A.M.O. Rifat Holdings Pty Ltd v Dib [2026] VSCA 124 (4 June 2026)

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SUPREME COURT OF VICTORIA

COURT OF APPEAL

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S EAPCI 2024 0099

A.M.O. RIFAT HOLDINGS PTY LTD (ACN 106 082 900)	Applicant/
	Cross-respondent
v	
SARKIS DIB & ANOR	Respondents/
(according to the attached Schedule)	Cross-applicants

JUDGES:	NIALL CJ, BEACH and DONAGHUE JJA
WHERE HELD:	Melbourne

DATE OF HEARING:	25 March 2026
DATE OF JUDGMENT:	4 June 2026
MEDIUM NEUTRAL CITATION:	[2026] VSCA 124
JUDGMENT APPEALED FROM:	[2024] VCAT 419 (Woodward P)

RESTITUTION – *Quantum meruit* – Domestic building contract with divisible stages and equal instalments due upon the completion of each stage – Builder sought to recover fair value for partially completed stages – Amount of contractual entitlement to payment on completion of a stage is a 'cap' on amount recoverable, not a substitute for assessing the value of work done – *Quantum meruit* different to contractual damages – Builder's evidence incapable of establishing value of the work done for which there was no contractual entitlement to payment – Not in interests of justice to remit matter to Tribunal to allow builder to re-run case on different evidence – Leave to appeal refused – *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32; (2019) 267 CLR 560; *South Australian Harbors Board v South Australian Gas Co* [1934] HCA 45; (1934) 51 CLR 485; *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5; (1987) 162 CLR 221, considered; *University of Wollongong v Metwally [No 2]* [1985] HCA 28; (1985) 59 ALJR 481, followed.

CONTRACT – Domestic building contract – Side agreement for cash payments of part of contract price – Statutory prohibition on builder retaining amounts contrary to *Domestic Building Contracts Act 1995*, s 40(2) – Tribunal's power to order restitution under s 53(2)(b)(iii) not at large – Builder ordered to repay amounts already paid under side agreement – Leave on cross-appeal ground allowed – Leave to appeal refused – *Stephens v Cameron* (2021) 65 VR 117, applied; *Imerva Corporation Pty Ltd v Kuna* [2017] VSCA 168*,* distinguished.

APPEALS – Question of law – Section 148 of *Victorian Civil and Administrative Tribunal Act 1998* – Proposed ground alleging error in Tribunal's findings concerning termination of contract was not on a question of law – No jurisdiction to entertain that ground of proposed cross-appeal – *Chief Commissioner of Police (Vic) v Crupi* [2023] VSCA 245; (2023) 72 VR 280; *Haritos v Federal Commissioner of Taxation* [2015] FCAFC 92; (2015) 233 FCR 315; *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280, applied; *Stojanovski v Australian Dream Homes Pty Ltd* [2015] VSC 404, distinguished.

Domestic Building Contracts Act 1995, ss 3(1), 40(1), 40(2), 40(4), 53(2)(b)(iii), 133.

Victorian Civil and Administrative Tribunal Act 1998, s 148.

Counsel

Applicant/ Cross-respondent:	Mr A Morrison with Mr J Lipinski
Respondents/ Cross-applicants:	Mr R Andrew KC with Mr J Silver

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Applicant/Cross-respondent:	Ward & Co Legal Consultants
Respondents/Cross-applicants:	Noble Lawyers

NIALL CJ

BEACH JA

DONAGHUE JA:

1. This is an application for leave to appeal, and an application for leave to cross-appeal, from orders made by the President of the Victorian Civil and Administrative Tribunal (the 'Tribunal') in a proceeding between the applicant builder, A.M.O. Rifat Holdings Pty Ltd (the 'builder') and Amal Dib and Sarkis Dib (together the 'owners'). That proceeding concerned a dispute between the owners and the builder with respect to the construction of a three-storey house on the owners' land.
2. The builder seeks leave to appeal on grounds that the Tribunal erred in law in valuing its entitlement to payment on a *quantum meruit* for work that it had performed but for which it

had not been paid, and in finding that a side agreement to the building contract was void because it contravened s 40 of the *Domestic Building Contracts Act 1995* (the ‘Act’).

3. The owners seek to leave to cross-appeal against the Tribunal’s finding that the builder validly terminated the building contract, and against the Tribunal’s failure to order a refund of payments that had already been made by the owners to the builder pursuant to the side agreement.

4. For the reasons that follow, with respect to the builder’s application we would refuse leave to appeal on both grounds. With respect to the owners’ application, we hold that the Court has no jurisdiction with respect to ground 1 because it is not an appeal on a question of law. We would grant leave to cross-appeal on ground 2, allow the cross-appeal on that ground, and order that the builder pay to the owners $50,000 forthwith.

PART A: BACKGROUND

5. On 5 May 2017, the builder signed a Master Builders Association HC6 Contract (the ‘contract’) for the construction of a house at 5 Eaglemont Crescent, Eaglemont for the contract price of $1,600,000. On the same date the parties also signed a further contract (the ‘side agreement’), in which the owners agreed to pay the ‘Total Construction Cost’ of $1,710,000. The side agreement provided for the payment of the additional $110,000 in cash instalments. The owners were to pay those cash instalments upon the completion of the same milestones that triggered the entitlement to progress payments under the contract.[1]

6. The builder had originally provided a higher quote of $2,188,482. The owners could not afford that quote, and therefore agreed with the builder to reduce the scope of the project. At a meeting held on or around 3 April 2017, Mr Rifat, who is the builder’s sole director, agreed with the owners that he would ‘do it for $1.71, but I want $110 in cash. Tradies love cash and it’s cheaper to use cash when you hire them’.[2] The price reduction to $1.71 million was also recorded in an email sent by the builder’s project manager later the same day.[3]

7. In the contract, the parties agreed that the progress payments fixed by s 40 of the Act did not apply (as is permitted by s 40(4) of the Act). The parties instead adopted the schedule specified as ‘Method B’ in item 23.2 in the appendix to the contract. It provided that ‘the percentage of the Contract Price and amounts payable are as follows’:[4]

Name of Stage	**If Stage is NOT the same as a Stage defined in this Contract or Section 40 (1) of the Domestic Building Contracts Act 1995, what does Stage mean?** **Name of Stage or Description of Stage of Works if different from Method A**	**% OF TOTAL CONTRACT PRICE**	**AMOUNT (in $ figures)**
Deposit	*Deposit* (Deposit)	*5%*	$80,000.00
Ground Plumbing	*Completion of Ground Plumbing Works*	*10%*	$160,000.00

Base Stage	*Completion of Slab*	*10%*	$160,000.00
Frame Stage Ground Floor	*Completion of Ground Floor Frame*	*10%*	$160,000.00
Frame Stage First Floor	*Completion of First Floor Frame*	*10%*	$160,000.00
***Frame Stage Second Floor Floor* [sic]**	*Completion of Second Floor Stage* [sic]	*10%*	$160,000.00

8. Some of the terms used in that table were defined in cl 1 of the contract. Relevantly:

> **Base Stage —** means ... For a home with a suspended concrete slab floor, when the concrete footings are poured;
> **Frame Stage** — means when the home's frame is completed and approved by the building surveyor.

9. On 5 July 2017, the registered building surveyor issued the building permit for the works. On 6 July 2017, the builder issued invoices for the deposit stage claim. This was paid by the owners,[5] and construction began on or about 19 July 2017.

10. The ground plumbing stage and base stage were completed, and the corresponding progress payments under the contract were made.

11. The builder completed the ground floor frame stage on about 10 October 2017 and, on about that date, issued a $160,000 progress claim for that work. That claim was paid by the owners' financier.[6] On the same date, the builder also made a payment claim for the fourth $10,000 cash payment under the side agreement.

12. In September and October 2017, issues emerged between the parties with respect to the cost of variations resulting from the need to excavate deeper foundations, and concerning the swimming pool.

13. On 31 October 2017, the owners paid the third cash payment under the side agreement (with respect to the completion of the base stage), having previously made cash payments under that agreement of $30,000 on 1 August 2017 and $10,000 on 6 September 2017.[7]

14. On 29 January 2018, at a meeting at a café near the site, relations between the parties soured. The owners accused the builder of fabricating and overcharging for excavation variation costs, which the builder denied. [8]

15. On 13 March 2018, the builder issued an invoice for the first-floor frame stage progress claim in the sum of $160,000.[9] Around a month later, on 17 April 2018, Mrs Dib (the second owner) emailed Mr Rifat and instructed him to cease works immediately, stating: 'We're requesting you not to proceed with any further work on our site as of today until further notice'. Mrs Dib attached a preliminary report from an inspector (Mr Ryan) who the owners had arranged to attend the site. That report alleged the first-floor frame stage had not been completed.[10]

16. In response to Mr Ryan's report, the builder withdrew the first-floor frame stage payment claim and stated that it remained ready and willing to perform the works and to comply with its obligations under the contract.[11]

17. On 20 April 2018, the builder emailed the owners stating that there would be substantial delays as a result of the stop works order and alleging that the owners had failed to provide any reason for that order. Mrs Dib replied, stating the builder had breached the contract and that the owners had filed a complaint with Domestic Building Dispute Resolution Victoria.[12]

18. On 30 April 2018, the builder received an email from the owners. It relevantly stated:

> After our meeting on Monday 23/4/18, we've sent you an email about our concerns, list of demand[s] and new progress payment schedule template which is self explanatory [sic], reasonable and suit[s] both parties.
> *There will be no more payment until lock up stage* ...
>
> There will be no more meeting.
>
> It's your last opportunity to make it right, so we can move forward ...[13]

19. On 7 May 2018, Mrs Dib sent a further email to the builder, in which she referred to a meeting on 3 May 2018 that was 'not successful' and had caused the owners' concerns to increase. Mrs Dib stated that '[n]o payment will be made until we resolve these issues and concerns'.

20. On 13 July 2018, the registered building surveyor attended the site and directed the builder to fix work in respect of the frame stages. The registered building surveyor returned to the site on 27 July 2018 and approved the frame stages. Shortly after, the builder issued progress claims for the first and second floor frame stages ($160,000 and $154,800) and for two sums of $10,000 for the corresponding stages under the side agreement.[14] Those claims were not paid.

21. On 8 August 2018, the builder sent the owners (by both email and registered post) a notice of intention to terminate the contract.

22. On 29 August 2018, the builder again emailed the notice of intention to terminate the contract to the owners, noting that it had 'not received any response from you to date and that you have failed to remedy the breaches and confirm that you will abide by the terms of the contract as required under the notices'.

23. On 24 September 2018, the builder sent to the owners (by email and registered post) a notice terminating the contract.[15]

24. The builder then commenced proceedings in the Tribunal. It alleged that the owners breached the contract by refusing to pay progress payments under the contract for the first and second floor frame stages.[16] It asserted that it had validly terminated the contract and claimed $729,112.03 in damages, comprising the unpaid progress payments, variations, delay claims and interest. In the alternative, the builder claimed that the owners were liable to make restitution on a *quantum meruit* basis in the amount of $365,746.78.

