SUPREME COURT OF QUEENSLAND

CITATION:	*SunWater Limited v Drake Coal Pty Ltd & Anor* [2016] QCA 255
PARTIES:	**SUNWATER LIMITED** ACN 131 034 985 (appellant) **v** **DRAKE COAL PTY LTD** ACN 138 221 600 (first respondent) **BYERWEN COAL PTY LTD** ACN 133 357 632 (second respondent)
FILE NO/S:	Appeal No 12477 of 2015 SC No 6430 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2015] QSC 320
DELIVERED ON:	11 October 2016
DELIVERED AT:	Brisbane
HEARING DATE:	7 June 2016
JUDGES:	Gotterson and Philippides and Philip McMurdo JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. Set aside the order pronounced on 12 November 2015 which dismissed the appellant's application filed 2 October 2015.** **3. Set aside the order of 2 December 2015 as to the costs of that application and substitute an order that those costs be paid by the respondent.** **4. Remit the matter to the primary judge for consideration of that application according to this judgment.** **5. Respondent to pay the appellant's costs of the appeal.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – DISCLOSING NO REASONABLE CAUSE OF ACTION OR DEFENCE – where the appellant commenced proceedings in the Trial Division claiming damages in

contract and, in the alternative, reasonable remuneration for work done in preparation for the construction of various pipelines – where the appellant brought an application to strike out multiple paragraphs of the respondents' draft defence and counterclaim, contending that the respondents pleaded matters that were irrelevant to the restitutionary claim – where the learned trial judge dismissed the application – where, subsequent to the trial judge's order but before the appeal, the respondents filed an amended defence and counterclaim – where the appellant contends that the learned trial judge erred in identifying the elements of the restitutionary claim and any defence to it and, notwithstanding the amendments, the pleading remains defective – whether the subject paragraphs of the defence and counterclaim are relevant to the restitutionary claim – whether the paragraphs should be struck out

Angelopoulos v Sabatino (1995) 65 SASR 1; [1995] SASC 5230, considered
Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd (2014) 253 CLR 560; [2014] HCA 14, considered
David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353; [1992] HCA 48, cited
Equuscorp Pty Ltd v Haxton (2012) 246 CLR 498; [2012] HCA 7, cited
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89; [2007] HCA 22, cited
Friend v Brooker (2009) 239 CLR 129; [2009] HCA 21, cited
Hendersons Automotive Technologies Pty Ltd (in liq) v Flaton Management Pty Ltd (2011) 32 VR 539; [2011] VSCA 167, cited
Lumbers v W Cook Builders Pty Ltd (In liq) (2008) 232 CLR 635; [2008] HCA 27, applied
Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221; [1987] HCA 5, cited
Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516; [2001] HCA 68, cited
SunWater Limited v Drake Coal Pty Ltd and Anor [2015] QSC 320, overruled

COUNSEL: A Pomerenke QC, with L Clark, for the appellant
R A Holt QC, with J Chapple, for the first and second respondent

SOLICITORS: Thomson Geer for the appellant
Holding Redlich for the first and second respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Philip McMurdo JA and with the reasons given by his Honour.

[2] **PHILIPPIDES JA:** I agree with the orders proposed by Philip McMurdo JA for the reasons set out in his Honour's judgment.

[3] I add some additional comments in respect of the trial judge's refusal to strike out the impugned paragraphs of the respondents' pleading then before the judge. The impugned paragraphs of that pleading concerned pleas in response to the appellant's claims for reasonable remuneration for work done at the respondents' request. As the primary judge identified,[1] the pleading included a denial that the work was performed for the respondents' benefit or that the respondents accepted any benefit of the work. In his judgment, the primary judge summed up the respondents' pleas as being that it was inequitable for the appellant to seek restitutionary relief, relying on conduct of the appellant which included matters said to have occurred long after the appellant had completed the work.[2]

[4] The appellant's case at first instance and before this court was that the impugned paragraphs did not invoke any recognised defence to its restitutionary claim, which fell within the category of cases constituted by claims for work and labour done at the request of another. Relying on *Lumbers v W Cook Builders Pty Ltd (In liq)*,[3] the appellant contended that an assessment of the pleaded conduct was neither necessary nor appropriate.

[5] Central to the primary judge's acceptance of the respondents' contention that they were entitled to argue that the alleged conduct made it "inequitable in all the circumstances" to require them to make restitution is the following paragraph of the judgment appealed:[4]

> "The [respondents] rely on the pleaded conduct to assert it would be unjust to make an order for restitution. Whilst such a contention does not invite a balancing of competing equities, it does raise whether it would be inequitable in all the circumstances to require the defendants to make restitution.[5] In an appropriate case, the circumstances could include conduct subsequent to completion of the work the subject of a claim for restitution."

[6] In drawing on the authority of *Hills*, this passage of the primary judge's reasoning reveals an erroneous application of the relevant paragraph in *Hills*.[6]

[7] In *Hills*, the plurality reiterated[7] in emphatic terms the court's rejection of unjust enrichment as a definitive legal principle, stated in *David Securities Pty Ltd v Commonwealth Bank of Australia*[8] and maintained by the Court consistently thereafter.[9]

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1 [2015] QSC 320 at [5].
2 [2015] QSC 320 at [6].
3 (2008) 232 CLR 635 at 666-667 [88]-[90].
4 [2015] QSC 320 at [15].
5 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560.
6 (2014) 253 CLR 560.
7 (2014) 253 CLR 560 at 594-595 [73]-[74] per Hayne, Crennan, Kiefel, Bell and Keane JJ.
8 (1992) 175 CLR 353 at 378 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ.
9 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 156 [151]; *Lumbers v W Cook Builders Pty Ltd (In liq)* (2008) 232 CLR 635 at 665 [85] per Gummow, Hayne, Crennan and Kiefel JJ; *Friend v Brooker* (2009) 239 CLR 129 at 141 [7] per French CJ, Gummow, Hayne and Bell JJ; *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at 299 [86] per Gummow, Hayne, Heydon, Kiefel and Bell JJ, cited in *Hills* (2014) 253 CLR 560 at 594-595 [73]-[74] per Hayne, Crennan, Kiefel, Bell and Keane JJ.

