IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **No. M197 of 2018**

BETWEEN: **PETER MANN**

First Appellant

and

10 **ANGELA MANN**

Second Appellant

and

PATERSON CONSTRUCTIONS PTY LTD (ACN 135 579 770)

Respondent

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APPELLANTS' OUTLINE OF ORAL ARGUMENT

Part I: Certification for publication on the internet

1. The appellants certify that this outline is suitable for publication on the internet.

Part II: Outline of propositions

Ground 1: availability of quantum meruit

2. Where the relevant building works are governed by a contract which is not frustrated, avoidable or unenforceable, the respondent should be confined to a claim in contractual damages: AS[10]. This Court is unencumbered by the historical authorities that constrained the Court of Appeal below and in *Sopov* from answering this question in the manner in which those Courts thought to be correct: AS[9].

10 3. The appellants' core argument is founded on two longstanding propositions.

4. First, as Deane J has said, there is "*neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration*" when there is a valid and enforceable agreement governing the respondent's right to payment for work performed: AS[12], [23]. The primacy of the contract prevails.

5. Secondly, the result of Dixon J's decision in *McDonald* is that such enforceable contractual obligations remain intact following the repudiation of a contract. The rescission fallacy, being the legal fiction that the repudiation of a contract has the effect of rescinding it ab initio, has been dispelled. Upon repudiation of a contract, parties are discharged from future performance "*but rights are not divested or discharged which*
20 *have been unconditionally acquired*": AS[11].

6. Following repudiation, the contract in this case remained enforceable for the purposes of assessing loss and damage. The rights the respondent had acquired were not divested or discharged. 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: AS[13].

7. These propositions alone warrant the appeal being allowed. But they do not stand alone.

8. The position the appellants argue for is consistent with the contractual risk allocation that was agreed to. The significance of giving effect to such a risk allocation is well appreciated by this Court: AS[17]-[18]. Allowing the respondent's quantum meruit claim does not fit with the contract the parties have made because that claim results in a
30 reallocation of risk: AS[19]. It also risks exposure to indeterminate liabilities: AS[21].

9. The contrary position can only be sustained on the basis of the rescission fallacy. But a fallacy can not sustain a principle. Whilst the fallacy may explain why the law is in its present state, it provides no justification for this Court to retain the status quo: AS[24]ff.

10. There is therefore no basis for the respondent to have recourse to a restitutionary remedy, whether framed in terms of quantum meruit or failure of consideration. And in any event, any submission founded on the latter encounters the insurmountable barrier of the respondent's obligations under the contract being severable, with rights to payment in respect of the majority of those obligations having in fact accrued and been paid at the date of repudiation, by way of progress payments: AS[31]-[34].

Ground II: quantum meruit subject to a contract price ceiling

11. This ground of appeal arises only if this Court finds quantum meruit to be available.

12. Where both contractual damages and quantum meruit are available, there is the risk of a divergence, oftentimes an extreme one, between the amount a party would be liable for by way of damages, and the amount they would be liable under a quantum meruit claim.

13. So much is illustrated by this case. In VCAT, the Senior Member stated that "*by succeeding in a claim for quantum meruit, the Builder has recovered considerably more than it might have recovered had the claim been confined to the contract*": AS[20]; CAB 158 [11]-[21]. Should the assessment of the value of the benefit conferred on the owner be carried out without reference to a ceiling price, "bizarre" results can emerge: AS[39].

14. Apart from the significant difference between the contract price and the quantum meruit assessment, the valuation of the benefit can include amounts for work and materials not provided and in excess of the amounts paid by the builder to a third party for the service or materials. Here, the quantum meruit assessment included an allowance of $24,000 for scaffolding which in fact was not provided: CAB 102-103 [514]; 180-181 [73]-[77].

15. Five further propositions are relied upon.

16. First, there can be no justification for restitution to "*put the innocent party in a better position than he would have been if the contract had been fulfilled.*" The contract price remains the "*objective price at which the service was chosen*": AS[39], [42].

17. Secondly, "*unjust enrichment should respect the contracting parties' allocation of risk*", and should not reallocate those risks: AS[40].

18. Thirdly, if a wronged party were able to disregard the terms of the contract on foot when the services were provided, that party would be unjustly enriched: AS[41]-[42]

19. Fourthly, consistent with analogous contexts, an action framed in restitution rather than contract should not result in a contract cap not being applied: AS[43].

