SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2016 0128

IMERVA CORPORATION PTY LTD (ACN 124 486 308) — Applicant

v

ANTON KUNA and JAGA KUNA — Respondents

JUDGES:	TATE, KYROU and McLEISH JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	9 May 2017
DATE OF JUDGMENT:	29 June 2017
MEDIUM NEUTRAL CITATION:	[2017] VSCA 168
JUDGMENT APPEALED FROM:	[2016] VSC 461 (McDonald J)

BUILDING AND CONSTRUCTION – Major domestic building contract – Whether progress payments governed by schedule in contract or by schedule prescribed by the *Domestic Building Contracts Act 1995* – Statute permits parties to depart from prescribed schedule where parties agree and 'do so in the manner set out in the regulations' – Regulations require warning of change to legal rights to be signed by building owner – Requirement has objective of consumer protection – Signature must demonstrate clearly that owners understand effect on legal rights – Initials at foot of page insufficient – Estoppel unavailable to preclude owners from relying on builders' contravention – *Tudor Developments Pty Ltd v Makeig* (2008) 72 NSWLR 624 considered – *R v Moore; ex parte Myers* (1884) 10 VLR 322, *Campbell v DPP (Cth)* [1995] 2 VR 654, *Waugh v Kippen* (1986) 160 CLR 156, *Nelson v Nelson* (1995) 184 CLR 538 discussed – *Re Brunswick NL; Blossomtree Pty Ltd v Brunswick NL* (1990) 2 ACSR 625 distinguished – *Domestic Building Contracts Act 1995* ss 40, 132, 133 – *Domestic Building Contracts Regulations 2007* regs 12(a) and (b), Forms 1 and 2 – Leave to appeal granted – Appeal dismissed.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr M A Robins QC	Guymer Lawyers
For the Respondents	Mr R Andrew with Mr P Kelly	Noble Lawyers

TATE JA:

TABLE OF CONTENTS

Introduction and summary

1 The *Domestic Building Contracts Act 1995* ('the Act') prescribes a schedule of progress payments applicable to a major domestic building contract. This prohibits a builder from charging more than a fixed percentage of the total contract price at the completion of each stage of building a home. The Act allows for the parties to a building contract, the builder and the owners, to agree that the schedule is not to apply to them and to specify instead what percentage of the contract price will be paid at each stage of construction. However, the Act directs that they must do so 'in the manner set out in the regulations'.[1] The Regulations contain a form including a

[1] The Act, s 40(4). The applicable regulations are the *Domestic Building Contracts Regulations 2007*, ('the Regulations'). See [28] and [31] respectively.

warning to the owners that they understand the change to their legal rights. The warning must be signed. The key question that arises in this proceeding is whether the placing of initials at the foot of the page containing the warning is sufficient compliance with the Regulations to displace the statutory schedule.

2 The judge below determined that there was insufficient compliance.[2] He refused to grant leave from the decision by the Victorian Civil and Administrative Tribunal ('the Tribunal') that the statutory schedule had not been displaced.[3] The judge concluded that the owners (Mr and Mrs Kuna ('the Kunas')) were entitled to rely upon the schedule of progress payments prescribed under the Act. The builder (Imerva Corporation Pty Ltd ('Imerva')) seeks leave to appeal and, if leave is granted, for the appeal to be allowed.

3 For the reasons which follow, I would grant leave to appeal but dismiss the appeal.[4] In my view, compliance with the Regulations requires that the warning be signed in a manner that demonstrates clearly that the owners understand that the legal protection afforded by the Act, with respect to progress payments, will not apply to their building contract. This was not demonstrated here. I also consider that the judge was correct to conclude that estoppel is not available to preclude the Kunas from relying upon Imerva's contravention of the Act.

Contract to construct two townhouses

4 The Kunas owned land in Brighton and decided to demolish an existing house on that land and build two attached townhouses. Their intention was that they would live in one of the units and rent out the other.

5 By a building contract dated 13 January 2013, the Kunas entered into a 'major

---

2 *Imerva Corporation Pty Ltd v Kuna* [2016] VSC 461 ('Reasons').

3 *Imerva Corporation Pty Ltd v Kuna (Building and Property)* [2015] VCAT 2058 ('Tribunal's reasons').

4 In what follows I refer to the proceeding as simply 'the appeal'.

domestic building contract' with Imerva, within the meaning of the Act[5] by which Imerva agreed to construct two attached two storey townhouses above a basement carpark for a price of $1,983,024 inclusive of GST ('the Contract').

6 The Kunas' son-in-law, Peter Paritsi ('Paritsi') is and was an experienced building construction manager and he was appointed as the Kunas' nominated representative under the Contract. Paritsi acted as agent for the Kunas in the negotiations leading up to the Contract. The Kunas' daughter, Marina Kuna-Paritsi ('Kuna-Paritsi'), is a former solicitor who completed articles at a construction law firm and then had two years post-qualification experience in construction law at a large commercial firm of solicitors. By late 2012 Kuna-Paritsi had not practised for many years.

7 The negotiations leading up to the Contract involved the director of Imerva, Ari Schachter ('Schachter'), emailing Paritsi the first draft of the Contract, on 14 September 2012. The draft included a method of progress payments for the construction of the townhouses that differed from that prescribed under the Act. Paritsi responded with an email sent on 25 September 2012 in which he said:

> Contract format should be fine, I will confirm if we have any issues with it, on first glance I would like to discuss the progress payment amounts.
>
> I will give you a call to discuss further.
>
> Peter Paritsi

8 Kuna-Paritsi drafted some proposed special conditions, which she sent to Schachter by email dated 9 November 2012. This included a proposed Special Condition 5:

> The parties' agreement as to which Method will be used for Progress Payments ... is subject to approval by the Lending Body.

9 This special condition was not ultimately included in the Contract.

---

5 A 'major domestic building contract' is defined in s 3 of the Act to mean 'a domestic building contract in which the contract price for the carrying out of domestic building work is more than $5000 (or any higher amount fixed by the regulations)'. It is not in contest that the Contract is a major domestic building contract.

10 Paritsi emailed Schachter further draft special conditions on 28 November 2012. They did not refer to the method to be used for progress payments but did provide, as Special Condition 2, that '[a]ny progress claims made by the Builder under the Contract are subject to the Lending Body's approval'. This was included in the Contract.

11 Schedule 3 to the Contract provides for two alternative methods for progress payments. Method 1 is the method prescribed under the Act.[6] Method 2 is the method that departs from that prescribed under the Act. Schedule 3 to the Contract states:

> **Schedule 3**
>
> CONSTRUCTION STAGES APPLICABLE TO METHOD 1 PROGRESS PAYMENTS
>
> | | |
> |---|---|
> | 'Base Stage' means | (a) in the case of a home with a timber floor, the stage when the concrete footings for the floor are poured and the base brickwork is built to floor level;

(b) in the case of a home with a timber floor with no base brickwork, the stage when the stumps, piers or columns are completed;

(c) in the case of a home with a suspended concrete slab floor, the stage when the concrete footings are poured;

(d) in the case of a home with a concrete floor, the stage when the floor is completed;

(e) in the case of a home for which the exterior walls and roof are constructed before the floor is constructed, the stage when the concrete footings are poured; |
> | 'Frame stage' means | the stage when a home's frame is completed and approved by a building surveyor; |
> | 'Lock-up stage' means | the stage when a home's external wall cladding and roof covering is fixed, the flooring is laid and external doors and external windows are fixed (even if those doors or windows are only temporary); |

---

6 Section 40. See [26] below.

'Fixing stage' means the stage when all internal cladding, architraves, skirting, doors, built-in shelves, baths, basins, troughs, sinks, cabinets and cupboards of a home are fitted and fixed in position;

'Completion' means the Building Works are complete in accordance with the Contract Documents.

NOTE: This table is prescribed by Section 40 of the *Domestic Building Contracts Act 1995*. In the case of a Domestic Building Contract that is not listed in the Table, a Builder must not demand or receive any amount or instalment that is not directly related to the progress of the Building Works being carried out under the Contract.

TABLE

Type of Contract	Percentage of Contract Price	Stage
Contract to build to lock-up	20%	Base Stage
	25%	Frame Stage
Contract to build to fixing stage	12%	Base Stage
	18%	Frame Stage
	40%	Lock-up Stage
Contract to build all stages	10%	Base Stage
	15%	Frame Stage
	35%	Lock-up Stage
	25%	Fixing Stage

Schedule 3 Method 1

PROGRESS PAYMENTS

NOTE

Use Method 1 unless the Building Works differ from the usual. *If Method 2 is to be used the Owner must read and sign Attachment 1.* Delete whichever method is inapplicable.[7]

Method 1

There are five stages in Method 1. These are described below. Fill in the percentage if the Contract Price and the amount payable for each of the stages applicable to your Contract (for example, if the Contract is to build to lock-up stage, fill in only the first 3 stages and delete the last 2 stages; if the Contract is to complete the Building Works complete all 5 stages).

There are five different types of construction for the Base Stage – refer to

7 Emphasis added.

Schedule 3. In the space provided below fill in (a), (b), (c), (d) or (e) to indicate which type will be used under this Contract.

Stage	Percent
Deposit	
Base Stage	10.00%
Frame Stage	15.00%
Lock-up Stage	35.00%
Fixing Stage	25.00%
Completion	

Schedule 3 Method 2

PROGRESS PAYMENTS

NOTES

Under Method 2 the Builder and the Owner must agree on stages at which Progress Payments must be made. *Remember, the Owner must read and sign Form 1 of the Regulations (refer to Attachment 1) before using Method 2*. [8]

FORM 2 OF THE REGULATIONS – REGULATION 6(B)

The parties agree -

(i) *that the Progress Payments fixed by section 40 of the Domestic Building Contracts Act 1995 do not apply*; and

(ii) *that instead the percentage of the Contract Price and amounts payable are as follows*: [9]

Stage	Percent	Amount
Deposit Adjusted by $1.00 to allow for rounding	2.00%	$39,661.00
Site establishment and set out	4.00%	$79,321.00
Basement Stage 1	10.00%	$198,302.00
Excavation	4.00%	$79,321.00
Basement stage 2	4.00%	$79,321.00
Ground floor slab	8.00%	$158,642.00
Ground floor framing	7.00%	$138,812.00

8 Emphasis added.

9 Emphasis added.

Ground floor brickwork	5.00%	$99,151.00
First floor framing stage 1	5.00%	$99,151.00
First floor framing stage 2	7.00%	$138,812.00
Roofing	4.00%	$79,321.00
Rough In	6.00%	$118,981.00
Windows installed	6.00%	$118,981.00
Plastering	4.00%	$79,321.00
Fixing stage 1	4.00%	$79,321.00
Joinery install	7.00%	$138,812.00
Fixing stage 2	6.00%	$118,981.00
Painting	3.00%	$59,491.00
Rendering	3.00%	$59,491.00
External works	1.00%	$19,830.00
Total	100.00%	$1,983,024.00

12 Attachment 1 to the Contract ('Attachment 1') reflects Form 1 of the Regulations,[10] including the warning to owners that the adoption of Method 2 means that their legal rights have changed. Attachment 1 reads as follows:

> **Attachment 1**
>
> FORM 1 OF THE REGULATIONS – REGULATION 6(A) [11]
>
> WARNING TO OWNER – CHANGE OF LEGAL RIGHTS
>
> Section 40 of the *Domestic Building Contracts Act 1995* provides that a Builder cannot charge more than a fixed percentage of the total Contract Price at the completion of each stage of building a home.
>
> The Act also allows the parties to agree in writing to change the stages and the percentage of the Contract Price to be paid at the completion for each stage.
>
> There are several ways in which a particular Contract can vary from the normal, and it is these exceptional cases which have caused the law to allow

---

10 The Regulations were revoked on 22 April 2017 but have been replaced by regulations, the *Domestic Building Contracts Regulations 2017* ('the new regulations'), which contain a somewhat similar requirement.

