IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No. M197 of 2018

BETWEEN:

Peter Mann

First Appellant

and

Angela Mann

Second Appellant

and

Paterson Constructions Pty Ltd (ACN 135 579 770)

Respondent

SUBMISSIONS OF THE RESPONDENT

Date of Document: 1 March 2019
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PART I – CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II – ISSUES ARISING

2. The appellants (the **owners**) engaged the respondent (the **builder**) under a contract dated 4 March 2014 (the **contract**) to build two townhouses on the owners' property. The owners requested, and the builder undertook, 42 variations to the original scope of works. Before completion, the owners repudiated the contract by wrongfully purporting to terminate the contract and by excluding the builder from the worksite. The builder accepted the repudiation, and terminated the contract. In those circumstances the following issues arise:

10 (a) Is the builder entitled to elect to sue on a quantum meruit for the fair and reasonable value of the work it carried out?

(b) If question (a) is answered 'yes', is the builder's quantum meruit claim capped by the price payable under the contract for the work carried out?

(c) If question (a) is answered 'yes', does s 38 of the *Domestic Building Contracts Act 1995* (Vic) (the **Act**) apply to the quantum meruit claim of the builder in respect of the 42 variations?

(d) If the owners succeed in their appeal, should the matter be remitted to the Victorian Civil and Administrative Tribunal (**VCAT**) as originally constituted?

PART III – NOTICE

20 3. No notice is required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV – MATERIAL FACTS

4. To the facts set out in Part V of the owners' submissions should be added the following facts:

(a) the owners requested, and the builder performed, 42 variations to the original contractual scope of works before the owners repudiated the contract;[1]

(b) the owners denied having made the vast majority of the requests for the 42 variations,[2] but they were found not to be credible witnesses.[3] The builder's evidence that the 42

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1 [2016] VCAT 2100 at [104] (CAB 25).

2 [2016] VCAT 2100 at [27] (CAB 12), [101]–[105] (CAB 24–5), [108] (CAB 26).

3 [2016] VCAT 2100 at [283]–[284] (CAB 50); [27] (CAB 12), [30] (CAB 13), [129] (CAB 30), [272] (CAB 48).

variations were requested by the owners was found to be truthful;[4]

(c) the owners gave no written notice in respect of any of the variations they requested, and the builder did not give any written response to the owners' oral requests. VCAT found that the parties proceeded on a 'very informal basis';[5]

(d) VCAT found that it would be 'most unfair to the [b]uilder' not to allow it to recover a reasonable price for the variations the owners asked it to carry out, and that to do so 'would not be unfair to the [o]wners';[6]

(e) on 16 April 2015, the owners purported to terminate the contract by letter from their solicitors. They changed the locks and excluded the builder from the site;[7]

(f) by its solicitor's letter dated 22 April 2015, the builder put the owners on notice of the principles in *Sopov v Kane Constructions Pty Ltd (No 2)* and its entitlement to elect to bring a quantum meruit claim if the contract were terminated;[8]

(g) by its solicitor's letter dated 28 April 2015, the builder elected to terminate the contract by accepting the owners' repudiation;[9]

(h) the owners did not contend before VCAT that a claim in quantum meruit was unavailable; or that it was capped by the original contract price; or that s 38 of the Act applied to the builder's quantum meruit claim.[10] Rather, the owners contended that s 38 was directed to the builder's alternative contractual claims in respect of the 42 variations. They also contended that the quantum meruit claim should be assessed by reference to 'actual costs' incurred by the builder;[11]

(i) VCAT had before it all the parties' evidence and submissions in respect of both the builder's quantum meruit claim and its alternative contractual claims for damages, including the 42 variations. The contractual claims were not finally determined by VCAT because it determined the quantum meruit claims in the builder's favour.[12]

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4 [2016] VCAT 2100 at [283]–[284] (CAB 50); [17] (CAB 10), [26] (CAB 12), [48]–[49] (CAB 16), [129] (CAB 30), [289] (CAB 51).

5 [2016] VCAT 2100 at [111]–[112] (CAB 27-8).

6 [2016] VCAT 2100 at [115] (CAB 28).

7 [2016] VCAT 2100 at [2] (CAB 8); Respondent's Further Materials pp 6–9.

8 (2009) 24 VR 510; [2016] VCAT 2100 at [508] (CAB 101); Respondent's Further Materials pp 12–15.

9 [2016] VCAT 2100 at [4] (CAB 8), [469] (CAB 95), [507] (CAB 101); Respondent's Further Materials p 18.

10 [2018] VSC 119 at [50]–[52] (CAB 130–1).

11 [2018] VSC 119 at [31] (CAB 121), [2018] VSCA 231 at [114] (CAB 196).

12 [2016] VCAT 2100 at [3] (CAB 8), [119]–[120] (CAB 29).

PART V – ARGUMENT

A. FIRST ISSUE – A CLAIM IN QUANTUM MERUIT IS AVAILABLE

5. Where a builder accepts the owners' repudiation and terminates the contract before completion, the ability of the builder to elect to bring a claim in quantum meruit for the work carried out is justified by both history and principle.

6. Repudiation is a distinctive kind of breach of contract; and, in particular, it has distinctive remedial consequences.[13] A repudiatory breach goes beyond breach of a condition, or breach giving rise to a contractual right to terminate. It is 'a serious matter and is not to be lightly inferred.'[14] This is because repudiation 'evinces' an intention 'no longer to be bound by the contract',[15] and a 'renunciation' of it,[16] thereby making continued mutual performance of the contract impossible. As Gleeson CJ, Gummow, Heydon and Crennan JJ observed in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*, 'unwillingness or inability to perform a contract often is manifested most clearly by the conduct of a party when the time for performance arrives. In contractual renunciation, actions may speak louder than words.'[17]

7. Where such a repudiation occurs, no right to contractual damages for loss of bargain arises until *after* the contract has been terminated.[18] Therefore, even in an action for damages, the owners' reference (**AS[11]**) to rights 'which have already been unconditionally acquired' *before termination* is misleading and incomplete. Indeed, as *McDonald v Dennys Lascelles Ltd* itself made clear, where a contract is terminated upon acceptance of the defendants' repudiation, each party

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13 See, e.g. *Carr v JA Berriman Pty Ltd* (1953) 89 CLR 327 at 350 (Fullagar J; Dixon CJ, Williams, Webb and Kitto JJ agreeing); *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 626–8 (Gibbs CJ); *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 31 (Mason J), 48 (Brennan J); *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 186 (Mason and Wilson JJ); *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245 at 260–1 (Mason CJ, Deane, Dawson and Toohey JJ agreeing); *Foran v Wight* (1989) 168 CLR 385 at 395–6 (Mason CJ); *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at 135–6 [44], 142–3 [58]–[59] (Gleeson CJ, Gummow, Heydon and Crennan JJ); *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 234 CLR 237 at 259 [58] (Gleeson CJ, Kirby, Heydon, Crennan and Kiefel JJ). Parliament likewise recognises the distinction between repudiatory and non-repudiatory breaches of contract in various statutory contexts: see, e.g. *Property Law Act 1958* (Vic) s 146 (right of re-entry or forfeiture of leases); *Residential Tenancies Act* 1997 (Vic) s 225 (termination of tenancy agreement); *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 25 (discharge or rescission of contract of supply of goods); *Goods Act 1958* (Vic) ss 3, 16, 38.

