Supreme Court of Victoria

Mann v Paterson Constructions Pty Ltd [2018] VSC 119 (19 March 2018)

Last Updated: 21 March 2018

IN THE SUPREME COURT OF VICTORIA	Not Restricted

AT MELBOURNE

COMMON LAW DIVISION

JUDICIAL REVIEW AND APPEALS LIST

S CI 2017 00018

PETER MANN — First Applicant

and

ANGELA MANN — Second Applicant

V

PATERSON CONSTRUCTIONS PTY LTD — Respondent

JUDGE:	Cavanough J
WHERE HELD:	Melbourne
DATE OF HEARING:	1-2 June 2017
DATE OF JUDGMENT:	19 March 2018
CASE MAY BE CITED AS:	Mann v Paterson Constructions Pty Ltd
MEDIUM NEUTRAL CITATION:	[2018] VSC 119 Second Revision: 21 March 2018

RESTITUTION – Work and labour done – Building contract – Wrongful repudiation accepted by builder – *Quantum meruit* as alternative to contract damages – Measure of value – Relevance of contract price – Relevance of builder's actual costs – Undocumented variations to scope of works – Whether such variations affect *quantum meruit* claim by virtue of *Domestic Building Contracts Act 1995* s 38.

ADMINISTRATIVE LAW – Appeal from VCAT on questions of law – Whether VCAT erred in law in calculating *quantum meruit* for building work – No error of law – Appeal dismissed – *Victorian Civil and Administrative Tribunal Act 1998* s 148.

APPEARANCES:	Counsel	Solicitors
For the Applicants	Mr T Margetts QC with Mr G Hellyer	Telford Story & Associates
For the Respondent	Mr A Laird	Kalus Kenny Intelex

HIS HONOUR:

1 In 2014 the applicants, Peter and Angela Mann, wanted to have two units built on land they owned in Blackburn. One unit would be for renting out as a residential investment property and the other would be for them and their children to live in. In March of that year, the Manns entered into a standard form written contract with the respondent, Paterson Constructions Pty Ltd ('PCPL'), for the construction of the two units. PCPL is a 'one man company'. It is owned and operated by Mr Stephen Paterson, who is an experienced builder and someone who turns his hand to the work of many different building trades. The building contract was subject to the *Domestic Building Contracts Act 1995* ('the Act') (as in force in March 2014), being a 'major domestic building contract' within the meaning of the Act.

2 By March 2015 the investment unit had been virtually completed and the home unit was quite close to completion. However, a dispute had arisen between the Manns and PCPL over moneys claimed and other things. The Manns purported to terminate the building contract and to exclude PCPL from the site. By letters from their respective solicitors, the parties accused each other of wrongful repudiation of the contract.

3 PCPL commenced a proceeding against the Manns in the Building and Property List of the Victorian Civil and Administrative Tribunal (VCAT), invoking VCAT's jurisdiction under Subdivision 1 ('Domestic Building Disputes') of Division 2 of Part 5 of the Act (as it stood in 2015). The Manns lodged a counterclaim in the same proceeding.

4 In 2016 the proceeding came before Senior Member Walker for hearing. Many issues were raised. The hearing ran for over three weeks. On 12 December 2016 Senior Member Walker published a written decision comprising 102 pages and 535 paragraphs.[1]

5 Importantly, the Senior Member found that the Manns had wrongfully repudiated the building contract.[2] He further held that, in those circumstances, the builder was entitled to recover payment for the works on a *quantum meruit* basis.[3] He said, in that regard, that he was applying the principles discussed by the Court of Appeal in *Sopov v Kane Constructions Pty Ltd (No 2)*[4].

6 The Senior Member accepted expert evidence as to the value of the building works (prior to adjustment for defects) given by a quantity surveyor and registered builder, Mr Pitney, who had been called by PCPL. An amount was then deducted for building defects as found and for payments already made. The Senior Member ordered the Manns to pay PCPL the net sum of $660,526.41. Costs were reserved.

7 The Manns now seek leave to appeal, under s 148 of the *Victorian Civil and Administrative Tribunal Act 1998*, from the order made by Senior Member Walker. The proposed appeal has been listed and heard together with the application for leave to appeal.

8 Section 148 provides for an appeal on a question or questions of law only. In the case of a proposed appeal to the Trial Division of this Court,[5] an applicant for leave to appeal must identify a question of law (as distinct from a question of fact) which is important to the success of failure of the proposed appeal.[6] If it is shown that there is sufficient doubt attending that question to justify the grant of leave, then leave will ordinarily be granted, especially if the order below is a final order or final in its effect. Though not essential, if any identified question of law be one of public or general importance, that will weigh in favour of the grant of leave. Whether leave is granted or not must always depend on the justice of the particular case.[7]

9 The Manns' proposed notice of appeal (as amended) and their written submissions in this Court are each lengthy and repetitive documents. The proposed notice of appeal states 13 'questions of law' and 17 'grounds of appeal'. The written submissions are 53 pages (219 paragraphs) long. They go into minute detail about the building works in question, especially by cross-references to the even longer written submissions filed by the Manns in VCAT (principal submissions of 144 pages (615 paragraphs); attachments (including particulars of loss and damage) of 29 pages; reply submissions of 55 pages (269 paragraphs) with 11 pages of attachments; updated particulars of loss and damage (including attachments) of 19 pages). By contrast, PCPL's written submissions were and are quite concise.

10 In its written submissions in this Court,[8] which were filed in advance of the hearing, PCPL submitted that the tenor of much of the Manns' written submissions suggested that they were impermissibly trying to reargue the case below, rather than addressing questions of law.[9] I agree with PCPL in this regard. However, by the end of the hearing, the Manns had refined their case considerably and I am satisfied that, in its final form, the Manns' case does raise certain arguable questions of law, and that leave to appeal should be granted.

11 At the beginning of his oral submissions on the first day of the hearing before me, Senior Counsel for the Manns told me that there were (only) 'two underlying issues' involving alleged errors of law on the part of the Senior Member of VCAT.

12 As to the 'first underlying issue', Senior Counsel said that the Senior Member had misunderstood or misapplied the test or the principles that should be applied to work out the value of a *quantum meruit* claim; that the proper test was to assess a value that was 'fair and reasonable'; that this required the assessor to take into account a range of specified matters; that VCAT had not taken all of those matters into account in this case; that, instead, VCAT had simply accepted the evidence of the quantity surveyor, Mr Pitney, as to the proper value; and that this was impermissible. Senior Counsel went on to say that the origin and explanation of VCAT's alleged error in this regard was a misreading of *Sopov v Kane (No 2)*,[10] in that VCAT – wrongly, according to Senior Counsel – had treated that case as establishing that a construction contract became 'void ab initio' where the contract had been wrongfully repudiated by the owner and the builder had accepted the repudiation and elected to claim in restitution. Senior Counsel described as a 'fiction' the proposition that a building contract became 'void ab initio' in such circumstances; and he said that *Sopov v Kane (No 2)* itself pointed out this 'fiction'. Alternatively, he submitted (as a formal submission only) that *Sopov v Kane (No 2)* was wrongly decided in this respect.[11]

13 In developing his case under this 'first underlying issue', Senior Counsel submitted that VCAT was required to apply a list of principles referred to by Vickery J in *Vasco Investments Ltd v Morgan Stanley Australia Ltd*,[12] and that, as a result, VCAT ought to have taken into account 12 particular matters that were specified by Senior Counsel, but that VCAT did not do so. A recurring theme was that, in accepting the quantity surveyor's evidence, VCAT had wrongly made allowances in favour of the builder for items that, admittedly, did not reflect the actual costs incurred by the builder.