11 The Contract incorrectly refers to the prescribed warning provisions in regs 6(a) and 6(b) of the *Domestic Building Contracts and Tribunal (General) Regulations 1996*, which were revoked by the Regulations. However, the parties have consistently referred to the application of regs 12(a) and 12(b)(as did the judge and the Tribunal).

for these changes. Examples would include:

- where it is very expensive to prepare the land for building, for example, where the site is steep or rocky;
- where the house is so large that it will take a long time to complete, and intermediate Progress Payments are therefore required;
- where exceptionally expensive finishes are required, meaning that the final stage will represent a much larger portion of the whole price;
- where an architect is engaged to independently assess the value of the completed work for Progress Payments.

You should not agree to Progress Payments different from that provided in the Act unless your house is unusual in some way and you are SURE THAT DIFFERENT PROGRESS PAYMENTS ARE NECESSARY and you understand clearly why the change is needed in the case of your particular house. If you have any doubts, you could contact:

- Housing Industry Association
- The Master Builders' Association of Victoria
- Office of Fair Trading and Business Affairs
- Royal Australian Institute of Architects

I acknowledge that I have read this warning before signing the Contract.

Owner

NAME Anton & Jaga Kuna

SIGNATURE _____

WHEN METHOD 2 IS TO BE USED FOR PROGRESS PAYMENTS ALL OWNERS MUST SIGN[12]

13 The Kunas initialled each page of the Contract on the right-hand corner of the foot of the page, including Attachment 1. No signatures were inserted in the space designated for 'Signature'. There was nothing to differentiate their assent to Attachment 1 from any other page of the Contract. There was no deletion of Method 1.

14 The Kunas signed the Contract. There was a finding made by the Tribunal that the Kunas signed the Contract at their home and there was no discussion at that

12 Capitalisation as in original.

time about the schedule of progress payments in Method 2.[13] The Contract was signed in the absence of Schachter and in the presence of Paritsi and Kuna-Paritsi.

15 Once the Contract was signed, Paritsi delivered the Contract to Schachter on 13 January 2013. There was some evidence given by Schachter at the Tribunal about an inquiry he made of Paritsi concerning the lack of any signature above the dotted line on Attachment 1, the page containing the warning. This is discussed below.[14]

16 On the same day, 13 January 2013, Kuna-Paritsi drew up a handwritten agreement, described by the parties as 'the letter agreement'. The letter agreement was signed by the Kunas and by Schachter, on behalf of Imerva. It provides:

> LETTER OF AGREEMENT
>
> We, Anton Kuna, Jaga Kuna and Imerva Corporation Pty Ltd (collectively referred to as 'the parties') hereby agree that the building contract dated 13 January 2013 ('the Contract') is subject to the following pre-conditions:
>
> (1) The contract drawings and specifications will be agreed upon by the parties prior to the Contract taking effect and prior to the commencement of the building works;
>
> (2) The time for commencement (15 month time frame under the Contract) will not commence until the parties are in agreement as to condition (1) above; and
>
> (3) The parties will not be held liable under the Contract and the Contract is voidable if the requirements in condition (1) above have not been met and all information which the Builder reasonably requires in order to commence the buildings has been provided.

17 On 25 January 2013 the Kunas paid the deposit due to Imerva under the Contract.

18 By 3 February 2013 the conditions in the letter agreement had been satisfied and Imerva commenced building work. The Kunas' financier, the Commonwealth Bank of Australia, approved finance on the basis of independent valuation advice dated 22 February 2013. The advice was to the effect that, given the configuration

---

13 Tribunal's reasons [30].

14 See [41]-[45] below.

and finish of the proposed improvements, and the quality and style of the development, the departure in the Contract from the regime of progress payments prescribed under the Act was reasonable.

19 Between 8 February 2013 and 8 October 2013 Imerva rendered progress claims 1 to 7 for the work as described in Method 2, each of which progress claims the Kunas duly paid. At no stage did the Kunas ever raise any issue with Schachter or Imerva that Imerva's progress claims were rendered in accordance with Method 2, and not the regime provided for under the Act.

20 On 27 March 2014 Imerva rendered three further progress claims, 8 to 10, for the work as described in Method 2. Payment was due on 10 April 2014. The Kunas did not pay any of these progress claims and they remain unpaid.[15]

21 The Kunas engaged Mr Lorich, a building expert, in April 2014 to inspect the work and provide a report detailing defects. On 7 April 2014 the Kunas served a notice to remedy a breach of contract on Imerva. Imerva was given ten days to remedy the breaches as identified in the notice.

22 On 11 April 2014, Imerva served a notice to remedy breach alleging non-payment of progress payments 8, 9 and 10 totalling $356,144.[16]

23 On 24 April 2014, by letter signed by Paritsi, the Kunas purported to terminate the Contract on the basis of alleged defects in the building work. They changed the locks and excluded Imerva from the site.

24 On 29 April 2014 Imerva sent a letter purporting to terminate the Contract based on the Kunas' failure to pay progress claims 8 to 10.

25 On 6 May 2014 Imerva commenced proceedings in the Tribunal claiming the sum of $529,820.62 representing the debt due from progress claims 8 to 10 as well as

---

15 On the appeal it was clarified that Imerva no longer seeks payment of progress claim 8.

16 Reasons [7].

variations and delays, interest under the Contract, a 10% builder's margin on the unpaid progress claims and variations, and GST. The Kunas counterclaimed for the return of excess progress payments made with respect to progress claims 1 to 7 (a claim of $634,568.12) and the additional cost to complete the units as well as the cost of rectification and incomplete works.

The Domestic Building Contracts Act and reg 12(a)

26 Section 40 of the Act is concerned with setting limits on progress payments under a major domestic building contract. Section 40(2) provides:

> A builder must not demand or recover or retain under a major domestic building contract of a type listed in column 1 of the Table more than the percentage of the contract price listed in column 2 at the completion of a stage referred to in column 3.
>
> Penalty: 50 penalty units.

TABLE

Column 1 *Type of contract*	Column 2 *Percentage of contract price*	Column 3 *Stage*
Contract to build to lock-up stage	20%	Base stage
"	25%	Frame stage
Contract to build to fixing stage	12%	Base stage
"	18%	Frame stage
"	40%	Lock-up stage
Contract to build all stages	10%	Base stage
"	15%	Frame stage
"	35%	Lock-up stage
"	25%	Fixing stage

27 Section 40(3) provides:

> In the case of a major domestic building contract that is not listed in the Table, a builder must not demand or receive any amount or instalment that is not directly related to the progress of the building work being carried out under the contract.
>
> Penalty: 50 penalty units.

28 The statutory provision of greatest importance to the appeal is s 40(4) of the

Act which provides:

> Subsections (2) and (3) do 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*.[17]

29 Section 40(5) confers a power on the Tribunal to order a builder to refund a payment in the event of a breach of s 40(2) or s 40(3):

> If a court finds proven a charge under subsection (2) or (3) against a builder, it may order the builder to refund to the building owner some or all of the amount the building owner has paid the builder under the contract.

30 The critical question in the appeal is whether, in the circumstances, there was compliance with the manner which the Regulations prescribe for departing from the statutory regime. The operative regulation is reg 12(a).

31 The Regulations provide:

> **12 Progress payments**
>
> For the purposes of section 40(4) of the Act, when parties to a major domestic building contract agree that sections 40(2) and (3) of the Act do not apply to that contract, the *manner of agreement* is to include in the major domestic building contract—
>
> (a) *a warning in the form of Form 1 in the Schedule which is signed by the building owner before the execution of the contract*; and
>
> (b) a clause in the form of Form 2 in the Schedule.[18]

32 Form 1 of the Regulations is in the terms reproduced in the Contract, as set out in Attachment 1 above.[19] At the end of the body of the text in Form 1, there is provision for a signature as follows:

> ……..
>
> I acknowledge that I have read this warning before signing the contract
>
> Signature of Building Owner.[20]

---

17 Emphasis added.

18 Emphasis added.

19 See [12] above.

20 Underlining in the original.

33 Form 2 of the Regulations provides:

> PROGRESS PAYMENTS
>
> The parties agree—
>
> (i) that the progress payments fixed by section 40 of the *Domestic Building Contracts Act 1995* do not apply; and
>
> (ii) that instead the percentages of the contract price and amounts payable are as follows—

Name of stage	If this stage is not the same as a stage defined in section 40(1) of the *Domestic Building Contracts Act 1995*, what does this stage mean?	Percentage of total contract price	$

34 Form 2 was completed in the Contract as described above.[21]

35 It is noteworthy that the Regulations prescribe two distinct Forms, one for the parties to express their agreement to a regime of progress payments that departs from the statutory regime (Form 2) and one for the owners to express their acknowledgement that they have read the warning that departing from the statutory regime involves a change to their legal rights (Form 1). The distinction between assenting to an alternative regime of progress payments and assenting to having read a warning is significant in the analysis adopted below.

36 Section 132 of the Act provides for a general prohibition on contracting out of the Act, subject to contrary legislative intention:

> **132 Contracting out of this Act prohibited**
>
> (1) Subject to any contrary intention set out in this Act—
>
> (a) any term in a domestic building contract that is contrary to this Act, or that purports to annul, vary or exclude any provision of this Act, is void; and
>
> (b) any term of any other agreement that seeks to exclude, modify or restrict any right conferred by this Act in relation to a domestic building contract is void.

