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' REPLY

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Ref: MJT:20180045

Part I:

1. We certify that this reply is in a form suitable for publication on the internet.

Part II:

2. Whilst the respondent fixates on historical considerations (see RS[8], [9], [17], [18], [20], [26], [27], [30]), it fails to appreciate that a strict adherence to such considerations is what has led to the present unsatisfactory state of law. In *Sopov*, the Court of Appeal was not empowered by history but rather was restrained by it. The Court begrudgingly found itself bound to apply a line of authority which it considered to be incorrect. The Court of Appeal in this case found itself bound in the same way: AS[9].

3. The respondent first makes the uncontroversial point that repudiation is a distinctive and serious kind of breach of contract: RS[6]-[7]. What follows are two assertions unsupported by authority. The first is at RS[8] and is contrary to Dixon J's statement of principle in *McDonald* (AS[26]); the appellants can insist on adherence to "rights and obligations" "which have already been unconditionally acquired" when a contract comes to an end. Despite the centrality of Dixon J's statement in *McDonald* to this area of law and to the appellants' case, at no point does the respondent engage with it.

4. The second assertion is at RS[9], where certain factors are referred to in support of the historical availability of quantum meruit. The terms used to describe the remedy can be contrasted with its description by others as a "useful threat" and a "nightmare".[1] Although the respondent's assertion lacks authority, it is suggested to follow from a comment of Gummow J in *Roxborough v Rothmans of Pall Mall Australia Ltd.* That comment does not support the assertion, and is in any event qualified in the next paragraph, where a statement of Lord Goff relied on at AS[17] is cited with approval.[2]

5. The respondent then trawls through a number of decisions that predate *McDonald*. In doing so, the respondent ignores that *McDonald* marked the relevant shift in the law that the appellants rely on, and that as a result cases that predate it, including those referred to at RS[10]-[13], are of limited value. There are other problems with reliance on those cases.[3] For example, it has been said about *Planché v Colburn* that it "should not be treated as authority in the law of unjust enrichment".[4]

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[1] *Kane Constructions Pty Ltd v Sopov (No 2)* (2006) 22 BCL 202 at [27] (Warren CJ).

[2] (2001) 208 CLR 516 at [64]-[65].

[3] See e.g., Furst et al, *Keating on Construction Contracts* (10th edition, 2018) (**Keating**) at 284, fn 179.

[4] See Edelman & Bant at 70 and fns 95, 97 and 98 (terms are used as defined in the principal submissions).

6. At RS[14], the respondent draws on the distinction between open and closed contracts. It is said that the reason quantum meruit is "available" is because there is no longer an open contract, with an 1868 text cited in support. This submission is contrary to Deane J's statement of principle in *Pavey*, which provides that there is no occasion to "superimpose or impute an obligation or promise to pay a reasonable renumeration" where there is a valid and enforceable agreement governing a claimant's right to payment (AS[12]). A "closed" contract is both valid and enforceable. But, despite the centrality of Deane J's statement in *Pavey* to this area of law and the appellants' submissions, at no point does the respondent engage with it, similarly to *McDonald.*

10 7. The respondent then cites cases said to have "acted upon" the principle outlined above (RS[16]). Strangely, the decisions of the Court of Appeal in *Sopov* and in this case are said to fall into that category. This is even though in each case the Court suggested it only acted upon the principle because it was "heavily constrained by authority", although no mention of that critical fact is to be found in the respondent's submissions. Support for a principle cannot be found in cases that are bound to apply it and do so unwillingly. As to the other cases cited as supporting the principle, *Ettridge* predates *McDonald*, and *Segur*, *Horton* and *Brooks* fail to engage with it. The remainder postdate *Renard.*

8. The respondent then makes a further appeal to history at RS[17]. Whilst history plays a significant role in the law, the law is not governed by the "ghosts of the past".[5] As
20 Windeyer J has observed, "We are concerned with the law of today, not with the law of the Middle Ages. The only reason for going back into the past is ... to help us to see more clearly the shape of the law of today".[6] History should not hold back the principled development of the law, yet that is precisely what the respondent asks it to do.