14 *Progressive Mailing House* (1985) 157 CLR 17 at 32 (Mason J); *Shevill* (1982) 149 CLR 620 at 633 (Wilson J); *Laurinda* (1989) 166 CLR 623 at 643 (Brennan J).

15 *Carr v JA Berriman* (1953) 89 CLR 327 at 350 (Fullagar J; Dixon CJ, Williams, Webb and Kitto JJ agreeing); *Laurinda* (1989) 166 CLR 623 at 634 (Mason CJ).

16 *Heyman v Darwins Ltd* [1942] AC 356 at 397 (Lord Porter).

17 *Koompahtoo* (2007) 233 CLR 115 at 135–6 [44] (Gleeson CJ, Gummow, Heydon and Crennan JJ).

18 *Sunbird Plaza* (1988) 166 CLR 245 at 260–1 (Mason CJ; Deane, Dawson and Toohey JJ agreeing).

must make restitution of any valuable benefit received from the other during the pendency of the contract, excepting deposits or other earnests of performance.[19]

8. Here, the owners did not merely depart from the terms of the contract, but by their conduct they manifested their intention 'no longer to be bound by the contract'.[20] The owners cannot now approbate and reprobate by insisting on adherence to the very contract to which they refused to adhere. Where a builder accepts the owners' repudiation and terminates the contract, it is by definition no longer possible for the builder to complete the promised contractual performance; nor to receive from the owners the contractual performance that was promised by them. It is hardly surprising, then, that the law should recognise the availability of a claim in quantum meruit upon a builder's termination of the contract as a result of the wrongful repudiation of it by the owners. The historical roots of that claim are very deep.

9. Quantum meruit is an example of the common money counts of indebitatus assumpsit. Despite the delictual origin of assumpsit as an offshoot of case,[21] Gummow J observed in *Roxborough v Rothmans of Pall Mall Australia Ltd* that the common money counts (including the claim for quantum meruit for the value of work done) occupy 'an uneasy position in the legal system between the three great sources of obligation in private law, tort, contract and trust.'[22] It is therefore unsurprising that the historical availability of quantum meruit in cases of termination as a consequence of repudiatory breach is simultaneously a recognition of the wrongfulness of the defendant's repudiation; the injustice of their causing the basis of the contractual bargain to fail; the unconscientiousness of the wrongdoers retaining the benefit of work performed non-gratuitously and at their own request without being accountable for the fair and reasonable value of that benefit.

10. In *Planché v Colburn*, the plaintiff was engaged by the defendant publisher to research and write a book on 'Costume and Ancient Armour' for 'The Juvenile Library'. The defendant repudiated the contract before the manuscript was delivered. In the Court of Common Pleas, the plaintiff's claim in quantum meruit succeeded. Tindal CJ held that:

> when a special contract is in existence and open, the Plaintiff cannot sue on a quantum meruit: part of the question here, therefore, was, whether the contract did exist or not. It distinctly appeared that the work was finally abandoned; and the jury found that no new contract had been entered into. Under these circumstances the Plaintiff ought not to lose the fruit of his labour…[23]

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19 (1933) 48 CLR 457 at 477, 479 (Dixon J).

20 *Carr v JA Berriman* (1953) 89 CLR 327 at 350 (Fullagar J; Dixon CJ, Williams, Webb and Kitto JJ agreeing).

21 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 265 (Dawson J).

22 (2001) 208 CLR 516 at 540 [64].

23 (1831) 8 Bing 14 at 16; 131 ER 305 at 306.

11. Likewise, in *De Bernardy v Harding*, the defendant engaged the plaintiff as an agent to sell tickets for viewing the funeral procession of the Duke of Wellington. The agent had incurred expenses on advertising, but not sold any tickets, before the defendant repudiated the contract. The agent was entitled to sue for reasonable remuneration upon terminating the contract. In the Court of Exchequer, Alderson B stated that:

> Where one party has absolutely refused to perform, or has rendered himself incapable of performing, his part of the contract, he puts it in the power of the other party either to sue for a breach of it, or to rescind the contract and sue on a *quantum meruit* for the work actually done.[24]

12. Similarly, in *Prickett v Badger*, an estate agent was engaged by the defendant, and succeeded in finding a buyer for the defendant's land. He was unable to earn his commission under the contract because the vendor repudiated the contract and declined to sell the land as he was unable to convey good title. In the Court of Common Pleas, Williams J held that the agent 'was entitled to abandon the special contract, and resort to an action founded upon the promise which the law would infer from such a state of facts.'[25] Willes J likewise emphasised that '[t]here are many instances in the books which might be cited to shew, that, under circumstances like these, the plaintiff may maintain an action upon the money counts.'[26]

13. In *Lodder v Slowey*, a subcontractor was wrongfully excluded from the construction site and had its works and plant wrongfully seized by the Council for whom the works were being carried out by the head contractor. The head contractor then wholly refused to perform the contract with the subcontractor, who accepted that repudiation. The Privy Council affirmed the decision of the New Zealand Court of Appeal, which held that the subcontractor was entitled to bring a claim for quantum meruit against the head contractor following the subcontractor's termination of the subcontract. That was because the subcontractor 'was in the circumstances entitled to treat the contract as at an end and to sue on a quantum meruit for work and labour done and materials supplied'.[27]

14. The critical fact in cases of termination for repudiatory breach is that quantum meruit is available because there is no longer an 'open' contract between the plaintiff and defendant.[28] Where a contract is discharged, it is no longer open as from the date of its termination.[29] Thus, as Jordan CJ stated in *Segur v Franklin*:

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[24] (1853) 8 Exch 822 at 824; 155 ER 1586 at 1587.

[25] (1856) 1 CB (NS) 296 at 304; ER 132 at 126.

[26] (1856) 1 CB (NS) 296 at 307; ER 132 at 127.

[27] [1904] AC 442 at 451 (Lord Davey).

[28] Bullen and Leake, *Precedents of Pleadings* (3rd ed, 1868), 37.

[29] *Roxborough* (2001) 208 CLR 516 at 541 [67] (Gummow J).