---

21 See [11] above.

> (2) However, the parties to a domestic building contract may include terms in the contract that impose greater or more onerous obligations on a builder than are imposed by this Act.

37 Section 133 of the Act allows for contracts that fail to comply with requirements under the Act to remain valid, subject to any contrary intention:

> **133 Effect of failure to comply with a requirement of this Act**
>
> A failure by a builder to comply with any requirement in this Act in relation to a domestic building contract does not make the contract illegal, void, or unenforceable, unless the contrary intention appears in this Act.

38 It was not in dispute that s 40(4) clearly manifests a contrary intention that parties are free to contract out of the regime of progress payments prescribed under s 40(2).

The Tribunal's reasons

39 The Tribunal held that the letter sent by the Kunas on 24 April 2014 purporting to terminate the Contract was effective to bring the Contract to an end.[22] It held that the Kunas were not obliged to pay the progress payments in accordance with Method 2 and thus they were not in substantial breach at the time they purported to terminate the Contract.[23]

40 By contrast, the Tribunal found that Imerva's letter dated 29 April 2014 purporting to terminate the Contract was ineffective because at that time Imerva was in substantial breach of the Contract and it was not entitled to serve a notice of termination.[24] The conduct supporting the finding that Imerva was in substantial breach related especially to what the Tribunal described as the 'defective construction of the party wall' which 'was a serious matter'.[25]

---

22 Tribunal's reasons [260].

23 Ibid [56].

24 Ibid [261].

25 Ibid [250].

41 On the issue of compliance with reg 12(a), Schachter gave evidence that shortly after 13 January 2013 he discussed with Paritsi the omission of the Kunas' signature on the dotted line on Attachment 1. In his principal witness statement, he said:

> Within a few days of signing the contract I noticed that our company copy did not have the signature on the designated line on attachment 1 on page 10 of the contract, or schedule 5 on page 12. I telephoned Mr Peter Paritsi and he advised that Anton and Jago Kuna had signed those pages on the line of their copy and he would forward me a copy. I considered this additional signature peripheral to the fact that Mr and Mrs Kuna had already signed the foot of the page 10 of the executed … contract.

42 Schachter expanded upon this in his witness statement in reply where he said:

> The building contract was further reviewed by them [Paritsi and Kuna-Paritsi] at the signing on 13 January 2013 when Marina, Peter Paritsi and myself met to have me sign the building contract. The meeting took place at a café.
>
> I did not deliver a copy of the signed building contract but rather I signed both copies of the building contract at that meeting and gave them to Marina to have the Respondents [the Kunas] sign the building contract. I received my copy back after a few days and immediately called Peter Paritsi after I received it as I noticed that some pages were missing additional signatures, namely pages 10, 12, 15. Peter Paritsi said that he would get the Respondents to sign and return those pages. I am almost sure that in a subsequent phone conversation Peter said that he had arranged the signatures and that he would drop off the pages. They were never delivered.

43 Paritsi was present during the hearing before the Tribunal. However, he gave no evidence for the Kunas to dispute the version of events recounted by Schachter and the Kunas gave no explanation for their failure to call him.

44 The Tribunal dealt with the issue by acknowledging that Schachter's evidence was uncontested but emphasising that, in any event, there was also a requirement that Attachment 1 be signed at a time before the Contract was signed:

> Mr Schachter said in his witness statement that within a few days of signing the contract he noticed that the Builder's copy did not have the signature on the designated line, that he telephoned Mr Paritsi who told him that the Owners had signed those pages and that he would forward a copy. Since Mr Paritsi did not give evidence, this evidence is uncontested. However even if the Owners were estopped from denying that they signed the attachment that would not assist the Builder because the Act requires that it be signed

before the Contract is signed.[26]

45 It became apparent at the hearing of the appeal that in the course of discovery, as directed by the Tribunal, Imerva had obtained the Kunas' copy of the Contract and there was no signature on the dotted line of Attachment 1.

46 The Tribunal's reference to the timing of the signature reflects the requirement in reg 12(a) that the warning be signed 'before the execution of the contract'.[27] The Tribunal implicitly construed the reference to 'execution of the contract' as meaning 'signing of the Contract'.[28] There was no evidence before the Tribunal to answer the question whether the initials on Attachment 1 came before or after the signing of the Contract. Given the conclusions about non-compliance with reg 12(a), the Tribunal held that 'it is not necessary to consider [the] detailed submission about the relative timing of the initialling and signing of the Contract'.[29] This issue is discussed below.[30]

47 The Tribunal held that the Kunas were 'aware of [the Method 2 schedule of payments in the Contract] and paid the first five progress payments in accordance with this schedule'.[31]

48 The Tribunal ultimately upheld the defence of the Kunas that reg 12(a) had not been complied with because they had not signed Attachment 1 in the manner required. The Tribunal member said:

> [I]n the present context the intention of the legislature appears to have been that the parties who are to pay for the work are to turn their minds to the consequences of agreeing to a form of payment other than that set out in the Act. This is to be done in the prescribed manner and it is also required to be verified by a signature which indicates that they have read and agreed to the wording giving rise to the significant change that is being made. I do not think that initials in the bottom right-hand corner of the page, which are,

---

26 Tribunal's reasons [51].

27 See [31] above.

28 Tribunal's reasons [46].

29 Ibid.

30 See [54], and [94] and [95]-[97] below.

31 Tribunal's reasons [42].

> practically, identical to the initials on the bottom right-hand corner of every other page of the Contract meet this requirement. I also do not believe that a reasonable bystander would interpret these initials in this way.[32]

49 The Tribunal also rejected the claim by Imerva that the Kunas were estopped from disputing the adequacy of Attachment 1:

> [T]here was no evidence, nor was it ... suggested, that the Owners made any representations in the terms alleged or specifically represented that they would not rely upon their rights under the Act. I cannot spell out from the facts referred to any representation which would make it inequitable for the Owners to rely upon the protection that the Act intended to give them.[33]

50 The Tribunal's conclusion was, relevantly, that the consequence of non-compliance with reg 12(a) meant that Imerva's entitlement to progress payments, before the Contract was terminated by the Kunas, was to be assessed in accordance with Method 1 provided for under s 40(2) of the Act.[34]

51 The Tribunal set out a table addressing the calculation of the payment due to be recovered by the Kunas from Imerva:

> By reason of s 40(2) of the Act, the Owners are entitled to recover back the amount of $634,568 from the payments that they have made. The effect of that will be a corresponding increase in the unpaid balance of the Contract price to $1,807,000.40 calculated as follows:
>
> | | | |
> |---|---|---|
> | Contract price | $1,983,024.00 | |
> | Add admitted variations | $17,571.84 | |
> | Variations allowed | $44,367.56 | $2,044,963.40 |
> | Total paid to the Builder | $872,531.00 | |
> | less refund to be paid | $634,568.00 | $ 237,963.00 |
> | Balance of Contract price unpaid | | $1,807,000.40 |
>
> The Owners are also entitled to the cost they will incur in having the works completed by another Builder, less the amount remaining unpaid under the Contract. The Owners' claim therefore becomes $97,858.33, calculated as follows:

---

32 Ibid [45].

33 Ibid [52].

34 See [98] below.

Cost of completion	$1,103,476.00	
plus GST	$110,347.60	$1,213,823.60
[Repairing] Defects		$ 56,467.13
Overpayment of instalments		$ 634,568.00
Total		$1,904,858.73
Less: balance of Contract price unpaid		$1,807,000.40
Balance		$ 97,858.33[35]

52 The Tribunal held that as Imerva's claim, 'insofar as it has been successful, is taken up in the calculation of the amount to be paid to the Owners, the claim will be struck out'.[36]

53 Imerva challenged the Tribunal's conclusion by seeking leave to appeal to the Trial Division of the Supreme Court.[37] An application for leave to appeal from the Tribunal is restricted to a question of law. Imerva raised multiple questions of law.[38]

The judge's reasons

54 The judge noted that senior counsel for Imerva had identified that 'whether the owners were entitled to rely upon the schedule of progress payments prescribed by s 40(2) of the Act, rather than the schedule [to the Contract], was the "killing ground" in the application for leave to appeal.'[39] The judge identified questions 1 and 2 raised in the Originating Motion as relevant to this issue:

> 1. What is the proper construction of Section 40(4) of [the Act] and Regulation 12(a) of [the Regulations] and in particular:

---

35 Tribunal's reasons [265]–[266]. This calculation was addressed on the appeal. See n 98 below.

36 Tribunal's reasons [267].

37 *Victorian Civil and Administrative Tribunal Act 1998* s 148.

38 The Originating Motion before the judge sought leave to appeal against the Tribunal's decision on six questions of law. The judge answered questions 1 and 2, which related to construction of the Act and the Regulations, and also answered question 6, which related to the issue of estoppel, but found it unnecessary to determine the other questions because Imerva conceded that if the questions of law regarding s 40 and estoppel were decided against Imerva there would be nothing left to be determined: Reasons [39].

39 Reasons [10] (citations omitted).

(a) Is the affixing of initials by a building owner to a page including Form 1 of the Regulations a sufficient signature for the purpose of these provisions; and

(b) Does the term 'before the execution of the contract' mean:

(i) before the mere act of the signing of the contract; or

(ii) before completion of all formalities, such as signing, sealing and delivery, or satisfaction of any escrow provision or condition precedent, as may be necessary to give validity or legal efficacy to the contract?

2. Did the Tribunal err in law in finding that the Section 40 warning in [the Contract] was not signed by the Defendants in circumstances where the Defendants admitted that they initialled the page including the Section 40 warning before delivering the signed document to Imerva? (collectively with paragraph 1 'the Section 40 decision')?[40]

55 The judge accepted the Kunas' submission that, in prescribing a penalty of 50 penalty units in each instance, s 40(2) and (3) created criminal offences.[41]

56 He also found that the Act is a 'Consumer Act' for the purposes of the *Australian Consumer Law and Fair Trading Act 2012* ('the ACL Act') and therefore, under s 194 of the ACL Act, the Director of Consumer Affairs Victoria may bring criminal proceedings for offences against the Act, including for breach of s 40(2) and (3).[42] The objective of consumer protection enshrined in the Act loomed large in the judge's reasoning, particularly on the question of whether estoppel is available to avoid the stringency of s 40(4).[43]

57 The judge considered that the words of s 40(4) and reg 12(a) are clear and unambiguous and that the initialling on the right-hand corner of the foot of Attachment 1 did not satisfy the requirements of reg 12(a) because this failed to

---

40 Reasons [19].

41 See [26] and [27] above respectively. The judge concluded that there was no provision in the Act which indicated those penalties were civil ones. There are other provisions in the Act that also supported the characterisation of s 40(2) and (3) as creating criminal offences, namely, s 59 (the Tribunal may hear a dispute regardless of related criminal proceedings), and s 131 (providing a time limit of three years for proceedings to be commenced after the commission of an alleged offence): Reasons [15].