14 The 'second underlying issue' identified by Senior Counsel for the Manns relates to whether VCAT erred in allowing the builder to recover on a *quantum meruit* basis in relation to items that amounted to variations of the original scope of work. This issue clearly raises a question of law, namely the proper interpretation of the Act, especially s 38. VCAT proceeded on the basis that, notwithstanding that the relevant building contract had been governed by the Act, where the owner has wrongfully repudiated the contract and the builder has accepted the repudiation and has elected to claim on a *quantum meruit* basis rather than for damages for breach of the contract, s 38 of the Act, which relates to variations, has no application. This second issue is indirectly related to the first, in that, once again, the Manns attribute VCAT's alleged error, at least in part, to VCAT's alleged misconception that, after an accepted wrongful repudiation and an election to sue in *quantum meruit*, a building contract is void ab initio.

15 Consistently with the case coming down to these 'underlying issues', and the Manns having already, within their written submissions, abandoned their proposed 'grounds of appeal' numbered 10 and 13 and their corresponding 'questions of law' numbered 8 and 10, Senior Counsel for the Manns orally abandoned, in addition, grounds 1, 2 and 7.[13] In effect, he thereby also abandoned the corresponding 'questions of law' numbered 1, 4, 5 and 7. What remains, therefore, are 7 'questions of law' numbered respectively 2, 3, 6, 9, 11, 12 and 13, and 12 'grounds of appeal' numbered respectively 3, 4, 5, 6, 8, 9, 11, 12, 14, 15, 16 and 17. These remaining questions and grounds still involve a considerable amount of overlap. It is not necessary to set them out individually.

Resolution of the 'first underlying issue'

16 I do not accept the Manns' contentions relating to the 'first underlying issue'.

17 The Senior Member did not misunderstand or misapply the principles that fell to be applied to work out the value of PCPL's *quantum meruit* claim. There is nothing in *Sopov v Kane (No 2)*[14] or in *Vasco*[15] that reveals any error of law on the part of the Senior Member.

18 The Senior Member observed, in terms, that the builder was 'entitled to an amount that reflects the value of the benefit that it has conferred upon the Owners, which I think is the fair and reasonable value of its work'.[16]

19 In the case of a building contract where the owner has wrongfully repudiated the contract and the builder has accepted the wrongful repudiation and has elected to claim in restitution, *Sopov v Kane (No 2)* is, according to the High Court, the 'prevailing authority'[17] for working out the amount which the builder is able to claim in restitution (as an alternative to a claim for breach of contract).

20 The Senior Member expressly directed himself that the payment was to be assessed 'on the principles discussed by the Court of Appeal in [*Sopov v Kane (No 2)*]'.[18] He then referred to *Sopov v Kane (No 2)* in the following terms:[19]

[509] In that case, the Court of Appeal said (at paragraph 12):

"12 The 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. It is supported by decisions of intermediate courts of appeal in three States, all of which postdate *McDonald* and two of which postdate *Pavey & Matthews*. If that remedy is now to be declared to be unavailable as a matter of law, that is a step which the High Court alone can take."

[510] As to the manner in which the claim should be assessed, Mr Laird referred me to paragraphs 25 and 26 of the judgement, where the Court said:

"25 The proper approach to assessment of a quantum meruit claim is, as the trial judge said, to ascertain the fair and reasonable value of the work performed. Axiomatically, the measure of the restitutionary remedy is the value of the benefit conferred on the party which received it. Once it is accepted that the quantum meruit claim is available independently of the contract, then it follows – as Meagher JA said in *Renard* - that it would be 'extremely anomalous' if the defaulting party could invoke the contract which it has repudiated to impose a ceiling on the amounts recoverable. [*emphasis added*]

26 Nor is the contract price 'the best evidence' of the value of the benefit conferred. As counsel for Kane pointed out, the contract price is struck prospectively, based on the parties' expectations of the future course of events. The quantum meruit, on the other hand, is assessed with the benefit of hindsight, on the basis of the events which actually happened."

and also to paragraph 35, where the Court said:

"35 The existence of the entitlement to a profit margin seems entirely consistent with the restitutionary objective of measuring the value of the benefit conferred. The inclusion of a margin for profit and overhead means that the calculation approximates the replacement cost of the works. As we have said, it is an appropriate index of value to ascertain what it would have cost the Principal to have had these works carried out by another builder in comparable circumstances. The answer to that question must necessarily include that other builder's margin." [*emphasis added*]

The paragraphs quoted by the Senior Member were the critically relevant paragraphs for present purposes; and he was correct to emphasise the words which he underlined.

21 Since, in relation to a *quantum meruit* claim in a building case, the object of the exercise is to work out the 'value of the benefit conferred on the party which received it', and since an 'appropriate index of value' is to ascertain 'what it would have cost the principal to have had these tasks carried out by another builder in comparable circumstances', there cannot be any objection in such a case to the receipt of competent evidence on that topic from a properly qualified quantity surveyor. Nor did the Manns submit, either at VCAT or before me, that such evidence could not be received or that Mr Pitney's evidence did not answer that description. Indeed, the Manns did not object at VCAT to any part of Mr Pitney's evidence nor did they call another quantity surveyor to give any contrary evidence. The Manns called a building expert, Mr Lorich, but he is not a qualified quantity surveyor. Mr Pitney was the only quantity surveyor called.

22 However, the Manns submit that it is never sufficient, or at least it was not sufficient in this case, for the decision maker to act on the evidence of a quantity surveyor alone.

23 As mentioned above, Senior Counsel for the Manns submitted before me that, in addition to, or as against, Mr Pitney's evidence, VCAT had been required to take into account 12 particular matters. It is not clear that a submission in quite the same terms was made to VCAT, but I put that aside. The 12 matters were:

(i) The rough, informal quote given by Mr Paterson before any contract was signed;

(ii) The original contract price of $971,000 (for the two units combined);

(iii) The figures specified in insurance certificates issued before the building work commenced;

(iv) The amount stated in the building permit;

(v) A spreadsheet of costs prepared by Angela Mann (the second applicant) at a late stage of the VCAT hearing and said to list all of the costs invoices discovered by PCPL in the VCAT proceeding;

(vi) The agreed reduction by $54,221 of the contract price, to $916,779;

(vii) The fact that Mr Pitney made allowances in favour of the builder for three items 'that were not in fact provided',[20] being a sum for certain mechanical equipment already owned by the builder, a sum for scaffolding not actually hired or used by the builder and a sum for an independent site foreman not actually engaged or used by the builder;

(viii) The difference between the contract price and the value of the work without defects ($1,898,000) assessed by Mr Pitney in one of his earlier reports;

(ix) The difference between the contract price and the value of the work without defects ($1,727,611) finally assessed by Mr Pitney;

(x) The amount claimed by PCPL at the start of the VCAT proceeding ($1,377,000) as the value of the work without defects, as compared with the amount of $1,727,611 finally assessed;

(xi) The fact that only $47,000 was initially claimed by PCPL in respect of Unit 1, at a time when it was virtually complete (in March 2015);

(xii) The relatively low amount charged by PCPL for the building of two 'similar' units in nearby Maple Street shortly prior to the contract being signed for the units presently in question.

24 It can be seen immediately that the matters designated as (i), (ii), (iii), (iv), (vi), (viii) and (ix) are not significantly different in nature from each other – in effect, much the same complaint is being made each time, namely that the figure finally assessed for the value of the work without defects is said to be much greater than the contract price. The alleged discrepancies listed as matters (x), (xi) and (xii) are of a somewhat different kind.

25 The Manns do not submit that Senior Member was not aware of these alleged discrepancies. In effect, their claim is that he should have asked himself whether, individually or together, they warranted a discounting of the figure eventually arrived at by Mr Pitney, but that he did not ask himself that question.

26 The complaints based on the alleged discrepancies listed as matters (x), (xi) and (xii) can be disposed of immediately. They do not raise any question of law. They are merely complaints about VCAT's fact-finding. They do not avail the Manns.