> it is clearly settled that if one party to a contract repudiates his liabilities under it, the other party may treat such repudiation as an invitation to him to regard himself as discharged from the further performance of the contract; and he may accept this invitation and treat the contract as at an end, except for the purposes of an action for damages for breach of contract … or, in a proper case, an action for a quantum meruit.[30]

15. In *Horton v Jones (No 2),* Jordan CJ stated the principle in the following terms:

> If one party to an express contract renders to the other some but not all the services which have to be performed in order that he may be entitled to receive the remuneration stipulated for by the contract, and the other by his wrongful repudiation of the contract prevents him from earning the stipulated remuneration, the former may treat the contract as at an end and then sue for a quantum meruit for the services actually rendered.[31]

16. That principle has been consistently acted upon by appellate courts in Australia[32] As the Court of Appeal observed in *Sopov v Kane Constructions Pty Ltd (No 2)*, '[t]he right of a builder to sue on a quantum meruit following a repudiation of the contract has been part of the common law of Australia for more than a century.'[33] In the present case, the Court of Appeal correctly held that 'a builder seeking a quantum meruit amount following acceptance of an owner's repudiation of a building contract is entitled to recover the fair and reasonable value of the benefit conferred on the owner by the work that the builder performed.'[34] There was 'no occasion' to reconsider that principle.[35]

17. The present state of the law is illuminated by its history.[36] In disregarding that history, the owners' submissions fail to pay heed to the warning of Lord Reed in *HM Revenue and Customs v*

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30 (1934) 34 SR (NSW) 67 at 72 (Street J and Maxwell AJ agreeing). See also *Heyman v Darwins Ltd* [1942] AC 356 at 397–8 (Lord Porter): such a plaintiff 'is not proceeding under [the contract], but upon quasi-contract. The obligation he incurs and the sum he recovers may differ from those provided in the contract and are not dependent upon its terms.'

31 *Horton v Jones (No 2)* (1939) 39 SR (NSW) 305 at 319 (Jordan CJ; Halse Rogers and Owen JJ agreeing).

32 *Ettridge v Vermin Board of the District of Murat Bay* [1928] SASR 124 at 130 (Napier J; Murray CJ and Richards J agreeing); *Segur v Franklin* (1934) 34 SR (NSW) 67 at 72 (Jordan CJ; Street J and Maxwell AJ agreeing); *Horton v Jones (No 2)* (1939) 39 SR (NSW) 305 at 319 (Jordan CJ; Halse Rogers and Owen JJ agreeing); *Brooks Robinson Pty Ltd v Rothfield* [1951] VLR 405 at 409 (Dean J; Martin and Sholl JJ agreeing); *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 276–8 (Meagher JA; Priestley and Handley JJA agreeing); *Independent Grocers Co-Operative Ltd v Noble Lowndes Superannuation Consultants Ltd* (1993) 60 SASR 525 at 536–7 (Legoe J), 556 (Matheson J), 561 (Duggan J); *Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd* [1995] 2 Qd R 350 at 361 (McPherson JA); *McGowan v Commissioner of Stamp Duties* [2002] 2 Qd R 499 at 505 [11] (McPherson JA; Helman J agreeing); *Speakman v Evans* [2002] QCA 293 at 4 (McPherson JA, Mackenzie and Holmes JJ agreeing); *Baker v Legal Services Commissioner* [2006] 2 Qd R 249 at 254 [3] (McPherson JA; Jerrard JA and Douglas J agreeing); *Sopov v Kane Constructions Pty Ltd (No 2)* (2009) 24 VR 510 at 512–15 (Maxwell P, Kellam JA and Whelan AJA); *Maxcon Constructions Pty Ltd v Vadasz* [2016] SASCFC 119 at [84] (Peek, Blue and Lovell JJ); *Mann v Paterson Constructions Pty Ltd* [2018] VSCA 231 at [97] (Kyrou, McLeish and Hargrave JJA).

33 *Sopov v Kane Constructions Pty Ltd (No 2)* (2009) 24 VR 510 at 515 [12] (Maxwell P, Kellam JA and Whelan AJA).

34 [2018] VSCA 231 at [69] (CAB 178–9).

35 [2018] VSCA 231 at [97] (CAB 187).

36 See *Victoria v Commonwealth* (1962) 107 CLR 529 at 595 (Windeyer J).

The Investment Trust Companies that 'there are centuries' worth of relevant authorities, whose value should not be underestimated. The wisdom of our predecessors is a valuable resource, and the doctrine of precedent continues to apply. The courts should not be reinventing the wheel.'[37]

18. In light of this history, the owners' reliance on *Tridant Engineering Co Ltd v Mansion Holdings Ltd* (**AS[28]**) is misplaced.[38] *Tridant* turned on a misunderstanding of the pre-*Judicature Act* authorities; *Ranger v Great Western Railway Co* in particular.[39] It is the same error pointed out by the New Zealand Court of Appeal and the Privy Council in *Lodder v Slowey*.[40] *Ranger* concerned a suit in equity (not at law) in respect of a contract that had not been found to have been repudiated or terminated.[41] The defendant's allegedly wrongful act was not a breach of contract.[42] The contract remained open. It was therefore unsurprising that their Lordships held that no remedy was available to the plaintiff in equity. However, nothing in *Ranger* gainsaid the availability of an action *at law* for quantum meruit in respect of a contract terminated for repudiatory breach. The judge in *Tridant* was wrong to hold to the contrary.[43]

19. The owners' argument also ignores the state of the law in comparable jurisdictions. Where a defendant repudiates a contract for the provision of services, the ability of the plaintiff to terminate the contract and elect to bring a restitutionary claim for the reasonable value of those services is recognised by the law of, among other places, New Zealand,[44] Canada,[45] the USA,[46]

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37 [2018] AC 275 at [40].

38 [2000] HKCFI 1.

39 (1854) HL Cas 72; 10 ER 824.

40 [1904] AC 442 at 451 (Lord Davey); See also *Slowey v Ladder* (1901) 20 NZLR 321.

41 (1854) HL Cas 72 at 91, ER 832 (Lord Cranworth LC), 118, ER 843 (Lord Brougham).

42 (1854) HL Cas 72 at 98–9, ER 835; 101–2, ER 836–7 (Lord Cranworth LC), 118, ER 843 (Lord Brougham).

43 [2000] HKCFI 1 at [237] (To DHCJ).

44 *Lodder v Slowey* was of course a New Zealand case: (1901) 20 NZLR 321, aff'd [1904] AC 442. Since 1979, remedies arising from termination of a contract have been put on a statutory footing: *Contract and Commercial Law Act 2017* (NZ), largely re-enacting the *Contractual Remedies Act 1979* (NZ). A party may 'cancel' a contract by accepting the other party's repudiation: *Contract and Commercial Law Act* s 36. When a contract is cancelled, the court is empowered to 'direct a party to pay to any other party the sum that the court thinks just': s 43(3)(a); and in so doing, the court 'must have regard to' matters including 'the value, in the court's opinion, of any work or services performed by a party in, or for the purpose of, performing the contract' and 'any benefit or advantage obtained by a party because of anything done by another party in, or for the purpose of, performing the contract': s 45 (d)–(e).