42 Reasons [16].

43 See [63] below.

record in the designated space that the Kunas had read the prescribed warning. He said:

> Applying the ordinary and grammatical meaning of s 40(4) and reg 12, it is clear that the owners did not agree in the manner set out in the Regulations that sub-ss (2) and (3) of s 40 of the Act were not to apply. In order for the parties to a domestic building contract to avoid the operation of s 40(2)-(3) they must do two things. First, they must agree that sub-ss (2) and (3) are not to apply. Second, they must record that agreement in the manner set out in the Regulations. This requires owner[s] to acknowledge, in the space provided, they have read the prescribed warning. Plainly, the owners did not acknowledge the prescribed warning in the manner set out in the Regulations. No signature or mark appears in the designated place.[44]

58 The judge took the view that reg 12(a) demands strict compliance with its requirements because of the criminal nature of the sanctions under s 40(2) and (3):

> In addition to the plain words of s 40(4) of the Act, legislative context strongly supports the conclusion that compliance with reg 12 is a mandatory pre-condition to the non-application of sub-ss (2) and (3). Section 40(2) prescribes a criminal offence with a penalty of up to 50 penalty units for a builder to demand, recover or retain progress payments in excess of the amounts prescribed in Column 3 of the table which is part of s 40(2). The fact that non-compliance with s 40(2) exposes a builder to potential criminal sanction strongly supports the conclusion that in order to avoid the operation of s 40(2), there must be strict compliance with s 40(4). This includes the requirement that any agreement avoiding the operation of s 40(2) be in the form prescribed by the Regulations.[45]

59 This approach was challenged on the appeal.

60 The judge also considered the balance of the Contract and what inference could be drawn from the fact that the Kunas' initials appeared at the right-hand corner of the foot of each page. He said:

> [Counsel for the Kunas] pointed out that each page of the contract had been initialled by both Imerva and the owners. This included page 8, headed 'Schedule [3] Method 1'. The contents of this Schedule replicate the progress payment table in s 40(2) of the Act for a contract to build all stages. I accept [counsel's] submission that if the owners' initials in a corner of the page constituted a signed acceptance, this would mean that the owners accepted both the progress payments prescribed by s 40(2) as well as the different schedule of payments set out at page 9[46] ... which had also been initialled.

---

44 Reasons [23].

45 Ibid [24].

46 See [11] above.

> Plainly, the owners could not have agreed to both schedules. I accept [counsel's] submission that by initialling each page of the contract the owners and Imerva were simply acknowledging that each page was part of the contract. The owners' initials in a corner of the page did not constitute a signed acknowledgment by them that s 40(2) and (3) did not apply.[47]

61 He then turned to the estoppel issue. Imerva had argued that even if there had not been compliance with s 40(4), the Kunas were estopped from relying on the regime of progress payments prescribed under s 40(2) of the Act because Paritsi had represented that the warning in Attachment 1 had been signed and Imerva had relied on this representation to its detriment. This was raised by question of law 6 in the Originating Motion:

> 6. Did the Tribunal err in law in its approach to the principles expressed in *Waltons Stores (Interstate) Ltd v Maher* and *Commonwealth v Verwayen* in finding that:
>
> (a) there was no estoppel upon which Imerva could rely to allow recovery of the Schedule 3 Method 2 progress payments despite an express or implied representation made by Paritsi as actual agent of the Defendants at or about the time of the execution of the Contract to the effect that the Defendants had signed the warning contained in Form 1 of the Regulations ('the Representation') and the Plaintiff ('Imerva') had thereafter performed the Contract in reliance upon the Representation and the assumptions arising therefrom; and/or
>
> (b) it was not unconscionable for the Defendants to rely upon Section 40(2) and (3) of the Act and [reg] 12(a) of the Regulations despite the Representation and/or the circumstances that:
>
> (i) the draft Contract was settled by the Defendants' daughter who was a fully qualified solicitor and where the draft Contract contained the Warning and the Clause required in Forms [sic] and 2 of the Regulations;
>
> (ii) Paritsi as an actual agent of the Defendants, and as an experienced person in building and construction, had reviewed and approved the method of progress payments contained in Schedule 3 Method 2 of the Contract prior to the execution of the Contract; and
>
> (iii) At the time of the Representation the Contract was still subject to the escrow or condition precedent terms of the handwritten letter agreement dated 13 January

---

47 Reasons [26] (citations omitted).

2013? ('the estoppel/unconscionability decision').[48]

62 The judge held that estoppel was not available to qualify the rights conferred upon Imerva by s 40 of the Act and reg 12(a) of the Regulations.[49] He considered that the purpose and effect of ss 40(2), 40(4), and 132 of the Act and reg 12 of the Regulations 'is to confer a benefit upon the owners',[50] namely, 'to prevent a builder from "front-loading" progress payments under a building contract'.[51] Here, the operation of Method 2 meant that, by the date of termination, 24 April 2014, the Kunas had paid a sum equivalent to 44 per cent of the total price under the Contract whereas payments made in accordance with s 40(2) would have meant that the Kunas had paid only 15 per cent. The judge considered that the only means by which the parties could depart from the regime of progress payments prescribed under s 40(2) was by strict observance of reg 12(a) and there was no room available for other forms of avoidance. He said:

> To the extent that the legislature has qualified the operation of s 40(2)-(3) of the Act, it has done so expressly in s 40(4). The operation of s 40(2) can only be avoided in circumstances where there has been strict compliance with the terms of s 40(4) of the Act and reg 12 of the Regulations. Further, the effect of s 132 of the Act is that any term of a contract which purports to exclude the operation of s 40(2) is void, save for a term which complies with s 40(4) and reg 12. The Act provides for the consequences of a contravention by way of criminal sanction prescribed by s 40(2). The statutory scheme leaves no room for a builder to contend that an owner is estopped from insisting upon compliance with s 40(2) of the Act.[52]

63 He drew an analogy with the circumstances of *Tudor Developments Pty Ltd v Makeig*[53] in which s 96A(1) of the *Home Building Act 1989* (NSW) prohibited a developer from entering into a contract for sale of land on which residential building work was to be done unless a certificate of insurance evidencing the contract of insurance required under that Act by the person doing the work for the developer

---

48 Reasons [27] (citations omitted).

49 Ibid [28].

50 Ibid [30].

51 Ibid.

52 Ibid [31].

53 (2008) 72 NSWLR 624 ('*Tudor Developments*').

was attached to the contract of sale. A contravention of the requirement rendered the contract voidable at the option of the purchaser, pursuant to s 96A(3). The New South Wales Court of Appeal held that estoppel could not be pleaded by a vendor against a purchaser who sought to rescind a contract of sale relying on the statutory right to treat the contract as void. In applying *Tudor Developments* to the circumstances of this case, the judge referred to Basten JA's observation that the purpose of s 96A(3) is to 'protect purchasers from themselves'[54] and he remarked that the 'same observation can be made in respect of the combined effect of ss 40(4) and 132 of the Act'.[55] He emphasised that:

> The clear consumer protection purpose of ss 11, 40(2) and (4), 132 and reg 12(a) weighs heavily in favour of the conclusion that estoppel may not be raised to avoid the operation of the progress payment schedule prescribed by s 40(2) of the Act.[56]

64 The judge also considered that, if estoppel was available, the element of unconscionability would need to be made out and Imerva had not identified any authority in which a court had held that it was unconscionable for a party to insist upon another party complying with a statutory requirement, non-compliance with which constituted a criminal offence. He found no error in the Tribunal's conclusion that there was no identifiable representation that would render it inequitable for the Kunas to rely upon the protection that the Act intended to give them.[57]

Grounds of appeal

65 Imerva relies on multiple grounds of appeal:[58]

1. In construing s 40(4) of the Act and reg 12(a) of the Regulations, the judge erred by construing those provisions to the effect that a warning and acknowledgement in terms of Form 1 of the Regulations could only be effectively signed by the Kunas if their signature appeared above the dotted line in the said Form and nowhere else on that page.

---

54 Reasons [34], citing *Tudor Developments* (2008) 72 NSWLR 624, 641 [71].

55 Reasons [34].

56 Ibid [35] (citations omitted).

57 Ibid [38]. See [49] above.

58 The grounds have been modified in light of terms already defined.

2. Given the unchallenged finding by the Tribunal below that the Kunas had initialled Attachment 1 before they delivered the Contract so signed to Imerva, the judge erred by failing to construe that objective act by the Kunas as constituting an effective signature of the warning and acknowledgement as sufficiently required under the Act and the Regulations.

3. The judge erred in construing s 40 of the Act as entirely precluding the grant of equitable relief in the nature of promissory estoppel to Imerva, in circumstances where:

    (a) s 40(4) of the Act expressly permitted the parties to contract out of the prohibition contained in s 40(2), so that the legislative scheme itself does not create an absolute prohibition or criminal offence merely because of non-compliance with s 40(2);

    (b) the question of whether or not equitable relief in the nature of promissory estoppel was open to preclude a party from denying that formal compliance had occurred with the requirements of s 40(4) and the Regulations was informed by Parliament's express intention to permit parties to so contract out, so that even if the provision was to be construed as a consumer protection provision, that was merely one factor and not of itself determinative;

    (c) the estoppel sought to be raised by Imerva was not against the operation of s 40(2) of the Act per se, but was against the Kunas unconscientiously denying that the parties had entered into a lawful and effective agreement to contract out in accordance with, and as required by, s 40(4) of the Act and the Regulations, in circumstances where:

        (1) it was properly conceded by the Kunas to the judge that they had agreed to contract out of the standard progress payments pursuant to s 40(4) of the Act and that they had agreed to pay the Schedule 3 Method 2 progress payments under the Contract rather than progress payments under s 40(2) of the Act;

        (2) the terms of the Contract were negotiated on behalf of the Kunas by their son-in-law, Paritsi, an experienced building construction project manager, and their daughter Kuna-Paritsi, a qualified but not then practising building and construction solicitor, which contract expressly provided for the payment of progress payments outside of s 40(2) and contained the prescribed form acknowledging such contracting out pursuant to s 40(4) of the Act and reg 12(a);

        (3) the Kunas' financier, the Commonwealth Bank of Australia, approved finance for the Kunas for the construction project on the basis of independent valuation advice dated 22 February 2013, which advice

was to the effect that given the configuration and finish of the proposed improvements, and the quality and style of the development, the departure in the Contract from the standard progress payments under s 40(2) was reasonable;

(4) the relevant assurance or promise on which Imerva relied as giving rise to the common assumption that the parties had effectively contracted out pursuant to s 40(4) of the Act and reg 12(a) was given by the Kunas' expressly nominated representative under the Contract, Paritsi, at a time when the Contract was then in escrow and was not binding upon either party pursuant to the terms of the letter agreement which was drafted by the Kunas' legally qualified daughter;

(5) in circumstances where the Kunas failed to call any evidence from Paritsi or to otherwise explain his failure to give evidence, the unchallenged evidence of Imerva in the Tribunal below was that but for that said assurance or promise, and the assumed facts that flowed from it that the parties had lawfully contracted out pursuant to s 40(4) of the Act, Imerva would not have proceeded with the works under the Contract at all;

(6) the Kunas never raised any purported defect in the signing of Attachment 1 under the Act or the Regulations until after litigation was on foot in the Tribunal and the Contract had been terminated by Imerva, or alternatively by the Kunas, paying the first seven payment claims made by Imerva in accordance with the Contract; and

(7) the finding that the Kunas could nevertheless subsequently lawfully deny their effective contracting out pursuant to s 40(4) of the Act and deny their signature of Attachment 1 simply because Attachment 1, although initialled by them, was not signed above the dotted line, was to elevate form over substance and to entirely disregard the equities and whether the parties' respective conduct was other than in good conscience.

