IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M197 of 2018

BETWEEN:

PETER MANN
First Appellant

and

ANGELA MANN
First Appellant

PATERSON CONSTRUCTIONS PTY LTD (ACN 135 579 770)
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

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Part I – Certification

This outline is in a form suitable for publication on the internet.

Part II – Outline

A. A claim in quantum meruit is available

1. The availability of a restitutionary claim in quantum meruit is long-established: **RS[8]–17]**. Its existence is recognised by Parliament in the *Domestic Building Contracts Act*: **RS[25], [31]–[32]**. It was appropriate for VCAT to have made such an award in this case.

2. Here, there was a failure of consideration or a failure basis: **RS [28]–[29]**.[1] The relevant consideration was not the appellants' promise (cf AS[34]), but performance. In a building contract, the basis for the builder's performance is that the owner will not prevent the builder from completing the building.

3. Where there is a repudiation of an agreement preventing complete performance, the question of whether performance was an entire or severable obligation is irrelevant: **RS[28]**. But if it matters, the contract here imposed an entire obligation.[2] Entitlement to any progress payments was conditional.[3]

4. There is no subversion of any contractual allocation of risk: **RS[21]–[22]**. Failure of the basis for a plaintiff's performance meant that the contractual allocation of risk and value has also failed.[4]

5. There is nothing unusual about the one set of events giving rise to different rights and remedies. That there may be a difference in the amount assessed as payable on a quantum meruit basis or on a breach of contract basis says nothing in itself about the whether the law should now be that a claimant should be confined to a claim in contract: **RS[24]**.

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1 See also *Barnes v Eastenders Cash & Carry plc* [2015] AC 1 at [108]–[109], [114]–[116].

2 See also *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 at 717. Cf *Nguyen v Luxury Design Homes Pty Ltd* [2004] NSWCA 178; (2005) 21 BCL 46.

3 See also *Hewett v Court* (1983) 149 CLR 639 at 669 (Deane J); *D O Ferguson & Associates v Sohl* (1992) 62 BLR 95.

4 See also *Jennings Constructions Ltd v Q H & M Birt Pty Ltd* (unreported, SC NSW, BC8801198, Cole J, 16 December 1998) at BC19.

6. Assessment of damages for breach of contract in a construction case can be complex, as evident from the various ways in which the remedy may be assessed.[5] Quantum meruit achieves practical and fair justice.

7. It is rational for legal systems to permit innocent parties to elect between claiming contractual damages, or recovering the reasonable value of the work performed. Many systems do so: **RS[19]**.

B. The value of that claim is not capped by the contract price

8. A claim in quantum meruit is valued in terms of fair and reasonable remuneration for the work actually done by the builder at the owners' request: **RS[36]–[37]**. That value is assessed objectively.[6]

9. Parliament has determined by s 16(2) of the Act that non-contractual claims may permissibly exceed the contract price: **RS[34]–[35]**. In any event, the appellants do not identify the contract price applicable in the events that have occurred: **RS[38]–[39]** cf AR[17].

10. It is inconsistent to enforce a contractual price cap in respect of a non-contractual claim: **RS[36], [42]–[43]**. There was no foundation for the appellants subjectively to value the builder's uncompensated work at less than a reasonable price objectively assessed, still less at zero, particularly in view of the owners' repudiation.

11. There is nothing anomalous in different remedies having different quantum: **RS[37], [44]**.[7] Even if confined to damages for breach of contract, the quantum may exceed the contract price: **RS[41]**.

12. Further, even if a contract price were identified (which the appellants did not seek to do, other than on the basis that they should pay nothing for the variations), there is no basis on which to undertake a pro rata division of that price in this case: **RS[40]**.

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5 See also McGregor on Damages (20th ed) at [31-022]-[31-024].

6 See also *Benedetti v Sawiris* [2014] AC 938 at [15], [100], [180].

7 See also *Jennings Constructions Ltd v M Birt Pty Ltd* (unreported, SC NSW, BC8801198, Cole J, 16 December 1998) at BC19.

C. Section 38 of the Act does not apply to the builder's quantum meruit claim

13. The Act recognises the distinction between contractual and non-contractual claims. It preserves the distinction between contractual, debt-based and restitutionary remedies. The Act likewise distinguishes between 'building contracts' and 'building work' more generally: **RS[49]**.

14. Section 38 is found in a Part and within a Division of the Act that are concerned with contractual matters: **RS[50]**. The text of s 38 itself is concerned with contractual matters: **RS[51]–[53]**.

15. Clear language is needed to deprive a builder of an important common law right in respect of its non-contractual claim. No such language is to be found as a result of a tentative implication drawn from a section in a Division and a Part of the Act which are concerned solely with contract: **RS[57]**.

16. The consequence of depriving the builder of its quantum meruit claim is particularly stark on the Court of Appeal's view of the substance of s 38. That is because the entitlement to recover under s 38(7) only arises in a limited set of circumstances. Even if another view is taken of that construction, the Court of Appeal was correct to hold that s 38 did not apply to the builder's quantum meruit claim.

17. It is not necessary to reach a view in this case about how s 38 applies in the case of a written agreement between owner and builder about variations. However, the Court should reject the appellants' contention that, for every variation where the owner and the builder reach an agreement on price, the builder cannot recover that price, but must instead prove what the cost of the variation was and what a reasonable profit is.

D. If the appeal is to be allowed, the terms of any remitter must be confined

18. If the appeal is not dismissed with costs, the matter should be remitted in the first instance to the Court of Appeal. Any remitter by that Court to VCAT ought be confined to those elements of s 38 not already the subject of findings: **RS [59]–[61]**.

DATED: 14 May 2019.

Jonathon Moore Andrew Laird James McComish