Aslan v Stepanoski - [2022] NSWCA 24

Court of Appeal

Supreme Court

New South Wales

Medium Neutral Citation:	**Aslan v Stepanoski [2022] NSWCA 24**
Hearing dates:	18 August 2021 and 13 December 2021
Date of orders:	25 February 2022
Decision date:	25 February 2022
Before:	Macfarlan JA at [1]; Gleeson JA at [106]; Payne JA at [107]
Decision:	(1) Allow the appeal. (2) Set aside Orders 1 and 2 made by Emmett AJA on 16 July 2020. (3) Judgment for the Builder on the Owners' claim against him. (4) Judgment for the Builder against the Owners in the sum of $50,000. (5) Order the Owners to pay the Builder's costs of the proceedings at first instance and on appeal.
Catchwords:	CONTRACTS – repudiation – whether the Builder repudiated the Lump Sum Contract – whether the Builder's claim for payment under the Lump Sum

Contract constituted repudiation – whether the Builder's "failure to resume work" constituted repudiatory conduct

RESTITUTION – mistake – restitution of money paid by the Owners to the Builder – whether a comparison of sums paid under the Lump Sum Contract with the value of the work completed revealed whether there had been an overpayment by the Owners to the Builder

CIVIL PROCEDURE – Owners sought leave to reopen case after judgment to tender additional evidence concerning loss – election had been made to claim damages on a particular basis – whether there were special circumstances that justified departure from the ordinary rule that a party is bound by the case that it conducts to judgment

Legislation Cited:

Environmental Planning and Assessment Act 1979 (NSW), s 96

Cases Cited:

Australia City Properties Management Pty Ltd v The Owners – Strata Plan No 65111 [2021] NSWCA 162

Autodesk Inc v Dyason (No 2) (1993) 176 CLR 300; [1993] HCA 6

Carter v Mehmet [2021] NSWCA 286

Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd (No 2) [2013] HCA 44; (2013) 87 ALJR 1159

DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423; [1978] HCA 12

Hadley v Baxendale (1854) 9 Exch 341; 156 ER 145

Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1989) 166 CLR 623; [1989] HCA 23

Mann v Paterson Constructions Pty Ltd (2019) 267 CLR 560; [2019] HCA 32

Smith v NSW Bar Association (1992) 176 CLR 256; [1992] HCA 36

Turner Corporation Limited (Receiver and Manager Appointed) v Austotel Pty Limited (1994) 13 BCL 378

University of Wollongong v Metwally (No 2) [1985] HCA 28; (1985) 59 ALJR 481

Category:	Principal judgment
Parties:	Mohammad Jamal Aslan (also known as Jim Aslan) (Appellant) Tony Stepanoski (First Respondent) Sonja Stepanoski (Second Respondent)
Representation:	Counsel: L Chan / K Sharma (Appellant) P Folino-Gallo (Respondents) Solicitors: Redenbach Legal (Respondents)
File Number(s):	2020/00237337
Publication restriction:	Nil
Decision under appeal	Court or tribunal: Supreme Court of New South Wales Jurisdiction: Equity Citation: [2018] NSWSC 1916 ; [2019] NSWSC 1445 ; [2020] NSWSC 139 ; [2020] NSWSC 900 Date of Decision: 11 December 2018 Before: Emmett AJA File Number(s): 2016/139580

HEADNOTE

[This headnote is not to be read as part of the judgment]

On 14 October 2014, Mr and Mrs Stepanoski ("the Owners") and Mr Aslan ("the Builder") signed a Cost Plus Contract for the construction by the Builder of two residences on the Owners' land. In late 2014 or early 2015, the Owners and the Builder signed a Lump Sum Contract relating to the same construction. The Lump Sum Contract was held to govern the parties' relationships from the date it was signed and was effective retrospectively from 14 October 2014.

As the works progressed, the Builder issued a number of progress claims under the Lump Sum Contract, including Progress Claim 4 which was issued on 14 September 2015. The Builder gave evidence that on or about 16 September 2015 he was prevented from "coming back to the job" because he was "locked out" by the Owners. On 21 September 2015 the Builder emailed the Owners a Notice of Ceasing Building Works which, inter alia, stated that work would not recommence until Progress Claim 4 was paid.

The Owners subsequently commenced proceedings in the Technology and Construction List of the Equity Division claiming damages for breach by the Builder of the Lump Sum Contract. The Owners claimed that, inter alia, by reason of the Builder's Notice of Ceasing Building Works, and of his cessation of work, the Builder evinced an intention to no longer be bound by the contract. The Owners claimed that they accepted the Builder's repudiation and terminated the contract on 1 May 2016. In the proceedings the Owners claimed loss arising from the cost of rectification works and a loss of rental income that would have been earned if the works had been completed on time. The Owners further alleged that they had overpaid the Builder and that they were entitled to recover the amounts of the overpayment because they had made the payments in the mistaken belief that they represented the Builder's true contractual entitlement.

The primary judge found that the Builder had repudiated the Lump Sum Contract but that the Owners had not proved that they suffered any loss as a result of their acceptance of the repudiation ([2019] NSWSC 1445). In a subsequent judgment, his Honour granted the Owners leave to reopen their case in the proceedings and tender additional evidence concerning the loss they had allegedly suffered ([2020] NSWSC 139). In a final further judgment, the primary judge awarded damages in the sum of $2,698,656.28 to the Owners ([2020] NSWSC 900).

The Builder then appealed to this Court and the primary issues on appeal were:

(1) Whether the Builder repudiated the Lump Sum Contract;

(2) Whether the Owners' payments to the Builder were recoverable to the extent that they exceeded the value of the work done;

(3) Whether the Owners should have been granted leave after the primary judge's judgment was given to reopen their case to tender additional evidence concerning their alleged loss.

The Court unanimously allowed the appeal:

<u>In relation to Issue 1 (repudiation)</u>

The Owners did not establish that, in making Progress Claim 4, the Builder was claiming an amount to which he was not entitled. In making Progress Claim 4, the Builder sought to hold the Owners to the Lump Sum Contract and that claim did not therefore constitute repudiation: [76], [78].

Further, there was evidence that the Owners locked the Builder out of the building site. The Builder's "failure to resume work" therefore could not be categorised as repudiatory conduct: [79], [81].

In relation to Issue 2 (restitution)

A comparison of the sums paid under a contract with the value of the work completed does not necessarily reveal whether there has been an overpayment under the contract: [88]. For the purpose of considering a restitutionary claim based on the payment of money under mistake of fact or law, the correct question was whether the payments made by the Owners were in fact in discomformity with what the Lump Sum Contract provided. The primary judge did not to answer this question: [89], [90].

In relation to Issue 3 (leave to reopen)

There were no special circumstances that justified departure from the ordinary rule that a party is bound by the case that it conducts to judgment, particularly where it has made a deliberate decision to put its case on a limited basis: [103].

Judgment

1. **MACFARLAN JA:** On 14 October 2014 Mr and Mrs Stepanoski ("the Owners") and Mr Aslan ("the Builder") signed a Cost Plus Contract for the construction by the Builder of two residences on the Owners' land. In late 2014 or early 2015 the Owners and the Builder further signed a Lump Sum Contract relating to the same construction. The Owners subsequently commenced proceedings in the Technology and Construction List claiming damages for breach by the Builder of the latter contract.

2. An initial issue of whether the Lump Sum Contract, or the Cost Plus Contract, was binding on the Builder was resolved in favour of the Owners by Emmett AJA in his judgment of 30 July 2018 ([2018] NSWSC 1160 : the "No 1 Judgment"). His Honour found that, whilst the Cost Plus Contract was operative from its date of 14 October 2014, it was superseded by the Lump Sum Contract when that contract was later signed.

3. In a subsequent decision of 11 December 2018 ([2018] NSWSC 1916 : the "No 2 Judgment") his Honour gave summary judgment in favour of the Owners for a limited part of their claim ($225,710.38).

4. In a third judgment of 28 October 2019 (the "No 3 Judgment") his Honour found that the Builder had repudiated the Lump Sum Contract but that the Owners had not proved that they suffered

any loss as a result of their acceptance of the repudiation ([2019] NSWSC 1445). His Honour's No 4 Judgment was concerned with a stay of the summary judgment referred to in [3] above ([2019] NSWSC 1859) and by his No 5 Judgment, his Honour granted the Owners leave to reopen their case in the proceedings and tender additional evidence concerning the loss they had allegedly suffered ([2020] NSWSC 139). By his No 6 Judgment his Honour gave judgment for the Owners for damages in the sum of $2,698,656.28 in lieu of the limited summary judgment earlier given (see [3] above) ([2020] NSWSC 900).