The Court confirmed what was said in *Equuscorp Pty Ltd v Haxton*[10] that "unjust enrichment does not found or reflect any 'all-embracing theory of restitutionary rights and remedies'".[11] It had previously explained in *Lumbers* that, while unjust enrichment was identified in *Pavey & Matthews Pty Ltd v Paul*[12] "as a legal *concept* unifying 'a variety of distinct categories of case'…[i]t was *not* identified as a principle which can be taken as a sufficient premise for direct application in particular cases."[13]

[8] The plurality in *Hills* adopted[14] what had been said in *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation* that "contemporary legal principles of restitution or unjust enrichment can be equated with seminal equitable notions of good conscience".[15] In that regard, it was observed[16] that the equitable roots of the action for money had and received had been recognised in Australia from as early as 1910 in *Campbell v Kitchen & Sons Ltd*.[17] In accordance with those comments, the plurality endorsed the explanation given in *Roxborough v Rothmans of Pall Mall Australia Ltd*[18] by Gummow J that the "equitable notions" referred to in judgments of Lord Mansfield, most famously in *Moses v Macferlan*[19] had been absorbed into the common law right of action for money had and received and, furthermore, that they did not invite a balancing of competing equities as between the parties.[20] As Gibbs CJ said in *National Commercial Banking Corporation of Australia Ltd v Batty*,[21] "the emphasis on justice and equity in both old and modern authority on this subject supports the view that the action will not lie unless the defendant in justice and equity ought to pay the money to the plaintiff". That draws attention to "issues of conscience which fall to be resolved assume a conscience 'properly formed and instructed' by established equitable principles and doctrines".[22]

[9] Consistently with that approach, in the action before it for money had and received (being a claim for payments made under a mistake of fact where a defence of change of position was pleaded) the plurality identified that the question before the court was one of whether it would be "inequitable in all the circumstances" to require restitution.[23] One category of case in which it would be "inequitable" to require a recipient to repay is where the recipient has so far altered its position in relation to the receipt that it would be a detriment to it if it were now required to repay. It is in that way, as a species of the genus "inequitable", that the defence of change of

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10 (2012) 246 CLR 498 at 516 [30] per French CJ, Crennan and Kiefel JJ.
11 *Hills* (2014) 253 CLR 560 at 595 [74] per Hayne, Crennan, Kiefel, Bell and Keane JJ.
12 (1987) 162 CLR 221.
13 It remains necessary therefore "to proceed by the 'ordinary processes of legal reasoning' and by reference to existing categories of cases in which an obligation to pay compensation has been imposed": *Lumbers* (2008) 232 CLR 635 at 665 [85] per Gummow, Hayne, Crennan and Kiefel JJ, quoting *Pavey & Matthews* (1987) 162 CLR 221 at 257 per Deane J.
14 *Hills* (2014) 253 CLR 560 at 595 [74] per Hayne, Crennan, Kiefel, Bell and Keane JJ.
15 (1988) 164 CLR 662 at 673 per Mason CJ, Wilson, Deane, Toohey and Gaudron JJ.
16 *Hills* (2014) 253 CLR 560 at 595-596 [75] per Hayne, Crennan, Kiefel, Bell and Keane JJ.
17 (1910) 12 CLR 515.
18 (2001) 208 CLR 516.
19 (1760) 2 Burr 1005.
20 *Hills* (2014) 253 CLR 560 at 594 [69] per Hayne, Crennan, Kiefel, Bell and Keane JJ.
21 (1986) 160 CLR 251 at 268.
22 *Hills* (2014) 253 CLR 560 at 596 [76] per Hayne, Crennan, Kiefel, Bell and Keane JJ (citations omitted).
23 *Hills* (2014) 253 CLR 560 at 594 [69] per Hayne, Crennan, Kiefel, Bell and Keane JJ.

position is to be understood,[24] in particular as an equitable doctrine concerning detriment.[25]

[10] There is nothing in *Hills* to support the proposition that a relevant issue that may arise for consideration in a case for remuneration for work and labour done at the request of another includes a consideration of whether it is "inequitable in all the circumstances" to allow that restitutionary claim because of "conduct by the claimant" subsequent to the performance of the requested work. Certainly, the defence of change of position cannot be pertinent. Indeed, no relevant equitable principle or doctrine was invoked by the respondents.

[11] In considering whether the impugned paragraphs were, as the appellant contended, irrelevant in law to the determination of the appellant's claim, the primary judge determined that the law was "not so clear" as to warrant the striking out of the impugned paragraphs. In so concluding, the primary judge referred to *Lumbers*, and reasoned as follows:[26]

> "On a strict reading of the judgment of the High Court in *Lumbers*, none of the matters the subject of the strike-out application are relevant to the [appellant's] claim to recover sums expended for work and labour undertaken at the request of the [respondents]. However, there is substance in the [respondents'] submission that the Court in *Lumbers* was considering the relevant factors for *establishing a claim* by the person undertaking that work. The Court was not considering the factors relevant to *establishing a defence* to such a claim."