45 *Alkok v Grymek* [1968] SCR 452 at 457–8 (Spence J); *Morrison-Knudsen Co Inc v British Columbia Hydro and Power Authority*, (1978) 85 DLR (3d) 186 at 224 (Seaton, McIntyre and Carrothers JJA) (BC CA); *McElheran v Great Northwest Insulation Ltd* [1995] NWTR 120 at [7] (Hetherington, Vertes and McFadyen JJA) (NWT CA); *Gulston v Aldred*, 2011 BCCA 147 at [50] (Ryan JA; Frankel and Groberman JJA agreeing).

46 *Boomer v. Muir*, 24 P(2d) 570 (Cal App, 1933); *United States v. Zara Contracting Co*, 146 F 2d 606 (2d Cir, 1944); *Re Montgomery's Estate*, 6 NE 2d 40 (NY, 1936); *Williston on Contracts* (4th ed) vol 26, § 68.14.

India,[47] France,[48] and Germany.[49] In likewise accepting such a claim, Australian law is within the mainstream of the major jurisdictions of the world. It is the owners' argument to the contrary that is anomalous.

A.1 THE OWNERS' ARGUMENTS AGAINST THE AVAILABILITY OF *QUANTUM MERUIT* ARE UNAVAILING

20. None of the five arguments proffered by the owners provide sufficient reason for this Court to depart from the law's current principled and historically well-grounded state.

21. The owners' first argument about 'contractual allocation of risk' is unavailing (**AS[15]**). By definition, repudiation arises where the defendant has manifested its intention not to be bound by the contract. Where a defendant repudiates, the law's concern about contractual allocation of risk is manifested in the right of the plaintiff to elect between accepting the defendant's repudiation (thereby terminating the contract) and affirming the contract by suing for its performance (thereby affirming the contractual allocation of risk).[50] Insofar as the contractual allocation of risk was undermined in this case, it was undermined by the fact of the owners' repudiation; not by the remedies available to the builder upon accepting that repudiation. The owners cannot now pray in aid the allocation of risk under the very contract they themselves have repudiated.

22. Since a claim for quantum meruit in this context can only arise between the actual parties to the terminated contract, there can be no complaint about the inappropriate imposition of liability on non-parties. The concern about contractual allocation of risk that animated this Court in *Lumbers v W Cook Builders Pty Ltd (in liq)* was the inappropriateness of liability for unrequested services being imposed by, or upon, strangers to the contract.[51] No such concern can arise in this case. The law sufficiently respects party autonomy by confining claims in quantum meruit to those services in fact requested by the defendant.[52] And insofar as the availability of quantum meruit in cases of repudiatory breach may dissuade some defendants

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47 *Indian Contract Act 1872* (India), ss 39, 64, 65, 75.

48 *Code civil* (France) arts 1229, 1352-8.

49 BGB § 325 (Germany).

50 None of the cases cited by the owners in **AS[18]** fn 20 are to the point. *Perum* [2007] WASCA 245 and *Coshott* [2007] NSWCA 153 each concerned contracts in respect of which no ground of invalidity or termination was alleged. *Brady Contracting* [2005] NSWCA 22 and *LMC Caravan* [2010] NSWCA 120 were each cases of unilateral mistake. *Trimis* [1999] NSWCA 140 was a case in which the builder's claim in respect of variations failed for want of evidence: see at [64]. *MacDonald Dickens* [2012] QB 244 was, like *Lumbers*, a failed attempt to impose liability on a third party where there was an open contract.

51 (2008) 232 CLR 635.

52 *Lumbers* (2008) 232 CLR 635 at 663–4 [80] (Gummow, Hayne, Crennan and Kiefel JJ).

from repudiating their contracts, then it serves — like all remedies available upon breach of contract — to uphold, not to undermine, the contractual bargain.

23. The owners' second argument about 'indeterminate' liability is misconceived (**AS[20]**). A claim for quantum meruit is indeterminate neither in value nor extent. It is a claim for a liquidated sum;[53] and is confined to a reasonable remuneration for services actually requested. As McHugh J observed in *Perre v Apand Pty Ltd*, 'liability is indeterminate only when it cannot be realistically calculated'.[54] Here, there was expert evidence providing just such a realistic calculation.[55] There is also no indeterminacy about the class of persons to whom liability can arise.[56] The owners' liability is to the builder alone, being the person from whom the services were requested. That is the point of *Lumbers*.

24. At base, the owners' concern about 'indeterminacy' is no more than the complaint of every contract-breaker who regrets that breach is more costly than performance.[57] In that regard, the policy of the law is to uphold the keeping — not simply the making — of contracts. If remedial 'indeterminacy' is an inherent consequence of a repudiatory breach, then that is a circumstance which arose from the owners' own conduct; and is not a factor unique to claims in quantum meruit.[58]

25. The third argument (**AS[23]**) about there being 'no room' for a restitutionary remedy is likewise misconceived. The existence and availability of such non-contractual remedies is expressly recognised in the Act.[59] The owners' assertions cannot stand against Parliament's own determination that there is indeed 'room' for a non-contractual remedy. The owners' argument relies on the mistaken supposition that an action for damages is, or should be, the only remedial response to a repudiatory breach of contract; or that there remained an open contract between the parties.[60]

26. The very consequence of accepting the owners' repudiation was that there was no open contract between the parties. In such circumstances, the law has for hundreds of years recognised the existence of a remedy in quantum meruit as an alternative to contractual damages. Deane J expressly recognised in *Pavey & Matthews Pty Ltd v Paul* that there are 'a variety

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53 *Segur v Franklin* (1934) 34 SR (NSW) at 72 (Jordan CJ; Street J and Maxwell AJ agreeing).

54 (1999) 198 CLR 221 at 221 [107].

55 [2016] VCAT 2100 at [512]–[518] (CAB 102–3).

56 Cf *Ultramares Corp v Touche, Niven & Co*, 255 NY 170 at 179; 174 NE 441 at 444 (Cardozo CJ) (NY, 1931).

57 Cf *Clark v Macourt* (2013) 253 CLR 1; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272.

58 Cf *The Golden Victory* [2007] 2 AC 353.

59 Namely, in ss 16(2), 53(2)(b), 67(4)(c).

60 Cf *Renard Constructions* (1992) 26 NSWLR 234 at 276–8 (Meagher JA; Priestley and Handley JJA agreeing).

of distinct categories of case' in which the law obliges a defendant 'to make fair and just restitution for a benefit derived at the expense of a plaintiff.'[61] But, as Brennan J pointed out, the line of cases allowing quantum meruit in cases of repudiatory breach was 'not material' to the issue there under discussion, namely a contract unenforceable for lack of writing.[62]

27. The fourth argument, about the so-called 'rescission fallacy' (**AS[24]**) is a claim about labels, not about substance. Classic statements of principle, such as in *Segur v Franklin*,[63] and *Horton v Jones (No 2)*[64] do not involve any notion of rescission ab initio. Further, 'rescission', which is a term employed in some cases in this area, can be used in a number of senses.[65] One such sense describes termination of a contract following acceptance of a defendant's repudiation. It has been used in that sense in modern times by many judges of this Court, who were not ignorant of *McDonald v Dennys Lascelles*.[66] The terminology of 'rescission' recognises the distinctiveness of termination following repudiatory breach. It is that distinctiveness, having deep historical roots, that is the principled basis for the availability of quantum meruit as an alternative remedy to contractual damages. Recognising the distinctiveness of termination as a result of repudiatory breach does not involve any 'fallacy' about the timing and effect of the contract's termination.