5. For the reasons given below, I have concluded that the Builder did not repudiate the contract, with the result that his appeal should be allowed. As well, the Builder is entitled to a judgment against the Owners for an undisputed amount of $50,000. In any event, in my view the Owners ought not to have been granted leave to reopen their damages case, with the result that it should have been found that they continued not to have proved any loss flowing from the alleged repudiation and consequent termination, as his Honour had held was the position in his No 3 Judgment.

6. In his No 3 Judgment, the primary judge upheld a restitutionary claim by the Owners for $452,667.80 (plus interest) that they alleged they overpaid to the Builder. This amount was included in the judgment for $2,698,656.28 directed in favour of the Owners in the No 6 Judgment. For reasons given below, I do not however consider that the Owners were entitled to succeed on their restitutionary claim. That claim cannot therefore provide a proper basis for any part of the judgment for $2,698,656.28.

THE RELEVANT FACTUAL CIRCUMSTANCES

Development approval

7. On 16 May 2013 the local council granted development consent to the construction of two residences on the Owners' land.

8. On 14 October 2014 the Owners and the Builder signed the Cost Plus Contract, but, according to the primary judge's unchallenged finding, this was replaced by the Lump Sum Contract which also bore the date of 14 October 2014 but which was signed subsequently, according to the Owners, on 17 October 2014, and, according to the Builder, either on 11 or 12 January 2015. In any event, it is not now in dispute that the latter contract governed the parties' relationships from the date it was signed and that it was effective retrospectively from 14 October 2014.

The Lump Sum Contract

9. The contract is entitled "Home building contract for work over $5,000" and is in the standard form made available by NSW Fair Trading. The contract price stated in it is $1,080,000. It provides in cl 6 for completion within 40 calendar weeks from the commencement of work and in cl 7 for extensions of time.

10. Clause 12 provides for progress payments of stipulated amounts according to six identified stages of the work. Progress Payment 4 was listed as $200,000 to be paid for the Third Stage of the works, the stage being described as "GF Sub Floor Walls / GF Slabs / Plumbing Roughins". The Progress Payment numbers do not coincide with the stage numbers because the first payment is the deposit which is payable before any stage of the works is completed.

11. Clause 13 provides for variations and consequent extensions of time and adjustments to the contract price.

12. Clause 24 provides for suspension of work by the Builder and is relevantly in the following terms:

> "... If the owner, without reasonable and substantial cause:
>
> ...
>
> fails to pay a progress payment or any other amount due to the contractor within the time allowed, but only if the owner fails to pay the progress payment or other amount due after a written notice from the contractor requiring payment within a further period of 5 business days
>
> ...
>
> fails to perform any work or supply materials as specified in Clause 16 which prevents the contractor from continuing with the work under the contract
>
> denies the contractor or the contractor's sub-contractors access to the site so as to prevent the work from proceeding, or otherwise prevents the contractor from carrying on the work; or if the owner becomes bankrupt, assigns assets for the benefit of creditors generally, makes a composition or other arrangement with creditors or, if the owner is a company, goes into liquidation or receivership or is otherwise without capacity,
>
> the contractor may, without prejudice to any other rights under the contract, suspend the work by giving written notice to the owner in accordance with Clause 28 (Giving of Notices) specifying the reason.
>
> If the owner remedies the default, the contractor must recommence the work within 10 business days unless the contractor has ended the contract under Clause 26."

13. Clause 25, dealing with termination by the Owners, is relevantly in the following terms:

> "... **Due to the fault of the contractor**
>
> If the contractor:
>
> is unable or unwilling to complete the work or abandons the work
>
> suspends the work before completion without reasonable cause
>
> ...

> fails to proceed diligently with the work
>
> ...
>
> the owner may, if such default can be remedied, notify the contractor in writing that unless the default is remedied within 10 business days or such longer period as specified, the owner will terminate the contract.
>
> If the contractor does not comply with the owner's request within the time allowed, or if the default cannot be remedied, the owner may terminate the contract by giving written notice to that effect to the contractor.
>
> ...
>
> Until completion of the work the contractor will not be entitled to any further payment under this contract. However, nothing contained in this clause may take away any right the contractor may have to payment under the dispute resolution procedure in Clause 27. ..."

14. Clause 27, dealing with disputes, is relevantly in the following terms:

> "... Even if a dispute has arisen the parties must, unless acting in accordance with an express provision of this contract, continue to perform their obligations under the contract so that the work is completed satisfactorily within the agreed time."

The progress of the works

15. On 24 October 2014 the Builder gave notice that the works would commence on or about 3 November 2014, as they did. As the works progressed, Progress Claims 1 and 2 were paid (this included payment for two "approved variations", being Variations 1 and 2).

16. On or soon after 5 June 2015, the Builder issued to the Owners Progress Claim 3 in the sum of $200,000 (the amount stipulated in the Contract for Stage 4 of the works), together with another $14,000 in respect of "Variation 3".

17. The Builder deposed that, shortly after providing the Owners with Progress Claim 3, Mr Stepanoski refused to make any payment until the Builder provided receipts for expenses.

18. On 10 June 2015 the Builder gave to the Owners a "Notice of Ceasing Building Works" (the "First Notice"), relevantly in the following terms:

> "... Please be informed that we will cease construction work on the above project as at 7.00 am, Thursday 11 June 2015, in accordance with the Terms and Conditions on your Lump Sum Building Contract for the following reasons;

Your advi[c]e today of your intention for withholding payment and refusal to pay our invoice relating to our Progress Claims Certificate No. 3 attached herein and sent to you previously on 8 June 2013.

Your advi[c]e today of your intention for refusal to forward the 'Subsequent Funds Drawdown Form' along with our Invoice and Progress Claims Certificate No. 3 to your Bank.

The Constant unwarranted harassment and false accusations and insinuations and character defamation and offensive messages being received by me via phone SMS text messages in recent months and almost dating back since the building contract started and being sent by Mr Tony Stepanoski's from his mobile phone and these text messages are still continuing and being received by me after countless requests for Mr Stepanoski to stop these unacceptable, harrassing [sic], false and offending phone text messages.

...

Furthermore, please be advised that construction work on the project will not recommence until you confirm the following;

That you will pay our above mentioned Progress Claims No. 3 Tax Invoice by the due date or that you will forward the above-mentioned documents to your Bank by the due date of our Invoice being 12 June 2015.

You give your written commitment to continue to fund the project either through private funding or through bank funding as per Contract Terms and Conditions until project completion.

That you will give a written undertaking to stop sending me these offensive and false phone txt messages.

Please note all project delays as a result of this Notice of Cessation of Work is regarded as 'Client Cause Delays' and will be added to the contract duration in addition to the Inclement weather delays and further please be advised that all Costs associated with Client Caused Delays including any interest due on outstanding Moneys and accumulated by these delays will be borne by you. This is in addition to the time it will take to remobilise trades affected by these delays and associated costs due to these client delays and all costs associated with extended scaffolding Hire including any and all other plant and equipment Hire and site fencing and site toilet currently on Hire and onsite as a result of these Client caused delays will be added to the contract price and contract period. These additional costs and project delays associated with this current Notice of Cessation of Work due to the above mentioned Client Caused Delays will also apply to any Client Caused Delays that may arise in the future.

Your intentions not to extend project funding on this project puts you in Breach of the Terms and Conditions of your Signed Lump Sum contract.

Your prompt attention to this Notice Of Ceasing Work on this project for the above mentioned reasons is appreciated."

19. Shortly thereafter "the dispute that gave rise to the First Notice was resolved and building work resumed" (No 3 Judgment at [19]). The Owners, through Macquarie Bank, paid Progress Claim 3 on 29 June 2015, but not the $14,000 claimed for "Variation 3".

20. On 13 June 2015 Mr Stepanoski sent an email to the Builder saying that he would like to view "all receipts ASAP". The Builder responded on the same day saying "Your contract is Lump Sum. I don't have to show you Nothing…". This response was consistent with the terms of the Lump Sum Contract.

21. On 27 July 2015 the Builder, acting on behalf of the Owners (or purportedly so), lodged with the local council an application for approval of modifications to the original development approval and construction certificate. Approval was sought under s 96 (now s 4.55) of the *Environmental Planning and Assessment Act 1979* (NSW) which permits modification of a development consent to correct a minor error, misdescription or miscalculation. The approval was granted on 30 September 2015.