25. The owners, by contrast, alleged that the base, ground, first and second floor frame stages were defective and incomplete, with the result that progress payments on those

stages had not fallen due. The owners also claimed that the cash instalment sums were not enforceable under the side agreement by reason of s 40 of the Act. The owners counterclaimed for damages in the sum of $240,234, liquidated damages in the sum of $3,285.71, interest and costs.[17]

26. The President ultimately held[18] that, by reason of the existence of substantial defects, the builder had failed to complete the base stage and the frame stages of the house (and therefore had not become entitled to the progress payments for those stages). The President also held that the side agreement was void, and that the builder was not entitled to any amounts unpaid under that agreement. However, his Honour declined to order that the builder repay the amounts that had already been paid under the side agreement. Finally, his Honour held that, while the builder had validly terminated the contract, its *quantum meruit* claim should be assessed at nil. The result was that 'there is a net sum of $88,367.01 payable by the builder to the owners'.[19]

27. The aspects of the President's conclusions that are in issue by reason of either the proposed appeal or the proposed cross-appeal fall within three broad categories.

> (a) The first concerns the value, if any, of the builder's claim for payment on a *quantum meruit* basis.
>
> (b) The second concerns the side agreement, including whether the builder is entitled to further payments under that agreement, or whether the owners are entitled to the refund of payments already made thereunder.
>
> (c) The third concerns whether the builder validly terminated the contract or whether, instead, the owners did so.

28. We consider the issues in that order.

PART B: THE **QUANTUM MERUIT** *CLAIM (APPEAL GROUND 1)*

29. The President held, in reasoning that is not challenged, that substantial defects in the structural brick columns that formed part of the base stage meant that the base stage was incomplete.[20] It followed from that conclusion that 'each of the frame stages was also incomplete'.[21] On that basis, the President held that the builder did not have a contractual entitlement to the progress payments for either the base or frame stages (although the builder had in fact been paid the progress payments for the base and ground floor frame stages).

30. The builder argued that, if it was not contractually entitled to the unpaid frame stage payments, then it should recover $365,746.78 on a *quantum meruit* basis. That amount was claimed to represent the 'reasonable value of the work performed to the date of termination', after deducting the amount in fact paid by the owners.

31. In its points of claim, the builder pleaded its *quantum meruit* argument in a single paragraph as follows:

> Further and/or in the alternative, pursuant to the matters pleaded in paragraphs 1 to 23 herein, the Builder claims the value of the works undertaken on a *quantum*

meruit basis for works, labour and materials provided to the Owners.

32. The builder did not particularise that claim until a few days before the trial. In a document headed 'Particulars of loss and damage' dated 15 February 2023, the builder stated that its '*quantum meruit* claim is made up as follows', before setting out a table listing all of the invoices that the builder had issued as part of the project. That table listed the name of the recipient of the invoice and its amount, but provided no information as to the stage of the project that the invoice concerned, or whether the builder had been paid with respect to that work. The affidavit sworn by Mr Rifat on 17 February 2023 to provide evidential support for that table simply exhibited some of the invoices listed in the table, although many were missing. The table concluded with the following calculations:

TOTAL	**$813,122.33**
***Plus* Preliminaries and Overheads at 5%**	**$40,656.12**
***Plus* Builder's Margin at 15%**	**$121,968.33**
Subtotal	**$975,746.78**
***Less Amounts* paid to Builder**	**$610,000.00**
Amount due to Builder under *Quantum Meruit Claim*	**$365,746.78**

33. The above table makes clear that the methodology adopted by the builder to quantify its *quantum meruit* claim concerned the *whole* of the work undertaken on the project, whether or not the builder had accrued a contractual entitlement to payment for work performed on particular parts of the project.

34. In addressing the *quantum meruit* claim, the President identified the source of the Tribunal's power in domestic building disputes to order recovery based on the equitable principle of *quantum meruit* as deriving from s 53(2)(b)(iii) of the Act, which provides that the Tribunal may order the payment of a sum of money by way of restitution. He observed that '[t]his provision also serves as a useful reminder that the principle enlivens an obligation to pay fair and just compensation for a benefit which has been accepted, not the cost'.[22]

35. The President stated[23] that the 'correct approach' to calculating the benefit to the owners for which the builder was entitled to be reimbursed appeared in the follow passage from the joint reasons of Nettle, Gordon and Edelman JJ in *Mann v Paterson Constructions Pty Ltd* ('*Mann*'):

> Equally, where the claim is founded on an obligation to pay for services rendered under a *contract which is unenforceable*, it has been held that '[o]rdinarily' the measure of restitution 'will correspond to the fair value of the benefit provided (eg remuneration calculated at a reasonable rate for work actually done or the fair market value of material supplied)'. Prices stated in the contract are regarded as relevant, but they remain 'evidence only, on the question of amount'. That approach is informed by a legal concern that direct application of the contract

price would risk incoherence with the policy of the law rendering the contract unenforceable, although this will always require consideration of that policy.[24]

36. The President observed that the parties had provided 'very limited assistance' in determining how to approach the calculation of the *quantum meruit* claim. He explained that he was unwilling to calculate the value of that claim by adopting the value of the builder's unpaid invoices, because:

> a. as *Mann v Paterson* makes clear, these are relevant but not decisive to the quantification process;
> b. in this case, given the round and equal amounts of the relevant progress payments, I am not satisfied that these represented a genuine estimate of the work contemplated by each stage; and
>
> c. the nature and extent of the defects in the base stage and each of the frame stages ... undermines any presumption that the invoiced amounts represent the value to the owners of the work.[25]

37. Having rejected the builder's proposed approach, the President ultimately concluded that he should determine the value of its *quantum meruit* claim 'doing the best I can based on the evidence I have'.[26] Proceeding in that way, the President held that 'the benefit to the owners of the works undertaken by the builder and not paid for at the time of contract termination is nil'.[27] He reached that conclusion by the following steps:

> a. the original [c]ontract price was $1,710,000;
> b. there should be deducted from this both the $610,000 paid by the owners and the $30,000 claimed but not paid under the collateral agreement, which the builder is not entitled to recover on a quantum meruit basis, leaving $1,070,000;
>
> c. the contract price under the owner's replacement contract with their new builder Marbuilt Pty Ltd (*Marbuilt*) (not including the costs of rectifying defects and variations) was $1,040,000;
>
> d. ... the delay and unrecoverable costs suffered by the owners as a result of the builder's defective work would comfortably equate to the $30,000 difference in the amounts in (b) and (c) above.[28]

38. The President also found that, if the owners could otherwise have established an entitlement to be repaid the progress payments for the base and ground floor stages, then his Honour 'would be satisfied that they had received a benefit from the works equivalent to the value of those progress payments (including the $50,000 in payments under the [side agreement]'.[29] Those sums would therefore have been payable to the builder under its *quantum meruit* claim.[30]
39. Proposed ground 1 in the builder's appeal concerns the above reasoning. That ground states:

> The President erred in law, or failed to apply correct principles, in valuing the applicant's entitlement to payment on a *quantum meruit* for the incomplete frame stages by:
> (a) valuing the whole of the work, rather than just the work done referable [to] the incomplete frame stages (Reasons at [123(a)]–[123(b)]);
>
> (b) deducting the respondents' costs to bring the whole of the work to completion (Reasons at [115]–[117] & [123(c)]);
>
> (c) not having regard to the contractual value of the frame stages (Reasons at [119]); and
>
> (d) deducting ancillary damages sums which the President had found in the Reasons at [169]–[173] were not made out (Reasons at [123(d)]).

The parties' submissions

40. The builder submits that the President erred in law or 'failed to apply correct principles' in valuing their post-termination *quantum meruit* entitlement. In support of ground 1, the builder submits that, because the contract contained 'divisible payment obligations', the value of the *quantum meruit* claim should have been limited 'only to the incomplete stages'. That followed because the High Court held in *Mann*[31] that a claim for *quantum meruit* was available only for work done before termination for which the builder had *not* accrued a contractual right to payment. As a contractual right to payment had accrued with respect to the deposit and completed ground plumbing stage, it followed that the President had erred by including the amounts corresponding to those stages in the calculation of the value of the *quantum meruit* claim.

41. The builder also submits that the President erred by deducting the owners' costs to complete the whole project, contending that this 'had no proper place' in *quantum meruit* calculation in circumstances where the builder had been entitled to terminate the contract. Further, to use the cost to have a new builder complete the work was inappropriate because that would include 'several layers of margin' that the existing builder would not have to complete their own work.

42. The owners did not attempt to defend the President's methodology. They conceded that, having regard to *Mann*, it was 'probably correct' as a 'bare statement of principle' that the Tribunal's analysis should have been limited to the incomplete stages. However, they submitted that the President's error was the result of the approach taken by the builder, which advanced its *quantum meruit* claim on the basis of the 'cost of the whole of the work' by relying upon 'an unsorted and unexplained list of trade invoices'. The owners agreed with the builder that, in order to be consistent with *Mann*, the value of the *quantum meruit* claim had to be limited to work that the builder had done for which it had not accrued a right to payment. But the owners pointed out that the builder's evidence drew no distinction between the work which it had done for which it had accrued a contractual right to payment, and that for which it had not. Nor did its 'very brief' submissions refer to the requirement from *Mann* that the claim should be limited in that way. The builder having run its *quantum meruit* claim in a manner

that was inconsistent with *Mann*, the owners contend that it should not be permitted a second opportunity to run that claim in a different way and on better evidence.

43. In answer, the builder submitted that it does not require new or better evidence to value its *quantum meruit* claim, because *Mann* requires that valuation to be calculated 'in accordance with' the contract price or appropriate part of the contract price. The builder submitted that the President failed to reason in that way because he relied upon the wrong part of the reasoning in *Mann*. Specifically, he relied upon a passage concerning a claim founded on an obligation to pay 'under a *contract which is unenforceable*'.[32] Where, as in the present case, work was performed under an *enforceable* contract, the builder contends that *Mann* supports the conclusion that its *quantum meruit* claim should have been valued 'by reference to the contract price for acts done prior to termination'. Had the President identified the correct passage from *Mann*, he would not have eschewed the contract price on the ground that he was not satisfied that the 'round and equal amounts' of the progress payments represented a 'genuine estimate of the work contemplated by each stage'.

44. On a correct application of *Mann*, the builder submits that it ought to have recovered the 'full amount due upon completion of each of the incomplete stages less the cost of bringing those stages to completion' (which, on the facts, was the cost of remedying the defective works). On that basis, the builder contends that its *quantum meruit* claim should have been valued as at least $314,800, less $113,918.53 in defective works.

Consideration

45. As we have summarised above, the method favoured by the President led his Honour to conclude that the benefit to the owners of work done but not paid for was nil.[33] The President valued the work performed by examining what it cost the owners to complete the entire contract (including rectifying defects) and subtracting what the owners had already paid to the builder. Having regard to the cost of getting a new builder to complete the construction, the amount already paid to the builder, and after applying deductions for delay and unrecoverable costs incurred by the owners as a result of the builder's defective work, the President concluded that the house was built for an amount that was close to the original contract price and therefore there was no value for the owners in the builder's work performed with respect to the incomplete stages.[34]

46. Notwithstanding that neither party sought to uphold this reasoning, two matters stand in the way of a grant of leave to appeal. First, the error on the part of the President was induced by the builder, who in claiming 'a quantum meruit claim for $365,746.78 being the reasonable value of the work performed *less* the sum of $610,000 paid by the Owners', impermissibly sought restitution assessed on the basis of the *whole* of the work. Second, even if the President's orders were set aside, having regard to the way in which the builder conducted its case in the Tribunal it is not in a position to satisfy the Court that a different order should be made in its favour. The second of those matters requires elaboration.

47. In the context of a divisible contract, there is no fixed way to value a partially completed stage. As Dixon J observed in *South Australian Harbors Board v South Australian Gas Co*,[35] identification of 'a fair and reasonable rate of remuneration, in other words, a *quantum*

meruit', raises a 'question of fact', the answer to which 'depends very much upon the methods of reasoning which are pursued'.

