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

APPELLANTS' SUBMISSIONS

Part I:

1. We certify that these submissions are in a form suitable for publication on the internet.

Part II:

2. This appeal raises the following issues:

    a. Where a contract is repudiated and that repudiation is accepted by the innocent party as terminating the contract, should that party be entitled to be paid upon a quantum meruit as an alternative to contractual damages?

    b. If a quantum meruit claim is available in these circumstances, should the quantum that can be recovered under it be subject to a contract price ceiling?

    c. If a quantum meruit claim is available in these circumstances, does s 38 of the *Domestic Building Contracts Act 1995* (Vic) govern claims for variations to works under a domestic building contract?

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Part III:

3. The appellants consider that no notice is required to be given in compliance with s 78B of the *Judiciary Act 1903* (Cth).

Part IV:

4. The reasons for decision of the Victorian Civil and Administrative Tribunal (**VCAT**) are *Paterson Constructions Pty Ltd v Mann* [2016] VCAT 2100. The judgment of the Supreme Court of Victoria is *Mann v Paterson Constructions Pty Ltd* [2018] VSC 119 (**SC**). The judgment of the Court of Appeal of the Supreme Court of Victoria is *Mann v Paterson Constructions Pty Ltd (ACN 135 579 770)* [2018] VSCA 231 (**CoA**).

10 **Part V:**

5. The appellants entered into a written domestic building contract with the respondent for the construction of two townhouses on a property they owned.[1] The price of works was fixed at $971,000.[2] Over the course of the construction of the townhouses, a large number of variations to the works were carried out by the respondent. After the completion of the first townhouse but before the completion of the second, the appellants asserted the respondent had repudiated the contract and purported to terminate the contract by accepting the alleged repudiation. The respondent in turn asserted that the appellants' conduct constituted a repudiation of the contract and purported to accept their repudiation.

20 6. The respondent then made an application to VCAT in which it sought relief on two alternative bases: contractual damages and quantum meruit. Both forms of relief included amounts for variations to the works. VCAT found that the appellants had requested the variations claimed by the respondent, that they had repudiated the contract by their purported termination and that the respondent had determined the contract when it accepted that repudiation. VCAT upheld the respondent's quantum meruit claim in an amount of $1,606,313. This amount was said by the Tribunal to be "considerably more" than the amount that would have been available by way of contractual damages.[3]

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[1] See Building Contract, 4 March 2014 (**Paterson & Mann Contract**), as provided to VCAT and reproduced in the appellants' book of further materials (**ABFM**) at 5-64.
[2] CoA at [10] (Core Appeal Book (**CAB**)) 158), Paterson & Mann Contract at Appendix cl 10.1 (ABFM 50).
[3] At [533] (CAB 107).

7. The appellants then appealed to the Supreme Court, which dismissed the appeal subject to a minor alteration to quantum.[4] A further appeal to the Court of Appeal was dismissed. Both the Supreme Court and Court of Appeal relevantly found that: (1) a claim in quantum meruit was available to the respondent;[5] (2) the contract price of the building contract was not a ceiling on the amount that could be claimed in a quantum meruit claim;[6] and (3), s 38 of the *Domestic Building Contracts Act 1995* (Vic) (**the Act**) was not applicable to claims in quantum meruit relating to variations to works under a building contract where a builder had accepted an owner's repudiation of the contract.[7] The appellants' grounds of appeal with respect to which special leave to appeal was granted correspond to these findings.

Part VI:

Ground I

8. This ground raises for consideration a longstanding question of law: whether quantum meruit should be available as an alternative remedy to contract damages where a repudiation of a contract is accepted.

9. In *Sopov v Kane Constructions Pty Ltd (No 2)* (***Sopov***),[8] the Victorian Court of Appeal (Maxwell P, Kellam JA and Whelan AJA) observed that "there has been a growing chorus of criticism … of the availability of quantum meruit as an alternative to contract damages where a repudiation is accepted". The Court considered these criticisms to be "very powerful" and stated that "[u]nconstrained by authority" it may have rejected the availability of the remedy. However, the Court found itself "heavily constrained by authority", concluding that if quantum meruit was to be declared unavailable, "that is a step which the High Court alone can take".[9] In this case, a differently constituted Court of Appeal (Kyrou, McLeish and Hargrave JJA) endorsed these observations, stating that "[n]othing has transpired in the nine years since those observations were made which lessens their force".[10]

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[4] At [84], [87] (CAB 141).
[5] SC [19] (CAB 115-116), CoA [95]-[97] (CAB 186-187).
[6] SC [27] (CAB 119), CoA [73] (CAB 179).
[7] SC [58], [81] (CAB 134, 140), CoA [147], [149] (CAB 204-205).
[8] (2009) 24 VR 510.
[9] (2009) 24 VR 510 at 514-515 [9]-[11].
[10] CoA [97] (CAB 187).