27 Turning to the complaints to the effect that there was a great discrepancy in relation to the contract price, in my view, the Senior Member was not required, as a matter of law, to ask himself the postulated question or questions. Senior Counsel did not cite any authority to the effect that the law stipulates or requires that the contract price be taken into account and weighed up in every case. In my view it would not necessarily, or even usually, be *wrong* for a decision-maker to take the contract price into account, whereas it would always, or at least usually, be wrong for the decision-maker to treat the contract price as determinative or as a ceiling on the amount recoverable.[21] In the language of administrative law, the contract price will often be a relevant consideration in the sense of a *permissible* consideration, but it will not always be – indeed, perhaps it may never be – something the decision-maker is *bound* to take into account.[22] In other words, the contract price is not, or at least will not always be, a *mandatory* relevant consideration.

28 Thus, in *Sopov v Kane (No 2)*, the Court of Appeal said that the contract price 'is merely a piece of evidence, showing what value the parties attributed – at a particular time – to the work which the builder was agreeing to perform'.[23] The Court further said that the contract price does not impose a ceiling though it 'may' produce a guide to the reasonableness of the remuneration claimed.[24] And the Court of Appeal seemed to accept the submission put to it by Kane to the effect that, in that case, 'the contract price provided very little guidance because the actual course of events in the carrying out of the works was "radically different" from what had been anticipated when the contract was entered into'.[25] Counsel for PCPL makes much the same submission in the present case. He is well justified in doing so. The Senior Member accepted the evidence of Mr Paterson and his witnesses that the owners made many requests for additional work and that Mr Paterson attended to them.[26] There were 11 variations claimed in regard to unit one and 31 variations claimed in regard to unit two, all requested by the Manns. [27] The Senior Member found that the total cost of the variations was 'very large indeed'.[28]

29 Even if, in this case, the comparison between the value of the work as assessed by VCAT and the contract price, or any of the other comparisons relied on by the Manns, was a mandatory relevant consideration, the Manns have not satisfied me that the Senior Member failed to take the same into account. These comparisons were much pressed by the Manns during the case at VCAT. It is unlikely that the Senior Member ignored them. It is much more likely that he took the view that they were quite unpersuasive, because of the major differences between, on the one hand, the work as originally contracted for and, on the other, the actual course of the building work and the actual benefit conferred on the Manns. In any event, for the reasons already mentioned, and for the additional reasons to be mentioned below, the Senior Member was entitled simply to prefer the approach of adopting Mr Pitney's assessment as a quantity surveyor.

30 Of the 12 matters listed by Senior Counsel for the Manns, two remain to be dealt with. They are closely related and may be considered together. Matter number (v) refers to a spreadsheet of invoices issued to PCPL in relation to the project. The Manns say that PCPL should have been confined to an amount based on these invoices, together with an allowance for Mr Paterson's own labour, and other limited allowances (eg for overheads), and with a mark-up for profit. Matter number (vii) relates to items allowed by Mr Pitney, and in turn by VCAT, for costs not actually incurred, being for certain mechanical equipment already owned by the builder, for scaffolding not ordered or employed and for an independent site foreman not employed.

31 In connection with these two matters the Manns insist that, by law, a *quantum meruit* claim can only be advanced and accepted by reference to evidence of 'costs actually incurred'. That phrase appears in paragraph 30 of *Sopov v Kane (No 2)*.[29] The Manns point out that paragraph 30 was not quoted by the Senior Member. They also point out that the Senior Member did not quote or refer to the following sentence in paragraph 26 of *Sopov v Kane (No 2)*: 'The quantum meruit, on the other hand, is assessed with the benefit of hindsight, on the basis of the events which actually happened'.[30] They emphasise the words 'the events which actually happened'. Further or alternatively, the Manns submit that VCAT should at least have *had regard to* the builder's actual costs, but did not do so. In this respect, they cite the following passage from the list of principles stated by Vickery J in *Vasco*,[31]

> The enquiry is not primarily directed to the cost to the plaintiff of performing the work, since the law is not compensating that party for loss suffered'; however, the actual cost should not be ignored.[32]

They say that the Senior Member misdirected himself accordingly. They say that this led to a 'windfall' for PCPL and that the Senior Member was led astray by the 'dark science'[33] of quantity surveying.

32 In my view, these submissions of the Manns are misconceived.

33 What the Court of Appeal relevantly said in paragraphs 29 and 30 of its judgment in *Sopov v Kane (No 2)* was that the value of work done *can* be proved by evidence of costs actually incurred, not that it *must* be proved in that way. In *Sopov v Kane (No 2)* it happened that the builder had sought to prove the value of the work in that way, but that was a choice it made as a litigant. As PCPL points out,[34] Kane was a substantial building company with staff and resources. By contrast, PCPL (in effect, Mr Paterson) was a small, hands on builder attempting to juggle everything under very trying circumstances (which, as VCAT apparently accepted, explained the absence of some records). In any event, as PCPL submits, it is clear from *Sopov v Kane (No 2)*[35] that using costs actually incurred is not the only available method to prove a *quantum meruit* claim.

34 There is nothing to the contrary in *Vasco*. Quite the reverse. Vickery J said:[36]

> It is well-established that the value of the services or work done can be proved by evidence of costs actually and fairly and reasonably incurred. But proof of the appropriate quantum is not confined to such evidence.

35 It is true that Vickery J had also said that 'the actual cost should not be ignored'.[37] For that particular proposition, Vickery J cited the judgment of Byrne J in *Brenner*.[38] It seems that Vickery J intended to cite what Byrne J had said at page 263. On that page Byrne J observed that 'the enquiry is not primarily directed to the cost to the plaintiff of performing the work since the law is not compensating that party for loss suffered'.[39] Byrne J continued: 'But this is not to ignore these costs for the reasonable remuneration for work must have some regard to the cost of its performance'.[40]

36 In my view, none of this means that actual costs are a mandatory relevant consideration in every case regardless of the facts. Byrne J himself emphasised that the case before him related to a claim arising out of services performed.[41] His Honour continued:[42]

> If different principles apply to different restitution claims such as those for the recovery of money paid or the value of good delivered, I am not concerned with them. Furthermore, it may be that even within that class of restitution claims which are for recompense for services performed, different principles will apply, or principles will apply differently, to different types of case.

In any event, *Brenner* preceded *Sopov v Kane (No 2)*. I am bound by judgment of the Court of Appeal in that case.

37 Further, I accept PCPL's answers to these aspects of the Manns' contentions. As PCPL submits,[43] the Manns' contentions fundamentally misconceive the law – a *quantum meruit* is concerned with the reasonable value of the benefit conferred on the party who receives the benefit (here, the owners).[44] There was no windfall. VCAT awarded PCPL the reasonable value of the work it had performed. Contrary to the Manns' assertions, VCAT did not ignore their argument about actual costs. Rather, as it was entitled to do, VCAT chose to calculate the fair and reasonable value of the task performed using an 'index of value' that the Court of Appeal has said is appropriate and by reference to probative independent expert evidence on this issue, which VCAT was entitled to prefer and did prefer. Insofar as the Manns still seek to attack Mr Pitney's evidence, any such attack is inappropriate, because Mr Pitney was cross-examined only briefly during the lengthy hearing (which included several conclaves of experts, in each of which he participated) and was essentially unchallenged on his methodology. VCAT clearly and cogently explained why it preferred Mr Pitney's evidence over the limited evidence of Mr Lorich on discrete issues and on the purported 'actual cost' spreadsheet prepared by Mrs Mann.[45]

38 I note also and accept PCPL's submissions that:[46]

(a) quantity surveying is a recognised profession (as distinct from a 'dark science');

(b) assessing the reasonable value of building work falls squarely within the expertise of a quantity surveyor;

(c) in addition to his quantity surveying expertise Mr Pitney is also a chartered builder;

(d) the Tribunal is an expert tribunal and it had the benefit of hearing (at length) over some three weeks from many witnesses including, inter alia, Messrs Pitney and Lorich and Mrs Mann before making its decision;

(e) the Tribunal found that Mrs Mann was not a credible witness and that her spreadsheet was incomplete; and

(f) Mr Pitney in any event reviewed Mrs Mann's spreadsheet before he produced his final report and:

(i) made adjustments to his figures having taken account of the matters raised; and

(ii) arrived at a figure of $1,582,220, even if an 'actual cost' methodology was adopted.