28. The fifth argument, about the supposed absence of an 'alternative doctrinal basis' (**AS[30]**) is inapt. As outlined in paragraphs 9 and 13–15 above, the principled basis for the remedy arises from the repudiatory nature of the owners' breach that resulted in termination. That breach has a dual significance, because it made complete performance by the builder impossible; and because it signalled the owners' intention not to be bound by the contract and their renunciation of it. In both those fundamental senses, the basis of the contractual transaction had failed by reason of the repudiatory breach. How, in those circumstances, could the owners in good conscience refuse to pay the fair and reasonable value of the work they themselves requested and benefited from, when their own conduct was the reason for the failure of the contractual bargain?[67]

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61 (1987) 162 CLR 221 at 257.

62 *Pavey & Matthews* (1987) 162 CLR 221 at 237.

63 (1934) 34 SR (NSW) 67 at 72 (Jordan CJ; Street J and Maxwell AJ agreeing).

64 (1939) 39 SR (NSW) 305 at 319–20 (Jordan CJ; Halse Rogers and Owen JJ agreeing).

65 *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205 at 223 [33] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

66 *Koompahtoo* (2007) 233 CLR 115 at 139 [52] (Gleeson CJ, Gummow, Heydon and Crennan JJ); *Commonwealth v Amann Aviation* (1991) 174 CLR 64 at 98 (Brennan J), 129 (Deane J); *Braidotti v Queensland City Properties Ltd* (1991) 172 CLR 293 at 302 (Mason CJ, Brennan and Dawson JJ); *Laurinda* (1989) 166 CLR 623 at 641–2 (Brennan J); *Foran v Wight* (1989) 168 CLR 385 at 416 (Brennan J), 395 (Mason CJ) and 441 (Dawson J); *Shevill* (1982) 149 CLR 620 at 625–7 (Gibbs CJ; Murphy and Brennan JJ agreeing).

67 See *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 at 1755–6 [3], 1759 [10], 1768 [28] (Lord Scott).

29. There is no evidential difficulty in determining the value of the builder's performance. And there is no conceptual difficulty in ordering, as this Court did in *Roxborough*, that there be restitution *pro tanto* insofar as the basis of the transaction had failed.[68] *Baltic Shipping Co v Dillon* does not require any contrary conclusion: that case rightly rejected a claim for the restitution of the *entire* contract price when the value of the unperformed portion had already been refunded.[69] Where, as here, there was expert evidence accepted by VCAT of the fair and reasonable value of the works in fact performed by the builder, there is no practical reason to insist that any failure of consideration be total. Given the orientation of Australian law in this area towards equitable considerations,[70] it is hardly surprising that equitable ideas of failure of basis, and equitable principles of not permitting retention of a benefit to the extent that it would be unconscionable to do so,[71] or of doing justice on terms that require restitution of the value of benefits actually received,[72] can explain the basis on which the law remedies repudiatory breaches after termination by the wronged party.

30. In many areas of law 'a page of history is worth a volume of logic',[73] but the current state of the law is neither illogical nor unprincipled. It is precisely this Court's attention to history and context, as well as to principle, that has enabled it to avoid the pitfalls into which others have stumbled.[74]

31. The current state of the law reflects a balancing of the interests of builders, owners and subcontractors, on the basis of which participants in the construction industry — and Parliament — have acted in reliance for many decades.[75] The regulatory balance reflects a complex interplay of common law, statute and subordinate legislation; including with respect to security of payments and statutory insurances.[76]

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68 (2001) 208 CLR 516 at 525–6 [16]–[17], 528–9 [21] (Gleeson CJ, Gaudron and Hayne JJ), 538–9 [60], 552–3 [94]–[95].

69 (1993) 176 CLR 344 at 348 (Mason CJ), 373 (Deane and Dawson JJ), 384 (Gaudron J).

70 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 at 596 [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ); *Roxborough* (2001) 208 CLR 516 at 553–5 [95]–[100] (Gummow J).

71 *Muschinski v Dodds* (1985) 160 CLR 583 at 620 (Deane J); *Atwood v Maude* (1868) LR 3 Ch App 369 at 374–5 (Lord Cairns LC); *Lyon v Tweddell* (1881) 17 Ch D 529 at 531 (Jessel MR).

72 See, e.g. *Foran v Wight* (1989) 168 CLR 385 at 438 (Deane J); *Langman v Handover* (1929) 43 CLR 334 at 347 (Isaacs J).

73 *Kline v Official Secretary to the Governor General* (2013) 249 CLR 645 at [62] (Gageler J), citing *New York Trust Co v Eisner*, 256 US 345 at 349 (1921) (Holmes J).

74 See, e.g., R Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 574.

75 See *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340 at 362 [66] (Kiefel, Bell, Gageler, Keane and Gordon JJ).

76 See *Building Act 1993* (Vic); *Building Regulations 2018* (Vic); *Domestic Building Contracts Act 1995* (Vic); *Domestic Building Contracts Regulations 2017* (Vic); *Building and Construction Industry Security of Payment Act 2002* (Vic) *Building and Construction Industry Security of Payment Regulations 2013* (Vic); *Domestic Building Insurance Ministerial Order 2003*.

32. Both in Victoria[77] and in other States,[78] Parliament has given express statutory recognition to the fact that restitution can be an appropriate remedy in disputes about building work. Likewise, both in Victoria[79] and in other States,[80] Parliament has expressly recognised the distinction between contractual and non-contractual claims and remedies in building cases. Given that delicate regulatory interplay, no mischief has been identified by the owners that would justify the change to the law they seek. Further, any such change would cause consequential upset to settled expectations in a complex area of national economic and social significance, in which any change to the current balance between competing considerations is properly a matter for Parliament.

33. The first ground of appeal should therefore be rejected.

B. SECOND ISSUE – THE BUILDER'S CLAIM WAS NOT CAPPED BY THE CONTRACT PRICE

34. The owners' argument about contractual 'caps' is inconsistent with the scheme of the Act. By s 16, Parliament has determined whether, and in what circumstances, a builder may bring a claim for more than the contract price. By s 16(1), a builder 'must not demand, recover or retain from the building owner an amount of money under the contract in excess of the contract price unless authorised to do so by this Act'; yet by s 16(2), that prohibition 'does not apply to any amount that is demanded, recovered or retained in respect of the contract as a result of a cause of action the builder may have that does not involve a claim made under the contract.'