10. The appellants submit that in circumstances where the relevant building works were governed by a contract which is not frustrated, avoided or unenforceable, the respondent should be confined to a claim in contractual damages. This submission is founded on three propositions, adopted from the criticisms of the availability of quantum meruit articulated by the Court of Appeal in *Sopov* and endorsed by the Court of Appeal in this case.

11. First, when a contract is terminated at common law by the acceptance of a repudiation, both parties are "discharged from the further performance of the contract", but rights "which have already been unconditionally acquired" are not divested or discharged unless the contract provides to the contrary.[11] In this case, the contract did not provide to the contrary. Accordingly, following acceptance of repudiation by the respondent, the contract remained effective for the purpose of assessing loss and damage.

12. Secondly, if there is a valid and enforceable agreement governing the claimant's right to payment, there is "neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration".[12] In this case, there is such an agreement governing the respondent's right to payment; there is no suggestion that the contract is frustrated, avoided or unenforceable.

13. Thirdly, in these circumstances, there is no room for a restitutionary remedy because the respondent's claim to payment is governed by the contract under which the work was carried out up to the point of repudiation.

14. The appellants make the following five submissions in support.

15. First, allowing a restitutionary remedy where the first and second propositions are satisfied would undermine the parties' contractual risk allocation. This risk allocation survives post-termination and is not impugned by the acceptance of a repudiatory breach, for at least two reasons. First, where a contract has been breached, the law imposes upon the defaulting party a secondary obligation to pay damages, so as to put the parties in the position they would have been in had the contract been performed.[13]

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[11] *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 (***McDonald***) at 476-7 (Dixon J).

[12] *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 (***Pavey***) at 256 (Deane J). See also *Trimis v Mina* (1999) 16 BCL 288 (***Trimis***) at 296 [54] (Mason P, Priestley and Handley JJA agreeing) and the cases cited therein.

[13] *Robinson v Harman* (1848) 154 ER 363 at 365 (Parke B); *Moschi v Lep Air Services Ltd* [1973] AC 331 at 350D-E.2 (Lord Diplock). See also *Taylor v Motability Finance Ltd* [2004] EWHC 2619 (Comm) (***Taylor***) at [24] (Cooke J).

By imposing such a secondary obligation, the law recognises that the parties' underlying allocation of risks survives, and may be given effect, post-termination. Secondly, risks are allocated to parties at the time of contract formation. Owing to the distinction between pre-contractual and post-contractual conduct,[14] a risk allocation determined at formation cannot be undermined by events occurring subsequent to it.[15]

16. This risk allocation would be undermined should a claim for quantum meruit be allowed in the alternative to contractual damages. This is because such a claim is calculated by reference to the reasonable value of the work performed rather than the contract price. In most if not all cases, this will result in a divergence in the quantum of the quantum meruit claim and the contractual damages claim, and a reallocation of risk.[16] As has been observed, "the remedy *does* ignore the bargain which the parties struck".[17] In this case, the respondent's claim proceeding on a quantum meruit basis has meant that the risks under the contract have been redistributed so as to impose upon the appellants a greater burden than that which existed under the bargain struck by the parties as reflected in the contract.[18]

17. Redistributing the contractual risk allocation of the parties is contrary to the general principle that restitutionary claims must respect contractual regimes and the allocations of risk made under those regimes. As four members of this Court observed in *Lumbers v W Cook Builders P/L (In Liq)* (***Lumbers***):[19]

> [A]n essential step in considering a claim in quantum meruit (or money paid) is to ask whether and how that claim fits with any particular contract the parties have made. It is essential to consider how the claim fits with contracts the parties have made because, as Lord Goff of Chieveley rightly warned in *Pan Ocean Shipping Co Ltd v Creditcorp Ltd*, "serious difficulties arise if the law seeks to expand the

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[14] See, e.g., *McDonald* (1933) 48 CLR 457 at 477-478 (Dixon J).

[15] Mason, Carter and Tolhurst, *Mason & Carter's Restitution Law in Australia* (3rd edition, 2016) (**Mason & Carter**) at 610. Subject to certain exceptions which are not presently relevant such as misrepresentation.

[16] Even if the two claims in quantum happened to be identical in any given case, by altering the integers used to reach that quantum a quantum meruit claim could still be said to reallocate the risks that existed under the contract.

[17] *Sopov* (2009) 24 VR 510 at 517 [21] (Maxwell P, Kellam JA and Whelan AJA), SC at [44] (CAB 128).

[18] See paragraphs 5-6 above.

[19] (2008) 232 CLR 635 at 663 [79] (citations omitted). See also 662 [77]-[78], 671 [111], 673-674 [122], [126] (Gummow, Hayne, Crennan and Kiefel JJ), 654-655 [45]-[48] (Gleeson CJ); *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 (***AFSL***) at 602-603 [97] fn 251 (Hayne, Crennan, Kiefel, Bell and Keane JJ); *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 514 [26] (French CJ, Crennan and Kiefel JJ); *Steele v Tardiani* (1946) 72 CLR 386 at 402 (Dixon J); and, *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 All ER 470 (***Pan Ocean***) at 473-474 (Lord Goff) in addition to 475 as cited in the excerpt above.

law of restitution to redistribute risks for which provision has been made under an applicable contract". In a similar vein, in the Comments upon §29 of the proposed Restatement, (3d), "Restitution and Unjust Enrichment", the Reporter says:

> "Even if restitution is the claimant's only recourse, a claim under this Section will be denied where the imposition of a liability in restitution would overturn an existing allocation of risk or limitation of liability previously established by contract."