22. In the meantime, on 14 September 2015, the Builder issued Progress Claim 4 dated 9 September 2015 claiming $214,000 which was said to relate to Stage 5 of the works ($200,000) and to Variation 3 ($14,000). The Contract specified $200,000 for this Progress Claim and described the work for Stage 5 in a way that is not on its face obviously different from that described in the supporting invoice.

23. In an email of 12 September 2015 Mr Stepanoski made many complaints to the Builder about his management of the progress of the works, complaining of "incredibly slow progress" and a "poorly executed build". Mr Stepanoski asserted that the Builder had agreed with the Owners that they would have "full access to all receipts and expenditures to view the progressive nature of the build yet nothing had happened". He requested provision of "all quotes from all subbies and suppliers" in respect of a large number of items involved in the building work.

24. In an email dated 14 September 2015 to the Builder, Mr Stepanoski made a number of allegations, including that the Builder had not followed approved plans and had sought "unauthorised modifications" to the original development and construction consents. The email further stated as follows (language as used in the original):

> "… I'll endeavour too get it [Progress Claim 4] back too you within 7 days from today after I've reviewed and when you've reply sent me all PC claim forms 1,2,3 and provided $175,000 dollars in cash payments paid too you on commencement off engaging your services and I'll consult with an independent coats estimates consultant asap so that I can review your unauthorised modifications too the original DA and CC consent approved by Willoughby City Council,
>
> I've noticed that you've at your own accord redesigned and modified approved Engineering at your own engineering assessment …
>
> …

Further more I'll require ALL receipts invoices and documented log off all expenditure reports prior too me assessment by Sonja and myself by no later than 5pm today at the close off business."

25. In the course of cross-examination below the Builder stated that on or about 16 September 2015 he was prevented from "coming back to the job" because he was "locked out".

26. On 21 September 2015 the Builder emailed the Owners a "Notice of Ceasing Building Works: No. 2" (the "Second Notice") dated 18 September 2015:

> "Please be informed that we have ceased construction work on the above project as at 7.00 am, Wednesday 16 September 2015, in accordance with the Terms and Conditions of your Lump Sum Building Contract for the following reasons;
>
> Your written advise of your decision for withholding payment and refusal to pay our invoice relating to our Progress Claims Certificate No. 4 for the above building contract works, sent to you on 9 September 2013 which was due for payment within 7 days on 16 September 2015.
>
> Your written advice of placing terms and conditions Not in accordance with the building Contract before any Progress Claims Invoices are paid by you for the building contract works.
>
> Your verbal and written advise and in text messages of your intention for refusal to pay for any building works variation for the current Section 96 Amendments once costed and for all other building works variations that you have requested us to carry out during the course of the building construction.
>
> Your unauthorised changing of the site gates lock on or about 16 September 2015, preventing the builder and building trades from entering the site and without advising the builder that you have changed the site lock and without prior consultation with the builder and without the prior permission given from the builder for you to do so.
>
> Your constant threats to remove from the site the existing plant and equipment which is currently on hire which you have no legal right to do so under the terms and conditions of the contract.
>
> The Constant unwarranted harassment and false accusations and insinuations and character defamation in written emails sent to third parties and to myself and the offensive messages being received by me via phone SMS text messages almost daily in recent months and dating back since the building contract started and being sent by Mr Tony Stepanoski from his mobile phones, and these emails and text messages are still continuing and being received by me after countless requests for Mr Stepanoski to stop these unacceptable, harassing, false and offensive emails and phone text messages.
>
> Furthermore, please be advised that construction work on the above project will not recommence until the following has occurred;
>
> Our above mentioned Progress Claims No. 4 Tax Invoice has been paid.

You give your written commitment to pay for all contract works variations and continue to fund the project either through private funding or through bank funding as per Contract Terms and Conditions until project completion.

That you will give a written undertaking to immediately withdraw and cease sending your false accusations and statements in emails to myself and to third parties which are character defamation and offensive or legal action will commence against you regarding this matter.

You immediately cease sending me offensive and abusive and harassing phone txt messages.

You remove the unauthorised site gates lock you have installed as mentioned above.

Please note all project delays as a result of this Notice of Cessation of Work is regarded as 'Client Caused Delays' and will be added to the contract duration in addition to Inclement weather delays and further please be advised that all Costs associated with Client Caused Delays including any Interest due on outstanding Moneys and accumulated by these delays will be borne by you. This is in addition to the time It will take to remobilise trades affected by these delays and associated costs due to these client delays and all costs associated with extended scaffolding Hire including any and all other plant and equipment Hire and site fencing and site toilet currently on Hire and onsite as a result of these Client caused delays will be added to the contract price and contract period. These additional costs and project delays associated with this current Notice of Cessation of Work due to the above mentioned Client Caused Delays will also apply to any Client Caused Delays that may arise in the future.

Your intentions not to pay any Variations to contract works and to withhold project funding on this project puts you in Breach of the Terms and Conditions of your Signed Lump Sum contract.

Your prompt attention to this Notice Of Ceasing Work on this project for the above mentioned reasons is appreciated."

27. On 2 October 2015 the Owners, through Macquarie Bank, paid the sum of $200,000 to the Builder, this being the amount of Progress Claim 4, less the amount for Variation 3.

28. On 1 May 2016 the Owners purported to terminate the contract by letter sent by their solicitors to the Builder. As the primary judge noted, a copy of the letter is not in evidence. In those circumstances, it should be treated, conformably with the Owners' pleading, as a purported acceptance of the Builder's alleged repudiation of the Lump Sum Contract constituted by his conduct as described by the primary judge. This is no basis for treating it as a termination pursuant to cl 25 of the contract (see [13] above) for breach or other act of the Builder identified in that provision. As the Owners' claim for damages arising out of the Builder's alleged repudiation of the Contract fails for the reasons given below, it is unnecessary to address the Builder's further contention that a claim on that basis is precluded by the terms of the Contract, particularly cl 25, which constitutes an exclusive code identifying the only remedies available to a proprietor whose builder defaults. The Builder referred in this regard to *Turner Corporation Limited (Receiver and Manager Appointed) v Austotel Pty Limited* (1994) 13 BCL 378.

29. On the appeal, the Builder expressly disclaimed any argument to the effect that, whether by the lapse of time or acts of affirmation, the Owners lost any right to terminate for the Builder's alleged repudiation that may have arisen in their favour.

THE TECHNOLOGY AND CONSTRUCTION LIST PROCEEDINGS

30. The following aspects of the proceedings below are of relevance to the issues on appeal.

The Owners' Amended Technology and Construction List Statement ("ATCLS")

31. In the ATCLS the Owners alleged that as at 16 September 2015 substantial parts of the works had not been commenced ("the Unstarted Work"), substantial portions were incomplete ("the Incomplete Work") and there were "Defective Works". Their particulars indicated that to prove these allegations they would rely on a report of Mr Michael Sanig, quantity surveyor, dated 24 October 2016. They further alleged that the Builder ceased work on or about 16 September 2015 and in doing so breached cl 27 of the Lump Sum Contract (see [14] above).

32. The Owners then alleged that by reason of the Unstarted Work, the Incomplete Work, the Defective Works, the Builder's Second Notice, given on or about 16 September 2015, of his intention to cease work and of his cessation of work on or about that date, the Builder "evinced an intention to no longer be bound by the contract", as a result of which the Owners "accepted the [Builder's] repudiation and terminated the Contract" on 1 May 2016 by letter from their solicitors to the Builder's solicitors.

33. The loss and damage alleged was the cost of rectification works and a loss of rental income that would have been earned if the works had been completed on time. There was no claim based on a comparison of the sale price of the property and the price that would have been achieved if the Builder had duly performed the Lump Sum Contract. The fact that there was a passing reference in particulars, as distinct from the pleading, to such a claim in connection with a misleading and deceptive conduct claim which is not now relevant emphasises its absence in relation to the claims that are relevant.

34. The Owners further alleged that they had overpaid the Builder and that they were entitled to recover the amounts of the overpayment because they had made the payments in the mistaken belief that they represented the Builder's true contractual entitlement.

The No 1 Judgment – Lump Sum Contract

35. In his No 1 Judgment of 30 July 2018 the primary judge concluded that although "[t]here are some minor inconsistencies in the contemporaneous material", it is clear that, apart from such

inconsistencies, the parties regarded themselves as bound by the Lump Sum Contract, rather than the Cost Plus Contract which they had earlier signed. In referring to "inconsistencies", his Honour was apparently referring in particular to the Owners' demands to see invoices and other supporting material in respect of the Builder's progress claims.