[12] In *Pavey & Matthews*,[27] the Court considered the history of a *quantum meruit* claim and the distinction between debt and *indebitatus assumpsit*[28] in rejecting the implied contract theory as the true foundation of the right to recover on a *quantum meruit*.[29] Deane J explained that a *quantum meruit* claim could be traced to the use of a common *indebitatus* count to recover a debt owing in circumstances where the law itself imposed or imputed an obligation or promise to make compensation for a benefit accepted.[30] In finding that the basis of such an action was restitution, his Honour noted that:[31]

> "To identify the basis of such actions as restitution and not genuine agreement is not to assert a judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate. The circumstances in which the common law imposes an enforceable obligation to pay compensation for a benefit accepted under an unenforceable agreement have been explored in the reported cases and in learned writings and are unlikely to be greatly affected by the

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24 *Hills* (2014) 253 CLR 560 at 596 [77] per Hayne, Crennan, Kiefel, Bell and Keane JJ (citations omitted).
25 *Hills* (2014) 253 CLR 560 at 598-599 [77] per Hayne, Crennan, Kiefel, Bell and Keane JJ.
26 [2015] QSC 320 at [18] (emphasis added).
27 (1987) 162 CLR 221.
28 See David Ibbetson, 'Implied Contracts and Restitution: History in the High Court of Australia' (1988) 8 *Oxford Journal of Legal Studies* 312; J H Baker, *An Introduction to English Legal History*, Oxford, Oxford University Press, 4th ed, 2005 at 367.
29 *Pavey & Matthews* (1987) 162 CLR 221 at 227 per Mason and Wilson JJ and 256 per Deane J.
30 *Pavey & Matthews* (1987) 162 CLR 221 at 255.
31 *Pavey & Matthews* (1987) 162 CLR 221 at 256.

> perception that the basis of such an obligation, when the common law imposes it, is preferably seen as lying in restitution…"

[13] In *Lumbers*,[32] it was observed that "[t]he doing of work, or payment of money, for and at the request of another, are archetypal cases in which it may be said that a person receives a 'benefit' at the 'expense' of another which the recipient 'accepts' and which it would be unconscionable for the recipient to retain without payment". However, it was noted that the long-established and well recognised category of cases constituted by claims for work and labour done or money paid at the request of another merely required that the work be done or money be paid at the other party's request, either express or implied.[33]

[14] The Court rejected[34] the formulation of factors, beyond that concerning the doing of work at the request of another, enunciated in *Angelopoulos*[35] as requiring consideration where a plaintiff seeks to recover a fair price for work done or payment made at a defendant's request. The Court also rejected the notion that acceptance of a "benefit" without a request sufficed to found an action for work and labour done or money paid.[36] The effect of the decision in *Lumbers* is that it is both necessary and sufficient that the work was done or the money paid at the other's request to establish the restitutionary cause of action for a *quantum meruit*.

[15] The Court's express rejection of the formulation in *Angelopoulos* was not directed solely to the establishment of a claim but also concerned the question of defences available to the claim. Moreover, considerations relevant in respect of other categories of restitutionary claims (such as change of position as considered in *Hills*) have never, as I have mentioned, been a disentitling factor in relation to that restitutionary claim for work and labour done at the request of another.

[16] In this case, the primary judge erred in interpreting the dicta in *Lumbers* as possibly confined to the factors relevant to establishing the restitutionary claim for work and labour done at the request of another, as opposed to those relevant to establishing a defence to the claim.

[17] His Honour was also in error in drawing on *Hills* in support of the respondent's contention that, in respect of the restitutionary claim for work and labour done at the request of another, it was relevant in law to consider whether a "benefit" was conferred. The High Court has in *Hills* put it beyond question that while unjust enrichment may serve a purpose as a unifying concept it does not itself constitute a definitive legal principle that amounts to a legal cause of action.[37] And as Tate JA stated in *Hendersons Automotive Technologies Pty Ltd (in liq) v Flaton Management Pty Ltd*,[38] a focus on questions of "benefit" and "expense" are the very factors considered to be irrelevant to the traditional category of cases constituted by claims for work done at the request of another.

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32 *Lumbers* (2008) 232 CLR 635 at 663 [79] per Gummow, Hayne, Crennan and Kiefel JJ.
33 (2008) 232 CLR 635 at 666 [89] per Gummow, Hayne, Crennan and Kiefel JJ.
34 (2008) 232 CLR 635 at 666 [90] per Gummow, Hayne, Crennan and Kiefel JJ.
35 (1995) 65 SASR 1.
36 (2008) 232 CLR 635 at 665 [86] per Gummow, Hayne, Crennan and Kiefel JJ.
37 *Hills* (2014) 253 CLR 560; [2014] HCA 14 at 594-595 [73]-[74] per Hayne, Crennan, Kiefel, Bell and Keane JJ, citing *David Securities* (1992) 175 CLR 353 at 375 and 378 and *Pavey & Matthews* (1987) 162 CLR 221 at 256-257 per Deane J. See also J Gordley, *Foundations of Private Law*, New York, Oxford University Press, 2006 at 419-420.
38 (2011) 32 VR 539 at 553 [60]-[62], with whom Ashley and Neave JJA agreed.

[18] Where it is pleaded that work was done by the claimant at the request of the other party, it is not open as a matter of law to the recipient to contend by way of defence that no "benefit" was conferred. The respondents' contention that no "benefit" was conferred may be a reflection on the nature or wisdom of the work requested but it is not, as a matter of law, a factor of relevance in defeating the restitutionary claim pleaded by the appellant.

[19] Restitutionary rights of action comprise a number of distinct rights of action. Being distinct rights of action, they have distinct elements and defences. Accordingly, principles relevant to the right of action for money had and received are not able to be transplanted to the right of action for work done at the request of another, on the assumption of there being a definitive legal principle of unjust enrichment.

[20] **PHILIP McMURDO JA:** This is an appeal from a decision of a judge in the Trial Division who declined to strike out parts of a pleading.[39] The appellant plaintiff had argued that certain paragraphs of a defence were irrelevant, in that the facts alleged within them, if true, could not affect the outcome of the case in any respect. As the case was argued before the primary judge, that involved a question of the effect of the judgment of the High Court in *Lumbers v W Cook Builders Pty Ltd (In liq)*[40] upon a restitutionary claim for remuneration for work done by a plaintiff at the request of a defendant.

[21] The appellant's interlocutory application was filed on 2 October 2015, relevantly challenging parts of the defence filed on 17 August 2015. On 16 October 2015, the defendants filed an application, relevantly seeking leave to file and serve an amended defence and counterclaim. But the proposed defence included the paragraphs from the August pleading which the plaintiff was challenging.