18. Comments to similar effect have been made by other courts, including that a "restitutionary cause of action cannot sit on top of an effective contractual arrangement where that would subvert or undermine the contractual allocation of risk".[20]

19. There is accordingly no room for a quantum meruit claim where the first and second propositions set out at paragraphs 11 and 12 above are satisfied, as they are here. In the language of *Lumbers*, the respondent's quantum meruit claim does not fit with the contract the parties have made because that claim results in a reallocation of risk.

20. The second submission in support is that allowing a restitutionary remedy where the first and second propositions are satisfied would expose the appellants to liabilities that were indeterminate at the time the contract was entered into. Generally, the contract price and terms play a significant role in determining the potential liabilities which a principal may be exposed to in the event of default. However, the contract price and terms are of very limited relevance to a quantum meruit claim.[21] This has the result

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[20] *Perum Building & Construction Pty Ltd v Tallenford Pty Ltd* (2008) 24 BCL 361 at [23] (Steytler P, Buss JA and Newnes AJA) citing *Coshott v Lenin* [2007] NSWCA 153 at [10] (Mason P, Spigelman CJ and Campbell JA agreeing). See also *Brady Contracting Pty Ltd v Kellyville Christmas Tree Farm Pty Ltd* [2005] NSWCA 22 at [3]-[5] (Santow JA, McColl JA agreeing); *LMC Caravan GmbH & Co KG v GE Commercial (Australia) Pty Ltd* [2010] NSWCA 120 at [41]-[42] (Allsop P, Hodgson and Macfarlan JJA agreeing), *Trimis v Mina* (1999) 16 BCL 288 at 296 [54]-[55] (Mason P, Priestley and Handley JJA agreeing); *Kane Constructions Pty Ltd v Sopov (No 2)* (2006) 22 BCL 202 at 207-208 [26] (Warren CJ); and in the United Kingdom, *MacDonald Dickens & Macklin (a firm) v Costello* [2012] QB 244 at 250-255 [21]-[31] (Etherton LJ, Patten and Pill LLJ agreeing) and the cases cited therein.

[21] The limited role the contract or contract price is to play for the purposes of a quantum meruit claim has been formulated in a number of ways, not all of which are consistent. For example, as noted at paragraph 16 above, a quantum meruit claim has been said to ignore the bargain the parties have struck, that is, the contract. The contract price has also been described as having "no 'continuing influence' when the value of the work is being assessed on a quantum meruit" but also as having the potential to "provide a guide to the reasonableness of the renumeration claimed": *Sopov* (2009) 24 VR 510 at 517-518 [21] and [24] (Maxwell P, Kellam JA and Whelan AJA). The contract price has further been said to be "evidence of the reasonableness claimed on a quantum meruit; strong evidence perhaps, but certainly not conclusive evidence": *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 (***Renard***) at 277-278 (Meagher JA), or a "a relevant consideration": *Eddy Lau Constructions Pty Ltd v Transdevelopment Enterprise Pty Ltd* [2004] NSWSC 273 at [70] (Barrett J). See also Raghavan, "Failure of Consideration as a Basis for *Quantum Meruit* Following a Repudiatory Breach of Contract" (2016) 42(1) *Monash University Law Review* 179 (**Raghavan**) at 183 and paragraphs 38-40 below.

that in a claim for quantum meruit the principal will be exposed to a liability that was unquantifiable or indeterminate at the time the contract was entered into.

21. The risk of exposure to indeterminate liabilities is exacerbated by the fact that there need not be a relationship between the fair and reasonable cost of work that may be valued for the purposes of a quantum meruit claim and the actual cost of that work incurred by the builder. For example, it may be that an amount is awarded as a fair and reasonable cost to a builder where no cost was in fact incurred at all.[22] The absence of such a relationship enhances the potential for indeterminate liabilities to arise.