35. Parliament has determined that the value of a non-contractual claim relating to a domestic building contract may indeed permissibly exceed the contract price. This Court has many times emphasised the need for coherence in the law, and the danger of restating the common law in a manner inconsistent with statute.[81] The effect of the owners' contention is that s 16 of the Act should be rewritten; but that is a matter for Parliament.

36. The 'basis' on which the owners are liable in restitution (**AS[38]**) is that they are liable to pay a fair and reasonable remuneration for the work performed at their request by the builder: no more and no less. The difficulty with the owners' first argument is that 'what they received' (**AS[39]**) was not the same as that which was included in the 'contract price'. That is both because of the 42 variations they requested and the builder performed; and because their

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77 *Domestic Building Contracts Act 1995* (Vic) s 53(2)(b); see also s 67(4)(c).

78 *Home Building Act 1989* (NSW) s 48O; *Queensland Building and Construction Commission Act 1991* (Qld) s 77(d).

79 *Domestic Building Contracts Act 1995* (Vic) s 16.

80 *Home Building Act 1989* (NSW) ss 10, 94; *Queensland Building and Construction Commission Act 1991* (Qld) ss 42, 67E; *Building Services (Registration) Act 1991* (WA) s 7.

81 *Sullivan v Moody* (2001) 207 CLR 562 at 579–80 [50], [55] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Miller v Miller* (2011) 242 CLR 446 at [15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

repudiatory breach prevented complete performance of the contract according to its terms. The facts of this case emphasise that what the owners 'received' and what they 'agreed' contractually were two separate things; and that the former was substantially more valuable than the latter.[82] In this case, the owners' own behaviour so radically departed from the contract that it manifested their intention no longer to be bound by it. It therefore lies ill in their mouths to insist on adherence to any supposed cap in the contract they themselves have repudiated.

37. A claim for quantum meruit is based on the fact that the owners were enriched by the services provided by the builder non-gratuitously and at the owners' request. It is the value of those services — assessed objectively in terms of reasonable remuneration — that determines the extent of the owners' enrichment. On what basis can the contractual 'cap' be determinative of the valuation of that enrichment? On the facts of this case, it cannot be relevant on the basis that the owners desired to adhere to the contract; for they had repudiated it. It cannot be because the contract in fact delimited the services actually performed; for those services differed from the contractual scope of work both because of the fact of the owners' repudiation, and because of their 42 requested variations.[83] Nor can it be because the contract was the best evidence of reasonable valuation; for it was not, given the expert evidence accepted by VCAT.[84]

38. The owners' argument assumes that in every case, it is possible to determine the value of the supposed contractual 'cap'. The diversity of pricing mechanisms in construction contracts — never mind other kinds of contracts — make that an unstable assumption. The very fact of the owners' repudiation may make it difficult to apply the supposed 'cap' to unit priced contracts, or to 'cost plus fixed fee' or 'cost plus variable percentage' contracts. The difficulty is starkly illustrated by the terms of the contract in this case. True it is that the contract identified a 'contract price' of $971,000,[85] but it also contained separate pricing mechanisms for, among other things, provisional sums;[86] prime cost items (which included the elaborate cellar);[87] contractual variations;[88] and delay payments.[89] These have the effect that the total consideration

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82 The evidential foundation for the builder's claim sets this case apart from *Trimis* [1999] NSWCA 140, where there was no evidence to justify the alleged difference in value between the contractual and non-contractual claim: at [64].

83 Cf *Steele v Tardiani* (1946) 72 CLR 386.

84 [2016] VCAT 2100 at [512]–[518] (CAB 102–3).

85 Appendix item 10.1, (Appellants' Further Materials p 50).

86 Clause 9.6, Appendix item 22 (Appellants' Further Materials pp 25, 54).

87 Clause 9.6, Appendix item 21 (Appellants' Further Materials pp 25, 53).

88 Clauses 12.8, 13.3 (Appellants' Further Materials pp 31, 32).

89 Clause 15.4, Appendix item 17a (Appellants' Further Materials pp 34, 52).

payable by the owners under the contract was not fixed at $971,000, but could in various circumstances exceed that sum.

39. The owners' submissions are inexplicit, but they appear to assume that the relevant 'cap' was necessarily fixed at $971,000. That, however, is inconsistent with the terms of the contract on which — notwithstanding their repudiation — they now seek to rely. The owners point to no finding as to what, in the events that occurred, was the total amount actually payable under the contract. The owners therefore wish the Court to address the second ground of appeal on an uncertain and hypothetical basis. This Court, however, does not give advisory opinions.[90]

40. In a case like the present, a claim for quantum meruit will by definition arise in respect of *incomplete* contractual performance; where that incompleteness arose from the defendants' own repudiatory breach. The owners offer no explanation about how the 'cap' should be allocated across the work actually done, albeit incompletely. If the reasonable valuation of the incomplete performance is in fact the same as the contract price, is the whole price payable notwithstanding the incompleteness of the work? Or is the contract price to be applied pro rata? If so, the 'cap' will by definition never be reached, because of the incompleteness of the work. How is the relative value of part performance to be measured? Is expensive structural work to receive a greater proportion of the contractual cap than inexpensive decorative work? Ultimately, one is thrown back on the need to assess reasonable remuneration on the basis of expert evidence. But if the basis of assessment is reasonable remuneration for the work actually performed, the contract price, while potentially relevant, cannot be determinative.

41. For the reasons outlined in paragraphs 21 to 22 above, the owners' second argument about 'reallocation of risk' (**AS[40]**) is misconceived. The liability of a contract-breaker may well exceed the contract price, even if a plaintiff were confined to an action for damages. In *Clark v Macourt*, for example, the purchase price was less than $400,000, but the damages awarded for the cost of obtaining alternative supplies was over $1 million.[91] As Hayne J put it, '[t]he loss which is compensated reflects a normative order in which contracts must be performed.'[92] It would be anomalous if a 'cap' were introduced to one remedy arising upon breach of contract, but not others.

42. The owners' third argument (**AS[41**]) cannot stand with their manifest intention not to be bound by the contract. No element of 'punishment' is involved: their conduct simply entitled the builder to terminate by accepting their repudiatory breach. It is fanciful to suggest that reasonable remuneration for the work actually requested by the defendants is an 'unjust

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90 *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

91 (2013) 253 CLR 1.

92 (2013) 253 CLR 1 at 7 [11].

enrichment' of the builder. The result in *Taylor v Motability Finance Ltd*[93] is entirely consistent with the orthodox principle that a plaintiff cannot recover on a quantum meruit in respect of *complete* performance of a contract.[94] The very point of this case, by contrast, is that the owners' own conduct prevented complete performance by the builder.