4. In considering the decision in *Tudor Developments Pty Ltd* the judge erred in construing that decision as expressing some broader statement of equitable principle which applied to the relevant provisions of the Act and the Regulations. Whereas his Honour should have found:

(a) that decision merely stands for the proposition that equitable estoppel is not available to prevent rescission of a contract under ss 96A(3) and 103D of the *Home Building Act 1989*

(NSW), which provisions contained no equivalent to s 40(4) of the Act;

(b) but otherwise the question of whether or not equitable estoppel applies to preclude reliance upon a statutory provision in each case turns on the language of the provision in question, and upon the construction of the particular statutory provision, viewed in its context and informed by an understanding of its purpose.

5. The judge erred by failing to have adequate regard to the language of s 40(4) of the Act and reg 12(a), or their proper construction, viewed in their context informed by an understanding of their purpose, in that:

(a) the Act is not merely a series of consumer protection provisions but was expressly enacted 'to ensure fairness to builders and consumers alike, and that appropriate standards of conduct are utilised at all times';

(b) s 40(4) is a provision which is remedial in nature and expressly permitted parties to lawfully contract out of the prescribed progress payments scheme and to avoid the potentially draconian consequences of a contravention of the provisions of ss 40(2), (3) and (5);

(c) a merely technical or formal clerical error or minor noncompliance in the parties' otherwise plainly evinced intention to acknowledge and give effect to an agreement under s 40(4) and reg 12(a) was not in any way so contrary to the legislative or social purpose of the Act as a whole, or s 40 in particular, so as to deprive a party such as Imerva from raising an equitable or general law estoppel if such an estoppel otherwise arose on the facts; and

(d) the mere fact that Form 1 to the Regulations had a dotted line above the words:

'*I acknowledge that I have read this warning before signing the contract*

Signature of Building Owner'

did not mean that that page could only be lawfully signed by the building owner affixing their full autograph immediately above the dotted line, so as to preclude any equitable or general law estoppel if it was otherwise sufficiently signed in some other place on that page, in the absence of some clear expression of Parliament's intention to that effect.

6. Given the judge's erroneous conclusion that s 40 of the Act entirely precluded the grant of equitable relief in the nature of promissory estoppel to Imerva, his Honour erred further in failing to apply the proper principles applicable to promissory estoppel to the otherwise uncontentious facts before the Court, consistent with *Legione v*

Hateley,[59] as explained in *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd*.[60]

66 It is convenient to deal with the issues as they were argued on the appeal, the principal issue being whether the judge was correct to conclude that there had not been sufficient compliance with s 40(4) of the Act and reg 12(a). The secondary issue is whether s 40 precludes the availability of estoppel.

Was there sufficient compliance with s 40(4) and reg 12(a)?[61]

67 The issue of compliance with s 40(4) of the Act and reg 12(a) is two-fold. There is the question of the placement of the initials on Attachment 1, and the further question of the meaning of 'execution' and the relative timing of the signing of Attachment 1 and of the Contract.

(1) Are the Kunas' initials at the foot of Attachment 1 sufficient?

68 Imerva submits that the judge erred by 'reading into' the language of s 40(4) of the Act and reg 12(a) an extra-statutory 'gloss', the gloss being that an owner can only effectively sign Form 1 in one precise place on the page and that any other method of signature, legally effective under the general law, placed elsewhere on Form 1 is to be disregarded. Imerva argues that the insertion of the gloss that, as the judge said, owners must make their acknowledgement 'in the space provided',[62] is neither open nor necessary on the proper construction of the statutory scheme; in no part of reg 12(a) or Form 1 do the words 'in the space provided' occur.

69 Furthermore, Imerva submits, the judge's approach is contrary to authority that, absent express statement by Parliament, it is irrelevant where on a page a signature appears, or whether a full signature is inscribed or only initials, a mark or even a stamp, if that inscription objectively conveys assent to the document. Imerva

---

59 (1983) 152 CLR 406.

60 (2016) 333 ALR 384.

61 Grounds 1, 2 and 5 of the grounds of appeal.

62 Reasons [23]. See [57] above.

relies upon observations made by Higinbotham J in *R v Moore; ex parte Myers*,[63] in the context of the *Pawnbrokers Statute 1865*, where his Honour said, on behalf of the Court:

> A signature is only a mark, and where a Statute merely requires that a document shall be signed, the Statute is satisfied by proof of the making of a mark upon the document by or by the authority of the signatory. Thus it has been held that when the Statute does not require that the document shall be signed with the name of the party signing, *a cross, ... or initials, ...or a part only of the full name will be sufficient*. So, *where the Statute does not direct subscription, the signature may be placed at the head or any other part of the document* .... In like manner, where the Statute does not require that the signature shall be an autograph, the printed name of the party who is required to sign the document is enough ... ; or the signature may be impressed upon the document by a stamp engraved with a fac-simile of the ordinary signature of the person signing ... But proof in each of these cases must be given that the name printed on the stamp was affixed by the person signing, or that such signature has been recognised and brought home to him as having been done by his authority so as to appropriate it to the particular instrument.[64]

70 Imerva also relies upon the statement of Sholl J in *Bosaid v Andry*,[65] made in the context of the *Statute of Frauds*: 'Initials so affixed are a sufficient "signature" for the purposes of the statute.'[66]

71 Ultimately, the question of whether it is necessary for a party to use initials or an autograph to sign Form 1 is not in contest. The Kunas on the appeal do not assert that a signature is deficient unless the full name is recorded. Their response to *Moore* is to assert that here Form 1 does direct where the signature is to be placed.

72 Imerva accepts that the nature of the requirement for a signature will vary depending upon the particular statutory context. In *Campbell v Director of Public Prosecutions (Cth)*[67] Ormiston J emphasised that the 'word "signature" and the concept of affixing a signature and signing must be interpreted according to the

---

63 (1884) 10 VLR 322 ('*Moore*').

64 Ibid 324-5 (emphasis added). The other members of the Court were Williams and Holroyd JJ.

65 [1963] VR 465.

66 Ibid 472.

67 [1995] 2 VR 654 ('*Campbell*').

language and context of the particular provision under consideration'[68] because '[i]n each case, and particularly when considering those expressions in statutes, it must depend entirely on what is meant by the expression used in that statute'.[69]

73 In the context of the Act, Imerva points to the lack of any requirement of unusual or additional formalities relating to the signature. Neither s 40(4) nor reg 12(a) expressly requires that: (1) the signature be by way of a fully inscribed autograph; or (2) the signature is only to be placed at one precise location on Form 1. Imerva concedes that the dotted line provides a 'directory' indication of where Form 1 may be signed, but submits that there is no express constraint mandating that the dotted line is the exclusive place at which the signature is to appear. It argues that it is wholly artificial to adopt a construction that means that a document that is otherwise lawfully and effectively signed by the Kunas, through the use of their initials, fails because that signature appears only at the foot of the page of Attachment 1 and not immediately above the dotted line. It submits that this is not the ordinary grammatical meaning of the words used in Form 1, but even if it was, it leads to a capricious and absurd result, which indicates that such a construction should be rejected and a purposive construction adopted instead that would make the requirement for owners to sign Form 1 workable. The absurd result is identified as permitting a potentially misplaced signature on a form to cause Imerva to lose its rights to progress payments which were agreed, transforming the repudiation of the Contract by the Kunas to a lawful refusal to pay, and exposing Imerva to criminal

---

68 Ibid 660.

69 Ibid 661. Ormiston J held that in the particular statutory context (that is, s 142 of the *Evidence Act 1958)*, if the commissioner of the Supreme Court signed as a witness of a statutory declaration knowing its contents to be untrue he or she would be guilty of forgery. His Honour observed: '[T]he expression "affixes any ... signature ..." should be interpreted to comprehend the placing by a commissioner or other person authorised of his or her signature, sign or mark to the document in the course of taking a declaration under the [Evidence] Act. If the commissioner or other person authorised knows the contents of that document to be untrue, an offence under para (d) of s 142 will have been committed': *Campbell* [1995] 2 VR 654, 663. He rejected the view that knowledge of untruthfulness would be confined to the time and place stated in the declaration and whether the declaration was made in the commissioner's presence. Section 142(d) provided: 'Any person who ... (d) affixes any such deal stamp or signature to any such document knowing such document to be untrue ... shall be guilty of an indictable offence'.

prosecution. It should be sufficient, according to Imerva, that the Kunas' initials at the foot of Attachment 1 are construed as objectively conveying their assent.

74 Imerva relies upon the decision of Commissioner O'Connor QC in *Re Brunswick NL; Blossomtree Pty Ltd v Brunswick NL.*[70] There a notice was given by Blossomtree Pty Ltd ('Blossomtree') under s 261(2)(b)(ii) ('the notice') of the former *Companies (WA) Code* ('the Code') to Brunswick NL (BNL) requesting that BNL issue notices to certain of its named shareholders requiring particulars of persons who had relevant interests in the shares held by them. The notice had been signed by a director of Blossomtree, Carolyn Wright, and there was argument as to whether that amounted to execution by Blossomtree. Commissioner O'Connor raised the threshold question of whether there was any need for a signature at all. The form of the notice accorded with the relevant regulation in that there was a place for a signature above the words 'Signature(s) of Shareholder(s)'. Regulation 4(1) provided that strict compliance with the style of a form was not necessary unless the Commission so required and reg 4(2) provided that strict compliance with the substance was necessary unless the Commission otherwise approved. Commissioner O'Connor held that the notice was valid. Relevantly, he held that neither s 261 of the Code nor the regulations required there to be any signature. He said:

> Nothing in s 261 of the Code suggests that the notice should be signed.
>
> In my view, a document answers the description of a 'notice' if it is directed to a person and states that, by the document, 'notice' is given of the matters contained in that document.
>
> I would not regard it as any more or less a 'notice' depending upon the presence or absence of a signature at the foot of the document. Similarly, if the document states, in the body of the document, that the 'notice' is given by a person named in the document, I would regard the document as a 'notice' given by the person so named, irrespective of whether or not that person has purported to sign it.
>
> Thus I do not consider that s 261(2) of the Code can be construed as requiring a notice under that section to be signed.