22. Such indeterminate liabilities are contrary to the principles that (i) contracting parties have a legitimate interest in being able to form, at the outset, an "estimate of liability in the event of default", and (ii) exposing a promisor to indeterminate liability would inhibit the making of contracts and seriously impede trade and commerce.[23] These principles are given effect should the respondent be confined to a contractual damages claim. Treating the contract price as merely providing a "guide"[24] to the reasonableness of renumeration also carries the risk of the quantum being determined on a discretionary basis,[25] this risk enhanced by the multiple formulations that have been posited of the role the contract price should in fact play.[26]

23. The third submission in support can be put shortly. As set out at paragraph 12 above, allowing a restitutionary remedy where the first and second propositions are satisfied is contrary to Deane J's statement of principle in *Pavey*. It is also contrary to the corollary to that statement, namely, that a restitutionary remedy may only be available where there is "no applicable genuine agreement or where such an agreement is frustrated, avoided, or unenforceable".[27] In this case, the respondent has retained an enforceable contractual right to damages. Accordingly, there is no room for the respondent to claim a quantum meruit.[28]

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[22] CoA at [75]-[77] (CAB 180-181), cf *Home Site Pty Ltd v ACN 124 452 786 Pty Ltd* [2017] NSWSC 698 at [96] (Ball J).
[23] *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 369 (Brennan J), see also 380-381 (Deane and Dawson JJ).
[24] *Sopov* (2009) 24 VR 510 at 518 [24] (Maxwell P, Kellam JA and Whelan AJA).
[25] See Mason & Carter at 609 and 598.
[26] See fn 21 above.
[27] *Pavey* (1987) 162 CLR 221 at 256 (Deane J).
[28] Attempts have been made to reconcile Deane J's statement of principle in *Pavey* with seemingly inconsistent latter authorities: see Morris, "Restitution Sans Rescission: Exposing the Myth of a Fallacy"

24. The fourth submission in support is that the line of authority supporting the availability of quantum meruit in this context is not determinative, not only because of the position this Court holds, but also on the basis that its availability suffers from the "rescission fallacy". As explained in *Sopov*, this term describes the notion that the acceptance of a repudiation of a contract had the effect of rescinding it ab initio.[29]

25. If the rescission fallacy were good law, it would mean that there would have been no valid and enforceable agreement governing the respondent's claim for work and labour done up to the time of acceptance of the repudiation. Accordingly, the propositions at paragraphs 11 and 12 above could not be established and a quantum meruit claim would properly be available. The rescission fallacy provides a doctrinal foundation for the 1904 decision of *Lodder v Slowey* (***Lodder***), upon which the Australian line of authority supporting the availability of quantum meruit in this context was founded.[30]

26. However, Dixon J in *McDonald* dispelled the rescission fallacy, stating:[31]

> Where a party to a simple contract, upon breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from further performance of the contract but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial performance of the contract and causes of action which have accrued from the breach alike continue unaffected.

27. Dixon J's judgment in *McDonald* had two relevant consequences. First, there is now no impediment to the satisfaction of the propositions at paragraphs 11 and 12 above in circumstances where a wronged party elects to accept a repudiation. Secondly, any doctrinal foundation underpinning the line of authority commencing with *Lodder* has been removed, with the result that there is now no articulated principled basis for the continued availability of quantum meruit.

28. It can separately be observed that *Lodder* has been described as a diversion in English law, sandwiched by inconsistent decisions preceding and postdating it, as is elucidated

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(2015) 89 *Australian Law Journal* 117 at 123-124. However, a satisfactory reconciliation has not been achieved: see Raghavan, at 183-184; Mulheron, "Quantum Meruit upon Discharge for Repudiation" (1997) 16 *Australian Bar Review* 150 (***Mulheron***) at 162-163 and 180. In any event, the contract in this case is not "unenforceable" even on the broad reading of that term preferred by Morris.

[29] (2009) 24 VR 510 at 514 [10] (Maxwell P, Kellam JA and Whelan AJA).

[30] [1904] AC 442, affirming *Slowey v Lodder* (1901) 20 NZLR 321. See also Mulheron at 153-154.

[31] (1933) 48 CLR 457 at 476-477, cited with approval by Lord Wilberforce in *Johnson v Agnew* [1980] AC 367 at 396.

in a considered historical analysis undertaken in *Tridant Engineering Company Ltd v Mansion Holdings Ltd* (***Tridant***).[32] The Court endorsed the following comments of Lord Chancellor Cranworth made in 1854 in *Ranger v Great Western Railway Company* (***Ranger***) as to damages being the proper remedy where a contract was repudiated (rather than the taking of an equitable account):[33]

> Such damages would of course be in part calculated on the value of the plant and other articles of which he had been wrongfully deprived; but the effect would not be to alter the relative position of the parties as to the contract itself, to entitle the Appellant to say there had been no contract, or that he was to be paid for what he had done without reference to the contract. That would not be the consequence of the act of the Respondents, even treating it as wrongful. The right of the Appellant would be, to recover such amount of damages as would put him in, as nearly as possible, the same position as if no such wrong had been committed – that is, not as if there had been no contract, but as if he had been allowed to complete the contract without interruption. This was his legal right, and I can discover nothing entitling him to any relief beyond that resulting from enforcing that right – nothing that can enable him to convert a wrongful act which might entitle him to damages, into an act which entitles him to an account of work already done, to be taken on terms different from those for which he had contracted.