48. *Mann* did not resolve the question of how to value a partially completed stage of a divisible contract. With respect to work performed pursuant to an enforceable contract prior to its termination, Nettle, Gordon and Edelman JJ in *Mann* said:

> It is ... appropriate to recognise that, where an entire obligation (or entire divisible stage of a contract) for work and labour (such as, for example, an entire obligation under or an obligation under a divisible stage of a domestic building contract) is terminated by the plaintiff upon the plaintiff's acceptance of the defendant's repudiation of the contract, the amount of restitution recoverable as upon a quantum meruit by the plaintiff for work performed as part of the entire obligation (or as part of the entire divisible stage of the contract) should prima facie not exceed a fair value calculated in *accordance with the contract price or appropriate part of the contract price*.[36]

49. As the final sentence of this passage demonstrates, *Mann* contemplates that the amount of restitution recoverable upon a *quantum meruit* should be calculated 'in accordance with' — and should not exceed — the contract price, but it does not otherwise prescribe a fixed methodology for identifying a 'fair and reasonable rate' of remuneration for the services. In other words, beyond capping any *quantum meruit* at the contract price — and requiring that any valuation be controlled by any applicable rates, prices or other constraints delineated in the contract — *Mann* did not decide how to quantify the value of the work performed in cases such as the present.[37]

50. The builder ultimately advanced two means of valuing the work in respect of incomplete stages:

> (a) On its primary argument, the builder sought to value the claim of an incomplete stage by subtracting from the amount contractually prescribed for the stage an amount that represents the costs to complete the stage. More particularly, on the facts of this case, the costs of completion were said to be represented by the costs of rectification of defects (being costs that the President had assessed).
>
> (b) The alternative argument, which was advanced by the builder in oral submissions, is for this Court to attribute a fair value to the work on the basis of invoices, or remit the matter to the Tribunal to do the same.

51. It is convenient to address the submissions in the reverse order, starting with the usual approach that is adopted in relation to *quantum meruit* claims arising from building contracts.

The usual approach

52. In *Pavey & Matthews Pty Ltd v Paul*, Deane J observed that the measure of a *quantum meruit* claim was an 'amount which constitutes, in all the relevant circumstances, fair and just

compensation for the benefit or "enrichment" actually or constructively accepted', which ordinarily corresponds to 'remuneration calculated at a reasonable rate for work actually done'.[38] The focus is upon valuing a benefit unjustly gained by a defendant at the expense of the claimant. The starting point in valuing that benefit is the price that a reasonable person in the defendant's position would have had to pay for the relevant work.[39]

53. Consistently with the above statement of principle, a common or 'usual'[40] way in which work is valued for the purpose of the *quantum meruit* claim is to value the claim by reference to the charges commonly made for like services. In order to comply with *Mann*, that value is subject to the contract price for any divisible but incomplete stage.

54. The problem for the builder in relying on this method is that, because of the way that its case was run below, there was no adequate or proper factual basis on which the Tribunal could have disentangled from the undifferentiated mass of invoices put in evidence an amount referable to the work for the incomplete stages.

55. There is no basis for this Court to undertake that factual enquiry and it would not be in the interests of justice to remit the matter to the Tribunal in circumstances where the builder did not run that case at trial in any meaningful way. In substance, to remit it on that basis would be to allow the builder to run a different case on remittal. We would not grant leave to appeal so as to permit that course to be taken.

The contract approach

56. As already indicated, on its primary argument, the builder seeks to value the claim of the incomplete stages by subtracting from the amount contractually prescribed for the relevant stage an amount that represents the costs to complete the stage.

57. It does so in circumstances where the builder — having terminated the uncompleted contract upon repudiation by the owners — elected to seek restitution in respect of the value of services rendered under the contract.[41] Yet the builder now seeks to value its claim by what it would have gotten from performance of the contract stage. The effect of this approach would be to place the builder in the position it would have been had the relevant stage of the contract been performed in accordance with its terms.[42] It would mean that the quantification of the *quantum meruit* claim would cleave closely to the methodology applicable to contractual damages.[43] In substance, it would equate with expectation damages in contract (albeit confined to the relevant contractual stage).

58. Before *Mann*, it would have been said that the suggested approach would impermissibly conflate contractual damages, based on the forward-looking assessment of what would have happened had the contract been performed, with quantification of a fair sum for the value of the works performed to the benefit of the owners.[44] It would be difficult to reconcile with the notion that there is an election between two alternative modes of recovery.[45]And it risks including aspects of the incomplete contract, such as the profit margin that would be earned in respect of the entire stage (including on works not yet provided), that are not part of the value of the works done to the point of termination.

59. In submitting that *Mann* has overlaid upon the usual approach to valuing a *quantum meruit* claim with respect to work performed pursuant to an enforceable contract prior to its

termination a requirement that the value of such a claim be calculated 'in accordance with' the contract price or appropriate part of the contract price, the builder relies particularly on the following passage in the judgment of Nettle, Gordon and Edelman JJ:

> [*W*]*here a contract is enforceable, but terminated for repudiation, there are no reasons of practicality and few in principle to eschew the contract price*. It has been said that '[t]he defendant cannot refuse to abide by the contract and at the same time claim its protection' against the innocent plaintiff. But, as has been seen, where a contract is terminated for breach, *it continues to apply to acts done up to the point of termination, and it remains the basis on which the work was done*. There is, therefore, nothing about the termination of the contract as such that is inconsistent with the *assessment of restitution by reference to the contract price for acts done prior to termination. The contract price reflects the parties' agreed allocation of risk. Termination of the contract provides no reason to disrespect that allocation*. Granted, there may be difficult questions of apportionment of the contract price ... There may also be difficult questions in identifying the contract price ... But such difficulties of valuation and apportionment have long been encountered in other areas. [46]

60. In *Mann*, Nettle, Gordon and Edelman JJ went on to say:

> For just as a contract may inform the scope of fiduciary and other equitable duties, the price at which a defendant has agreed to accept the work comprising an entire obligation is logically significant to the amount of restitution necessary to ensure that the defendant's retention of the benefit of that work is not unjust and unconscionable. In point of principle, deference to contract as a reflection of parties' agreed allocation of risk is at least as appropriate in Australia as it is in England.[47]

61. The first passage quoted above suggests that the plurality thought it appropriate to assess the amount of a claim in *quantum meruit* for work done prior to termination by reference to the contract price (as that respects the agreed allocation of risk pursuant to which the work was performed). The passage recognises that questions of apportionment (of the contract price) may arise, because the contract will not specify the value of an incomplete stage, but it contemplates that those questions must be answered in order to value the *quantum meruit* claim. By contrast, the passage in the reasons of Nettle, Gordon and Edelman JJ that we quoted in para [48] above emphasises that the amount of the claim 'should prima facie *not exceed* a fair value calculated in accordance with the contract'. The difference has caused some commentators to observe that 'cap and basis (for valuation) tend to coalesce in the judgm[48]ts'.[48]

62. The other member of the majority in *Mann*, Gageler J, did not clearly state that the amount of a restitutionary claim for work done prior to termination should reflect the contract price for the applicable contract stage. However, in explaining why the amount recoverable upon a *quantum meruit* could not exceed the contract price, his Honour said:

> The common law rule should accordingly be that the amount recoverable on a non-contractual quantum meruit as remuneration for services rendered in performance of a contract prior to its termination by acceptance of a repudiation cannot exceed *that portion of the contract price as is attributable to those services*. Issues concerning the identification and appropriate method of *apportionment of the contract price* are best left to be addressed on a case by case basis if and when they arise.[49]

63. The reference in the final sentence of that paragraph to issues concerning the 'appropriate method of apportionment of the contract price' implies that the amount that is recoverable as 'representing reasonable remuneration for the work'[50] is to be determined by 'apportioning' the contract price to reflect the value of the work that was done prior to termination. That points against a methodology by which the amount of the reasonable value of the works is calculated *independently* of the contract price, with that price being relevant only as a cap on the recoverable amount.

64. As we have said, both parties recognise that *Mann* did not decide how to quantify a *quantum meruit* claim in a case such as the present. The question is how much guidance its reasoning provides. In that regard, we accept the builder's submission that the plurality's recognition that a contract that is terminated for breach 'continues to apply to acts done up to the point of termination' and 'remains the basis on which the work was done' means that nothing about the termination was 'inconsistent with the assessment of restitution by reference to the contract price for acts done prior to termination'.[51]

65. The builder contends that *Mann* supports its submission that, upon termination of the contract, it was entitled to recover the full amount due upon completion of the incomplete stages, less the cost of bringing those stages to completion.

66. In light of the above discussion, while *Mann* establishes that, in the case of an enforceable contract, 'the amount of restitution recoverable as upon a quantum meruit ... should prima facie not exceed a fair value calculated in *accordance with the contract price or appropriate part of the contract price*',[52] it does not wholly equate *quantum meruit* with the methodology applicable to the calculation of contractual damages. Had that been the intended result, there would have been no reason to retain *quantum meruit* as an available choice for partially completed work performed prior to termination of an enforceable contract. Yet a majority of the High Court decided not to abandon *quantum meruit* in that context.[53] In doing so, their Honours sought to align the two remedies to the extent of ensuring that any recovery in a *quantum meruit* claim would not exceed the contract price (while leaving open the possibility that in particular cases it may do so). But the Court in *Mann* did not abandon the central conception of *quantum meruit* as a mechanism to recover the fair and reasonable value of the work done.[54]

67. Consistently with the above, the builder accepted in oral submissions that *quantum meruit* is a backward-looking claim for the value of the work done, or the value of the benefit accepted. Even before *Mann*, the contract price provided some evidence of that value. After *Mann*, the contract price has a more prominent role. Nevertheless, in our view *Mann* does not dictate that a contractual damages-style measure must be applied as a proxy for the

valuation of partially completed work in a *quantum meruit* claim. As we see it, the price of a divisible stage of a contract represents a cap on the amount that can be recovered in a *quantum meruit* claim, but does not alter the fundamental question: what is the value of the work done.

68. There is not necessarily a linear relationship between the work done and the contract price for a particular stage. For that reason, the progress payment that is due under a contract upon the completion of a stage may not be a useful starting point in valuing partially completed work. To give an hypothetical example: assume, as this contract does, a contract that provides an entitlement to a stage payment upon the completion of a slab. It would not follow that, if half a slab was laid, the value of the work would be 50 per cent of the stage price. Indeed, in the context of the parties' bargain, half a slab may be of no value at all. Put differently, there may be no correlation between the percentage of work completed relative to the stage price, and the value of that work to the recipient.[55]

69. That point is compounded where a divisible contract contains stages priced at a uniform rate of equal instalments. In some of those stages, the stage price might exceed the value of the work actually performed and in others it might fall below that value. In such a case, any assessment based on the contractual stage price would be an unsound basis to determine a fair and reasonable value for the work actually performed.[56]

70. Where a contract provides for equal instalments with each stage representing a fixed proportion of the overall cost, it is possible to discern at any point in time a proportion of the overall contract that had been performed by reference to completed stages. Thus, for example if three of ten stages had been completed it could reasonably be said that 30 per cent of the contract had been completed. However, there is no basis to apply that approach to the altogether different question as to the *extent or proportion that an incomplete stage* has been completed, and even less to apply it to the valuation of that work.

71. In this case, each stage under the contract was allocated 10 per cent of the total contract price. That led the owners to submit that, as the value of the work required to be completed at each stage obviously was not exactly the same, the parties did not objectively intend the amount of the progress payment due upon the completion of each stage to represent the agreed value of the work to be performed at that stage.