While accepting PCPL's primary submissions that the Manns' assertions about 'actual costs' and 'windfalls' are irrelevant, I note that the annexure to PCPL's written submissions contains a summary of the Manns' key assertions in those respects and of the grounds on which PCPL rejects those assertions. Senior Counsel for the Manns did not, in his oral submissions, contradict any of the factual contentions set out in the annexure. Hence, and for completeness, I would indicate that I accept all of PCPL's factual contentions in that annexure. I accept, also, PCPL's submission that the amount awarded by VCAT is not 'orders of magnitude greater' than PCPL's contractual claim,[47] and I further agree with PCPL that, even if it was, the outcome would be unaffected. Here, PCLP quotes, appropriately, the following passage from the judgment of Meagher JA of the New South Wales Court of Appeal in *Renard*:[48]

> There is nothing anomalous in the notion that two different remedies, proceeding on entirely different principles, might yield different results. Nor is there anything anomalous in the fact that either remedy may yield a higher monetary figure than the other. Nor is there anything anomalous in the prospect that a figure arrived at on a quantum meruit might exceed, or even far exceed, the profit which would have been made if the contract had been fully performed. Such a result would only be anomalous if there were some rule of law that the remuneration arrived at contractually was the greatest possible remuneration available, or that it was a reasonable remuneration for all work requiring to be performed. There is no such rule of law.

39 Renard was, of course, followed and applied in *Sopov v Kane (No 2)*.[49] That it is well open to an assessor to depart from 'actual costs' was specifically affirmed by Barrett J in *Eddy Lau Constructions Pty Ltd v Transdevelopment Enterprise Pty Ltd*,[50] a case decided in 2004 (between the time of *Renard* and the time of *Sopov v Kane (No 2)*). Barrett J was required to deal with how a building case referee, in assessing a builder's statutory claim to a *quantum meruit*, might deal with the fact that, on some items of cost, the builder actually incurred less than the assessed reasonable cost. Barrett J said:[51]

> In the course of the reference, evidence was received as to certain of the costs actually incurred by the plaintiff in performing the works. Evidence was also received from quantity surveyors concerning the value that should be ascribed to various components of the work. The significance of item 13 in the statement of issues may be illustrated by referring to three areas of the services provided, being the provision of scaffolding and a hoist, the provision of site supervision and the provision of formwork, reinforcement and concreting.
>
> The quantity surveyors, in estimating costs relevant to the calculation of the quantum meruit sum, allowed $59,964 for scaffolding and hoist ($53,664 for scaffolding and $6,300 for hoist) whereas, according to the defendant, evidence before the referee showed that these had in fact been obtained from Sydney Hoist at a cost of $19,440 ($15,686 for scaffolding and $3,754 for hoist). On site supervision, the quantity surveyors allowed $50,000, whereas the defendant says that evidence before the referee identified the site supervisor as a Mr Ghossein to whom only about $25,500 was paid. In relation to formwork, reinforcement and concreting, the quantity surveyors allowed $552,559 as against what the defendant says to be an actual outlay of $360,000 as shown by the evidence.
>
> The referee considered various alleged discrepancies of this kind and identified only two areas — one being site supervision and the other formwork, reinforcement and concreting — in which there was evidence warranting a finding that the sum ascribed to the particular element by the quantity surveyors was greater than the cost actually incurred by the plaintiff. The referee's conclusion was that the adoption of actual cost figures where they were established by the evidence was not warranted because of distortions that would introduce. As the referee observed, it would be wrong to adopt actual cost figures where they were less than the allowances made by the experts without at the same time adopting an identical approach where it could be shown that the actual cost exceeded the experts' assessments. It was also recognised that there was a significant element of incongruity in attempting to combine some actual costs with some assessed costs.
>
> In my opinion, the passage I have quoted from the judgment of Meagher JA in Renard Constructions (above) supports the approach the referee took in this respect and indicates that, while evidence of actual expenditure may be relevant to an assessment of what is a reasonable reward for work done and expenditure incurred, the amount of such actual expenditure as may be proved does not operate in any way as a controlling factor. The quantum meruit sum is the reasonable cost of the work done and expenditure incurred, with the assessment of reasonableness being undertaken by reference to the results produced and evidence of what it would in the ordinary course of things be necessary to outlay in order to produce those results. The fact that some actual outlays were larger and others were smaller is not relevant to the inquiry.

40 It will be noted that Barrett J had no difficulty with the simple acceptance by the building referee of the opinions of the quantity surveyor, nor with the fact that some of the allowances made were much greater than the corresponding 'actual costs'. It may be thought that a rather different approach to much the same question was taken recently by Ball J of the Supreme Court of New South Wales in *Home Site Pty Ltd v ACN 124 452 786 (formerly Nahas Construction (NSW) Pty Ltd)*.[52] Ball J observed that, in relation to items supplied to a builder by third parties, he could not see why the builder should be able to recover more than the actual cost plus a reasonable builder's margin, regardless of what might otherwise be a reasonable allowance.[53] Ball J commented that, in *Eddy Lau*, Barrett J had said nothing about the relevance of the actual cost of the work undertaken by the builder.

41 With respect, it seems to me that, in the passage from *Eddy Lau* I have quoted above, Barrett J did have things to say about the relevance, or irrelevance, of actual costs. In my view the quoted observations of Barrett J (which have not otherwise been the subject of any doubt, as far as I can tell) are in accordance with *Renard* and *Sopov v Kane (No 2)* and should be followed in the present case in preference to *Home Site*.

42 Finally, in relation to the 'first underlying issue', the Manns contend that the Senior Member erred in law insofar as he said, and proceeded on the basis that, 'in the case of a building contract, when one party repudiates the contract and the other party brings it to an end by accepting the repudiation, the contract is avoided ab initio'.[54] However, it is necessary to read the whole of the paragraph (paragraph 525) in which those words appear, and to read it together with paragraph 509 of the Senior Member's decision, where (as shown above) the Senior Member quotes paragraph 12 of *Sopov v Kane (No 2)*. Such a reading shows that the Senior Member was merely endeavouring to encapsulate what had been said in *Sopov v Kane (No 2)* in this regard. In *Sopov v Kane (No 2)*, the Court of Appeal had said that the remedy of *quantum meruit* in relation to a repudiated building contract 'rests on the *fiction* of the contract's having ceased to exist ab initio'.[55] I do not accept that the Senior Member misunderstood this.

43 Legal fictions are commonplace, both in the general law and in statute law. The personality of an ordinary corporation rests on a legal fiction. Contrary to the view that appears to underlie the contentions of the Manns, a legal fiction is not the same as a (legal) fallacy. A legal fiction may serve to reconcile a specific legal outcome or result with a premise or postulate involving unexpressed considerations of social and economic policy.[56]

44 In any event, even if the Senior Member did misapprehend what was said in this regard in *Sopov v Kane (No 2)*, it matters not for the purpose of the Manns' contentions relating to the 'first underlying issue'. As the Court of Appeal said, although the remedy rests on a fiction, and although the result may be seen as anomalous, the remedy *does* ignore the bargain which the parties struck,[57] and, further, 'the measure of the restitutionary remedy is the value of the benefit conferred on the party which received it'.[58] Hence, even if there was an error of law in what the Senior Member said in paragraph 525, it was not an operative or vitiating error.

45 In addressing this 'first underlying issue', and only in that regard, Senior Counsel for the Manns made passing reference to the claim in the amended proposed notice of appeal and in the Manns' written submissions to the effect that there was inadequacy in VCAT's statement of its reasons for decision.[59] He did little or nothing more than to say that he relied on the Manns' written submissions in that regard. The judicial statements of principle quoted in those submissions are mainly directed to the obligations of courts, as distinct from tribunals. But, in any event, as PCPL submits, VCAT's path of reasoning in preferring the independent expert evidence of the quantity surveyor on behalf of the builder, Mr Pitney, on the valuation of the quantum is clearly exposed in the reasons; and the fact that the Manns assert that a different methodology (which they prefer) was available is irrelevant. The Court of Appeal have indicated clearly that the methodology adopted by the Tribunal is an appropriate index of value. The *Eddy Lau*[60] case spells this out even more explicitly. There is nothing of substance in the Manns' complaint as to the adequacy of the Senior Member's statement of reasons.