29. To similar effect, 150 years later in *Taylor* it was stated by reference to House of Lords authority that: "Not only is it true to say that, historically, restitution has emerged as a remedy where there is no contract or no effective contract, but there is no room for a remedy outside the terms of the contract where what is done amounts to a breach of it where ordinary contractual remedies can apply and payment of damages is the secondary liability for which the contract provides".[34]

30. The fifth and final submission in support is that there is no alternative doctrinal basis upon which the respondent's quantum meruit claim can be satisfactorily supported. The dominant alternative basis put forward is the doctrine of failure of consideration, described as meaning that "the state of affairs contemplated as the basis or reason for the payment has failed to materialize or, if it did exist, has failed to sustain itself".[35]

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[32] [2000] HKCFI 1 at 96-111, see in particular 97-98, 103-104, 106-107, 110-111.

[33] See *Tridant* [2000] HKCFI 1 at 97-98, 106-107 (Deputy High Court Judge To), citing *Ranger* (1854) 5 HLC 72 at 95-97 (obiter).

[34] [2004] EWHC 2619 (Comm) at [23]-[24] (Cooke J), see also Furst et al, *Keating on Construction Contracts* (10th edition, 2018) at 283-284 [9-062], cf Dennys, Raeside and Clay (Eds), *Hudson's Building and Engineering Contracts* (12th edition, 2010) at 1091 [8-027].

[35] *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 517 [31] (French CJ, Crennan and Kiefel JJ).

31. It is submitted that this Court should not take the novel step of finding that the respondent's quantum meruit claim can be supported on this basis. This is because the submissions made above as to why the remedy should not be available are applicable, on the facts of this case, irrespective of the doctrinal basis upon which that remedy may be founded.

32. Even if this Court were to find that the availability of the remedy could be supported doctrinally on this basis, there are at least two reasons why there has not, in fact, been a total failure of consideration.

33. First, the respondent's obligations are properly construed as severable rather than entire, and rights to payment in respect of the majority of those obligations had accrued as at the date of repudiation. A builder's obligations to perform works in large building contracts are "invariably severable".[36] Here, the contract provided for the respondent to be paid by way of progress payments,[37] which were not stated to be "on account only" and to which the appellants possess no entitlement to any refund. These obligations are therefore properly characterised as severable. The majority of the respondent's rights to progress payments had accrued at the date of repudiation.[38] This means that there could be no failure of consideration in respect of those accrued rights[39] and, in turn, no total failure of consideration in respect of the contract.

34. Secondly, even if the respondent's contractual obligations could be construed as entire, the basis upon which the respondent rendered contractual performance should be characterised as the promise, rather than receipt, of counter-performance from the appellants. This is because if the contract is construed as being entire, the respondent would have been required to complete performance before the appellants became obliged to pay the contract price. It would follow that the respondent's obligation to construct the townhouses was not conditional upon the appellants paying the contract price – rather, the contract required the respondent to provide performance on the faith of the appellants' promise to pay once those townhouses were complete. On this

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[36] Edelman & Bant, *Unjust Enrichment* (2nd edition, 2016) (***Edelman & Bant***) at 276.
[37] Paterson & Mann Contract at cl 11.8 (ABFM 28), see also CoA at [12] (CAB 158). The Act addresses the treatment of progress payments, in particular at s 40.
[38] CoA at [12] (CAB 158). See further *Trimis* (1999) 16 BCL 288 at 296 [55] (Mason P, Priestley and Handley JJA agreeing) and *Pan Ocean* [1994] 1 All ER 470 at 474 (Lord Goff). The majority of progress payments had in fact been made by the appellants as at the date of repudiation: CoA [11]-[12] (CAB 158).
[39] See Edelman & Bant at 276; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at 155-158 [651]-[666], 165 [705], 337 [1569]; see further Raghavan at 187-192.

analysis, the appellants' promise constitutes the relevant basis, and as that promise was made, there can be no total failure of consideration.[40]

35. For these reasons, it is submitted that the respondent should not be entitled to be paid upon a quantum meruit in the alternative to contractual damages.

Ground II

36. Ground II only arises if this Court finds a claim in quantum meruit is available to the respondent. In these circumstances, the appellants submit that any claim in quantum meruit should be subject to a contract price ceiling.[41]

37. There is a line of authority in support of there being no such contract price ceiling.[42] However, it is submitted that this line of authority should be rejected and the respondent's claim should be subject to such a ceiling, for at least three reasons (noting that a number of additional reasons have been advanced in support of such a ceiling[43]).

38. First, ignoring the contract price gives inadequate regard to the basis on which the appellants are liable in restitution. The appellants are liable on the basis that the respondent has partly performed the contract but has been prevented from earning the contract price, and the respondent's quantum meruit claim is not properly characterised as being pursued on a basis truly independent from the contract.[44] This is illustrated by the fact that the respondent sought contractual damages in the alternative to quantum meruit and the significant overlap in the subject matter of each claim. The valuation of the quantum meruit claim should therefore reflect the bargain struck by the parties.