36. This judgment is not the subject of an appeal.

The No 2 Judgment – Summary Judgment for $225,710.38

37. The primary judge noted that "[t]he Builder accepts that, although $1,067,094.28 has been paid by the Owners in respect of the contract sum of $1,080,000, the work required to complete the contract was no more than some 57 per cent completed".

38. His Honour then referred to the parties' appointment of experts on the issue of quantification of damages, being Mr Michael Sanig on behalf of the Owners and Dr Patrick O'Donnell on behalf of the Builder. His Honour said that the effect of the Joint Report of these two experts was that at least $471,244.10 was payable by the Builder to the Owners, subject to any amount recoverable by the Builder on his cross-claim. As the maximum amount of recovery on the cross-claim, based upon the Builder's particulars, was $245,533.72, the sum of $225,710.38 was to be regarded as undisputed and therefore an appropriate sum to be awarded to the Owners by way of summary judgment.

The No 3 Judgment – Repudiation and Damages

39. The primary judge first concluded that claims the Builder made in his cross-claim should be rejected, except for the sum of $50,000 for variations. Deducting that sum, his Honour concluded that the value of the work completed by the Builder was $614,426.48 but that he had been paid $1,067,094.28, resulting in an overpayment of $452,667.80 which the Owners were entitled to have refunded. Their restitutionary claim thus succeeded to that extent.

40. His Honour then noted that the Owners also claimed damages flowing from the Builder's alleged repudiation of the contract which was accepted by the Owners and gave the following reasons for concluding that the Builder repudiated the contract as alleged:

> "[54] Where a party to a contract acts on a genuine but erroneous view of its obligations under the contract, the party will not, for that reason alone, have repudiated the contract if the party [has] shown that it is still willing to perform the contract according to its tenor. However, persistence in an untenable construction will ordinarily be regarded as repudiatory conduct.
>
> [55] In his written submissions, Mr Aslan asserts that he suspended works as a result of the default by Mr and Mrs Stepanoski. He asserts that the Second Notice 'proved fatal', in that work was never recommenced and he was not paid his entitlement. Thus, he asserts that he did not perform any further work because he had not been paid in accordance with cll 12 and 14 of the Lump Sum Contract and that Mr and Mrs Stepanoski were not entitled to

terminate the Lump Sum Contract pursuant to cl 25, or for any other reason, because they were in default, in having failed to pay Progress Claim No 4 in full and having failed to pay Progress Claim No 5 at all. He says that an inference should be drawn, from the fact that he returned to work after the First Notice, that he was prepared to return to work if payment of Progress Claim No 4 and Progress Claim No 5 had been made. He asserts that the termination of the Lump Sum Contract by Mr and Mrs Stepanoski was 'high handed and unlawful' and there was no proper basis for the termination and locking him and his subcontractors out of the site.

[56] Mr Aslan adduced no evidence as to the alleged locking out or to demonstrate that he was willing and was able to perform the Lump Sum Contract according to its proper terms. There was no evidence that he would have performed the Lump Sum Contract if he had been advised that that contract was applicable rather than the alleged Cost Plus Contract. Thus, there is not a basis for concluding that Mr Aslan was merely pressing a misconceived interpretation of the Lump Sum Contract and would have been prepared to perform the Lump Sum Contract according to its proper meaning and effect.

[57] As at the time of the suspension of work, Mr and Mrs Stepanoski had already paid significantly more than the value of the work completed. It is common ground that, as at that time, they had paid the sum of $1,067,094.28 in circumstances where the Contract Price payable under the Lump Sum Contract was $1,080,000. It is also common ground that the value of work completed when work was suspended was $564,426.48. That is to say, they had paid 98.8% of the Contract Price, whereas only 52.26% of the work under the Lump Sum Contract had been completed, omitting the variations approved by the Council.

[58] As indicated in the Principal Reasons [the No 1 Judgment], cl 12 of the Lump Sum Contract set out a schedule of progress payments and descriptions of the work to be completed for each of the seven progress payments. As a matter of simple arithmetic, it is clear that Mr Aslan had been paid well in excess of the amounts to which he was entitled under the Lump Sum Contract in respect of the Contract Price. In the circumstances, it is clear that Mr Aslan claimed payments to which he was not entitled. He suspended work on the basis that Mr and Mrs Stepanoski had not made payments to which he was not entitled.

[59] I conclude that Mr Aslan's conduct, in giving the Second Notice, stopping work, and failing to resume work, evinced an intention not to perform the Lump Sum Contract unless he was paid sums to which he had no contractual entitlement. It follows that Mr and Mrs Stepanoski were entitled to treat his conduct as repudiation, accept the repudiation and terminate the Lump Sum Contract. As a consequence, Mr Aslan is not entitled to damages for breach of the Lump Sum Contract. It also follows that Mr and Mrs Stepanoski are entitled to be compensated for the loss they have suffered as a result of the repudiation of the Lump Sum Contract by Mr Aslan." (Footnotes omitted.)

41. His Honour then described the nature of the damages claimed by the Owners in addition to recovery of the overpayment made to the Builder:

> "[60] ...First, they claim loss of rental that they would have derived had Mr Aslan performed his obligations under the Lump Sum Contract. Secondly, they claim damages for the additional cost of completing the work under the Lump Sum Contract. ..."

42. His Honour assessed the loss of rental, for which the Owners were entitled to damages, and then turned to the evidence as to the costs of completing the works.

43. His Honour noted that Dr O'Donnell (the Builder's expert) gave evidence of the cost to complete the works by reference to a Cost Plus Contract, but not with reference to the Lump Sum Contract which his Honour had found was the applicable contract. His Honour then stated that there was no evidence as to the cost of completing the works in accordance with the Lump Sum Contract and made the following remarks:

> "[71] Mr and Mrs Stepanoski did not in fact complete the work contemplated by the Lump Sum Contract but sold the property with the building in its incomplete state. It can be assumed that the sale price was below the price that would have been realised had the work been completed. An appropriate measure of the loss might, therefore, have been the difference between the sale price, on the one hand, and the price that might have been realised had the Works being completed, on the other.
>
> [72] Of course, Mr and Mrs Stepanoski would have been liable to pay to Mr Aslan the balance of the Contract Price of $1,080,000, plus the cost of variations approved by the Council, as consideration for the completion of the Works. After the refund referred to above, they will have paid the sum of $614,426.48. To have the work completed, they would be liable for the difference between that figure and the Contract Price plus the cost of Council approved variations. An allowance would be required in respect of that amount.
>
> [73] However, no attempt was made to establish loss on the basis just outlined. There was no evidence as to the likely sale price of the property with the work completed. In the absence of any further evidence, I would conclude that Mr and Mrs Stepanoski have not established the quantum of the loss, if any, occasioned by the failure of Mr Aslan to complete the Works in accordance with the Lump Sum Contract."

44. His Honour concluded the judgment with the following paragraph:

> "[74] The parties have requested that I reserve the question of costs after publishing reasons for the conclusions that I have reached as to the quantum of damages to which Mr and Mrs Stepanoski are entitled. I propose to afford the parties the opportunity of considering the conclusions that I have now reached and will then entertain further submissions as to the appropriate orders, including orders as to costs."

The No 4 Judgment – Stay on Summary Judgment lifted

45. By this judgment, the primary judge lifted the stay on enforcement of the summary judgment for $225,710.38 entered pursuant to the No 2 Judgment. On 16 April 2019, the primary judge had ordered a stay of the No 2 Judgment while the parties made further preparations for the hearing of the Owners' claim for damages and the Builder's claim to offset certain amounts.

The Reopening Application

46. On 21 November 2019, the Owners filed a notice of motion seeking leave to rely upon affidavits of Mr Keith Redenbach sworn 21 November 2019 and Mr Adam McMonigal sworn 28 October 2016 and seeking judgment in favour of the Owners in the sum of $2,698,656.28 (less the amount for which summary judgment had already been entered). In doing so, they sought to quantify their damages in the way that the primary judge had said in his No 3 Judgment that they had not sought to do (see [46] above), that is, by claiming the difference between the sale price of the property and the price that would have been achieved if the Builder had duly performed his obligations under the Lump Sum Contract.