---

70 (1990) 3 ACSR 625 ('*Blossomtree v Brunswick*') (Western Australia Supreme Court).

> This only leaves the question as to whether the regulations require the notice to be signed.
>
> In this case, we have a document addressed to the respondent. I have already pointed out that the document calls on the respondent to 'take notice' that the applicant requires certain things to be done. Whether it was signed or unsigned would not, in my view, affect its efficacy as a notice. It clearly tells the respondent what the applicant requires, namely the issue of certain notices. That being the case, it seems to me that it is a matter of style whether it is 'signed' by the company or not. Being a matter of style, in my view, it is not necessary, because of reg 4(1), to sign the documents in order to comply with the formal requirements.
>
> The fact that it was signed by Mrs Wright does not, I believe, alter the position.[71]

75 I consider *Blossomtree v Brunswick* to be readily distinguishable. First, unlike s 261 of the Code there is here under the Act, specifically under s 40(4), a requirement that avoidance of the prohibition under s 40(2) depends upon the parties agreeing that it will not apply and doing so '*in the manner set out in the regulations*'.[72] Secondly, by contrast with reg 4 of the Code, there is nothing in the Regulations that directs that strict compliance with the style of a form is not necessary; nor is there anything in the Regulations that provides that only strict compliance with substance is necessary. Indeed, no distinction is drawn in the Regulations between matters of 'style' and matters of 'substance'. Given that the reasons of Commissioner O'Connor expressly relied upon reg 4 to excuse non-compliance, the absence of a comparable regulation in the Regulations is a critical difference. Thirdly, by contrast with reg 4 of the Code, reg 12(a) of the Regulations expressly sets out what it describes as 'the manner of agreement' for the purposes of s 40(4), namely, that it requires to be included in the building contract 'a warning in the form of Form 1 ... which is signed by the building owner'. This is an express requirement for a signature that, in the context of a stipulated means of avoiding a statutory contravention with a risk of criminal prosecution, cannot be dismissed as a mere matter of style. Fourthly, unlike the nondescript account of the notice, Form 1 expresses in a striking way that it has the status of a 'WARNING TO OWNER –

---

71 Ibid 628.

72 Emphasis added.

CHANGE OF LEGAL RIGHTS'.[73] Fifthly, by contrast with the ordinary signature block in the notice, the signature block on Form 1 contains the critical acknowledgment that the owner has 'read this warning'.

76 The Kunas accept the significance of the statutory context. However, they claim that here the context supports their approach. They submit that the Act is unmistakably directed at consumer protection, the Act being designed, amongst other things, to avoid uncertainty and disputes about progress payments by restricting the progress claims builders can make unless there is agreement to the contrary. They point to the Explanatory Memorandum to the Bill which describes the limits placed on builders in their demands for progress payments:

> Clause 40 prescribes limits on progress payments depending on the stage of building contemplated in the contract and the stage reached during the building process. In the case of contracts to which the specified limits do not apply, the builder must not demand or receive any amount that is not directly related to the progress of the building work being carried out. The building owner and builder are able to determine alternative progress payments in the manner prescribed in the regulations. If a court finds that a builder has received an amount either in excess of the prescribed limit or not directly related to the progress of the work, it may order the builder to refund some or all of the amount to the building owner.[74]

77 Section 21(3) of the *House Contracts Guarantee Act 1987*, the predecessor to the Act, prohibited a builder demanding or receiving a progress payment that departed from the prescribed regime unless the parties 'otherwise agree[d] in writing in the prescribed manner'. Section 40 of the Act extends the prohibition to a builder 'retain[ing]' such a progress payment without the necessary acknowledgement.[75] The Kunas rely on this legislative history to support the proposition that the Act seeks to enhance the protections afforded to consumers. They also emphasise that the retention of improperly demanded progress payments (which they allege

---

73 See [12] and n 12 above.

74 Explanatory Memorandum, Domestic Building Contracts and Tribunal Bill 1995 7–8. Clause 40 of the Bill became s 40 of the Act. The name of the *Domestic Building Contracts and Tribunal Act 1995* was changed to the *Domestic Building Contracts Act 1995* by s 36 of the *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998*.

75 See [26] above.

occurred here) creates an exposure to criminal sanction on a continuing basis.

78 The Kunas concede that they agreed to depart from the prescribed schedule of progress payments under s 40(2). The objective circumstances indicate that the Contract includes Method 2 and there were many progress claims made in accordance with Method 2 which they duly paid. However, they submit that the Act is premised on a distinction between assent to an alternative regime of progress payments and assent to having read the warning that an owners' legal rights have changed. The distinction reflects the objective of consumer protection to which s 40(2), s 40(4) and reg 12(a) are directed, as supported by the legislative history of the provisions.

79 The Kunas submit that reg 12(a) is not satisfied by a party's agreement to use an alternative arrangement, nor by a party's acknowledgment that it has agreed to use an alternative arrangement. Rather, it requires a party's acknowledgement that it has read the warning; that is, the party must acknowledge it has read that its legal rights have changed.

80 I agree.

81 The character of Form 1 as containing a warning is significant. Section 40(4) only permits departure from the prescribed regime of progress payments when two conditions are met. The first is that the parties agree that the prescribed regime is not to apply. As mentioned, the Kunas concede that they so agreed. The second requirement is that the manner of their agreement that the prescribed regime is not to apply must reflect the manner set out in the regulations. Regulation 12(a) does not prescribe that there is to be a simple acknowledgment, or manifestation of assent, to Method 2, in the ordinary way in which parties are bound. If that was all that was required it might be sufficient for the Kunas to have placed their initials at the right-hand foot of Attachment 1, the Kunas not disputing that initials rather than a complete autograph can serve as a signature. The difficulty is rather that the prescribed manner by which agreement to an alternative arrangement is to occur

includes signing *the warning*. Regulation 12(a) presupposes that there will be assent to the adoption of an alternative arrangement; what it requires is that the '*warning* ... is *signed* by the building owner'.[76] It is the warning, and not simply the form, which must be signed.[77]

82 I do not consider that the signature must be placed exactly 'in the space provided', that is, on the dotted line, as the judge appeared to consider was necessary.[78] Nor did the Kunas argue for that degree of precision on the appeal.

83 What is important is that the signature is placed in such a position on Form 1 that it can be confidently inferred that the building owners have read the warning of the effect on their legal rights of their acceptance of an alternative progress payments regime. In my view, the presence of the Kunas' initials at the foot of Attachment 1 does not permit that inference to be drawn. Not only have the initials been placed in a manner far removed from the designated position, but the presence of the initials on the right-hand side of the foot of Attachment 1, in a manner that is undifferentiated from the marking of each page of the Contract, indicates that the placing of the initials at the foot of Attachment 1 does no more than record an acknowledgment that the Contract includes Attachment 1, just as the Contract includes each of the other pages marked by initials.

84 In particular, the Kunas' initials appear on the page describing Method 1. There the inference can only be that they are acknowledging that this page is part of the Contract; as the judge observed, they cannot be indicating their assent to a regime of progress payments that is inconsistent with their adoption of Method 2.[79]

---

76 See [31] above (emphasis added).

77 The Act utilises the notion of a 'warning' in other contexts, for example, s 33 of the Act provides that where a major domestic building contract contains a provision that allows for the contract price to change but is not a cost escalation clause (as defined in s 15) a builder must not enter into such a contract 'unless there is a warning that the contract price is subject to change'. There are various requirements set out in s 33(2) with respect to the manner in which the warning must appear. Unless the warning appears as prescribed, any provision in the contract that enables the contract price to change can only decrease the price: s 33(3).

78 See [57] above.

79 See [60] above.

They could not have agreed to both methods. Their initials also appear at the right-hand side of the foot of the page on which the signatures of all parties to the Contract are recorded. The Kunas signed the Contract with Paritsi as their witness (who then signed in that capacity) and Schachter signed the Contract for and on behalf of Imerva with Paritsi as his witness (who again signed in that capacity). The repetition of the initials throughout the Contract, including on these particular pages, indicate that the initials do no more than acknowledge that these pages are included within the Contract. As the Kunas submit, the initials do no more than 'authenticate the genuineness of the document'.[80] This is an insufficient basis from which to draw the inference that the Kunas had read the warning that the Contract involved a departure from their legal rights under the Act. The presence of the initials on Attachment 1 cannot bear the forensic weight that Imerva seeks to place upon them.

85 In my view, the judge was correct to conclude that Attachment 1 had not been signed 'in the manner set out in the regulations' within the meaning of s 40(4).

86 The judge considered that the criminal sanction attaching to a breach of s 40(2) supported a stringent construction of reg 12(a); that is, in his Honour's view, a construction that insisted on strict compliance with its requirements. Imerva submits that this appears to be contrary to the principle that, where the language of a legislative provision imposing a criminal or punitive sanction is 'ambiguous or doubtful', it is to be construed strictly in the sense that 'the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences'.[81] In other words, if a contravention of a statute gives rise to criminal liability, a strict construction reduces, rather than enlarges, its punitive effect. The application of that principle here would increase the tolerance to be afforded as to where on Form 1 a signature was required to appear. It would support treating the Kunas' initials at the foot of Attachment 1 as sufficiently complying with reg 12(a).

---

80 *Moore* (1884) 10 VLR 322, 324.

81 *Beckwith v The Queen* (1976) 135 CLR 569, 576 (Gibbs J). See *R v Adams* (1935) 53 CLR 563, 567-8; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193, 210-11 [45]; *Public Trustee (Qld) v Fortress Credit Corporation (Aus) 11 Pty Ltd* (2010) 241 CLR 286, 294 [20].

The judge appeared to adopt a mistaken approach in this respect although it may be that, by referring to the criminal sanction available for a breach of s 40(2), his aim was simply to underscore the importance which the legislature ascribes to a breach of s 40(2).