9. In fixating on very old decisions, the respondent has either ignored or has not appreciated the significance of more modern ones. At RS[18] the respondent criticises the outcome in *Tridant* on the basis that it relied on "pre-*Judicature Act* authorities". That criticism is misplaced,[7] and also ignores the fact that *Tridant* did not turn on those authorities alone. Rather, it turned on those authorities read with a variety of others including *McDonald*, and the House of Lords cases of *Johnson v Agnew*, *Photo Production Ltd v*

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[5] *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 29 (Lord Atkin).
[6] *Victoria v The Commonwealth* (1960) 107 CLR 529 at 595.
[7] See e.g., Keating at 283-285, in particular fns 171, 177 and 179.

Securicor Transport Ltd and *Lep Air Services Ltd v Rolloswin Investments Ltd*,[8] the same three cases cited in *Taylor* (AS[29], see also RS[42] where no complaint is made of *Taylor*). However, like *McDonald* and *Pavey*, no engagement with these House of Lords cases is to be found in the respondent's submissions.

10. The respondent at RS[19] and at RS[43] places reliance on a list of what it calls "comparable jurisdictions", with the United Kingdom notably absent. Out of the six jurisdictions referred to, four address the matter in statute or code in a manner that is not on all fours with the treatment of the matter at common law in Australia. The United States decision of *Boomer* is founded on the rescission fallacy, and states that a "rescinded contract ceases to exist for all purposes".[9] This is contrary to *McDonald*. The approach in Canada is influenced by *Lodder*, and that country in any event takes a quite different approach to restitutionary relief governed by notions of "flexibility".[10]

11. The respondent's response to the appellants' five supporting arguments variously misstates or misunderstands the appellants' arguments and the relevant authorities.

12. **Argument 1**: At RS[21] an assertion is made as to how the "law's concern about contractual allocation of risk is manifested". This assertion is both unsupported and contrary to the authorities considered at AS[15]. The respondent fails to appreciate that risk allocation has a temporal aspect, being determined when a contract is entered into, and that the factor that renders a contract ineffective at a later point cannot impugn that allocation. The respondent then downplays the significance of statements of principle referred to at AS[17]-[18]. Plainly, those statements, and the rationale underpinning them, have application beyond the "imposition of liability on non-parties" (cf RS[22]).

13. **Argument 3:** As to RS[25], the references to restitutionary relief in the Act are, of course, predicated on such relief being available at common law. The appellants attack the availability of that relief in this case, rather than make any submission that the Act does not permit non-contractual remedies. At RS[26] the respondent refers to Deane J's judgment in *Pavey* whilst ignoring AS[12], with which the first sentence of RS[26] is inconsistent. The respondent places weight on Deane J's comments that there are a variety of categories of case where a defendant is obliged to "make fair and just

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[8] See *Tridant* at 106-107, see also 97-98 and 103-104 (Deputy High Court Judge To).

[9] *Boomer v Muir* 24 P 2d 570 (Cal, 1933) at 577.

[10] *Van Wezel v Risdon* [1953] 2 DLR 382 at 393; *Kerr v Baranow* [2011] 1 SCR 269 at [70]-[73], see also [23], [32], [34], [44], [58], [74], [77], [79], [82].

restitution". But these comments are taken out of context. Deane J states immediately prior that it is only the absence of a genuine agreement that provides the occasion to impose an obligation to make restitution or "pay fair and just compensation":[11]

14. **Argument 4:** At RS[27], the "rescission fallacy" is said to be a claim about labels. This is incorrect: AS[24]-[27].[12] The respondent goes on to itself apply labels to the term "rescission", before making an untenable submission. The respondent acknowledges the "number of senses" in which "rescission" can be used, and refers to decisions of this Court where the term is variously described as "convenient to say", having historically led to "confusion", capturing multiple ideas that "are not mutually exclusive", and having "several distinct meanings and applications".[13] Despite these cases illustrating that "rescission" is used imprecisely and to mean a variety of things, the respondent then asks this Court to find that there is something so distinctive about the term that it provides "the [singular] principled basis for the availability of quantum meruit as an alternative remedy". There is no basis to accept this submission.