47. Mr McMonigal is a registered property valuer. He exhibited to his affidavit a report giving his valuation of the subject property as at 20 September 2016. Mr Redenbach, who is the Owners' solicitor, gave evidence stating that on or about 14 July 2016 the Owners entered into a contract for the sale of the property. The ATCLS states that on or about 9 September 2016 that contract was completed.

48. Pursuant to the primary judge's directions of 12 December 2019 the Owners filed written submissions dated 9 January 2020. In them, they sought to have admitted "further evidence in support of their claim for damages and to be granted leave by the Court to reopen their case". They submitted that they "suffered loss in the sum of $1,979,426.48 in respect of the sale of the property by reason of the incomplete works/repudiation of the Defendant".

49. The Builder's written submissions in response opposed these orders and stated:

> "To this extent, the defendant has run his case in a specific way and manner based on the forensic decisions, in part, made by the plaintiff, and made in response by the defendant. There is no explanation as to why the late evidence should be allowed to be put before the Court. The Court has made its decision. What the plaintiff is seeking to do is to essentially run a quasi appeal. His Honour has determined the matters before the court, the evidence has closed, the pleadings are closed and judgement is reserved. With respect, this approach is misconceived. The relief available to the plaintiff, if the plaintiff is not happy with the decision given by His Honour, is for an appeal to be brought. The remedy is not to file a motion and seek to reopen the case now that judgement has been delivered."

50. At a directions hearing on 13 February 2020, the primary judge gave the Owners an opportunity to explain their position further by filing further evidence by 4pm on 17 February 2020. The following exchange then occurred between the primary judge, Mr Eardley (who then appeared for the Builder) and Mr Folino-Gallo (who appeared for the Owners):

"HIS HONOUR: I direct the defendant to file and serve no later than 4pm on Wednesday 19 February and any further submissions as to why the explanation contained in the plaintiff's affidavits would not support the granting of the leave sought in the notice of motion.

EARDLEY: My learned friend and I are in agreement, subject to your Honour's view. Once my friend does his evidence and we potentially do short written submissions, there is not much further I can assist your Honour with. My friend's submissions and my submissions are detailed.

HIS HONOUR: Are you content for me to decide on the papers?

FOLINO-GALLO: I am content for that course to be adopted.

HIS HONOUR: I might list it provisionally on the day in case, having seen the material, I need to ask you some questions. But if, having looked at it, I am satisfied then I will make a decision and depending on what that decision is when I publish it we will work out where we go from there.

I will provisionally fix the matter for directions on 24 February which I will either give a decision or say that I want to hear further about whatever questions come up, if there are any."

51. Pursuant to these directions, the Owners filed a further affidavit of Mr Redenbach, sworn 17 February 2020, seeking to explain why the evidence the Owners sought to adduce was not adduced earlier. Relevant parts of Mr Redenbach's affidavit are as follows:

"... [4] The First Trial principally concerned whether the Plaintiff and the Defendants were bound by a Lump Sum Contract or a Cost-Plus Contract.

...

[11] On or about 25 and 26 June 2019 the Second Trial continued and ran for approximately two days.

[12] Due to the time between the commencement of the First Trial and the Second Trial both the Plaintiffs and the Defendants had a change in counsel.

[13] The Second Trial concerned the following questions:

(a) The extent to which Mr Aslan has been overpaid for the work that had been completed before the Lump Sum Contract was terminated.

(b) Whether the Lump Sum Contract was wrongly terminated by Mr and Mrs Stepanoski as Mr Aslan contended, or whether the Lump Sum Contract was repudiated by Mr Aslan as Mr and Mrs Stepanoski contend.

(c) The quantification of any damages to which Mr and Mrs Stepanoski or Mr Aslan would be entitled.

[14] During the hearing of the Second Trial, the Plaintiff proceeded on the assumption that all of the McMonigal report[s] could later be read into evidence after the Second Trial (only where necessary and only at the appropriate time). For the reasons set out in paragraph 4 above, the McMonigal report was not read into evidence and, in particular, the aspect of the McMonigal report that dealt with the value of the completed project was not read in the First Trial. The failure to read the entirety of the McMonigal report, the brief to expert and to tender the sale contract was a function of the fact that these documents were already (relevantly) in evidence and had not been tendered in the First Trial.

...

[18] Given what I understood to be another opportunity afforded by Honourable Acting Justice Emmett AO QC in the Second Judgment to supplement our evidence, on or about 5 November 2019 the Plaintiffs filed further submissions about the quantification of any damages to which Mr and Mrs Stepanoski or Mr Aslan would be entitled. ..."

52. At a directions hearing on 24 February 2020, the transcript lists Mr Folino-Gallo as appearing on behalf of the Owners and says "Mr DC Eardley for the Defendant mentioned". The following exchanges are then recorded:

"FOLINO-GALLO: I would move your Honour to make a determination on the materials before your Honour. I don't mean that as any - I am not calling on your Honour to make that decision now, but simply in circumstances where your Honour extended an invitation to my learned friend to put on submissions in resistance of our application and those submissions have not been forthcoming.

My position is, in my respectful submission, it is for your Honour to determine the matter on the materials that are now before your Honour, without further indulgence being granted to the defendant.

HIS HONOUR: Which motion is it?

FOLINO-GALLO: We are dealing with the motion that was filed on 21 November.

HIS HONOUR: Yes, I have got that. How much of that was left for resolution again?

FOLINO-GALLO: It was orders.

HIS HONOUR: 4, 5 and 6?

FOLINO-GALLO: 4, 5 and 6, and the addition now of an additional affidavit that is not contemplated in this notice of motion, but pursuant to your Honour's orders was filed.

HIS HONOUR: You tell me what orders you want me to make today.

FOLINO-GALLO: Well, your Honour, I am not certain as to whether or not there are any further procedural orders [that] need to be taken up.

HIS HONOUR: On the last occasion, I ordered you to file an affidavit by 27 February, which you have done.

FOLINO-GALLO: Yes.

HIS HONOUR: The defendant to file no later than Wednesday 19 submissions providing an explanation in support of the grant of leave in the notice of motion.

FOLINO-GALLO: Yes.

HIS HONOUR: No submissions were made on the relief sought in the notice of motion, how, at least, in relation to prayers 4 and 5, therefore, be granted; is that right?

FOLINO-GALLO: That would be the plaintiff's position, your Honour, yes.

HIS HONOUR: That then leaves what we do next as to the judgment for the sum of $2.698 million, which you now seek.

FOLINO-GALLO: Yes. Now I don't wish to speak to what my friend has said in the past in the absence of my friend but, in those circumstances, perhaps if there is any further argument to be had about even the admissibility—

HIS HONOUR: Have you made all the submissions you want on damages or are we doing it in stages?

FOLINO-GALLO: Yes, I have. No, all the submissions are bundled up in the last set of submissions that I have filed.

HIS HONOUR: They are the submissions of 9 January?

FOLINO-GALLO: That is so, yes.

HIS HONOUR: And Mr Eardley filed some submissions on 21 January, if that is right?

FOLINO-GALLO: Yes. Although, in the interests of candour, my understanding is that those submissions were squarely directed—

HIS HONOUR: --to narrowly opposing the material.

FOLINO-GALLO: Quite. Not what is in the material or whether the material ought to be admitted.

HIS HONOUR: I suppose I can conclude that there is, therefore, no opposition to prayers 4 and 5. Is that the only additional evidence you rely on or did you say there's a third affidavit, just explaining why?

FOLINO-GALLO: That's so. It speaks to two issues. They may well have gone away. The first was why the material was not relied upon at first instance.

HIS HONOUR: I follow that.

FOLINO-GALLO: And the second was the delay in putting on the evidence that falls within that first tranche.

HIS HONOUR: Yes.

FOLINO-GALLO: The sum total of the evidence is what's already admitted into evidence in support of this application, your Honour. That is, for the sake of abundant caution, I will just identify this.

HIS HONOUR: Can you just take me then to the bits of Mr Redenbach's affidavit of 17 October, which you say explained those two matters. I have read the affidavit now.

FOLINO-GALLO: Yes.

HIS HONOUR: I will just give some brief reasons of what I propose to do."