43. There is no inconsistency in refusing to enforce a contractual price cap in respect of a non-contractual claim. The owners' reference to exclusion clauses in tort claims (**AS[43]**) begs the question by assuming the existence of an open contract between plaintiff and defendant. Why should the price cap apply in circumstances where, ex hypothesi, that was the very thing repudiated by the plaintiff? Put simply, 'defendant[s] cannot be allowed to take advantage of [their] own wrong, and screen [themselves] from payment for what has been done' by their own wrongful refusal to perform the contract.[95] And in focusing on the value of the benefit actually provided, and not on the contractual cap, Australian law is within the mainstream of other comparable jurisdictions, including New Zealand,[96] Canada,[97] the USA,[98] and France.[99]

44. Finally, the builder adopts and relies upon the reasons of Meagher JA in *Renard Constructions* for rejecting the contractual price cap sought by the owners:[100]

> There is nothing anomalous in the notion that two different remedies, proceeding on entirely different principles, might yield different results. … On the other hand, it would be extremely anomalous if the defaulting party when sued on a quantum meruit could invoke the contract which he has repudiated in order to impose a ceiling on amounts otherwise recoverable.[101]

45. The second ground of appeal should therefore be rejected.

C. THIRD ISSUE – S 38 OF THE *DOMESTIC BUILDING CONTRACTS ACT*

46. The Court of Appeal was correct to hold that s 38 of the Act did not apply to the builder's non-contractual claim for quantum meruit in respect of variations undertaken at the owners' request.

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93 [2004] EWHC 2619 (Comm).

94 *Morrison-Knudsen Co Inc v British Columbia Hydro and Power Authority* (1978) 85 DLR (3d) 186 (BC CA).

95 *Prickett v Badger* (1856) 1 CB (NS) 296 at 306; ER 132 at 127 (Crowder J), referring to 2 *Smith's Leading Cases* 31, note to *Cutter v Powell* [(1795) 6 TR 320; 101 ER 573].

96 *Contract and Commercial Law Act 2017* (NZ) s 45 (d)–(e).

97 *Kerr v Baranow* [2011] 1 SCR 269 at [71]–[72] (Cromwell J); *Infinity Steel Inc v B & C Steel Erectors Inc* [2011] 6 WWR 575 at [21] (Huddart JA) (BCCA); *McElheran v Great Northwest Insulation Ltd* [1995] NWTR 120.

98 *Boomer v. Muir*, 24 P(2d) 570 (Cal App, 1933); *United States v. Zara Contracting Co*, 146 F 2d 606 (2d Cir, 1944); *Re Montgomery's Estate*, 272 NY 323; 6 NE 2d 40 (NY, 1936); *Williston on Contracts* (4th ed) vol 26, § 68.14.

99 *Code civil*, art 1352-8.

100 (1992) 26 NSWLR 234 at 276–8 (Meagher JA; Priestley and Handley JJA agreeing).

101 *Renard Constructions* (1992) 26 NSWLR 234 at 277–8 (Meagher JA; Priestley and Handley JJA agreeing).

47. The owners' statement (**AS[46]**) that the builder 'did not comply' with the notice requirements of s 38 is inaccurate. The owners did not fulfil the statutory precondition in s 38(1) by giving the builder 'a notice outlining the variation the building owner wishes to make'.[102] And because of the way the owners conducted their case below, VCAT was not called on to make any final determination on the operation of s 38, nor of whether the conditions in s 38(2) or s 38(6)(b) were satisfied if the section applied to the 42 variations.[103] In the absence of such findings, it cannot be said that the builder was precluded from recovering the moneys it was claiming in respect of the 42 variations.

48. As in any case involving statutory construction, one must begin, and end, with the statutory text.[104] That is what the Court of Appeal did.[105] Six textual features of Act must be noted.

49. First, s 38 is to be found in Part 3 of the Act, which is entitled 'Provisions that only apply to major domestic building *contracts*'; the specific word 'contracts' being chosen in distinction to the broader concept of 'building work'.[106] That is consistent with the Part concerning contractual, but not non-contractual, matters. By contrast, Part 4 of the Act concerns 'Domestic *building work* disputes', and Part 5 expressly gives VCAT power to grant remedies 'by way of restitution' in respect of such a dispute: s 53(2)(b)(iii).[107] The scheme of the Act therefore recognises that disputes about building work may extend beyond contractual matters, and may encompass claims for which restitution is an appropriate remedy; and that Part 3 concerns only a subset of the issues which may give rise to a claim. In other words, the Act expressly recognises the distinction between contractual and non-contractual claims; and expressly preserves the distinction between contractual, debt-based and restitutionary remedies.[108]

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[102] As is apparent from the text, context and purpose of s 38, a notice in writing from the owner is the precondition for the operation of the section. The Explanatory Memorandum in respect of cl 38 of the Bill confirms that construction. This issue was raised but not determined at first instance: see [2018] VSC 119 at [58].

[103] [2016] VCAT 2100 at [119]–[120] (CAB 29), [282] (CAB 50) [469] (CAB 95); [2018] VSC 119 at [50]–[52] (CAB 130–1). VCAT did, however, find that none of the variations would have added more than 2% to the original contract price; and that most variations would not have required an amendment to the building permit and would not have caused any delay to the work: [2016] VCAT 2100 at [116] (CAB 28).

[104] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

[105] [2018] VSCA 231 at [130] (CAB 200).

[106] The same distinction between the broader term 'building work', and the narrower term 'building contract', is found in the *Building Act 1993* (Vic) ss 3(1) (definition of 'building work'), 24A(c), 24B(4)–(5), 25AB(3)(b), 25B(1A), 78(1A), 136, 137A, 169A, 169F, 176A, 205H(1).

[107] [2018] VSCA 231 at [135] (CAB 201).

[108] Sections 16(2), 53(2)(b); see also s 67(4)(c).

50. Second, s 38 is to be found in Division 4 of Part 3, entitled 'Provisions *applying after the contract is signed*'. Again, that emphasises the contractual focus of the Division, within the context of a Part which is itself concerned with contracts; not with building work disputes more widely.

51. Third, s 38(1) speaks of a 'building owner who wishes to vary the plans or specifications *set out in a major domestic building contract*'. Whether that subsection connotes a change to the contract itself (as the Supreme Court found),[109] or a change to the scope of works set out in, or to be performed under, such a contract (as the Court of Appeal found),[110] it is the *contract* that is central.

52. Fourth, in referring to the effect on the 'original contract price', the 'work as a whole being carried out under the contract', and 'the contract price', ss 38(2) and (3) are unmistakably concerned with contractual claims.

53. Fifth, the owner mistakes the significance of the limitation in s 38(8) (**AS[53]**). That exclusion concerns '*contractual terms* dealing with prime cost items or provisional sums'. If s 38 had the operation for which the owners contend, the reference to 'contractual terms' would be unnecessary. Contrary to the owners' argument, the limitation in sub-s (8) confirms that s 38 as a whole is concerned with contractual terms and contractual —not non-contractual — claims.