[22] The applications were determined by the judgment under appeal, delivered on 12 November 2015, where it was noted that the parties had agreed on the outcome, save for the matters pleaded in certain paragraphs of the defendants' proposed amended defence.[41] Having concluded that they should not be struck out, the primary judge ordered that the plaintiff's application be dismissed.

[23] Despite assurances given to the primary judge that the pleading would be relevantly amended in the terms of the draft which was argued before him, the defendants filed an amended defence on 14 March 2016 which was not in those terms. The defendants were able to make these amendments without leave.[42] However this appeal was filed against a judgment which had considered a different pleading and consequently this court is without the benefit of a consideration by the primary judge of some parts of the current pleading which are now challenged. This court must consider the judgment under appeal and therefore the pleading which was there discussed. But there is utility in the appeal because this court's judgment would indicate what should happen to the current pleading.

The plaintiff's case

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39 *SunWater Limited v Drake Coal Pty Ltd and Anor* [2015] QSC 320.
40 (2008) 232 CLR 635; [2008] HCA 27.
41 [2015] QSC 320 at [1].
42 *Uniform Civil Procedure Rules* 1999 r 378.

[24] The plaintiff is a corporation the shares in which are held by ministers of the Queensland Government. It is a large supplier of water used for commercial purposes. The plaintiff's case, for the most part, arises from three agreements, two made with the first respondent (Drake) and the other with the second respondent (Byerwen). One agreement made with Drake concerned a proposed pipeline for water described as the Main Line and the other a proposed spur line running off the Main Line. The agreement with Byerwen also concerned the Main Line. Each agreement was made in September 2011. None required the plaintiff to construct the proposed pipeline with which it was concerned. Rather, the plaintiff was to undertake investigations, prepare designs, commence to obtain relevant statutory approvals and take certain other steps in preparation for the possible construction of the relevant pipeline. The agreements each described this work as "Stage 1 Activities" and provided, in each case, for the negotiation of a possible further contract between the parties under which the pipeline would be constructed.

[25] Drake and Byerwen became dissatisfied with the progress of the Stage 1 Activities and they purported to terminate the agreements. Drake did so on 3 April 2014 and Byerwen did so on 11 July 2014. The plaintiff alleges that the respondents were not entitled to terminate and that instead, the agreements were terminated by the plaintiff on 14 May 2014 (the two agreements with Drake) and on 29 October 2014 (the Byerwen agreement).

[26] The plaintiff pleads contractual claims against Drake. It claims a sum of approximately $1.39 million as a debt due and owing under the agreement for the spur line or alternatively the same sum as damages for breach of that agreement. It claims an amount of approximately $900,000 as a debt due by Drake under the agreement for the Main Line and again, alternatively, the same sum as damages.

[27] Alternatively to its contractual claims, the plaintiff makes claims against Drake for a reasonable remuneration for work done (in the nature of the Stage 1 Activities) at Drake's request. It pleads that it performed work for the proposed spur line in the period 24 December 2010 to 24 February 2014, for which it incurred costs and expenses in an amount of approximately $1.33 million which it claims as the fair and reasonable value of that work.

[28] For work said to have been performed in the period 24 December 2010 to 13 November 2012 for the Main Line, it claims against both Drake and Byerwen what it alleges were its costs and expenses of that work, in an amount of approximately $3.3 million.

The defence

[29] Those three non-contractual claims are defended upon identical grounds. At this point it is convenient to discuss that part of the defence which responds to the claim against Drake for work relating to the Main Line. In the (draft) pleading which was considered by the primary judge, the controversial paragraphs were within a denial of the allegation that the plaintiff carried out this work for and at the request of Drake. Those parts were within paragraph 61 of the pleading as follows:

> "(k) alternatively, SunWater is not entitled to seek any restitution due to its conduct in:
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> (i) continuing to incur costs and expenses;

(ii) continuing to extend the First Sunset Date;

when it:

(iii) knew that it could not supply water to the Drake mine from the BMP as it did not have any water allocation;

(iv) knew the only means of providing water to the Drake mine through the Drake Spur was if the GWBP was constructed;

(v) knew it could not obtain Conditional Approval under the Drake Main Line Agreement or the Byerwen Main Line Agreement for the design, commissioning and construction of the GWBP;

and by:

(vi) on or about 27 February 2013, advising the defendants that an option for the supply of water to Byerwen and/or Drake was for SunWater to acquire an existing water allocation from RATCH-Australia Collinsville Pty Ltd and RATCH-Australia Collinsville B.V ('jointly referred to in this defence as 'RATCH') which would be sufficient to meet its water supply requirements and on sell that allocation to Drake and/or Byerwen;

…

(viii) on or about 27 February 2013, advising the defendants that it would seek approval and funding from the SunWater Board and Shareholding Ministers to purchase the RATCH water allocation and transfer it to Drake and/or Byerwen;

(ix) on or about 27 March 2013, advising the defendants that:

(A) it could not obtain SunWater Board approval or the Shareholding Minister's consent to fund the purchase of the RATCH water allocation;

(B) RATCH had confirmed it would deal directly with Drake and/or Byerwen in relation to the acquisition of the water allocation;

(C) Drake should contact RATCH to investigate whether it could acquire the water allocation from RATCH directly;

(x) RATCH requiring SunWater's consent to the assignment of RATCH's water allocation to Drake and/or Byerwen under clause 15(ii) of the Water Supply Agreement between RATCH and SunWater dated 17 January 1996 as amended on 17 June 2005;

(xi) In or about March 2015, following termination of the Drake Spur Agreement and the Drake Main Line

> Agreement, refusing to consent to the assignment of the Water Supply Agreement to facilitate the transfer of RATCH's water allocation to QCoal (as agent for Drake) in the circumstances more fully set out in paragraphs 1-18 of the Counterclaim."

[30] The "First Sunset Date" was the date (27 July 2012) specified by each agreement as the date by which the Stage 1 Activities were to be completed (subject to extension according to the terms of the agreement). The "BMP" was the Burdekin Moranbah Pipeline, an existing facility. The "GWBP" was the Gorge Weir to Byerwen Pipeline or in other words the proposed Main Line.