20. Fifthly, there are established mechanisms that may be used to calculate the quantum of a quantum meruit claim subject to a ceiling: see e.g. JBA 1712-1713 [3-56]; AR[17].

Ground III: interpretation of s 38 of the *Domestic Building Contracts Act 1995* (Vic)

21. The appellants requested a large number of variations: CAB 26 [108]. Extras and omissions referred to as variations are the cause of "many building disputes": *Brooking on Building Contracts*, (5th edition, 2014) at 217. This practical reality provides context for the detailed provisions governing variations in the Act, which proscribes the requisite form of notice that must be given, as well as the consequences of not providing it.

22. The appellants submit that s 38 should be interpreted to operate in the following manner to all variations carried out during the currency of the contract (AS[47ff):

    (a) s 38 applies to all variations carried out by the builder;

    (b) s 38(1) requires an owner to provide a notice as a condition precedent to a variation;

    (c) s 38(2) only applies to, and operates on, "the variation" referred to in the notice from the building owner under s 38(1) (see also AR[19]);

    (d) all other variations the subject of a s 38(1) notice are governed by s 38(3), as s 38(4)

expressly states;

(e) s 38(5) emphasises the significance of compliance with s 38(1) and 38(3);

(f) s 38(6) provides the only mechanism by which a builder may recover money for a variation, namely if it has satisfied s 38(6)(a) or VCAT is satisfied per s 38(6)(b);

(g) if s 38(6)(a) is satisfied, where s 38(3) applies the builder is entitled to the "cost of the variation" as specified in the s 38(3)(a)(iii) notice, and where s 38(2) applies the Act does not provide for a pricing mechanism (the variation could either be priced at any agreed price or at cost plus a reasonable profit);

(h) if s 38(6)(a) is not satisfied but s 36(b) is satisfied, s 38(7) applies; and

(i) if neither 38(6)(a) or (b) is satisfied, the builder may not "recover any money".

23. In this manner, the section sets out a universal set of rules for variations relating to domestic building work achieve the purpose of s 38. That purpose is to protect consumers, and is achieved by providing a strong incentive for a builder to comply with the provision, by resulting in it being left out of pocket if it does not: AS[53]-[54].

24. In contrast, the Court of Appeal's construction of s 38 (CAB 199 [129]) is problematic for a variety of reasons (see AS[57]-[62]), including the following.

25. First, the Court treats the phrase "[i]f subsection (6) applies" as referring to the "prohibition against recovery of 'any money'". It is then said that if "s 38(6) 'applies' within the meaning of s 38(7) [meaning that the prohibition applies], s 38(6) 'applies' within the meaning of s 38(7)". But it is also said that "where the prohibition in s 38(6) applies but no contractual price has been agreed for the variation, s 38(7) is not attracted": CAB 198-200 [127], [129], 204 [145]. This reasoning is internally inconsistent.

26. Secondly, the Court's construction leaves open the door for a builder to claim variations on a quantum meruit basis even where the contract remains current and undetermined, i.e., in the circumstances set out at CAB 200 [129(c)]

27. Thirdly, the Court of Appeal's construction discourages a builder from providing any form of notice of a claimed variation. By way of illustration:

(a) on the Court's construction, if the agreed contractual price for a variation is lower than its actual cost, a builder will be better off should it fail to comply with the notice requirements of s 38 and also fail to fall within s 38(6)(b), than if it had in fact complied with the notice requirements or fell within s 38(6)(b); and

(b) owing to the potential for a quantum meruit claim to exceed an agreed price (as was the case here), a builder may be better off not to comply with the notice requirements of s 38 and not to agree to a contractual price for a variation, so as to leave open the option of claiming a quantum meruit. The result is that an approach that enhances uncertainty and risk for the owner is encouraged.

Further materials

28. An article on this case has recently been published: "Discharged Contracts and Quantum Meruit: *Mann v Paterson Constructions Pty Ltd*", available online and to be published in the Sydney Law Review. The appellants also commend Havelock, "A Taxonomic Approach to Quantum Meruit" (2016) 132 *Law Quarterly Review* 470 to the Court.

Dated: 14 May 2019

Tim Margetts QC **Graeme Hellyer** **Andrew Roe**