39. The appellants were willing to pay for what they received at the contract price, rather than some other (indeterminate[45]) price. There is accordingly "no justification, even if a restitutionary claim is available, for recovery in excess of the contract limit".[46] Put another way, "[i]n the case of a simple contract involving the performance of a service

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[40] See further Raghavan at 195-197 and the cases cited therein. Raghavan's analysis is respectfully endorsed.
[41] The appellants accept that if any works were independent to the contract or "non-price benefits", a contract price ceiling should not apply to those works: see Mason & Carter at 611 and Edelman & Bant at 84.
[42] See *Renard* (1992) 26 NSWLR 234 at 277-278 (Meagher JA) and *Sopov* (2009) 24 VR 510 at 518 [24]-[25] (Maxwell P, Kellam JA and Whelan AJA).
[43] See for example Mason & Carter at 609-611; Edelman and Bant at 276 fns 175-178.
[44] Mason & Carter at 610-611.
[45] See paragraphs 20-22 above.
[46] *Taylor* [2004] EWHC 2619 (Comm) at [26] (Cooke J). See also *Elek v Bar-Tur* [2013] 2 EGLR 159 at [13] (Mr David Donaldson QC); *Howes Percival LLP v Page* [2013] EWHC 4104 (Ch) at [309]-[312] (Judge Behrens); and, *Tridant* [2000] HKCFI 1 at 110-111 (Deputy High Court Judge To).

for a price, the award of restitution should never exceed the contract price because that was the objective price at which the service was chosen".[47] As Professor Birks has observed, the contrary approach "can produce bizarre results".[48] The respondent should accordingly be subject to a contract price ceiling.

40. Secondly, the contract price reflects the parties' allocation of risk. For the same reasons as those set out at paragraphs 15-19 above in respect of the availability of the remedy, it would be contrary to principle to allow the respondent's restitutionary claim if it would result in the reallocation of contractual risks. However, in the absence of a ceiling, such a reallocation would occur. As is observed in *Goff & Jones* in endorsing a ceiling by reference to Australian authorities, "unjust enrichment should respect the contracting parties' allocation of risk … Allowing a supplier bringing an action … to recover more than the contract price … would clearly reallocate … risks to the purchaser".[49] Here, such a reallocation did in fact occur. As VCAT observed, the respondent recovered significantly more than it might have "had the claim been confined to the contract".[50] In the appellants' submission, such a reallocation of risk is inconsistent with principle.

41. Thirdly, it should not be the case that the appellants' repudiation of the contract deprives them of the right to rely on the contract as setting a price ceiling on the basis that they could be said to have acted wrongfully. As was observed in *Tridant*:[51]

> Next is the argument that it is wrong to allow the guilty party who repudiated the contract to have the protection of the contract in assessing damages. This argument fails to recognise that the right and obligation had arisen at a time when the contract was on foot and ignores in total the terms of the contract. Accordingly the parties' right and liability should be settled on the basis of the contract. *Quantum meruit* is based on the law of restitution and unjust enrichment. If a party, who entered into a contract on certain terms which is then wrongfully repudiated by the other party, should be allowed to ignore those terms and claim compensation for more than what he would have been entitled to under those terms, he is also being unjustly enriched.

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[47] Edelman & Bant at 84.

[48] Birks, *Unjust Enrichment* (2nd Edition, 2005) at 59.

[49] Mitchell, Mitchell and Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th edition, 2016) at [3-54] (noting that in Australia the inquiry is governed by equity rather than unjust enrichment: *AFSL* (2014) 253 CLR 560 at 596-597 [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ)).

[50] At [533] (CAB 107).

[51] [2000] HKCFI 1 at 110 (Deputy High Court Judge To).

42. Similarly in *Taylor* it was observed that recovery in excess of the contract price "in itself would be unjust since it would put the innocent party in a better position than he would have been if the contract had been fulfilled".[52]

43. Depriving the appellants of the right to rely on the contract price ceiling would also be inconsistent with authorities in analogous contexts. For example, the fact that an action is framed in tort as opposed to contract does not prevent an exclusion clause being applied. By analogy, the fact that an action is framed in restitution rather than contract should not result in the contract price cap not being applied.[53]

44. For these reasons, it is submitted that if a claim in quantum meruit is available to the respondent, the respondent should be subject to a contract price cap.

Ground III

45. Ground III concerns whether s 38 of the Act governs only claims for variations made in contract or also governs claims for variations on a quantum meruit where a builder has accepted an owner's repudiation.

46. Over the course of the construction of the two townhouses, a large number of variations to the works were requested by the appellants and carried out by the respondent. Section 38 of the Act prescribes notice requirements with respect to variations requested by an owner. The respondent did not comply with these requirements.

47. In the appellants' submission, where a builder carries out a variation to building work at the request of an owner, s 38 should operate in the following manner:

    a. If a builder has complied with the notice requirements of s 38, it is entitled to recover the cost of carrying out a variation plus a reasonable profit: s 38(7).

    b. If a builder has not complied with the notice requirements of s 38 but s 38(2) or (6)(b) applies, then its entitlement is as set out in (a) above.

    c. If a builder has not complied with the notice requirements of s 38 and neither s 38(2) nor (6)(b) applies, it is prohibited from recovering "any money": s 38(6).