54. Sixth, s 38(6) is a nuanced and qualified provision, and not a 'blanket prohibition' (cf **AS[49]**). In that respect, it is consistent with the nuanced and qualified nature of other provisions in the Act.[111] The subsection takes its place within a Part, a Division, and a section of the Act which are concerned with contractual claims. Further, the subsection 'contains important exceptions',[112] and has no application:

    (a) where the builder 'reasonably believes the variation will not require a variation to any permit and will not cause any delay and will not add more than 2% to the original contract price stated in the contract', because 'the builder may carry out the variation' (s 38(2)). Significantly, none of the owners' requested variations exceeded the 2% threshold;[113]

    (b) where the builder, among other things, states 'the cost of the variation and the effect it will have on the contract price' (s 38(3)(a)(ii)); or

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109 [2018] VSC 119 at [66] (CAB 136).

110 [2018] VSCA 231 at [119]–[121] (CAB 197).

111 Cf ss 11 (deposits), 12 (contracts for more than one kind of building work), 13 (cost plus contracts), 15 (escalation clauses), 16 (claims for more than the contract price).

112 [2018] VSCA 231 at [141] (CAB 203).

113 [2016] VCAT 2100 at [116] (CAB 28).

(c) in cases of 'contractual terms dealing with prime cost items or provisional sums' (s 38(8)). Significantly, the most extravagant example of the owners' requested variations — the elaborate cellar, which the owners wished to have lined with sandstone, with bluestone floor tiles, a spiral staircase and a custom-made hatch set into the living room floor[114] — did not fall within any prohibition in s 38, as it was a prime cost item or provisional sum within the meaning of s 38(8).[115]

55. Even where the subsection does apply, the builder is nonetheless 'entitled to recover the cost of carrying out the variation plus a reasonable profit': s 38(7). That is consistent with the public policy behind s 38, namely to preventing overcharging by unscrupulous builders.[116] The builder has a statutory entitlement to no more than a reasonable sum.

56. In light of those matters, it is difficult to see how the text of s 38, or the public policy rationale behind it, is applicable to non-contractual claims for quantum meruit. By definition, such a claim can only arise where the work in question was in fact requested by the building owner. It can never arise if unwanted work is imposed on an unwilling client. As the Court of Appeal emphasised, such a claim can give rise to no more than a reasonable remuneration for the work in fact done.[117] No possibility of 'overcharging' can arise.

57. The object of the Act is relevantly 'to provide for the maintenance of proper standards in the carrying out of domestic building work in a way that is fair to *both* builders and building owner': s 4(a). The construction for which the owners contend would not promote the purpose of the Act.[118] This Court has recognised that to deprive the builder of an important common law right to reasonable remuneration would be 'harsh', 'draconian' and having 'no apparent reason in justice'.[119] As the Court of Appeal recognised,[120] clear language is needed.[121] And as the Court of Appeal also recognised, the principle of legality 'strongly favours' adoption of a construction that avoids such a result.[122] It would be surprising indeed if the builder were to be deprived of that right by a side-wind, in the absence of express language, as a result of a tentative implication to be drawn from a section in a Division and a Part of the Act concerned solely with contract;

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114 [2016] VCAT 2100 at [287] (CAB 50–1).

115 [2016] VCAT 2100 at [286]–[290] (CAB 50–1).

116 [2018] VSCA 231 at [138] (CAB 202).

117 [2018] VSCA 231 at [139] (CAB 202–3).

118 *Interpretation of Legislation Act 1984* (Vic) s 35(a).

119 *Pavey & Matthews* (1987) 162 CLR 221 at 229 (Mason and Wilson JJ), 242 (Brennan J), 262 (Deane J).

120 [2018] VSCA 231 at [144] (CAB 203-4).

121 Cf *Potter v Minahan* (1908) 7 CLR 277 at 304 (O'Connor J); *Coco v The Queen* (1994) 179 CLR 427 at 436–8 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364 at 373 [23] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

122 [2018] VSCA 231 at [142] (CAB 203).

when the Act itself expressly preserves restitutionary claims and remedies.

58. The third ground of appeal should therefore also be rejected.

D. REMITTAL

59. If, contrary to these submissions, the appeal is to be allowed on the first ground, the builder will be confined to a contractual claim which, insofar as it concerns variations, will fall to be considered under s 38 of the Act. Likewise, if the appeal is allowed on the third ground (but not the first), the builder's quantum meruit claim will also fall to be considered under s 38. In each case, the same questions would now arise, namely (a) does s 38 apply to the 42 variations requested orally by the owners; (b) insofar as the builder's claim does not concern prime cost items or provisional sums, does it fall within the scope of s 38(2); and (c) if not, does the builder's claim fall within the scope of s 38(6)?

60. Because the owners made no challenge in VCAT to the ability of the builder to bring a claim for quantum meruit, and because the owners did not assert in VCAT that s 38 applied to the builder's quantum meruit claim,[123] it was never incumbent on VCAT to determine whether either ss 38(2) or 38(6) were satisfied.[124] If the challenge to the availability of quantum meruit, or the applicability of s 38, had been raised by the owners in VCAT, the builder would have insisted that VCAT make findings about the operation of s 38 and, in particular, ss 38(2) and 38(6), and VCAT would, in any event, have been required to make those findings if it concluded that the section applied to the quantum meruit claims. The builder would now suffer irreparable prejudice if, after the 20 day hearing, the findings of VCAT were to be rendered nugatory by the matter being remitted to a differently constituted tribunal, which is being sought by the owners at **AS[63](b)(ii)**. That is particularly so because the failure of VCAT to make findings on the issues raised by s 38 arose by reason of the owners' conduct of the proceeding.

61. The owners make no challenge in this Court to any aspect of VCAT's fact-finding, or to the fairness of its processes. Further, the parties put before VCAT their entire case on both the contractual and non-contractual claims as well as on any matters relevant to s 38 insofar as it was related to the alternative contractual claims for the 42 variations. If the appeal is to be allowed, the matter should be remitted to the same Senior Member to be determined upon the material already in evidence, subject to VCAT's discretion to allow any further material that it in its discretion regards as relevant and appropriate. That approach would advance the just,

[123] The builder drew this failure to the attention of the courts below: [2018] VSCA 231 at [114] (CAB 196); [2018] VSC 119 at [50]–[52] (CAB 130–1).

[124] [2016] VCAT 2100 at [3] (CAB 8), [119]–[120] (CAB 29).

efficient, timely and cost-effective resolution of the real issues in dispute. Remittal to a differently constitution tribunal would not do so.

E. ORDERS

62. The appeal should be dismissed with costs.

63. If, contrary to these submissions, the appeal is to be allowed, the matter should be remitted to VCAT as originally constituted to be determined in accordance with law.

PART VII – TIME ESTIMATE:

64. It is estimated that up to 2.5 hours will be required for the builder's oral argument.

DATED: 1 March 2019.

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