The No 5 Judgment – Grant of Leave to the Owners to Reopen

53. This was an ex tempore judgment delivered at the directions hearing on 24 February 2020. After referring to the Owners' notice of motion and the directions of 13 February 2020, the primary judge stated:

> "[3] By affidavit sworn on 17 February 2020, Mr Redenbach proffered an explanation based, essentially, on a misapprehension as to the evidence that was before the Court and the evidence that had been foreshadowed but had not been tendered. Having regard to the unusual course of the proceedings, bearing in mind that there has been a change of legal representation, that misapprehension is understandable. No submissions were filed on behalf of the defendant indicating why that explanation would not support the granting of leave.
>
> [4] On 13 February 2020, I listed the matter for further directions today. When the matter was called on today, there was no appearance for the defendant. However, it emerged that counsel for the plaintiffs was asked to mention the matter on behalf of the defendant.
>
> [5] In the circumstances, I propose to make orders in terms of prayers 4 and 5 of the notice of motion of 21 November 2019 [that is, prayers seeking that the Owners be entitled to rely upon the affidavits of Mr Redenbach and Mr McMonigal – see [46] above]. Counsel for the plaintiffs has indicated that the plaintiffs wish to rely on their submissions dated 9 January 2020 in support of prayer 6 of the notice of motion of 21 November 2019 seeking judgment in the sum of $2,698,656.28, less the judgment sum of $225,710.38 already entered in favour of the plaintiffs.
>
> [6] In the circumstances, I propose to direct the defendant by 16 March 2020 to file and serve any submissions on which he wishes to rely in response to the plaintiffs' submissions of 9 January 2020. I will direct the plaintiffs to file and serve, by no later than 4 pm today, a statement of all the additional evidence on which they wish to rely in support of prayer 6 of the notice of motion of 21 November 2019, if it is not already in evidence as indicated in earlier reasons that I have published. There being no indication to the contrary, I will give you leave to rely on all of that material, as long as it does not go beyond what is in the affidavit."

54. On 7 May 2020 both the Builder and the Owners filed brief submissions concerning the appropriate quantification of damages taking into account the primary judge's decision to allow the Owners to reopen their case and rely on the evidence of Mr Redenbach and Mr McMonigal.

55. This judgment records the hearing dates as 13 and 24 February 2020 and "submissions" of 7 May 2020. As the catchwords indicate, it concerned the "[r]eformulation of quantum after reopening of case granted to read and tender additional evidence on damages".

56. The primary judge referred to his decision of 24 February 2020 (the No 5 Judgment) to permit the Owners to reopen, as follows:

> "[4] I subsequently received further evidence and submissions in relation to the balance of the notice of motion filed on 21 November 2019. The evidence and submissions addressed the reasons for the failure of the Owners to adduce the relevant evidence at the original hearing, which resulted in the conclusions published on 28 October 2019.
>
> [5] In short, the explanation for the failure was to be found in the changes in legal representation that have occurred since the proceedings were first commenced. Both new solicitors and new counsel have been retained on behalf of the Owners as well as the Builder. The new solicitors and counsel for the Owners were under the impression that the proposed additional evidence was already before the Court. I was satisfied that the explanation was not unreasonable and that the interests of justice required that the Owners be permitted to rely on the additional material for the purposes of assessing damages for the breaches of the Lump Sum Contract that I have found."

57. His Honour then accepted the evidence of Mr McMonigal and the Owners' calculation of damages as $2,698,656.28 comprising:

> "(1) Loss in respect of the sale of the land and buildings by reason of the incomplete works /repudiation of the Builder: **$1,979,426.48**
>
> (a) Value of the completed project: $5,195,000.00
>
> (b) Less sale price: $2,700,000.00
>
> (c) Less costs of completion: $515,573.52
>
> (2) The Owners overpaid the sum of **$452,667.80.**
>
> (3) Pre-judgment interest on the overpayment for the period 31 October 2015 to the date of judgment, being 28 October 2019, is **$101,161.00.**
>
> (4) Rental lost 21 July 2015 to 31 December 2015 was **$29,325.00.**
>
> (5) Rental lost 1 January 2016 to 9 September 2017 was **$118,800.00.**
>
> (6) Pre-judgment interest on the rental losses is **$17,276.**"

58. His Honour then gave judgment for the Owners for damages in the sum of $2,698,656.28.

THE GROUNDS OF APPEAL

59. The Builder's grounds of appeal are to the following effect.

60. First, the primary judge erred in finding that the Builder repudiated the Lump Sum Contract with the result that the Owners are not entitled to damages flowing from their purported acceptance of such a repudiation (the "Repudiation Issue").

61. Secondly, the primary judge's exercise of discretion to permit the Owners to reopen their case on damages miscarried, with the result that, as earlier found in the No 3 Judgment at [72], the Owners did not establish that they suffered any loss by reason of his Honour finding that the Builder failed to complete the works in accordance with the Lump Sum Contract (the "Reopening Issue").

62. Thirdly, even if the Owners were entitled to reopen their claim on damages, their claim for loss of profits on resale was not recoverable in accordance with the principles governing remoteness of damages in *Hadley v Baxendale* (1854) 9 Exch 341 at 345; 156 ER 145 (the "Remoteness Argument").

63. Fourthly, the primary judge erred in finding that the Owners' payments to the Builder were recoverable to the extent they exceeded the value of the work done (the "Restitutionary Claim").

64. Fifthly, the primary judge erred in his award of damages representing rent paid by the Owners by reason of any breach by the Builder of the Lump Sum Contract (the "Loss of Rental Issue").

CONSIDERATION OF THE APPEAL

THE REPUDIATION ISSUE

65. The concept of repudiation was summarised by Brennan J in *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 at 647; [1989] HCA 23 as follows:

> "Repudiation is not ascertained by an inquiry into the subjective state of mind of the party in default; it is to be found in the conduct, whether verbal or other, of the party in default which conveys to the other party the defaulting party's inability to perform the contract or promise or his intention not to perform it or to fulfil it only in a manner substantially inconsistent with his obligations and not in any other way. In *Freeth v. Burr* [(1874) L.R. 9 C. P. 208 at 213], Lord Coleridge C.J. spoke of acts or conduct which 'do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract' or of acts and conduct which 'evince an intention no longer to be bound by the contract'."

66. Likewise Mason CJ at 634 referred to the expression of "an intention to fulfill the contract only in a manner substantially inconsistent with the party's obligations and not in any other way" and Deane and Dawson JJ at 658 referred to conduct that if viewed objectively would "convey to a reasonable person, in the situation of the other party, repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it."

67. Consistently with these principles, bona fide insistence on a mistaken interpretation of a contract will not, without more, constitute repudiation (see *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (19 78) 138 CLR 423 at 431-432; [1978] HCA 12; *Australia City Properties Management Pty Ltd v The Owners – Strata Plan No 65111* [2021] NSWCA 162 at [307] ; *Carter v Mehmet* [2021] NSWCA 286 at [163]). A significant factor in this context is whether the other party has attempted to persuade the allegedly repudiating party that it is taking an erroneous position. In the absence of that occurring, it will be difficult to conclude that the first party was "persisting in its interpretation willy nilly in the face of a clear enunciation of the true agreement" (*DTR* ibid). No such attempt was made by the Owners in the present case.

68. I turn then to consider the features of the Builder's conduct that the primary judge found characterised it as repudiatory.

Whether the Builder claimed amounts to which he was not entitled

69. The primary judge's reasoning in support of his conclusion that the Builder repudiated the Lump Sum Contract is set out in [40] above. Fundamental to his Honour's conclusion was his view that the Builder, by his Second Notice (see [26] above), claimed payment of sums to which he had no contractual entitlement (No 3 Judgment at [58] and [59]). Essentially, his Honour found that to be the case because the value of the work done by the Builder up to the date of suspension of work was accepted, based on the expert evidence, to have been $564,426.48 (see No 3 Judgment at [57]) whereas the Owners had paid to the Builder amounts totalling $1,067,094.28.

70. This was, with respect, not an appropriate way of determining whether the Builder claimed in his Second Notice amounts to which he was not entitled as the parties' relations were governed by the Lump Sum Contract, and, before that was signed, by the Cost Plus Contract. The Builder's contractual entitlement did not necessarily accord with the value of the work he undertook to perform and, a fortiori, did not necessarily accord with the value of the work he did in fact perform. The Owners might well have a claim in damages against the Builder for defective or deficient work but that would not necessarily disentitle the Builder to payments specified in the contract. Alternatively, by the Lump Sum Contract, the Owners may simply have agreed to pay more for the contract work than the actual value of the work, possibly because of a bad bargain from the Owners' point of view, or stipulated instalments might not have reflected the value of the work to be done to earn those instalment payments because the parties had decided by their contract to "front-end" the payments by making earlier instalments disproportionately high.

