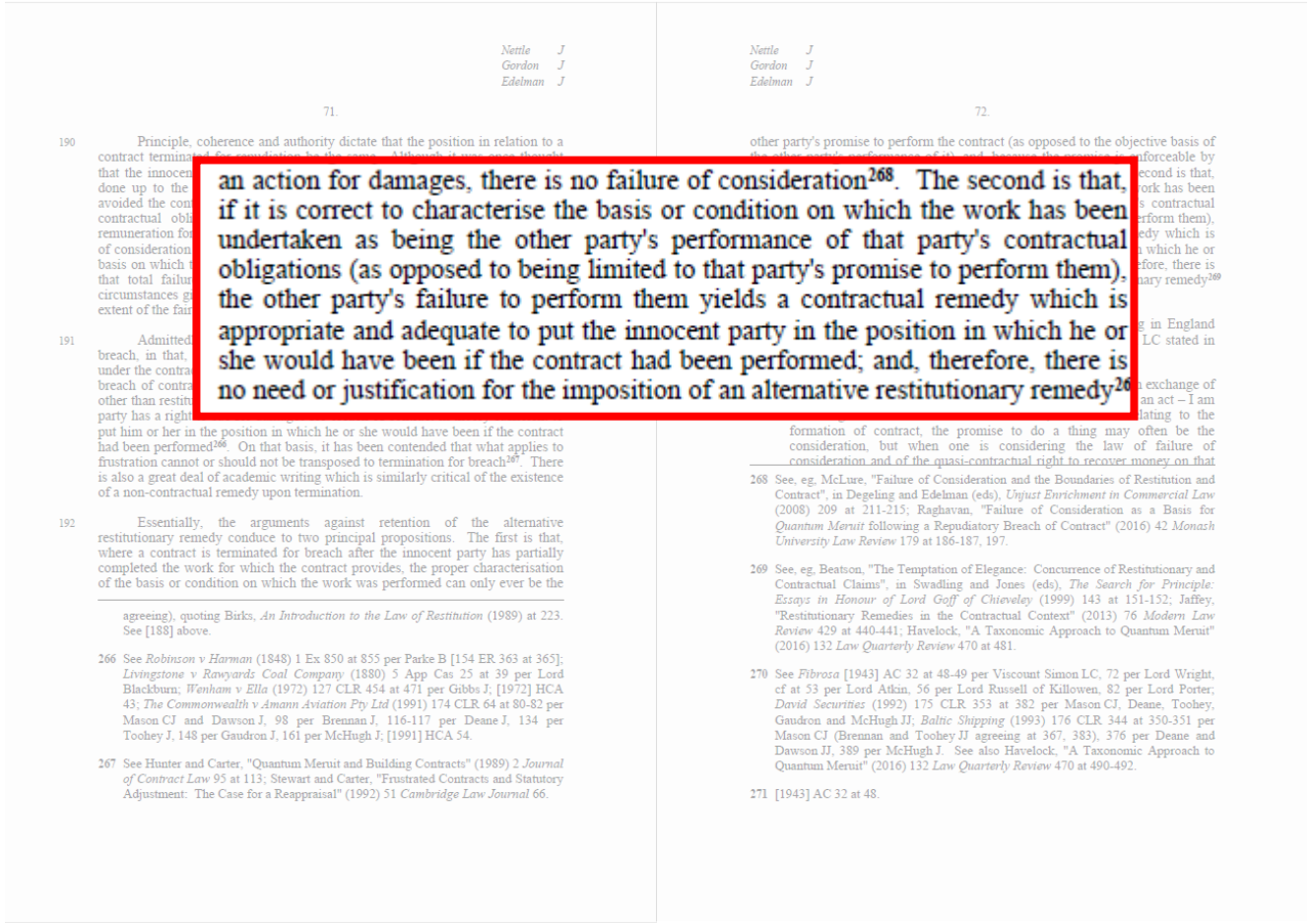

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an action for damages, there is no failure of consideration[268]. The second is that, if it is correct to characterise the basis or condition on which the work has been undertaken as being the other party's performance of that party's contractual obligations (as opposed to being limited to that party's promise to perform them), the other party's failure to perform them yields a contractual remedy which is appropriate and adequate to put the innocent party in the position in which he or she would have been if the contract had been performed; and, therefore, there is no need or justification for the imposition of an alternative restitutionary remedy[26…

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# >> Justifications for minority position

- The basis is the other party's promise to perform
- There is no need for restitution; damages are adequate
- The parties have contractually allocated risk

# >> 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]