46 Accordingly, the Manns do not succeed on any of the questions of law or grounds relating to their 'first underlying issue'.

Resolution of the 'second underlying issue'

47 As mentioned above, the 'second underlying issue' is whether, insofar as PCPL's *quantum meruit* claim relates to work that involved a departure from the plans and specifications set out in the contract, the claim to that extent was affected by s 38 of the Act.

48 Section 38 provides:

38 Variation of plans or specifications—by building owner

(1) A building owner who wishes to vary the plans or specifications set out in a major domestic building contract must give the builder a notice outlining the variation the building owner wishes to make.

(2) If 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, the builder may carry out the variation.

(3) In any other case, the builder must give the building owner either—

(a) a notice that—

(i) states what effect the variation will have on the work as a whole being carried out under the contract and whether a variation to any permit will be required; and

(ii) if the variation will result in any delays, states the builder's reasonable estimate as to how long those delays will be; and

(iii) states the cost of the variation and the effect it will have on the contract price; or

(b) a notice that states that the builder refuses, or is unable, to carry out the variation and that states the reason for the refusal or inability.

(4) The builder must comply with subsection (3) within a reasonable time of receiving a notice under subsection (1).

(5) A builder must not give effect to any variation asked for by a building owner unless—

(a) the building owner gives the builder a signed request for the variation attached to a copy of the notice required by subsection (3)(a); or

(b) subsection (2) applies.

(6) A builder is not entitled to recover any money in respect of a variation asked for by a building owner unless—

(a) the builder has complied with this section; or

(b) VCAT is satisfied—

(i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of paragraph (a); and

(ii) that it would not be unfair to the building owner for the builder to recover the money.

(7) If subsection (6) applies, the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit.

(8) This section does not apply to contractual terms dealing with prime cost items or provisional sums.

49 It has always been common ground that the building contract between the Manns and PCPL was a 'major domestic building contract' within the meaning of s 38.

50 The lengthy written submissions filed by the Manns at VCAT included a substantial part[61] relating to s 38. But everything in that part, with a few possible exceptions,[62] seems to have been directed to PCPL's contractual claim, as distinct from its *quantum meruit* claim.

51 Correspondingly, although the Senior Member's reasons for decision referred quite extensively to s 38,[63] those references seem to have been directed principally, if not exclusively, to PCPL's (alternate) contractual claim. When the Senior Member ultimately came to the matter of variations in relation to the *quantum meruit* claim, his reasons betray no hint that there was a perceived contest between the parties on the point. At paragraphs 119 and 120, after dealing in detail with disputes as to the variations claimed and whether they were requested by the Manns, the Senior Member said:[64]

[119] Because of the conclusion that I have reached on the termination issue the Builder's claim for recovery on a quantum meruit basis is established and it is entitled to an amount that reflects the value of the benefit that it has conferred upon the Owners, which I think is the fair and reasonable value of its work. The assessment that I have to make is not the builder 's entitlement according to the Contract but rather, the reasonable value of the work and materials the Owners have requested and the value of the benefit they have received from the Builder.

[120] Accordingly, it is unnecessary for me to determine whether section 38 or the equivalent provision in the Contract document applies. If I find that the work that was done was requested by the Owners, the Builder is entitled to its fair and reasonable value which might be quite different from the claim that it has made or what it might have been entitled to under the terms of the Contract. Consequently, in regard to each variation I only need to determine whether or not the work was requested and whether or not it has been included in the valuation that Mr Pitney has made.

The Senior Member went on to deal with each individual variation claim in detail. At paragraph 511, under the heading 'Variations', the Senior Member said:[65]

[511] It would seem the variations are taken into account in the assessment of a quantum meruit claim and indeed, that will be necessary if the full value of the benefit conferred is to be ascertained. In this regard, the Court said at paragraph 43:[66]

"43 If the work the subject of the variations has been carried out – and there was no dispute here that it had been – the only question is the fair and reasonable value of the work. It is irrelevant whether or not the work fell outside the original contractual scope. All that matters is that the performance of the work has conferred a benefit on the owner, for the reasonable value of which the Builder should be remunerated."

52 Whatever position the Manns may have taken previously, in their written submissions in this Court they quoted s 38,[67] referred to paragraphs 119 and 120 of the Senior Member's reasons[68] and then continued:[69]

[175] By consequence, the Tribunal held that consequent upon the termination, the DBC Act no longer applies to any aspect of the domestic building work carried out by the respondent, including variations.

[176] This is wrong at law for two reasons. First, section 38 of the DBC Act does not say so (contrasting the exclusion in section 16(2) of the DBC Act) and therefore the provisions of section 38(7) of the DBC Act apply. Secondly, it appears to be premised upon a misunderstanding as to the legal consequences of acceptance of repudiation and the resulting termination of the contract. The right to a payment for a variation was an accrued legal right that existed prior to termination.

[177] In *McDonald v Dennys Lascelles Ltd*[70], Dixon J stated as follows:

"When a party to a simple contract upon a breach by the other contradicting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded [terminated] as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired."

53 The Manns' written submissions proceed to set out detailed contentions to the effect that the Senior Member's reasons do not contain any finding that PCPL complied with s 38 or any finding (or any sufficient finding) that the Senior Member was satisfied of the matters specified in s 38(6)(b). Otherwise, there is no legal argument about the application of s 38 to a *quantum meruit* claim.

54 PCPL accepts that VCAT did not make any, or any sufficient, finding that the conditions in s 38 were satisfied. However, in its written submissions PCPL contended as follows:[71]

[28] The purport of the owners' argument appears to be that s. 38 of the DBCA trumps the builder's right to recover a quantum meruit where a builder has validly terminated a building contract.

[29] That argument is untenable in circumstances where *Sopov v Kane* (which concerned both commercial and domestic building work[72]) definitively sets out how variations are to be valued where a quantum meruit is claimed. Put simply the varied scope of work is valued in exactly the same way as the original scope of work.[73] There is no difference.

[30] Even if the binding decision in *Sopov v Kane* is put to one side however the owners' argument is problematic on many levels.

[31] Firstly s. 38 of the DBCA on its proper construction deals with the contractual recovery of variations and is therefore irrelevant where the claim being made is not contractual. That is the effect of the Tribunal's findings at paragraphs 119 and 120 of the reasons and that is why the Tribunal did not (and did not need to) embark on a detailed analysis of the factors that would be relevant on a s. 38 contractual assessment.[74] Moreover the purported characterization of the Tribunal's findings contained in paragraph 175 of the owners' submissions is erroneous. The Tribunal said no such thing.

[32] Secondly even if s. 38 was ambiguous (which is denied) there is no reason to think that Parliament intended to interfere with fundamental common law rights so as to remove the builder's right to claim a quantum meruit for changes to the original scope of works. In circumstances where *"The 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"*[75] there would need to be very clear words indeed in s.38 to justify a finding that s. 38 was intended to abrogate such a fundamental right.[76] Those words simply aren't there.

[33] Thirdly s. 16 of the DBCA specifically contemplates a builder being awarded a sum of money in excess of the contract price pursuant to an extracontractual cause of action, such as a restitutionary claim. Section 16 is in the following terms:

Builder must not seek more than the contract price

(1) A builder who enters into a domestic building contract 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. Penalty: 100 penalty units.

(2) Subsection (1) 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.

[34] Fourthly the owners' attempt to rely on *McDonald v Dennys Lascelles Ltd* [1933] HCA 25; (1933) 48 CLR 457 is misconceived. *Sopov v Kane* is authority for the proposition that (as the law currently stands) acceptance of the repudiation means that the contract ceases to exist ab initio.[77] As the Court of Appeal stated very clearly:

"The 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. It is supported by decisions of intermediate courts of appeal in three States, all of which postdate McDonald and two of which postdate Pavey & Matthews. If that remedy is now to be declared to be unavailable as a matter of law, that is a step which the High Court alone can take."