72. It may be accepted that the agreement of the parties as to the progress payments to be made upon the completion of each stage determined not just the price to be paid, but also the risk allocation in respect of the particular items of work required to complete each stage. The overall contract price, and each stage price, implicitly allocated the risks to the builder including the obvious risk that the market value of the work would increase before performance or that the value of material supplied by the builder would increase more than the builder had provisioned for. To that extent, it is apt to describe the stage payments as an agreement to the value of the work performed upon the completion of each stage. Nevertheless, by electing to bring a *quantum meruit* claim, the builder elected to seek to recover not the agreed amount due upon *completion* of a stage, but the fair value for *incomplete* works (for which neither party bargained, and the value of which was not agreed).

73. In circumstances where the President found that all that remained to complete the base and frame stages was the rectification of defects (which his Honour had separately costed),

we have given careful consideration to whether an available and appropriate means of assessing the value of the work performed on the incomplete stages is to take the agreed value of those stages when complete, and to deduct the cost of rectifying defects (so as to bring those stages to completion). If that method of valuation is available, then it would not matter that the evidence led by the builder failed to establish the *costs* incurred by the builder in the performance of the incomplete stages (as a proxy for their value), because the value of the *benefit* to the owners of the work that the builder undertook would be calculated in accordance with the agreed contract price for the completed stages.

74. Ultimately, we have concluded that the owners are correct in contending that to value the *quantum meruit* claim in that way 'would amount to a complete break from the notion of quantum meruit, as a form of restitution to provide compensation to the builder for the benefit received by the [o]wner'. It would elide *quantum meruit* with expectation loss and, in doing so, fail in the ultimate task of valuing the work done. If the builder wished to recover damages according to the contractual measure, it should not have elected to pursue a *quantum meruit* claim.

75. For the above reasons, while the result of the way that the case was run below was that the President erred by calculating the value of the builder's *quantum meruit* claim by using a methodology that was inconsistent with *Mann*, we nevertheless refuse leave to appeal on ground 1. We do so because, the builder not being entitled to value its *quantum meruit* claim by reference to the contract price for each stage (less the cost of completing that stage), the evidence that the builder placed before the Tribunal was not capable of providing an alternative basis for valuing that claim. That evidence was simply incapable of establishing the value to the owners of the work that the builder had performed, but to which it did not have a contractual right to payment.

76. It would not be in the interests of justice to allow the builder a second opportunity to advance its *quantum meruit* case on a different basis. As the High Court remarked in *University of Wollongong v Metwally [No 2]*:

> It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.[57]

77. For those reasons, we would refuse leave to appeal on ground 1.

PART C: THE SIDE AGREEMENT (APPEAL GROUND 2 AND CROSS-APPEAL GROUND 2)

Was the builder entitled to payment under the side agreement? (Appeal ground 2)

78. The builder's proposed ground 2 states:

> The President erred in law in finding that the Collateral Contract contravened s 40 of the *Domestic Building Contracts Act 1995* (Vic) (**DBC Act**), was void and

the applicant was not entitled to claim any further payments under it (Reasons at [6(f)], [97]) as:

(a) the Collateral Contract was not a domestic building contract or otherwise subject to the DBC Act at all; or

(b) alternatively, if it was subject to the DBC Act, the impact of a contravention of s 40 ought to have been that progress payments under the Collateral Contract reverted to the default mechanism in s 40(2) but the Collateral Contract otherwise remained valid.

79. Section 40(2) of the Act provides that a builder must not 'demand or recover or retain under a major domestic building contract ... more than the percentage of the contract price listed in column 2 at the completion of the stage referred to in column 3'. It then sets out a table specifying different percentages of the contract price that are payable at different stages of the construction process for different kinds of building contracts.

80. Section 40(4) of the Act relevantly provides that s 40(2) does not apply if the parties to a contract 'agree that it is not to apply *and* do so in the manner set out in the regulations, namely, Form 2'.[58] Those requirements are plainly cumulative.

81. The owners submitted, and the President accepted, that it followed from s 40(4) that, if there is to be a departure from the payment regime that is specified in s 40(2), then 'all payments agreed at the date of execution of the Contract to be for the contract works *must* be contained in a Form 2 table. There is no provision in the [Act] mandated contractual regime for other payments, for the same matters, to be found in a collateral contract'.[59] In other words, even if the parties opt out of the payment regime in the table in s 40(2), it does not follow that their capacity to make alternative payment arrangements is 'at large'. So to hold would be contrary to the plain words of s 40(2) and to the consumer protection purpose of the Act.[60] Instead, an alternative payment regime under s 40(4) substitutes for the table in s 40(2), but 'does not open the door to collateral agreements and additional progress payment tables that are clearly outside what is contemplated by the [Act]'.[61]

82. The President held that the side agreement contained a payment schedule that was *not* set out in a Form 2 table (as the regulations required). The side agreement therefore did not fall within the exception to s 40(4) and was void.[62] It followed that the builder was 'not entitled to claim any further payments under that contract', because to do so would be directly contrary to s 40(2).[63]

83. The builder sought to challenge the above reasoning by advancing two arguments, neither of which was raised below. The builder submitted that it should be given leave to raise those arguments as they involved 'pure questions of law on which the facts have been established beyond controversy'.

84. The builder's first argument was that it followed from the President's acceptance of the owners' oral evidence that the side agreement was a 'collateral contract' that the side agreement was not a 'domestic building contract' within s 3(1) of the Act (and therefore that it was not subject to s 40 of the Act). In support of that argument, the builder sought to characterise the side agreement as an agreement to enter into a domestic building contract, rather than as itself constituting such a contract.

85. We reject that argument. In our view, the question whether or not the side agreement is appropriately described as a 'collateral contract' is a distraction. The important question is whether it was a 'domestic building contract', which is defined in s 3(1) to mean 'a contract to carry out, or to arrange or manage the carrying out of, domestic building work other than a contract between a builder and a sub-contractor'.
86. At trial, there was a dispute about the circumstances in which the parties agreed to the side agreement. That dispute was decided in favour of the owners, with the President concluding that the side agreement provided for the payment of $110,000 in cash as part of the total contract price (because '[t]radies love cash and its cheaper to use cash when you hire them').[64] His Honour said that 'there is no suggestion that the owners were in any doubt about the effect of the collateral agreement and had agreed to a total price of $1,710,000, which included the $110,000 payable under the collateral contract'.[65]
87. In our view, on those findings the side agreement was a 'domestic building contract', because it provided for payments to be made to the builder 'to carry out, or to arrange or manage the carrying out of, domestic building work'. As the owners put it, the side agreement was 'an agreement for part of the contract price to be paid in cash'. That contract was for 'domestic building work' (as defined), as it concerned payment for the construction of a home.[66] Section 40(2) therefore expressly prohibited the builder from 'demanding, recovering or retaining' funds under the side agreement. The side agreement was therefore void by reason of s 132(1) of the Act, with the consequence that the builder had no contractual entitlement to the balance of the amounts specified in that agreement.[67]
88. The side agreement being contrary to s 40(2), the President was likewise correct to conclude that it follows from *Stephens v Cameron* ('*Stephens*') that the builder was 'also precluded from pursuing a *quantum meruit* claim that seeks to recover the very payment for work done that the statute forbids'.[68] As the Court said in *Stephens*, 'for the applicant to pursue a *quantum meruit* claim would be to seek the very payment for work done which the statute forbids. The coherence of the law and the need to avoid stultifying the statutory purpose of s 40(2) mean that this could not be permitted'.[69]
89. The builder's second argument was that, even if the side agreement contravened s 40, that section ought not to have invalidated the side agreement as a whole. Instead, it was said to follow from *Imerva Corporation Pty Ltd v Kuna* ('*Imerva*') that the side agreement remained valid, but that any non-compliance with the regulations for contracting out of ss 40(2) and (3) should have resulted in a reversion to the rates for payment back to the s 40(2) default rates. The consequence was said to be that the unpaid balance ($60,000) ought to have been recoverable as contractual damages.[70]
90. That argument is misconceived. *Imerva* did not involve a contract and a separate side agreement that made provision for payments outside the statutory regime specified in s 40(2). In that case, the contract provided for two alternative methods for progress payments, being Method 1 (which was the method prescribed in s 40) and Method 2 (which purported to vary the default payment in reliance on s 40(4)).[71] When the contract was signed, Method 1 was not deleted.[72] This Court held that s 40(4) was not validly engaged, because the building owner had not signed the acknowledgment that the regulations required and thus the parties

had not agreed that s 40(2) not apply 'in the manner set out in the regulations'. That meant that Method 2 was void. However, the building contract as a whole was not invalid. As the Court observed, 's 133 preserves the validity of the Contract ... the Contract price remains and the progress payments revert to the statutory regime as expressed schematically in the Contract in Method 1'.[73] In other words, *Imerva* was a case where the provisions of the Contract that were not void under s 40(2) remained binding. It was by reason of those residual contractual provisions that the rights of the parties reverted to the default schedule in s 40(2).

91. That reasoning has no application in this case. Here, as in *Imerva*, the parties failed validly to engage s 40(4) because they did not agree that s 40(2) was not to apply 'in the manner set out in the regulations'. But, unlike *Imerva*, the side agreement was void in its entirety because it dealt only with matters the subject of s 40 of the Act. That being so, there could be no residual contractual entitlement to payment of the amounts for which the side agreement provided.

92. As both of the builder's proposed new arguments in support of appeal ground 2 fail on their merits, it is unnecessary to decide whether the builder should be refused permission to raise them either because they might have been met by evidence at trial, or more generally because it is bound by the conduct of its case at trial.[74]

Were the owners entitled to a refund of payments made under the side agreement? (cross-appeal ground 2)

93. Ground 2 of the owners' proposed cross-appeal is that '[t]he Tribunal erred in law in failing to order a refund of money paid in contravention of s 40(2) of the [Act]'.

94. The President identified the Tribunal's power in domestic building disputes to order recovery based on equitable principles as deriving from s 53(2)(b)(iii) of the Act, which provides that the Tribunal may order the payment of a sum of money by way of restitution.[75] That power is expressed to be without limitation upon the power conferred by s 53(1), which provides that the Tribunal 'may make any order it considers fair to resolve a domestic building dispute'.

95. The President commenced his analysis of the owners' claim for a refund of the $50,000 that they had paid under the side agreement by noting that both parties agreed that '*Stephens v Cameron* stands as binding authority for the proposition that s 40(2) ... does not create an independent cause of action to recover payments already made'.[76] The President said that this left only the owners' argument that the Tribunal should make an order pursuant to s 53 of the Act.

96. In dealing with that argument, the President said that there was 'no doubt' that 's 53 is sufficiently broad to encompass [such] an order', before observing that 'the only question is whether such an order is fair'.[77] His Honour held that an order refunding the $50,000 already paid under the side agreement would *not* be fair, essentially because the payments were for work done by the builder in relation to the deposit, ground plumbing and base stages, and the performance of that work 'effectively exhausted' the amount of the payments, that conclusion being reinforced by the fact that the owners were willing to make those

payments (unlike the latter payments) and retained the benefit of them.[78] The builder supported that reasoning. It also submitted that *Stephens* establishes that the owners could recover the money paid under the side agreement *only* by bringing a restitutionary claim, that being a proposition that was said to be true whether proceedings were brought in the Tribunal or in a court.

97. The owners submit that the reasoning summarised above is erroneous, because to allow the builder to retain the $50,000 paid under the side agreement would be to sanction a continuing breach of s 40(2) of the Act. The owners contend that, as the Act prohibits a builder from 'demanding, recovering *and retaining* moneys received in contravention of s 40(2)',[79] it imposes an 'absolute mandate' to order the return of that money.