15. **Argument 5:** The fact that certain of the respondent's severable obligations were performed means that there can be no total failure of consideration (AS[33] cf RS[28]). In *Roxborough*, a restitutionary claim was allowed in respect of a severable unconstitutional tax component which had special features. Those features included the component being externally imposed, not being agreed by negotiation, and not resulting in confusion between rights of compensation and restitution. The features canvassed in *Roxborough* are not present here, and there is no basis to award restitution pro tanto (cf RS[29]). For the respondent's submission to succeed, this Court would need to reject both the requirement that a failure of consideration be total and the reasoning in *Roxborough* limiting the circumstances in which a restitutionary claim may be made against the backdrop of an enforceable contract. This approach would also redistribute contract risk allocation (AS[17]-[18]) and greatly expand the ambit of restitution in Australian law. Such an approach is unwarranted.

16. As to RS[34]-[35], Parliament through s 16 has simply declined to express a view on amounts that should be recoverable under non-contractual causes of action. It is not

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[11] *Pavey* (1987) 162 CLR 221 at 256-257.

[12] See further Jackman, *The Varieties of Restitution* (2nd edition, 2017) at 118-121.

[13] *Shevill* (1982) 149 CLR 620 at 626; *Koompahtoo* (2007) 233 CLR 115 at 118 (comment made by Gleeson CJ in course of argument); *Braidotti* (1991) 172 CLR 293 at 302; *Andrews* (2012) 247 CLR 205 at [33].

inconsistent to find as a matter of common law that quantum meruit is subject to a cap.

17. At RS[36]-[40], the respondent masks a relatively simple matter in myriad complexities. The first step is to determine the contract price. As any "variation to the scope of work involves a variation to the contract", the contract price is inclusive of variations (CA [120], [125]).[14] Any recovery in excess of the contract price would be unjust because it would put the respondent in a better position than it would have been in if the contract was fulfilled (AS[32]-[42]), and so it is this amount that is subject to a cap. Whether that cap is reached in any given case is a matter for evidence, but the cap sets the outer boundary on the amount to which an innocent party is entitled.

10 18. In RS[41] it is said to be "anomalous" for a cap to apply to one remedy but not others, before in RS[44] the respondent relies on the statement that "[t]here is nothing anomalous in the notion that two different remedies … might yield different results".

19. As to RS[47]-[58], the respondent's starting premise is incorrect. The fact that the appellants did not provide any notice under s 38(1) meant that the condition precedent for the respondent to perform any variations was not satisfied, irrespective of whether any given variation fell within s 38(2) or 38(3).[15] The proper approach was for the respondent to refuse to carry out the requested variations in the absence of a notice. It cannot be the case that the protection s 38 is intended to provide to an owner can be defeated by a builder choosing to ignore the statutory requirement for a notice to be
20 provided by the owner. The reliance on *Pavey* at RS[57] is inapt; the text, purpose and context of the provision considered in *Pavey* is wholly distinguishable from s 38.

20. As to RS[59]-[61], the matter should be remitted to a different member in light of the Tribunal's treatment of issues that would need to be reconsidered at rehearing.[16]

Dated: 22 March 2019

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[14] See further Appellants' Further Materials at 16 – definition of "Contract Price".

[15] See also s 37(1) of the Act, where a similar condition precedent for a builder to provide notice is present.

[16] See in particular [49], [117] (CAB 16 and 28); *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal* (1990) 26 FCR 39 at 42-43, *Barro Group Pty Ltd v Brimbank CC (No 2)* [2012] VSC 199 at [6]-[9].