71. It is significant in this respect that from the date of its signature on 14 October 2014, and therefore when work commenced on or about 3 November 2014, the Cost Plus Contract governed the parties' relationship. On his Honour's findings, the Lump Sum Contract was signed and became operative "no later than 12 January 2015" and took effect from 14 October 2014 (No 1 Judgment at [70]). Although it therefore superseded the Cost Plus Contract with effect from 14 October 2014, any assessment of the conduct of the parties in the three months from early October to early January needs to be considered in light of the fact that they were then operating under the Cost Plus Contract. During that period the Owners made six payments to the Builder totalling $196,094.28 (No 1 Judgment at [28], [35], [40] and [43]) for reasons that were not the subject of detailed analysis on appeal nor, does it seem, at first instance. As a result, the entitlement of the Builder to those payments and their conformity or lack of conformity with the then operative Cost Plus Contract remains undetermined.

72. Once the Lump Sum Contract became operative in January 2015, the Builder sought and was paid progress claims substantially in accordance with the schedule for such claims in cl 12 of the Lump Sum Contract:

    - Progress Claim No 1 for $216,000 was paid on 6 February 2015 (No 1 Judgment at [44]).
    - Progress Claim No 2 for $215,000 was paid (together with $40,000 in respect of Variations 1 and 2) on 31 March 2015 (ibid [46]).
    - Progress Claim No 3 for $200,000 was paid on 29 June 2015 after the Builder sent his first Notice of Ceasing Building Works (ibid [52]). The amount of $14,000 claimed in respect of Variation 3 was not paid.
    - Progress Claim No 4 for $200,000 was paid on 2 October 2015 after the Builder issued his second Notice of Ceasing Building Works on 21 September 2015. The amount claimed of $14,000 for Variation 3 was again not paid (ibid [58]).

73. The primary judge acknowledged that the Lump Sum Contract "set out a schedule of progress payments and descriptions of the work to be completed for each of the seven progress payments". His Honour did not however consider whether the Builder was entitled to Progress Claim 4 which was the subject of the Builder's Second Notice. There appears to have been no attempt at first instance, nor was there on appeal, to demonstrate that the Builder had not reached the stage of the work specified in the Lump Sum Contract in respect of that Progress Claim such that the time to make the claim had not yet arrived.

74. Instead, the primary judge dealt with it "[a]s a matter of simple arithmetic" by comparing the totality of what the Builder had been paid with the totality of the amounts to which he was entitled under the Lump Sum Contract (No 3 Judgment at [58]). This was a reference to his Honour's earlier statement (ibid [57]) that the total that the Builder had been paid ($1,067,094.38) represented 98.8% of the contract price ($1,080,000) "whereas only 52.26% of the work under the Lump Sum Contract had been completed". This percentage represented the value of the work completed, as determined by the experts, as compared to the Lump Sum Contract price.

75. This reasoning did not have regard to the fact that $196,094.28 had been paid by the Owners to the Builder when the Cost Plus Contract was operative nor, perhaps more importantly, whether the stage of work identified by the Lump Sum Contract for entitlement to make Progress Claim 4 had been reached. The fact that the overall value of the work might have suggested that that stage had not been reached was not determinative because the value of the work, although reaching certain specified stages, may have been considerably diminished by defectiveness of the work or, indeed, the Lump Sum Contract may have represented a bad bargain from the Owners' point of view. His Honour's reasoning did not include a conclusion that the stage specified by the contract for the making of Progress Claim 4 had not been reached. That was so in respect of the amount of $200,000 stipulated by the Lump Sum Contract for Progress Claim 4 but was also the case in relation to the additional $14,000 claimed in that progress payment in respect of Variation 3. On appeal, this Court was not directed to any evidence or finding that that variation claim was not justified, or at least not arguably justified.

76. The above considerations lead to the conclusion that the Owners did not establish (in asserting repudiation by the Builder, the onus of proof rested on them) that in making Progress Claim 4, and in later reasserting that claim in the Second Notice, the Builder was claiming an amount to which he was not entitled. Even if that had been established as an objective matter, a conclusion of repudiation would not be drawn unless it was further concluded that the Builder's acts evinced an intention no longer to be bound by the contract. In the present context, it is difficult to see how that conclusion could be reached unless it were found that the Builder's Progress Claim 4 was not a bona fide claim for payment under the contract. No such finding was made.

77. This conclusion is reinforced by Mr Stepanoski's email of 14 September 2015 sent in response to Progress Claim 4. Mr Stepanoski did not assert that the stage of work specified in the Lump Sum Contract for Progress Claim 4 had not arrived. Instead, he sought documentation to enable him to consult with an independent costs estimator, complained about unauthorised changes to the design and engineering of the works and required provision of all receipts, invoices and expenditure reports for the works. As the primary judge acknowledged in his No 1 Judgment at [54] and [57], this response was not consistent with the Lump Sum Contract. The Builder did not have any obligation to provide this documentation. The Owners may have had that entitlement under the Cost Plus Contract but, as the primary judge found, the then operative contract was the Lump Sum Contract. The Builder made this point in the third paragraph of his Second Notice (see [26] above) and in an email to Mr Stepanoski dated 13 June 2015 (see [20] above).

78. Instead of showing a disregard for the Lump Sum Contract, the Builder's Second Notice sought to hold the Owners to that contract and did not therefore constitute a repudiation. The Builder may have been mistaken in giving a Notice of Ceasing Building Works on the basis of non-payment of Progress Claim 4 within 7 days of its date (as arguably cl 24 entitled the Owners to an additional period of 5 business days) but no basis for treating that as other than a bona fide oversight was demonstrated. In particular, that point was not taken by the Owners, and the Builder was not therefore given the opportunity to allow further time for payment.

Whether the Builder locked out from the works

79. The other matter that assumed significance in the primary judge's reasoning supporting his conclusion that the Builder repudiated the contract is that the Second Notice asserted that the Owners had, without authority from the Builder, changed the site gate lock on or about 16 September 2015, preventing the Builder working on the site (see [26] above). The primary judge found that the Builder "adduced no evidence as to the alleged locking out" (No 3 Judgment at [56]). There was however evidence, as follows, that the Owners did lock the Builder out and the Builder's assertion of it in his Second Notice did not therefore constitute repudiatory conduct.

80. The Second Notice was itself evidence of the lockout by the Owners in that it was a business record containing an assertion that that had occurred. Moreover, in the course of his cross-examination, the Builder stated that he was prevented from "coming back to the job" because he was locked out. This evidence was not challenged by the Owners, nor did the Owners adduce any contrary evidence. The Builder's right to suspend work in these circumstances was expressly conferred by cl 24 of the Lump Sum Contract (see [12] above).

81. In addition to identifying "stopping work" as repudiatory conduct, the primary judge referred to the Builder "failing to resume work" (No 3 Judgment at [59]). No evidence was brought to this Court's attention, nor was there any finding, that the Owners' lock out of the Builder from the site ceased after it had initially occurred. On the contrary, the Builder said in the evidence just referred to that he was prevented from "coming back to the job". In those circumstances, it was not appropriate to categorise his "failing to resume work" as repudiatory conduct.

82. The fact that the Builder made other complaints in his Second Notice did not detract from the fact that his primary complaints of non-payment of Progress Claim 4 and the Owners' lock out of him from the site were of non-compliance by the Owners with the Lump Sum Contract. This was a far cry from the Builder repudiating the Contract by indicating an intention not to perform it according to its terms. Indeed, it was the Owners, by Mr Stepanoski's email of 14 September 2015 (see [24] above), who made a demand that was plainly inconsistent with the Contract, namely, for the provision of copies of invoices and other supporting documents, at least implicitly, before they would pay Progress Claim 4.

Conclusion on repudiation

83. For the reasons given above, the Primary Judge erred in finding that the Builder repudiated the Lump Sum Contract in the manner determined by his Honour.

84. As a result, the Owners were not entitled to terminate the Lump Sum Contract for any such repudiation and the Owners are not entitled to any of the damages that they were awarded at first instance. The question of whether the Owners were properly given leave to reopen their case on damages by the primary judge's judgment of 24 February 2020 does not therefore arise. I nevertheless address that issue on a contingent and brief basis below. Likewise, the Loss of Rental Issue and the Remoteness Argument do not arise. They are not addressed in this judgment.

85. A further issue that does however still arise is the Owners' claim to restitution of the amounts that they allegedly overpaid to the Builder. I now turn to that claim.