98. In *Stephens*, this Court explained that, while s 40(2) does not create a statutory entitlement to recover amounts that are retained by a builder contrary to s 40(2),[80] it does 'suppl[y] the vitiating element to found a claim in restitution'.[81] The Court also explained that this was not the only effect of s 40(2), which also has 'an impact on potential defences to such a claim'.[82] Having noted that s 40(2) impliedly prevents a *quantum meruit* claim seeking 'the very payment for work done which the statute forbids', the Court went on to accept a submission that:

> it would be equally anomalous if a builder could not recover any amount for work done beyond the last 'stage' reached in the table in s 40(2), but could advance defences if such amounts had been paid to the builder already and the owner sought their return. In particular, a defence asserting that the owner had received value (in the form of work done) for the payment made would, like a claim for quantum meruit, be inconsistent with the prohibition on demanding, recovering or retaining payment for work done beyond the stage reached.[83]

99. In our view, the above reasoning cannot be reconciled with the President's conclusion that the builder should not be ordered to repay the $50,000 that the owners had already paid under the side agreement because the owners had agreed to the side agreement and received value for the work done. That reasoning produces the very anomaly to which the Court in *Stephens* referred in the passage just quoted. It would also be inconsistent with the statutory prohibition on a builder 'retaining' amounts paid contrary to s 40(2).

100. It is true, as the builder points out, that the reasoning in *Stephens* emphasised that the Act did not itself create a cause of action, and that if recovery of monies paid contrary to s 40(2) was sought then a claim for restitution should be brought. However, as the owners point out, *Stephens* was a case where the claim for recovery was made in a *court*, such that a cause of action was plainly necessary. Given that context, *Stephens* should not be understood as seeking to confine the power of the Tribunal under s 53(1) of the Act to 'make any order it considers fair to resolve a domestic building dispute', that being a power that expressly includes (s 53(2)(b)(iii)) power to 'order the payment of a sum of money ... by way of restitution'.

101. In determining what is 'fair' for the purposes of s 53(1) of the Act, the Tribunal is not at large. It must have regard to the statutory framework (including s 40) and to the legal

principles that otherwise govern restitutionary relief. As the owners accepted, the Tribunal must 'apply the law and not merely be guided by it. Any flexibility relates only to the *form* of the order and of course, to procedural and evidential matters'.[84] For that reason, it is, for example, relevant to an order that might be made under s 53(2)(b)(iii) that *Stephens* acknowledges the possibility that 'a defence of change of position might avail a builder who had dissipated the moneys, including by disbursing them to trade contractors', because such a defence would 'rely, not on the performance of work done under the contract, but on the builder's change of position in respect of the money in question'.[85] Such a defence, if established, would be equally relevant to a claim under s 53(1). That possibility might have been relevant in this case, as the stated purpose of the side agreement (ie, to provide the builder with cash to pay subcontractors) gives rise to the possibility that the $50,000 already paid under the side agreement may have been disbursed in this way. However, the builder was aware that the owners sought to recover the $50,000 already paid under the side agreement, yet the builder did not lead any evidence that it had disbursed those funds to subcontractors. Having chosen not to advance such a defence, it is bound by the conduct of its case.

102. For the above reasons, we would grant leave on ground 2 of the cross-appeal, allow the appeal on that ground, and order that the builder repay to the owners the $50,000 it was paid under the side agreement with interest.

PART D: DID THE BUILDER VALIDLY TERMINATE THE CONTRACT? (CROSS-APPEAL GROUND 1)

103. Ground 1 in the proposed cross-appeal is that '[t]he Tribunal erred in law in finding that the Builder, and not the Owners, validly terminated the Contract'.

104. Clause 22.1 of the contract provided that, if (relevantly) the owner 'indicates to the Builder that the Owner is unable or unwilling to make any payment required under this Contract' then 'the Builder may give written notice by registered post to the Owner ... describing the breaches of the Contract by the Owner; <u>AND</u> stating the Builder's intention to terminate the Contract unless the Owner remedies the breach or breaches within fourteen (14) Days after the Owner's receipt of the above notice'. Clause 22.2 provided that, if the owner fails to remedy the breach within 14 days of the owners' receipt of the notice, then the builder may give a further written notice by registered post to the owner immediately terminating the contract.

105. On 8 August 2018, the builder sent the owners a notice of intention to terminate the contract, headed 'Notice Under Clause 22.1'. This notice advised that the builder 'remain[ed] ready, willing and able to comply with all of its obligations under the Contract', and stated that the owners 'have failed to abide by the terms of the Contract and have failed to perform the Owners' obligations under the Contract'. It gave notice under cl 22.1 of the contract, and at common law, that the builder intended to terminate the contract due to the owners' continuing breaches of the contract and/or sustained repudiatory conduct. It identified four categories of breaches or repudiatory contract, the first two of which were: (1) 'Indicating an unwillingness and/or inability to make payments pursuant to the Contract'; and (2) 'Refusing to comply with the Contract'. Particulars were given of each category, which included, for category 2, that the

owners had 'invalidly withheld payments on the basis that it proposes that an expert report to be obtained' in respect of the frame stages.

106. On 29 August 2018, the owners' solicitor wrote to the builder asserting that the owners had received the builder's notice of intention to terminated dated 8 August 2018 'today for the first time'. That letter gave notice that, unless various identified breaches of the contract were remedied within 14 days after receipt of the notice, the owners would terminate the contract.

107. On 24 September 2018, the builder sent to the owners a document headed 'Notice of Termination of Contract under Clause 22.2'.[86] That notice referred to the owners' 'purported notice attempting to claim that [the builder] had breached the Contract', denied the alleged breaches, and denied that even if those breaches occurred they would amount to a substantial breach of the contract. It then stated that 'the Owner's purported Notice is unwarranted and itself amounts to a repudiation of the Contract because it evinces an intention by the Owners to no longer be bound by the Contract and or to only be bound on materially different terms to those contained within the Contract'.

108. The notice next referred to the owners' failure to address or respond to the matters in the 8 August 2018 notice of intention, and stated that, in accordance with cl 22 of the contract, 'we hereby serve **NOTICE OF TERMINATION** due to the Owner's continuing breaches of the Contract and/or the Owner's sustained repudiatory conduct'. It then referred to five categories of conduct, the first of which was '[i]ndicating an unwillingness and/or inability to make payments pursuant to the Contract'. It stated that the builder 'hereby exercises its rights to **IMMEDIATELY TERMINATE** the Contract pursuant to Clauses [sic] 22 of the Contract, without prejudice to any other of [the builder's] rights or remedies.

109. Finally, the notice stated, under the heading '**NOTICE OF INTENTION TO TERMINATE AT COMMON LAW'** that, '[f]urther and/or in the alternative, by ... the breaches described above and in paragraphs 1 to 5 herein', the owners had repudiated the contract and that the builder 'hereby accept[s] your repudiation of the Contract and accordingly terminate[s] the Contract'.

The President's reasoning

110. In addressing the dispute between the parties as to whether the builder had validly terminated the contract, the President put to one side arguments based on the owners' failure to pay the progress payments allegedly due for the first and second floor frame stages (having found that those payments were not due at the time the notice of termination was sent).[87]

111. The President was, however, satisfied that the builder validly terminated the contract on grounds *other than* the owners' failure to pay the first and second floor frame stages.[88] Specifically, his Honour was satisfied that the builder was entitled to terminate the contract as a result of the owners having indicated to the builder that they were 'unwilling to make any payment required under this Contract'.[89] The President observed that, while the builder's descriptions of the owners' breaches in the notice of intention were 'not as clear as they could be', he was 'satisfied that [the notice of intention] encompassed the owners' asserted

intention not to make any further payments beyond the date when they might otherwise become due'.[90]

112. The builder submitted before the Tribunal that it had terminated the contract both in reliance upon cl 22.1 of the contract and on the alternative ground that it had accepted the owners' repudiation of the contract. The owners accepted that both issues had been raised before the Tribunal, but they contended that the President decided the question of termination *only* in reliance upon cl 22.1 and that he left the question of repudiation at common law undecided.

113. We do not read the President's reasons in that way. The heading above the relevant section of the reasons is '[d]id the builder validly terminate the contract by its notice of 24 September 2018 *or otherwise*?' (emphasis added). Under that heading, the President stated, in part:

> Further, I accept the builder's submission that the owners' assertion that they would not make any further payments until the lock up stage, evinces an intention to be bound only on substantially different terms to those contained in the Contract. It essentially amounts to the owners saying that three payments totalling $480,000 would be withheld until the lock up stage payment (a further $160,000) became due.[91]

114. That finding is expressed in the language of repudiation.[92] The next paragraph of the reasons makes plain that this finding was based in part on an email sent by Mrs Dib to the builder on 30 April 2018, in which Mrs Dib stated that '[t]here will be no more payment until lock up stage'. There was a contest at trial about that email, but the President rejected the owners' claim that this statement was a bluff (and noted that Mr Dib had said something similar to the builder on 16 August 2018).[93] The President also referred to an email from Mrs Dib to the builder dated 7 May 2018, in which Mrs Dib stated, in part, '[n]o payment will be made until we resolve these issues and concerns'.

115. In our view, the better reading of the reasons is that, in addition to finding that the builder's descriptions of the owners' breach in the notices of intention was sufficient to enliven the contractual right to terminate in cl 22 of the contract, the President also accepted the builder's submission that Mrs Dibs' emails constituted a repudiation of the contract. That repudiation was expressly accepted in the notice dated 24 September 2018.

Does ground 1 of the cross-application for leave to appeal raise a question of law?

116. Pursuant to s 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998* ('VCAT Act'), a party to a proceeding in the Tribunal 'may appeal on a question of law' to this Court, with leave, if the Tribunal was constituted by the President. The existence of a question of law is not merely a qualifying condition for an appeal; it is the 'subject matter of the appeal itself'.[94] The limitation of appellate rights from the Tribunal to appeals on a question of law embodies Parliament's judgment as to the extent to which the work of the Tribunal is intended to be subject to review by the Court.

117. The cross-application for leave to appeal does not identify any question of law. While it asserts that the Tribunal 'erred in law' in finding that the builder validly terminated the contract, to assert an 'error of law' is not to state a 'question of law'.[95] The absence of any attention to the need to identify 'a question of law' may be the result of the fact that, where an appeal is brought directly to this Court from orders made by the President of the Tribunal, the applicable form (unlike the form for appeals to the trial division) does not require the parties to state separately the question or questions of law. Nevertheless, as a question of law forms the subject matter of an appeal under s 148(1) of the VCAT Act, such a question must be identified, although failure to do so in the initiating document is not itself fatal, this Court having held that '[e]ven where a notice of appeal or originating process fails altogether to state questions of law, it is ... still necessary to decide whether questions of law are none the less articulated by reference to the document as a whole'.[96]

118. In its response to the cross-application for leave to appeal, the builder contends that ground 1 is not an appeal 'on a question of law', but simply an attack on the President's factual conclusions with respect to whether the notice of intention sufficiently complied with cl 22. In order to evaluate that submission, it is necessary to say something about the meaning of the phrase 'on a question of law' when it is used to confer jurisdiction in an appeal from an administrative tribunal.