[31] The part of paragraph 61(k) which was challenged was that within (vi) through (xi). The appellant conceded that Drake could plead the balance where it alleged that the appellant could not supply water to the Drake mine from either the existing BMP or from the proposed Main Line, because the Main Line would not receive the approval of the appellant's shareholding Ministers.[43] In that context, it was alleged that there were certain dealings between the parties about another possible source of supply. That was an existing water allocation in favour of the companies described as "RATCH", which were the owners and operators of the Collinsville Power Station. Apparently without objection, they were added as counterclaimants in the hearing before the primary judge.

[32] What was challenged in paragraph 61 of the defence is more easily understood when read with the counterclaim which was pleaded as follows. In 1996, RATCH contracted with what was then the Primary Industries Corporation for the supply to RATCH of water from the Eungella Dam. The appellant became substituted for the Primary Industries Corporation as the supplier under that agreement. RATCH's interest under the agreement was expressed to be assignable, but only with the prior written consent of the supplier, which was not to be unreasonably withheld. On 16 January 2015, RATCH sought the appellant's consent to the assignment of its interest under the agreement to QCoal or one of its related body corporates, which included Drake and Byerwen. Because the proposed assignee would not be operating the power station, but instead required the water elsewhere, the agreement with RATCH could not have been assigned without a relocation of what was called the Terminal Control Valve which was then within the premises of the power station. On 16 March 2015, the appellant advised RATCH that it would not authorise the relocation of the Terminal Control Valve. It was alleged that by refusing that authority, the appellant refused its consent to the assignment of the agreement with RATCH and that its refusal was "unreasonable". The particulars of that allegation referred to the events of 27 February 2013 and 27 March 2013 which were pleaded in paragraph 61 of the defence as set out above. In the counterclaim, the respondents, RATCH and QCoal sought a declaration that the appellant had acted unreasonably in refusing its consent and an injunction requiring the appellant to grant that consent.

[33] Returning to paragraph 61 of the defence, the case pleaded in subparagraphs (vi) through (xi) was the complaint, as made in the counterclaim, that the appellant refused to consent to the assignment of the RATCH agreement thereby depriving QCoal or a related company of that source of supply. But here it was pleaded as conduct which disentitled the appellant to be paid, upon a restitutionary basis, the value of work performed at Drake's request. That work, of course, was preparatory

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[43] "Conditional Approval" being so defined in each of the agreements.

work towards the possible construction of a distinct source of supply, namely the Main Line. And importantly, the matters complained of in relation to the RATCH agreement commenced in February 2013 which was after the period in which the appellant's work was allegedly performed.[44] Therefore the events in 2013 onwards involving the RATCH agreement could not have affected whether the work which the appellant performed had been requested by Drake and the pleading did suggest otherwise.

The appellant's challenge to the pleading about the RATCH agreement

[34] The appellant's argument accepts that it must prove that it performed the alleged work, at the defendant's request and that the amount claimed is reasonable. It argues, upon the authority of *Lumbers*, that once it proves those matters it is entitled to payment and that nothing else could be relevant. There was no argument before the primary judge (or here) as to the availability of this right of action in the circumstance where the work which was performed was that which had been required by the parties' contract. On the assumption that the appellant is otherwise entitled to payment on this non-contractual basis, the question for the primary judge was whether the matters pleaded about the RATCH agreement could have any relevance.

[35] The primary judge accepted the respondent's argument, which is repeated here, that the defendants could rely upon any matters which would make it "inequitable in all the circumstances to require the defendants to make restitution [including] in an appropriate case … conduct subsequent to completion of the work the subject of a claim for restitution."[45] The primary judge there cited *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*.[46] In that case the appellant had sued to recover payments to the respondents which the appellant made under mistakes of fact. It was held that the claims were defeated by defences of change of position by the payees. Hayne, Crennan, Kiefel, Bell and Keane JJ explained the origin of the appellant's right of action as follows:[47]

> "[65] The entitlement to recover money mistakenly paid to another in an action for money had and received has its roots in the decision of the Court of King's Bench led by Lord Mansfield in *Moses v Macferlan*. Lord Mansfield expressly founded the action to recover money had and received to the use of the payer on the notion that retention of the money by the payee would be 'against conscience'.
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> [66] Lord Mansfield explained that, in the case of mistaken payment, a plaintiff need not show special circumstances and may simply declare that the money was received by another to his use. His Lordship went on to say that, equally beneficially, a defendant 'may go into every equitable defence, upon the general issue; he may claim every equitable allowance; … in short, he may defend himself by every thing which shews that the plaintiff, ex aequo et bono, is not intitled to the whole of

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44 24 December 2010 to 13 November 2012.
45 [2015] QSC 320 at [15].
46 (2014) 253 CLR 560; [2014] HCA 14.
47 (2014) 253 CLR 560, 592, 593; [2014] HCA 14 [65], [66].

> his demand, or to any part of it'. In *Sadler v Evans*, it was said that "[t]he defence is any equity that will rebut the action".
>
> (Footnotes omitted.)

In the passage to which the primary judge apparently referred, the plurality continued:[48]

> "[69] In *Roxborough v Rothmans of Pall Mall Australia Ltd*, Gummow J explained that the 'equitable notions' of which Lord Mansfield wrote have been absorbed into the 'fabric of the common law' right of action for money had and received. In this regard, it is to be noted that any reference to equitable notions does not invite a balancing of competing equities as between the parties, based on considerations such as fault. The question here is whether it would be inequitable in all the circumstances to require Hills and Bosch to make restitution. The answer to that question is not at large, but neither is it simply a measure of the monetary extent to which the recipient remains enriched by the receipt at the time of demand for repayment."
>
> (Footnotes omitted.)