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[52] [2004] EWHC 2619 (Comm) at [26] (Cooke J).
[53] See further Mason & Carter at 610.

48. The appellants submit that this interpretation gives effect to s 38's text, purpose and context.[54] Each is addressed in turn.

49. The appellants emphasise three aspects of the text of s 38. First, s 38(6) provides that "A builder is not entitled to recover any money in respect of a variation asked for by a building owner" unless certain exceptions apply. Section 38(6) does not discriminate as to whether a builder is able to recover "any money" by way of a claim in contract, restitution, or otherwise. Rather, this subsection provides a blanket prohibition on the recovery of "any money" in broad and general terms.[55] In these circumstances, the better view is that the subsection captures both contractual and restitutionary claims.

10 50. This view is supported by two additional statutory indicia. First, the builder is expressly ordered not to give effect to any variation unless the notice requirements are complied with: s 38(5) (subject to (2)). Should a builder choose to ignore this clear statutory direction, there is no unfairness that results from it being subject to the associated consequence that it is unable to recover any money associated with that variation. Secondly, any potential for unwarranted strictness in the application of s 38(6) is offset by a discretion granted to VCAT to allow the builder to recover money in the event of non-compliance as appropriate: s 38(6)(b).

51. Secondly, s 38(7) provides that "If subsection (6) applies, the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit". Similarly to
20 s 38(6), this subsection is expressed in broad and general terms, and does not discriminate between claims made in contract, restitution, or otherwise. In the appellants' submission, the better view is that this provision operates as an exclusive code capping the amount that a builder is entitled to recover for the cost of carrying out variations. VCAT is granted a discretion to determine a "reasonable profit" which, similarly to s 38(6)(b), offsets any undue strictness in the application of the provision.

52. Thirdly, s 38(8) provides that "This section does not apply to contractual terms dealing with prime cost items or provisional sums". This provision was not the subject of attention by the courts below. But in the appellants' submission it evidences that in drafting s 38, the legislature turned its mind to matters that would be inappropriate to

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[54] *Regional Express Holdings Ltd v Australian Federation of Air Pilots* [2017] HCA 55; 92 ALJR 134 at 138-139 [19] and the cases cited therein (Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ).

[55] See also the Explanatory Memorandum to the Domestic Building Contracts and Tribunal Bill 1995 (Vic) at 7, which describes the intended operation of s 38 similarly broad and general terms.

be captured by the provision. The legislature did not exclude restitutionary claims from s 38's ambit, notwithstanding that that distinction is made elsewhere in the Act explicitly (see s 53(2)(b)[56]) and implicitly (see s 16(2)).

53. With respect to purpose, the appellants adopt the consumer protection purpose of s 38 as ascertained by the Court of Appeal, namely, "to protect owners from being liable for variations where builders do not provide sufficient information to the owners to enable them to make an informed decision whether to sign a contract or proceed with a variation".[57] The appellants' construction gives effect to that purpose, by resulting in a builder being left out of pocket where it fails to comply with the notice provisions of s 38. This a powerful incentive for the builder to comply with those provisions and, in turn, ensures that owners will be appropriately informed to decide whether to proceed with a variation.

54. The fact that an owner repudiates a contract should not displace this consumer protection purpose.[58] Rather, as s 38 is remedial in nature, it should be construed "so as to give the fullest relief which the fair meaning of its language will allow"[59] to "protect owners" as the provision's subject. It is further submitted that, in the absence of any words indicating such an outcome was intended, it is incorrect to treat "wrongful conduct" in a contractual setting as a justification to displace the protection of the provision's subject for analogous reasons to those outlined at paragraph 41-42 above in the contractual price ceiling context.

55. With respect to context, there are two other provisions in the Act relevant to s 38's interpretation: ss 16(2) and 53(2)(b). Each provision recognises distinctions between contractual and non-contractual causes of action or claims. In the appellants' submission, to the extent that an inference should be drawn from these provisions,[60] the correct one is that where the legislature intended that claims founded on contract and other kinds of claims be treated separately in the Act, a distinction was explicitly made. The fact that such a distinction is absent in s 38 means that there is no warrant

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[56] See also s 67(4) of the Act as amended by s 9 of the *Building Legislation Amendment (Consumer Protection) Act 2016* (Vic).
[57] CoA [138] (CAB 202).
[58] Cf CoA [139] (CAB 202-203).
[59] *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 at 44 (Mason CJ).
[60] See CoA [134]-[135] (CAB 201).

to read down its broad words of general application. Accordingly, s 38 should be taken to apply to contractual and restitutionary claims.