87 Imerva accepts, correctly in my opinion, that the principle of construction applicable to penal provisions is not intended to displace the application of the other guides to statutory construction, including the need to interpret a legislative provision within the context of a statute as a whole. This is especially so where the objective of the statute is remedial or beneficial so that it should be interpreted 'to give the fullest relief which the fair meaning of its language will allow'.[82] In that context the rule supporting the strict construction of penal provisions 'is indeed one of last resort':[83]

> It comes into operation when the normal principles of interpretation have 'run out', if 'all other indicia [have] failed' to provide guidance. It applies 'if [there is] genuine doubt as to the intention of the legislature and if there are no considerations indicating the desirability of a wide interpretation of the statute'.[84]

88 Here, as mentioned, the objective of consumer protection is apparent throughout the Act, albeit that the Act is designed to 'ensure fairness to builders and consumers alike'.[85] It is apparent that this is especially so in respect of reg 12(a) because its primary purpose is the protection of owners given that it is the alteration, and most likely the diminution, of their legal rights to which the warning in Form 1 is addressed. The acknowledgment that the owner has read the warning records a conscious acceptance by the owner of the loss of consumer rights. In that context, the strict construction of s 40(2) as a penal provision cannot override the need to ensure that the protection afforded by the Act is effective. As the High Court observed in *Waugh* in the context of industrial safety remedial legislation:

---

82 *Waugh v Kippen* (1986) 160 CLR 156, 164 ('*Waugh*'), citing Isaacs J in *Bull v A-G (NSW)* (1913) 17 CLR 370, 384.

83 *Waugh* (1986) 160 CLR 156, 165.

84 *R v Lavender* (2005) 222 CLR 67, 96-7 [93] (citations omitted) (Kirby J).

85 Explanatory Memorandum, Domestic Building Contracts and Tribunal Bill 1995 1.

> In the course of argument, the question arose whether the two principles of interpretation to which we have referred [the principle with respect to remedial legislation and the principle applicable to penal provisions] come into conflict in the present case and if so, how the conflict is to be resolved. If such a conflict was to arise, the court must proceed with its primary task of extracting the intention of the legislature from the fair meaning of words by which it has expressed that intention, remembering that it is a remedial measure passed for the protection of the worker. It should not be construed so strictly as to deprive the worker of the protection which Parliament intended that he should have.[86]

89 A similar observation can be made here. The requirement of compliance with reg 12(a) is mandated by s 40(4) to avoid the penal sanction associated with a breach of s 40(2). Regulation 12(a) ought not be read so narrowly as to deprive building owners of the protection which Parliament intended them to have. I see nothing absurd in Parliament imposing a requirement in a building contract to ensure that building owners are aware of their loss of rights. It is necessary to interpret reg 12(a) in accordance with the fair meaning of its words, remembering that it is a remedial measure passed for the protection of building owners. For the reasons discussed above, that fair meaning demands that the owners sign Form 1 in a manner that permits the inference confidently to be drawn that they have read the warning that departing from the prescribed regime under the Act involves a change to their legal rights. As mentioned, I do not consider that the Kunas' initials at the foot of Attachment 1 permit the necessary inference to be made here.

90 As a subsidiary argument, Imerva relies upon s 53 of the *Interpretation of Legislation Act 1984* to support the proposition that initials at the foot of Attachment 1 demonstrate sufficient compliance with reg 12(a). Section 53 reads:

> **53 Strict compliance with prescribed forms not necessary**
>
> Where a form is prescribed by an Act or subordinate instrument for any purpose, any form in or to the like effect of the prescribed form shall, unless the contrary intention appears, be sufficient in law.

91 Whatever assistance Imerva might gain from the words of the heading to s 53, the substance of s 53 is clearly directed at the format of a form. For example, if a

---

86 *Waugh* (1986) 160 CLR 156, 164.

prescribed form has a phrase underlined, s 53, as a savings provision, might preserve the sufficiency of a form where the phrase appears in bold rather than underlined. Indeed, in Form 1 the acknowledgement of the warning is underlined[87] but the acknowledgment is not underlined in Attachment 1.[88] Section 53 might preserve the sufficiency of Attachment 1 if this formatting problem was the only potentially vitiating issue. However, in my view, s 53 has no capacity to meet the difficulties Attachment 1 has in its non-compliance with the statutory and regulatory requirements discussed above.

92 I turn to the question of the meaning of 'execution' and the relative timing of the signing of Attachment 1 and of the Contract.

(2) Was the warning signed 'before the execution of the contract?'

93 Imerva submits that the requirement in reg 12(a) that Form 1 be signed before 'the execution' of the contract means that Form 1 must be signed before the conclusion of all of the formal requirements that must be met for a contract to be binding, including the satisfaction of any necessary pre-conditions. Here, Imerva submits, the Contract was not binding until all the pre-conditions stipulated in the letter of agreement were met.[89] Those conditions were not met by 13 January 2013 when Schachter received the Kunas' copy of the Contract from Paritsi. Putting to one side the question of the adequacy of the placement of the initials, Attachment 1 (including the warning) was thus signed before the Contract was executed.

94 The Kunas submit that 'execution' in reg 12(a) means 'signing' so that reg 12(a) requires the warning to be signed before the contract is signed. They support this by the language used in Form 1 whereby an owner is to 'acknowledge that I have read this warning before *signing* the contract'.[90] What is required is that

---

87 See [32] above.

88 See [12] above.

89 See [16] above.

90 Emphasis added. See [32] above.

the acknowledgement that the warning has been read occurs before the contract is signed. They submit the significance of the warning is reinforced by the need for its acknowledgment to occur before the owners sign the contract.

95 I agree that the language used in Form 1, whereby the owner is to acknowledge that he or she has 'read this warning before *signing* the contract'[91] dispels any doubt that 'execution' in reg 12(a) is to be construed as meaning 'signed'. It is open to read 'execution' as meaning 'signed', depending on the context, and here the context supports that construction. Form 1 is expressly referred to in reg 12(a) and it is part of the Regulations; that is, it is part of the same instrument drafted by parliamentary counsel. It is most unlikely that parliamentary counsel would have used the word 'signed' in Form 1, to give effect to reg 12(a), without using it as a synonym for 'execution' in the same regulation. This means that the sequence mandated by reg 12(a) is for the warning in Form 1 to be signed prior to the signing of the contract.

96 This view is supported by the details of the warning which are extensive and build upon the provisions in the Act. This is so especially with respect to the statement that a variation from the prescribed regime may occur in 'exceptional cases';[92] there are examples given of some exceptional cases (for example, where the house is so large that it will take a long time to complete or where exceptionally expensive finishes are required); there is the statement that owners ought not agree to depart from the prescribed regime 'unless your house is unusual in some way'; there is the capitalised statement that owners should be 'SURE THAT DIFFERENT PROGRESS PAYMENTS ARE NECESSARY' and that owners should understand clearly 'why the change is needed in the case of your particular house'.[93] If the warning in Form 1 is to be effective it must come at a time when the owners have an opportunity to reflect on whether they consider that departure from the prescribed

---

91 Emphasis added.

92 See [12] above.

93 Ibid.

regime is indeed necessary and whether their circumstances are 'unusual' or amount to an 'exceptional' case. There must be the opportunity for the owners to determine that they wish to withdraw their assent to the alternative arrangement because, for example, upon reflection, they do not consider that departure from the prescribed regime is necessary. Form 1 may alert the owners, for the first time, that departing from the prescribed regime is somewhat unusual and possibly exceptional. While the terms 'unusual', 'exceptional' and 'necessary' are not statutory terms, their inclusion in Form 1 does suggest that it is anticipated that Form 1 will be signed at a time when the owners still have an opportunity to reflect on their circumstances and to refrain from signing the contract (independently of the five day cooling-off period that permits the owners to withdraw from the contract).[94]

97 Here, there was no evidence before the Tribunal of the sequence in which Attachment 1 and the Contract were signed.[95] The onus of demonstrating compliance with reg 12(a) lies on Imerva given that it seeks to rely upon s 40(4), and it has not discharged that onus.[96]

(3) What are the civil consequences of non-compliance?

98 Non-compliance with reg 12(a) carries both criminal and civil consequences. As mentioned, non-compliance means that, pursuant to s 40(2), Imerva was not entitled to demand, recover, or retain more than the percentage of the contract price specified in the prescribed payments regime on pain of exposure to a criminal pecuniary penalty. However, as the Tribunal acknowledged and the judge confirmed, Imerva remains entitled to the sequence of payments specified in the prescribed payments regime under s 40(2) of the Act, insofar as the stages of construction identified under the Act were completed. In other words, the non-compliance does not invalidate the Contract as a whole. The adoption of Method 2 in the Contract is void, pursuant to s 132, because it seeks to 'annul, vary or exclude'

---

94 The Act s 34.

95 See [46] above.

96 It follows that I reject grounds 1, 2 and 5 of the grounds of appeal.

the prohibition in s 40(2). For the reasons given, Imerva cannot rely upon s 40(4) to avoid the prohibition in s 40(2). However, s 133 preserves the validity of the Contract given that no contrary intention appears in s 40; the Contract price remains and the progress payments revert to the statutory regime as expressed schematically in the Contract in Method 1. The Tribunal's finding that Imerva owed a refund to the Kunas[97] was made within that context.[98]

99 The secondary issue of the appeal is whether Imerva can preclude the Kunas' reliance on s 40(4) and reg 12(a) by arguing that, in the circumstances, their conduct gives rise to an estoppel.

Does s 40 preclude the availability of estoppel?[99]

100 The judge concluded that s 40 precludes the availability of equitable relief. Imerva submits that his Honour did not sufficiently recognise that s 40(4) itself provided for a permissible means of contracting out of s 40(2) and thereby manifested a legislative intention that the prohibition in 40(2) was not absolute. Contracting out is permitted despite a breach of s 40(2) attracting a criminal sanction. In support of its submission that the judge misapplied *Tudor Developments*, Imerva

---

97 See also the power to order refunds in the event of a breach of s 40(2): s 40(5). See [29] above.

98 The Kunas also submit that there is no utility in the appeal unless the finding made by the Tribunal that the Kunas validly terminated the Contract is overturned. As noted, the Tribunal found that Imerva was in substantial breach and therefore its termination notice was ineffective: see [39] above. The Tribunal also found that the Kunas were not in substantial breach and their termination notice was effective. If that finding remains, so the Kunas submit, the result below should stand because there would be no difference to the refund to be made by Imerva to the Kunas. This is because the Tribunal found that the amount the Kunas paid in excess of the schedule of progress payments under s 40(2) was $634,568. If, in the calculation set out in the Table at [51] above, that figure is deleted as a 'refund to be paid' it will have the effect of reducing the balance of the Contract price unpaid (from $1,807,000.40 to $1,172,432.40). However, this will be balanced against the deletion of 'Overpayment of instalments' in the second part of the calculation which would give a total of $1,270,290.73 and from that would be deducted the revised balance of Contract price unpaid, $1,172,432.40, leaving a Balance of $97,858.33. This is identical to the refund the Tribunal ordered Imerva to pay. However, there is a challenge by Imerva to the finding that the Kunas' notice of termination was effective. Imerva seeks a declaration that the Kunas' termination of the Contract was void and amounted to a repudiation of the Contract which was duly accepted by Imerva. Given my conclusions on s 40(4) and on the unavailability of estoppel (see below) it is unnecessary to consider this issue further.