[36] What was there said related to the right of action for money had and received. It was not referable to the distinct right of action for work done at the request of another. Since *Pavey & Matthews Pty Ltd v Paul*,[49] that right of action has had a recognised basis which is restitution. An action for money had and received is also restitutionary, but that does not mean that what is relevant in the proof or defence of that right of action is also relevant to a claim of the present kind. Although the concept of unjust enrichment is common to the two rights of action, unjust enrichment is not a definitive legal principle,[50] as was again confirmed by the High Court in the joint judgment in *Australian Financial Services and Leasing Pty Ltd v Hills Leasing Pty Ltd*.[51] Therefore reasoning in that case, particularly in the joint judgment at [69], should not be transposed to the distinct right of action which is here in question.

[37] The relevant considerations for the proof or defence of a claim of the present kind were considered by the Full Court of the Supreme Court of South Australia in *Angelopoulos v Sabatino*.[52] The claim there was for reasonable remuneration for building work performed upon the defendants' premises, not under an agreement between the parties but with the awareness and encouragement of the owner of the land and an expectation by the plaintiffs that they would be paid for the work. A judgment against the owner was upheld by the Full Court where Doyle CJ, with the agreement of Duggan and Nyland JJ, identified the relevant circumstances which gave the case what he saw as the necessary character of one in which a defendant had accepted benefits accruing to the defendant from the plaintiff's performance of work, "such that the law should … impose an obligation to make fair and just restitution."[53] Doyle CJ then listed those circumstances as follows:[54]

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48 (2014) 253 CLR 560, 594; [2014] HCA 14 at [69].

49 (1987) 162 CLR 221; [1987] HCA 5.

50 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 378; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 156 [151]; *Friend v Brooker* (2009) 239 CLR 129, 141 [7]; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 516 [30].

51 (2014) 253 CLR 560, 597.

52 (1995) 65 SASR 1.

53 (1995) 65 SASR 1, 12.

> "First, the plaintiffs did not intend to provide their services gratuitously. … Secondly, the plaintiffs did not provide their services and supply the plant and equipment entirely at their own initiative. They acted not only with the knowledge of Ditara … but with the approval of Ditara. In my opinion there was more than passive acquiescence. It is not necessary for me to find that there was a request that the services be performed and the plant and equipment supplied, but were it necessary to do so I would be prepared to conclude that there was an implied request. Thirdly, the plaintiffs did not provide their services on the basis that there would be no payment unless a certain event came to pass. … Fourthly, this was not a case in which the services were provided on a basis from which the plaintiffs chose to depart. … Fifthly, the defendant Ditara benefited from what the plaintiffs did. … Sixthly, that benefit was conferred at the expense of the plaintiffs. Seventh, Ditara by its agents approved of or agreed to the plaintiffs carrying out the work which they did. … Eighth … the circumstances were such that Ditara by its agents must have known as a reasonable person that the plaintiffs expected to be remunerated for their services. Ninth, there is no argument advanced identifying any particular circumstance by virtue of which it is unjust to require Ditara to remunerate the plaintiffs. By this I mean that no matter such as change of position was advanced, nor … was it suggested that the work carried out was work which Ditara did not want done or which was of no use to Ditara."
>
> (Footnotes omitted.)

[38] However that reasoning was disapproved in the joint judgment of Gummow, Hayne, Crennan and Kiefel JJ in *Lumbers*.[55] In that case, a majority of the Full Court of the Supreme Court of South Australia had held that building owners were liable to pay for work done by a builder where there was no contract between them, but where the owners (the Lumbers brothers) had received an incontrovertible benefit at the builder's expense which they had freely accepted. That decision was reversed by the High Court. The claim was not framed as one for work and labour done or money paid at the request of the owners. According to the evidence, the owners had never asked the builder to do any of the subject work.[56] It was argued that acceptance of a benefit without a request sufficed to found an action for work and labour done or money paid, an argument which relied upon the judgment of the Full Court in *Angelopoulos v Sabatino*.

[39] Gummow, Hayne, Crennan and Kiefel JJ considered that it was convenient to consider the decision in *Angelopoulos* by reference to the argument of the respondent builder and by reference to the nine factors identified by Doyle CJ in the passage set out above. The plurality said:[57]

> "[88] Adapting what was said by Doyle CJ in *Angelopoulos* to the facts of this case, the nine factors identified by Builders as

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54 (1995) 65 SASR 1, 12-13.
55 (2008) 232 CLR 635, 665-667 [87]-[90].
56 (2008) 232 CLR 635, 664 [81].
57 (2008) 232 CLR 635, 666 [88].

> supporting its claim were: (a) the plaintiff (here, Builders) did not do the work gratuitously; (b) Builders did not act 'entirely at [its] own initiative' but at the implied request of the Lumbers; (c) payment for doing the work was not subject to fulfilment of a subsequent condition; (d) the work was not done 'on a basis from which [Builders] chose to depart'; (e) the Lumbers benefited from what Builders did; (f) the benefit was conferred at the expense of Builders; (g) the Lumbers 'approved of or agreed to' Builders carrying out the work it did; (h) the circumstances were such that the Lumbers 'must have known as … reasonable [persons] that [Builders] expected to be remunerated for [its] services'; and (i) there is no particular circumstance (such as change of position) by virtue of which it would be unjust to require the Lumbers to remunerate Builders."

(Footnotes omitted.)

[40] In a passage of critical importance to the present appeal, the plurality continued:[58]

> "[89] It will be noted that the second of the matters identified was the making of an 'implied request' by the Lumbers to Builders to do the work and to pay money. At once it should be pointed out that, if Builders did whatever work it did and paid whatever money it paid at the Lumbers' request, Builders' claim for a reasonable price for the work and for the money it paid would fall neatly within long-established principles. It would matter not at all whether the request was made expressly, or its making was to be implied from the actions of the parties in the circumstances of the case. Builders would have an action for work and labour done or money paid for and at the request of the Lumbers.
>
> [90] And if Builders did work or paid money at the Lumbers' request, it would also follow that it would be neither necessary nor appropriate to consider any of the other eight factors identified in *Angelopoulos* in deciding whether Builders could recover a fair price for the work it had done and the amount it had paid for and at the request of the Lumbers. To the extent that *Angelopoulos* is understood as requiring separate or additional consideration of those other factors, where a plaintiff seeks to recover a fair price for work done at the defendant's request, or the amount the plaintiff has paid for the defendant at the defendant's request, *Angelopoulos* is wrong and should not be followed."