[35] Finally (even if the above matters were put to one side for the sake of argument) the owners' whole case is that the builder had no contractual right to be paid for variations because of alleged non-compliance with, inter alia, s. 38 of the DBCA. Accordingly the owners are seeking to approbate and reprobate by asserting (as they do in paragraph 176) that: *"The right to a payment for a variation was an accrued legal right that existed prior to termination"*.

[36] In view of the above matters it is submitted that the owners' arguments based on s. 38 of the DBCA are also unsustainable. There was no error of law.

55 At the oral hearing before me, counsel for PCPL conceded that, contrary to paragraph 29 of PCPL's written submissions, he could not rely on *Sopov v Kane (No 2)* as having dealt expressly or impliedly with the present point. I accept that concession.

56 During the hearing, neither side cited any authorities in support of their respective positions on the present issue, other than those authorities mentioned in their written submissions filed in this Court.

57 After the hearing, albeit without leave, Senior Counsel for the Manns sent an email to the Court requesting that three nominated cases be drawn to my attention, namely:

(a) CMF Projects Pty Ltd v Riggall [2016] 1 QdR 187 ('*Riggall*')

(b) PACD Pty Ltd v Depas Pty Ltd [2008] VCC 26 ('*the 2008 PACD case*')

(c) PACD Pty Ltd v Depas Pty Ltd [2007] VCC 1683 ('*the 2007 PACD case*')

I will come to those three cases shortly.

58 At the hearing I raised with both counsel a question that had occurred to me about the proper construction of s 38 (where it would otherwise apply). I asked for counsel's comments as to whether there was any room for the application of subsections (6) or (7) of s 38 if the owner had not given a notice, in writing, to the builder under subsection (1). Senior Counsel for the Manns submitted that subsections (6) and (7) would apply even in such a case, while counsel for PCPL submitted to the contrary. In the end, I need not and will not determine that question, because I am satisfied that s 38 does not apply to the assessment of a *quantum meruit* claim.

59 The arguments advanced by the Manns in paragraph 174 to 177 of their written submissions are not persuasive. Indeed, they seem to involve an implicit concession that s 38 only applies to a contractual claim, while somehow asserting that a *quantum meruit* claim of the kind made by PCPL remains in truth and in law a contractual claim. If that is the intended argument, I do not accept it. In one of the cases drawn to my attention by Senior Counsel for the Manns after the hearing, namely *Riggall*, a decision of the Queensland Court of Appeal, Gotterson JA (with whom Holmes JA (as Holmes CJ then was) and Morrison JA agreed), it was said:[78]

In *Pavey & Matthews Pty Ltd v Paul*,[79] the High Court held that a right of a builder to recover on a quantum meruit does not depend upon the existence of an implied contract but on a claim to restitution independent of contract.[80] For the builder to have pursued a quantum meruit claim in that case was not to have sought to enforce a building contract. That cause of action was therefore not prohibited by a New South Wales legislative enactment which provided that a building contract was not enforceable in circumstances that prevailed in that case.

60 On the other hand, contrary to PCPL's submissions, I do not consider that recognition of the non-contractual nature of a restitutionary claim puts an end to the present question.

61 It is plainly open to a Parliament to regulate what may or may not be recovered by way of a claim in restitution in relation to building work. The question here is whether the Victorian Parliament has done so by means of s 38 of the Act, in relation to the relevant parts of the work that was done by PCPL for the benefit of the Manns.

62 The task is to ascertain the true meaning of s 38 in the context of the Act as a whole, applying any relevant principles of statutory construction.

63 If the matter were free from authority, I would be quite confident that s 38 was not applicable any part of PCPL's claim in restitution.

64 The Manns rely principally on s 38(6). It provides that a builder is not entitled 'to recover any money in respect of a variation asked for by a building owner' unless certain specified conditions are met. The Manns would say that, on their face, the expressions 'to recover any money' and 'in respect of a variation asked for by a building owner' are both expressions of considerable width.

65 What should Parliament be taken to have meant by a 'variation'? Speaking generally, the word could refer either to different work or to a different contractual requirement in relation to work.

66 With alternative constructions being available, the word should not be read in isolation, divorced from its context.[81] The immediate context shows that a 'variation' must be something that can be 'asked for by a building owner'. But that is neutral. A building owner might 'ask for' different work, or might ask for a different agreement as to work. Looking a little wider, s 38(1) speaks of a 'building owner who wishes to vary the plans or specifications *set out in a major domestic building contract*'. This connotes a contractual change, more so than a work change. If anything, the same may be said about the reference in s 38(2) to the prospect that a variation will add more than 2% 'to the contract price'; about the reference in s 38(3)(a)(iii) to the 'cost of the variation' and the effect it will have on the contract price; about the reference in s 38(8) to 'contractual terms'; and about the references in s 39 to the plans and specifications '*set out in a major domestic building contract*' and to the contract price being adjusted to take account of the variations.

67 These concepts must surely inform the reader's understanding of the word 'variation' in s 38(6). Looking wider again, s 38 is contained in a Division – Division 4 of Part 3 – entitled 'Provisions applying after the contract is signed'. Further, the order and sequence of the provisions of Division 4 of Part 3 suggest that the contract itself is the main focus. Thus ss 37 and 38 come immediately after the first provision in the Division, s 36, which deals with documents to be given by builders to persons entering into major domestic building contracts. Further, s 38 is immediately succeeded by a provision, s 39, which prescribes the effect of a variation on the contract price. The next section, s 40, relates to progress payments under major domestic building contracts. The next provision, s 41, is in Division 5 of Part 3, which relates to the ending of major domestic building contracts, and to demands for payment under major domestic building contracts.

68 In my view, these contextual indications are strengthened by the principle of legality. The cases cited by PCPL in the footnote to paragraph 32 of its written submissions amply support this proposition.[82] And there is a passage in *Riggall* which makes a similar point. In that case, the main question was whether the builder could sue in Court (and not only in QCAT) on a *quantum meruit* where the work had been done under a cost plus contract which was rendered unenforceable by the *Domestic Building Contracts Act 2000* (Qld). Gotterson JA said:[83]

From this background of judicial decisions, I now turn to consider the issue in dispute. The approach to resolution of it is informed by the presumption of statutory interpretation against abrogation or curtailment of common law rights. The presumption has been confirmed at the highest level of authority on many occasions. It requires that a legislative intention to take away a common law right be clearly expressed. The degree of clarity of expression of such an intention that is required has been described in slightly differing ways by justices of the High Court. In *Sargood Brothers v The Commonwealth*,[84] O'Connor J said at 279 that "an Act will never be construed as taking away an existing right unless its language is reasonably capable of no other construction". To similar effect, Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ in *Berowra Holdings Pty Ltd v Gordon*[85] restated the position thus:

"The approach of the courts has consistently been to require very clear legislative intent before treating a statutory provision as taking away common law rights of a plaintiff, where there is an alternative construction available".[86]

The legislative intention to take away a common law right may be expressly stated or it may arise by necessary implication.[87] Here, an intention to abrogate the restitutionary right to claim quantum meruit has not been expressly articulated. The question is whether a clear legislative intention to that effect is necessarily implied in the provisions of the DBCA.

Ultimately, the Court held that the restitutionary remedy was available, despite certain statutory indications to the contrary.

69 However, other aspects of *Riggall* may be thought to assist the Manns.

70 In *Riggall*, the Court contrasted the section of the Queensland Act which rendered the contract unenforceable – s 55 – with another section – s 84 – which related to variations. The Court seemed to accept that s 84 would operate to limit recovery for variations even in a *quantum meruit* claim.[88]

71 However, much turns on the precise language of the relevant statutory provisions. In the Queensland Act, there is a special definition of 'variation'. Moreover, the word 'is defined by reference to the change in the subject work, rather than a change in the terms of the contract, so long as the additional work is domestic building work'.[89]

72 There is no such definition of 'variation' in the Victorian Act. Further, as mentioned above, the relevant context of the word in the Victorian Act tends to favour the meaning of a change in the terms of the contract rather than a change in the work.