99 Ground 3(a) and (b), and ground 4.

argues that the obligation in that case to attach a certificate of insurance to the contract of land was unconditional in character; unlike s 40(4) of the Act, no mechanism was provided for parties to 'contract out' of that obligation.[100]

101 Moreover, Imerva submits, equitable relief may be granted in circumstances where a statute imposes criminal penalties for a contravention and the judge was wrong to conclude otherwise.[101] Imerva relies upon *Nelson v Nelson*[102] where the High Court recognised that a mother had a beneficial interest in a property purchased by her despite the fact that she had transferred the house into the names of her son and daughter for the illegal purpose of enabling her to purchase another house with a subsidy under the *Defence Service Homes Act 1918* (Cth). The mother would not have been entitled to the defence subsidy if she owned another house, an 'owner' being defined to include equitable as well as legal ownership. False answers were given on the application for a subsidy. The Court held that a presumption of advancement operated in favour of the children but that the presumption was rebutted by the evidence. The daughter claimed that the children did not hold the house upon a resulting trust for the mother, despite the mother's contribution of the purchase price, relying on the defence of illegality. The Court rejected the defence of illegality and accepted that a declaration should be made that the mother held the beneficial interest in the property.

102 Imerva relies upon Toohey J's recognition in *Nelson v Nelson* that, although the *Defence Service Homes Act* did not impose a penalty for a breach but rather made provision for recovery of the subsidy, there was the potential for various sections of the *Crimes Act 1914* (Cth) to be applicable, including the imposition of sanctions against conduct aimed at securing a financial advantage at the expense of the Commonwealth.[103] Although Toohey J found it unnecessary to determine if any of

---

100 See [63] above. See also *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993, 1015.

101 See [62] above.

102 (1995) 184 CLR 538.

103 Ibid 590.

the sections imposing criminal sanctions might have been applicable in the circumstances of the case, he did not view their potential application as precluding the grant of equitable relief, and it is this which is relied upon by Imerva.[104]

103 In my view, Imerva is correct to assert that the High Court, including Toohey J, rejected the adoption of any inflexible rule that illegality arising from the contravention of a statute will always preclude a grant of equitable relief.[105] Toohey J spoke of the need to identify the policy underlying the particular statute. He held that there was nothing in the *Defence Service Homes Act* that 'purports to affect the ownership of a dwelling-house wrongly obtained through the use of a subsidy'[106] and that the mother's beneficial ownership of the property should be recognised. Deane and Gummow JJ, in a joint judgment, also rejected the existence of a general proposition that in a case of illegality, equity lets the loss lie where it falls.[107] They stated:

> As one might expect from such situations, equity eschews any broad generalisations in favour of concentrating upon the specific situation which has arisen, in the light of the relevant statutory provisions.[108]

104 However, it is important to observe that the Court ultimately imposed a condition upon the relief granted to 'reflect the unavailability of equity to obtain for [the mother] the actual fruits of her unlawful conduct'.[109] Deane and Gummow JJ held that the policy of the *Defence Service Homes Act* could be 'satisfied by the imposition of an appropriate term concerning the subsidy received by Mrs Nelson as the price for the relief she seeks to enforce by the resulting trust'.[110] This term was ultimately the imposition of a condition upon the declaration of the mother's

---

104 There is recognition of the potential relevance of criminal sanctions by the other judges, see, for example, *Nelson v Nelson* (1995) 184 CLR 538, 570 (Deane and Gummow JJ), 573 (Dawson J), 616 (McHugh J).

105 See also *CA & CA Ballan Pty Ltd v Oliver Hume (Australia) Pty Ltd* [2017] VSCA 11 [69].

106 *Nelson v Nelson* (1995) 184 CLR 538, 593.

107 Ibid 559, 561.

108 Ibid 561.

109 Ibid 573.

110 Ibid 564.

beneficial interest in the property that she be denied the benefit obtained by her unlawful conduct, namely, an obligation to pay to the Commonwealth the present value of the difference between the subsidised rate applicable to the housing loan and the usual rate the bank would have charged.[111]

105 Dawson J also recognised 'the principle that illegal conduct on the part of a person claiming equitable relief does not in every instance disentitle that person to the relief'.[112] However, he considered that equitable relief is precluded where there is an 'immediate and necessary relation between the illegality and the claim',[113] for example, where 'the court is ... asked to effectuate the illegal purpose'.[114]

106 McHugh J also rejected the view that there was a 'rule to the effect that, if the purpose of a transaction was to defeat the operation of an Act of Parliament, equity would always refuse its remedies to a person who had participated in that transaction'.[115] He maintained that there was a need for greater flexibility and that much depended upon the policy of the particular statute and whether protection against its avoidance required such drastic remedies. However, he recognised that the courts should not enforce legal or equitable rights where the legislative intention is plain that such rights are unenforceable. Relevantly, he said:

> [C]ourts should not refuse to enforce legal or equitable rights simply because they arose out of or were associated with an unlawful purpose unless ... the statute discloses an intention that those rights should be unenforceable in all circumstances.[116]

107 The Kunas submit that the enforcement of equitable rights is not available here because the Act makes it plain that there is no scope for that enforcement. They point to the language of s 40(2), that a builder '*must not* demand or recover or

---

111 Ibid 618. This condition was imposed by majority (Deane, McHugh and Gummow JJ, Dawson and Toohey JJ dissenting).

112 *Nelson v Nelson* (1995) 184 CLR 538, 581.

113 Ibid.

114 Ibid.

115 Ibid 608.

116 Ibid 613.

retain'[117] progress payments other than that prescribed under the Act, as expressing an absolute prohibition. They submit that the language discloses an intention that any right, whether recognised in equity or not, a builder has to an alternative progress payments regime, is unenforceable. The only enforceable right to avoid s 40(2) is a legal right that arises from the satisfaction of s 40(4). The judge was thus correct to recognise that the Act left no room available for other forms of avoidance of the prohibition in s 40(2).

108 In my view, the Kunas are correct and no error was made by the judge. I consider that the statutory language indicates an intention that there is no scope for estoppel in the context of a breach of s 40(2). Although the prohibition can be avoided, this is only so where there has been compliance with s 40(4) and reg 12(a). The stringency of those requirements, already discussed, reinforces rather than detracts from the proposition that other means of avoiding the strictures of s 40(2) are not permitted.

109 Furthermore, it is important to note the different context in which the question of illegality and equitable relief arose in *Nelson v Nelson* from that which arises here. In *Nelson v Nelson* the daughter, seeking to obtain a 'windfall gain',[118] attempted to resist the recognition of a resulting trust in favour of her mother by pointing to her mother's illegality vis-à-vis the Commonwealth by reference to another transaction. The circumstances here are that Imerva, the person who engaged in conduct in contravention of a statutory prohibition, by demanding, recovering and retaining progress payments not prescribed under the Act, is seeking to enlist the assistance of equity to preclude the persons affected by the illegality, the Kunas, from asserting or relying on that illegality. This is a vastly different context from that of *Nelson v Nelson*. The policy of the Act, as manifest by the protection to owners afforded by s 40(2), s 40(4), and reg 12(a), excludes the availability of a grant of equitable relief in those circumstances.

---

117 Emphasis added.

118 *Nelson v Nelson* (1995) 184 CLR 538, 597.

110 In my view, permitting Imerva to raise an estoppel against the Kunas would be, by contrast to the determination in *Nelson v Nelson*, to make equity available to obtain for Imerva the fruits of its illegal conduct. Expressed in the language used by Dawson J, here the Court is being 'asked to effectuate the illegal purpose'[119] by ignoring the contravention of s 40(2). In those circumstances, Imerva's illegality disentitles its claim to the assistance of equity.

111 I consider that *Nelson v Nelson* does not assist Imerva.

112 Furthermore, I do not consider that the judge misapplied *Tudor Developments*[120] despite the prohibition in s 96A(1) of the *Home Building Act* having an unconditional character, because, although contracting out of the prohibition in s 40(2) of the Act is permitted, the terms on which it is permitted are of such stringency, and here unsatisfied, that the analogy the judge drew with the legislation in *Tudor Developments* is a useful one. The judge adopted an analysis of the Act that demonstrated that he was well aware that the availability of equitable estoppel to preclude reliance upon a breach of a statutory provision turns on the statutory language at issue, viewed in its context and informed by its purpose.

113 It is common ground that Imerva and the Kunas agreed to use Method 2 as an alternative regime of progress payments.[121] If the Kunas were to be estopped from asserting, or relying upon, Imerva's breach of s 40(2), that agreement would remain in effect. Imerva submits that the purpose of the estoppel would be to give effect to that lawful agreement and that this is a significant factor in the consideration of whether estoppel is available here. I do not accept, however, that this is material. The Act manifests a clear intention that avoidance of a breach of s 40(2) can be achieved in only one way. Section 40(4) provides that exclusive means and I have concluded that its requirements have not been met.

---

119 See [105] above.

120 See [63] above.

121 See [78] above.

114 In my view, there is no scope for a contravention of s 40(2) to be met by a plea of estoppel.[122]

115 Given my conclusions, it is unnecessary to determine whether the element of unconscionability is made out in the circumstances of the case.[123]

Conclusion on the application for leave to appeal

116 I consider that leave should be granted as it could not be said that the prospects for success on the appeal were no more than fanciful.[124] In particular, the issues of statutory construction are complex and required full argument.

Conclusion on the appeal

117 I would dismiss the appeal.

KYROU JA:

118 I agree with Tate JA.

McLEISH JA:

119 I agree with Tate JA.

---

122 It follows that I reject grounds 3(a) and (b), and 4.

123 That is, grounds 3(c) and 6. Indeed, it was conceded at the hearing of the appeal that even if this Court upheld the grounds of appeal that seek to demonstrate the availability of estoppel, it would be necessary for the matter to be remitted to the Tribunal for further findings to be made. In any event, the grounds asserting the availability of estoppel have been rejected. Appeal transcript, 126.

124 *Kennedy v Shire of Campaspe* [2015] VSCA 47 [12]; *Supreme Court Act 1986* s 14C.