(Footnotes omitted.)

[41] For present purposes, there are two points of principle which are explained in that passage. The first is that the necessary elements of the presently relevant right of action are that the plaintiff has performed work and at the request of the defendant. In those circumstances there is a right to be paid a reasonable price for the work.

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58 (2008) 232 CLR 635, 666-667 [89]-[90].

The second is that if those elements are established, it is "neither necessary nor appropriate" to consider any of the other circumstances listed in *Angelopoulos* "in deciding whether [the plaintiff can] recover a fair price for the work …". In particular, it is neither necessary nor appropriate to consider whether the defendant benefited from the plaintiff's work or whether there is any "particular circumstance (such as change of position) by virtue of which it would be unjust to require [the defendant] to remunerate [the plaintiff]."

[42] In reliance upon those passages from *Lumbers*, the appellant argued before the primary judge that the matters pleaded about the RATCH agreement could not be relevant. They were matters which went neither to whether work was performed nor whether it was requested. And nor could they have affected the quantification of the claim.

[43] Thus far I have discussed the pleading in response to the claim against Drake for work concerning the Main Line. As for the other claims, paragraph 48(k)(vi) through (xi) were in identical terms[59] for the claim concerning the Spur Line and a pleading in identical terms was in paragraph 68(o)(vi) through (xi) in the (draft) defence in response to the claim against Byerwen.

The decision of the primary judge

[44] The essence of the primary judge's reasoning is within these paragraphs of the judgment:

> "[16] A perusal of the contents of paragraphs 48(k), 61(k) and 68(o) supports the defendants' contention that the allegations the subject of the strike-out application are not separate and distinct. They are in addition to the other matters pleaded in each of those paragraphs. None of those other matters are the subject of the strike-out application.
>
> [17] As those allegations are said to be related, they form part all of the circumstances to be considered in determining whether it would be unequitable to require the defendants to make restitution. They cannot therefore be said to be irrelevant to the defendants' plea, unless the plaintiff is correct that the matters there pleaded are irrelevant in law to the determination of its claim.
>
> [18] On a strict reading of the judgment of the High Court in *Lumbers*, none of the matters the subject of the strike-out application are relevant to the plaintiff's claim to recover sums expended for work and labour undertaken at the request of the defendants. However, there is substance in the defendants' submission that the Court in *Lumbers* was considering the relevant factors for establishing a claim by the person undertaking that work. The Court was not considering the factors relevant to establishing a defence to such a claim.
>
> [19] Striking out deprives a party on a summary basis of the opportunity to advance contentions in the applicable Court proceeding. The power to strike-out is therefore to be exercised with caution. Particular caution is to be exercised

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[59] Save for any material respect in that the words "from the Eungella Dam" appeared in paragraph 48(k)(vi) after "RATCH".

> where the issues in dispute involve complex issues of fact and law. In such circumstances, it is appropriate, in the exercise of the Court's discretion, to allow the proceedings to run the usual course."

(Footnotes omitted.)

[45] In paragraph [18], the primary judge apparently accepted the respondents' submission, which is repeated here, about the suggested effect of the joint judgment in *Lumbers* in the passage which I have set out above at [40]. I respectfully disagree with that interpretation. In my view the plurality in *Lumbers* were there identifying what was or was not relevant, from the nine considerations listed in *Angelopoulos*, to both the proof and defence of a claim for payment for work done at a defendant's request. In *Angelopoulos*, Doyle CJ listed the nine circumstances which, in his view, meant that "the law should … impose an obligation to make fair and just restitution" and clearly the Chief Justice was not referring only to circumstances affecting the proof of a plaintiff's case, as distinct from those which could be relevant to a defence. In turn, the plurality in *Lumbers*, having identified the elements of the right of action, said that it would be neither necessary nor appropriate to consider the other factors identified in *Angelopoulos* "in deciding whether [a plaintiff] could recover a fair price for the work it had done … at the request of [a defendant]".[60] The ninth of the factors in *Angelopoulos* was the absence of "a particular circumstance (such as change of position) by virtue of which it would be unjust to require the [defendant] to remunerate [the plaintiff]."[61] Clearly any such circumstance, in particular a change of position, if relevant would be a *defendant's* issue, meaning that it would be for a defendant to at least plead if not also prove the circumstance. My understanding of the reasoning in *Lumbers* is consistent with what was said by Tate JA (with whom Ashley and Neave JJA agreed) in *Hendersons Automotive Technologies Pty Ltd (in liq) v Flaton Management Pty Ltd*.[62]

[46] The primary judge appropriately referred to the need for caution upon an interlocutory application before depriving a party of part of its case proposed for the trial.[63] However in my respectful view, the effect of the joint judgment in *Lumbers* is clear and the primary judge was persuaded to decline to strike out these allegations upon an incorrect basis. Consequently the primary judge should not have dismissed the appellant's application. Because the pleading which was considered was a *proposed* defence, the appropriate order on the application was to direct that a pleading not be filed which contained paragraphs 48(k)(vi)-(xi), 61(k)(vi)-(xi) and 68(o)(vi)-(xi) of the draft defence.

The 2016 pleading

[47] The amended defence filed in March this year repeats the allegations about the RATCH agreement. But it attributes a different legal significance to them. In apparent recognition of the weakness of the previous pleading (notwithstanding the decision of the primary judge), the defendants pleaded that the facts about the RATCH agreement were relevant to the question of whether the work for which payment is claimed was performed in response to a request by the defendants. There were

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60 (2008) 232 CLR 635, 666 [90].

61 (2008) 232 CLR 635, 666 [88] referring to *Angelopoulos* (1995) 65 SASR 1, 13.

62 (2011) 32 VR 539, 552-553 [59]-[60].