THE OWNERS' RESTITUTIONARY CLAIM

86. The primary judge's reason for accepting the Owners' claim for restitution to them by the Builder of $452,667.80 is set out in the No 3 Judgment at [53] (see [39] above) and was to the effect that the Owners had paid the total amount of $1,067,094.28 whereas the value of the work completed by the Builder was $614,426.48. The result was held to be that the Owners had overpaid the Builder and that the Builder was liable to refund the amount of the overpayment. With respect, that reasoning cannot be sustained for the reasons that follow.

87. His Honour said that it had not been suggested to him by the Builder that, if the Court concluded that there had been an overpayment, the Owners would not be entitled to recover that amount, subject to the Builder's claim (which the primary judge rejected) for loss of profit (ibid). Although on appeal the Owners therefore correctly assert that the Builder did not argue before the primary judge that the Owners were not entitled to the refund of the alleged overpayment, they did not argue that they were prejudiced by the argument not having been put below and that the Builder should therefore be precluded from putting it on appeal. It is therefore addressed below.

88. Consistent with what I said above in [70], a comparison of the sums paid under a contract with the value of work completed does not reveal whether there has been an overpayment under the contract. The contract price may be very different from the value of the work promised and a deficiency in value may be attributable to matters that give rise to a claim in damages rather than a reduction in contract price, or attributable simply to a bargain which is bad from the proprietor's point of view. Moreover, as in *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560; [2019] HCA 32, the Lump Sum Contract provided for staged payments, not a single indivisible contract price, and there was nothing in the Contract to suggest that the stipulated progress payments were to be regarded as provisional only and subject to a final taking of accounts (at [26]-[27], [176]-[177], [179]). Contrary to the Owners' submission, cl 12 of the Lump Sum Contract (entitling the Owners to withhold disputed amounts from progress payments) does not indicate that amounts the Owners do pay are provisional only.

89. The present claim could therefore not succeed unless there was at least an examination of the individual payments made (and as I noted above in [71], there were some six payments made whilst the Cost Plus Contract was operative) and a comparison made with the then subsisting contractual provisions, or other circumstances, that gave rise to their payment, as "[r]estitutionary claims must respect contractual regimes and the allocations of risk made under those regimes" (*Mann v Paterson Constructions* at [14]; see also [19]-[22], [61]-[64] and [172]-[179]). This did not occur and in particular was not the basis upon which the primary judge found that the restitutionary claim succeeded.

90. Leaving aside whether the Owners, when making payments, believed they accorded with the then operative contractual provisions, the question remained, for the purpose of considering a

restitutionary claim based on the payment of money under mistakes of fact or law, of whether the payments were in fact in disconformity with what the contract required. This question was not answered.

91. In the absence of any other justification for the claims being successfully advanced, the primary judge's judgment for $452,667.80 (plus interest) in favour of the Owners in respect of overpayments should be set aside.

LEAVE GRANTED TO THE OWNERS TO REOPEN THEIR CASE ON DAMAGES

92. The circumstances in which the primary judge came to give leave to the Owners to reopen their case on damages are indicated in [46]-[54] above. But for that reopening, the unchallenged position was, as his Honour found in his No 3 Judgment at [73], that the Owners did not establish that they suffered any loss (apart from rental loss) by reason of the Builder's alleged repudiation of the Lump Sum Contract.

93. As the Builder pointed out in his written submissions on appeal, the Owners' pleaded case for damages (other than rental loss) was at all times for the cost of rectification works required to complete the works for which the Lump Sum Contract provided.

94. On the first day of the first hearing before the primary judge the Owners tendered a report by Mr McMonigal dated 28 October 2016 but only to the extent that it addressed the Owners' claim for loss of rental income. The Owners' senior counsel expressly stated that "there's no claim here for loss relating to loss of value so in essence, I don't rely on the first part of this report" (which contained valuation evidence). At the hearing on 25 and 26 June 2019, preceding the primary judge' s delivery of the No 3 Judgment, expert evidence was tendered by both sides but that did not include any valuation evidence, in particular, not that which was in the untendered part of the report of Mr McMonigal. Consistently with this, the Owners' written submissions in chief and in reply referred to the recovery of damages for the costs of rectification, not for loss of value.

95. In his No 3 Judgment the primary judge found that there was no evidence to support the Owners' claim for the cost of rectifying the works to accord with the requirement of the Lump Sum Contract, but noted that an appropriate measure of loss might have been the difference between the sale price of the property and the price that might have been realised had the works been completed in accordance with the Contract. He added that no attempt had however been made to establish loss on that basis.

96. Those observations led to the Owners filing a notice of motion seeking to reopen their case on damages and to attempt to explain why they should be allowed to do so.

97. As submitted by the Builder on appeal, a heavy burden rested on the Owners to persuade the Court that they should be allowed to reopen their case at the conclusion of the hearing. It was of fundamental importance to their application that their damages claim had been pursued to

judgment after it had been pleaded in a limited manner and had been expressly stated not to extend to the basis of the claim now sought to be advanced. As submitted by the Builder, parties are ordinarily bound by their conduct of their cases and should not be allowed to raise new arguments when they have previously had the opportunity to raise them but did not do so (*University of Wollongong v Metwally (No 2)* [1985] HCA 28; (1985) 59 ALJR 481 at 483). In particular "[i]f there was a deliberate decision not to call [the evidence], ordinarily that will tell decisively against the application" (*Smith v NSW Bar Association* (1992) 176 CLR 256 at 266; [1992] HCA 36; see also *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 at 303; [1993] HCA 6). Such a deliberate decision was clearly made in the present case. The observation made in the course of the Owners' opening (see [94] above) demonstrated that the Owners adverted to the possibility of framing their case in a different way based on loss of value but chose not to do that.

98. Taking the preceding, as well the following, matters into account, I conclude that the primary judge's exercise of discretion to permit the Owners to reopen their case miscarried.

99. First, the primary judge mistakenly understood the Owners' solicitor, Mr Redenbach, to have said in his affidavit that the Owners changed both their solicitors and counsel after the first judgment. In fact, Mr Redenbach was involved throughout and it was only counsel who were changed. There was thus a continuity in representation of which the primary judge was not cognisant.

100. Secondly, his Honour said that the "Owners were under the impression that the proposed additional evidence was already before the Court" but Mr Redenbach cannot have been under that impression because he was the Owners' solicitor during the first hearing (and beyond) when Mr McMonigal's evidence was expressly tendered on the limited basis referred to above in [94]. Moreover what his Honour said did not accord with Mr Redenbach's statement in paragraph [33] of his affidavit of 17 February 2020 that "[t]he delay in filing of this evidence stemmed from the understanding that this evidence could be adduced at this later point in time". Mr Redenbach did not say who had this understanding, when he or she had it and what led to the understanding.

101. Thirdly, as his Honour did not mention it, he must have been unaware that the Owners, by their notice of motion, were implicitly seeking to change their pleaded and propounded case, not simply seeking to adduce further evidence that fell within the umbrella of that case. Bearing in mind that the damages claim had been litigated to judgment, that fact should have raised considerably the barrier that the Owners had to surmount to obtain leave to reopen. Moreover, the Owners should have been required to address explicitly the need for them to apply for leave to amend their pleadings.

102. Fourthly, presumably due to the misapprehensions just referred to, his Honour did not apply the principle that a party is ordinarily bound by its case and a deliberate decision not to call additional evidence will "ordinarily… tell decisively" against giving leave to reopen (see [97] above).

103. If it had been necessary for this Court to re-exercise his Honour's discretion to allow the Owners to reopen, I would have refused their application on the basis that they did not establish that

there were any special circumstances that justified departure from the ordinary rule that a party is bound by the case that it conducts to judgment, particularly where it has made a deliberate decision to put its case on a limited basis.

104. For these reasons, even if the Owners had succeeded in establishing that they had an entitlement to damages as a result of a repudiation by the Builder and subsequent acceptance of it by the Owners, they failed to establish that they suffered any loss, other than perhaps a loss of rental income, their claim for which it has not been necessary to address (see [64] and [84] above).

ORDERS

105. For the reasons I have given the Owners' damages and restitution claims fail. I therefore propose the following orders:

    1. Allow the appeal.

    2. Set aside Orders 1 and 2 made by Emmett AJA on 16 July 2020.

    3. Judgment for the Builder on the Owners' claim against him.

    4. Judgment for the Builder against the Owners in the sum of $50,000.

    5. Order the Owners to pay the Builder's costs of the proceedings at first instance and on appeal.

106. **GLEESON JA:** I agree with Macfarlan JA.

107. **PAYNE JA:** I agree with Macfarlan JA.

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Decision last updated: 25 February 2022