56. For these reasons, the appellants submit that the construction of s 38 set out above at paragraph 47 is to be preferred, with the result that the appellants are not liable to pay the respondent for the variations. However, this construction was rejected by the Court of Appeal, in favour of an alternative construction.[61] The appellants submit that the Court of Appeal's construction should be rejected for four reasons.

57. First, the Court considered that the principle of legality favoured a construction which confined s 38 to contractual claims. As the Court stated, pursuant to that principle, a provision of an Act will not be construed as abrogating a common law right except by "clear words or necessary intendment".[62] However, in the appellants' submission, the words of s 38 do clearly abrogate the right to a quantum meruit. Section 38(6) provides that a "builder is not entitled to recover any money in respect of a variation" unless certain exceptions are met. There is no ambiguity in these words.

58. Further, the Court of Appeal's reliance on the principle of legality has an unstable foundation. The Court relied on *CMF Projects Pty Ltd v Riggall*[63] (***Riggall***) in support of the approach taken.[64] However in that decision, the Queensland Court of Appeal, in obiter, seemingly construed an equivalent and similarly worded provision to s 38 as having the effect that a "building contractor may recover an amount only with the approval of QCAT, and not by a quantum meruit claim in a court",[65] despite there being no express words in the provision providing that a quantum meruit claim should not be available.

59. Secondly, the Court found that the phrase "[i]f subsection 6 applies" in s 38(7) meant, in effect, "if the prohibition in subsection 38(6) applies and an exception to that prohibition does not apply".[66] This has the results that: (i) the scope of s 38(7) is significantly narrowed; (ii) depending on the circumstances, a builder may be able to

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[61] CoA [129] (CAB 199-200).
[62] CoA [144] (CAB 203-204).
[63] [2016] 1 Qd R 187.
[64] CoA [143] (CAB 203).
[65] *Riggall* at 198 [37], see also 199-200 [46] (Gotterson JA, Holmes and Morrison JJA agreeing). Notably, one of the bases upon which the primary judge distinguished s 84 of the *Domestic Building Contracts Act 2000* (Qld) from s 38 of the Act was overturned on appeal: see SC [70]-[72] (CAB 138) and cf CoA [118]-[121] (CAB 196-197).
[66] CoA [128]-[129] (CAB 199-200).

recover the cost of variations on the basis of an agreed contractual price, a quantum meruit, or the "cost plus profit" basis in s 38(7); and (iii) even if a builder fails to comply with the notice requirements and neither s 38(2) or (6)(b) applies, the builder will still be entitled to recover under s 38(7).

60. The appellants' complaint with this construction is that it significantly reduces any incentive for the builder to comply with the notice requirements in s 38, and so defeats the consumer protection purpose of the provision: the builder will always be entitled to, at a minimum, recovery on a "cost plus profit" basis. Further, there is no warrant to, in effect, read a number of words in to s 38(7) so as to significantly alter the operation of that provision and reduce its ambit in a manner contrary to the purpose of s 38.

61. Thirdly, the Court of Appeal considered that an "anomalous result" would follow by excluding quantum meruit from s 38.[67] However, this "anomalous result" only arises on the Court of Appeal's construction of s 38. On the appellants' construction of s 38, no such anomalous result arises.

62. Fourthly, the Court of Appeal's construction is reliant upon, and only sensible in light of, the availability of quantum meruit. Three problems with this approach can be identified. First, the Court's interpretation in effect takes a comprehensive statutory provision and carves out a role within that provision for a restitutionary claim to play. However, the fact that Parliament has addressed the treatment of variations through statute should tend against interpreting s 38 in that manner. As Gleeson CJ observed in *Lumbers* in an analogous context, "The fact that such legislation exists should discourage, rather than encourage, attempts to extend the scope of restitutionary claims".[68] Against the backdrop of the Act, the need for judicial intervention to find a role for a restitutionary claim to play is "undemonstrated".[69] Secondly, it is submitted that there is no justification to give a comprehensive statutory provision an interpretation that is wholly dependent on a restitutionary remedy in the absence of the words to that effect and when there is a sensible alternative available interpretation that is not so dependent. Thirdly, as a practical matter, if this Court were to find that quantum meruit should not in fact be available to the respondent, there would be a gap

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[67] CoA [145] (CAB 204).
[68] (2008) 232 CLR 635 at 655 [48]. See further *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 62 [24] (Gleeson CJ, Gaudron and Gummow JJ).
[69] *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 843D (Lord Wilberforce).

in the Court of Appeal's construction and that construction would cease to sensibly operate. If the appellants' construction is adopted, no such gap arises.

Part VII:

63. The appellants seek the following orders:

    a. Appeal allowed with costs.

    b. Set aside the orders of the Court of Appeal made on 12 September 2018 and in their place order that:

        i. the appeal be allowed with costs;

        ii. the matter be remitted to the Victorian and Civil Administrative Tribunal, differently constituted, for determination of the respondent's claim in accordance with law.

Part VIII:

64. It is estimated that 2.5 hours will be required for the presentation of the oral submissions and reply of the appellants.

Dated: 1 February 2019

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