63 [2015] QSC 320 at [19] citing *Batistatos v The Roads and Traffic Authority (NSW)* (2006) 226 CLR 256, 257 [46]; and *Agar v Hyde* (2000) 201 CLR 552, 575-576 [57].

many amendments made by this 2016 pleading but within the present paragraph 61, the paragraphs now challenged are 61(k)(iv) to (vi) and 61(l), (m) and (n) which are as follows:

"61. …

(k) …

(iv) in a project review group report dated in or about 27 February 2013, advised the defendants that it would seek approval and funding from the SunWater Board and Shareholding Ministers to purchase the RATCH water allocation and transfer it to Drake and/or Byerwen;

(v) in an email from Stuart Low of SunWater to Deborah Silver of QCoal on or about 27 March 2013, advised the defendants that:

(A) it could not obtain SunWater Board approval or the Shareholding Minister's consent to fund the purchase of the RATCH water allocation;

(B) SunWater had discussed with RATCH whether they would deal with QCoal directly;

(C) RATCH had confirmed it would deal directly with Drake and/or Byerwen in relation to the acquisition of the water allocation;

(D) QCoal should contact RATCH to investigate whether it could acquire the water allocation from RATCH directly;

(vi) in the circumstances pleaded in paragraph 19(b)(ii) - (v) and 25(c)(ii), knew it could not obtain Conditional Approval under the Drake Main Line Agreement, the Byerwen Main Line Agreement or the Drake Spur Agreement for the design, commissioning and construction of the GWBP or the Drake Spur Pipeline;

(l) it was implied by SunWater's conduct pleaded in paragraph 61(k)(iv) - (vi) that if QCoal and RATCH reached agreement on the acquisition of the water allocation, SunWater would:

(i) consent to the assignment;

(ii) alternatively, not act in a manner to frustrate the transfer of the water to QCoal, Drake or Byerwen;

(m) in or about March 2015, following termination of the Drake Spur Agreement and the Drake Main Line Agreement, SunWater unreasonably withheld its consent to the assignment of RATCH's interest in the Water

Supply Agreement to facilitate the transfer of RATCH's water allocation to the defendants;

(n) As a consequence of the matters pleaded in sub-paragraph (k) (l) and (m) above the work performed by SunWater did not conform to any request because it was implicit in that request that in the event that water could be supplied from the Eungella Dam, SunWater:

(i) would take all necessary steps to effect the transfer of that water to Byerwen; and

(ii) would not act to frustrate the transfer of that water to Byerwen.

[48] Sub-paragraph 61(k)(vi) refers to matters pleaded in parts of paragraphs 19 and 25. It is sufficient to say that none of those matters relates to the RATCH agreement. Some of those facts or circumstances are said to postdate May 2013 so that they have no apparent relevance to the existence or content of a request for work performed in earlier years. Nevertheless it is possible that other matters pleaded in paragraphs 19 and 25 have an arguable relevance to the claim to which they respond and at least for that reason, I would not offer a concluded opinion about whether paragraph 61(k)(vi) of the current pleading should remain.

[49] Paragraphs 61(l) and (m) repeat the allegations about the RATCH agreement but it is alleged in paragraph 61(n) that in consequence of those matters (and those in sub-paragraph (k)), the work performed by the appellant did not conform to any request by Drake because, in effect, any request had an implied qualification from the facts and circumstances of the RATCH dealings.

[50] The allegations about the RATCH agreement do not have the same defect as their predecessors in the pleading considered by the primary judge, because they are now given a relevant legal significance, namely that they affected the content of any relevant request for the subject work to be performed. Instead the apparent problem in the current pleading is that it alleges a factual case which could not be correct. Perhaps the defendants' case in this current pleading needs to be further clarified or particularised. But at present it appears to be an allegation that the content of any relevant request for work which was performed by November 2012 was affected by subsequent events and circumstances. That could not have been the fact.

[51] The same observations can be made about those parts of paragraph 67 of the current pleading which were challenged in the hearing in this court. They are pleaded in response to the like claim against Byerwen.

[52] Most of the same observations can be made also about those parts of paragraph 48 which are challenged, being part of the response to the claim against Drake for work concerning the spur line. I would add the qualification that here the relevant work was said to have been performed in a period ending in February 2014, so that in theory, some of the events and circumstances of 2013 could be relevant to whether all of the subject work was performed according to Drake's request.

[53] Lastly reference should be made to another part of the current defence, namely paragraph 73(g)(ii) to (v) and 73(h). These were included within draft orders handed up by the appellant's counsel at the conclusion of the hearing of this appeal, the striking out of parts of the current pleading. They appear to have been included

because they also plead the same case about the RATCH agreement. They do so in response to paragraph 73 of the statement of claim, which is a distinct cause of action from those which were the subject of the primary judgment. In that paragraph there is an allegation by the appellant of an implied agreement between the appellant and Byerwen for the appellant to perform work described as the Eungella Dam Activities. An amount of approximately $44,000 is claimed for that work, apparently upon a contractual basis. Whether the matters pleaded in paragraph 73 of the present defence are an appropriate response is not a question which is relevant to the present appeal.

Orders

[54] Although the pleading considered by the primary judge could be thought to have been superseded by the 2016 pleading, there is still utility in allowing the appeal and setting aside the order which dismissed the appellant's application. This would allow the primary judge to reconsider the application consistently with this court's reasons. Consistently with its challenge (made only on the hearing of this appeal) to the current pleading, the appellant would be expected to amend that application to address the current pleading, consistently with this court's reasons. It is preferable that the challenges to the present pleading are made in that context at least for the reason that the challenge to the present defence is more a factual than a legal one and conceivably a determination of that challenge could be assisted by evidence.

[55] I would order as follows:

(1) Appeal allowed.

(2) Set aside the order pronounced on 12 November 2015 which dismissed the appellant's application filed 2 October 2015.

(3) Set aside the order of 2 December 2015 as to the costs of that application and substitute an order that those costs be paid by the respondent.

(4) Remit the matter to the primary judge for consideration of that application according to this judgment.

(5) Respondent to pay the appellant's costs of the appeal.