119. That issue was the subject of extensive examination in *Chief Commissioner of Police (Vic) v Crupi* ('*Crupi*').[97] In introducing that examination, the Court (Emerton P, Niall and Taylor JJA) recognised that:

> The proper ambit of a 'question of law' is elusive. It is often used in contra-distinction to a question of fact and the dichotomy between questions of fact and questions of law has been productive of numerous cases and judicial statements of principle, none of which has yielded a single unifying definition. The difficulty in discerning a clean line of demarcation between a question of fact and a question of law has led to the use of contrasting phrases such as a 'mixed question of fact and law' and a 'pure question of law', which may introduce their own uncertainty of meaning.[98]

120. The Court explained that what constitutes a question of law depends on the context in which the concept is employed, and that there are important contextual differences depending on whether the phrase is used in an appeal on a question of law and when it is used in a provision concerning the referral of a question of law for determination by a court.[99] The Court highlighted two matters of general context. First:

> In the context of appeals from administrative decision makers, which are often couched as appeals on a question of law, the determination of the merits, including factual questions, is given to the executive arm and the role of the court is limited to the determination and declaration of the law.[100]

121. Second, '[c]onferring jurisdiction by reference to questions of law does not mean that the facts are irrelevant or that the Court must not have regard to them'.[101] In the course of an extensive (albeit *obiter*) analysis directed to appeals on a question of law, the Court explained:

> [A]n error of law is not exclusively confined to mistakes in the articulation of the applicable law. It is well established that an error of law may arise in the application of the facts to the law, and even in certain cases in the findings of fact.
>
> Understandably, in many appeals on a question of law, the focus is on the grounds of appeal and on the identification of an error of law. In such cases, the principles that demarcate an error of law from an error of fact assume significance and often represent the starting point to answer the logically and legally anterior question of whether there is a question of law. The temptation to assume that if there is an error of law there must be a question of law is, in this context, strong. However, *to start with the error rather than the question may invert the proper process, and the assumption that an error of law will always be associated with a question of law may beg the question of what constitutes a question of law*.[102]

122. In addressing what constitutes a 'question of law', the Court in *Crupi* discussed the reasoning of a five-member bench of the Full Federal Court in *Haritos v Federal Commissioner of Taxation*,[103] which held that an appeal on a question of law under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) could (sometimes) include an appeal on a mixed question of fact and law. The Full Federal Court noted that the phrase 'mixed questions of fact and law' is imprecise, before observing that if what is meant is a question that can 'only be answered by both determining the facts of a case and determining what the relevant law means', such a question 'does not fall within s 44'.[104] The same is true of an appeal under s 148 of the VCAT Act.

123. Consistently with that view, in *Crupi*, this Court endorsed the conclusion in *Haritos* that 'the right of appeal does not extend to mixed questions of fact and law where, in order to decide the question of law, the Court must positively determine a question of fact itself, rather than judicially review the Tribunal's fact finding.'[105] The Court also endorsed an observation of Perram J that '[w]hilst the question of whether a given set of facts *could* fall within such a standard is a question of law the question of whether a particular set of facts does do so is a question of fact'.[106] Shortly after quoting that observation, the Court in *Crupi* concluded that:

> [T]he description 'mixed question of fact and law' is not necessarily inapt for an appeal on a question of law. Where there is a mixed question of law and fact, it will be necessary to identify whether the administrative decision maker is alleged to have made an error of law or an error of fact.[107]

124. That passage recognises that there is no universally applicable answer to whether an appeal on a 'mixed question of fact and law' falls under s 148 of the VCAT Act.[108] Equally, however, the conclusion that an appeal on a 'mixed question of fact and law' will sometimes fall within s 148 demonstrates that the jurisdiction conferred by that provision is not confined to 'pure' questions of law.[109]

125. Both *Crupi* and *Haritos* suggest that, where a proposed appeal concerns a mixed question of fact and law, an appeal will be 'on a question of law' if, but only if, the appeal alleges an error that is properly characterised as an error of law.

126. A great many authorities have analysed the line between errors of law and errors of fact. In *Collector of Customs v Pozzolanic Enterprises Pty Ltd*,[110] a Full Court of the Federal Court identified five general propositions that were subsequently approved by the High Court in *Collector of Customs v Agfa-Gevaert Ltd*[111] and have been applied many times since.[112] The fifth of those propositions was that '[t]he question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law'.[113] However, the Court immediately qualified that proposition by stating that 'when a statute uses words according to their ordinary meaning and it is reasonably open to hold that the facts of the case fall within those words, the question as to whether they do or do not is one of fact'.[114]

127. Applying the above authorities, it is apparent that, in many cases where a party seeks to challenge a finding that a contract has been validly terminated, that will not be an appeal 'on a question of law'. That follows because, very often, that question 'can only be answered by both determining the facts of a case and determining what the relevant law means'.[115] Indeed, in cases where a contractual provision that confers the right to terminate uses words in accordance with their ordinary meaning, the question whether the facts fall within the meaning of the contractual term will itself be a question of fact. As this Court observed in *Coliban Heights Pty Ltd v Citisolar Vic Pty Ltd*, 'termination may be expected to be a question of fact depending on all the circumstances of the case.'[116]

128. That is not to suggest that an appeal concerning whether a contract has been validly terminated can *never* be an appeal on a question of law. If, for example, the facts have been fully found, and the only question is whether those facts fall within the legal meaning of a particular term, then an appropriately framed appeal against the answer to that question would involve a question of law.[117] Nevertheless, we emphasise that an appeal will not be 'on a question of law' simply because it is asserted that a conclusion as to the termination of a contract involves a legal error.

129. Our reasoning above is consistent with that of the Queensland Court of Appeal in *Allen v Queensland Building and Construction Commission* ('*Allen*').[118] That was an application for leave to appeal pursuant to s 150 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), which relevantly provided that a party could appeal to the Court of Appeal 'only on a question of law'. The case had strong factual parallels with the present, as the purported appeal focused on a dispute about whether the builder or owner had validly terminated a domestic building contract. Its persuasive significance is, however, reduced by the fact that the Queensland Court of Appeal has held that s 150 does not encompass appeals on mixed

questions of fact and law.[119] As a result, that Court applies a stricter approach to the identification of an 'appeal on a question of law' than is reflected in the analysis in *Crupi* or *Haritos*. Nevertheless, the following observation from *Allen* is equally apt to the first ground of the application for leave to cross-appeal in this case:

> In very many respects the applicants challenged the fact finding below referrable to the question whether the contract had been properly terminated ...
> By the proposed appeal ground presently under consideration, the applicants seek to have this Court make different findings on questions of fact and mixed fact and law referable to the ultimate question whether the contract had been properly terminated. Then having reached a different evaluation on those questions, the applicants would invite this Court to reach a different conclusion on the ultimate question. The applicants' case on the first proposed ground of appeal could not be characterised as an appeal only on a question of law.[120]

130. Although the builder squarely raised the above jurisdictional point in its written response, the owners advanced only limited submissions on the point. When questioned during oral argument, they relied principally on *Stojanovski v Australian Dream Homes Pty Ltd*.[121] That case involved a dispute between the parties to a domestic building contract where both parties purported to have terminated the contract. On appeal under s 148 of the VCAT Act, the notice of appeal purported to raise five questions of law relating to the termination of the contract.[122] However, it does not appear that any argument was advanced as to whether those questions conformed to the legal principles that we have discussed above. Accordingly, while John Dixon J proceeded to determine the issues raised concerning the 'operation of cl 20 of the contract in the context of the default notice, the termination notice and the findings by the tribunal',[123] the case is not authority on a point that was not argued.[124] Similarly, while an application for leave to appeal against his Honour's judgment was refused,[125] again the question whether the appeal was 'on a question of law' appears not to have been argued, and certainly was not the subject of any analysis in the judgment.[126] Accordingly, that judgment likewise does not constitute a relevant authority on that issue.

131. We turn to apply the above principles to the findings in this case.

Is an appeal against the Tribunal's finding concerning common law repudiation an appeal on a question of law?

132. As already noted, the Tribunal found that the emails sent by Mrs Dib on 20 April 2018 and 7 May 2018 constituted a repudiation of the contract that the builder accepted. The owners did not advance any real argument against that finding, save for the argument that we have already rejected that the Tribunal did not reach or decide the builder's argument concerning common law repudiation.

133. The owners did not contend that the facts found by the Tribunal were incapable of supporting the conclusion that the owners repudiated the contract.[127] Instead, they sought to rely upon an email sent by Mrs Dib to Mr Rifat dated 19 September 2018 in which Mrs Dib

stated, in part, that the owners 'remain prepared to pay the frame stage payments'.[128] The owners argue that the effect of this email (and an earlier letter from their solicitor dated 29 August 2018) was that Mrs Dibs' emails on 20 April and 7 May 2018 had been 'overtaken by subsequent emails and events' and 'taken out of context'. That submission is an overt attempt to challenge the President's findings of fact. It invites the Court to engage in 'a review of the facts in order to arrive at a different conclusion' about whether the contract was validly terminated.[129] An appeal of that kind is not an appeal on a question of law, and does not fall within s 148 of the VCAT Act.

134. For completeness, we note that cl 22.2 of the contract does not affect the builder's common law right to accept the owners' repudiation and terminate the contract. Although it is 'open to the parties by their contract to regulate the exercise of the common law right to determine for repudiation or fundamental breach', the 'mere presence' of an express power to terminate does not do so.[130] Indeed, where contracting parties include an express termination clause, the strong presumption is that they intend to augment, rather than codify, their common law termination rights.[131] That being so, the Tribunal's conclusions concerning repudiation are wholly independent of its conclusions concerning contractual termination.

135. As the owners' attempt to challenge the Tribunal's conclusion concerning repudiation cannot be maintained, the Tribunal's conclusion that the builder validly terminated the contract by accepting the owners' repudiation of the contract stands.

Is an appeal against the Tribunal's finding concerning contractual termination an appeal on a question of law?

136. In light of the above conclusion, it is not necessary to address the owners' submission that the notice of intention issued on 8 August 2018 did not validly enliven the right to terminate conferred by cl 22.2 of the contract. However, as the matter was fully argued, we briefly address that issue.

137. The owners argue that the right to serve a notice under cl 22.1 was 'conditional' on the owners being in breach of the contract in one or more of the ways listed in that clause. They contend that such a notice must describe, at a minimum, which of the bullet points under cl 22.1 is relied upon and contain a short statement identifying the owners' acts or omissions with 'sufficient particularity'. They submit that the notice of intention issued on 8 August 2018 did not satisfy that requirement. In particular, they contend that the description of the relevant breach (being that of the owners 'withholding payments with no legitimate basis for doing so') falls 'well short of any breach listed in cl 22.1', given that the Tribunal found that the frame stage claims were not complete and therefore that the progress payments for those stages were not due.

138. In rejecting the above argument, the President held that, while the descriptions of the relevant breaches were 'not as clear as they could be', they 'encompass[ed] the owners' asserted intention not to make any further payments beyond the date when they might otherwise be due'.[132] That is a factual conclusion. The owners argue that, having regard to other evidence that the Tribunal accepted, that conclusion was not reasonably open. But, at its highest, that argument is a challenge to a mixed conclusion of fact and law raising 'a

question that can only be answered by both determining the facts of a case and determining what the relevant law means'.[133] For the reasons we have given, a question of that kind cannot be raised on an appeal under s 148 of the VCAT Act. That being so, the Court has no jurisdiction to entertain proposed ground 1 of the cross-application for leave to appeal.

139. In light of our conclusion that the builder validly terminated the contract, the aspect of proposed ground 1 of the cross-application for leave to appeal that concerns whether the owners validly terminated the contract does not arise. That follows because the builder's termination 'took effect well before the owners took any steps that might be said to have evinced an intention to terminated based on any breaches by the builder'.[134]

PART E: DISPOSITION

140. For the above reasons, with respect to the builder's application for leave to appeal, we would refuse leave to appeal on both grounds.