73 Nevertheless, there is some Victorian authority, too, which may be thought to favour the position of the Manns. The cases in question were referred to in the Manns' written submissions before VCAT but, so it seems to me, without having been cited for the proposition now being advanced. I refer to *Sevastopoulos v Spanos*,[90] a decision of B. Beach J given in 1990, and the two *PACD* decisions referred to above, being decisions given by Judge Anderson of the County Court of Victoria.

74 In *Sevastopoulos*, B. Beach J held that on the proper construction of s 19(1) of the *House Contracts Guarantee Act 1987* (a predecessor of the Act), unless a variation to a domestic building work contract was in writing and signed by the builder and the building owner personally or by an agent, the builder was not entitled to recover in any court the cost of any work performed or materials supplied under the variation, and it did not matter whether the claim by a builder in respect of such cost was brought in contract, in *indebitatus assumpsit* or otherwise.

75 In the *PACD* cases, which relate in part to s 37 of the (current) Act – s 37 being similar in its terms and effect to s 38 – Judge Anderson treated himself as being bound by the decision of B. Beach J in *Sevastopoulos*.[91] Judge Anderson considered that the use of the word 'recover' in s 19(1) of the old Act and again in s 37 (and s 38) of the current Act was significant. He did not believe that the could distinguish, or not follow, *Sevastopoulos*.

76 With respect, I take a different view.

77 First, the observations made by B. Beach J about claims in '*indebitatus assumpsit* or otherwise' were obiter. His Honour held that the builders' claim was brought pursuant to an agreement, not in *indebitatus assumpsit* for the value of work done and materials supplied.[92] It was only by reference to an assumption that this was wrong that his Honour went on to consider the wider questions. Further, his Honour's views were strongly influenced by his Honour's understanding of the effect of certain standard form contractual restrictions on recovery for undocumented variations, as illustrated, in particular, by an English case from 1940 – *S. C. Tavener & Co. Ltd. v Glamorgan City Council*.[93] It is true that a strict view was taken by Humphreys J in the English case. Humphreys J distinguished the leading decision of the Privy Council (on appeal from Australia) in *Molloy v Liebe*.[94] However, the learned authors of the current edition of Brooking on Building Contracts comment that the decision in *Tavener* 'does no more than recognise that with a clause in what might be regarded as one of the usual forms the lack of a written order will be fatal if nothing more appears than that extra work was done and no written order was given. The decision does not question the proposition that the contractor may in appropriate circumstances recover on an implied promise to pay.'[95]

78 In any event, there are significant differences between the *House Contracts Guarantee Act 1987* and the Act. As to s 19(1) of the old Act itself, it provided that 'if at any time after a domestic building contract is entered into a variation is made to the contract' [then] 'the builder is not entitled to recover in any court the cost of any work performed or materials supplied under the variation unless the variation is in writing and signed by the builder and the building owner personally or by an agent authorised to act on behalf of the builder or building owner'. This provision was targeted directly against recovery of 'the cost of any work performed or materials supplied' under the variation. Under the (current) Act, the restriction is expressed to relate to the recovery of 'any money in respect of a variation'. The concepts are not the same, in my view.

79 Further, in the old Act, there was no equivalent to s 16(2) of the current Act (on which, aptly in my view, PCPL relies, as indicated above). Nor was there any equivalent of s 53(2)(b)(iii), which empowers VCAT to order the payment of a sum of money 'by way of restitution'. Nor was there an equivalent of s 133 of the current Act, which provides that a failure by a builder to comply with any requirement in the Act relating to a domestic building contract does not make the contract illegal, void or unenforceable, unless the contrary attention appears in the Act.

80 Finally, *Sevastopoulos* was decided before it was confirmed in *Sopov v Kane (No 2)* that, in Australia, the *entitlement* of a builder to sue on a *quantum meruit* rather than for contractual damages was 'too well settled by authority to be shaken'.[96]

81 There is no need to consider further the Manns' grounds that challenge the Senior Member's findings as to whether the conditions in s 38 were satisfied. Section 38 was not applicable in any event.

82 I reject the Manns' submission that this view means that the provisions of s 8 (relating to warranties) or any other provisions of the Act are likewise inapplicable after a builder accepts a wrongful repudiation by an owner and sues in restitution. I agree with PCPL that VCAT did not so hold and that its decision does not carry any such implication or consequences.

83 It follows that the appeal cannot be upheld by reference to any of the matters argued by the Manns in relation to the 'second underlying issue'.

Alleged mathematical error

84 The Manns allege that the final order of the Tribunal involves a mathematical error relating to the payments already received by PCPL, being an error likely to be attributable to transposition of figures.[97] It appears that the Manns claim that, whatever else may occur, the amount of $660,526.41 ordered by the Tribunal to be paid by the Manns to PCPL should be reduced by an amount which I have calculated (based on the Manns' written submissions) at $7,992.

85 No reference to this allegation was made in PCPL's written submissions nor by either counsel in oral submissions at the hearing.

86 I will invite the parties to let me know their positions in this regard at the handing down of judgment.

Conclusion

87 Leave to appeal will be granted but, subject to the abovementioned point relating to the alleged mathematical error, the appeal will be dismissed. I will hear the parties as to the question of costs.

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[1] *Paterson Constructions Pty Ltd v Mann (Building and Property)* [2016] VCAT 2100.

[2] *Paterson Constructions Pty Ltd v Mann (Building and Property)* [2016] VCAT 2100, [469]–[507].

[3] *Paterson Constructions Pty Ltd v Mann (Building and Property)* [2016] VCAT 2100, [508]–[518].

[4] (2009) 24 VR 510 ('*Sopov v Kane (No 2)*').

[5] As to the case of a proposed appeal to the Court of Appeal, see *Metricon Homes v Sofiley* [2016] VSCA 60; (2016) 49 VR 746.

[6] As to the manner in which a question of law may be identified, see *McSteen v Architects Registration Board of Victoria* [2017] VSC 276 (McDonald J) [9]–[14] and the cases there cited.

[7] See, generally, *Secretary to the Department of Premier and Cabinet v Hulls* [1999] VSCA 117; [1999] 3 VR 331 at 335–337 [8]–[17]; *Myers v Medical Practitioners Board* [2007] VSCA 163; (2007) 18 VR 48 at 55–57 [28]–[31].

[8] PCPL's written submissions dated 17 May 2017, [2].

[9] See and compare see *McSteen v Architects Registration Board of Victoria* [2017] VSC 276, [11].

[10] (2009) 24 VR 510. The Manns also have a formal submission (grounds 11 and 12 and questions of law numbers 2 and 9) to the effect that *Sopov v Kane (No 2)* was wrongly decided.

[11] See previous footnote.

[12] [2014] VSC 455 ('*Vasco*').

[13] Transcript of Proceedings, *Mann v Patterson Constructions Pty Ltd* (Supreme Court of Victoria, S CI 2007 00018, Cavanough J, 1-2 June 2017) ('Transcript') 144-147.

[14] (2009) 24 VR 510.

[15] [2014] VSC 455.

[16] *Paterson Constructions Pty Ltd v Mann (Building and Property)* [2016] VCAT 2100, [119].

[17] *Southern Han Breakfast Point Pty ltd v Lewence Construction Pty Ltd* [2016] HCA 52; (2016) 340 ALR 193, 208 [66]. I note that special leave to appeal to the High Court in *Sopov v Kane (No 2)* itself was refused: transcript of proceedings, *Sopov v Kane Constructions Pty Ltd* [2009] HCATrans 338 (11 December 2009).

[18] *Paterson Constructions Pty Ltd v Mann (Building and Property)* [2016] VCAT 2100, [508].