141. With respect to the application for leave to cross-appeal, we conclude that the Court has no jurisdiction with respect to proposed ground 1. We would grant leave to appeal on ground 2, allow the cross-appeal on ground 2, and order that the builder pay to the owners $50,000 forthwith.

SCHEDULE OF PARTIES

A.M.O RIFAT HOLDINGS PTY LTD (ACN 106 082 900)	Applicant/ Cross-respondent
and	
SARKIS DIB	First Respondent/ First Cross-applicant
AMAL DIB	Second Respondent/ Second Cross-applicant

[1] *AMO Rifat Holdings Pty Ltd v Dib* [2024] VCAT 419, [1] (Woodward P) ('Reasons').

[2] Reasons, [9].

[3] Reasons, [11].

[4] Reasons, [32].

[5] Reasons, [15].

[6] Reasons, [20].

[7] Reasons, [28].

[8] Reasons, [29].

[9] Reasons, [31(c)].

[10] Reasons, [31(e)–(f)].

[11] Reasons, [31(g)].

[12] Reasons, [31(i)].

[13] Emphasis added.

[14] Reasons, [31(q)], [31(s)].

[15] Reasons, [31(w)].

[16] Reasons, [2].

[17] Reasons, [3].

[18] Reasons, [4] (summarising each of the holdings referred to in this paragraph).

[19] Reasons, [5].

[20] Reasons, [4(c)], [55]–[56]. See also the additional reason given in Reasons, [57].

[21] Reasons, [54], [56]–[57], citing *Cardona v Brown* [2012] VSCA 174; (2012) 35 VR 538, 556 [74] (Tate JA, Bongiorno JA agreeing at 540 [1], Osborn JA agreeing at 562 [102]); [2012] VSCA 174 (‘*Cardona*’).

[22] Reasons, [115] (emphasis omitted) citing *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5; (1987) 162 CLR 221, 256 (Deane J); [1987] HCA 5 (‘*Pavey*’).

[23] Reasons, [117].

[24] [2019] HCA 32; (2019) 267 CLR 560, 645 [204] (Nettle, Gordon and Edelman JJ); [2019] HCA 32 (emphasis added) (‘*Mann*’).

[25] Reasons, [119].

[26] Reasons, [121].

[27] Reasons, [123].

[28] Reasons, [123].

[29] Reasons, [124].

[30] Reasons, [124].

[31] [2019] HCA 32; (2019) 267 CLR 560, 606 [105] (Gageler J), 630–1 [176] (Nettle, Gordon and Edelman JJ; [2019] HCA 32.

[32] *Mann* [2019] HCA 32; (2019) 267 CLR 560, 645 [204] (Nettle, Gordon and Edelman JJ); [2019] HCA 32 (emphasis added).

[33] Reasons, [123].

[34] Reasons, [123].

[35] [1934] HCA 45; (1934) 51 CLR 485, 499; [1934] HCA 45 (‘*South Australian Harbors Board*’).

[36] *Mann* [2019] HCA 32; (2019) 267 CLR 560, 650–1 [215]; [2019] HCA 32 (emphasis added).

[37] Julian Bailey, *Construction Law* (London Publishing Partnership, 4th ed, 2024) 886–7 [9.119].

[38] [1987] HCA 5; (1987) 162 CLR 221, 263 (Deane J); [1987] HCA 5.

[39] See, eg, *Mann* [2019] HCA 32; (2019) 267 CLR 560, 602 [92] (Gageler J); RF Elliott, *Extra-Contractual Recoveries for Construction and Engineering Work* (London Publishing Partnership, 2022), 256 [7.43], 257 [7.46].

[40] *South Australian Harbors Board* [1934] HCA 45; (1934) 51 CLR 485, 501 (Dixon J); [1934] HCA 45. See also at 490 (Starke J).

[41] *Mann* [2019] HCA 32; (2019) 267 CLR 560, 626 [166] (Nettle, Gordon and Edelman JJ); [2019] HCA 32.

[42] Julian Bailey, *Construction Law* (London Publishing Partnership, 4th ed, 2024) 883 [9.115]; *Versa-Tile Pty Ltd v 101 Construction Pty Ltd* [2017] VSC 73, [35]–[38] (Ginnane J).

[43] That methodology being ‘the contract price less the cost to [the builder] of executing or completing the work’: *Gabriel v Sea & Retaining Wall Constructions Pty Ltd* (1986) 3 BCL 162, 167–8 (Lusher J), citing Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 14th ed, 1980) 601 [872]; John B Dorter and John JA Sharkey, *Building and Construction Contracts in Australia: Law and Practice* (Law Book, 1981) 82.

[44] *Sopov v Kane Constructions Pty Ltd (No 2)* (2009) 24 VR 510, 518 [26] (Maxwell P, Kellam JA and Whelan AJA); [2009] VSCA 141.

[45] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 276–7 (Meagher JA); (1992) 9 BCL 40.

[46] *Mann* [2019] HCA 32; (2019) 267 CLR 560, 646 [205]; [2019] HCA 32 (citations omitted) (emphasis added).

[47] *Mann* [2019] HCA 32; (2019) 267 CLR 560, 650 [214]; [2019] HCA 32 (citations omitted).

[48] K Mason, JW Carter and GJ Tolhurst, *Mason & Carter's Restitution Law in Australia* (LexisNexis Butterworths, 4th ed, 2021) 709–10 [1430]. See also JW Carter, *Contract Law in Australia* (Carter Publishing, 8th ed, 2023) [38]–[39].

[49] *Mann* [2019] HCA 32; (2019) 267 CLR 560, 605 [102]; [2019] HCA 32 (emphasis added).

[50] *Mann* [2019] HCA 32; (2019) 267 CLR 560, 606 [105] (Gageler J); [2019] HCA 32.

[51] *Mann* [2019] HCA 32; (2019) 267 CLR 560, 646 [205] (Nettle, Gordon and Edelman JJ); [2019] HCA 32.

[52] *Mann* [2019] HCA 32; (2019) 267 CLR 560, 650–1 [215] (Nettle, Gordon and Edelman JJ); [2019] HCA 32 (emphasis added).

[53] *Mann* [2019] HCA 32; (2019) 267 CLR 560, 599–607 [82]–[107] (Gageler J); 637–43 [192]–[200] (Nettle, Gordon and Edelman JJ); [2019] HCA 32.

[54] *Pavey* [1987] HCA 5; (1987) 162 CLR 221, 257 (Deane J); [1987] HCA 5.

[55] David Winterton and Timothy Pilkington, '*Mann v Paterson Constructions Pty Ltd*: The Intersection of Debt, Damages and *Quantum Meruit*' [2020] MelbULawRw 37; (2020) 44(2) *Melbourne University Law Review* 679, 722 ('Winterton and Pilkington').

[56] Cf Winterton and Pilkington [2020] MelbULawRw 37; (2020) 44(2) *Melbourne University Law Review* 679, 723.

[57] [1985] HCA 28; (1985) 59 ALJR 481, 483 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ); [1985] HCA 28 ('*University of Wollongong*').

[58] Reasons, [92] (emphasis in original).

[59] Reasons, [90].

[60] Reasons, [91]–[94].

[61] Reasons, [93].

[62] *Domestic Building Contracts Act 1995*, s 132(1); Reasons, [95].

[63] Reasons, [95].

[64] Reasons, [9]–[13].

[65] Reasons, [99].

[66] See the equivalent finding in *Stephens v Cameron* (2021) 65 VR 117, 132 [64] (Kyrou, McLeish and Niall JJA); [2021] VSCA 208 ('*Stephens*').

[67] *Stephens v Cameron* (2021) 65 VR 117, 135 [80] (Kyrou, McLeish and Niall JJA); [2021] VSCA 208.

[68] (2021) 65 VR 117, 140 [96] (Kyrou, McLeish and Niall JJA); [2021] VSCA 208, cited in Reasons, [95].

[69] (2021) 65 VR 117, 140 [96] (Kyrou, McLeish and Niall JJA); [2021] VSCA 208 (citations omitted).

[70] [2017] VSCA 168.

[71] [2017] VSCA 168, [11] (Tate JA, Kyrou JA agreeing at [118], McLeish JA agreeing at [119]).

[72] [2017] VSCA 168, [13] (Tate JA, Kyrou JA agreeing at [118], McLeish JA agreeing at [119]).

[73] [2017] VSCA 168, [98] (Tate JA, Kyrou JA agreeing at [118], McLeish JA agreeing at [119]).

[74] *Coulton v Holcombe* [1986] HCA 33; (1986) 162 CLR 1, 7–8 (Gibbs CJ, Wilson, Brennan and Dawson JJ); [1986] HCA 33; *University of Wollongong* [1985] HCA 28; (1985) 59 ALJR 481, 483 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ); [1985] HCA 28; *Whisprun Pty Ltd v Dixon* [2003] HCA 48; (2003) 77 ALJR 1598, 1608 [51]–[52] (Gleeson CJ, McHugh and Gummow JJ); [2003] HCA 48; *Mayfair Land Holdings Pty Ltd v Terafortis Ltd* [2025] VSCA 343, [15] (Walker, Orr and Kenny JJA).

[75] Reasons, [115].

[76] Reasons, [96].

[77] Reasons, [97].

[78] Reasons, [98].

[79] Emphasis added.

[80] (2021) 65 VR 117, 139 [94] (Kyrou, McLeish and Niall JJA); [2021] VSCA 208.

[81] (2021) 65 VR 117, 140 [96] (Kyrou, McLeish and Niall JJA); [2021] VSCA 208.

[82] *Stephens* (2021) 65 VR 117, 140 [96] (Kyrou, McLeish and Niall JJA); [2021] VSCA 208.

[83] *Stephens* (2021) 65 VR 117, 140 [97] (Kyrou, McLeish and Niall JJA); [2021] VSCA 208.

[84] *Christ Church Grammar School v Bosnich* (2010) 34 VAR 23, 32 [40] (Sifris J); [2010] VSC 476, applied in relation to s 53 of the Act in *Versa-Tile Pty Ltd v 101 Construction Pty Ltd* [2017] VSC 73, [10] (Ginnane J) (emphasis in original); *AG Advanced Construction Pty Ltd v Shao* [2018] VSC 116, [66] (Daly AsJ).

[85] (2021) 65 VR 117, 140–1 [98] (Kyrou, McLeish and Niall JJA); [2021] VSCA 208.

[86] Reasons, [31].

[87] Reasons, [101].

[88] Reasons, [110].

[89] Reasons, [104].

[90] Reasons, [105].

[91] Reasons, [106].

[92] See, eg, *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* [1985] HCA 14; (1985) 157 CLR 17, 33 (Mason J, Wilson J generally agreeing at 38, Deane J generally agreeing at 51, Dawson J agreeing at 56), stating '[w]hat needs to be established in order to constitute a repudiation is that the party evinces an intention no longer to be bound by the contract or that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way'; [1985] HCA 14 ('*Progressive Mailing House*').

[93] Reasons, [107]–[108].

[94] *Osland v Secretary to the Department of Justice* [2010] HCA 24; (2010) 241 CLR 320, 333 [21] (French CJ, Gummow and Bell JJ); [2010] HCA 24, quoting *TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation* (1988) 82 ALR 175, 178 (Gummow J); [1988] FCA 198.

[95] *Haritos v Federal Commissioner of Taxation* [2015] FCAFC 92; (2015) 233 FCR 315, 350 [92] (Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ); [2015] FCAFC 92 ('*Haritos*'). See also *Orr v Cobar Management Pty Ltd* [2020] NSWCCA 220; (2020) 103 NSWLR 36, 48 [51] (Bathurst CJ and Bell P, Johnson J agreeing at 61 [128], Garling J agreeing at 62 [136], Lonergan J agreeing at 62 [137]); [2020] NSWCCA 220.

[96] *Coliban Heights Pty Ltd v Citisolar Vic Pty Ltd* [2018] VSCA 191, [39] (Tate, Kyrou and McLeish JJA), citing *McSteen v Architects Registration Board of Victoria* [2018] VSCA 96, [38] (Maxwell P, Priest and McLeish JJA). See also *Cosmopolitan Hotel v Crown Melbourne Ltd* [2014] VSCA 353; (2014) 45 VR 771, 784 [49] (Warren CJ), 805 [166] (Whelan JA, Santamaria JA agreeing at 814 [206]); [2014] VSCA 353 ('*Cosmopolitan Hotel*').

[97] (2023) 72 VR 280; [2023] VSCA 245 ('*Crupi*').

[98] *Crupi* [2023] VSCA 245; (2023) 72 VR 280, 295 [51] (Emerton P, Niall and Taylor JJA); [2023] VSCA 245 (citations omitted).

[99] *Crupi* [2023] VSCA 245; (2023) 72 VR 280, 295 [52] (Emerton P, Niall and Taylor JJA); [2023] VSCA 245. See also 296 [57], 302 [87] (Emerton P, Niall and Taylor JJA).

[100] *Crupi* [2023] VSCA 245; (2023) 72 VR 280, 296 [53] (Emerton P, Niall and Taylor JJA); [2023] VSCA 245.

[101] *Crupi* [2023] VSCA 245; (2023) 72 VR 280, 296 [55] (Emerton P, Niall and Taylor JJA); [2023] VSCA 245.

[102] *Crupi* [2023] VSCA 245; (2023) 72 VR 280, 297–8 [61]–[62] (Emerton P, Niall and Taylor JJA); [2023] VSCA 245 (emphasis added).

[103] (2015) 233 FCR 315; [2015] FCAFC 92 (‘*Haritos*’).

[104] *Haritos* [2015] FCAFC 92; (2015) 233 FCR 315, 375 [169] (Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ); [2015] FCAFC 92.

[105] *Haritos* [2015] FCAFC 92; (2015) 233 FCR 315, 383 [192] (Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ); [2015] FCAFC 92.

[106] *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; (2018) 261 FCR 301, 317 [49]; [2018] FCAFC 93, quoted in *Crupi* [2023] VSCA 245; (2023) 72 VR 280, 298 [67] (Emerton P, Niall and Taylor JJA); [2023] VSCA 245.

[107] *Crupi* [2023] VSCA 245; (2023) 72 VR 280, 299 [69] (Emerton P, Niall and Taylor JJA); [2023] VSCA 245. See also *Van Der Wolf v Transport Accident Commission*, (2025) 109 MVR 108, 116 [40] (Beach JA, Forbes and J Forrest AJJA); [2025] VSCA 24, adopting and applying *March v Transport Accident Commission* (2020) 92 MVR 201, 206 [23]–[26] (Niall JA); [2020] VSC 228.

[108] As was correctly recognised in *Keogh & Co Pty Ltd v Pless* [2025] VSC 341, [53]–[54] (Gray J).

[109] Cf *Nepean Country Club Ltd v Paterson* (2009) 32 VAR 37, 38 [2] (Davies J); [2009] VSC 436; *Commissioner of State Revenue v STIC Australia Pty Ltd* [2010] VSC 608; (2010) 81 ATR 682, 687–8 [10] (Davies J); [2010] VSC 608, which is frequently cited. The view that s 148 is not confined to ‘pure’ questions of law was favoured in *Spirovski v Univest Asset Merchants Syndicators Pty Ltd* [2013] VSC 728, [20] (Croft J), and in many other decisions of Croft J. The division of opinion was left open in *Cosmopolitan Hotel* [2014] VSCA 353; (2014) 45 VR 771, 784 [52] (Warren CJ), 807 [171] (Whelan JA, Santamaria JA agreeing at 814 [206]); [2014] VSCA 353. In light of *Crupi* and *Haritos*, that question should now be treated as resolved.

[110] (1993) 43 FCR 280, 287 (Neaves, French and Cooper JJ); [1993] FCA 456 (‘*Pozzolanic*’).

[111] [1996] HCA 36; (1996) 186 CLR 389, 395 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ); [1996] HCA 36.

[112] See, eg, *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439, 450 [24]–[25] (Gleeson CJ, Gummow and Callinan JJ); [2001] HCA 12; *Cosmopolitan Hotel* [2014] VSCA 353; (2014) 45 VR 771, 783 [48] (Warren CJ), 805–6 [167] (Whelan J); [2014] VSCA 353, citing *Commissioner of Taxation v Trail Bros Steel and Plastics Pty Ltd* [2010] FCAFC 94; (2010) 186 FCR 410, 415 [13] (Dowsett and Gordon JJ); [2010] FCAFC 94.

[113] *Collector of Customs v Agfa-Gevaert Ltd* [1996] HCA 36; (1996) 186 CLR 389, 395 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ); [1996] HCA 36.

[114] *Collector of Customs v Agfa-Gevaert Ltd* [1996] HCA 36; (1996) 186 CLR 389, 395 (Brennan CJ, Dawson, Toohey, Gaudron, and McHugh JJ) (citations omitted), discussing *Pozzolanic* (1993) 43 FCR 280; [1993] FCA 456. That qualification is also recognised in *Hope*

v Bathurst City Council (1980) 144 CLR 1, 7 (Mason J, Gibbs and Stephen JJ agreeing at 4, Murphy J agreeing at 11, Aickin J agreeing at 11); [1980] HCA 16; *Chopra v Department of Education and Training* [2019] VSCA 298; (2019) 60 VR 505, 527 [88] (Tate, Whelan and Kyrou JJA); [2019] VSCA 298. While this category refers to words used in a statute, subsequent authorities have treated it as extending 'to whether the facts as found can support the legal description given to them': *Cosmopolitan Hotel* [2014] VSCA 353; (2014) 45 VR 771, 806 [169] (Whelan JA); [2014] VSCA 353. See also *Amaca Pty Ltd v Frost* [2006] NSWCA 173; (2006) 67 NSWLR 635, 646 [55] (Spigelman CJ, Santow J agreeing at 658 [133], McColl JA agreeing at 658 [134]); [2006] NSWCA 173.

[115] *Haritos* [2015] FCAFC 92; (2015) 233 FCR 315, 375 [169] (Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ); [2015] FCAFC 92.

[116] [2018] VSCA 191, [46] (Tate, Kyrou and McLeish JJA) (citations omitted). In that case, this Court accepted, without detailed analysis, that a dispute about the termination of a contract was an appeal was on a question of law. However, in that case the issue in dispute was a legal question: ie, whether a consumer can terminate a contract for services under the *Australian Consumer Law* while still accepting goods in connection with the services: see [1], [40] (Tate, Kyrou and McLeish JJA).

[117] As is discussed below, *Stojanovski v Australian Dream Homes Pty Ltd* [2016] VSCA 133 is arguably such a case.

[118] (2024) 18 QR 79; [2024] QCA 24 ('*Allen*').

[119] *Allen* [2024] QCA 24; (2024) 18 QR 79, 85 [16] (Mullen P, Bond JA and Williams J); [2024] QCA 24; *Pivovarova v Michelsen* (2019) 2 QR 508; [2019] QCA 256, and the cases that have followed it.

[120] *Allen* [2024] QCA 24; (2024) 18 QR 79, 94–5 [51]–[52] (Mullen P, Bond JA and Williams J); [2024] QCA 24. See also 100 [70], 102 [84] (Mullen P, Bond JA and Williams J).

[121] [2015] VSC 404.

[122] [2015] VSC 404, [4] (John Dixon J).

[123] [2015] VSC 404, [41].

[124] *CSR Ltd v Eddy* [2005] HCA 64; (2005) 226 CLR 1, 11 [13] (Gleeson CJ, Gummow and Heydon JJ), stating 'where a proposition of law is incorporated into the reasoning of a particular court, that proposition, even if it forms part of the ratio decidendi, is not binding on later courts if the particular court merely assumed its correctness without argument'; [2005] HCA 64. That statement was approved in *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333, 346 [28] (Kiefel CJ, Bell, Keane and Gordon JJ); [2019] HCA 29.

[125] *Stojanovski v Australian Dream Homes Pty Ltd* [2016] VSCA 133, [78] (Kaye JA, Ashley JA agreeing at [1], Osborn JA agreeing at [2]).

[126] It appears that the Court analysed the application through the prism of whether the Tribunal erred in law by reaching a conclusion that was not 'open' on the facts as found: *Stojanovski v Australian Dream Homes Pty Ltd* [2016] VSCA 133, [2] (Osborn JA), [65]–[68] (Kaye JA, Ashley JA agreeing at [1]). The same is true of *Cardona* [2012] VSCA 174; (2012) 35 VR 538, [6] (Bongiorno, Tate and Osborn JJA); [2012] VSCA 174. Those authorities lend no support to the owners' submission that the question 'Do these facts amount to ... the owners acting unreasonably such that they cannot rely on termination under clause 20.2' is a question of law, because that submission invites the Court to decide for itself whether particular actions were reasonable (a factual question), rather than to decide whether the Tribunal's conclusion as to the reasonableness of those actions was 'open' on the fact found by the Tribunal. As to the distinction, see *La Perouse Local Aboriginal Land Council v Quarry Street Pty Ltd* [2025] HCA 32; (2025) 99 ALJR 1285, 1326–7 [198]–[199] (Jagot J); [2025] HCA 32.

[127] An argument of that kind may be 'on a question of law': compare *Maag Developments Pty Ltd v Oxanda Childcare Pty Ltd* [2018] VSCA 289, [38]–[45] (McLeish, Hargrave JJA and Almond AJA).

[128] There was a dispute about whether that email was actually in evidence before the Tribunal, but in light of our conclusion, it is unnecessary to resolve that dispute.

[129] See *Crupi* [2023] VSCA 245; (2023) 72 VR 280, 303 [93] (Emerton P, Niall and Taylor JJA); [2023] VSCA 245.

[130] See *Progressive Mailing House* [1985] HCA 14; (1985) 157 CLR 17, 30 (Mason J, Wilson J generally agreeing at 38, Deane J generally agreeing at 51, Dawson J agreeing at 56); [1985] HCA 14. See also *Amann Aviation Pty Ltd v Commonwealth* (1990) 22 FCR 527, 533–5 (Davies J).

[131] *Concut Pty Ltd v Worrell* (2000) 176 ALR 693, 699 [23] (Gleeson CJ, Gaudron and Gummow JJ); [2000] HCA 64 (citations omitted). See also *Waterways Authority of New South Wales v Coal & Allied (Operations) Pty Ltd* [2007] NSWCA 276, [236] (McColl JA); *Taylor v Raglan Developments Pty Ltd* [1981] 2 NSWLR 117, 135 (Powell J); *Berry v Mahony* [1933] VLR 314, 321 (Mann ACJ, Lowe J agreeing at 323, Gavan Duffy J agreeing at 324).

[132] Reasons, [105].

[133] *Haritos* [2015] FCAFC 92; (2015) 233 FCR 315, 375 [169] (Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ); [2015] FCAFC 92.

[134] Reasons, [112].