[19] *Paterson Constructions Pty Ltd v Mann (Building and Property)* [2016] VCAT 2100, [509]-[510]. Emphasis as in VCAT's reasons.

[20] Transcript, 88-89.

[21] *Sopov v Kane (No 2)* (2009) 24 VR 510, 516-520 [19]-[32].

[22] Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook Co., 6th ed, 2017) 281-282 [5.30].

[23] (2009) 24 VR 510, 517 [21].

[24] (2009) 24 VR 510, 518 [24].

[25] (2009) 24 VR 510, 518 [27].

[26] *Paterson Constructions Pty Ltd v Mann (Building and Property)* [2016] VCAT 2100, [103], [115]-[117].

[27] *Paterson Constructions Pty Ltd v Mann (Building and Property)* [2016] VCAT 2100, [104], [108].

[28] *Paterson Constructions Pty Ltd v Mann (Building and Property)* [2016] VCAT 2100, [115].

[29] (2009) 24 VR 510, 519 [30].

[30] (2009) 24 VR 510, 518 [26].

[31] [2014] VSC 455, [359(a)].

[32] Citing *Brenner v First Artists' Management Pty Ltd* [1993] VicRp 71; [1993] 2 VR 221, 262 (Byrne J) ('*Brenner*').

[33] The Manns' written submissions dated 27 April 2017, [68].

[34] PCPL's written submissions dated 17 May 2017, [17].

[35] (2009) 24 VR 510, especially at 518 [25] and 520 [35].

[36] [2014] VSC 455, [359(h)]. My emphasis.

[37] [2014] VSC 455, [359(a)].

[38] [1993] VicRp 71; [1993] 2 VR 221, 262 [sic, scil 263].

[39] Interestingly, citing the judgment of Brownie J in *Minister for Public Works v Renard Constructions (ME) Pty Ltd* (unreported, Supreme Court of New South Wales, Brownie J, 15 February 1989), and inviting a comparison with *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 276 ('*Renard*').

[40] Citing *Jennings Construction Ltd v OH & M Birt Pty Ltd* (unreported, Supreme Court of New South Wales, Cole J, 16 December 1988).

[41] [1993] VicRp 71; [1993] 2 VR 221, 256. The services were in the nature of managerial or representational services for a musical entertainer.

[42] [1993] VicRp 71; [1993] 2 VR 221, 256.

[43] PCPL's written submissions dated 17 May 2017, [4].

[44] *Sopov v Kane (No 2)* (2009) 24 VR 510, 518 [25].

[45] *Paterson Constructions Pty Ltd v Mann (Building and Property)* [2016] VCAT 2100, [512]-[518].

[46] PCPL's written submissions dated 17 May 2017, [14].

[47] PCPL's written submission dated 17 May 2017, [16].

[48] (1992) 26 NSWLR 324, 277-278.

[49] *Sopov v Kane (No 2)* (2009) 24 VR 510, 512-513 [6]-[8], 513-514 [11], 518 [25], 519 [28].

[50] [2004] NSWSC 273 ('*Eddy Lau*').

[51] *Eddy Lau* [2004] NSWSC 273, [72]-[76].

[52] [2017] NSWSC 698 ('*Home Site*').

[53] *Home Site* [2017] NSWSC 698, [96].

[54] *Paterson Constructions Pty Ltd v Mann (Building and Property)* [2016] VCAT 2100, [525].

[55] *Sopov v Kane (No 2)* (2009) 24 VR 510, 517 [21].

[56] *Pyrenees Shire Council v Day* [1998] HCA 3; (1998) 192 CLR 330, 387 [163] (Gummow J).

[57] *Sopov v Kane (No 2)* (2009) 24 VR 510, 517 [21].

[58] *Sopov v Kane (No 2)* (2009) 24 VR 510, 518 [25].

[59] Question of law number 3 and ground 9.

[60] [2004] NSWSC 273.

[61] The Manns' written submissions in the VCAT proceeding dated 28 September 2016, 61-78 [267]-[332].

[62] See the Manns' written submissions in the VCAT proceeding dated 28 September 2016, 63-64 [278]-[282].

[63] And to its companion provision, s 37, which relates to variations requested by the builder.

[64] *Paterson Constructions Pty Ltd v Mann (Building and Property)* [2016] VCAT 2100, [119]-[120].

[65] *Paterson Constructions Pty Ltd v Mann (Building and Property)* [2016] VCAT 2100, [511].

[66] Citing *Sopov v Kane (No 2)* (2009) 24 VR 510, 251-252 [43].

[67] The Manns' written submissions dated 27 April 2017, [173].

[68] The Manns' written submissions dated 27 April 2017, [174].

[69] The Manns' written submissions dated 27 April 2017, [175]-[177].

[70] [1933] HCA 25; (1933) 48 CLR 457, 476-7.

[71] PCPL's written submission dated 17 May 2017, [28]-[36].

[72] PCPL says here: 'The dispute in *Sopov v Kane* supra concerned a refurbishment and extension of a former industrial building to include, inter alia, 14 residential units *Kane Constructions Pty Ltd v Sopov* [2005] VSC 237 (30 June 2005) at para 1'.

[73] Citing *Sopov v Kane (No 2)* (2009) 24 VR 510, 251-252 [43].

[74] PCPL says here: 'It should be noted however that the Tribunal made a number of findings that indicate that the builder would (in all likelihood) have been awarded a very substantial sum had a s.38 assessment been necessary. See for example paras 48, 114-115 and 117 of the reasons.'

[75] Citing *Sopov v Kane (No 2)* (2009) 24 VR 510, 515 [12].

[76] Citing *Coco v The Queen* (1994) 179 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ) and *McLeod-Dryden v Supreme Court of Victoria* [2017] VSCA 60, [33] (Priest, Santamaria and McLeish JJA).

[77] Citing *Sopov v Kane (No 2)* (2009) 24 VR 510, 514 [10], 517 [21].

[78] [2016] 1 Qd R 187, 196 [28].

[79] [1987] HCA 5; (1987) 162 CLR 221 ('*Pavey & Matthews*').

[80] Citing *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5; (1987) 162 CLR 221, 228 (Mason and Wilson JJ), 263 (Deane J).

[81] *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; (2015) 256 CLR 1, 28 [57] ('*Cunneen*').

[82] See above. See also *Cunneen* [2015] HCA 14; (2015) 256 CLR 1, 27 [54].

[83] *Riggall* [2016] 1 Qd R 187, 197-198 [34]-[35].

[84] [1910] HCA 45; (1910) 11 CLR 258.

[85] [2006] HCA 32; (2006) 225 CLR 364, 373 [23].

[86] See also *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30] (Gleeson CJ) and D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 243-244 [5.35].

[87] Citing *Melbourne Corporation v Barry* [1922] HCA 56; (1922) 31 CLR 174 (Higgins J).

[88] *Riggall* [2016] 1 Qd R 187, 196-197 [31], 198 [37], 199-200 [46].

[89] *Thompson Residential Pty Ltd v Tran* [2014] QDC 156, [11], referred to in *Riggall* [2016] 1 QdR 187, 196-197 [31].

[90] [1991] VicRp 59; [1991] 2 VR 194 ('*Sevastopoulos*').

[91] See the *2007 PACD case* [2007] VCC 1683, [30]-[33] and the *2008 PACD case* [2008] VCC 26, [2].

[92] *Sevastopoulos* [1991] VicRp 59; [1991] 2 VR 194, 202.

[93] (1940) 164 L. T. 357 ('*Tavener*').

[94] (1910) 102 L. T. 616.

[95] Damien Cremean, Michael Whitten and Michael Sharkey, *Brooking on Building Contracts* (Lexis Nexis Butterworths, 5th ed, 2014) 209 [10.8].

[96] *Sopov v Kane (No 2)* (2009) 24 VR 510, 512 [5]. See also 515 [12], [14], 517-518 [21]-[23].

[97] The Manns' written submissions dated 27 April 2017, [46], [50].
